

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF PUBLIC UTILITIES**

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INVESTIGATION BY THE DEPARTMENT OF	:	
PUBLIC UTILITIES ON ITS OWN MOTION INTO	:	
INITIATIVES TO PROMOTE AND PROTECT	:	D.P.U. 19-07
CONSUMER INTERESTS IN THE RETAIL	:	
ELECTRIC COMPETITIVE SUPPLY MARKET	:	

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**COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION**  
**RE REVISED TABLES**

The Retail Energy Supply Association (“RESA”)<sup>1</sup> hereby submits its comments on the revised tables (“Revised Tables”) provided with the Hearing Officer’s July 2, 2019 Memorandum<sup>2</sup> in the above-referenced proceeding.

**BACKGROUND**

By its January 18, 2019 Vote and Order Opening Investigation (“Order”), the Department of Public Utilities (“Department”) opened an investigation “to seek input from stakeholders on initiatives to further improve the retail electric competitive supply market in the Commonwealth of Massachusetts.”<sup>3</sup> In the Order, the Department invited all interested persons to submit written comments on twenty-one specific questions.<sup>4</sup> The Department further indicated that it would determine the appropriate next steps after reviewing the initial comments.<sup>5</sup> Various entities,

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<sup>1</sup> The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at [www.resausa.org](http://www.resausa.org).

<sup>2</sup> Memorandum of Gregory Wade, Hearing Officer, to Distribution List (Jul. 2, 2019) (“July 2 Memorandum”).

<sup>3</sup> Order, at 1.

<sup>4</sup> *Id.* at 14.

<sup>5</sup> *Id.* at 15.

including RESA, submitted comments in response to the Order.<sup>6</sup> Subsequently, the Department held a technical session and created stakeholder working groups.<sup>7</sup>

On June 24, 2019, the Hearing Officer issued a Memorandum identifying stakeholder working groups proposed by the staff of the Department to take the lead in developing implementation details for initiatives under review in the instant proceeding.<sup>8</sup> A Customer Protection Working Group is focusing on initiatives related to automatic renewal, customer complaint data, marketing standards of conduct, supplier enrollment reports, and increased awareness of the Energy Switch website.<sup>9</sup> In connection with the automatic renewal and supplier enrollment initiatives, Department staff (“Staff”) developed two tables for competitive suppliers to populate with data to facilitate discussion - an automatic renewal table and an enrollment report table.<sup>10</sup>

Subsequently, Staff revised these two tables<sup>11</sup> and developed the revised automatic renewal report table (“Automatic Renewal Report”) and the revised enrollment report table (“Enrollment Report”).<sup>12</sup> Further, Staff developed a new contract price reporting table (“Contract Pricing Report”).<sup>13</sup> The Hearing Officer invited comments on the Revised Tables by July 19, 2019. RESA hereby submits its comments on the Revised Tables.

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<sup>6</sup> See, e.g., Initial Comments of the Retail Energy Supply Association (Mar. 8, 2019).

<sup>7</sup> See Hearing Officer Memorandum/Electronic Mail Correspondence (Jun. 7, 2019).

<sup>8</sup> See Memorandum of Gregory Wade, Hearing Officer, to Distribution List (Jun. 24, 2019) (“June 24 Memorandum”), at 1.

<sup>9</sup> July 2 Memorandum, at 1.

<sup>10</sup> See June 24 Memorandum, at 3, 4. A third table summarized the implementation details identified during the technical session and the proposed stakeholder assignments of the Staff. See *id.* at 1, 3.

<sup>11</sup> July 2 Memorandum, at 3.

<sup>12</sup> July 2 Memorandum, at 3; see also Automatic Renewal Report; Enrollment Report. The Automatic Renewal Report “now includes columns for the reporting of customers that have entered into new contracts with a supplier during the time in which the customers were receiving service through the automatic renewal provision of their previous contracts.” July 2 Memorandum, at 3. The Enrollment Report “now includes columns for the reporting of enrollments through additional marketing channels.” *Id.*

<sup>13</sup> See July 2 Memorandum, at 3; see also Contract Pricing Report.

