

ATTACHMENT A

Interim Guidelines for Competitive Supply Investigations and Proceedings pursuant to G.L. c. 30A and 220 C.M.R. §§ 11.07, 14.06(5), 25.00.

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Section 1: Purpose and Scope

- (1) Purpose. These Interim Guidelines set forth the rules and procedures for competitive supply informal reviews and formal investigations pursuant to G.L. c. 30A and 220 C.M.R. §§ 11.07, 14.06(5), 25.00.
- (2) Scope. These Interim Guidelines apply to all Electric Competitive Suppliers, Electricity Brokers, Gas Suppliers, and Gas Retail Agents that participate in the electric and gas retail markets in the Commonwealth of Massachusetts and are licensed by the Department of Public Utilities.

Section 2: Definitions

- (1) “Competitive Supply Company” or “Competitive Supply Companies” refers to any Electric Competitive Supplier, Electricity Broker, Gas Supplier, and Gas Retail Agent that participates in the electric and gas industries in the Commonwealth of Massachusetts and are licensed by the Department of Public Utilities.
- (2) “Delegated Commissioner” refers to the commissioner to whom the Chairman, with authorization from the Commission, delegates the authority to: (i) initiate and conduct informal reviews; (ii) enter into informal remedial plans; (iii) issue a notice of probable violation (“NOPV”); (iv) participate in a formal proceeding before the Department, which includes but shall not be limited to, presenting evidence in support of the allegations contained in the NOPV, and presenting final arguments on the record; and (v) sign and seek approval of a consent agreement.

- (3) “Department” refers to the Massachusetts Department of Public Utilities.
- (4) “Electricity Broker” refers to an entity licensed by the Department pursuant to 220 C.M.R. § 11.00 to facilitate or otherwise arrange for the purchase and sale of electricity and related services to retail electricity consumers in the Commonwealth.
- (5) “Electric Competitive Supplier” refers to an entity licensed by the Department pursuant to 220 C.M.R. § 11.00 to sell electricity and related services to retail electricity consumers in the Commonwealth.
- (6) “Gas Retail Agent” refers to an entity licensed by the Department pursuant to 220 C.M.R. § 14.02 to facilitate or otherwise arrange for the purchase and sale of natural gas to retail gas consumers in the Commonwealth.
- (7) “Gas Supplier” refers to an entity licensed by the Department pursuant to 220 C.M.R. § 14.02 to sell natural gas (including the sale of capacity, commodity, or balancing and peaking services) to retail gas customers in the Commonwealth.
- (8) “Interim Guidelines” refers to the Interim Guidelines for Competitive Supply Formal Investigations and Proceedings issued pursuant to G.L. c. 30A and 220 C.M.R. §§ 11.07, 14.06(5), 25.00, and described herein.
- (9) “Nondelegated Commissioners” refers to the two remaining Commissioners that were not given delegated authority to initiate and conduct competitive supply informal reviews and formal investigations.
- (10) “NOPV” refers to the Notice of Probable Violation that is issued by the Delegated Commissioner and initiates the formal proceedings pursuant to G.L. c. 30A.
- (11) “Presiding Officer” refers to the hearing officer designated by the Nondelegated Commissioners to conduct formal adjudications.
- (12) “Prosecuting Officer” refers to the hearing officer to whom the Delegated Commissioner may further delegate the authority to (i) conduct informal reviews, and (ii) participate as a party in formal proceedings.
- (13) “Respondent” refers to the Competitive Supply Company that is issued the NOPV and alleged to have violated G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder.

Section 3: Informal Review and Remedial Plans

- (1) The Delegated Commissioner may immediately commence an informal review of a Competitive Supply Company on receipt of a complaint or report of a suspected or alleged violation of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or

Order issued thereunder. Such review may be at the Delegated Commissioner's initiative or at the request of an outside party.

