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January 22, 2020

Jeffrey R. Gaudiosi, Esq.
Executive Secretary
Public Utilities Regulatory Authority
10 Franklin Square
New Britain, CT 06051

Re: **Docket No. 14-07-20RE01: PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers – Revised Standards**

Dear Mr. Gaudiosi:

Enclosed please find the Written Exceptions of Retail Energy Supply Association to the Public Utilities Regulatory Authority's ("Authority") January 6, 2020 Proposed Final Decision in the above-referenced matter. ***Retail Energy Supply Association requests oral argument.***

I certify that a copy hereof has been sent to all parties and intervenors of record as reflected on the Authority's service list as of this date. A copy has also been filed with the Authority as an electronic web filing and is complete.

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

Thank you.

Sincerely,

JL Miranda

Joey Lee Miranda

Enclosure
Copy to: Service List

DOCKET NO. 14-07-20RE01

PURA DEVELOPMENT AND IMPLEMENTATION OF MARKETING STANDARDS AND SALES PRACTICES BY ELECTRIC SUPPLIERS - REVISED STANDARDS

WRITTEN EXCEPTIONS OF RETAIL ENERGY SUPPLY ASSOCIATION

JANUARY 22, 2020

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PUBLIC UTILITIES REGULATORY AUTHORITY

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	:	JANUARY 22, 2020

WRITTEN EXCEPTIONS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1] hereby submits its Written Exceptions in response to the Public Utilities Regulatory Authority's ("Authority" or "PURA") January 6, 2020 Proposed Final Decision ("Proposed Decision") in the above-referenced docket.[2] ***RESA requests oral argument***.

BACKGROUND

In 2014, the Connecticut General Assembly passed Public Act 14-75, *An Act Concerning Electric Customer Consumer Protection* ("Public Act 14-75"). Section 4 of Public Act 14-75 required, *inter alia*, that the Authority "initiate a contested proceeding to develop and implement, or cause to be implemented, standards relating to abusive switching practices, solicitations and renewals by electric suppliers, the hiring and training of sales representatives, door-to-door sales and telemarketing practices by electric suppliers."[3] In response to this statutory requirement, 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.

[2] Proposed Final Decision (Jan. 6, 2020).

[3] The relevant provisions of Section 4 of Public Act 14-75 have now been codified at Connecticut General Statutes section 16-245o(*l*)(2).

Authority opened the original phase of this proceeding[4] and, on February 4, 2015, issued a Decision adopting certain Electric Supplier Standards (the "Original Standards") and a disclosure statement.[5]

On March 19, 2015, the Office of Consumer Counsel ("OCC") and several electric suppliers jointly moved to reopen the docket "for the limited purpose of accepting, approving and implementing" certain mutually-agreed-upon proposed revisions to the Original Standards (the "Supplier/OCC Revised Standards") and to stay the Original Standards during the Authority's consideration of the motion to reopen.[6] In response to the motion, the Authority agreed to reopen the docket but declined to adopt the Supplier/OCC Revised Standards without "testimony in support of suggestions as to how the Standards may or should be updated, improved and or streamlined" and "input as to the most appropriate vehicle (e.g., periodic reopeners, or Supplier Working Group) to accommodate and implement any necessary future changes to the Standards."[7]

On May 8, 2015, in response to a request from the Authority,[8] a group consisting of various individual electric suppliers and RESA (together, the "Supplier Group") offered pre-filed testimony in support of the Supplier/OCC Revised Standards.[9] In response to specific questions asked by the Authority in notices dated October 28, 2016[10] and February 21, 2017,[11] Supplier

[4] *See, generally*, Docket No. 14-07-20, *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers* ("Docket No. 14-07-20").

[5] *See, generally*, Docket No. 14-07-20, Decision (Feb. 4, 2015) ("Docket No. 14-07-20 Decision").

[6] *See* Docket No. 14-07-20, Motion No. 9 (Mar. 19, 2015).

[7] *See* Docket No. 14-07-20, Motion No. 9 Ruling (Mar. 26, 2015). In a separate ruling, PURA confirmed that the Original Standards were stayed pending a final decision in this docket. *See* Motion No. 1 Ruling (Apr. 15, 2015).

[8] Notice of Request for Written Comments (Apr. 8, 2015).

[9] *See, generally*, Pre-Filed Testimony (May 8, 2015) ("May 2015 Testimony").

[10] Notice of Request for Written Comments (Oct. 28, 2016).

[11] Second Notice of Request for Written Comments (Feb. 21, 2017).

Group witnesses offered further pre-filed testimony.[12] On June 7, 2017, the Authority released proposed revisions to the Original Standards (the "2017 Proposed PURA Revisions") and solicited comments and testimony from parties.[13] The Supplier Group responded by, once again, submitting pre-filed testimony.[14] No other participant in this proceeding submitted pre-filed testimony.[15]

On July 24, 2017, the Authority conducted an evidentiary hearing at which witnesses for the Supplier Group and a witness for The Connecticut Light and Power Company d/b/a Eversource Energy ("Eversource") testified.[16] No other participant offered testimony at the hearing.[17] The Authority subsequently received late filed exhibits.[18] Thereafter, the Supplier Group, Eversource, the OCC, and the Attorney General ("AG") filed briefs[19] and reply briefs.[20] On October 25, 2017, the OCC filed a notice of supplemental authority to which RESA responded on November 6, 2017.[21]

On January 6, 2020, the Authority issued the Proposed Decision.[22] Appended as Exhibit B to the Proposed Decision were revisions to the 2017 Proposed PURA Revisions (the

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[12] *See, generally,* Additional and Updated Pre-Filed Testimony (Dec. 19, 2016) ("December 2016 Testimony"); Second Additional and Updated Pre-Filed Testimony (Mar. 7, 2017) ("March 2017 Testimony").

[13] Notice of Request for Written Comments and Hearing (Jun. 7, 2017).

[14] *See, generally,* Pre-Filed Testimony Regarding the June 7, 2017 Proposed Revisions to the Revised Marketing Standards (Jun. 30, 2017) ("June 2017 Testimony").

[15] *See, generally,* Record.

[16] *See, generally,* Hearing Transcript ("Tr.").

[17] *Id.*

[18] *See* Late Filed Exhibit No. 1 (Aug. 14, 2017); Late Filed Exhibit No. 2 (Aug. 24, 2017).

[19] *See* Brief of George Jepsen, Attorney General of the State of Connecticut (Oct. 11, 2017); Brief of the Office of Consumer Counsel (Oct. 11, 2017); Brief of the Supplier Group (Oct. 11, 2017); Brief of The Connecticut Light and Power Company d/b/a Eversource Energy (Oct. 11, 2017).

[20] *See* Reply Brief of George Jepsen, Attorney General of the State of Connecticut (Oct. 18, 2017); Reply Brief of the Office of Consumer Counsel (Oct. 18, 2017); Reply Brief of the Supplier Group (Oct. 18, 2017); Reply Brief of The Connecticut Light and Power Company d/b/a Eversource Energy (Oct. 18, 2017).

[21] *See* Office of Consumer Counsel's Notice of Supplemental Authority (Oct. 25, 2017); Retail Energy Supply Association Response to Notice of Supplemental Authority (Nov. 6, 2017).

[22] *See* Proposed Decision.

"2020 Proposed PURA Revisions").[23] RESA now hereby files its written exceptions to the Proposed Decision and requests that the Authority modify the Proposed Decision, including the 2020 Proposed PURA Revisions, as set forth herein before issuing a final decision.

ARGUMENT

The unrefuted evidence in the record supports the Authority's adoption of the Supplier/OCC Revised Standards. If, despite this, the Authority concludes that revisions to the Supplier/OCC Revised Standards are in order, the Authority should only make revisions that are supported by evidence on the record, clarify the applicability of those standards, and modify the 2020 Proposed PURA Revisions as set forth herein before issuing a final decision.

I. THE AUTHORITY'S DECISIONS MUST BE BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD

As the Authority is aware, it is subject to the Uniform Administrative Procedures Act.[24] As a consequence, in a contested case, such as the instant docket,[25] the Authority must afford all parties the UAPA's procedural protections.[26] Similarly, the Authority must follow the UAPA's requirements in reaching its final decision.[27] Among other things, the final decision must be

[23] *See* Proposed Decision.

[24] *See* Conn. Gen. Stat. § 4-166 *et seq.* ("UAPA").

[25] *See* Conn. Gen. Stat. § 16-245o(*l*)(2) (requiring that the Authority "initiate a ***contested*** proceeding to develop and implement, or cause to be implemented, standards relating to abusive switching practices, solicitations and renewals by electric suppliers, the hiring and training of sales representatives, door-to-door sales and telemarketing practices by electric suppliers.") (emphasis added); *see also* Proposed Decision, at 1, 2, 3 n.3 (acknowledging that the instant docket is a contested case).

[26] *See, e.g.*, Conn. Gen. Stat. § 4-177c(a) (providing for the presentation of evidence and the cross-examination of witnesses).

[27] *See* Conn. Gen. Stat. § 4-180 (setting requirements for agency final decisions).

based on substantial evidence,[28] in the record,[29] and must include findings of fact and conclusions of law necessary to it.[30]

Nevertheless, many aspects of the Proposed Decision are ***not based on any evidence*** in the record. For example, aspects of the Proposed Decision are supported only by material that is ***not*** in the evidentiary record in the instant proceeding.[31] Similarly, other aspects of the Proposed Decision are based on events that occurred ***after*** the July 24, 2017 evidentiary hearing.[32] Consequently, the participants in this proceeding, including RESA, were deprived of the statutory right to offer evidence on the material on which the Authority relied to reach its decision.[33] Further, the 2020 Proposed PURA Revisions contain additional and revised provisions that were not considered during the evidentiary phase of this proceeding.[34] As a

[28] *See* Conn. Gen. Stat. § 4-183(j) (An agency decision can be found to be clearly erroneous if it is not supported by "reliable, probative, and substantial evidence on the whole record."); *Bialowas v. Comm'r of Motor Vehicles*, 44 Conn. App. 702, 708-09 (1997).

[29] *See* Conn. Gen. Stat. § 4-180(c).

[30] *See id.* ("A final decision in a contested case shall be in writing or orally stated on the record and, if adverse to a party, shall include the agency's findings of fact and conclusions of law necessary to its decision, including the specific provisions of the general statutes or of regulations adopted by the agency upon which the agency bases its decision.").

[31] *See, e.g.*, Proposed Decision, at 5 ("[T]he technology to make and the ability to store digital recordings is becoming less expensive as computer technology progresses . . . ."); *id.* at 5 n.6 (stating that "Liberty Power, LLC [sic] and Town Square Energy Inc. record door-to-door marketing"). Further, while Liberty Power Delaware, LLC and Liberty Power Holdings, LLC are licensed electric suppliers, RESA is not aware of an entity called "Liberty Power, LLC" licensed as an electric supplier in Connecticut.

[32] *See, e.g.*, Proposed Decision, at 3 (indicating that the Authority "has amassed a wealth of experience and knowledge of supplier marketing practices" "between the last submission in this docket and this Decision"); *id.* (citing findings in investigations closed in 2019); *id.* at 5 (same); *id.* (citing electric supplier notices of customer assignments provided in 2019); *id.* at 10 (Finding of Fact 3) (same); *id.* at 6 (citing 2019 findings that "suppliers are not directly training their third-party agents pursuant to statutory requirements"); *id.* at 8 (citing 2019 finding about "a pattern of marketing violations").

[33] *See* Conn. Gen. Stat. § 4-177c(a) (providing for the presentation of evidence and the cross-examination of witnesses).

[34] *Compare* 2020 Proposed PURA Revisions *with* 2017 Proposed PURA Revisions. For example, the 2020 Proposed PURA Revisions contain additional definitions, marketing content requirements, and third-party verification ("TPV") elements not contained in the 2017 PURA Revisions.

consequence, the participants in this proceeding, including RESA, were deprived of the statutory right to offer evidence on those standards.[35]

Moreover, some aspects of the Proposed Decision are based on written comments submitted in the instant proceeding.[36] However, as the Supplier Group noted in its brief,[37] comments do not constitute "evidence."[38] According to the Proposed Decision, the Authority finds this argument "confusing" because, "[i]f written comments could not factor into the Authority's decision, there would be no purpose in presenting the straw proposal and seeking written comments."[39] However, RESA finds this confusing.

First and foremost, by statute, the Authority was required to conduct this proceeding as a contested case.[40] Thus, the Authority was aware that, pursuant to the UAPA, it must have substantial evidence on the record to support its decision.[41] In fact, the Authority specifically declined to adopt the Supplier/OCC Revised Standards without "***testimony*** in support of suggestions as to how the Standards may or should be updated, improved and or streamlined."[42] Second, the participants were not required to respond to the request for comments in the form of comments; they could have, as the Supplier Group did, submitted testimony, which they did not

[35] *See* Conn. Gen. Stat. § 4-177c(a) (providing for the presentation of evidence and the cross-examination of witnesses).

[36] *See* Proposed Decision, at 2 n.2.

[37] *See, e.g.*, Brief of the Supplier Group (Oct. 11, 2017), at 7 n.41, 9 n.52, 27 n.135.

[38] Docket No. 14-07-20, Motion No. 4 Ruling ("Written Comments are not evidence . . . .").

[39] Proposed Decision, at 2.

[40] *See* Conn. Gen. Stat. § 16-245o(*l*)(2) (requiring that the Authority "initiate a ***contested*** proceeding to develop and implement, or cause to be implemented, standards relating to abusive switching practices, solicitations and renewals by electric suppliers, the hiring and training of sales representatives, door-to-door sales and telemarketing practices by electric suppliers.") (emphasis added).

[41] *See* Conn. Gen. Stat. § 4-183(j) (An agency decision can be found to be clearly erroneous if it is not supported by "reliable, probative, and substantial evidence on the whole record."); *Bialowas v. Comm'r of Motor Vehicles*, 44 Conn. App. 702, 708-09 (1997).

[42] *See* Docket No. 14-07-20, Motion No. 9 Ruling (Mar. 26, 2015). In a separate ruling, PURA confirmed that the Original Standards were stayed pending a final decision in this docket. *See* Motion No. 1 Ruling (Apr. 15, 2015).

do.[43] Third, even if they submitted written comments, the other participants could have presented witnesses and adopted those comments as testimony, which they did not do.[44] As a consequence, participants, including RESA, were denied their statutory right to cross-examine the materials on which the Authority now intends to rely for its decision.[45] Finally, the fact that the Supplier Group did not object to any written comments[46] is irrelevant. The Authority frequently accepts public comment during the course of contested cases.[47] However, it was not until the Proposed Decision was issued, the Supplier Group, including RESA, had any reason to believe that the Authority would disregard the requirements of the UAPA[48] or its prior practice and attempt to improperly rely on those comments as evidence to support its decision.

