DOCKET NO.: HHB-CV21-6063122-S	:	SUPERIOR COURT
	:	
DIRECT ENERGY SERVICES, LLC;	:	JUDICIAL DISTRICT OF NEW BRITAIN
DIRECT ENERGY BUSINESS, LLC;	:	
DIRECT ENERGY BUSINESS	:	
MARKETING, LLC; CLEANCHOICE	:	
ENERGY, INC.; AND RETAIL ENERGY	:	
SUPPLY ASSOCIATION	:	AT NEW BRITAIN
	:	
v.	:	
	:	
PUBLIC UTILITIES REGULATORY	:	
AUTHORITY	:	JANUARY 8, 2021

APPELLANTS' BRIEF

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Retail Energy Supply Association

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Pursuant to Connecticut General Statutes § 4-183(f) and Stipulated Application to Stay Enforcement of Agency Decision,[1] Plaintiffs-Appellants, Direct Energy Services, LLC ("DES"); Direct Energy Business, LLC ("DEB"); Direct Energy Business Marketing, LLC ("DEBM"); CleanChoice Energy, Inc. ("CleanChoice") (together, "Appellant Suppliers"); and Retail Energy Supply Association ("RESA") (together, the "Appellants"), by their undersigned counsel, hereby respectfully submit this brief in support of their Petition for Administrative Appeal[2] of Defendant-Appellee Public Utilities Regulatory Authority's ("PURA") October 21, 2020 Decision in Docket No. 16-12-29, *PURA Development of Voluntary Renewable Options Program*.[3]

PRELIMINARY STATEMENT

In its Decision, PURA imposed a series of restrictions on electric suppliers offering renewable energy credits ("RECs") bundled with electric supply to Connecticut customers. Among other restrictions, PURA's Decision: (a) prohibits electric suppliers from marketing certain products as containing "renewable energy," (b) prohibits these products from containing RECs sourced outside particular geographic regions, (c) imposes restrictions on permissible renewable energy sources, and (d) requires electric suppliers to provide disclosure labels at the time of enrollment with granular detail about the source of renewable energy.

As described herein, these chilling and far-reaching restrictions were reached following a wholly unfair administrative hearing process in violation of the Uniform Administrative Procedure Act ("UAPA") and Appellants' due process and common law rights. In particular,

[1] Stipulated Application to Stay Enforcement of Agency Decision (Dec. 15, 2020) (Entry No. 104.00).
[2] Petition for Administrative Appeal (Dec. 4, 2020) (Entry No. 100.31).
[3] Decision (Oct. 21, 2020) [ROR-0464 – ROR-0516] ("Decision").

PURA's findings supporting its Decision rely not on evidence, but on written comments and conclusory statements.

Beyond these defects in procedure, each of the aforementioned restrictions severely prejudices the substantial rights of Appellants. In imposing impermissible restrictions on use of the term "renewable energy," PURA ignored evidence that Appellants' use of this term is both accurate and consistent with descriptions adopted by federal agencies and other states. As a result, PURA impermissibly restricted rights to free speech and disproportionately burdened interstate commerce in violation of Appellants' constitutional rights. Further, PURA acted in excess of its statutory authority and in violation of the Commerce Clause in creating arbitrary geographic and resource type restrictions on product offerings and associated disclosure obligations. Accordingly, for the reasons set forth more fully herein, Appellants submit that this appeal should be sustained and PURA's Decision reversed.

BACKGROUND

Connecticut law authorizes electric suppliers licensed by PURA to provide electric generation services to end use customers.[4] The Appellant Suppliers are electric suppliers licensed by PURA to serve customers in Connecticut. RESA is a non-profit organization and trade association whose members include electric suppliers licensed to serve customers in Connecticut. RESA represents the interests of its members in regulatory proceedings in Connecticut, as well as in the Mid-Atlantic, Great Lakes, New York, and New England regions.

Through mechanisms known as renewable portfolio standards ("RPS"), electric suppliers are required to demonstrate that certain percentages of the electricity that they supply has been

[4] Conn. Gen. Stat. § 16-245.

generated by Class I renewable energy sources and Class III sources.[5] Electric suppliers demonstrate compliance with these RPS obligations by filing an annual report with PURA.[6] These annual reports are based exclusively on RECs issued by New England Power Pool Generation Information System ("NEPOOL GIS").[7] RECs are property interests, distinct from electricity, that are generated by renewable power generators (i.e., renewable energy sources) and that represent the renewable attributes of power generation.[8] RECs are used to track the generation and consumption of the renewable attributes of power generation.[9]

Some electric suppliers sell RECs to customers in amounts beyond those required by the RPS in products, known as voluntary renewable offers ("VROs"), which bundle electricity supply with RECs.[10] Each electric supplier doing so is required to disclose to PURA in a standardized format: (A) the amount of additional RECs it will purchase (other than those required for RPS compliance); (B) where such additional RECs are being sourced from; and (C) the types of renewable energy sources that will be purchased.[11] Additionally, any electric supplier offering any products that contain renewable energy attributes beyond the minimum RECs used for RPS compliance is required to disclose, in each customer contract and in its marketing materials, the renewable energy content of the product or service offering and to make available, on its website, information sufficient to substantiate the marketing claims about such

[5] *See* Conn. Gen. Stat. §§ 16-243q, 16-245a. Electric suppliers are permitted to substitute Class II renewable energy sources for a specified portion of the otherwise required percentage of electricity generated by Class I renewable energy sources. *See* Conn. Gen. Stat. § 16-245a.

