DAVIS MALM &
D'AGOSTINE P.C.
ATTORNEYS AT LAW
Robert J. Munnelly, Jr.

VIA EMAIL (luly.massaro@puc.ri.gov) and
FEDERAL EXPRESS

May 1, 2017

Division Clerk
Rhode Island Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

Re: D-16-112 Rulemaking To Establish Nonregulated Power Producer Consumer Protection Rules
Comments of Retail Energy Supply Association

Dear Sir or Madam:

Enclosed please find Comments of Retail Energy Supply Association ("RESA") regarding the above-captioned Proposed Rulemaking.

If there are any questions regarding this matter, or if any additional information is required, please contact undersigned counsel.

Sincerely,

Robert J. Munnelly, Jr.

cc: Service List

direct 617-589-3822 *direct fax* 617-305-3122
email rmunnelly@davismalm.com
ONE BOSTON PLACE • BOSTON • MA • 02108
617·367·2500 • *fax* 617·523·6215
www.davismalm.com

STATE OF RHODE ISLAND

DIVISION OF PUBLIC UTILITIES AND CARRIERS

RULEMAKING TO ESTABLISH NONREGULATED POWER PRODUCER CONSUMER PROTECTION RULES	:	D-16-112

PUBLIC COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION ON PROPOSED NONREGULATED POWER PRODUCER CONSUMER BILL OF RIGHTS

Introduction and Summary of Comments

The Retail Energy Supply Association ("RESA")[1] offers the following comments on behalf of its members concerning the proposed 815-RICR-40-05-2 Regulations establishing the "Nonregulated Power Producer Consumer Bill of Rights") ("Draft Consumer Rules"). The Division of Public Utilities and Carriers ("Division") circulated the Draft Consumer Rules and an accompanying Public Notice of Proposed Rulemaking on March 28, 2017. The Division, through its hearing officer, conducted an April 20, 2017 hearing at which undersigned counsel and Mr. Marc Hanks, Senior Manager of Corporate and Regulatory Affairs of Direct Energy, a RESA member, attended and offered public comment. Division Advocacy Staff and Mr. Andy Mitrey, President, of Archer Energy, also provided public comment at the April 20 hearing.

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

RESA acknowledges the Division's thoughtful examination and efforts in the Draft Consumer Rules to implement directives in the Rhode Island legislature's "Nonregulated Power Producer Consumer Bill of Rights," enacted into law by Governor Raimondo on July 12, 2016 (the "Act").[2] Nevertheless, RESA seeks clarification and offers suggested wording changes with respect to a number of provisions in the Draft Consumer Rules based on legal, policy and/or wording concerns. Many of these concerns were raised by RESA representatives at the April 20, 2017 hearing. Among other suggested changes with respect to potential impacts on Nonregulated Power Producers ("NPPs" or "suppliers"), discussed in greater detail below, RESA asks for the Division's consideration of the following:

(1) amending the Section 2.2 Purpose Section to reflect the fact that the Draft Consumer Rules should not place unreasonable or unnecessary burdens on NPPs that would impede competition and harm the public interest;

(2) adding a new "Applicability"section which would confirm that the Draft Consumer Rules apply exclusively to suppliers serving residential customers, with limited and clearly identified exceptions, clarify that incidental residential accounts within commercial contracts are treated as commercial rather than residential customers, and address the awkward ruling that various rules apply "on or after January 1, 2017" even before the Draft Consumer Rules were developed or promulgated by the Division;

(3) adding useful individual definitions to those listed in Section 2.3 (including to define the terms used in the above-discussed "Applicability" section and key terms used in the Draft Consumer Rules, including "Clear and Conspicuous" and "customer information";

(4) reviewing Section 2.4 Consumer Information/Billing requirements to ensure that they do not unnecessarily burden suppliers and their customers and, in particular, seeks to soften

[2] See 2016 House Bill 7040, codified principally at new Rhode Island General Laws ("RIGL") chapter 39-26.7.

or limit any requirement that an individual customer can force a supplier to issue him or her a separate supplier-specific bill rather than a consolidated bill with all distribution and supply charges;

(5) making appropriate changes to the Section 2.5 Certain Consumer Rights section to avoid unnecessary conflicts and/or confusion between or among NPPs, distribution companies and consumers; and

(6) adjusting requirements in the Section 2.6 NPP Obligations section, including deleting the requirement that suppliers need to make more than annual filings with respect to their "aggregator and agent" representatives working on the NPP's behalf in Rhode Island, or alternatively limiting those filings to a semiannual or quarterly basis rather than doing so on only five (5) business days' notice with respect to each change in the status of an aggregator or agent.

RESA's goal with the instant Comments is to ensure that the final Consumer Rules strike the right balance between protecting consumers and being administratively and operationally workable from a NPP standpoint. Maintaining this balance is critically important to enabling robust and sustainable electric competition that will generate economic benefits within Rhode Island and foster choice for all business and residential consumers. Accordingly, for the reasons stated in more detail below, RESA requests that the Division incorporate RESA's recommended changes in promulgating the final Consumer Rules. Finally, RESA notes with approval certain general observations made by Archer Energy and RESA representatives identifying potentially anti-competitive policies and practices remaining within the current Rhode Island competitive landscape. RESA urges the Division to initiate changes, or support changes within the jurisdiction of the Public Utilities Commission, to address impediments likely to interfere with the development of robust competition in the State of Rhode Island.

RESA Comments

I. Recommended Rule Changes and Comments Regarding Key Issues.

A. The Division Should Add an "Applicability" Section.

As noted by RESA presenters during the April 20, 2017 hearing, the Division should add a new section early in the Draft Consumer Rules to address key issues with how they will apply to certain NPPs and issues. Specifically, RESA recommends as follows.

