



# The Commonwealth of Massachusetts

## DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 14-69

May 1, 2015

Petition of Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, acting together as the Cape Light Compact for approval by the Department of Public Utilities of a municipal aggregation plan pursuant to G.L. c. 164, § 134.

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## I. INTRODUCTION

On August 10, 2000, the Department of Public Utilities (“Department”), pursuant to G.L. c. 164, § 134 (“Municipal Aggregation Statute ” or “Section 134”), approved the municipal aggregation plan of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, acting together as the Cape Light Compact (“Compact”). Cape Light Compact, D.T.E. 00-47 (2000). The Compact initially provided electric power supply to approximately 42,000 customers through its Default Service Pilot Project pursuant to the Acts of 1997, c. 164, § 339. Cape Light Compact Pilot Program, D.T.E. 01-63 (2002); Cape Light Compact Pilot Program, D.T.E. 03-61 (2003); Cape Light Compact Pilot Program, D.T.E. 03-99 (2003). In 2004, the Department approved the Compact’s municipal aggregation plan and model electric service agreement (“ESA”) (“2004 Plan”) authorizing the Compact to enroll all eligible customers within its 21 member towns in the Compact’s municipal aggregation program (“Program”). Cape Light Compact, D.T.E. 04-32 (2004).

On August 27, 2013, the Department requested that the Compact review its 2004 Plan and determine whether the Compact should file a revised plan to reflect the Program’s current structure and operations. The Department specifically requested that the Compact remove references to out-of-date terms, such as standard offer service<sup>1</sup> and Commonwealth Electric Company. On April 3, 2014, the Compact filed with the Department a petition seeking approval

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<sup>1</sup> Standard offer service was discontinued in 2005.

of a revised municipal aggregation plan (“Plan” or “2014 Plan”)<sup>2</sup> pursuant to the Municipal Aggregation Statute and the Department’s directives. The Department docketed this matter as D.P.U. 14-69.

On April 23, 2014, the Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed a notice of intervention pursuant to G.L. c. 12, §§ 10, 11E.<sup>3,4</sup> On

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<sup>2</sup> On August 20, 2014, the Compact revised the April 3, 2014 Plan to include several suggested edits discussed during a technical session held on August 6, 2014. Unless otherwise specified, any reference to the Plan herein is to the revised Plan filed on August 20, 2014.

<sup>3</sup> The Department has determined that it need not rule on the appropriateness or scope of the Attorney General’s intervention in this Order. Nevertheless, we take this opportunity to note that G.L. c. 12, § 10 allows the Attorney General, in the public interest, to institute criminal or civil proceedings for violations of law affecting the general welfare of the people before the appropriate commission. G.L. c. 12, § 10 also allows the Attorney General to intervene in a proceeding to seek the recovery of damages for any conspiracy, combination or agreement in restraint of trade or commerce or similar unlawful action. This proceeding was not instituted to investigate violations of law nor has the Attorney General intervened on behalf of a government entity to seek recovery of damages for any conspiracy, combination or agreement in restraint of trade or commerce or similar unlawful action.

Pursuant to G. L. c. 12, § 11E, the Attorney General may intervene in a Department proceeding “on behalf of any group of consumers in connection with any matter involving rates, charges, prices and tariffs of an *electric company*, water company, gas company, generator, transmission company, telephone company and telegraph company doing business in the [C]ommonwealth and subject to the jurisdiction of the [D]epartment of [P]ublic [U]tilities” (emphasis added). A municipality operating a municipal aggregation program, however, is not an *electric company* subject to the jurisdiction of the Department. See G.L. c. 164, § 1(a); Bd. of Gas and Elec. Commissioners of Middleborough v. Department of Public Utilities, 294 N.E.2d 866, 869 (1973); Howard v. City of Chicopee, 299 Mass. 115, 122 (1938). In addition, contrary to the Attorney General’s assertion, a competitive supplier is not an *electric company* whose rates are subject to the jurisdiction of the Department. G.L. c. 164, §§ 1, 1A, 1F, 94.

Further, the Department notes that we have broad discretion to determine intervention in our proceedings and that discretion is not subject to deference to an intervenor’s interpretation of standing before the Department. Tofias v. Energy Facilities Siting Bd.,

May 14, 2014, pursuant to 220 C.M.R. § 1.03(1)(e) and § 1.03(2)(c), the Department permitted NSTAR Electric Company, d/b/a Eversource Energy (“NSTAR”) to intervene as a full party. Also on May 14, 2014, the Department granted the Massachusetts Department of Energy Resources (“DOER”) and the Cape & Islands Self Reliance Corporation limited participant status.

On May 14, 2014, the Department held a public hearing at the Mashpee Public Library. Approximately 40 individuals, including state officials, provided comments at the public hearing. The Department also received written comments from 16 persons.<sup>5</sup>

On June 20, 2014 and July 29, 2014, the Attorney General filed motions to compel the Compact to respond to certain information requests. On June 27, 2014 and August 5, 2014, the Compact filed responses to the motions to compel. On October 15, 2014, the Department denied the Attorney General’s motions to compel, finding that the requested information is outside the scope of this proceeding, is not relevant to the proceeding, or has already been provided by the Compact in response to other information requests. D.P.U. 14-69, Interlocutory Order on the

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435 Mass. 340, 346-347 (2001); Cosby v. Department of Social Services, 32 Mass. App. Ct. 392, 395 (1992).

<sup>4</sup> On brief, the Compact argues that the Attorney General does not have standing to raise the issues addressed on brief (Compact Brief at 25-29).

<sup>5</sup> On May 28, 2014, the Compact filed a motion to strike portions of public comments provided by five individuals. The Department allowed the five individuals to respond to the motion to strike their public comments (Hearing Officer Memorandum regarding Motion to Strike Portions of Public Comments at 2 (May 29, 2014)). Eric Bibler, Lilli-Ann Green, and Christopher Powicki filed responses to the motion to strike. The Department makes no finding as to the probative value of the facts asserted in these public comments, and does not rely on the facts asserted in these comments as evidence upon which we base our decision. Therefore, we find that the Compact’s motion to strike is moot.

Attorney General's Motions to Compel Discovery at 17, 22, 26 (October 15, 2014) ("Interlocutory Order").

On August 6, 2014, the Department held a technical session to discuss suggested revisions to the Compact's April 3, 2014 Plan. On August 20, 2014, the Compact submitted a further revised municipal aggregation plan adopting some of the Department's recommendations.

On October 22, 2014, the Attorney General filed a request for evidentiary hearings ("Request for Evidentiary Hearings") and an affidavit authenticating certain documents that the Attorney General requested be considered as evidence in this proceeding ("Request to Submit Additional Evidence"). On October 27, 2014, the Compact filed its opposition to the Request for Evidentiary Hearings and the Request to Submit Additional Evidence ("Opposition"). On November 3, 2014, the Hearing Officer denied the Request for Evidentiary Hearings and the Request to Submit Additional Evidence (Hearing Officer Rulings on Attorney General's Request for Evidentiary Hearings, and Admissibility of Evidence at 3-6 ("Hearing Officer Rulings")). On November 10, 2014, the Attorney General filed an appeal of the Hearing Officer Rulings ("Appeal"). On November 13, 2014, the Compact filed its response to the Appeal ("Response to Appeal").

On November 12, 2014, the Attorney General filed an initial brief. On November 19, 2014, the Compact filed its initial brief and a motion to strike portions of the Attorney General's initial brief that are based on evidence that the Department previously ruled to be outside the scope of the proceeding ("Motion to Strike"). On November 24, 2014, the Attorney General filed a reply brief and opposition to the Motion to Strike. On



December 1, 2014, the Compact filed its reply brief and reply to the Attorney General's opposition to the Motion to Strike. The evidentiary record contains 103 responses to information requests, including all supplemental responses (Hearing Officer Rulings at 6).

## II. OUTSTANDING MOTIONS AND APPEAL

### A. Introduction

There are a few outstanding procedural matters to address. The Attorney General filed an Appeal of the Hearing Officer Rulings which denied the Attorney General's Request for Evidentiary Hearings and Request to Submit Additional Evidence. The Compact also filed a Motion to Strike portions of the Attorney General's initial and reply briefs that rely on evidence that the Hearing Officer Rulings determined is outside the scope of this proceeding.

### B. Appeal of the Hearing Officer Ruling Denying the Attorney General's Request for Evidentiary Hearings

#### 1. Introduction

The Attorney General requested evidentiary hearings on three specific issues: (1) whether the Plan provides for equitable treatment of customers, specifically, in regards to municipal customers<sup>6</sup> who are not placed on aggregation rates; (2) whether the Plan provides for an equitable distribution of the costs and benefits, specifically whether municipal customers pay the Operational Adder<sup>7</sup> and whether specific renewable energy projects supported by the Compact disproportionately benefit municipal customers; and (3) whether the Compact's

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<sup>6</sup> Municipal customers include the electric accounts of cities, towns, counties, and other public entities (e.g., Woods Hole Library) (see Exh. DPU-1-6). Non-municipal customers include private residences and businesses.

<sup>7</sup> The Operational Adder is the per kilowatt hour ("kWh") charge paid by all Program participants to fund the administrative and operational costs of the Program (Plan at 15).

Operational Adder is an improper tax or a valid fee (Request for Evidentiary Hearings at 1-2, 7; Appeal at 2). The Hearing Officer found that these issues are outside the scope of this proceeding (Hearing Officer Rulings at 3).

2. Positions of the Parties

a. Attorney General

The Attorney General argues that the Department should have allowed a hearing on the issue of whether the Plan provides for equitable treatment of municipal and non-municipal customers. The Attorney General contends that consistent with 220 C.M.R. § 11.02, a municipal aggregator, such as the Compact, may only negotiate an ESA through a municipal aggregation program (Appeal at 5). Specifically, the Attorney General argues that a customer cannot opt out of a municipal aggregation program and then subsequently ask a municipal aggregator to negotiate an ESA on behalf of that customer outside of the municipal aggregation program (Appeal at 5 n.2). The Attorney General, therefore, contends that Compact's negotiation of ESAs on behalf of municipal customers must be reviewed as part of the Program (Appeal at 4-6). In the alternative, the Attorney General argues that even if the Compact can act as an agent for municipal customers who have opted out of the Program, the issue of whether the Compact may act as an unlicensed electricity broker<sup>8</sup> is within the scope of this proceeding because the Plan allows the Compact to act as an electricity broker (Appeal at 6-7).