Throughout the Proposed Decision, citing Connecticut General Statutes section 4-178(8), the Authority also attempts to rely on its knowledge and experience to supports its findings and conclusions.[49] However, the Authority cannot remedy the lack of evidence supporting the Proposed Decision, including the 2020 Proposed PURA Standards, by relying on its experience and knowledge. Connecticut General Statutes section 4-178(8) empowers the Authority to use its "experience, technical competence, and specialized knowledge may be used ***in the evaluation of the evidence***."[50] It does not authorize the Authority to use such experience, technical

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[43] *See* May 2015 Testimony; December 2016 Testimony; March 2017 Testimony; June 2017 Testimony.

[44] *See, generally*, Tr.

[45] *See* Conn. Gen. Stat. § 4-178(5) (authorizing cross-examination "required for a full and true disclosure of the facts").

[46] Proposed Decision, at 2 ("Furthermore, as Eversource indicates in its reply brief, the Supplier Group did not object to any written comment when it was filed and cannot be heard to object now.") (*citing* Reply Brief of the Connecticut Light and Power Company d/b/a Eversource Energy, p. 4).

[47] *See, generally, e.g.*, Docket No. 17-10-46, *Application of The Connecticut Light and Power Company d/b/a Eversource Energy to Amend its Rate Schedules.*

[48] *See* Docket No. 14-07-20, Motion No. 4 Ruling ("Written Comments are not evidence . . . .").

[49] *See* Proposed Decision, at 3 ("[T]he Authority uses this knowledge and experience in evaluating the evidence on the record in this docket . . . .); *see also id.* at 5, 6, 7, 8, 10.

[50] *See* Conn. Gen. Stat. § 4-178(8) ("In contested cases . . . the agency's experience, technical competence, and specialized knowledge may be used ***in the evaluation of the evidence***.") (emphasis added).

competence, and specialized knowledge as a substitute for actual evidence.[51] In fact, if the Authority were allowed to do so, Connecticut General Statutes section 4-178(6), which allows the Authority, after notice and an opportunity to contest the material,[52] to take notice of "judicially cognizable facts and of generally recognized technical or scientific facts within the [Authority]'s specified knowledge,"[53] would be unnecessary. However, the Authority did not do so in the instant proceeding.[54] Thus, once again, participants, including RESA, were deprived of their statutory rights under the UAPA[55] and denied fundamental fairness in the conduct of this proceeding.[56]

Moreover, the Authority cannot rely on experience that does not exist. According to the Proposed Decision, "experience has proven" that the Supplier/OCC Revised Standards do not offer sufficient customer protections.[57] However, the Supplier/OCC Revised Standards were ***never*** implemented.[58] In fact, the Authority specifically declined to adopt the Supplier/OCC

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[51] *Accord Deangelis v. Commissioner of Motor Vehicles*, 15 Conn. L. Rptr. 248, No. CV 94 070 50 86, 1995 WL 527382 (Conn. Supp. Ct. Aug. 23, 1995), at *4 ("[I]n a [Connecticut General Statutes section 4-178] subsection (8) situation, the agency members are using their special qualifications to evaluate matters that ***have been formally admitted as evidence*** in the record.") (emphasis added).

[52] *See* Conn. Gen. Stat. §4-178(7) (providing that "parties shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed"); *see also* Conn. Agencies Regs. § 16-1-38(e) ("The commissioners may take notice of generally recognized technical or scientific facts within the Authority's specialized knowledge. Parties shall be afforded an opportunity to contest the material so noticed by being notified before or during the hearing, by an appropriate reference in preliminary reports or otherwise of the material noticed."); *Deangelis v. Commissioner of Motor Vehicles*, 15 Conn. L. Rptr. 248, No. CV 94 070 50 86, 1995 WL 527382 (Conn. Supp. Ct. Aug. 23, 1995), at *3 (recognizing "[t]he requirement that the agency notify a party in advance of its proposed use of specific scientific or technological facts within its specialized knowledge . . . .").

[53] Conn. Gen. Stat. §4-178(6).

[54] *See, generally*, Record.

[55] *See* Conn. Gen. Stat. §4-178(7) (providing that "parties shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed").

[56] *See Deangelis v. Commissioner of Motor Vehicles*, 15 Conn. L. Rptr. 248, No. CV 94 070 50 86, 1995 WL 527382 (Conn. Supp. Ct. Aug. 23, 1995), at *3 ("The requirement that the agency notify a party in advance of its proposed use of specific scientific or technological facts within its specialized knowledge is based on principles of fundamental fairness.").

[57] Proposed Decision, at 3.

[58] *See, generally*, Record.

Revised Standards without "testimony in support of suggestions as to how the Standards may or should be updated, improved and or streamlined."[59] Because the Supplier/OCC Revised Standards were never implemented, there is no experience about how they would have functioned on which to base a conclusion about their sufficiency in practice. Conversely, the evidence actually in the record in the instant proceeding demonstrates that the Supplier/OCC Revised Standards are reasonable and workable and should be adopted.[60]

Because the "reliable, probative, and substantial evidence on the whole record"[61] does not support the 2020 Proposed PURA Revisions, the Authority should not adopt them. The evidence in the record[62] actually support the Authority's adoption of the Supplier/OCC Revised Standards.[63] Accordingly, the Authority should adopt them.

II. THE AUTHORITY SHOULD CLARIFY THE APPLICABILITY OF THE STANDARDS

The 2020 Proposed PURA Revisions are applicable to "all residential customers unless indicated otherwise" therein.[64] RESA appreciates the Authority's limitation of the applicability of the standards to those customers who could most benefit. However, it would be clearer if the Authority either expressly indicated when a provision applied to commercial customers or specified to which customer class(es) each particular standard applies. For instance, pursuant to the 2020 Proposed PURA Revisions, "Electric Suppliers must send all enrollments to the electric distribution company (EDC) within seven (7) business days after the date of the sales transaction

[59] *See* Docket No. 14-07-20, Motion No. 9 Ruling (Mar. 26, 2015). In a separate ruling, PURA confirmed that the Original Standards were stayed pending a final decision in this docket. *See* Motion No. 1 Ruling (Apr. 15, 2015).

[60] *See, e.g.*, March 2017 Testimony, at 3.

[61] Conn. Gen. Stat. § 4-183(j) (An agency decision can be found to be clearly erroneous if it is not supported by "reliable, probative, and substantial evidence on the whole record.").

[62] *See* May 2015 Testimony; December 2016 Testimony; March 2017 Testimony; June 2017 Testimony; Tr.

[63] *See, e.g.*, March 2017 Testimony, at 3.

[64] 2020 Proposed PURA Revisions, at 2 (§ A).

in which the customer requests to enroll."[65] This provision could be interpreted in two different ways: (1) as applying all residential enrollments; or (2) as applying to all enrollments no matter the customer class. Thus, in order to avoid confusion with this and other provisions, RESA requests that the Authority clarify the customer class(es) to which particular standard applies. In doing so, RESA also requests that, consistent with the Original Standards[66] and Connecticut General Statutes section 16-245o,[67] the Authority clarify that, to the extent a standard applies to commercial customers, it only applies to customers with less than 100 kW demand.

III. THE AUTHORITY SHOULD REVISE CERTAIN DEFINITIONS IN THE 2020 PROPOSED PURA REVISIONS

The 2020 Proposed PURA Revisions would define "all inclusive" to mean "a price that includes all generation-related costs or charges and that no other charges or costs can be added."[68] This definition is potentially ambiguous because it could be read to represent a change from current practice in which an "all-inclusive" price does not include separate fees, such as enrollment fees.[69] Notably, the definition of "offer" in the 2020 Proposed PURA Revisions contemplates the generation products containing "all-inclusive" rates as well as cancellation fees and enrollment fees.[70] To avoid the risk of an ambiguity, the Authority should revise the

[65] 2020 Proposed PURA Revisions, at 3 (§ C.2).

[66] *See* Docket No. 14-07-20 Decision, at 5.

[67] *See* Conn. Gen. Stat. § 16-245o(h)(2) (setting requirements for certain "sales and solicitations of electric generation services by an electric supplier, aggregator or agent of an electric supplier or aggregator to a customer with a maximum demand of one hundred kilowatts or less").

[68] 2020 Proposed PURA Revisions, at 2 (§ A.).

[69] *See* Docket No. 07-05-33, *DPUC Administration of Disclosure Label Requirements and Examination of Direct Billing by Electric Suppliers*, Decision (Feb. 27, 2008), at 6 (defining "all-inclusive"); *id.* at 9 (recognizing the prospect of enrollment and cancellation fees even for "all-inclusive" offerings).

[70] *See* 2020 Proposed PURA Revisions, at 2 (§A.) ("'Offer' means the information provided to consumers for each generation product or record displayed on the Rate Board. This information includes, but is not limited to, the applicable EDC tariff and customer class, term in billing cycles, ***all-inclusive rate***, ***cancellation fee***, ***enrollment fee***, restrictions and other product specific information included in a proposal made by a supplier that will create a binding contract if accepted by the customer to whom it is made.") (emphasis added).

definition of "all inclusive" to recognize that, even under an all-inclusive offer, a customer may be subject to certain charges or fees.

The 2020 Proposed PURA Revisions would define "offer" to mean "the information provided to consumers for each generation product or record displayed on the Rate Board."[71] This information would include, without limitation, "the applicable EDC tariff and customer class, term in billing cycles, all-inclusive rate, cancellation fee, enrollment fee, restrictions and other product specific information included in a proposal made by a supplier that will create a binding contract if accepted by the customer to whom it is made."[72] The Authority should clarify that "other product specific information" does not include the electric supplier's complete terms and conditions of service or that the complete terms and conditions of service need not be listed on the Rate Board. Listing electric suppliers' complete terms and conditions of service on the Rate Board has the potential to distract from the clear presentation of information. Instead, customers should be directed to electric supplier websites, which are linked to the Rate Board,[73] for the complete terms and conditions of service.[74]

IV. ELECTRIC SUPPLIERS SHOULD BE ALLOWED TO PROCESS ENROLLMENTS AT FUTURE TIMES AGREED TO BY CUSTOMERS

The 2020 Proposed PURA Revisions would require electric suppliers to send enrollments to the electric distribution companies ("EDCs") within seven (7) business days.[75] However, the

[71] 2020 Proposed PURA Revisions, at 2 (§A.).

[72] *Id*.

[73] *See* Connecticut Rate Board, https://www.energizect.com/compare-energy-suppliers (providing links to supplier websites for enrollment) (last visited Jan. 21, 2020).

[74] *See* Docket No. 13-07-18, *PURA Establishment of Rules for Electric Suppliers and Electric Distribution Companies Concerning Operations and Marketing in the Electric Retail Market*, Decision (Nov. 5, 2014), at 12 ("The [supplier] website must also list and provide information concerning all generally available offers, renewable products and information about the source of renewable energy (e.g., RECs), ***standard contracts***, and enrollment forms.") (emphasis added).

[75] 2020 Proposed PURA Revisions, at 3 (§ B.2.).

evidence in the record establishes that some customers choose future enrollment dates in order to, among other things, lock in future, favorable pricing arrangements and/or avoid paying early termination fees ("ETFs") to their current suppliers.[76] Customers should not be deprived of this option. Thus, while RESA does not object to a general rule that requires electric suppliers to submit customer enrollments within a certain time period, an exception should be permitted to address situations where the customer has requested that service start at a date in the future.

In a competitive market environment, this customer-driven arrangement is relatively common, as some customers seize the opportunity to secure an advantageous future supply arrangement.[77] Such arrangements would not be possible if the electric supplier is obligated to submit all enrollments within a defined time period.[78] For instance, a customer may enroll with an electric supplier in a specific product with pricing that is not effective until some set date in the future.[79] To ensure the customer receives the offer that the customer has requested, the enrollment is held until the date that offer is effective.[80] A customer may also specifically request that the enrollment be held for some period of time to ensure that the customer does not incur an ETF by enrolling with a new electric supplier before the customer's current contract expires.[81] While allowing enrollments at set future times provides value to all customers,[82] it is particularly important for commercial customers.[83] Commercial customers, especially those using significant

[76] *See* June 2017 Testimony, at 6-7; Tr., at 23-24.

[77] June 2017 Testimony, at 6-7.

[78] *Id.* at 7.

[79] *Id*.

[80] *Id*.

[81] *Id.*; *see also* Tr., at 21-22.

[82] The 2020 Proposed PURA Revisions "apply to all residential customer unless indicated otherwise [t]herein." 2020 Proposed PURA Revisions, at 2 (§ A). However, the enrollment processing standard appears to apply to "all enrollments." 2020 Proposed PURA Revisions, at 3 (§ B.2.).

[83] *Cf.* Tr., at 22 (observing that enrolling at set future times "probably is more common with larger commercial customers").

volumes of energy, avail themselves of options to enroll at set future times more often than other customers.[84] Customers should not be denied the ability to continue to do so. Thus, the Authority should permit enrollments to be submitted at a date in the future when the customer agrees to such an arrangement.

V. THE AUTHORITY SHOULD NOT IMPOSE A SELF-REPORTING REQUIREMENT

The Proposed Decision would require electric suppliers to report to the Authority "deceptive trade practices" by independent representatives.[85] However, Connecticut law does not provide a basis for the Authority's imposition of a mandatory self-reporting requirement. Moreover, these requirements, if adopted, would expose suppliers to near limitless liability.

A. The Authority Is Not Empowered To Impose A Self-Reporting Requirement

The Authority is a creature of statute.[86] As such, it is bound by the specific powers given to it by its authorizing statute.[87] The Connecticut Supreme Court has long held that "the power of an administrative agency to prescribe rules and regulations under a statue is not the power to make law, but only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute."[88] Moreover, the intent of the legislature is to be found in the meaning of the words of the statute; that is, in what the legislature actually ***did*** say, not in what it ***meant*** to say."[89] Indeed, "it is a well-settled principle of statutory construction that the legislature

[84] *See id.*

[85] Proposed Decision, at 3-5; 2020 Proposed PURA Revisions, at 3 (§ B.4.).

[86] Conn. Gen. Stat. § 16-2(a).

[87] *Waterbury v. Comm'n on Human Rights & Opportunities*, 160 Conn. 226, 230-31 (1971) ("It is clear that an administrative body must act strictly within its statutory authority . . . . It cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power.") (internal citations omitted).

[88] *Salmon Brook Convalescent Home v. Commission on Hospitals & Health Care*, 177 Conn. 356, 363 (1979).

[89] *Doe v. Manson*, 183 Conn. 183, 186 (1981) (citations omitted) (emphasis added).

knows how to convey its intent expressly or to use broader or limiting terms when it chooses to do so."[90]

Connecticut General Statutes section 16-245o(*l*)(2) authorizes the Authority to establish standards. Neither subsection (*l*) nor Connecticut General Statutes section 16-245o generally authorize the Authority to impose mandatory self-reporting requirements on electric suppliers regarding the conduct of their independent representatives.[91] In fact, if the General Assembly had intended to give the Authority that power it knew how to do so[92] and would have done so expressly.[93] Since the legislature did not give the Authority the power to require self-reporting, the Authority cannot convey such authority upon itself.[94] Accordingly, the mandatory self-reporting requirements should be removed from the 2020 Proposed PURA Revisions.

B. A Self-Reporting Requirement Is Inappropriate

Even if the Authority had the power to impose the self-reporting requirement (which RESA disputes), the unrefuted evidence[95] in this proceeding establishes that adoption of this requirement would be inappropriate.