First, a sentence or subsection should make clear that to the extent the Rules will apply to NPPs (as opposed to provisions applicable to distribution companies and consumers), they apply only to NPPs serving residential customers unless expressly stated to the contrary. As far as RESA can discern, the only sections of the Draft Consumer Rules applicable to NPPs serving commercial or industrial customers are 2.5H.2, 2.5I - K, 2.5O - R, and 2.6B - F. To the extent other provisions apply to NPPs serving commercial customers, the Division should state so expressly in a new Applicability section or in the individual rules themselves.

Second, the Applicability section should address the status of so-called "incidental residential accounts" ("IRAs") within a commercial contract served by an NPP focused on commercial and industrial customers. As noted during the April 20 hearing, the classic example of an IRA is the NPP having a commercial contract to serve a college or university and the service includes the residence of the college dean or university president which may be classified as residential by utility rate code.[3] From the standpoint of the NPP and the commercial customer contracting with the NPP, this is a commercial contract and the intent of the parties is that the terms of such contract should apply to all accounts and related load generated by all college/university premises, including the dean's or president's home. There is no need to create

[3] Another example may be a condominium complex comprised of individual residential units but contractually served under a master service agreement that represents a commercial counterparty.

a separate bill for the dean or president that sets forth the Section 2.4A "standard billing format for residential customers" – because the dean or president will not be viewing a bill for his or her home and he or she will not need the required disclosures – nor will he or she need to receive a residential terms of service with a minimum number of specified disclosure items in 2.5G because, again, the dean or president will be subject to the terms of service stated in the college or university commercial contract. RESA believes the legislative spirit and intent of the Act is to safeguard and protect the traditionally-defined residential consumers rather than residential accounts that may be comingled with commercial counterparties. Commercial NPPs should not be subject to potential noncompliance liability for failing to provide residential customer protections to IRAs within a commercial account that is not intended to provide, or should as a policy matter be required to provide, residentially-focused consumer protections. The Applicability Section should make clear that IRAs should only be subject to the Draft Consumer Rules applicable to commercial or industrial NPPs and are not subject to residential bill disclosure, terms of service or other residential consumer protections in the Draft Consumer Rules.

Third and finally, either the new Applicability section or the Section 2.3 Definitions should address the meaning of individual rules made applicable "...on or after January 1, 2017." See, e.g. Sections 2.5H, 2.5R. Since it would be both unfair and in violation of ex post facto law principles to deem compliance required as of four months ago for regulatory requirements that have not yet been defined or made effective to date, this "on or after" provision (emphasis added) should be construed in the Applicability or Definitions sections of the final Consumer Rules to mean sixty (60) days after the Division issues its Order approving the final Consumer Rules. The sixty day period is consistent with the "on or after" phrasing of the Act and will

afford time for new and existing NPPs and the distribution company to undertake steps post-Order to change policies and practices to comply fully with a host of new consumer protection requirements. To not otherwise remedy this inartful and ambiguous statutory language construction and retroactively impose new and unanticipated rules and related conditions on NPPs, it would have a significant chilling effect on the competitive market in Rhode Island.

B. Additional Terms Should be Added to the "Definitions" Section.

The Section 2.3 Definition section appropriately includes six statutorily defined terms used in the Draft Consumer Rules. Additional definitions should be added to avoid potential ambiguities and potential controversy once the Rules are finalized, including but not limited to establishing the meaning of "residential" customers and "incidental residential accounts" (to the extent the Division adopts RESA's recommendation in the preceding section), "conspicuous" or "conspicuously" (used in Sections 2.4B.1 and B. 2, and 2.5R), "clear and conspicuous statement" (a term used in Sections 2.5K.2 and 2.5K.4 of the Draft Consumer Rules) and, to the extent not addressed in an Applicability section as discussed in the preceding section of these comments, "...on or after January 1, 2017." Finally, as noted later in the Comments, the Division should consider adding a definition of "door-to-door sales" that protects residential consumers but carves out inapplicable commercial sales efforts from certain residential customer-focused marketing requirements.

C. NPP Bill Requirements in Section 2.4B.1 Should Only Require Charges Applicable to NPPs.

The Section 2.4B requirement for the standard billing format for residential customers, as applied to the "charges for electricity supplied/used" by NPPs in Section 2.4B.1, states that a bill for electricity charges by an NPP using its own billing platform rather than relying on the utility's consolidated distribution/generation bill must include "all of the information required by

[RIGL] § 39-3-37.2 in the order specified therein." (Emphasis added). This should be modified to "all of the applicable information," a change supported by the reference to including specified billing information "as appropriate" in the final sentence of the lead-in portion of Section 2.4A. Section 39-3-37.2 is a pre-competition statute, dating from 1991, and includes several specified billing elements that are not going to be included in most NPP's charges to Rhode Island consumers, specifically:

"(1) The total number of kilowatt hours consumed;

(2) The base rate amount for the hours;

(3) Capacity cost adjustment;

(4) Fuel adjustment charge;

(5) Conservation costs;

(6) All applicable credits;

(7) Applicable street light rental costs;

(8) Applicable taxes; and

(9) All other costs, charges or fees added to the bill or statement."

Virtually all NPPs do not calculate or use a base rate with additional specified add-ons, as envisioned in the pre-competition statute. Instead, competitive suppliers typically use a consolidated per kilowatt hour rate that includes all generation-related charges, overhead and profit. Additionally, to the extent the NPP offers a renewable or "green" product, it will offer a consolidated per kilowatt hour rate that includes all generation-related and renewables charges plus overhead and profit. As a practical matter, NPP bills will show categories (1), (2) (an all-in generation only or a generation plus renewables rate), (6) (if applicable), (8) (if applicable) and (9) (if applicable). It would not make sense, and would confuse consumers and unnecessarily

waste limited available room on supplier bills to require NPPs to reserve space for inserting blanks or a "not applicable" statement for categories (3) - (5) and potentially (6) and (9) on each bill given to consumers. Alternatively, the Division should not administratively burden and require NPPs to allot time, resources and effort to disaggregate fully consolidated retail charges to fit within arbitrary pre-competition cost categories that have not had any relevance to the competitive supply industry for over a decade.

