D.P.U./D.T.E. 96-100

Investigation by the Department of Telecommunications and Energy upon its own motion commencing a Notice of Inquiry/Rulemaking, pursuant to 220 C.M.R. §§ 2.00 et seq., establishing the procedures to be followed in electric industry restructuring by electric companies subject to G.L. c. 164.

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I. INTRODUCTION

In this Order, the Department of Telecommunications and Energy ("Department") promulgates regulations, designated as 220 C.M.R. § 11.00 et seq., pursuant to our authority under G.L. c. 30A and enhanced by the Electric Industry Restructuring Act, Chapter 164 of the Acts of 1997 ("Act").[1] These regulations implement the intent of the Legislature manifest in the Act to bring the benefits of retail competition in the electricity generation market to all retail consumers in Massachusetts beginning March 1, 1998, and become effective upon publication in the Massachusetts Register. By this Order, the Department also finalizes our regulations governing licensing of competitive suppliers and electricity brokers as required by G.L. c. 30A, § 2.

II. HISTORY OF THE PROCEEDING

On August 16, 1995, the Department issued its Order in Electric Industry Restructuring, D.P.U. 95-30, setting forth principles for a restructured electric industry and for the transition to a restructured electric industry. On March 15, 1996, the Department issued an Order commencing a Notice of Inquiry/Rulemaking to develop rules and regulations that would implement the principles established in D.P.U. 95-30. The scope of the NOI/Rulemaking covered developing a competitive electric generation market. Order Commencing Notice of Inquiry/Rulemaking and Setting a Procedural Schedule, D.P.U. 96-100, at 5-6 (March 15, 1996). After notice and an opportunity for public comment, on May 1, 1996, the Department issued proposed rules accompanied by a detailed explanatory statement. Draft Rules and Explanatory Statement, D.P.U. 96-100 (May 1, 1996). Thereafter, the Department received two rounds of comments and

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[1] An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protections Therein.

conducted fifteen days of hearings focusing on issues raised by the Department's draft rules. In addition, the Department held sixteen public hearings around the Commonwealth.

On December 30, 1996, the Department concluded the first phase of our rulemaking proceeding by issuing Electric Industry Restructuring: Model Rules and Legislative Proposal, D.P.U. 96-100 (1996) ("December 30, 1996 Plan"). The Model Rules were to govern the transition and to apply thereafter to the restructured electric industry. The Model Rules provided a regulatory framework for an efficient industry structure that would minimize long-term costs to consumers while maintaining the safety and reliability of electric services with minimum impact on the environment.

The Department delayed promulgation of final rules in deference to the Legislature, under whose delegation the Department acts. During 1997, the Legislature undertook a comprehensive review of electric restructuring, culminating in passage of the Act on November 25, 1997. The Department's Order in D.P.U. 96-100 anticipated that the Legislature might enact different principles, in which case, the Department would modify the final rules consistent with Legislative direction. Id. at 23. The Act requires the Department to implement the Legislature's principles by promulgating rules and regulations on many of the same issues the Department included in our Model Rules.

On January 9, 1998, pursuant to G.L. c. 30A, § 2, the Department promulgated emergency regulations governing the licensing of competitive suppliers and electricity brokers. Order Adopting Emergency Regulations, D.P.U./D.T.E. 96-100 (1998). These emergency regulations were necessary for the public safety and general welfare given the need to allow new

entrants to the electricity market a reasonable period to apply for and receive licenses before March 1, 1998. In our Order promulgating the licensing regulations, the Department noted that, as emergency regulations, the licensing regulations are required to be reviewed within 90 days and provided for comment on the regulations by January 30, 1998. Id. at 1, 7.

On January 16, 1998, the Department issued proposed regulations on other restructuring issues to conform to the Act and solicited public comment on those regulations. Order Proposing Regulations and Soliciting Comment, D.P.U./D.T.E. 96-100 (1998) ("January 16, 1998 Order"). In that Order, the Department also solicited comment on our emergency regulations issued on January 9, 1998. On or about January 30, 1998, the Department received comments on our proposed regulations from the following entities: American Ref-Fuel Co. of SEMASS, L.P. ("SEMASS"); Associated Industries of Massachusetts ("AIM"); Attorney General ("AG"); Boston Edison Company ("BECo"); Cambridge Electric Light Company and Commonwealth Electric Company ("COM/Electric"); Competitive Power Coalition of New England, Inc. ("CPC"); Conservation Law Foundation ("CLF"); Cooperative Development Institute, Inc.; Department of Environmental Protection ("DEP"); Division of Energy Resources ("DOER"); Eastern Edison Company ("EECo"); EnergyEXPRESS, Select Energy, PG & E Energy Services, Green Mountain Energy Resources, TelEnergy, Wheeled Electric Power Company, AllEnergy, Xenergy, Enron Energy Services, New Energy Ventures (together "Competitive Suppliers"); EnergyVision; Fitchburg Gas and Electric Light Company ("FG&E"); General Services Administration ("GSA"); H.Q. Energy Services, Inc.; Harvard University; ISO New England ("ISO-NE"); Massachusetts Electric Company/Nantucket Electric Company (together "NEES");

Massachusetts Health and Educational Facilities Administration (“HEFA”); Midcon Corp.; Natural Resources Defense Council (“NRDC”); New England Power Service (“NEP”); NorAm Energy Management, Electric Clearinghouse, Amoco Energy Trading Company, Shell Energy Services Company, L.L.C., Eastern Power Distribution, Inc. (together “Indicated Parties"); Northeast Energy Efficiency Council (“NEEC"); U.S. Generating Company (“USGen"); Union of Concerned Scientist (“UCS"); Unitil Resources, Inc. (“UNITIL"); John W. Wadsworth, Esq.; and Western Massachusetts Electric Company ("WMECo").[2] In addition to filing individual comments, BECo, COM/Electric, EECo, FG&E, NEES and WMECo (together “Utilities”) jointly filed revised regulations.

III. DISCUSSION AND ANALYSIS

The regulations effect a comprehensive framework for the restructuring of the electric industry under which competitive suppliers will supply electric power and customers will gain the ability to choose their electric power supplier. The regulations consist of the following sections: the purpose and scope (11.01); the applicable definitions (11.02); transition cost recovery (11.03); distribution company requirements (11.04); competitive supplier and electricity broker requirements (11.05); information disclosure requirements (11.06); complaint resolution procedures (11.07); and exceptions (11.08). The regulations are attached to this Order as Attachment A. In this Order, the Department addresses the issues raised in the comments and sets forth our rationale for promulgating the specific regulations. Many of the comments

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[2] On February 6, 1998, the National Consumer Law Center, on behalf of the Low Income Intervenors ("LII"), moved for leave to file comments late. In the interest of finalizing these regulations with input from the only commenter exclusively representing low-income customers, the Department accepts the Low Income Intervenors’ filing.

contained suggestions for minor changes of a grammatical or clarifying nature and thus do not require discussion. Other comments raised issues that are more properly addressed in other proceedings.[3] These comments are not discussed in this Order.

The Department notes that while these regulations are promulgated as final, they are intended only to allow the restructuring process to move forward. In promulgating these regulations, we have considered the Legislative intent manifested in the Act. We also have anticipated the form of the competitive market, based on limited experience. The Department, however, recognizes that as the market develops and the knowledge and experience of the Department and participants grow, new issues or different perspectives on the existing complex issues may surface. In such an event, interested persons may petition the Department for review and revision of these regulations pursuant to 220 C.M.R. § 2.00 et seq. The Department, of course, also may refine our regulations consistent with statutory authority on our own motion.

A. Definitions

The Department received many comments on our proposed definitions. Several commenters note that in certain instances our proposed definition differed from the definition in the Act and suggested that the final rules reflect the Act's definition (see e.g., BECo Comments at 4; SEMASS Comments at 1). Others raised more substantive comments and suggested additional terms to be defined (see e.g., CPC Comments at 3-5; DOER Comments at 2-5). The Department

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[3] For example, some comments addressed the issue of fees that distribution companies may charge competitive suppliers for the release of customers' historic usage information. Issues associated with distribution company fees are properly addressed in each company's terms and conditions proceeding.

has reviewed all the comments regarding the definitions contained in the regulations and has made a number of changes. We highlight some of those changes below.

First, in response to the commenters requesting additional definitions, the Department includes in our final regulations the definitions of "affiliate," "alternative energy producer," and "ancillary services." These definitions reflect statutory definitions, where applicable. Our final regulations also clarify the distinction between retail and wholesale activities. To this end, the Department includes references to "retail sales" where appropriate and deletes the definitions of "wholesale customer" and "wholesale generation company" since the regulations do not apply to wholesale sales of electricity. Moreover, we deleted several definitions where the term in question was no longer used in our regulations.

