ROBINSON & COLE LLP

JOEY LEE MIRANDA

280 Trumbull Street
Hartford, CT 06103-3597
Main (860) 275-8200
Fax (860) 275-8299
jmiranda@rc.com
Direct (860) 275-8227

Also admitted in District of Columbia and Massachusetts

Via Electronic Filing and First Class Mail

August 19, 2011

Kimberley J. Santopietro
Executive Secretary
Public Utilities Regulatory Authority
10 Franklin Square
New Britain, CT 06051

Re: **Docket No. 10-06-24: DPUC Review of the Current Status of the Competitive Supplier and Aggregator Market in Connecticut and Marketing Practices and Conduct of Participants in That Market**

Dear Ms. Santopietro:

Enclosed please find the Joint Reply Brief of Dominion Retail, Inc. and the Retail Energy Supply Association in connection with the above-referenced matter.

I certify that a copy hereof has been sent on this date to all participants of record as reflected on the Public Utilities Regulatory Authority's (Authority) 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 or David Bogan of my office (860-275-8262) if you have any questions or require additional information. Thank you.

Very truly yours,

JL Miranda

Joey Lee Miranda

Enclosure

Copy to: Service List

Law Offices
BOSTON
PROVIDENCE
HARTFORD
NEW LONDON
STAMFORD
WHITE PLAINS
NEW YORK CITY
ALBANY
SARASOTA
www.rc.com

STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY

DPUC REVIEW OF THE CURRENT STATUS OF THE COMPETITIVE SUPPLIER AND AGGREGATOR MARKET IN CONNECTICUT AND MARKETING PRACTICES AND CONDUCT OF PARTICIPANTS IN THAT MARKET	:	DOCKET NO. 10-06-24
	:	AUGUST 19, 2011

JOINT REPLY BRIEF OF DOMINION RETAIL, INC. AND RETAIL ENERGY SUPPLY ASSOCIATION

Dominion Retail, Inc. ("Dominion") and the Retail Energy Supply Association ("RESA")[1] (collectively, the "Suppliers") hereby respectfully submit this joint reply brief in accordance with the schedule established by the Public Utilities Regulatory Authority ("Authority") in connection with the above-referenced proceeding. For the reasons set forth more fully in their initial joint brief and discussed more fully below, the Suppliers respectfully request that the Authority issue the following clarifications: (a) third party entities, including Electric Aggregators and brokers, that negotiate the "purchase" of electric generation services on behalf of customers are ***not*** agents of Electric Suppliers; (b) Electric Aggregators are permitted to use power of attorney agreements to enroll customers with Electric Suppliers; (c) the use of "automatic invalidation clauses" is not prohibited; (d) Electric Suppliers will not be required to

[1] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant Energy Northeast LLC and TriEagle Energy, L.P.. 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.

offer time of use ("TOU") prices until the necessary billing and metering infrastructure is in place to support such pricing offers and will be permitted to offer TOU prices that are greater than two parts; (e) the limitation on residential early termination fees does not apply when the contractual counterparty to the Electric Supplier is a non-residential customer; and (f) Electric Suppliers are only required to maintain records of signed service contracts or customer consents to service for a period of two years from the date on which the initial term of the contract expires. In addition, as discussed more fully in their initial brief, the Suppliers support the posting of the electric distribution companies' ("EDCs") distribution rates on a central location on the Authority's Rate Board and the continuation of the inclusion of Electric Supplier pricing information on the EDCs' quarterly bill inserts. The Suppliers will not reiterate all of their arguments from their initial joint brief here but rather will address the issues raised by the other participants in their initial briefs.

I. THIRD PARTY ENTITIES THAT NEGOTIATE THE PURCHASE OF ELECTRIC GENERATION SERVICES ON BEHALF OF CUSTOMERS ARE NOT AGENTS OF ELECTRIC SUPPLIERS.

Section 113 of Public Act 11-80 provides, in relevant part, that "[a]ny third-party agent who contracts with or is otherwise compensated by an electric supplier ***to sell*** electric generation services shall be a legal agent of the electric supplier." Public Act 11-80, *An Act Concerning the Establishment of the Department of Energy and Environmental Protection and Planning for Connecticut's Energy Future* (the "Act"), at § 113(f)(1) (emphasis added). In its brief, the Office of Consumer Counsel ("OCC") asserts that any third party, besides an Electric Aggregator, that receives compensation "in any capacity" from an Electric Supplier qualifies as an "agent" pursuant to the Act. Brief of the Office of Consumer Counsel, dated August 12, 2011 ("OCC Brief"), at 8. However, such an interpretation ignores the plain language of the Act and renders the phrase "to sell" meaningless.