D. The Division Should Confirm that the Division's Utility Billing Detail Order in Docket 16-78 Satisfies Standard Service Comparison Requirements in Sections 2.4B.3.a through c of the Draft Consumer Rules.

1. Sections 2.4B.3.a through c Appear to be Fully Addressed by the Division's Recent Order in Docket 16-78.

The instant proceeding to promulgate Draft Consumer Rules is not the first Division proceeding to address billing provisions required by the legislature in last year's Act. On August 17, 2016, the Division (by Kevin M. Lynch, Deputy Administrator), opened Docket 16-78, as required by RIGL §39-26.7-4(a) to be initiated by September 1, 2016, to:

> "redesign the standard billing format for residential customers to better enable such residential customers to compare pricing policies and charges of nonregulated power producers to the standard-offer service rate. The division shall issue a final decision or rules in such docket not later than six (6) months after its initiation."

It is RESA's understanding that following commencement of this docket, Division Staff consulted with NPP representatives and National Grid regarding development of the required standardized billing format for comparing NPP charges to standard offer service, and that NPP representatives did not oppose the Division's proposed standardized billing language. Thereafter, on February 8, 2017, National Grid filed a petition with the Division to "modify the standard billing format for residential customers to 'include a price comparison of the Standard Offer Service ("SOS") rate to the rate of [NPPs] to better enable residential customers to

compare pricing policies and charges of NPPs to the SOS rate,' as required by" the Act. See Order, Docket D-16-78 (February 28, 2017), pp. 1-2. The ensuing February 28, 2017 Order, issued following a February 24, 2017 hearing attended by the Advocacy Section and National Grid, approved standard billing language to be included on the separate second NPP page of the joint National Grid-NPP bill.[4] The approved language compares the NPP rate to the then-current SOS rate and also includes information on the customer's next scheduled meter read date.

Even though the Draft Consumer Rules include no text or commentary explaining how the requirements in Proposed Rule 2.4B[3] relate to or reconcile with the standard billing format approved and implemented by the Division on February 28, 2017 for the National Grid-NPP joint bill in the final Order in Docket 16-78, RESA believes that the Division-approved text satisfies the regulatory requirements for the form of NPP-SOS comparison established in all subsections of Proposed Rule 2.4B.3, such that suppliers using the consolidated National Grid joint bill need not do more. As such, RESA recommends that the final version of the Draft Consumer Rules, the final Division Order promulgating them, or both, make clear the relationship between these two dockets implementing the billing requirements of the Act. In particular, to avoid confusion, RESA recommends that a footnote be added to the final version of Proposed Rule 2.4B.3 referencing that NPPs should refer to the format approved in Docket 16-78, or any future successor docket, if there are any questions about the standardized format

[4] The NPP-SOS comparison text approved by the Division in Docket 16-78 reads as follows:

> Customers can choose to purchase their electric supply from a non-regulated power producer (NPP). National Grid will continue to deliver electricity to you, and will respond to service calls, emergencies, and provide storm restoration. To compare offers, the rate for [name of distribution company]'s electric supply, known as Standard Offer Service (SOS), is $XXX effective XX/XX/XXXX. The SOS rate is scheduled to change on XX/XX/XXXX. Please note: The electric NPP must submit the enrollment at least X business days prior to your next scheduled meter read date, which is XX XX. For more information, visit www.ripuc.ri.gov.

needed to comply with Rule 2.4B.3 billing requirements, either for NPPs using the joint utility bill or those relying on their own customer bills.

2. To the Extent Not Fully Resolved in Docket 16-78, the Division Should Clarify and Limit the Billing Obligations on NPPs in Section 2.4B.

As noted by RESA representatives during the April 20, 2017 hearing, RESA has significant concerns with requirements in Section 2.4B.3.b of the Draft Consumer Rules that require each NPP, on its bill, to "list all of the component costs of its total supply/commodity cost." To the extent that this statement is just a restatement of the inclusion of outdated and inapplicable pre-competition cost categories pursuant to RIGL 39-3-37.2, RESA's position is fully articulated above in Section I.C of these RESA Comments seeking to construe Draft Consumer Rule 2.4B.1. To the extent Draft Consumer Rule Section 2.4B.3.b would require compelled disclosure of all of all "component costs" in an NPP retail supply offer to Rhode Island consumers, such a requirement would involve disclosure of commercially sensitive cost information and financial hedging strategies that would be unnecessary for consumers, harm NPPs and potentially result in NPPs avoiding entry into the Rhode Island market. Furthermore, RESA believes the disclosure of this commercially sensitive and proprietary information among NPPs both competing with each other in the marketplace and cooperating with each other to support regulatory and legislative objectives through industry associations such as RESA and the National Energy Marketers Association ("NEMA") would create conditions for the NPP industry to be investigated for possible violations of federal Antitrust laws – a result that would disrupt the retail supply industry and harm consumers.

E. The Consumer Rules Should Not Compel NPPs to Issue Individual Bills Unless They Maintain the Requisite Functionality in Rhode Island.

Section 2.4B.4 of the Draft Consumer Rules provides that residential consumers may "request" an NPP to provide separate bills for electricity supply. This Rule should be amended

to provide that such request shall be granted only to the extent that the supplier in question maintains functionality to issue separate bills in Rhode Island for the customer class it is serving in Rhode Island; otherwise, NPPs need not comply with such a request. As noted during the April 20, 2017 hearing, nearly all NPPs serving residential customers rely on the utility consolidated bill, and organize their operations and interfaces to provide timely billing information as required by the utility's billing systems. It would be commercially unreasonable and imprudent to require NPPs to maintain duplicative operations, interfaces and billing systems required to generate a separate bill for a single customer, in the event requested by the customer. The requirement can be fulfilled in cases where the NPP maintains functionality to generate an NPP-specific bill to a customer, rather than relying solely on the utility joint bill. Nevertheless, an NPP should not have to maintain an entirely new billing system, at extreme and unreasonable costs in money, resources and equipment, just to have the capability available to serve the needs of a consumer in the uncertain event that chooses to rely on that functionality rather than the identical functionality offered more cost effectively to suppliers and, ultimately, to consumers using the joint utility bill. The imposition of these unnecessary administrative and cost burdens will only serve to increase the cost to serve in Rhode Island and to reduce the net benefits to shopping consumers.

