DAVIS MALM
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Robert J. Munnelly Jr.

P: 617.589.3822 | F: 617.523.6215
rmunnelly@davismalm.com

BY EMAIL ONLY

February 4, 2021

Mark Marini, Secretary
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 – Reply Comments of Davis, Malm & D'Agostine, P.C. on Additional Tier One Issues

Dear Mr. Marini:

Pursuant to the schedule established in the November 19, 2020 Hearing Officer Request for Comments, as amended by subsequent orders, attached please find our firm's Reply Comments on Additional Tier One Issues.

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

Sincerely,

Robert J. Munnelly, Jr.
RJM/jmc
Enclosure
cc: Greggory Wade, Hearing Officer
Peter Ray, Paralegal

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

REPLY COMMENTS OF DAVIS, MALM ON TIER ONE ISSUES

Introduction and Summary

Davis, Malm & D'Agostine, P.C. ("Davis Malm") respectfully replies as follows to the comments of a dozen-plus participants filed on or before January 11, 2021 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 requirements beyond its May 22, 2020 "Tier One" Order ("May 22 Order"). See Request, pp. 3-22. These reply comments supplement Davis Malm's January 11, 2021 initial comments on the electricity-related issues raised in the Request ("Davis Malm Comments").[1] They also address initial comments submitted on or before January 11, 2021 by the following docket participants: Retail Energy Supply Association ("RESA" and "RESA Comments"); Vistra Corp. ("Vistra" and "Vistra Comments"); Green Mountain Energy Company, Reliant Energy Northeast LLC d/b/a NRG Home and d/b/a NRG Business Solutions, Energy Plus Holdings LLC, and XOOM Energy Massachusetts, LLC ("NRG" and "NRG Comments"); CleanChoice Energy, Inc. ("CleanChoice" and "CleanChoice Comments"); SFE Energy Massachusetts, Inc. ("SFE" and "SFE Comments") (collectively, "Suppliers" and "Supplier Comments"); coalition of the Attorney General's Office ("AG") and Alternatives for

[1] The Davis Malm initial and reply are limited to electric issues and do not address natural gas issues.

Community and Environment, the National Consumer Law Center, Greater Boston Legal Services, and Lawyers for Civil Rights (collectively, "Consumers" and "Consumers Comments"); Department of Energy Resources ("DOER" and "DOER Comments"); and coalition of Fitchburg Gas and Electric Light Company d/b/a Unitil, Massachusetts Electric Company, Nantucket Electric Company, Boston Gas Company and former Colonial Gas Company each d/b/a National Grid, NSTAR Electric Company, NSTAR Gas Company, and Eversource Gas Company of Massachusetts each d/b/a Eversource Energy, The Berkshire Gas Company, and Liberty Utilities (New England Natural Gas Company) Corp. d/b/a Liberty (collectively, "Utilities" and "Utilities Comments").[2]

The Davis Malm Comments and the Supplier Comments provide a detailed and near-uniform consensus on the Department's many proposals set forth in the Request, several of which are of critical importance to all suppliers in general or suppliers pursuing certain types of lawful sales channels:

- Door-to-Door Notices. Expansion of the number of municipalities that can be listed on a supplier's daily door-to-door notices, subject to mandatory geographic spread by utility service area (Request, pp. 6-7), is well-considered and worthy of immediate adoption without the need to require global positioning system ("GPS") devices, whereas municipal notice and municipal splitting proposals for Springfield and Worcester (Request, pp. 4-5, 7-10) are problematic in multiple respects.
- Contract Summary. Suppliers have multiple and serious competitive, customer experience, and practical implementation concerns with the extensive proposed

[2] Additional participants also filed comments on discrete issues, but they are not addressed herein.

expansions to the relatively concise and well-crafted contract summary approved by the Department in its May 22 Order (Request, pp. 10-16).

- Direct Mail. Suppliers have significant concerns with the Department's proposal to copy the AG on mail pieces approved by the Department following discussions with the supplier without any assurance of timely AG review (Request, p. 17) that are confirmed and heightened by the specific positions taken by the AG within the Consumer Comments (see Consumer Comments, pp. 16-17).
- Licensee Information on Public Department Website. Additional transparency on supplier renewal information beyond that already available on the Department's website (Request, pp. 3-4) is supported, provided that the expansions provide useful information for consumers and protect supplier confidentiality.
- Recordings Response Time. Suppliers support a reasonable period at or, preferably, in excess of three business days to respond to Department one-off requests for sales and third-party verification ("TPV") recordings that accommodate the potential for emergency or weather delays and potential difficulties with recovering older recordings (Request, pp. 16-17).
- Other Issues. Suppliers generally support (i) the Department's proposed elimination of the minimum renewable content requirement on the Energy Switch website (Request, pp. 17-18), (ii) the proposed definition of Small Commercial customers for purposes of being subject to Tier One consumer protection obligations (Request, pp. 18-19), and (iii) the proposed notice and remedy regime for suppliers and brokers untimely filing annual renewal notices (Request, pp. 19-22), except that Suppliers recommend enforcement of remedies through

Department-issued cease and desist letters to the supplier rather than either of the two difficult, costly and potentially anticompetitive remedies administered with the assistance of the Utilities.

