

New England Electric Retail Competition

2022-23 in Review

January 2024

The five restructured New England states open to retail electric supply competition – Connecticut, Maine, Massachusetts, New Hampshire and Rhode Island – saw significant activity during the 2022 and 2023 calendar years. Business issues (notably historically high default service and supplier prices) and record inflation in related markets in 2022 posed significant challenges for retail suppliers, wholesale suppliers, agency and legislative policymakers, and consumers across the region. Enforcement activities ranged from very high in Connecticut to moderate in Maine and relatively low in the other states.

During the preceding two year period, Connecticut’s regulatory and legislative activities far exceeded those in other New England states, while Massachusetts had limited developments due to disagreements among policymakers on potentially ending residential retail competition. The remaining restructured New England states had moderately active regulatory activities at state utility commissions (PUCs), and legislative activities that included substantial progress towards implementing pro-competitive purchase of receivables (POR) programs, implementing additional municipal and/or community aggregation programs, active consideration of changes to decades-old methodologies for determining market-following default service prices, and considering safeguards for retail market access by low-income or hardship customers.

STATE-BY-STATE HIGHLIGHTS

Connecticut

Connecticut was by far the busiest New England state, from a competitive retail developments standpoint, at the PUC, in courts, and in the legislature. The state saw plenty of activities affecting retail supply, default service and consumers.

Proposed Regulatory Changes – PURA made progress in 2022 on two longstanding sets of proposed regulatory changes: State renewable portfolio standard (“RPS”) rules and State licensing rules, respectively. The revised RPS

rules were promulgated at the end of 2022 and implemented during 2023. The RPS rules include a host of significant changes, including substantial RPS-specific bond requirements - totaling millions of dollars for larger suppliers - that are intended to be sufficient to cover RPS obligations incurred by the supplier for each given compliance year. Extensive comments were received on the retail licensing rules and are awaiting finalization. If adopted, changes would include reducing the current five-year license review cycle to two years, adding a new and significant increased license bond requirement, and including a data security self-certification.

Default-Service Pricing – Connecticut was one of many New England states with default service pricing that spiked to historically high levels leading into winter 2022-23. Prices moderated in calendar 2023, but the utility commission investigated whether to change longstanding strategies for procuring power to be used to supply so-called standard service (or default or basic service) customers who remained unserved by competitive retail suppliers. The PUC investigation remains in process at 2023-year end.

Enforcement – The Education, Oversight and Enforcement (“EOE”) unit within the PUC continued its aggressive efforts to initiate regulatory investigations and propose significant sanctions on Connecticut’s retail suppliers, in terms of fines, service suspensions and settlements that encouraged investigated suppliers to depart Connecticut as a condition of settlements. Targets during 2022-23 included:

- Discount Power (proposed \$2 million fine, a three-year license suspension, plus a refund obligation for all customers in 2018 and 2019 – settled in Spring 2022 for \$1 million and exit from Connecticut marketplace);
- Public Power and affiliated companies Viridian, Connecticut Gas and Electric and Energy Rewards and Ambit (settled for \$3 million and exit of all companies from Connecticut with Ambit retaining the ability to reapply in 2027);
- Sunwave Gas and Electric (\$1 million penalty plus license revocation);
- Verde Energy (\$2 million fine proposed plus restitution payments settled for \$1.5 million plus exit from Connecticut for at least seven years);
- Eligo Energy (settled for \$3 million in two installments and agreement not to market to new customers until January 2030);
- Mega Energy (proposed fine of \$124,000; waiting on resolution of complaint proceeding);

- Xoom (negotiated payment of \$1,500,000, with the funds devoted to paying a portion of the arrearages of residential customers who are currently: a) designated financial hardship; b) have never been designated medical hardship; and c) have arrearages greater than 180 days); and
- Town Square Energy (settled in late 2023 for unspecified potential violations through date of settlement for \$450,000 with funds earmarked to reduce arrearages).

Investigation into Retail Pricing Practices – Pursuant to a legislative directive, PURA re-opened an investigation in late 2021 to consider possible changes to a 2019 decision that had precluded lower income “hardship” customers from enrolling with retail suppliers, leaving them only to utility-provided standard service that experienced price hikes in excess of retail market alternatives for much of 2022 and 2023. Instead of focusing exclusively on the merits of a policy of letting hardship customers back into the market, provided that the price did not exceed the default service price, PURA granted an EOE request to conduct a “Phase I” that would involve assessing whether PURA should place limits on product offerings by all retail suppliers relative to all residential customers, not just the relatively small hardship segment.

