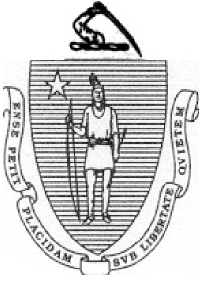

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 06-102 March 14, 2007

Petition of the City of Marlborough for approval of its municipal aggregation plan pursuant to G.L. c. 164, § 134.

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I. INTRODUCTION

On November 8, 2006, the City of Marlborough ("Marlborough" or "City") filed with the Department of Telecommunications and Energy ("Department") a petition for approval of a municipal aggregation plan ("Plan") pursuant to G.L. c. 164, § 134. As part of its Plan, Marlborough seeks a waiver from the information disclosure requirements contained in 220 C.M.R. § 11.06(4)(c) (Petition at 8-9).

The Department docketed this matter as D.T.E. 06-102. On December 6, 2006, a notice of intervention pursuant to G.L. c. 12, § 11E was filed by the Attorney General of the Commonwealth ("Attorney General"). A public hearing was held on December 13, 2006. On December 22, 2006, Colonial Power Group, Inc. ("Colonial") and Massachusetts Electric Company d/b/a National Grid's ("National Grid") were permitted to intervene as full parties and Direct Energy Services, LLC ("Direct Energy") was granted limited participant status. On January 16, 2007, comments were filed by Water Energy and Ecology Information Services ("WeeInfo"). On February 6, 2007, comments were filed by the Attorney General, Marlborough and Colonial jointly, and National Grid. On February 13, 2007, reply comments were filed by Marlborough and Colonial jointly. The evidentiary record consists of 45 responses to information requests.[1]

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[1] On its own motion, the Department moves into the evidentiary record Marlborough's responses to information requests AG 1-1 through AG 1-3, DTE 1-1 through DTE 1-7, DTE 2-1 through DTE 2-11, and DTE 3-1 through DTE 3-24.

II. SUMMARY OF MARLBOROUGH'S PROPOSED PLAN

A. Introduction

According to the City, the Plan will aggregate more than 14,000 electricity consumers in Marlborough to negotiate electricity supply at the best, most stable rates (Petition, Att. A at 1). The City will not buy and resell electric power, rather it will represent consumers in the negotiation of the terms of electricity service (id. at 6). In addition, the City states that the Plan will provide professional representation to support its consumers' interests in state, regional, and local forums (id. at 1, 6). The City has hired Colonial as a consultant to assist it in the design, implementation, and administration of the Plan (id., Att. C at 2).

B. Development of Plan

In September 2002, Colonial first met with Marlborough to discuss implementing a municipal aggregation for the City's electricity consumers (Petition, Att. C at 2; Att. D). In August 2004, the City Council initiated the formal process for Marlborough to become a municipal aggregator (id. at 2; Att. E). In November 2004, with the authorization of the City Council, the Mayor authorized Colonial to evaluate the feasibility of implementing a municipal aggregation plan (id., Att. C at 2; Att. F).

Colonial delivered a report to the City recommending aggregation in July 2005. The City Council subsequently issued a request for proposals to hire a consultant to assist the City in the design, implementation, and administration of an aggregation plan (id., Att. C at 2). Colonial was the winning bidder and was awarded a consulting contract in November 2005 (id.; Att. K).

Formal development of the Plan involved numerous meetings with members of the public, as well as with the Massachusetts Division of Energy Resources ("DOER"), potential competitive electricity suppliers, and National Grid (id. at 2-3, 5; Att. C at 3; Att. N).[2] The City Council held a public hearing on the Plan on May 8, 2006 (id. at 2; Att. C at 3). On June 12, 2006, the City Council voted to approve the Plan (id. at 3; Att. O). Finally, on November 6, 2006, the City Council approved several draft electric supply agreements ("ESAs") as well as certain amendments to the Plan (id.).

