**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF ENERGY RESOURCES**

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| RPS CLASS I REGULATIONS | : | JULY 26, 2019 |

**COMMENTS OF**
**RETAIL ENERGY SUPPLY ASSOCIATION**
**RE CLASS I RPS RULEMAKING**

The Retail Energy Supply Association ("RESA")[1] hereby submits its comments in response to the Department of Energy Resources' ("Department" or "DOER") rulemaking on 225 C.M.R. 14.00 ("Class I RPS Rulemaking"). 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. Accordingly, RESA and its members have an interest in ensuring that the

[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.

Class I RPS Rulemaking does not have an adverse effect on RESA members, their customers, or the continued success of the retail electric market in Massachusetts.

## BACKGROUND

Pursuant to existing regulations, all retail electricity providers selling electricity to end-use customers in the Commonwealth are required to provide specific minimum percentages of their electricity supply from renewable energy generation sources.[2] On April 5, 2019, the Department issued draft regulations to amend portions of these regulations.[3]

On April 11, 2019, the Department issued a Stakeholder Announcement offering interested stakeholders an opportunity to comment on the Department's proposed amendments to the RPS and APS regulations.[4] RESA now hereby submits its comments regarding the Class I RPS Rulemaking.[5]

## COMMENTS

According to the Stakeholder Announcement:

> The proposed changes to both RPS Class I and II include those required by Chapter 227 of the Acts of 2018, changes made to improve the regulation, streamline requirements, reduce costs, and eliminate unnecessary or onerous provisions as contemplated by Executive Order 562, and other policy related changes that were identified by DOER during its comprehensive review of the existing regulations.[6]

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[2] *See* 225 C.M.R. 14.00 ("Class I RPS"); 225 C.M.R. 15.00 ("Class II RPS"); 225 C.M.R. 16.00 ("APS").

[3] *See* RPS and APS Stakeholder Announcement (Apr. 11, 2019) (available at: https://www.mass.gov/files/documents/2019/05/15/RPS%20and%20APS%20Stakeholder%20Announcement.pdf) (last visited Jul. 25, 2019) ("Stakeholder Announcement"). The Department's proposed changes to the Class I RPS regulations are available at: https://www.mass.gov/files/documents/2019/04/08/225%20CMR%2014.00%20Draft%20RPS%20Class%20I%20REDLINE%20%28030119%29_0.pdf) (last visited Jul. 25, 2019) ("225 Proposed CMR").

[4] Stakeholder Announcement, at 6. The deadline to submit comments was subsequently extended. *See* RPS Class I & II Rulemaking, Public Comment Period Extended (available at: https://www.mass.gov/service-details/rps-class-i-ii-rulemaking) (last visited Jul. 25, 2019).

[5] RESA is also submitting comments separately regarding the Department's proposed amendments to the Class II RPS regulations.

[6] Stakeholder Announcement, at 2.

Pursuant to Executive Order 562, when adopting regulations, the Department should: (a) only address areas in which there is a clear need for intervention that is best addressed by it; (b) use "less restrictive and intrusive alternatives" when available; and (c) "not unduly and adversely affect Massachusetts citizens and customers of the Commonwealth, or the competitive environment in Massachusetts."[7] However, some of the Department's proposed changes to the Class I RPS regulations would not satisfy these standards. Accordingly, as discussed more fully below, RESA requests that the Department modify those provisions before promulgating amendments to the Class I RPS regulations.

## I. THE DEPARTMENT IS NOT AUTHORIZED TO REQUIRE FINANCIAL SECURITY OR TO GRANT ITSELF BROAD ENFORCEMENT AUTHORITY

The Department's proposed changes to the Class I RPS regulations would require competitive suppliers to provide evidence of financial security on an annual basis.[8] As proposed, the financial security requirement would be the greater of $100,000 or 20% of the supplier's estimated gross receipts for its first full year of operation or actual gross receipts for the preceding year of operation for any year after the first year of operation, not to exceed $1 million.[9] The Department would collect the financial security in the event a supplier failed to satisfy its Class I RPS obligations.[10] In the proposed changes to the Class I RPS regulations, the Department also "reserves all rights to take any and all appropriate actions to ensure the collection of all Alternative Compliance Payments owed to ensure annual compliance obligations are fully discharged by a Retail Electricity Supplier . . . ."[11] However, the Department is not empowered to require that suppliers provide financial security, to use that financial