## COMMENTS

RESA appreciates the Department's efforts, through this investigation, to consider enhancements to the retail electric competitive supply market. In particular, RESA supports the use of technical sessions and stakeholder working groups to consider matters at issue in this proceeding. The robust discussion that these mechanisms enable provide for an appropriate exploration of the issues.

It is important for stakeholders and the Department to have sufficient information to develop well-formed positions that, among other things, account for the practical realities of the retail electric supply market in the Commonwealth. Nevertheless, information sought in this proceeding, whether during the stakeholder working group process or otherwise, should: (a) be relevant and meaningful to the Department's review of the issues; (b) recognize the practical difficulties that may be involved in gathering information; and (c) ensure that any confidential or otherwise sensitive information is protected from public disclosure and improper use. For these reasons, RESA urges the Department to modify or clarify the scope of the information sought by the Revised Tables and to issue a standing order protecting the confidential, competitively sensitive information provided.

### **I. THE INFORMATION SOUGHT SHOULD BE RELEVANT**

Relevance is a basic threshold for discovery in proceedings before the Department.<sup>14</sup> While the stakeholder working group process may be less formal and more collaborative than discovery, using it to gather information irrelevant to the instant proceeding will not advance the Department's consideration of the issues in this proceeding. Accordingly, the Department should ensure that the Revised Tables do not seek irrelevant information.

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<sup>14</sup> See 220 C.M.R. 1.06(5)(c)(1) ("The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner.").

For instance, neither the Automatic Renewal Report nor the Contract Pricing Report indicate that they are limited to requests for information about Massachusetts customers.<sup>15</sup> Since this proceeding is intended to address the retail competitive electric supply market *within* the Commonwealth,<sup>16</sup> information about customers in other states is irrelevant. Accordingly, RESA requests that the Department clarify that the information to be reported in the Revised Tables should be limited to the suppliers' activities and customers in the Commonwealth.

## **II. THE INFORMATION SOUGHT SHOULD NOT BE IMPRACTICAL TO OBTAIN**

Competitive suppliers generally and RESA's members in particular maintain their records in different ways and with different systems. Some of these systems may allow suppliers to gather the information sought by the Revised Tables quickly and with modest effort. Other systems may not. For example, some systems may not allow their users to query how a particular customer was enrolled, especially a customer that was enrolled months or even years earlier.<sup>17</sup> If an information system does not allow this data to be queried and gathered expeditiously, it might be necessary for suppliers to gather the requested information manually. Depending on the number of customers involved, which could be substantial, this task could require an extraordinary amount of effort and resources. RESA members want to provide relevant, helpful information to the Department and the stakeholders. However, they are not in a position to undertake extraordinary efforts (such as reviewing all of their Massachusetts customer accounts manually) to do so. Accordingly, the Department should limit the scope of the information

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<sup>15</sup> See, e.g., Contract Pricing Report, Note 1 ("Provide the information requested below for *all* residential customers that the supplier was serving as of June 1, 2019.") (emphasis added).

<sup>16</sup> See Order, at 1 ("The Department of Public Utilities . . . opens this Notice of Investigation . . . to seek input from stakeholders on initiatives to further improve the retail electric competitive supply market *in the Commonwealth of Massachusetts*.") (emphasis added).

<sup>17</sup> See Enrollment Report, Note 1 ("Enter the total number of residential customers (including low-income customers) that the supplier was serving in the applicable distribution company service territory [sic] as of June 1, 2019, and enrolled through the specified marketing channel.").

requests on the Revised Tables to information that can be gathered using commercially reasonable efforts.

### **III. THE DEPARTMENT SHOULD PROTECT CONFIDENTIAL INFORMATION PROVIDED PURSUANT TO THE REVISED TABLES**

The Department should institute a standing order to protect the information provided pursuant to the Revised Tables, distribute such information to stakeholders only in aggregated form, and impose restrictions on how stakeholders are permitted to use such information.