The Attorney General also contends that the Hearing Officer Ruling should be reversed because the Hearing Officer improperly relied on an Interlocutory Order in denying evidentiary hearings on whether the Plan provides for an equitable distribution of the costs and benefits and

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<sup>8</sup> The Compact is not currently licensed to act as an electricity broker in Massachusetts.

whether the Compact's Operational Adder is an improper tax or a valid fee. The Attorney General claims the Interlocutory Order upon which the Hearing Officer based his Ruling is erroneous as a matter of law (Appeal at 8-15). Specifically, with regard to whether the Plan provides for an equitable distribution of the costs and benefits, the Attorney General argues that the Department is required to review a municipal aggregation's rates and fees to ensure that the costs and benefits of the Program are equitably distributed across and within customer classes (Appeal at 8-9).

The Attorney General concedes that the Department has already determined that issues concerning whether the Operational Adder is an improper tax are outside the scope of review of a municipal aggregation plan, but she asserts that the Department's interpretation of Section 134 is erroneous (Appeal at 11). The Attorney General argues that the Department's construction of Section 134 effectively omits the requirement that a municipal aggregation plan meet any requirement established "by law" concerning aggregated service (Appeal at 11). Since the Legislature did not say that a municipal aggregation plan must meet any requirements "established by chapters 25 and 164," the Attorney General argues that the Legislature intended that the Department determine whether a municipal aggregation plan complies with any law that is relevant to the legality of a municipal aggregation program, including the legality of its charges (Appeal at 12).

The Attorney General also argues that the Department's interpretation of Section 134 will lead to illogical results (Appeal at 12-13). Specifically, the Attorney General contends that it does not make sense for the Department to approve a plan as complying with Section 134 if the municipality may violate other laws of the Commonwealth (Appeal at 12). The Attorney

General asserts that since customers are enrolled within 30 days after the aggregation is fully operational, individuals do not have a reasonable amount of time to challenge the validity of specific actions by a municipal aggregation (Appeal at 12). The Attorney General, instead, argues that the Legislature intended that the Department determine whether a municipal aggregation program will comply with all applicable laws (Appeal at 12-13).

Finally, the Attorney General asserts that the Interlocutory Order does not satisfy the principle of reasoned consistency because the Department previously held that the review of a municipal aggregation plan includes whether the plan complies with judicial determinations (Appeal at 13-14, citing D.T.E. 00-47, at 6). The Attorney General claims that in D.T.E. 00-47, the Department held a separate adjudicatory proceeding to determine whether the Compact may include its opt-out notices in the electric distribution company's customer bills in violation of the distribution company's property rights under U.S. Constitution (Appeal at 14). The Attorney General claims that this proceeding is indistinguishable from D.T.E. 00-47 because in this proceeding the Attorney General asks the Department to determine whether the Compact's Operational Adder is a tax or fee under Emerson College v. City of Boston, 391 Mass. 415 (1984) (Appeal at 14).<sup>9</sup>

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<sup>9</sup> In Emerson College, the Supreme Judicial Court developed a three-factor analysis to distinguish fees from taxes: (1) whether charges are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) whether charges are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and (3) the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. 391 Mass. at 424-425.

b. Cape Light Compact

The Compact contends that the Appeal should be denied and the Hearing Officer Ruling affirmed (Response to Appeal at 1). The Compact argues that the Attorney General has raised the same arguments regarding the scope of municipal aggregation proceedings on numerous occasions and each time the Department has declined to adopt the Attorney General's interpretation of the Municipal Aggregation Statute (Response to Appeal at 1, citing D.P.U. 14-69, Interlocutory Order; City of Lowell, D.P.U. 12-124 (2013)). The Compact asserts that the Attorney General has failed to assert any new legal basis that would lead to a different result (Response to Appeal at 1).

The Compact also contends that the Attorney General's argument that ESAs for municipal customers must be reviewed under Section 134 is without merit (Response to Appeal at 2). According to the Compact, the Attorney General improperly categorizes the Compact solely as a municipal aggregator (Response to Appeal at 2). The Compact explains that it is organized and operates under an inter-governmental agreement pursuant to G.L. c. 40, § 4A, which allows municipalities to contract with other municipalities to jointly perform activities that any of the contracting municipalities are authorized by law to perform (Response to Appeal at 2). The Compact contends that its authority to negotiate ESAs with competitive suppliers on behalf of municipal customers is properly authorized by its inter-governmental agreement and is beyond the scope of this proceeding (Response to Appeal at 2). In regards to other issues raised by the Attorney General, the Compact argues that these issues are "red herrings" that have been thoroughly briefed and rejected in previous rulings in this and other municipal aggregation dockets (Response to Appeal at 2).

### 3. Standard of Review

The Department has held that a Hearing Officer<sup>10</sup> has the authority to conduct a proceeding in an efficient manner and to make decisions regarding procedural matters that may arise during the course of the proceeding. 220 C.M.R. § 1.06(6)(a); Bay State Gas Company, D.T.E. 05-27, Interlocutory Order at 5-6 (2005); see also 435 Mass. 340, 349-50. Where there is no evidence that the Hearing Officer abused his or her discretion in ruling on a pleading, motion, petition, or request, the Hearing Officer's decision must be affirmed. National Grid/KeySpan Merger, D.P.U. 07-30, at 40-41 (2010); D.T.E. 05-27, Interlocutory Order at 6; The Berkshire Gas Company, D.T.E. 01-56, at 6-7 (2002).

### 4. Analysis and Findings

The Attorney General seeks evidentiary hearings on three issues that the Hearing Officer determined were outside the scope of proceeding: (1) whether the Plan provides for equitable treatment of customers, specifically, in regards to municipal customers who are not placed on aggregation rates; (2) whether the Plan provides for an equitable distribution of the costs and benefits; and (3) whether the Compact's Operational Adder is an improper tax or a valid fee (Request for Evidentiary Hearings at 1-2, 7; Appeal at 2).

First, the Attorney General seeks to determine whether the Plan treats municipal customers (e.g., municipal buildings, schools, courts) differently than other aggregation customers that participate in the Program (e.g., private residences and businesses). The

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<sup>10</sup> A Hearing Officer is formally assigned by the Commission to hear, examine, and investigate matters before the Department. G.L. c. 25, § 4. As part of this delegated authority, the Hearing Officer is authorized to make all rulings during the course of a proceeding, including rulings on the admissibility of evidence and any other procedural matters. 220 C.M.R. §1.06(6)(a), (d).

municipal customers that the Attorney General references have opted out of the Program and the Compact states that it will procure electricity to serve these municipal customers through a separate request for proposals (“RFP”) process, and therefore not as part of the Program (Plan at 13; Exhs. DPU-1-6, DPU-2-5). Accordingly, the Hearing Officer appropriately determined that issues regarding the rates of electric consumers that have opted out of the Program are outside the scope of this proceeding.

The Attorney General argues, however, that the Compact, as a municipal aggregator, may not negotiate ESAs on behalf of its member municipalities outside of the Program because the Department’s electric broker regulations, 220 C.M.R. § 11.02,<sup>11</sup> prohibit municipal aggregations from acting as electric brokers and negotiating ESAs on behalf of specific municipal electric customers outside of the municipal aggregation (see Appeal at 4). This interpretation represents a fundamental misunderstanding of municipal aggregation and the requirements for electricity brokers, and would contravene the Restructuring Act.<sup>12</sup> Municipalities, like any other customer, may opt out of a municipal aggregation program and procure energy, either individually or with other customers, in the competitive electric supply market outside of a municipal aggregation

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<sup>11</sup> 220 C.M.R. § 11.02 provides, in relevant part, that for the purpose of 220 C.M.R. §§ 11.00 et seq., an electricity broker means an entity, including but not limited to an aggregator, that facilitates or otherwise arranges for the purchase and sale of electricity and related services to retail customers, but does not sell electricity. The Department’s regulations further provide that public aggregators (i.e., a municipality or group of municipalities that brokers the purchase and sale of electricity pursuant to G.L. c. 164, § 134) shall not be considered electricity brokers for the purpose of 220 C.M.R. §§ 11.00 et seq.

<sup>12</sup> Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protections Therein, St. 1997, c. 164 (“Restructuring Act”).

program.<sup>13</sup> G.L. c. 164, §§ 1A, 134; see also G.L. c. 40, § 4A. Further, contrary to the Attorney General's assertions, the Compact does not act solely as a municipal aggregator.<sup>14</sup> The Compact is formed by an inter-governmental agreement<sup>15</sup> pursuant to G.L. c. 40, § 4A<sup>16</sup> and engages in many activities including, but not limited to, a municipal aggregation program, energy efficiency programs, and joint municipal energy procurement (see D.T.E. 04-32, at 1 n.1; Exh. DPU-1-1).<sup>17</sup> Section 134(a) applies only to a municipal aggregation plan and is not the applicable law governing the Compact's authority to negotiate ESAs to serve municipal electric loads outside of

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<sup>13</sup> The Department notes that, under certain circumstances, a municipality may determine that it is prudent and in the best interest of taxpayers to have certain municipal accounts opt out of a municipal aggregation program and directly procure energy supply for these accounts from a competitive supplier.

<sup>14</sup> The Department also notes that contrary to the Attorney General's assertions in her Appeal at 7 n.3, the Department specifically asked the Compact to either delete references in the Plan to the negotiation of ESAs on behalf of municipal customers that opted out of the Program or revise the Plan to move this information to a separate subheading entitled "Programs of the Compact" (see Hearing Officer Memorandum Regarding August 6, 2014 Technical Session, Att. at 1 (August 7, 2014)).

<sup>15</sup> The Compact is governed by a board composed of representatives from each member municipality, selected by their respective board of selectmen or town council (Exhs. DPU-1-1; DPU-1-5; DPU-2-4). The representatives act on behalf of their respective municipality and are responsible for the general management and supervision of the business and affairs of the Compact (Exhs. DPU-1-1; DPU-1-5). The board also includes representatives from Barnstable and Dukes Counties (Exhs. DPU-1-1; DPU-1-5; DPU-2-3). Pursuant to Section 134, individual municipalities or municipalities acting together may implement municipal aggregation, energy efficiency, and renewable energy programs.

<sup>16</sup> The Department does not have general regulatory authority over municipalities or entities formed under G.L. c. 40, § 4A.

