STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

DPUC INVESTIGATION INTO THE CONNECTICUT LIGHT AND POWER COMPANY'S BILLING ISSUES	: : : ;	**DOCKET NO. 08-02-06** **JULY 7, 2008**

WRITTEN EXCEPTIONS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA") submits these Written Exceptions to the June 19, 2008 Draft Decision (the "Draft Decision") issued by the Department of Public Utility Control (the "Department") in the above-captioned docket.[1] The Draft Decision states that The Connecticut Light and Power Company ("CL&P") acted imprudently after it discovered that its billing system had malfunctioned and failed to timely communicate the error to electric suppliers.[2] The Draft Decision further finds that several of the affected suppliers, including certain RESA member companies, violated Section 16-259a of the Connecticut General Statutes ("Section 16-259a" or the "Statute") because they did not offer payment plans for bills rendered by them upon receipt of adjusted usage data from CL&P.[3]

RESA and its members are fully cognizant of the paramount importance of supplier knowledge of, and compliance with, consumer protection statutes in the states in which they do business. Suppliers go to great lengths to comply with all applicable statutes and regulations because it's the law and so that they can maintain good standing with public utility

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[1] RESA's members include Commerce Energy, Inc; Consolidated Edison Solutions, Inc; Direct Energy Services, LLC; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corp.; Reliant Energy Retail Services, LLC; Sempra Energy Solutions; Strategic Energy, LLC; SUEZ Energy Resources NA, Inc. and US Energy Savings Corp. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

[2] Draft Decision, pp. 11-14.

[3] *Id.* at pp. 19-22.

commissions and other governmental agencies. When, as here, a public agency states in a decision or order that a supplier has violated the law, that supplier may be required to disclose the violation in other jurisdictions in connection with its application for an electric supplier license or a license renewal. Thus, the repercussions of a statutory violation can go far beyond the damage to the supplier's reputation in the public eye. It could adversely affect the supplier's ability to do business in other states.

As discussed in more detail in these Written Exceptions, RESA respectfully requests that the totality of the record in this proceeding be taken into full consideration when making a determination on the suppliers' adherence to the standards of Section 16-259a as illuminated by the Department for the first time in the Draft Decision. This totality, as further explained below, includes: (1) the lack of clarity in Section 16-259a prior to the Department's first express interpretation of its meaning in the Draft Decision; (2) consideration of the suppliers' actions in voluntarily agreeing to payment plans for affected customers that are well in excess of the scope required by Section 16-259a, despite their relative lack of culpability in comparison to the utility that originated the billing errors; and (3) the suppliers' efforts on short notice of the billing error to gather information for the Department and, following the April 15 hearings, working with the affected customers and Department Staff to comply with Department directives, to ensure quick and efficient notification to affected customers and to implement remedial measures deemed appropriate by the Department.

In requesting that the Department look to and acknowledge the totality of the record in this case, RESA readily admits that certain of its members did not initially administer the billing adjustments arising from CL&P's system error in a manner that was consistent with the Department's ultimate interpretation of Section 16-259a in the Draft Decision. RESA does not dispute this shortcoming. Nor does RESA challenge the reasoning underlying the

Department's interpretation. RESA nonetheless believes that a formal finding of a statutory violation is unwarranted in this case given the totality of the circumstances detailed in Parts A through C below and the adverse impacts that may be visited upon the named suppliers for the reasons stated above. RESA respectfully requests that the Department continue to take a very firm approach with respect to the suppliers' failure to adhere to the announced standards of Section 16-259a, but that this criticism stop short of the formal finding of a statutory violation.

Some helpful perspective is found in the May 2, 2008 Brief filed by the Attorney General ("AG"):

> The billing error that is at issue in this case is the fault of CL&P's imprudence and is not attributable to the conduct of the electricity suppliers. Certainly better protocols are necessary to improve communications between CL&P and alternate suppliers to avoid problems such as this in the future. At the present time, however, the DPUC should allow the affected electricity suppliers a reasonable opportunity to come into compliance with the requirements of § 16-259a.[4]

RESA therefore respectfully requests that the language regarding such Section 16-259a "violations" be modified in the Final Decision as set forth in Part E of these Exceptions.

