



# The Commonwealth of Massachusetts

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## DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 17-47

January 23, 2018

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

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**APPEARANCES:**

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FOR: COLONIAL POWER GROUP, INC. as agent for  
CITY OF MARLBOROUGH  
Petitioner

## I. INTRODUCTION AND PROCEDURAL HISTORY

On April 20, 2017, the City of Marlborough (“City” or “Marlborough”), through its agent Colonial Power Group, Inc. (“Colonial”), filed with the Department of Public Utilities (“Department”), a petition for approval of a revised municipal aggregation plan (“Plan”) pursuant to G.L. c. 164, § 134.<sup>1</sup> The City’s initial aggregation plan was approved by the Department in City of Marlborough, D.P.U. 06-102 (2007). The revised Plan includes: (1) a provision for an operational adder to enable Marlborough to fund an energy manager position; (2) an optional renewable energy product; and (3) and an updated education and information plan, and consumer notification form (“opt-out notice”) (Plan at 11, 15; Petition, Atts. E, F (rev.)). Eligible customers will continue to be automatically enrolled in the Program unless they choose to opt out. G.L. c. 164, § 134(a). The Department docketed this matter as D.P.U. 17-47.

On June 8, 2017, the Department issued a Notice of Public Hearing and Request for Comments (“Notice”).<sup>2</sup> On August 25, 2017, the City filed responses to the Department’s first

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<sup>1</sup> Colonial is the agent for Marlborough. Petition at 1.

<sup>2</sup> On April 20, 2017, Colonial filed a petition to intervene. The Department’s Notice did not seek petitions to intervene. In addition, as agent for the petitioner, Colonial need not intervene. For these reasons, the Department takes no action on Colonial’s petition.

set of information requests.<sup>3</sup> Also on August 25, 2017, the City filed a revised opt-out notice (Exh. DPU 1-4, Att.).

## II. SUMMARY OF THE PROPOSED PLAN

The City has retained Colonial as its agent as well as its consultant to assist in the design, implementation, and management of the municipal aggregation program (“Program”) (Plan at 3; Petition at 1, Att. E). The City and Colonial developed the Plan in consultation with the Department of Energy Resources (“DOER”) and the electric distribution company serving Marlborough, Massachusetts Electric Company, d/b/a National Grid (“National Grid”) (Letter from DOER to the Town (April 14, 2017)). Marlborough’s Board of Selectmen and Mayor will be responsible for all Program decisions, including the selection of the competitive supplier(s), execution of contracts, and termination of the Program (Plan at 3, 6, 9).

Under the Plan, the City will issue a request for proposals to solicit bids from competitive suppliers for firm, all-requirements electric power supply (Plan at 2). The City will offer a default opt-out product that meets the required Massachusetts Renewable Portfolio Standard (“RPS”) obligation (Plan at 15). The City intends to offer an optional opt-in product that will include the purchase of renewable energy certificates (“RECs”) above the minimum RPS obligation (Petition at 2; Plan at 15). Customers may elect the optional product by contacting the competitive supplier by telephone (Petition, Att. F (rev.)). For each product,

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<sup>3</sup> On its own motion, the Department moves Marlborough’s responses to Information Requests DPU-1-1 through DPU-1-4 into the evidentiary record in this proceeding.

prices, terms, and conditions for electric supply may differ among customer classes (Plan at 11).

After executing a contract for electric supply, the City, through the competitive supplier, will begin the process of notifying eligible customers about Program initiation and customers' ability to opt out of the Program (Plan at 2, 6-9). The notification process will include direct mailings, newspaper notices, public service announcements, website postings, social media, and the posting of notices in the Marlborough City Hall (Petition, Att. E). Program enrollments will begin no sooner than 30 days after customer receipt of the opt-out notice plus the time required for the return notice to be delivered to the competitive supplier through the mail (i.e., three business days) (Exh. DPU 1-3). Those customers who do not opt out will be automatically enrolled in the Program (Plan at 6-9).

The competitive supplier will bear all expenses relating to the opt-out notice (Plan at 5). 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 document can protect their signature from being exposed (Petition, Att. F).

Program participants will receive one bill from the distribution company, which will include the generation charge and the distribution company's delivery charge (Plan at 11-12). The Program's generation charge(s), which will be paid by Program participants, will include a \$0.001 per kilowatt hour ("kWh") administrative adder that will be used to compensate the City's consultant for the development and implementation of the Program and ongoing services including, but not limited to, the issuance of subsequent requests for proposals for competitive

supply, negotiation of future contracts, and customer service, education, and notification (Plan at 5, 11). In addition, the City intends to implement an operational adder to fund personnel costs associated with an energy manager position, whose duties may include the preparation of energy consumption analyses; goal-setting, monitoring, and reporting; preparation of grant proposals; conducting public information sessions; and identification of energy savings opportunities (Plan at 11; Exh. DPU 1-1). The City Council will periodically set the operational adder and the Town expects that it will initially be set at approximately \$0.00025 per kWh (Exh. DPU 1-1).