<sup>17</sup> The Department notes that the Attorney General inconsistently argues that the Compact is a separate entity requiring an electric broker license but also argues that the Compact is only an agreement between municipalities (compare Request for Evidentiary Hearings at 5-6 and Attorney General's Second Motion to Compel at 16-17).



the Program. Therefore, the Compact's negotiation of these ESAs and the applicability of the electric broker licensure regulations to these ESAs are not subject to the Department's review of a municipal aggregation plan under G.L. c. 164, § 134(a).<sup>18</sup>

Furthermore, the Attorney General argues that the Department should allow a hearing on whether the Plan provides for an equitable distribution of costs and benefits and whether the Compact's Operational Adder is an illegal tax. The Department notes that the Attorney General's arguments on these issues are essentially the same arguments set forth in her motions to compel and the same arguments that the Attorney General has asserted in 36 other proceedings, which the Department has rejected.<sup>19</sup> See, e.g., City of Lowell, D.P.U. 14-100, at 9 n.6 (2015); D.P.U. 14-69, Attorney General's Second Motion to Compel at 6-15 (July 29, 2014); Attorney General's Motion to Compel at 7-30 (June 20, 2014); Town of Barre, D.P.U. 14-10, Attorney General's Motion to Compel at 7-19 (May 30, 2014). Presenting the same argument that the Department has previously ruled on is, in effect, requesting reconsideration of the prior Department decision. Aquarion Water Company of Massachusetts, D.P.U. 11-55, at 8 n.8 (2011). Under the Department's well-settled standard, a motion for reconsideration should not attempt to reargue issues considered and previously decided. See,

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<sup>18</sup> Whether Department regulations require the Compact to obtain an electric broker license to negotiate ESAs for municipal customers that are not participating in the Program is outside the scope of this proceeding.

<sup>19</sup> Specifically, the Attorney General argues that the Department should expand its standard of review regarding equitable treatment of customers to include an analysis of actual rates and costs, and determine whether an adder charged by a governmental entity is a fee or tax under the Emerson College test. The Department has previously found that these issues are outside the scope of this proceeding. D.P.U. 14-69, Interlocutory Order at 13-17, 20-22; see also D.P.U. 14-100, at 9 n.6, 15.

e.g., Commonwealth Electric Company, D.P.U. 92-3C-1A at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Boston Edison Company, D.P.U. 1350-A at 2-4 (1983). Here, the Attorney General attempts to merely reargue an issue, previously decided by the Department, and presents no new argument. The Department has held that it is insufficient to continuously raise the same issue for every case with no new argument. D.P.U. 11-55, at 8 n.8. The Attorney General's persistence on these topics despite Department rulings finding them beyond the scope of municipal aggregation proceedings results in increased administrative and legal costs, and wastes resources. D.P.U. 14-100, at 9 n.6.

Regarding the Attorney General's equitable distribution of Program costs arguments, the Department's determination of whether a plan provides for equitable treatment of customer classes ensures that similarly-situated customers are treated equitably. D.P.U. 14-69, Interlocutory Order at 19-20; D.P.U. 14-100, at 14-15; D.P.U. 12-124, at 47; City of Marlborough, D.T.E. 06-102, at 20 (2006). The Department reviews a proposed municipal aggregation plan to ensure that if a municipality plans to offer varied pricing among different customer classes, the variance accounts for disparate characteristics of the customer classes. D.P.U. 14-69, Interlocutory Order at 20; see also Town of Natick, D.P.U. 13-131, at 22-25 (2014); D.P.U. 12-124, at 47; D.T.E. 06-102, at 20. Since the Department reviews a municipal aggregation plan prior to implementation (i.e., prior to the establishment of rates and fees), the Department does not (and cannot) review a municipal aggregation's actual rates or executed ESAs<sup>20</sup> as part of our review under Section 134. D.P.U. 14-69, Interlocutory Order at 21;

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<sup>20</sup> The Legislature amended the Uniform Procurement Act (G.L. c. 30B, § 1) to exempt municipal aggregations from filing their contracts with confidential rate information with the Department. St. 2008, c. 445, § 2. Rather, the Uniform Procurement Act provides

D.P.U. 12-124, at 27-29, 47. Contrary to the Attorney General's assertions, the availability of actual rate information in the case of a revised municipal aggregation plan does not alter the Department's authority or standard of review under Section 134. In addition, a municipal aggregation's fees, such as the Compact's Operational Adder, are determined by municipal officials, who are not required to design rates to recover costs equally from each customer class.

D.P.U. 14-69, Interlocutory Order at 21; see D.P.U. 12-124, at 27-29. Further, the Department notes that the Compact plans to charge the same Operational Adder to all customer classes, including municipal customers participating in the Program (Exh. DPU-1-20).<sup>21</sup> The Department finds that the issues raised by the Attorney General regarding distribution of Program costs do not raise a question of equitable treatment under the Department's well-established standard of review. D.P.U. 14-100, at 14. Therefore, the Department finds that the Hearing Officer appropriately found that the issue of whether the Compact equally distributes costs among customers is outside the scope of this proceeding. D.P.U. 14-100, at 8, 14-15.

Similarly, the Department finds that the Hearing Officer did not abuse his discretion in determining that issues regarding whether the benefits of a municipal aggregation program are equitably distributed among customer classes<sup>22</sup> are outside the scope of the Department's

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that the Office of the Inspector General may request this type of confidential rate information from a municipal aggregation. G.L. c. 30B, § 1(33).

<sup>21</sup> The Attorney General specifically requested an evidentiary hearing to determine if municipal customers are charged the Operational Adder (Attorney General Request for Evidentiary Hearings at 8). As discussed above, municipal customers have opted out of the Program and therefore, are not treated as customers of the municipal aggregation program.

<sup>22</sup> The Department notes that the Attorney General inconsistently argues that the benefits associated with supporting Cape and Vineyard Electric Cooperative's development of

Section 134 review. D.P.U. 14-100, at 8, 14-15. Under our well-established standard of review of a municipal aggregation plan regarding equitable treatment, we must ensure that municipalities plan to charge similarly-situated municipal aggregation customers the same rates and that all customers will be afforded similar consumer protections. D.T.E. 06-102, at 20. The Attorney General argues that the Department must determine whether the Compact's support of specific renewable energy projects benefit every Program customer equitably. This argument is without legal foundation as Section 134 does not include such a review. The Attorney General focuses on a single type of expenditure and conflates the plain language of Section 134 in an attempt to expand the Department's review of the Plan into a review of the appropriateness of the Compact's support of specific renewable energy projects. Furthermore, the benefits of participating in a municipal aggregation program, such as savings, rate stability, and composition of renewable energy, vary from participant to participant; individual participants must assess the benefits of remaining in a municipal aggregation program or opting out and returning to basic service.<sup>23</sup> The Department does not supplant a participant's determination of the value of remaining in a municipal aggregation program with our own determination.

Finally, the Department has already found that the issue of whether the Compact's actual Operational Adder operates as an illegal tax is outside the scope of the Department's review of a

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renewable energy projects principally accrue to the Compact's municipal customers, but also argues that the benefits accrue to all members of society (compare Attorney General Brief at 15 and Attorney General Brief at 25-26).

<sup>23</sup> The Attorney General does not assert that the Department must evaluate the benefits of receiving power supply through the aggregation under Section 134(a) but rather the Attorney General focuses solely on benefits of other Compact activities (i.e., the development of renewable energy resources).

municipal aggregation plan under G.L. c. 164, § 134(a). D.P.U. 14-100, at 9 n.6; D.P.U. 14-69, Interlocutory Order at 13-17; D.P.U. 14-10, Interlocutory Order at 12-13. The Legislature specifically provided that the Department determines whether a plan meets any requirements established by law or the Department concerning aggregated service. G.L. c. 164, § 134(a). Accordingly, the Department determines whether a municipal aggregation plan is consistent with the requirements of law relating to the procurement of electric supply and energy services for aggregated retail customers in competitive markets. D.P.U. 14-69, Interlocutory Order at 14; D.P.U. 14-10, Interlocutory Order at 11. These requirements include not just the requirements set forth in Section 134 but also applicable provisions of law regarding aggregators in general, and the procurement of energy in the competitive supply market.<sup>24</sup> See D.T.E. 00-47, at 7-8, 26-31 (finding that a municipal aggregation plan, unless specifically exempt, must comply with the rules for electric competition); D.P.U. 14-10, Interlocutory Order at 11; D.P.U. 12-124, at 23, 46-50; Town of Lancaster, D.P.U. 12-39, at 21-24 (2012); Town of Lanesborough, D.P.U. 11-27, at 21-24 (2011); Town of Ashland, D.P.U. 11-28, at 20-22 (2011); Town of Lunenburg, D.P.U. 11-32, at 20-22 (2011); D.T.E. 06-102, at 23-25; D.T.E. 04-32, at 17-18. For example, a municipal aggregation plan must comply with the applicable requirements set forth in

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<sup>24</sup> Contrary to the Attorney General's assertion, the Department's standard of review is consistent with the Department's findings in the first Compact municipal aggregation proceeding, D.T.E. 00-47. The Attorney General seems to suggest that all judicial determinations are laws concerning aggregated service. We do not agree. While all judicial determinations are a form of law, not all judicial determinations concern aggregated service. The issue of whether a municipality's actual fees constitute an illegal tax does not concern aggregated service but rather concerns municipal finance law. In contrast, the issue in D.T.E. 00-47 was whether the Compact could fulfill its obligation under Section 134 to mail opt-out notices by forcing a distribution company, regulated by the Department, to include these notices in the distribution company's bill envelopes. See D.T.E. 00-47-A at 3.

G.L. c. 164, § 1F,<sup>25</sup> such as information disclosure requirements, and the renewable energy portfolio standards set forth in G.L. c. 25A, § 11E.

The Attorney General, however, proposes that the Department expand its standard of review of a plan to ensure that a municipal aggregation program and its rates comply with all substantive bodies of law (Appeal at 12; Request for Evidentiary Hearings at 13). The Attorney General's proposed standard of review essentially interprets the phrase "concerning aggregated service" out of the statute in violation of the canons of statutory construction. See Bolster v. Comm'r of Corps. and Taxation, 319 Mass. 81, 84-85 (1946).<sup>26</sup> Section 134 states that a plan must meet any requirement established by law "concerning aggregated service,"<sup>27</sup> limiting the Department's review of a plan to a set of laws that relate to the provision of energy for aggregated retail customers, which is within the Department's general administrative expertise. D.P.U. 14-10, Interlocutory Order at 10-12. Therefore, for the reasons discussed above, the

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<sup>25</sup> Contrary to the Attorney General's assertion, the Department has never stated that the review of a municipal aggregation plan includes whether the municipality complies with the electric broker licensing requirements of G.L. c. 164, § 1F (see Attorney General Appeal at 6). Municipal aggregations are specifically exempt from the licensing requirements, and therefore, this requirement is not applicable to the Department's review of a municipal aggregation plan. See 220 C.M.R. §§ 11.02; 11.05.

<sup>26</sup> The Supreme Judicial Court has stated that when interpreting a statute, none of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature. Bolster, 319 Mass. at 84-85; see also International Org. of Masters, Mates and Pilots, Atlantic and Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha's Vineyard and Nantucket S.S. Authority, 392 Mass. 811, 813 (1984).