[6] Conn. Agencies Regs. § 16-245a-1.

[7] Conn. Agencies Regs. § 16-245a-1(c). In the NEPOOL GIS, RECs are called renewable energy certificates.

[8] *See, e.g.*, *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 92-93 (2d Cir. 2017) (describing RECs).

[9] *See, e.g.*, *id*.

[10] *See, e.g.*, Interrogatory EOE-1 Responses [ROR-0529 – ROR-0835] (identifying electric suppliers that offered VROs in 2016).

[11] Conn. Gen. Stat. § 16-245o(h)(5).

content.[12]

On December 20, 2016, PURA opened the proceeding as a contested case to establish a new program to replace the Connecticut Clean Energy Option Program ("CEOP").[13] The CEOP allowed customers purchasing electric supply from The Connecticut Light and Power Company d/b/a Eversource Energy and The United Illuminating Company (together, the "electric distribution companies" or "EDCs") to purchase RECs from electric suppliers selected and at prices derived through a request for proposal process run by the EDCs.[14] Subsequently, PURA revised the purpose of the docket to develop standards for a new CEOP that would govern ***all*** VROs—including those of electric suppliers—and disclosure statements associated with such offerings ("Disclosure Labels").[15] In the course of its proceeding, PURA issued notices requesting comments, served interrogatories, conducted an evidentiary hearing ("Hearing"), and admitted material into the evidentiary record.[16]

Following briefing by the parties, on September 9, 2020, PURA issued a proposed decision ("Proposed Decision").[17] On September 30, 2020, DES, DEB, CleanChoice, and RESA filed written exceptions identifying several serious errors of law and fact in the Proposed Decision.[18] On that same day, other individual electric suppliers also filed written exceptions in

[12] *See* Conn. Gen. Stat. § 16-245o(h)(6).

[13] *See* Revised Notice of Proceeding (Nov. 26, 2019), at 1 [ROR-1207]; Request to Establish a New Docket on PURA's Own Motion (Nov. 21, 2019) [ROR-0002].

[14] *See* Decision, at 2 [ROR-0467]; Notice of Proceeding (Jan. 4, 2017) [ROR-1205].

[15] *See* Decision, at 2 [ROR-0467]; Revised Notice of Proceeding (Nov. 26, 2019), at 1 [ROR-1207]; Request to Establish a New Docket on PURA's Own Motion (Nov. 21, 2019) [ROR-000].

[16] *See, generally*, Record.

[17] *See* Proposed Final Decision (Sep. 9, 2020) [ROR-0344 – ROR-0389].

[18] Written Exceptions of Retail Energy Supply Association (Sep. 30, 2020) [ROR-0425 – ROR-0450]; Written Exceptions of CleanChoice Energy Inc., Direct Energy Business, LLC, and Direct Energy Services, LLC (Sep. 30, 2020) [ROR-0396 – ROR-0411].

which they identified additional errors of law and fact in the Proposed Decision.[19]

On October 21, 2020, PURA issued the Decision, which was substantially similar to the Proposed Decision and which failed to remedy the errors of law and fact identified by RESA and electric suppliers.[20] Among other things, the Decision prohibits VROs from containing RECs sourced outside particular geographic regions, specifically the New England, New York, and PJM Interconnection, L.L.C. ("PJM") control areas (the "Geographic Restrictions"), and from being generated by sources other than those that would meet the definition of Connecticut Class I renewable energy sources[21] (the "Resource Type Restrictions").[22] In the Decision, PURA also concluded that a "supplier may not market [a] product as 'renewable energy' unless the offer is supported by an ownership interest in or PPA [power purchase agreement] for a renewable resource used to serve the contract."[23] Thus, the Decision prohibits electric suppliers from marketing REC-only VROs as containing "renewable energy" (the "Marketing Restriction"). On December 4, 2020, the Appellants appealed.[24]

AGGRIEVEMENT

The Appellants are aggrieved by the Decision.

> The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal

[19] Written Exceptions of Constellation NewEnergy, Inc. (Sep. 30, 2020) [ROR-0417 – ROR-0420]; Written Exceptions of Starion Energy, Inc. (Sep. 30, 2020) [ROR-0452 – ROR-0457] ("Starion Exceptions"); Written Exceptions of Vistra Corp. (Sep. 30, 2020) [ROR-0458 – ROR-0463].

