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Via Electronic Filing

March 26, 2020

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

Re: **Docket No. 20-03-15: Emergency Petition of William Tong, Attorney General for the State of Connecticut, for a Proceeding to Establish a State of Emergency Utility Shut-Off Moratorium**

Dear Mr. Gaudiosi:

Enclosed please find the Comments of Retail Energy Supply Association in connection with the above-referenced proceeding.

I certify that a copy hereof has been sent to all participants of record as reflected on the Public Utilities Regulatory Authority's ("Authority") service list as of this date.

Please feel free to contact me if you have any questions or require additional information. Thank you.

Sincerely,

Joey Lee Miranda

Attachment

Copy to: Service List

STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY

EMERGENCY PETITION OF WILLIAM TONG, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT, FOR A PROCEEDING TO ESTABLISH A STATE OF EMERGENCY UTILITY SHUT-OFF MORATORIUM	:	DOCKET NO. 20-03-15
	:	MARCH 26, 2020

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1] hereby submits its comments in response to the March 18, 2020 Notice of Request for Written Comments in the above-referenced proceeding.[2] For the reasons set forth below, RESA requests that the Public Utilities Regulatory Authority ("Authority") forgo capping electric supplier prices and imposing moratoria on electric supplier termination fees ("ETFs") and late fees (collectively, the "Proposals").

BACKGROUND

On March 10, 2020, the Governor of the State of Connecticut ("Governor") declared a public health and civil preparedness emergency pursuant to Connecticut General Statutes sections 19a-131a and 28-9 in response to the global pandemic of COVID-19 disease associated with a novel coronavirus ("COVID-19").[3] On March 12, 2020, the Attorney General of the State of Connecticut ("AG") petitioned the Authority to open a proceeding to order electric, natural

[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] Notice of Request for Written Comments (Mar. 18, 2020) ("Notice").

[3] Declaration of Public Health and Civil Preparedness Emergencies (Mar. 10, 2020) ("Emergency Declaration").

gas, and water utilities to cease all utility service terminations for a thirty (30) day period (subject to renewal).[4] The Authority granted the AG Petition and ordered the gas, electric, and water public service companies regulated by the Authority to implement a shut-off moratorium and refrain from terminating utility service to residential customers, except for reasons of public safety, for the duration of the public health and civil preparedness emergency declared by the Governor, or until such other time as determined by the Authority ("Moratorium").[5]

On March 17, 2020, the Department of Energy and Environmental Protection ("Department") requested that the Authority expand the scope of the instant docket (or open a new docket) to address issues that might arise as a result of the COVID-19 pandemic and persist during any period of economic recovery.[6] The Authority granted the Department's request[7] and noted its intent to "identify and implement effective and prudent policies in response to the COVID-19 emergency."[8]

On March 18, 2020, the Authority issued the Notice, which requested comments on five particular issues.[9] Among these was a request for comment on whether "capping electricity rates during the Moratorium . . . including supplier rates, would assist in reducing the overall financial harm to the Electric Distribution Companies (EDCs) and to the ratepayers and the legal mechanism by which the Authority could affect such a cap."[10] The Authority also requested comment on whether "a moratorium on early termination fees charged by suppliers to both

[4] Emergency Petition of William Tong, Attorney General for the State of Connecticut, for a Proceeding to Establish a State of Emergency Utility Shut-Off Moratorium (Mar. 12, 2020) ("AG Petition"), at 1.

[5] Motion No. 1 Ruling (Mar. 12, 2020).

[6] *See* Motion No. 2 (Mar. 17, 2020) ("DEEP Petition").

[7] *See* Motion No. 2 Ruling (Mar. 18, 2020) ("Motion No. 2 Ruling"), at 1.

[8] *See id*. at 3.

[9] *See* Notice, at 1-2.