For the reasons discussed below, the Department should not adopt the comments filed by other docket participants, with limited exceptions enumerated in this Reply. The other comments either support the Department's proposals in conclusory fashion without grappling with the complexities, cost and administrative difficulties raised by Davis Malm and other Suppliers or, alternatively, use these Tier One regulations improperly to seek policy goals that would be more appropriately pursued in other proceedings or forums or even render impractical the ability of suppliers to participate in certain forms of customer-beneficial competition. The Department should closely scrutinize and reject all proposals that would impose excessive or unreasonable burdens on the ability of suppliers and consumers to participate in competitive electricity markets.

Additionally, Davis Malm notes that substantial portions of the Consumer Comments are devoted to arguing issues well outside of the scope of the Request. See Consumer Comments at p. 2 (arguing for publicizing supplier-related complaint information in multiple languages on the Department's website as well as other state and municipal forums); pp. 13-16 (arguing for extensive reworking of the Department's Energy Switch website to address purported accessibility difficulties); pp. 18-21 (offering a lengthy anticipatory attack on the Department's consideration of "Enroll with Your Wallet" programs adopted in other restructured states, even though the Department expressly has classified this initiative as a Tier Two issue). The Department should disregard all out-of-scope arguments and Davis Malm will not address them herein.

Argument

I. Reply Comments on Critical Issues to Cost-Effective Competitive Choice

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

1. The Department Should Expand the Five Municipality Statewide Limit on Supplier Daily Notices.

Davis Malm and the many Suppliers that weighed in on this issue uniformly support the Request's proposal to provide immediate relief to the current May 22 Order limit of five municipalities and/or Boston neighborhoods on the daily door-to-door notice by changing it to five municipalities/Boston neighborhoods per utility service area. Request, pp. 6-7; see also Davis Malm Comments, pp. 10-11; RESA Comments, pp. 5-7; Vistra Comments, p. 2; NRG Comments, p. 3; SFE Comments, pp. 4-5. As well summarized by RESA, "[l]imiting suppliers to a maximum of five municipalities statewide on each notification is too restrictive. Some suppliers, or their door-to-door marketing vendors, may have multiple offices in the Commonwealth and may be able to market in multiple regions at the same time. A five-municipality statewide limit could deny such suppliers the flexibility to adapt to changing conditions due to circumstances beyond their control, such as traffic delays, weather, or comparable unexpected events." RESA Comments, p. 6; accord SFE Comments, p. 4 (Department's proposal "continues to accomplish the goal of providing the Department with robust information about the location of supplier marketing efforts while also allowing suppliers to reasonably expand the reach of their marketing activities as market conditions and business indicia would support"); NRG Comments, p. 3 (setting the five-municipality limit at the utility level "would provide additional flexibility … when permits are denied or delayed. In addition, sales teams need to be able to shift gears to adjust to competitor activity (if another company is

selling in the same area, sales teams will often move to another location)"); see also Vistra Comments, p. 2:

> …suppliers need flexibility to change their marketing plans as new information comes to light, including on the same day that the supplier is marketing. For instance, upon beginning to market door-to-door in a certain municipality, a supplier may learn that several other suppliers have recently covered the same area. Canvassing the same municipality recently covered by other suppliers will not provide a good experience for customers or a positive result for the supplier. In such a situation, the supplier needs the flexibility to pivot to a new municipality, and the five-municipality limit statewide may not allow for that. Expanding the five-municipality limit to each utility territory provides suppliers with more alternatives and allows them to create a better experience for customers, while still meeting the Department's goals of transparency and information sharing.

Additionally, absent any proof that the Department's daily notice system is inadequate for identifying suppliers or vendors potentially responsible for consumer protection issues in a particular municipality, Davis Malm and other Suppliers support immediate implementation of the modified limit. See, e.g., SFE Comments, p. 4 ("[d]elay will not enhance the quality of the data reported or the Department's ability to review it"). Finally, virtually all commenting Suppliers opposed mandatory use of GPS or similar devices on grounds that they were already in use by some suppliers on a voluntary basis, unnecessary, costly and administratively burdensome. See e.g., Vistra Comments at p. 2 ("[w]hile such technology may be useful, use of this technology should be voluntary and should provide added leniency with regard to marketing restrictions over the standard requirements"); SFE Comments, pp. 4-5 (detailing practical problems with required GPS use); cf. RESA Comments at p. 6 (supporting use of GPS and similar devices without addressing concerns voiced by other suppliers).