1. What Constitutes A Deceptive Trade Practice Is Subject To Interpretation

First, what constitutes a "deceptive trade practice" could be disputed and, thus, subject to varying forms of interpretation. Electric suppliers and the Authority could disagree about

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[90] *Perry v. Perry*, 312 Conn. 600, 624 (2014) (internal quotations and citations omitted).

[91] *See, generally*, Conn. Gen. Stat. § 16-245o.

[92] *See, e.g.*, Conn. Gen. Stat. § 16-245o(h)(5) (requiring that suppliers report certain information regarding voluntary renewable product offerings to the Authority).

[93] *Manson*, 183 Conn. at 186; *Perry*, 312 Conn. at 624.

[94] *Waterbury*, 160 Conn. at 230-31.

[95] While the OCC submitted comments supporting mandatory reporting and recommending revisions to PURA's proposal, it did not offer a witness or testimony in this proceeding. Thus, those comments cannot support the Authority's decision in this proceeding. Conn. Gen. Stat. § 4-183(j) (An agency decision can be found to be clearly erroneous if it is not supported by "reliable, probative, and substantial evidence on the whole record."); Docket No. 14-07-20, Motion No. 4 Ruling ("Written Comments are not evidence . . . .").

whether a particular event constitutes a "deceptive trade practice." In fact, this has occurred in investigations cited in the Proposed Decision. For example, in Docket No. 06-12-07RE07, Liberty Power Holdings, LLC argued, on the basis of correspondence issued by the Department of Public Utility Control,[96] that electric suppliers did not have an obligation to disclose Standard Service rates.[97] In its decision in that docket, however, the Authority concluded that Liberty Power Holdings, LLC had "incorrectly interpret[ed]" the Department of Public Utility Control's correspondence and found that Liberty Power Holdings, LLC had violated Connecticut General Statutes section 16-245o(h)(3) by not disclosing the EDCs' Standard Service rates.[98] Further, the Authority observed that Liberty Power Holdings, LLC "should have sought clarification" from the Authority if it had been "unclear" of the statutory requirements.[99] It is possible that other circumstances could arise in which an electric supplier and the Authority have different views about whether conduct constitutes a "deceptive trade practice." In such a situation, the electric supplier would not report it because it would not regard the conduct as constituting a "deceptive trade practice," but the Authority might, nevertheless, expect the conduct to be reported as a "deceptive trade practice." This potential for divergent views could expose electric suppliers to liability for failure to report conduct that they reasonably deem permissible within Connecticut

[96] Docket No. 99-03-36, *DPUC Determination of The Connecticut Light and Power Company's Standard Offer*, and Docket No. 99-03-35, *DPUC Determination of The United Illuminating Company's Standard Offer*, Department of Public Utility Control correspondence (Jul. 6, 2000), at 2 ("Because this subsection [Conn. Gen. Stat. § 16-245o(f)] serves to provide full disclosure of all charges a customer would be subject to, rather than serving as a comparison for shopping against the standard offer, disclosure of the standard offer electric generation services charge is not necessary for this purpose, and therefore should be omitted from the average current charge calculations.").

[97] Docket No. 06-12-07RE07, *Application of Liberty Power Holdings, LLC for an Electric Supplier License – Review of Allegations of Consumer Protection Violations*, Brief of Liberty Power Holdings, LLC, (Dec. 20, 2018) at 71.

[98] *See* Docket No. 06-12-07RE07, *Application of Liberty Power Holdings, LLC for an Electric Supplier License – Review of Allegations of Consumer Protection Violations*, Decision (Jul. 31, 2019), at 15.

[99] Docket No. 06-12-07RE07, *Application of Liberty Power Holdings, LLC for an Electric Supplier License – Review of Allegations of Consumer Protection Violations*, Decision (Jul. 31, 2019), at 15.

law and regulation.[100] To avoid exposing electric suppliers to such liability, the Authority should remove the self-reporting requirement from the 2020 Proposed PURA Revisions.

Further, electric suppliers would be also subject to liability in the event that a representative disagrees with an electric supplier's determination of non-compliance or deceptive conduct.[101] For example, the 2020 Proposed PURA Revisions would require electric suppliers and their independent representatives to record telephone conversations.[102] Failure to abide by this requirement could be deemed "deceptive conduct." However, a person is guilty of eavesdropping, which is a class D felony, when (s)he unlawfully engages in wiretapping or mechanical overhearing of a conversation.[103] Thus, requiring an electric supplier to report such conduct could expose it, its employees, and its vendors and their employees to potential criminal charges that, even if ultimately found to be without merit, could lead to irreparable damage to the supplier, vendor and/or employee reputations.[104] Rather than expose electric suppliers to such liability, the Authority should remove the self-reporting requirement from the 2020 Proposed PURA Revisions.

2. Other Entities Subject To The Authority's Jurisdiction Are Not Subject To Comparable Requirements

Second, this proposed requirement, if adopted, would represent a significant departure from how the Authority treats all other entities subject to its jurisdiction; many of which rely in

[100] *See* Conn. Gen. Stat. § 16-41(a) (authorizing the Authority to impose civil penalties of up to $10,000 per violation for failure to comply with Authority orders).

[101] *See, e.g.*, June 2017 Testimony, at 11-12.

[102] 2020 Proposed PURA Revisions, at 11 (§ H.) (requiring suppliers and their independent representatives to record telephone conversations).

[103] Conn. Gen. Stat. § 53a-189; *see also* Conn. Gen. Stat. § 52-570d(a) ("No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment . . . is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party . . . .").

[104] *See* June 2017 Testimony, at 12.

whole or part on third-party agents to deliver services to consumers. In fact, RESA is not aware of any similar self-reporting requirement applicable to registered natural gas sellers, competitive local exchange carriers or cable television companies.[105] Singling out retail suppliers is unreasonable, discriminatory and unfair.[106]

The Proposed Decision concluded that electric suppliers are not singled out for self-reporting because various "utilities" are subject to certain reporting requirements, including accident reporting.[107] First and foremost, electric suppliers are not "utilities" a/k/a public service companies. Connecticut General Statutes section 16-1 defines "public service company" as "includ[ing] electric distribution, gas, telephone, pipeline, sewage, water and community antenna television companies and holders of a certificate of cable franchise authority, owning, leasing, maintaining, operating, managing or controlling plants or parts of plants or equipment, but . . . not includ[ing] towns, cities, boroughs, any municipal corporation or department thereof, whether separately incorporated or not, a private power producer, as defined in section 16-243b, or an exempt wholesale generator, as defined in 15 USC 79z-5a."[108] This definition does not include electric suppliers or other similar competitive entities, such as natural gas sellers.[109] Second, the Authority does not impose similar self-reporting requirements on those competitive entities who also engage in sales and marketing activity similar to that of electric suppliers. Third, the accident self-reporting requirements are not comparable to the self-reporting requirement contained in the 2020 Proposed PURA Revisions. Fundamentally, accident-

[105] *See* June 2017 Testimony, at 12.

[106] June 2017 Testimony, at 12.

[107] *See* Proposed Decision, at 4.

[108] Conn. Gen. Stat. § 16-1(3).

[109] *See* Conn. Gen. Stat. § 16-1(23)(F) (excluding "electric supplier" from the definition of "electric distribution company"; Conn. Gen. Stat. § 16-258a(a) (indicating that natural gas sellers are not "gas companies" and therefore not "public service companies").

reporting requirements are generally applicable ***statutory*** requirements imposed on all public service companies and all electric suppliers.[110] Thus, the Authority has been given specific power by the General Assembly to require such reporting. Further, the statutory accident-reporting requirements are different from the self-reporting requirement in the 2020 Proposed PURA Revisions. They distinguish "minor accidents" from other accidents and impose more limited reporting requirements on "minor accidents."[111] Moreover, unlike "deceptive conduct," the occurrence of an accident, is not inherently a potential violation of law, regulation, or an order of the Authority.[112]

3. Complying With The Self-Reporting Provisions Of The 2020 Proposed PURA Revisions Would Be Unduly Burdensome

Pursuant to the 2020 Proposed PURA Revisions, in the instance of "deceptive conduct," electric suppliers would be required to notify the Authority within ten (10) business days of discovery and submit a detailed description of the incident, the investigation, and planned resolution.[113] This proposed requirement is burdensome and would not afford adequate time for the supplier to investigate, confirm and, if necessary, correct the conduct internally prior to submitting a mandatory filing to the Authority.[114] Moreover, a focus on mandatory reporting

[110] Conn. Gen. Stat. § 16-16; *see also* Conn. Gen. Stat. § 16-1(a)(3) (listing the entities encompassed within the term "public service company").

[111] Conn. Gen. Stat. § 16-16.

[112] *Compare* Conn. Gen. Stat. § 16-245o(h)(4), (k) (subjecting electric suppliers to sanctions for deceptive practices) *with* Conn. Gen. Stat. § 16-16 (requiring public service companies and electric suppliers to report certain accidents to the Authority).

[113] 2020 Proposed PURA Revisions, at 3 (§ B.4.).

[114] *Cf.* June 2017 Testimony, at 13 (discussing the burdens of complying with a self-reporting requirement within a five-business-day timeframe).

would require commitment of resources and expertise that could otherwise be focused on working directly to remedy suspected deceptive conduct.[115]

4. A Voluntary Self-Reporting Option Is Preferable To A Mandatory Self-Reporting Requirement

If despite the foregoing, the Authority determines that there would be value in electric supplier self-reporting, the Authority should adopt a reporting construct like that of the Department of Energy and Environmental Protection ("DEEP"), which encourages ***voluntary*** discovery, reporting, disclosure, correction and prevention of violations of applicable law and regulations.[116] The Authority's adoption of such a model would likewise encourage voluntary self-policing while preserving fair and effective enforcement and, concurrently, avoid the prospect of the Authority overstepping the bounds of its legislative authority,[117] subjecting suppliers to potential liability, and potentially, improperly tarnishing the reputation of suppliers, employees and/or contractors.

VI. THE AUTHORITY SHOULD NOT REQUIRE ELECTRIC SUPPLIERS TO RECORD SALES TRANSACTIONS

The Proposed Decision would require electric suppliers to record the entirety of all telesales calls and door-to-door marketing lasting ten (10) seconds or longer with residential or potential residential customers.[118] Further, electric suppliers would be required to retain those

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[115] *Id.* During the hearing, Staff suggested the prospect of providing suppliers with either thirty days to report discovered deceptive conduct or of requiring suppliers to report such conduct on a monthly basis. Tr., at 60-61. If the Authority maintains the mandatory reporting requirement, a thirty-day or monthly-based reporting would provide suppliers with more time to investigate and correct the conduct internally prior to submitting a mandatory filing to the Authority. Allowing sufficient time for investigation will also reduce the potential for liability from suppliers reporting conduct that is, ultimately, determined not to be deceptive.

[116] DEEP Policy on Incentives for Self-Policing, available at: http://www.ct.gov/deep/lib/deep/enforcement/policies/incentivesforselfpolicingpolicy.pdf (last visited Jan. 21, 2020).

[117] June 2017 Testimony, at 13; Tr., at 60-64.

[118] *See* Proposed Decision, at 5; 2020 Proposed PURA Revisions, at 11 (§ H.).

recordings for three years.[119] These requirements are unnecessary, unreasonable, and grossly burdensome in terms of costs and time for both suppliers and customers, and fundamentally unfair in relation to other similarly situated companies subject to the Authority's jurisdiction.[120]

The uncontroverted evidence in this proceeding[121] establishes that such recordkeeping requirements: (1) impose obligations to record sales conversations and retain associated recordings that the Authority has not imposed on other competitive providers such as competitive local exchange carriers, cable television companies and registered natural gas sellers;[122] (2) are both unnecessary and duplicative of robust Authority, Connecticut Unfair Trade Practices Act ("CUTPA"), Home Solicitation Sales Act, federal, municipal and additional state law provisions regulating telemarketing and door-to-door sales and marketing efforts;[123] (3) impose "substantial and disproportionate" costs of compliance, including recording device costs and associated programming costs for door-to-door sales 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;[124] (4) have not been adopted in other jurisdictions;[125] and (5) will almost certainly dissuade some consumers from participating in recorded door-to-door sales transactions.[126] In short, while RESA

[119] *See* Proposed Decision, at 5; 2020 Proposed PURA Revisions, at 11 (§ H.).

[120] See June 2017 Testimony, at 40.

[121] While the OCC submitted comments supporting these new requirements and recommending revisions, it did not offer a witness or testimony in this proceeding. Thus, those comments cannot support the Authority's decision in this proceeding. Conn. Gen. Stat. § 4-183(j) (An agency decision can be found to be clearly erroneous if it is not supported by "reliable, probative, and substantial evidence on the whole record."); Docket No. 14-07-20, Motion No. 4 Ruling ("Written Comments are not evidence . . . .").

[122] June 2017 Testimony, at 40-41. Indeed, even a distribution company monopoly, such as Eversource, with full rights to seek cost recovery in a rate proceeding, only retains recordings for a two-year period. See Response to LFE-002.

[123] June 2017 Testimony, at 42-47.

[124] June 2017 Testimony, at 47-48.

[125] June 2017 Testimony, at 47.

[126] June 2017 Testimony, at 48-50.

appreciates the Authority's desire to enhance transparency with respect to the sales and marketing practices of electric suppliers in the State, the costs and burdens associated with mandatory recordings and three years of record retention for door-to-door and telemarketing sales grossly outweigh the "limited value produced from the availability of such records,"[127] especially given the other robust protections afforded to Connecticut consumers under applicable state, federal and local laws.[128]

First and foremost, these new recordkeeping requirements would represent a significant departure from how the Authority treats other competitive entities subject to its jurisdiction. For instance, RESA is not aware of any similar requirements applicable to registered natural gas sellers, competitive local exchange carriers or cable television companies to record sales activities and maintain full records available for possible access by the Authority.[129] Contrary to the Proposed Decision,[130] comparison of the obligations that the Proposed Decision would place on electric suppliers to the obligations imposed on these entities are apt because all of these entities engage in sales and marketing activity like electric suppliers.[131] Thus, imposing additional requirements on electric suppliers—when these requirements are not imposed on registered natural gas sellers, competitive local exchange carriers or cable television companies—is not appropriate.

Second, the Connecticut General Statues already include numerous standards regarding supplier marketing practices.[132] In addition to the standards specifically related to solicitations

[127] June 2017 Testimony, at 47.
[128] *See* June 2017 Testimony, at 40-50.
[129] June 2017 Testimony, at 41.
[130] *See* Proposed Decision, at 5.
[131] *Cf., e.g.*, Conn. Gen. Stat. §§ 16-256i, 16-258a.
[132] *See, e.g.,* Conn. Gen. Stat. § 16-245o.

for electric generation service, electric suppliers are also subject to various other legal requirements applicable to solicitations more generally. For instance, as a condition of continued licensure, electric suppliers are required to comply with CUTPA and its applicable regulations.[133] The regulations promulgated pursuant to CUTPA include specific requirements related to, *inter alia,* guarantees,[134] comparison price advertising,[135] misleading advertising,[136] bait and switch,[137] and offer conditions.[138] All electric suppliers engaged in telesales are also explicitly required to comply with the federal telemarketing regulations.[139] The Connecticut General Statutes also contain an entire chapter dedicated to telemarketing[140] that imposes a host of obligations on entities engaged in such activities, including electric suppliers, and provides that violations of those requirements "shall be an unfair or deceptive act or practice."[141] The Connecticut General Statutes also include provisions related to the use and maintenance of "Do Not Call" lists[142] and regarding unsolicited telephone messages and recording of telephone conversations.[143] Once a customer agrees to enroll with a supplier, the third party verification process[144] and subsequent provision of the written terms and conditions applicable to the offer to which the customer agreed[145] provide further protections to consumers.

