

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department on its)
Own Motion into Initiatives to) D.P.U. Docket No. 19-07
Promote and Protect Consumer Interest in the)
Retail Electric Competitive Supply Market)

**COMMENTS OF DAVIS, MALM & D’AGOSTINE, P.C.
ON TIER TWO ISSUES**

Davis, Malm & D’Agostine, P.C. (“Davis Malm”) respectfully provides the following written comments in response to the latter part of 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 Department proposals for the so-called “Tier Two” issues and for revisions to the license renewal process, respectively. See Request, pp. 19-21. The instant comments are in addition to Davis Malm’s previously-submitted March 5, 2020 comments on Tier One issues. As stated in the March 5, 2020 comments, 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, even though Davis Malm supports several aspects of the Tier Two proposals and license renewal process, it has significant concerns about the proposal for a wholly new and nationally untried interactive third-party verification (“Interactive TPV”) regime. An Interactive TPV regime is unworkable for multiple reasons. As the Department moves forward on Tier Two and license renewal proposals, Davis Malm asks the Department to address concerns about the quality of TPVs through less restrictive and more customer-friendly means.

Argument

I. COMMENTS ON THE TIER TWO ISSUES RAISED IN THE REQUEST.

A. Third-Party Verifications (Request, pp. 19-20).

The Request proposes a significant change to the current TPV process. See generally Request, pp. 19-20; see also November 1, 2019 PowerPoint at Slides 30-31. Current TPVs in Massachusetts and other restructured states involve either a live operator or automated voice system, each associated with an entity independent from the retail supplier, asking a series of yes/no enrollment questions. The salesperson is required to remain silent during the TPV (in some automated systems, the salesperson, while silent, is the one who advances the customer to the next question.). Each question must be answered “yes” in order to continue to the next question. A “no” answer or the customer indicating he or she has questions or comments about a particular question will trigger a TPV failure and termination of this enrollment attempt. All TPVs are recorded and can be accessed either live or in an after-the-fact quality check or audit to confirm that a salesperson or administrator of the TPV did not improperly guide or mislead the customer.

The Department believes that the current process is “insufficient.” See November 1, 2019 PowerPoint at Slide 30. It proposes to require all Massachusetts TPVs to employ Interactive TPV questions. This would require the customer to respond orally to questions from the TPV vendor targeted to all material contract terms in the supplier’s offer (such as what is the name of the supplier that made the offer? What is the agreed-upon price? What is the agreed-upon term? What fees will apply to the product if you enroll? What will happen at the end of the contract term?). *Id.*, p. 19; see November 1, 2019 PowerPoint at Slide 31.¹ The Department

¹ Specifically, per the November 1, 2019 PowerPoint, customers would be required to confirm in spoken words the following information:

also proposes to require the supplier to ask the customer to identify the telephone number and name showing in a telephone call detail box during the TPV as a safeguard against “spoofing.” Request, p. 20. The Request specifically requests stakeholder comments on (1) the benefits of these proposed modifications to the TPV process to customers (i.e., protecting against insufficiently informed consumers), and (2) the “difficulties that competitive suppliers may have in implementing such a process.” Id., pp. 19-20.

Throughout this proceeding, suppliers have strongly opposed this Interactive TPV concept on multiple grounds. Most importantly, the many burdens and consumer impact associated with this requirement would be at such a high level it could lead suppliers to abandon the Massachusetts market. Davis Malm joins those strongly opposing this proposed requirement. Grounds for opposition include at least the following:

- Suppliers are not aware of any TPV firms in any jurisdiction serving retail electric suppliers that conduct Interactive TPV calls. As such, introduction of an Interactive TPV process specific to Massachusetts is certain to be infeasible for TPV providers and the suppliers that would be required to retain them in the Commonwealth for all sales requiring a TPV. At minimum, it will require suppliers to pay providers to develop new Massachusetts-specific TPV systems and for providers and suppliers to implement the new Interactive TPV requirements at substantial cost, both in the short term and long term. Costs could

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- o Name of Supplier
 - o Price
 - o Contract term
 - o Early termination fee (if applicable)
 - o Automatic renewal provision (if applicable)
 - o Renewable content (if applicable)
 - o Spoofing protections

include, and not be limited to, acquisition or development by TPV providers of new interactive technology, implementation by TPV providers of such technology if available; Massachusetts-specific training by TPV providers; development of new interactive TPV scripts by suppliers; substantially increased costs by suppliers associated with longer sales calls that would include detailed specific training in the specific questions and answers to be included in the ensuing TPV call; and substantially increased costs and decreased revenues for suppliers due to expected higher rates of TPV call failures and call abandonment associated with more customer-demanding Interactive TPV calls. The combination of these adverse factors will almost certainly limit or even effectively destroy the Massachusetts retail market.