In addition, the Department incorporated the revisions proposed by many commenters to add consistency between the definitions contained in the Act and those in our regulations. There are certain notable exceptions, however. Our final regulations continue to distinguish between competitive suppliers and electricity brokers. While the Act's definition of "supplier" includes entities such as power marketers and brokers, the Department determines that, for the purposes of our regulations, an important distinction must be made between those entities that sell electricity and those that merely facilitate the sale. This becomes evident when applying our licensing regulations, where the Department requires somewhat different documentation from competitive suppliers than from electricity brokers. Another area where this distinction is evident is in the regulations governing information disclosure requirements. The duty to disclose certain information resides with a competitive supplier, not with an electricity broker.

Finally, HEFA recommends that the term "public aggregator" be defined so as to include public bodies, such as independent authorities, that are vested with the statutory authority to create energy procurement groups (HEFA Comments at 1-2). HEFA states that, otherwise, an organization like itself would be subject to the Department's regulations as an electricity broker. HEFA contends that this outcome would not be consistent with the intent of the Act (id.). The Department concludes that it is appropriate for an entity such as HEFA to be subject to our regulations as an electricity broker because, otherwise, it is not clear what rules would apply with respect to issues such as customer authorization and dispute resolution. Unlike its treatment of municipal aggregators, the Act does not specify a comprehensive treatment for entities such as HEFA. The Department determines that the application of our regulations to these entities is particularly important when the entities may serve residential customers as well as health and educational facilities. Finally, as a practical matter, the Department notes that the licensing procedure for electricity brokers will be neither extensive nor expensive for an entity such as HEFA. Therefore, the Department rejects HEFA's recommendation. However, HEFA may petition the Department for an exception from our rules for good cause shown pursuant to 220 C.M.R. § 11.05(8).

B. Transition Cost Recovery

1. Substantial Compliance Standard and Functional Separation

The Utilities recommend revised rule language indicating that a finding by the Department of “substantial compliance” related to a restructuring plan connotes approval (Utilities’ Revised Regulations at A-11, A-12). In addition, the Utilities state that the Act allows for functional

separation of generation, transmission, and distribution as an alternative to the full separation or transfer of such facilities, and they propose language to allow for this alternative (id. at A-9).

The Department includes language to ensure that the Act's language regarding substantial compliance is encompassed by the Department's final rules. 220 C.M.R. § 11.03(3)(a). In addition, the Act includes functional separation as an option for separation of the ownership of generation, transmission, and distribution assets, and the Department makes the appropriate changes in the final rules to reflect the Act's language.

2. Mitigation Issues

DOER recommends language that would revise the rules to address the treatment of any net positive revenues associated with the operation of retained nuclear facilities (DOER Comments at 5-6). CPC, USGen, and SEMASS suggest that the Department include specific language in the rules, consistent with the Act, excluding waste-to-energy facilities from the requirements related to renegotiation of power purchase contracts (CPC Comments at 10; USGen Comments at 1; SEMASS Comments at 1-2).

As a general matter, the Department notes that any net positive value associated with any company asset -- whether it be a retained generation facility, land holding, other physical or intellectual property, or other asset -- must be applied to reduce the company's transition costs. This is a fundamental component of the company's obligation to mitigate transition costs. As a practical matter, such value is included in the proposed rules under 220 C.M.R. § 11.03(2)(a)(4). However, retained nuclear facilities represent a unique category of generating facility as presented in the Act, and the Department determines that explicit recognition of the net positive revenues

from such facilities should be identified in the final rules. Consequently, the Department adopts the language proposed by DOER. Similarly, the Department agrees with CPC, USGen, and SEMASS that the Act singles out waste-to-energy facilities in certain provisions related to purchased power contracts. The Department therefore makes appropriate changes to the rule relating to waste-to-energy facilities. 220 C.M.R. § 11.03(3)(c).

3. Exit Fees

Two issues have been raised with respect to exit fees. First, NEEC and CLF question whether the Department should interpret the six-month notice requirement in the Act's exit fee provisions in a manner that would exempt from such requirement facilities that are eligible for net metering (NEEC Comments at 5-6; CLF Comments at 1). The Department determines that the six-month notice requirement may result in an inappropriate disincentive to customers to install renewable and cogeneration applications that are generally eligible for net metering. Moreover, the requirement would be administratively burdensome and perhaps costly to enforce for those applications. The Department therefore makes appropriate changes in the final rules to exempt such facilities from the six-month notice requirement. 220 C.M.R. § 11.03(4)(d).

The second issue related to exit fees concerns the level of detail in the Department's regulations (see e.g., NEEC Comments at 2). The Department's proposed rules stated that the Department shall determine whether exit fees may be charged to retail customers in accordance with St. 1997, c. 164, § 193 (G.L. c. 164, § 1G(g)). There are three areas of that section of the Act where additional Department guidance may be helpful in such determinations: (1) how the Department will review whether the retail customer on its own, or in combination with other retail

customers within a 36-month time frame, represents greater than ten percent of the annual gross revenues of the service provider; (2) how the Department will review whether the equipment used to reduce purchases from the service provider has a combined efficiency of 50 percent or more; and (3) how the Department will determine the level of the exit fee charged. The Department notes that, in all three cases, Department determinations will require case-specific information that cannot be anticipated at this time, and that standards that may apply in the future will be developed through individual cases.[4]

C. Distribution Company Requirements

1. Low-Income Customer Tariff

The Department addresses three issues regarding the low-income customer tariff: (1) the billing options that will be available to customers who take service under this tariff; (2) the guarantee of payment to competitive suppliers; and (3) revenue under-recovery due to the possibility of an increased number of customers taking service under a low-income rate. The proposed regulations did not distinguish, in terms of available billing options, between low-income customers and other customers. Instead, the proposed regulations provided that all customers could choose between two billing options: (1) the passthrough billing option, in which a customer would receive one bill from his distribution company and a second bill from his competitive supplier; and (2) the complete billing option, in which a customer would receive a single bill for all services from his distribution company. The proposed regulations required each distribution company to guarantee payment to competitive suppliers that provide generation

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[4] For example, Cambridge Electric Light Company has proposed an exit fee in D.T.E. 98-16, currently pending before the Department.

service to customers who are eligible for the distribution company's low-income customer tariff. The proposed regulations stated that the payment guarantee would not exceed the distribution company's standard offer generation service ("standard offer service") price.

The Utilities make two recommendations regarding the provision of service to low-income customers: (1) customers taking service under the low-income tariff should be billed only under the complete billing option, in order to facilitate the implementation of the payment guarantee; and (2) the payment guarantee to competitive suppliers should apply only to those customers who actually are receiving service under the low-income discount tariff, and not to those customers who simply are eligible for the rate (Utilities' Revised Regulations at A-13, A-14; see also, NEES Comments at 1-2).

The Low Income Intervenors state that the guarantee of payments to competitive suppliers should not be capped at the price for standard offer service because such a limit is not authorized by the Act (LII Comments at 2). Finally, the Competitive Suppliers state that the Department needs to specify the procedure by which the payment guarantee will be implemented (Competitive Supplier Comments at 5).

With regard to billing options, the Department rejects the Utilities' proposal that customers taking service under the low-income tariff may only be billed under the complete billing option. The Department believes that the Utilities' proposal might significantly limit the competitive generation options that would be available to these customers because competitive suppliers that want to bill separately would not want to provide generation service to these customers. The Department acknowledges that implementation of the payment guarantee would

be administratively simplified under the complete billing option. However, the Department concludes that this benefit is outweighed by the negative implications discussed above. In addition, the Act does not authorize a billing distinction between customers taking service under a distribution company's low-income tariff and other customers. Therefore, under the final regulations, both billing options will be available to customers taking service under a distribution company's low-income tariff.

With regard to the guarantee of payment to competitive suppliers, the Act states that the guarantee should apply to low-income customers, which, in the Act, are those customers who receive service under discounted rates. St. 1997, c. 164, § 193 (G.L. c.164, § 1F(4)(i)). Therefore, the Department concludes that this guarantee should apply only to those customers that are taking service under a distribution company's low-income discount rate.[5] The final regulations reflect this interpretation. 220 C.M.R. § 11.04(5)(e).

The final regulations retain the provision that the payment guarantee will be capped at the standard offer price. The Department believes that fairness to the other customers of the distribution companies dictates that guaranteed prices not exceed the prices that are otherwise available to customers taking service under the low-income rate. Otherwise, these other customers could be adversely affected because of increased bad-debt recovery by the distribution companies.

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[5] The Department notes that, in contrast to eligibility for the payment guarantee, customers who simply are eligible for the low-income tariff may return to standard offer service at any time; these customers do not have to be taking service under a distribution company's low-income tariff to be eligible to return to standard offer service. St. 1997, c. 164, § 193 (G.L. c.164, § 1F(4)(iii)).

With regard to the procedure by which the payment guarantee would be implemented, the Department believes that the Electronic Business Transaction Working Group (the "Working Group")[6] would be well-suited to develop such a procedure. Therefore, the Department requests and urges the Working Group to submit a proposed procedure for implementing the payment guarantee. The Department requests that the Working Group notify the Department, by March 15, 1998, whether it will be able to develop such a procedure.

