COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF ENERGY RESOURCES

MASSACHUSETTS CLEAN PEAK ENERGY PORTFOLIO STANDARD	:	OCTOBER 30, 2019

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION RE PROPOSED REGULATIONS

The Retail Energy Supply Association ("RESA")[1] hereby submits its comments in response to the Department of Energy Resources' ("Department" or "DOER") proposed 225 CMR 21—Clean Peak Energy Portfolio Standard ("Proposed Regulations" or "225 Proposed CMR 21").[2] RESA appreciates the opportunity to comment on this important matter.

INTRODUCTION

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York and New England regions. RESA members are active participants in the retail competitive markets for electricity, including the Massachusetts retail electric market. Several RESA member companies are licensed by the Department of Public Utilities ("DPU") to serve residential, commercial and industrial customers in Massachusetts and are presently providing electricity supply to customers in the Commonwealth. As such, RESA and its members have an interest in ensuring that the new

[1] 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.

[2] Except as otherwise defined herein, capitalized terms are used as defined in the Proposed Regulations.

Clean Peak Energy Portfolio Standard program ("Program") does not have an adverse effect on RESA members, their customers, or the continued success of the retail electric market in Massachusetts.

BACKGROUND

On August 9, 2018, Governor Baker signed into law An Act to Advance Clean Energy ("Act"),[3] which directed the Department to develop a program requiring Retail Electricity Suppliers to meet a baseline minimum percentage of sales with qualified clean peak resources that dispatch or discharge electricity to the Distribution System during Seasonal Peak Periods, or alternatively, reduce load on the system.[4] Pursuant to the Act, the Department is charged with developing regulations that establish:

- Seasonal Peak Periods;
- a minimum standard for Retail Electricity Suppliers;
- a value for Clean Peak Energy Certificates by creating an Alternative Compliance Payment ("ACP") rate and potentially other mechanisms; and
- a metering and verification protocol to ensure that all data is collected, reviewed and reported in a consistent manner.[5]

After reviewing available information, the statutory definition of clean peak resource,[6] and a number of other factors, the Department determined that approximately 0 MWh were being served by existing Clean Peak Resources during peak load hours as of December 31, 2018, and established the 2019 Minimum Standard percentage requirement at zero percent (0%).[7] The Department subsequently engaged with stakeholders about designing the Clean Peak Energy

[3] Chapter 227 of the Acts of 2018.

[4] *Id.* at § 13(a).

[5] *See id.* at § 13(c).

[6] *See id.* at § 7 (defining clean peak resource as: "a qualified RPS resource, a qualified energy storage system or a demand response resource that generates, dispatches or discharges electricity to the electric distribution system during seasonal peak periods, or alternatively, reduces load on said system.").

[7] *See* Clean Peak Energy Standard, https://www.mass.gov/service-details/clean-peak-energy-standard (Last visited: Oct. 30, 2019).

Portfolio Standard[8] and hired a consultant to develop a model to evaluate the impacts of Clean Peak Energy Portfolio Standard market design changes.[9]

On September 20, 2019, the Department issued a Notice of Public Comment and Hearing scheduling public hearings on the Proposed Regulations and indicating that it would accept written comments on the Proposed Regulations until October 30, 2019.[10] RESA hereby submits its comments on the Proposed Regulations.

COMMENTS

The Department should exempt retail electric supply contracts executed before the unspecified CPS Effective Date from the Clean Peak Energy Portfolio Standard to protect existing customer expectations. Likewise, the Department should exempt retail electric supply contracts executed before the effective date of any subsequent modifications to the Clean Peak Energy Portfolio Standard from such modifications. Moreover, the Department is not empowered to require competitive suppliers to provide financial security or to grant itself broad enforcement authority, and the financial security requirement is inconsistent with the principles of Executive Order 562. Thus, for the reasons discussed more fully below, the Department should modify the Proposed Regulations as indicated herein before issuing the Clean Peak Energy Portfolio Standard regulations in final form.

