



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

June 11, 2020

D.P.U. 19-17

Petition of the City of Haverhill for approval by the Department of Public Utilities of a municipal aggregation plan pursuant to G.L. c. 164, § 134.

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TABLE OF CONTENTS

I. INTRODUCTION AND PROCEDURAL HISTORY 1

II. SUMMARY OF PROPOSED PLAN..... 2

III. STANDARD OF REVIEW..... 5

IV. ANALYSIS AND FINDINGS 8

 A. Consistency with G.L. c. 164, § 134 8

 1. Procedural Requirements 8

 2. Substantive Requirements 10

 a. Introduction 10

 b. Universal Access 10

 c. Reliability 11

 d. Equitable Treatment of All Customer Classes 13

 e. Customer Education 14

 i. Introduction 14

 ii. Eligible Customers 14

 iii. Language Access 16

 iv. Ongoing Education 20

 v. Timing of Program Enrollment 21

 vi. Conclusion 23

 f. Identification of Program Charges and Basic Service Rate 23

 g. Savings Disclaimer 27

 h. Conclusion 29

 B. Waiver from Department Regulations Regarding Information Disclosure 30

V. OTHER REQUIREMENTS 31

VI. CONCLUSION 33

VII. ORDER..... 33

I. INTRODUCTION AND PROCEDURAL HISTORY

On February 13, 2019, the City of Haverhill (“City”), through its agent, Colonial Power Group, Inc. (“Colonial”), filed with the Department of Public Utilities (“Department”) a petition for approval of a municipal aggregation plan pursuant to G.L. c. 164, § 134. Under the proposed municipal aggregation plan, the City will establish a municipal aggregation program (“Program”) to aggregate the electric load of eligible customers located within its municipal borders in order to procure electric supply for Program participants.¹ Eligible customers will be automatically enrolled in the Program unless they choose to opt out. G.L. c. 164, § 134(a).

On March 13, 2019, the Department issued a Notice of Public Hearing and Request for Comments. The Department conducted a public hearing on April 29, 2019.² On July 15, 2019 and December 5, 2019, the City filed responses to the Department’s first and

¹ This is the City’s second municipal aggregation program. The first municipal aggregation program was approved by the Department in City of Haverhill, D.P.U. 15-61 (2015) and was active from December 1, 2015 until May 31, 2017. The City suspended the program on June 1, 2017 and returned all participants to basic service because it could not obtain a favorable price as compared to the basic service rate. Haverhill Community Choice Power Supply Program, <https://colonialpowergroup.com/haverhill/> (last visited May 27, 2020).

² Pursuant to G.L. c. 164, § 134(a), the Department must hold a public hearing prior to approval of a municipal aggregation plan.

second sets of information requests, respectively.^{3,4} On December 5, 2019, in response to discovery requests, the City filed a revised municipal aggregation plan (“Plan”)⁵ (Exhs. DPU 2-1, Att.; DPU 2-10, Att.; DPU 2-15, Att.; DPU 2-29, Att.) Finally, on April 14, 2020, the City filed a further revised municipal aggregation plan (“Revised Plan”), model electric service agreement (“Revised ESA”), education and information plan (“Revised Education Plan”), and consumer notification form with opt-out card (“Revised Opt-Out Documents”).

II. SUMMARY OF PROPOSED PLAN

The City states that the purpose of its Program is to “represent consumer interests in competitive markets for electricity” (Revised Plan at “Purpose of the Aggregation Plan”). The City retained Colonial as both its agent and municipal aggregation consultant to assist it in developing, implementing, and managing its Program (Revised Plan at 3-5). The Mayor and City Council will be responsible for all Program decisions, including the selection of competitive suppliers, execution of electric supply contracts, and Program termination (Revised Plan at 4, 6-7).

³ On December 18, 2019, the City filed a supplemental response to Information Request DPU 2-32.

⁴ On its own motion, the Department moves into the record the City’s responses to Information Requests DPU 1-1 through DPU 1-27 and DPU 2-1 through DPU 2-45, including all supplements.

⁵ On that same date, the City filed a revised Petition. All cites to “Petition” herein are to the revised Petition filed on December 5, 2019.

Under the Revised Plan, the City will issue a request for proposals to solicit bids from competitive suppliers for firm, all-requirements electric power supply (Revised Plan at 2; Petition, Att. D at 5). Prices, terms, and conditions for electric supply may differ among customer classes (Revised Plan at 10-11, 13). In addition to a standard product, the City may offer one or more optional products (see Petition at 2; Revised Plan at 5-6). The standard product and any optional products will meet the required Massachusetts Renewable Portfolio Standard and may provide additional Renewable Energy Certificates (“RECs”) above required minimums, depending upon the bids received (see Petition at 2; Revised Plan at 5-6).

After executing a contract for electric supply, the City will notify eligible customers⁶ about Program initiation and how they can opt out of the Program (Revised Plan at 7-9; Revised Education Plan at 5; Revised Opt-Out Documents). The notification process will include newspaper notices, public service announcements, an informational web page, a

⁶ Pursuant to Municipal Aggregation Programs, D.P.U. 16-10, at 19 (2017), the following are eligible customers: (1) basic service customers; (2) basic service customers who have informed the electric distribution company they do not want their contact information shared with competitive suppliers for marketing purposes; and (3) customers receiving basic service plus an optional green power product that allows concurrent enrollment in either basic service or competitive supply. The following are not eligible customers: (1) basic service customers who have asked the electric distribution company to not enroll them in competitive supply; (2) basic service customers enrolled in a green power product program that prohibits switching to a competitive supplier; and (3) customers receiving competitive supply. D.P.U. 16-10, at 19.

toll-free customer support hotline, community presentations, and posting of notices at City Hall and on the City's website (Revised Plan at 7-9; Revised Education Plan at 2-3).

The notification process will also include a Department-approved opt-out notice to be mailed to eligible customers on the City's behalf by the Program's competitive supplier (Revised Plan at 7-8). The City's competitive supplier will bear all expenses relating to the opt-out notice (Revised Plan at 6; Revised Education Plan at 6). The City will require the competitive supplier to include a return-addressed, postage-paid reply envelope with the opt-out notice so that consumers who sign the opt-out documents can protect their signature from exposure (Revised Plan at 8; Revised Opt-Out Documents). After enrollment, participants will have the right to opt out of the Program at any time and return to basic service at no charge (Revised Plan at 9; Revised Education Plan at 1; Revised Opt-Out Documents).

