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September 20, 2019

Mark D. Marini, Secretary
Commonwealth of Massachusetts
Department of Public Utilities
One South Station, 5th Floor
Boston, Massachusetts 02110

Re: **D.P.U. 19-07 – Investigation by the Department of Public Utilities on its Own Motion into Initiatives to Promote and Protect Consumer Interests in the Retail Electric Competitive Supply Market**

Dear Mr. Marini:

In connection with the above-referenced matter, enclosed please find Supplier Working Group's Comments Regarding Consumer Advocates' Proposals.

Please do not hesitate to contact me if you have any questions or require additional information. Thank you.

Sincerely,

Joey Lee Miranda

Joey Lee Miranda

Enclosure

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

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

SUPPLIER WORKING GROUP'S COMMENTS REGARDING CONSUMER ADVOCATES' PROPOSALS

Choice Energy, LLC; Direct Energy Services, LLC; Major Energy Electric Services, LLC; Provider Power MASS, LLC; Residents Energy, LLC; the Retail Energy Supply Association ("RESA") [1]; Spark Energy, LLC; Town Square Energy, LLC; Verde Energy USA Massachusetts, LLC (together, the "Supplier Working Group" or "SWG") hereby submit comments in response to the request for comments in the Hearing Officer's August 15, 2019 Memorandum.[2]

COMMENTS

The Supplier Working Group appreciates the Department's Working Group process and supports the continued consideration of proposals for initiatives to improve the retail electric competitive supply market. The collaborative and deliberative process that the Department of Public Utilities ("Department") has established to evaluate issues in this proceeding encourages

[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] *See* Hearing Officer Memorandum (Aug. 15, 2019) ("Memorandum").

the participation of stakeholders with varied and diverse perspectives. To assist in those efforts, the Supplier Working Group hereby submits comments on ways in which the Consumer Advocate Stakeholders' proposals should be modified to reflect competitive marketplace realities and to benefit all stakeholders, in particular, residential customers. The Supplier Working Group encourages the Department to continue to ensure that all stakeholders have a meaningful opportunity to comment on proposals that could impact suppliers, the competitive market, and/or consumers.[3]

I. THE SWG SUPPORTS ENHANCEMENTS TO THE SUPPLIER LICENSING PROCESS

The Consumer Advocate Stakeholders[4] propose that the Department's review of supplier licensing applications (including renewal applications) be publicly docketed with the opportunity for intervention.[5] This proposal is fraught with challenging and practical issues that the Department may well want to bypass entirely. To the extent that the Department is open to changes, at a minimum the SWG strongly recommends that supplier license applications ***not*** be docketed as adjudicatory proceedings under Massachusetts law. Additionally, the SWG would support, if deemed desirable and feasible by the Department, measures to enhance access to public records associated with supplier licensing applications.

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[3] *See, e.g.,* Straw Proposal by Consumer Advocate Stakeholders Regarding Protocol for Competitive Supplier Oversight of their Third-Party Marketing Vendors (Jul. 30, 2019) ("CAS Straw Proposal"), at 1 ("The following straw proposal is not a comprehensive list of all reforms that the consumer advocate stakeholders may support or recommend.").

[4] The Consumer Advocate Stakeholders include the Massachusetts Attorney General and the National Consumer Law Center. *See* CAS Straw Proposal, at 1.

[5] To the extent the Consumer Advocate Stakeholders wish to advance further proposals, the SWG requests that it also have the opportunity to comment on such proposals. *See id.* at 2.

A. Licensing Processes Are Not Considered "Adjudicatory Proceedings" Absent Statutory Authority Not Present Under Existing Law

The Consumer Advocate Stakeholders propose that license applications and renewals should be "publicly" docketed, in part to afford "an opportunity for other parties to intervene in the licensing proceeding."[6] In making that recommendation, the Consumer Advocate Stakeholders imply that the process by which the Department grants or renews a supplier license is an "adjudicatory proceeding" for purposes of the Massachusetts Administrative Procedure Act, M.G.L. c. 30A, § 1(1), to which persons other than the applicant might become a "party."[7] Under Massachusetts law, licensing proceedings are not required to be "adjudicatory proceedings" absent express statutory authority to the contrary.[8] The SWG does not support transforming the longstanding licensing process under Chapter 164 into an adjudicatory proceeding process absent legislative change directing it to do so.

Even if the Department were to consider changing the licensing process into an adjudicatory proceeding process – which the SWG does not support – practical issues would have to be considered before adopting this approach. For example, it is not clear that any person (other than the applicant) would have a sufficient interest in the matter that (s)he could meet the standard for becoming a "party" to such a proceeding. In order to intervene as a party, a petitioner must demonstrate that he or she is, or may be, "substantially and specifically affected" by the proceeding.[9] Over the years, the Department enforced the "substantially and specifically affected" standard, for example, by denying attempts by individual ratepayers to intervene in

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[6] *Id.*

[7] *See* M.G.L. c.30A, § 1(3) (defining a "party" to an "adjudicatory proceeding").

[8] See M.G.L. c. 30A, § 13.

[9] *See* 220 C.M.R. 1.03(1)(b) (A petition for leave to intervene "shall describe the manner in which the petitioner is substantially and specifically affected by the proceeding.").

utility rate cases.[10] While the Attorney General may intervene as of right in adjudicatory proceedings before the Department,[11] that right does not convert a process into an adjudicatory proceeding that otherwise would not be considered one. Thus, it is unlikely that the Department could make the supplier licensing process an adjudicatory proceeding without an act of the Legislature such that the licensing process would become, without doubt, an "adjudicatory proceeding," and would create some class of persons, other than the applicant, who would be allowed to intervene in such proceedings notwithstanding their inability to otherwise meet the "substantially and specifically affected" standard.

This concern is more than mere procedural flyspecking. A supplier's license is the foundation of its business in a state. In Massachusetts, the current process for obtaining and maintaining that foundation that provides the opportunity for retail suppliers to legally conduct business is not adversarial. The Department has a clear standard that an applicant must meet to be granted a license,[12] and the Department's Staff gathers sufficient information to allow it to make an internal recommendation to Department leadership as to whether the applicant meets that standard.[13] The change the Consumer Advocate Stakeholders are proposing—converting all licensing proceedings into an adjudicatory process—would inevitably make those proceedings adversarial. This would have consequences for applicants, who might find themselves being opposed for reasons good and bad (as, for example, by a party who is convinced that no one

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[10] *See Robinson v. Department of Public Utilities*, 416 Mass. 668, 673 (1993) (upholding the denial of a residential customer's intervention request and noting that "a residential customer alleging no peculiar damage to himself has no constitutional or statutory right to participate fully in the proceeding.") (*quoting Attorney Gen. v. Department of Public Utilities*, 390 Mass. 208, 217 (1983) (quotation marks and alterations omitted).

[11] *See* M.G.L. c. 12, § 11E(a).

[12] *See* 220 C.M.R. 11.05(2) (establishing requirements for licensure).