In early 2022, PURA approved a lengthy procedural schedule for Phase I, which included active discovery, pre-filed testimony, a hearing, and briefing and initial draft decisions. The schedule was later limited to the discovery and an EOE report on recommendations without any opportunity for supplier testimony, hearings or briefing relative to EOE findings.

The REAL retail supplier trade group and several individual suppliers challenged the statutory basis for the Phase I proceeding in a Connecticut Superior Court action that the parties later dismissed as moot following a PUC decision to terminate Phase I without a final order. Instead, a legislative change was implemented, allowing hardship customers to resume participating in the retail market at a price at or below default service.

The issue of industry-wide limits on retail supplier offers remains live in a new Phase II docket. REAL and individual suppliers have raised at the PUC and in new Superior Court proceedings the due process contention that the PUC cannot impose limits on non-hardship customers without first meeting State “contested case” due process requirements of notice, proceedings on formal record and opportunity to test evidence at a hearing. Retail plaintiffs also argue that the statute requires supplier limits to be determined on a supplier-by-supplier basis rather than on an industry-wide basis, as argued to date by EOE.

Supplier Cost Allocation Associated with Utility Billing Changes – As part of an earlier phase in a longstanding case dealing with changes in utility billing formats to include the next month’s supplier price and other information, the PUC had determined that supplier partial noncompliance justified imposing all associated utility billing format costs – over \$2 million – on all Connecticut suppliers. Following a written comment process in 2022, the EOE proposed an allocation using fixed and variable cost methodologies with specified proposed costs on a per-supplier basis. The PUC adopted the EOE proposal, and payments were required in Q4 of 2023. One complicating aspect is that at least one of the supplier parties that made enforcement payments as part of an agreed-upon exit from Connecticut argued for an exemption from paying billing-related charges and challenged the assessment in a still-pending Connecticut Superior Court case.

Appeal and Resolution of Voluntary Renewable Offer Investigation – In Fall 2020, PURA issued a controversial decision that would change the ability of Connecticut retail suppliers to offer products that included voluntary compliance with RPS requirements above mandatory minimums, including:

- the voluntary component of such offers could no longer be bundled with a conventional retail offering, but must be offered as an RPS-only product;
- the particular certificates used in a voluntary product would be subject to geographic limitations (i.e., only the New England, New York and so-called PJM regions adjacent to Connecticut); and
- the wording used in describing voluntary offers would be strictly regulated (including no longer referring to them as renewable or green offers). Following a lengthy appeals process through the Connecticut Superior and Appeals Courts, the state Supreme Court took the case on its own motion and denied all retail supplier challenges in a July 2023 decision.

Implementation of the multiple disruptive changes proposed by PURA in its original decision is on a revised schedule and should occur by Q1 2024.

PURA Website Status Update – During most of 2021, PURA was engaged in a long-contemplated project to replace its electronic filing system with a more updated system. Despite active implementation efforts on the part of PURA and stakeholders’ staffs, the new system experienced technical issues, and PURA halted implementation in the first half of 2022. The resumption of implementation efforts seems unlikely at this juncture.

Maine

Maine had a moderate amount of activity both at PUC and legislative levels.

Proposed Regulatory Changes – A significant development for the competitive supply industry and stakeholders was the Public Utilities Commission’s completion of a significant retail supplier rulemaking in mid-2022.. A key feature of the revised retail supplier rules is a new registration process for retail supplier marketing agent companies operating in Maine.

Enforcement – The PUC has been actively engaged in a regulatory investigation into marketing complaints against the state’s largest retail supplier, Electricity Maine, during much of 2023. Settlement talks have been underway, and an outcome is expected in early 2024.

Default Service Pricing – As in Connecticut and other states, Maine experienced significant spikes in standard offer prices in 2022, which moderated in 2023. Also, as in Connecticut, in Fall 2023, the State PUC – implementing a legislative directive – opened a docket to consider changes to the current one-year procurement cycle for standard service prices. While some parties have proposed retaining a one-year cycle to pursue some laddering options, the Public Advocate has expressed support for a two-year cycle. Proceedings have continued into 2024.