Program participants will receive one bill from the City's electric distribution company, Massachusetts Electric Company d/b/a National Grid ("National Grid") (Revised Opt-Out Documents). The bill will include the Program's supply charge and the electric distribution company's delivery charge (Revised Plan at 12-13). Program participants will also pay a \$0.001 per kilowatt-hour ("kWh") administrative adder that will be used to compensate Colonial for the development and implementation of the Program, including the provision of ongoing services. Such ongoing services include the following: (1) managing supply procurements; (2) implementing the education plan; (3) providing customer support; (4) interacting with the electric distribution company; (5) monitoring supply contracts; and

(6) providing reports to the Department and DOER (Revised Plan at 5, 11; Petition, Att. E at 1).

In addition, the City proposes to collect an operational adder of up to \$0.001 per kWh to fund an energy manager position to assist with the Program (Revised Plan at 12; Revised Education Plan at 4; Revised Opt-Out Documents). The City proposes to periodically determine the level of the operational adder based upon market conditions and Plan participation levels, and anticipates that it will initially set the operational adder at approximately \$0.00025 per kWh (Exh. DPU 1-3(b)).

The City requests a waiver, on its behalf and on behalf of its competitive supplier, from the information disclosure requirements contained at 220 CMR 11.06, which obliges competitive suppliers to mail information disclosure labels directly to customers on a quarterly basis⁷ (Petition at 3). As good cause for the waiver, the City states that it can provide this information as effectively and at a lower cost using means other than those specified in the Department's regulations, including press releases, public service announcements on cable television, newsletters of local organizations, and postings on the Program website (Petition at 3-4).

III. STANDARD OF REVIEW

General Laws c. 164, § 134(a) authorizes any municipality or group of municipalities to aggregate the electrical load of interested customers within its boundaries, provided that

⁷ The disclosure label provides information regarding a competitive supplier's fuel sources, emission characteristics, and labor characteristics. 220 CMR 11.06.

the load is not served by a municipal light plant. Upon approval by the local governing entity or entities, a municipality or group of municipalities may develop a municipal aggregation plan, in consultation with DOER and for review by its citizens, providing detailed information to customers on the process and consequences of aggregation.

G.L. c. 164, § 134(a). A municipal aggregation plan must provide for universal access, reliability, and equitable treatment of all classes of customers and meet any requirements established by law or the Department concerning aggregated service. G.L. c. 164, § 134(a).

A plan must include the following: (1) the organizational structure of the program, its operations, and its funding; (2) details on rate setting and other costs to its participants; (3) the method of entering and terminating agreements with other entities; (4) the rights and responsibilities of program participants; and (5) the procedure for termination of the program. G.L. c. 164, § 134(a). Municipal aggregation plans must be submitted to the Department for review and approval. G.L. c. 164, § 134(a).

Participation in a municipal aggregation plan is voluntary and a retail electric customer has the right to opt out of plan participation. G.L. c. 164, § 134(a).

Municipalities must inform eligible customers of (1) automatic plan enrollment; (2) the right to opt out; and (3) other pertinent information about the plan. G.L. c. 164, § 134(a);

Municipal Aggregation Programs, D.P.U. 16-10, at 19 (2017).

The Department's review will ensure that the plan meets the requirements of G.L. c. 164, § 134, and any other statutory requirements concerning aggregated service. In addition, the Department will determine whether a plan is consistent with provisions in the

Department's regulations that apply to competitive suppliers and electricity brokers. See 220 CMR 11.01. Although the Department's regulations exempt municipal aggregators from certain provisions contained therein, the regulations provide no such exemption for the competitive suppliers that are selected to serve a municipal aggregation load. See 220 CMR 11.01.

A municipal aggregator is exempt from two requirements included in the Department's regulations concerning competitive supply. First, a municipal aggregator is not required to obtain a license as an electricity broker from the Department under 220 CMR 11.05(2) in order to proceed with an aggregation plan. City of Marlborough, D.T.E. 06-102, at 16 (2007). Second, a municipal aggregator is not required to obtain customer authorization to enroll customers in the program pursuant to G.L. c. 164, § 1F(8)(a) and 220 CMR 11.05(4). D.T.E. 06-102, at 16. The opt-out provision applicable to municipal aggregators replaces the authorization requirements in the Department's regulations. D.T.E. 06-102, at 16.

A competitive supplier chosen by a municipal aggregator is not exempt from other applicable Department regulations. D.T.E. 06-102, at 16. To the extent that a municipal aggregation plan includes provisions that are not consistent with Department regulations, the Department will review these provisions on a case-by-case basis. D.T.E. 06-102, at 16.

IV. ANALYSIS AND FINDINGS

A. Consistency with G.L. c. 164, § 134

1. Procedural Requirements

General Laws c. 164, § 134(a) establishes several procedural requirements for municipal aggregation plans. First, a municipality must obtain authorization from certain local governing entities prior to initiating the process to develop an aggregation plan.

G.L. c. 164, § 134(a).⁸ The City provided meeting minutes demonstrating local approval to initiate the process of aggregation through a majority vote of the City Council with approval of the Mayor (Revised Plan at 2; Petition at Att. F). Therefore, the Department concludes that the City has satisfied the requirement regarding local governmental approval.

Second, a municipality must consult with DOER in developing its municipal aggregation plan. G.L. c. 164, § 134(a). The City provided a letter from DOER confirming that the City completed this consultation (Petition at 1, DOER Consultation Letter).

Therefore, the Department concludes that the City has satisfied the requirement to consult with DOER.