F. Website Requirements Should be Amended to Clarify that "Participating" NPPs Should Follow Division Rules for Updating Website Information.

During the April 20, 2017 hearing, RESA representatives commended the Division and the legislature for enabling and populating a voluntary shopping website and committing to a review process on a biennial (every two years) basis. See Draft Consumer Rules at Sections 2.4D and E (encouraging consumers and NPPs to consult the website and recommending that NPPs "wishing to have their products listed" on the website should contact the Division's Chief

of Information). Draft Consumer Rules Section 2.4 in a later subsection goes on to to specify that NPPs "shall" provide information to the Division on pricing policies, charges and termination fees, and "shall" provide information in a manner consistent with digital filing requirements and website information. Id., at Section 2.4F.

In order to avoid confusion and to reconcile the voluntary nature of involvement in the website as established in Section 2.4D with the mandatory "shall" references regarding the website and updates to it in Section 2.4F, RESA recommends that the text in Section 2.4F be amended to apply mandatory obligations only to "participating NPPs" or "NPPs participating in the website" or similar terms. RESA supports having NPPs with product offerings on the website being in full compliance with applicable information transmission and update requirements while, at the same time, not creating a misunderstanding or conflict between different sections of the Consumer Rules that all NPPs are or are not obligated to have products listed on the site.

G. The Division Should Modify Inaccurate and Confusing Text in the Utility Enrollment Provision.

In Section 2.5C, one of the initial sections in the portion of the Draft Consumer Rules addressing "Certain Customer Rights," the obligation on the electric distribution company to transfer a customer appears confusing and potentially inconsistent to RESA. The confusion comes from an early reference in the fourth line of Section 2.5C to the NPP providing a "successful enrollment" of a customer to the distribution company but then creates an exception for when "notification is not received by the electric distribution company" in accordance with

its approved tariff on file with the Division. RESA has reviewed the National Grid tariff for NPPs and does not understand the meaning of the exception language.[5]

Specifically, the National Grid tariff at Sections 1.3.2 (Testing) and especially 1.3.3 (Customer Participation) appears to be clear: if the NPP submits electronic data interchange ("EDI") data supporting the customer enrollment to National Grid and "the enrollment data are successful," National Grid enrolls the customer and National Grid generates confirming notifications **to** the new supplier (as well as the former supplier). National Grid Tariff for NPPs 1.3.3 (emphasis added). The tariff has no requirement whatsoever that would require cancellation of enrollment, following successful transmission by the NPP of enrollment EDI data to National Grid, based on a failure of the NPP to send an additional "notification" **to** National Grid. See id. Accordingly, the first part of Section 2.5 of the Draft Consumer Rules – requiring that the NPP have a "successful" enrollment from a distribution company standpoint – makes complete sense and fully comports with the National Grid tariff. The second part – creating an exception where National Grid does not receive "the notification" **from** the NPP required by the tariff – lacks a basis in the tariff language and, therefore, should be deleted.

H. The Division Should Clarify the Meaning of "Customer Information" That Can be Released to a NPP.

As discussed at the April 20, 2017 hearing, RESA noted that its members were confused by the scope of the term "customer information" eligible for release to NPPs upon the meeting of tariffed conditions, in Section 2.5E of the Draft Consumer Rules. RESA has now reviewed the current National Grid tariff and notes that Section 2.5 of the tariff provides that NPPs are

[5] The National Grid NPP tariff for Rhode Island can be found at the following link: https://www9.nationalgridus.com/narragansett/non_html/supplier_nonregpwrprod.pdf (last accessed April 25, 2017).

entitled, with customer consent, to receive twelve (12) months of historical usage data for such customer.

In order to avoid confusion and to prevent the necessity of new NPPs being forced to find and review National Grid's tariffs to determine the meaning of the term "customer information" in the final Consumer Rules, RESA recommends that the term "customer information" be added to the current Section 2.2 Definitions in the Draft Consumer Rules as follows: "'Customer information' shall have the same meaning as that which is contained in approved distribution company terms and conditions for Nonregulated Power Producers, and which currently refer to twelve (12) months of a customer's historical usage information."

I. "Guarantee" or Other Mandatory Language in Terms of Service Requirements Relative to Customer Switching Should Be Omitted or Modified to Require "Commercially Reasonable" Actions by the NPP.

Section 2.5G establishes 19 categories of "specified information" to be provided by each NPP to residential customers in the terms of service, with numbered and bolded topic identifiers for each. Three of these categories include express or implied requirements relative to the timeliness of customer switches to the NPP from a prior supplier or from the NPP to a new supplier. See Section 2.5G at subsection nos. 4 (requiring a disenrollment date to be specified in the contract that would enable the customer to be switched prior to the next billing cycle), 5 (requiring that the customer be afforded the "right" to schedule cancellation of the service on a date certain), and 7 (requiring that the contract "shall specifically guarantee" that the NPP shall enroll the customer or terminate service "prior to the consumer's next bill read date so long as the request to enroll or de-enroll has been made at least seven (7) calendar days in advance of the next bill read date"). RESA requests that these provisions either be deleted or modified to require only that the NPP make commercially reasonable efforts to undertake the stated obligations.