A. The Requirements of Section 16-259a Were Unclear in Some Respects.

As a general matter, suppliers routinely receive adjusted usage data from electric utilities throughout the country in the normal course of business. Most states, however, do not have a statute like Section 16-259a that requires a supplier to offer an extended payment plan to every customer (including a large commercial and industrial customer) that receives a catch-up bill arising from a utility usage adjustment. Indeed, for most competitive suppliers – and certainly for all competitive suppliers serving mainly commercial and industrial customers – such a sweeping requirement would be and is one that is foreign in the normal course of their business and regulatory compliance experience. For this reason, most, if not all, suppliers were unaware of the existence of Section 16-259a prior to this proceeding. Even if they had known

4 Brief of the AG (May 2, 2008).

of the Statute, it would have been difficult for suppliers to discern how, absent Department guidance in the form of a clear interpretation of the Statute, it should have applied to the various bill adjustments required in this case.

Indeed, during this proceeding, the AG and the Office of Consumer Counsel ("OCC") openly disagreed as to the meaning of Section 16-259a despite each undertaking a rigorous analysis of its language. The OCC opined that the Statute clearly requires a payment plan for make-up bills arising from an inaccurate bill, but questioned whether it applies to a bill that is not timely issued.[5] The AG, by contrast, argued that Section 16-259a applied to both "inaccurate billing" and "non-billing."[6] Given that two state agencies charged with protecting consumer rights disagreed as to the requirements of Section 16-259a and that the Statute had not been previously interpreted by the Department, RESA respectfully submits that the balance of equities would make it appear a bit severe to find that the named suppliers violated a statutory mandate not based upon the Department's ultimate interpretation of the Statute in the Draft Decision.

B. The Draft Decision Fails To Recognize the Supplier's Subsequent Actions in this Proceeding As Reflected In The Record.

The Draft Decision states that "CL&P's imprudent actions in this case warrant a pay-back period of twelve months for the affected customers."[7] Even though the suppliers played no role in creating the billing error, they voluntarily agreed to the twelve-month payment plan required of CL&P. And they did so with full knowledge that this extraordinary long payment period is far greater than that required by Section 16-259a and will surely increase the suppliers'

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[5] Brief of the OCC (May 2, 2008), pp. 11-12.

[6] Brief of the AG (May 2, 2008), pp. 9-10.

[7] Draft Decision, p. 18.

bad debt expense. In addition, each supplier rushed to gather reports on how the system error affected their customers for presentation to the Department at the April 15 Hearing with little advance notice of the hearing. Thereafter, the suppliers, working closely with their affected customers and Department Staff, promptly complied with all orders of the Department in connection with the billing inquiry, implementing corrected billing and affected customer payment plan options, and continue to do so. The Draft Decision fails to take notice of any of these subsequent actions when discussing the complicity of the suppliers cited for violations of Section 16-259a. RESA respectfully suggests that the totality of the record would indicate that the affected suppliers fully cooperated to ensure affected customers would be taken care of in a manner that achieves the Department's goals in resolving this unfortunate situation. Thus, the balance of equities would likewise warrant a finding by the Department that takes this aspect into consideration with respect to its discussion of supplier adherence to Section 16-259a.

C. The Record Is Inconclusive As To Whether Named Violators Are More Culpable Than the Non-Violators.

Ten suppliers that bill customers directly in Connecticut testified at the April 15 hearing in this proceeding.[8] Six suppliers were cited for violations of Section 16-259a, apparently because they admitted at the hearing that they had issued rebills to their customers at amounts higher than the original bills as detailed in the reports ordered by the Department.[9] The testimony of the non-violators is a mixed bag: one supplier stated that it was unable to provide a definitive answer as to whether it issued higher rebills to its customers but assumed that it had done so.[10] Another testified that it did not know the exact number of customers who received

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[8] Transcript of April 15 Hearing (hereinafter "Tr.") at 208-241.