Finally, the Department recognizes that the number of customers that receive distribution service under the low-income customer tariff may increase over current levels due to the eligibility criteria established in the final regulations. Distribution companies may defer costs associated with any increased number of low-income customers for consideration in a subsequent general rate case.

2. Standard Offer Generation Service

a. Introduction

The Department addresses the comments of many concerning the eligibility for standard offer service. Our proposed regulations stated that a customer who has received generation service from a competitive supplier since the retail access date is not eligible to receive standard offer service, except that (1) a low-income customer may receive standard offer service at any time; (2) during the first year following the retail access date, a residential or small commercial and industrial customer who has received generation service from a competitive supplier since the

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6 The Electronic Business Transaction Working Group is an ad hoc group of distribution companies and competitive suppliers that was formed during the course of the Department's Terms and Conditions NOI, D.P.U./D.T.E. 97-65.

retail access date is eligible to receive standard offer service by so notifying the distribution company within 120 days of the date when the customer first began to receive the competitive generation service; and (3) a customer who has received generation service pursuant to an agreement with a public (i.e., municipal) aggregator is eligible to receive standard offer service by so notifying the distribution company within 180 days of the date when the customer first began to receive generation service through such agreement.

The proposed regulations also stated that a distribution company shall make a determination whether a customer who is eligible for the company's low-income tariff will be placed on standard offer service or default generation service ("default service") based on which service has the lower rate, unless otherwise indicated by the customer. This determination shall be made at the time the service is initiated.

b. Summary of Comments

Several commenters address the circumstances under which a customer should be allowed to return to standard offer service. AIM recommends that all existing customers, not just residential and small commercial and industrial, be able to return to standard offer service within the first year of the retail access date, because of the lack of experience with a competitive generation market and the immaturity of the market itself (AIM Comments at 1). The Indicated Parties recommend that a customer receiving generation service from a competitive supplier be able to return to standard offer service during the first year after the retail access date, regardless of how long the customer was receiving the competitive generation service (Indicated Parties Comments at 5). The Indicated Parties state that this would allow customers to "experiment"

with competitive generation service before having to make a decision whether to return to standard offer service (id.). Other commenters recommend that standard offer service be available to new customers in a distribution company's service territory, stating that, otherwise, new customers might experience substantial price increases, particularly during the early stages of competition when competitive options may not be available (AIM Comments at 2-3; Wadsworth Comments at 2). These commenters assert that this might affect the decisions of businesses contemplating moving into Massachusetts (id.). Finally, the Utilities recommend that a customer receiving generation service through a public aggregator be allowed to return to standard offer service only if the customer was receiving standard offer service at the time the public aggregation took effect (Utilities' Revised Regulations at A-12).

With respect to the determination of whether a customer who is eligible for a distribution company's low-income tariff will be placed on standard offer service or default service, DOER recommends that the determination be based on a projection of prices for the two services over the subsequent six-month period (DOER Comments at 8). The Low Income Intervenors recommend that the determination be revisited annually based on a comparison of the prices for the two services (LII Comments at 2).

c. Discussion and Analysis

The Department's policies with respect to the circumstances under which customers would be eligible to receive standard offer service were first established in our December 30, 1996 Plan and affirmed in the Act. These policies were further developed in the Department's Terms and Conditions NOI, D.P.U./D.T.E. 97-65 (1997). In D.P.U./D.T.E. 97-65, the Department issued a

Model Tariff for Standard Offer Service that was intended to serve as the basis for each distribution company's standard offer tariff. The Department stated that a distribution company must justify any deviations from the Model Tariff when it presents its tariff for review. Id. at 3, 87.

The provisions included in our January 16, 1998 Order reflected the Department's Model Tariff for Standard Offer Service, as well as the requirements mandated by the Act. Among other things, the Act states that "any ratepayer," without limitation, who is receiving generation service under a plan developed by a public aggregator shall be entitled to return to standard offer service provided that he opts out of the public aggregation plan within 180 days. St. 1997, c. 164, § 193 (G.L. c.164, § 134(a)). The Department concludes that the Utilities' proposal limiting the return provision to customers who were receiving standard offer service at the time the aggregation plan took effect would be inconsistent with the letter and spirit of the Act. Therefore, the Department rejects the Utilities' proposal.

The Department's policy that standard offer service would not be available to customers who move into a distribution company's service territory after the retail access date was also first established in our December 30, 1996 Plan. In D.P.U./D.T.E. 97-65, at 85, 88, the Department reaffirmed this policy, based on guidance from the Legislature, stating that allowing new customers to receive standard offer service would create uncertainty regarding the load for which standard offer service providers would be responsible, possibly resulting in higher prices for this service. The Department concludes that adoption of the proposals put forth by AIM and the Indicated Parties would have the same effect. Therefore, the Department rejects these proposals.

The Department does recognize, however, the underlying concerns that motivate the proposals put forth by AIM, the Indicated Parties, and John Wadsworth. Because of the lack of experience customers have with a competitive generation market and because the market itself will take time to develop, customers who find themselves ineligible for standard offer service could face prices for electricity that are higher than the standard offer price. The Department determines that the appropriate way to address this concern is to establish a process for setting rates for default service that ensures that the rates do not exceed the average monthly market price for electricity. As discussed below, the determination of what constitutes the average monthly market price will be made at the time of the Department's review of the default service plans submitted by the distribution companies.

Finally, the Department rejects the methods proposed by DOER and the Low Income Intervenors regarding the placement of low-income customers[7] on standard offer or default service. The Department concludes that implementation of these methods would represent an unnecessary burden on distribution companies that would outweigh any benefits to the customers affected. In addition, DOER's proposal would require the Department, or the distribution companies, to forecast default (i.e. market) prices over a six-month period, a potentially contentious undertaking that could be burdensome both for the Department and the distribution companies.

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[7] Low-income customers are defined in the final regulations as those customers eligible for a distribution company's low-income customer tariff. 220 C.M.R. § 11.02.

3. Default Generation Service

The proposed regulations required that distribution companies procure electricity for default service through competitive bidding, subject to review by the Department. The proposed regulations stated that rates for default service should be established through competitive bidding, but in no case should they exceed the average monthly market price for electricity, as determined by the Department.

DOER recommends that the Department's regulations state that, once the ISO-NE or some other approved power exchange has established "an operational and workably competitive market or bid-based dispatch system that provides a competitive market price for electricity," the procurement of electricity for default service from the ISO-NE or approved power exchange will satisfy the requirement that default service electricity be procured through competitive bidding (DOER Comments at 7-8). DOER asserts that the regional market to be administered by the ISO-NE will represent a form of competitive bidding that will yield benefits to consumers equal to the benefits that would be provided by other forms of competitive bidding (id.). Regarding pricing of this service, the Attorney General states that until a robust spot market for electricity exists, the price for all non-competitive generation service should be set at the standard offer price (AG Comments at 2). Finally, the Competitive Suppliers state that the term “average market prices” must be better defined (Competitive Suppliers Comments at 5).

In principle, the Department supports the concept that electricity purchases for default service from the ISO-NE spot market, once that market is operating in an efficient manner, would satisfy the requirement that such electricity be procured through a competitive bidding process.

However, the Department determines that DOER's proposed language is not necessary in the final regulations. The Department can make the determination whether a distribution company's default service procurement satisfies the requirement for competitive bidding at the time that the Department reviews the default service plans submitted by each company. Similarly, the determination of what will constitute the "average monthly market price" is one that would be made most properly at the time of the Department's review of the default service plans submitted by each company.

Finally, the Department has included three new provisions in the final regulations regarding default service: (1) each distribution company must offer a rate option that provides for constant rates over a six-month period; (2) providers of default service for a distribution company are entitled to include a one-page insert in the bills sent to the distribution company's default service customers; and (3) there will be no fees associated with initiating and terminating default service when it occurs concurrent with a meter read or is involuntary on the part of the customer. 220 C.M.R. §§ 11.04(9)(c) and (d). These provisions are mandated by the Act. St. 1997, c. 164, § 193 (G.L. c.164, §§ 1B(d), 1F(4)(iv)).

4. Billing and Payment

On our own review, the Department has added a provision to the final regulations specifying that distribution companies separately identify on their bills the charges that will be collected from ratepayers for renewable resources and energy efficiency services.[8] 220

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[8] The Department notes that, in the final regulations, the terms "Bill" and "Unbundled Rates" are defined to require that charges for renewable resources and energy efficiency services be separately identified on distribution company bills. 220 C.M.R. § 11.02.

C.M.R. § 11.04(10)(c). The Department concludes that this provision is necessary in order to be consistent with the requirements of the Act. St. 1997, c. 164, § 193 (G.L. c.164, § 1D).