Third, a municipality must allow for citizen review of the plan. G.L. c. 164, § 134(a). General Laws c. 164, § 134(a) is silent on the process a municipality must use to satisfy citizen review of a municipal aggregation plan. The Department, however, requires

⁸ A town may initiate a process to aggregate electrical load upon authorization by a majority vote of town meeting or town council. A city may initiate a process to authorize aggregation by a majority vote of the city council, with the approval of the mayor or, where applicable, the city manager. G.L. c. 164, § 134(a).

municipalities to allow citizens sufficient opportunity to provide comments on a proposed plan prior to the municipality filing its plan with the Department. Cape Light Compact, D.P.U. 14-69, at 42 (2015); Town of Ashby, D.P.U. 12-94, at 27 (2014).

The City made the initial version of its Plan⁹ available for citizen review and comment from February 5, 2018 through February 26, 2018 at City Hall and on its website (Petition, Att. A, F). Therefore, the Department concludes that the City has satisfied the requirement regarding citizen review.

Finally, a municipal aggregation plan filed with the Department shall include the following: (1) the organizational structure of the program, its operations, and its funding; (2) details on rate setting and other costs to its participants; (3) the method of entering and terminating agreements with other entities; (4) the rights and responsibilities of program participants; and (5) the procedure for terminating the program. G.L. c. 164, § 134(a). The Department finds that the City's Revised Plan includes these required components and that the City has satisfied all procedural requirements of G.L. c. 164, § 134(a) (Revised Plan at 2-17).¹⁰

⁹ The Department notes that the City did not make its education and information plan, model electric service agreement or consumer notification form with opt-out reply card available for citizen review (Exh. DPU 1-19). The Department considers each of these documents to be fundamental components of a municipal aggregation plan. Going forward, municipalities shall ensure that all plan components (*i.e.*, education and information plan (including exemplar implementation schedule), opt-out documents, and model electric service agreement) are made available for citizen review pursuant to G.L. c. 164, § 134(a).

¹⁰ In its Petition, the City states that, it will offer a standard product and an optional product "that may include the purchase of [RECs] above the City's standard product."

2. Substantive Requirements

a. Introduction

Municipal aggregation plans must provide for universal access, reliability, and equitable treatment of all classes of customers. G.L. c. 164, § 134(a). In addition, municipalities must inform all eligible customers prior to their enrollment of their right to opt out of the program and disclose other pertinent information regarding the municipal aggregation plan.¹¹ G.L. c. 164, § 134(a); D.P.U. 16-10, at 19.

b. Universal Access

The Department has found that the universal access requirement is satisfied when a municipal aggregation program is available to all customers within the municipality. City of Lowell, D.P.U. 12-124, at 44-46 (2013); D.T.E. 06-102, at 19; Cape Light Compact, D.T.E. 00-47, at 24 (2000). Under the Revised Plan, all eligible customers will be enrolled in the applicable Program unless they affirmatively opt out (Revised Plan at 5, 14). Consistent with Town of Lexington, D.P.U. 16-152, at 17 (2017), new eligible customers

(Petition at 2). However, the Plan as initially filed did not contain a prominent description of the standard or optional product(s) the City intends to offer under its Program (Plan at 15). Consistent with Town of Becket, et al., D.P.U. 18-133 through D.P.U. 18-146, at 11 (2020), the City revised its Plan to include, in a separate section near the beginning of the Plan, a description of the standard product and each optional product it anticipates offering through its Program (including a description of the renewable energy content of each product) (Revised Plan at 5-6).

¹¹ The municipal disclosures must (1) prominently identify all rates and charges under the municipal aggregation plan, (2) provide the basic service rate, (3) describe how to access the basic service rate, and (4) disclose that a customer may choose the basic service rate without penalty. G.L. c. 164, § 134(a).

moving into the City will (1) initially be placed on basic service and (2) subsequently receive a notice informing them that they will be automatically enrolled in the Program unless they opt out (Revised Plan at 5, 14). Finally, pursuant to G.L. c. 164, § 134(a), the Revised Plan provides that Program participants may return to basic service at any time after enrollment (Revised Plan at 2, 9-10, 14). After review, the Department concludes that the City has satisfied the requirements regarding universal access.

c. Reliability

A municipal aggregation plan must provide for reliability. G.L. c. 164, § 134(a). The ESA that the City will enter into with the competitive supplier will contain provisions that commit the competitive supplier to provide all-requirements power supply, make all necessary arrangements for power supply, and use proper standards for management and operations (Revised Plan at 2-4; at 5, 12). In addition, the City will use the services of Colonial, a Massachusetts licensed electricity broker, to ensure that the City has the technical expertise necessary to operate the Program (Revised Plan at 4; Petition, Att. E). After review, the Department concludes that the City has satisfied the requirements of G.L. c. 164, § 134(a) regarding reliability. See D.P.U. 14-69, at 45; Town of Natick, D.P.U. 13-131, at 20 (2014); D.P.U. 12-124, at 46.

The Department's findings above regarding reliability are premised on the City's use of a Massachusetts licensed electricity broker with the technical expertise necessary to operate the Program. The City's current contract for municipal aggregation consulting services expires on May 30, 2021 (Petition, Att. E). Prior to the expiration of its contract with

Colonial, the City states that it intends to explore how best to procure future municipal aggregation consulting services (Exh. DPU 1-20).

If the City engages the services of a different municipal aggregation consultant that is also a licensed electricity broker in Massachusetts, the City shall notify the Department in writing in advance of such change.¹² Alternately, in the event that the City intends to (1) forgo the services of a municipal aggregation consultant or (2) engage the services of a consultant that is not a licensed electricity broker in Massachusetts, the City will be required to demonstrate that, after such change, it will continue to have the technical expertise necessary to operate the Program.¹³

¹² Such notice shall identify the new electricity broker and describe its technical expertise to operate the Program (including any previous experience operating municipal aggregation programs). In addition, the notice shall identify counsel who will represent the City at the Department in connection with the Program. Massachusetts Electric Company and Nantucket Electric Company, D.P.U. 18-118, Hearing Officer Memorandum at 2 (November 5, 2018), citing Massachusetts Electric Company and Nantucket Electric Company, D.P.U. 16-05, Hearing Officer Ruling on Petition to Intervene at 10 n.3 (March 25, 2016); Western Massachusetts Electric Company, D.T.E. 01-36/02-20, Interlocutory Order on Appeal of Hearing Officer Ruling Denying Petition to Intervene at 8-10 (January 31, 2003); 1975 Mass. Op. Att'y Gen. 136.