<sup>27</sup> The Department notes that contrary to the Attorney General's assertions, there are multiple types of aggregations and the laws concerning aggregated service are not limited to municipal aggregation. D.P.U. 14-10, Interlocutory Order at 10; see also G.L. c. 164, §§ 1, 134, 135, 136.

Department finds that the Attorney General's proposed standard of review is not a reasonable interpretation of the statute and we do not adopt it here.

5. Conclusion

For the reasons discussed above, the Department finds that the Hearing Officer did not abuse his discretion by denying the Attorney General's request for evidentiary hearings.

Accordingly, the Hearing Officer Ruling is affirmed and the Attorney General's Appeal is denied.

C. Appeal of the Hearing Officer Ruling Denying the Attorney General's Request to Submit Additional Evidence

1. Introduction

The Attorney General, after the close of discovery, sought to introduce into evidence eight sets of documents which are labeled for identification purposes as AG KC-1 through AG KC-8. The documents can be generally categorized as: (1) the Compact's operating budgets for fiscal years 2010 through 2015 (Document AG KC-1); (2) the Compact's responses to Information Requests AG 1-7, AG 1-8, AG 1-10, and AG 1-15, which were provided to the Attorney General outside of this proceeding (Document AG KC-2);<sup>28</sup> (3) information regarding the Cape and Vineyard Electric Cooperative ("CVEC"), an entity formed under

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<sup>28</sup> Although the Compact objected to filing responses to Information Requests AG 1-7, AG 1-8, AG 1-10, and AG 1-15, it provided the information requested in these Information Requests to the Attorney General outside of the proceeding. The Compact explains that it provided the Attorney General this information regarding the Compact's operations as a courtesy to the Attorney General (see Opposition at 7; Exh. AG KC-2, at 1). The Compact maintains that the requested information is outside the scope of the Department's review in this proceeding (see Opposition at 7; Exh. AG KC-2, at 1; Preface to Compact's responses to Information Requests AG 1-1 through AG 1-21 (June 13, 2014)).

G.L. c. 164, § 136, that develops renewable energy projects (Documents AG KC-3 through AG KC-7); and (4) NSTAR Electric Company's default service rates (i.e., standard offer and basic service rates) from 1998 through 2014 (Document AG KC-8) (Affidavit at 1-3). The Hearing Officer found that these documents are outside the scope of this proceeding and therefore did not admit them into evidence (Hearing Officer Rulings at 5).

2. Position of the Parties

a. Attorney General

The Attorney General argues that the Hearing Officer erred by excluding relevant evidence from the record (Appeal at 15). The Attorney General contends that the documents marked AG KC-1 through AG KC-7 contain the Compact's funding amounts, legal charges, and rates and information regarding CVEC, which is relevant to whether the Plan provides for equitable treatment of all classes of customers and whether the Operational Adder is a tax or a fee (Appeal at 15-16). Specifically, the Attorney General argues that the information demonstrates benefits provided by the Compact giving money to CVEC (Appeal at 16). The Attorney General argues that the document marked AG KC-8 provides historic basic service rates of NSTAR Electric Company,<sup>29</sup> which is a counterpoint to the historic rates and adders charged by the Compact (Appeal at 16).

b. Compact

The Compact asserts that the Attorney General has failed to provide any legal basis for the introduction of the documents marked AG KC-1 through AG KC-8 (Response to Appeal

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<sup>29</sup> The Department notes that basic service rates did not take effect until 2005. Prior to 2005, electric distribution companies provided standard offer service. The Attorney General, however, classifies both of these rate types as basic service.



at 1-2; Opposition at 7). Specifically, the Compact argues that the Department has already found that the issues raised by the Attorney General are outside the scope of this proceeding and the Department specifically determined that the documents marked AG KC-2 are outside the scope of this proceeding (Response to Appeal at 1; Opposition at 7, citing Interlocutory Order).

3. Analysis and Findings<sup>30</sup>

The documents marked AG KC-1, AG KC-2, and AG KC-7 contain the same information the Attorney General requested in Information Requests AG 1-2, AG 1-7, AG 1-8, AG 1-10, AG 1-14 and AG 1-15. The Department has already found that this information is not relevant and is outside the scope of this proceeding (Interlocutory Order at 17). Accordingly, the Hearing Officer appropriately enforced the Department's rulings and excluded these documents from evidence.

The documents marked AG KC-3 through AG KC-6 contain information relating to the operations of CVEC, an entity formed under G.L. c. 164, § 136, which is not a party to this proceeding. The Department finds that the Attorney General's relevancy arguments are without merit. The Attorney General raises the same arguments set forth in her motions to compel, request for evidentiary hearings, Appeal of the Request for Evidentiary Hearings, and in 36 other municipal aggregation proceedings, which have been rejected by the Department. See, e.g., D.P.U. 14-100, at 9 n.6; D.P.U. 14-69, Interlocutory Order at 13-17, 19-22; Attorney General's Second Motion to Compel at 6-15; Attorney General's Motion to Compel at 7-30; D.P.U. 14-10, Attorney General's Motion to Compel at 7-19. As discussed above and in the Interlocutory Order, the issues regarding the costs and benefits associated with specific uses of the Operational

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<sup>30</sup> See Section II.B.3, above, for the standard of review applicable to hearing officer rulings.

Adder (e.g., supporting CVEC's renewable energy projects) and whether the Operational Adder is a tax or fee are not relevant to and outside the scope of this proceeding. Further, information regarding CVEC is not relevant to any of the findings regarding whether a municipal aggregation plan complies with Section 134. Therefore, the Hearing Officer appropriately enforced the Department's rulings and excluded the documents marked AG KC-3 through AG KC-6 from evidence.

The documents marked AG KC-8 contain information regarding NSTAR's standard offer and basic service rates between 1998 and 2014. The Attorney General's argument that these historic rates are relevant as a counterpoint to the Compact's historic rates is inconsistent with the scope of our review under Section 134 in this proceeding. Under Section 134, the Department reviews a plan that, among other things, describes how a municipality will structure its funding (e.g., a per kWh charge to participants) and how the municipality will set rates (e.g., a competitive solicitation for residential and commercial and industrial ("C&I") rate classes). The Department does not analyze how a municipal aggregation's rates compare to an electric distribution company's basic service rates.<sup>31</sup> The Attorney General, however, continues to seek to investigate information not contained in a municipal aggregation plan, for the purpose of supporting arguments that are outside the scope of a municipal aggregation proceeding and the Department's jurisdiction. See, e.g., D.P.U. 14-69, Interlocutory Order; D.P.U. 14-10 through D.P.U. 14-47, Interlocutory Order at 13-14; Town of Ashby, D.P.U. 12-94, at 13-15 (2014);

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<sup>31</sup> The Municipal Aggregation Statute does not require a municipal aggregation's rates to be lower than the prevailing basic service rates. See St. 2008, c. 196, § 75; D.P.U. 12-124, at 25 n.16; D.T.E. 06-102, at 20; D.T.E. 04-32, at 21-22.

D.P.U. 12-94, Interlocutory Order at 10-17 (April 4, 2013); D.P.U. 12-124, at 15-29, Tr. 191-193.

The Attorney General has failed to prove the relevancy of the documents marked as AG KC-8. Accordingly, the Hearing Officer appropriately determined that AG KC-8 should not be moved into evidence.

4. Conclusion

For the reasons discussed above, the Department finds that the Hearing Officer did not abuse his discretion by denying the Attorney General's request to include the documents marked as AG KC-1 through AG KC-8 as evidence in this proceeding. Accordingly, the Hearing Officer Ruling is affirmed and the Attorney General's Appeal is denied.

D. Motion to Strike Portions of the Attorney General's Briefs

1. Introduction

The Attorney General's briefs cite to the documents marked AG KC-1 through AG KC-8. Pursuant to 220 C.M.R. § 1.06(6)(d), the Hearing Officer ruled that AG KC-1 through AG KC-8 were outside the scope of the proceeding and therefore excluded from evidence (Hearing Officer Rulings at 5-6). We have affirmed this Hearing Officer Ruling. See Section II.C. The Compact filed a motion to strike portions of the Attorney General's initial and reply briefs that rely on documents outside of the evidentiary record of this proceeding.

2. Position of the Parties

a. Compact

The Compact argues that the Hearing Officer Ruling is incontrovertible that no party was permitted to rely on the excluded documents on brief (Motion to Strike at 2). The Compact contends that the Attorney General cannot rely on a claim of an offer of proof to justify the

citation to and reliance on documents excluded from evidence (Motion to Strike at 2-3). The Compact asserts that, to the extent that the Attorney General has any right of appeal in this proceeding, any offer of proof to preserve such a right was proffered when the Attorney General filed her request for evidentiary hearing (Motion to Strike at 3).

b. Attorney General

The Attorney General argues that the documents relied on in her briefs are relevant to the Department's review (Attorney General Reply Brief at 16).<sup>32</sup> The Attorney General contends that to the extent the Hearing Officer Ruling is inconsistent with the Attorney General's position, the ruling should be disregarded (Attorney General Reply Brief at 16).

3. Analysis and Findings

It is axiomatic that a brief may not rely on facts or other evidence that have not been admitted as evidence in a proceeding. See New England Gas Company, D.P.U. 10-114, at 7-8 (2011). Further, Hearing Officer and Commission rulings remain in full force and effect unless and until set aside or modified by the Commission. 220 C.M.R. § 1.06. Filing an appeal does not stay the force and effect of a ruling. 220 C.M.R. § 1.06. Disregard for Department rulings may cause administrative delays that prejudice other parties, abuses the administrative process, and wastes resources.

The Department has issued multiple Orders and rulings regarding the scope of this proceeding. The Attorney General's reliance on documents that have been excluded from evidence on brief violates the Department's Interlocutory Order, Hearing Officer Rulings and

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<sup>32</sup> The Attorney General also states that she attached the documents to her initial brief as an offer of proof to preserve her rights on appeal (Attorney General Initial Brief at 7 n.7).

Department regulations.<sup>33</sup> Accordingly, the Department hereby strikes the portions of the Attorney General's briefs that rely on such documents.

