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 ON TIER ONE ISSUES

Introduction and Summary

Davis, Malm & D'Agostine, P.C. ("Davis Malm") respectfully provides the following comments in response to the November 19, 2020 Hearing Officer's Memorandum Request for Comments ("Request") issued by the Department of Public Utilities ("Department" or "DPU"), specifically with respect to the solicitation of comments on additional potential "Tier One" requirements. See Request, pp. 3-22. Please note that unless otherwise specified herein, Davis Malm is limiting its comments to the potential impact of the Request on electricity suppliers and consumers.

Davis Malm continues to appreciate the Department's active efforts, through presentation of proposals, solicitation of stakeholder comments, and the conduct of technical sessions and working group meetings, to fashion workable retail rules that protect Massachusetts consumers while not overburdening suppliers and/or increasing consumer costs. Several of the proposals in the Request, most notably the expansion of the number of municipalities which a supplier can list on its daily door-to-door notice to the Department, are well-considered and should be adopted immediately. Nevertheless, in contrast to the initial May 22, 2020 Tier One Order ("May 22 Order"), which Davis Malm and its clients substantially supported, the Request includes a host of provisions that have limited to no additional consumer benefits coupled with excessive burdens on suppliers and other stakeholders. Simply put, many of the proposals in the Request go too far

and should be reconsidered. Accordingly, for the reasons discussed in detail below, Davis Malm requests reconsideration or modification of key proposals in the Request that would be unworkable in practice or excessively burdensome and costly to suppliers and, ultimately Massachusetts consumers.

Argument

I. Renewal License Application Processes (Request, pp. 3-4).

The Request (at p. 3) seeks to "revise the existing license renewal application to provide information that would be most useful to stakeholders, while ensuring that posting such information on the Department's website would not violate licensees' confidentiality concerns." It reflects an agreement with Consumer Advocates that "more general business information about licensed Competitive Entities should be available to the public on the Department's website. Id. To achieve these goals, the Department proposes a revised renewal application (attached as Attachment 1 to the Request) that would include new application questions and substantially increase the information a renewing supplier would be required to place on the public record in each renewal application. Id., pp. 3-4. Davis Malm disagrees strongly with the approach chosen to make public renewal applications filed by each supplier on an annual basis and with several of the specific proposals that involve information not suitable for public disclosure on the Department's website. This is an example of where the Request goes too far and its proposed approach should be reconsidered or substantially modified.

A. The Department Should Revise Its Current Supplier Information Pages Rather Than Publicly Posting Annual Renewal Applications.

Relative to public posting of supplier renewal license information, the Request fails to expressly address that the Department's website, in the "Electric Suppliers" tab of the File Room and also accessed via links available on the Department's Electric Power Division page, already

includes significant amounts of public information on licensed competitive suppliers and brokers. See Request, pp. 3-4; compare e.g., File Room information on Electric Suppliers at https://eeaonline.eea.state.ma.us/DPU/Fileroom/Licenses. Current supplier information made publicly available in these File Room tabs includes Company name, rate classes served, website URL link, City and State information, Company phone number, date of initial licensing and Department license number. See Electric Supplier information link supra. If the Department seeks to add additional public "general business information" to this portion of the website, the Department should do so, subject to the confidentiality/suitability limitations discussed below.

Davis Malm opposes the Request's proposal to establish a new, largely duplicative, requirement to publicly post the renewal license applications that are filed each year. This will involve substantial, unnecessary burdens on suppliers and Department staff to manage the multiple responses on the renewal license filings that should remain non-public. Davis Malm also contends that publicly posting renewal applications filed by each supplier likely will be less effective from a public transparency perspective compared to enhancing the public business information on all licensed suppliers available on the current Department's website. Accordingly, Davis Malm requests that annual renewal applications filed with the Department remain confidential. If information on specified questions is suitable for public review, the Department can use the information on the application responses to update the information available on its website.

B. Substantial Portions of Information on Annual Renewal Applications Should Remain Confidential.

1. Current Protective Versus Public Supplier Information.

The current Electric Supplier or Electric Broker renewal application can be found at the following link: https://www.mass.gov/how-to/renew-a-competitive-supplier-or-electricity-

broker-license. The current application requires information on the existing license number and year of the current renewal application, plus responses to eight questions: Company name; Company address; website URL (optional); name, title, toll free number and email information for the Company's customer service contact; name, title, direct phone number and direct email information for the Company's regulatory contact; service agent for Massachusetts service of process; an entity-specific summary of history of bankruptcy, dissolution, merger, or acquisition during the last year; and an entity-specific statement of any regulatory actions taken against the entity in the preceding year. See id. Davis Malm supports the continued inclusion of all of these questions on the confidential renewal license form that suppliers submit to the Department each year. Davis Malm notes, and supports, that the Department has already elected to reproduce certain of this information – specifically Company name, Company City/State, and website URL, plus additional information on the Company's permitted rate classes, on public portions of the Department website. See id.