As RESA representatives discussed during the April 20, 2017 public hearing, EDI transactions back and forth with the distribution utility regarding enrollment and de-enrollment typically flow smoothly but occasionally have problems, whether caused by inaccurate data, missing data or data transmission and processing errors from the NPP, the distribution utility or the customer himself or herself. Given these issues, RESA members oppose the proposed regulatory language creating customer "rights" in terms and conditions or contract clauses relative to inflexible obligations or even "guarantees" on the part of the NPP relating to the timeliness of enrollment and de-enrollment transactions that are not fully within the NPP's control, particularly when such provisions may well result in complaints, contract breach claims and even class action lawsuits from dissatisfied consumers.[6] Nevertheless, despite these potential liabilities, RESA accepts some obligation to seek to secure timely processing of customer switches and would support language that NPPs are required to make "commercially reasonable efforts" to meet enrollment or de-enrollment obligations currently required by the Draft Consumer Rules.

J. NPPs Should Not Be Required to Provide Written Notice to a Customer Guaranteeing that the NPP has Processed a Request to Cancel Service and Return the Customer to Standard Service.

Section 2.5G.8 requires that a terms of service "specifically guarantee" that when a consumer opts to return to SOS service, that the NPP will provide the consumer with a "written confirmation" that the NPP has "received word of the customer's cancellation and has processed the request." This Section 2.5G.8 requirement of a written notice from the NPP to the consumer confirming the cancellation is confusing, inapplicable to certain customer cancellation

[6] RESA specifically notes that subsection (7), which includes the strongest "specifically guarantee" language, was not included with the legislative Act or existing Division consumer rules, but was added as part of the "catch all" provision permitting the addition to the terms of service of "[a]ny other information required by the division...." Compare annotated version of Draft Consumer Rules (stating that subsection (7) was "[a]s authorized by39-26-7-5(g)(11)" with the text of the Act cited (the catch all for "any other information required by the division.).

tranactions, wholly unnecessary and burdensome, as well as inconsistent with EDI processing practices. Accordingly, this requirement should be deleted from the Draft Consumer Rules before the Division finalizes them. Alternatively, to the extent the Division insists that a written notice of cancellation be sent, the obligation to generate a written confirmation notice should be placed on the supplying party chosen by the customer, in this case National Grid.

Section 1.3.3 of the National Grid tariff (see link in footnote 5 supra) does not specifically disclose the EDI processing steps that occur when a customer switches back to National Grid's standard offer service. Nevertheless, the tariff does make clear that the "chosen supplier" (in this case National Grid) submits the data needed for the EDI enrollment transaction and the outgoing supplier has no role other than to receive an EDI notice confirming the effective date of the service termination. The customer may receive a notice from National Grid (it is not specified on the tariff) but the customer certainly will receive notice when the switch to standard offer service is reflected on the customer's bill. It is unfair and inequitable to force the NPP losing the customer to generate a written customer notice where, in many cases, the NPP will not receive any pre-switch "word of the cancellation decision" and in all cases will not be the entity that "processed the request." See Draft Consumer Rules at Section 25G.8. To the extent there is a need for a written customer notice requirement, it should be on National Grid, who is the chosen supplier and is directly responsible for receiving "word of the cancellation decision" and being the party that "processed the request," as stated in Section 2.5G.8 of the Draft Consumer Rules.

K. The Rules Should Delete the Required Outdated Reference to the Former Fixed-to-Variable True Up Adjustment.

As noted on the Division's competitive supply informational webpage, the former longstanding Rhode Island requirement of a fixed-to-variable true up "market adjustment" was

eliminated for residential customers more than two years ago, in 2015.[7] While an NPP may well choose to keep the text enumerated in Section 2.5G.10 of the Draft Consumer Rules that such a market adjustment "may" occur for a terms of service used for both commercial and residential customers, it would be unnecessary, inappropriate and confusing to consumers for the Division to require inclusion of such section describing a fee inapplicable to residential customers in rules governing the content of residential terms of service documents. This outdated clause should not be a requirement for residential terms of service documents, as it is under the current version of the Draft Consumer Rules.

L. The Division Should Delete or Limit the Current Text Requiring the Terms of Service Include Contact Information for the NPP "Person" that "Agreed on the Service Contract Terms" with the Consumer.

The final provision in the Section 2.5G specification of provisions in a terms of service for residential customers, subsection 19, reads in full as follows: "The name, business phone number, business address, and email address of the person at the [NPP] that agreed on the service contract terms with the customer." This provision is not a clause legislatively required by the Act. See RIGL § 39-26.7-5 (Certain customer rights) at subsections (g)(1) through (10) (specifying terms that are represented in the Draft Consumer Rules up through subsection 18). The annotated version of the Draft Consumer Rules, available on the Division website, states that subsection 19 of the Draft Rules is supported by subsection (g)(11), which permits in catch all fashion the inclusion in the terms of service "[a]ny other information required by the division."

RESA vigorously opposes inclusion of this vague and confusing Division-mandated obligation to include individualized information on one or more particular NPP "persons" responsible for the NPP's contract with an individual consumer contract as a mandatory

[7] See Division Competitive Energy Suppliers – Q&A, located at <http://www.ripuc.org/utility.info/electric/compfaq.html> (last accessed April 28, 2017).

component in a generic Rhode Island-wide residential terms of service document. It should be deleted or, if something must be retained, clarified to permit the NPP to name executives in customer facing areas such as Regulatory, Marketing or Operations as the NPP "persons" who are the persons responsible for the NPP having "agreed on" contract terms with the customer. Even then, the NPP should not have to provide individualized business contact information for executive in the terms of service. Such inclusion will almost certainly force the named executive to be distracted from valuable business duties in favor of having to field individualized service questions and complaint calls that would be better handled through by customer service staff.

