

124 West Allegan Street, Suite 1000  
Lansing, Michigan 48933  
T (517) 482-5800 F (517) 482-0887  
www.fraserlawfirm.com

Douglas J. Austin	Jennifer Utter Heston	Jean E. Kordenbrock	Retired
Michael E. Cavanaugh	Marlaine C. Teahan	Melisa M. W. Mysliwiec	Donald A. Hines
Gary C. Rogers	Mark E. Kellogg	Emily M. Vanderlaan	John J. Loose
Michael H. Perry	Ryan K. Kauffman	Amanda S. Wolanin	David E. S. Marvin
Thomas J. Waters	Paula J. Manderfield		Mary M. Moyne
Michael S. Ashton	Paul V. McCord	OF COUNSEL	Archie C. Fraser
H. Kirby Albright	Brian T. Gallagher	Stephen L. Burlingame	(1902-1998)
Graham K. Crabtree	Jonathan T. Walton, Jr.	Mark A. Bush	Everett R. Trebilcock
Michael P. Donnelly	Laura S. Faussié	David S. Fry	(1918-2002)
Edward J. Castellani	Norbert T. Madison, Jr.	Max R. Hoffman	James R. Davis
Jonathan E. Raven	Aaron L. Davis	Darrell A. Lindman	(1918-2005)
Peter D. Houk	Paul C. Mallon, Jr.	Thomas L. Sparks	Ronald R. Pentecost
Elizabeth H. Latchana	Jared A. Roberts	Brandon W. Zuk	(1932-2008)
Thaddeus E. Morgan	David J. Houston		Mark R. Fox
Brian P. Morley	Shaina R. Reed		(1953-2011)

Peter L. Dunlap, P.C.

jheston@fraserlawfirm.com  
(517) 377-0802

August 7, 2020

Ms. Lisa Felice, Executive Secretary  
Michigan Public Service Commission  
7109 W. Saginaw Hwy.  
Lansing, MI 48917

RE: MPSC Docket No. U-20839

Dear Ms. Felice:

Attached herewith for filing in the above-referenced matter, please find the *Comments of Retail Energy Supply Association*.

Thank you.

Very truly yours,

**Fraser Trebilcock Davis & Dunlap, P.C.**



Jennifer Utter Heston

JUH/ab  
Attachment

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the request of	)	
DTE Gas Company seeking authority	)	
to amend its Voluntary BioGreenGas	)	Case No. U-20839
Program and implement a new Voluntary	)	
Renewable Gas program (VRG) Pilot	)	
_____	)	

**COMMENTS OF  
RETAIL ENERGY SUPPLY ASSOCIATION**

On June 15, 2020, DTE Gas Company (“DTE”) filed an application in this proceeding seeking *ex parte* approval to amend its existing Voluntary BioGreenGas program and to implement a new pilot Voluntary Renewable Gas (“VRG”) program.<sup>1</sup> The Retail Energy Supply Association (“RESA”)<sup>2</sup>, by and through its attorneys, Fraser, Trebilcock, Davis & Dunlap, P.C., hereby submits the below comments.

RESA consists of alternative gas suppliers who participate in both the Gas Customer Choice and End-Use Transportation programs offered by DTE. RESA is a broad and diverse group of retail energy suppliers who share the common vision that competitive retail energy markets deliver a more efficient customer-oriented outcome than a regulated utility structure. RESA members are licensed to sell natural gas to retail customers in Michigan.

<sup>1</sup> DTE’s retail gas business is subject to the jurisdiction of the Commission pursuant to various statutory provisions of 1909 PA 300, as amended, MCL 462.2 *et seq.*; 1919 PA 419, as amended, MCL 460.54 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; and 1982 PA 304, as amended, MCL 460.6h(1) *et seq.* Pursuant to these statutory provisions, the Commission has the power and jurisdiction to regulate DTE’s retail natural gas rates, terms and conditions of service.

<sup>2</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).



For its VRG program proposal, DTE will develop and market a new pilot program wherein DTE will allow residential and small commercial customers to offset a portion of their carbon emissions from natural gas. The proposed VRG program will allow customers to offset a portion of their emissions profile, based on an average annual residential usage, by purchasing blocks of offsets. Each block would cost \$4 and would offset 25% of the average residential customer's usage. DTE intends to offset the customer's emissions profile by purchasing carbon offsets and renewable natural gas. In fact, DTE intends to use carbon offsets for 95% of the carbon emissions abatements and renewable natural gas for the remaining 5% of the emissions abatements.<sup>3</sup> DTE reports that it intends to rely predominantly on the purchase of voluntary forestry-based carbon offsets to compensate for the customer's combustion-related emissions.<sup>4</sup> DTE intends to transfer all of its existing BioGreenGas customers to its proposed VRG program and retire the BioGreenGas program.<sup>5</sup>

As a general matter, RESA does not oppose the approval of DTE's new pilot program. RESA recognizes the value in optionality for customers. RESA, however, is opposed to DTE's characterization of this new pilot program as a "renewable gas" program.<sup>6</sup> DTE's so-called VRG program is designed as a carbon offset program wherein 95% of the carbon abatements will be derived from the purchase of predominantly forestry-based carbon offsets. DTE's characterization of the program as a "renewable gas" program in its tariffs and associated

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<sup>3</sup> Pre-Filed Direct Testimony of Henry J. Decker, p. 11.