[133] Conn. Gen. Stat. § 16-245(g).
[134] *See* Conn. Agencies Regs. §§ 42-110b-1 through 42-110b-8.
[135] *See* Conn. Agencies Regs. §§ 42-110b-9a through 42-110b-15.
[136] *See* Conn. Agencies Regs. § 42-110b-18.
[137] *See* Conn. Agencies Regs. § 42-110b-20.
[138] *See* Conn. Agencies Regs. § 42-110b-22.
[139] Conn. Gen. Stat. § 16-245o(i).
[140] *See* Conn. Gen. Stat. § 42-284 *et seq.*
[141] Conn. Gen. Stat. § 42-288.
[142] Conn. Gen. Stat. § 42-288a.
[143] Conn. Gen. Stat. § 52-570d.
[144] *See* Conn. Gen. Stat. § 16-245o(f)(2); Conn. Gen. Stat. § 16-245s.
[145] Conn. Gen. Stat. § 16-245o(f)(2).

In addition to the numerous standards applicable to the sale of electric generation service and to sales generally, in Connecticut, the Home Solicitation Sales Act also governs door-to-door sales and imposes numerous obligations on entities engaged in such sales, including requirements related to contracts, notices of cancellation, and customer rights and supplier responsibilities upon cancellation.[146] In addition to the general requirements set forth in the Home Solicitation Sales Act, Title 16 also includes standards regarding door-to-door sales by electric suppliers.[147] Thus, there are already significant protections afforded to customers who are solicited through door-to-door sales and telemarketing.

Third, the costs of these requirements, which would ultimately be borne by customers, would be substantial and disproportionate when compared to the limited value produced from the availability of such records. The potential costs of this requirement would include the costs of system development, implementation and testing, data storage, and database management.[148] These costs could be exorbitant for a supplier that has a robust telesales channel.[149] Moreover, for door-to-door sales, the recordings to be made require the purchase of some type of recording device. The cost of requiring every supplier to equip every door-to-door marketing representative with such devices will further increase costs[150] and those costs will ultimately be passed onto ratepayers in the form of higher prices with little (if any) corresponding benefit.[151] Furthermore, since recordings for any given sales transaction may need to be provided to the Authority on

[146] *See, generally*, Conn. Gen. Stat. § 42-134a *et seq*.

[147] Conn. Gen. Stat. § 16-245o(h)(2).

[148] *Cf.* June 2017 Testimony, at 47 (discussing the costs of comparable recordkeeping requirements in the 2017 Proposed PURA Revisions).

[149] *Cf.* June 2017 Testimony, at 47 (discussing the costs of comparable recordkeeping requirements in the 2017 Proposed PURA Revisions).

[150] *Cf.* June 2017 Testimony, at 47 (discussing the costs of equipping door-to-door sales agents with tablets for marketing recording purposes).

[151] June 2017 Testimony, at 47.

short notice, electric suppliers could not simply warehouse digital recordings of the sales calls.[152] Instead, the sales calls would need to be catalogued and tagged by several different factors (customer name, address, account number, or other information), and be placed somewhere where they are quickly retrievable.[153] Decisions as to how to set this system up to delete the recordings no earlier than three years after they are collected in a manner consistent with internal document retention polices will require significant time and attention from multiple resources.[154] All of these functions cost money, whether from internal information technology upgrades to human time transcribing and tagging to hiring various outside vendors.[155] Moreover, these costs will be unnecessarily exacerbated by the requirement that the entirety of all telesales calls and door-to-door marketing interactions lasting ***ten (10) seconds*** or longer with residential consumers be recorded.[156] Because of the numerous disclosures that would be required at the beginning of a transaction,[157] this ten-second period will likely result in the retention of all or nearly all, transactions. Thus, if the Authority requires recording of transactions, it should only require the retention of interactions lasting one minute or longer. Setting a one-minute threshold will prevent electric suppliers from being subject to costly data retention requirements for marketing interactions that did not proceed past the introductory phase; costs that will ultimately be borne by customers in the form of higher prices.[158] Although the Proposed Decision found that "technology to make and the ability to store digital recordings is becoming less expensive,"

[152] *See* 2020 Proposed PURA Revisions, at 11 (§ I) (requiring electric suppliers to respond to Authority inquiries regarding complaints within three business days); *see also* June 2017 Testimony, at 48.

[153] *See* June 2017 Testimony, at 48.

[154] *See* June 2017 Testimony, at 48.

[155] *See* June 2017 Testimony, at 48.

[156] *See* 2020 Proposed PURA Revisions, at 11 (§ H).

[157] *See* 2020 Proposed PURA Revisions, at 7 (§ E.3.), 9 (§ F.3.) (requiring disclosure of the name of the supplier, the purpose of the interaction, and the fact that the supplier does not represent and is not affiliated with an EDC at the beginning of a sales interaction).

[158] *See* June 2017 Testimony, at 48.

that "suppliers have become accustomed to recording and storing sales calls,"[159] there is no evidence in the record to support these conclusions.[160]

Finally, the mandatory recording of sales transactions also presents potential privacy concerns. Many consumers would find door-to-door agents with recording devices on their persons to be extraordinarily invasive and not justified by the engagement. Consumers who worry that these devices may unintentionally capture the most private elements of their home will disengage with a supplier agent once a recording disclosure occurs. These personal privacy concerns are real and recording door-to-door sales could present far reaching consequences to individual consumers depending on what happens to be captured on the recording. These matters are highly sensitive and a customer's desire not to be recorded at his or her doorstep ought not to limit consumer access to supplier offers or the channels through which those offers are presented. Unlike telemarketing customers, door-to-door customers do not have the opportunity to "mute" background conversations. However, that cannot occur during a door-to-door transaction.[161] Because the 2020 Proposed PURA Revisions require that the "entirety" of the transaction be recorded,[162] the only option would be for customers to discontinue sales transactions - resulting in customer frustration because they are unable to complete a transaction that they otherwise might wish to complete. Nevertheless, the Proposed Decision found that recording of door-to-door transactions was appropriate because "[i]n the Authority's experience" telemarketing and door-to-door marketing "equally are likely to experience marketing

[159] Proposed Decision, at 5

[160] *See, generally*, Record; *see supra* Section I.

[161] June 2017 Testimony, at 49.

[162] 2020 Proposed PURA Revisions, at 11 (§ H.).

violations."[163] However, any such experience of the Authority is not in the record.[164] Accordingly, it may not be relied upon as the basis for the Authority's final decision.[165]

VII. THE TPV RECORDING RETENTION REQUIREMENT SHOULD BE CONSISTENT WITH THE STATUTORY REQUIREMENT

The 2020 Proposed PURA Revisions would require that any TPV must be retained for three years after the date of such TPV recordings.[166] However, Connecticut General Statutes section 16-245o(f)(2) requires that TPVs be retained for two years after the expiration of the contract.[167] The Authority does not have the power to modify this requirement.[168]

Moreover, imposing different retention requirements based on two disparate starting points will increase the administrative burden associated with tracking when TPVs no longer need to be retained and the likelihood of inadvertent noncompliance. The additional administrative burden will impose additional costs on electric suppliers, which costs customers ultimately will bear through higher electric supply prices.[169] Additionally, inadvertent noncompliance could expose suppliers to significant penalties.[170] Accordingly, the Authority should rely on the statutory TPV retention requirement and not impose an additional retention requirement in its final standards.

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[163] Proposed Decision, at 5.

[164] *See, generally*, Record.

[165] *See* Conn. Gen. Stat. 4-180(c).

[166] *See* 2020 Proposed PURA Revisions, at 11 (§ H).

[167] *See* Conn. Gen. Stat. § 16-245o(f)(2) ("Each electric supplier . . . maintain records of such . . . consent to service for a period of not less than two years from the date of expiration of such contract, which records shall be provided to the authority or the customer upon request.")

[168] *Salmon Brook Convalescent Home v. Commission on Hospitals & Health Care*, 177 Conn. 356, 363 (1979) ("the power of an administrative agency to prescribe rules and regulations under a statue is not the power to make law, but only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute.").

[169] *Cf.* June 2017 Testimony, at 48 (observing that electric suppliers will pass recordkeeping costs along to customers).

[170] *See* Conn. Gen. Stat. § 16-41(a) (authorizing the Authority to impose civil penalties of up to $10,000 per violation for failure to comply with Title 16 and Authority orders).

VIII. THE ASSIGNMENT NOTICE REQUIREMENTS ARE UNREASONABLE

The Proposed Decision would establish certain standards for the assignment of customers from one electric supplier to another.[171] The Proposed Decision characterizes its conclusions as an attempt "to balance the concerns of both the Supplier Group and the OCC."[172] However, the Proposed Decision would lengthen the required notice period for an assignment to ninety (90) days.[173] This notice period is significantly longer than the sixty-day notice period in the 2017 Proposed PURA Revisions.[174] However, the evidence in the record demonstrates that a sixty-day notice period before an assignment of customers is unreasonably long.[175] Nevertheless, the Authority adopted a ***longer*** notice period, which is even more unreasonable.

As a general matter, the customer assignment provisions have been a matter of key concern to electric suppliers throughout the original proceeding and this reopened docket. Policies favoring assignability of contracts are well established in Connecticut law for good reason.[176] Electric suppliers with the market focus and organizational skills to succeed in Connecticut often seek to pursue opportunities to acquire customers or assets to enhance such success.[177] Conversely, those electric suppliers whose business models are working better in other restructured states, are seeking to exit the industry entirely, or are facing financial difficulties, often seek to reach sales and assignment agreements with growth-oriented suppliers.[178] Regulatory requirements that unnecessarily impede assignments raise concerns that

[171] *See* Proposed Decision, at 5-6; 2020 Proposed PURA Revisions, at 4 (§ B.5.).
[172] Proposed Decision, at 6.
[173] Proposed Decision, at 6.
[174] *See* 2017 Proposed PURA Revisions, at § B.6.
[175] *See* June 2017 Testimony, at 17-18.
[176] June 2017 Testimony, at 15.
[177] June 2017 Testimony, at 15.
[178] June 2017 Testimony, at 15.

suppliers cannot either grow or exit as circumstances require and will operate to discourage suppliers from investing in Connecticut in the first place or risk harm to themselves and, potentially, their customers if regulatory limitations impede them from exiting.[179] To address these critical concerns, the Supplier/OCC Revised Standards proposed important changes to the "Assignment of Customers" section in the Original Standards, including: (1) modifying what the Supplier Group viewed as unreasonable and anti-competitive introductory text language; (2) shortening the advance notice to the Authority of a proposed assignment transaction from 60 days to a more commercially reasonable 45-day period or less; and (3) establishing an expedited Authority review and notice regime for exigent circumstances, such as a distressed sale or bankruptcy.[180] The Supplier/OCC Revised Standards, including these changes to the assignment provisions, were supported by both the supplier community and the OCC.[181] Subsequently, the Supplier Group provided detailed testimony explaining the key bases for these revisions.[182] No party presented evidence to the contrary.[183]

[179] June 2017 Testimony, at 15, 16.

[180] June 2017 Testimony, at 16 (*citing* Supplier/OCC Revised Standards, at § B(5)). In such cases, without relief on the time line, a distressed company may not be able to wait a full 45 or 60-day review period and will fail; thereby harming the company and disrupting their customers, who will be effectively "slammed" to Standard Service notwithstanding their expressed preference for a competitive alternative. The proposed revised exigent circumstances language still required "commercially reasonable" notice to both the Authority and the customers, and included a special provision for customers to terminate the contract with the new supplier shortly after completion of such expedited assignment process without incurring a contractual ETF.

[181] *See, generally*, Docket No. 14-07-20, Motion to Reopen of Various Electric Suppliers and the Office Of Consumer Counsel (Mar. 19, 2015).

[182] May 2015 Testimony, at 6-9.

[183] *See, generally*, Record.

A. A Ninety-Day Notice Period Is Unnecessary And Overly Burdensome

Without citing any evidentiary or legal support for doing so,[184] the Proposed Decision would impose a ninety-day notice period.[185] A ninety-day notice period is unreasonable and unwise and risks impeding customer-beneficial assignment transactions. The information required to be filed with the Authority is straightforward (i.e., copy of contractual assignment language; information on customers to be assigned; expected date for assignment; identification of acquiring supplier; inclusion of a mandatory statement regarding maintaining terms; stating reason for assignment; and a copy of the proposed notice letter and envelope).[186] The Authority can easily review these items and identify any issues of concern expeditiously.[187] In fact, the Proposed Decision would require the Authority to approve assignments within fifteen (15) business days.[188] Since fifteen (15) business days generally equates to less than 30 calendar days, there is no justification for an extended, ninety-day notice period.

The Massachusetts Department of Public Utilities ("DPU") adopted a rule requiring a set of standardized materials to be filed "no later than five business days after the Final Contract between the Assigning and Acquiring Suppliers has been executed, but ***not less than five business days prior*** to Notice of Assignment letters to customers being sent."[189] The DPU also

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[184] [184] *See* Proposed Decision, at 6. While the Proposed Decision refers to the Authority's "understand[ing] that such assignments are not as simple form the customer perspective as the Supplier Group represents," it does not provide the basis for this understanding. *See* Proposed Decision, at 6. Nor is there evidence to support such a conclusion in the record. *See, generally,* Record.

[185] Proposed Decision, at 6.

[186] *See* 2020 Proposed PURA Revisions, at 4 (§ B.5.).

[187] *See* June 2017 Testimony, at 17.

[188] 2020 Proposed PURA Revisions, at 4.

[189] Docket No. D.P.U. 14-140, *Investigation by the Department of Public Utilities on its own Motion into Initiatives to Improve the Retail Electric Competitive Supply Market,* Order Establishing Reporting Requirements and Rules for the Assignment of Customers from One Competitive Supplier to Another Competitive Supplier (Sep. 16, 2016) ("Massachusetts Assignment Order"), at 15 (emphasis added).

expressly approved a shorter notice period to the agency in exigent circumstances.[190] It is unclear why the Authority would require such a significantly longer period to review similar information in Connecticut.[191]

Furthermore, as a practical matter, increasing the notice period would require contracting parties to finalize agreements for the assignment of customers over three months in advance of the consummation of the transaction. Such extra time will impede and unnecessarily delay many assignment transactions. For example, during this extended review period, the assigning supplier may continue to enroll and drop customers; thereby, changing the potential anticipated benefits of the transaction for the acquiring supplier. Moreover, an extended notice period could keep an acquiring electric supplier from beginning to hedge customer load before the peak winter season, while compelling the assigning electric supplier to hedge such load, even though the assigning supplier expects to transfer this load, and encouraging the acquiring electric supplier to pay less for the load to offset the risk of having to hedge new customers in the peak winter season.[192] To prevent such outcomes, the Authority should adopt the forty-five-day notice period proposed in the Supplier/OCC Revised Standards.[193]

B. A Fifteen-Business-Day Period For Assignment Approval Is Unduly Long

The 2020 Proposed PURA Revisions would provide for the approval (or modification) of customer assignments or transfers within fifteen (15) business days of the Authority's receipt of notice of assignment from an electric supplier.[194] This period of time is unduly long. It should be

[190] *See id.* at 15-17.