¹³ Prior to any change in Program operations, the City will be required to file a written Plan supplement for Department approval. Such filing shall be supported by testimony and exhibits designed to show that the City will continue to have the technical expertise necessary to operate the Program after any change in operations. Failure to make this required showing will result in termination of the Program.

d. Equitable Treatment of All Customer Classes

A municipal aggregation plan must provide for equitable treatment of all customer classes. G.L. c. 164, § 134(a). Equitable treatment of all customer classes does not mean that all customer classes must be treated equally; rather, customer classes that are similarly situated must be treated equitably. D.P.U. 14-69, at 10-16, 45-47; D.T.E. 06-102, at 20. Here, the Revised Plan allows for varied pricing, terms, and conditions for different customer classes (Revised Plan at 11-15).¹⁴ This feature of the Plan's design appropriately considers the different characteristics of each customer class. D.P.U. 13-131, at 22-25; D.P.U. 12-94, at 32; D.P.U. 12-124, at 47.

Consistent with the procedures adopted by the Department in Town of Natick, D.P.U. 13-131-A at 10 (2014), the Revised Plan includes a detailed description of the enrollment procedures and pricing for the following "opt-in" customer groups: (1) eligible customers who opt-out and subsequently wish to enroll in the Program; and (2) competitive supply customers at Program initiation who wish to enroll in the Program after their competitive supply contract ends.¹⁵ D.P.U. 18-133 through D.P.U. 18-146, at 15. After review, the Department finds that the City has satisfied the requirements of G.L. c. 164, § 134(a) regarding equitable treatment of all customer classes.

¹⁴ The Program will employ the customer classes used by National Grid (Revised Plan at 11-12).

¹⁵ The Revised Plan includes opt-in enrollment procedures and pricing for each applicable customer class identified in D.P.U. 13-131-A (Revised Plan at 14).

e. Customer Education

i. Introduction

General Laws c. 164, § 134(a) provides that it is the duty of the aggregated entity to fully inform eligible customers that they will be automatically enrolled in the municipal aggregation program and that they have the right to opt out. It is critical that municipalities appropriately inform and educate all eligible customers about municipal aggregation plans and the right to opt out of aggregation programs, especially considering the automatic enrollment provisions afforded to these plans. D.T.E. 06-102, at 21; City of Newton, D.P.U. 18-36, at 10 (2018). To this end, the Department reviews a municipality's education and information plan, including the form and content of its consumer notifications. As the Department continues to gain experience with the operation of municipal aggregation programs, it is fully anticipated that we will refine our position on the adequacy and clarity of consumer outreach, education, and notifications. Town of Stoughton, D.P.U. 17-43, at 13 (2017). The City will be required to adhere to any future directives in this regard. D.P.U. 17-43, at 13.

ii. Eligible Customers

The Department addressed the definition of "eligible customer" for the purposes of municipal aggregation in D.P.U. 16-10, at 19. During discovery, the City made several revisions to its Plan to conform it to the Department's directives in D.P.U. 16-10, at 19, regarding eligible customers (Exh. DPU 2-10).

In addition to providing notice to eligible customers, the Plan as initially filed provided that the City may also “generally notify all consumers receiving competitive service of their eligibility to receive power from the City’s competitive supplier” (Plan at 7). To enable such notice, the City stated that it “may request full consumer lists from National Grid” (Exh. DPU 2-11). Pursuant to D.P.U. 16-10, however, competitive supply customers are not eligible customers for the purposes of municipal aggregation and, therefore, such customers (1) will not be included in the eligible customer lists provided to the Program supplier by the distribution company and (2) will not receive opt-out notices from the City. D.P.U. 16-10, at 19; D.P.U. 18-133 through D.P.U. 18-146, at 17. Accordingly, the City will not receive full customer lists from National Grid as it initially proposed.

The City states that it “does not plan to (or believe it has any obligation to) reimburse third-party supply customers for penalties and early termination charges” associated with switching to the City’s Program during a competitive supply contract term (Exh. DPU 2-12(c)). Therefore, to the extent that the City intends to generally inform competitive supply customers by alternate means about the availability of the Program, the City must clearly disclose in any educational or outreach materials that such customers may be subject to penalties or early termination fees if they switch from competitive supply to the City’s Program during the customer’s competitive supply contract term.¹⁶ D.P.U. 18-133 through D.P.U. 18-146, at 18.

¹⁶ The City amended its Plan at Section 5.1.4 to recognize this requirement (Revised Plan at 7). The City also amended its Plan to recognize the requirement to provide the Department, for review, an advance copy of any notices or other outreach

Competitive suppliers may use eligible customer information only as required for the operation of the Program. D.P.U. 16-10, at 14-15; D.P.U. 18-133 through D.P.U. 18-146, at 18. The City revised its model ESA to clarify (1) that the competitive supplier may only communicate with Program participants and/or use the lists of eligible customers/Program participants to send Department-approved educational materials, opt-out notices, or other communications essential to the operation of the Program and (2) that such lists may not be used by the competitive supplier to market any additional products or services to eligible customers or Program participants (Revised ESA at 7, 13-14, 26). The City's revised model ESA also specifies that any new product or service that the competitive supplier and/or the City seek(s) to make available to Program participants is subject to Department approval (Revised ESA at 26).

iii. Language Access

The City proposes to provide Program information to customers in other languages through the following channels: (1) general education, which will consist of community-wide presentations, media outreach, public notices and postings, and a toll-free customer service number and Program website operated by the consultant and linked to the City's website; and (2) a direct mail opt-out notice, which will inform eligible customers of their rights under the

materials it proposes to use to generally inform competitive supply customers about the availability of the Program (Revised Plan at 7). D.P.U. 18-133 through D.P.U. 18-146, at 18. Such documents shall be provided to the Department no later than ten days prior to the proposed date of issuance. The City shall revise Section 5.1.4 of its Revised Plan to recognize this timing requirement.