- (2) An informal review shall be conducted by the Delegated Commissioner or a Prosecuting Officer. The informal review may consist of, but not be limited to, an informal conference (e.g., in-person meeting, telephone call) or request for information.
- (3) At any informal conference, the Competitive Supply Company shall have the right to be represented by an attorney or other person. The Competitive Supply Company shall have the right to present relevant documents to the Delegated Commissioner or Prosecuting Officer. The Delegated Commissioner or Prosecuting Officer shall make available to the Competitive Supply Company any information in the Department's possession that indicates that the Competitive Supply Company may have violated G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder, and the Competitive Supply Company or their representatives shall have the opportunity to rebut this evidence.
- (4) Any informal review or conference shall not be construed to be an adjudicatory proceeding as defined in G.L. c. 30A. Nonetheless, the Delegated Commissioner, the Prosecuting Officer, the Competitive Supply Company, and any possible intervenors are precluded from having any substantive discussions with the Nondelegated Commissioners or other Department staff not specifically involved in the informal review.
- (5) At any time in the informal review process, the Delegated Commissioner and Competitive Supply Company may agree to an informal remedial plan. The informal remedial plan shall be in writing and signed by the Competitive Supply Company. The informal remedial plan need not contain an admission that a violation has occurred and, without such a term, does not constitute an admission.
- (6) An informal remedial plan shall not be construed as a final Order of the Department.

Section 4: Commencement of Formal Proceedings

- (1) The Delegated Commissioner may initiate a formal proceeding without an informal review where appropriate. The Delegated Commissioner may initiate such a proceeding on his or her own motion or the petition of a third party.
- (2) The Delegated Commissioner may initiate a formal proceeding if the Delegated Commissioner has reason to believe that a violation of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder, has occurred or is continuing to occur.

- (3) The Delegated Commissioner shall initiate a formal proceeding by issuing an NOPV within 90 days after a report of a suspected or alleged violation of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder.
- (4) The NOPV shall include the following information:
 - a. A docket number;
 - b. A title or case caption;
 - c. Notice of statutory authority;
 - d. Factual allegations against the Respondent and the statutes and regulations that the Respondent allegedly violated;
 - e. The proposed sanctions against the Respondent (e.g., licensure action or civil penalties, or both, described in Section 8 of the Interim Guidelines);
 - f. Notice that the Respondent must be represented by counsel;
 - g. The Respondent's right to review documentary evidence against it in the record, on which the Nondelegated Commissioners will rely for their decision;
 - h. The Respondent's obligation to provide written responses to the allegations within 30 days from the date of the NOPV;
 - i. A statement that, should the Respondent fail to respond to the allegations or fail to appear at the adjudicatory hearing, which date shall be set by the Presiding Officer, the Department will issue a default judgment against the Respondent;
 - j. The option for other parties to petition the Department to intervene in the proceeding, subject to meeting the "substantially and specifically affected by the proceeding" requirements of 220 C.M.R. § 1.03; and
 - k. A statement that, prior to the conclusion of the formal proceeding, the Respondent may enter into a consent agreement. The consent agreement must be signed by the Respondent and the Delegated Commissioner, and may be signed by any full-party intervenors in the proceeding.
- (5) Any written reply must include a complete statement of all relevant facts and authority, and a full description of the reasons that the Respondent disputes the violations alleged in the NOPV.
- (6) If the Respondent or his representatives fail, without good cause, to file a written reply or to appear at the adjudicatory hearing, the Respondent shall be deemed to

have admitted the accuracy of the factual allegations and legal conclusions stated in the NOPV, and the Respondent shall be held liable to take the remedial action proposed in the NOPV through the issuance of a Remedial Order pursuant to Section 6 of the Interim Guidelines.

- (7) The Department may refer certain complaints to the Office of Attorney General pursuant to G.L. c. 164, § 1F(3)(v), including, but not limited to, complaints alleging potential violations of G.L. c. 93A.

Section 5: Adjudicatory Hearing

- (1) The adjudicatory hearing shall be a de novo hearing, shall be an adjudicatory proceeding as defined in G.L. c. 30A, and shall be conducted pursuant to the Department's procedural regulations, 220 C.M.R. § 1.00.
- (2) The adjudicatory hearing shall be conducted by a Presiding Officer. The Presiding Officer shall not be the same person designated as the Prosecuting Officer.
- (3) At the adjudicatory hearing, the Respondent must be represented by an attorney.

Section 6: Order Finding No Violation and Remedial Orders

- (1) If the Nondelegated Commissioners finds, at the conclusion of the adjudicatory hearing, that the Respondent has not violated G.L. c. 164, §1F, or any regulation promulgated or Order issued thereunder, the Nondelegated Commissioners may issue an Order finding no violation and dismissing the proceeding.
- (2) If the Nondelegated Commissioners finds, at the conclusion of the adjudicatory hearing, that the Respondent has violated G.L. c. 164, §1F, or any regulation promulgated or Order issued thereunder, the Nondelegated Commissioners will issue a Remedial Order. The Remedial Order shall include a written opinion setting forth the factual and legal basis of the Nondelegated Commissioner's findings and shall direct any party to take, or refrain from taking, any action, consistent with said party's obligations under G.L. c. 164, §1F, or any regulation promulgated or Order issued thereunder.
- (3) If the Department finds that a violation has occurred or is continuing to occur, the Remedial Order may include penalties described in Section 8 of the Interim Guidelines.
- (4) A Remedial Order issued by the Nondelegated Commissioners under Section 6 of the Interim Guidelines shall be effective upon issuance, in accordance with its terms, unless stayed, suspended, modified, or rescinded.