It is axiomatic that "[t]he meaning of a statute shall, in the first instance, be ascertained from the ***text of the statute itself*** and its relationship to other statutes." *See* Conn. Gen. Stat. § 1-2z (emphasis added). Moreover, it has long been held that an agency cannot ignore the plain language of a statute. *See Neilson v. Perkins*, 86 Conn. 425, 428 (1913); *accord Chadha v. Charlotte Hungerford Hosp.*, 272 Conn. 776, 796 (2005). An agency is also not empowered "to alter the meaning of clear language employed by the legislature." *Muha v. United Oil Co.*, 180 Conn. 720, 730 (1980). Thus, an agency "must interpret statutes ***as they are written***." *Id.; see also Liistro v. Robinson*, 170 Conn. 116, 129 (1976).

Further, it is "a basic tenet of statutory construction that the legislature does not intend to enact meaningless provisions." *American Promotional Events, Inc. v. Blumenthal*, 285 Conn. 192, 203 (2008) (citations, internal alterations and quotation marks omitted). Therefore, when construing statutes, an agency must "presume that there is a purpose behind every sentence, clause, or ***phrase*** used in an act and that no part of a statute is superfluous." *Id.* (emphasis added) (citations, internal alterations and quotation marks omitted). Accordingly, "[b]ecause every ***word and phrase*** of a statute is presumed to have meaning [it] must be construed, if possible, such that no clause, sentence or word shall be ***superfluous, void or insignificant***." *Id.* (emphasis added) (citations, internal alterations and quotation marks omitted).

Despite these basic principles of statutory construction, the OCC asks the Authority to read Section 113 of the Act as if it did not contain the words "to sell" but, instead, contained the words "any capacity." Such an interpretation improperly renders the phrase "to sell" meaningless, superfluous, void and insignificant. By its plain language, the Act expressly provides that only entities that contract with or are compensated by an Electric Supplier "***to sell*** electric generation services" qualify as agents of Electric Suppliers. Thus, by definition, Electric

Aggregators are acting on behalf of groups of customers to negotiate the "***purchase*** [of] electric generation services." Conn. Gen. Stat. § 16-1(31) (defining "Electric Aggregator," in relevant part, as an entity that "gathers together electric customers for the purpose of negotiating the ***purchase*** of electric generation services from an electric supplier . . . .") (emphasis added). Accordingly, Electric Aggregators are not "agents" of Electric Suppliers.

As the Suppliers explained in their initial brief, brokers perform almost identical functions and are compensated[2] in nearly an identical fashion as Electric Aggregators with one distinction: brokers are typically acting on behalf of a ***single customer***, rather than a group of customers. The fact that brokers are acting on behalf of a single customer does not change the analysis. Brokers, just like Electric Aggregators, are acting on behalf of and receiving compensation from customers to negotiate the ***purchase*** of electric generation services. Accordingly, just like Aggregators, brokers are not "agents" of Electric Suppliers. Suppliers' Brief at 5-7.

Perhaps recognizing that the plain language of the Act does not support its position, the OCC also contends that the purpose/intent of the statute supports its claim that any third party that receives compensation "in any capacity" from an Electric Supplier qualifies as an "agent" of the supplier. OCC Brief at 5, 8. However, the OCC's claims of legislative intent are based on pure conjecture.

---

[2] In its brief, the OCC also argues that "[i]f brokers truly only work for customers, then there is no need for them to be paid by electric suppliers." OCC Brief at 6. Further, OCC asserts that, because the customer is ultimately enrolled with an Electric Supplier, the broker is "clearly helping Suppliers to sell those services." OCC Brief at 7. These arguments are specious and ignore how commercial transactions in the marketplace work when a third party brings other parties together. For instance, when a potential home buyer retains a buyer's broker, even though that broker is acting as the agent of the buyer, the seller actually pays the buyer's broker's commission. However, the payment of that commission does not make the buyer's broker, the seller's agent.