[13] *See* Competitive Supplier License Application for New Applicants ("License Application") (available at: https://www.mass.gov/how-to/apply-for-a-competitive-supplier-or-electricity-broker-license) (last visited Sep. 19, 2019); Competitive Supplier License Application for Renewal ("Renewal Application") (available at: https://www.mass.gov/how-to/renew-a-competitive-supplier-or-electricity-broker-license) (last visited Sep. 19, 2019).

should be allowed to sell competitive electricity outside the context of a municipal aggregation program). In such circumstances, the Department would have to expend a much greater level of resources on matters that are currently handled well at the Department's current staffing levels and which may make it impossible for the Department to timely review and decide pending license applications.[14]

Moreover, it is not clear at all what would be accomplished by this change. The Consumer Advocate Stakeholders have offered no evidence that any consumer issues in the Massachusetts marketplace are the direct result of laxity in granting or renewing licenses. The Department has ample tools to investigate and act upon such issues, either during the next license renewal process or informal or formal investigations of the supplier under the new procedures established in the final Order in Docket 16-156-A (2017). To the extent the Attorney General believes a supplier has engaged in conduct that should result in that supplier's license being suspended or revoked, it already has the authority to seek such a remedy pursuant to M.G.L. c. 164, § 102C(a) and M.G.L. c. 93A, and the regulations promulgated pursuant thereto. The Attorney General need not wait for a supplier's license to come up for renewal to take action.

B. The Licensing Process Is Already "Public"

The Consumer Advocate Stakeholders' claim that creating a "public" licensing process would "allow[] for a public repository of information regarding the supplier and its activity in the Commonwealth and elsewhere."[15] The licensing process is already public. Every government record in Massachusetts is presumed to be public unless it may be withheld under a specifically stated exemption.[16] Documents filed with the Department become public records.[17] The only

[14] 220 C.M.R. 11.05(2)(d) (requiring that the Department approve or reject a completed application within 20 business days).

[15] CAS Straw Proposal, at 2.

[16] *See* M.G.L. c. 4, § 7(26) (defining public records).

exemptions that currently apply to documents filed in connection with a licensing application are those that would continue to apply irrespective of whether the licensing process is converted into adjudicatory proceedings; namely, information granted protective treatment under one of the currently recognized exceptions to public disclosure.[18]

The SWG concedes there is a difference between what is public and what is readily accessible. Any member of the public could, upon request, gain access to all the documents in a supplier's licensing file, except those that have been granted confidential treatment. That request, however, would either have to be made and fulfilled via a public records request, with the person making the request paying for any copies of the documents sought.[19] It is possible to make the supplier licensing process more accessible to the public without fundamentally altering the nature of the supplier licensing process. Thus, if supported by the Department, the SWG would not oppose the Department, subject to existing protections for confidential material,[20] making the public portion of a supplier's application file available online. These files could be collected on the Department's website in the section now used for information about the competitive market.[21]

The Supplier Working Group appreciates the Consumer Advocate Stakeholders' recognition of the Department's existing procedures for protecting confidential information by filing motions for protective treatment.[22] The Consumer Advocate Stakeholders also propose that the Attorney General should receive an unredacted version of any licensing document submitted

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[17] *See* 220 C.M.R. 1.04(5)(e) ("Documents in the possession of the Department are presumed to be public records.").

[18] *See* M.G.L. c. 4, § 7(26) (enumerating exclusions from the definition of "public records").

[19] *See, e.g.*, A Guide to the Massachusetts Public Records Law (Last Updated: January 2017) (available at: https://www.sec.state.ma.us/pre/prepdf/A-Guide-to-Massachusetts-Public-Records-Law-2017-Edition.pdf) (Last Visited: Sep. 20, 2019).

[20] *See, e.g.*, 220 C.M.R. 1.04(5)(e) (establishing procedures for the protection of confidential information).

[21] *See* https://www.mass.gov/competitive-electric-supply (last visited: Sep. 20. 2019).

[22] *See* CAS Straw Proposal, at 3; *see also* 220 C.M.R. 1.04(5)(e).

to the Department subject to a motion for protective treatment.[23] As long as the Attorney General is bound by regulation, order, or agreement to preserve the confidentiality of such documents pending and (if applicable) following resolution of the motion for protective treatment by the Department, the Supplier Working Group does not object to this proposal.

C. Additional Filing Requirements Should Be Tied To The Criteria For Licensing, Which Might Require Further Revisions To The Department's Regulations

The Consumer Advocate Stakeholders also proposed that the Department make the granting or renewal of a license contingent on the filing of a great many documents to be "posted on the public docket on the Department's website."[24] These include:

1. All third-party vendor and/or marketer contracts, including any and all sub-contractors who market on the supplier's behalf. The obligation to provide this information shall be on a rolling basis, but no later than (30) days following the effective date of the contract or the date the contract is fully executed, whichever is earlier.

2. Copies of the supplier's marketing materials (or the vendor's marketing materials, as applicable), including, but not limited to, mailings; online postings/offers; telemarketing scripts; door-to-door marketing scripts; pamphlets/handouts; contract summaries; contract documents; and welcome letters. The supplier should update the marketing materials on a rolling basis, as they become available, but no less than quarterly.

3. Copies of any training materials provided by the supplier or the supplier's third-party marketer to agents conducting marketing and sales campaigns.

4. Copies of the supplier's compliance policy, if applicable.

5. Correspondence informing the Department of any lawsuits (or lack thereof) brought by the supplier's employees or the employees of its third-party vendors; lawsuits brought by the supplier's customers or other consumers who were contacted by the supplier; and any federal or state lawsuits or investigations regarding the supplier, any of its third-party vendors, or any of its corporate officers. The supplier should be required to respond to any

[23] *See* CAS Straw Proposal, at 3.

[24] *Id.* at 2.

> requests by the Department or the Attorney General for additional information concerning the lawsuits and investigations.[25]

The Consumer Advocate Stakeholders also propose requiring the submission of third-party verification ("TPV") vendor contracts as a requirement for licensure and on a rolling basis.[26]

The implementation of these proposals would fundamentally change the nature of the licensing process. The Department should require suppliers to file only information that is actually relevant to the standard for having a license granted or renewed. That standard is set forth in statute.[27]

The Department promulgated regulations implementing this section of the Restructuring Act.[28] The requirements, including any documents required to be submitted, relate to the standard set forth in the statute, as they must. In other words, the Department's current licensing requirements are actionable. If an applicant fails to provide required documents, the Department's authority to take the action of denying the application is clear.

The requirements suggested by the Consumer Advocate Stakeholders would not be actionable, as many of the documents they wish to see filed are not related to the current standard for the granting of a license. Let's take an example. The Consumer Advocate Stakeholders would require a supplier to file "[a]ll third-party vendor and/or marketer contracts" as part of the licensing requirement.[29] There are currently, however, no Department standards for such contracts, other than, perhaps, some over-arching standard (which applies to everything done in the Commonwealth by every business and citizen) of compliance with existing law and

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[25] CAS Straw Proposal, at 2.

[26] *See* CAS Straw Proposal, at 4.

[27] M.G.L. c. 164, § 1F(1)(i).

[28] *See . An Act Relative To Restructuring The Electric Utility Industry In The Commonwealth, Regulating The Provision Of Electricity And Other Services, And Promoting Enhanced Consumer Protections Therein*, St. 1997, c. 164 (1997); *see also* 220 C.M.R. 11.05(2).

