

NEW ENGLAND ELECTRIC RETAIL REPORT | MAY 2016
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ATTORNEYS AT LAW

New England remains a hotbed of legislative and regulatory activity involving retail electric suppliers. Key recent developments in each New England state are outlined below. The report concludes by highlighting the current activity in New York, which may affect electric suppliers operating in the Northeast and may serve as a troubling model for regulatory efforts in New England states.

Davis Malm represents national and local supplier clients in each of the five restructured states and can meet all of your competitive entry and regulatory support needs.

Connecticut

Activity is high on many fronts. The Public Utilities Regulatory Authority (CT PURA) issued a September 2015 Decision broadly interpreting the June 2015 Public Act prohibiting suppliers from entering into new variable-rate contracts with residential customers. CT PURA continues to implement the complex regulatory requirements established in its November 2014 Retail Markets Order docket and remains the regional leader in actively investigating and sanctioning suppliers for alleged misdeeds. Rules defining and limiting a variety of abusive marketing practices remain stayed pending consideration of consensus revisions developed by suppliers and the Office of Consumer Counsel (OCC).

1. PURA Interpretation of Legislative Prohibition on New or Automatically Renewed Variable-Rate Contracts for Residential Customers.

A June 2015 Public Act prohibited electric suppliers from entering into new variable-rate contracts with residential customers on or after October 1, 2015 and barred automatic renewal of a residential customer's contract when the customer would be charged variable rates under the renewed contract. CT PURA conducted technical sessions, solicited written comments, and issued two Decisions. The first Decision, in late

September 2015, ruled that the Act did not "grandfather" existing (pre-October 1) residential contracts with fixed-rate terms, which were drafted to default to short-term, variable-rate provisions in the event the customer failed to select an alternative fixed-price option before the end of the initial fixed-rate term. The second Decision, in late December 2015, reported to the legislature that eliminating variable rates after the end of fixed-price terms provided certain consumer protection benefits, but also limited flexibility in retail supplier contracts that otherwise could have resulted in consumer benefits. Accordingly, as of October 1, 2015, except for grandfathered variable-rate contracts and short-term promotions, all Connecticut residential contracts must have fixed rates and a minimum term of four months.

2. Revising Rules Governing Abusive Marketing Practices.

In spring 2015, following issuance of an early 2015 Order defining a variety of abusive marketing practices, CT PURA granted a joint supplier-OCC request to stay the Order and proposed modifications to many of the new requirements. PURA has not commenced proceedings to review the proposed changes, but held technical sessions on enrollment issues that may be considered when the docket reopens.

3. Refining Policies Applicable to Annual Renewable Portfolio Standard Filings.

In late 2015 Decisions, CT PURA reinforced its refusal to accept renewable energy certificates (RECs) held in Generation Information System (GIS) reserve accounts or to permit suppliers to correct errors in renewable portfolio standards filings, even if CT PURA's rejection results in waste of substantial supplier investments in RECs. Nevertheless, CT PURA approved settlement granting one-time partial relief to two suppliers harmed by its policies but reiterated it would not make similar accommodations going forward. Connecticut suppliers need to take care to ensure strict compliance with NEPOOL GIS settlement rules for RECs and not use GIS reserve accounts for compliance RECs. As an alternative, suppliers should consider whether to minimize risk of loss by relying on paying Alternative Compliance Payment penalties rather than purchasing any Connecticut RECs.

4. Partial Reconsideration of Retail Markets Order.

In mid-June 2015, CT PURA issued an order to reconsider and reopen several issues raised in reconsideration motions filed by the Retail Energy Supply Association, Choice, and Starion in December 2014/January 2015. CT PURA rejected reconsideration of two issues, namely:

- renewable only products cannot refer to 100% only products but may say 100% plus the RPS percentage; and
- the requirement of naming each individual employee or sales agent rather than the names of

employee and the third-party contracting agency.