Further, the Department finds that the Attorney General briefed issues that the Department has already determined to be outside the scope of this proceeding, specifically the issues regarding the distribution of costs and benefits related to a portion of the Operational Adder used to fund specific renewable energy projects and whether the Operational Adder is a fee or a tax (see Interlocutory Order at 7-22). Accordingly, the Department will not rely on Sections II.C.1, II.C.2, II.D.1, and II.D.2 in the Attorney General's Brief and Sections I.B and I.C in the Attorney General's Reply Brief in our decision in this proceeding.<sup>34</sup>

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<sup>33</sup> The Department recognizes that the Attorney General has raised some serious allegations regarding the Compact over the course of this proceeding, including that (i) the Compact has charged an illegal tax for almost a decade; (ii) the Compact is operating in violation of G.L. c. 40, § 4A (the Attorney General asserts that the Compact has failed to provide municipalities periodic financial statements required by G.L. c. 40 § 4A); and (iii) the Compact's executed contracts are unenforceable. The Department notes, however, that the Department does not have the jurisdiction to address these claims; this proceeding is a review of a revised municipal aggregation plan, not an investigation into all potential violations of law committed by the Compact. The Department also notes that despite the Attorney General's claim that these violations have been occurring for almost a decade, neither the Attorney General nor any other party has ever filed a claim in the appropriate forum to address these claims. While the Attorney General, through the Office of Ratepayer Advocacy, may desire to have a single administrative agency resolve all accusations against a particular entity, the law does not confer such broad authority on the Department.

<sup>34</sup> The Department notes that the Attorney General's briefs contain several statements that may misstate certain matters of law and fact, including, but not limited to, statements that the Compact's Plan places municipal customers on different rates than municipal aggregation customers and that a municipal aggregation subsidizes municipalities if the municipality receives a different rate than other customers. In addition, the Attorney General mischaracterizes the relationship between the terms "aggregated service" and "competitive supply," and elements of other municipal aggregation plans and Department Orders. Although the Department does not address all of these statements in this Order,

### III. STANDARD OF REVIEW FOR REVISED MUNICIPAL AGGREGATION PLANS

#### A. Introduction

Prior to addressing the Compact's Plan, we will consider the appropriate procedural requirements for a revised municipal aggregation plan. The Attorney General and the Compact disagree on whether the towns that form the Compact must re-initiate the process of aggregation by obtaining approval from each municipality through town meeting votes prior to filing a revised municipal aggregation plan with the Department.

#### B. Positions of the Parties

##### 1. Attorney General

The Attorney General asserts that Section 134 requires a town to initiate the process of aggregation by a majority vote of town meeting or town council prior to developing a municipal aggregation plan (Attorney General Brief at 12). The Attorney General contends that since the Legislature did not distinguish between an initial and revised plan, this requirement must apply to both types of plans (Attorney General Brief at 13-14). Therefore, the Attorney General asserts that each municipality must also receive authorization to file a revised plan from their individual municipal governing bodies (Attorney General Brief at 12-13). The Attorney General argues that this interpretation is consistent with the Department's finding that the standard of review is the same for all municipal aggregation plans regardless of whether it is an initial or revised plan, and the Department's construction of Section 134 which requires a municipality to obtain all necessary approvals prior to filing a revised municipal aggregation plan (Attorney General Brief at 13-14, citing Interlocutory Order at 21).

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our silence on a particular matter of law or fact should not be construed as endorsing the Attorney General's assertions.

Further, the Attorney General argues that interpreting Section 134 as requiring a town meeting vote only for initial plans will lead to absurd and illogical results (Attorney General Reply Brief at 5-7). The Attorney General contends that this interpretation will result in a requirement that a town consult with DOER and make a plan available for review by its citizens but not a requirement to obtain municipal approvals, which is a pre-condition to any pre-filing requirements (Attorney General Reply Brief at 5-6). The Attorney General claims that this would lead to chaos on the important question of whether each municipality approves of the changes in the Plan (Attorney General Reply Brief at 6-7). Finally, the Attorney General argues that if the Department determines that municipal approvals are not required under Section 134, then there are no statutory requirements for a revised municipal aggregation plan (Attorney General Reply Brief at 6). Therefore, the Attorney General argues that the only logical interpretation is that the same procedural requirements apply to both an initial and revised municipal aggregation plan (Attorney General Reply Brief at 7).

## 2. Compact

The Compact asserts that Section 134 does not provide a procedure for revising an aggregation plan and the Department never has directed the Compact to obtain individual town approvals prior to submitting a revised plan (Compact Brief at 9). The Compact contends that when it initiated its Program, the Compact received all requisite town meeting votes (Compact Brief at 9 n.9). The Compact argues that since it never ceased the operation of the Program, there is no need to obtain town meeting votes to re-initiate the process of aggregation (Compact Reply Brief at 2). Under Section 134, the Compact contends that it was required to (and did) develop a plan in consultation with DOER and make the plan available for review by its citizens

(Compact Reply Brief at 2). The Compact argues that adopting the Attorney General’s proposed standard of review is illogical and counter to the express intent of the Legislature (Compact Reply Brief at 2).

C. Standard of Review

When interpreting a statute, the “statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result.” Welch v. Sudbury Youth Soccer Assoc., Inc., 453 Mass. 352, 354-355 (2009), quoting, Sullivan v. Brookline, 435 Mass. 353, 360 (2001). The Supreme Judicial Court has also stated:

[n]one of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature.

Bolster v. Comm’r of Corps. and Taxation, 319 Mass. 81, 84-85 (1946); see also International Org. of Masters, Mates and Pilots, Atlantic and Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha’s Vineyard and Nantucket S.S. Authority, 392 Mass. 811, 813 (1984). Where ambiguities exist, the Court will interpret a statute:

according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.

Commonwealth v. Welch, 444 Mass. 80, 85 (2005) (quoting Bd. of Ed. v. Assessor of Worcester, 368 Mass. 511, 513 (1975)); see also Sperounes v. Farese, 449 Mass. 800, 804 (2007) (quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934)).



D. Analysis and Findings

The Department has previously determined that a municipality must file a revised municipal aggregation plan if the municipality seeks to deviate from its approved plan, or if due to changes in the law, regulations, the competitive supply market, or other circumstances the approved plan no longer accurately describes the operations of the municipal aggregation program. D.P.U. 12-124, at 52. Section 134 is silent on the specific procedural requirements for a revised municipal aggregation plan.

General Laws c. 164, § 134(a) provides, in relevant part, that:

[a] town may initiate a process to aggregate electrical load upon authorization by a majority vote of town meeting or town council. . . Two or more municipalities may as a group initiate a process jointly to authorize aggregation by a majority vote of each particular municipality . . . Upon an affirmative vote to initiate said process, a municipality or group of municipalities establishing load aggregation . . . shall in consultation with [DOER], develop a plan, for review by its citizens, detailing the process and consequences of aggregation.

G.L. c. 164, § 134(a) ¶¶ 3-4.

Under the plain language of Section 134, a town must receive authorization by town meeting or town council to initiate the process of aggregation. This authorization provides municipal officials with the power to develop and implement a municipal aggregation program. After obtaining approval to initiate the process, the municipality or group of municipalities may develop a municipal aggregation plan, in consultation with DOER, for review by its citizens. In the case of a revised plan, a municipality is not seeking to initiate the process of aggregation and therefore, is not required to obtain additional authorizations from town meeting or town council under Section 134. The municipalities, however, are essentially seeking to develop a municipal aggregation plan, and therefore must comply with Section 134's requirements that the

municipality develop its plan in consultation with DOER and provide its citizens an opportunity to review the plan.

The Attorney General's construction of Section 134 confuses authorization to form a municipal aggregation program with approval of a municipal aggregation plan. The initial town meeting vote does not approve a particular plan as it occurs before a municipal aggregation plan is developed. In fact, Section 134 is silent on the process a municipality must follow to approve a particular municipal aggregation plan or authorize the filing of the plan with the Department. Therefore, after a plan is developed, the municipalities must determine what authorizations are necessary in order to file a plan with the Department. These authorizations may include a vote of a board of selectmen, a vote pursuant to an inter-governmental agreement, authorization by a town manager, an authorization by a designated municipal official, or another method allowed under municipal law.

Therefore, for the reasons discussed above, the Department finds that a municipality seeking approval of a revised municipal aggregation plan must develop the plan in consultation with DOER, and make the plan available for review by its citizens. The municipality should also ensure that it obtains any necessary approvals as required by its town charter and other municipal rules and laws prior to filing with the Department for review and approval. As long as a municipality has not discontinued the operation of a municipal aggregation program or had the power to operate a municipal aggregation program rescinded by town meeting or town council vote, the municipality is not required to re-initiate the process of aggregation in order to revise its municipal aggregation plan.

#### IV. COMPACT'S REVISED MUNICIPAL AGGREGATION PLAN

##### A. Summary of the Compact's Revised Plan

The Compact's revisions to its 2004 Plan can be generally categorized into four broad areas: (1) clerical updates; (2) operational updates; (3) legal updates; and (4) non-substantive updates (see generally Plan). Many aspects of the Compact's Program have remained unchanged under the 2014 Plan, including the governing structure of the Compact, customer access and rights provisions, and the rate and funding structure. The Compact also plans to continue to use a per kWh adder to fund its programs authorized by Section 134, and continue to operate programs pursuant to G.L. c. 164, § 134(b).<sup>35</sup>

The clerical updates in the 2014 Plan incorporate changes in terminology, updated goals that reflect those set forth in the Compact's Inter-Governmental Agreement, and replaces specific entity/individual names with titles and positions. Specifically, the 2014 Plan replaces outdated terms such as "Department of Telecommunications and Energy" with "Department of Public Utilities." Similarly, references to "Commonwealth Electric" were changed to "Local Distribution Company." References to standard offer and other outdated charges were removed from the Plan. The Compact also revised the Plan to reflect the current goals set forth in its Inter-Governmental Agreement and included references to the Compact's website that will allow customers to access the most up-to-date goals and information regarding the Program (Plan at 10-11, 19). The Compact also replaced the list of former Governing Board members with a

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<sup>35</sup> The Department notes that the Compact's 2004 Plan provided funding for its municipal aggregation, energy efficiency, and renewable programs through per kWh adders. The Compact has charged a single per kWh charge, now called the Operational Adder, to fund all of the programs authorized by Section 134 (see Exhs. DPU-1-19; DPU-1-20).

description of the Compact's governing structure and a reference to its website for a list of current Governing Board members (Plan at 8-9).

The operational changes include revisions to the Compact's methods for entering into contracts, including the addition of a Chief Procurement Officer ("CPO"), an updated procurement process that includes the role and responsibilities of the CPO, and additional factors the Compact considers when evaluating contracts (Plan at 10-12, 17-18). The Compact also revised the process for approving the Operational Adder, and included a description of its optional green product (Plan at 13-16). The Compact states that many of these elements have already been implemented by the Compact (Exh. DPU-1-26).

