

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

310 CMR 7.75: CLEAN ENERGY STANDARD - PROPOSED AMENDMENTS	:	NOVEMBER 12, 2019
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**COMMENTS OF  
RETAIL ENERGY SUPPLY ASSOCIATION  
RE PROPOSED AMENDMENTS**

The Retail Energy Supply Association (“RESA”)<sup>1</sup> hereby submits its comments in response to the Department of Environmental Protection’s (“Department”) October 4, 2019 Proposed Amendments to 310 CMR 7.75 *Clean Energy Standard* (“Proposed Amendments” or “310 Proposed CMR 7.75”).

**INTRODUCTION**

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York, and New England regions. RESA members are active participants in the retail competitive markets for electricity, including the Massachusetts retail electric market. Several RESA member companies are licensed by the Department of Public Utilities to serve customers in Massachusetts and are presently providing electricity service to customers in the Commonwealth. Accordingly, RESA and its members have an interest in ensuring that amendments to the Clean Energy Standard

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<sup>1</sup> The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at [www.resausa.org](http://www.resausa.org).

(“CES”) do not have an adverse effect on its members, their customers, or the continued success of the competitive retail electric market in Massachusetts.

## BACKGROUND

In August 2017, the Department adopted the CES, which required the electric distribution companies (“EDCs”) and competitive suppliers (collectively, “Retail Sellers”) to procure a minimum percentage of electricity sales from clean energy resources beginning in 2018.<sup>2</sup> On February 20, 2019, the Department issued a MassDEP Stakeholder Discussion Document describing options for expanding the CES to achieve additional emissions reductions in support of the Global Warming Solutions Act.<sup>3</sup> In the Discussion Document, the Department sought stakeholder input on increasing the CES, applying the CES to municipally-owned utilities, and creating a clean energy standard for existing clean generation resources (“CES-E”).<sup>4</sup> Numerous stakeholders, including RESA, filed comments in response to the Discussion Document.<sup>5</sup>

On October 4, 2019, the Department issued the Proposed Amendments, which would make certain changes to the CES and establish the CES-E.<sup>6</sup> Subsequently, the Department issued a Public Hearing Notice scheduling two public hearings on the Proposed Amendments and indicating it would accept comments on the Proposed Amendments until November 12, 2019.<sup>7</sup> RESA now hereby submits its comments regarding the Proposed Amendments.

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<sup>2</sup> 310 C.M.R. 7.75(4).

<sup>3</sup> MassDEP Stakeholder Discussion Document Discussion Document (Feb. 20, 2019) (“Discussion Document”) (available at: <https://www.mass.gov/doc/2019-stakeholder-document-expanding-the-ces/download>) (last visited Nov. 11, 2019), at 1.

<sup>4</sup> *Id.* at 1-4.

<sup>5</sup> *See, e.g.*, Comments of Retail Energy Supply Association re 2019 Stakeholder Discussion Document (Mar. 29, 2019) (available at: <https://www.mass.gov/doc/2019-stakeholder-comments-expanding-the-ces/download>) (last visited Nov. 11, 2019).

<sup>6</sup> *See* Proposed Amendments (available at: <https://www.mass.gov/doc/310-cmr-775-proposed-clean-energy-standard-ces-amendments/download>) (last visited Nov. 11, 2019).

<sup>7</sup> Public Hearing Notice (Oct. 7, 2019) (available at: <https://www.mass.gov/doc/310-cmr-775-notice-of-public-comment-period/download>) (last visited Nov. 11, 2019).

## COMMENTS

RESA appreciates the Department's consideration of its prior comments. However, before the Department adopts final amendments to the CES, for the reasons discussed more fully below, RESA requests that the Department provide as much regulatory certainty as possible by ensuring that the CES-E compliance obligation is always known three years in advance, fully protecting existing ratepayer expectations, and announcing alternative compliance payment ("ACP") rates each year.