[7] Executive Order No. 562 To Reduce Unnecessary Regulatory Burden (Mar. 31, 2015) ("EO 562"), §§ 3, 5.
[8] 225 Proposed CMR 14.08(4).
[9] *See* 225 Proposed CMR 14.08(4).
[10] *See* 225 Proposed CMR 14.12(5).
[11] 225 Proposed CMR 14.12(7).

security to enforce the Class I RPS regulations, or to otherwise grant itself broad enforcement authority.

As a creature of statute,[12] the Department can act only within the parameters provided by law.[13] The legislature has not authorized the Department to require financial security to ensure a supplier discharges its Class I RPS obligations.[14] Nor has the legislature authorized the Department to grant itself broad enforcement authority over suppliers who fail to meet those obligations.[15] If the legislature had intended to do so, it could have.[16] Thus, the Department does not have the power to require that competitive suppliers post financial security, to use that financial security to enforce the Class I RPS regulations, or to otherwise grant itself broad enforcement authority.[17]

## II. THE PROPOSED FINANCIAL SECURITY REQUIREMENT IS INCONSISTENT WITH 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 ratepayers would be unduly and adversely affected by the requirement. Accordingly, the Department should not require competitive suppliers to post financial security.

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

[13] *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).

[14] *See, generally,* Mass. Gen. Laws Ch. 25A, § 11F.

[15] *See, generally, id.*

[16] *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).

[17] *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).

Each licensed competitive supplier is already required to provide annual documentation to the DPU of its financial capability.[18] 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),[19] which requires demonstration of financial capability.[20] Because these other financial capability requirements already exist, there is not a clear need for intervention into this area by the Department.

Moreover, the Department regulations already provide appropriate mechanisms for enforcement of the Class I RPS regulations, including referral of non-compliant suppliers to the DPU for licensure action.[21] In addition, the DPU has broad enforcement authority over competitive suppliers[22] and has exercised that authority in connection with a supplier's failure to satisfy its RPS obligations.[23] 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*** suppliers even those complying with their obligations. Further, the costs associated with maintaining the financial security would ultimately been borne by ratepayers through higher supplier prices. As a consequence, Massachusetts

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

[19] *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).

[20] *See, generally*, Federal Energy Regulatory Commission Docket # ER 19-444-000, ISO New England Financial Assurance Policy (Effective Date: Jan. 29, 2019).

[21] *See* 225 C.M.R. 14.12.

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

[23] *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).

ratepayers would be unduly and adversely affected by this requirement in contravention of Executive Order 562.[24]

## III. THE DEPARTMENT SHOULD REDUCE RATEPAYER EXPOSURE TO HIGHER PROGRAM COSTS AS MUCH AS POSSIBLE

If, despite the foregoing, the Department still intends to require that suppliers post financial security, it should reduce the amount of the security required to "reduce ratepayer exposure to higher program costs."[25] As proposed, the financial security requirement would be the greater of $100,000 or 20% of the competitive supplier's estimated gross receipts for its first full year of operation or actual gross receipts for the preceding year of operation for any year after the first year of operation, not to exceed $1 million.[26]

These levels are higher than those of other states for security mechanisms designed to ensure compliance with a range of obligations, not just RPS compliance. For example, in Connecticut, the security requirement is set at five percent (5%) of the supplier's annual estimated gross receipts, with a maximum security requirement of $250,000.[27] In order to "reduce ratepayer exposure to higher program costs,"[28] if the Department imposes a financial security percentage and maximum requirement, it should be at percentage and maximum levels less than or comparable to those required in Connecticut.

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[24] EO 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 . . .").

[25] *Cf.* Stakeholder Announcement, at 3.

[26] *See* 225 Proposed CMR 14.08(4).