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[8] *See, e.g.*, Clean Peak Standard (CPS) Stakeholder Questions (Jan. 16, 2019) (*available at* https://www.mass.gov/files/documents/2019/01/17/Clean%20Peak%20Standard%20Stakeholder%20Questions%201.17.19.pdf) (last visited Oct. 30, 2019); Clean Peak Standard Stakeholder Answers (*available at https://www.mass.gov/files/documents/2019/02/19/Responses.zip*)(last visited Oct. 30, 2019); Clean Peak Standard Straw Proposal (Apr. 2, 2019) (*available at* https://www.mass.gov/files/documents/2019/04/02/Clean%20Peak%20Straw%20Proposal%203.29.19%20.pdf) (last visited Oct. 30, 2019); Clean Peak Standard Straw Proposal Stakeholder Comments (*available at https://www.mass.gov/files/documents/2019/04/24/Comments.zip*) (last visited Oct. 30, 2019).

[9] Massachusetts Clean Peak Standard: Market Model Final Report (Aug. 27, 2019) (*available at* https://www.mass.gov/files/documents/2019/09/27/CPS_Final_Consultant_Report.pdf) (last visited Oct. 30, 2019).

[10] *See, generally*, Notice of Public Comment and Hearing (Sep. 20, 2019) ("Notice").

I. THE DEPARTMENT SHOULD PROTECT EXISTING CUSTOMER EXPECTATIONS

Section 21.06(4) of the Proposed Regulations provides: "The CPS Effective Date shall be the earliest date on or after the Commercial Operation Date on which the operation of a Clean Peak Resource can result in the creation of Clean Peak Energy Certificates, as determined by the Department."[11] Because this provision does not determine the CPS Effective Date with certainty, it raises significant concerns about the transparency of the Program. Moreover, under the Proposed Regulations, Retail Electricity Suppliers could be required to comply with the Program before resources start generating Clean Peak Energy Certificates. In addition, because Retail Electricity Suppliers will not know the CPS Effective Date with certainty, they will not be able to estimate the availability of Clean Peak Energy Certificates appropriately. As a result, they will have significant difficulties predicting Program compliance costs and ensuring that customers pay no more than necessary for such compliance. Uncertainty about the CPS Effective Date could prevent customers from easily comparing supplier offers and lead to customer confusion. To address these issues and ensure transparency, the Department should exempt supply contracts executed before the CPS Effective Date from Program compliance obligations.

A. The Proposed Regulations Do Not Provide Clarity About When Clean Peak Energy Certificates Will Be Available

The CPS Effective Date is not certain. It depends on two factors: (i) the Commercial Operation Date; and (ii) the potential for creating Clean Peak Energy Certificates.[12] Because these variables depend on the actions of various parties and because the Proposed Regulations do

[11] 225 Proposed CMR 21.06(4).

[12] *See id.* ("The CPS Effective Date shall be the earliest date on or after the Commercial Operation Date on which the operation of a Clean Peak Resource can result in the creation of Clean Peak Energy Certificates, as determined by the Department.").

not set forth applicable timeframes, the CPS Effective Date is not currently known or knowable by stakeholders.

The Commercial Operation Date depends on decisions made by a resource's Operator or the Distribution Company. For example, for a Clean Peak Resource that is connected to the customer's side of the electric meter, the Commercial Operation Date is the date on which the Distribution Company grants approval for the resource to interconnect with the grid.[13] For a Demand Response Resource, the Commercial Operation Date is the date on which the resource first changes electric usage.[14] For other resources, the Commercial Operation Date may be the date on which its Operator first decides to operate it to produce or provide electrical energy for sale.[15]

A resource's eligibility to generate Clean Peak Energy Certificates depends on submission of a Statement of Qualification Application[16] and on the Department's subsequent qualification process.[17] However, the Proposed Regulations do not set timeframes for the application's submission or the Department's review procedures. In fact, it would remain within the Department's discretion to request additional information from resources seeking qualification or to provide an opportunity for public comment;[18] both of which could affect the timing of the Department's issuance of any Statement of Qualification.