### **I. THE DEPARTMENT SHOULD PROVIDE AS MUCH REGULATORY CERTAINTY AS POSSIBLE**

RESA appreciates the Department's allowance of existing resources that will help the Commonwealth to reduce greenhouse gas ("GHG") emissions to participate in the CES. However, the Department should ensure that the CES-E compliance requirements are straightforward, easily calculable, and identified on a forward basis for a three (3) year period to allow businesses to manage their affairs more effectively and reduce risk premiums; thus, mitigating costs borne by ratepayers.

#### **A. The CES-E Minimum Percentage Should Be Established Three Years In Advance**

The Proposed Amendments would require a Retail Seller to include a minimum percentage of electrical energy sales with clean existing generation attributes ("CES-E Minimum Percentage").<sup>8</sup> While the Proposed Amendments specify the CES-E Minimum Percentage for the years 2020 and 2021, they provide a formula for calculating the CES-E Minimum Percentage for the years 2022 through 2050.<sup>9</sup>

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<sup>8</sup> 310 Proposed CMR 7.75(4).

<sup>9</sup> 310 Proposed CMR 7.75(4)(b).

A formula or other methodology that fails to provide an easy and predictable method for determining compliance creates uncertainty that forces suppliers to estimate their compliance obligations and to include a significant premium in what they charge consumers to protect against that risk; thereby, increasing prices to ratepayers. Furthermore, if the compliance obligation is ultimately less than the suppliers estimated, customers will have paid more for CES-E compliance than was actually necessary. Conversely, by providing quantity and cost certainty, the Department can eliminate risk premiums associated with such uncertainty - resulting in lower prices for consumers.

As written, the Proposed Amendments do not provide sufficient quantity certainty beyond 2021. For 2022 through 2050, the CES-E minimum percentage will be calculated pursuant to a formula based on electricity sales reported “for the year three years before the calendar year for which the percentage requirement applies.”<sup>10</sup> Specifically, the 2022 CES-E Minimum Percentage will be calculated by dividing a numerator of fifteen percent (15%) by a denominator that equals the ratio of the total amount of electrical energy sales to end use customers reported for 2019 to the total electrical energy sales to end use customers provided in the report for 2018.<sup>11</sup> However, because of reporting lags, electricity sales reported for the year

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<sup>10</sup> *Id.*; see also Background Document on Proposed Amendments to: 310 CMR 7.75 *Clean Energy Standard* (Oct. 7, 2019) (available at: <https://www.mass.gov/doc/310-cmr-775-background-document/download>) (last visited Nov. 11, 2019) (“Background Document”), at 5 (“[T]he standard would be calculated based on electricity sales reported for the year three years prior to the year for which the standard is being established . . . once the report published pursuant to 310 CMR 7.75(9)(b) for the earlier year is available.”).

<sup>11</sup> 310 Proposed CMR 7.75(4)(b) (“For calendar years 2022 through 2050, percentage requirements for clean existing generation attributes shall be determined by dividing 15% by the percentage *provided by the Department* pursuant to 310 CMR 7.75(9)(b)4. for the year three years before the calendar year for which the percentage requirement applies, rounded to the nearest percent (i.e., if the percentage provided pursuant to 310 CMR 7.75(9)(b)4. for 2027 is 105%, then the percentage requirement for clean existing generation attributes in 2030 would be  $15\% \div 105\% = 14\%$ .”) (emphasis added); see also 310 Proposed CMR 7.75(9)(b)4 (“The total amount of electrical energy sales to end-use customers *reported* pursuant to 310 CMR 7.75(6)(b)1., expressed in MWh and, beginning with the report for 2019, as a percentage of the total electrical energy sales to end use customers provided in the report for 2018.”) (emphasis added).

three years before the year for which the CES-E Minimum Percentage is being established will *not* be known three years in advance of the CES-E Minimum Percentage’s applicability.