- (5) A Remedial Order is a final decision of the Department within the meaning of G.L. c. 25, § 5, and thereby subject to review by the Supreme Judicial Court.
- (6) If the Respondent fails either to appeal a Remedial Order to the Supreme Judicial Court or to fully comply within the time period specified in the Remedial Order, the Department may refer the case to the Attorney General with a request that an action be brought in the Superior Court to seek appropriate relief.
- (7) The Department may waive the requirement for notice and hearing under Section 3 through 5 of the Interim Guidelines before issuing a Remedial Order pursuant to Section 6 of the Interim Guidelines when the Nondelegated Commissioners determines that failure to do so would result in serious harm to life or property. The Department shall include in any such Order an opportunity for a hearing pursuant to Section 5 of the Interim Guidelines, as soon as practicable after issuance of the Order.

Section 7: Consent Agreements and Consent Orders

- (1) A consent agreement shall be in writing and must be signed by the Respondent (or a duly authorized representative of that company) and the Delegated Commissioner, and may be signed by other full-party intervenors to the proceeding. The consent agreement must indicate agreement with the terms therein, and need not contain an admission that a violation has occurred and, without such a term, does not constitute an admission.
- (2) The signatories to the consent agreement shall file a motion to approve the consent agreement with the Department.
- (3) Notwithstanding any other provision to the contrary, the Nondelegated Commissioners may, at any time prior to the issuance of a Remedial Order, issue a Consent Order that approves a consent agreement submitted as outlined in Section 7(1) above.
- (4) A Consent Order is a final Order of the Department, having the same force and effect as a Remedial Order issued pursuant to Section 6 of the Interim Guidelines pursuant to G.L. c. 30A, 220 C.M.R. §§ 11.07, 14.06(5), 25.00.
- (5) A Consent Order shall not be appealable by signatories of the consent agreement and shall include an express waiver of appeal and judicial review rights that might otherwise attach to a final Order of the Department.

Section 8: Penalties

- (1) Each Competitive Supply Company found, pursuant to Chapter 30A and Sections 4 through 6 of the Interim Guidelines, to have violated G.L. c. 164, §§ 1A through 1F,

or any regulation promulgated or Order issued thereunder, shall be subject to a remedial plan, licensure action, civil penalties, or a combination of the three.

(2) Remedial Plan

- a. Each Competitive Supply Company that violates G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder, shall be subject to a remedial plan that directs the Competitive Supply Company to take affirmative action to remedy or fix the violations.
- b. A remedial plan may include, but not be limited to:
 - i. A reporting requirement;
 - ii. A prohibition on engaging in a particular marketing channel for a specified period of time;
 - iii. A prohibition from offering particular products for a specified period of time; or
 - iv. Consumer notifications

(3) Licensure Action

- a. Each Competitive Supply Company that violates G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder, shall be subject to licensure action including, but not be limited to, being:
 - i. Placed on probationary status;
 - ii. Prohibited from signing up new customers for a specified period time; or
 - iii. Subject to suspension, revocation, or non-renewal of its license.

(4) Civil Penalties

- a. Each Competitive Supply Company that violates G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder, shall be subject to a civil penalty not to exceed \$25,000 for each violation for each day that the violation persists; provided however, that the maximum civil penalty shall not exceed \$5,000,000 for any related series of violations. G.L. c. 164, § 1F(7).
- b. In determining the amount of the civil penalty, the Department shall consider the nature, circumstances, and gravity of the violation; the degree of the

Respondent's culpability; the Respondent's history of prior offenses; the Respondent's ability to pay; any good faith shown by the Respondent in attempting to achieve compliance after notification of a violation; the appropriateness of the penalty to the size of the business of the Respondent; the effect on the Respondent's ability to continue in business; and such other matters as justice may require.

Section 9: Waiver

Where good cause appears, not contrary to statute, the Delegated Commissioner, Prosecuting Officer, Presiding Officer, or Nondelegated Commissioners may permit deviation from these Interim Guidelines.