C. Selection of Potential Suppliers

On behalf of the City, Colonial contacted each of the licensed competitive suppliers in Massachusetts to gauge their interest in serving the fully aggregated load as well as in serving selected customer classes (Petition, Att. C at 4). The following criteria were used to evaluate the qualifications of interested suppliers: (1) the supplier was licensed by the Department; (2) the supplier was a member of NEPOOL; (3) the supplier had no bankruptcies pending; (4) the supplier had a strong financial background; and (5) the supplier had a history of serving the competitive market in Massachusetts or in other states (id.; Att. A at 7). Using these criteria, the City identified three qualified suppliers that were interested in serving its municipal aggregation (id. at 5; Att. C at 4). The City subsequently negotiated a form ESA

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[2] Marlborough is in National Grid's service territory.

with each interested supplier (id. at 5).[3] The form ESAs do not include price terms or limits with respect to contract duration (id. at 3).[4]

D. Evaluation of Bids

The City expects to select one supplier for the Plan, for a term of one year (Exh. DTE 3-14). The City will evaluate suppliers' bids with respect to price, stability of price, length of the term of the proposed supply, surety, and the financial condition of the supplier at the time the bids are provided. The City will evaluate offers against current basic/default ("basic") service rates, as well as market projections for comparable all-requirements service. While basic service rates will be one benchmark, the City does not believe that basic service rates are appropriate as the sole benchmark (id., Att. C at 5). If the City does not receive pricing that it considers acceptable, it will continue periodically to ask suppliers to submit bids until it achieves what it considers to be the best price (id., Att. C at 5-6). During the initial solicitation, the City has agreed to execute an ESA only if the price for residential customers,

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[3] Subsequently, two additional qualified suppliers expressed interest in serving Marlborough's municipal aggregation (Exh. DTE 3-7).

[4] Marlborough requested approval of the non-price terms of the ESAs negotiated with potential competitive electricity suppliers. The City requested approval of a process in which, if it executes an ESA with one or more of the suppliers, the executed ESAs will be deemed approved provided that they (1) are substantially consistent with ESAs included in the filing, (2) include a term of no more than three years, and (3) include a price that is less than National Grid's then current residential basic/default service rate (Petition at 3-4). Marlborough later stated that it did not believe that preapproval of the ESAs is necessary (Exh. DTE 3-2). Accordingly, the Department will not preapprove the ESAs.

including Colonial's administrative adder, is lower than National Grid's residential basic service rate (Petition at 3-4; Exh. DTE 2-7).

E. Organizational Structure of the Plan

Consistent with the Plan B charter under which Marlborough operates, the Mayor and City Council are jointly responsible for establishment of the policies and development of the Plan.[5] Colonial will act as the City's professional, technical, and legal consultant to operate the Plan. Colonial will be responsible for all aspects of the Plan, including (1) the day-to-day management and supervision of the Plan; (2) serving as the City's procurement agent and monitoring any resulting contractual arrangements; (3) negotiating with National Grid as it relates to the implementation of the Plan; and (4) providing routine updates to the Mayor and City Council (id., Att. A at 5-7).

F. Plan Operations

1. Enrollment of Customers

The Plan will begin 40 days after an ESA is executed with a winning supplier (id., Att. C at 6). Upon approval of the ESA by the Mayor and City Council, the City will begin the process of notifying customers of the upcoming start of the Plan, including a direct mailing, newspaper notices, public service announcements, and posting of notices in City Hall (id., Att. A at 9).

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[5] Under a Plan B charter, the Mayor is the chief executive officer of the City and is responsible for overseeing all city departments. The City Council, comprised of eleven councilors, serves as the legislative branch and is responsible for enacting laws, reviewing the annual operating budget, and confirming mayoral appointments (Petition, Att. A at 4-5).

All eligible basic service customers within the City's municipal boundaries will be enrolled in the Plan unless they affirmatively opt out (id., Att. A at 14). Customers may opt out of the Plan at no charge either in advance of the start of the Plan or at anytime after the first day of service (id., Att. A at 10). New customers in the service territory will be enrolled automatically in the Plan unless they choose another supplier or opt out following activation of service (id., Att. A at 9, 14).

2. Participation of G-2 and G-3 Customers

According to the City, competitive suppliers have informed them that they would include a substantial risk premium in their bids if larger commercial and industrial ("C&I") customers are included as part of the municipal aggregation (id. at 7). The City contends that, because of the associated right to opt out of the plan at any time, larger customers could "game" the municipal aggregation, causing the costs associated with this potential load volatility to be shifted to other participating customers. Accordingly, the City proposes to exclude G-2 and G-3 customers from participation in the Plan (id.).

