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November 1, 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 Retail Energy Supply Association (RESA) Written Exceptions in connection with the above-referenced matter. RESA requests oral argument.

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,

Joey Lee Miranda

Enclosure

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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
	:	NOVEMBER 1, 2011

RETAIL ENERGY SUPPLY ASSOCIATION
WRITTEN EXCEPTIONS

The Retail Energy Supply Association ("RESA")[1] hereby respectfully submits its Written Exceptions in response to the Public Utilities Regulatory Authority's ("Authority") September 29, 2011 Draft Decision ("Draft Decision") in connection with the above-referenced proceeding. RESA also requests oral argument.

BACKGROUND

On June 21, 2010, the Authority[2] opened this proceeding "to review the current status of the competitive supplier and aggregator market in Connecticut." *See* Request to Establish a New Docket on DPUC's Own Motion, dated June 17, 2010. Subsequently, after an opportunity for comment and a hearing, on March 16, 2011, the Authority issued a Final Decision, which addressed the following issues: (a) Electric Supplier/Electric Aggregator relationships; (b) marketing/sales practices; (c) the Electric Supplier referral program; (d) the Authority's Rate

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[1] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; 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 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.

[2] At the time this proceeding was opened, the Authority was known as the Department of Public Utility Control ("DPUC" or "Department").

Board; (e) disclosure labels; (f) three-way call center inquiries; (g) direct billing by Electric Suppliers; and (h) mid-cycle enrollments and price changes. *See, generally,* Final Decision, dated March 16, 2011 ("Decision").

During the most recent legislative session, the General Assembly passed 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"). The Act addressed several of the same matters that the Authority addressed in the Decision. On July 12, 2011, the Authority held a working group meeting ("Working Group Meeting") to discuss some of these issues and offered the participants the opportunity to submit briefs and reply briefs on the matters discussed at the meeting.

On September 29, 2011, the Authority issued the Draft Decision that, *inter alia*, purported to clarify what types of entities qualify as "legal agents" of Electric Suppliers pursuant to the Act. *See, generally,* Draft Decision. On October 7, 2011, RESA filed a Motion to Reopen the Record ("Motion to Reopen") in this proceeding requesting that the Authority conduct a duly noticed evidentiary hearing on the issues address in the Draft Decision. *See* Motion No. 005. The motion was subsequently denied. RESA now hereby submits its written exceptions to the Draft Decision in accordance with the schedule established by the Authority.

WRITTEN EXCEPTIONS

RESA respectfully requests that the Authority consider these written exceptions and clarify or reconsider the aspects of the Draft Decision discussed more fully below before issuing a final decision.

I. THE AUTHORITY DID NOT FOLLOW ITS OWN STATED PROCEDURES FOR ADDRESSING MATTERS ON WHICH THERE IS DISAGREEMENT

In the Decision, the Authority established the working group "for the purpose of having a mechanism in place to reach ***collaborative*** agreements and resolution of common issues . . . among the [Electric] Suppliers, Aggregators, EDCs [electric distribution companies] and any other interested persons." Decision at 31 (emphasis added). With respect to more substantive issues on which the participants could not reach agreement, the Authority specifically stated that it would "***adjudicate if need be, any issues that cannot be resolved by the working group***." Decision at 31 (emphasis added).

As the Authority is aware and as noted in the Draft Decision, there is ***substantial disagreement*** among participants regarding the types of entities that would qualify as "legal agents" of Electric Suppliers pursuant to the Act. *See* Draft Decision at 3-7 (setting forth the opposing positions of the Office of Consumer Counsel and RESA). Since there was significant disagreement surrounding the issue and a consensus could not be reached, consistent with the Decision, principles of fundamental fairness and due process, the Authority should then have provided a forum for a full adjudication before issuing the Draft Decision.