### 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 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 concerning aggregated service. Id.

A plan must include: (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. Id. Municipal aggregation plans must be submitted to the Department for final review and approval. Id.

Participation in a municipal aggregation plan is voluntary and a retail electric customer has the right to opt out of plan participation. Id. Municipalities must inform electric customers of: (1) automatic plan enrollment and the right to opt out; and (2) other pertinent information about the plan. Id.

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 at 220 CMR 11.01 et seq. that apply to competitive suppliers and electricity brokers. 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. 220 CMR 11.01 et seq.

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. D.T.E. 06-102, at 16. 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). Id. The opt-out provision

applicable to municipal aggregators replaces the authorization requirements included in the Department's regulations. Id.

A competitive supplier chosen by a municipal aggregator is not exempt from other applicable Department regulations. Id. 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. Id.

#### IV. ANALYSIS AND FINDINGS

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

##### 1. Filing Requirements

General Laws c. 164, § 134, establishes several filing requirements for a municipal aggregation plan. First, a municipality must obtain the authorization of certain local governing entities prior to initiating the process to develop an aggregation plan. G.L. c. 164, § 134(a).<sup>4</sup> In conjunction with its approval of Marlborough's initial municipal aggregation plan, the Department found that the City satisfied the statutory requirement regarding initiation through an affirmative vote of the City Council with the approval of the Mayor. D.P.U. 06-102, at 2. As Marlborough is not seeking to initiate the process of aggregation here, it is not required to demonstrate further governmental authorization pursuant to G.L. c. 164, § 134. Cape Light Compact, D.P.U. 14-69, at 32 (2015).

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<sup>4</sup> 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).

Second, a municipality must consult with DOER in developing its municipal aggregation plan. G.L. c. 164, § 134. DOER submitted a letter to the Department confirming that the Town completed its consultation (Letter from DOER to City (April 14, 2017)).

Therefore, the Department concludes that Marlborough has satisfied the statutory requirement regarding consultation with DOER.

Third, a municipality, after development of a plan in consultation with DOER, must allow for citizen review of the plan. G.L. c. 164, § 134. 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 municipalities to allow citizens sufficient opportunity to provide comments on a proposed plan prior to the municipality filing its plan with the Department. D.P.U. 14-69, at 42; Town of Ashby, D.P.U. 12-94, at 27 (2014).

The City provided documentation demonstrating that municipal officials and its consultant presented the Plan at a public meeting of the City Council on February 6, 2017 (Petition, Att. D). Therefore, the Department concludes that Marlborough has satisfied the statutory requirement regarding citizen review.

Finally, a municipal aggregation plan filed with the Department shall include: (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. After review, the



Department finds that the Plan includes each of these components (Plan at 2-15). Accordingly, the Department concludes that Marlborough has satisfied all statutory filing requirements.

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 electric customers prior to their enrollment of their right to opt out of the program and disclose other pertinent information regarding the plan.<sup>5</sup> Id.

b. Universal Access

The Department has stated 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 Plan, all eligible customers in the City will be transferred to the Program unless the customer previously contracted with a competitive supplier or affirmatively opts out of the Program (Plan at 7, 13). Consistent with Town of Lexington, D.P.U. 16-153, at 17 (2017), new eligible customers moving to the City initially will be placed on basic service and then will receive an opt-out notice informing the customer that they will be automatically enrolled in the Program unless they opt out (Plan at 7). The

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<sup>5</sup> The municipal disclosures must: (1) prominently identify all rates under the 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).

Plan provides that all Program customers may return to basic service at any time (Plan at 3, 8-9, 13). After review, the Department concludes that the City has satisfied the requirements of G.L. c. 164, § 134(a) regarding universal access. Town of Natick, D.P.U. 13-131, at 19-20 (2014); D.P.U. 12-124, at 5-46; D.T.E. 06-102, at 20.

c. Reliability

A municipal aggregation plan must provide for reliability. G.L. c. 164, § 134(a). The contract that the City will enter into with the competitive supplier contains provisions that commit the competitive supplier to provide all-requirements power supply, to make all necessary arrangements for power supply, and to use proper standards of management and operations (Plan at 2-4). In addition, Marlborough will use the services of a consultant that is also a licensed electricity broker (overseen by the City Council and Mayor) to ensure that the City has the technical expertise necessary to operate a municipal aggregation program (Plan at 2-5; Att. E). After review, the Department concludes that the City has satisfied the requirements of G.L. c. 164, § 134(a) regarding reliability. D.P.U. 14-69, at 45; D.P.U. 13-131, at 20; D.P.U. 12-124, at 46.