Alternatively, if the universal access provisions of G.L. c. 164, § 134 require G-2 and G-3 customers to be included in the Plan, the City proposes to: (1) require these customers to provide security, such as a bond, guarantee, or letter of credit or other limitation upon the ability of these customers to opt out of the Plan, and/or (2) establish a separate class-specific rate that appropriately allocates and assigns the risk premium for opt outs to larger customers (id. at 7-8). While Marlborough would prefer to use a combination of both alternatives, if only one is used, the City states that the establishment of a separate class-specific rate is

preferable because it is easier to implement, is responsive to market conditions, and is more easily understood by customers (Exh. DTE 1-5).

3. Information Disclosure Requirements

The City requests a waiver from the information disclosure regulations contained in 220 C.M.R. § 11.06 that require competitive suppliers to mail information disclosure labels to their customers on a quarterly basis.[6] As good cause for the waiver, the City states that it can provide this information more effectively and at a lower cost using means other than those specified in the regulation, including press releases, public service announcements on cable television, newsletters, postings at City Hall, televised meetings of the City Council, and postings on the websites of the City and Colonial (Petition at 8-9; Att. C at 7).

G. Funding of the Plan

The City states that it has not incurred any costs associated with development of the Plan, nor will it incur any cost associated with implementation of the Plan. Instead, Colonial has incurred, and will incur, these costs and will receive payment through a $0.001 per kilowatt-hour ("KWH") administrative adder to be included in the Plan's energy charge (id. at 6, 8). Costs of administering all education activities under the Plan including direct mailings, press conferences, television media, newspapers, electronic communications, and public presentations will be funded by Colonial and the competitive supplier (Exh. DTE 3-1).

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[6] The disclosure label provides information regarding a supplier's fuels sources, emission characteristics, and labor characteristics.

H. Rate Setting and Other Costs to Participants

The price(s) to be paid by Plan participants will be set through a competitive bidding and negotiation process and will include Colonial's $0.001 per KWH administrative adder, discussed above (Petition, Att. A at 11-12). Prices, terms, and conditions may differ among customer classes (id., Att. A at 12). Plan participants will receive one bill that incorporates the power supply charge and National Grid's charges (id.).

I. Method for Entering and Terminating Agreements with Other Entities

According to the Plan, the City's process for entering, modifying, enforcing, and terminating all agreements associated with the Plan will comply with the requirements of the City's charter, state and federal laws, and the express provisions of the relevant agreements. In addition, where applicable, the provisions of G.L. c. 30B will be followed (id., Att. A at 11).

J. Rights and Responsibilities of Program Participants

According to the terms of the Plan, all participants will enjoy the consumer protections of the law including the right to question billings or service quality practices (id., Att. A at 15). In addition, participants have the right to opt out of participation in the Plan. Participants are responsible for the payment of billings and for providing access to essential metering and other equipment to carry out utility operations (id.).

K. Termination of the Program

No termination date is contemplated for the Plan. However, the City states that the Plan may be terminated in two ways: (1) upon termination of the ESA without any extension,

renewal, or subsequent supply contract being negotiated; or (2) upon a decision of the City Council and Mayor to dissolve the Plan. Each participating customer will receive 90 days advance notice prior to termination of the Plan. In the event of termination, customers would return to basic service unless they choose an alternate competitive supplier (id., Att. A at 11).

L. Education Component of Plan

1. Introduction

The education component of the Plan includes: (1) a general component, through which information will be provided to consumers via the media, electronic communications, and public presentations; and (2) a direct mail component, including the opt out notification, targeted towards eligible consumers. According to the City, the purpose of the education component of the Plan is to raise awareness and provide consumers with information concerning the opportunities, options, and rights for participation in the Plan (id., Att. P at 1). The City states that the general education component is intended to increase awareness of the direct mail component and provide reinforcement of key information (id.).