Because the CPS Effective Date depends on these variables, which are not subject to schedules or timeframes specified in the Proposed Regulations, the CPS Effective Date is not

[13] 225 Proposed CMR 21.02 (defining "Commercial Operation Date").

[14] *Id.*

[15] *See id.* (defining "Commercial Operation Date" as "[t]he date that a Clean Peak Resource first produces or provides electrical energy for sale").

[16] *See* 225 Proposed CMR 21.06(1).

[17] *See* 225 Proposed CMR 21.06.

[18] *See* 225 Proposed CMR 21.06(2).

certain or readily ascertainable by stakeholders. As a result, Retail Electricity Suppliers cannot be assured of when resources will begin generating Clean Peak Energy Certificates or if they will be generating certificates when Retail Electricity Suppliers are currently required to begin including Clean Peak Energy Certificates with their electrical energy sales in 2020.[19] Further, Retail Electricity Suppliers will not know, nor can they estimate, the number of resources that will begin generating Clean Peak Energy Certificates or the number of certificates that these resources will generate.

Moreover, Retail Electricity Suppliers will not be able meet their compliance obligations with banked certificates in 2020. While the Proposed Regulations contain provisions that allow for compliance through banked Clean Peak Energy Certificates,[20] to take advantage of these provisions for 2020 compliance, Retail Electricity Suppliers would need to bank certificates in 2019. However, the Proposed Regulations, which would allow such banking and establish processes for the qualification of resources to produce Clean Peak Energy Certificates, are not currently effective.[21] Final regulations are not expected to be issued until 2020.[22] Until regulations allowing resources to generate Clean Peak Energy Certificates and authorizing Retail Electricity Suppliers to bank such certificates for future compliance are actually effective, Retail Electricity Suppliers will not be able to acquire certificates and bank them for future

[19] *See* 225 Proposed CMR 21.07(1) (indicating that Retail Electricity Suppliers must begin including Clean Peak Energy Certificates with their electrical energy sales in 2020).

[20] *See* 225 Proposed CMR 21.08(2).

[21] *See* Notice (indicating that the Proposed Regulations are simply proposed regulations).

[22] The Clean Peak Energy Standard: Draft Regulation Summary (Aug. 7, 2019 and Aug. 9, 2019) ("Draft Regulation Summary") (*available at* https://www.mass.gov/files/documents/2019/08/07/Draft%20CPS%20Reg%20Summary%20Presentation%208.6.pdf) (last visited Oct. 30, 2019), at 40.

compliance.[23] Because no certificates will be generated until 2020, Retail Electricity Suppliers will not be able to bank in 2019.

B. The Proposed Regulations Could Require Retail Electricity Suppliers To Include Clean Peak Energy Certificates With Their Sales Before Any Clean Peak Energy Certificates Are Generated

Under the Proposed Regulations, as noted, Retail Electricity Suppliers' obligation to include with their total annual energy sales a non-zero minimum percentage of Clean Peak Energy Certificates begins in 2020.[24] Because the obligation relates to Retail Electricity Suppliers' total annual sales, it would apply for all of 2020, beginning on January 1. However, as discussed above, there is no certainty about when resources actually will begin to generate Clean Peak Energy Certificates. This date likely will fall ***after*** January 1, 2020 because regulations enabling resources to qualify to generate Clean Peak Energy Certificates are not expected to be promulgated until the first quarter of 2020.[25]

Consequently, as currently drafted, the Proposed Regulations would require Retail Electricity Suppliers to purchase Clean Peak Energy Certificates for load served, ***before*** any Clean Peak Resources actually generate such certificates. However, Retail Electricity Suppliers should only be required to purchase Clean Peak Energy Certificates for load served ***after*** Clean Peak Resources start to generate certificates;[26] that is, after the CPS Effective Date. To do this,

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[23] *See* Act, § 13 (requiring the Department to promulgate regulations to implement the Clean Peak Energy Portfolio Standard).

[24] 225 Proposed CMR 21.07(1).

[25] Draft Regulation Summary, at 40 (presenting an anticipated Program implementation schedule, with the filing of final regulations in the first quarter of 2020).