2. Most Additional Public Disclosures Proposed in the Request Should be Reconsidered.

The Request proposes to modify the current renewal application to add only one additional question: "Provide a description of the corporate structure of the applicant (e.g., identification of parent company, affiliates, owners)." Davis Malm does not oppose having this one new question added to the current renewal application submitted to the Department on a confidential, non-public basis. Nevertheless, Davis Malm strongly objects to placing onto the public record many categories of information on the existing and proposed renewal applications.

Relative to the specific information items on the proposed revised renewal application, as supplemented with additional potential categories discussed in the Request, Davis Malm makes the following recommendations:

- **Company name –** already public on the File Room list. No comment needed.
- **Company address –** the Company's City and State are already public on the File Room list. Davis Malm questions any value to the public from adding the Company's specific street address. **If anything, the proper address is the one listed in the supplier's terms of service, as the corporate address often differs from the customer care contact address.**
- **Company URL –** already public on the File Room list to the extent the supplier provides this optional information. No comment needed.
- **Company's customer service contact and associated contact information –** Davis Malm opposes including the name, toll free number (if direct to the contact) and email address of the Company's customer service contact on a public portion of the website. The Department's website already includes the Company's toll-free number as an entry point for getting answers about the Company's services or customer account-specific information. The proposal to include the specific name and direct email and/or telephone number for the Company's Massachusetts customer service contact is certain to invite irrelevant, spamming and information security/hacking efforts that will waste the representative's valuable time and will risk the Company's security efforts.

  Davis Malm notes that the Department has already recognized the importance of not publicly disclosing certain contact information when it issued blanket confidentiality orders applicable to individual vendor contacts and vendor and supplier weekend contact information in connection with the Department's Decision in the Docket No. 14-140 retail investigation establishing rules for

periodic door-to-door notices. See Decision, Docket 14-140-G (May 2018), pp. 23-24. In that case, the Department elected not to provide blanket protection for certain professional contact information for those responsible for managing door-to-door rollouts subject to Department disclosure. Id., pp. 25-26. Davis Malm would respectfully argue that the balance of harms is different in scope and extent of potential harm for a customer service representative responsible for all supplier activities in the Commonwealth, rather than just being involved in the narrow issue of door-to-door rollouts subject to a specific and mandatory Department notice. At most, a general toll free customer service number should be listed to the extent not already disclosed on the File Room Supplier listings.

- **Company's regulatory contact and associated direct phone and email address information –** Davis Malm strongly opposes any proposal to publicly provide the direct email and telephone contact information for the Massachusetts regulatory contact. There is no public benefit from making this information available and there is a countervailing harm of members of the public reaching out to this contact, whose job title does not involve interfacing with general customer concerns, with associated misguided or misdirected inquiries, spamming inquiries and potential information security/hacking efforts. The regulatory contact should be able to focus on assisting the competitive supplier to operate in a compliant fashion and respond to inquiries from regulatory authorities**.** Furthermore, naming a specific regulatory contact person on a public website creates administrative burdens when personnel changes occur.

- **Service agent for Massachusetts service of process –** Davis Malm questions any value to the public from adding the Company's service agent to a public website.
- **Entity-specific summary of history of bankruptcy, dissolution, merger, or acquisition during the last year –** Davis Malm questions any value to the public from adding information on recent bankruptcy, dissolution, merger or acquisition information to a public website. Such information should not be customer-affecting, insofar as suppliers ordinarily are required to maintain contract terms even if financial problems or mergers require an assignment to a new supplier. Furthermore, information on a planned assignment are required to be disclosed to affected consumers in the methods specified in the Department's Decision in Docket No.14-140-D (September 2016). Given these pertinent disclosures, Davis Malm sees no need for a disclosure on a public website.
- **Entity-specific statement of any regulatory actions taken against the entity in the preceding year –** Davis Malm supports providing this information to the Department during the course of the annual renewal license process but believes that in many cases such disclosures will cause more confusion than illumination in the minds of customers not steeped in the multiplicity of regulatory requirements applicable to suppliers in the restructured states across the country. At most, public disclosures should be limited to regulatory actions against the supplier in the Commonwealth of Massachusetts.
- **Description of corporate structure of the applicant (e.g., identification of parent company, affiliates, owners) –** Davis Malm opposes inclusion of this

information on a public website. The corporate structure of a licensee – whether a corporation, partnership or limited liability entity – is already clear from the name used on the list of suppliers already posted on the website. Even though Davis Malm has no objection to providing full corporate structure information to the Department on the confidential annual renewal application – assuming the Department reasonably believe it needs such information – including on a public website all corporate structure information on all suppliers is going to be a daunting effort likely to confuse rather than enlighten most consumers. Many suppliers have highly complex structures tied to different parties with ownership interests and different affiliated companies that often were added over time through acquisitions or mergers, domestically and internationally. Several major suppliers are publicly traded companies with a host of interests that go far beyond the retail supply issues subject to the Department's jurisdiction and the legitimate interests of Massachusetts consumers. At most, corporate structure information included on a public website should be limited to reference to any other affiliated retail supply companies licensed within the Commonwealth of Massachusetts.