Program, including their right to opt out at any time without penalty (Revised Plan at 7-9; Revised Education Plan at 3-4). The City's initial Plan did not, however, identify the other languages in which Program information will be made available (Plan at 6-8).

In response to discovery, the City stated that (1) its toll free telephone number will be available in English, Spanish and Portuguese; (2) its energy manager will be available to address questions in English, Spanish and Portuguese; (3) it will retain additional translation services "as may be necessary or appropriate"; and (4) the Program website will provide the capability to translate key information into over 100 languages (Exhs. DPU 1-7; DPU 1-8). In addition, the City indicated that 17 percent of its residents speak Spanish or Portuguese (Exh. DPU 1-6). The City did not, however, explain how it arrived at this figure based on the source material provided¹⁷ (Exh. DPU 1-6). Also, the City was unable to identify all specific languages spoken by its residents who speak English "less than very well" (Exhs. DPU 1-6, DPU 1-9).

Participation in a municipal aggregation program is voluntary. G.L. c. 164, § 134(a). As noted above, G.L. c. 164, § 134(a) establishes a statutory duty for the municipality to "fully inform" customers about automatic enrollment and the right to opt out of a municipal aggregation program. Contrary to the City's assertion, it cannot be left to a municipality's judgment as to whether this statutory mandate has been fulfilled (Exhs. DPU 1-8; DPU 1-9).

¹⁷ The source material provided by the City contained demographic and housing estimates that did not identify the languages spoken by residents who identify as speaking English "less than very well" (Exh. DPU 1-6(c)).

Instead, the Department has found that municipalities must fully address in their plans how they will provide adequate notice and education to customers with limited English proficiency. D.P.U. 19-41, at 17-18. In addition, the Department has found that municipalities must address how they will provide adequate notice and education to customers with impaired physical capabilities who require visual or audial assistance. D.P.U. 19-41, at 17-18.

The opt-out notice is a critical element of municipal aggregation education and outreach and it must be designed to ensure that all eligible customers are clearly and fully informed about the Plan and their rights and obligations under the Program. D.P.U. 19-41, at 18. In order to ensure that the opt-out notice is meaningful to all customers with limited English proficiency and other language access needs and to ensure that essential Program information is not compressed or omitted in order to accommodate adequate notice to such customers, the Department requires all municipalities to include a separate Language Access Document with the opt-out notice.¹⁸ D.P.U. 18-133 through D.P.U. 18-144, at 21 & n.23. The required Language Access Document translates the following text into 26 languages that,

¹⁸ The required Language Access Document supersedes earlier directives in Town of Grafton D.P.U. 18-61, at 9 (2019) that generally required municipalities to include a translated sentence at the top of the opt-out notice in the native language(s) of residents with limited English proficiency. D.P.U. 18-133 through D.P.U. 18-144, at 22.

according to U.S. Census Bureau data, are the languages spoken by limited-English-speaking Massachusetts residents:¹⁹

Important notice enclosed from [Municipality] about your electricity service. Translate the notice immediately. Call the number or visit the website, above, for help.

The Language Access Document also provides instructions regarding how customers can receive visual or audial assistance with Program information.

The City provided a revised opt-out notice that includes a proposed Language Access Document modeled after the Language Access Document approved in D.P.U. 19-41 (Revised Opt-Out Documents). In addition, the City provided documentation verifying the accuracy of the translations in its proposed Language Access Document (Revised Opt-Out Documents, Certificate of Accuracy).

Although the Language Access Document is designed to be universal, the Department may modify the language access requirements for individual municipal aggregation programs on a case-by-case basis where we find additional notice or education is warranted. D.P.U.

¹⁹ The English-language opt-out notice plus the text translated into 26 languages in the Language Access Document will reach more than 99 percent of the total population in Massachusetts. See 2018 American Community Survey 5-Year Estimates, Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over (Table B16001) for Massachusetts, available at: <https://data.census.gov/cedsci/table?q=B16&d=ACS%205-Year%20Estimates%20Detailed%20Tables&g=0400000US25&tid=ACSDT5Y2018.B16001&vintage=2018&hidePreview=false&t=Language%20Spoken%20at%20Home> (last visited June 1, 2020). The Language Access Document will also reach more than 97 percent of the Massachusetts population that speaks a language other than English.

18-133 through D.P.U. 18-146, at 22; D.P.U. 19-41, at 18. In this regard, because a significant percentage of Haverhill's citizens speak Spanish or Portuguese, the City shall include a translated sentence at the top of the opt-out notice in Spanish and Portuguese informing eligible customers that the notice contains important and urgent information from the City about electricity service and the customer should contact the City immediately to obtain the notice in Spanish or Portuguese.²⁰ See D.P.U. 19-41, at 17-18.

iv. Ongoing Education

While G.L. c. 164, § 134(a) is silent regarding customer education after a customer is enrolled in a municipal aggregation program, the City must continue to provide customers with information regarding the ongoing operations of the Program. D.P.U. 14-69, at 48; Town of Dalton, D.P.U. 13-136, at 23 (2014). The City will provide ongoing education through a dedicated Program website linked to the City's website, including information regarding Program details, changes, and power supply sources (Revised Plan at 7; Revised Education Plan at 3).²¹ In addition, the Revised Education Plan provides that price changes will be announced in a media release, a posted notice at City Hall, and through the Program

²⁰ As part of its Revised Education Plan, the City described how it will inform and educate residents, including residents with (1) limited English proficiency and (2) impaired physical capabilities who require visual or audial assistance, about their rights and obligations under the Plan (Revised Education Plan at 4-5). The City shall further revise its Revised Education Plan to incorporate the additional directives above regarding opt-out notice text in Spanish and Portuguese.