[26] Ensuring that consumers are not required to pay for renewable energy before it is actually generated is a matter of basic fairness that is also under consideration by the Maryland Public Service Commission ("MDPSC"). Recognizing the seriousness of this issue with respect to offshore wind development, the MDPSC, in Case No. 9431 requested comments on a motion that RESA had filed requesting, among other things, a "holding that, under the Maryland Offshore Wind Energy Act of 2013, electric suppliers and their customers are not required to pay for offshore wind renewable energy credits . . . before an offshore wind project begins operating." *See* MDPSC Case No. 9431, *In the Matter of the Applications of US Wind, Inc. and Skipjack Offshore Energy, LLC for a Proposed*

the Department should provide Retail Electricity Suppliers, all other stakeholders, and the public with notice of the CPS Effective Date and prorate Program compliance obligations for 2020 based on the time remaining in the year after the CPS Effective Date. Further, as discussed more fully below,[27] in order to protect existing customer expectations, because the actual CPS Effective Date is not known or established, the Department should exempt competitive suppliers' contracts executed before the CPS Effective Date from Clean Peak Energy Portfolio Standard compliance.

C. The Unavailability Of Clean Peak Energy Certificates Will Increase Costs to Customers

Requiring Retail Electricity Suppliers to serve load with a minimum, non-zero percentage of Clean Peak Energy Certificates before such certificates are generated will unnecessarily raise costs to all customers. Once Retail Electricity Suppliers' electric sales must include a non-zero percentage of electrical energy sales with Clean Peak Energy Certificates, if no certificates are available, Retail Electricity Suppliers will have no option to satisfy their Clean Peak Energy Portfolio Standard obligations except remittance of ACPs. Similarly, if the number of certificates available in the market does not equal or exceed the aggregate compliance obligations, sellers of certificates likely will price their certificates at or near the full ACP rate. Indeed, they will have no incentive to price their certificates materially below the full ACP rate because Retail Electricity Suppliers will be compelled to acquire the limited number of available certificates (or pay ACPs). As a consequence, Program compliance costs will be higher than if Clean Peak Energy Certificates prices are set in a competitive market for certificates in which there is actual supply available that could satisfy demand. Ultimately, customers will bear these higher Program

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Offshore Wind Project(s) Pursuant to the Maryland Offshore Wind Energy Act of 2013, Notice of Request for Comments (Oct. 8, 2019).

[27] *See infra* Section I.C.

compliance costs as Retail Electricity Suppliers build these costs into their Retail Electricity Products—Basic Service in the case of Distribution Companies and supply contracts in the case of competitive suppliers.

In addition, for customers served by competitive suppliers, which do not have the same reconciliation options as Distribution Companies,[28] this would be exacerbated by the uncertainty of when certificates will become available. If competitive suppliers cannot be assured that there will be sufficient certificates to meet their compliance obligations, they may need to include in their contracts the price of Clean Peak Energy Portfolio Standard compliance at the full ACP rate in order to ensure that their contract prices accurately reflect the maximum costs that they could incur in serving their customers. This risk premium will cause customers to pay unnecessarily higher prices. In order to reduce this risk, competitive supplier contracts executed before the CPS Effective Date should be exempt from Program compliance.

D. The Department Should Protect Existing Consumer Expectations By Grandfathering Retail Electricity Supply Contracts Executed Before The CPS Effective Date

Exempting competitive suppliers' contracts executed before the CPS Effective Date from Clean Peak Energy Portfolio Standard compliance also will protect customer expectations more broadly. Because competitive suppliers enter into multi-year agreements,[29] if existing contracts are not exempt from Program compliance, customers with fixed-price arrangements could be faced with unexpected price increases to account for the new obligation.[30] When a new

[28] *See, e.g.*, D.P.U. 16-76, *Petition of Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid to revise its Basic Service Adjustment Factors*, Order (Jul. 29, 2016) (allowing the recovery of Distribution Company renewable energy portfolio standard compliance cost through a Basic Service reconciliation mechanism).