[29] CAS Straw Proposal, at 2.

regulation. Within that broad constraint, suppliers are free to engage in a wide variety of arrangements with their vendors and marketers. So what, exactly, would the Department do with vendor and marketer contracts? How would those contracts relate to the criteria set forth in the statute for granting or renewing a supplier license? This is not at all clear and appears administratively burdensome.

The Supplier Working Group does not oppose thoughtful substantive changes to the Department's licensing process, including in a manner that would elevate the importance of a supplier's track record with respect to consumer protection. Any such changes, however, including any new requirements for submitting documents to the Department, should relate directly to the criteria for licensing set forth in the Restructuring Act. Establishing this relationship might require revisions to other parts of the Department's regulations. For example, the Consumer Advocate Stakeholders propose that suppliers be required to provide "[c]opies of the supplier's compliance policy, if applicable"[30] as part of the licensing process. But the Department currently has no standard by which such compliance policies are judged. Without the establishment of such a standard, the Department has no foundation for incorporating its review of compliance policies into the licensing framework set forth in the Restructuring Act.

Nevertheless, if the Department is inclined to require that further documentation be provided with supplier licensing applications to better understand which suppliers are using third-party vendors, the materials used by and policies imposed on such vendors, and the consumer protection history of suppliers, the Supplier Working Group would find it reasonable for a supplier seeking to serve or serving residential customers to be required to include the following in their license application materials: (i) a list of third-party vendors marketing on

[30] CAS Straw Proposal, at 2.

behalf of the supplier and identification of the supplier's TPV provider(s);[31] (ii) copies of the supplier's applicable marketing materials;[32] (iii) copies of applicable supplier training materials;[33] (iv) copies of the compliance policy or code of conduct the supplier provides to third-party vendors and/or marketers; and (v) a statement identifying whether any lawsuits involving claims of fraud, deceptive conduct or violation of consumer protection requirements have been adjudicated adversely against the supplier or any of its directors, officers, or other similar officials.[34] This information would assist the Department in understanding the supplier's relationship with third-party marketing vendors and its record for compliance with consumer protection laws, without significantly modifying the existing licensing applications and processes.[35]

Requiring that this information only be submitted annually as part of the licensing application is also consistent with the current manner in which the Department requires the disclosure or reporting of similar information and conducts its licensing process. For example, the Consumer Advocate Stakeholders would require suppliers to submit marketing materials "on a rolling basis, as they become available, but no less than quarterly."[36] Licenses are currently reviewed and renewed annually.[37] Suppliers are also separately required to submit updates for

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[31] *Cf.* License Application, at Q22; Renewal Application, at Q12. Other states have requirements that suppliers provide a list of their third-party marketing vendors annually. *See, e.g.*, 815-30-05 R.I. Code R. § 2.6(B).

[32] *See* License Application, at Q22, 23; Renewal Application, at Q12, 13.

[33] *See* License Application, at Q24; Renewal Application, at Q14.

[34] *Cf.* License Application, at Q33, 34; Renewal Application, at Q21, 22.

[35] For example, the Consumer Advocate Stakeholders would have the supplier license application require "[c]orrespondence informing the Department of any lawsuits (or lack thereof) brought by the supplier's employees or the employees of its third-party vendors." CAS Straw Proposal, at 2. Such a requirement would cover common litigation between employers and employees (such as litigation related to wages and benefits) that is not relevant to supplier licensing.

[36] CAS Straw Proposal, at 2.

[37] *See* 220 C.M.R. 11.05(2)(d) ("Approved license applications will be valid for one year from the date of approval.").

"any material or organic . . . change" to its license application materials.[38] While requiring suppliers to submit updates may have the same effect as the Consumer Advocate Stakeholders' proposal in some cases, in instances where a supplier has no such changes, the Consumer Advocate Stakeholders' Proposal would force suppliers to make a quarterly filing. Thus, the SWG recommends that the Department reject the Consumer Advocate Stakeholders' proposal and rely on its existing authority to receive updates on application materials during the renewal process and receive information on material corporate changes shortly after they occur.

As noted, suppliers do not oppose moving the licensing process more in the direction of emphasizing consumer protection to the extent such changes are deemed necessary or useful by the Department. Establishing clear standards for some of the items that the Consumer Advocate Stakeholders would like to see suppliers submit as part of the licensing process, and having the Department apply those standards to materials submitted by suppliers, could allow suppliers a safe harbor, which does not appear to be envisioned in the Consumer Advocate Stakeholders' proposal as currently configured. It is one thing to file a compliance plan when there is no clear Department standard for what a compliance plan should contain and no explicit connection between the compliance plan and the standard for being granted or denied a license or license renewal. It is quite another thing to submit a compliance plan that is found to comply with clear standards set forth by the Department, helping to clear the way for the supplier's license application or renewal to be granted and, hopefully, insulating the supplier from later claims the materials submitted were deficient in some manner.

D. The Terms of Supplier Licenses Should Be Extended

One final point should be made about the Consumer Advocate Stakeholders' proposal. First, any changes to the licensing process that increase the burden on those seeking an initial

[38] 220 C.M.R. 11.05(2)(b).

license or a license renewal should be accompanied by a lengthening of the time during which the license is valid. In Massachusetts, licenses expire annually.[39] Other states have longer licensing cycles. In Connecticut, licenses are subject to review every five years.[40] In New York, eligibility to sell electricity at retail lasts for three years.[41] If the licensing process is to become more complex and burdensome, suppliers should not have to go through the full process every year. An annual update informing the Department of material changes since the last review might be appropriate,[42] with full license renewal coming every three to five years.

II. EXISTING REQUIREMENTS ENSURE TRANSPARENCY AND AVAILABILITY OF DOOR-TO-DOOR MARKETING AND TELEMARKETING INFORMATION

As part of their Straw Proposal, the Consumer Advocate Stakeholders offer a section entitled "Transparency and Availability of Door-to-Door Marketing and Telemarketing Information" (the "Transparency Proposal").[43] The first paragraph of the Transparency Proposal recommends that the location of each supplier's door-to-door marketing campaign and contact information for the supplier and any vendors should be made available on the Department's website.[44] The second paragraph of the Transparency Proposal goes on to recommend five separate changes to the current Notice of Door-to-Door Marketing issued by the Department in

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[39] *See* 220 C.M.R. 11.05(2)(d) ("Approved license applications will be valid for one year from the date of approval.").

[40] Conn. Agencies Regs. § 16-245-2(f)(" Any license to supply electricity in this state shall be subject to a periodic review which shall occur every five (5) years after the date on which the license was issued or was last reviewed.").

[41] New York Uniform Business Practices (Feb. 2016) ("UBP"), § 2(D)(2) ("An ESCO shall update all the information it submitted in its original application package to the Department every three years, starting from the date of its eligibility letter . . . .").

[42] *See, e.g.*, UBP, § 2(D)(1).

[43] CAS Straw Proposal, at 3.

[44] *Id.*

May 2018 ("Notice"),[45] with only limited explanations for their proposals.[46] Many of the Transparency Proposal's recommendations are problematic and should not be adopted.