- **Residential rate class status** – Disclosure of whether a supplier serves residential customers is raised in the Request at p. 4. However, rate class information already public on the File Room list. No additional comment should be needed.

II. Modification of Requirements for Door-to-Door Marketing Notices (Request, pp. 4-10).

One of the most discussed issues in the May 22 Order was the timing and scope of the notices to be filed with the Department by suppliers, listing the municipalities in which they

intended to conduct door-to-door marketing activities, and the limits on how many municipalities could be listed in a single notice. See May 22 Order, pp. 13-30. The May 22 Order eventually chose very strict options – a daily notice two business days in advance of the planned marketing date, plus a cap of five municipalities per notice. Id., pp. 19-23. The May 22 Order also divided the Commonwealth's largest city, Boston, into 20-plus neighborhoods akin to municipalities for purposes of meeting the five-municipality limit on the daily notice form. Id., pp. 23-24. The May 22 Order reserved other questions, including potential options for providing relief to the strict five municipality state-wide limit, for later discussion at the subsequent August 6, 2020 technical session. See Davis Malm PowerPoint (circulated with August 6 technical session materials). The Request proposes to supplement several obligations relative to the municipal notice in the May 22 Order.

Davis Malm unreservedly supports one proposal circulated for comment in the Request – to relieve the strict five-municipality limit state-wide and establish a new limit of up to five municipalities per each of the four utility service areas (Eversource East, Eversource West, National Grid and Unitil). Request, pp. 6-7. This proposal mitigates a significant barrier to competition in all parts of the Commonwealth without adversely affecting the Department's ability to monitor potentially problematic behaviors. It should be adopted without delay so that suppliers can make effective plans for door-to-door sales once they resume following the current Covid-19 stay. With respect to the remaining proposals in the Request, relative to providing daily notice to municipal officials and establishing and defining new neighborhoods in Springfield and Worcester, Davis Malm has concerns that should be addressed as discussed herein. Request, pp. 4-5, 7-10.

A. The Five Municipality Statewide Limit on Supplier Daily Notices Should Change Immediately to Up to Five Municipalities Per Utility Service Area.

Davis Malm strongly supports the Request's proposal to provide relief to the current May 22 Order limit of five municipalities on the daily door-to-door notice by changing it to five municipalities per utility service area. Request, pp. 6-7.

Davis Malm recognizes that a daily notice is a useful tool for the Department to promptly track, investigate and, if warranted, take action against the supplier or vendor responsible for potential door-to-door issues identified in the field by municipal officials or consumers. This May 22 Order requirement gives the Department two business days to collate information to create a ready list of the maximum number of suppliers/vendors who may be present in a given municipality on a given day. Unsurprisingly, the Request identifies no supplier identification problems with the May 22 Order daily notice system. Overlapping sales efforts have been minimal, totaling a daily high of 2.6 in the relatively large and geographically spread out City of Springfield and 1.6 in the very large Dorchester neighborhood of Boston (Request, p. 8 and note 17). Even this minimal extent of supplier overlap is likely overstated as most suppliers will include backups on their daily lists that they will reach only in the event of unexpected difficulties (such as a permitting delay or unexpected presence of a competing campaign in the targeted area). The far more likely problem is that the current five-municipality limit will preclude otherwise valid marketing opportunities. Suppliers often have qualified vendor teams ready to sell in varying locations across the Commonwealth but cannot pursue such efforts because of the strict five-municipality limit and the need to include back up municipalities.

Accordingly, Davis Malm supports the Request's reasonable proposal to address this concern about unnecessary restrictions on door-to-door sales benefitting Massachusetts consumers by changing the limit from five municipalities (or specified neighborhoods) state-

wide to up to five each of the four utility service areas distributed across the Commonwealth. Davis Malm also requests that the change be implemented without delay.[1] The Request offers no reason why this reasonable change should be delayed or subject to any conditions.[2]

B. Davis Malm Opposes Provision on Daily Department Notice Information to Municipal Officials.

The Request proposes that a new process be established for providing certain information contained in the daily notice filings to interested municipal officials. Request, pp. 4-5. In summary, the Request proposes that (1) municipal officials interested in receiving notices should submit contact information to the Department for listing on the Department website; (2) the supplier would provide information on the Department notice to the listed municipal officials on the same two business days in advance schedule; and (3) the provision of information would be contingent on agreement between the supplier and municipality for keeping the information confidential. Id., p. 5. The Request solicits input on the following topics: (1) what type of contact information should be provided by municipalities to the Department; (2) what information should be included by suppliers in the notification email to the municipalities opting into the notice provision; and (3) ideas for the Department to ensure that municipalities are aware of this option and to facilitate the exchange of confidential information. Id.