[9] Draft Decision, pp. 19-22.

[10] *Id.* at 20.

higher rebills but believed that some customers had received them.[11] The rebills of one supplier were lower than the original bills, thereby resulting in credit balances.[12] The final supplier had not yet rebilled its customers because it was waiting for adjusted usage data from CL&P.[13]

All of the suppliers undoubtedly used their best efforts to gather the relevant billing data prior to the April 15 hearing. But in retrospect, the Department appears to take a harsher view of suppliers whose testimony was more precise. Those suppliers who did enough homework or had better data tended to end up wearing the "violator" badge. Others who were not able to gather exact data, seemed to avoid "violator" status. Still others who either had the good luck of receiving adjusted usage data that resulted in a credit balance or had not received the adjusted usage data required to rebill the customer as of the April 15 hearing also were fortunate enough to be labeled non-violators.

RESA does not mean to suggest that all ten suppliers should be named as violators in the Final Decision. Clearly they should not be. Rather RESA respectfully suggests that the totality of the circumstances of the record brings into question whether the six named "violators" were substantially more culpable than the other four with respect to awareness of and compliance with Section 16-259a. RESA respectfully suggests that the record is incomplete on this score. The six "violators" simply had the bad luck of receiving adjusted usage data that resulted in a debit balance and promptly reported the pertinent statistics at the hearing. Application of the balance of equities would suggest that to expose these suppliers to the potentially serious adverse impacts of a statutory violation does not produce the most equitable result on this issue. This is

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[11] *Id.* at 21.

[12] *Id.* at 20.

[13] *Id.* at 21.

especially true where, as here, Section 16-259a was ambiguous until the Department, in a situation of first impression, provided its interpretation of the Statute in its Draft Decision.

D. The AG Recommends That Suppliers Be Given a Reasonable Opportunity to Comply With Section 16-259a.

The AG recognizes that given the totality of the circumstances in this case, the suppliers should be given a reasonable grace period with regard to Section 16-259a. In its Brief dated May 2, 2008, the AG wrote in pertinent part:

> The billing error that is at issue in this case is the fault of CL&P's imprudence and is not attributable to the conduct of the electricity suppliers. Certainly better protocols are necessary to improve communications between CL&P and alternate suppliers to avoid problems such as this in the future. At the present time, however, the DPUC should allow the affected electricity suppliers a reasonable opportunity to come into compliance with the requirements of § 16-259a.[14]

Consistent with the recommendation of the AG, RESA respectfully requests that the suppliers' inadvertent, technical failure to comport with the Department's interpretation of the Statute not give rise to a formal finding of a statutory violation. The Draft Decision clearly puts electric suppliers on notice of the Department's expectations concerning Section 16-259a in the event that similar circumstances arise again.

E. The "Violation" Language Should be Removed from the Final Decision and Replaced with Alternate Language that Achieves the Department's Goals.

On pages 1, 22, and 25 of the Draft Decision, the Department states that the suppliers named on each such page "violated Conn. Gen. Stat. §16-259a." For the reasons stated above, RESA requests that such phrase whenever it appears on pages 1, 22 and 25 be replaced with the phrase "failed to provide payment plans that were consistent with the requirements of Conn. Gen. Stat. § 16-259a, as clarified by the Department in this Decision."

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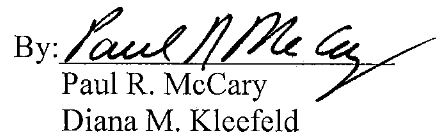
[14] Brief of the AG (May 2, 2008).

Conclusion

RESA appreciates the opportunity to present these Written Exceptions and requests that the Department adopt the substitute language recommended in Part E above in the Final Decision.

Respectfully submitted,

RETAIL ENERGY SUPPLY ASSOCIATION

By: 

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