[10] *See id.* at 2 (Item 4).

residents and businesses, and a moratorium on late fees charged by suppliers would assist in reducing the overall financial harm to customers during this crisis."[11] RESA now hereby files its comments in response to the Notice.[12]

COMMENTS

RESA understands the impact COVID-19 is having on consumers and businesses across the United States.[13] Public health and safety should be everyone's top priority. RESA supports efforts to ensure appropriate measures, like the Authority encouraging suppliers to suspend door-to-door marketing,[14] are taken to protect the continued health and safety of consumers. However, the COVID-19 pandemic presents unprecedented challenges. Some of these challenges—such as ensuring adequate supplies of medical equipment and uninterrupted utility service to hospitals and other essential facilities—may require immediate action. Other challenges may benefit from additional deliberation to ensure that resources are appropriately allocated to maximize their usefulness and that decisions lead to "effective and prudent policies"[15] and do not have unintended, negative consequences. Such deliberation is particularly important when designing measures to respond to potential financial and economic impacts, which are not yet fully understood and which may be affected by other governmental action (whether at the federal or

[11] Notice, at 2 (Item 5).

[12] Although the Notice only specifically requested comment from the Department, the Office of Consumer Counsel and the EDCs (and other public service companies), it also welcomed "all responses to the issues contained within this Notice . . . ." Notice, at 1.

[13] *See* Retail Energy Supply Association Issues Statement Regarding COVID-19, Energy Choice Matters, http://www.energychoicematters.com/stories/20200323ztac.html (last visited Mar. 26, 2020).

[14] *See* Docket No 14-07-20RE01, *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers - Revised Standards*, Authority Correspondence (Mar. 20, 2020) ("Due to the current public health crisis, the Authority is requesting that electric suppliers cease door-to-door marketing until further instruction by the Authority.").

[15] *See* Motion No. 2 Ruling, at 3.

state level). Actions taken too hastily, even out of a well-intentioned desire to respond, ultimately could produce more harm than good or limit available resources in the future.

RESA urges the Authority to deliberate carefully about the economic measures that it is considering taking in response to the COVID-19 pandemic and to consider the financial impact that those measures may have on all stakeholders. To that end, the Authority should seek out and support robust stakeholder engagement and consideration of diverse perspectives (which could be expedited and include such measures as technical meetings by teleconference). RESA looks forward to contributing to an ongoing dialogue about the most appropriate and efficacious ways that the Authority can assist Connecticut consumers.

However, during this time, the Authority and all stakeholders should bear in mind their responsibility to uphold the core values of the American constitutional system of government and resist any temptations to set aside fundamental principles of the rule of law in an effort to meet the exigencies of the COVID-19 pandemic. Instead, the Authority should continue to observe the long-held principle that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, ***at all times and under all circumstances***."[16] The COVID-19 pandemic, while exceptionally serious, does not justify the violation of Constitutional rights or permit action beyond that authorized by law. Because capping electric supplier prices and imposing moratoria on electric supplier ETFs and late fees would violate such rights and is unauthorized by law, the Authority should decline to pursue such policies.

Instead, as the Authority considers potential measures to assist customers, it should heighten its efforts make consumers aware of existing mechanisms to protect the economic

[16] *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) (emphasis added).

interests of Connecticut residents and businesses. For example, the Authority could enhance its promotion of the many protections already available to Connecticut ratepayers.[17] Similarly, the Authority could advise ratepayers about Connecticut's prohibitions on price gouging and encourage them to report such activities.[18] It could coordinate its efforts in this regard with the AG and refer allegations of such activity to the AG for further investigation as appropriate.

I. EXISTING CONNECTICUT LAW ALREADY PROTECTS CONSUMER FINANCIAL INTERESTS

Connecticut law already protects consumer interests during the current civil preparedness emergency. Following a disaster emergency declaration pursuant to Chapter 517 of the Connecticut General Statutes, "[n]o person, firm or corporation shall increase the price of any item which such person, firm or corporation sells or offers for sale at retail" (subject to the fluctuation in the price of items sold at retail which occurs during the normal course of business).[19] Thus, because of the Governor's Emergency Declaration,[20] price gouging is already prohibited. In addition, the AG has issued guidance and press releases about this prohibition.[21] This existing authority protects Connecticut consumers from unscrupulous retailers seeking to profit from the COVID-19-related civil preparedness emergency. Thus, if an entity subject to the jurisdiction of the Authority is engaging in price gouging, including electric suppliers, the AG

[17] *See, e.g.*, EnergizeCT, Energy Assistance Programs, https://www.energizect.com/events-resources/energy-basics/energy-assistance (listing sources of assistance) (last visited Mar. 26, 2020).