Under the 2014 Plan, the Compact's CPO is responsible for the energy procurement process.<sup>36</sup> The Compact procures energy contracts through a competitive bid process (Plan at 17-18). The Compact may solicit bids as firm prices or pricing strategies for each customer class<sup>37</sup> (Plan at 18). Suppliers that respond to an RFP enter into a confidentiality agreement and begin contract negotiations with the Compact (Plan at 17-18). Compact Governing Board members, staff, counsel, and consultants participate in the negotiation process (Plan at 18). The CPO is ultimately responsible for selecting and executing an ESA on behalf of the Compact (Plan at 18). The Compact will evaluate prices based on the best terms and conditions and the

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<sup>36</sup> Barnstable County will still serve as the Compact's procurement agent for the procurement of goods and services, such as office supplies and equipment (Plan at 10).

<sup>37</sup> The Compact states that it will not alter the customer classes defined by the electric distribution company (i.e., NSTAR) (Plan at 18-19).

most competitive market rates available (Plan at 18).<sup>38</sup> The Compact will notify existing customers of the execution of a new ESA and new rates through: (1) the Compact's website; (2) notices in the Cape and Vineyards daily and weekly print newspapers; (3) press releases; and (4) social media (Plan at 18).

The Compact notes that funding for the Program, as well as some funding for the Compact's renewable energy and energy efficiency activities, may be derived from (i) funds appropriated by Barnstable or Dukes Counties, or (ii) a charge, called an Operational Adder, up to \$0.001 per kWh (Plan at 15; Exhs. DPU-1-11, DPU-1-19, DPU-1-20). The amount of the Operational Adder will be determined through the Compact's annual budget process (Plan at 15-16).<sup>39</sup> The Compact's budget, including the Operational Adder, must be approved by the Compact's Governing Board using a weighted vote based on the Compact member municipalities' populations (Plan at 16). The appropriations of the Operational Adder will be subject to the review of a certified independent financial auditor (Plan at 16). The Compact's funding will be included in Barnstable County's annual financial audit (Plan at 16).

Finally, the Compact offers a green power option for Program customers called Cape Light Compact Green (Plan at 13). Customers selecting Cape Light Compact Green will pay a premium, in addition to the Compact's rates for power supply, for renewable energy certificates ("RECs") proportional to either 50 or 100 percent of the customer's energy usage (Plan at 13-14). The premiums for Cape Light Compact Green are determined by the Compact and are

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<sup>38</sup> The 2004 Plan provided that the Compact would acquire the best market rate for electricity and transparent pricing (Petition at 11).

<sup>39</sup> Prior to 2013, the Compact determined the amount of the Operational Adder as part of the ESA negotiation process (see Plan at 15-16).

based on the cost of RECs, marketing, administrative, and other program costs (Plan at 14). The Compact will procure RECs for Cape Light Compact Green principally through long-term contracts with local renewable energy projects (Plan at 13). Program customers may opt into or out of Cape Light Compact Green at any time without penalty by calling a toll-free number operated by the Compact's competitive supplier (Plan at 13).

In regards to legal updates, the Compact revised its Plan to reflect amendments to the General Laws, such as removing references to standard offer service and incorporating changes to the Compact's energy efficiency programs pursuant to the Green Communities Act<sup>40</sup> (see Petition at 11). In addition, the Compact amended its plan to reflect several Department directives from D.P.U. 12-124 (see Petition at 11). Specifically, the Plan incorporates (i) an annual reporting requirement to the Department; (ii) an express provision stating that the Compact will revise its Plan if, in the future, the Compact seeks to deviate from its approved Plan; and (iii) a revision to reflect that the Compact may not switch its customers from the Program's supplier to basic service for the purpose of obtaining a lower rate<sup>41</sup> (Plan at 17, 20, 23). See D.P.U. 12-124, at 51-52; 65-68. The Plan also provides that the Compact will provide the electric distribution company with a 90-day notice of a planned Program termination, 90-day notice prior to the end of an ESA, and four-business day notice of the successful negotiation of a new ESA (Plan at 17). See D.P.U. 12-124, at 45-46.

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<sup>40</sup> An Act Relative to Green Communities, St. 2008, c. 169.

<sup>41</sup> Individual customers still have the right to opt out of the Program at any time and return to basic service (Plan at 21).

The Compact also made several non-substantive changes to its Plan that can generally be categorized as: (1) a foreword describing the reasons for the 2014 Plan; (2) revisions to the organizational structure of the Plan document by moving text to different subheadings, such as including all information regarding the Compact's energy efficiency program under a single subheading; (3) revisions to the Plan to remove the process of activating the municipal aggregation plan since the Compact's plan has already been activated; (4) a description of the process used to revise the Plan; and (5) grammatical revisions (see generally Plan).

B. Positions of the Parties

1. Compact

The Compact claims that it has satisfied the procedural and substantive requirements of G.L. c. 164, § 134, and therefore the Department should approve the Plan (Compact Brief at 1-2). Regarding the procedural requirements, the Compact states it (1) consulted with DOER; (2) allowed citizen review of the Plan at three public information sessions and provided a seven week comment period; (3) approved the revisions to its Plan through a vote of the Governing Board; and (4) included a description of all of the required elements in its Plan (Compact Brief at 9-10, citing Petition at 4, 6; Plan at 5-6). The Compact also states that a copy of the Plan was provided to each member municipality and, between September 2013 and March 2014, its staff met with member municipalities to discuss the Plan (Compact Brief at 10).

The Compact also argues that the Plan provides for universal access, reliability, equitable treatment of all customer classes, and customer education (Compact Brief at 12-19). Specifically in regards to universal access, the Compact states that, consistent with its 2004 Plan, all eligible customers have been enrolled in the Program unless the customer contracted with a competitive

supplier or opted out of the Program (Compact Brief at 13). New customers moving into the Compact's service territory will be automatically enrolled in the Program, subject to the customer's right to opt out (Compact Brief at 13). Customers that have opted out of the Program may seek to opt back into the Program at any time subject to certain conditions (Compact Brief at 13, citing Plan at 21-22).

In regards to reliability, the Compact states that the Plan provides for ESA provisions that commit the competitive supplier to provide all-requirements power supply, make all necessary arrangements for power supply, and use proper standards of management and operations (Compact Brief at 14, citing Plan at 20; Exhs. DPU-1-2, DPU-1-12).

In regards to equitable treatment of customer classes, the Compact argues that the Plan treats all customers equitably (Compact Brief at 15, citing Plan at 20-21). The Compact asserts that all customers are covered by the consumer protection provisions of Massachusetts law and regulations, including the right to question billing and service quality practices (Compact Brief at 15, citing Plan at 20-21). The Compact also states that the Attorney General's contention that the Plan treats municipal customers more favorably than non-municipal customers is factually wrong (Compact Brief at 16). According to the Compact, the municipal customers referenced by the Attorney General have opted out of the Program (Compact Brief at 16, citing Exh. DPU-1-6). The Compact contends that any differences in the terms and conditions contained in a separate ESA for municipal customers not participating in the Program have no bearing on whether the Plan treats customers participating in the Program equitably (Compact Brief at 16).

The Compact also contends that the Plan meets the customer education requirement that a municipal aggregator must fully inform customers that they will be automatically enrolled in the



Plan unless the customers opt out (Compact Brief at 17). Specifically, the Compact asserts that it mails opt-out notices to new customers and publishes notice of a new ESA and changes in prices by public notice in daily and weekly printed newspapers, and through social media (Compact Brief at 17-18, citing Plan at 13, 17-18; Exh. DPU-1-14). The Compact also maintains a website with its current rate information, links to the electric distribution company's basic service webpage, the Department's website (including the webpage with a list of licensed competitive electric suppliers), and other documents related to the Program (Compact Brief at 17-18, citing Plan at 19). The Compact states that customers may also call a toll-free number for questions regarding enrollment, billing, and other issues (Compact Brief at 18, citing Plan at 21).

The Compact argues that the Attorney General's assertions that the Plan does not comply with the statutory requirement to mail opt-out notices to its customers is erroneous (Compact Brief at 18). The Compact contends that the requirement to mail opt-out notices to all customers prior to automatic enrollment only applies to newly forming aggregation programs (Compact Brief at 18). Since its aggregation is already formed, the Compact argues that there is no automatic enrollment for existing customers, and therefore, the opt-out notice requirement is inapplicable (Compact Brief at 18-19). The Compact also contends that although it does not plan to send new opt-out notices to existing customers, it notifies customers of new ESAs and prices through several methods (Compact Brief at 19, citing Plan at 11, 21-22; Exh. DPU-1-14). The Compact asserts that the published notices regarding new ESAs and prices state that customers may opt out of the Program by contacting the Compact's competitive supplier (Compact Brief at 19, citing Exh. DPU-1-14).

Finally, the Compact contends that the Plan complies with the Department's rules and regulations governing the restructured electric industry and the competitive supply of electricity (Compact Brief at 20). In D.T.E. 00-47 at 28, the Department granted the Compact and its competitive supplier a waiver of the quarterly information disclosure requirements set forth in 220 C.M.R. § 11.06, conditioned on the requirement that the Compact provide information regarding the fuel mix, emissions, and labor characteristics of its energy supply through alternative vehicles. The Compact asserts that it does not seek to alter or amend this waiver (Compact Brief at 20). According to the Compact, it will continue to disclose the required information through the methods listed in D.T.E. 00-47, at 20; nevertheless, the Compact may not use every single available method (Compact Brief at 20). At a minimum, the Compact contends the disclosure label will be: (1) posted on the Compact's website at all times; (2) posted quarterly in daily and weekly print newspapers; (3) provided to municipalities, libraries, and senior centers annually; and (4) available at events that the Compact attends (Compact Brief at 20).

## 2. Attorney General

The Attorney General contends that if the Department declines to determine whether the Compact's Operational Adder is a fee or tax, the Department should reject the Plan in the interest of administrative efficiency (Attorney General Brief at 37). According to the Attorney General, it is only a matter of time before taxpayers file a lawsuit alleging that the Operational Adder is an illegal tax (Attorney General Brief at 38). The Attorney General argues that if such a lawsuit is filed, the Plan will be struck down in material part by a court (Attorney General Brief at 38-39). According to the Attorney General, if such a verdict is reached, the Compact will be required to

file another revised plan, which the Attorney General contends is administratively inefficient (Attorney General Brief at 39). Therefore, the Attorney General argues that the Department should approve the Plan only on the condition that the Compact bring the Plan in compliance with the law (Attorney General Brief at 39).