The objections of non-Supplier parties offered to the proposed relief to the strict five-municipality state-wide limit are not well-taken or persuasive. Cf., Consumer Comments,

pp. 4-6; Utilities Comments, pp. 6-7. The conclusory arguments of opponents fail to explain how having a five-municipality/Boston neighborhood limit per day per supplier, that needs to include one or often more back ups in case of unexpected difficulties accessing a targeted community, could possibly afford consumers adequate access to door-to-door offers in all of the many Massachusetts regions, including all Boston neighborhoods, Boston suburbs, North Shore, South Shore, Cape Cod, Buzzards Bay, Cape Ann, Blackstone Valley, Merrimack Valley, Central Massachusetts, Pioneer Valley, Berkshires and all points between. Maintaining the five-municipality/district daily notice limit amounts to an unwarranted restriction of customer choice of a particular marketing channel – especially in the absence of any indication that the current daily notice system is having any difficulties meeting its intended purpose of helping the Department promptly identify suppliers or vendors responsible for problematic sales in a particular municipality. Opponents then jump to the "parade of horribles" argument that the daily notice system will not work effectively if each electric supplier reports the maximum 19 municipalities each day. Consumer Comments, pp. 4-5; Utilities Comments, p. 7. This argument ignores the business realities that suppliers hire sales teams only to the extent (i) justified by anticipated demand for their products, and (ii) consistent with the supplier's ability to effectively manage vendors and sales agents in the field, both of which factors are unlikely to result in any supplier maxing out daily notices. Opponents also cite to language in the May 22 Order (at p. 22) expressing concern about RESA's proposed limit of 15 municipalities per notice (Consumer Comments, pp. 4-5; Utilities Comments, p. 7). This argument is misleading. The Department's concern was raised in a portion of the May 22 Order discussing potential changes to the then-existing practice of having no limits and a monthly report. The Department was expressing obvious concern about suppliers having the ability to market in any of 15 listed

municipalities at any point in a given month, as is made clear by the specific text from the May 22 Order quoted by the Utilities. See Utilities Comments, p. 7 ("…such a limit would not provide sufficient certainty regarding where a competitive supplier will be door-to-door marketing on a particular day") (emphasis added). The Department addressed that concern by requiring daily notices elsewhere in the May 22 Order, so there would be "certainty" as to the locations in which suppliers could be marketing on each "particular day." The daily notice safeguard will remain in place even as the Department affords relief on the five-municipality/Boston neighborhood. In adopting a proposal to afford reasonable and geographically dispersed relief to the restrictive five-municipality state-wide limit, the Department's daily notice system grants it the ability to identify all suppliers potentially marketing on that given day to any particular municipality, thereby meeting the Department's purpose of facilitating prompt review of problematic sales activities. If, post-implementation, the Department experiences difficulties using the daily notices to identify responsibility for problematic sales agents, the Department can consider modifications to the new limits grounded in actual experience administering the daily notice system.

2. Suppliers Remain Concerned About Transmission of Daily Notice Information to Municipal Officials.

Davis Malm and most commenting Suppliers expressed opposition and concern over the Request's proposal to establish a new process for providing certain information contained in the daily notice filings to interested municipal officials. Request, pp. 4-5; see also Davis Malm Comments, pp. 11-13; NRG Comments, pp. 2-3; SFE Comments, p. 3; Vistra Comments, p. 4; cf., RESA Comments, pp. 4-5 (agreeing to optional municipal notice provided that confidentiality agreements can be reached that can be tailored to local issues associated with each municipality). As well put by NRG, "[r]equiring suppliers to provide a copy of the

[Department's daily] Notice to the impacted towns is redundant to that process and unnecessarily burdens suppliers with time consuming and costly filing obligations and should not be required." NRG Comments, p. 3. The SFE Comments (at p. 3) focus on the confidentiality concerns raised by the proposal that potentially may not be fully addressed by the process of reaching confidentiality agreements with each and every interested municipality:

> SFE Energy is not aware of any other Commission that requires this disclosure to municipalities. SFE Energy submits that the municipality notification requirement raises a number of implementation problems and confidentiality concerns. For instance, it is unclear if FOIA requests apply to information provided to the municipality. It is also unclear what processes the municipalities will utilize to ensure the confidentiality of supplier information is maintained. In the absence of these controls, it implicates a heretofore unknown realm of disclosure to competitors. SFE Energy is also concerned that if the contact information for the municipality is not consistently updated, it could lead to inadvertent supplier reporting errors

Davis Malm shares the concerns of other Suppliers regarding the redundant nature of the proposal, insofar as the municipality can contact the Department directly as the entity best positioned to identify the company or companies potentially responsible for a consumer complaint and follow up to get answers from those companies in a prompt and efficient manner. Davis Malm also shares additional concerns about the (i) unnecessary nature of the proposal, insofar as municipalities concerned with door-to-door activities can maintain or initiate permitting requirements; (ii) confidentiality issues involved sharing competitively sensitive information with municipal personnel who could inadvertently disclose sales plans to the supplier's competitors in the course of responding to a notice received, and (iii) the practical administrative time and resources needed to reach, maintain and, if needed, enforce confidentiality agreements with each municipality.