[18] *See* Conn. Gen. Stat. § 42-230.

[19] *See id.*

[20] *See* Emergency Declaration.

[21] *See, e.g.*, Office of the Attorney General, Press Releases, Attorney General Tong Releases Guidance on Price Gouging Enforcement (Mar. 10, 2020) (available at https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/Attorney-General-Tong-Releases-Guidance-on-Price-Gouging-Enforcement) (last visited Mar. 26, 2020); *see also* Office of the Attorney General, Press Releases, Attorney General Tong Provides Update on Coronavirus Price Gouging Complaints (Mar. 17, 2020) (available at https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/Attorney-General-Tong-Provides-Update-on-Coronavirus-Price-Gouging-Complaints) (last visited Mar. 26, 2020).

can already take action pursuant to Connecticut General Statutes section 42-230 and the Emergency Declaration. Thus, rather than enacting separate measures, RESA urges the Authority to rely on existing law and refer any allegations of price gouging that it receives to the AG.

II. THE AUTHORITY SHOULD TAKE OTHER REASONABLE STEPS TO PROMOTE CONSUMER INTERESTS

RESA is mindful of the unprecedented stresses that COVID-19 and the measures taken to respond to it place upon the economy, businesses, and individuals. In this situation, the Authority should redouble its efforts to ensure that ratepayers are aware of the assistance that may be available to them.[22] Further, as the Department suggested,[23] the Authority could work with the EDCs and other utilities to create streamlined processes for classifying customers as hardship[24] so that they can receive the protections associated with that status as quickly as possible. Additionally, the Authority could encourage electric suppliers to take ***voluntary action*** to waive late fees and ETFs for hardship customers returning to Standard Service so long as the Emergency Declaration is in effect.[25] In fact, the Authority could encourage ***all*** competitive entities subject to its oversight to take similar action. While waiving these fees would involve sacrifices on the part of those entities, some will likely be willing to do so. Others, however, may be experiencing their own financial difficulties from the current situation. For example, electric suppliers who rely on door-to-door sales as a primary marketing channel, but have suspended

[22] *See, e.g.*, EnergizeCT, Energy Assistance Programs, https://www.energizect.com/events-resources/energy-basics/energy-assistance (listing existing resources for assistance) (last visited Mar. 26, 2020).

[23] DEEP Petition, at 4.

[24] *See* Conn. Gen. Stat. § 16-262c(b)(3).

[25] The Authority should be careful not to encourage action that leads to unintended consequences. For example, the Authority should not encourage suppliers to waive ETFs when customers switch from one electric supplier to another. In this situation, the customer may terminate a current contract with a supplier to purchase a product with a higher price, longer term, and/or different characteristics (e.g., a renewable resource, etc.) from another supplier. However, that new contract may actually result in the consumer paying more (perhaps, for a longer period of time) than under the current contract; thereby, undermining the Authority's goals.

such activity,[26] are already forgoing revenues from potential new enrollments. Thus, while it remains worthwhile to encourage entities that are able to do so to provide relief, it would not be appropriate to expect them to jeopardize their own financial situation to do so.

III. CAPPING ELECTRIC SUPPLIER PRICES AND IMPOSING ETF AND LATE FEE MORATORIA COULD HAVE DIRE FINANCIAL CONSEQUENCES

If the Authority implements any of its Proposals, electric suppliers could incur substantial losses.[27] If the prices that electric suppliers are permitted to charge under existing contracts are capped, suppliers will not receive the revenues currently expected from those contracts. Revenues intended to cover their various expenses, including fixed costs, such as overhead, and sunk costs, such as energy procurement costs.[28] These costs can be substantial, especially for suppliers who serve commercial customers who have significantly higher usage.[29] For example, in February 2020, average usage for residential customers was 687 kWh, for Standard Service commercial customers was 3,549 kWh, and for Last Resort Service commercial customers was 368,512 kWh.[30] Thus, in February 2020, average Standard Service commercial customer usage was more than five (5) times higher than average residential usage, and average Last Resort

[26] *See* Docket No 14-07-20RE01, *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers - Revised Standards*, Authority Correspondence (Mar. 20, 2020) ("Due to the current public health crisis, the Authority is requesting that electric suppliers cease door-to-door marketing until further instruction by the Authority.").