Davis Malm opposes these proposed provisions on multiple grounds. This represents another example of where the Request just goes too far and creates administrative burdens and risks for insufficient reasons. The overarching goal of the daily notice provision is so that the

[1] Davis Malm would have also supported the alternative proposal of modifying the limit to be on a per-vendor basis. See Request, p. 6.

[2] Davis Malm did identify an alternative of conditioning additional municipalities on implementation of global positioning system or GPS technologies (Request, p. 7 and note 12), but intended that option to come into play only if the Department was otherwise intransigent with respect to adhering to the original five-municipality state-wide limit if the Department contended it would have difficulties identifying vendor bad actors notwithstanding the mandatory daily notice by all door-to-door suppliers.

Department will have information available to enable it to promptly identify sales agents and associated vendors and suppliers responsible for apparent consumer protection issues in the field reported by individuals or municipalities. Provision of the same daily notice information to individual municipalities would be unnecessary and duplicative of the Department's centralized and efficient information collecting efforts.

Furthermore, the highly confidential information on upcoming supplier marketing plans is fully protected by the Department's standing confidentiality order issued in this docket in full conformity with the Department's broad trade secret protection authority in G.L. c. 25, § 5D. The same cannot be said of daily marketing plan information provided to a municipality. Sensitive supplier marketing information will necessarily pass though the hands of several employees within the various officials' offices (Mayor or Selectman's Offices, Police Department) and are not insulated from disclosure to the broader public. Even worse, it could pass to employees of supplier competitors located in the municipality or friends and family members of such employees. Such information provided to a municipality is not handled in the same manner as information provided to the Department – i.e., by the information being maintained by Department staff within the confines of a state agency who are well-accustomed to protecting information subject to the Department's confidentiality orders issued pursuant to a well-established trade secret statute. Given the number of municipal officials who will need to receive confidential notice information for it to be useful, the efficacy of a negotiated confidentiality agreement to fully protect highly confidential competitive information cannot and should not be assumed. It also cannot be said that each supplier will be able to reach adequate confidentiality agreements with every interested municipality in the Commonwealth at all, or at minimum without an extraordinary commitment in supplier time and resources.

Given those circumstances, Davis Malm respectfully objects to the proposal that sensitive competitive information be duplicated for municipal entities solely upon a showing of interest in receiving the information via a posting of designated officials on the Department's website. To the contrary, if municipalities seek to become more active participants in reviewing vendor sales activities within their borders, they can pursue their rights, consistent with applicable laws, to enact their own notice or permit provisions tailored to their own local interests in assuring that vendors comply with applicable state and local laws. To the extent the Department chooses to pursue this option, the Department should limit the information to one point of contact and one back up in case the principal contact is unavailable per municipality.

C. The Proposed Definitions of New Neighborhoods in Springfield and Worcester Should Be Reviewed in a Working Group Process.

Davis Malm can understand the Department's inquiry concerning creating new door-to-door marketing neighborhoods in Worcester and Springfield, the second and third largest cities in the Commonwealth, but questions whether the potential benefits exceed the costs associated with managing vendors to conduct sales in "neighborhoods" that are smaller, less well defined and less dense than the well-established counterparts in Boston. To be clear, even though there was a strong case for a neighborhood-by-neighborhood breakdown in the City of Boston – which has neighborhoods that are relatively well-established and identifiable by suppliers and their vendors though simple Google searches, sufficiently populous to justify a municipality-like treatment on the daily supplier lists, highly dense and, as such, highly desirable from a door-to-door marketing perspective – the same is not true for many neighborhoods in Worcester and Springfield. Any proposal to break the two cities into neighborhoods or agglomerations of neighborhoods is likely to raise concerns of whether its benefits exceed anticipated costs. Additionally, any proposal is likely to have alternatives that could work more effectively for

door-to-door suppliers and local residents interested in competitive options. Accordingly, to the extent the Department does not choose to reject or delay implementation of a new neighborhood scheme in these cities at this time, Davis Malm suggests that the Department propose a technical session to see if suppliers seek to modify the proposed Worcester and Springfield neighborhoods in the Request and, if so, are prepared to justify their arguments for modifications. Further, the Department should ensure that these cities not be broken down to more than five neighborhoods each, with fewer preferred, and that larger neighborhoods be strongly considered. Otherwise, conducting marketing efforts in Springfield or Worcester could take up all available daily market slots in Eversource West or National Grid, respectively, and crowd out other potentially attractive markets throughout the Commonwealth.

