



# The Commonwealth of Massachusetts

## DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 19-140

March 10, 2022

Investigation by the Department of Public Utilities on its own Motion into Bay State Gas Company d/b/a Columbia Gas of Massachusetts' responsibility for and response to the September 13, 2018 Merrimack Valley Incident, pursuant to 49 U.S.C. § 60105, G.L. c. 164, § 76, G.L. c. 164, § 105A, and 220 CMR 69.00.

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HEARING OFFICER RULING ON MOTIONS FOR PROTECTIVE TREATMENT AND STATEMENTS IN SUPPORT OF A FINDING OF CRITICAL ENERGY INFRASTRUCTURE INFORMATION

### I. INTRODUCTION

On October 25, 2019, the Department of Public Utilities ("Department") commenced this investigation into Bay State Gas Company d/b/a Columbia Gas of Massachusetts' ("Bay State") responsibility for and response to the September 13, 2018 Merrimack Valley Incident. The Department docketed this matter as D.P.U. 19-140.

Upon opening this investigation, the Department transferred into the docket discovery responses that Bay State had previously provided to the Department's Pipeline Safety Division ("Division") in its related D.P.U. 19-PL-07 investigation. Bay State filed motions for protective treatment of confidential information for some of these materials, along with appropriately redacted copies. I stamp-granted these motions on December 23, 2019, affording protective treatment for the confidential materials. In addition, Bay State asserted in two of these motions that some of this information also constituted critical energy infrastructure information ("CEII") and was entitled to protective treatment pursuant to G.L. c. 4, § 7(26)(n) ("Exemption 26(n)").<sup>1</sup>

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<sup>1</sup> In September 2002, following the events of 9/11, the Legislature added an exemption for critical energy infrastructure information to the Public Records Law, G.L. c. 4, § 7(26), which was later modified by the Act of 2016, Chapter 121, Sections 1-3:

(n) records, including but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other

Following execution of the August 14, 2020 Consent Order and Compliance Agreement (“Consent Order”) between the Division and Bay State in this docket, Eversource Gas Company of Massachusetts d/b/a Eversource Energy (“EGMA” or “Company”) -- successor in interest to Bay State -- began submitting materials in compliance with the Consent Order. EGMA filed motions for protective treatment of confidential information for some items, along with appropriately redacted copies, and filed statements in support of a finding of CEII (seeking protective treatment pursuant to Exemption 26(n)) for other items.

This ruling serves to address all above-noted pending requests for protective or CEII treatment.

## II. MOTIONS FOR PROTECTIVE TREATMENT

### A. Standard of Review

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

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

General Laws c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) (“specifically or by necessary implication exempted from disclosure by statute”). To overcome the presumption that documents in the possession of the Department are public records and to protect confidential information from public disclosure,

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records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

the Department requires a party in a Department proceeding to file a written motion for a protective order in accordance with 220 CMR 1.04(5)(e).

General Laws c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute “trade secrets, confidential, competitively sensitive or other proprietary information;” second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by “proving” the need for its non-disclosure; and third, 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. See G.L. c. 25, § 5D; 220 CMR 1.04(5)(e).

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, Hearing Officer Ruling at 4 (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party’s Limited Liability Company Agreement, notwithstanding requesting party’s assertion that such terms were competitively sensitive); see also Standard of Review for Electric Contracts, D.P.U. 96-39, Letter Order at 2 (August 30, 1996) (Department will grant exemption for electricity contract prices, but “[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer”); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

Motions for protection from public disclosure will not be allowed automatically by the Department. A party’s willingness to enter into a non-disclosure agreement with other parties does not resolve the question of whether a document, presumed to be a public record once it is received by the Department, should be protected from public disclosure. What parties may agree to share and the terms of that sharing are not dispositive of the Department’s scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

#### B. Analysis

EGMA filed motions for protective treatment for the following items:

- Compliance Items filed September 28, 2020: Attachments 19-140-16(b) and (f), and Attachment 19-140-16(l), which contain confidential employee identification

information, employee user identification numbers, and personal contact information for police and fire chiefs in the Company's service territory; and Attachment 19-140-16(a) CONFIDENTIAL, which contains internal audit information.

- Compliance Items filed October 30, 2020: Attachment 19-140-16 Supp. (a) CONFIDENTIAL; Attachment 19-140-26 Supp. (b) CONFIDENTIAL; and Attachment 19-140- 29 Supp. (c) CONFIDENTIAL. These documents contain confidential employee user identification numbers.
- Compliance Items filed April 22, 2021: Attachment 19-140-11 CONFIDENTIAL, which contains confidential employee user identification numbers.

EGMA bears the burden of proving that the information for which protection is sought constitutes trade secrets or confidential, competitively sensitive, or proprietary information. G.L. c. 25, § 5D. I have reviewed EGMA's motions and find that EGMA has met its burden as to the above-noted information. Specifically, EGMA has shown that the employee identification numbers, personal contact information for police and fire chiefs, and internal audit information warrant protective treatment as trade secrets, confidential, competitively sensitive, or other proprietary information. Moreover, EGMA has shown that this information will not change over time and is therefore appropriate for indefinite protection.