[27] *See* Docket No. 18-06-02, *Review of Feasibility, Costs and Benefits of Placing Certain Customers on Standard Service Pursuant to Conn. Gen. Stat. § 16-245o(m)*, Testimony of Richard J. Hudson, Jr. on Behalf of Retail Energy Supply Association (May 21, 2019) ("RESA Testimony"), at 75 ("Suppliers must procure energy and related services in the wholesale energy markets to hedge their retail load positions. These procurement activities carry a significant cost. This is especially true when a supplier is extending a fixed price offering to retail customers because the supplier must have wholesale positions in place to support those fixed price offerings.").

[28] *Cf. id.* (describing a situation in which the supplier may be left with sunk energy procurement costs).

[29] *See* Docket No. 06-10-22, *PURA Monitoring the State of Competition in the Electric Industry*, March 2020 Migration Reports (showing monthly aggregate usage and customer counts by customer category); *cf.* Docket No 14-07-20RE01, *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers - Revised Standards*, June 24, 2017 Hearing Transcript, at 12 (describing a commercial customer with a demand of 100 kW could be a "fairly sizeable commercial establishment").

[30] *See* Docket No. 06-10-22, *PURA Monitoring the State of Competition in the Electric Industry*, March 2020 Migration Reports (providing data as February 29, 2020).

Service commercial usage was more than five hundred (500) times average residential usage. As a consequence, suppliers incur markedly higher power procurement costs to serve commercial customers. Notably, the Authority seems to believe these losses can be recovered later.[31] However, unlike public service companies, including the EDCs,[32] suppliers do ***not*** have the mechanisms or contractual rights to recoup these losses from customers at a later time.

Similarly, if a moratorium is imposed on ETFs and customers terminate their contracts before their expiration, suppliers will not receive the revenues currently expected under those contracts to offset supplier expenses.[33] As the Authority is aware, residential ETFs are limited to fifty dollars.[34] However, electric suppliers frequently incur substantially higher costs to acquire these customers and for the hedges to serve those customers.[35] If customers complete their contractual terms, electric suppliers are generally able to recoup these costs fully. However, if these customers terminate their agreements early, the fifty dollar ETFs may not be sufficient to cover all of those costs.[36] As a consequence, electric suppliers could suffer significant financial losses under the current statutory limitation on residential ETFs. These losses would be compounded if electric suppliers were not permitted to collect ETFs from residential customers at all. Losses that suppliers do ***not*** have the mechanisms or contractual rights to recoup later.

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[31] Motion No. 2 Ruling, at 2 (observing that the costs of the initiatives proposed by the Department "would likely be borne by all ratepayers in the emergency's aftermath").

[32] *See, e.g.*, Conn. Gen. Stat. § 16-19b(c) (allowing EDCs to recover power procurement under-recoveries in future rates).

[33] Docket No. 14-07-20RE01, *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers - Revised Standards*, Pre-Filed Testimony Regarding the June 7, 2017 Proposed Revisions to the Revised Marketing Standards (Jun. 30, 2017) ("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.").

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

[35] *Cf.* RESA Testimony, at 75 ("Suppliers must procure energy and related services in the wholesale energy markets to hedge their retail load positions. These procurement activities carry a significant cost. This is especially true when a supplier is extending a fixed price offering to retail customers because the supplier must have wholesale positions in place to support those fixed price offerings.").

[36] *Cf. id.* (describing a situation in which the supplier may be left with sunk energy procurement costs).

Moreover, if the Authority prohibits electric suppliers from collecting ETFs from commercial customers, these losses will be exponentially higher still.[37] In some cases, suppliers could suffer catastrophic losses. For example, if a supplier is only serving Last Resort Service commercial customers and a substantial number of those customers terminate their contracts before they expire without being required to pay their ETFs, the supplier's losses may be so significant that it may be unable to recover. Even suppliers that do recover, however, will not be able to recoup their losses because suppliers do ***not*** have the mechanisms or contractual rights to do so.