[20] *See, generally*, Decision.

[21] *See* Conn. Gen. Stat. § 16-1(a)(20) (defining Class I renewable energy source).

[22] Decision, at 3-13.

[23] *Id.* at 32.

[24] Petition for Administrative Appeal (Dec. 4, 2020) (Entry No. 100.31).

interest has been specially and injuriously affected by the decision.[25]

Further, "[a]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[26] The Appellants may demonstrate aggrievement based on the administrative record.[27] However, they may also introduce additional proof to demonstrate aggrievement.[28]

The Appellant Suppliers have specific personal and legal interests in the subject matter of the Decision because they are licensed electric suppliers to which the requirements of the Decision apply.[29] Several RESA members, including Starion Energy, Inc. ("Starion"),[30] have specific personal and legal interests in the subject matter of the Decision because they are licensed electric suppliers to which the requirements of the Decision apply.[31]

The Appellant Suppliers' and RESA members' specific personal and legal interests have been specifically and injuriously affected by the Decision. First, the Appellant Suppliers and RESA members are aggrieved by the Decision because the Marketing Restriction is a restraint on free speech. The Appellant Suppliers and RESA members hitherto have marketed REC-only

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[25] *Conn. State Med. Soc'y v. Conn. Bd. of Exam'rs in Podiatry*, 203 Conn. 295, 299-300 (1987) (internal quotation marks omitted).

[26] *Id.* at 304 (internal quotation marks omitted).

[27] *See State Library v. Freedom of Info. Comm'n*, 240 Conn. 824, 832 (1997).

[28] *See* Conn. Gen. Stat. § 4-183(i).

[29] *Cf. Conn. State Med. Soc'y*, 203 Conn. at 300-01 (concluding that a licensed physician's interest in his license demonstrated a specific and personal interest in a declaratory ruling regarding the scope of podiatry practice in Connecticut).

[30] *See* RESA, Members, https://www.resausa.org/members (identifying Starion as a RESA member) (last visited Jan. 8, 2021).

[31] *Cf. Conn. State Med. Soc'y*, 203 Conn. at 300-01.

based VROs as containing "renewable energy."[32] The Marketing Restriction's restraint on free speech will prevent the Appellant Suppliers and RESA members from making factually and legally accurate statements about their VROs.

Further, because of the Marketing Restriction, the Appellant Suppliers and RESA members will be required to change their VRO marketing to comply with the Decision.[33] This change will only apply to Connecticut and will force the Appellant Suppliers and RESA members to incur added costs to create Connecticut-specific marketing materials.[34]

Additionally, the Appellant Suppliers and RESA members are aggrieved by the Decision because the Geographic and Resource Type Restrictions will prohibit them from selling VROs that contain RECs sourced from particular regions and generated by particular technologies.[35] DES, DEB, and RESA members hitherto have marketed, sold, and derived substantial revenues from VROs that that do not meet the new requirements created by the Geographic and Resource Type Restrictions.[36] DES, DEB, and RESA members will not be able to sell such VROs or derive revenues from their sale in Connecticut and, as a consequence, will forgo or lose substantial revenues.[37] Further, DES, DEB, and RESA members will be required to change their

[32] *See, e.g.*, Starion Comments (Dec. 20, 2019), Attachment A, at 1 [ROR-1285] ("Starion Energy's New England Green Power Plan provides 100% renewable energy from generation sites in New England, including Massachusetts and Connecticut."); Starion Comments (Feb. 12, 2020), Exhibit A, at 1 [ROR-1354] (marketing "Local, New England Renewable Energy").

[33] *See, e.g.*, Starion Comments (Dec. 20, 2019), Attachment A, at 1-2 [ROR-1285 – ROR-1286] (Starion marketing to be changed to comply with the Decision).

[34] *Cf. id.*

[35] *See* Decision, at 3-13.

[36] *See* DEB Interrogatory SEU-1 Response (May 21, 2020), Attachment A (identifying VRO sales) [ROR-0575]; DES Interrogatory SEU-1 Response (May 21, 2020), Attachment A (identifying VRO sales) [ROR-0582]; Starion Exceptions, at 3-4 [ROR-0454 – ROR-0455] (stating that the Geographic and Resource Type Restrictions will prevent Starion from offering certain of its current product offerings).

[37] *See, e.g.*, Starion Exceptions, at 3-4 [ROR-0454 – ROR-0455].