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 Plan allows for varied pricing, terms and conditions for different customer classes (Plan at 10-13).<sup>6</sup> This feature of the Plan’s design appropriately takes into account 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. After review, the Department finds the City has satisfied the requirements of G.L. c. 164, § 134(a) regarding equitable treatment of all customer classes.

e. Customer Education

General Laws c. 164, § 134(a), provides that it is the “duty of the aggregated entity to fully inform participating ratepayers” that they will be automatically enrolled in the municipal aggregation program and that they have the right to opt out. It is critical that customers, including customers with limited English language proficiency, are informed and educated about a municipal aggregation plan and their right to opt out of the program, especially in light of the automatic enrollment provisions afforded to these plans. D.T.E. 06-102, at 21. To this end, the Department reviews the form and content of the consumer notifications issued by municipal aggregations. 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 notifications and the Town will be required to adhere to any future directives in this regard. Town of Stoughton, D.P.U. 17-43, at 13.

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<sup>6</sup> The customer classes in the Program will be the same as National Grid’s customer classes (Plan at 10-11; Petition, Att. F).

The City intends to inform customers of their right to opt out and provide other pertinent information about the Program, where appropriate, in multiple languages, through newspapers, public and cable television, public meetings, electronic communication, a toll-free customer service line, and a direct mail component including the opt-out notification (Plan at 6-8; Petition, Atts. E, F (rev.)). The proposed opt out notice is consistent with the Department's requirement that opt-out notices be sent in clearly marked City envelopes that state they contain information regarding customers' participation in the Program (Petition, Att. F (rev.)). D.P.U. 13-131, at 26 27. In addition, the proposed opt-out notice:

- (1) prominently identifies all rates under the plan; (2) provides the basic service rate;
- (3) describes how to access the basic service rate; and (4) disclose that a customer may choose the basic service rate without penalty (Petition, Att. F (rev.)). G.L. c. 164, § 134(a).

While the statute is silent regarding customer education after a customer is enrolled in a municipal aggregation program, the Department expects the Town will 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). Here, the Town's education and information plan provides that ongoing education, including information regarding price changes and power supply sources, will be posted on a dedicated Program website linked to the City's website. In addition, information regarding price changes will also be announced in media releases (Petition, Att. E). The City will also maintain a toll-free customer information and support hotline for the duration of the Program (Petition, Att. E).

The Department has determined that Program enrollments shall begin no sooner than 36 days after mailing of the opt-out notice. Such timing will 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). Town of Orange, D.P.U. 17-14, at 11-12 (2007). The City and its consultant must ensure that the competitive supplier adhere to this directive. The City shall file an updated Plan and updated education and information plan which clearly identify that Program enrollments shall begin no sooner than 36 days after mailing of the opt-out notice.<sup>7</sup>

In addition, in order to ensure that no customers who wish to opt out are automatically enrolled in a municipal aggregation program, the Department has determined that municipalities shall identify the actual date by which customers must postmark the opt-out reply card, consistent with the timing described above. D.P.U. 17-14, at 12. Such language must appear in a prominent location and color at the top of the first page of the opt-out notice<sup>8,9</sup>

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<sup>7</sup> Regarding the timing of the steps related to customer notification, the Plan at § 4.1.4 does not clearly identify that Program enrollments shall begin no sooner than 36 days after mailing of the opt-out notice. Further, the education and information plan at § 1.2.1 incorrectly states that eligible consumers will have “30 days from the date of mailing” to return the opt-out postcard instead of “30 days from the date of receipt.”

<sup>8</sup> In the event that the opt-out notices will be printed entirely in black and white, a municipality may include the language in bold black type in the specified location instead of in color. However, if the opt-out notice includes color text, this language must be included in color. D.P.U. 17-14, at 12.

as well as on the opt out reply card, and must inform eligible customers that they will be automatically enrolled in the municipal aggregation program unless they return postmark the opt-out document by the identified date. D.P.U. 17-14, at 12. The City’s proposed opt-out notice and opt-out reply card are consistent with these directives (Petition, Att. F (rev.)).