The Attorney General also argues that the Plan does not comply with the statutory requirement that customers receive opt-out notices prior to their enrollment in the Plan (Attorney General Brief at 39). The Attorney General contends that Section 134 unambiguously requires new opt-out notices be sent to existing customers, and even if the statute does not include this requirement, the Department should require the Compact to send opt-out notices anyway (Attorney General Brief at 39-40). According to the Attorney General, the Plan contains several significant changes from the 2004 Plan, including the addition of the Operational Adder, the funding of CVEC, and advocacy before the Department (Attorney General Brief at 40). The Attorney General asserts that existing customers should be fully informed of the new terms of the Plan through opt-out notices (Attorney General Brief at 40-41).

### C. 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. General Laws c. 164, § 134(a) is silent on the process for a municipality to file a revised municipal aggregation plan. The Department requires that a municipality must develop a revised municipal aggregation plan, in consultation with DOER and submit the revised plan for review by its citizens. D.P.U. 12-124, at 52. 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. G.L. c. 164, § 134(a)

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 program is voluntary and a retail electric customer has the right to opt out of program participation. 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 C.M.R. § 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. See 220 C.M.R. § 11.01 et seq.

A municipal aggregator is exempt from two requirements in the Department's competitive supply regulations. D.T.E. 06-102, at 16. First, a municipal aggregator is not required to obtain a license as an electricity broker from the Department under the provisions of 220 C.M.R. § 11.05(2) in order to proceed with an aggregation plan. Id. 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). 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 the other rules for electric competition. Id. To the extent that a municipal aggregation plan includes provisions that are not consistent with Department rules, the Department will review these provisions on a case-by-case basis. Id.

D. Analysis and Findings

1. Introduction

The Department is required to determine whether a municipal aggregation plan is consistent with the requirements established in G.L. c. 164, § 134(a), and with the laws and Department's rules and regulations concerning aggregated service. D.P.U. 13-183, at 16, citing D.P.U. 12-124, at 30-31.<sup>42</sup>

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

a. Procedural Requirements

As discussed above, there are several procedural requirements for a revised municipal aggregation plan. First, a municipality must consult with DOER in developing its revised municipal aggregation plan. G.L. c. 164, § 134(a). The Compact consulted with DOER regarding the Compact's proposed process and revisions to the Plan (Plan at 6; Letter from

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<sup>42</sup> General Laws c. 164, § 134(b) allows municipalities that operate a municipal aggregation program pursuant to G.L. c. 164, § 134(a) to also implement energy efficiency and renewable energy programs that are consistent with any state energy conservation goals. Since 2001, the Compact has implemented programs pursuant Section 134(b). See D.T.E. 00-47, at 14; D.T.E. 00-47-C (2001). Nothing in this Order should be construed to alter the Department's certification of the Compact's energy plan or its ability to implement programs pursuant to G.L. c. 164, § 134(b).

DOER to the Compact (March 26, 2014)). DOER provided several comments and suggestions, which were incorporated into the Plan (Petition at 6; Letter from DOER to the Compact (March 26, 2014)).<sup>43</sup> Therefore, the Department concludes that the Compact has satisfied the statutory requirement regarding consultation with DOER.

Second, a municipality, after developing a plan in consultation with DOER, must allow for citizen review of the Plan. G.L. c. 164, § 134(a) is silent on the process a municipality must use to satisfy citizen review of a municipal aggregation plan. The Department encourages municipalities to allow citizens sufficient opportunity to provide comments on a proposed plan to the municipality prior to filing a petition with the Department for final approval. Town of Ashby, D.P.U. 12-94, at 27 (2014). The Compact held meetings with its member municipalities' Boards of Selectmen, held three public informational sessions on January 15, 2014, January 16, 2014, and January 30, 2014, and allowed citizens to submit written comments during a seven-week comment period (Petition at 4, Atts. E, F, G; Plan at 6; Exh. DPU-1-3).<sup>44</sup> Therefore, the Department concludes that the Compact 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

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<sup>43</sup> The revised municipal aggregation plan filed on August 20, 2014 was submitted after DOER consultation. DOER has not submitted comments on, or objections to, the August 20, 2014 revised Plan.

<sup>44</sup> During the comment period, the Compact received 65 letters in support of the proposed revisions and 14 letters opposing the proposed revisions (Petition at 5; Atts. F, G).

other entities; (4) the rights and responsibilities of program participants; and (5) the procedure for terminating the program. G.L. c. 164, § 134(a). After review of the Plan, the Department finds that the Plan includes a full and accurate description of each of these components, including the Compact's optional Cape Light Compact Green power product.

The Department notes, however, that the Plan, under the subheading "Municipal Electric Accounts," includes a description of the Compact's procurement of ESAs on behalf of municipal customers outside of the Program (see Plan at 13). Various sections of the Plan filed on April 3, 2014 described how the Compact procures energy for municipal customers outside of the Program (see April 3, 2014 Plan at 8-11, 17). In response to discovery, the Compact clarified that the municipal customers referenced in the April 3, 2014 Plan opted out of the Program in 2009, and the ESAs for these municipal customers are executed separately from the Program<sup>45</sup> (Exh. DPU-1-6). During the August 6, 2014 technical session, the Department requested that the Compact either remove references to the procurement of ESAs for municipal customers from the Plan or move this information to a subheading under Section 2.3 "Programs of the Compact" (see Hearing Officer Memorandum regarding August 6, 2014 Technical Session (August 7, 2014)). On August 20, 2014, the Compact filed a revised plan that moved the information regarding municipal customer procurement into Section 2.3.1.2, which is a subsection of the section entitled "Power Supply Program" (Plan at 13).

The Department finds that including information in the Plan regarding how the Compact will procure ESAs for entities not participating in the Program under the heading "Power Supply

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<sup>45</sup> The Compact states that the Inter-Governmental Agreement gives the Compact the power to negotiate contracts on behalf of its member municipalities outside of the Program (see Exhs. DPU-1-1, DPU-1-6).

Program” may confuse or mislead customers. Although the Department understands that the Compact seeks to disclose all of its energy-related programs, the Plan is not the appropriate place to do so. Section 134 requires that a municipal aggregation plan describe programs operated pursuant to Section 134 and does not require the plan to describe all programs offered by the Compact pursuant to its Inter-Governmental Agreement. Therefore, to minimize customer confusion, the Compact is directed to revise its Plan by deleting Section 2.3.1.2. The Compact shall submit a revised Plan within ten business days of the date of this Order.<sup>46</sup>

Subject to the condition above, the Department concludes that the Compact has satisfied the statutory procedural requirements.

b. Substantive Requirements

i. 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 aggregation program and disclose other pertinent information regarding the plan.<sup>47</sup>

ii. Universal Access

In D.T.E. 04-32, at 16, the Department concluded that the Compact’s 2004 Plan satisfactorily provided for universal access because participation in the Program was available to

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<sup>46</sup> The Department also notes that Section 11.1 of the Plan includes a cross-reference to a section that does not exist (Plan at 21). The Compact shall revise Section 11.1 to reflect the correct reference.

<sup>47</sup> The opt-out notices must prominently identify all rates under the plan, include the basic service rate, describe how to find a copy of the plan, and disclose that a customer may choose the basic service rate without penalty. G.L. c. 164, § 134(a).



all standard offer service and basic service consumers. In the instant proceeding, all new and existing basic service consumers within the Compact's member municipalities may enroll in the Program (Plan at 19-20). New customers moving to the Compact's service territory will be automatically enrolled in the Program unless they opt out of the Program (Plan at 20).

Accordingly, the Department finds that the Compact has satisfied the statutory requirement of G.L. c. 164, § 134(a) regarding universal access.

iii. Reliability

In D.T.E. 04-32, at 16-17, the Department concluded that the 2004 Plan satisfactorily provided for reliability because the plan's ESA (1) called for all-requirements power supply, and (2) included sufficient financial assurance provisions. In the instant proceeding, the Plan and the model ESA contain 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 11-12, 20, 22; Exh. DPU-1-2, Att.). In addition, the Plan provides an organizational structure (including staff and consultants) to ensure that the Program has the technical expertise necessary to operate a municipal aggregation program (Plan at 8, 12). Accordingly, the Department finds that the Compact has satisfied the statutory requirement regarding reliability.

iv. Equitable Treatment of all Customer Classes

General Laws c. 164, § 134(a) also requires a municipal aggregation plan to provide for equitable treatment of all customer classes. The Department has stated that this requirement does not mean that all customer classes must be treated equally; rather, customer classes that are similarly situated must be treated equitably. D.T.E. 06-102, at 20. The Plan allows for varied

pricing and terms and conditions among different customer classes to account for the disparate characteristics of each customer class (Plan 12, 18-20, 21-22). The Program's customer classes will be the same as the electric distribution company's basic service customer classes (Plan at 18-19). Accordingly, the Plan provides that any municipal customer that does not opt out of the Program will receive the same rate as any other Program customer in the same rate class (see Plan at 18-19).

In D.P.U. 13-131 and D.P.U. 13-138, the Department issued directives regarding the treatment of new customers moving to a municipality and customers that seek to opt into a municipal aggregation program. Specifically, the Department found that new residential and small C&I customers that move to a municipality and residential and small C&I customers that were not initially eligible to join a municipal aggregation program (because they were on competitive supply) should be charged the same ESA rate as all other residential and small C&I customers. D.P.U. 13-131, at 24; D.P.U. 13-183, at 22-23. Customers who choose to opt out of the Program, but then later seek to opt in to the Program, however, may be charged a market-based rate for the remainder of the Program's then-current ESA. D.P.U. 13-131, at 24; D.P.U. 13-183, at 22-23. The Department hereby directs the Compact to comply with these directives when the Compact executes its next ESA.

The Plan provides for the right of all customers to raise and resolve disputes with the competitive supplier, as well as with the Department (Plan at 21). The Plan further provides all customers with the right to all requisite notices and the right to opt out of the Program (Plan at 17, 20-22).

Subject to the directives above, the Department finds that the Compact has satisfied the statutory requirement regarding equitable treatment of all classes of customers.

v. Customer Education

The Attorney General argues that opt-out notices should be sent to new and existing customers according to statutory requirement, or alternatively, at the Department's discretion (see Attorney General Brief at 39-41). The Municipal Aggregation Statute is clear that opt-out notices are required prior to automatic enrollment in the aggregated entity for new customers.

D.P.U. 14-100, at 16. Section 134 does not require a municipality to issue an opt-out notice to existing customers each time there is a change in price, operations, or in the plan.

D.P.U. 14-100, at 16. Accordingly, the Department finds that Compact is not statutorily required to send opt-out notices to existing customers upon approval of a revised municipal aggregation plan. D.P.U. 14-100, at 16.

