

SENATE No. 388

By Mr. Montigny, a petition (accompanied by bill, Senate, No. 388) of Mark C. Montigny 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-Seven.

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 granted by a local government to provide
42 electric service within its municipal boundaries.

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 company's activities under the contract; (xvi) forfeiture provi-

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 (ii) 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 164B. In addition, the department shall recognize
284 the authority of a municipal governing body to do the following:
285 (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, shall be liberally
362 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.