III. Contract Summary Issues (Request, pp. 10-16).

Davis Malm supports the current Contract Summary form established in the May 22 Order. May 22 Order, pp. 39-50 and Attachment E 1. The form provides an appropriate summary of agreed-to energy and renewable product terms before the expiration of the rescission period. See id. Additionally, the form includes the agreed-to disclosure that consumers can look to the State shopping website if interested in seeing a range of energy products. Id., pp. 47-48. In contrast, Davis Malm has significant concerns with the two principal "improvements" to the contract summary form, specifically, adding information regarding renewable products and listing the applicable basic service price for the utility area in which the product is being marketed. Both changes are excessive and inappropriate and should be reconsidered for the reasons set forth below.

A. Inclusion of Additional Voluntary Renewable Content.

For "brown" products, the current Contract Summary form requires a recitation that they meet the minimum renewable energy resources requirement. See May 22 Order, Attachment E.1. For "green" products, the current Contract Summary form simply specifies the amount of renewable resources and states the percentage by which the product exceeds the required minimum renewable content. May 22 Order, p. 44. These disclosures provide appropriate information for consumers seeking to understand the conventional and voluntary renewable content in the supply products recently purchased, subject only to possible post-sale rescission pursuant to Massachusetts law.

The "improvements" proposed in the Request would implicitly create new categories of Department-approved "premium" renewable products – specifically those qualifying as Massachusetts Class I resources, those qualifying as resources sited within the borders of New England, or both – and requires that all other conventional and voluntary renewable products not meeting these two categories be classified as "non-premium" products. Request, pp. 12-13. In furtherance of these new categories, the Request proposes that all contract summaries would include three substantial alternative versions of additional mandatory text to describe precisely how the products sold to the consumer would fit within these new "premium" and "nonpremium" categories. Id.

Davis Malm strongly opposes the proposed "improvements" to the contract summary to reflect these new premium and nonpremium categories, on multiple grounds. First, they amount to an unsanctioned rulemaking as to the permitted and recommended characteristics of currently lawful voluntary renewable offerings that should not be added to mandatory supplier documents until fully vetted in a notice and comment proceeding or formal rulemaking. The Request makes

no effort to explain why Class I resources should be deemed "premium" more than the other forms of permissible Renewable Portfolio Standards products in the Commonwealth. The Request makes no effort to explain why resources located within the borders of New England should be considered premium resources and not resources from other states (including resources from New York or the PJM area that might be physically closer to the Commonwealth than resources in substantial portions of Maine). The Request also makes no effort to explain why other resources should be deemed non-premium even though they include voluntary renewable commitments in excess of minimum Massachusetts requirements that should merit encouragement rather than implicit disparagement. Indeed, the proposal is inconsistent with the principle that climate change knows no boundaries. "Premium" products sources outside of New England should be treated as no less valuable than those sources within New England and a contrary position may risk legal challenge under the so-called "dormant" Commerce Clause to the United States Constitution.[3]

Second, the "improvements" are fundamentally inappropriate within the context of a contract summary, whose purpose is to confirm for an enrolling customer the terms of the products sold. A contract summary should not be used to launch a new Department-mandated education campaign on various forms of renewable products that the Department finds worthy of commendation as "premium." Moreover, inclusion of this text is certain to confuse customers, who may already be receiving products with renewable content well above state minimums that

[3] U.S. Constitution, Art. I, § 8, cl. 3 (granting Congress the ability to regulate commerce among the States); *see also* *Capital One Bank v. Commissioner of Revenue*, 453 Mass. 1, 9-10, cert. denied, 129 S. Ct. 2827 (2009), discussing *Oklahoma Tax Comm'n v. Jefferson Lines, Inc*., 514 U.S. 175, 179 (1995) and other Supreme Court case law that a negative implication from the Commerce Clause, the so-called "dormant" Commerce Clause, prohibits differential treatment of in-state and out-of-of state economic interests that benefit in-state interests, as compared to regulating evenhandedly with only incidental effects on interstate commerce; Order Adopting Emergency Regulations, Docket No 10-58 (June 9, 2010) (confirming Department decision to modify geographic scope elements in an offshore wind power solicitation and seek emergency changes to bidding regulations in order to moot legal challenges based upon dormant Commerce Clause).

the supplier and consumer already believe are effectively premium products compared to conventional supply products. At most, the Department should develop its own educational resources and communicate those to consumers in ways more suited to an educational campaign, such as through links to resources on the Massachusetts electricity shopping page, on the Department's website, or on the site of the Department's sister agency, the Department of Energy Resources.