5. Farm Discount

The Department addresses three issues regarding the legislatively-mandated discount for farmers: (1) what eligibility criteria must a customer meet to be classified as a farmer for the purposes of receiving the discount; (2) to which farm facilities' electric consumption should the discount apply; and (3) revenue under-recovery due to the farm discount. The Utilities suggest adding a requirement that reasonable proof of eligibility for the farm discount be provided to the distribution company to reduce confusion and avoid potential abuse (BECo Comments at 7-8; COM/Electric Comments at 3; EECo Comments at 8; FG&E Comments at 3; NEES Comments at 2; WMECo Comments at 3). The Utilities further suggest that such proof could include forms by other governmental agencies such as those used for state sales tax exemption (Department of Revenue Form ST-12) real estate abatement (G.L. c. 61A, §§ 1-4) or federal tax purposes (Internal Revenue Service Form 1040-S) (COM/Electric Comments at 3; EECo Comments at 9; NEES Comments at 3). Analogizing the farm discount to the low-income discount, EECo states that companies would offer the discount to those who have certified that they are eligible for either exemption, rather then making an individual determination of eligibility (EECo Comments at 9).

In mandating a discount for those engaged in the business of farming or agriculture, the Act references G.L. c. 128, § 1A, which provides:

> "Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and

> harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

The Act does not specify any verification procedures that distribution companies must follow to determine eligibility for the discounted rate. The Department is collaborating with the Massachusetts Department of Food and Agriculture ("DFA") to develop a verification process whereby the DFA would certify that a customer meets the definition of a farmer. A customer would then present the distribution company with a copy of the certificate issued by the DFA upon application for the farm discount. The Department recognizes that while we are developing this verification process, distribution companies may receive requests for the farm discount. In the interim, the Department determines that distribution companies might request that such customers provide them with one of the following: (1) any license or permit required by any federal, state or local law prior to engaging in farming or forestry operations; (2) Schedule C, D, or F of the prior year's federal and state income tax returns demonstrating income of at least $1,000 or a net farm-related loss of at least $2,000 related to the applicant's gross farm, forest product harvesting or incidental lumbering operations, (3) a copy of the current tax certificate issued by the local assessor demonstrating that the applicant's land is enrolled in and classified pursuant to G.L. c. 61A as being devoted to agricultural or horticultural use or both, and meets the production values in that chapter; or (4) a copy of the current tax certificate issued by the

local assessor demonstrating that the applicant's land is classified pursuant to G.L. c. 61 as being forest land.

With regard to the second issue, the Department does not have sufficient information on which to based an informed decision. The Department may address this issue in a subsequent proceeding.

Finally, the Department recognizes that distribution companies may experience under-recoveries associated with implementation of the farm discount. Distribution companies may defer costs associated with the implementation of the farm discount for consideration in a subsequent general rate case.

6. Net Metering

Several utilities comment that the Act does not require increasing the size of generation facilities eligible for net metering from 30 kilowatts ("KW") to 60 KW (BECo Comments at 8; NEES Comments at 3; COM/Electric Comments at 4-5). In support, the Utilities argue that the reference in the Act to net-metered facilities is applicable to only exit fees (BECo Comments at 8, NEES Comments at 3, citing St. 1997, c. 164, § 193 (G.L. c. 164, § 1G)). These companies recommend that the Department delete the net metering provision contained in these rules, reserving the issue for consideration as part of a review of the Department's rules for qualifying facilities, 220 C.M.R. § 8.00 et seq. (BECo Comments at 8; NEES Comments at 3; COM/Electric Comments at 4-5).

The Act states that a customer shall not be subject to an exit fee if he reduces purchases through the operation of "an on site generation or cogeneration facility of 60 [KW] or less which

is eligible for net metering." St. 1997, c. 164, § 193 (G.L. c. 164, § 1G). The Department interprets this statement to mean that facilities of 60 KW or less shall be eligible for net metering, rather than facilities of 30 KW or less, as previously allowed by 220 C.M.R. § 8.04. The Department therefore rejects the Utilities' proposal to delete the net metering provision contained in these rules and finds that eligibility for net metering shall apply to on-site generation or cogeneration facilities of 60 KW or less.

7. Renewable Resources

The comments on renewable resources address the definition of renewable resources and the issue of requiring distribution companies to share information on these resources with customers. The Indicated Parties seek to delete the reference to technologies that have significant potential for commercialization in New England and New York from the definition of renewable resources (Indicated Parties Comments at 4). The definition of renewable resources contained in our rules is consistent with the definition provided in the Act. St. 1997, c. 164, § 190 (G.L. c. 164, § 1). Therefore, the Department finds that this definition should not be modified.

The Utilities seek to modify the rule requiring distribution companies to share information on renewable resources with their customers (Utilities' Revised Regulations at A-15-A-16). In our January 16, 1998 Order, the Department proposed regulations requiring distribution companies to share information on renewables with their customers, stating that each distribution company shall make “any and all non-proprietary information that it has obtained on Renewable Resources . . . available to its customers upon request." 220 C.M.R. § 11.04(7)(c). The Utilities seek to delete the words “any and all" from the definition, claiming that this language would

impose an unnecessary burden on the distribution companies (see e.g., COM/Electric Comments at 3). The Department's intent in requiring the companies to provide this information was not to place an undue burden upon the distribution companies, but to ensure that customers have access to information that will enable them to make informed decisions regarding these technologies. Therefore, the Department has modified its rules to attain the objective of providing consumers with useful information without placing undue hardship upon the distribution companies. 220 C.M.R. § 11.04(7)(b).

8. Energy Efficiency

The Utilities make identical arguments concerning sharing information on renewable resources and energy efficiency (Utilities' Revised Regulations at A-15, A-16). In our January 16, 1998 Order, the Department proposed regulations requiring distribution companies to share information on energy efficiency with their customers, stating that each distribution company shall make “any and all non-proprietary information that it has obtained regarding energy efficiency technologies . . . available to its customers upon request." 220 C.M.R. § 11.04(8)(d)(1). The Utilities seek to delete the words “any and all" from the definition, claiming that this language would impose an unnecessary burden on the distribution companies (see e.g., COM/Electric Comments at 3). The Department's intent in requiring the companies to provide this information was not to place an undue burden upon the distribution companies, but to ensure that customers have access to information that will enable them to make informed decisions regarding these technologies and the programs offered by the distribution companies through which these technologies can be installed. Therefore, the Department has

modified its rules to attain the objective of providing consumers with useful information without placing undue hardship upon the distribution companies. 220 C.M.R. § 11.04(8)(c)(1).

DOER seeks clarification of the filing requirements for energy efficiency plans (DOER Comments at 7). DOER proposes additional language in the rules to state that energy efficiency plans must be reviewed first by DOER for consistency with the Commonwealth's energy efficiency and fuel diversity goals before they are reviewed by the Department for cost-effectiveness (id.).

The Act states that DOER shall oversee and coordinate ratepayer-funded energy efficiency programs, and shall seek to achieve goals including (1) equitable allocation among the customer classes, (2) adequate support for "lost opportunity" efficiency programs, (3) emphasis on statewide market transformation programs, and (4) continuation of weatherization and efficiency services to low-income customers. St. 1997, c. 164, § 50 (G.L. c. 25A, § 11G). The Act further states that DOER shall annually file a report with the Department on the proposed funding levels for energy efficiency programs. Id. The Department shall review and approve energy efficiency expenditures after determining that implementation of these programs was cost-effective. Id. DOER is required to promulgate the necessary rules and regulations to implement the Act no later than March 1, 1999. Id. The Department recognizes the shared responsibilities and need for coordination between the Department and DOER in review of energy efficiency programs. However, reference to DOER's role in review of energy efficiency programs should be made in the rules promulgated by DOER. The Department has modified its rule concerning review of energy efficiency plans, stating that review shall be in accordance with G.L. c. 25A, § 11G.

D. Competitive Supplier And Electricity Broker Requirements

1. Licensing Requirements

a. Confidentiality of the License Application

The Department's proposed regulations on competitive supplier and electricity broker licensing requirements contained several informational requirements, including the following: (1) documentation regarding valid purchased power contracts pursuant to 220 C.M.R. § 11.05(2)(b)(11); and (2) documentation of financial capability pursuant to 220 C.M.R. § 11.05(2)(b)(13). Several commenters object to these requirements, stating that purchased power contracts and financial information should be treated as confidential by the Department (AIM Comments at 5; Competitive Suppliers Comments at 6; EnergyVision Comments at 5).

Pursuant to G.L. c. 25, § 5D, the Department may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information. There is a statutory presumption, however, that information submitted to the Department is public information. Accordingly, proponents of protected treatment of information have the burden to establish the need for protection from disclosure on a case-by-case basis. Id. An applicant for licensure may file with the Department a motion requesting protective treatment under G.L. c. 25, § 5D with supporting rationale. Therefore, the Department has made no change to the regulations with regard to this issue.

b. Purchased Power Contract Renegotiation

The Department's proposed regulations required applicants to provide documentation that each above-market contract between the applicant, its affiliates, its parent or subsidiary, and any

electric company formed pursuant to the provisions of G.L. c. 164 is the subject of good-faith renegotiation. COM/Electric, CPC, and WMECo state that our requirement language is too broad (COM/Electric Comments at 6; CPC Comments at 5-10; WMECo Comments at 5). The Utilities propose that the Department add language to our rules requiring renegotiation "subject to . . . G.L. c. 164 § 1G(d)(2)" (Utilities' Revised Regulations at A-22). In addition, CPC states that the renegotiation requirement should be limited to the applicant seeking a license and not extend to the applicant's affiliate, subsidiary, or parent (CPC Comments at 10).

