

# SENATE . . . . . No. 447

By Mr. Montigny, a petition of Mark C. Montigny, William M. Straus, Antonio F. D. Cabral, Joseph B. McIntyre, Robert M. Koczera, James H. Fagan, Shirley Gomes, Daniel J. Valianti, Henri S. Rauschenbach and J. James Marzilli, Jr. for legislation to establish guidelines for competition in the electric utility industry. Government Regulations.

## The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Five.

### AN ACT TO ESTABLISH GUIDELINES FOR COMPETITION IN THE ELECTRIC UTILITY INDUSTRY.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

- 1 The General Laws are hereby amended by inserting after
- 2 Chapter 164A the following chapter:—

#### 3 CHAPTER 164B.

- 4 Department of Public Utilities Authorities for the Creation and
- 5 Operation of Consumer Service District Franchises.

6 Section 1. To capture economic benefits for the Common-  
7 wealth's industrial, commercial, and residential electricity  
8 consumers, the following sections seek to encourage competition  
9 among electric utility companies by providing authorities,  
10 rules and guidelines for municipalities to offer electric service  
11 franchises for competitive bidding.

12 Section 2. For the purposes of this legislation, subsections two  
13 through eighteen inclusive, shall, unless the context otherwise  
14 requires, have the following meanings:

15 "Arbitration board," a board consisting of three members: one  
16 member appointed by the current service provider; one appointed  
17 by the new service provider; and one appointed by the depart-  
18 ment. This board shall specify the valuation, schedule of payment,  
19 and schedule for transition in ownership of facilities and service.

20 “Consumer service district,” the entire geographic area defined  
21 by municipal boundaries.

22 “Contract,” a document outlining the terms of service, mutual  
23 obligations, responsibilities, and compensation in conformance  
24 with the terms of the request for proposals, and subject to review  
25 and approval by the department.

26 “Current service provider,” an electric company providing elec-  
27 tric service to a municipality prior to establishment of a consumer  
28 service district.

29 “Department,” the department of public utilities.

30 “Electric company,” an electric utility company, as defined by  
31 section 1 of chapter 164. which provides electric energy to retail  
32 customers within the commonwealth.

33 “Electric utility franchise,” a franchise territory recognized by  
34 the department of public utilities.

35 “Formula for valuation,” a formula consisting of three parts:

36 (i) replacement value less depreciation on a straight line basis,  
37 and/or consideration of obsolescence;

38 (ii) the costs associated with inventory and appraisal of  
39 facilities to be transferred; and

40 (iii) the costs of reintegrating the system, if any.

41 “Franchise,” the right or rights, stated or implied, of an electric  
42 company to provide service to a particular territory.

43 “Franchise fee,” a fee payable by the utility to the municipality,  
44 in return for the franchise to the consumer service district.

45 “Franchise territory,” the geographic area in which an electric  
46 company has the stated or implied right or rights to provide elec-  
47 tric service.

48 “Municipal governing body,” any duly elected City Council or  
49 Board of Selectmen. In cities or towns where municipal electric  
50 companies exist, it shall mean the municipal light commission.


51 “Municipality,” a city or town within the commonwealth.

52 “New service provider,” electric company which holds a  
53 contract to serve a newly established consumer service district.

54 “Request for proposals,” a document, as described by sec-  
55 tion 3, prepared by the municipality to solicit bids for electric  
56 service.