Third and finally, the "improvements" will make the contract summaries un-administrable in practice in two dimensions: (1) the lengthy text may require that contract summaries be spread over yet another page, up from the current two pages, and, accordingly, adversely impact the readability of the form by many customers and increase the associated costs applicable to preparing and transmitting the summaries to suppliers; and (2) substantially increase the number of forms of contract summary templates – from at least two and potentially many more depending on the percentage of renewable resources in a voluntary renewable, to at least four and potentially many more forms (i.e., conventional product with minimum required renewable resources; voluntary renewable product with a specified percentage above the minimum requirement and new non-premium designation text; voluntary renewable product with a specified percentage above the minimum requirement and new premium designation text relating to Class I resources; and voluntary renewable product with a specified percentage above the minimum requirement and new premium designation text relating to Class I resources and resources located within New England). The administrability concern will increase substantially if the Department chooses to adopt the separate new "improvement" of adding basic service pricing for each of the four distribution company service areas as well, as discussed in Section III.B below.

B. Inclusion of Basic Service Price and Term Information.

Pursuant to the May 22 Order, the contract summary includes the price of the product agreed to by the customer. May 22 Order, Attachment E.1. At the Department's behest, suppliers conceded to an additional statement on the contract summary that consumers can learn additional information on the broad range of supply products available by reviewing information on the MA Energy Switch shopping website. Id. As with the renewable product disclosures on the contract summary as discussed in the preceding section (Section III.A), Davis Malm considers these required disclosures of the agreed-upon contract price and a cross-reference to the Energy Switch website to be appropriate information to be included in a post-sale contract summary of the supply products recently purchased, subject only to possible post-sale rescission pursuant to Massachusetts law.

The Request proposes to do more than that, and require suppliers to include in the contract summary (1) the current basic service price for the distribution company service territory of the customer, (2) the end date for the current basic service price for that territory, and (3) the upcoming rate with effective date if known at time of enrollment. Request, p. 14. The information would be placed in the bottom of the contract summary form, directly preceding the reference to the Energy Switch website. Request, p. 15. The Department would also require use of the introductory language "A Message from the Massachusetts Department of Public Utilities" before the basic service price and Energy Switch references. Request, p. 15.

Davis Malm strongly opposes the inclusion in the mandatory contract summary form of distribution company territory-specific and associated term and upcoming price-specific information, for multiple reasons (many of which are similar to those discussed above with respect to suggested "improvements" to the renewable portion of the contract summary). First, it

is inappropriate for the Department to compel suppliers to use its contract summary to implicitly market for non-supplier products offered by their distribution company competitors. The reference to the Energy Switch website – which prominently lists products offered by distribution companies, municipal aggregations and other suppliers – is more than enough to ensure that consumers are aware of other supply options. Second, inclusion of basic service pricing information is flatly inconsistent with the purpose of a contract summary to allow the customer to confirm the terms of the agreed-upon deal between the customer and the supplier with whom they are contracting. Third, inclusion of basic service pricing information on products that differ from what the customer selected during the sales process is certain to confuse or mislead customers. Fourth and finally, as with the arguments regarding renewable information above and especially if the Department orders additional forms of renewable notices, the addition of lengthy basic service disclosures for each of the four distribution company territories will render the contract summary to be overly-lengthy and the process to develop and maintain contract summary templates for all possible permutations of renewable product and basic service offerings will be unadministrable as a practical matter.

Davis Malm does not oppose including the mandatory "A Message from the Massachusetts Department of Public Utilities" above the current cross-reference to the EnergySwitch website but, as noted herein, opposes the addition of basic service pricing information to the contract summary form.

IV. Recording of Telemarketing Calls (Request, pp. 16-17).

The May 22 Order required recording of all telemarketing calls lasting more than one minute, irrespective of whether the call resulted in enrollment, but reserved until this phase of the proceeding details regarding how the Department would be able to gain access to sales

recordings. Specifically, the Request (at p. 16) proposes that suppliers be required to provide the Department with sales recordings and any associated third-party verifications three business days following a Department request.

Davis Malm recommends that the Department establish a somewhat longer interval than three business days, such as a uniform five or ten business day period. A three-business-day period may work for many requests but will oftentimes be too short – e.g., during weeks leading up to holidays, periods of bad weather, and periods of local or national emergencies. Furthermore, even in more normal times, regulatory requests to pull records often involve interactions among internal managers and staff, vendor personnel and, in appropriate cases, internal or outside legal counsel. All of these personnel are likely to have other duties and will not be exclusively dedicated to retrieval of sales and TPV recordings requested by Department staff. Affording extra time beyond the proposed three-day period will ensure that there will be sufficient time to identify desired records, communicate internally, communicate with vendors, review the requested work product and prepare the information for submission to the Department with a cushion to cover hard-to-locate or old recordings and the exigencies that may otherwise occupy supplier staff assigned to procure and transmit the requested records. At most, the Department should limit maximum three-day response requirements to requests in exigent requests (such as seeking information on an identified or suspected customer protection violation) and use a five or ten-day period for ordinary proactive checking of supplier recordings. Additionally, Davis Malm would ask that any specified response period be limited to one-off or limited requests for recording records. Requests for multiple records pose different challenges and should be subject to more extended timelines.