The Act's informational requirements (St. 1997, c. 164, § 193 (G.L. c. 164, § 1F(1))) allow the Department to determine which companies are parties to contracts with above-market prices, including those companies that do not plan to sell to retail customers directly but that might have subsidiaries or affiliates in the retail market. In the interest of reducing the stranded cost burden imposed on all consumers, the Act imposes a renegotiation requirement on all electric companies and sellers with purchase power contracts that have above-market prices. St. 1997, c. 164, § 193 (G.L. c. 164, § 1G(d)). In order to ensure that the intent of the legislation is implemented to the fullest extent, the Department has modified its rules to reflect the spirit of the Utilities' Revised Regulations, and will require contract renegotiation pursuant to St. 1997, c. 164, § 193 (G.L. c. 164, § 1G(d)).

Finally, BECo notes that the Act requires renegotiation of purchased power contracts approved by the Department on or by December 31, 1995, except facilities that burn trash to generate electricity (BECo Comments at 10, citing St. 1997, c. 164, §193 (G.L. c. 164,

§ 1G(d)(2)(i)). The Department's final rules reflect the technical correction suggested by BECo. 220 C.M.R. § 11.05(2)(b).

c. Reporting Criminal History

In the January 16, 1998 Order, the Department asked commenters whether there would be any value in ascertaining an applicant's criminal history with regard to commercial or business fraud. AIM states that such information would be useful, although applicants should have an opportunity to explain the event (AIM Comments at 5). The Low Income Intervenors comment that such a conviction would have bearing on the applicant's fitness to do business in the Commonwealth (LII Comments at 2). The Low Income Intervenors further comment that the Department unnecessarily limited the disclosure to convictions for fraud, and state that antitrust convictions should be included as well (id. at 2-3).

In order to enhance consumer protection, the Department has revised its proposed licensing rules to include a reporting requirement regarding business fraud and antitrust violations. We further extend this reporting requirement to civil liability, including settled matters, for antitrust violations. Thus, the final regulation requires a statement whether the applicant business or any director, officer, or other official has been convicted of a felony involving business fraud or held liable for any antitrust violation. 220 C.M.R. § 11.05(2)(b).

d. Reporting Information to DOER

The Department's proposed regulations required documentation of competitive supplier information as well as various statements by an applicant with regard to Department requirements. DOER requests that additional language be included in the Department's rules,

requiring applicants to agree to comply with reporting requirements yet to be promulgated by DOER (DOER Comments at 9-10). In addition, DOER requests that competitive suppliers be required to submit a copy of their application to DOER (id.).

The Department has composed its rules pursuant to its obligations under the Act. The Department supports DOER in its attempts to fulfill that agency's obligations and strongly encourages competitive suppliers and electricity brokers to provide DOER with copies of their licensing applications. However, the Department determines that it is premature for the Department to require applicants to agree to rules that have yet to be promulgated and that will be developed by another agency. Therefore, the Department has made no change to its rules in response to DOER's comments on this issue.

e. Listing of Licensed Competitive Suppliers and Electricity Brokers

COM/Electric expresses concern that distribution companies would be burdened by trying to determine whether a competitive supplier or electricity broker is licensed by the Department (COM/Electric Comments at 6). The Department will "publish" a current list of competitive suppliers and electricity brokers on our Homepage:

http://www.magnet.state.ma.us/dpu.

A current list will also be available at the Department's offices during regular business hours.

f. License Renewal

The Department's proposed regulations required applicants to file updated information within 30 days of any change in the information required. In addition, the Department's proposed regulations required applicants to submit a filing fee of one hundred dollars with the application.

However, the proposed regulations were silent on the need for a license renewal process. In the interest of minimizing customers' confusion in their efforts to choose suppliers, the Department hopes to ensure that only those competitive suppliers that are actively involved in serving Massachusetts customers are listed on the Department's register of licensed competitive suppliers and electricity brokers. Therefore, the Department has amended its regulations to require an annual fee of one hundred dollars so that only those entities that actively choose to continue their licensure remain on the Department's list. Licensees should submit that fee with an updated application. If there has been no material or organic change to the relevant information, an applicant may submit an updated application indicating that there has been no change since the previous application. 220 C.M.R. § 11.05(2)(b). The Department will treat such applications as approved.

2. Billing and Generation Service Termination Requirements

a. Introduction

The Department addresses the following two issues: (1) the flexibility to be afforded competitive suppliers in designing pricing structures and bill formats; and (2) the application of the Department's consumer protection regulations to competitive suppliers. With respect to price structures and bill formats, the proposed regulations stated that bills sent by competitive suppliers through the passthrough billing option (i.e., the two-bill option, in which one bill is sent by the distribution company and a second bill is sent by the competitive supplier) must include separate lines for electricity consumption, generation price (rate per kilowatthour ("KWH")), generation cost (total dollar amount owed), and, when applicable, transmission price and cost. In addition,

the proposed regulations required that competitive suppliers that plan to bill customers through the passthrough billing option submit a sample bill as part of their licensing application. With respect to the Department's rules for consumer protection, the proposed regulations established a procedure by which these bills may be considered overdue that mirrors the procedure established for distribution company bills in 220 C.M.R. § 25.02.

b. Price Structure and Bill Formats

Several commenters state that competitive suppliers should be given the flexibility to design price structures and bill formats that meet their customers' needs (AIM Comments at 4; Indicated Parties Comments at 10; Competitive Suppliers Comments at 8). These commenters maintain that suppliers need the opportunity to respond to consumers' preferences for optional pricing methods, such as a flat fee per month (AIM Comments at 4; Indicated Parties Comments at 10; Competitive Suppliers Comments at 8). Accordingly, these commenters recommend that suppliers not be required to include a separate line on their bills for a per-kilowatthour generation charge (AIM Comments at 4; Indicated Parties Comments at 10; Competitive Suppliers Comments at 8). Finally, EnergyVision stated that the regulations should not preclude suppliers from including on their bills charges for non-generation services such as energy efficiency services (EnergyVision Comments at 5-6).

The Department considers it important to distinguish between affording competitive suppliers the flexibility to design price structures that respond to consumers' preferences and affording suppliers the flexibility to present the appropriate pricing information on customers' bills. The Department fully supports providing competitive suppliers with the flexibility to design price

structures that meet customers' needs and expects that optional price structures will be one of many services by which competitive suppliers will try to distinguish themselves. Accordingly, the final regulations do not require that a competitive supplier's bill include a separate line for a per-KWH generation charge. 220 C.M.R. § 11.05(3)(a). Similarly, the final regulations provide that competitive suppliers may issue bills to customers less frequently than the traditional billing period of approximately 30 days. 220 C.M.R. § 11.05(3)(b). Finally, the final regulations allow for the inclusion on competitive suppliers' bills of charges for non-generation services (e.g., energy efficiency services). 220 C.M.R. § 11.04(10)(c).

However, the Department does not support allowing this same level of flexibility with regard to billing formats, at least during the early stages of restructuring. Until such time as customers gain more experience with the competitive generation market and the market itself develops into an efficient, mature market, customers' bills should be presented in such a way that allows for relatively easy computation of bill amounts. The Department concludes that this is essential in order to minimize customer confusion. As such, the final regulations require that supplier bills include the information necessary for customers to calculate their bills -- electricity consumption, the price structure agreed to between the supplier and customer,[9] and the total charge for generation, identical to the information a customer would see if a distribution company were doing the billing for generation service under the complete billing option. 220 C.M.R. § 11.05(3)(a). The final regulations additionally require that, in those instances when a

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[9] The price structure agreed to by the competitive supplier and customer will be included in the Terms of Service that each competitive supplier will be required to send to its customers prior to initiating generation service, in accordance with 220 C.M.R. §§ 11.06(3) and (4).

supplier issues its bills less frequently than the traditional billing period (i.e., monthly), the bills must include electricity consumption information for each traditional billing period, rather than simply the aggregated consumption over the period that the bill covers. 220 C.M.R. § 11.05(3)(c). This would allow customers to compare the consumption levels on which their generation charges are based with the levels appearing on their distribution company bills. The Department determines that these provisions strike an appropriate balance between the flexibility necessary for competitive suppliers to introduce new product offerings into the marketplace and the need for appropriate and necessary consumer protections.