57 “Standard franchise contract provisions,” terms to be included  
58 in consumer service district contracts between electric companies

59 and municipalities. These provisions shall include, but not be  
60 limited to, the following: (i) grant of authority; (ii) the temporal  
61 term of franchise, specifying the franchise's beginning and ending  
62 dates; (iii) termination provisions, describing the power of the  
63 municipality and/or electric company to terminate the franchise;  
64 (iv) regulation provisions, citing the state laws and regulations the  
65 electric company must obey in fulfilling its obligations under the  
66 contract; (v) construction and maintenance provisions, outlining  
67 construction and maintenance standards with which the utility  
68 must comply; (vi) provisions for the restoration of streets,  
69 requiring the utility to restore streets to good condition pursuant  
70 to section 70 of chapter 164, after erecting or maintaining lines or  
71 equipment in the consumer service district; (vii) municipal  
72 services provisions, identifying services which the electric  
73 company must provide to the consumer service district;  
74 (viii) quality of service provisions, specifying the quality of  
75 service the electric company must provide to the consumer service  
76 district; (ix) provisions for the use of public ways, detailing  
77 purposes for which the utilities can use the public rights of way;  
78 (x) provisions for reports, identifying and describing the reports  
79 an electric company must submit, as well as frequency and con-  
80 tents of these reports; (xi) provisions for inspections, identifying  
81 the municipality's right to audit and inspect an electric company's  
82 financial records and facilities; (xii) franchise fee provisions, out-  
83 lining an amount equal to six per cent of annual gross revenues  
84 from kilowatt hour sales to the consumer service district, or an  
85 amount deemed appropriate by a municipal governing body,  
86 according to a schedule of fees payable on a monthly basis to the  
87 municipality; (xiii) non-waiver provisions, describing terms of  
88 compliance with the provisions of the contract, including a  
89 statement that each party must comply with current or future law,  
90 regulation or other contractual agreements; (xiv) assignment pro-  
91 visions providing that the municipality's express consent must be  
92 obtained before assignment of any or all of the electric company's  
93 equipment, operations, or holdings within the municipality's con-  
94 sumer service district to another entity; (xv) indemnity provisions,  
95 requiring an electric company to hold the municipality harmless  
96 for damages to persons or property which result from an electric  
97



98 sions, stating conditions under which a municipality may revoke  
99 the contract, and outlining methods and procedures for these  
100 actions and for the electric company's redress; (xvii) provisions  
101 for notices, stating the person or persons either party shall contact  
102 regarding routine and extraordinary contract issues, and stating  
103 the proper methods of notice and the length of notice required;  
104 (xviii) provisions for amendments, describing conditions which  
105 can trigger amendments to the contract. and outlining the process  
106 for the creation and acceptance of these amendments; (xix) provi-  
107 sions for acceptance, defining the action the electric company  
108 must take to formally accept the contract; (xx) undergrounding  
109 provisions, describing the conversion of above-ground equipment  
110 to underground/burial conversions.

111 "Stranded investment," an investment in generating facilities,  
112 transmission facilities or contracts. which the department has  
113 deemed no longer "used and useful," due to a prospective acquisi-  
114 tion of part of an electric company's franchise territory pursuant  
115 to the creation of a consumer service district.

116 "Transfer of service, " a process by which the new service  
117 provider assumes the responsibility to provide electric service to  
118 the consumer service district from the current service provider.  
119 This process may be accomplished by one of several methods:

120 (i) a new contractual arrangement between the municipality and  
121 the current service provider with no transfer of facilities;

122 (ii) the leasing of facilities within the consumer service district  
123 from the current service provider by a new service provider;

124 (iii ) an arbitrated buy-out or acquisition of the facilities within  
125 the consumer service district by the new service provider; or

126 (iv) municipal acquisition of facilities by eminent domain,  
127 pursuant to section 1 of chapter 79 et seq., within the consumer  
128 service district. The municipality may then offer a franchise lease  
129 to a new service provider. For the purposes of establishing a com-  
130 petitive consumer service district through municipal acquisition,  
131 such transfers shall be exempt from the provisions of sections 35  
132 and 36 of chapter 164.

133 "Used and useful," a facility or power supply contract helping  
134 to meet forecasted demand on an economical basis as determined  
135 by the department .