The report of electrical energy sales required to calculate the CES-E obligation is based on a Retail Seller’s New England Power Pool Generation Information System (“NEPOOL GIS”) certificates obligation to retail customers under the NEPOOL GIS Operating Rules.<sup>12</sup> The NEPOOL GIS certificates obligation, however, cannot be known until more than one quarter *after* the generation of this energy actually occurs.<sup>13</sup> As a consequence, the electrical energy sales for the last quarter of a calendar year is not known until April 15 of the subsequent year.<sup>14</sup> Moreover, because Retail Sellers do not report the information necessary for the Department to calculate the denominator of the CES-E obligation formula until at least July 1 of the year *following* the year in which the generation of this energy actually occurs<sup>15</sup> and the Department has no deadline by which it must provide the denominator necessary for Retail Sellers to calculate the CES-E Minimum Percentage,<sup>16</sup> Retail Sellers will have no idea what their CES-E compliance obligation will be for 2022 at the time the Proposed Amendments are adopted nor will they know by what date the information necessary to determine their 2022 through 2050 CES-E compliance obligations will be available each year.

Consequently, even though the Department contemplated basing the CES-E Minimum Percentage “on electricity sales reported for the year three years prior to the year for which the

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<sup>12</sup> See 310 Proposed CMR 7.75(6)(b)(1).

<sup>13</sup> See NEPOOL GIS Operating Rules, Rule 4.3(a) (effective Jul. 1, 2019) (noting that, subject to certain exceptions, the certificates obligation is calculated on the “Creation Date”). The Creation Date is generally the fifteenth day of the second quarter after the applicable energy was generated. See NEPOOL GIS Operating Rules, Rule 2.1(b) (defining “Creation Date”).

<sup>14</sup> See Important NEPOOL GIS Dates, <https://www.nepoolgis.com> (last visited Nov. 11, 2019) (indicating that, for generation in the months of October, November, and December the certificate issuance date is April 15 of the following year).

<sup>15</sup> 310 C.M.R. 7.75(6)(a), (b) (requiring that Retail Sellers submit their annual compliance filings for a given compliance year by the following July 1 (or the first business day thereafter)).

<sup>16</sup> See 310 Proposed CMR 7.75(9)(b)4.

standard is being established,” competitive suppliers will not know a particular year’s CES-E Minimum Percentage three full years in advance.<sup>17</sup>

If competitive suppliers do not know and cannot reasonably estimate their actual CES-E compliance obligations with certainty, they may include significant risk premiums in their customer contracts that extend into 2022<sup>18</sup> and beyond. These risk premiums will cause customers to pay unnecessarily high prices. Alternatively, competitive suppliers may include a provision in their customer contracts that either passes through the cost of CES-E compliance or allows the supplier to adjust the contract price once the CES-E compliance obligation for a particular year is known. These mechanisms will have a direct and immediate financial effect on customers that have contracted for a fixed price and will be subject to new and unanticipated charges that are not within their budgets. Such an unexpected cost impact would be particularly difficult for customers that have limited budgetary flexibility. Moreover, such unexpected changes would undermine the consumers’ underlying confidence that the competitive electricity market can provide and deliver the type of pricing products they desire and have contracted to meet their energy needs.

To obviate the need for risk premiums or less attractive contract terms, RESA urges the Department to establish the CES-E obligation for 2022 in the final CES amendments and to modify the CES-E formula for years 2023 through 2050 to ensure that Retail Sellers actually **know** their CES-E compliance obligation “for the year three years before the calendar year for

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<sup>17</sup> Background Document, at 5; *see also* 310 Proposed CMR 7.75(4)(b). According to the Background Document, the three-period would run from the issuance of the applicable report. *See* Background Document, at 5 (“the standard would be calculated based on electricity sales reported for the year three years prior to the year for which the standard is being established . . . **once the report published pursuant to 310 CMR 7.75(9)(b) for the earlier year is available.**”) (emphasis added). However, the Proposed Amendments do not set a deadline for the issuance of the report. *See* 310 Proposed CMR 7.75(4)(b).

<sup>18</sup> *See* Energy Switch Massachusetts website (available at: <http://www.energyswitchma.gov>) (displaying multiple fixed price offers that extend thirty-six (36) months into the future) (last visited Nov. 11, 2019).

which the percentage requirement applies.”<sup>19</sup> Taking such an approach would also reduce the criticality of including exemptions for existing contracts for any future program modifications.