2. General Education

The initial launch of the Plan will include a media event designed to create an awareness and understanding of the Plan, featuring representatives from the City, its supplier, and Colonial (id., Att. P at 2). Following this initial launch, media outreach will continue through public service announcements and interviews with local media outlets including cable television stations, newspapers, and internet sources (id., Att. A at 2). Colonial will also

maintain a toll-free telephone number and a website to address consumer questions regarding the Plan (id., Att. A at 2-3).

3. Direct Mail

The opt out notification will be sent via mail to the billing address of each eligible customer receiving basic service, in an envelope marked as containing time sensitive information related to the Plan (id., Att. R). The notification will: (1) describe the Plan; (2) inform consumers of their right to opt out without penalty and choose basic service at any time before or after the first day of service; (3) explain how to opt out; (4) prominently state all Plan charges and compare the price and primary terms of the City's contract to the price and terms of National Grid's basic service; and (5) include a telephone number to obtain such information in Spanish and Portuguese (id., Att. P at 3-4).[7]

The direct mailing will include an opt out reply card with return postage. Consumers will have 30 days from the date of postmark on the direct mailing (or approximately 40 days from the initial launch of the Plan) to return the reply card if they wish to opt out of the Plan (id., Att. P at 4; Exh. DTE 3-24).

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[7] According to the City, Spanish and Portuguese are the predominant languages of those Marlborough residents whose primary language is not English. The Marlborough School Department routinely translates some of its vital communications into these two languages (Exh. DTE 3-13).

II. SUMMARY OF COMMENTS

A. Marlborough and Colonial

Marlborough and Colonial argue that the City has satisfied all statutory and regulatory requirements with respect to municipal aggregation (Marlborough and Colonial Comments at 7). Specifically, the City and Colonial note that Marlborough's City Council has fully authorized the Plan (id., citing Petition at 3; Att. A; Exh. DTE 3-4, att. DTE 3-4(a)). Also, Marlborough and Colonial state that the plan was developed in consultation with DOER (id. at 7-8).

Marlborough and Colonial argue that the Plan contains an adequate description of its (1) operational structure, operations and funding, (2) rate setting and other costs to participants, (3) method of entering and terminating agreements with other entities, (4) rights and responsibilities of program participants, and (5) termination of the program (id. at 8). Marlborough and Colonial contend that the structural and operational aspects of the Plan are substantially comparable to the municipal aggregation approved for Cape Light Compact (id. citing Cape Light Compact, D.T.E. 00-47 (2000); Cape Light Compact, D.T.E. 04-32 (2004)).

Marlborough and Colonial contend that the Plan meets all non-price requirements of G.L. c. 164, § 134 including universal access, reliability, and equitable treatment of all customer classes (id. at 10). With respect to reliability, Marlborough and Colonial contend that the Plan will provide for power supply from a reputable competitive supplier pursuant to an ESA containing appropriate financial assurance provisions (id.).

With respect to universal access, Marlborough and Colonial contend that the City's proposal to exclude G-2 and G-3 customers from the Plan is consistent with G.L. c. 164, § 134 if access is interpreted to mean universal access to competitive alternatives to basic service rather than universal access to the Plan (id. at 12). Given that more than half of Marlborough's current G-2 and G-3 customers are served by competitive supply, Marlborough and Colonial argue that these customers enjoy universal access to competitive alternatives. Accordingly, Marlborough and Colonial urge the Department to approve the City's proposal to exclude G-2 and G-3 customers from the Plan (id. at 12-13).

Alternatively, if G-2 and G-3 customers must be included in the Plan, Marlborough and Colonial argue that the Department should allow the City to establish class-specific rates for these customers or impose appropriate administrative terms and conditions based on class-specific risk factors (id. at 13). Marlborough and Colonial argue that such class-specific differences are consistent with the requirements of G.L. c. 164, § 134 because the requirement to treat all classes of customers equitably does not require the identical treatment of all customer classes (id.). Further, Marlborough and Colonial note that no commenters objected to the establishment of class-specific rates (Marlborough and Colonial Reply Comments at 4).

Finally, Marlborough and Colonial argue that the City's request for a waiver from the provisions of 220 C.M.R. § 11.06 that require competitive suppliers to mail disclosure labels on a quarterly basis is in the public interest. Marlborough and Colonial contend that the City is able to accomplish this disclosure more effectively through news releases, public service

announcements on local access cable television, public representatives, and postings on the Plan's website (Marlborough and Colonial Initial Comments at 9).

