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January 13, 2017

Rebecca Tepper, Chief
Office of the Attorney General
Office of Ratepayer Advocacy
One Ashburton Place
Boston, MA 02108

RE: Comments on Proposed Changes to 940 CMR 19.00

Dear Ms. Tepper:

Thank you for inviting public comment on proposed revisions to 940 CMR 19.00. The National Consumer Law Center (NCLC) is a nonprofit organization that, since 1969, has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people. NCLC submits these comments on behalf of our low-income clients.

We appreciate the work that the Office of the Attorney General (AG) has devoted to the issue of consumer protections for customers of competitive electricity suppliers. NCLC frequently hears of problems encountered by low-income consumers who are subjected to high-pressure sales tactics, and who may sign up with an electric supply company without an adequate understanding of the contract terms and the impact on their utility bills. On a broader level, our preliminary analysis indicates that Massachusetts competitive electric supply customers usually end up paying more for electricity than they would have paid for basic service. While not every company is a bad actor, there is a clear need for enhanced, rigorous consumer protections in this area.

The proposed changes would help clarify which practices are unfair or deceptive, giving greater guidance and clarity to consumers, their advocates and market participants. We support the stronger consumer protections and also propose additional safeguards and reporting requirements.

19.03: Definitions

The AG's proposed changes to this section will provide clear guidance to consumers and their advocates. We have two recommendations for additions to the proposed language.

First, we recommend that the proposed definition of "substantial hardship" should be expanded to include "other emergency" in the list of potential hardships (". . . a hardship of such magnitude that it would significantly impair a consumer's ability to transact business at his or her home address, including but not limited to, hospitalization, the need to care for a family member suffering serious illness, a loss of capacity, or other emergency.") The current proposal lists a number of hardships related to health or disability, and we suggest this addition to emphasize that a natural disaster or other type of emergency may qualify as well.

Second, the proposed definition of "stated term" does not address situations in which the term represented to the consumer may not match the term stated in marketing materials or other documents, or when no term is specified in a contract. We ask that the AG consider a default term, possibly six months, in the event that no term is stated or if there is a conflict between the company's materials or representations.

19.04: Misrepresentations Prohibited

The additional protections proposed by the AG in this section are vital to low-income consumers, who are frequently the targets of deceptive practices. At NCLC, we are aware of consumers who have been approached by door-to-door salespeople who use the logo of the distribution utility in a deceptive manner, and telemarketers who do not identify themselves as part of a competitive supply company but instead tell the consumer that they are calling to sign up the consumer for a discount on their Eversource or National Grid bill. This section addresses these misrepresentations, but we suggest further modifications to emphasize the prohibition of these activities more clearly. We recommend that the AG consider incorporating into its proposed regulations the following modifications:

> It is an unfair or deceptive act or practice for a retail seller of electricity to make any material representation to the public or to any consumer, either directly or through any type of marketing or agreement, or through the use of any misleading symbol (including but not limited to the logo or emblem of a distribution company or other entity) or representation, which the seller knows or should know has the capacity or tendency to deceive or mislead a reasonable consumer, or that has the effect of deceiving or misleading a reasonable consumer, in any material respect, including but not limited to representations relating to:
> . . .
> (13) characterizing the retail seller's offer as a discount or other reduced price on the customer's electric bill from the distribution company.

19.05: Disclosures Required

The proposed regulations would improve consumer disclosures by including information to help consumers make informed decisions about electric supply. While disclosures are important, they are not adequate to protect consumers as even the most carefully crafted disclosures may be difficult for consumers to understand. However, a strong disclosure is necessary as a first step.

19.06: Unfair or Deceptive Acts or Practices Unique to Variable Rates and Electricity Supply Agreements Automatically Renewed Into Variable Rates

While strong consumer protections in Connecticut[1] prohibit new variable rate contracts, we recognize that such a change is beyond the scope of this regulatory process. We would support such a change, as consumers frequently do not understand that they have been offered a fixed rate contract which will convert into a variable rate contract after an introductory period expires, often at much higher rates. We support the proposed changes which would require any variable rate to be a "calculable" rate, based upon extrinsic factors that affect the price of electricity.

We support the requirement for a price chart, and have a few questions and suggestions. Will the chart use the supply company's introductory rate as the basis of comparison with distribution company rates? Or would the chart also include the variable rate that a customer will pay once any introductory rate expires? We suggest that both be included in the chart.

We also suggest that the chart contain both the R-1 and R-2 rates charged by the utility, to be compared with the supply company's rate. If only the R-1 rate were used, then low-income customers would not have an accurate comparison. Separate charts containing R-1 or R-2 rates would likely be unworkable. A supply company would not know which rate should apply to the customer, and we would recommend against directing salespeople to ask the household whether they qualify for the R-2 rate due to privacy concerns, the inability of a marketer to accurately screen a household to find out if they should qualify for the R-2 rate, and the likelihood of further customer confusion.

We also propose that the regulations make clear that the price chart and any other disclosures should be provided to the customer before the customer is asked to sign a contract with the supply company. The price chart and disclosures should not be buried in a stack of other papers or presented in a way that discourages the consumer from reading them.

Where a consumer is signing up with a supply company on line, we agree that consumers should be directed to a page where they must click through the disclosures and price chart before signing the agreement. We recommend that this be configured in a way that is reasonably likely to encourage the customer to read the information, and that multiple documents or complex price terms would require more than one click.