A. Adjustments To The Public Availability Of Marketing Campaign Information Are Not Needed

The Consumer Advocate Stakeholders offer no explanation for the new proposal that suppliers be required to post on a public portion of the Department's website information on the supplier, vendors and municipalities targeted in a marketing campaign other than "so that municipal officials and other authorities have quick and easy access to this information."[47] To the best of the Supplier Working Group's knowledge, not a single utility commission in any other restructured energy state has adopted a similar transparency policy or even considered such a policy. The reason for this absence of precedent should be obvious. Information of this nature posted on the Department's public website would not only be available to "municipal officials and other authorities" but also to all suppliers in the local marketplace, who could use this information for their own competitive purposes. Making the locations of suppliers' marketing campaigns publicly available would reveal their business strategies to their competitors and cause them competitive harm.[48] With respect to another industry, this proposed requirement would be akin to AT&T Mobile, Verizon Wireless, Sprint and T-Mobile having to publicly post its commercially sensitive marketing plans and locational strategies on the Department's website for all competitors to view and assess. Therefore, if the Department is inclined to post certain information related to supplier marketing campaigns on its website, that information should be limited to business contact information for the supplier, disclosure of which would not pose the

[45] *See* D.P.U. 14-140-G (May 4, 2018).

[46] *See* CAS Straw Proposal, at 3.

[47] *See id.*

[48] *Cf.* D.P.U. 14-140-G (May 4, 2018), at 27, 35 (granting a standing protective order for confidential treatment of certain information on the Notice).

severe risk of competitive and commercial harm that disclosure of marketing locations would but would provide "municipal officials and other authorities" information about whom to contact should they have questions or concerns about a supplier's activities.

While it is true that consumers should be protected, this interest must be weighed against a business enterprise's right to keep its business plans and marketing strategies confidential from its competitors. Suppliers are subject to consumer-protective obligations to file Notices with the Department and obtain appropriate permits from local authorities prior to commencing door-to-door marketing activity in a particular location and renew and update such filings on a periodic basis.[49] Department staff can and does use the information in these Notices to respond to questions or complaints from municipalities or consumers. These requirements – which were only adopted just over a year ago, following lengthy and fully adjudicated proceedings before the Department[50] – provide adequate protection for consumers and municipalities and should be maintained absent a compelling showing of changed circumstances since the Department adopted the Notice.

The Consumer Advocate Stakeholders also propose that the Department impose sanctions on suppliers that fail to submit Notices or include false information on such Notices.[51] Failure to comply with a regulatory requirement is a serious matter, and intentionally falsifying reports submitted to the Department is an exceptionally serious matter. Indeed, for this reason, Massachusetts law gives the Department enforcement authority[52] and imposes criminal penalties on those who make false entries on reports "with intent to deceive the department."[53] However, it

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[49] *See* D.P.U. 14-140-G (May 4, 2018), at 13-14.

[50] *See, generally*, DPU 14-140, *Investigation by the Department of Public Utilities on its own Motion into Initiatives to Improve the Retail Electric Competitive Supply Market.*

[51] *See* CAS Straw Proposal, at 3.

[52] *See, e.g.*, M.G.L. c 164, §1F(7); *see, generally*, D.P.U. 16-156-A.

[53] M.G.L. c. 268, § 6.

is important to recognize that a report was not made with intent to deceive the Department just because it contains information that is inaccurate. For example, contact information may be inaccurate because of inadvertent typographical errors, and lists of municipalities in which marketing will occur may disclose municipalities in which a supplier does not ultimately end up marketing for any number of reasons, including changes in marketing strategies. In fact, when it adopted the Notice, the Department specifically recognized that supplier plans may change.[54] Thus, consistent with existing law, the Department should only take action in the event suppliers submit information in the Notice "with intent to deceive the department."[55] There is no need to establish a new rule or policy that duplicates the Department's existing statutory authority to act in cases of intentionally deceptive information.

B. It Is Not Appropriate To Change The Notice Content

The Transparency Proposal also would make five specific changes to the Notice. As a general matter, the Supplier Working Group opposes any changes to this form absent compelling grounds justifying why changes are necessary at this time. The form in question has only been in use for somewhat more than one year and should not be materially modified so soon after its development absent a truly compelling justification that is supported by Department Staff administering the current Notice process. Additionally, many of the changes appear to be either unnecessary or would involve undue extra work on the part of the supplier that would add costs and administrative burdens to the detriment of suppliers with little or no additional benefit to consumers.

[54] *See* D.P.U. 14-140-G (May 4, 2018), at 16.
[55] M.G.L. c. 268, § 6.

For example, the first suggested change is to list at least three contact people for the "Third Party Vendor" instead of one vendor contact.[56] This ignores that the current form requires suppliers to include on the form ***two*** contacts – a supplier contact and a vendor contact, either of whom can be reached in an emergency – and requires a number that could be used in case of issues on nights and weekends. Listing three representatives for the vendor, apparently in addition to the supplier representative, is unnecessary and should not be adopted absent compelling proof that the current reporting scheme is inadequate.

The second suggested change is to attach a copy of a municipal permit to a completed Notice.[57] This would be unduly burdensome and, in some cases, a requirement with which suppliers would be wholly unable to comply before submitting the Notice. For instance, some Massachusetts municipalities require suppliers or their vendors and/or individual marketing representatives to obtain the permit the actual day they are selling, rather than in advance.[58] Furthermore, the Department is not responsible for enforcing the permitting rules of local municipalities and should not participate in that process beyond receiving the certification that such permits have or will be obtained and retaining the ability to investigate the supplier or its vendors for noncompliance. Cities and towns are the appropriate bodies to enforce their own permitting requirements based on applicable municipal ordinance. Thus, the Supplier Working Group requests that the Department maintain the current system, which requires suppliers to

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[56] CAS Straw Proposal, at 3.

[57] *Id.*

[58] For instance, a survey of local solicitation requirements in Massachusetts found that the following municipalities issue permits the day the applicant intends to begin selling, have same-day turn-around for permit processing, or require submission of a list of sales agents to the police department each day: Amherst, Barnstable, Barre, Chelmsford, Eastham, Monterey, North Adams, Northampton, Palmer, Saugus.

certify they or their vendors will obtain required permits before they commence sales in a particular municipality.[59]

The third suggested change is to add zip code information to the Notice.[60] This change again is unaccompanied by supporting reasons and does not appear to be justified by need. For many suppliers, zip codes are not relevant to door-to-door marketing. If a supplier or its vendors organize their campaigns by municipality rather than by zip code, it would add a level of administrative burden to research the zip codes of the areas where their marketing campaigns will be conducted and include that information in their Notices. Nevertheless, if the Department believes it is warranted, the Supplier Working Group would be willing to confidentially report zip code information.

The fourth suggested change is for suppliers to send a copy of all Notices to a representative of the Attorney General.[61] The Department should not adopt this invitation for Attorney General's intervention in a supplier's local marketing campaign absent compelling proof that the current system of notifying the Department on a confidential basis fails to adequately protect consumers and municipalities. Nevertheless, if the Department determines that Notices should be provided to the Attorney General's Office, , the SWG will not oppose such a measure provided that the Attorney General's Office be required to maintain the confidentiality of material that the Department has determined is subject to protective treatment.[62]

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[59] *See* D.P.U. 14-140-G (May 4, 2018), at 15-16.