²¹ The City shall provide, at a minimum, basic information about the Plan in a prominent location on its website with appropriate links to the dedicated Program website. D.P.U. 18-133 through D.P.U. 18-146, at n. 26.

website (Revised Education Plan at 4). The City will also maintain a toll-free customer information and support hotline for the duration of its Program (Revised Plan at 3; Revised Education Plan at 2-4).

v. Timing of Program Enrollment

The timing of Program enrollments must ensure that eligible customers have a full 30 days to opt out, plus an additional six days to account for mailing (*i.e.*, three days for the opt-out notice to be delivered to the customer and three days for the opt-out document to be delivered to the competitive supplier through the mail). D.P.U. 18-133 through D.P.U. 18-146, at 24, citing Town of Orange, D.P.U. 17-14, at 11-12 (2017). The City and its consultant must ensure that the competitive supplier adheres to these directives.²²

In addition, to ensure that no customers who wish to opt out are automatically enrolled in the Program, the Department has determined that a municipal aggregator must identify the actual date by which customers must postmark the opt-out document, consistent with the timing described above. D.P.U. 18-133 through D.P.U. 18-146, at 26, citing D.P.U. 17-14, at 12. The Department has further found that such language must appear in a prominent location and color at the top of the first page of the opt-out notice, as well as on the opt-out reply card, and it must inform eligible customers that they will be automatically

²² The opt-out period ends 36 days after mailing of the opt-out notice (*i.e.*, mailing date of the opt out notice plus (1) three days for the opt-out notice to be delivered to the customer; (2) 30 days to opt-out; and (3) three additional days for the opt-out document to be delivered to the competitive supplier) and Program enrollments shall begin no sooner than 37 days after mailing of the opt-out notice. D.P.U. 18-133 through D.P.U. 18-146, at n. 27.

enrolled in the Program, unless they return the postmarked opt-out document by the identified date.²³ D.P.U. 17-14, at 12.

In the City's proposed exemplar opt-out notice, the essential language regarding automatic enrollment and the deadline to act does not appear at top of the first page of the opt-out notice as required by D.P.U. 17-14 but, instead, appears after the first full paragraph of text (Revised Opt-Out Documents at 1). After review, the Department finds that this alternate placement is acceptable as the essential language appears near the top of the opt-out notice, is sufficiently prominent (in an upper case font preceded by a checkmark symbol), and is sufficiently set apart from other text.²⁴ D.P.U. 18-133 through D.P.U. 18-146 at 26-27. The City's exemplar opt-out notice and opt-out reply card are consistent with the Department's remaining directives, including the requirement that such notices be sent in clearly marked municipal envelopes that state they contain information regarding customers' participation in the Program and include a return-addressed, postage-paid reply envelope to protect consumer signatures from exposure (Revised Education Plan at 5; Revised Opt-Out Documents).

²³ The Department has found that, where the opt-out notice and reply card will be printed entirely in black and white, a municipality may include the language in bold black type in the specified locations instead of in color. However, if the opt-out notice and reply card include any color text, this language must be included in color. Town of Shirley, D.P.U. 17-21, at 12 n.11 (2017), citing D.P.U. 17-14, at 12.

²⁴ The Department has determined that it is not optimal to group essential language regarding automatic enrollment and the deadline to act together with other information in the body of the opt-out notice. D.P.U. 17-14, at 12.

Finally, the City's Revised Plan provides that "further opportunities for eligible consumer opt-out may be negotiated by the City and the Competitive Supplier . . . and made part of the public information offered to each eligible consumer" (Revised Plan at 9). The City shall revise Section 5.1.6 of its Revised Plan to indicate that any "further opportunities" for eligible customers to opt-out must be approved by the Department (including all public education and outreach information provided to eligible consumers regarding such opportunities).

vi. Conclusion

The Department has reviewed the City's Revised Education Plan, including the form and content of its proposed consumer notifications (Revised Plan at 9; Revised Education Plan; Revised Opt-Out Documents). With the required edits to the Revised Plan, Revised Education Plan, and Revised Opt-Out Documents addressed above, the Department finds that these materials are designed to facilitate the City's achievement of its obligation under G.L. c. 164, § 134(a) to fully inform eligible customers about automatic enrollment and the right to opt out of each Plan.

f. Identification of Program Charges and Basic Service Rate

Pursuant to G.L. c. 164, § 134(a), the City must prominently identify all Program charges and include a full disclosure of the basic service rate. In this regard, the Revised Plan and exemplar opt-out notice (1) prominently identify the Program power supply charge, including a \$0.001 per kWh administrative adder that will be used to compensate the municipal aggregation consultant for the development of the Plan and operation of the

Program and (2) fully disclose the basic service rate (Revised Plan at 11; Revised Education Plan at 4-5; Revised Opt-Out Documents). In its initial filing, the City also proposed to charge a yet-to-be-determined per kWh operational adder that will be paid to the City and used to fund an energy manager position (Plan at 11; Exh. DPU 1-3).

In contrast to the fixed administrative adder of \$0.001 per kWh, the initial Plan did not identify a maximum operational adder (Plan at 11). Instead, the City proposed to periodically determine, without limitation, the amount of the operational adder based on “changing market conditions and Plan participation levels”²⁵ (Exh. DPU 1-3(b)). As part of its Revised Plan, the City proposed to cap the amount of the operational adder at \$0.001 per kWh (Revised Plan at 12).

The Department does not review competitively procured Program rates (*i.e.*, supply rate, administrative adder) for the purpose of determining whether they are just and reasonable. D.P.U. 18-133 through D.P.U. 18-146, at 28-29, citing D.P.U. 12-94, at 14; D.P.U. 12-124, at 25-29. However, the Department will review a proposed operational adder to determine whether there is a sufficient nexus with the proposed use of the funds to be collected through the adder and the operation of the Program as authorized under G.L. c. 164, § 134(a).²⁶ D.P.U. 18-133 through D.P.U. 18-146, at 29. Accordingly, each

²⁵ The City projects that it will set its operational adder at approximately \$0.00025 per kWh at Program launch (Exh. DPU 1-3(b)).

²⁶ Depending on the nature of the proposed use of funds, the Department may consider other factors when reviewing an operational adder. See e.g., 2019-2021 Three-Year

municipality proposing to charge an operational adder bears the burden of fully describing the proposed use of such funds and demonstrating how such use is consistent with the municipal aggregation of electricity supply as authorized under G.L. c. 164, § 134(a). D.P.U. 18-133 through D.P.U. 18-146, at 29.

As noted above, the Revised Plan specifies that the operational adder will be used to fund personnel costs to fund an energy manager position to support the operation of the Program (Revised Plan at 12). The Department finds that this proposed use of funds is directly related to the operation of each Program under G.L. c. 164, § 134(a).