RESA representatives at the April 20, 2017 hearing highlighted the many problems with this provision from the standpoint of an NPP. The terms of service should be a generic form document applicable to all of the NPP's residential customers. It is contrary to the generic nature of the terms of service form to add a required element in the middle of a document that would mandate the naming of different individual personnel at the NPP and, depending on how expansively the Division interprets "the person at the [NPP] that agreed on the service contract terms with the customer," create a near-certainty of having to create different terms of service for use by different sales people or marketing managers or executive level managers within each NPP. Any type of individualized, customer-specific information such as this is unreasonable, grossly burdensome and inappropriate for inclusion within a terms of service document. It should be deleted.[8]

If the Division insists on inclusion in the terms of service of an individual NPP "person" who "agreed on" the service terms, the Division should clarify that the NPP can name the

[8] To be clear, if the Division expansively construes the "person" requirement to include individual sales people who interacted with the customer over the phone or in a door-to-door transaction, the operational issues associated with Rhode Island terms of service that would have to be varied to incorporate tens or even hundreds of salespersons would be entirely unworkable and would run the risk of suppliers bypassing Rhode Island as not NPP-friendly.

executive responsible for contract form and implementation of pricing strategy – typically, an executive with responsibility for Regulatory, Marketing or Operations functions in Rhode Island. Even then, the terms of service should not be required to include the email, direct business phone number or address of the executive in question. Including individual contact information on those key executives in the terms of service would invite direct individualized inquiries and complaints to such executive that would distract them from pressing duties and be more effectively handled by customer service personnel in any event.

M. The Written Notice Requirement for Commercial or Industrial Customers Should be Clarified in a Manner Consistent with the Limited Purpose of a Notice in a Transaction Involving Sophisticated Parties.

In contrast to Section 2.5H.1 which provides that NPPs serving residential customers must provide residential customers with the detailed, 19-point terms of service crafted pursuant to Section 2.5G before commencing services to such customer, Section 2.5H.2 provides that an NPP need only provide a slimmed down written notice to non-residential customers. RESA requests that this provision of the Draft Consumer Rules be clarified to confirm the limited purpose of a written notice to sophisticated commercial parties, in the particular respects described below.

First, taking each provision of the commercial summary requirement in turn, Section 2.5H.2 of the Draft Consumer Rules requires that such written notice "describe[e] the rates...." This is a direct quote from the Act (at Section 39-26.7-5(h)(second sentence)). This text should be construed to require only a brief summary of the commercial contract rate structure and/or a cross-reference to the rate sections in the applicable commercial agreement. It should not have to include a detailed discussion of whether such rate is a fixed or variable rate, its term and expiration date, whether the contract will automatically renew, or similar detailed information required in the Act for residential customers but not applied to commercial or industrial

customers. Given the complexity and customized manner of the commercial terms of service and array of commercial rate designs, including those tied to Independent System Operator-New England ("ISO-NE") hourly and/or day-ahead rates, those tied to other published indexes, variable rates with maximum and minimum collars, and the like, anything other than a short summary is likely to be confusing to the customer and/or raise the potential for conflicts as between the actual agreement and the summary required for the written notice.

Second, Section 2.5H.2 of the Draft Consumer Rules requires that the notice describe "information that complies with R.I.G.L. § 39-26-9 and the [Rhode Island Public Utilities Commission's] rules governing energy source disclosure," as such requirements may be amended. Compliance with these requirements should not be controversial or difficult.

Third, Section 2.5H.2 of the Draft Consumer Rules requires that the notice describe "terms and conditions of the service." This text also should be construed to require only a brief summary of the commercial contract terms of service and/or a cross-reference to the terms of service document provided in the contract provisions given to the commercial or industrial customer. It certainly need not compel the commercial NPP to create a detailed summary akin to the categories in the detailed 19-point terms of service required for residential customers by both the Draft Consumer Rules and the Act.

Fourth and finally, Section 2.5H.2 of the Draft Consumer Rules requires that the notice describe "the customer's right to cancel the service...." This is an evident reference to the three (3) day right of rescission applicable to all residential and commercial contracts, and the requirement to provide a cancellation means available even if the customer has no Internet access, both of which are described "in this section" of both the Act (at RIGL § 39-26.7-5, at subsections (k)(5) and (6)) and in the Draft Consumer Rules (at Sections 2.5K.4 and 5).

In sum, a short notice or statement briefly referencing the required elements should meet the requirements of the Act to provide a slimmed down summary of the terms of service to be given to sophisticated commercial customers. RESA would support adding clarifying information in Section 2.5H.2 of the Draft Consumer Rules to reinforce that the commercial contract summary should be brief and need not include a level of prescribed detail that may be more appropriate for a residential consumer, such as modifying the current Section 2.5H.2 to read "describe the rates in summary fashion..." or "briefly describe key terms and conditions of the service." RESA believes its proposed recommendation to be consistent with the legislative intent of the Act.

N. The Division Should Clarify Residential Contract Requirements.

Section 2.5K of the Draft Consumer Rules establishes the requirement for each contract for generation services, as further articulated in subsections (1) through (6). Some of the text used in this section or these subsections should be clarified as follows:

First, subsection (1) requires that the contract should include all material terms of the agreement between the NPP and the customer, and that all required elements in the Section 2.5G residential terms of service is "considered to be a material term." A sentence should be added stating as follows: "The contract may incorporate by reference the terms of service." This sentence seeks to prevent the duplicative and wasteful requirement of restating a lengthy terms of service document in the body of the contract.

Second, subsection (2) is understandable on its own terms but the Division should define what "clear and conspicuous" means, either in this subsection or in the Section 2.3 Definitions section.

Third, subsection (3) accurately re-states the applicable section of the Act. Nevertheless, the Division should seek to interpret and clarify the reference to "how long those rates are

guaranteed." The reference to "those rates" lacks clear definition. RESA assumes it refers to the customer's new rates with the NPP and how long they are guaranteed, either to the end of the term for fixed rate contract or not at all for most variable price contracts. It should not refer to the then-current standard offer service rates, as the customer's former rates might be with either a different NPP or utility standard offer service, and cannot be assumed to refer solely to standard offer service. RESA supports clarifying this provision by stating "how long the NPP's rates with the customer are guaranteed."

Fourth, subsection (4) again is understandable but the Division should define the term "clear and conspicuous," either here or in the Definitions section.

Fifth and finally, subsection (5) is generally fine but the text should be modified to read the "method or methods by which...." (RESA has no problem with the reservation of rights for future action in subsection (6)).