<sup>4</sup> *Id.*, pp. 6 & 12.

<sup>5</sup> *Id.*, pp. 8-9.

<sup>6</sup> The American Gas Association defines "Renewable Natural Gas" as "any pipeline compatible gaseous fuel derived from biogenic or other renewable sources that has lower lifecycle CO<sub>2</sub>e emissions than geological natural gas." See, <https://www.aga.org/natural-gas/renewable/>. Carbon offsets do not meet the definition of renewable natural gas.

marketing materials would be misleading.<sup>7</sup> DTE's new program design could easily be misunderstood by residential and small commercial customers. The new program could be particularly misleading to those customers who are participants in DTE's existing BioGreenGas program who enrolled in a true renewable natural gas program wherein DTE purchases gas from renewable sources to serve enrolled customers.

The Commission has previously addressed concerns about misleading statements by regulated entities. In MPSC Case No. U-11038, Sprint Communications Company filed a complaint against Ameritech Michigan alleging that a bill insert to residential and small business customers was misleading and anticompetitive. The bill insert advised customers about slamming and encouraged them to sign up for Ameritech Michigan's PIC<sup>8</sup> protection program. The Commission found the bill insert to be deceptive and misleading in several respects.<sup>9</sup> The Commission, "relying on its common sense and everyday experience," determined "that customers could not make an informed decision" about the marketed service.<sup>10</sup> The Commission ordered Ameritech Michigan to cease and desist its violations of law and to issue a corrected bill insert, among several other remedies.<sup>11</sup>

Ameritech Michigan appealed the Commission's ruling that Ameritech Michigan sent a misleading and anticompetitive bill insert. In its order affirming the Commission, the Court

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<sup>7</sup> "Misleading" is generally defined as "giving the wrong idea or impression." See, <https://www.bing.com/search?q=misleading+meaning&form=ANNNB1&refig=bba0deb454aa443e91509c661368bfa7&sp=4&qs=AS&pq=misleading+&sk=PRE1LS1AS2&sc=8-11&cvid=bba0deb454aa443e91509c661368bfa7>. DTE is expressly prohibited from soliciting or entering "into contracts subject to [Section 9 of 1939 PA 3] with customers in a misleading, fraudulent or deceptive manner." MCL 460.9(6).

<sup>8</sup> PIC stands for "primary interexchange carrier", which is the toll carrier that a customer reaches when dialing 1+. Order dated August 1, 1996, MPSC Case No. U-11038, fn. 5.

<sup>9</sup> *Id.*, pp. 5-8.

<sup>10</sup> *Id.*, p. 8.

<sup>11</sup> *Id.*, p. 24-25.

of Appeals cited several important authorities on what is means to be misleading. The Court stated the following:

We are ultimately unpersuaded by Ameritech's objection to the lack of evidence showing that any of its customers were actually misled by the bill insert. It is an established principle, under both the common law and statutory trade regulation laws, such as the Federal Trade Commission Act (FTCA), 15 USC 41 et seq., that proof of actual deception is unnecessary to establish that advertising is unfair and misleading. Rather, it is sufficient to show that the advertising has the capacity to deceive. See, e.g., *Carbonated Beverages, Inc. v. Wisko*, 297 Mich. 80, 84, 297 N.W. 79 (1941); *Montgomery Ward & Co. v. Federal Trade Comm.*, 379 F.2d 666, 670 (C.A.7, 1967). For example, when the Federal Trade Commission determines whether advertising is unfair, deceptive, or misleading in violation of the FTCA, the commission is not obliged to rely on customer testimony or survey evidence, or any other kind of extrinsic evidence. Instead, the FTC may rely on its own common sense and administrative experience to assess whether the overall impression made by the advertising is expressly or impliedly misleading. See, e.g., *Kraft, Inc. v. Federal Trade Comm.*, 970 F.2d 311, 319 (C.A.7, 1992); 54A Am. Jur. 2d, *Monopolies, Restraints of Trade, and Unfair Trade Practices*, §§ 1155-1157. If the FTC's own evaluation of the advertising is reasonable, its findings may be considered supported by the requisite substantial evidence. *Kraft, Inc*, supra.