[191] June 2017 Testimony, at 18.

[192] *Cf.* June 2017 Testimony, at 18 (discussing the effects of a sixty-day notice period on load assignment transactions).

[193] *See* June 2017 Testimony, at 18.

[194] *See* 2020 Proposed PURA Revisions, at 4 (§ B.5.).

possible to review the notice of assignment more quickly.[195] Moreover, delays in administrative review of notices of assignment could frustrate transactions and potentially lead to situations in which electric suppliers become insolvent. For example, if one electric supplier is transferring certain accounts to another to cover certain immediate needs for cash, an extended period of regulatory review could push the assigning electric supplier into insolvency.[196] Consequently, the period for regulatory review should be as short as reasonably possible in light of the Authority's resources. Similarly, to ensure that an assignment is not delayed by an inadvertent failure to issue a timely approval of an assignment, the final standards should provide that assignments not approved, modified, or rejected within the specified timeframe are deemed approved.[197]

C. The Authority Should Allow Shorter Notice And Review Periods For Exigent Circumstances

The Proposed Decision does not vary the timeframe for notice to the Authority for any reason. Thus, it would not allow electric suppliers to identify exigent circumstances that would support commercially reasonable notice periods that are shorter than would otherwise be required.[198] As the Authority should be well aware, some suppliers have experienced financial difficulty, often during times of extreme weather patterns, and must choose between selling all or a portion of their customers and assets in a fairly short time frame or being forced into bankruptcy.[199] It benefits all parties – selling electric supplier, acquiring electric supplier and customers – if in such circumstances, expedited transactions can be completed and the customers

[195] *See, e.g.*, Ohio Admin. Code 4901:1-21-11(D)(1)(a) (requiring fourteen calendar days' notice in advance of an assignment of residential and small commercial customer contracts).

[196] *Cf.* Tr., at 82 (discussing the need to complete assignments expeditiously if a supplier is in default with ISO New England Inc. and needs "an almost immediate infusion of capital").

[197] *Cf.* Ohio Admin. Code 4901:1-24-12(A)(2) (providing that an application to transfer a certificate will be automatically approved on the thirty-first day after filing, unless the commission acts to suspend or reject the application).

[198] *See* Proposed Decision, at 6; 2020 Proposed PURA Revisions, at 4 (§ B.5.).

[199] *See* June 2017 Testimony, at 19.

seamlessly assigned without loss of or disruption to the customers' chosen generation serving arrangements. Categorically denying the opportunity for expedited sales transactions in such exigent circumstances will harm all affected parties, including the customers of the distressed supplier.[200] For instance, if a financially troubled supplier cannot assign its customers quickly, it could be forced to return them to Standard Service. At the time of such a return, the Standard Service rate could be higher than the prices that the customers of that supplier would otherwise pay if they continued to receive competitive supply under the terms of their existing supply arrangements.[201] Conversely, if those customers can be quickly assigned to another supplier, they will continue to receive the benefits of the supply arrangements[202] that they affirmatively chose.[203]

Recognizing this potential negative effect on customers and the market, the Massachusetts Assignment Order included a specific exigent circumstances exception provision. In particular, in circumstances where it is not possible to provide the required notice in advance of the proposed sale (i.e., due to a "distressed sale"), the DPU permits suppliers to provide both the DPU and customers with notice within one business day after the final contract between the selling and acquiring supplier is signed.[204] In the cover letter that accompanies the notice to the DPU, suppliers are required to include "details regarding: (1) the nature of the distressed sale; (2) why the five-day notification requirements could not be met; and (3) when customers

[200] June 2017 Testimony, at 22.

[201] *Cf.* Connecticut Rate Board, https://www.energizect.com/compare-energy-suppliers (showing supplier offers whose prices are less than the Standard Service rate) (last visited Jan. 21, 2020).

[202] *See* 2020 Proposed PURA Revisions, at 4 (§B.5) (requiring the acquiring supplier to" maintain all contractual terms and conditions, including the pricing terms, through the term of the contract.").

[203] *See* Conn. Gen. Stat. § 16-245o(f)(2) (requiring suppliers to obtain customer consent to change electric suppliers).

[204] *See* Massachusetts Assignment Order, at 15-16, 18-20.

affected by the assignment will be notified."[205] Similarly, the Authority should recognize that there may be circumstances in which a shorter notice period will benefit all stakeholders and asks that the Authority reinstate the exigent circumstances text from the Supplier/OCC Revised Standards.[206] As an alternative, RESA also would support adoption of the Massachusetts exigent circumstances process and associated timeframes.[207]

D. The Authority's Proposed Limitations on Early Termination Fees Impede Suppliers' Contractual Rights

The Proposed Decision would allow the Authority to determine whether a customer may be charged an ETF if the customer terminates a contract assigned to a new electric supplier in advance of the natural expiration date of the contract.[208] This provision of the Proposed Decision is inappropriate and contrary to electric suppliers' legal and contractual rights.

1. The Authority Is Not Empowered to Void Contractual ETF Provisions

According to the Proposed Decision, in imposing this potential condition on assignments, "[t]he Authority maintained its right to assess whether or not a cancellation fee may be charged." However, the Authority has no such right. The Authority is a creature of statute.[209] As such, it is bound by the specific powers given to it by its authorizing statute.[210] The Connecticut Supreme Court has long held that "the power of an administrative agency to prescribe rules and regulations under a statue is ***not*** the power to make law, but only the power to adopt regulations

[205] Massachusetts Assignment Order, at 16.

[206] *See* Supplier/OCC Revised Standards, at § B.5.

[207] June 2017 Testimony, at 22.

[208] Proposed Decision, at 6; 2020 Proposed PURA Revisions, at 4 (§ B.5.).

[209] Conn. Gen. Stat. § 16-2(a).

[210] *Waterbury v. Comm'n on Human Rights & Opportunities*, 160 Conn. 226, 230-31 (1971) ("It is clear that an administrative body must act strictly within its statutory authority . . . . It cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power.") (internal citations omitted).

to carry into effect the will of the legislature as expressed by the statute."[211] No Connecticut statute empowers the Authority to void, at its discretion, contractual ETF provisions. In fact, Connecticut law expressly allows electric suppliers to include ETF provisions in their contracts.[212] Therefore, the Authority is without power to void contractual ETF provisions.

2. Particular Electric Suppliers Cannot Waive Other Electric Suppliers' Contractual Rights To Collect ETFs

In further support of its conclusion that requiring suppliers to waive ETFs is appropriate, the Proposed Decision attempts to rely on historical examples of certain electric suppliers' who voluntarily accepted a prohibition on charging ETFs to customers who terminated their contracts in advance of their expiration dates in connection with assignments.[213] However, none of these actions by electric suppliers are part of the evidentiary record; consequently, they may not be relied upon to support the conclusion that the Proposed Decision would reach.[214] Further, even if they were part of the record, they are only discrete actions of particular electric suppliers. They do not constitute agreement on the part of all other electric suppliers to forgo ETFs. Nor is the Authority's requirement that those suppliers forgo ETFs binding on other suppliers.[215]

3. Allowing Electric Suppliers To Collect ETFs Protects The Reasonable Expectations Of Contracting Parties

Contracts between electric suppliers and customers generally include an assignment provision.[216] Thus, at the time the customer enrolls with an electric supplier, the customer is

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[211] *Salmon Brook Convalescent Home v. Commission on Hospitals & Health Care*, 177 Conn. 356, 363 (1979) (emphasis added).

[212] *See* Conn. Gen. Stat. § 16-245o(h)(A)(7).

[213] *See* Proposed Decision, at 6.

[214] *See* Conn. Gen. Stat. § 4-180(c); *see also supra* Section I.

[215] *Cf.* See *Edelman v. State Elections Enforcement Comm'n*, No. CV 950553538, 1995 Conn. Super. LEXIS 3086, at *5 (Nov. 1, 1995), ("an agency decision in a contested case is binding only on the immediate parties").

[216] June 2017 Testimony, at 20.

aware that an assignment could occur.[217] A customer should not be free to terminate the contract without consequence simply because the electric supplier exercised a right clearly provided for in the agreement between the two parties.[218] In any other circumstance, this would constitute a breach and entitle the electric supplier to damages.[219]

ETFs have an important commercial purpose – electric suppliers incur hedging and other customer-specific costs in anticipation of serving customers for the agreed upon fixed price term.[220] ETFs offset or defray these costs in the event that the customer chooses another generation supplier before the end of the agreed term.[221] In an assignment context, such customer-specific costs are borne by the original electric supplier and then either re-incurred or accepted by the acquiring electric supplier.[222] If the customer chooses to leave early, thereby causing the supplier to incur a loss, such customer should pay the required ETF to offset such loss to the supplier.[223] This contractual protection is a fundamental business consideration.[224] Since the customer is getting the same deal, both before and after the assignment, like the acquiring supplier, [225] the customer should be required to adhere to the contract through the end of term, including the requirement to pay an ETF for any early termination.[226]

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[217] *Id*.

[218] *Id*.

[219] *Id*.

[220] *Id*.

[221] *Id*.

[222] *Id*.

[223] June 2017 Testimony, at 21.

[224] June 2017 Testimony, at 21.

[225] *See* 2020 Proposed PURA Revisions, at 4 (§ B.5.e.) (requiring that the acquiring supplier "maintain all contractual terms and conditions, including the pricing terms, through the term of the contract . . . .").

[226] June 2017 Testimony, at 21.

4. The Authority Would Violate The Contracts Clause Of The United States Constitution By Voiding Contractual ETF Provisions

The Contracts Clause of the United States Constitution prohibits the Authority from voiding an ETF provision in the event of the assignment of a customer contract. The Contracts Clause provides, in pertinent part: "No State shall . . . pass any . . . law impairing the obligation of contracts."[227] A law violates the Contracts Clause if it operates "as a substantial impairment of a contractual relationship."[228] This determination requires the evaluation of "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial."[229] There is no dispute that: (a) each electric supplier has a contractual relationship with each of its customers;[230] and (b) voiding an otherwise applicable ETF provision would impair the contractual relationships between customers and their electric suppliers because it will disrupt the current expectations and obligations of the parties.[231]

In the Second Circuit, courts have developed a three-prong test to ascertain whether a law impermissibly encroaches upon contract rights: (1) is the contractual impairment substantial?; if so, (2) does the law serve a legitimate public purpose such as remedying a general social or economic problem; and (3) if such purpose is demonstrated, are the means chosen to accomplish this purpose reasonable and necessary.[232] Under the first prong, "[t]he primary consideration in

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[227] U.S. Const. art. I, § 10.

[228] *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (citation omitted); *see also Serrano v. Aetna Ins. Co.*, 233 Conn. 437, 447 (1995).

[229] *General Motors*, 503 U.S. at 186; *see also Serrano*, 233 Conn. at 447.

[230] *See, e.g.*, Conn. Gen. Stat. § 16-245o(f)(2) ("Each electric supplier shall provide each customer with a demand of less than one hundred kilowatts, a written contract that conforms with the provisions of this section . . . .").

[231] *See Stoneridge Apts., Co. v. Lindsay*, 303 F. Supp. 677, 679 (S.D.N.Y. 1969) ("The [Contract Clause] is clearly intended to protect benefits and rights of a party under a contract . . . .").

[232] *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367 (2d Cir. 2006); *see Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32, 54 (D. Conn. 2013).

determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted."[233] However, where a "plaintiff could anticipate, expect, or foresee the governmental action at the time of contract execution, the plaintiff will ordinarily not be able to prevail."[234]

Here, the impairment will be substantial because it will frustrate customers' and electric suppliers' reasonable contractual expectations (i.e., that both will complete and comply with the terms of their contracts and receive the benefits thereof).[235] As noted, if customers are not required to pay ETFs specified by contract, electric suppliers could suffer losses.[236] Moreover, electric suppliers could foresee that the Authority might attempt to void contractual ETF provisions. In fact, Connecticut law expressly authorizes electric suppliers to include fifty-dollar ($50.00) ETFs in residential customer contracts.[237] Because they could foresee that the Authority might attempt to void contractual ETF provisions, electric suppliers could not reasonably plan for such an event. Consequently, voiding ETF provisions in customer contracts would substantially impair electric suppliers' contractual rights.

When a state law constitutes substantial impairment, the state must show a significant and legitimate public purpose behind the law.[238] A legitimate public purpose is one "aimed at remedying an important general social or economic problem . . . ."[239] The Proposed Decision

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[233] *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997).

[234] *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 53 (2d Cir. 1998).

[235] *See Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) ("the obligation of a contract is the law which binds the parties to perform their agreement.") (internal quotation marks omitted).

[236] *Cf.* June 2017 Testimony, at 21 (describing the losses that electric suppliers would suffer if customers terminate their contracts before these contracts' natural expiration dates).

[237] See Conn. Gen. Stat. § 16-245o(h)(7).

[238] *Buffalo Teachers Fed'n*, 464 F.3d at 368 (*citing Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983); *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997)).

[239] *Buffalo Teachers Fed'n*, 464 F.3d at 368.

identified the purposes to be served by voiding ETF provisions as preserving "the customer's intent when entering the contract" or preventing the customer from being assigned to a "with a history of marketing violations and recent penalties."[240] However, voiding a contractual provision does not preserve a customer's intent when entering the contract. In fact, there is no risk that the customer's intent when entering a contract will be frustrated because all of the contract terms will remain the same.[241] Thus, voiding contractual ETF provisions does not serve a legitimate public purpose. Further, there is no evidence in the record of customers being assigned to a supplier with prior marketing violations or penalties.[242] In addition, just because a supplier has prior marketing violations or recent penalties does not mean that the supplier will not honor the terms of the customers' agreements. Nor is there evidence in the record of acquiring suppliers with marketing violations or recent penalties failing to honor the terms of assigned agreements.[243]

Moreover, the mere existence of a legitimate public purpose does not end the relevant inquiry. Rather, "the means chosen to accomplish this purpose [must be] reasonable and necessary."[244] To satisfy this standard,

> it must be shown that the state did (1) "consider impairing the ... contracts on par with other policy alternatives" or (2) not "impose a drastic impairment when an evident and more moderate course would serve its purpose equally well," nor (3) act unreasonably "in light of the surrounding circumstances."[245]

[240] Proposed Decision, at 6.

[241] *See* 2020 Proposed PURA Revisions, at 4 (§ B.5.e.) (requiring that an assignment will maintain all contractual terms and conditions).

