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BY EMAIL ONLY

March 5, 2020

Greggory Wade, Hearing Officer
Department of Public Utilities
One South Station, 5th Floor
Boston, MA 02110

Re: DPU 19-07 Investigation by the Department of Public Utilities on its own Motion into Initiatives to Promote and Protect Consumer Interests in the Retail Electric Competitive Supply Market – Comments of Davis, Malm & D'Agostine, P.C. on Tier One Issues

Dear Mr. Wade:

Pursuant to the Department of Public Utility's February 5, 2020 Request for Comments, attached please find our firm's Comments on Tier One Issues.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Robert J. Munnelly, Jr.

RJM/jmc
Enclosure
cc: Docket No. 19-07 Email Distribution List

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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities on its own Motion into Initiatives to Promote and Protect Consumer Interests in the Retail Electric Competitive Supply Market	)))))	Docket No. 19-07

COMMENTS OF DAVIS, MALM AND D'AGOSTINE, P.C.
ON TIER ONE ISSUES

Davis, Malm & D'Agostine, P.C. ("Davis Malm") respectfully provides the following comments in response to the February 5, 2020 Request for Comments ("Request") issued by the Department of Public Utilities ("Department" or "DPU"), specifically with respect to the solicitation of comments on so-called "Tier One" issues. See Request, pp. 3-19. Davis Malm appreciates the Department's active efforts, through presentation of proposals, solicitation of stakeholder comments, and the conduct of technical session and working group meetings, to fashion workable retail rules that protect Massachusetts consumers. As discussed below, Davis Malm supports most of the Tier One proposals in the Request and urges that the many noncontroversial proposals be implemented promptly in a final Order. Nevertheless, Davis Malm requests modification of certain key provisions raised in the Request that would be unworkable in practice or excessively burdensome and costly to an extent that would harm suppliers and, ultimately Massachusetts consumers.

Argument

I. New and Renewal License Application Processes (Request, pp. 3-5).

The Request responds to a July 30, 2019 Consumer Advocate Group proposal for modification of longstanding initial and renewal retail supplier licensing processes and ensuing discussions at a November 1, 2019 technical session at the Department to provide (1) a detailed

new proposal for continuation of a non-adjudicative approach to initial licensing that, nevertheless, would allow for targeted stakeholder input, and (2) continuation of non-adjudicative renewal licensing without any stakeholder input. Even though Davis Malm does not necessarily agree that existing initial license process needed any change, Davis Malm supports the thoughtful revised process established in the Request, with one exception: the supplier should have a final opportunity to reply to the facts and arguments in any stakeholder's response.

At present, the proposal allows stakeholders to comment on public information in a pending new license application, allows the applicant to respond, and then affords stakeholders the right to "submit further comments" before the Department proceeds to approve or reject the application on the merits. Request, pp. 4-5. Unfortunately, this final chance afforded to stakeholders allows them to make inaccurate or misleading claims or arguments that could unduly influence the Department's review of the application's merits, without any process for supplier reply or correction. Fairness and avoidance of wasteful and time inefficient reconsideration motions would strongly suggest affording suppliers a time-limited opportunity – such as the same ten (10) business-day period used elsewhere in the Request – to reply to the stakeholder response filing. This supplier filing should be limited in scope to facts, arguments or issues raised in the stakeholder response filing.

II. Notification of Door-to-Door Marketing Plans (DPU pp. 5-8).

A. Introduction.

This proceeding has discussed whether, and if so the extent to which, the Department should depart from the notification processes established in the predecessor docket DPU 14-140 for door-to-door ("D2D") sales in the Commonwealth, following detailed input and briefing from all stakeholders, only 20 months before the date of the Request. Compare Request, pp. 5-8

and Order Establishing Door-to-Door Marketing Notification Requirements and Standards of Conduct, Docket 14-140-G (May 2, 2018) ("14-140-G Order"). The 14-140-G Order specified that suppliers provide the Department with a notice containing specified information not less than thirty (30) days in advance of marketing to a Massachusetts municipality. 14-140-G Order, pp. 17-18. The Department rejected supplier assertions of potential burdens associated with the 30-day advance notice requirement by stating in pertinent part as follows:

> The Department finds that submitting a new notice every 30 days, via email, is not unduly burdensome. For example, a competitive supply company that continuously engages in door-to-door marketing throughout the year would be required to email a one and a half page Notice twelve times a year. Further, if none of the substantive information in the Notice has changed at the expiration of the 30-day period, the competitive supply company would only be required to change the date and then email the updated Notice to the Department.... Based on the above, the Department finds that a 30-day effective time period for the Notices strikes an appropriate balance between providing the Department with accurate and up-to-date information so that it can respond to any issues in a timely manner, while not overly burdening the competitive supply companies.