In view of federal law in this area, we find that the MPSC's legal analysis here is not unreasonable and is, therefore, entitled to deference. *Sullivan v. Everhart*, 494 U.S. 83, 88-90, 110 S.Ct. 960, 108 L.Ed.2d 72 (1990); *In re MCI Complaint*, supra at 681-682, 583 N.W.2d 458. An advertisement may be misleading or deceptive even though the statements made are literally true, because of what is implied under the circumstances. *Kraft, Inc*, supra at 322. Advertising may also be unfair and deceptive if it omits information material to the customer's assessment and reliance on the representations made. The MPSC here did not err in relying on its own expertise and common sense to determine that Ameritech's bill insert here was false, misleading, or deceptive. See also *Great Lakes Steel Div. of Nat'l Steel Corp. v. Public Service Comm.*, 94 Mich.App. 694, 701, 290 N.W.2d 54 (1980), rev'd on other grounds 416 Mich. 166, 330 N.W.2d 380 (1982).<sup>12</sup>

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<sup>12</sup> *In re Sprint Communications Co LP Complaint, Ameritech Michigan v Pub Serv Comm*, 234 Mich App 22, 35-36, 592 NW2d 825, 832 (1999).

Thus, it is unnecessary to show that customers will be misled by DTE's depiction of its new program as a "renewable gas" program for the Commission to find the program name to be misleading. The program name is misleading where it 'has the capacity to deceive'. In determining whether a statement 'has the capacity to deceive' the Commission may rely on its own expertise and common sense to determine if the overall impression of the advertising is expressly or impliedly misleading.

DTE's characterization of its new pilot program as a "renewable gas" program is misleading. The proposed program is overwhelmingly focused on the purchase of carbon offsets. Carbon offsets do not meet either industry or common-sense notions of "renewable gas." Residential and small commercial customers are likely to be deceived by descriptions of the proposed program as a "renewable gas" program. Consequently, RESA recommends that the Commission direct DTE to not call the new program a "renewable gas" program. An accurate description of the program would be a "carbon offset" program or perhaps a "carbon offset and renewable natural gas hybrid" program.

RESA has not found any other similarly structured program by any other natural gas utility described as a "renewable gas" program. In its proposed Exhibit A-1, DTE identifies four other gas utility green programs.<sup>13</sup> The Georgia Natural Gas program identified by DTE as a carbon offset program is called the "Greener Life" program.<sup>14</sup> Similarly, the NW Natural carbon offset program identified is called the "Smart Energy" program.<sup>15</sup> The Summit Natural Gas of Maine "Renewable Natural Gas" program purchases the renewable attributes of landfill methane gas.<sup>16</sup> The Vermont Gas program cited is called a "Renewable Natural Gas" program,

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<sup>13</sup> Proposed Exhibit A-1, p. 14.

<sup>14</sup> See, <https://www.gng.com/greenerlife/>.

<sup>15</sup> See, <https://www.nwnatural.com/Residential/SmartEnergy>.

<sup>16</sup> See, <https://summitnaturalgasmaine.com/renewablenaturalgas>.

but Vermont Gas only purchases carbon offsets if renewable gas supply is not available and customers are notified of the non-renewable purchases.<sup>17</sup> DTE does not identify any utility program that overwhelmingly involves the purchase of carbon offsets that uses the term “renewable” in its program description.

Further, to prevent an additional misunderstanding regarding the program design, RESA recommends that any marketing materials for the new pilot program contain accurate and understandable information regarding the offering to enable a customer to make an informed decision. Specifically, RESA believes it should be plainly disclosed that the offset percentages in the program are based upon the average residential usage, not actual customer usage. Indeed, as noted by DTE’s witness Mr. Decker, customers “have a strong desire to offset their carbon emissions arising from their own personal natural gas usage.”<sup>18</sup> However, under proposed pilot program, customers will not be offsetting their own personal gas usage; rather, customers will be offsetting the average customer’s gas usage. Certainly some customers will be drawn to the benefits of the proposed program design, such as the fixed price and multiple block options, however RESA believes that a proper disclosure will enable a customer to be adequately informed when comparing green offerings, especially those customers wishing to truly offset their carbon footprint based upon their own personal gas usage.

**WHEREFORE**, RESA hereby respectfully requests that if this Commission approves DTE’s program proposals, that the Commission direct DTE to not characterize the new pilot program as a “renewable gas” program. Instead, RESA recommends that the new pilot program be described in DTE’s tariffs and any associated marketing materials as a “carbon offset”

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<sup>17</sup> “VGS reserves the right to purchase carbon offsets if RNG supply is not available. VGS will notify customers if this occurs.” See, <https://www.vermontgas.com/renewablenaturalgas/>.

<sup>18</sup> Pre-Filed Direct Testimony of Henry J. Decker, p. 14, ln. 15-16.

program, or other similar depiction that accurately reflects the program's overwhelmingly predominant carbon offset design. Further, RESA recommends that the Commission direct DTE to plainly disclose that offset percentages available for purchase are based on DTE's average residential customers' usage, not the customer's own actual natural gas usage.

Respectfully submitted,

**FRASER TREBILCOCK DAVIS & DUNLAP, P.C.**  
ATTORNEYS FOR RETAIL ENERGY SUPPLY ASSOCIATION

Date: August 7, 2020

By:



Jennifer Utter Heston (P65202)

Business Address:

124 W. Allegan, Ste 1000

Lansing, MI 48933

Telephone: (517) 482-5800

E-mail: [jheston@fraserlawfirm.com](mailto:jheston@fraserlawfirm.com)