The Department notes that municipal aggregations may seek competitive supply rates that provide savings for participating electric customers compared to basic service rates. While the Department supports this goal, due to changes in market conditions and differences in contract terms, a municipal aggregation cannot guarantee customers cost savings compared to basic service. D.P.U. 12-124, at 61-66. Municipalities must fully inform customers about the plan, including the benefits and consequences of municipal aggregation. G.L. c. 164, § 134(a). Therefore, the Department has found that municipalities must clearly explain in a plan and all education materials distributed prior to program implementation that customers are not guaranteed cost savings compared to basic service. City of Gloucester, D.P.U. 16-101, at 13 (2017). The revised opt-out notice filed on August 25, 2017, describes savings in one instance without the required qualifying language that such savings cannot be guaranteed (Exh. DPU 1-4, Att.). The Town shall file a further revised opt-out notice that includes the appropriate qualifying language in each instance where savings are described.<sup>10</sup>

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<sup>9</sup> 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.

<sup>10</sup> Such language appears on the first page of the opt-out notice under the heading “Important Information” with the sentence, “The goal of the aggregation is to deliver

Within 14 days of the date of this Order, the City shall file for Department review an updated Plan, updated education and information plan, and further revised opt-out notice consistent with the directives contained herein. After review, and with the required modifications to the Plan, education and information plan, and opt-out notice addressed above, the Department concludes that the City has satisfied the requirements of G.L. c. 164, § 134(a) regarding customer education. Prior to issuance, the City shall submit a copy of the final opt-out notice and reply card it intends to issue to the Department's Consumer Division for review and approval.<sup>11</sup>

B. Waiver from Department Regulations Regarding Information Disclosure

General Laws 164, § 134, requires that a municipal aggregation plan meet any requirements established by law or the Department concerning aggregated service. The Department's regulations at 220 CMR 11.08 permit a waiver from these regulations for good cause shown.

As part of its original plan, Marlborough was granted a waiver, on behalf of itself and its competitive supplier, from the information disclosure requirements contained in 220 CMR 11.06(4)(c). D.P.U. 06-102, at 23. Such waiver remains in effect. Marlborough

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savings over the life of the Program against Eversource's Basic Service Rate" (Exh. DPU 1-4, Att.). At the end of this sentence, the City shall add the qualifier "however, such savings cannot be guaranteed."

<sup>11</sup> 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 docket, in a manner consistent with the Department's filing requirements. 220 CMR 1.02.

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 forth by the Department. See e.g. D.P.U. 12-124, at 61-66 (prohibiting the practice of suspension); D.P.U. 13-131-A at 10 (program pricing for customers that join a municipal aggregation program after initiation); D.P.U. 14-69, at 29-30 (requirements for revising a municipal aggregation plan); Town of Lanesborough, D.P.U. 11-27, at 24 (2011) (notice requirements to local distribution company).

The City shall submit an annual report to the Department by December 1<sup>st</sup> of each year. The annual report shall, at a minimum, provide: (1) a list of the Program's competitive suppliers over the past year; (2) the term of each energy supply agreement; (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 brief description of any renewable energy supply options included in the Program; (6) a detailed discussion (with all relevant documentation) addressing Town and competitive supplier compliance with the alternative information disclosure strategy approved in Section IV.B, above; (8) evidence documenting that the City has fully complied with all provisions contained in its education and information plan (including, at a minimum, copies of notices, minutes of any City Council meetings, and screenshot images of all relevant pages of the websites of the



City and consultant); (9) copies of all communications, including opt-out notices sent to customers in the past year. The City's next annual report shall be filed on or before December 1, 2018.

#### VI. CONCLUSION

Consistent with the discussion above, the Department finds that the Plan satisfies all statutory filing requirements contained in G.L. c. 164, § 134. In addition, with the waiver from the information disclosure requirements contained in 220 CMR 11.06(4)(c) allowed above, and subject to all required modifications to the Plan, education and information plan, and opt-out notice addressed herein, the Department finds that the Plan meets all substantive requirements established by law and the Department concerning aggregated service.

Accordingly, subject to the modifications to the Plan, education and information plan, and opt-out notice required herein, the Department approves Marlborough's revised Plan.

#### VII. ORDER

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

ORDERED: That, subject to the modifications required herein, the revised municipal aggregation plan filed by the City of Marlborough is APPROVED; and it is

FURTHER ORDERED: That, within 14 days of the date of this Order, the City of Marlborough shall file a compliance filing consistent with all directives contained herein; 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/  
Angela M. O'Connor, Chairman

/s/  
Robert E. Hayden, Commissioner

/s/  
Cecile M. Fraser, 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.