Id., pp. 17, 19 (emphasis added). The Supplier Working Group, in its September 20, 2019 joint comments, emphasized it opposed as unnecessary and unsupported the extreme positions advocated by the Consumer Advocate Group in their July 30, 2019 comments, including the proposed requirement of reducing the notice period for a municipality from 30 days to two business days. Supplier Working Group Comments Regarding Consumer Advocates' Proposals, pp. 12-18.

The Request properly chose not to adopt most the Consumer Advocates' positions relative to the content and timing of D2D Notices. See generally, Request, pp. 5-8. Nevertheless, the Request (1) adopted the Consumer Advocates' position of a filing each day the supplier plans to conduct D2D sales, two business days in advance of the planned selling date,

(2) added a new limitation on the number of municipalities that could be included in each supplier's notice, and (3) offered additional proposed provisions applicable to D2D Notices, some of which are acceptable. These proposals relating to D2D notices are discussed in the following sections.

B. Notice Period.

Davis Malm strongly opposes the Request's proposal to change from one D2D notice filing with the Department each 30-day period to as many as 20-30 filings each month for each day of sales in the Commonwealth. This extreme increase will be overwhelmingly burdensome for suppliers to manage, virtually eliminate ordinary levels of flexibility in deployment by supplier-retained vendors across targeted municipalities and city neighborhoods, and almost certainly threaten the overall viability of the D2D sales channel in the Commonwealth. The proposed change is particularly problematic considering the recency of the Department's prior determination less than two years ago specifying notice submission only every 30 days. Interests of fairness and regulatory stability weigh strongly against such a fundamental change in notice requirements only approximately 20 months after a fully litigated Department decision, as such a rapid and radical change in a litigated order could encourage challenges to other recent Department precedents. As a further note suggesting caution in this area, the Request focused exclusively on the benefits of improved targeting associated with specifying each municipality in a single day without any discussion or making any preliminary factual findings about the extent of additional burdens and costs that would be placed upon Massachusetts suppliers as a result of the new daily filing requirement, as discussed expressly in the predecessor 14-140-G Order.

In place of the impractical daily notice process proposed in the Request, Davis Malm would support a substantial reduction of the advance notice period from once per each 30 days to

twice per month, such as on the first and third Monday of every month. This shorter period should help facilitate identification of municipalities or neighborhoods being served by a particular supplier or its vendors, especially when combined with support for having the bi-monthly filings specify municipalities or city neighborhoods to be served by each D2D vendor of each supplier (as discussed in Section II. C below).

Additionally, given the unworkable nature of a daily notice process that will almost certainly threaten the overall viability of the D2D sales channel, if the Department does not choose to implement the bi-weekly notice process outlined above, it should be open to alternative means to allow the Department to monitor supplier and vendor activity in the Commonwealth that would impose far fewer burdens than a daily notice.

- One option is to combine the above bi-weekly advance notice with an e-blast list that the Department would employ to identify or narrow down the suppliers or vendors marketing in a municipality or neighborhood on a particular day in which consumer protection issues were alleged (such as the Department employed recently to seek to identify suppliers associated with a particularly problematic robo-telemarketing call).
- An additional option is to establish policies whereby suppliers who voluntarily undertake additional consumer protection measures could be exempted from all or most of the more burdensome notice requirements. Such extra measures warranting exceptions from notice requirements could include voluntarily employing GPS tracking capability combined with a commitment to use the technologies to respond promptly to Department inquiries.

In any event, Davis Malm recommends that the Department significantly cut back on the proposed daily filing process, either by adopting the twice weekly notice approach or identifying more innovative ways to meet the Department's supervision needs without overburdening the competitive market.

C. Limitation on Municipalities to be Marketed.

Davis Malm also opposes the arbitrary and impractical decision in the Request to limit the number of municipalities or neighborhoods to three in each Department D2D filing. Request, p. 8. This strict limitation was not included as part of the November 1, 2019 technical session and is patently arbitrary. For example, a supplier potentially could work with multiple third-party vendors in different parts of Massachusetts, some of whom could be forced to cease work or leave the supplier's service if the supplier's total number of third-party vendors is limited to a maximum of three municipalities per day. Davis Malm also questions whether the Department possesses legal authority under its enabling statutes to implement such a significant restraint of trade on suppliers duly licensed by the Department.