136 Section 3. A municipality, by two-thirds vote of a municipal  
137 governing body, shall have the power to create a consumer service  
138 district. This vote shall also create the office of the consumer  
139 service district manager. The municipal governing body shall then  
140 file this vote with the department within ninety days. The depart-  
141 ment shall recognize this vote as establishing a consumer service  
142 district.

143 Within thirty days of receipt of this vote, the department shall  
144 inform, by written notice, the municipality's current service  
145 provider of the vote. This notice shall inform the municipality's  
146 current service provider of the municipality's intention to offer the  
147 consumer service district's electric service for competitive bid-  
148 ding. Along with this notice, the department shall instruct the  
149 municipality's current service provider to deliver to the municipal  
150 governing body the following: (i) a complete inventory of the cur-  
151 rent service provider's facilities and equipment within the con-  
152 sumer service district; (ii) a list of planned upgrades and facility  
153 retirements within the consumer service district; (iii) the current  
154 service provider's demand forecast for the consumer service dis-  
155 trict; (iv) the current service provider's rate forecast for residen-  
156 tial, commercial, and industrial customers within the consumer  
157 service district; (v) a complete statement of planned conservation  
158 or load management programs within the consumer service dis-  
159 trict; (vi) any other information deemed pertinent and requested  
160 by the municipality, excluding any information that the depart-  
161 ment deems of a proprietary or confidential nature.

162 The current service provider shall deliver the above informa-  
163 tion to the municipal governing body within sixty days of the  
164 department's instruction. The governing body may use this infor-  
165 mation to prepare a request for proposals pursuant to section 4.  
166 The municipal governing body shall release this information to  
167 interested electric companies.

168 Section 4. Upon creation of a consumer service district, the  
169 department shall recognize the municipal governing body's  
170 authority to issue a request for proposals. The request for propos-  
171 als shall notify interested electric companies of a municipality's  
172 intention to accept bids for electric service.

173 (a) The request for proposals shall include the following items:

174 (i) a profile of the consumer service district compiled from  
175 information obtained from the current service provider;

176 (ii) provisions for demand side management;  
177 (iii) provisions for integrated resource management;  
178 (iv) provisions for environmental protection;  
179 (v) generic provisions provided by the department pursuant to  
180 section 7;  
181 (vi) a description of the standard contract provisions delineated  
182 in section 2;  
183 (vii) the term of any ensuing contract, which shall be ten years,  
184 unless some other term is deemed appropriate;  
185 (viii) provisions for low-income service and rates;  
186 (ix) a provision which requires the new service provider to con-  
187 duct demand forecasting, subject to oversight of the consumer  
188 service district manager and approval of the department.  
189 (b) In addition, the department shall issue to the municipality  
190 a list of generic items or standards for inclusion in the request  
191 for proposals. The department will provide this list to the munici-  
192 pality within thirty days of the date on which the department  
193 recognized the consumer service district. The department may  
194 update this list and specific provisions through its public rule-  
195 making process.  
196 (c) The request for proposals shall also include "most favored  
197 nation" provisions to take advantage of technological advance-  
198 ments and maintain marketplace competition. The request for pro-  
199 posals shall further contain a description of standard franchise  
200 contract provisions as defined in section 2.  
201 Section 5. The department shall recognize the authority of con-  
202 tiguous consumer service districts to make joint efforts in issuing  
203 requests for proposals, negotiating contracts and conducting oper-  
204 ations. Each interested municipality shall first form a consumer  
205 service district as prescribed by section 3.  
206 Section 6. Upon completion of a request for proposals,  
207 the municipal governing body shall issue this document to all  
208 interested electric companies. The request for proposals shall  
209 include a deadline, determined by the municipal governing body,  
210 by which the municipal governing body must receive the bid in  
211 hand. The municipal governing body shall review and consider  
212 bids only after the bidding deadline has passed.  
213 Section 7. After the bidding process ends, the municipality  
214 shall have the authority to negotiate a contract. The municipality

215 may negotiate directly with the current service provider. The  
216 municipality may also negotiate with a prospective new service  
217 provider based upon its response to the request for proposals.  
218 When the parties reach an agreement, the municipality shall for-  
219 ward the proposed contract to the department. The department  
220 shall review the proposed contract to assure that it complies with  
221 the department's generic provisions and standards. The depart-  
222 ment shall have final approval of the proposed contract. Approval  
223 shall not be unreasonably withheld. If the department disapproves  
224 a proposed contract, it shall notify the parties, in writing, of the  
225 reasons for disapproval. The parties shall have the opportunity to  
226 correct any defects in the contract.

