

GRANTED

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

EW
Gregory Wade
Hearing Officer
September 19, 2019

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

**DIRECT ENERGY SERVICES, LLC'S
MOTION FOR PROTECTIVE TREATMENT**

Direct Energy Services, LLC ("Company") hereby requests that the Department of Public Utilities ("Department"), in accordance with M.G.L. Chapter 25, Section 5D ("M.G.L. c. 25, § 5D") and 220 C.M.R. Section 1.04(5)(e), protect from public disclosure the confidential, competitively sensitive, and proprietary information being submitted herewith to the Department on the Automatic Renewal Report and the Contract Pricing Report included as Attachment 1 ("Reports") to the Hearing Officer's August 15, 2019 Memorandum in the instant proceeding (the "Confidential Information").¹

I. LEGAL STANDARD

Confidential information may be protected from public disclosure in accordance with 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

¹ See Memorandum (Aug. 15, 2019) ("Memorandum"), Attachment 1.

found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.²

The party moving for protective treatment must substantiate its motion with the following information:

1. the time period for which confidential treatment is desired;
2. the reason the record was provided to the Department and the date of submittal;
3. a precise description of the information to be protected;
4. the reasons for the claim of confidentiality, including proof that an exemption to public disclosure applies;
5. proof of the harm of public disclosure;
6. the extent to which the record or its contents has been disclosed to other persons or to federal, state, or local agencies, including the status of any requests for confidentiality; and
7. a certification to the best of the moving party's knowledge, information and belief, that the information is not customarily available in the public domain.³

In implementing these regulations, the Department has held 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":⁴

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 presumption⁵ 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.⁶

² M.G.L. c. 25, § 5D.

³ 220 C.M.R. § 1.04(5)(e).

⁴ 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.

⁵ See M.G.L. c. 66, § 10.

⁶ 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.

II. CONFIDENTIAL INFORMATION

The Automatic Renewal Report requests the following data for January through May

2019:

- The number of customers whose initial supply contract terminated in the specified month or period (“End-Of-Term Customers”);
- The number of End-Of-Term Customers whose contract included an automatic renewal provision to a fixed-price product (“Fixed-Price Auto-Renewal Customers”);
- The number of End-Of-Term Customers whose contract included an automatic renewal provision to a monthly-price product (“Monthly-Price Auto-Renewal Customers”);
- The numbers of Fixed-Price Auto-Renewal Customers and Monthly-Price Auto-Renewal Customers who continued to be customers of the Company through their billing cycle that ended in June 2019 because of the automatic renewal provision; and
- The numbers of Fixed-Price Auto-Renewal Customers and Monthly-Price Auto-Renewal Customers who continued to be customers of the supplier through their billing cycle that ended in June 2019 because the customers affirmatively entered into a new fixed-price contract with the Company.⁷

The Contract Pricing Report requests the following data as of June 1, 2019:

- The total number of residential customers (including low-income customers) paying a fixed price;
- The number of low-income residential customers paying a fixed price;
- The total number of residential customers (including low-income customers) paying a monthly price;
- The number of low-income residential customers paying a monthly price;
- The total number of residential customers (including low-income customers) paying a fixed price through the automatic renewal provision of their supply contract;
- The number of low-income residential customers paying a fixed price through the automatic renewal provision of their supply contract;

⁷ Memorandum, Attachment 1.

- The total number of residential customers (including low-income customers) paying a monthly price through the automatic renewal provision of their supply contract; and
- The number of low-income residential customers paying a monthly price through the automatic renewal provision of their supply contract.⁸

III. BASIS FOR PROTECTION

As reflected in the attached certification of Chris Kallaher, Senior Director, Corporate Affairs for the Company (“Certification”) and for the reasons set forth more fully below, the Confidential Information contains commercially valuable, confidential and proprietary, market-sensitive information the disclosure of which would reveal information regarding the Company’s business and marketing strategies and market position, and which the Company has, heretofore, used reasonable efforts to maintain as confidential in order to avoid the harm that would result if the information were to become publicly available.⁹ Accordingly, the Confidential Information is exempt from public disclosure pursuant to M.G.L. c. 25, § 5D.

Automatic Renewal Report

The Company operates in a highly competitive retail market for electric supply.¹⁰ In this market, the Company competes with the electric distribution companies and each and every other licensed competitive supplier for a limited customer base on a variety of factors, including contract terms and marketing and customer retention strategies.¹¹ Through the years, the Company has spent extensive time and resources developing its business and marketing strategies and differentiating itself in the market.¹²

⁸ Memorandum, Attachment 1.

⁹ See Certification, at ¶¶ 4-18.

¹⁰ *Id.* at ¶ 4.

¹¹ *Id.*

¹² *Id.* at ¶ 5.