First and foremost, "[i]t has often been said that the legislative intent is to be found not in what the legislature meant to say, but in the meaning of ***what it did say***." *See Muha*, 180 Conn. at 730 (emphasis added) (*citing Wiegand v. Heffernan*, 170 Conn. 567, 581 (1976); *Colli v. Real Estate Comm'n*, 169 Conn. 445, 452 (1975)). Moreover, in ascertaining legislative intent, an agency is "***not at liberty to speculate*** upon any supposed actual intention of the legislature." *Bysiewicz v. Dinardo*, 298 Conn. 748, 801 (2010) (emphasis added) (citations omitted). Likewise, an agency is "not at liberty to imagine an intent and bind the letter of the act to that intent; ***much less can [an agency] indulge in the license of striking out and inserting and remodeling*** with the view of making the letter express an intent which the statute in its native form does not express." *Id.* (emphasis added) (citations omitted).

The Act provides that only entities that contract with or are compensated by an Electric Supplier "***to sell*** electric generation services" qualify as agents of Electric Suppliers. If the legislature had intended every third party acting in "any capacity" that contracted with or was otherwise compensated by an Electric Supplier to be deemed an agent of that supplier, it could have said so. However, it did not. Instead, it limited the Act's applicability. Thus, based on the plain language of the Act, the legislative intent was to bring within the definition of "agent," only those entities that enter into contracts or are otherwise compensated "***to sell*** electric generation services."

Moreover, the OCC has presented absolutely ***no evidence*** of legislative intent. Instead, the OCC has engaged in pure speculation about what the OCC thinks the legislature intended. Although the OCC cites to the actions of Turris Associates, LLC ("Turris") as evidence of legislative intent, the OCC fails to provide the Authority with any support for this claim. OCC

Brief at 5-6. Instead, OCC engages in pure conjecture. The Authority cannot rely on this speculation as evidence of legislative intent. *See Bysiewicz*, 298 Conn. at 801.

Furthermore, OCC's reliance on the Turris investigation in support of its claims of legislative intent to regulate brokers is misplaced. As the OCC admits, at the time the actions complained of occurred, Turris was actually a registered Electric Aggregator, not a broker. OCC Brief at 5; s*ee also* Docket No. 10-02-08, *Joint Petition of Richard Blumenthal, Attorney General for the State of Connecticut and the Office of Consumer Counsel for an Investigation Into Raymond Sanzone And Turris Associates LLC*. Since OCC does not dispute that Electric Aggregators do not qualify as agents of Electric Suppliers, it is unclear how the actions of Turris could have been the impetus for the legislature's action to regulate other third parties, such as brokers. Thus, the Turris investigation's claimed impact on legislative intent is a complete *non sequiter.*

In its brief, the OCC further asserts that "Section 113 acts in derogation of the common law principles of agency." OCC Brief at 4. However, this claim fails to recognize the limits on such derogations.

"Interpreting a statute to impair an existing interest or to change radically existing law is appropriate only if the language of the legislature ***plainly and unambiguously*** reflects such an intent." *Vitanza v. Upjohn Co.*, 257 Conn. 365, 381 (2001) (emphasis added) (citations omitted). Thus, "[i]n determining whether or not a statute abrogates or modifies a common law rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters ***clearly brought within its scope***." *Id.* (emphasis added) (*citing Willoughby v. New Haven*, 123 Conn. 446, 454 (1937)). "In the absence of explicit language . . . [an agency] ordinarily will not presume that the legislature intended to act in derogation of the common law."

Vitanza, 257 Conn. at 382. "[T]he legislature is capable of providing explicit limitations when that is its intent." *Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282, 290 (1993) (citations omitted). Thus, an agency should "recognize only those alterations of the common law that ***are clearly expressed*** in the language of the statute because the traditional principles of justice upon which the common law is founded should be perpetuated." *Vitanza*, 257 Conn. at 381-82 (emphasis added).

As discussed above, the Act provides that only third parties that contract with or are compensated by an Electric Supplier "***to sell*** electric generation services" qualify as agents of Electric Suppliers. Thus, only to the extent a third party contracts with or is compensated by an Electric Supplier "***to sell*** electric generation services" has the Act abrogated the common law. In all other instances, the common law continues to apply. Thus, as discussed above, since both Electric Aggregators and brokers are compensated to negotiate the "purchase" of electric generation services on behalf of customers, neither would qualify as "agents" of Electric Suppliers. Similarly, should another type of third party entity be retained ***by a customer*** to assist it in ***purchasing*** electric generation services, such an entity also would ***not*** qualify as an "agent" of an Electric Supplier. Accordingly, in order to reduce uncertainty in the marketplace, Suppliers request that the Authority clarify that to the extent the business arrangement between an Electric Supplier and a third party is similar to the type of arrangement between an Electric Aggregator, Electric Supplier and customer, there would ***not*** be an agency relationship between the Electric Supplier and the third party.