Even putting aside the impact of the multi-vendor issue, the proposed limits are likely to prove impractical in the field in circumstances where flexibility in planning is required by factors in the field. This could include when inclement weather renders sales impractical in a particular area within the Commonwealth, or when the supplier discovers that a third-party vendor of another supplier recently has completed an active D2D sales campaign in one or more of the communities planned to be marketed pursuant to the notice filed with the Department. In such circumstances, the ordinary and efficient response, for both the supplier and consumers, would be to switch sales to another authorized locale with better weather or which has not been the subject of a competitor sales D2D sales campaign. Such options may be unavailable in whole or

part if a supplier is limited to three municipalities or neighborhoods on a particular day for all D2D sales activities.

Davis Malm suggests that such limitations on number of municipalities be lifted but, as a compensating factor, that the supplier separately identify the municipalities or neighborhoods to be served by each of its vendors in the specified response period. This should enhance the Department's ability to identify suppliers or individual vendors serving a locale. Additionally, to the extent that the Department chooses to limit the number of municipalities or neighborhoods to be served in a filing period – which Davis Malm does not support – such limitations should be applied per each third-party vendor marketing for a supplier rather than on a global per-supplier basis.

D. Other Notice-Related Issues.

The Request proposes that all D2D notices be transmitted to the Attorney General on a confidential basis and solicits comment on whether notices should be transmitted to other parties. Request, pp. 7-8. Davis Malm does not support either proposal for providing all notices to the Attorney General or any other party. Nevertheless, it is willing to provide information to the Attorney General or the distribution utilities upon reasonable request for information applicable to particular municipalities or dates, provided that the information is kept confidential pursuant to a Department-issued standing protective order, such as in place pursuant to the 14-140-G Order. One of the concerns with providing competitively sensitive D2D notice information to other stakeholders is that there is no assurance that such stakeholders will protect such sensitive information to the required extent that the Department, Attorney General and utilities – each of which regularly handles confidential information in the regular course of business – can be

trusted to do. If municipalities or other stakeholders seek data, they should reach out to the Department.

The Request also proposes to require that suppliers specify enumerated neighborhoods in Boston in connection with the required notice filings and solicits comments on whether to adopt a similar approach with respect to other cities in Massachusetts. Request, p. 8. Davis Malm supports the use of neighborhoods for Boston given Boston's large overall population (nearly 700,000 per recent census data) and clearly definable and well-known neighborhoods that will limit confusion in preparing filings. Davis Malm does not support requiring establishment of similar neighborhoods for portions of other Massachusetts cities, which are at most less than a third of Boston's size and lack the well-established and widely-known neighborhoods that are seen in Boston.

III. Identification of Third-Party Vendors (Request, p. 9).

Davis Malm is not opposed to the provisions in the Request (at p. 9) for some form of process for submission by suppliers of the names of their vendors to the Department on a periodic basis. The Request does not specify a proposal for the frequency by which suppliers should update vendor information on file on an "ongoing basis." Davis Malm would support a reasonable process for updating vendor information, such as (1) within a month or a somewhat smaller period – such as ten business days – of a vendor being dropped from service, or (2) in the form of prompt advance notice or post-retention notice when the supplier is onboarding a new vendor. Any such regime should be conditioned on a standing confidentiality order, such as was adopted in the 14-140 Order, so that suppliers need not make repetitive filings seeking confidential treatment for such standard and regularly provided information.

As with the preceding section, Davis Malm opposes giving vendor information to the Attorney General, utilities or other stakeholders, but is willing to furnish such information to the Attorney General and distribution utilities upon reasonable request, subject to the substantially similar confidentiality obligations adopted by the Department for filings with it. Davis Malm remains opposed providing vendor information to other stakeholders.

Davis Malm agrees that a Department process for identifying and communicating to supplier information on problematic vendors, vendor sales offices or individual vendor agents is intriguing and potentially beneficial to all legitimate suppliers. The concept needs additional consideration and refinement by the Department and stakeholders to develop a workable process that preserves due process rights of vendors, vendor managers, individual agents and suppliers contracting with them with respect to those of which the Department will consider classifying as problematic and/or subject to a no-hire recommendation or requirement. Adverse agency actions affecting license or livelihood status typically require the agency to afford opportunity for an adjudicatory hearing to challenge such determinations, and such due process opportunity should be part of any new process.

IV. Supplier Disclosure to DPU of Product Information (Request, pp. 9-11).

Davis Malm supports this reasonable proposal as drafted.

V. Door-to-Door and Telemarketing Scripts (Request, pp. 11-12).

Davis Malm supports these reasonable proposals as drafted.