Further, the Department does not agree that opt-out notices should be sent to existing customers in this instance. Contrary to the Attorney General's characterization, the Compact's Operational Adder, support of renewable energy projects, and advocacy are not significant changes to the Compact's operations (see Attorney General Brief at 40). The Compact's original municipal aggregation plan provided for a per kWh charge to fund administrative costs, renewable energy activities, and energy efficiency programs. See D.T.E. 00-47, at 13-14. The principal differences between the adder that the Compact proposed in its original municipal aggregation plan and the Operational Adder in the 2014 Plan is (1) the name, and (2) the process the Compact will use to determine the amount of the adder, not the use of the funding (Plan

at 15-16; Exhs. DPU-1-19, DPU-1-20).<sup>48</sup> Similarly, the Compact's original plan also provided for the support of the development of renewable energy projects and advocacy before the Department. See D.T.E. 00-47, Aggregation Plan at 7, 9. Also, approval of the Plan will not change the rates or service that existing customers are currently receiving under the Program (see Exhs. DPU-1-24; DPU-1-26).

Further, opt-out notices provide the initial rates, the prevailing basic service rates, and inform customers that they will be automatically enrolled in the program unless the customer opts out. G.L. c. 164, § 134(a). The opt-out notices do not describe the details of the municipal aggregation plan; instead, customers are notified about the details of the municipal aggregation plan through the citizen review process and the general customer education process. In this case, the Compact has held multiple public information sessions regarding the revisions to the Plan and provided extensive opportunity for citizen review and feedback (Plan at 5-6; Petition at 4, Atts. E, F, G; Exh. DPU-1-3).

While the statute is silent regarding customer education after a customer is enrolled with the municipal aggregation, the Department expects the Compact will continue to provide customers with information regarding the ongoing operations of the Program. D.P.U. 14-100, at 17; Town of Dalton, D.P.U. 13-136, at 23 (2014). The Compact explains that it will notify customers of the execution of all ESAs and changes in prices through website postings, press releases, social media, and public notices (Plan at 18). In order to ensure that customers are

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<sup>48</sup> As discussed above, prior to 2013, the Compact determined the amount of the Operational Adder as part of the ESA negotiation process (see Plan at 15-16; Exh. DPU-1-20). The Operational Adder is now set through the Compact's Governing Board's budget process (Plan at 15-16).

aware of their right to opt out of the Program, the Compact shall remind customers that they may opt out of the Program in these notices, and promptly post on its Program website notice that customers may opt out of the Program and return to basic service by contacting the Compact's supplier.

Subject to the directives stated above, the Department concludes that the Compact has satisfied the statutory requirement regarding customer education.

3. Consistency with the Department's Rules and Regulations Regarding Information Disclosure

The Municipal Aggregation Statute requires that a municipal aggregation plan meet any requirements established by law or the Department concerning aggregated service. In D.T.E. 00-47, at 27-28, the Department granted the Compact's competitive supplier a waiver of the requirement to directly mail quarterly uniform information disclosures to the Compact's customers pursuant to 220 C.M.R. § 11.06(4)(c).<sup>49,50</sup> The Department concluded in that proceeding that the Compact's alternate information disclosure strategy would allow the competitive supplier to provide the required information<sup>51</sup> to its customers as effectively as quarterly mailings. D.T.E. 00-47, at 27-28. The methods by which the Compact will provide

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<sup>49</sup> Municipal aggregators are exempt from the information disclosure requirements of 220 C.M.R. § 11.06. However, there is no exemption for the competitive supplier of a municipal aggregation. 220 C.M.R. § 11.02.

<sup>50</sup> The Department notes that in Investigation by the Department of Public Utilities on its own Motion into Initiatives to Improve the Retail Electric Competitive Supply Market, D.P.U. 14-140 (2014), we are investigating potential revisions to information disclosure label requirements regarding price-related information provided to customers. See D.P.U. 14-140, at 6-7.

<sup>51</sup> The required information includes the competitive supplier's price; customer service information; and fuel, emissions, and labor characteristics. 220 C.M.R. § 11.06(2).

this information to customers remains unchanged from the methods approved by the Department in D.T.E. 00-47 (Exh. DPU-1-28). The Compact states that it may not use every method in a particular year but at a minimum the required information will be: (1) posted on the Compact's website at all times; (2) posted quarterly in daily and weekly print newspapers; (3) provided to municipalities, libraries, and senior centers annually; and (4) available at events that the Compact attends (Exh. DPU-1-28). The Department finds that the Compact's information disclosure strategy will allow its competitive supplier to provide the required information to customers as effectively as quarterly mailings. Accordingly, the Department reaffirms our grant of a waiver from the information disclosure requirements of 220 C.M.R. § 11.06(4)(c). In order to ensure that such alternate means are effective and are used on a comprehensive and consistent basis, the Compact shall document its information disclosure strategy to the Department on an annual basis as part of its annual report to the Department. See Letter from Department to Compact (December 11, 2013).

Accordingly, the Department finds that the Compact has satisfied the applicable regulatory requirements regarding information disclosure. After review of the Plan, the Department finds that the Plan meets the requirements established by law and the Department concerning aggregated service.

#### 4. Other Issues

The Attorney General argues that the Department should, in the interest of administrative efficiency, reject the Plan and direct the Compact to alter its Operational Adder because a court may in the future determine that the manner in which the Compact uses funding to support certain renewable energy projects, such as projects developed by CVEC, and to participate in

certain proceedings, is illegal (Attorney General Brief at 38-39). The Department is not persuaded that rejecting the Plan, based on the possibility that a court may rule in a particular manner in a hypothetical lawsuit, is in the best interest of customers, administratively efficient, or consistent with the law.

First, the Department notes that the Compact's use of funding to support renewable energy development and advocacy is consistent with the Compact's original municipal aggregation plan. See D.T.E. 00-47, at 14, Aggregation Plan at 7, 9. Therefore, rejecting the Plan filed in the instant proceeding, as suggested by the Attorney General, will have no effect on the Compact's use of funding to support renewable energy projects or advocacy; rather, if the Department rejects the Plan, the Compact will have to continue operating under its 2004 Plan with its many outdated terms and practices, which will hinder transparency and customer education.

Second, the Department notes that no party questions the Compact's ability to charge a per kWh charge (i.e., the Operational Adder) to Program customers to cover the administrative and operational costs of the Program. Further, no party objects to the Compact determining the amount of the Operational Adder through the Governing Board's budget process. Rather, the Attorney General alleges that the Compact's use of a portion of the funds generated through the Operational Adder to support certain renewable energy projects and intervene in certain administrative proceedings may not be permissible under municipal finance law.<sup>52</sup> Even if a court finds that the Attorney General's allegations are valid, the Compact will not necessarily be

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<sup>52</sup> The Department notes that the Attorney General's allegations are based solely on the Compact's historic actions, not on specific renewable energy projects or advocacy provided for in the Plan.

required to file a revised municipal aggregation plan. If a court finds that the Compact's Operational Adder constitutes an illegal tax because the Compact funds certain renewable projects and advocacy efforts<sup>53</sup> through the adder, the Compact, consistent with the Plan, can adjust the amount and specific uses of the Operational Adder.<sup>54</sup> These potential changes may not require a revised municipal aggregation plan because the Plan will still contain an accurate description of the organizational structure of the Compact's funding (i.e., a per kWh charge to fund its administrative and operational costs associated with the Program) (Plan at 15-16).

Finally, the Department has repeatedly stated that under Section 134 we review a plan prior to implementation; it is the responsibility of municipal officials to ensure that they operate municipal aggregation programs in accordance with the laws of the Commonwealth, including municipal finance law. D.P.U. 14-100, at 15; D.P.U. 14-69, Interlocutory Order at 16; D.P.U. 14-10, Interlocutory Order on the Attorney General's Appeal of the Hearing Officer Ruling Denying the Attorney General's Motion to Compel Discovery at 12; see also D.P.U. 12-124, at 27-28. As an administrative agency, the Department generally has only those powers, duties, and obligations expressly conferred on it by statute or reasonably necessary to carry out its purpose. Boston Neighborhood Taxi Ass'n v. Department of Public Utilities, 410 Mass. 686, 692 (1991). The Department's authority to review plans under G.L. c. 164,

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<sup>53</sup> The Department notes that a determination of how the Compact may fund its advocacy efforts is independent from a determination of whether the Compact has standing in that particular administrative proceeding.

<sup>54</sup> For example, the Compact could limit its support of renewable energy projects to projects that provide more benefits to the Program participants (e.g., supporting the development of a project in exchange for the REC output of the facility), and limit funding its advocacy through the Operational Adder to proceedings that have specific impacts on the Program and its customers.



§ 134(a) does not include the authority to review and approve municipal aggregation's rates or charges. See D.P.U. 12-124, at 25-27. Further, the Department does not have the authority to adjudicate claims that municipalities are violating their charters and municipal finance laws.

The Department notes that the Compact asserts that its use of funding is in compliance with the applicable laws and contends that the Attorney General is applying an incorrect legal standard (see Compact Brief at 22-23). Nevertheless, the Department strongly encourages the Compact to review its use and accounting of the Operational Adder with the appropriate administrative agencies (e.g., Department of Revenue and the Office of the Inspector General) to ensure that the Compact is complying with all applicable laws.

#### V. CONCLUSION

The Department finds that the Plan is consistent with the requirements established in G.L. c. 164, § 134, including universal access, reliability, and equitable treatment, as well as the Department's rules and regulations, subject to the condition and directives established above. See supra Section IV. The Compact shall file within ten business days of the date of this Order a revised municipal aggregation plan to remove references to the negotiation of ESAs for municipal customers outside of the Program and to revise an incorrect reference in the Plan. See supra Section IV.D.2.a. In conclusion, the Department conditionally approves the Compact's revised municipal aggregation plan as filed on August 20, 2014.

VI. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the Commonwealth of Massachusetts Attorney General's appeal of the Hearing Officer Rulings on the request for evidentiary hearings and admissibility of evidence is DENIED; and it is

FURTHER ORDERED: That the Cape Light Compact's motion to strike portions of the Commonwealth of Massachusetts Attorney General's briefs is GRANTED; and it is

FURTHER ORDERED: That subject to the directives and condition established above, the revised municipal aggregation plan filed by the Cape Light Compact on August 20, 2014 is conditionally APPROVED; and it is

FURTHER ORDERED: That the Cape Light Compact shall file a revised municipal aggregation plan consistent with the directives contained in this Order within ten business days of the date of this Order; and it is

FURTHER ORDERED: That the Cape Light Compact shall comply with all other directives contained in this Order.

By Order of the Department,

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/s/  
Angela M. O'Connor, Chairman

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/s/  
Jollette A. Westbrook, Commissioner

\_\_\_\_\_  
/s/  
Robert E. Hayden, 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.