B. Attorney General

The Attorney General states that the Department should consider whether the City's and Colonial's organizational structure and expertise will protect the residents of Marlborough. The Attorney General argues that the City and Colonial must ensure the full exchange of information with customers throughout the term of the plan (Attorney General Comments at 3).

With respect to Marlborough's proposal to exclude larger C&I customers from the Plan or, in the alternative, to allow their participation with restrictions (i.e., require a bond, guarantee or letter or credit), the Attorney General contends that this is inconsistent with the requirements of G.L. c. 164, § 134(a) to provide for universal access and equitable treatment of all classes of customers (id.). As an alternative, the Attorney General argues that the City should modify its Plan to include conditions similar to those adopted in NSTAR Electric, D.T.E. 05-84 (2006) that preclude G-2 and G-3 customers who have switched to basic service or competitive supply from returning to the Plan for a period of six months from the effective date of the change, unless the customer is returning to the Plan upon the expiration of a contract with a competitive supplier (id.).

C. National Grid

With respect to Marlborough's proposal to exclude G-2 and G-3 customers from the Plan or set certain requirements for their participation, National Grid argues that the equitable treatment of all classes of customers required by G.L. 164, § 134 does not require that all

customers be treated the same (National Grid Comments at 1). So long as Marlborough treats all members of each rate class similarly, National Grid argues that different requirements for participation depending on rate class is not problematic (id.).

D. WeeInfo

WeeInfo recommends that Marlborough be required to issue supplemental opt out mailings on at least an annual basis or whenever rates or other contract terms change substantially or whenever competitive suppliers change (WeeInfo Comments at 3). With respect to Marlborough's request for a waiver of certain information disclosure requirements, WeeInfo recommends that the waiver be granted if (1) the energy disclosure label is included with all opt out notification mailings, (2) alternative means of disclosure are used on a comprehensive and consistent basis, and (3) such alternative means are documented to the Department on an annual basis (id.).

IV. 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 the load is not served by a municipal lighting plant. Upon approval by its local governing entity, a municipality or group of municipalities may develop such an aggregation plan, in consultation with DOER, providing detailed information to consumers on the process and consequences of aggregation. General Laws c. 164, § 134(a) requires that a municipal aggregation plan 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.

A plan must include: (1) an organizational structure of the plan, its operations, and funding; (2) rate setting and other costs to its participants; (3) the method for entering and terminating agreements with other entities; (4) the rights and responsibilities of program participants; and (5) termination of the program. General Laws c. 164, § 134(a) provides that a municipal aggregation plan must be submitted to the Department for final review and approval.

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). The statute requires municipalities to inform electric consumers of (1) automatic plan enrollment and the right to opt out, and (2) other pertinent information about the plan (id.).

The Department's review of a plan will ensure that it meets the requirements of G.L. c. 164, § 134(a) and any other statutory requirements concerning aggregated service. In addition, the Department will determine whether a plan is consistent with the provisions in the Department's regulations contained in 220 C.M.R. §11.00, et. seq. that apply to competitive suppliers and electricity brokers. Although the Department's regulations exempt municipal aggregators from certain provisions contained therein,[8] the regulations provide no such exemption for the competitive suppliers that are selected to serve the municipal aggregation load.

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8 The Department's regulations at 220 C.M.R. § 11.01 apply to "distribution companies, competitive suppliers and electricity brokers that will participate in the electric industry" in Massachusetts. The definition of electricity broker states that municipal aggregators shall not be considered an electricity broker.

General Laws c. 164, § 134(a) specifically exempts a municipal aggregator from two requirements included in 220 C.M.R. § 11.05. First, a municipal aggregator need not be licensed as an electricity broker by the Department under the provisions of 220 C.M.R. § 11.05(2) in order to proceed with an aggregation plan. As established in G.L. c. 164, § 134(a), a municipal aggregator is allowed to proceed with its plan upon approval by its municipal governing body. Second, a municipal aggregator is not required to obtain customer authorization pursuant to G.L. c. 164, § 1F(8)(a) and 220 C.M.R. § 11.05(4). The opt out provision applicable to municipal aggregators replaces the authorization requirements included in the Department's regulations.