VI. Non-Recording of D2D Transactions (Request, pp. 12-13).

Davis Malm supports the Department's decision (at p. 13) not to require at this time D2D sales to be subject to mandatory recording, which would have been an excessively problematic and costly requirement and substantially duplicative of other consumer protection measures

embedded in applicable law, including sales script, third-party verification ("TPV"), and enrollment documentation requirements.

VII. Recording of Telemarketing Transactions (Request, pp. 12-13).

Davis Malm questions the necessity of the Department's decision to require that telemarketing calls be subject to mandatory recording, in light of associated compliance costs and, conversely, other consumer protection measures embedded in applicable law, including sales script, TPV and enrollment documentation requirements that obviate the necessity for recording. Davis Malm would be open to adding reasonable additional specific questions to TPV scripts if it would result in a Department change of position on the proposed telemarketing sales call recording requirement.

To the extent the recording requirement remains in place, the Department should clarify its scope to apply only to bona fide residential telemarketing calls (i.e., outbound unsolicited calls to residential customers for sales purposes) and not to other supplier call activity, such as inbound calls seeking information on supplier products that result in sales or responding to an offer set forth in a direct mail piece. The recording requirement also should be limited to sales calls resulting in enrollments.

VIII. Filing of Marketing Materials with DPU (Request, pp. 13-14).

Davis Malm supports the proposal not to require widespread filing of marketing materials with the Department and does not oppose the limited exception of Department review for direct mail pieces while maintaining a moderately short ten business-day maximum review period. Davis Malm urges the Department to use best efforts to not only respond within ten business days but also work with the supplier on mutually-agreed final language within the ten business-day period. Direct mail is a fast-moving market segment and the supplier should not have to

undergo protracted discussions if the supplier offers a prompt counterproposal for the Department's review and approval.

Davis Malm would be supportive of additional direction from the Department about aspects of direct mail pieces that would be considered presumptively either acceptable or objectionable to limit the necessity of review-related disputes.

IX. Customer Notification of Automatic Renewals (Request, pp. 14-15).

Davis Malm supports this reasonable proposal as drafted.

X. Reports to DPU about Automatic Renewal Information (Request, p. 16).

Davis Malm opposes the proposed requirement for suppliers to prepare and periodically file with the Department a variety of data requiring inquiry into all or virtually all supplier customers relative to customers automatically renewed during a given period and the number of contracts subject to automatic renewal. The proposed data will be operationally difficult and costly to develop and prepare in report form, in comparison to the limited information to be gained. To the extent the Department elects to proceed with such reporting, the Department should give suppliers substantial time to prepare the first report, such as having it be due in early 2021 for the 2020 calendar year, and the reporting should be semi-annual or annual rather than quarterly.

XI. Reports to DPU about Customer Enrollment Data (Request, pp. 16-17).

Davis Malm opposes the proposed requirement for suppliers to prepare and periodically file with the Department a variety of customer enrollment data that will require inquiry into all or virtually all supplier customers. The proposed data will be operationally difficult and costly to develop and prepare in report form, in comparison to the limited information to be gained. To the extent the Department elects to proceed with such reporting, the Department should give

suppliers substantial time to prepare the first report, such as having it be due in early 2021 for the 2020 calendar year, and the reporting should be semi-annual or annual rather than quarterly.

XII. Energy Switch Website (Request, pp. 17-19).

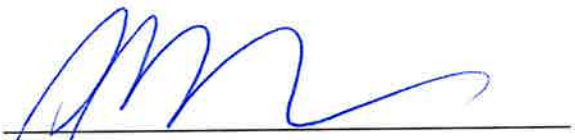
Davis Malm supports the Energy Switch website as a useful tool for educating customers about competitive supply options available in the Commonwealth. Specifically, with respect to modifying the website to include municipal aggregation programs, Davis Malm does not oppose the Department's proposals for aggregation program inclusion. Davis Malm does request that the Department, as a priority matter, move forward on changes to the website to allow it to be even more effective for Massachusetts consumers. The Department should seek to have the website modified to include all product offerings, both fixed price and variable product, and full product information, including all information about renewable content.

Conclusion

Davis Malm appreciates the opportunity to present the above arguments on Tier One issues to assist the Department with refining retail supplier rules in the Commonwealth. The Department should consider changes to several of the Tier One rules proposed in the Request, including (1) providing suppliers with the opportunity to reply to stakeholder comments relative to initial licensing, (2) substantially revising the grossly burdensome proposed daily filing requirement for D2D sales, (3) reconsidering the necessity of recording of telemarketing calls and providing clarity on the applicable scope if required, and (4) reconsidering the necessity of, or alternatively, frequency of submission of supplier reports to the Department relative to automatic renewal and customer enrollment information.

DAVIS MALM STAKEHOLDERS

By their attorney,



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