**B. The Department Should Set The CES-E Minimum Percentage For 2022 At Fifteen Percent**

For 2022, the Department should set the CES-E Minimum Percentage at fifteen percent (15%). In this way, at the time the CES-E is adopted, the Department can ensure that customers with longer term contracts<sup>20</sup> are not subject to risk premiums or less desirable contract terms.

Furthermore, elsewhere in the Proposed Amendments, it appears the Department contemplated fixing the 2022 CES-E Minimum Percentage at fifteen percent (15%). Specifically, the Proposed Amendments provide: “The adjustment to the retail electricity seller’s compliance obligation pursuant to 310 CMR 7.75(4)(b) shall be equal to 15% of the amount of contracted electricity energy sales and shall apply to sales that occur in 2020 *through 2022* only.”<sup>21</sup> For 2020 and 2021, this is equal to the CES-E Minimum Percentage.<sup>22</sup> As a result, the exemption from the CES-E applies to all sales in these years that otherwise would be subject to the CES-E. By contrast, for 2022, if the CES-E Minimum Percentage is set by formula, but the CES-E exemption is fixed at fifteen percent (15%) of sales, the exemption likely would not match the CES-E Minimum Percentage. As a consequence, if application of the formula produces a CES-E Minimum Percentage greater than fifteen percent (15%), contracts otherwise subject to the exemption would have a certain portion of sales that would not be exempt from the CES-E; thereby, subjecting customers with longer term contracts to risk premiums or less appealing

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<sup>19</sup> Cf. 310 Proposed CMR 7.75(4)(b); *see also* Background Document, at 5.

<sup>20</sup> *See* Energy Switch Massachusetts website (available at: <http://www.energyswitchma.gov>) (displaying multiple fixed price offers that extend thirty-six (36) months into the future) (last visited Nov. 11, 2019).

<sup>21</sup> 310 Proposed CMR 7.75(5)(e)(2) (emphasis added).

<sup>22</sup> *See* 310 Proposed CMR 7.75(4)(b) (setting the CES-E Minimum Percentage at fifteen percent (15%) for 2020 and 2021).

contract terms. To avoid this, the Department should set the 2022 CES-E Minimum Percentage at fifteen percent (15%).

**C. Any Future Changes To The CES or CES-E Minimum Percentage Should Be Effective Three Years After Adoption Or Subject To Grandfathering**

Any future increase in the CES Minimum Percentage (similar to the expansion of the CES in the Proposed Amendments)<sup>23</sup> or the CES-E Minimum Percentage or adoption of new ways of calculating these minimum percentages have the potential to frustrate consumer expectations because they could affect contracts that were priced based on prior CES requirements and may have terms of service that extend over multiple years.<sup>24</sup> As noted, while competitive suppliers may have contractual and legal means to address change of law circumstances, these mechanisms will have a direct and immediate financial effect on customers that have contracted for a fixed price and will be subject to new and unanticipated charges that are not within their budgets. These unanticipated charges could place customers in untenable positions because they may be required to pay these new costs per the terms of their contractual agreements. Moreover, such unexpected changes would undermine the consumers' underlying confidence that the competitive electricity market can provide and deliver the type of pricing products they desire and have contracted to meet their energy needs. Accordingly, in order to avoid disrupting these existing agreements, just as the Department recognized an exemption from the CES for existing contracts at the time it promulgated the original regulations,<sup>25</sup> it should recognize a comparable exemption from any future increase in the CES Minimum Percentage or the CES-E Minimum Percentage or adoption of new ways of calculating these minimum

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<sup>23</sup> See 310 Proposed CMR 7.75(4)(a) (increasing the CES Minimum Percentage for 2020 to twenty-two percent (22%)).

<sup>24</sup> See Energy Switch Massachusetts website (available at: <http://www.energyswitchma.gov>) (displaying multiple fixed price offers that extend thirty-six (36) months into the future) (last visited Nov. 11, 2019).