227 Section 8. The current service provider may claim that estab-  
228 lishment of the consumer service district renders certain of its  
229 facilities or contracts no longer used or useful. In this case, the  
230 current service provider may request that the department designate  
231 these facilities or contracts as stranded investment.

232 (a) The request shall be made to the department no later than  
233 sixty days after recognition of the consumer service district. The  
234 request will include the following:

235 (i) a full description of the facilities or contracts the current  
236 service provider claims as stranded investment; a full valuation of  
237 these facilities or contracts;

238 (iii) a brief which includes the following: (A) The current  
239 service provider's rationale for the requested designation; (B) a  
240 complete list of the alternatives the current service provider has  
241 pursued to market its capacity and energy; (C) a complete list of  
242 the steps the current service provider has taken to maintain these  
243 facilities or contracts as used and useful.

244 (b) The department shall determine these facilities or contracts  
245 as stranded investment if no longer used and useful. To determine  
246 these facilities or contracts as stranded investment, the department  
247 must find the following:

248 (i) The facilities or contracts are no longer used and useful, due  
249 to the consumer service district's creation and resultant loss of  
250 franchise territory;

251 (ii) The current service provider has made reasonable efforts to  
252 market its capacity and/or energy;



253 (iii) The current service provider has no reasonable alternatives  
254 to maintain the facilities as used and useful.

255 (c) The department shall make this determination prior to the  
256 approval of the municipality's contract with the new service  
257 provider.

258 (d) If a facility or contract is determined by the department  
259 to be stranded investment, the department may instruct that the  
260 facility's or contract's energy and/or capacity be sold at prevailing  
261 market rates. The department may also allow the current service  
262 provider to sell the entire assets of a facility deemed stranded  
263 investment. Any resulting loss from these transactions shall be  
264 shared between the consumer service district's ratepayers and the  
265 current service provider. Ratepayers shall be responsible for no  
266 greater than thirty-three and one-third percent of the resulting  
267 loss; the current service provider shall be responsible for no less  
268 than sixty-six and two-thirds percent of the resulting loss. In the  
269 case of a municipal electric system, the department shall make  
270 appropriate determinations recognizing that municipal electric  
271 systems have no stockholders to share any resulting losses.

272 (e) The department shall also determine, if appropriate, the time  
273 period for which a facility or contract remains a stranded invest-  
274 ment.

275 Section 9. The municipal governing body shall have authority  
276 to accept a bid received pursuant to section 6. It shall also have  
277 final approval of a contract negotiated pursuant to section 7,  
278 provided that such contract has been approved by the department.  
279 In recognition of the validity of the contract, the department shall  
280 amend the current service provider's franchise to specifically  
281 exclude the new consumer service district.

282 Section 10. The department will retain all authority granted to it  
283 under chapter 164 and chapter 164B. In addition, the department  
284 shall recognize the authority of a municipal governing body to do  
285 the following: (a) form or dissolve a consumer service district;  
286 (b) request and receive all pertinent information from a current  
287 service provider to compile a request for proposals; (c) issue a  
288 request for proposals to all interested electric companies;  
289 (d) undertake joint efforts with other contiguous consumer service  
290 districts, bargain collectively and function cooperatively;  
291 (e) negotiate with an interested electric company, including the



292 current service provider; (f) enter into contracts with an electric  
293 company, subject to the department's approval; (g) take by emi-  
294 nent domain the current service provider's facilities within the  
295 consumer service district.