V. Direct Mail Marketing (Request, p. 17)

The May 22, 2020 Order required that all direct mail pieces be submitted to the Department for review and comment or implicit approval if not responded to within a ten-business-day period. The Request (at p. 17) now proposes to provide that the Department, at the time it informs the supplier via email that it may proceed with marketing a submitted or modified direct mail piece, will send a copy of such email to the Attorney General's office.

Davis Malm has several concerns with this process. Direct mail campaigns are often time-sensitive and tied to marketplace opportunities. Under the May 22 Order, suppliers already have to wait up to ten business days for the Department to offer comments and, typically, have to undergo an additional period of time, lasting several days or longer, to discuss and achieve final resolution with the Department concerning requested or suggested changes in order to reach consensus on an approved direct mail piece. Providing a copy to the Attorney General at the end of this lengthy process, with no time limit provided for any subsequent Attorney General review, places suppliers in an untenable position. They either have to wait indefinitely for additional feedback from the Attorney General, beyond that already given to the supplier by Department staff, or proceed to issue the direct mail collateral immediately and face possible consequences if the Attorney General's staff believes that the Department-approved piece includes potential violations of G.L.c. 93A or the Attorney General's 940 CMR 19.00 rules for the marketing of retail electricity.

Davis Malm would support retention of the current review system, where the supplier works directly with Department staff over a time limited period to resolve concerns, and then can move forward with the marketing piece. Thereafter, if the Attorney General receives a consumer complaint about a supplier direct mail piece that it believes violates applicable law and rules, the

Attorney General's representatives can reach out directly to the supplier or to Department staff to discuss the issue. Suppliers certainly would point to the Department review process as evidence of their reasonable behavior, even if that is not conclusive as to the Attorney General's rights under its enabling statute and regulations.

If the Department instead chooses to go forward with transmitting direct mail pieces to the Attorney General, such mandatory inclusion of the Attorney General should be expressly conditioned on the Attorney General agreeing to follow the established Tier One process that exists with suppliers and Department staff, such that suppliers will provide the Attorney General with a copy of the proposed direct mail marketing material simultaneously with the copy transmitted to the Department. Thereafter, both the Department and the Attorney General will have up to 10 business days to provide feedback to the supplier, with any conflicting feedback worked out cooperatively by the parties within the 10-business-day period or shortly thereafter in order to avoid delays that will effectively frustrate time-sensitive direct mail campaigns.

VI. Display of Renewable Energy Products on Energy Switch Shopping Website (Request, pp. 17-18).

The May 22, 2020 Order established requirements for presentation of information on the Energy Switch website relative to products containing voluntary renewable content above the Department-ordered minimum. Specifically, the website would only display offers composed of at least 50 percent renewable content (including the state law minimum), except that for products composed entirely of Class I resources, the products could be displayed irrespective of the level of renewable content. The Department now is proposing to eliminate the 50 percent minimum for non-Class I voluntary products. Request, p. 18. Davis Malm supports this reasonable request.

VII. Definition of Small Commercial and Industrial Consumers (Request, pp. 18-19).

The May 22 Order applied several of its new consumer protection requirements to small commercial customers, but it did not definitively define small commercial for purposes of the new requirements and elected to stay implementation as applied to small commercial customers pending a ruling on class definition. May 22 Order; July 17, 2020 Hearing Officer Memorandum, p. 2. The specified Tier One requirements applicable to small commercial customers are: "(1) identification of third-party marketing vendors; (2) disclosure of product information; (3) marketing scripts; (4) recording of telemarketing calls; (5) review of direct mail marketing materials; and (6) automatic renewal notification." July 17, 2020 Hearing Officer Memorandum, p. 2. The Department discussed possible class definitions during the August 6, 2020 technical session, and proposes now to address the issue by adopting a proposed decision offered by RESA through its expert, Daniel Allegretti. Request, pp. 18-19. The proposed definition of a small commercial customer would be (1) a non-residential customer, (2) whose annual electric usage does not exceed 15,000 kilowatt hours (which is consistent with the similar definitions adopted in other large restructured states), and (3) the supplier is able to aggregate accounts for a consumer with multiple accounts/locations for purposes of determining whether the customer qualifies or does not qualify as a small commercial customer subject to the specified Tier One requirements. Id. The Department also separately asked how to handle new customers for whom historical usage is not yet available. Id., p. 19.