#### **A. The Department Should Institute A Standing Order Protecting Confidential Information Provided Pursuant To The Revised Tables From Public Disclosure**

The Revised Tables seek information that is competitively sensitive and that suppliers regard as confidential. For example, the Automatic Renewal Report and Contract Pricing Report request enrollment numbers or customer number information by contract type (i.e., fixed price or monthly price) and by whether a customer's contract contained an automatic renewal provision.<sup>18</sup> Also for example, the Enrollment Report requests information about the electric distribution company ("EDC") service territory in which a supplier's customers are located and the marketing channels through which the supplier's customers were enrolled.<sup>19</sup> This information is competitively sensitive because it reveals aspects of a competitive supplier's marketing and pricing strategies.

Armed with information about whether certain suppliers offer fixed- or monthly-priced electric supply products, or include automatic renewal provisions in these products, and/or how many such products these suppliers have been able to sell, competitors could design their own electric supply products and marketing efforts to compete favorably, without needing to conduct

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<sup>18</sup> See Automatic Renewal Report; Contract Pricing Report.

<sup>19</sup> See Enrollment Report.

their own independent market research. Similarly, with access to information about the EDC service territories in which, and marketing channels through which, competitors have obtained customers, suppliers could design marketing initiatives targeting service territories in which, and using marketing channels through which, significant numbers of customers may be obtained, without needing to conduct their own independent market research.

Moreover, because there are no entities on the service list in this proceeding<sup>20</sup> and no suppliers were made parties to this proceeding by the Order,<sup>21</sup> supplier participation in this proceeding has been voluntary. As a consequence, suppliers who choose not to submit the information requested in the Revised Tables will continue to maintain the confidentiality of their information, while those who elect to provide it will be placed at a competitive disadvantage not only from new market entrants, but also from existing competitors. This is inappropriate. It is also out of keeping with the protections that Massachusetts law and the Department afford to competitively sensitive information.<sup>22</sup>

Under Massachusetts law, confidential information may be protected from public disclosure in accordance with Massachusetts General Laws, chapter 25, section 5D (“M.G.L. c. 25, § 5D”), which states in pertinent part:

The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been

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<sup>20</sup> See Service List.

<sup>21</sup> See Order.

<sup>22</sup> See, e.g., M.G.L. c. 25, § 5D; D.P.U. 09-GAF-P1, *Petition of Bay State Gas Company for Approval of its 2009/2010 Peak Cost of Gas Adjustment Clause Filing*, Hearing Officer Ruling on Motion for Protective Treatment (Feb. 5, 2010), at 2.

found to exist, the department shall protect only so much of the information as is necessary to meet such need.<sup>23</sup>

The Department has determined that M.G.L. c. 25 § 5D establishes the following three-part standard for determining “whether, and to what extent, information filed . . . may be protected from public disclosure”:<sup>24</sup>

1. the information for which protection is sought must constitute “trade secrets, [or] confidential, competitively sensitive or other proprietary information”;
2. the party seeking protection must overcome the statutory presumption that all such information is public information by “proving” the need for its non-disclosure; and
3. even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect.<sup>25</sup>

As a general matter, “the Department does not automatically grant protective treatment.”<sup>26</sup> However, unique circumstances justify the issuance of a standing order protecting information required to be provided by competitive suppliers.<sup>27</sup> The instant proceeding presents such unique circumstances.

In D.P.U. 14-140-G, the Department instituted a standing order protecting the names of the cities and towns in which competitive suppliers engage in door-to-door marketing because “competitors could use the names of the cities and towns to determine a competitive supply company’s marketing strategy and use that information to their advantage.”<sup>28</sup> Because competitors could use the EDC service territory and marketing channel information on the Enrollment Report in the same way, this information should be subject to a comparable standing order. In fact, the information on the Enrollment Report is more sensitive than the door-to-door

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<sup>23</sup> M.G.L. c. 25, § 5D.

