TESTIMONY FOR SENATE BILL 1

SUBMITTED TO THE ENERGY AND TECHNOLOGY COMMITTEE

MARCH 15, 2011

STATEMENT OF TIMOTHY LOCASCIO

ON BEHALF OF LIBERTY POWER CORP., LLC

Good Afternoon Members of the Energy and Technology Committee,

My name is Tim LoCascio, Manager, Regulatory Affairs for Liberty Power Corp., LLC ("Liberty Power"). I would like to offer this testimony on behalf of Liberty Power in opposition to Senate Bill 1 ("SB1") and recommend several amendments to sections within the bill.

Liberty Power is a competitive electricity supplier serving tens of thousands of small and medium-sized businesses, Fortune 500 companies and government entities in Connecticut and 12 other competitive retail markets across the United States. We also serve residential customers in some of our markets. Liberty Power's story captures the entrepreneurial spirit the United States is known for. Founded in 2001, the company has received a number of recognitions based on the company's organic growth, having been ranked as the fastest-growing Hispanic-owned company in the United States in 2007 by *Hispanic Business*, and was named an Inc. 500 company in 2008. Liberty Power is currently ranked as the leading privately-held, non-residential retail electric supplier by KEMA, a global authority on the energy and utility industries.

Section 54 develops additional consumer protections. While Liberty Power is supportive of the development and adoption of essential consumer protection rules, we believe it is most appropriate to carefully vet and evaluate these proposals through a rulemaking process at the Department of Public Utility Control ("DPUC"). To that end, Liberty Power, through its national advocacy organization, the Retail Energy Supply Association ("RESA"), has been an active participant in the DPUC Docket No. 10-06-24 which pertains to a DPUC review of Marketing Practices and Conduct of Market Participants. Within SB1, there are several proposals that exhibit a number of unintended consequences that will lead to a reduced number of choices for electricity supply options and higher costs to customers. Liberty Power's testimony seeks to identify some of these instances, and offer alternative solutions.

> Applicability - It should be noted that Section 54 provides proposed protections to customers below 100 kilowatts ("kW") of peak demand. Liberty Power believes treating medium and large businesses identically to individual residential customers ignores a fundamental fact that the DPUC and the state legislature have repeatedly acknowledged: Large institutions and businesses are more sophisticated in their procurement approach and have more resources to devote to shopping the competitive electric market than do residential customers (e.g., they have staff

devoted to energy procurement, they seek multiple offers from multiple suppliers, etc.). Large customers have more dollars at stake and are accountable to the business owners for conducting all purchasing activities – including buying electricity – prudently. What's more, many of them are often represented by counsel or consultants that assist in the review of supply options and contract terms during procurement negotiations with suppliers. Even medium-sized businesses bear a greater responsibility for any procurement than does a typical homeowner or apartment dweller.

Accordingly, Liberty Power proposes that Section 54 limit the applicability of the proposed consumer protections to residential and small commercial and industrial ("C&I") customers. Small C&I customers should be defined as customers with a maximum demand of less than 50 kW. The 50 kW threshold includes those small C&I customers that may lack the sophistication or resources to negotiate energy supply contracts, including convenience stores and gas stations, barber shops and the local deli or pizza shop. In addition, the 50 kW threshold is consistent with the DPUC's previous rulings requiring electric distribution companies ("EDCs") to provide direct billing options to customers with demands of 50 kW or more. Other jurisdictions have also found a 50 kW (or lower) threshold appropriate in defining small C&I customers.[1] Accordingly, Liberty Power proposes all instances referring to a customer with a demand of less than "one hundred kilowatts" be replaced with "fifty kilowatts".

Right of Rescission – Liberty Power does not oppose the 3-day right of rescission, but as stated earlier, believes this provision should be limited to residential and small commercial customers (50 kW and below). Additionally, the proposed language would begin to toll the right of rescission period once the customer receives the written contract. In doing so, the legislation provides an incentive for a retailer to utilize door-to-door marketing, but provides a disincentive to telemarketing channels. This is due to the added time it takes to process and mail a written contract to the customer under telemarketing practices. The mailing of a written contract, after receiving the customer's affirmative consent to effectuate a change in service via a third-party verification, extends the rescission period and increases mark-to-market risks and costs to the retailer (which are ultimately borne by customers). It is unclear if the intent of the legislation was to make door-to-door marketing the least risky business model. In general, Liberty Power believes that various marketing methods should be provided equal treatment. Imposing an extended rescission period for customers solicited through telemarketing (and other