VROs solely to comply with the Decision and to be able to offer them in Connecticut.[38] Making these changes will require DES, DEB, and RESA members to incur costs.[39] Additionally, DES, DEB, and RESA members have contracts to purchase RECs that do not meet the new requirements created by the Geographic Restrictions and/or Resource Type Restrictions.[40] As a result of the Decision, DES, DEB, and RESA members will be unable to use the RECs from those existing contracts to support Connecticut VROs.[41]

Further, in order to sell VROs in Connecticut and comply with the Decision's new requirements, the Appellant Suppliers and RESA members will have to enter into contracts for RECs that meet the new requirements created by the Geographic and Resource Type Restrictions.[42] RECs that meet these new requirements will cost more than those that do not.[43] DES, DEB, and RESA members have existing contracts with Connecticut customers for VROs that do not satisfy the Decision's new requirements and that contain automatic renewal provisions.[44] As a result of the Decision, they will not be able to renew those customers automatically on the same product offerings.[45] For these reasons, the Appellant Suppliers and

[38] *Cf., e.g.*, DEB Interrogatory SEU-1 Response (May 21, 2020), Attachment A [ROR-0575]; DES Interrogatory SEU-1 Response (May 21, 2020), Attachment A [ROR-0582]; Starion Exceptions, at 3-4 [ROR-0454 – ROR-0455].

[39] *See, e.g.*, Tr. at 108-11 [ROR-1526 – ROR-1529] (discussing the additional REC procurement costs of imposing geographic and resource type restrictions on RECs supporting VROs).

[40] *See, e.g.*, Starion Exceptions, at 3-4 [ROR-0454 – ROR-0455] (describing Starion's arrangement for RECs with Putnam Hydropower Power Inc.).

[41] *See, e.g.*, Written Exceptions of Putnam Hydro Power Inc. (Sep. 25, 2020) [ROR-0393] (stating that the Resource Type Restrictions "would essentially exclude Putnam from even participating in the Connecticut voluntary renewable market through sales of RECs to entities like Starion"); Starion Exceptions, at 4 [ROR-0455] (observing that Putnam Hydropower Inc. will not be permitted to sell RECs to Starion for Connecticut VROs with the imposition of the Resource Type Restrictions).

[42] *Cf.* Comments of Retail Energy Supply Association re Second Notice of Request for Written Comments (Feb. 12, 2020) ("RESA Second Notice Comments"), at 4-5 [ROR-1333 – ROR-1334] (observing that imposing geographic restriction on the RECs supporting VROs will drive suppliers to seek supplies of available, compliant RECs).

[43] *Cf., e.g.*, Tr. at 108-11 [ROR-1526 – ROR-1529].

[44] *Cf., e.g.*, Starion Interrogatory SEU-5 Response (Jun. 10, 2020), at 1 [ROR-1091] (describing historical VRO products); Starion Interrogatory SEU-5 Response (Jun. 10, 2020), Attachment A, at 1 [ROR-1092] (terms of service for a REC-based VRO containing an automatic renewal provision).

[45] *See* Decision, at 25.

RESA members have specific personal and legal interests that have been injuriously affected by the Decision.[46]

RESA has standing to bring this action on behalf of its members because, as discussed above, they are aggrieved and have standing in their own right, because the interests that RESA seeks to protect are germane to its purpose of promoting efficient, sustainable and consumer-oriented competitive retail energy markets,[47] and neither RESA's claims nor its requested relief require the participation of its individual members.[48]

STANDARD OF REVIEW

Upon appeal, the Superior Court cannot uphold an agency decision if:

> the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[49]

"Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred."[50] The Connecticut Supreme Court has repeatedly held that "mere speculation, or general concerns do not qualify as substantial

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[46] *See Fin. Consulting, LLC v. Comm'r of Ins.*, 315 Conn. 210 (2014) (reversing a ruling that insurance producers were not aggrieved parties regarding statutes and regulations related to the insurance producers' business practices and sale of insurance products); *Conn. State Med. Soc'y*, 203 Conn. at 300-01 (concluding that a licensed physician's anticipated loss of revenues resulting from unfair or illegal competition established aggrievement).

[47] *See* Comments of Retail Energy Supply Association (Dec. 20, 2019), at 1 n.1 [ROR-1290].

[48] *Connecticut State Med. Soc'y*, 203 Conn. at 304 (concluding that a medical society satisfied the requirements for standing to challenge the expansion of podiatry practice when one of its members had standing in his own right, when its purposes included the extension of medical knowledge and the promotion of high quality medical care, and when money damages were not sought).

[49] Conn. Gen. Stat. § 4-183(j).