In its brief, The Connecticut Light and Power Company ("CL&P") asserts that "customer confusion can be reduced, in large measure, by clear definitions of market participants . . . ." CL&P Letter in Lieu of Brief, dated August 12, 2011 ("CL&P Brief"), at 2. The Suppliers agree.

Thus, the Suppliers have requested that the Authority issue a clarification regarding what types of entities do and do not qualify as "agents" of Electric Suppliers. *See* Joint Brief of Dominion Retail, Inc. and the Retail Energy Supply Association, dated August 5, 2011 ("Suppliers' Brief"), at 3-10.

Specifically, as indicated in their initial brief, the Suppliers request that the Authority provide guidance on what factors it will consider in determining whether a particular business arrangement between an Electric Supplier and a third party creates an agency relationship. In particular, as discussed at the Working Group Meeting, the Suppliers request that the Authority consider the following in evaluating whether an agency relationship exists between an Electric Supplier and a third party:

- Does the Electric Supplier have the ability to require the third party to bring it customers or otherwise direct the action of the third party regarding the sale or offer for sale of electric generation services?
- Does the third party have an obligation to bring customers to the Electric Supplier or otherwise do anything on behalf of the Electric Supplier regarding the sale or offer for sale of electric generation services?
- Does the third party have an exclusive relationship with the Electric Supplier?

Moreover, the Suppliers request that the Authority clarify that: (a) if the answer to all of these questions is no, then the third party is ***not*** an agent of the Electric Supplier; and (b) if the answer to all of these questions is yes, then the third party ***is*** an agent of the Electric Supplier. In those cases in which the answer is not clear based on the three factors described above, the Suppliers urge the Authority to consider the specific factual circumstances of the business arrangement between the customer, the Electric Supplier and the third party to determine whether or not there is an agency relationship. *See Wesley v. Schaller Subaru, Inc.*, 277 Conn. 526, 543 (2006) (finding that whether there is an agency relationship is a question of fact).

In making this determination, the Suppliers encourage the Authority to look to the language of the agreement, if any, between the Electric Supplier and the third party and clarify that there is no agency relationship if all of the following terms[3] are present:

- the third party is acting for the benefit of or as the agent for the customer;
- the third party has no authority to act for or on behalf of or to bind the Electric Supplier to any contract, representation, or any other matter;
- the third party has no obligation to offer to sell the Electric Supplier's product or to bring customers to the Electric Supplier;
- the Electric Supplier has no obligation to accept customers brought to it by the third party; and
- the compensation to be paid to the third party is determined by the third party and/or the customer.

Since the ultimate finding of whether an agency relationship exists presents a question of fact, *Wesley*, 277 Conn. at 543, the Suppliers request that the Authority issue the clarifications described herein in order to provide Electric Suppliers with a framework under which they can better understand the implications of their relationships with third parties in the retail electric market and structure those relationships to avoid running afoul of the Act.

II. TIME OF USE PRICING SHOULD NOT BE USED AS A METHOD TO REQUIRE ELECTRIC SUPPLIERS TO PERFORM DIRECT BILLING.

Section 104 of the Act requires Electric Suppliers, as a condition of maintaining their licenses, to offer a TOU price option to customers. P.A. 11-80, § 104. As the Suppliers pointed out in their initial brief, Section 104 of the Act became effective on July 1, 2011 - the same day that it was signed into law by the Governor. Thus, neither the EDCs nor Electric Suppliers were given any opportunity to prepare for this requirement. Suppliers' Brief at 15; *see also* CL&P

[3] In its brief, the OCC asserts that the Suppliers failed to provide hypothetical contract language that would indicate the nature of potential contractual arrangements between Electric Suppliers and third parties. OCC Brief at 3. This simply inaccurate. The same contractual terms as set forth herein were included in the Suppliers' initial brief. *See* Suppliers' Brief at 9.