A municipal aggregator is not exempt from the other rules for electric competition.[9] To the extent that a municipal aggregation plan includes provisions that are not consistent with Department's rules, the Department will review these provisions on a case-by-case basis.

V. ANALYSIS AND FINDINGS

A. Introduction

The Department is required to determine that a municipal aggregation plan is consistent with the requirements established in G. L. c. 164, § 134. In addition, the Department must

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[9] The sections of 220 C.M.R. § 11.00 that apply to competitive suppliers and electricity brokers are § 11.05 ("Competitive Supplier and Electricity Broker Requirements"), § 11.06 ("Information Disclosure Requirements"), and § 11.07 ("Complaint and Damage Claim Resolution; Penalties"). In addition, § 11.04(9)(f) ("Distribution Company Terms and Conditions for Competitive Suppliers) requires that each distribution company file, for Department approval, terms and conditions that will govern the relationship between the distribution company and competitive suppliers. These terms and conditions establish, among other things, the process by which data is transmitted between distribution companies and suppliers.

determine that a municipal aggregation plan is consistent with and the Department's rules and regulations.

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

1. Procedural Requirements

General Laws c. 164, § 134 establishes several procedural requirements for a municipal aggregation Plan. First, G.L. c. 164, § 134 requires that a municipality obtain the approval of local governing entities prior to initiating a process to develop an aggregation plan. The City has documented that its Mayor and City Council have properly authorized the development of the Plan (Petition, Atts. E, F; Exhs. DTE 2-2, DTE 2-4). Therefore, the Department concludes that Marlborough has satisfied the statutory requirement regarding government approvals.

Second, G. L. c. 164, § 134 requires a municipality to consult with DOER in developing its municipal aggregation plan. Marlborough met with DOER several times over the course of developing its Plan and DOER provided substantial comments on the Plan and the form ESAs (Petition, Att. N). DOER has confirmed that it has consulted with Marlborough in the development of the Plan (Letter from DOER to the Department, December 6, 2007). Therefore, Department concludes that the City has satisfied the statutory requirement regarding consultation with DOER in developing the Plan.

Finally, G. L. c. 164, § 134 requires that a municipal aggregation plan filing include: (1) the organizational structure of the plan, its operations, and funding; (2) rate setting and other costs to its participants; (3) the method for entering and terminating agreements with

other entities; (4) the rights and responsibilities of plan participants; and (5) termination of the plan. Marlborough's filing includes descriptions of each of these features of the Plan (Petition, Att. A). Accordingly, the Department concludes that Marlborough has satisfied the statutory filing requirements.

2. Substantive Requirements

a. Introduction

Regarding the substance of a municipal aggregation plan, G. L. c. 164, § 134 requires that such plans provide for reliability, universal access, and equitable treatment of all classes of customers. In addition, the statute requires a municipality to inform its electric consumers of their right to opt out of the municipal aggregation plan and to disclose other pertinent information regarding the plan.

b. Reliability

The Department examines reliability both from a physical and a financial perspective. D.T.E. 00-47, at 24. From a physical perspective, provisions in the ESAs commit the power supplier to provide all-requirements power supply in a reliable manner (Petition, Att. B). From a financial perspective, the ESAs contains several provisions that delineate the supplier's responsibilities in the event the supplier does not meet its physical obligations (id.). Accordingly, the Department finds that the Plan satisfies the statutory requirement regarding reliability.

c. Universal Access

General Laws c. 164, § 134 requires a municipal aggregation plan to provide for universal access. The Department has stated that this requirement is satisfied when a municipal aggregation plan is available to all consumers within the municipality. D.T.E. 00-47, at 24; D.T.E. 04-32, at 16. Arguing that these consumers already have significant access to the competitive market and that their ability to opt out could shift costs to other participants, Marlborough proposes to exclude G-2 and G-3 customers from the Plan. However, limiting the availability of the Plan to only certain customers within Marlborough would violate the statutory requirement to provide universal access. Accordingly, we find that the Plan must be made available to Marlborough's G-2 and G-3 customers.