[50] *Bialowas v. Comm'r of Motor Vehicles*, 44 Conn. App. 702, 709 (1997) (citation and internal quotation marks omitted).

evidence."[51] Further,

> [s]ubstantial and competent evidence is that which carries conviction. It is such as a reasonable mind might accept as adequate to support a conclusion. It means something more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established.[52]

Although the substantial evidence test allows an administrative agency to resolve inconsistencies in the evidence and to make credibility determinations, if there is ***no*** evidence to support an administrative agency's factual finding, that finding fails to satisfy the substantial evidence test.[53] The test requires something beyond conclusory and general statements in the record.[54]

In the context of administrative law, arbitrary means "without adequate determining principle . . . not governed by any fixed rules or standard"[55] or "so unreasonable as to be without rational basis."[56] In ordinary usage, capricious means "not guided by steady judgment, intent, or purpose, lacking a standard or norm, . . . lacking predictable pattern or law, changeable, erratic, whimsical."[57] Furthermore, "[a] decision unsupported by some rational basis is unreasonable, arbitrary, and capricious."[58] An administrative agency abuses its discretion when it "could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has

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[51] *River Bend Assocs, Inc. v. Conservation & Inland Wetlands Comm'n of Town of Simsbury*, 269 Conn. 57, 71 (2004) (*superseded by statute on other grounds*, Conn. Gen. Stat. § 22a-41, *as recognized in Unistar Properties, LLC v. Conserv. & Inland Wetlands Comm'n of Town of Putnam*, 293 Conn. 93 (2009)) (*citing Conn. Fund for the Env't, Inc. v. Stamford*, 192 Conn. 247, 250 (1984)).

[52] *Fenn Mfg. v. Comm'n on Human Rights & Opps.*, No. CV-92-509435, 1994 WL 51143, (Conn. Super. Ct. Feb. 8, 1994), *6 (*citing Bd. of Ed. v. Comm'n on Human Rights & Opps.*, 176 Conn. 533, 538 (1979)).

[53] *Morrisey v. Conn. Dep't of Pub. Util. Control*, No. CV010510478S, 2002 WL 853621 (Conn. Super. Ct. Apr. 12, 2002), *5.

[54] *Dolgner v. Alander*, 237 Conn. 272, 281-82 (1996).

[55] *State v. S&R Sanitation Servs.*, 202 Conn. 300, 312 (1987) (brackets omitted)

[56] *Conn. Light & Power Co. v. Dep't of Pub. Util. Control*, 40 Conn. Supp. 520, 535 (1986)

[57] *Whipple Hydropower I, Inc. v. Conn. Dep't of Pub. Util. Control*, No. 09-17-74, 1990 WL 271044 (Conn. Super. Ct. May 25, 1990), *6.

[58] *Conn. Light & Power Co. v. Conn. Dep't of Pub. Util. Control*, No. 89-356847, 1990 WL 271488 (Conn. Super. Ct. May 1, 1990), *7.

decided it based on improper or irrelevant factors."[59] Furthermore, an administrative agency's discretion is not completely unfettered and is open to a limited review to the extent of providing safeguards against statutory or constitutional excesses.[60]

Indeed, pure questions of law are subject to a broader, *de novo* standard of review.[61] Although Connecticut courts defer to the construction of a statute applied by the administrative agency empowered to carry out the statute's purposes, such deference "is unwarranted when the construction of a statute has not previously been subjected to judicial scrutiny or to a governmental agency's time-tested interpretation."[62] "Even if time-tested," Connecticut courts "will defer to an agency's interpretation of a statute ***only*** if it is 'reasonable'; that reasonableness is determined by application of . . . established rules of statutory construction."[63] A reviewing court "is not required to defer to an improper application of the law."[64] Further, a *de novo* standard will apply to constitutional claims.[65]

ARGUMENT

As discussed further below, the imposition of the Marketing Restriction, Geographic Restrictions, and Resource Type Restrictions, and other Decision requirements is in violation of constitutional or statutory provisions, in excess of PURA's statutory authority, made upon

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[59] *State v. Williams*, 146 Conn. App. 114, 138 (2013).

[60] *Ethics Comm'n v. Freedom of Info. Comm'n*, 302 Conn. 1, 9 (2011).

[61] *See, e.g., Lieberman v. Aronow*, 319 Conn. 748, 756 (2015); *Dir., Ret. & Benefits Servs. Div., Office of the Comptroller v. Freedom of Info. Comm'n*, 256 Conn.764, 772 (2001) ("Because this case forces us to examine a question of law, namely, the construction and interpretation of § 1–210(b)(2) as well as the standard to be applied, our review is de novo.").

[62] *Comm'r of Public Safety v. Freedom of Info. Comm'n*, 312 Conn. 513, 526 (2014) (quotation marks and ellipses omitted).

[63] *Id.* (emphasis added) (brackets omitted)

[64] *Dir., Ret. & Benefits Servs. Div., Office of the Comptroller*, 256 Conn. at 772.