Davis Malm rejects the conclusory and unsupported arguments of the Utilities that a municipal notice regime involving all of the contact information for the Supplier, detailed contact from the third-party vendor and the date or dates of marketing as listed in the daily notice to the Department is "vital for municipal planning purposes." Utilities Comments, pp. 5-6. The Utilities Comments ignore the obvious confidentiality issues mentioned in the proposal and raised by all commenting Suppliers. The Utilities Comments also ignore that if door-to-door supervision is "vital" to a municipality, the municipally can require permits. Otherwise, if a municipality receives door-to-door complaints and cannot itself identify the vendor from the required sales agent identifications, sales contracts or other leave-behind materials or supplier-branded gear, the municipality can contact Department staff and receive immediate information about the suppliers potentially marketing in the municipality on that particular day and, likely, getting a follow up report from the Department once it has contacted the suppliers identified in the daily notice.

3. Suppliers Generally Oppose Adding New Neighborhoods in Springfield and Worcester.

The Davis Malm Comments (at pp. 13-14) expressed serious reservations about the need for and burdens to suppliers and, indirectly, consumers, associated with creating five new door-to-door marketing neighborhoods in Worcester and Springfield and, at most, requested that any such proposal involve substantially fewer neighborhoods. These concerns were shared by all commenting Suppliers. See RESA Comments, pp. 7-9 (opposing neighborhood splitting other than for Boston and, alternatively, no more than two neighborhoods in Springfield and Worcester); Vistra Comments, pp. 3-4 (opposes neighborhood splitting other than for Boston and emphasizes the paramount importance of clear boundaries in any split city, including Boston, as they are often hard to identify and burden sales efforts); NRG Comments, p. 3 (opposes districts

for Springfield and Worcester and emphasizes the practical difficulties for supplier agents to identify and remain within boundaries); SFE Comments, p. 5 (opposes districts for Springfield and Worcester).

In contrast, the Utilities Comments (at pp. 8-9) support the proposal in order to enable a "more discrete identification" of where door-to-door activity is taking place but offer no more specific grounds supporting adoption of five-plus new neighborhoods in Springfield and Worcester. The Consumer Comments (at p. 6) do not ask the Department to adopt a specific Springfield or Worcester proposal but urge the Department to work to identify neighborhoods excessively "targeted" by energy marketers that should be separately identified. This argument falls well outside of the scope of the issues on which the Request solicited comments, and should be ignored by the Department.

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

Davis Malm and all other Suppliers uniformly and strongly opposed the extensive proposed additions to the contract summary form established in the May 22 Order. May 22 Order, pp. 39-50 and Attachment E 1; see Davis Malm Comments, pp. 15-17; RESA Comments, pp. 10-12; CleanChoice Comments, pp. 4-7; and NRG Comments, pp. 4-5. As discussed in the Davis Malm Comments, the contact summary form approved in the May 22 Order 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 Energy Switch shopping website if interested in seeing a range of energy products. Id., pp. 47-48. In contrast, all Suppliers have significant concerns with the two principal "improvements" to the contract summary form, specifically, adding substantial additional information to the summary form regarding renewable products and listing the

applicable basic service price on the form for each utility area in which the product is being marketed.

1. Inclusion of Additional Voluntary Renewable Content.

The "improvements" proposed in the Request on voluntary renewable content issues 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. All Suppliers oppose the proposed "improvements" to the contract summary to reflect and describe new premium and nonpremium categories, on multiple grounds.

First, as argued by most of the Supplier Comments, the proposal in the Request ignores the fundamental point that a contract summary, by its nature, should be short. As described by the RESA Comments (at p. 10), "to be useful for customers, the Contract Summary Form should present only the key terms of the contract. This presentation should be concise. All of the key contract terms should be summarized on a single page. If additional information is needed to explain a particular contractual provision, that explanation should be provided in the full terms of service. If too much information is provided on the Contract Summary Form, it will cease to be a true summary and will lose its effectiveness." Id., p. 10 (emphasis added); accord NRG Comments, pp. 4-5 (emphasizing that additional text and issues beyond a concise summary will confuse customers or cause them to discard the summary as unread). The extensive proposed changes violate this concision principle for a contract summary form and will likely confuse consumers or lead them to discard the form as unread. Additionally, as the Vistra Comments

point out, the greater the amount of information on the contract summary form, the greater the complexity of the sales transaction discussion, as suppliers are required to present to consumers all information on the contract summary. Vistra Comments, p. 5 and note 13 (citing to May 22 Order at p. 51).

