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Via Electronic Mail

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Re: Retail Electricity Supplier Programs – Recommended Policy Improvements

Dear Chief Hoffer, Secretary Tepper, and Chairs Barrett and Roy:

Pursuant to its statutory authority under Chapter 12A of the Massachusetts General Laws, the Massachusetts Office of the Inspector General (OIG) is issuing this letter with policy recommendations for improvements to retail electricity supplier (RES) programs in the Commonwealth. The OIG is an independent agency that prevents and detects fraud, waste and abuse in public funds and public property and promotes transparency and efficiency in government. Massachusetts RES programs – including the Renewable Energy Portfolio Standard (RPS),[1] Alternative Energy Portfolio Standard (APS)[2] and Clean Energy Standard (CES)[3] – have a substantial impact on public funds, raising revenue that helps fund Commonwealth investments in mitigating the negative consequences of climate change and accelerating development of the state's clean energy future.

Following an investigation, the OIG has concluded that strengthened enforcement mechanisms and bolstered surety requirements are necessary to position the Commonwealth RES programs to fulfill their purpose and hold participants accountable. Unfortunately, in reviewing

[1] M.G.L. c. 25A, § 11F, 225 CMR 14.00 *et seq*. and 225 CMR 15.00 *et seq*. The state Department of Energy Resources (DOER) oversees the RPS.

[2] M.G.L. c. 25A, § 11F 1/2 and 225 CMR 16.00 *et seq*. DOER oversees the APS.

[3] 310 CMR 7.75. The state Department of Environmental Protection (DEP) oversees the CES.

prior years of this program, the OIG found enforcement gaps that prevented the Commonwealth from recouping millions of dollars that retail electricity suppliers owed to the state. The OIG recommends several reforms to ensure that Massachusetts consumers are receiving the benefits of renewable and clean energy sources and that the Commonwealth can mitigate ways that retail electricity suppliers can evade their obligations to the Commonwealth.

Recommendations

1. Strengthen surety bond requirements for retail electricity suppliers.

A key part of the RPS, APS and CES programs is a requirement that retail electricity suppliers make a payment (known as an alternative compliance payment, or ACP) to the state if they fail to obtain a certain amount of renewable or clean energy during a given year.[4] To help ensure retail electricity suppliers meet this requirement, the state Department of Energy Resources (DOER) revised its APS and RPS regulations in December 2022 to require that retail electricity suppliers annually provide evidence of financial security in the form of a surety bond or other financial instrument showing evidence of liquid funds.[5] The bond or instrument, however, is capped under these regulations at $1 million.[6]

While this is certainly a positive regulatory change, the system should be strengthened even further. The OIG's investigation found multiple companies that had failed to pay the state millions of dollars under the RPS, APS and CES programs. The state was unable to collect on these obligations because the companies had filed for bankruptcy or otherwise ceased business. The OIG appreciates that noncompliant RESs made up less than five percent of the RES market for compliance year 2021. However, for the small number of companies owing irrecuperable millions of dollars to the state, current surety requirements for the RPS and APS programs are insufficient. Therefore, the OIG proposes that the state raise the current $1 million cap on RPS and APS surety

[4] M.G.L. c. 25A, §§ 11F(f) and 11F 1/2(c); 225 CMR 14.08(3), 15.08(3) and 16.07(3); 310 CMR 7.75(5)(c).

[5] 225 CMR 14.08(4). Under this regulation, the bond or other financial instrument must be the greater of: (1) $100,000; (2) 20% of the company's estimated gross receipts for its first full year of operation; or (3) 20% of the company's actual gross receipts for the preceding year of operation for any year after the first year of operation. *Id.* The bond or instrument must name DOER as the beneficiary, obligee or guaranteed party, and specify that a notice of default under the RPS or APS is sufficient grounds for DOER to obtain funds from the surety. *Id.* If a retail electricity supplier fails to meet its annual obligations under the RPS or APS (by failing to obtain certificates or to make an ACP) by September 1, DOER will notify the company that it must pay DOER within 30 days using the financial security, unless that company has an approved alternative payment plan to discharge its annual obligations in full that has been approved by DOER prior to September 1. 225 CMR 14.12(5). The amount must be equal to the lesser of: (1) the ACP amount due under the RPS or APS or (2) the full amount of the financial security. *Id.* If this payment amount is insufficient to discharge the retail electricity supplier's full obligation, the company will remain in a state of noncompliance, and DOER reserves all rights to take necessary actions to enforce compliance. 225 CMR 14.12(6)-(7).

[6] 225 CMR 14.08(4).

obligations so that the amount of insurance the state requires from retail electricity suppliers scales to the specific size of the companies involved. Furthermore, the state should implement a similar requirement for the CES program.

2. Change the ACP due date and date of noncompliance.

Currently, there is a large window between the end of a calendar year and the date when ACP obligations are due for that year, which is currently July 1 of the following year.[7] Changing the obligation due date from July 1 to earlier in the year will make it more difficult for retail electricity suppliers to skirt payment of their ACPs to the Commonwealth by transferring funds or filing for bankruptcy during that interim period. The OIG suggests an April 1 deadline, which would provide retail electricity suppliers with 90 days to fulfill and pay their obligations to the Commonwealth.