[65] *In Re Shaquanna M.*, 61 Conn. App. 592, 600 (2001) (*quoting McNary v. Haitian Refugee Ctr, Inc.*, 498 U.S. 479, 493 (1991)) (finding that the abuse of discretion standard "does not apply to constitutional ... claims, which are reviewed de novo by the courts."); *see also State v. DeLoreto*, 265 Conn. 145, 152-53 (2003); *DiMartino v. Richens*, 263 Conn. 639, 661-62 (2003).

unlawful procedure, affected by other error of law, clearly erroneous in view of reliable, probative, and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

I THE MARKETING RESTRICTION VIOLATES THE CONSTITUTIONAL RIGHT TO FREE SPEECH

The Marketing Restriction prohibits electric suppliers from marketing REC-only based VROs as containing "renewable energy." This restriction violates constitutional free speech protections. Appellants' substantial rights are prejudiced because the Marketing Restriction prohibits Appellants from exercising their constitutional free speech rights.

A. The Marketing Restriction Violates The First Amendment

The First Amendment, applied to the states through the Fourteenth Amendment, protects speech from governmental restrictions.[66] The United States Supreme Court has established that "[f]or commercial speech to come within that provision, it at least must concern lawful activity and not be misleading."[67] For such commercial speech, "we ask whether the asserted governmental interest is substantial."[68] If so, "we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[69] Significantly, to be permissible under the First Amendment, a regulation impinging upon commercial expression must "directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[70] Further, "[t]he party seeking to uphold a restriction on commercial

[66] *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).

[67] *Id.* at 566.

[68] *Id.*; *see Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("[W]e must ask whether the State's interests in proscribing [such speech] are substantial . . . .").

[69] *Cent. Hudson Gas & Elec.*, 447 U.S. at 566.

[70] *Id.* at 564.

speech carries the burden of justifying it."[71] However, "'mere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"[72] Because describing REC-based VROs as containing "renewable energy" concerns lawful activity and is not misleading, and because the Marketing Restriction does not directly advance, and is more extensive than necessary to serve, a substantial government purpose, the Marketing Restriction violates the First Amendment.

1. The Marketing Restriction Concerns Lawful Activity That Is Not Misleading

As an initial matter, the Marketing Restriction is an infringement upon speech because it bans the description of REC-based VROs as "renewable energy" in marketing and Disclosure Labels.[73] There is no question that marketing addressing REC-based VROs concern lawful activity. Connecticut law allows suppliers to sell VROs.[74] Indeed, if the sale of VROs were illegal, PURA would not have devoted a proceeding to establishing rules for their sale.

Moreover, describing REC-based VROs as containing "renewable energy" is not misleading. Describing REC-based VROs as containing renewable energy is a well-established practice.[75] In fact, PURA itself participates in this practice.[76] The Office of Consumer Counsel

[71] *Edenfield*, 507 U.S. at 770 (quotation marks and alteration omitted); *see also Alexander v. Cahill*, 598 F.3d 79, 90 (2d Cir. 2010).

[72] *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg., Bd. of Accountancy*, 512 U.S. 136, 143 (1994) (*quoting Edenfield v. Fane*, 507 U.S. 761, 770, 771 (1993)).

[73] *See Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 97 (2d Cir. 1998) (concluding that even "minimal information, conveyed in the context of a proposal of a commercial transaction, suffices to invoke the protections for commercial speech, articulated in *Central Hudson*").

[74] *See* Conn. Gen. Stat. §§ 16-245o(h)(5); 16-245o(h)(6)

[75] *See* Decision, at 32 (acknowledging that the Marketing Restriction "is a change from the current structure").

[76] *See id.* (observing that PURA's "Rate Board has a column labeled Renewable Energy").

("OCC") has also recognized that REC-based VROs are accurately described as containing "renewable energy."[77]

Further, federal agencies and other states have determined that RECs are the attribute that represents "renewable energy." For example, the Federal Trade Commission ("FTC") has determined that products may be advertised as being made with "renewable energy" as long as any non-renewable energy use is matched with RECs.[78] Similarly, the United States Environmental Protection Agency ("EPA") has concluded that "RECs substantiate the claim that you are using a specific number of megawatt-hours of renewable electricity from a zero-emissions renewable resource."[79] Likewise, the Vermont Attorney General and Department of Public Service have determined:

> Renewable energy certificates or renewable energy credits ("RECs") ***are what make*** solar ***a "green" or renewable energy resource***—they are certificates that track the source of the renewable energy and are the ***legal attribute*** of renewable energy. The nature of electricity is that it is physically untraceable. Once generated, the electricity flows into a common pool where it cannot be physically traced to its source or end use. The system of tracking attributes via RECs is the ***only legal way*** of characterizing the "renewability" of different sources of electricity. RECs can be separated, or "unbundled," from the electric output and sold to anyone, such as to a utility that needs renewable credits to comply with a state renewable portfolio standard. Whoever buys the RECs has paid an extra cost to bring renewable energy to the grid and ***has the only legal claim that their energy is renewable***.[80]

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[77] Oral Argument Transcript (Oct. 6, 2020), at 44 [ROR-1595] ("The OCC is understanding legally of what a REC is. . . . That certificate is the legal right that allows you as a product vendor to go out and say this is renewable energy. And that's recognized throughout the country, not just in Connecticut.").