[1] *See* 16 Tex. Admin. Code § 24.471(d)(10)(defining small commercial customer as "A non-residential customer that has a peak demand of less than 50 kilowatts during any 12-month period, unless the customer's load is part of an aggregation program whose peak demand is in excess of 50 kilowatts during the same 12-month period."); 52 Pa. Code § 54.2 (defining small business customer as "a person, sole proprietorship, partnership, corporation, association or other business entity that receives electric service under a small commercial, small industrial or small business rate classification, and whose maximum registered peak load was less than 25 kW within the last 12 months."); and 220 Ill. Comp. Stat. Ann. 5/16-102 (defining small commercial retail customers as "those nonresidential retail customers of an electric utility consuming 15,000 kilowatt-hours or less of electricity annually in its service area.").

means) will dramatically impact suppliers existing marketing and procurement strategies. For the C&I market most suppliers buy energy for customers as soon as the contract is executed. The extended rescission period will impose added costs on suppliers resulting in higher prices for customers. Therefore, Liberty Power recommends the trigger for tolling the 3-day rescission period should remain as "until midnight on the third business day after the day on which the customer enters into a service agreement".

Early Termination Fee Caps - Section 54 also discusses limitations on penalties for residential customers looking to amend or cancel their contract with a supplier. First, it is important to note that early termination fees ("ETFs") are one of many factors that customers can take into account when shopping for a supplier. Some suppliers impose early termination fees for customers cancelling a contract and others do not. Customers are capable of factoring these issues into their purchase decision. Secondly, retail electric suppliers should be treated no different than any other type of vendor when a customer breaches its contract, especially, when that customer is a business. Early termination fees are a mechanism that suppliers can use to limit their financial risk of contract cancellation. Without the ability to hold customers to their contracts some suppliers may elect to charge higher prices in Connecticut to cover their increased risk. Accordingly, this provision may raise prices for the very customers the bill is intending to protect.

While Liberty Power opposes the concept of ETF caps, if such a provision is deemed necessary, Liberty Power agrees that the provision should be limited to residential customers only. Additionally, Liberty believes the amount of the proposed limit on residential ETFs should be adjusted to take into account multi-year contracts. In essentially limiting ETFs to $100, the legislation provides a disincentive to provide customers with long-term price certainty, and most fixed contracts will be limited to 12-months (or less), and/or be more costly due to the additional risks involved in offering a multi-year contract, while only being able to recover $100 of market exposure if and when a customer cancels its contract. To remedy this, Liberty Power suggests the following alternative language:

> (6) No contract for electric generation services by an electric supplier shall require a residential customer to pay any fee for termination or early cancellation of a contract in excess of (A) one hundred dollars for any contract with a remaining term of less than 12 months; or (B) two hundred dollars for any contract with a remaining term 12 months or more; or (C) twice the estimated bill for energy services for an average month, provided when an electric supplier offers a contract, it provides the residential customer an estimate of such customer's average monthly bill.

Right of Rescission after Renewal – Section 54 allows residential customers to cancel a contract renewal seven business days after receiving its first bill without being subject to any early termination fees. Liberty Power has already testified to the fact

that extended rescission timeframes create additional risks which result in higher costs to customers. This provision essentially creates a right of rescission period specific to residential renewals that can last upwards of three to four months – represented by the time a customer receives a renewal notice until seven business days after receiving its first bill. The provision provides an exorbitantly costly "free option" to residential customers. If there is a downward trend in market prices between the time the residential customer receives the expiration notice and seven business days after receipt of the first bill (roughly three to four months later), customers (in mass amounts) will simply cancel their renewal, penalty free, and sign a new contract at the then lowest prevailing market rate. However, the retailer is not afforded the same treatment – if market prices were to increase significantly during that same timeframe, a retailer does not have the ability to cancel the offer, and must continue to adhere to the terms of the contract and honor a price that is well below then current market rates. This is simply an unacceptable amount of risk and will result in higher costs to customers as well as a limited amount of fixed-rate renewals in the marketplace.

Definition of Agent – Section 54(f)(1) currently defines a legal agent of the electric supplier as "any third-party agent who contracts with or is otherwise compensated by an electric supplier to sell electric generation services." It is important to emphasize the difference between an agent, who acts exclusively on behalf of a particular supplier, and a broker, who may have a contractual relationship with and receive compensation from multiple suppliers, but who does not act as an agent for any particular supplier. The current definition would also capture unintended individuals or entities and therefore prevent such individuals or entities from providing benefits to its members. Liberty Power recommends defining agent as set forth in RESA's brief on exception to the Marketing Practices and Conduct of Participants in Docket 10-06-24:

> "Agent is intended to apply to any person who is authorized, directly or indirectly, either to conduct marketing or sales activities or to enroll Customers, in each case exclusively on behalf of a Supplier or Aggregator. The term "agent" may include an employee, a representative, an independent contractor, or a vendor, but does not include Brokers or any employee of an organization that is providing access to a Supplier or Aggregator as a service to the organization's members."