[60] CAS Straw Proposal, at 3.

[61] *Id.*

[62] *See* D.P.U. 14-140-G (May 4, 2018), at 23-27 (granting a standing order protecting certain information on Notices of door-to-door marketing).

The fifth and final proposed change is to extend the timing of the Notice filing from 5:00 p.m. one day prior to two business days prior to the start of a door-to-door marketing campaign.[63] Once again, this change is unexplained and unjustified, and serves no apparent purpose. Plans for marketing are often set ahead of time but regularly changed based on numerous factors, including the timing of product launches, results-based adjustments to initial marketing plans, changes in the timing and coordination of targeted print or direct mail initiatives, inclement weather, unanticipated absences for issues such as illness, the speed of permit processing by the municipality, and many other factors. These factors make it nearly impossible to accurately predict the location of sales activities days in advance. Thus, the SWG recommends that, absent a compelling reason, the Department not modify the current Notice filing deadline so not to impede the business practices of retail suppliers.

III. THE PROPOSED RECORDING AND RETENTION REQUIREMENTS ARE EXTREMELY ONEROUS WITH LITTLE OR NO CORRESPONDING BENEFIT

The Consumer Advocate Stakeholders propose that "[e]ach interaction between a salesperson and a potential customer or a customer should be recorded," whether the interaction is in-person (i.e., door-to-door) or over the phone (i.e., telemarketing).[64] Under the Consumer Advocate Stakeholders' proposal, "[e]ach potential customer or customer should be asked for permission to record the interaction; if the customer or potential customer refuses, the salesperson must end the conversation but may offer written marketing materials to the customer."[65] Further, the customer or potential customer would be required to be at least eighteen years of age; if not, the salesperson would be required to end the conversation and leave

[63] *Compare* D.P.U. 14-140-G (May 4, 2018), at 27 *with* CAS Straw Proposal, at 3.
[64] CAS Straw Proposal, at 3-4.
[65] CAS Straw Proposal, at 4.

the premises.[66] In addition, the Consumer Advocate Stakeholders suggest that supplier license applications include explanations of the recording equipment or technology to be used, which could be subject to Department approval.[67] Further, if the Consumer Advocate Stakeholders' proposal is adopted, all sales recordings would need to be maintained for a period of five (5) years and identified by the date, time, and address or account number of the customer or potential customer.[68] Pursuant to the CAS Straw Proposal, suppliers that fail to maintain recordings or that fail to provide them on request of the Department or the Attorney General would be subject to licensure review or civil penalties.[69] However, many of these proposals would add significant time and cost to the marketing process with little or no benefit to consumers. Moreover, unlike the electric distribution companies that are generally allowed rate recovery, retail suppliers are required to adsorb these incremental costs in the form of higher prices to end-use customer. Finally, the recording of the sales interaction may be viewed as highly intrusive by some customers, thus negatively impacting the overall sales experience.

A. Suppliers Should Only Be Required To Record Third-Party Verifications

The proposed door-to-door and telesales recording and retention requirements, individually and collectively, are unnecessary, unreasonable, and unprecedented among restructured states, grossly burdensome in terms of costs and time for both suppliers and customers, and fundamentally unfair in relation to other companies subject to the jurisdiction of the Department. For instance, most or all of these extreme recording obligations, including the recording option for door-to-door sales, have not been adopted in other jurisdictions. Further, these new recording and retention requirements impose obligations to record sales conversations

[66] *See id.*
[67] *See id.*
[68] *See id.*
[69] *See id.*

and retain associated recordings that neither the Department nor the Department of Telecommunications and Cable ("DTC"), which oversees the telecommunications and cable industries in Massachusetts, has imposed on other non-utility competitive providers, such as competitive local exchange carriers, cable television companies, and registered natural gas sellers.

Moreover, these requirements are both unnecessary and duplicative of robust consumer protections already available under federal, municipal and additional state law provisions regulating telemarketing and door-to-door marketing.[70] Furthermore, suppliers will incur substantial and disproportionate costs of complying with these many obligations, including equipment costs and associated programming costs, and system development, implementation and testing, data storage, and database management for both door-to-door and telephone sales that will be passed onto consumers in the form of higher prices. In short, the costs and burdens associated with mandatory telesales and door-to-door sales recordings and retention grossly outweigh the potential value of such efforts, especially given the other robust protections afforded to Massachusetts consumers under other applicable state, federal and local laws. Thus, the Department should reject these proposed requirements.

Finally, the mandatory recording of sales transactions also presents potential privacy concerns.[71] Meaningful consent to such recordings, however, can only be obtained after the customer has been educated about the nature of the transaction being offered and has agreed to allow recording as a condition of moving forward and transacting with the supplier.[72] As proposed, however, the Consumer Advocate Stakeholders' proposed changes would require the

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[70] *See, e.g.*, M.G.L. c. 93 § 48; 940 C.M.R. 3.00; M.G.L. c. 159C § 1; 201 C.M.R. 12.01.

[71] *Cf.* CAS Straw Proposal, at 3-4.

[72] *See* M.G.L. c. 272, § 99(B)(4) (requiring that "prior authority" must be given to the recording of a conversation so as not to run afoul of the Massachusetts wiretapping statute).

suppliers to engage in recording even before the customer or potential customer can be told who is making the recording, why such recordings are required by the Commonwealth, and otherwise be meaningfully informed about the purpose of the interaction and the recording of it. The Supplier Working Group believes that customers and potential customers are due respect for their own privacy, that suppliers should not record conversations unless and until customers grant their informed consent, and that such consent is simply not practicable until the conversation reaches the TPV stage. The significant privacy implications associated with the proposed sales recording will almost certainly dissuade some consumers from participating in recorded sales transactions and resulting in the loss of the opportunity of such consumers to choose an energy supply product that best suits their needs. Conversely, by the time that a TPV takes place, the customer will have been told that a recording will occur and has been fully informed about the nature of the transaction and, therefore, can meaningfully consent to the recording of the TPV call. Thus, a requirement that suppliers record and retain TPV calls is more appropriate.

B. The SWG Recommends Changes To The Consumer Advocate Stakeholders' Related Proposals

The Supplier Working Group agrees that suppliers should not attempt to makes sales to children. However, the Consumer Advocate Stakeholders' proposal that a salesperson must end a conversation and leave the premises if the person who answers the door is under eighteen years old[73] goes too far. If a sales person knocks on the door of a residence and a child answers, the salesperson should be permitted to ask if a parent or other adult is present before being required to depart the premises. If no such adult is available, the supplier should then be required to conclude the interaction and depart the premises.

[73] *See* CAS Straw Proposal, at 4.

Further, the Supplier Working Group opposes inquiry into, and approval of, the particular recording equipment that suppliers may use.[74] Ultimately, what matters is that suppliers are able to make any required recordings (e.g., TPV recordings). As long as suppliers can and do make and retain any required recordings, the particular type of technology should be of no moment. Moreover, because technology can change rapidly, requiring that the Department engage in this type of oversight would require considerable effort and resources, including researching and evaluating recording technologies, with no corresponding benefit. Thus, suppliers should not be required to report what recording equipment they are using nor obtain Department approval for such equipment.