Brief at 3. Indeed, in its brief, CL&P confirmed that it "does not currently have the infrastructure in place to offer TOU pricing to competitive suppliers . . . ." CL&P Brief at 3. However, CL&P then asserts that its lack of infrastructure should not impede the ability of Electric Suppliers to offer TOU pricing because Electric Suppliers have the ability to direct bill customers. *Id.* However, CL&P's suggestion amounts to a *de facto* requirement that Electric Suppliers be required to direct bill their customers, which ignores the Authority's final decision in this proceeding.

In its final decision, the Authority[4] specifically concluded that:

> All customers may be direct billed by Suppliers. Suppliers may choose this billing option and ***cannot be required to do so by the EDCs***. The Department will not require Suppliers to assume this responsibility. Based on the foregoing, Suppliers may choose to offer direct billing, choose not to offer direct billing, or choose to offer both options. Customers therefore ***would not be forced onto direct billing*** since they can choose between different Suppliers, pricing and billing options.

See Final Decision, dated March 16, 2011 ("Decision") at 30 (emphasis added).

If the Authority requires Electric Suppliers to offer TOU prices without the necessary EDC infrastructure in place to allow those TOU prices to be offered through consolidated billing, Electric Suppliers will be ***required*** to offer direct billing and customers will be ***forced*** onto direct billing in direct contravention of the Decision and the nature of a competitive marketplace.

As participants in the underlying proceeding indicated, customer choice, including choice of billing arrangements, is an important aspect of the competitive market. *See, e.g.,* Decision at 27-28 (setting forth the position of the Suppliers that direct billing should be a choice, not a requirement). Thus, the Suppliers support permitting suppliers the opportunity to direct bill any consumer who desires such a billing option. However, many smaller customers prefer to receive

[4] At the time the Decision was rendered, the Authority was known as the Department of Public Utility Control ("Department" or "DPUC").

one bill for their electric service, rather than multiple bills. The Authority should not adopt a policy that takes that choice away from customers. Thus, to ensure customers still have a choice of both billing and pricing options, the Suppliers request that the Authority clarify that Electric Suppliers will not be required to offer TOU pricing structures until the EDCs have the necessary infrastructure in place to support such pricing structures.

Further, as set forth in the Suppliers' initial brief, because not all Electric Suppliers offered TOU prices prior to the effective date of Section 104, some Electric Suppliers require time to develop the necessary infrastructure (e.g., computer programming modifications, etc.) to offer such pricing options. Accordingly, the Suppliers request that the Authority clarify that Electric Suppliers that do not currently have the necessary infrastructure to offer TOU prices immediately will be given sufficient lead time to develop such infrastructure. In particular, the Suppliers request that the Authority clarify that each Electric Supplier will be required to offer TOU prices as soon as it has the necessary infrastructure and that such infrastructure must be developed by all Electric Suppliers by no later than December 31, 2011 or the date by which the EDCs have the necessary infrastructure to allow all customers of Electric Suppliers, including those receiving consolidated billing, to take advantage of these pricing options, whichever is later. Suppliers' Brief at 16.

CONCLUSION

For all of the foregoing reasons and those set forth in the Suppliers' initial brief, the Suppliers respectfully request that the Authority issue the following clarifications: (a) third party entities, including Electric Aggregators and brokers, that negotiate the "purchase" of electric generation services on behalf of customers are ***not*** agents of Electric Suppliers; (b) Electric Aggregators are permitted to use power of attorney agreements to enroll customers with Electric

Suppliers; (c) the use of "automatic invalidation clauses" is not prohibited; (d) Electric Suppliers will not be required to offer TOU prices until the necessary billing and metering infrastructure is in place to support such pricing offers and will be permitted to offer TOU prices that are greater than two parts; (e) the limitation on residential early termination fees does not apply when the contractual counterparty to the Electric Supplier is a non-residential customer; and (f) Electric Suppliers are only required to maintain records of signed service contracts or customer consents to service for a period of two years from the date on which the initial term of the contract expires.

Respectfully submitted,
DOMINION RETAIL, INC. and
RETAIL ENERGY SUPPLY ASSOCIATION

By: 

Joey Lee Miranda
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
Phone: (860) 275-8200
Fax: (860) 275-8299
E-Mail: jmiranda@rc.com

CERTIFICATION

I hereby certify that, a copy of the foregoing was sent to all participants of record, on this 19th day of August 2011.

Joey Lee Miranda