The Department will review a proposed operational adder to determine whether the proposal includes sufficient detail on costs to participants as required by G.L. c. 164, § 134(a). D.P.U. 18-133 through D.P.U. 18-146, at 29. In this regard, the Department has found that identification of an appropriate maximum operational adder is consistent with the requirement of G.L. c. 164, § 134(a) that a plan include details on costs to participants. D.P.U. 18-133 through D.P.U. 18-146, at 29. Based on the above findings regarding the proposed use of the operational adder and the estimated annual Program sales for the City,²⁷ the Department finds that the City may implement an operational adder of up to

Energy Efficiency Plans, D.P.U. 18-110 through D.P.U. 18-119, at 141-143 (2019); Cape Light Compact, D.P.U. 17-84, at 22-23 (2018).

²⁷ The City was unable to provide an estimate of annual Program sales and, instead, provided an estimate of total annual electricity consumption (Exh. DPU 1-16). In this case, the Department will use these data as a reasonable estimate of annual Program sales for the purpose of determining an appropriate maximum operational adder.

\$0.001 per kWh for the purpose of funding an energy manager position to support the operation of its Program²⁸ (Exh. DPU 1-16).

The Revised Plan includes appropriate notice of additional costs that could be charged to Program participants due to a change in law, regulatory event, or new taxes (Revised Plan at 12; see also Revised ESA at Art. 17). In addition, pursuant to D.P.U. 18-133 through D.P.U. 18-146, at 31, the Revised Plan and Revised ESA describe the circumstances under which the City and its competitive supplier will negotiate any such potential change in Program price (Revised Plan at 12; Revised ESA at 25).

At least 30 days prior to the implementation of any change in Program price related to a change in law, regulatory event, or new taxes, the City will notify Program participants of the change in price through media releases, postings at City Hall, and on the Program website²⁹ (Revised Plan at 12). Pursuant to City of Melrose, D.P.U. 18-59, at 13 n.9

²⁸ Given the estimate of annual consumption provided by the City, the Department expects that if the City were to charge Program participants the maximum operational adder of \$0.001 per kWh at Program launch, it would collect more funds than required to fund an energy manager position to support the operation of the Program. However, as noted above, the City anticipates that it will charge a significantly lower operational adder of approximately \$0.00025 per kWh at Program launch (Exh. DPU 1-3(b)). As discussed in Section V, below, as part of its Annual Reports to the Department, the City will be required to identify the amount of any operational adder charged to Program participants and provide an accounting sufficient to demonstrate that the use of such funds was solely for the purposes approved herein.

²⁹ If any such change causes the Program price to be above the applicable basic service price, the Department may require additional notification to Program participants. D.P.U. 18-133 through D.P.U. 18-146, at n. 38.

(2019), the City will submit the text of such notifications to the Department's Consumer Division no less than ten days prior to issuance (Revised Plan at 12).

Finally, pursuant to Town of Bedford, D.P.U. 17-178, at 13-14 (2018), the Revised Plan appropriately discloses that (1) taxes will be billed as part of the Program's power supply charge and (2) Program participants are responsible for identifying and requesting an exemption from the collection of any tax by providing appropriate documentation to the competitive supplier (Plan at 12).

g. Savings Disclaimer

Certain municipal aggregations may seek competitive supply rates that provide savings for participating electric customers compared to basic service rates. However, due to changes in market conditions and differences in contract terms, a municipal aggregation plan cannot guarantee customers cost savings compared to basic service over time. See D.P.U. 12-124, at 57-66. In addition, municipalities must fully inform customers about the plan, including the benefits and consequences of municipal aggregation. G.L. c. 164, § 134(a). This is true regardless of whether the primary purpose of the municipal aggregation is to provide savings to participating customers. D.P.U. 18-36, at 12. Therefore, the Department has found that municipalities must clearly explain in plans and all education and outreach materials that customers are not guaranteed cost savings compared to basic service. City of Gloucester, D.P.U. 16-101, at 12-13 (2017).

The initial Plan made available for citizen review included language regarding "favorable economic and non-economic terms" without an appropriate disclosure that savings

cannot be guaranteed (Plan at 2). However, the Revised Plan and education materials prepared by or on behalf of the City include language related to “savings” while also appropriately disclosing that savings cannot be guaranteed (Revised Plan at “Purpose of the Aggregation Plan”). The City and its consultant shall ensure that all future communications and information regarding the Program (including, but not limited to mailings, advertisements, website postings, and presentations to consumers) contain a disclaimer that “savings cannot be guaranteed” in each instance where price is referenced, regardless of whether references to “savings,” “price stability,” or the like are made. D.P.U. 19-41, at 25.

Conversely, information provided by Colonial to the City in response to its request for proposals to secure municipal aggregation consulting services included language related to “savings,” “discounts,” and “lowest prices” without any accompanying explanation or disclaimer that savings cannot be guaranteed (Exh. DPU 1-17, Att. 1, at 6, 9,19; Att. 2, at 5). In Town of Hadley, D.P.U. 17-173, at 13-14 & nn.12, 13 (2018), the Department determined that any representations regarding savings made in conjunction with a consultant’s presentations to a municipality must also contain a disclaimer that such savings cannot be guaranteed. The Department notes that the materials at issue are dated June 13, 2013 and March 10, 2015, prior to the issuance of D.P.U. 17-173 and D.P.U. 16-101.