Second, as pointed out by all commenting Suppliers, including Davis Malm, the extensive proposed expansions to voluntary renewable content disclosures in the contract summary are highly problematic on their own terms as they rely on terms not established in existing Department jurisprudence and are likely to induce confusion in new supplier customers interested in confirming the terms of a just-concluded energy supply agreement. See RESA Comments, pp. 11-12 (pointing out that the term "premium" is presently undefined and that it is "possible that customers will not understand what 'premium resources' are or will have difficulty determining what renewable energy resources qualify as 'premium resources'"); Vistra Comments, pp. 5-6 (discussing the complexity of including on the summary three required percentages of renewable information, use of the term "premium" that is "imprecise and confusing to customers," and use of the term "premium," to refer to Class I resources that are not referred to as being "premium" in the applicable RPS regulations); CleanChoice Comments, pp. 4-5 (states same points as above re confusing terminology re use of "premium" and also complains of an inappropriate conflation of voluntary renewable products offers with RPS compliance requirements without any statutory basis and the lack of any basis in Department existing rules for this premium/nonpremium distinction); NRG Comments, pp. 4-5 (making additional arguments about the inappropriateness of using contract summaries as marketing pieces for types of renewable products); see also Davis Malm Comments, pp. 15-17.

Third, to the extent that the Department insists on modifying the renewable content portions of the contract summary form, the RESA Comments (at p. 12) include useful suggestions for minimizing excessive length and confusion and the NRG Comments (at pp. 4-5) suggest skipping the detailed additional text in favor of adding a link to the DOER website or, alternatively, including new requirements in the required Information Disclosure Label rather than the contract summary form.

Comments of non-Supplier parties highlight issues associated with the problematic wording of the Request's proposal of a substantially expanded version of the renewable supply portions of the May 22 Order's approved forms and, moreover, do not overcome the cogent grounds cited by Suppliers in opposition to the proposal. See Consumer Comments, pp. 7-10; Utilities Comments, pp. 9-10; DOER Comments, pp. 4-5. None of the non-Supplier parties recognize the fundamental problem highlighted by the Supplier parties that lengthy contract summary forms are inconsistent with short and simple disclosures of what they have purchased that have a chance of actually being read by the purchasing supplier customers. Additionally, none of the non-Supplier comments accept the proposed language as written. Both the Consumer Comments and DOER Comments offer substantial revisions to the misleading and confusing references to disclosures of "premium" services and to correct other deficiencies in the descriptive categories chosen in the Request. See Consumer Comments, pp. 9-10 (proposing substantial rethinking of proposed form to increase number of reportable categories and, alternatively, rewording of the current proposed text to eliminate confusing use of "premium" term, avoid "normaliz[ing]" non-RPS eligible resources, and add a lengthy new 30-plus word disclosure for products without voluntary renewable content over the state minimum); DOER Comments, pp. 4-5 (proposing substantial edits to eliminate use of "premium" and to revise the

current emphasis on New England resources to encompass all Northeast resources); see also Utilities Comments, pp. 9-10 (generally supporting proposed contract form changes without addressing specific criticisms discussed above by Supplier Comments).

For all of the above reasons the Department should reconsider proposals in the Request, and as modified or supplemented by non-Supplier commenters, to substantially expand the renewable information to be incorporated into the contract summary form. Any efforts to further the commendable goals of further educating consumers of renewable energy options should be undertaken in other forums, such as formation of a working group to consider alternative ways to provide information about renewable energy content or targeted Department investigations to refine renewable resource policymaking or consider changes to the current Information Disclosure Label.

2. Inclusion of Basic Service Price and Term Information.

Suppliers joined Davis Malm in uniformly and strongly opposing the Request's proposal to require extensive additional information on current and upcoming basic service pricing to be added to the contract summary form approved in the May 22 Order. See Vistra Comments, pp. 7-8; CleanChoice Comments, p. 6; NRG Comments, p. 5; SFE Comments, p. 6; accord RESA Comments, p. 10 (opposing virtually all changes to May 22 approved form without specifically discussing proposed basic service pricing changes); see also Davis Malm Comments, pp. 18-19).