Davis Malm supports the definition of a small commercial customer proposed by RESA's witness and supported in the Request. Relative to new commercial customers, Davis Malm recommends that the classification should be based on good faith estimates by the customer and/or the supplier of the customer's projected annual electric load. Davis Malm is open to

hearing input from the Department or distribution utilities regarding whether they have specific procedures or practices that they use in estimating usage for rate class determination purposes when connecting a new or substantially renovated business.

VIII. Process for Addressing Untimely License Renewal Applications (Request, pp. 19-22).

During Tier One proceedings, the Department solicited comments on the process for addressing suppliers or brokers that failed to submit annual license renewal applications when due, including at which point the Department can begin taking license actions such as suspending the licensee's ability to enroll new customers (or, for a broker, suspending a supplier's ability to accept sales) or eventually, if the renewal application remains unfiled, initiating formal license actions pursuant the Department's informal or formal investigation and remedy provisions in Docket 16-156-A. The Request's proposal for electric suppliers and brokers is for two pre-deadline notices (timed for 30 days and five days before the deadline); a 14-day period to file without any adverse consequences; beyond 14 days late, the supplier would be blocked from enrolling new customers until the renewal application is belatedly filed; and, once beyond 60 days after the deadline, a petition to the Department to resume sales would be required and the Department would reserve rights to take license action under D.P.U. 16-156-A if an application remains unfiled after the end of the 60-day period. Request, pp. 20-22. The Request proposes to involve distribution companies in enforcing the new enrollment sales limitations, whether via electronic data interface ("EDI") changes or by intervening in enrollment order processing. Request, p. 21. The Request also solicits feedback on the criteria it should adopt for suppliers during the post-60-day petition phase of the process applicable to suppliers that still fail to file renewal applications. Id., pp. 21-22.

Davis Malm supports the Department's proposals with respect to two Department-issued reminders in advance of the renewal application deadline, a 14-day grace period to submit the renewal application untimely without consequence, and to establish a 60-day period before the Department will consider license action as part of its authority pursuant to Docket No. 16-156-A. Davis Malm respectfully opposes portions of the Request that would seek to involve distribution companies in enforcing the new enrollment limitations following the 14-day grace period, either via EDI reprogramming or manual intervention. Both are likely to involve excessive costs and resources on the part of suppliers and distribution companies as well as a high risk of tension, errors and consumer harms during interactions between and among the customer, their supplier, the distribution company and the Department.

As an alternative remedy for a recalcitrant supplier or broker, the Department should short circuit cost, inter-company tension and competitive concerns by bypassing the distribution companies in the enforcement phase. Instead, the Department, at the end of the 14-day grace period, should send a Docket 16-156-A informal review letter directly to the regulatory contact for the untimely supplier or broker directing them to immediately cease enrollments until such time as a renewal application is filed. The letter also can warn the supplier or broker that a failure to respect the stay as directed could trigger investigation pursuant to Docket No. 16-156-A or the sanctions provision in the 220 CMR 11.05 et seq. electric supplier and broker rules. This is a far simpler approach to meeting the Department's objectives. The Department has well-established and well-practiced enforcement capabilities which it should employ under these circumstances.

As a final point, Davis Malm does not see the value in providing advance comment on criteria for possible remedies for supplier or broker inaction following the second 60-day grace

period. The Department can respond based on the facts presented to it, which may well vary markedly from case to case. The proper action from a non-filing caused by Department error, or change of personnel at the supplier or broker, or an apparently intentional failure to heed warnings, or difficulties caused by business failure, may well justify different remedies under the Department's authority.

Conclusion

Davis Malm once again appreciates the opportunity to present the above arguments on these remaining Tier One issues to assist the Department completing this initial phase of changes to the retail rules in the Commonwealth. Davis Malm supports several changes as reasonable, most notably relief on the strict five-municipality limit on the daily door-to-door notice. The Department should reject or substantially modify several of the changes proposed in the Request as being unreasonable, inappropriate or excessively burdensome, including but not limited to (1) inappropriately and unwisely placing excessive and confidential supplier renewal license information on the public record; (2) creating a duplicative and insecure addition of a daily notice requirement for suppliers for interested municipalities that already possess permitting authority; (3) grossly and inappropriately expanding the length, complexity and scope of the required contract summary form; and unnecessarily and inappropriately including distribution company personnel in enforcing supplier and broker failures to submit timely renewal applications notwithstanding helpful new notice and grace period. These changes, individually and collectively, if adopted, simply go too far and will cause too much harm to competitive markets in Massachusetts, and should be reconsidered.

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