[29] *See* Energy Switch Massachusetts website (available at: http://www.energyswitchma.gov) (displaying numerous fixed price offers that extend up to 36 months into the future) (last visited Oct. 30, 2019).

[30] *See, e.g.*, Act, § 13 (requiring that, for each year after 2019, "every retail electricity supplier in the commonwealth shall provide a minimum percentage of not less than an additional 0.25 per cent of sales by retail electricity suppliers in the commonwealth that shall be met with clean peak certificates, as determined by the department.").

obligation is imposed, it impacts existing contracts that were not priced to include such obligations and may have a term of service that extends over multiple years. While competitive suppliers may have contractual and legal means to address change of law circumstances, these mechanisms will have a direct and immediate financial impact to customers who have contracted for a fixed-price and will now be subject to new and unanticipated charges that are not within their budgets. These unanticipated charges place customers in an untenable position as they may be required to pay these new and unanticipated costs per the terms of their contractual agreements. Moreover, they undermine the customers' underlying confidence that the competitive electricity market can provide and deliver the type of pricing products they desire (which often include fixed-price products) and have contracted to meet their energy needs. The other alternative is for competitive suppliers to enter into agreements in which they pass through the cost of Program compliance to customers. However, this type of contracting arrangement is not desirable to many customers because it does not provide budget certainty. These customers prefer fixed-price contracts in which the risk of price fluctuations is placed on the competitive suppliers.

As the Department most certainly appreciates, the competitive electricity market in the Commonwealth continues to advance and competitive suppliers continue to enter into contractual obligations, often with multi-year terms of service, while new regulations are being proposed and promulgated by the Department. However, competitive suppliers do not take market positions or enter into agreement terms with customers based simply on the announcement that a regulatory change may occur or even based on the release of proposed regulatory revisions. Rather, since announced or even proposed regulatory revisions are subject

to change based on the regulatory input process,[31] competitive suppliers take market positions and enter into agreements based only on actual regulatory requirements officially promulgated by the governing regulatory authority. In this way, customers are not exposed to undesirable contracting arrangements, unnecessary price increases and/or pricing volatility as a result of speculative regulatory changes that may never be adopted or that may be significantly modified through the regulatory process before such changes ultimately become effective.

In this case, this issue is further exacerbated by the fact that the Department has not given competitive suppliers ***any*** indication of when resources will actually begin generating Clean Peak Energy Certificates.[32] Without this information, competitive suppliers have absolutely ***no*** basis on which to price the Clean Peak Energy Portfolio Standard into contracts that extend into 2020 and beyond.[33] While the ACP rate arguably could provide some basis, the ACP rate is itself is part of the Proposed Regulations[34] and, therefore, subject to change before final regulations are adopted. Because competitive suppliers do not know nor can they reasonably estimate their compliance obligations or the cost of such obligations beyond 2019, customers are at risk of entering into agreements with competitive suppliers that do not appropriately account for Program compliance costs. As a consequence, even if existing contracts are exempt as of the date on which final regulations are promulgated, customers could still be subject to contract price adjustments through contractual change of law provisions.

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[31] *See, e.g.*, Historical Development of the Alternative Energy Portfolio Standard, https://www.mass.gov/service-details/historical-development-of-the-alternative-energy-portfolio-standard (last visited Oct. 30, 2019) (outlining the development of the Alternative Energy Portfolio Standard, which included significant changes from proposed regulations considered in the primary comment period to proposed regulations considered in the secondary comment period).

[32] *See* 225 Proposed CMR 21.06(4) (defining "CPS Effective Date").

[33] As discussed above, if the ACP rate is the only basis on which Clean Peak Energy Portfolio Standard can be based, customers likely will unnecessarily bear higher Program compliance costs because the contract will be priced at the ACP rate.

[34] *See* 225 Proposed CMR 21.08(3)(a)(2) (setting the ACP rate).