[242] *See, generally*, Record.

[243] *See, generally*, Record.

[244] *See Buffalo Teachers Fed'n*, 464 F.3d at 368.

[245] *Id.* at 371 (*quoting U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 30-31 (1977)).

In this case, voiding contractual ETF provisions is not appropriate "in light of the surrounding circumstances" as it will result in electric suppliers' bearing the expense that the ETFs were meant to cover.[246] Further, there are significantly less drastic alternatives available, including enforcement action against acquiring suppliers who fail to honor the terms of the assigned contracts.[247] Thus, voiding contractual ETF provisions is not reasonable or necessary.

5. Voiding Contractual ETF Provisions Could Constitute An Illegal Regulatory Taking

Prohibiting electric suppliers from collecting contractual ETFs also could constitute a regulatory taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution.[248] A regulatory taking occurs where governmental regulation of private property "goes too far" and is "tantamount to a direct appropriation or ouster."[249]

> The Supreme Court has generally eschewed any set formula for identifying regulatory takings, instead preferring to engage in essentially ad hoc, factual inquiries to determine in each case whether the challenged property restriction rises to the level of a taking. Paramount to the inquiry are the familiar factors set forth in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. Also telling, is the character of the governmental action, particularly whether it amounts to a physical invasion or appropriation of property or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good.[250]

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[246] *See* June 2017 Testimony, at 21.

[247] *See* Conn. Gen. Stat. § 16-41(a) (authorizing the Authority to impose civil penalties of up to $10,000 per violation for failure to comply with Authority orders).

[248] U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."); U.S. Const. amend. XIV.

[249] *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 263 (2d Cir. 2014) (citations and internal quotation marks omitted"); *see also Miller v. Town of Westport*, 268 Conn. 207, 210, 842 A.2d 558, 560 n.2 (2004) ("[A] regulatory taking—also known as inverse condemnation—occurs when the purpose of government regulation and its economic effect on the property owner render the regulation substantially equivalent to an eminent domain proceeding and, therefore, require the government to pay compensation to the property owner.").

[250] *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 263 (2d Cir. 2014) (citations and internal quotation marks omitted).

Prohibiting electric suppliers from collecting contractual ETFs would go too far and be tantamount to a direct appropriation or ouster because electric suppliers would be denied their contractual right to collect ETFs. Further, these ETFs were included in contracts because of electric suppliers' investment-backed expectations.[251] Specifically, ETFs are designed to offset or defray hedging and other costs in the event that a customer chooses another generation supplier before the end of the agreed term.[252] Moreover, prohibiting electric suppliers from collecting contractual ETFs does not merely adjust the benefits and burdens of economic life; rather, it would prohibit electric suppliers from collecting property under circumstances in which they have contracted for it. Consequently, prohibiting electric suppliers from collecting contractual ETFs would be an appropriation of property (without just compensation) and, thus, could constitute a regulatory taking in violation of the Fifth Amendment of the United States Constitution.

IX. THE AUTHORITY SHOULD PROVIDE A CLEAR AND REASONABLE PERIOD OF TIME FOR SUPPLIERS TO UPDATE MARKETING MATERIALS

The 2020 Proposed PURA Revisions include deadlines for electric suppliers to update marketing materials following PURA's "release" of new Standard Service rates; specifically, suppliers must update all "verbal and electronic" materials "immediately upon [the Authority's] release of a new standard service price."[253] However, the Authority does not define "immediately." Further, suppliers would need to update written materials within five (5) days the Authority's release of new Standard Service rates.[254] To ensure suppliers' obligations are clear

[251] *See* June 2017 Testimony, at 20.

[252] *See* June 2017 Testimony, at 20 ("[S]uppliers incur hedging and other customer-specific costs in anticipation of serving customers for the agreed upon fixed price term. ETFs offset these costs in the event that the customer chooses another generation supplier before the end of the agreed term.").

[253] *See* 2020 Proposed PURA Revisions, at 5 (§ C.4.).

[254] *See id*.

and operationally workable, the Authority should clarify what constitutes "release" of Standard Service rates and provide suppliers a reasonable period of time in which to update their marketing materials.

First, the Authority should expressly define what qualifies as "release" of new Standard Service rates in its standards. In order to build a compliance program for this requirement, electric suppliers need to know the time at which the obligation to update their marketing materials arises.[255] RESA understands, based on the text of the Proposed Decision, that the "release" of new Standard Service rates will mean the Authority's written approval of the Standard Service rates that is posted in the Eversource and The United Illuminating Company dockets established for that purpose.[256] However, this standard is not included in the 2020 Proposed PURA Revisions.[257] Since the evidence in this proceeding establishes that there are multiple dates that could constitute release of the Standard Service rates,[258] in order to provide clarity, the Authority should specifically define "release" before adopting the 2020 Proposed PURA Revisions as final.

Further, for operational reasons, the Authority should also modify the timeframes by which suppliers must update marketing materials following PURA's "release" of new Standard Service rates. Updating "all verbal and electronic marketing materials" cannot be accomplished "immediately," even if electric suppliers begin the process of making these updates as soon as new Standard Service rates are released.[259] For example, the Authority could release the

[255] *See* Tr., at 172.

[256] *See* Proposed Decision, at 7-8, 8 n.7.

[257] *See* 2020 Proposed PURA Revisions, at 5 (§ C.4).

[258] *See* June 2017 Testimony, at 25 (listing, as potential understandings of the release of Standard Service rates, oral approval of Standard Service rates at an Authority meeting, issuance of a press release, the appearance of a pop-up box on the Rate Board, and issuance of a formal ruling approving new Standard Service rates).

[259] *Cf.* Tr., at 98-100 (discussing constraints on updating marketing materials).

Standard Service rates at the end of the day on a Friday after the personnel who would receive notice of the release have left for the day. Thus, the supplier may not even know until at least three days later (i.e., on Monday) and, possibly longer if the rates are released before a holiday weekend, that new Standard Service rates have been released.[260] In addition, because different individuals may be responsible for monitoring updates to Standard Services rates and for making changes to marketing materials,[261] suppliers may need time to simply ensure that the personnel responsible for updating marketing materials are notified of the release of new Standard Service rates. Additional time would then be needed to actually update the marketing materials and distribute them to the appropriate personnel and/or vendors. Further, some systems that may be required to contain Standard Services rates (such as automated TPV systems),[262] particularly if they are operated by vendors, may take additional time to modify. Thus, in order to avoid potential inadvertent noncompliance, RESA requests that, as the Supplier Group proposed,[263] the Authority provide suppliers up to two (2) business days after the release of Standard Service rates to make changes to verbal and electronic marketing materials.

The Authority should also modify the deadline for the modification of written materials to a business days standards. Modifying written materials within five (5) calendar days[264] will not always be feasible because of the potential for intervening weekends and holidays. For instance, if the Authority were to release the Standard Service rates at the end of the day on the Wednesday before Thanksgiving after the personnel who would receive notice of the release have left for the day, it could be five (5) calendar days (i.e., on Monday) before the supplier even

[260] *Cf.* June 2017 Testimony, at 25.
[261] *See* Tr., at 92-93.
[262] *See* 2020 Proposed PURA Revisions, at 10 (§ G.8.) (requiring that the TPV state the Standard Service rate).
[263] *See* Tr., at 98; June 2017 Testimony, at 25.
[264] *See* 2020 Proposed PURA Revisions, at 5 (§ C.4.).

knows that new Standard Service rates have been released.[265] Even if the Standard Service rates are released on a Friday, if it occurs at the end of the day, it still could be three (3) days before suppliers know that new Standard Service rates have been released, leaving only two (2) days for suppliers to take all the steps necessary to incorporate the new Standard Service rates into their materials and distribute them to appropriate personnel and/or vendors. Thus, in order to avoid inadvertent noncompliance and provide suppliers sufficient time to implement changes, RESA requests that, as the Supplier Group proposed,[266] the Authority provide suppliers up to five (5) ***business*** days after the release of Standard Service rates to make changes to written marketing materials.

X. THE AUTHORITY SHOULD MODIFY THE RENEWAL NOTICE PROVISIONS

The 2020 Proposed PURA Revisions would require renewal notices to "state the renewal rate and offer as a ***comparison*** the standard service rate applicable ***at the time*** the renewal rate will become effective."[267] The Proposed Decision does not define what constitutes a "comparison."[268] Nevertheless, because it requires a "comparison," RESA understands it to require something more than the mere disclosure of the Standard Service rate in the renewal notice. However, electric suppliers should not be required to present a comparison between the renewal price and the Standard Service rate. Such a requirement could impose additional burdens on electric suppliers to calculate the difference between the renewal price and the Standard Service rate and increase the potential that customers do not receive accurate information or are confused by the information presented. For instance, if a supplier is offering a time-of-use

[265] *Cf.* June 2017 Testimony, at 25.

[266] *See* Tr., at 98; June 2017 Testimony, at 25.

[267] 2020 Proposed PURA Revisions, at 6 (§ C.5) (emphasis added).

[268] *See, generally*, Proposed Decision.

rate,[269] a comparison of the Standard Service rate to the on and off peak rates without accounting for the customer's usage during those periods would not provide an accurate picture of what the customer would actually pay. Thus, the Authority should simply require that electric suppliers include the Standard Service Rate on the renewal notice.

Furthermore, this requirement should be adjusted to account for the timing of the issuance of renewal notices and the release of Standard Service rates. Electric suppliers are statutorily required to send renewal notices to residential customers "[b]etween thirty and sixty days, inclusive, prior to the expiration of a fixed price term for a residential customer."[270] If a residential customer's contract is set to expire on January 1 or July 1, an electric supplier sending a renewal notice to a residential customer in compliance with Connecticut General Statutes section 16-245o(g)(1) may not yet know the Standard Service rate that would be in effect at the time of the renewal, because the Standard Service rate would not have been released.[271] In such instances, electric suppliers could not and should not be required to provide the Standard Service rate "applicable at the time the renewal rate will become effective"[272] in their renewal notices.

XI. CONTRACTORS SHOULD BE ALLOWED TO PROVIDE TRAINING IF AN ELECTRIC SUPPLIER EMPLOYEE IS PRESENT

Connecticut General Statutes section 16-245o provides, in relevant part: "No third-party agent may sell electric generation services on behalf of an electric supplier unless . . . the third-

[269] *See* Conn. Gen. Stat. § 16-243w.

[270] Conn. Gen. Stat. § 16-245o(g)(1).

[271] *See, e.g.,* Docket No. 17-01-02, Administrative Proceeding to Review The United Illuminating Company's Standard Service and Supplier of Last Resort Service 2017 Procurement Results and Rates, Authority Correspondence (Jun. 12, 2017) (approving Standard Service rates to be effective July 1, 2017); Docket No. 16-01-01, *Administrative Proceeding to Review The Connecticut Light and Power Company's Standard Service and Supplier of Last Resort Service 2016 Procurement Results and Rates,* Authority Correspondence (Nov. 23, 2015) (approving Standard Service rates to be effective January 1, 2016).

[272] 2020 Proposed PURA Revisions, at 6 (§ C.5) (emphasis added).

party agent has received appropriate training directly from such electric supplier."[273] This statutory provision strikes a balance between ensuring responsibility and accountability of suppliers for training their agents while allowing for flexible training programs. However, the Proposed Decision would narrow this provision to require that all training be conducted by an ***employee*** of the electric supplier.[274] Narrowing this provision to require that supplier employees be the ones who must provide such training on behalf of the supplier is unnecessary, goes beyond the statutory directive and, most importantly, would unnecessarily and inappropriately curtail the possible use of supplier-directed training methods that would more effectively meet the supplier's obligation to train third party representatives directly.

While RESA understands the Authority's desire to prevent sales vendors from performing training, the present market is bursting with technologically vibrant training solutions and legitimate roles for consultants and trainers, managed by the retaining principal (in this case, a supplier), in provision of training services.[275] Undermining the use of these methods by requiring that training be provided by supplier "employees" does not serve the end goal of producing a well informed and compliant workforce that is able to deliver on business goals and consumer protection requirements.[276] Instead, the Authority should allow suppliers to implement their training programs either through their employees or with the aid of professional trainers (who are not employees of either the supplier or its sales vendors) in the presence of supplier "employees."[277] Disallowing these parties to have meaningful engagement in delivering training undermines the ability of suppliers to develop and deliver appropriately tailored training in a

[273] Conn. Gen. Stat. § 16-245o(h)(1).
[274] Proposed Decision, at 6; 2020 Proposed PURA Revisions, at 6 (§ D.1.).
[275] *See* June 2017 Testimony, at 30.
[276] *See* June 2017 Testimony, at 30-31.
[277] *See* June 2017 Testimony, at 31.

timely fashion especially as policies and regulations evolve.[278] Thus, the Authority should allow suppliers to implement their training programs either through their employees or with the aid of professional trainers (who are not employees of either the supplier or its sales vendors) in the presence of supplier "employees."

XII. THE AUTHORITY SHOULD MODIFY THE ASPECTS OF THE 2020 PROPOSED PURA REVISIONS REGARDING REPORTING NONCOMPLIANCE

The 2020 Proposed PURA Revisions would require electric suppliers, upon request by the Authority, to "provide a list of any employees, representatives, agents, brokers, vendors, or any individual or entities acting on behalf of ***or under contract to*** the Electric Supplier that the Electric Supplier has found to be non-compliant with their ***internal code of conduct*** or any relevant state statutes and regulations."[279] However, this requirement is too broad.

First, the Authority's final standards should not require any electric supplier to provide such reports for all entities "under contract to" the electric supplier. Such phrasing would apply to entities that, while having a contractual relationship with an electric supplier, have little relation to the electric supplier's marketing and sale of electricity. As drafted, the proposed standard could require a supplier to disclose if a party to a contract to maintain and repair the supplier's copiers, violated a provision of the statutes over which the Authority has no jurisdiction. Thus, as it did in the definition section, the Authority should limit the applicability of this requirement to those entities "acting on behalf of Electric Suppliers."

Further, the Authority's final standards should not require reporting of violations of internal codes of conduct. Such a requirement would be too broad. It would cover conduct

[278] June 2017 Testimony, at 31.

[279] 2020 Proposed PURA Revisions, a 7.

unrelated to the marketing or sale of electricity. For example, if an electric supplier has a policy that its employees, when driving, must stop at all railroad crossings, and an employee violates this policy, under the proposed standard, the electric supplier would be required to provide a report to the Authority. The administrative burden of preparing these reports could discourage electric suppliers from implementing policies that go beyond the requirements of law or regulation, even if these policies are prudent safety policies. Thus, the Authority should limit this provision to require the disclosure, upon request, of employees or agents found to be non-compliant with relevant state statutes and regulations.

XIII. MARKETING REPRESENTATIVE IDENTIFICATION SHOULD NOT INCLUDE INDIVIDUALS' LAST NAMES

The 2020 Proposed PURA Revisions would require electric supplier representatives engaging in door-to-door sales to "display identification that clearly identifies . . . the individual's name . . . ."[280] In order to protect marketing representatives, the Authority should require that the identification only include the representative's first name. In other markets, the listing of a representative's full name on the identification badge has resulted in some representatives being stalked and harassed through social media channels by persons with whom they have engaged in in-person marketing activities.[281] In order to mitigate against such incidents, RESA requests that, similar to other retail merchants and as has been done in other states,[282] the identification badge only include the representative's first name along with a unique identification number as this will provide customers and electric suppliers with sufficient

[280] 2020 Proposed PURA Revisions, at 7 (§ E.1.).