Similarly, requiring suppliers to store recordings in a particular way or to identify them with particular information[75] serves no practical benefit. As long as suppliers' recordings are retrievable when needed or requested, there is no need for the Department to prescribe the method by which suppliers identify these recordings and store them in their systems. In fact, doing so, will unnecessarily increase supplier costs, which will ultimately be passed on to customers in the form of higher prices.

IV. TPVS SERVE AN IMPORTANT PURPOSE

The Consumer Advocate Stakeholders make various proposals regarding TPVs. Specifically, the Consumer Advocate Stakeholders propose: (i) certain requirements for the vendors permitted to perform TPVs; (ii) a requirement that TPV vendor contracts be submitted to the Department as a requirement of a supplier's licensure; (iii) a requirement that suppliers

[74] *See id.*

[75] *See id.*

conduct audits of TPVs; and (iv) a requirement that suppliers retain TPV recordings for a period of five years.[76]

The Supplier Working Group is a strong supporter of the TPV. It is an important, effective way of verifying that customers understood the terms of the transaction to which they agreed and confirming customers' affirmative choice to enter into energy supply contracts.[77] For this reason, the Supplier Working Group would support a requirement that all outgoing telemarketing calls (i.e., telesales calls placed by a supplier or its agent to a prospective customer) that produce a sale and all door-to-door sales interactions resulting in a sale be confirmed by a TPV.

The SWG supports the independence of the TPV process. The SWG also supports auditing of TPVs to ensure certain standards have been met. However, the Consumer Advocate Stakeholders' audit requirement would be ineffective and is too amorphous. First, the Consumer Advocate Stakeholders recommend that the audit ensure that the TPV is "independent" as required by law and as the stakeholders propose it be defined; namely, that the vendor's compensation is not tied to success of customer enrollments or retentions and that the vendor is not affiliated with the supplier or marketer.[78] However, an audit of the TPV recording would not reveal either of these items. Moreover, an audit to determine if the TPV is "independent" as required by law is too amorphous a standard. Instead, the SWG recommends that the Department prohibit the sales person from speaking during the TPV or from coaching customers prior to the TPV to answer in a certain way. By implementing these requirements, the Department can

[76] CAS Straw Proposal, at 4.
[77] *See* 220 C.M.R. 11.05(4)(c).
[78] CAS Straw Proposal, at 4.

further ensure the "independence" of the TPV process and provide suppliers with a defined standard that they can implement.

The Consumer Advocate Stakeholders also recommend that the audit confirm that the TPV was "***strictly*** used for the stated purpose."[79] However, this requirement is too narrow and too ambiguous. First, this requirement is too narrow because it would only "confirm the customer's oral authorization to change to a new electricity service provider."[80] The SWG believes that the TPV should also confirm the key terms of the transaction. Thus, it recommends that the Department require that the TPV confirm all of the terms, including the renewal process, that will ultimately be required to be disclosed in the contract summary form being developed in this proceeding.[81] The requirement is also too ambiguous because, under the CAS Straw Proposal, the TPV could "not [be] used as an extension, ***in any way***, of the sales and marketing campaigns."[82] While the SWG agrees that the purpose of the TPV is separate and distinct from the sales and marketing process, this requirement is not well-defined. For instance, would confirming contract details, such as price or term, be considered an "extension" of the sales and marketing campaign? Prohibiting a TPV from doing these things would eviscerate the value of the TPV, which is highest when the TPV confirms the core features of the contract, such as price, term, and options for renewal. Any auditing requirement should not operate as such a prohibition.

In order to facilitate supplier audits of TPVs, as noted above, subject to the requirements of the Massachusetts wiretapping statute,[83] presuming that the customer consents, all TPVs

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[79] *Id.* (emphasis added).

[80] *Id.*

[81] *See* Competitive Supply NOI Technical Session Presentation (Jun. 6, 2019), at Slides 19-21 (discussing disclosure of product information).

[82] CAS Straw Proposal, at 4 (emphasis added).

[83] *See* M.G.L. c. 272, § 99.

should be recorded. However, contrary to the position of the Consumer Advocate Stakeholders,[84] suppliers should only be required to retain these recordings for two (2) years, not five (5) years. A five-year retention period would impose more significant data retention costs on suppliers, and these costs would not be justified by any corresponding benefit. For instance, the potential need to confirm a customer's affirmative choice to enter into a contract is greatest near the start of the contract term, when questions about the transaction are most likely. Once a customer has been served under a contract for two years, there should not be a need to confirm that the customer understood the terms of the transaction or consented to enter into the contract.

The Supplier Working Group welcomes further discussion of TPVs among the stakeholders. Indeed, there are many TPV-related issues that could be discussed productively. For example, the Department may wish to promote the use of an electronic TPV process, which relies on technology, instead of a live operator, to capture the customer's affirmative choice. Use of such technology could obviate concerns about human error and heighten stakeholders' assurance that TPVs are independent.

V. REASONABLE AUDITING REQUIREMENTS ARE APPROPRIATE

The Consumer Advocate Stakeholders propose that each supplier should regularly audit recordings for sales conducted by third-party marketers and that, if such audits reveal that deceptive, false, or misleading information was provided, or that the contract was not signed by the customer of record, the supplier should terminate its agreement with the marketer or agent, void and refund any resulting contracts, and report the incident to the Department and the

[84] *See* CAS Straw Proposal, at 4.

Attorney General.[85] The Consumer Advocate Stakeholders also propose certain actions that the supplier should take to monitor their telemarketing sales agents.[86]

A. Suppliers Should Have Flexibility To Address Issues Identified By Auditing

Conceptually, the Supplier Working Group supports supplier oversight of the activity of their third-party marketers. However, the Consumer Advocate Stakeholders' proposals are in need of modification. First, as discussed above, the Supplier Working Group does not support the recording of telesales calls or door-to-door marketing interactions. Rather, recording should be limited to TPVs. Because recording should limited to TPVs, any audit of recordings necessarily should be restricted to recordings of TPVs.

Further, suppliers should not be required to take action against a sales agent simply because a contract was not signed by the customer of record.[87] In circumstances where an authorized representative of the customer of record, such as a spouse or someone with power of attorney, signs the contract, the supplier should not be required to take action against the sales agent. Moreover, the specific action that the supplier must take against a sales agent should not be prescribed. While terminating contracts with third-party marketers could be appropriate in some circumstances, there could be other circumstances where such drastic actions are not appropriate, such as if a salesperson provided inaccurate information as a result of a simple mistake, especially if that mistake was subsequently corrected or was immaterial. In such circumstances, it may be appropriate for the salesperson to be disciplined in far less drastic ways (e.g., warning, suspension, etc.).

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[85] CAS Straw Proposal, at 5.

[86] *Id.*

[87] *Id.*

Suppliers also should not be required to automatically void any customer contracts. Indeed, the supplier's unilateral voiding of the contract could lead to significant customer dissatisfaction if, notwithstanding the salesperson's inaccurate statement, the customer finds the contract terms attractive. Instead, suppliers should be permitted to contact customers, correct any misstatements and offer each customer the option of deciding whether (s)he wants to void the contract. Similarly, notwithstanding the salesperson's inaccurate statement, the supplier should have the option of choosing to honor the misstated contract term. For instance, if a salesperson told the customer that the contract term was nine months but it was really only six months, suppliers should have the option of deciding to simply honor the nine month contract term.