We are cognizant of the fact that Marlborough would like to implement its Plan at the earliest possible date in order to provide benefits to its consumers. Incorporating G-2 and G-3 customers into the Plan will require additional planning and negotiation with competitive suppliers. Therefore, to avoid delaying implementation of the Plan, we will permit Marlborough to phase in participation of these customers. See D.T.E. 00-47, at 25. Such participation must begin no later than one year from the date of implementation of the Plan.

Within six months of the date of this Order, Marlborough must file for Department review a detailed proposal for the phase-in of G-2 and G-3 customers into the Plan, including any specific education requirements for these customer classes. Marlborough currently offers two alternatives for G-2 and G-3 participation. First, Marlborough proposes to require G-2 and G-3 customers to provide security, such as a bond, guarantee, or letter of credit or other

limitation upon the ability of these customers to opt out of the Plan. Second, Marlborough proposes to establish a separate class-specific rate that appropriately allocates and assigns the risk premium for opt outs to larger customers (id. at 7-8). We agree with Marlborough that establishment of a separate class-specific rate is preferable because it is easier to implement and is more easily understood by customers (Exh. DTE 1-5). If Marlborough also seeks to require G-2 and G-3 customers to provide security or otherwise place a limit on the ability of these customers to opt out of the Plan, Marlborough's proposal must clearly describe such limitations and provide adequate justification for their use.

d. Equitable Treatment of all Customer Classes

For its initial competitive solicitation, Marlborough has agreed not to execute an ESA unless the price for residential customers, including Colonial's administrative adder, is lower than National Grid's residential basic service rate (Petition at 3-4; Exh. DTE 2-7). While G.L. c. 164, § 134 is silent as to a price benchmark for review of post standard offer service municipal aggregation plans, Marlborough's benchmark will ensure that residential customers receive savings, at least during the initial term of the Plan. D.T.E. 04-32, at 22. Marlborough has not committed to a similar price benchmark for its small C&I consumers.

General Laws c. 164, § 134 requires that a municipal aggregation plan provide for equitable treatment of all customer classes. Although this requirement does not mean that all customer classes must be treated equally, customer classes that are similarly situated must be treated equitably. In this circumstance, residential and small C&I customers are similarly situated. Currently, both have limited competitive options. For this reason, the Department

has determined that basic service should be procured and priced for residential and small C&I customers in a similar manner. Procurement of Default Service, D.T.E. 02-40-B (2003).

As proposed, the Plan provides more protection to residential consumers than small C&I consumers. Accordingly, in order to ensure that the Plan provides for equitable treatment of all customer classes, the Department directs Marlborough, for the initial competitive solicitation, to employ the same benchmark for small C&I customers as it does for residential customers (i.e., Marlborough should not execute an ESA unless the price for small C&I customers, including Colonial's administrative adder, is lower than National Grid's small C&I basic service rate).

e. Customer Education and Information

Informing and educating consumers about a municipal aggregation plan and the right to opt out of participation is critical, especially in light of the automatic enrollment provisions afforded to these plans. Marlborough has described the manner in which it intends to inform consumers of their right to opt out of the Plan and to provide other pertinent information about the Plan (Petition at Atts. P, R). The education component of Marlborough's Plan includes several means to relate this information to consumers including newspapers, cable television, and a direct mail component including the opt out notification. The education component of Marlborough's plan is similar to the approved education component of Cape Light Compact's municipal aggregation plan (Exh. DTE 2-10). D.T.E. 00-47, at 26. Pending a final review of the form and content of the opt out notice, discussed below, we find that Marlborough has satisfied the statutory requirement regarding consumer education.

Of note, unlike Cape Light Compact's education plan, certain of the form ESAs negotiated with potential suppliers make it the responsibility of the selected supplier to prepare the direct mail materials and to perform the mailing, giving the supplier "discretion as to form and content" of the opt out notice (Petition, Att. B at 6; Exh. DTE 3-11). The City was unable to provide the Department with the specific language of the direct mail materials including the opt out notice and envelope, however, Marlborough stated it would work with the selected supplier to address issues of form and content (Exhs. DTE 3-19; DTE 3-23; DTE 3-24).