[281] *See* Maine Public Utilities Commission Docket No. 2018-00056, *Amendment to Chapter 305, Licensing Requirements, Annual Reporting, Enforcement and Consumer Protection Provisions for Competitive Provision Of Electricity*, Order Adopting Rule and Statement of Factual and Policy Basis (Sep. 13, 2018), at 10.

[282] *See* New York Uniform Business Practices (Sep. 2019) § 10(C)(1)(b)(1).

information to determine who was involved in a particular transaction should that become necessary while also protecting the representative's privacy and safety.

XIV. THE AUTHORITY SHOULD MODIFY ITS PROPOSED STANDARDS REGARDING THE CONTENT OF DOOR-TO-DOOR SALES AND TELESALES CALLS

The 2020 Proposed PURA Revisions contain requirements about the content of door-to-door sales transactions and telesales calls. However, these requirements exceed those authorized by statute. Moreover, they fail to appropriately account for the timing of when Standard Service rates are actually released. In addition, certain of the requirements merit clarification.

A. The Disclosure Requirements Go Beyond Those Authorized By Statute

If the 2020 Proposed PURA Revisions are adopted without modification, when conducting door-to-door and telesales solicitations to residential consumers, each electric supplier would be required to "***begin by immediately*** stating: (A) The full name of the Electric Supplier conducting the call; (B) that the purpose of the call is to sell electric supply service to the customer or potential customer; and (C) that such Electric Supplier does not represent and is not affiliated with the customer's local utility company."[283] However, imposing such a requirement goes beyond the requirements of Connecticut General Statutes section 16-245o(h)(2), which provides that, for sales and solicitations by an electric supplier to a customer with a maximum demand of one hundred kilowatts or less:[284]

> such electric supplier, aggregator or agent of an electric supplier or aggregator (i) identify the person and the electric generation services company or companies the person represents; (ii) provide a statement that the person does not represent an electric distribution company; (iii) explain the purpose of the solicitation; and (iv) explain all rates, fees, variable charges and terms and conditions for the services provided.[285]

[283] 2020 Proposed PURA Revisions, at 7 (§ E.3) (door-to-door), 9 (§ F.3) (telesales) (emphasis added).

[284] *See* Conn. Gen. Stat. § 16-245o(h)(2).

[285] Conn. Gen. Stat. § 16-245o(h)(2)(A).

This statutory provision does ***not*** prescribe when, in a sale or solicitation, an electric supplier or its agent must provide the required information. Indeed, by the statute's plain language, an electric supplier may make the required statements at any time during a sale or solicitation.

As noted above, the Authority is a creature of statute.[286] As such, it is bound by the specific powers given to it by its authorizing statute.[287] The Connecticut Supreme Court has long held that "the power of an administrative agency to prescribe rules and regulations under a statue is not the power to make law, but only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute."[288] Moreover, "[t]he intent of the legislature is to be found in the meaning of the words of the statute; that is, in what the legislature actually ***did*** say, not in what it ***meant*** to say."[289] Indeed, "it is a well-settled principle of statutory construction that the legislature knows how to convey its intent expressly or to use broader or limiting terms when it chooses to do so."[290]

Connecticut General Statutes section 16-245o(h)(2) does not include a temporal requirement. Indeed, if the legislature had intended to require that the required disclosures be made "immediately," it could have said so. Since it did not, the Authority's requirement that suppliers "begin by immediately" making the required disclosures goes beyond what was authorized by the statute. By imposing such a requirement, the Authority is "making" law, not simply putting into effect the will of the legislature as expressed in the plain language of the statute.

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[286] Conn. Gen. Stat. § 16-2(a).

[287] *Waterbury v. Comm'n on Human Rights & Opportunities*, 160 Conn. 226, 230-31 (1971) ("It is clear that an administrative body must act strictly within its statutory authority . . . . It cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power.") (internal citations omitted).

[288] *Salmon Brook Convalescent Home v. Commission on Hospitals & Health Care*, 177 Conn. 356, 363 (1979).

[289] *Doe v. Manson*, 183 Conn. 183, 186 (1981) (citations omitted) (emphasis added).

[290] *Perry v. Perry*, 312 Conn. 600, 624 (2014) (internal quotations and citations omitted).

B. Disclosures Of Standard Service Rates Should Not Be Required Until Standard Service Rates Are Actually Released

The 2020 Proposed PURA Revisions would require suppliers during door-to-door and telesales solicitations to inform the customer or prospective customer of, among other things, what the Standard Service rate will be when the Standard Service rate changes, if the solicitation is conducted within forty-five days of a change in the Standard Service rate.[291] An electric supplier's ability to comply with this provision is contingent on the Standard Service rate's having been released.[292] However, the Authority does not always release the Standard Service rates forty-five in advance of their effective date.[293] Moreover, this requirement fails to account for the time needed for electric suppliers to update their marketing materials once those rates are released.[294] Accordingly, the final standards should condition this obligation on the actual release of the applicable Standard Service rates and allow the necessary time for suppliers to update their marketing materials to include those updated rates.

C. The Authority Should Clarify The Material Contract Terms That Must Be Disclosed To Customers

The 2020 Proposed PURA Revisions would require all door-to-door and telesales solicitations to inform the customer or prospective customer of, among other things, "of all material contract terms," as defined by the Authority in its decisions.[295] This requirement is vague and should be clarified before it is included in the final standards. First, the 2020 Proposed

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[291] *See* 2020 Proposed PURA Revisions, at 7 (§ E.3) (door-to-door), 9 (§ F.3) (telesales).

[292] *See* Proposed Decision, at 8 (discussing the release of Standard Service rates).

[293] *See, e.g.*, Docket No. 17-01-02, Administrative Proceeding to Review The United Illuminating Company's Standard Service and Supplier of Last Resort Service 2017 Procurement Results and Rates, Authority Correspondence (Jun. 12, 2017) (approving Standard Service rates to be effective July 1, 2017); Docket No. 16-01-01, *Administrative Proceeding to Review The Connecticut Light and Power Company's Standard Service and Supplier of Last Resort Service 2016 Procurement Results and Rates*, Authority Correspondence (Nov. 23, 2015) (approving Standard Service rates to be effective January 1, 2016).

[294] *See supra* Section XIV.B.

[295] *See* 2020 Proposed PURA Revisions, at 7-8 (§ E.3.), 9 (§ F.3) (telesales).

PURA Revisions do not identify the existing decisions that define what contract terms are material. Further, the Authority does not clarify how suppliers will be able to identify future decisions that define contract terms as material. As a consequence, this standard is vague as suppliers do not have sufficient notice of their compliance obligations.[296] For instance, it is possible that some decisions defining material contract terms might apply only to particular suppliers, but not others.[297] To resolve these concerns and avoid future ambiguities that could lead to inadvertent noncompliance, the Authority could clarify that the "material contract terms" that must be disclosed are the terms included on the standard contract summary form adopted by the Authority,[298] as the same may be modified from time to time. In this way, all stakeholders will have a clear understanding of exactly what information must be disclosed during the sales process.

D. Marketing Representatives Should Be Permitted To Direct Customers To EDC Bills For Relevant Information

The 2020 Proposed PURA Revisions would prohibit electric suppliers from requesting that a potential customer retrieve his or her EDC bill until immediately before the potential customer is transferred to the TPV.[299] This proposed standard is unduly restrictive. Electric supplier representatives should be allowed to suggest that prospective customers consult their EDC bills earlier in a solicitation if the EDC bill contains information that the customer may need. For example, suppliers are required to provide "specific directions to the customer as to

[296] *Benjamin v. Bailey*, 234 Conn. 455, 483 (1995) ("[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") (internal citations and quotations omitted).

[297] See *Edelman v. State Elections Enforcement Comm'n*, No. CV 950553538, 1995 Conn. Super. LEXIS 3086 (Nov. 1, 1995), at *5 ("an agency decision in a contested case is binding only on the immediate parties")

[298] *See* Docket No. 14-07-17, *PURA Development of Standard Summary Form of Material Contract Terms*, Decision (Feb. 11, 2015) (developing a standard contract summary form).

[299] *See* 2020 Proposed PURA Revisions, at 8 (§ E.3.) (door-to-door), 9-10 (§ F.3) (telesales).

how to compare the price term in the contract to the customer's existing electric generation service charge on the electric bill and how long those rates are guaranteed."[300] This information can best be determined by asking the customer to review their bill. In addition, a customer considering a solicitation may wish to know the term and expiration date of his or her current electric supply contract, and the applicable cancellation fee, if any, if the customer is served by a supplier. Because all of this information is contained on the customer's EDC bill,[301] it may be convenient for the customer to consult his or her EDC bill earlier in the solicitation. Prohibiting an electric supplier representative from requesting a customer retrieve a copy of his/her bill to review this information would actually make it more difficult for consumers to make informed decisions and lead to customer frustration. Thus, the Authority should remove this prohibition from the standards before adopting them in final.

E. The Authority Should Clarify That Marketing Representatives May Rely On Translation Services

The 2020 Proposed PURA Revisions allow door-to-door solicitations of customers who have difficulty understanding English if the electric supplier provides translation services.[302] The next sentence in the proposed standards, however, only permits "a door-to-door sale to continue[s] in a language other than English because the salesperson has a proficiency in said other language."[303] For consistency, the Authority should clarify that the interaction can proceed if the salesperson has a proficiency in said other language or provides translation services.

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[300] Conn. Gen. Stat. § 16-245o(f)(2).

[301] *See* Conn. Gen. Stat. § 16-245d(a)(2).

[302] *See* 2020 Proposed PURA Revisions, at 8 (§ E.4.) ("Those engaging in door-to-door sales must immediately leave the premises and discontinue their sales presentation, or ***provide translation services***, once a customer demonstrates that they have difficulty understanding English or the customer requests them to leave.") (emphasis added).

[303] 2020 Proposed PURA Revisions, at 8 (§ E.4.).

XV. THE AUTHORITY SHOULD CLARIFY TO WHOM THE REQUIREMENT TO REGULARLY UPDATE AND ABIDE BY DO NOT CALL REGISTRIES APPLIES

The 2020 Proposed PURA Revisions would require electric suppliers, upon request by the Authority, "to ensure that any individual or entity acting on behalf of ***or under contract to*** the Electric Supplier are regularly updating and abiding by the Do Not Call Registries."[304] However, this standard is too broad because it would apply to entities that, while having a contractual relationship with an electric supplier, have little or no relation to the electric supplier's marketing and sale of electricity. For example, as drafted the proposed standard could cover the employees of the company that maintains or repairs a supplier's copiers. Thus, as it did in the definition section, the Authority should limit the applicability of this requirement to those entities "acting on behalf of Electric Suppliers."

XVI. ELECTRIC SUPPLIERS SHOULD NOT BE RESPONSIBLE FOR ASPECTS OF CALLER ID BEYOND THEIR CONTROL

The 2020 Proposed PURA Revisions would require electric suppliers to "ensure that the phone number that appears on the customer's caller identification information is accurate and allows for the customer to call back."[305] The idea of prohibiting the display of any false or misleading phrase on a customer's Caller ID is conceptually sound. However, electric 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.[306] 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 customer's Caller ID.[307] This

[304] 2020 Proposed PURA Revisions, at 8 (§ F.1) (emphasis added).

[305] 2020 Proposed PURA Revisions, at 9 (§ F.2).

[306] *See* May 2015 Testimony, at 16.

[307] *See* May 2015 Testimony, at 16.

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.[308] Rather than holding electric suppliers responsible for that which they do not control, the Authority should revise the standard to require that suppliers ensure that accurate information is "transmitted," rather than displayed.

In addition, the 2020 Proposed PURA Revisions would provide that "[i]t is the responsibility of the Electric Supplier to ensure that all employees, representatives, agents, brokers, vendors, or any individual or group of individuals acting on behalf of or under contract to the supplier are not engaging in false, misleading or deceptive conduct."[309] This proposed standard should be revised to remove the reference to those "under contract to" the electric supplier. Such phrasing would apply to entities that, while having a contractual relationship with an electric supplier, have little relation to the electric supplier's marketing and sale of electricity. As drafted, the proposed standard could require a supplier to disclose if a party to a contract to maintain and repair the supplier's copiers, violated a provision of the statutes over which the Authority has no jurisdiction. Thus, as it did in the definition section, the Authority should limit the applicability of this requirement to those entities "acting on behalf of Electric Suppliers."

XVII. ELECTRIC SUPPLIER MARKETING REPRESENTATIVES SHOULD BE ALLOWED TO REMAIN DURING THE TPV

The Proposed Decision would conclude that a marketing representative is only necessary during a TPV when the customer does not understand the transaction and has a question and that a customer that does not understand the transaction should not be engaging in a TPV that results

[308] *See* May 2015 Testimony, at 16.

[309] *See* 2020 Proposed PURA Revisions, at 9.

in a contract.[310] However, the marketing representative should not be required to depart before the TPV because such a requirement will increase premature call abandonment for otherwise mutually-beneficial sales calls.[311] The 2020 Proposed PURA Revisions already require that the verification process must end if the customer cannot answer a question.[312] Similarly, the 2020 Proposed PURA Revisions already require TPVs to demonstrate that the customer have a clear understanding of the services offered.[313] If a sales agent must leave the premises or the call, the customer whose TPV has concluded prematurely but still wishes to pursue the transaction would be required to find and contact the sales agent again in order to move forward. Conversely, if sales agents are permitted to remain on the premises or on the phone, and if the TPV concludes prematurely but the customer still wishes to proceed with the transaction, he or she can easily re-engage with the marketing representative.[314] Moreover, on some TPV systems, the sales agent is required to remain on the call to advance the call to the next prompt.[315] Thus, in order to make the process as simple as possible for consumers, sales agents should be permitted to remain on the premises or on the phone.[316] The Authority could achieve the same consumer protection goals through the less restrictive means of adopting a standard that sales agents may not speak during the TPV process and that any efforts to speak or intervene would render the TPV invalid.[317]

[310] *See* Proposed Decision, at 7.
[311] *See* June 2017 Testimony, at 35.
[312] *See* 2020 Proposed PURA Revisions, at 11 (§ G.).
[313] *See* 2020 Proposed PURA Revisions, at 11 (§ G.).
[314] *See* June 2017 Testimony, at 35.
[315] *See* June 2017 Testimony, at 35.
[316] *See* June 2017 Testimony, at 35-36.
[317] *See* June 2017 Testimony, at 36.