Moreover, in circumstances in which any inaccurate statements that a salesperson has made can be addressed and resolved swiftly by the supplier to the customer's satisfaction, it should not be necessary for the supplier to report the matter to the Department or to the Attorney General. A reporting requirement, when the supplier has resolved the matter with the customer expeditiously and proactively, would impose an administrative burden on the supplier; however, it would not lead to better outcomes for the customer because the customer already would be fully satisfied.

B. Telemarketing Monitoring

The Consumer Advocate Stakeholders state that suppliers should take various steps to monitor the actions of telemarketing sales agents and identify five specific steps: (i) verifying that each sales call is placed from a phone number that accurately identifies either the supplier or the marketer as the entity placing the call; (ii) terminating any vendor or agent using spoofed phone numbers and notifying appropriate agencies; (iii) voiding and refunding any contracts resulting from spoofed sales calls or other deceptive phone calls; (iv) voiding and refunding any

contracts resulting from illegal phone calls and notifying appropriate agencies; and (v) imposing an automatic penalty on the supplier on whose behalf spoofing occurs.[88]

The Supplier Working Group agrees that a telemarketer's deliberately falsifying the information transmitted to a customer's caller identification system ("Caller ID") display to disguise his or her identity is an egregious practice that should not be tolerated. It is incumbent on all participants in the retail electric supply market take appropriate action to combat spoofing. That said, it is important to recognize that not every instance of the failure of Caller ID to identify the caller accurately constitutes spoofing. For example, while suppliers can control what it is ***transmitted*** to Caller ID, as it stands today, suppliers (and their authorized agents) are not able to control the message ***displayed*** by the local telephone service provider on the customer's Caller ID. Despite reasonable efforts made by suppliers to provide accurate information to their local telephone service provider, the local telephone service provider may not actually display the correct information on the customers Caller ID. This can be caused by a myriad of reasons, including but not limited to, the local telephone service provider not using an updated database of third-party telephone record information and/or the information contained in that third-party database being incorrect. Accordingly, suppliers and their vendors should only be expected to verify that accurate information is transmitted to Caller ID and not be held responsible for, despite this, inaccurate information appearing when the customer receives the information.

The Supplier Working Group agrees that vendors or agents implicated in spoofing should be terminated forthwith. Further, the Supplier Working Group supports appropriate action be taken against suppliers on whose behalf spoofing occurs. However, the penalty should not be "automatic" because, as noted above, spoofing is a deliberate action, and determining whether an

[88] CAS Straw Proposal, at 5.

action is deliberate requires a level of review and analysis. For instance, inaccurate display of Caller ID information as a result of telecommunication provider actions is not spoofing and should not receive the severe response that spoofing warrants.

Apart from spoofing, the Consumer Advocate Stakeholders' concerns about "illegal phone calls" are over-broad. The Consumer Advocate Stakeholders propose responses, comparable to those for spoofing, for telephone calls to phone numbers on the Massachusetts or federal "Do Not Call" lists.[89] However, the mere presence of a phone number on a "Do Not Call" list does not mean that calling that number is improper. For example, under the Massachusetts telemarketing solicitation statute, "unsolicited telephonic sales call[s]" to customers on the applicable "Do Not Call" list are prohibited.[90] An "unsolicited telephonic sales call" is defined as:

> a telephonic sales call ***other than*** a call made: (i) in response to an express written or verbal request of the consumer called; (ii) primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of the call; (iii) to an existing customer unless such customer has stated to the telephone solicitor that such customer no longer wishes to receive the telephonic sales calls of such telephone solicitor; or (iv) in which the sale of goods and services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the telephone solicitor or a meeting between the telephone solicitor and customer.[91]

Thus, to the extent a call to someone on the "Do Not Call" list does not qualify as an "unsolicited telephonic sales call," no action should be taken against the supplier or its vendor and the customer contract resulting from such sale should remain in full force and effect.

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[89] CAS Straw Proposal, at 5.

[90] M.G.L. c. 159C, § 3.

[91] M.G.L. c. 159C, § 1 (emphasis added).

Furthermore, suppliers should not be required to report instances of spoofing or "unsolicited telephonic sales call."[92] First and foremost, Massachusetts law does not provide a basis for the Department's imposition of a mandatory self-reporting requirement. Moreover, these requirements, if adopted, could expose suppliers to near limitless liability. As noted above, whether a particular action constitutes spoofing or an "unsolicited telephonic sales call" is subject to a myriad of factual and legal analyses. Consequently, suppliers will be inherently subject to liability in the event that a representative disagrees with a supplier's determination that such activities occurred. Similarly, requiring a supplier to report conduct that is ultimately found to be without merit could irreparably damage supplier, vendor, and employee reputations. Second, this proposed requirement, if adopted, would represent a significant departure from how the Department treats all other entities subject to its jurisdiction; many of whom rely in whole or part on third-party agents to deliver services to consumers. In fact, the SWG is not aware of any similar self-reporting requirement applicable to the electric distribution companies, natural gas distribution companies, water companies, or natural gas suppliers. Singling out electric suppliers is unreasonable, discriminatory, and unfair.

Moreover, suppliers should not be required to automatically void customer contracts resulting from the inaccurate receipt of Caller ID information or resulting from an unsolicited telephonic sales call. Customers should be given the choice of how to proceed, including being allowed to terminate any contract resulting from activities and to receive a refund for any amounts paid under the contract. However, such customers should be allowed to remain enrolled on these contracts (without receiving refunds) if they so choose.

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[92] *See* CAS Straw Proposal, at 5.

VI. THE CONSUMER ADVOCATE STAKEHOLDERS' PROPOSALS FOR THE RETENTION OF COMPLAINT INFORMATION ARE EXCESSIVE

The final section of the Consumer Advocate Stakeholders' proposal calls for the following requirements for Massachusetts suppliers:

(1) Five-year record retention for complaints and customer inquiries. Suppliers would be required to retain information on all customer complaints and inquiries received by the supplier for a minimum five-year period;

(2) In all retained complaint and inquiry records the third-party marketer should be easily identified;

(3) Mandatory complaint and inquiry log. Suppliers would be required to maintain a log of all customer complaints and inquiries and submit it to the Department and to the Attorney General on an annual basis, along with providing detailed information upon request by the Department, Attorney General, or a municipality; and

(4) Supplier liability for vendor acts. Suppliers would be liable for penalties for violations of proposed regulations by vendors and vendor subcontractors.[93]

All of these recommendations are problematic. Consequently, the Supplier Working Group does not support them.

A. The Proposed Recordkeeping And Retention Requirements For Supplier Internal Complaints And Internal Inquiries Lack Precedent And Cause Burden And Workability Concerns

The Supplier Working Group objects to the proposed recordkeeping obligations relative to supplier customer complaint and inquiry records because the proposed scope of the recordkeeping obligation is too broad and the length of the proposed retention period is too long.