<sup>25</sup> See 310 C.M.R. 7.75(5)(d).



percentages. As an alternative, because retail electric supply contract terms typically do not exceed three years,<sup>26</sup> delaying the compliance obligation associated with any changes until three years after such changes are effective also would protect customer expectations.

## **II. THE DEPARTMENT SHOULD PROTECT EXISTING CUSTOMER EXPECTATIONS**

The Proposed Amendments exempt retail electricity supply contracts executed as of February 20, 2019 from the two percent (2%) increase in the CES for 2020 and from the CES-E for 2020 through 2022.<sup>27</sup> “This date was chosen because it is the date that [the Department] notified retail electricity sellers of *potential* changes to the CES Regulation.”<sup>28</sup> However, February 20, 2019 is not the appropriate date for determining the applicability of the exemption. Thus, when issuing the final amendments, the Department should establish the date for determining the applicability of the exemption for existing contracts as the effective date of the final amendments to the CES.

As an initial matter, on (and after) February 20, 2019, competitive suppliers did not have knowledge of the *actual* changes. They did not know, and could not reasonably have predicted, how their CES compliance obligations and costs would change, if at all, as a result of the Department’s rulemaking process. For example, because the Department asked for stakeholder input on all of those topics, competitive suppliers did not know the extent of the expansion of the CES,<sup>29</sup> the calculation methodology for CES-E Minimum Percentage,<sup>30</sup> or the CES-E ACP

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<sup>26</sup> See Energy Switch Massachusetts website (available at: <http://www.energyswitchma.gov>) (displaying numerous fixed-price offers that extend up to 36 months into the future) (last visited Nov. 11, 2019).

<sup>27</sup> See 310 Proposed CMR 7.75(5)(e); see also Background Document, at 5-6.

<sup>28</sup> Background Document, at 5 (emphasis added).

<sup>29</sup> See Discussion Document, at 1 (requesting input on the possibility of the expansion of the CES in 2020 “for example to 21% or 22%”).

<sup>30</sup> See *id.* at 2 (requesting input on the possibility of setting the CES-E minimum percentage at fifteen percent).

rate.<sup>31</sup> In fact, although the Discussion Document contemplated an initial CES-E obligation of fifteen percent (15%), the Department did not indicate when that percentage would go into effect or how long that percentage would be in effect.<sup>32</sup> Further, in the Discussion Document, the Department noted that the CES-E could be expressed either a percentage or a megawatt hour (“MWh”) obligation.<sup>33</sup> Moreover, although the Discussion Document sought input on a formula for calculating the CES-E obligation in future years, the Department did not define the inputs to that formula.<sup>34</sup> As a consequence, if competitive suppliers had attempted to account for the proposed changes to the CES outlined in the Discussion Document in their post-February 20, 2019 contracts, those contracts could not have accurately reflected the changes in the Proposed Amendments. Further, because the Proposed Amendments could still be revised based on stakeholder comments,<sup>35</sup> issuance of the Proposed Amendments also has not given competitive suppliers or their customers knowledge of the provisions of that will ultimately be adopted and will not enable them to reflect such provisions in their contracts.

As the Department most certainly appreciates, the competitive electricity market in the Commonwealth continues to advance and competitive suppliers continue to enter into contractual obligations, often with multi-year terms of service,<sup>36</sup> while the CES amendments are being proposed and promulgated. However, competitive suppliers do not take market positions

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<sup>31</sup> See *id.* at 3 (requesting input on the possibility of setting the ACP rate at fifteen percent of the Renewable Portfolio Standard Class I ACP rate).

<sup>32</sup> Discussion Document, at 2.

<sup>33</sup> *Id.* at 2-3.

<sup>34</sup> *Id.*

<sup>35</sup> Public Hearing Notice (Oct. 7, 2019) (providing an opportunity for comment on the Proposed Amendments); see also Background Document, at 5 (welcoming “comment on ***all aspects*** of this proposal.”) (emphasis added); *Id.* (acknowledging “that a ***higher standard*** could be supported by historical data, and welcom[ing] additional technical comment on this question”) (emphasis added); *Id.* at 10 (providing an opportunity for comment on the Proposed Amendments).