A final bill format issue that is addressed in the final regulations is the requirement that competitive suppliers submit a sample bill as part of their licensing application if they plan to separately bill customers for generation service pursuant to the passthrough billing option. 220 C.M.R. § 11.05(2)(b). The Department recognizes that suppliers may offer various bill formats from which customers may choose. The Department emphasizes that the sample bill requirement is intended only to demonstrate the suppliers' familiarity with the requirements established in the final regulations. Suppliers will not be required to submit a sample bill for each type of bill format that they may offer.

c. Consumer Protection Regulations

Midcon asserts that the Department's consumer protection rules, as set forth in 220 C.M.R. § 25.00 et seq., § 27.00 et seq., § 28.00 et seq., and § 29.00 et seq. were intended to protect consumers against monopoly service providers and should not apply to a competitive market for generation services, in which consumers dissatisfied with the billing practices of a

competitive supplier can readily switch to a different supplier (Midcon Comments at 9-11). UNITIL argues that applying the Department's consumer protection regulations relating to overdue bills to competitive suppliers would unnecessarily hinder the effective functioning of the competitive market, particularly because a supplier's termination of generation service would not interrupt a customer's electric service (UNITIL Comments at 1-2). EnergyVision states that the Department's billing and termination protection rules should apply only to residential customers, as is currently the case (EnergyVision Comments at 6).

The Competitive Suppliers and UNITIL state that the Department's regulations regarding security deposits, included in 220 C.M.R. § 26.00 et seq., should not apply to competitive suppliers (Competitive Suppliers Comments at 9; UNITIL Comments at 2). The Competitive Suppliers note that the application of these rules to competitive suppliers is not mandated by the Act and argue that such application would inhibit product development and offerings to commercial and industrial customers with poor credit histories (Competitive Suppliers Comments at 9). UNITIL argues that the application of these rules to competitive suppliers would add another constraint on the efficient operation of the competitive market (UNITIL Comments at 2).

In contrast to the comments described above, the Low Income Intervenors maintain that the Act mandates that all of the Department's consumer protection rules included in 220 C.M.R. § 25.00 et seq., § 27.00 et seq., § 28.00 et seq., and § 29.00 et seq. apply to all competitive suppliers (LII Comments at 3). The Low Income Intervenors state that the Department's proposed regulations do not address many of the consumer protections (e.g., payment plans, financial hardship protections) included in the Department's consumer protection

rules (id.). Finally, the Low Income Intervenors argue that these protections should apply to competitive suppliers irrespective of the selected billing option, because termination of generation service would have the same consequence to a consumer regardless of whether the supplier or the distribution company is billing for generation service (id.).

In evaluating which of the Department's consumer protection regulations should apply to competitive suppliers, the Department distinguishes between those regulations that address issues associated with billing and those that address issues associated with termination of electric service. In the December 31, 1996 Plan, at 146, the Department stated that our existing billing regulations should apply to competitive suppliers; otherwise, the level of consumer protection afforded a customer would be dependent on the billing option the customer has chosen. The Department recognizes that, once the market for competitive generation services has matured, the marketplace will likely provide the constraints on competitive supplier behavior that our consumer protection regulations are intended to provide. However, during the early stages of restructuring, the Department considers it essential in order to protect customers and to minimize customer confusion that our billing regulations be applied to competitive suppliers. Similarly, our regulations related to billing deposits and late payment charges also should apply to competitive suppliers, at least during the early stages of restructuring. The Department concludes that the application of these regulations to competitive suppliers is consistent with the requirements of the Act. St. 1997, c. 164, § 193 (G.L. c.164, § 1F(7)).

As such, the final regulations establish a procedure for the determination of when a bill for generation service may be considered past-due that mirrors the procedure established for

distribution company bills in 220 C.M.R.§ 25.02. The final regulations specify that this provision applies only to residential customers. 220 C.M.R.§§ 11.05(3)(c) and (d). In addition, the final regulations preclude competitive suppliers and electricity brokers from requiring security deposits or assessing late payment charges from customers except as provided in 220 C.M.R.§ 26.00 et seq.. Finally, the Department has added a provision to the final regulations specifying that competitive suppliers must notify customers of termination of generation service at least ten days before termination, when such termination is due to reasons other than non-payment. The Department determines that this rule will provide customers with appropriate notification regarding termination of their generation service. 220 C.M.R. § 11.05(3)(f).

With respect to termination protections, the Department distinguishes between the termination of generation service and the termination of electric service. In the restructured electric industry, competitive suppliers will have the ability to terminate generation service only; they will not have the ability to terminate a customer's electric service. Only distribution companies will have the ability to terminate a customer's electric service (i.e., physically disconnect a customer from the electricity grid), as is currently the case. The termination of generation service by a competitive supplier to a customer would not result in an interruption of the customer's electric service; the affected customer would automatically receive either standard offer or default service provided by his distribution company. Because the final regulations provide that all of the Department's billing and termination procedures, as set forth in 220 C.M.R. § 25.00 et seq., shall continue to apply to distribution companies, customers for whom generation service is terminated will be afforded the same protections against termination of

electric service that currently exist. Thus, the final regulations provide a level of protection for customers in the restructured electric industry that is equal to the level that is currently provided.

The Department recognizes that termination of generation service by a competitive supplier could affect the price that a consumer would pay for electricity. The Department further recognizes that, for some customers, an increase in the price they pay for electricity could have adverse effects. Under the final regulations, consumers that meet the eligibility criteria for a distribution company's low-income tariff would be eligible to return to standard offer service at any time. This provision would allow these customers to receive the rate reductions that are incorporated into the standard offer price. Therefore, the Department believes that, on the whole, the final regulations provide appropriate protection to those consumers who would be most adversely affected by any increased rates that may result from termination of their generation service

3. Conducting Business With Unlicensed Entities

The proposed regulations precluded distribution companies, competitive suppliers, and electricity brokers from "doing business" with any competitive supplier or electricity broker that is not licensed by the Department. Several commenters state that this language is overly broad and perhaps unduly restrictive (DOER Comments at 10; Interested Parties at 11; Midcon at 12-13). The Indicated Parties added that it is unclear what is meant by the phrase "doing business" (Indicated Parties at 11).

The final regulations focus separately on two business relationships in determining the restrictions that will apply to distribution companies, competitive suppliers, and electricity brokers

interacting with only licensed entities. The first relationship is between distribution companies and competitive suppliers, for which the final regulations state that distribution companies may provide services associated with the provision of Generation Service to entities that are licensed as competitive suppliers or electricity brokers by the Department. 220 C.M.R. § 11.04(14).[10] The second relationship is between competitive suppliers and electricity brokers, for which the final regulations state that competitive suppliers may not use the services of any entity to facilitate or otherwise arrange for the purchase and sale of electricity to retail customers, unless that entity has been licensed as an electricity broker by the Department. 220 C.M.R. § 11.05(5).

E. Information Disclosure

1. Basis for Disclosure

The Department's proposed rules required that a competitive supplier disclose information on its company resource portfolio using market settlement data provided by ISO-NE. In addition, the proposed rules required that a competitive supplier determine its company resource portfolio as the sum, over the label reporting period, of resources used by the provider in each hour to meet its load obligation.

The majority of commenters suggest that the Department's information disclosure policy allow a competitive supplier to disclose segments of its resource portfolio (or "products") to retail customers rather than the company resource portfolio (see e.g., UCS Comments at 1-3; DOER Comments at 11; Competitive Suppliers Comments at 10-11; CPC Comments at 11; NRDC

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[10] The Department notes that distribution company services associated with the provision of Generation Service are addressed in each distribution company's Terms and Conditions for Competitive Suppliers.

Comments at 2). They state that requiring disclosure of company resource portfolios without allowing disclosure of segments of the resource portfolio would prevent the development of a strong market for renewable resources and other resources with desirable environmental characteristics (see e.g., UCS Comments at 3; NRDC Comments at 2). Several also suggest that requiring company-based disclosure would hamper efforts to market to retail customers specific segments of a company resource portfolio (see e.g., CLF Comments at 3; CPC Comments at 11). Some commenters state that requiring an hourly matching of resources to load obligation would have an adverse impact upon intermittent resources (UCS Comments at 4; CLF Comments at 6-7). Other commenters state that hourly matching is excessively restrictive (see e.g., CPC Comments at 12; NEP Comments at 1; CLF Comments at 6-7). ISO-NE states that not allowing differentiation among segments of a company resource portfolio could increase operation and administration costs for ISO-NE and for participants (ISO-NE Comments at 2). In its comments, DOER recommends a multi-step verification procedure relying on ISO-NE data and certification by an independent auditor for verifying product-based disclosure (DOER Comments at Att. 1). Finally, two commenters noted that resources smaller than one megawatt will not be included in ISO-NE's market settlement data although some suppliers may wish to include such resources in their information disclosure (ISO-NE Comments at 4; CLF Comments at 6).

In responding to the comments received, the Department notes that our goal with respect to information disclosure is first to enable consumers to make informed choices of supply resources whose development and use they may wish to facilitate, and second, to ensure that consumers are protected from misrepresentations regarding these resources. The Department

must ensure that information disclosure labels are not easily misinterpreted by retail customers. There are several complicated steps in the matching of generation resources in New England to individual competitive suppliers, and in the assignment of segments of an individual competitive supplier's company resource portfolio to the consumption of electricity by its retail customers. These calculations necessarily rely upon information of a confidential nature that is generated hourly by ISO-NE. The Department remains concerned that the complexity of this company resource portfolio calculation and assignment to retail customers will introduce opportunities for competitors to game the Act's disclosure requirements to the detriment of consumers. ISO-NE is ideally and uniquely suited to address this concern through the task of supporting and verifying the calculations underlying information disclosure, given the independent composition of the ISO-NE board, its role in the daily operations of the New England Power Pool ("NEPOOL"), and the access that ISO-NE has to the data necessary to verify company calculations.