Suppliers highlighted a huge number of seriously problematic issues associated with the current and upcoming basic service price disclosure proposal, including that:

- the requirement for suppliers to incorporate into the form periodically changing current and upcoming basic service pricing in all Massachusetts utility service areas will be operationally difficult and costly (NRG, p. 5);
- the cross-reference to the EnergySwitch website on the approved May 22 form adequately informs new supplier customers of a ready source of information on other options should they choose to pursue them (Vistra Comments, p.7);
- recitation of the basic service price in the summary form inappropriately singles out and highlights only one competitive offer out of dozens available on the Energy Switch website (Vistra Comments, p. 7);
- inclusion of the six-month fixed basic service offer will confuse customers coming off variable basic service rates or supplier-sourced contracts that do not mirror a six-month fixed price structure (Vistra Comments, p. 7);
- the proposal creates a risk that inclusion of utility prices may confuse customers into thinking the supplier is affiliated with the local utility (Vistra Comments, p. 7);
- the aspect of the proposal requiring upcoming prices would compel suppliers to violate the Attorney General's retail supplier regulations at 940 CMR 19, which establish as an unfair and deceptive practice any price comparison to a product not offered for sale at the time of the comparison or previously offered for sale (Vistra Comments, p. 8); and
- the required price comparison between a supplier's products with value-added components, including voluntary renewable content, programmable thermostats or high-efficiency lightbulbs; or free months or rewards components, or long-term

price protection products, with the "brown" and inadorned utility basic service product, is inherently unfair and will undermine the value of competitive offerings in the marketplace (SFE Comments, p. 6).

Comments of non-Supplier parties either support the addition of basic service prices to foster transparency without addressing any of the complexities and issues highlighted above, or offer comments that serve to highlight the complexities. See, e.g., DOER Comments, p. 6 (supporting proposal in conclusory fashion); Utilities Comments, pp. 9-10 (generally supporting proposal but opposing inclusion of upcoming rates on the forms based on complexities associated with upcoming basic service rates); Consumer Comments, pp. 10-11 (generally supporting proposal but seeks lengthy additional proposal on the cyclical nature of basic service rates that the Department expressly rejected for inclusion in the form in the May 22 Order). The non-Supplier Comments provide no compelling reason for adopting the proposed compelled inclusion of basic service pricing on the contract summary form in light of the numerous and serious issues raised in Supplier Comments.

C. 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 approval email plus the underlying direct mail collateral to the AG's office. All Suppliers that commented on the proposal, including Davis Malm, uniformly voiced significant concerns with the proposal and requested that it be

reconsidered. See RESA Comments, pp. 12-13; CleanChoice Comments pp. 7-8; NRG Comments, p. 6; SFE Comments, p. 7; see also Davis Malm Comments, pp. 21-22.

In particular, RESA (at pp. 12-13) aptly argues that "because the material will already have been expressly approved by the Department, the purpose of providing this information to the Attorney General is not clear… [and] because RESA is not aware of any other restructured energy markets that have created comparable requirements for approved direct mail marketing material, it has not been able to infer the purpose of this proposal." RESA then argues that if the purpose is to provide informational copies of Department-approved materials, then "the universe of materials will be incomplete" because materials can take effect by Department inaction within ten business days and would not be transmitted to the AG. Id., p. 13. Additionally, if the purpose is to afford the AG the opportunity to provide input on Department-approved materials, the proposal is flawed because the AG "has not provided or agreed to any set deadline by which it would provide feedback on such materials," thereby seriously prejudicing suppliers by precluding them from obtaining a prompt and complete regulatory review for their time-sensitive direct mail pieces. Id. RESA's fears were confirmed in AG-specific comments on this point at pp. 16-17 of the Consumer Comments where the AG reinforced that its separate statutory review powers under G.L. c. 93A were in no way subject to Department control and, further, that the AG was unwilling to undertaking any "pre-clearing" of supplier direct mail pieces.

Accordingly, if the proposed forwarding of marketing pieces is only going to apply to a subset of direct mail pieces submitted to the Department, and the AG will not agree to a prompt timeframe for reviewing and commenting on direct mail pieces forwarded to it or to accept the Department's review of the piece, the proposal is fundamentally flawed and should be reconsidered. It creates an untenable and unwinnable lose-lose proposition for the Suppliers

unlucky enough to receive actual Department review and approval. The Department will then forward the materials to the AG with no deadline for action and fully reserved rights to bring legal claims against the supplier pursuant to G.L. c. 93A with the AG's independent statutory authority. Davis Malm requests that the Department decline the option of voluntarily handing the AG a subset of Department-approved marketing materials that could invite legal action against the suppliers if the AG interprets the direct mail pieces differently from the Department. Declining to adopt this proposal does not impede or restrict the AG in any way, as it can review and take action on direct mail pieces in the marketplace that reach the AG through ordinary complaint processes.

II. Davis Malm Reply Comments on Other Issues

A. Renewal License Application Information (Request, pp. 3-4).

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. As discussed in Davis Malm Comments at pp. 4-10, Davis Malm strongly disagrees with the approach chosen to make public the 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. Instead, the Department should leave the annual renewal applications alone and then review and selectively enhance the supplier information already available on the Department's website, in the "Electric Suppliers" tab of the File Room, which already includes most of the non-confidential information proposed to be disclosed in the Request. See id. (arguing that the Department should keep confidential items on its current nonpublic renewal application except for supplier 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.