General Laws c. 164, § 134 states that it is the "duty of the aggregated entity to fully inform participating ratepayers" that they are being automatically enrolled in the municipal aggregation plan and that they have the right to opt out. Although Marlborough acknowledges it remains responsible for the delivery of the opt out notice, it has elected to fulfil this statutory obligation by shifting it to the competitive supplier (Exh. DTE 3-20). Customers would not expect to receive important information about Marlborough's plan and the right to opt out of the Plan from a competitive supplier. Thus, customers may forgo their statutory right to opt out because the notice might be overlooked.

Regardless of which entity prepares, funds, and physically sends the direct mail materials, the education materials must appear to the consumer as having come from the City including the City seal and letterhead where appropriate. The opt out notices must be sent in clearly marked City envelopes identified as including information about customers' participation in the Plan. Cape Light Compact, D.T.E. 00-47-A, at 14 (2000). The opt out

notice must be designed in such a manner as is reasonably calculated to draw to the attention of each customer the importance of the decision he or she must make. Id. The form and content of the direct mail materials must be reviewed by the Department's consumer division prior to issuance to ensure that they meet these requirements. We, therefore, encourage Marlborough to work with Department's consumer division in drafting the final language of the opt out notice and other direct mail materials.

C. Consistency with the Department's Rules and Regulations

Marlborough has requested a waiver from the Department's information disclosure requirements included in 220 C.M.R. § 11.06, which require competitive suppliers to provide to their customers, on a quarterly basis, an information disclosure label that describes the suppliers' prices, resource portfolios, emissions characteristics, and labor characteristics. As good cause for the waiver, the City states that it can provide this information more effectively and at a lower cost through alternate means.

General Laws c. 164 § 1(F)(6) requires the Department to promulgate uniform information disclosure labeling regulations, applicable to all competitive suppliers of electricity, in order to provide "prospective and existing customers with adequate information by which to readily evaluate power supply options available in the market." Consistent with the statute, the Department's regulations provide for uniform disclosure labels that include information regarding a supplier's price and price variability, customer service, and fuel, emission and labor characteristics. 220 C.M.R. § 11.06(2). The regulations require suppliers

to provide an information disclosure label to each of their existing customers quarterly. 220 C.M.R. § 11.06(4)(c).

For an aggregation plan such as that proposed by Marlborough, the Department has stated that we would normally require the quarterly notification to take place via individual mailings to customers because this is the vehicle by which customers will be informed of their opt out rights. D.T.E. 00-47, at 28. However, in D.T.E. 00-47, at 28, the Department approved a request by Cape Light Compact for a waiver from the information disclosure requirements of 220 C.M.R. § 11.06 because (1) its customers were located in a geographically distinct region; (2) its education plan included many means by which this information would be provided to consumers; and (3) its alternate information disclosure strategy would allow it to provide the required information to its customers as efficiently as quarterly mailings.

Marlborough's proposal to disseminate information regarding its supplier's prices, resource portfolios, emissions characteristics, and labor characteristics includes alternate strategies that are similar to those used by Cape Light Compact including press releases, public service announcements on cable television, newsletters, postings at City Hall, meetings of the City Council, and posting on the websites of the City and Colonial (Petition at 8-9; Att. C at 7). We conclude that this alternate information disclosure strategy will allow Marlborough to provide the required information to its customers as efficiently as quarterly mailings. Accordingly, pursuant to 220 C.M.R. § 11.08, the Department grants Marlborough's competitive supplier an exception from 220 C.M.R. § 11.06(4)(c). In order to ensure that

such alternative means are effective and are used on a comprehensive and consistent basis, Marlborough shall document its information disclosure strategy to the Department on an annual basis. Marlborough's competitive supplier shall be required to adhere to all other applicable provisions of 220 C.M.R. § 11.06.

VI. ORDER

After public hearing, opportunity for comment, review and consideration, it is

ORDERED: That subject to the conditions established above, the municipal aggregation plan filed by the City of Marlborough is APPROVED; and it is

FURTHER ORDERED: That the City of Marlborough shall comply with all other directives contained in this Order.

By Order of the Department,

/s/

Judith F. Judson, Chairman

/s/

James Connelly, Commissioner

/s/

W. Robert Keating, Commissioner

/s/

Soo J. Kim, Commissioner

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.