O. Section 2.5L Should Not Require the NPP to Demand Choice of Written Notice Method During a Post-Sale Third-Party Verification Confirmation Call.

The first portion of Section 2.5L sets forth an obligation, common in many restructured states and/or as a business practice of NPPs even without a regulatory requirement, to provide a written notice 30-60 days before the end of a fixed-price term to advise the customer of available end-of-term options for renewal or for changing providers. RESA supports this provision as it provides greater transparency and disclosure to shopping consumers. Section 2.5L then creates an additional obligation, expressly required in the Act at RIGL § 39-26.7-5(l), to require that the NPP customer "shall select" the method of written notice "at the time the contract is signed or verified through third party verification." In so doing, the Division goes beyond the statutory text to require a complex set of procedures to manage this required written notice selection process as applied to the required third-party verification ("TPV") call to confirm a lawful

enrollment. See id. (requiring that the selection be made during the TPV call by "indicating to the third-party verifier the method of written notice to be used by the [NPP]") (emphasis added); compare RIGL § 39-26.7-5(l) (not requiring specific TPV procedures for making the written notice selection except generally mentioning "in a manner approved by the division"). The provision concludes by stating that the customer shall have the option of switching between and among written notice options during the contract.

While acknowledging the awkwardness of the statutory language requiring incorporation into the Draft Consumer Rules, RESA strongly objects to the specific manner the Division has sought to implement this statute relative to telephone calls verified by TPV. NPPs should be allowed to choose whether to offer the required written election before the call is switched to the third party vendor for processing (presumably after the sale agreement is concluded between the customer and NPP's telephone sales representative) or during the TPV verification process itself. The Division should be mindful of the significant administrative, operational and cost implications with compelling NPPs to effectuate the written notice option for telephone sales calls exclusively through the mechanism of the TPV calls. It would force NPP TPV vendors to go beyond their ordinary course verification duties in which they are expert and operate at a regional or national basis and take all of the following additional steps that they are not currently required to do (to RESA's knowledge) anywhere else in the United States: (1) explain to a customer that State regulators require they make a choice at this point, prior to completion of enrollment, that they choose a format for receiving written notices, (2) explain the choice of options, (3) receive the customer's choice of options, (4) record such choice on a recording that may be either separate from the regular TPV recording that is maintained in the event of controversy but not invariably listened to except if chosen to be audited, and (5) transmit the

recording of such choice to the NPP. Many, if not all, NPPs would likely prefer to handle compliance with the statutory choice requirement by addressing it with their own specially trained sales staff before the call is transferred to the TPV vendor with no existing processes or expertise in managing a written notice process for the NPP. Accordingly, for the aforementioned reasons, RESA urges the Division not impose the proposed TPV requirements on NPPs.

To accomplish this modification, RESA would recommend that the Division adjust Draft Consumer Rule 2.5L by deleting all text in the second sentence that follows "...as described in this section" and ends "...to be used by the nonregulated power producer." NPPs should be permitted to achieve compliance with the principal statutory obligation of offering a written choice of written notice options based on their own reading of the statutory and regulatory text.

P. The Badging and Branding Obligations for NPP Representatives Should Not Apply to NPPs Serving Commercial Customers.

RESA supports reasonable requirements for door-to-door sales to residential customers for NPP sales staff to wear photo identification badges, avoiding use of branded apparel or collateral that would imply a relationship with the local distribution company or uses collateral implying a relationship that does not exist with a state agency or unaffiliated supplier, such as seen in Section 2.5Q of the Draft Consumer Rules. RESA recommends, however, that these mass market-focused consumer protection measures are unnecessary in a commercial sales context where sales staff typically rely on in-person meetings scheduled in advance between NPP and customer personnel that are held at the customer's business offices. RESA recommends that this goal be accomplished by inserting the term "conducting a door-to-door sale" after the term "agent of a nonregulated power producer or aggregator" in the top two lines of Section 2.5Q and then adding the following "door-to-door sales" definition at the end of Section 2.5Q or earlier in the Draft Consumer Rules within the Section 2.3 Definitions section:

> "'Door-to-Door Sales' means any sale of energy services in which the NPP or the NPP's representative personally solicits the sale, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller; provided that 'door-to- door sales' shall not include any sale which is conducted and consummated entirely by mail, telephone or other electronic means, or during a scheduled appointment at the premises of a buyer of nonresidential utility service, or through solicitations of commercial accounts at trade or business shows, conventions or expositions."

Q. The Division Should Extend Dates for NPPs to Submit Required Annual Aggregator or Agent Filings and Cancel or Defer Periodic Update Filings.

Section 2.6 of the Draft Consumer Rules ("NonRegulated Power Producer Obligations") includes requirements in Section 2.6B that each NPP make an annual filing "on December 31" of aggregators or agents working on their behalf, and update such filing within five (5) business days after it either removes or adds an aggregator or agent. This provision should be modified to make it more workable in at least two principal respects.

First, the underlying Act requires an annual filing but does not specify a date by which such filing shall be made. Section 2.6B specifies December 31. RESA strongly recommends that this be changed to a date in March (such as March 1st or the first business day in March). This will allow the NPP to close its books for the calendar year, be able to take some time reviewing its engagements of aggregators and agents in the preceding year, and submit an accurate and complete list to the Division. A late December date during which management staff may be fully engaged on closing out year-end offerings, staff may be on holiday week vacations, and staff may be in the process of finalizing hiring or transitioning of aggregators and agents to be used in the next quarter, make December 31 a particularly disadvantageous date for an annual report.