Only after the Department officially promulgates the regulations for the Program ***and*** the CPS Effective Date has occurred will suppliers modify their market positions and/or the terms of their agreements with customers to account for the Clean Peak Energy Portfolio Standard.[35] Accordingly, consistent with its prior practice,[36] RESA requests that the Department create a compliance exemption (subject to suppliers providing appropriate documentation) from the Program's obligations until the expiration of any contracts existing as of the CPS Effective Date.[37] In this way, the Department can establish a paradigm that protects existing customer expectations. Further, the Department should enhance transparency by providing stakeholders with more detail about the CPS Effective Date. This could be accomplished by establishing timeframes in its regulations or by requiring that regular updates about the establishment of the CPS Effective Date be provided to the public.

II. ANY FUTURE CLEAN PEAK ENERGY PORTFOLIO STANDARD MODIFICATIONS SHOULD ALSO PROTECT EXISTING CUSTOMER EXPECTATIONS

The Proposed Regulations contemplate the review of the CPS Minimum Standard at least every five years.[38] Similarly, the Proposed Regulations contemplate the review, at least every

[35] *See* Draft Regulation Summary, at 40 (setting forth the anticipated implementation schedule, including a first quarter 2020 timeframe for the promulgation of final regulations).

[36] *See, e.g.*, 225 C.M.R. 14.07(2)(a), (3)(a); *cf.* 225 C.M.R. 14.09(2)(g) (setting the ACP Rate for that portion of a supplier's solar renewable energy credit ("SREC") obligations that were contractually committed or renewed prior to January 1, 2010 to the RPS Class I ACP Rate for the applicable compliance year).

[37] The Department contemplated exempting contracts executed before January 1, 2019 from the Program's compliance obligation. *See* Draft Regulation Summary, at 7 ("Retail load served under contracts executed prior to 1/1/19 is exempt from obligation."). However, the Proposed Regulations do not include such an exemption. *See, generally*, Proposed Regulations. As demonstrated herein, exempting contracts executed before the CPS Effective Date is necessary to protect the interests of customers, competitive suppliers, and other stakeholders. Exempting contracts executed before January 1, 2019 does not appropriately account for the unavailability of certificates, and the uncertainty about the availability of certificates, that will continue until the CPS Effective Date, when certificates may begin to be generated.

[38] 225 Proposed CMR 21.07(2).

five years, of the ACP rate.[39] These reviews could lead to modification of the Minimum Standard[40] and/or ACP rate.[41]

However, changes to the CPS Minimum Standard or to the ACP rate could have significant effects on the costs that customers ultimately bear for Clean Peak Energy Portfolio Standard compliance. For example, an increase in the CPS Minimum Standard would require Retail Electricity Suppliers to procure more certificates to serve their customers (or pay more ACPs). Such an increase also could increase the demand for certificates and, thereby, increase their prices in the market. Customers will bear these increased costs as Distribution Companies incorporate them into their Basic Service rates and competitive suppliers price them into their contracts. An increase in the ACP rate, likewise, could increase the prices of Retail Electricity Products. For instance, because the ACP functions as a cap on certificate prices, an increase in the ACP rate also could lead to increases in the market prices for certificates. All Retail Electricity Supplier customers would bear these costs as they are incorporated into the rates and prices of Retail Electricity Products.

While the Department's reviews of the CPS Minimum Standard and the ACP rate could lead to increased compliance costs, the Department has not given Retail Electricity Suppliers ***any*** indication of what the potential outcomes of that review may be.[42] Without this information, competitive suppliers will have absolutely ***no*** basis on which even to attempt to price these modifications into contracts that extend into 2025 and beyond. Accordingly, competitive suppliers will enter into agreements with customers that do not account for Clean Peak Energy Portfolio Standard modifications because suppliers will not know nor be able to estimate the

[39] 225 Proposed CMR 21.08(3)(a)(3).
[40] 225 Proposed CMR 21.07(2).
[41] 225 Proposed CMR 21.08(3)(a)(3).
[42] *See* 225 Proposed CMR 21.07(2); 225 Proposed CMR 21.08(3)(a)(3).

effect of any such modifications on their compliance obligations or the cost of such obligations beyond 2025. As noted above, while competitive suppliers may have contractual and legal means to address such change of law circumstances, these mechanisms will have a direct and immediate financial impact to customers who have contracted for a fixed-price and would be subject to new and unanticipated charges that are not within their budgets. These unanticipated charges place customers in an untenable position as they may be required to pay these new and unanticipated costs per the terms of their contractual agreements. The other alternative is for suppliers to enter into agreements in which they pass through the cost of Program compliance to customers. However, neither of these options is desirable to most customers because it does not provide budget certainty and places the risk of price fluctuations on the customers.