- Furthermore, suppliers are not aware of any verification services in any industry that handle enrollment verification calls in an Interactive TPV manner, as proposed in the Request. Davis Malm requests that if the Department or other stakeholders are aware of any examples in any industry, that such examples be circulated to all stakeholders for follow-up investigation. The Department should not implement an untried Interactive TPV model on a state-specific basis without first identifying any and all similar models used locally or nationally, and exploring the costs and challenges associated with such models. If there are no Interactive TPV models available, the Department should reconsider this approach in Massachusetts.
- Putting aside cost impacts, suppliers are concerned about potential customer dissatisfaction issues from an Interactive TPV approach requiring 100% correct

answers from or loss of the preferred electric product that would discourage participation in sales efforts. This is certain to be stressful to customers, will negatively impact their customer experience, and may discourage them from participating in sales efforts with electric suppliers.

- An Interactive TPV requirement would eliminate automated TPV services that some suppliers use, adding cost and unnecessary complexity to their sales operations.
- The further requirement that the TPV requires customers to answer questions on telephone call detail information to combat spoofing is itself problematic. Davis Malm is unaware of any states that have required confirmation of call detail information as part of a TPV process and is concerned that requiring customers to check on this information in the middle of a marketing call and accurately answer interactive questions based on it will result in customer confusion and additional failures of customer-beneficial sales.

Davis Malm contends that existing consumer protections being reviewed and strengthened in this docket, coupled with the Department's ability to follow up on and address any claims of fraudulent door-to-door ("D2D") or telemarketing conduct through the Docket 16-156-A informal review process, should be adequate to protect against fraudulent sales without the extraordinarily excessive burdens associated with the proposed Interactive TPV process. Among other things, Davis Malm would support requiring TPV calls to include customer confirmation and acceptance of all elements identified in the Department-mandated contract summary (like those listed in the Notice and reproduced in footnote 1 *supra*). Additionally, TPV calls are recorded by all suppliers, and the Department can use the Docket 16-156-A informal

review process to request copies of specific calls or a sample of calls for review to identify potential salesperson or TPV vendor misbehavior. Davis Malm would support exploration by the Department of additional techniques for identifying likely fraudulent calls when compared to sampled or selected TPV calls, such as use of voice analytics and pattern recognition technologies to compare confirmed fraudulent calls to other TPV calls under review and identify likely “tells” for fraudulent calls, such as differences in cadences and in tone and inflection.

B. Customer Account Numbers/Enroll with your Wallet (Request, p. 20).

The Department to date has expressed support for supplier efforts to eliminate the need for the customer account number in the enrollment process, on the grounds that most customers don’t carry their account number with them and lack of ready access to the account number limits the ability of suppliers to move beyond D2D, telemarketed or internet sales where a customer can have an electricity bill and associated account number readily available. See generally November 1, 2019 PowerPoint at Slide 29; see also November 1, 2019 Supplier Presentation passim.

Service providers in virtually all industries can enroll customers seamlessly using readily available data; suppliers should be able to do the same. For example, there are commonly used ID verification methods that should be applied to retail electric transactions, including linking to Equifax or similar entities which can present a series of questions to a customer to confirm their identity. Davis Malm is pleased to see the Department, through the Request, continuing to support this initiative and asking the distribution companies to develop processes to make this work in Massachusetts.

C. Product Limitations (Request, pp. 20-21).

In earlier activities in this proceeding, the Department offered for consideration the potential option of imposing various forms of product limitations on suppliers that were undertaking specific activities under Department review, including auto-renewing customers or serving low-income customers. See generally November 1, 2019 PowerPoint at Slides 32-33. The Request states that the Department is not seeking comments on autorenewal or low-income customer limitations at this time, but will consider the appropriateness of limitations with suppliers on an individual basis, likely with respect to suppliers subject to informal review processes under Docket 16-156-A. Request, pp. 20-21.