II. THE AUTHORITY DID NOT PROVIDE PROPER NOTICE TO INTERESTED PARTIES

"In general terms, the law recognizes a distinction between the rulemaking and adjudicatory functions of administrative agencies." *Edelman v. State Elections Enforcement Comm'n*, No. CV 95 055 35 38, 1995 Conn. Super. LEXIS 3086 (Nov. 1, 1995) (citations omitted), at *3. "The rulemaking function is generally prospective in effect; it establishes a rule or interpretation or standard to be applied in the future to circumstances occurring in the future as well as to present circumstances." *Id.* "By contrast, the adjudicatory function involves the

retrospective determination of specific facts about individual parties." *Id.* at 4 (internal quotations and citations omitted).

As a result, there are "significant differences in the procedures that an agency must follow, depending upon which function it is performing." *Id.* at 5. "If the agency is performing its rulemaking function by issuing a declaratory ruling on the proper interpretation of a statute, for example, its action has the potential for affecting the interests in the future of individuals other than the immediate petitioner." *Id.* "For that reason, the declaratory ruling statute, § 4-176(c) and (d), provides for notice to other potentially interested persons and their inclusion in the proceedings." *Id.*

In the Draft Decision, the Authority establishes an interpretation of the term "legal agent" "to be applied in the future to circumstances occurring in the future as well as to present circumstances" in a manner that affects the substantive rights and obligations of Electric Suppliers, customers and other participants in the competitive retail electric market. However, only licensed Electric Suppliers and registered Electric Aggregators were given notice of the Working Group Meeting. Thus, other interested parties were not made aware that their interests could and would be affected by the Authority's decision in this proceeding.

Moreover, the notice of the Working Group Meeting did not sufficiently advise interested stakeholders of the issues that would be considered. The notice of the July 12, 2011 meeting only included the following agenda items:

- <u>Section 113 of Public Act 11-80</u>: Whether independent contractors who are contracted with or otherwise compensated by suppliers under "Brokers" or "independent contractor" agreements to perform sales, marketing or solicitation would be considered "third-party agents" under subsection (f);
- <u>Supplier-Aggregator Relationship</u>: Whether P.A. 11-80 affects the Authority's rulings in the March 16, 2011 Decision in this Docket;
- Compliance Regarding Order No. 5 in the March 16, 2011 Decision in this Docket; and

- Status of the Order Imposing Stay issued by the Authority on March 30, 2011, in this Docket.

See Notice of Working Group Meeting, dated July 8, 2011. However, as the Authority is aware, numerous other items were discussed during the meeting, including the use of automatic invalidation clauses, which were also the subject of the Draft Decision.

Furthermore, based on the Authority's stated position that it would adjudicate matters on which there was disagreement, interested stakeholders could have reasonably believed that the Authority would only issue directives on items on which participants had reached consensus. As such, some stakeholders may not have participated in the Working Group Meeting expecting that issues on which there was disagreement would be subject to further proceedings with a full opportunity for a review of the issues. Yet, the Authority did not provide an opportunity for a full and fair hearing on the issues involving all potentially interested stakeholders. Because the Authority did not provide proper notice of the issues under consideration and did not offer participants an opportunity for a full adjudication of the issues, RESA and other interested stakeholders were not afforded appropriate due process. *Cf. Tele Tech of Connecticut Corp. v. Department of Pub. Util. Control*, 270 Conn. 778 (2004).

III. THE EXTENT OF THE ACT'S ABROGATION OF THE COMMON LAW IS LIMITED BY THE ACT'S EXPRESS LANGUAGE

In the Draft Decision, the Authority accepts the Office of Consumer Counsel's ("OCC") argument that Section 113 acts in derogation of common law principles of agency. Draft Decision at 3-4. The Draft Decision further states that RESA disagreed with this premise and failed to "elaborate or provide any further discussion on this point." Draft Decision at 3. This is simply inaccurate.

As RESA pointed out in its reply brief, "[i]nterpreting 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." *See* Joint Reply Brief of Dominion Retail, Inc. and Retail Energy Supply Association, dated August 19, 2011 ("RESA Reply Brief"), at 6 (*quoting Vitanza v. Upjohn Co.*, 257 Conn. 365, 381 (2001)). "In 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) (citations omitted). "In the absence of explicit language . . . [an agency] ordinarily will not presume that the legislature intended to act in derogation of the common law." *Id.* at 382. Indeed, "the legislature is capable of ***providing explicit limitations*** when that is its intent." *Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282, 290 (1993) (emphasis added) (citations omitted).