Commercial ETFs are not capped by statute[38] and are generally negotiated between suppliers and customers. Although all customers regularly enter into contracts that include early termination fees and/or penalties (e.g., mortgages, leases, mobile phone agreements, etc.), commercial customers do so even more frequently. Further, commercial customers commonly have assistance in their contract negotiations. For example, when it comes to energy supply agreements, commercial customers often rely on in-house energy personnel, outside energy consultants, in-house counsel and/or outside counsel to assist with negotiations. Just like other industries, suppliers should have the ability to charge a legitimate cancellation fee or assess liquidated damages when a customer switches before the end of a term that was clearly set forth in the contract. In other business contexts, this behavior by a customer is known as "breach of contract" and RESA does not believe it is appropriate to forbid perfectly legitimate contract damages for breach.

[37] *See supra* Section III (demonstrating that commercial customer usage is, on average, 5 to 500 times higher than that of residential customers).

[38] Conn. Gen. Stat. § 16-245o(h)(7) (setting ETF limits for residential customers only).

A prohibition on the collection of late fees could increase losses even further. For example, some suppliers' operations are backed by credit extended by third parties. If customer payments are not received on time, a supplier may not be able to pay as much to its creditor as it otherwise would in a given month, causing that supplier to incur carrying costs. Costs that will be significantly higher if commercial customers are permitted to forgo paying such fees. Further, if a significant number of customers make late payments, the supplier's payment to its creditors could then be late, forcing it to incur late fees. Further, suppliers do ***not*** have the mechanisms or contractual rights to recoup these costs later.

IV. THE AUTHORITY IS NOT EMPOWERED TO CAP SUPPLIER PRICES OR IMPOSE A MORATORIUM ON SUPPLIER ETFS OR LATE FEES

As a creature of statute, the Authority may act only within the authority expressly provided by statute.[39] The Authority does not have the power to make law; it only has the power to carry out the will of the legislature as expressed in statute.[40] When the legislature drafts a law, "it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes and the effect that its action or nonaction will have upon any one of them."[41] Moreover, the legislature knows how to convey its intent by using broader or limiting terms.[42]

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[39] *See Waterbury v. Comm'n on Human Rights and Opportunities*, 160 Conn. 226, 230 (1971) ("It is clear that an administrative body must act ***strictly*** within its statutory authority, within constitutional limitations and in a lawful manner.") (citations omitted) (emphasis added).

[40] *See Conn. Hosp. Ass'n. v. Comm'n on Hosps. & Health Care*, 200 Conn. 133, 144 (1986) ("The power of an administrative agency to prescribe rules and regulations under a statute 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.") (internal quotation mark removed) (emphasis added).

[41] *King v. Volvo Excavators*, 333 Conn. 283, 296 (2019) (*quoting McCoy v. Commissioner of Public Safety*, 300 Conn. 144, 155 (2011)).

[42] *See Marchesi v. Bd. of Selectmen of Lyme*, 309 Conn. 608, 618 (2013) ("[I]t 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.") (citations omitted); *see also State v. Heredia*, 310 Conn. 742, 761-62 (2013) (same).

Specific statutory provisions empower the Authority to regulate the rates of public service companies,[43] and limit the ETFs that electric suppliers may charge to residential customers.[44] However, no provision of Connecticut law requires or permits the Authority to cap the prices charged by electric suppliers or to impose moratoria on supplier ETFs or late fees.[45] Consequently, the Authority is not authorized to do so. Indeed, the Authority itself has recognized that it "does not regulate the rates of electric suppliers . . . ."[46]

The General Assembly's explicit grant to the Authority of the power to cap the rates charged by public service companies[47] further demonstrates that the Authority has not been empowered to cap supplier prices. "Public service company" is defined, in relevant part, as: "electric distribution, gas, telephone, pipeline, sewage, water and community antenna television companies and holders of a certificate of cable franchise authority . . . ."[48] The definition does not include an "electric supplier." Moreover, the definition of "electric distribution company"—a particular type of public service company—explicitly excludes electric supplier.[49] Thus, electric suppliers are not public service companies, and the Authority is, therefore, not permitted to cap their prices or fees.[50]

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[43] *See* Conn. Gen. Stat. § 16-19(a) ("No public service company may charge rates in excess of those previously approved by . . . the Public Utilities Regulatory Authority . . . .").

[44] *See* Conn. Gen. Stat. § 16-245o(h)(7) (setting ETF limits for residential customers).

[45] *See, generally*, Conn. Gen. Stat. Title 16.