Investigation into Low-Income Customers – Also implementing a legislative directive, in late 2023, the PUC opened a docket to consider options for establishing additional protections for low-income consumers participating in the retail supply market. Questions solicited by the PUC for comment included:

- how best to obtain consent from a customer for sharing their low-income assistance program status;
- assuming a ban on retail service for low-income customers was implemented, which entity would be responsible for ensuring that a customer who is participating in a low-income assistance program is not entering into an agreement to purchase energy from a CEP;
- would eliminating automatic renewal of a contract between a supplier and low-income customer achieve the same or similar protections as capping the cost of supply at the standard offer rate while still allowing customers to take advantage of potentially “lower than standard offer prices” offered in the competitive market; and

- what other options or mechanisms were available to protect customers who participate in a low-income assistance program other than capping the supply cost at the standard offer rate?
- Suggested changes introduced to date include:
- additional disclosure requirements;
- implementing a Connecticut-style price ban to low-income customers in excess of default pricing; and
- even a ban on residential service to all customers.

Proceedings have continued into 2024.

Massachusetts

Massachusetts had a busy legislative, and relatively quiet, regulatory period over the past two years.

Legislative Landscape – For many years, the Attorney General has argued to the Massachusetts legislature that competitive retail supply harmed residential customers and that the residential market should be shut down. The State PUC consistently responded that it had been improving customer protections in several longstanding dockets and that the legislature should let competitive supply continue to flourish. In 2021, the PUC Chair testified to a legislative committee that he saw merit in the Attorney General’s views. This kicked off a lengthy process where retail supply supporters defended the market, and opponents claimed the market was not worth saving. In Spring 2023, the Senate passed an energy bill that included a residential retail market killing section that was not supported in the counterpart House energy bill.

Following a House-Senate Conference process, the final bill signed by Governor Baker in late summer 2023 omitted the residential retail-killing provision. Legislators are continuing the debate into the 2023-24 legislative year. Although the retail supply industry hopes to retain residential competition, likely coupled with additional market protective measures, the outcome remains unclear at this time.

Proposed Regulatory Changes – One consequence of the legislative differences relative to retail competition is that the PUC stopped work on the multi-year reform investigation to consider regulatory changes to the Massachusetts retail marketplace. The only substantive development after mid-2021 was a mid-2022 Order on adding transparency and opportunities for public input into the

renewal license process for electric and gas suppliers and brokers. Detailed proposals from suppliers and PUC staff on nearly a dozen so-called Tier Two issues remain unaddressed. On a tangentially related regulatory front, in late 2023, the Massachusetts Attorney General initiated a regulatory process to enact new 940 CMR 38.00 disclosure requirements that would target hidden “junk fees” imposed by product and service providers in Massachusetts.

Participants raised concerns in many heavily regulated industries, including retail supply, that the new rules conflicted or were substantially inconsistent with longstanding billing and marketing requirements. Final regulations addressing recommended changes or carveouts are expected in the first half of 2024. As a non-PUC change, in late 2023, the Massachusetts Department of Environmental Protection began developing a new Clean Heat Standard that would require retail suppliers to make annual filings and purchases of either new Clean Heat credits or alternative compliance payments. New regulations could be seen in 2024.

As a final non-PUC change, in early 2022, the Department of Energy Resources, in connection with the requirement for retail suppliers to have some renewable energy sources in their supply mix, required retail suppliers to provide DOER evidence of liquid funds or credit equal to the greater of \$100,000 or 20% of their estimated gross receipts, but not more than \$1,000,000.

Enforcement – Most PUC investigation and enforcement activity involving Massachusetts-licensed retail suppliers is undertaken under the agency’s informal enforcement rules and, as such, is nonpublic. Public enforcement efforts by the agency have been limited to a 2021 notice of probable violation enforcement action against Indra, resulting in a Fall 2023 approval of a settlement involving payment of a \$460,000 fine, refunds to affected customers, and a stay of residential telemarketing until an agreed-upon customer service plan is in place. Additionally, Mega Energy received a notice of probable violation enforcement action, resulting in a December 2022 approval of settlement involving payment of a \$100,000 fine and an agreed-upon departure from marketing residential customers for a three-year period, after which time Mega may apply for authorization to serve residential customers again. Separately, in late June 2022, the Attorney General’s Office announced the terms of a settlement with the retail marketer Utility Expense Reduction LLC (UER), whereby UER paid \$1.65 million to resolve allegations that it knowingly failed to make RPS payments to the Commonwealth from 2016-2019. UER also agreed not to operate in Massachusetts for the next five years.