In this case, the General Assembly did provide explicit limitations on the extent of its intended abrogation of the common law. The Act specifically 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. Accordingly, in all other instances, the common law continues to apply.

IV. THE DRAFT DECISION IGNORES THE PLAIN LANGUAGE OF THE ACT

In the Draft Decision, the Authority specifically finds that it "is ***not*** free to ignore the express language of Section 113(f)(1) . . . ." Draft Decision at 5 (emphasis added). Indeed, 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 well accepted tenets of statutory construction, the Draft Decision ignores the phrase "***to sell*** electric generation services" as evidenced by the Authority's use of quotation marks around the phrases "contracts with" or "compensated by" and the lack thereof around the phrase "to sell electric generation services." *See, e.g.*, Draft Decision at 7. 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, only to the extent a third party contracts with or is compensated by an Electric Supplier "***to sell*** electric generation services" does that entity qualify as a "legal agent" of the Electric Supplier pursuant to the Act. Conversely, any third party who is acting on behalf of a customer

or group of customers, regardless of title, "*to purchase* electric generation services" is ***not*** the "legal agent" of the Electric Supplier.

V. THE ULTIMATE FINDING OF AN AGENCY RELATIONSHIP PRESENTS A QUESTION OF FACT

In the Draft Decision, the Authority indicates that it will consider three factors[3] in determining whether an agency relationship exists between an Electric Supplier and a third party: "the language of any contracts between the parties, whether compensation has been made by the supplier, and the nature of services performed by the third party." Draft Decision at 2, 7. Thus, the Authority recognizes that ultimately its determination of whether an agency relationship exists presents a question of fact. RESA agrees. *Accord* Joint Brief of Dominion Retail, Inc. and Retail Energy Supply Association, dated August 5, 2011 ("RESA Brief") at 7; RESA Reply Brief at 8-9 (*citing Wesley v. Schaller Subaru, Inc.*, 277 Conn. 526, 543 (2006) (finding that whether there is an agency relationship is a question of fact)).

Indeed, in its filings in this docket, RESA has continually urged 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. RESA Brief at 9-10; RESA Reply Brief at 8-9. However, since the ultimate finding of whether an agency relationship exists presents a question of fact, *Wesley*, 277 Conn. at 543, RESA requests that the Authority issue the further clarifications described herein.

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[3] In the Conclusion, the Draft Decision states that "the Authority will only consider ***two*** factors: the language of the contract between the parties, and whether compensation has been made." Draft Decision at 11 (emphasis added). Before issuing a final decision, RESA requests that the Authority clarify that it will actually consider the following three factors in determining if an agency relationship exists: "the language of any contracts between the parties, whether compensation has been made by the supplier, and the nature of services performed by the third party."

A. Compensation

The Draft Decision states that the Authority will consider whether compensation has been made by the Electric Supplier as one of the factors in evaluating whether an agency relationship exists. Draft Decision at 2, 7. However, the Authority fails to provide any clear insight into how it will determine if compensation is made by the Electric Supplier. Rather, the Draft Decision states that "in the typical supplier-broker arrangements, it is the electric supplier who sets the fee it will pay to the broker, and such fee is not related to or dependent on any aspect of the agent-customer relationship." Draft Decision at 6. This is inaccurate and unsupported by the record in this proceeding. Indeed, it is the broker and/or the customer that determines the fee that will be paid to the broker. *See, e.g.*, Written Exceptions of Competitive Energy Services, LLC ("CES"), dated October 18, 2011 ("CES Exceptions"), at 2. Further, the Authority finds that "[i]f the customer were paying for the agent's services 'to purchase,' then the fee paid by the customer for such services should be the same regardless which supplier is chosen and the fee should be pre-set by either the customer or the agent." *Id.* RESA agrees and, in fact, as CES pointed out, the fee is typically pre-set by the broker or the agent and does not vary based on which Electric Supplier is ultimately selected to serve the customer. *Id.* ("CES fees are fixed by the CRA [Client Representation/Energy Procurement Agreement], known in advance and agreed to by the customer and invariant with respect to the supplier of energy that the customer may ultimately contract with for electricity supply."). Thus, RESA requests that the Authority clarify that if the customer and/or the third party sets the fee to be paid to the third party, the Authority will ***not***