Thus, consistent with the Department's past practice,[43] RESA requests that the Department modify the Proposed Regulations to exempt from future Program modifications retail load served under contracts executed prior to the date that those modifications are ultimately implemented. Alternatively, because retail electric supply contract terms typically do not exceed three years,[44] the Department also could protect customer expectations by delaying the effectiveness of such modifications for three years after they are finalized.

III. THE DPU IS THE MOST APPROPRIATE FORUM FOR CONSIDERING ENFORCEMENT MECHANISMS

The Proposed Regulations would require competitive suppliers to post financial security that could be used to enforce those regulations.[45] In the Proposed Regulations, the Department also "reserves all rights to take any and all appropriate actions to ensure the collection of all

[43] *See, e.g.*, 225 C.M.R. 14.07(2)(a), (3)(a); *cf.* 225 C.M.R. 14.09(2)(g) (setting the ACP Rate for that portion of a supplier's SREC obligations that were contractually committed or renewed prior to January 1, 2010 to the RPS Class I ACP Rate for the applicable compliance year).

[44] *See* Energy Switch Massachusetts website (available at: http://www.energyswitchma.gov) (displaying numerous fixed-price offers that extend up to 36 months into the future) (last visited Oct. 30, 2019).

[45] *See* 225 Proposed CMR 21.12(5).

Alternative Compliance Payments owed to ensure annual compliance obligations are fully discharged by a Retail Electricity Supplier . . . ."[46] However, the Department is not empowered to require that suppliers provide financial security, to use that financial security to enforce the Clean Peak Energy Portfolio Standard, or otherwise to grant itself broad enforcement authority.

As a creature of statute,[47] the Department can act only within the parameters provided by the legislature.[48] The legislature has not authorized the Department to require financial security to ensure a supplier discharges its Clean Peak Energy Portfolio Standard obligations.[49] Nor has the legislature authorized the Department to grant itself broad enforcement authority over suppliers who fail to meet those obligations.[50] If the legislature had intended to do so, it could have.[51] Thus, the Department does not have the power to require that competitive suppliers post financial security, to use that financial security to enforce the Proposed Regulations, or otherwise to grant itself broad enforcement authority.[52]

As discussed further below, because the DPU oversees competitive supplier licensure, it has existing enforcement authority in its regulations.[53] This existing DPU enforcement authority provides an appropriate framework for ensuring compliance. However, if there is a desire to

[46] 225 Proposed CMR 21.12(7).

[47] *See* Mass. Gen. Laws Ch. 25A, § 1 (creating the Department).

[48] *See, e.g.*, *Mass. Comm'n Against Discrimination v. Liberty Mutual Ins. Co.*, 371 Mass. 186, 189 (1976) ("It is well settled that the commission, as a board created by statute has . . . only those powers, duties and obligations conferred upon it by statute . . . .") (citations omitted).

[49] *See, generally,* Act.

[50] *See, generally, id.*

[51] *See, e.g.*, Mass. Gen. Laws Ch. 25A, § 11I(*l*) (requiring the provision of financial security for energy management service contracts); Mass. Gen. Laws Ch. 25A, § 11A (giving the Department the power to enforce the Massachusetts commercial and apartment conservation service program).

[52] *Cf. Mass. Comm'n Against Discrimination*, 371 Mass. at 189 ("It is well settled that the commission, as a board created by statute has . . . ***only*** those powers, duties and obligations conferred upon it by statute . . . .") (emphasis added).