Consistent with the detailed Davis Malm Comments, which Davis Malm will rely on but not repeat here, Suppliers expressed significant interest in maintaining confidentiality of trade secret or confidentially sensitive information on the renewal application and modifying certain of the questions proposed in the Request to be included on a public portion of the Department's website, either via a Department standing order of confidentiality or, as needed, motions for protective treatment. SFE Comments, p. 2 (contending that corporate structure information, history of bankruptcy, dissolution, merger or acquisition, and the statement of regulatory actions all should be protected from public disclosure); RESA Comments, pp. 3-4 (focusing in on clarifying and limiting the scope of public disclosure of irrelevant corporate information); see also CleanChoice Comments, pp. 2-3 (highlighting the importance of confidentiality in supplier applications and reservations of the ability to file motions for protective order when appropriate).

In contrast, the Consumer Comments and Utilities Comments both support the Request's proposal based on broad and mostly unsupported claims of transparency. Consumer Comments, pp. 2-4; Utilities Comments, pp. 3-4. The Consumer Comments attempt to make much of the claims that significant information on suppliers is available on the websites of other states. Consumer Comments, p. 3. Nevertheless, the only information specifically cited as being on other utility websites is New Hampshire Public Utilities Commission information on whether a supplier serves residential customers – which information already is featured on the Supplier page of the Department's website. Id.; see Davis Malm Comments, p. 3 (discussing Massachusetts supplier information already publicly available). The Consumer Comments lack plausible justifications for producing other information. Production of such other information

would be of dubious public benefit and would likely cause suppliers unnecessary harm from disclosure. See Davis Malm Comments, pp. 5-8 (specifying problems associated with many information categories mentioned in the Request.). The Utilities Comments (at pp. 3-4) include similar conclusory support for the Request but add a request for an increase from one year to a five-year period on the periods for bankruptcy, mergers, regulatory actions, etc., citing the potential for adverse impacts on Utilities from unexpected defaults. This claim is unsupported and unpersuasive, as past defaults are poor predictors of future problems, i.e., troubled suppliers will typically either go out of business or be acquired by substantially more creditworthy entities. Requiring five years of data in each annual renewal on a host of issues is a recipe for expensive and burdensome annual makework for suppliers that will provide few or no benefits for Utilities or the broader public. Even if a supplier does experience problems requiring assignment or transfer of its license or its customers, the Utilities already receive advance notice of such changes under the Department's Final Decision in Docket No. 14-140-D (2016) and can undertake preparations specific to such transferring and receiving suppliers at that time. Alternatively, any rulings that will involve provision on the public record of additional information that could be proprietary or competitively sensitive, including but not limited to, supplier-specific financial information, should be protected by a standing Department protective order or the Department order language preserving the ability to file motions for protective order to avoid public disclosure of sensitive information.

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

The Request (at p. 16) proposes that suppliers be required to provide the Department with sales recordings and any associated TPVs three business days following a Department request. The Suppliers agree that the three-business day period will work in most cases for one-off

requests for sales recordings and associated TPVs. Davis Malm and other suppliers support this reasonable request. RESA Comments, pp. 15-16; CleanChoice Comments, pp. 6-7; NRG Comments, p. 6; SFE Comments, p. 7; see also Davis Malm Comments, pp. 19-20. NRG specifically asked for additional time to accommodate emergency circumstances or older and harder-to-find records, or an understanding from the Department that the three-day period will not be met in all circumstances due to holidays, bad weather or emergency circumstances. NRG Comments, p. 6; accord Davis Malm Comments, pp. 19-20. Both options would be acceptable to commenting Suppliers, provided that the Department grant an extended response period in the event of larger or bulk requests for recordings. Such options would also appear acceptable to non-Supplier commenters that largely ignored this issue.

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

The Request Proposes to eliminate the 50 percent minimum for non-Class I voluntary products established in the May 22 Order. The Suppliers support this reasonable proposal. See RESA Comments, p. 15; CleanChoice Comments, pp. 8-9; NRG Comments, p. 7; see also Davis Malm Comments, p. 22. RESA also proposed, and Davis Malm supports, the formation of an ongoing working group to regularly consider additional changes to the Energy Switch website. RESA Comments, p. 15. NRG proposed a further change that the Energy Switch website be modified to provide for offers touting renewable content in excess of 100%, such as a product that meets the minimum required statewide renewable content plus 100% additional voluntary RECs. NRG Comments, p. 7. Davis Malm takes no position at this time on NRG's proposal.

Additionally, as mentioned in Introduction and Summary Section supra, Davis Malm takes no position on the extensive out-of-scope arguments in the Consumer Comments (at pp. 13-16) for extensive additional changes to the Energy Switch website and format to address

perceived presentation and accessibility concerns. To the extent the Department seeks additional information on these matters, such topics should be assigned to the new ongoing working group suggested by RESA above.