As a threshold matter, the Supplier Working Group objects to any retention requirements involving "inquiries," which, in most cases, do not involve any claim of wrongdoing on the part of the supplier. These are customer interactions with suppliers ***that do not result*** in a complaint filed with the Department. Imposing a retention requirement for inquiries would impose

[93] *See* CAS Straw Proposal, at 5-6.

excessive regulatory burdens with no or minimal consumer benefits. In fact, a lack of complaints with the Department should not be the cause for imposing additional administrative requirements on suppliers, but rather should be commended as it is likely the result of a supplier, in reacting to the pressures of a competitive market, seeking to meet customer expectations and resolve any customer concerns before they rise to the level of a complaint.

In this proceeding, RESA has urged the Department should establish a uniform definition of what qualifies as a complaint.[94] As discussed above, a customer inquiry about a supplier, the price, or terms of service should not be classified as a complaint. Further, certain customer communications that might be referred to colloquially as "complaints" should not constitute complaints for the purposes of regulatory reporting. Thus, the Supplier Working Group opposes the proposal to impose obligations on suppliers' internally-received customer complaints (i.e., complaints that are made simply by the customer's contacting the supplier) and, even more so, on a supplier's customer inquiries. Internal complaints and customer inquiries are standard features of any mass market business, including retail electric supply. Because of this, suppliers, which expend significant financial resources in the form of various sales and marketing channels to acquire customers, are compelled to seek to resolve customer concerns effectively in order to retain the customer. As a result of these efforts, in many cases, internally-received customer complaints can be resolved in a single call, without being escalated into formal complaints with the Department, the Attorney General, or other bodies.

Further, mandated retention of information related to these internal complaints and inquiries would be difficult to administer because it would be difficult for a supplier or a government official to identify which internal complaints or inquiries have any regulatory

[94] Initial Comments of the Retail Energy Supply Association (Mar. 8, 2019).

significance (e.g., it would be unnecessary and burdensome to track on a call-by-call basis inquiries as to the supplier's proper billing address, confirmations of the extent of applicable termination fees, identification of available offers after contract end).

Furthermore, the proposed five-year retention period for regulatory complaints, internal complaints, and internal inquiries is too long. There are cost implications regarding the retention of the information for the proposed extensive period in form of higher prices to customers. In addition, suppliers are unaware of any state that has imposed a five-year retention period on third-party complaints, let alone internal complaints or inquiries. Most are either two years from the date of the complaint or, at most, two years after the customer leaves the supplier's service and are more than adequate to allow for after-the-fact inquiry by regulatory authorities. Balancing these two timeframe options, the Supplier Working Group would regard as reasonable a retention period of three years from the date of the complaint. Moreover, the Supplier Working Group believes the excessive requirement proposed in the Consumer Advocate Stakeholders' straw proposal is inconsistent with the spirit of Governor Baker's Executive Order No. 562 designed to reduce unnecessary regulatory burden in the Commonwealth, explicitly regulations adopted by state government agencies and offices that imposed unnecessary cost, burden and complexity.[95]

Accordingly, to the extent the Department elects to adopt a recordkeeping and retention proposal as part of the instant docket, such requirement (1) should apply only to complaints received by the supplier from third-party authorities, and (2) be set at three years from the date of complaint.

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[95] *Cf.* Exec. Order No. 562 (2015) ("[M]any of the regulations adopted by state government agencies and offices have imposed unnecessary cost, burden and complexity" and "confusing, unnecessary, inconsistent and redundant government regulations inconvenience individuals, . . . inhibit business growth and the creation of jobs, and place Massachusetts for profit enterprises at a competitive disadvantage relative to their out-of-state and foreign competitors.") .

B. The Proposed Requirement For The "Third-Party Marketer" To Be Easily Identified On Each Customer Complaint Or Customer Inquiry Is Unreasonable

Suppliers maintain information as received from third-party complaints, internal customer complaints, and internal inquiries as a matter of business practice and, in some states some records are subject to regulatory requirements. Absent allegations of agent misbehavior, such information received from the customer or gathered by the supplier in responding to the complaint or inquiry typically does not involve the name of any "third-party marketer" involved in the customer's account. The Supplier Working Group suggests that it would be unreasonable and likely unadministrable in practice for suppliers to be forced to amend ***all*** complaint and inquiry records to add in the name of a third-party marketer in the many cases where the vendor's or agent's name is not already incorporated into the records to that point in the ordinary course of business. It also remains ambiguous what the reference to "third-party marketer" means. Does it mean the vendor, the vendor's sales agent, or both? If an individual agent is involved, privacy issues also many be implicated by naming an individual agent on a public record, a complication that further undercuts the benefits of the proposed marketer disclosure rule.

C. The Proposed Complaint And Inquiry Log Is Burdensome And Unnecessary

Suppliers work hard to address customer complaints and inquiries in a manner that supports customer satisfaction and retention, and responding fully to regulatory requests seeking information on any particular complaints. The Supplier Working Group does not see the value in devoting additional scarce resources to create new paperwork to log all third-party complaints, internal customer complaints, and internal inquiries on an across-the-board basis that would be provided on a regular basis to any regulatory agency, let alone both the Department and the

Attorney General. If the Department or the Attorney General has a reasonable basis for seeking particular information about specific complaints, a supplier could provide such information upon request. However, all suppliers should not be required to provide complaint logs every year, "in addition to any other reporting of complaint data,"[96] just because it is possible to contemplate discrete situations in which the Department might be interested in certain complaints.

The Supplier Working Group also objects to the requirements that consumer complaints – not limited to door-to-door sales – involving a particular municipality be available to the municipality upon request. Unless the municipality is afforded access to complaints from telephone, gas utility, electric utility, cable, and satellite companies, as well as Amazon, Door Dash, and other mass market vendors, singling out retail electric suppliers for a special municipal complaint process is inappropriate and unreasonable. Municipalities have the ability to require complaint information when they set parameters for granting permits for certain marketing activity. This permitting process is the appropriate mechanism for municipalities to seek and receive complaint information. Similarly, municipalities could avail themselves of public records requests or the complaint performance data to be made public as a result of the instant proceeding[97] for further information about complaints.

D. No Rules Are Needed To Codify Supplier Obligations For Vendor Actions

Under agency law principles, suppliers are generally responsible for actions committed by vendors retained by them, provided that the vendors and agents or sub-vendors working for such vendors act within the actual or apparent scope of authority. Accordingly, with a well-developed applicable body of law in place, the Supplier Working Group does not see a need for regulatory provisions in this area; however, the Supplier Working Group is willing to review any

[96] CAS Straw Proposal, at 6.

[97] *See* Competitive Supply NOI Technical Session Presentation (Jun. 6, 2019), at Slides 15-18.

specific proposals offered by the Attorney General or consumer groups or the Department. In the context of such a review, it would be appropriate to consider creating "safe-harbor" regulations that would exempt suppliers from regulatory enforcement action for marketing vendor conduct, provided that the suppliers had adhered to specified standards of conduct.

CONCLUSION

The Supplier Working Group appreciates the opportunity to offer these comments in this important proceeding and looks forward to working with the other stakeholders as this proceeding continues to develop.

Respectfully Submitted,

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