3. Update billing and collection procedures.

The OIG recommends that the state update its billing and collection procedures for the RES programs to include an established billing date – such as the date of initial noncompliance – and procedures for the invoicing of noncomplying companies. These invoices should include information about the amount owed, procedures that companies should follow to submit their required payment, and notice of the penalties facing the companies should they fail to pay. Billing, invoicing language, aging timelines and subsequent requirements should align with the requirements of the Comptroller of the Commonwealth. This will allow use of the Comptroller's billing system and the Commonwealth's Intercept system, should those tools be necessary.

4. Increase penalties for RES program violations and improve enforcement mechanisms.

Under current law, a retail electricity supplier that violates the RPS or APS programs "shall be subject to a civil penalty not to exceed five thousand dollars per offense."[8] However, pursuant to the Massachusetts Clean Air Act (CAA), a fine of not more than $25,000 shall be assessed for each violation of the CES program.[9] *Each day* a violation of the CES program occurs is a separate

[7] 225 CMR 14.09(1); 225 CMR 15.09(1); 225 CMR 16.08(1); 310 CMR 7.75(6).

[8] M.G.L. c. 25A, § 7.

[9] *See* M.G.L. c. 111, § 142A. The CES program was adopted pursuant to the CAA, M.G.L. c. 111, §§ 142A-142E. 310 CMR 7.75(1). The CAA states that each violation of any regulation adopted pursuant to the act is punishable by a fine "of not more than twenty-five thousand dollars." M.G.L. c. 111, § 142A.

violation.[10] The CAA also makes clear that these penalties may be assessed by an action brought on behalf of the Commonwealth in Superior Court.[11]

To encourage program compliance, the OIG strongly recommends that the state revise the RPS and APS programs to better align penalties of both programs with the CES program. RPS and APS program language (statutory or regulatory) should clarify that each day a retail electricity supplier fails to pay is a separate violation. The state should also increase the current $5,000 fine per violation for the RPS and APS to the CES penalty amount of $25,000 per violation and clarify that the Commonwealth may bring an action in Superior Court against the retail electricity supplier to assess these penalties. Finally, the state should clarify that violations of requirements under the RPS, APS and CES shall per se constitute an unfair or deceptive act or practice by a retail electricity supplier for purposes of the Massachusetts Consumer Protection Act.[12]

5. **Develop a Department of Public Utilities licensure debarment list for all companies and their principals that owe ACPs.**

Under the RES programs, DOER and DEP refer noncompliant retail electricity suppliers to the state Department of Public Utilities (DPU) for revocation of their competitive electricity supplier license.[13] The OIG supports license revocation for any retail electricity supplier that fails to make its ACPs. In addition, the OIG recommends that the DPU create and maintain a "debarment list" of companies and individual principals that have failed to pay ACPs owed to the Commonwealth. Under this arrangement, the DPU would deny a company or individual appearing on the debarment list a new license to sell electricity within the Commonwealth. Implementing this system would help ensure that, at a minimum, individuals or companies that have evaded obligations under RES programs in the past – taking unfair advantage of both the Commonwealth and Massachusetts consumers – are prevented from repeating such harms in the future.

Conclusion

DOER and DEP's work in overseeing the Commonwealth's RES programs has proven enormously successful in accelerating the use of renewable and clean energy and bringing in millions in funding for state programs working to mitigate the impacts of climate change. However, the current paradigm has allowed certain vendors to avoid paying the Commonwealth millions of dollars due under the RES programs, with no real recourse for the Commonwealth. The OIG believes that with some modest changes, these provisions can be tightened to protect the Commonwealth's interests. By adopting important legislative and regulatory fixes to the RPS, APS

[10] *See* M.G.L. c. 111, § 142A.

[11] M.G.L. c. 111, § 142A. The Commonwealth may also bring an action for injunctive relief in Superior Court for any such violation. *Id*. The Superior Court has jurisdiction to enjoin such violation and to grant further relief as it may deem appropriate. *Id*.

[12] *See* M.G.L. c. 93A, §§ 4, 9.

[13] 225 CMR 14.12(1), (4); 225 CMR 15.12(1), (4); 225 CMR 16.11(1), (4).

and CES programs, Massachusetts can continue to be a national leader in preserving our environment and stimulating our green sector economy through fostering investments in renewable and clean energy sources, while positioning itself to collect fees and fines owed by retail electricity sellers for the benefit of Massachusetts consumers.

If you have any questions, please do not hesitate to contact me at Jeffrey.S.Shapiro@mass.gov. OIG General Counsel Susanne O'Neil is also available at Susanne.M.ONeil@mass.gov.

Thank you for your attention to this matter.

Sincerely,

Jeffrey S. Shapiro
Inspector General

cc (via email):

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