[27] *See* Conn. Agencies Regs. § 16-245-4(a) ("An electric supplier shall maintain security in an amount that will ensure its financial responsibility and its supply of electricity to end use customers in accordance with contracts, agreements or arrangements. An electric supplier may elect to maintain security in the amount of $250,000 or five per cent of its estimated gross receipts . . . .").

[28] *Cf.* Stakeholder Announcement, at 3.

## IV. THE DEPARTMENT SHOULD PROTECT EXISTING RATEPAYER EXPECTATIONS

The proposed changes to the Class I RPS regulations increase the growth rate for the Class I Minimum Standard percentage per year from 2020-2029.[29] As the Department most certainly appreciates, while the Department's proposed regulatory changes are being considered, the competitive electricity market in the Commonwealth continues to advance and suppliers continue to enter into contractual obligations with customers, often with multi-year terms of service.[30] When entering into these arrangements, suppliers do not take market positions or enter into agreement terms with customers based on the release of proposed regulatory revisions. Rather, since proposed regulatory revisions are subject to change based on legislative considerations as well as the regulatory input process, suppliers take market positions and enter into agreements based only on currently effective 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. Thus, only once the Department officially adopts changes to the Class I RPS regulations will suppliers modify their market positions and/or the terms of their agreements with customers to account for those changes.

Furthermore, when a new 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

[29] *See* 225 Proposed CMR 14.07(1); *see also* Stakeholder Announcement, at 2.

[30] *See*, *e.g.*, Energy Switch Massachusetts website (available at: http://www.energyswitchma.gov) (displaying numerous fixed price offers that extend 12-36 months into the future) (last visited Jul. 25, 2019).

years.[31] While suppliers may have contractual and legal means to address change of law circumstances, these mechanisms will have a direct and immediate financial impact on 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 suppliers to enter into agreements in which they pass through the cost of Class I RPS compliance to customers. However, this type of contracting arrangement is not desirable to many customers, who prefer fixed price contracts in which the risk of price fluctuations is placed on the suppliers, because it does not provide budget certainty.

Accordingly, consistent with its prior practice,[32] RESA requests that the Department create an exemption (subject to suppliers providing appropriate documentation) from the increased Class I Minimum Standard until the expiration of any contracts existing as of the effective date of the regulations instituting that change. In this way, the Department can protect existing ratepayer expectations.

[31] *Cf.* Energy Switch Massachusetts website (available at: http://www.energyswitchma.gov) (displaying numerous fixed price offers that extend 12-36 months into the future) (last visited Jul. 25, 2019).

[32] *See, e.g.*, 225 C.M.R. 14.07(2)(a), (3)(a).

## V. OTHER PROPOSED REVISIONS

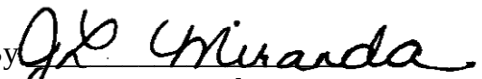
The Department's 225 Proposed CMR 14.07(3)(c) indicates that it contain three subsections.[33] However, only two subsections actually appear under that section of the proposed revision of the Class I RPS regulations.[34] Thus, the Department should correct 225 Proposed CMR 14.07(3)(c). However, if that revision includes the addition of an inadvertently omitted provision, stakeholders should be afforded an opportunity to comment on it.

As a general matter, RESA supports the other changes proposed by the Department. For instance, RESA endorses the Department's proposed deletion of 225 C.M.R. 14.10(2)(c), which would remove certain information from annual RPS reports.[35] RESA appreciates the Department's attempt to streamline those materials.

## CONCLUSION

For all of the foregoing reasons, the Department should modify its proposed changes to the Class I RPS regulations before adopting them as final.

Respectfully submitted,
RETAIL ENERGY SUPPLY ASSOCIATION

By 

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[33] *See* 225 Proposed CMR 14.07(3)(c) ("The following methodologies will be used to calculate the compliance obligations and resulting Minimum Standards that apply to electrical energy sales that were subject to contracts executed or extended prior to certain dates as prescribed in 225 CMR 14.07(3)***(c)1. through 3.***") (emphasis added).

[34] *See, generally*, 225 Proposed CMR 14.07(3)(c).

[35] *See* 225 C.M.R. 14.10(2).