CT PURA subsequently issued a December 30, 2015 Order in the reopened retail market orders docket that modified unacceptable provisions, but still required changes by retail suppliers, including that suppliers must:

- have at least two transmission formats by which notices are provided to customers—the default format being U.S. mail and the mandatory additional mechanism being one of several other options, including email, text, cell phone app, or other approved mechanisms;
- offer smaller (under 100kV) customers the ability to cancel service using at least U.S. mail, email, and telephone;
- clarify to customers that their contracts will begin on the meter read date following acceptance of an enrollment by the distribution company, and incorporate such description into all contracts, terms and conditions, and enrollment related customer communications; and
- maintain its website that displays required, Connecticut-specific information—and not information from other states—and allows customers to obtain information through techniques such as customer self-selection, zip code filtering, or “other best practices adopted by the market.”

Compliance with reopened Order requirements is due by June 30, 2016.

5. Continued Supervision of Compliance with Retail Markets Order.

CT PURA continues to closely supervise compliance with the ongoing regulatory requirements mandated by the November 2014 Order, including holding monthly technical sessions to discuss implementation and other regulatory issues, and introducing improvements to the Connecticut shopping website at <http://www.energizect.com/>. PURA also completed a proceeding to revamp supplier pricing information shown on joint bills that was put into effect by January 2016.

6. Investigations and Enforcement Proceedings.

Since summer 2015, CT PURA has opened or continued numerous investigations against individual suppliers related to alleged noncompliance, including against Choice, Constellation, Direct, Liberty, Palmco, Public Power, and Viridian.

Maine

Activity settled down in Maine after completion in early 2015 of two Public Utilities Commission (ME PUC) rulemakings devoted to consideration of retail markets changes. Commencing in Fall 2015, ME PUC undertook an investigation of Clearview that led to an early 2016 settlement confirming detailed changes to Clearview’s marketing practices.

Massachusetts

Retail supplier activity increased markedly over the past year following implementation of a purchase of receivables program and historically high post-polar vortex default/basic service rates at all of the Massachusetts utilities. Activity by regulators increased at the same time.

1. MA DPU Retail Market Proceeding.

Since December 2014, the Department of Public Utilities (MA DPU) has been actively engaged in a working group and briefing process seeking to change its longstanding retail supplier rules at Sections 11.05 and 11.06. The MA DPU is managing the proceeding on several tracks and, to date:

- ordered elimination of the anti-competitive fixed to variable true up for residential and small commercial customers;
- established a limited carve out of the new true up for municipal aggregations; and
- formulated initial and increasingly refined proposals for new or amended provisions for assignments, contact summaries, information labels, and door-to-door sales practices.

Final rulings are expected in the upcoming months. MA DPU staff have signaled that they support creation of a stakeholder working group process to formulate detailed proposals for certain complex issues.

2. Shopping Website.

As part of the above proceeding, the MA DPU made substantial progress in developing the specific elements of a new Massachusetts shopping website, including that it is intended to be voluntary and applicable initially only to fixed-rate offerings, and that it also include robust price and terms comparison functionality. A temporary interim website was put in place in late 2015 and can be found at www.mass.gov/eea/grants-and-tech-assistance/guidance-technical-assistance/agencies-and-divisions/dpu/utility-prices. Work on a permanent site will commence following selection of a vendor through an RFP process.

3. Attorney General Retail Supply Rulemaking.

On March 29 and 30, 2016, the Attorney General's office held technical sessions to discuss possible changes to the 940 CMR 19.00 retail electric supply marketing rules. Representatives discussed the potential for significant changes to key provisions, including one that would eliminate variable-rate products not tied to an index, and significant restrictions on customer assignments. Suppliers in attendance expressed serious concerns over many of the changes—and the apparent lack of consistency with MA DPU rules being developed in Docket 14-140—and requested an opportunity to see the proposed regulations as worded and submit written comments prior to commencement of a formal rulemaking process. Additional proceedings, whether written comments or additional technical sessions, are anticipated before the start of rulemaking efforts.

4. AG Office Investigations.

In early June 2015, the AG's Office stepped up enforcement by issuing investigative demands to several electric suppliers for broad discovery. Fact finding continued through late 2015 and into 2016, without enforcement actions issued to date.