XVIII. THE AUTHORITY SHOULD ADJUST THE ELEMENTS REQUIRED TO BE INCLUDED IN TPVS

The 2020 Proposed PURA Revisions would require the TPV to include confirmation of the customer's account number, name, service address, and telephone.[318] The customer would confirm this information by reading the information directly from his or her EDC bill.[319] However, this fails to recognize that there may be situations where some of this information may have changed since the bill was issued or may not be located on the customer bill. For example, if a customer changes his or her name legally, the name on the bill may not be accurate. Similarly, if a customer changes his or her telephone number, the telephone number on the bill—if a telephone number is actually listed on the bill[320]—would not be accurate. If a telephone number is not listed on a customer bill, the customer could not confirm it by consulting his or her bill. The final standards should account for this and simply require that the TPV include confirmation of the required information without requiring the customer to read the information directly from the bill.

The 2020 Proposed PURA Revisions would require the TPV to contain a confirmation that the customer has a three-day rescission period.[321] This proposed standard should be revised to reflect the statutory rescission period of three ***business*** days.[322]

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[318] *See* 2020 Proposed PURA Revisions, at 10 (§ G.6).

[319] *See* 2020 Proposed PURA Revisions, at 10 (§ G.6).

[320] Customer telephone numbers do not appear to be located on sample bills of Eversource and The United Illuminating Company ("UI"). *See* Eversource sample bill, https://www.eversource.com/content/ct-c/residential/my-account/billing-payments/about-your-bill/understanding-my-bill (last visited Jan. 21, 2020); UI sample bill, https://www.uinet.com/wps/wcm/connect/www.uinet.com-7188/e85d2967-0643-4957-9482-2f63ab26174f/ui+SAMPLE+BILL.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE.Z18_J092I2G0N01BF0A7QAR8BK20A3-e85d2967-0643-4957-9482-2f63ab26174f-miailaY (last visited Jan. 21, 2020).

[321] *See* 2020 Proposed PURA Revisions, at 11 (§ G.11).

[322] *See* Conn. Gen. Stat. § 16-145o(f)(2) ("A customer who has a maximum demand of five hundred kilowatts or less shall, until midnight of the third ***business*** day after the latter of the day on which the customer enters into a service agreement or the day on which the customer receives the written contract from the electric supplier as provided in this section, have the right to cancel a contract for electric generation services entered into with an electric supplier.") (emphasis added).

XIX. THE TPV SHOULD NOT INCLUDE THE CURRENT STANDARD SERVICE RATE

The 2020 Proposed PURA Revisions would require that, during the TPV, the customer be told the Standard Service rate and confirm that (s)he is aware that, if (s)he were on Standard Service that is the price that (s)he would pay.[323] However, the purpose of the TPV is to "ensure the customer is aware of the transaction that results from the marketing call."[324] Since the Standard Service rate is not part of that transaction and disclosure of it, during the TPV, may actually create customer confusion, the Authority should remove this requirement.

As an initial matter, the purpose of the TPV is to "obtain the customer's oral confirmation regarding the change" in the customer's electric supply.[325] Thus, the TPV is part of the contracting process, not the marketing process. Moreover, mentioning the Standard Service rate is not a statutorily required TPV element.[326] Further, the person conducting the TPV—a third-party verification company—is not the electric supplier nor its sales agent.[327] Consequently, the Standard Service rate need not be disclosed during the TPV.

[323] *See* 2020 Proposed PURA Revisions, at 10 (§ G.8.). Notably, because this proposed standard was not included until the Proposed Decision, participants did not have an opportunity to present evidence of its potential effect on customers during the course of this proceeding.

[324] *Cf.* Proposed Decision, at 7.

[325] Conn. Gen. Stat. § 16-245s(b).

[326] *See id.* (listing required TPV procedures).

[327] *See id.* (defining "third-party verification company" as a company that "(A) Is ***independent*** from the electric supplier that seeks to provide the new service; (B) is not directly or indirectly managed, controlled or directed or owned wholly or in part by (i) an electric supplier that seeks to provide the new service, or (ii) any corporation, firm or person who directly or indirectly manages, controls or directs or owns more than five per cent of such supplier; (C) operates from facilities physically separate from those of the electric supplier that seeks to provide the new service; and (D) does not derive commissions or compensation based upon the number of sales confirmed") (emphasis added).

In addition, requiring that the Standard Service rate be disclosed multiple times,[328] including during the TPV, could lead to customer confusion. For example, a customer hearing the Standard Service rate multiple times could come to believe that (s)he is going to pay that price; thereby, defeating the purpose "ensur[ing] the customer is aware of the transaction that results from the marketing call."[329] Accordingly, the Authority should remove the requirement that, during the TPV, the customer be told the Standard Service rate and confirm that (s)he is aware that, if (s)he were on Standard Service, that is the price that (s)he would pay.

XX. ELECTRIC SUPPLIERS SHOULD NOT BE REQUIRED TO COMPLETE INTERNAL INVESTIGATIONS OF COMPLAINTS WITHIN THREE BUSINESS DAYS

The 2020 Proposed PURA Revisions would require all electric suppliers to respond to the Authority's inquiries regarding complaints within three (3) business days.[330] However, the facts and circumstances underlying particular complaints may take additional time to investigate fully before a supplier can provide a comprehensive response.[331] Thus, the Authority should clarify that electric suppliers are required to provide an ***initial*** response within three business days and that, in such circumstances, a supplemental response will be provided.

XXI. THE AUTHORITY SHOULD NOT REQUIRE USE OF THE DISCLOSURE STATEMENT

The Proposed Decision would require electric suppliers to include a specified disclosure statement (the "Disclosure Statement") in their promotional materials.[332] The Disclosure

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[328] *See* Proposed Decision, at 7 ("the Marketing Standards require a supplier to be aware of the current and pending standard service prices and to ***include*** such prices at points of the marketing ***and*** prior to the TPV.") (emphasis added). Notably, the EDCs are not required to provide customers with information about supplier prices when enrolling customers in Standard Service even if those suppliers prices are less than the Standard Service rate.

[329] *Cf.* Proposed Decision, at 7.

[330] *See* 2020 Proposed PURA Revisions, at 11 (§ I).

[331] *Cf.* June 2017 Testimony, at 13 (indicating that five (5) business days is not a sufficient amount of time to investigate and correct potential problems).

[332] *See* Proposed Decision, at 9, 11 (Order 2).

Statement would advise customers that "Licensed Electric Suppliers are required to post the highest and lowest generation service charge that was billed to their customers under a variable rate offer in each of the preceding 12 months."[333] The Proposed Decision's directive regarding the Disclosure Statement is designed to respond to the statutory directive that the Authority "***examine*** a disclosure statement for all electric suppliers to use on all promotional materials directed to residential customers that will direct consumers where they can find the highest and lowest electric generation service rate charged by such supplier ***as part of a variable rate offer*** in each of the preceding twelve months to any customer eligible for standard service."[334]

As the Authority is aware, electric suppliers are prohibited from entering into new variable price contracts with residential customers or automatically renewing residential customers to a variable price.[335] Because of these prohibitions, notice of the highest and lowest generation service charge that was billed to customers under a variable rate offer in each of the preceding twelve (12) months would provide no benefit to customers evaluating electric supply options. Consequently, the Disclosure Statement is no longer necessary or appropriate.[336]

Moreover, the directive of Connecticut General Statutes section 16-245o(*l*)(2) does not require the Authority to adopt the Disclosure Statement.[337] It simply requires the Authority to "examine" such a statement.[338] The Authority has discharged this requirement by considering the

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[333] *Id.* at 9.

[334] Conn. Gen. Stat. § 16-245o(*l*)(2) (emphasis added).

[335] *See* Conn. Gen. Stat. § 16-245o(g)(4) ("On and after October 1, 2015, no electric supplier shall (A) enter into a contract to charge a residential customer a variable rate for electric generation services; or (B) automatically renew or cause to be automatically renewed a contract with a residential customer and, pursuant to such contract, charge such customer a variable rate for electric generation services.").

[336] *See* June 2017 Testimony, at 50; March 2017 Testimony, at 4.

[337] *See* Conn. Gen. Stat. § 16-245o(*l*)(2).

[338] *See id.* ("Such docket shall ***examine*** a disclosure statement for all electric suppliers to use on all promotional materials directed to residential customers that will direct consumers where they can find the highest and lowest electric generation service rate charged by such supplier as part of a variable rate offer in each of the preceding twelve months to any customer eligible for standard service.") (emphasis added).

need for the Disclosure Statement as part of this proceeding.[339] However, because, as noted, the Disclosure Statement would direct residential customers to information about a pricing option in which they are prohibited from being enrolled,[340] the Authority should not require electric suppliers to include the Disclosure Statement in their promotional materials directed to residential customers.

XXII. THE AUTHORITY SHOULD MAKE ITS FINAL STANDARDS EFFECTIVE NINETY (90) DAYS AFTER IT ISSUES ITS FINAL DECISION

The Proposed Decision contains several inconsistent statements about the effectiveness of the 2020 Proposed PURA Revisions.[341] The Authority's final decision should resolve these inconsistencies. It should also recognize that electric suppliers will need sufficient time to make changes to their operations to implement the final standards. For example, as discussed further below, the following standards require operational changes that all must be implemented simultaneously: Training (§ D.1); Identification (§ E.1); Time of Sale Notice (§ E.2); Sales Agent Identification (§ E.5); Third Party Verification (§ G); and Recordkeeping (§ H). A ninety-day period between the issuance of the final decision and the effectiveness of the final standards will provide electric suppliers such a sufficient amount of time. Thus, the Authority should make its final standards effective ninety (90) days after it issues its final decision in the instant proceeding.

[339] *See, e.g.*, Proposed Decision, at 9.

[340] *See* Conn. Gen. Stat. § 16-245o(g)(4).

[341] *See* Proposed Decision, at 10 (setting the effective date as February 1, 2020); Proposed Decision, at 11 (setting the effective date as March 1, 2020); 2020 Proposed PURA Revisions, at 2 (providing that the 2020 Proposed PURA Revisions "will be effective immediately upon the date of the Decision . . . ."); *see also* Time Schedule (date of last revision: Jan. 6, 2020) (identifying the tentative date of the final decision as February 5, 2020).

A. Training (§ D.1)

The 2020 Proposed PURA Revisions would require that all training for representatives marketing for an electric supplier be conducted by an employee of the electric supplier.[342] To comply with this requirement, electric suppliers that currently conduct training using vendors would need to hire employees to conduct training for marketing representatives. Hiring employees is a time-consuming task that could involve advertising open positions, interviewing candidates, and negotiating terms of employment. Candidates accepting offers of employment might need to give several weeks' notice before leaving the employ of their prior employers and starting these new training positions. Even after new employees are hired, they will need to be trained on the policies and procedures of their new employers before they can begin training marketing representatives. A ninety-day period between the issuance of the final decision and the effectiveness of the final standards will provide electric suppliers a sufficient amount of time to comply with such a training requirement.

B. Identification (§ E.1)

The 2020 Proposed PURA Revisions would require electric suppliers engaging in door-to-door sales to display identification that clearly identifies the electric suppliers' trade names and logos, as well as the individuals' name, photo, and identification number.[343] To comply with such a requirements, electric suppliers would need to review all of the existing identification used by their marketing representatives, assess whether it is compliant with the requirement, and, if it is not, take steps to replace it with compliant identification. Replacing identification could require electric suppliers to contract with an identification provider and to coordinate with all of their marketing representatives to ensure that identification photographs are taken. Ninety (90)

[342] *See* 2020 Proposed PURA Revisions, at 6 (§ D.1).

[343] *See* 2020 Proposed PURA Revisions, at 7 (§ E.1).

days after the Authority has rendered a final decision is necessary for electric suppliers to comply with this new requirement.

C. Time of Sale Notice (§ E.2)

The 2020 Proposed PURA Revisions would require electric suppliers engaging in door-to door sales to provide customers with a document containing certain specified information.[344] In order to comply with this requirement, electric suppliers will need to draft and prepare these documents. Once the documents have been finalized, they will need to be printed and distributed to marketing representatives, who themselves will need to be trained about how and when to provide these documents to customers. A ninety-day period between the issuance of the final decision and the effectiveness of the final standards will provide electric suppliers a sufficient amount of time to comply with this requirement.

D. Sales Agent Monitoring (§ E.5)

The 2020 Proposed PURA Revisions would require electric suppliers to "fit all door-to-door marketers with GPS monitoring devices that allow the supplier to track, and later verify, the marketer's location during door-to-door sales."[345] To comply with this requirement, electric suppliers would need to acquire evaluate and test GPS monitoring devices that could be used to satisfy the requirement. In fact, before acquiring these devices, electric suppliers must be satisfied that they will function under typical operational conditions. For example, electric suppliers will need to assess how well particular device types function in cloudy weather, amid the topography of the regions in which marketing representatives operate, and over the course of a marketing representative's full shift. Once an electric supplier has acquired such devices, it will

[344] 2020 Proposed PURA Revisions, at 7 (§ E.2.).

[345] 2020 Proposed PURA Revisions, at 8 (§ E.5.).

need to train its marketing representatives on their use. Ninety (90) days after the Authority has rendered a final decision is necessary for electric suppliers to comply with this new requirement.

E. TPV Requirements (§ G)

The 2020 Proposed PURA Revisions would require TPVs to contain certain required elements.[346] To comply with this requirement, electric suppliers will need to ensure that third-party verification companies and their personnel implement these requirements. In some instances, it could be necessary for electric suppliers to update their contractual arrangements with the third-party verification companies with which they contract for third-party verification service. For electric suppliers that use automated TPVs, programming changes might be required to ensure that the TPVs contain all of the required elements. Ninety (90) days after the Authority has rendered a final decision is necessary for electric suppliers to comply with this new requirement.

F. Recordkeeping (§ H)

The 2020 Proposed PURA Revisions would require electric suppliers to record the entirety of all door-to-door marketing lasting ten seconds or longer with residential or potential residential customers and to retain those recordings for three years.[347] To comply with this requirement, electric suppliers would need to acquire, evaluate and test recording devices that could be used to satisfy the requirement. In fact, before acquiring these devices, electric suppliers must be satisfied that they will function under typical operational conditions. For example, electric suppliers will need to assess whether particular device types have appropriate battery life and sound quality. Further, electric suppliers will need to make arrangements for storing the recordings. Doing so could require acquiring additional data storage capacity or contracting with

[346] *See* 2020 Proposed PURA Revisions, at 10-11 (§ G.).

[347] *See* 2020 Proposed PURA Revisions, at 11 (§ H.).

a data storage provider. Thus, ninety (90) days after the Authority has rendered a final decision is necessary for electric suppliers to comply with this new requirement.

XXIII. THE AUTHORITY SHOULD MAKE A TYPOGRAPHICAL CORRECTION

The first sentence of section B.4 should be revised as follows (proposed change shown as underlined text): "It is the responsibility of every Electric Supplier to ensure that any entity or individual marketing and/or acting on behalf of an Electric Supplier does not engage in false, misleading or deceptive trade practices, nor perform unauthorized switching of customer accounts."

CONCLUSION

For all the foregoing reasons, RESA requests that the Authority adopt the Supplier/OCC Revised Standards or, in the alternative, modify the 2020 Proposed PURA Revisions as described herein.

Respectfully Submitted,
RETAIL ENERGY SUPPLY ASSOCIATION

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent to all participants of record on this 22nd day of January 2020.

Joey Lee Miranda