Consequently, in our final regulation, we require the calculation of company resource portfolios on a quarterly basis, and provide for the segmentation of such resource portfolios into discreet components, subject to ISO-NE verifying such calculations for competitive suppliers. 220 C.M.R. §11.06(2)(d)(2). In doing so, the Department recognizes that it cannot require that ISO-NE undertake these responsibilities. ISO-NE operates under an interim service contract with NEPOOL, subject to the jurisdiction of the Federal Energy Regulatory Commission. ISO-NE operations, billing, and information dissemination occur pursuant to rules and procedures that must be developed and approved through NEPOOL committees whose voting members consist of the NEPOOL market participants. However, ISO-NE has recommended allowing differentiation

of products. The Department is committed to fostering the development of the ISO-NE's authority to facilitate the implementation of information disclosure policies that may be applied on a consistent regional basis. This has been an important component of recent and ongoing efforts related to the tracking of disclosure data coordinated through the New England Conference of Public Utility Commissioners and the New England Governors' Conference, and we expect that this role will be better defined in the coming year. Given that suppliers may wish to offer products prior to the time that ISO-NE obtains the necessary authority to provide this verification service, the final rules provide for verification by an independent auditor of resource portfolio disaggregation for a transition period prior to March 1, 1999. 220 C.M.R. § 11.06(2)(d)(2). Finally, the rules provide that competitive suppliers with verifiable contracts for resources smaller than one megawatt may include such resources in their company resource portfolio. 220 C.M.R. § 11.06(2)(d)(1)(c).

2. Prospective Disclosure for New Suppliers and Disclosure Prior to Operation of the ISO Markets

The proposed rules provided that, for the first three months that a supplier is in business, label data would be projected based on known resources and average regional system characteristics. The proposed rules did not include any provisions specific to information disclosure in the period between March 1, 1998, the date upon which retail customers may select a competitive supplier, and when the ISO-NE markets become operational.[11]

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[11] ISO-NE recently stated that it anticipated that the markets would become operational in the fourth quarter of 1998 (ISO-NE press release Feb. 10, 1998).

Some commenters suggest that the Department expand the period for prospective disclosure for new suppliers (see e.g., DOER Comments at 17; UCS Comments at 5; CLF Comments at 2; Competitive Suppliers Comments at 13). The DEP, on the other hand, strongly supports the Department's proposal (DEP Comments at 2). In addition, some commenters suggest that there be an interim approach to disclosure. For example, UCS suggests that it may be appropriate to allow for prospective disclosure in general for the first three to six months following implementation of a bid-based market in New England to allow time for the ISO structure to become operative (UCS Comments at 5). CLF suggests that the Department implement a "contingency phase" during which competitive suppliers wishing to make a claim pertaining to the fuel or emissions characteristics of their generation service would be required to substantiate the claim, but competitive suppliers who make no claims would disclose certain default characteristics (CLF Comments at 8).

The Department determines that the three-month prospective period should be retained as it represents a time frame that balances the problem of data availability for new competitive suppliers with the need for verifiable information for disclosure purposes. 220 C.M.R. § 11.06(2)(d)(1)(b). The Department determines that it is not necessary to provide for prospective disclosure prior to the implementation of bid-based markets since even prior to the bid-based markets competitive suppliers should have information sufficient to identify settlement resources and distinguish between known resources and system power. Finally, the Department does not consider a claims-based disclosure policy appropriate as we find that disclosure requirements

should apply consistently to all competitive suppliers rather than applying differently depending on specific conditions, such as whether a competitive supplier makes a claim.

3. Data on Characteristics of System Mix, Imports and Labor

The proposed rules required disclosure of system power to be based on information on the average regional system mix, including fuel characteristics, emissions characteristics and labor characteristics. The proposed rules provided for imports of known resources to be assigned characteristics of the appropriate generating unit, and for imports of system power to be assigned the characteristics of the exporting system mix. The proposed rules required that the emissions from a company resource portfolio or a segment of a company resource portfolio be compared on the label to the New England regional average emissions rate.

Several commenters suggest modifications to the proposed rules. For example, DOER suggests that the Department determine the regional average system mix, and the fuel, emissions and labor characteristics of that mix (DOER Comments at 21-22). ISO-NE states that the proposed rules regarding imports presented the opportunity for competitive suppliers to "green-wash" electricity by selling power with undesirable characteristics outside the region and purchasing an equivalent amount of power with more favorable characteristics from outside the region through a unit contract (ISO-NE Comments at 1). ISO-NE recommends that imports be assigned the emissions characteristics of the New England regional average (id. at 2). DEP suggests that imports be clearly differentiated from power generated in the NEPOOL region, and that they be assigned default emissions characteristics different from those of the NEPOOL regional system (DEP Comments at 3). In addition, DEP recommends that emissions from a

company resource portfolio or a segment of a company resource portfolio also be compared on the label to the emissions from a new unit (id.).

The Department has modified our proposed rules in two ways. First, in order to avoid the problem of "green-washing," the final rules require that all imports to the region be identified in the "fuel sources" column as "imports," without any distinction between known resources and system power. 220 C.M.R. § 11.06(2)(d)(1)(e). Second, the Department has incorporated a comparison to new unit emissions into the final rules and into the sample label attached to this Order. 220 C.M.R. § 11.06(2)(d)(5). In addition, the Department recognizes that implementation of our disclosure policy requires the following information: (1) the average regional system mix; (2) the emissions characteristics of the average regional system mix; (3) the emissions characteristics of imported power; (4) the emissions characteristics of a new unit, and (5) the labor characteristics of the average regional system mix. 220 C.M.R. § 11.06(2)(d). The Department will determine average regional system characteristics, emissions factors, and labor practices in consultation with DEP, and other agencies as appropriate.

4. Information Disclosure for Distribution Companies Providing Standard Offer Generation or Default Generation Service

The proposed rules applied consistently to competitive suppliers and to distribution companies providing standard offer service or default service. The Utilities state that, due to the particular circumstances of distribution companies, the rules should be modified as follows: (1) distribution companies should not be required to prepare terms of service, as they are covered by the Department's rules governing Terms and Conditions of Distribution Service; (2) distribution companies should not be required to provide a label to customers prior to initiation of default

service; rather, the label should be distributed with the first distribution bill after a customer's switch to default service; (3) disclosure of information for standard offer service and default service should be based on regional information since they are not competitive offerings; and (4) notification could be less frequent for standard offer service and default service customers (see e.g., EECo Comments at 6; COM/Electric Comments at 7-8).

The Department agrees with the Utilities that, because they are required to have Terms and Conditions of Distribution Service, the requirement to prepare terms of service is not necessary for distribution companies. The Department also agrees that, because of the ability of customers to switch at any time to default service, it is not appropriate to require that a label be distributed prior to initiation of default service. The Department has incorporated these comments into its final rules. 220 C.M.R. §§ 11.06(3) and (4). The Department agrees that standard offer generation service and default generation service may be served from system power, and thus would bear the characteristics of the regional system, and notes that the proposed rules accommodate this possibility. Therefore, the final rules do not reflect any change on this item. 220 C.M.R. § 11.06(2)(d)(1). Finally, the Department has not modified the quarterly notification requirements so that retail customers receive consistent information on a consistent basis regarding their generation service options. 220 C.M.R. § 11.06(4).

5. Distribution of Terms of Service

The proposed rules stated that terms of service must be available to any person upon request. Two commenters state that the terms of service should not be available to any person upon request as the terms of service contain information that is competitively sensitive and pertain

to a contract between a competitive supplier and a particular retail customer (Competitive Suppliers Comments at 2, 15; Indicated Parties Comments at 15).

The Department has clarified in its final rules that the terms of service "for any available generation offerings" should be available upon request. 220 C.M.R. § 11.06(4). The Department does not intend to inhibit competitive suppliers from writing contracts specific to individual retail customers; however, the Department considers that retail customers should be able to obtain terms of service for generation service offerings that are not tailored to an individual customer.

6. Information Disclosure in Advertising

The proposed rules required that the label be presented in all written marketing materials describing generation service. The proposed rules also conditioned a competitive supplier's ability to advertise or make claims regarding the relative environmentally beneficial effects of its resource portfolio upon compliance with renewable portfolio standards and generation performance standards. Some commenters state that the requirement to include the label in advertising and marketing materials should apply only to materials where a specific product is marketed (UCS Comments at 5; CLF Comments at 7). EnergyVision and the Indicated Parties suggest that marketing materials not include the label but state that the label is available upon request (EnergyVision Comments at 8; Indicated Parties Comments at 16). The Competitive Suppliers state that implementing the Department's proposal would be "costly, burdensome, and over broad" (Competitive Suppliers Comments at 16). CLF requests that the Department clarify that competitive suppliers may make claims prior to the implementation of renewable portfolio standards and generation portfolio standards (CLF Comments at 8). DOER suggests that the

Department should delay conditioning the ability to make claims until renewable portfolio and generation performance standards are in place (DOER Comments at 22).