Additionally, Section 54(f)(1) makes the agent a "legal agent" of the electric supplier. In doing so, the retailer can potentially be held liable for any action by the third-party, even if it is completely unrelated to the sale or marketing of electricity on behalf of the retailer. Liberty Power believes that retailers should not be responsible for actions taken by an independent third party that is unrelated to the sale and marketing of the retailer's own products and services. To remedy this issue, Liberty Power proposes Section 54(f)(1) be modified to read as follows:

(f) (1) No third-party agent may sell electric generation services on behalf of an electric supplier unless (A) the third-party agent is an employee or independent contractor of such electric supplier, and (B) the third-party agent has received appropriate training directly from such electric supplier.

Disclosure of Terms and Conditions – Section 54(f)(2)(A)(iv) states that a salesperson must "explain **all** rates, fees, variable charges and terms and conditions for the services provided". Liberty Power is concerned that the language could be interpreted to require the sales person to read **all** terms and conditions within a written contract to a customer. Liberty Power assumes the intent was not to read the contract to the customer, but to ensure all the material terms and conditions are disclosed to the customer during the sales process. As such, Liberty Power recommends the word "material" be inserted prior to "terms and conditions" so that the proposed section reads:

(A) For any sale or solicitation, including from any person representing such electric supplier, aggregator or agent of an electric supplier or aggregator (i) identify the person and the electric generation services company or companies the person represents; (ii) provide a statement that the person does not represent an electric distribution company; (iii) explain the purpose of the solicitation; and (iv) explain all rates, fees, variable charges and material terms and conditions for the services provided; and

Pricing Disclosures – Section 54(f)(3) requires sales agents to "disclose the electric distribution company's current charges, including the competitive transition assessment and the systems benefit charge, for that customer class". Liberty Power is not certain how to interpret this proposal. Liberty Power is concerned that it may require a retailer to disclose the utility's distribution charges. Such a requirement is not appropriate. Certainly, it is important that customers understand that their total bill consists of both supply and delivery charges, however retailers are not intimately familiar with utility charges, just as the utilities are not intimately familiar with retailers' charges. Distribution or delivery charges are often very complicated, and not uniformly applied (i.e. a customers' individual peak demand or even location can impact their distribution rates). If this section is referring to the utility's delivery charges, relying on retailers to disclose this information will only lead to misinformation and customer confusion. It would be more appropriate to have retailers disclose a web page address maintained by the local utilities where they can access their delivery charges.

Disclosure of Renewable Energy Credits purchased beyond those required – Section 54(f)(4) prohibits retailers of advertising the green attributes of a particular product if such green attributes are utilized to meet the state's renewable portfolio standards. It is not clear why the legislature believes renewable energy credits

("RECs") and/or alternative compliance payments ("ACPs") associated with meeting a renewable portfolios standard ("RPS") does not constitute "green" or "renewable energy". After all, RECs represent the environmental and other non-power attributes of renewable electricity generation and are a component of all renewable electricity products. In Liberty Power's opinion, if a retailer has an obligation to "green" 4% (percentage value is for illustrative purposes only) of its metered load through RECs and ACPs, then the retail electric supplier ("RES") should be able to market the fact that 4% of electricity associated with that product is "green" or "renewable" as the purpose of an RPS and the various compliance mechanisms is to promote "environmentally friendly" sources of energy. Liberty Power does not believe the language presented above provides any additional transparency and creates numerous problems in marketing green products. For example, if a customer wanted to purchase a product that was 100% green, how could this be accomplished under the proposed restrictions? Would a RES then be compelled to purchase RECs 100% above and beyond the RPS requirements? This would only serve to raise prices for renewable products that already typically carry a price premium and could thwart the growth of voluntary renewable energy markets. Liberty Power would not oppose the concept of an additional disclaimer that points out that X% out of Y% of the green energy associated with a specific product was used to meet the state's renewable portfolio standard.

Additionally, Liberty Power holds the requirement to "report to the department the renewable energy sources of such credits and **whenever** the mix of such sources change" to be overly burdensome and unnecessary. Requiring all of this information from every supplier for **every sale** will encourage suppliers to simply avoid additional REC purchases in Connecticut altogether. Whatever the intent, the effect of this provision is harmful to competition and harmful to the development of renewable energy.