find that the third party has been "compensated by" the Electric Supplier even if the third party's fee is ultimately distributed by the Electric Supplier to the third party.[4]

B. Contract Terms

The Draft Decision states that "[w]here there is ***no contact*** between the parties, it would be impracticable for the Authority to enter the parties' minds to determine who is acting on behalf of whom, what authority was given, who is paying whom, etc." Draft Decision at 6 (emphasis added). However, the Draft Decision fails to address what happens when there is a contract.

Throughout the course of this proceeding, RESA has encouraged the Authority ***to look to the language of the agreement*** between the Electric Supplier and the third party. RESA Brief at 9; RESA Reply Brief at 9. Before issuing a final decision, RESA requests that the Authority clarify what contract terms will be evaluated in determining whether an agency relationship exists. In particular, RESA requests that the Authority clarify that there is no agency relationship if all of the following terms are present in any contract between an Electric Supplier and a third party:

- 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;

[4] In its brief, the OCC argued that "[i]f brokers truly only work for customers, then there is no need for them to be paid by electric suppliers." Brief of the Office of Consumer Counsel, dated August 12, 2011, at 6. This argument ignores 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. Similarly, in this case, how the third party ultimately receives its fee should be irrelevant so long as the fee is set by the customer and/or the third party.

- 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.

These further clarifications will 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.

VI. THE DRAFT DECISION CREATES FURTHER AMBIGUITY

Although the Draft Decision was issued as a "clarification," it actually creates further ambiguity in the marketplace. In particular, the Draft Decision states that "any person or entity who 'contracts with' or 'is compensated by' an electric supplier to sell electric generation services will be deemed to be a 'legal agent' of such electric supplier, whether such person or entity is a broker, marketer, ***aggregator*** or sale representatives."[5] Draft Decision at 2, 7 (emphasis added).

By definition, however, 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). Thus, based on the plain language of Connecticut General Statutes section 16-1(30), Electric Aggregators cannot be agents of Electric Suppliers. Indeed, in the Decision, the Authority specifically held that "[a]ggregators are the customers'

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[5] RESA agrees that the title of the third party entity is irrelevant. It simply used the term "broker" because that is the most commonly accepted term in the industry to describe third parties that act on behalf of customers. However, in its brief, RESA urged the Authority to clarify in general terms (rather than by name) what types of third parties would qualify as agents. *See* RESA Brief at 7-10.

agents. Aggregators' loyalty must lie with the customers, and as such, Aggregators ***may not*** represent or act as agents or representatives for any Suppliers at any time, or in any capacity." Decision at 7 (emphasis added).

Since the Draft Decision's conclusion that Electric Aggregators can qualify as "legal agents" of Electric Suppliers ***directly contradicts*** the Authority's prior holding that Electric Aggregators are prohibited from acting as agents of Electric Suppliers, in order to avoid creating even further confusion in the market, RESA requests that the Authority clarify whether Electric Aggregators can be the agents of Electric Suppliers and, if so, how such a conclusion comports with the statutory definition of Electric Aggregator set forth in Connecticut General Statutes section 16-1(30).

CONCLUSION

For all of the foregoing reasons, RESA respectfully requests that the Authority consider these written exceptions before issuing a final decision.

Respectfully submitted,
RETAIL ENERGY SUPPLY ASSOCIATION

By: ________________________

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CERTIFICATION

I hereby certify that, a copy of the foregoing was sent to all participants of record, on this 1st day of November 2011.

Joey Lee Miranda