19.07: Unfair or Deceptive Acts or Practices Unique to Fixed Rates

As in the previous section, we suggest that fixed price comparisons include basic service at both the R-1 and R-2 rates, to give low-income customers an accurate basis of comparison.

19.08: Unfair or Deceptive Acts or Practice Regarding the Environmental Benefits of Electricity Supply Services

[1] Conn. Gen. Stat. Ann. § 16-245o ("(4) On and after October 1, 2015, no electric supplier shall (A) enter into a contract to charge a residential customer a variable rate for electric generation services; . . .").

The AG's efforts to curtail "greenwashing" are commendable. Since many customers may need disclosures that provide more background information than that specified in part (2), we suggest that the supply company must also disclose that it provides renewable energy by purchasing renewable energy credits (RECs), provide a simple explanation of RECs, and specify whether the RECs originate in Massachusetts or in another state.

Section (3) states that it is an unfair or deceptive practice for a supply company to market its services as green or renewable unless the company retires RECs which are "in excess" of those that it must already purchase under the state Renewable Portfolio Standard. We urge the Office of the Attorney General to provide a threshold which must be met, so that supply companies do not market power as "green" while purchasing a *de minimis* amount of additional RECs. We suggest that the regulations contain a threshold figure, for instance, that supply companies must provide electricity that is 90% or 100% renewable in order to use terms such as "green," "renewable," "clean energy," or similar labels.

19.09: Aggressive Sales Tactics Prohibited

We support the proposed limits on aggressive sales tactics, though we suggest that the prohibition on further solicitation be extended to twelve months, rather than six months.

Also, we urge the Office of the Attorney General to explore the creation of an "opt out" list, where consumers may register if they do not wish to be contacted by any supply companies. Connecticut has adopted this type of protection.[2] Contacting customers who have affirmatively opted out should be designated as an unfair and deceptive trade practice.

19.10: Automatic Renewal

Regarding automatic renewals, the strongest consumer protection would be to prohibit automatic renewals entirely.

In the alternative, one solution may be to allow customers who have been automatically renewed to cancel their contracts at any time without any fees. Additionally, supply companies could be directed to only renew customers automatically into the same type of contract as the contract that is ending.

19.11 through 19.16

We support the additional consumer protections provided in these sections.

<u>Additional Comments</u>

In addition to the strong consumer protections included in the proposed changes to 940 CMR 19.00, we request that the Office of the Attorney General consider the following additional protections.

[2] Conn. Gen. Stat. Ann. § 16-245o.

1. Price Reporting

We understand that the scope of the Attorney General's authority is defined by G.L. c. 164, § 102C(a). However, we believe that detailed and frequent public reporting of the prices charged by supply companies, including rates paid by customers after any introductory rate expires, is an essential consumer protection. If the Office of the Attorney General has concerns about whether it has legal authority to require such reporting, we urge the AG to seek such authority or to work with the Department of Public Utilities to develop a process for requiring reports. Connecticut provides for such reporting through compliance filings with the Public Utilities Regulatory Authority,[3] and data and analysis of the actual prices paid by consumers (beyond the initial offers of the supply companies) are made available to the public.[4] Such information could be reported on a quarterly or twice-annual basis.

2. Reporting on Complaints

We respectfully request that the Office of the Attorney General compile an annual report to provide information to the public about the numbers of consumer complaints it receives that are related to electric supply companies, the types of complaints, and the zip codes of the consumers who file the complaints. Complaint information from distribution utility companies and electric supply companies could be included as well.

3. Fees

While it may be beyond the scope of these proposed regulatory changes, we encourage Massachusetts to restrict the fees that may be charged to consumers who enroll with electric supply companies or who wish to switch back to basic service. Such limits could include a reasonable cap on cancellation and enrollment fees. As mentioned above, Massachusetts could also consider eliminating fees for customers who are automatically enrolled or re-enrolled in a variable rate contract but wish to terminate the contract.[5]

4. Prohibit Forced Arbitration Provisions in Contracts

Massachusetts law regarding consumer disputes with electric supply companies makes arbitration available for consumers.[6] However, the statute does not restrict eventual access to the court system. In order to protect the rights of consumers and avoid undue confusion, electric supply companies should not be allowed to include any mandatory arbitration terms in their contracts[7] with Massachusetts consumers.

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[3] See generally, Conn. Public Utilities Regulatory Authority, Docket No. 06-10-22.

[4] See, e.g., Conn. Office of Consumer Counsel, *OCC Fact Sheet: Electric Supplier Market, August 2015 Through July 2016* (Sept. 1, 2016).

[5] Connecticut has a similar protection. Conn. Gen. Stat. Ann. § 16-245o ("(B) If a residential customer does not have a contract for electric generation services with an electric supplier and is receiving a month-to-month variable rate from such supplier, there shall be no fee for termination or early cancellation.").

[6] G.L. c. 164, § 1F(2)(ii).

[7] For example, Inspire Energy's Terms of Service includes the following language:

"16. Waiver of Jury Trial. TO THE FULLEST EXTENT PERMITTED BY LAW, ANY DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING CLAIMS ARISING IN CONTRACT,

Thank you for the opportunity to comment on these proposed changes to the regulation. If you have any questions about these comments, please feel free to contact Jenifer Bosco at jbosco@nclc.org or John Howat at jhowat@nclc.org.

Sincerely,

Jenifer Bosco
Staff Attorney

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