<sup>36</sup> See Energy Switch Massachusetts website (available at: <http://www.energyswitchma.gov>) (displaying multiple fixed price offers that extend thirty-six (36) months into the future) (last visited Nov. 11, 2019).

or enter into agreement terms with customers based simply on the announcement that a regulatory change may occur or even based on the release of proposed regulatory revisions. Rather, since announced or even proposed regulatory revisions are subject to change based on the regulatory input process,<sup>37</sup> competitive suppliers take market positions and enter into agreements based only on actual regulatory requirements officially promulgated by the governing regulatory authority. In this way, customers are not exposed to undesirable contracting arrangements, unnecessary price increases and/or pricing volatility as a result of speculative regulatory changes that may never be adopted or that may be significantly modified<sup>38</sup> through the regulatory process before such changes ultimately become effective. As consequence, only after the Department officially promulgates amendments to the CES will suppliers modify their market positions and/or the terms of their agreements with customers to account for the creation of the CES-E and the expansion of the CES. Accordingly, RESA requests that the Department create a compliance exemption (subject to suppliers providing appropriate documentation) from the obligations of the CES-E and the expansion of the CES until the expiration of any contracts existing as of the effective date of these amendments. In this way, the Department can establish a paradigm that protects existing customer expectations. Otherwise, in order to account for any changes that occurred between February 20, 2019 and the date on which the final amendments to the CES are promulgated, customers with fixed-price arrangements could be faced with unexpected price increases to account for the expansion of the CES and the creation of the CES-

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<sup>37</sup> See, e.g., Response to Comments on Proposed Amendments to 310 CMR 310 CMR 7.75 *Clean Energy Standard*, <http://www.massdep.org/BAW/air/cesf-rtc.pdf> (December 2017) (last visited Nov. 11, 2019) (outlining the Department's responses, including updates to proposed amendments to the CES, to stakeholder comments); see also Background Document, at 5 (welcoming "comment on *all aspects* of this proposal") (emphasis added); *Id.* (acknowledging "that a *higher standard* could be supported by historical data, and welcom[ing] additional technical comment on this question.") (emphasis added).

<sup>38</sup> See, e.g., Background Document, at 5 (welcoming "comment on *all aspects* of this proposal") (emphasis added); *Id.* (acknowledging "that a *higher standard* could be supported by historical data, and welcom[ing] additional technical comment on this question") (emphasis added)

E. As noted above,<sup>39</sup> these unanticipated charges place customers in an untenable position. Moreover, they undermine the customers' underlying confidence that the competitive electricity market can provide and deliver the type of pricing products they desire (which often include fixed-price products) and have contracted to meet their energy needs.

### **III. THE DEPARTMENT SHOULD ANNOUNCE ACP RATES EACH YEAR**

The CES includes an alternative compliance mechanism.<sup>40</sup> Similarly, in the Proposed Amendments, the Department included a CES-E alternative compliance mechanism.<sup>41</sup> The CES and CES-E ACP rates are set by a formula that uses an input calculated annually by the Department of Energy Resources ("DOER")<sup>42</sup> and announced by January 31.<sup>43</sup> The use of such a formula adds complexity to, and increases the risk of error in, calculating the ACP rate. Thus, consistent with the practice of the DOER,<sup>44</sup> RESA requests that the Department announce the ACP for both the CES and CES-E by January 31st each year.

### **CONCLUSION**

For all of the foregoing reasons, RESA urges the Department to ensure that any expansion of the CES and the creation of the new CES-E provide as much regulatory certainty as possible.

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<sup>39</sup> Sections I.A, I.C.

<sup>40</sup> See 310 C.M.R. 7.75(5)(c).


<sup>41</sup> See 310 Proposed CMR 7.75(5)(c).

<sup>42</sup> See 310 C.M.R. 7.75(5)(c); 310 Proposed CMR 7.75(5)(c)(1)(b).

<sup>43</sup> See 225 C.M.R. 14.08(3)(a).

<sup>44</sup> See *id.*

Respectfully submitted,  
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