Penalties for Violation – Section 54(i) pertains to applicable penalties if a retailer is found to be in non-compliance. The language is simply too strict and draconian and does not allow for the "penalty to match the crime". For example, if there is a single instance of a retailer marketing to a customer at 6:01PM (one minute past the permissible hours for marketing electricity) the retailer **shall** be subject to civil penalties and/or a suspension of their license. Liberty Power believes the law should allow for more flexibility and recommends the word "may" replace the term "shall" so the new language would read:

> (i) Any violation or failure to comply with any provision of this section may be subject to (1) civil penalties by the department in accordance with section 16-41, (2) the suspension or revocation of an electric supplier or aggregator's license, or (3) a prohibition on accepting new customers following a hearing that is conducted as a contested case in accordance with chapter 54.

Door-to-Door Sales - Section 54(f)(2)(B) imposes severe restrictions on the marketing and sale of electricity to commercial customers by applying to them door-to-door sales requirements more appropriately designed for residential customers. For example the language in section 54(f)(2)(B)(iii) limits door-to-door visits from the hours of ten o'clock am and six o'clock pm, without making any expectations for scheduled appointments. Clearly a retail supplier should be free to sit down with business owner to discuss his or her electricity needs at 7:00 pm if such an appointment were requested by the owner. Accordingly, Liberty Power would recommend adding after six o'clock pm, 'or during a scheduled appointment'.

Adoption of Regulations – Section 54(j) allows the department to adopt regulations to address abusive practices, solicitations and renewals by **electric suppliers**. It is not entirely clear who "electric suppliers" refers to, but it appears to be limited to retail electric suppliers. Liberty Power recommends that the language be clarified so that regulations may be adopted to address issues from all entities involved, and not limited to retailers:

> (j) The department may adopt regulations, in accordance with the provisions of chapter 54, to include, but not be limited to, abusive switching practices, solicitations and renewals by electric suppliers, aggregators, brokers, consultants, and third-party agents, and electric distribution companies.

Mandatory peak pricing offers – Imposing a mandate on competitive retail suppliers is not a solution to getting time of use prices to customers. Suppliers can and will innovate and offer various such products to customers but cannot do so for every customer unless and until distribution companies achieve full deployment of smart meters and upgrade their billing and meter data management and delivery systems to support such products. Imposing a mandate on suppliers ahead of this supporting infrastructure is premature and impractical.

Section 66 requires each electric distribution company to work in consultation with the the Department of Energy and Environmental Protection ("DEEP") procurement officer to develop a plan to procure electric generation services to allow the distribution company to manage a portfolio of contracts (of various lengths) in an attempt to reduce the average cost of standard offer service.

If passed, this legislation would allow the utilities to enter into risky long term contracts and make other procurement decisions in an effort to produce lower electricity rates for consumers. These "active portfolio management" activities would require the utilities to predict market trends in a futile attempt to produce pricing outcomes that are consistently better than what the competitive market can produce. As this Committee is aware, utilities long ago stopped engaging in these business practices when the state chose to restructure the energy market because the prior regulated model produced high electricity rates and

inefficient generation construction decisions. This legislation produces a 180 degree departure from this policy decision and will shift the risk of energy procurement decisions back to customers instead of on energy company stockholders. A managed portfolio exposes customers to the risk of unexpected rate increases. Under the current "full requirements" auction process competitive suppliers bid a firm price and then shoulder the risk of any "stranded" costs or sudden changes in wholesale market costs. By contrast, under utility managed portfolio these costs can be passed on to customers in the form of rate increases at any time.

Section 52 would require DEEP to conduct a proceeding to determine the cost of billing, collection and other services provided by the utilities and allocate these costs to retail suppliers that choose to use utility consolidated billing. At the outset it is important to emphasize that many of Liberty Power customers prefer the convenience of one utility consolidated bill. It is only fair to allow retail suppliers to bill their charges through the billing and customer care functions provided by the utility. All customers pay for these functions through their regulated distribution rates. To charge a retail supplier for use of these services will result in customers served by retail suppliers paying for these services twice—once to the utility and again to the retail supplier. Clearly this is an untenable outcome. Section 52 will require retail suppliers using utility billing to pay for the cost of these billing and collection services. While Liberty Power is not opposed to the examination of how costs for utility billing functions are allocated, we think it is important to: 1) maintain the ability of retail suppliers to bill their services through the utilities for the convenience of customers, and 2) ensure that any allocation of additional costs of utility billing services to retail suppliers does not force customers to pay those costs twice.