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

The Request (at pp. 18-19) proposes to address the issue of the size of the small commercial class that would be subject to nearly all Tier One residential protections by adopting a proposal offered by RESA with a fixed electricity load cutoff and the ability of suppliers to aggregate load of customers with multiple accounts in determining a customer's classification. All commenting Suppliers supported the proposed small customer definition, as did all or virtually all of the non-Supplier parties – except for the Utilities. RESA Comments, p. 14; CleanChoice Comments, p. 9; NRG Comments, pp. 7-8; SFE Comments, pp. 8-9; see also Davis Malm Comments, p. 23-24; cf., Utilities Comments, pp. 11-15.

In contrast to the Request's straightforward approach, relying on a uniform state-wide load standard and the ability to aggregate customer-specific load from multiple accounts, the Utilities propose to make suppliers abide by the small commercial definitions in the tariffs of each Utility, which differ significantly by each Utility based on historical factors having nothing to do with the question of which commercial customers are sufficiently small and residential-like to benefit from Tier One consumer service protections. Utilities Comments, pp. 11-15. The Utilities proposed definitions would also appear to preclude aggregation of load from a multi-account or multi-location customer in establishing those qualifying or not qualifying as small commercial customers. See id. Davis Malm strongly opposes this proposal as being hard to implement, unnecessarily complicated and administratively costly for what should be the simple

issue of determining when a commercial customer is sufficiently small to be subject to the Tier One customer protections.

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

The Davis Malm Comments (1) supported the Request's proposals with respect to two Department-issued reminders in advance of the renewal application deadline, plus 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, and (2) opposed 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. Davis Malm Comments, pp. 24-26. Instead, at the end of the 14-day grace period, Davis Malm recommends that the Department undertake the simple expedient of a cease and desist 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. See id. This reliance on a Department-issued letter, backed by the threat of an informal review or enforcement pursuant to Docket 16-156-A authority, 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.

Commenting Suppliers mostly share Davis Malm's approach to addressing issues with untimely license renewal applications. CleanChoice Comments (pp. 9-10) makes the same recommendations as Davis Malm, namely, supporting the Department notice letters and relying on cease and desist letters sent directly to the supplier to implement targeted remedies for noncompliance, without any direct involvement of the Utilities. RESA Comments strongly

supported the Department notice letters – observing that RESA itself initially made the suggestion to the Department – and made no recommendation on enforcement; accord NRG Comments, p. 8 (supporting Department's proposed notice schedule without commenting on enforcement specifics). Finally, SFE (at p. 10) joined Davis Malm in being strongly opposed on competitive grounds to any involvement of Utilities in defining or imposing remedies on suppliers for late submission of renewal applications. See SFE Comments, p. 10 ("From a policy perspective, it is inappropriate to put the utility monopoly in an oversight position with respect to its competitors, and this proposal should be rejected on that basis"). SFE went on to propose somewhat different remedy approaches compared to other Suppliers, such as imposing fines rather that blocking enrollments and following timeframes for late filings and associated remedies adopted in Pennsylvania (i.e., with a 30-day cure period following notice). SFE Comments, p. 10. Davis Malm would not oppose a revised remedy mechanism based on some or all parts of the SFE proposals, provided that applicable details were clarified.

The only non-Supplier parties to weigh in were the Utilities, that (1) properly and reasonably opposed the proposal to modify EDI transactions methodologies, at great expense, to accomplish the Department's planned blockage of new enrollments of untimely suppliers until they filed their renewal application (Utilities Comments, p. 16); and (2) supported the Utilities' involvement in enforcing remedies against suppliers, provided that the Department clarified several specifics associated with enforcing such remedies – such as whether the enrollment ban only applied to enrollments actually processed by the supplier or also to those that were received before a renewal application was filed but submitted after the renewal application was filed. Utilities Comments, p. 16. Respectfully, the brainstorming of Utilities regarding the scope of their authority to impose sanctions on suppliers in several alternative factual scenarios is

precisely the "oversight responsibility" over supplier competitors, with its opportunities for mis-interpretations and mis-application, about which the Department should be concerned. The Department should eliminate any active role for the Utilities in enforcing remedies against Massachusetts suppliers.

Conclusion

Davis Malm once again appreciates the opportunity to present the above Reply Comments in response to the dozen-plus Initial Comments filed by both Supplier and non-Supplier parties in response to the Request. As discussed herein, the Supplier drew clear distinctions about the specific aspects of the proposals in the Request that the Department should adopt, and the many proposals in the Request that should be reconsidered or substantially modified as unnecessary or harmful to customer-beneficial competition.

DAVIS MALM STAKEHOLDERS

By their attorney,

Robert J. Munnelly, Jr.
Davis Malm & D'Agostine, P.C.
One Boston Place – 37th Floor
Boston, MA 02108
Telephone: (617) 589-3822
rmunnelly@davismalm.com

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