### III. CEII ANALYSIS

The Department has developed a protocol to review a company's request for CEII protection for information submitted in the context of an adjudicatory proceeding, such as in response to an information request. The first step requires that the hearing officer conduct a threshold review to verify that the information claimed as CEII falls within the realm of Exemption 26(n). Next, the hearing officer will consider whether broad dissemination of such information could jeopardize public safety pursuant to Exemption 26(n). If the hearing officer rules that the information falls within Exemption (26)(n) and could jeopardize public safety if made public, then the Department will protect the information, but will not make a final determination as to whether it is likely to jeopardize public safety if disseminated to a particular requester pursuant to Exemption 26(n) until someone makes a public record request. See People for the Ethical Treatment of Animals, Inc. v. Department of Agricultural Resources, 477 Mass. 280, 286 (2017); D.P.U. 16-GSEP-05, Procedural Notice and Ground Rules at III.E.2.c. (December 16, 2016). Upon receipt of a public records request, the Department, through its records access officer, will conduct a secondary review to exercise its reasonable judgment in determining whether disclosure to the requester of the requested records is likely to jeopardize public safety pursuant to Exemption 26(n). 477 Mass. at 286. This process is not intended, nor should it be used, as a mechanism to withhold from public access information that does not pose a security risk for the energy

infrastructure. The Department will take appropriate action against any parties who knowingly misfile public information as confidential CEII.

In accordance with that protocol, Bay State and EGMA sought CEII treatment for the following items:

- Items identified in Bay State's previously granted November 15, 2019 Motion as requiring CEII protection: Response PL-1-9 and Attachment PL-1-9(g) and (h), which contain the locations of regulator stations inspected by the Company in its service territory.
- Items identified in Bay State's previously granted December 20, 2019 Revised Motion as requiring CEII protection: Attachments PL-1-4(c), Attachment PL-1-6(a) through (d); Attachments PL-1-9(a) through (e), Attachment PL-1-10(a), Response PL-1-11; Attachments PL-1-17(b)(a) through (aa), and Attachment PL-1-20(a). These documents contain specific maps and diagrams demonstrating the exact location of mains, services, and valves critical to the Company's energy infrastructure, as well as emergency preparedness training documents analyzing emergency training exercises performed by the Company
- Compliance Items filed September 11, 2020: Attachment 19-140-15(b), Attachment 19-140-22(e), Attachment 19-140-22(f), and Attachment 19-140-22(g), which contain detailed maps, schematics and photographs of the Company's distribution system, regulator stations, and liquefied natural gas facilities.
- Compliance Items filed September 25, 2020: Attachment 19-140-1-5(j) and Attachment 19-140-8(b), which contain detailed diagrams and schematics of the Company's distribution system and detailed information on the Company's emergency response exercises, including maps and images of the distribution system and response plans to address emergencies.
- Compliance Items filed September 28, 2020: Attachment 19-140-16(g), Attachment 19-140-16(p), and Attachment 19-140-16(q), which contain maps, schematics, photographs, and analysis of the Company's distribution system, regulator stations, and the Company's planned work on regulator stations, including specific engineering solutions.
- Compliance Items filed April 22, 2021: Attachment 19-140-12, which contains site-specific maintenance procedures for the Company's regulator stations, including diagrams of the Company's facilities and step-by-step instructions specifically documenting procedures to maintain the facilities, shut the facilities down temporarily, and return the facilities to service.

Bay State and EGMA have physically segregated these materials and marked each page with “Contains CEII – Do Not Release.” In addition, the Company has provided statements of justification for claiming CEII. In these statements, Bay State and EGMA claim that public exposure of these materials could reveal sensitive and detailed information about the Company’s distribution infrastructure to bad actors and thus could jeopardize public safety if not protected from public disclosure. Bay State and EGMA request that the Department protect this information from public disclosure as CEII.

I find that Bay State and EGMA have made sufficient showings that the information for which they seek protection falls within the realm of CEII, could jeopardize public safety if broadly disseminated, and should be protected from public disclosure at this time. See Investigation into Electric Companies’ Biennial Reviews, D.T.E. 98-84/EFBSB 98-5, at 23-24 (2003); see also Critical Energy Infrastructure Information, Order No. 630, 102 FERC ¶ 61,190 (February 21, 2003), 68 Fed. Reg. 9,857 (March 3, 2003).

The Department will maintain the information in a secure, nonpublic file. By placing the documents in a nonpublic file, the Department is not making a final determination on any claim of exemption from public record status unique to a particular requester pursuant to Exemption 26(n). Rather, that determination will be made by the records access officer only if and when someone makes a public records request pursuant to G.L. c. 66, § 6A; 950 CMR 32.02.

#### IV. RULING

Accordingly, after due consideration, Bay State’s and EGMA’s requests for protective and CEII treatment are GRANTED, as provided herein. EGMA shall comply with all directives outlined above.

Under the provisions of 220 CMR 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within three days of the appeal. The Ruling remains in full force and effect unless and until set aside or modified by the Commission. 220 CMR 1.06(6)(d)(2).



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Laurie Ellen Weisman  
Hearing Officer