The Department has modified its final rules to require that marketing and advertising materials pertaining to specific generation service indicate that a label is available upon request. 220 C.M.R. § 11.06(6)(c). As a preliminary matter, the Department is directed in the Act to coordinate its rules and regulations governing advertising or marketing of electricity with the Attorney General. St. 1997, c. 164, § 193 (G.L. c.164, § 1F(5)(iii)). The Attorney General has recently issued for comment regulations governing advertising and marketing of electricity.[12] The Department considers it premature to determine whether the label meets the Attorney General's requirements related to deceptive advertising, and we will coordinate with the Attorney General on the use of the disclosure label in advertising and marketing. In addition, consistent with the Act, the final rules require that, where electricity rates are advertised, the rate to be charged must be included in bold print in the case of print advertisements or conveyed through clear and deliberate speech in the case of television or radio advertisements. St. 1997, c. 164, § 193 (G.L. c.164, § 1F(5)(iii)); 220 C.M.R. § 11.06(6)(e). Finally, the Department clarifies here that a competitive supplier's ability to make claims is not conditioned on the existence of renewable portfolio and generation performance standards, but on compliance with those standards once they are implemented by the appropriate agencies. 220 C.M.R. § 11.06(6).

7. Format of the Label

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[12] Attorney General's proposed regulations, 940 C.M.R. § 19.00 et seq. (Feb. 6, 1998).

The proposed rules stated that the label should be in a form to be determined by the Department. The Department attached a copy of a label format proposed by DOER to our January 16, 1998 Order and requested comment on that format. DOER suggests several modifications to the label, including modifying the statements regarding the fuel mix and bundled products, and inclusion of explanatory language on the back of the label (DOER Comments at 20-21). Other commenters suggest that the DOER label format is not appropriate, or that there should not be a predetermined format for the label (see e.g., Competitive Suppliers Comments at 11-12; Indicated Parties Comments at 13). The Attorney General requests that the Department require that the text of the disclosure label appear in 10-point type, except for footnotes, which should be in 8-point type since "the label is similar to, and can be used as, an advertising vehicle" (AG Comments at 1).

The Department has attached four label formats to this Order providing for disclosure of historic and prospective information on a product and a company basis. Attachments B-1 through B-4. Competitive suppliers and distribution companies offering standard offer service or default service should prepare disclosure labels using the appropriate format. The sample labels are based upon the format proposed by DOER, with language modifications and inclusion of marks indicating the emissions rates of a new unit. In addition, the Department adopts DOER's suggestions regarding information to be included on the back of the label as we anticipate that it will assist customers, at least in the beginning, with making informed comparisons among generation service offerings. Each label should present the information shown in Attachment C on the back of all labels distributed to retail customers.

8. Initiation and Revision of the Department's Disclosure Policy

The Utilities suggest that the Department set a date upon which competitive suppliers would begin distribution of their disclosure label since many matters pertaining to the label have not yet been settled (see e.g., COM/Electric Comments at 7; Utilities' Revised Regulations at A-26). The DEP suggests that the Department establish a specific event (e.g., an improved data tracking mechanism) or a date (e.g., 1999) that would trigger a review of the disclosure policy (DEP Comments at 2). DOER recommends that the disclosure requirements expire on March 1, 2000, and that the Department initiate a rulemaking 120 days prior to that date to revise the requirements (DOER Comments at 23).

The Department agrees with the Utilities' suggestion that it is appropriate to establish a date upon which the disclosure requirements become effective. Where appropriate, the Department has constructed the information disclosure rules to allow for their evolution over time as markets evolve and participants and consumers develop experience in retail sales of electricity. As discussed above, there is specific information pertaining to the characteristics of the regional system mix that is not immediately available. Thus, the Department determines that it is appropriate to establish a specific date upon which the disclosure rules become effective by requiring Competitive Suppliers to distribute labels in accordance with the Department's final rules beginning September 1, 1998. 220 C.M.R. § 11.06(2)(a).

The Department has constructed its information disclosure policy and rules to provide retail customers with consistent and useful information using available data concerning resources used to serve retail customers. The Department recognizes, however, that our approach to

information disclosure must remain flexible, and will evolve significantly over time as customers gain experience with retail competition, the markets unfold, ISO-NE gains expertise in the operation and settlement of electricity markets, other agencies implement policies that must rely on generating unit tracking (e.g., emission performance standards and renewable portfolio standards), and other states in New England move towards retail competition and develop their own information disclosure requirements. The Department does not anticipate a specific date or event that will trigger review of our rules, but we are committed to adapting our information disclosure policy in response to these developments.

F. Complaint and Damage Claim Resolution; Penalties

Commenters raise the following issues with regard to the Department's proposed rule, 220 C.M.R. § 11.07: (1) competitive suppliers as well as customers should be able to bring slamming complaints to the Department, not just customers; and (2) competitive suppliers should be allowed to substitute their own complaint procedures, not simply follow the procedures set forth in 220 C.M.R. § 25.00 et seq., when consumers have complaints against competitive suppliers.

The Indicated Parties state that the Department should allow competitive suppliers who are the victims of slamming the opportunity to file complaints and "attempt to redress grievances against competitive suppliers who have acted inconsistently with the slamming provisions" (Indicated Parties Comments at 16).

The Act specifies in detail the procedures for bringing a slamming complaint. St. 1997, c. 164, § 193 (G.L. c. 164, § 1F(8)(b), (c)). Specifically, the Act states that a customer may initiate

a complaint of unauthorized switching within 30 days of the statement date of the notice indicating that the customer has been switched. If the Department determines that the new service provider does not possess the required proof of the customer's affirmative choice, such new service provider shall be required to (a) refund to the customer the difference between what the customer would have paid to the previous service provider and the actual charges paid to the new service provider; (b) refund to the customer any reasonable expense the customer incurred in switching back to the original service provider; and (c) refund to the original service provider any lost revenue, consisting of what the original service provider would have received for the service used by the customer if the customer's service had not been switched. Id. The Act does not include a provision to allow competitive suppliers to initiate complaints of unauthorized switching. Therefore, the Department will not amend its proposed rule on this issue.

Midcon states that the Department should amend its rules to provide that consumer complaints against competitive suppliers and electricity brokers should not follow the procedures set forth in 220 C.M.R. § 25.00 et seq.; rather, the complaint procedure should be determined by the specific terms and conditions agreed to by the customer and competitive supplier and electricity broker (Midcon Comments at 16-17). Moreover, Midcon states that a customer should only be permitted to seek alternative dispute resolution after having attempted to resolve the complaint in the manner specified in the agreed-upon terms and conditions (id. at 17).

The Act explicitly provides that 220 C.M.R. § 25.00 et seq. shall be applicable to competitive suppliers and electricity brokers. St. 1997, c. 164, § 193 (G.L. c. 164, § 1F(7)). Therefore, the Department will not amend the complaint procedure to require that consumer

complaints against competitive suppliers and electricity brokers follow the specific terms and conditions agreed to by the customer and competitive supplier and electricity broker. The Department notes that 220 C.M.R. § 25.04 provides that customers first notify the company of a dispute and allow the company an opportunity to investigate and attempt to resolve the complaint before the customer may come to the Department.

G. Exceptions

The Utilities suggest that the Department add a section to the regulations that would permit the Department to grant exceptions to the regulations, where appropriate (Utilities Revised Regulations at A-38). The Department inadvertently omitted an exceptions provision in the January 16, 1998 proposed regulations. The Department has included an exceptions provision in other regulations. See e.g., 220 C.M.R. § 8.07(3); 220 C.M.R. § 9.05; 220 C.M.R. § 10.07(5). In this proceeding involving resolution of many complex issues of first impression, the need for flexibility provided by an exceptions provision is evident. Accordingly, our final regulations include Section 11.08, entitled "Exceptions." The Department notes that in some areas which these regulations govern, the Department lacks a legislative grant of discretion. In other areas, where the Department has discretion in applying the regulations, proponents of an exception will have the burden of establishing the necessity and reasonableness of such an exception.

IV. ORDER

Accordingly, after due notice, public hearing, and consideration, and under the authority of St. 1997, c. 164, G.L. c. 164, §§ 76, 76C and 94, it is

DETERMINED: That the regulations designated as 220 C.M.R. §11.00 et seq. are reasonably necessary for the administration of Chapter 25 and Chapter 164 of the General Laws; and it is

ORDERED: That the regulations designated as 220 C.M.R. §11.00 et seq. shall take effect upon publication in the Massachusetts Register.

By Order of the Department,

_____
Janet Gail Besser, Chair

_____
John D. Patrone, Commissioner

_____
James Connelly, Commissioner