[46] *See, e.g.*, Docket No. 00-10-13, *Petition of Community Renewal Team, Inc. for a Declaratory Ruling Regarding Treatment of Bad Debt Incurred by Electric Suppliers Through Serving Hardship Customers*, Decision (Jan. 24, 2001).

[47] *See* Conn. Gen. Stat. § 16-19(a) ("No public service company may charge rates in excess of those previously approved by . . . the Public Utilities Regulatory Authority . . . .").

[48] Conn. Gen. Stat. § 16-1(3).

[49] Conn. Gen. Stat. § 16-1(23).

[50] *See Waterbury*, 160 Conn. at 230 ("It is clear that an administrative body must act strictly within its statutory authority, within constitutional limitations and in a lawful manner.") (citations omitted); *Conn. Hosp. Ass'n*, 200 Conn. at 144 ("The power of an administrative agency to prescribe rules and regulations under a statute 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.") (internal quotation mark removed).

If the General Assembly had intended to empower the Authority to cap the prices and/or fees charged by electric suppliers, it could have done so.[51] Indeed, when the legislature has wanted to impose restrictions on supplier prices or fees, it has done so explicitly. Connecticut General Statutes section 16-245o(g) expressly prohibits electric suppliers from charging residential customers new variable rates as of October 1, 2015.[52] If the General Assembly had intended to permit broader restrictions on supplier prices, it could have done so.[53] However, it has not.[54] Similarly, the legislature has explicitly restricted the amount that suppliers may charge residential customers for an ETF.[55] If the legislature had intended to allow broader restrictions on supplier ETFs or restrictions on any other fees charged by electric suppliers, it could have done so.[56] However, it has not.[57] Consequently, the Authority does not have the power to cap suppliers prices or prohibit suppliers from charging ETFs or late fees.[58]

V. CAPPING ELECTRIC SUPPLIER PRICES AND IMPOSING ETF AND LATE FEE MORATORIA COULD CONSTITUTE REGULATORY TAKINGS

Capping electric supplier prices and prohibiting electric suppliers from collecting contractual ETFs and late fees could constitute regulatory takings in violation of the Fifth and

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[51] *See Heredia*, 310 Conn. at 761-62.

[52] Conn. Gen. Stat. § 16-245o(g)(4).

[53] *See Marchesi*, 309 Conn. at 618 ("[I]t 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.") (citations omitted); *Heredia*, 310 Conn. at 761-62.

[54] *See, generally*, Conn. Gen. Stat. Title 16.

[55] Conn. Gen. Stat. § 16-245o(h)(7) (expressly limiting ETFs charged to residential customers to no more than fifty dollars ($50.00)).

[56] *See Marchesi*, 309 Conn. at 618 ("[I]t 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.") (citations omitted); *Heredia*, 310 Conn. at 761-62.

[57] *See, generally*, Conn. Gen. Stat. Title 16.

[58] *See Waterbury*, 160 Conn. at 230 ("It is clear that an administrative body must act strictly within its statutory authority, within constitutional limitations and in a lawful manner.") (citations omitted); *Conn. Hosp. Ass'n*, 200 Conn. at 144 ("The power of an administrative agency to prescribe rules and regulations under a statute 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.") (internal quotation mark removed).

Fourteenth Amendments of the United States Constitution.[59] A regulatory taking occurs where governmental regulation of private property "goes too far" and is "tantamount to a direct appropriation or ouster."[60]

> 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.[61]

As noted above,[62] the economic impact on suppliers will be substantial and, for some, could be catastrophic. In effect, if the Authority's Proposals are adopted, amounts otherwise appropriately due to suppliers would be appropriated. The Authority's Proposals would also interfere with electric suppliers' investment-backed expectations. For example,

> Suppliers must procure energy and related services in the wholesale energy markets to hedge their retail load positions. These procurement activities carry a significant cost. This is especially true when a supplier is extending a fixed price offering to retail customers because the supplier must have wholesale positions in place to support those fixed price offerings.[63]

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

[60] *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.").

[61] *Id.* (citations and internal quotation marks omitted).

[62] *See supra* Section III.

[63] *See* RESA Testimony, at 75.