As a general matter, suppliers are concerned with the Department's product limitation proposals and oppose them in their most restrictive forms. Restrictive forms that Davis Malm opposes without detailed exploration in this docket would include any cap on renewals based on basic service pricing – which would eliminate virtually any use of innovative or renewable products by suppliers subject to such limitations and would discount the benefits of longer-term contracts that ensure pricing stability which may be priced above basic service levels for some or all of the contracts – or those which require a new customer enrollment within a short period of time, which would result in high supplier costs and high customer churn that may not allow for recovery of customer acquisition costs and damage supplier incentives to enter the Massachusetts competitive market. The likely end result of product limitations will be to constrain further development and introduction of new products and services that would otherwise benefit Massachusetts consumers. Davis Malm is pleased that the Department is not pursuing such limitations against all suppliers at this time, and strongly suggests both caution and moderation

in applying product limitations – especially the more extreme forms – during informal review processes for individual suppliers.

II. LICENSE RENEWAL PROCESS (Request, p. 21).

The Request solicits stakeholder input on a new potential remedy associated processes for suppliers and brokers, respectively, that do not timely file their annual renewal packages with the Department. Request, p. 21. The proposed supplier process is that if the renewal filing is 30 days late, the Department will suspend the supplier's ability to enroll new customers. If supplier files the renewal application package before it is 90 days late, the Department will lift the temporary ban on sales by the supplier. If, however, the supplier files the renewal package more than 90 days late, the Department reserves rights to take licensure action against the supplier pursuant to Docket 16-156-A. Id. The parallel process for brokers is similar. Once the broker's annual renewal filing is 30 days late, the Department will notify all competitive suppliers not to do business with the broker until the Department notifies them otherwise. If the broker files before 90 days late, the Department will lift the ban. If more than 90 days late, the Department reserves rights to take licensure action pursuant to Docket 16-156-A. Id.

These provisions are reasonable in concept. Davis Malm supports ensuring that the Department has adequate tools to ensure timely submission of annual renewal forms. Nevertheless, Davis Malm suggests that the current proposal will have an unnecessarily adverse impact on suppliers and brokers in that they are lacking in express notice provisions that ensure the supplier or broker understands the consequences of noncompliance and can take action to avoid business interruptions and potentially high levels of customer inconvenience while a supplier or broker continues to make sales enrollments that will be rejected due to newly imposed bans under the proposal. Davis Malm recommends that the Department incorporate

notice requirements into its proposal, specifically, (1) a notice approximately 15 days after the due date for a renewal filing warning of the untimely filing and the sales interruption order that will be implemented if the filing is not made before it is 30 days late; and (2) a notice to the noncompliant supplier or broker of the ban order that explains the ban will remain in place until the filing is made and outlines the specific consequences if the renewal application is not filed within 90 days. Brokers and suppliers need to know as soon as possible once a filing is substantially late and, again, after non-filing within the required 30-day period that prompt submissions of the application will result in either no ban or lifting an imposed ban and, relative to the latter, that delaying the renewal filing beyond 90 days risks the ability of the supplier or broker to continue to operate within the Commonwealth. A notice system, either formally through a letter to the provider, informally through emails or calls to the provider, or ideally both, are used in other states and are likely to ensure prompt compliance.

Additionally, the Department should consider using the opportunity of this global retail rules proceeding to take a fresh look at changing the timing of renewal filings. The longstanding annual process is relatively burdensome and differs from the two-to-five-year processes employed in most other restructured states. See generally Supplier Working Group's Comments Regarding Consumer Advocates' Proposals, at p. 12 (discussing other state renewal periods and alternative for consideration of a longer licensing period coupled with limited annual updates in the event of material changes). This change in the current annual renewal process would reduce administrative burdens on both the Department and suppliers and limit opportunities for noncompliance issues of the types discussed in the Request.

Finally, if the Department is finding that smaller or less sophisticated suppliers or brokers are the ones causing the most challenges with noncompliant filings, the Department should

consider taking a fresh look at strengthening entry requirements for initial licensing, such as use of minimum financial security requirements.

Conclusion

Davis Malm appreciates the opportunity to present the above arguments on Tier Two and License Renewal issues to assist the Department with refining retail supplier rules in the Commonwealth. For the reasons discussed herein, the Department should (1) reconsider required use of an Interactive TPV process and, instead, explore ways of strengthening the TPV process and enforcement tools; (2) continue to pursue prompt implementation of the customer-friendly Enroll with Your Wallet initiative; (3) avoid widespread use of product limitations, especially in their most restrictive forms; and (4) incorporate more robust notice elements into the proposed License Renewal process changes.

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