To eliminate any future claim of confusion, the Department reaffirms its earlier finding that all communications, materials, and information (including, without limitation, mailings, advertisements, website postings, responses to requests for proposals, presentations,

program documentation, educational materials, and exemplar program documents) that an aggregation consultant provides to a municipality (or to an entity acting on behalf of one or more municipalities), at any time, must contain a disclaimer that “savings cannot be guaranteed” in each instance where price or savings is referenced. See D.P.U. 19-41, at 26, citing D.P.U. 17-173, at 13-14 & nn.12, 13; D.P.U. 16-101, at 12-13. Colonial acts as a program consultant for numerous municipal aggregation programs in Massachusetts. In its role as consultant, Colonial must ensure that all of its communications with, and information submitted to, municipalities regarding municipal aggregation—at every step in the process—fully disclose that savings cannot be guaranteed. Town of Avon, D.P.U. 17-182, at 16 (2018). Further failure by Colonial to adhere to these directives will result in remedial action, including additional customer education prior to plan approvals and/or a finding that Colonial does not have the technical expertise to act as a municipal aggregation program consultant. D.P.U. 17-182, at 16.

h. Conclusion

Based on the findings above, with the required modifications to the Revised Plan and supporting documents, the Department concludes the City has satisfied all substantive requirements in G.L. c. 164, § 134(a). Within 14 days of the date of this Order, the City shall file a further Revised Plan, Revised Education Plan, and Revised Opt-Out Documents

consistent with the directives contained herein. The Department will review these materials for compliance with the directives specified above.³⁰

B. Waiver from Department Regulations Regarding Information Disclosure

General Laws c. 164, § 134, requires that a municipal aggregation plan meet any requirements established by law or the Department concerning aggregated service. In this regard, the City has requested a waiver, on behalf of itself and its competitive supplier, from the information disclosure requirements contained in 220 CMR 11.06(4)(c) (Petition at 3-4). The Department's regulations at 220 CMR 11.08 permit a waiver from these regulations for good cause shown. As good cause for the waiver, the City maintains that the competitive supplier can provide the same information more effectively and at a lower cost through alternate means (Petition at 3-4).

The City's proposed information disclosure strategy is similar to the strategies approved by the Department in other municipal aggregation plan proceedings (Petition at 3-4). See e.g., D.P.U. 13-131, at 29-31; Town of Greenfield, D.P.U. 13-183, at 27-29 (2014). The Department finds that the City's proposed alternate information disclosure strategy should allow its competitive supplier to provide the required information

³⁰ The City also shall submit a copy of the final opt-out notice and reply card to the Director of the Department's Consumer Division for review and approval prior to issuance. The final opt-out notice should contain all relevant prices. The return postmark date may be left blank on the final opt-out notice and reply card if the date is not yet known. The final opt-out notice and reply card must also be filed in the instant applicable docket, in a manner consistent with the Department's filing requirements. D.P.U. 17-182, at 18 & n.16, citing Town of Southborough, D.P.U. 17-19, at 14 (2017); 220 CMR 1.02.

to its customers as effectively as the quarterly mailings required under 220 CMR 11.06(4)(c). Accordingly, pursuant to 220 CMR 11.08, the Department grants the City's request for a waiver from 220 CMR 11.06(4)(c) on behalf of itself and its competitive supplier. To maintain this waiver, as part of its Annual Reports to the Department (see Section V, below), the City must provide sufficient information to show that the competitive supplier has provided the same information to Program participants as effectively as the quarterly mailings required under 220 CMR 11.06(4)(c). The City and its competitive supplier are required to adhere to all other applicable provisions of 220 CMR 11.06.

V. OTHER REQUIREMENTS

In addition to the requirements set forth in G.L. c. 164, § 134, as discussed above, the City shall comply with all additional requirements for municipal aggregations as set by the Department. See e.g., D.P.U. 14-69, at 29-30 (requirements for revising a municipal aggregation plan); D.P.U. 12-124, at 61-66 (prohibiting the practice of suspension); Town of Lanesborough, D.P.U. 11-27, at 24 (2011) (notice requirements to local distribution company).

The City shall notify the Department in writing within ten days of its Program becoming operational (i.e., the date the City executes an agreement with a competitive supplier). Until its Program is operational, the City shall provide quarterly notifications to the Department as to the status of its procurement process (i.e., a brief description of the City's supply procurement activities in the previous quarter and whether the City intends to solicit bids for Program supply in the upcoming quarter). Such updates shall be filed with

the Department no later than 45 days before the start of each applicable quarterly basic service pricing period.³¹

In addition, the City shall submit an Annual Report to the Department by May 1st of each year for the previous calendar year. The Annual Report shall, at a minimum, provide the following information: (1) a list of the Program's competitive suppliers over the past year; (2) the term of each ESA; (3) monthly enrollment statistics by customer class (including customer additions and withdrawals); (4) the number and percentage of customers that opted-out of the Program over the past year; (5) a description of the standard product and any optional products offered through the Program (including product pricing and percentage of clean energy supply above required minimums); (6) where applicable, identification of the amount of any operational adder charged to Program participants and an accounting of the use of such funds; (7) total annual kWh sales, by customer class, for the standard product and each optional product; (8) a detailed discussion (with all relevant documentation) addressing City and competitive supplier compliance with the alternative information disclosure strategy approved in Section IV.B, above; (9) evidence documenting that the City has fully complied with all provisions contained in its public outreach and education plan (including, at a minimum, copies of all opt-out notices and other correspondence with eligible customers and Program participants, City Council meeting notices, minutes of any such meetings, and screenshot images of all relevant Program pages of the websites of the City

³¹ Because the City is in National Grid's service territory, such updates shall be made on or before September 17th, December 18th, March 17th, and June 17th.

and consultant); and (10) copies of any complaints received by the City, its consultant, or the competitive supplier regarding the Program and a narrative addressing the response to such complaints (including copies of all relevant documentation).

The City's first Annual Report shall be filed on or before May 1, 2021, covering calendar year 2020. As the Department continues to gain experience with the operation of municipal aggregation programs, it is fully anticipated that we will refine reporting requirements from time to time. The City shall be required to adhere to all future directives in this regard.

VI. CONCLUSION

Consistent with the discussion above, the Department finds that the Revised Plan, with all modifications required herein, satisfies all procedural and substantive requirements contained in G.L. c. 164, § 134(a). In addition, with the waiver from the information disclosure requirements contained in 220 CMR 11.06(4)(c) allowed above, the Department finds that the Revised Plan, as further amended consistent with the directives contained herein, meets the requirements established by the Department concerning aggregated service. Accordingly, the Department approves the City's Revised Plan as amended consistent with the directives contained herein.

VII. ORDER

Accordingly, after due notice, public hearing, and consideration, it is

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.