New Hampshire

During 2012–2014, New Hampshire saw spectacular growth in competitive supply due to high PSNH pricing. Since then, growth has slowed. The New Hampshire Public Utilities Commission (NH PUC) issued orders reducing excessive supplier fees and addressing an outdated and unfair payment hierarchy. It is now poised to update its supplier rules and address details regarding potential divestiture of PSNH-owned generation that could affect suppliers.

1. New Supplier Rules Investigation.

In April 2015, the NH PUC finally took action in its longstanding docket to consider updates and other changes to the PUC 2000 retail supplier rules. The NH PUC circulated a set of updates and held a late April 2015 technical session to discuss the consumer protection provisions in the supplier rules. Revised and expanded drafts of three more sections dealing with definitions, registration process, and enforcement was issued in late April 2016, with a working group session scheduled for mid-May 2016.

2. PSNH Divestiture.

PSNH reached a deal with key interest groups, supported by the legislature, to divest its remaining generation assets, which would be divested in return for some concessions (such as partial cost recovery of scrubber investments at the PSNH Merrimack facility that have been subject to significant challenge since the investments were made). Divestiture, if and when it is completed, should help address potential competitive issues in the New Hampshire PSNH territories. The divestiture docket has been in active litigation since commencing in July 2015. Parties are engaged in active settlement talks regarding at least some of the disputed issues.

3. General—New NH PUC Commissioner and New Consumer Counsel.

Longtime Commission staffer Kate Bailey was named and confirmed in mid-2015 to fill the open seat left by former Chair Amy Ignatius. Former NH PUC legal staffer Don Kreis was nominated to and approved as the new Consumer Counsel in early 2016.

Rhode Island

Rhode Island saw somewhat lower supplier growth than other New England states, but activity is ramping up due to increases in standard offer pricing since 2014. Regulatory activity in the retail electric space is relatively limited, although legislative intervention to increase regulatory requirements remains a possibility.

NEW YORK ACTIVITY

In an order issued February 23, 2016, the New York Public Service Commission (NY PSC) imposed restrictive provisions with short response deadlines on retail suppliers that, if implemented, were likely to cause market exit for many suppliers serving mass market (residential and small commercial) customers. This Order stemmed from a longstanding docket reviewing electricity and gas energy service company (ESCO) eligibility criteria and modifying the consumer protections applicable to ESCOs, but went well beyond the proposals contemplated in the proceeding. The Order proposed to limit ESCOs from serving mass market customers under any new or renewed contract unless that contract either (1) guaranteed customer cost savings compared to utility rates, or (2) guaranteed that the energy delivered to mass market customers comprised at least 30% renewable energy. These limits were intended to apply not only to new customers, but also to contract renewals and even to customers currently served under existing, effective, month-to-month variable-rate contracts. The Order announced its provisions would become effective on Friday, March 4, only ten calendar days from issuance of the Order.

The Order also provided that if the compliance requirements are not met, the supplier must return affected customers to the utility standard service after the end of the next billing period. This Order potentially affected over 100 competitive retail suppliers and over one million mass market customers.

On March 4, 2016, a trial court (misleadingly named Supreme Court of the State of New York) granted the temporary restraining order (TRO) request of a group of ESCOs,

preventing the enforcement of the February 23, 2016 Order. The TRO was effective until April 14, 2016, the date by which the Court ordered the PSC to show cause as to why the Court should not grant a decision permanently staying enforcement of the Order. The Order was subsequently extended by agreement to April 25, 2016 and was extended again until later in May 2016.

Following the issuance of the Order, the NY PSC issued related guidance and instructions so rapidly that it created a webpage for all updates

pertaining to the Order: <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/A6FFDA3D233FF24185257F68006F6D78?OpenDocument>. Currently, the PSC is holding collaborative meetings with stakeholders to discuss pricing and other standards relative to the mass markets. While the short-term crisis was averted and ESCOs and NY PSC staff have been meeting to bridge differences and formulate a more reasonable set of supplier rules, it remains unclear how mass market ESCOs will be regulated going forward.

REGULATORY AND ADMINISTRATIVE LAW GROUP AT DAVIS MALM

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