Suppliers set prices and ETFs[64] based on these and other investment-backed expectations. Suppliers also set late fees based on investment-backed expectations. As noted above,[65] some suppliers' operations are backed by credit extended by third parties that result in those suppliers having to pay or incur certain costs if customers do not make timely payments.

Since the Authority's Proposals would have an adverse impact on suppliers and would interfere with distinct investment-backed expectations, they go too far and would be tantamount to a direct appropriation or ouster. As a consequence, the Authority's actions could constitute a regulatory taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

VI. THE CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION PROHIBITS CAPPING ELECTRIC SUPPLIER PRICES AND IMPOSING MORATORIA ON ETFS AND LATE FEES

Article I, Section 10 of the United States Constitution provides, in pertinent part: "No State shall . . . pass any . . . law impairing the obligation of contracts."[66] A law violates the Contracts Clause if it operates "as a substantial impairment of a contractual relationship."[67] 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."[68] There is no dispute that: (a) electric suppliers have contractual relationships with their customers;[69] and (b) because they will disrupt the current expectations

[64] RESA Testimony, at 75; 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.").

[65] *See supra* Section III.

[66] U.S. Const. art. I, § 10 ("Contracts Clause").

[67] *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (citation omitted); *see also Serrano v. Aetna Ins. Co.*, 233 Conn. 437, 447 (1995).

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

[69] *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 . . . .").

and obligations under those contractual relationships (i.e., that customers will pay specified contract prices and fees), the Authority's Proposals would impair those relationships.[70]

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.[71] Under the first prong, "[t]he primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted."[72] 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."[73]

Here, as noted above,[74] the impairment will be substantial and, for some suppliers, could be catastrophic. Moreover, because Connecticut law does not empower the Authority to cap electric supplier prices or impose moratoria on contractual ETFs and late fees,[75] electric suppliers could not "anticipate, expect, or foresee" that the Authority would propose to do so.

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

[71] *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).

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

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

[74] *See supra* Section III.

[75] *See supra* Section IV.

When a state law constitutes substantial impairment, the state must show a significant and legitimate public purpose behind the law.[76] A legitimate public purpose is one "aimed at remedying an important general social or economic problem . . . ."[77] The Authority identified the purpose to be served by capping electric supplier prices as reducing the overall financial harm to the EDCs and ratepayers[78] and the purpose of moratoria on ETFs and late fees as reducing the overall financial harm to customers.[79] While those are laudable goals, they focus solely on the short-term and a specific subset of the population. As such, they fail to account for the financial harm to others and the potential long-term financial harm that may result.

As noted above, the harm to suppliers will be substantial and unrecoverable and, for some suppliers, ruinous. Conversely, there is no evidence or, even reason to believe, that the EDCs are suffering any financial harm as a result of prices that suppliers charge or that capping supplier prices would, in some way, reduce any such harm. There is also a presumption that customers are suffering financial harm as a result of having to honor their contractual obligations to suppliers. However, many customers are saving money as compared to the default service rate by being served by competitive suppliers.[80] Further, shortly, hardship customers served by electric suppliers will automatically be returned to Standard Service without having to pay ETFs;[81] thereby, mitigating any potential harm to "vulnerable populations."[82] Moreover, although

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[76] *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)).

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

[78] Notice, at 2.

[79] *Id*.

[80] *See* Docket No. 06-10-22, *PURA Monitoring the State of Competition in the Electric Industry*, March 2020 Migration Reports (showing both residential and commercial customers who are paying less than the applicable default service rate).

[81] *See, generally,* Docket No. 18-06-02, *Review of Feasibility, Costs and Benefits of Placing Certain Customers on Standard Service Pursuant to Conn. Gen. Stat. § 16-245o(m)*, Decision (Dec. 18, 2019).

[82] *Id.* at 12.

suppliers do not have the contractual rights to recoup their losses, the utilities do.[83] As a consequence, once the Moratorium is lifted, the losses the utilities suffer as a result of the Authority's Proposal[84] "would likely be borne by all ratepayers in the emergency's aftermath."[85] Thus, they would not resolve any potential financial harm to customers; rather, the Authority's Proposals would simply postpone it. Consequently, the Authority's Proposals would not serve a significant and legitimate public purpose.