296 Section 11. A municipality may request that an arbitration  
297 board be formed with membership as specified in section 2. The  
298 board shall determine the valuation of any transferred or taken  
299 facility or property. The board shall also determine which facili-  
300 ties or properties are to be included within such a transfer.  
301 Establishment of the arbitration board shall occur within thirty  
302 days of the contract's award to a new service provider.

303 The arbitration board shall act pursuant to section 1 of chap-  
304 ter 251 et seq., and its evaluation determination shall be exempt  
305 from the provisions of section 43 of chapter 164.

306 (a) The arbitration board will conduct hearings to determine the  
307 valuations of the facilities within the consumer service district.  
308 The arbitration board shall employ the formula defined in  
309 section 2. The arbitration board shall issue a decision on the pro-  
310 posed valuation within six months of appointment. The arbitration  
311 board will have authority to make other findings of fact and award  
312 damages.

313 (b) Upon the request of the municipality, the arbitration board  
314 may also conduct hearings to determine whether the current  
315 service provider created unreasonable delays in the arbitration  
316 process. If the arbitration board determines that the current service  
317 provider caused unreasonable delay, it may determine the amount  
318 of and award damages. The arbitration board's decisions will be  
319 binding on all parties. A party may appeal the arbitration board's  
320 decisions pursuant to section 18 of chapter 251.

321 (c) The department shall review the expenses and service  
322 charges for the arbitration board. The final cost of the facility's  
323 acquisition shall include these charges. If the arbitration board is  
324 convened to hear charges of unreasonable delay, the losing party  
325 shall pay these charges.

326 Section 12. The office of the consumer service district manager,  
327 formed pursuant to section 3, shall operate at the discretion of the  
328 municipal governing body, which body shall oversee said office.  
329 The consumer service district manager shall have the following  
330 duties:

331 (a) assist the municipal governing board during the bidding  
332 process;

333 (b) negotiate a contract with the new service provider;

334 (c) represent the municipal governing body during transfer of  
335 services between the current service provider and the new service  
336 provider;

337 (d) oversee the new service provider's forecasting duties for the  
338 new consumer service district;

339 (e) carry out administrative and business operations, including  
340 the review of the new service provider's compliance with the  
341 terms of the contract as well as any other duties deemed  
342 appropriate by the municipal governing body for purposes of  
343 establishing or operating a consumer service district.

344 Section 13. A municipal governing body may dissolve its con-  
345 sumer service district by a two-thirds vote of its members.

346 Section 14. Notices pursuant to this chapter shall be by certified  
347 mail and deemed received three days after mailing.

348 Section 15. An electric company affected, directly or indirectly,  
349 by this chapter, shall comply with air pollution standards pursuant  
350 to chapter 111, chapter 164, and all other applicable federal and  
351 state laws regarding air emissions and the protection of environ-  
352 mental resources.

353 Section 16. An electric company under contract to a consumer  
354 service district shall supply annual reports to the municipality.  
355 The annual report will verify compliance with the terms and stan-  
356 dards in the contract. The annual report will also demonstrate the  
357 proper maintenance of the electric company's facilities. Failure to  
358 meet the terms or standards of the contract may trigger court  
359 actions for damages, or dissolution of the contract.

360 Section 17. This act, being necessary for the welfare of the  
361 Commonwealth and its electricity consumers,  
362 shall be liberally construed to effect the purposes hereof.

363 Section 18. The provisions of this act are severable, and if any  
364 provision hereof shall be held invalid in any circumstances, such  
365 invalidity shall not affect any other provisions or circumstances.  
366 This act shall be construed in all respects so as to meet all consti-  
367 tutional requirements. These provisions are intended to be in  
368 accordance with the existing rights and powers of municipalities,  
369 and not to interfere or restrict those rights and powers in  
370 any way.