[78] 16 CFR 260.15(a) ("A marketer should not make unqualified renewable energy claims, directly or by implication, if fossil fuel, or electricity derived from fossil fuel, is used to manufacture any part of the advertised item or is used to power any part of the advertised service, ***unless the marketer has matched such non-renewable energy use with renewable energy certificates***.") (emphasis added).

[79] *See* EPA, Green Power Partnership, Making Environmental Claims, https://www.epa.gov/greenpower/making-environmental-claims (last visited Jan. 8, 2021) ("EPA Definition") (emphasis removed).

[80] *See* Guidance for Third-Party Solar Projects, https://ago.vermont.gov/wp-content/uploads/2018/01/Guidance-on-Solar-Marketing.pdf (last visited Jan. 8, 2021) ("VT Guidance"), at 1 (emphasis added); *see also* 65-407-305 Me. Code. R. § 4(A)(7) (allowing RECs to be used to substantiate renewable energy marketing claims); N.H. Rev. Stat. Ann. § 374-F:3.V(f)(4) (same).

Thus, describing a REC-based VRO as containing "renewable energy" is not misleading and is generally accepted as being accurate by the federal government, PURA itself and other state governments.[81]

2. PURA's Interests Are Not Substantial

PURA must show that the interests that it has asserted are ***substantial***.[82] However, it has not done so. PURA identified three interests underlying the Marketing Restriction: (1) increasing "education and transparency";[83] (2) "improv[ing] understanding by avoiding the potential that customers believe they are buying renewable energy when their purchases are supporting the attribute to subsidize the energy's generation";[84] and (3) reaching state clean energy goals.[85] PURA's first and third asserted interests are supported only with bald, conclusory statements.[86] Further, PURA cannot credibly assert that improving customer understanding is a substantial government interest when its own Rate Board uses the term "Renewable Energy" to describe VROs supported solely by RECs.[87]

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[81] Further, even if describing REC-based VROs as containing renewable energy were potentially misleading (which it is not), such descriptions would still receive protection under the First Amendment. *See Alexander*, 598 F.3d at 89 ("[T]he *Central Hudson* analysis applies to regulations of commercial speech that is only *potentially* misleading.") (emphasis in original).

[82] *Central Hudson Gas & Elec.*, 447 U.S. at 566 (1980); *Mass. Ass'n of Private Career Schs. v. Healy*, 159 F. Supp. 3d 173, 202 (D. Mass. 2016) ("Under *Central Hudson*, the Attorney General must first show that the Commonwealth's asserted interest is substantial.").

[83] Decision, at 31-32.

[84] *Id.* at 32.

[85] *See id.* at 34 ("If Connecticut is going to meet its clean energy goals, then customers have the right to understand that their purchase of local RECs now subsidize those renewable generation sources and support Connecticut's clean energy goals.").

[86] *See id.* at 31-32, 34.

[87] *See id.* at 32.

3. The Marketing Restriction Does Not Directly Advance PURA's Identified Interests

Even if PURA were able to demonstrate that its asserted interests were substantial (which Appellants dispute), it did not (and cannot) demonstrate that the Marketing Restriction will directly advance any of those purported interests. First, PURA did not demonstrate that the Marketing Restriction will directly increase "education and transparency."[88] To the contrary, the Marketing Restriction will ***harm*** these interests by forbidding suppliers from explaining that REC-based VROs contain renewable energy, which is a legal and acceptable way of describing RECs that has been used by federal agencies,[89] other states,[90] and PURA itself.[91] Prohibiting such descriptions in Connecticut will only serve to confuse customers, especially those customers who purchase renewable energy not only in Connecticut but also in other states that do permit the use of the term "renewable energy" to describe VROs supported solely by RECs.[92]

Second, PURA did not demonstrate that the Marketing Restriction will directly improve customer understanding.[93] The record contains absolutely no evidence of actual or potential customer misunderstandings occurring as a result of the descriptions of VROs supported solely by RECs as containing "renewable energy."[94] Or, that prohibiting the use of that term will enhance customer understanding.[95] Thus, the Marketing Restriction's ability to improve

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[88] *See* Decision, at 31-32.

[89] 16 CFR 260.15(a); EPA Definition.

[90] *See, e.g.*, VT Guidance; 65-407-305 Me. Code. R. § 4(A)(7); N.H. Rev. Stat. Ann. § 374-F:3.V(f)(4).

[91] *See* Decision, at 32 (observing that PURA's "Rate Board has a column labeled Renewable Energy").

[92] *See, e.g.*, VT Guidance; 65-407-305 Me. Code. R. § 4(A)(7); N.H. Rev. Stat. Ann. § 374-F:3.V(f)(4).