<sup>24</sup> D.P.U. 09-GAF-P1, *Petition of Bay State Gas Company for Approval of its 2009/2010 Peak Cost of Gas Adjustment Clause Filing*, Hearing Officer Ruling on Motion for Protective Treatment (Feb. 5, 2010), at 2.

<sup>25</sup> *Id.*

<sup>26</sup> D.P.U. 14-140-G (May 4, 2018), at 23.

<sup>27</sup> *See id.* at 23-24.

<sup>28</sup> *Id.* at 24.

marketing information protected by the standing order granted in D.P.U. 14-140-G because it includes information about multiple marketing channels and gives a fuller picture of the supplier's marketing efforts and strategies. Accordingly, instituting a standing order to protect the information on the Enrollment Report is warranted.

Similarly, the information on the Automatic Renewal Report and Contract Pricing Report should be protected by a standing order. As noted, it is sensitive information that competitors could use to their advantage in pricing, or otherwise developing, competitive energy supply products. It would also enable competitors to avoid expending resources to conduct market studies to develop information about what competitive energy supply products are sought after by customers in the Commonwealth. Accordingly, instituting a standing order to protect the information on the Automatic Renewal Report and Contract Pricing Report is also warranted.

Moreover, granting a standing order protecting the information on the Revised Tables will encourage suppliers to provide this information. Suppliers that regard the public disclosure of the information on the Revised Tables as unacceptable without a standing protective order simply may elect not to provide the information or to cease participating in this proceeding. If this happens, the Department will lose the perspective of these suppliers and have less information on which to base its ultimate conclusions. This will harm the Department's deliberative process and could lead to results that are inequitable. Thus, the unique circumstances of this proceeding warrant the protection of the information to be submitted in the Revised Tables through a standing order.



**B. Any Supplier Information Provided Pursuant to the Revised Tables Should Be Provided To Stakeholders In Aggregated Form Only**

RESA appreciates that Staff intends to aggregate the information submitted pursuant to the Automatic Renewal Report before providing it to stakeholders.<sup>29</sup> As long as multiple suppliers provide information requested by this table, aggregating the information provided will make it difficult to determine any particular supplier's information from the aggregated data and will afford some measure of protection to the supplier information to be considered by the stakeholders. Similarly, if information submitted pursuant to the Enrollment Report and Contract Pricing Report is to be shared with stakeholders, it should also be aggregated before it is provided to the stakeholders. However, on its own, aggregating multiple suppliers' data will not prevent individual suppliers' submissions from being public records, potentially subject to public disclosure.<sup>30</sup> Accordingly, further measures beyond aggregation of data, including specifically the standing order discussed above, are also needed to protect the sensitivity of these data.

**C. Stakeholders Receiving Any Supplier Information Provided Pursuant To The Revised Tables Should Not Be Permitted To Use Such Information For Any Improper Purpose**

Suppliers providing information pursuant to the Revised Tables will do so in order to advance the Department's consideration of the issues in the instant proceeding. They should not be subjected to any risk of competitive harm as a consequence of providing this information. Accordingly, the Department should impose appropriate restrictions on stakeholders receiving information provided pursuant to the Revised Tables, even aggregate information. In all events, stakeholders who receive any information provided on the Automatic Renewal Report, Enrollment Report, or Contract Pricing Report, in any format, whether aggregated or not, should

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<sup>29</sup> See June 24 Memorandum, at 3.

<sup>30</sup> See M.G.L. c. 4, § 7, cl. 26.

be prohibited from using it for any competitive purposes and should be required to certify that they will use it solely for the purposes of their participation in the instant proceeding.

**CONCLUSION**

RESA appreciates the efforts of the Department in this important docket and asks that the Department clarify the information requested in the Revised Tables as discussed above and issue a standing order protecting any information submitted on the Revised Tables from public disclosure and improper competitive use.

Respectfully submitted,  
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