Default Service Pricing – As in other states, Massachusetts experienced very high default service and market pricing and addressed them in several different forums. One involved the smallest Massachusetts distribution utility, until, which requested waivers from the longstanding approach to determining default/basic services to cap winter rates and recover the excess in subsequent periods using a rate recovery method that passed some deferred costs onto all distribution companies. Several retail suppliers opposed the request as being contrary to precedent and an effective double payment of default-service-related expenses by distribution customers served by competitive suppliers. The PUC allowed the proposal to take effect but has yet to provide a merits response to retail supplier oppositions. Additionally, during the peak pricing periods in 2022 and early 2023, the State PUC received requests from several utilities to self-supply default service load due to alleged unreasonably high prices or limited offers in response to requests for wholesale supply proposals. Finally, in early 2023, the State PUC opened a docket to consider alternatives to current practices. Retail and wholesale suppliers largely urged the PUC to retain longstanding practices relative to procurements and to restrict the ability of utilities to self-supply except in extreme circumstances. In a September 2023 Order, the PUC changed the timing of six-month procurement cycles to split up the two highest demand months, January and February, such that the longstanding January to June, July to December cycles would change to February to July, and August to January. The Order ignored the objections of retail supply witnesses who said markets have a well-established practice of pricing January/February load as a unit and that separately procuring them as part of different six-month blocks likely would increase procurement costs.

Municipal Aggregation Reform – Municipal aggregation plans are popular in the Commonwealth, with more than 100 municipalities not served by a municipal light plant filing for and/or receiving State PUC approval pursuant to a longstanding enabling statute. What is not popular is the lengthy and resource-intensive process for securing PUC approval. Recognizing this issue, the PUC opened an investigation in August 2023 to seek ways to streamline the administrative approval process. Stakeholders have submitted comments and participated in a December 2023 technical session. At the end of the technical session, municipal aggregation consultants offered to develop a set of proposed guidelines that reflect points raised by mid-January 2024. During calendar 2024, the PUC will convene a working group open to stakeholders to review the proposed guidelines once circulated.

New Hampshire

New Hampshire had relatively limited retail supplier-focused activity, both legislatively and at the PUC.

Proposed Regulatory Changes – A critical change for retail suppliers is the substantial move in favor of implementing a pro-competitive purchase of receivables (POR) regime for all New Hampshire utility areas. This change benefits retail suppliers and consumers. POR has been in place in Connecticut, Massachusetts and many non-New England restructured states for over a decade. Active proceedings were conducted throughout 2023, and most issues were resolved by settlements approved in late 2023. Final implementation details are expected during 2024.

Default Service Pricing – As in other New England states, the PUC has opened a docket to consider changes to default service procurement practices in each utility service area. The PUC has continued to approve procurements under the existing procurement schedules but has asked each utility to develop a plan to purchase approximately 20% of load from ISO-New England markets and file such plans for review and approval during the next procurement cycle.

Community Aggregation Programs – Following legislative changes several years ago that enabled the creation of community or municipal aggregation programs, the PUC launched a docket to determine basic regulations applicable to all such programs. Following docket completion in late 2022, numerous New Hampshire community and municipal groups filed for plan approval in 2023 and, following such approvals, have begun program implementation.

Rhode Island

Rhode Island also has limited retail supplier-focused activity at the PUC and legislatively during 2022-23. Most attention has been focused on implementing the transition from National Grid to Rhode Island Energy as the utility serving all of the state except for Block Island and off-shore wind development efforts.

Proposed Regulatory Changes – The most significant change is the completion of a POR proceeding in 2023, which had been under consideration in regulatory proceedings at the PUC since 2020. Final implementation is expected shortly.

Enforcement – In 2022, the PUC notified retail supplier Sunwave of its noncompliance with obligations to either purchase qualifying RECs or make an alternative compliance payment to address the amount required to cover its

Rhode Island electricity load for 2021. Following notice to the Company and a failure to respond, RI PUC issued a September 2022 decision requiring payment of \$93,682 out of the Company's financial security on file. This amount is double the alternative compliance payment that Sunwave should have paid.

Community Aggregation Programs – Following legislative changes several years ago that enabled creation of community aggregation programs in Rhode Island, a variety of community groups have filed with the PUC to approve proposed programs

Consider expanding all company security policies to address non-US requirements where warranted by business opportunities. Also, pay attention to new requirements that may apply to the company privacy policy. An increasing number of states – including Connecticut, Delaware, Tennessee and Virginia, plus several western states – have followed the lead of California, requiring companies to either implement privacy policies containing minimum requirements or adding new requirements to existing privacy policies. The new requirements differ from state to state, so it would be best to determine the scope of states applicable to your business and implement mandated requirements accordingly.

CONTACT

If you have any questions about the New England Electric Retail Competition regulations, please contact [Rob Munnelly](#) in our [Regulatory and Administrative Law Practice](#).