The Confidential Information has value to the Company's competitors because the public disclosure of it would reveal information about the Company's marketing, contracting, and customer retention strategies.¹³ For example, publicly disclosing the information in the Automatic Renewal Report would reveal whether or not the Company uses automatic renewal provisions in its contracts.¹⁴ Similarly, such a disclosure would reveal whether automatic renewal to a fixed price product is more or less likely to result in customer retention than automatic renewal to a monthly-priced product.¹⁵ Further, this disclosure could reveal whether and to what extent contractual automatic renewal provisions are more effective than efforts to retain customers through obtaining the customer's affirmative consent.¹⁶ Likewise, by allowing comparison of the numbers of customers whose contracts were expiring with the numbers of such customers whom the Company retained, public disclosure of the Automatic Renewal Report Confidential Information would reveal the overall success of the Company's customer retention efforts.¹⁷

Moreover, in the highly competitive retail electric supply market, the confidential, competitively sensitive, propriety information in the Automatic Renewal Report has independent economic value to the Company's competitors and the disclosure of such information would cause harm to the Company. For example, based on the Confidential Information contained in the Automatic Renewal Report, competitors could modify and enhance the effectiveness of their customer retention programs without having to expend substantial time and resources to test various marketing strategies and contracting terms in the market themselves to determine which

¹³ Certification, at ¶ 6.

¹⁴ *Id.* at ¶ 7.

¹⁵ *Id.*

¹⁶ *Id.* at ¶ 8.

¹⁷ *Id.* at ¶ 9.

are most effective.¹⁸ This places the Company at an unfair competitive disadvantage because it did need to invest such time and resources.¹⁹

As a direct result of the actual and potential economic value of the Confidential Information in the Automatic Renewal Report, the Company has undertaken reasonable efforts to protect the confidentiality of this information to ensure that it is not made known to its competitors or the public at large.²⁰ When this information is provided to third-parties, it is given subject to a confidentiality obligation, which the Company has expended time and resources drafting, implementing, and enforcing.²¹ Even within the Company, the distribution of this information is limited to those individuals who require the information to perform their duties.²² Moreover, to the best of the Company's knowledge, information, and belief, there is no publicly available source from which this information can be obtained.²³ Since the Confidential Information in the Automatic Renewal Report has independent economic value from not being generally known to those who could profit from the knowledge of it and has been the subject of efforts to maintain its confidentiality, it qualifies as exempt from public disclosure pursuant to M.G.L. c. 25, § 5D.

Contract Pricing Report

The Company operates in a highly competitive retail market for electric supply.²⁴ In this market, the Company competes with the electric distribution companies and each and every other licensed competitive for a limited customer base on a variety of factors, including pricing and

¹⁸ Certification, at ¶ 10.

¹⁹ *Id.*

²⁰ *Id.* at ¶ 15.

²¹ *Id.* at ¶ 16.

²² *Id.* at ¶ 17.

²³ *Id.* at ¶ 18.

²⁴ *Id.* at ¶ 4.

contract terms.²⁵ The Company has spent extensive time and resources developing its pricing and contracting strategies.²⁶

The Confidential Information has value to the Company's competitors because the public disclosure of it would reveal the pricing and contract terms that the Company offers.²⁷ Further, this disclosure could reveal whether and to what extent certain contract and pricing options are more effective than others in obtaining and retaining customers.²⁸ Likewise, by disclosing the number of customers that have selected pricing or contract terms, competitors could determine the overall success of the Company's marketing, contracting and pricing strategies.²⁹

Moreover, in the highly competitive retail electric supply market, the confidential, competitively sensitive, propriety information in the Customer Pricing Report has independent economic value to the Company's competitors and the disclosure of such information would cause harm to the Company. For example, with the Confidential Information in the Customer Pricing Report, competitors could enhance their marketing, contracting and pricing without having to expend substantial time and resources to test these various strategies in the market themselves to determine which are most effective.³⁰ This places the Company at an unfair competitive disadvantage because it did need to invest such time and resources.³¹

As a direct result of the actual and potential economic value of the Confidential Information in the Contract Pricing Report, the Company has undertaken reasonable efforts to protect the confidentiality of this information to ensure that it is not made known to its

²⁵ Certification, at ¶ 4.

²⁶ *Id.* at ¶ 11.

²⁷ *Id.* at ¶ 12.

²⁸ *Id.*

²⁹ *Id.* at ¶ 13.

³⁰ *Id.* at ¶ 14.

³¹ *Id.*

competitors or the public at large.³² When this information is provided to third-parties, it is given subject to a confidentiality obligation, which the Company has expended time and resources drafting, implementing, and enforcing.³³ Even within the Company, the distribution of this information is limited to those individuals who require the information to perform their duties.³⁴ Moreover, to the best of the Company's knowledge, information, and belief, there is no publicly available source from which this information can be obtained.³⁵ Since the Confidential Information in the Contract Pricing Report has independent economic value from not being generally known to those who could profit from the knowledge of it and has been the subject of efforts to maintain its confidentiality, it qualifies as exempt from public disclosure pursuant to M.G.L. c. 25, § 5D.

CONCLUSION

As the foregoing demonstrates, the disclosure of the Confidential Information would reveal competitively sensitive, confidential, and proprietary information regarding the Company's business and marketing strategies and market position. Therefore, the Department should protect the Confidential Information from public disclosure pursuant to M.G.L. c. 25, § 5D for so long as the Company is licensed as a competitive supplier.


³² Certification, at ¶ 15.

³³ *Id.* at ¶ 16.

³⁴ *Id.* at ¶ 17.

³⁵ *Id.* at ¶ 18.

Respectfully submitted,
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