Second, again, the underlying Act only specifies an annual filing. Section 2.6B goes beyond the statutory obligation by not only requiring ongoing supplemental filings throughout

the course of a calendar year but requiring such updates to be filed on a rolling basis only five (5) business days after each aggregator or agent is removed or added. This is an unnecessary and administratively burdensome requirement that exceeds legislative intent, and it should be deleted. The Act called for annual filings of aggregators and agents, which should provide some useful information to the Division on how NPPs operate within the State of Rhode Island. Especially in light of the limited nature of Division staff presently devoted to NPP activities, it makes little apparent sense to require a continuous stream of notices of hirings and firings to the Division that would have to be reviewed by Staff on a continuous basis throughout the calendar year. If the Division is still insistent on receiving updates throughout the calendar year, they should be required on a semi-annual or, at most, a quarterly basis where the changes can be collated into a single filing and reported to the Division. It would waste time and resources for an NPP to be required to employ counsel to make dozens of regulatory filings during the course of a calendar with only an absurdly short five (5) business day lead time to denote the adding to or departure of a single aggregator or agent.

Please note that RESA has no additional comments on the remaining subsections in Section 2.6 of the Draft Consumer Rules.

II. Key Additional Issues to be Addressed in this Docket or Other Regulatory Dockets

Representatives of both Archer Energy and RESA noted that, in addition to the changes called for in the Draft Consumer Rules, additional work appears to be needed to enable robust competition to develop in Rhode Island.

A. Implementation of Purchase of Receivables. Many states, including Connecticut and Massachusetts, have worked with utilities to implement pro-competitive Purchase of Receivables ("POR") systems that allow suppliers to market to interested consumers without the

need for credit checks or collectability concerns. The Division should strongly consider working with stakeholders to determine if a POR option would benefit Rhode Island consumers.

B. Review of Discriminatory Utility Payment Hierarchy Issues. In an issue of critical importance for non-POR states, the representative from Archer raised concerns that the current payment hierarchy for current and receivable debts paid by consumers to the distribution utility discriminated against NPPs that make use of the utility consolidated billing option. When utility current and past debts are favored over both current and past NPP debts, as Archer alleged is the case today with National Grid's hierarchy relative to consumer payments on the consolidated utility-NPP bill, NPP payments from consumers are either grossly delayed or never paid in full, as the past and current utility debts are satisfied before the supplier receives any monies. This causes a huge cash flow and profitability problem for NPPs and may well lead NPPs to avoid joining the Rhode Island market once they discover that such a problem exists.

This was a recognized problem in New Hampshire that was addressed by the Public Utilities Commission in Docket 13-244, captioned "Electric Distribution Utilities and Competitive Energy Suppliers: Investigation into Payment Hierarchy Issues." Following a docket opening order, discovery, technical sessions and a hearing, the proceeding was resolved by means of a June 4, 2014 Commission Order approving an agreement among stakeholders establishing a more equitable payment flow for customer payments to the utilities on joint utility-supplier consolidated bills.[9] The critical element is that the settlement made sure that overdue supplier debts were paid before utility current distribution debts. This ensures that supplier overdue obligations will be paid without excessive delay. To the extent this equitable arrangement is not in place in Rhode Island, RESA recommends the Division establish and/or

[9] A copy of the pleadings and final Order can be found at the following link: https://www.puc.nh.gov/Regulatory/Docketbk/2013/13-244.html (copy last accessed April 27, 2017).

recommend that the Public Utilities Commission establish a docketed proceeding to examine the current payment structure and explore efforts to address this payment hierarchy inequity as quickly as possible.

Conclusion

RESA appreciates the opportunity to provide comments on these topics of importance to consumers, NPPs and the development of robust electric competition in the State of Rhode Island. For the reasons discussed above, RESA recommends that the Division:

(1) amend the Section 2.2 Purpose Section to reflect the fact that the Draft Consumer Rules should not place unreasonable or unnecessary burdens on NPPs that would impede competition and harm the public interest;

(2) add a new "Applicability" section which would confirm that the Draft Consumer Rules apply exclusively to suppliers serving residential customers, with limited and clearly identified exceptions, clarify that incidental residential accounts within commercial contracts are treated as commercial rather than residential customers, and address the awkward ruling that various rules apply "on or after January 1, 2017" even before the Draft Consumer Rules were developed or promulgated by the Division;

(3) add useful individual definitions to those listed in Section 2.3 (including to define the terms used in the above-discussed "Application" section and key terms used or potentially useful in the Draft Consumer Rules, including "clear and conspicuous," "customer information" and "door-to-door sales";

(4) review and modify Section 2.4 Consumer Information/Billing requirements to ensure that they do not unnecessarily burden suppliers and their customers and, in particular, seek to soften or limit any requirement that an individual customer can force a supplier to issue

him or her a separate supplier-specific bill rather than a consolidated bill with all distribution and supply charges;

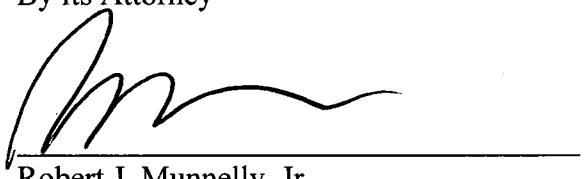
(5) make appropriate changes to the Section 2.5 Certain Consumer Rights section to avoid unnecessary conflicts and/or confusion between or among NPPs, distribution companies and consumers;

(6) adjust certain requirements in the Section 2.6 NPP Obligations section, including deleting the requirement that suppliers need to make more than annual filings with respect to their "aggregator and agent" representatives working on the NPP's behalf in Rhode Island, or alternatively, limiting those filings to a semiannual or quarterly basis rather than doing so on only five (5) business days' notice with respect to each change in the status of an aggregator or agent; and

(7) support efforts outside of the instant proceeding to address inequities in the current regulatory system, including considering implementation of a POR regime in Rhode Island and, if not, reviewing current payment hierarchy rules and practices.

RETAIL ENERGY SUPPLY ASSOCIATION

By its Attorney



Robert J. Munnelly, Jr.
Davis, Malm & D'Agostine, P.C.
One Boston Place - 37th Floor
Boston, MA 02108
Telephone: (617) 589-3822
Fax: (617) 523-6215
rmunnelly@davismalm.com

Date: May 1, 2017