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."[86] To satisfy this standard,

> it must be shown that the state did not (1) "consider impairing the ... contracts on par with other policy alternatives" or (2) "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."[87]

In this case, the Authority did not consider other policy alternatives that may satisfy its goals without impairing suppliers' contractual rights. As noted above,[88] there are far less draconian alternatives available to achieve the Authority's goals. Moreover, as noted above,[89] the Authority's Proposals will cause suppliers to suffer "drastic" impairments even though an alternative that would not cause suppliers to suffer any impairment could "serve its purpose equally well." For instance, application of the rate cap to public service companies in other

[83] *See, e.g.*, Conn. Gen. Stat. § 16-19b(c) (allowing EDCs to recover power procurement under-recoveries in future rates).

[84] *See, e.g.*, Notice, at 2 (seeking comment on capping all electricity rates, not just those of electric suppliers).

[85] *Cf.* Motion No. 2 Ruling, at 2.

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

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

[88] *See supra* Section II (suggesting reasonable options for the Authority's consideration).

[89] *See supra* Section III (discussing the substantial financial impact the Authority's Proposals would have on suppliers).

industries would reduce consumer expenses as well. Thus, if adopted, the Authority's Proposals would violate the Contracts Clause.

VII. THE AUTHORITY'S PROPOSALS WILL VIOLATE ELECTRIC SUPPLIERS' EQUAL PROTECTION RIGHTS

The Fourteenth Amendment of the United States Constitution prohibits each state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[90] Similarly, the Connecticut Constitution provides that "[n]o person shall be denied the equal protection of the law."[91] This "concept of equal protection under both the state and federal constitutions has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."[92] Different treatment of those persons will violate Equal Protection when it is "arbitrary or irrational."[93]

The Authority has the power to regulate the rates of all public service companies across numerous utility sectors.[94] However, the Authority's Proposals would only impose a cap on electric rates.[95] In addition, there are numerous competitive entities that are subject to the Authority's oversight, including electric suppliers, natural gas sellers, competitive local exchange carriers, and cable television companies. However, the only competitive entities to whom the Authority's Proposals would apply are electric suppliers.[96] This does not constitute

[90] U.S. Const. amend. XIV, § 1.

[91] Conn. Const. Art. 1, § 20.

[92] *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 157–58 (2008) (internal quotation marks and alterations omitted).

[93] *Kerrigan*, 289 Conn. at 159.

[94] *See* Conn. Gen. Stat. § 16-19(a) ("No public service company may charge rates in excess of those previously approved by . . . the Public Utilities Regulatory Authority . . . ."); *see also* Conn. Gen. Stat. § 16-1(3) (defining public service company).

[95] Notice, at 2 (Item 4).

[96] Notice, at 2 (Items 4-5).

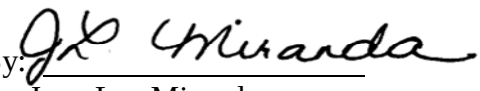
"the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."

Despite this, the Authority has provided no basis for singling out electric rates, prices and fees. Nor is it evident why the Authority chose to do so. In fact, both the AG and the Department sought to have their petitions applied across industries.[97] Moreover, application of the Proposals to other industries would reduce consumer expenses as well. Consequently, applying the Proposals solely to electric rates, prices and fees would be arbitrary and irrational. Thus, if adopted, the Authority's Proposals could violate the Equal Protection provisions of the United States and Connecticut Constitutions.[98]

CONCLUSION

For all the foregoing reasons, the Authority should not implement the Proposals and, instead, take a more measured and balanced approach. RESA welcomes the opportunity to continue to be engaged and involved in assisting the Authority in evaluating and adopting effective and prudent policies to protect and assist consumers during the COVID-19 pandemic.

Respectfully Submitted,
RETAIL ENERGY SUPPLY ASSOCIATION

By: 

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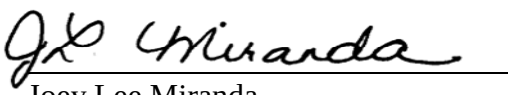
[97] *See, generally,* AG Petition; DEEP Petition.

[98] *See Kerrigan*, 289 Conn. at 157-59.

CERTIFICATION

I hereby certify that a copy of the foregoing was sent to all participants of record on this 26th day of March 2020.



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