[53] *See* 220 C.M.R. 11.07.

explore additional enforcement mechanisms, these mechanisms should be considered by the DPU in the context of its regulations.

IV. THE PROPOSED FINANCIAL SECURITY REQUIREMENT IS INCONSISTENT WITH THE PRINCIPLES OF EXECUTIVE ORDER 562

The Department's proposed financial security requirement runs afoul of the principles of Executive Order 562 because: (a) there is not a clear need for intervention ***by the Department;*** (b) there are "less restrictive and intrusive alternatives" available; and (c) Massachusetts customers would be unduly and adversely affected by the requirement.[54] Accordingly, the Department should not require competitive suppliers to post financial security.

Each licensed competitive supplier is already required to provide annual documentation to the DPU of its financial capability.[55] Similarly, each licensed competitive supplier must provide annual documentation to the DPU that it is a New England Power Pool ("NEPOOL") participant (or has a contractual relationship with a NEPOOL participant),[56] which requires demonstration of financial capability.[57] Because these other financial capability requirements already exist, there is not a clear need for intervention into this area by the Department.

Moreover, the DPU has broad enforcement authority over competitive suppliers[58] and has exercised that authority in connection with a competitive supplier's failure to satisfy renewable

[54] *See* E.O. 562, §§ 3, 5 (requiring that, when adopting a regulation, an agency demonstrate a clearly identified need for governmental intervention that is best addressed by the agency); *id.* (requiring that, when adopting a regulation, an agency demonstrate that less restrictive and intrusive alternatives have been considered and found less desirable based on a sound evaluation of the alternatives); *id.* (requiring that, when adopting a regulation, an agency demonstrate that "the regulation does not unduly and adversely affect . . . customers of the Commonwealth . . .").

[55] *See* 220 C.M.R. 11.05(2)(b)(13) (requiring documentation of financial capability in license applications and annual license renewal applications).

[56] *See* 220 C.M.R. 11.05(2)(b)(14) (requiring documentation that the Competitive Supplier is a NEPOOL participant or will meet its transaction requirements through a contractual arrangement with a NEPOOL participant).

[57] *See*, *generally*, Federal Energy Regulatory Commission Docket # ER 19-2815-000, ISO New England Financial Assurance Policy (Effective Date: Sep. 17, 2019).

[58] *See* 220 C.M.R. 11.07.

portfolio standard obligations similar to the obligations of the Program.[59] Because these enforcement mechanisms already exist, there is not a clear need for further intervention by the Department into this area.

These other enforcement mechanisms also present less intrusive alternatives to the Department's proposed financial security requirement because they address any discrete non-compliance issues with the particular competitive suppliers involved. Conversely, a financial security requirement would impose a burden on ***all*** competitive suppliers even those complying with their obligations. Further, the costs associated with maintaining the financial security would ultimately be borne by customers through higher supply prices. As a consequence, Massachusetts customers would be unduly and adversely affected by this requirement in contravention of the principles of Executive Order 562.[60]

CONCLUSION

For all of the foregoing reasons, RESA urges the Department to revise the Proposed Regulations to exempt retail contracts executed before the CPS Effective Date from Program compliance obligations, exempt retail contracts executed before the effective date of future Program modifications from such modifications, and avoid imposing a financial security requirement on competitive suppliers.

[59] *See* Docket D.P.U. 19-18, *Notice of Probable Violation upon Union Atlantic Electricity, LLC, pursuant to G.L. c. 30A, 220 CMR 11.07, 14.06(5), 25.00, and Order Establishing Final Interim Guidelines for Competitive Supply Investigations and Proceedings, D.P.U. 16-156-A (2017)*, Notice of Probable Violation (Feb. 4, 2019).

[60] E.O. 562, §§ 3, 5 (requiring that, when adopting a regulation, an agency demonstrate that "the costs of the regulation do not exceed the benefits that would result from the regulation"); *id.* (requiring that, when adopting a regulation, an agency demonstrate that "the regulation does not unduly and adversely affect . . . customers of the Commonwealth . . .").

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