[93] *Id.*

[94] *See, generally,* Record; *see also* Oral Argument Transcript (Oct. 6, 2020), at 46 [ROR-1597] ("Commissioner Betkoski asked if we had metrics about customer confusion that might occur as a result of not allowing something to be called renewable energy in Connecticut. Again, because this issue wasn't brought up until the proposed decision, there was no opportunity to put on evidence.").

[95] *See, generally,* Record.

customer understanding is entirely speculative. Moreover, simply invoking the potential for misunderstanding does not justify suppressing commercial speech.[96]

Third, PURA did not demonstrate that the Marketing Restriction will directly advance Connecticut's clean energy goals. As a preliminary matter, in asserting this purported interest, PURA did not specifically define or describe "Connecticut's clean energy goals."[97] Elsewhere in the Decision, PURA identified such goals as: (a) "reducing local greenhouse gas emissions and supporting sustainable local renewable energy sources,"[98] (b) "Connecticut's environmental betterment,"[99] (c) "reduc[ing] statewide greenhouse gas emissions to 80 percent below 2001 levels by 2050,"[100] (d) "achieving a 100% zero carbon target for the electric sector by 2040,"[101] and (e) "encourag[ing] greater development of renewable sources of energy generation."[102] However, the Decision cites no evidence and offers no support demonstrating a connection between the Marketing Restriction and these goals.[103] PURA simply speculates that the Marketing Restriction somehow could encourage customers to purchase "local RECs" to "subsidize those renewable generation sources."[104] However, PURA offers no demonstration or evidence that the Marketing Restriction will do this or that it will accomplish PURA's goals at all, let alone "to a material degree."[105]

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[96] *Ibanez*, 512 U.S. at 146 ("[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'").

[97] Decision at 2.

[98] *Id.* at 6.

[99] *Id*.

[100] *Id.* at 7 (*quoting* Bureau of Energy and Technology Policy of the Department of Energy and Environmental Protection's Written Comments [ROR-1255] ("DEEP First Notice Comments")); *see also* "Conn. Gen. Stat. § 22a-200a.

[101] Decision, at 7 (*quoting* DEEP First Notice Comments); *see also* Executive Order No. 3.

[102] *Id.* at 9 n.10.

[103] *See id.* at 34.

[104] *See id.*

[105] *See Edenfield*, 507 U.S. at 771.

4. The Marketing Restriction Is More Extensive Than Necessary

PURA must also demonstrate that the Marketing Restriction is not "more extensive than necessary to serve" the purported interests.[106] PURA has failed to do so. Moreover, PURA could achieve its asserted interests "in a manner that does not restrict speech, or that restricts less speech."[107]

First and foremost, it is well established that a categorical prohibition on "advertising speech that is *potentially* misleading but is not inherently or actually misleading in all cases" is more extensive than necessary.[108] Because describing REC-based VROs as containing "renewable energy" is not inherently or actually misleading,[109] imposing the Marketing Restriction to avoid potential misunderstanding fails the *Central Hudson* test. Indeed, any potential misunderstanding can easily be addressed by a disclaimer,[110] rather than the Marketing Restriction. Similarly, PURA could achieve the purpose of increasing education and transparency by providing additional information, for example, on its Rate Board to consumers about what they are buying when they choose to purchase "renewable energy."[111]

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[106] *See Cent. Hudson Gas & Elec.*, 447 U.S. at 569-70.

[107] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002); *see also Bad Frog Brewery*, 134 F.3d at 101.

[108] *See Alexander*, 598 F.3d at 96.

[109] For example, as part of a description of a REC-based VRO in marketing, Starion states: "Renewable energy benefits future generations." Starion Comments (Dec. 20, 2019), Exhibit A, at 2 [ROR-1286]. There is nothing misleading about this statement, yet it would be banned unless Starion complied with the Marketing Restriction. Consequently, the Marketing Restriction is more extensive than necessary to avoid potential customer misunderstandings.

[110] *See Alexander*, 598 F.3d at 96.

[111] RESA Second Notice Comments, at 11 [ROR-1340] ("Providing customers with additional information about VROs on the Rate Board and through modifications to the disclosure label (both of which RESA support) will enhance transparency without unnecessarily restricting customer choice."); Starion Comments (Feb. 12, 2020), at 2 [ROR-1351] ("[T]he Authority could modify the Connecticut Rate Board to provide additional information about VROs. In particular, the Rate Board could be updated to provide information about the resource type and general location of the facilities producing the renewable energy credits ('RECs') included in posted VROs.") (footnote omitted); Starion Energy, Inc.'s Comments re Third Notice of Request for Written Comments (Jun. 23, 2020), at 6-7 [ROR-1412 – ROR-1413] (proposing that elements of the current disclosure label be moved to the Rate Board to assist customers considering supply options).

Second, PURA has other means available that do not involve suppressing speech to advance Connecticut's clean energy goals. For example, PURA could better promote the purchase of VROs through its Rate Board.[112] Similarly, PURA could seek to increase the RPS, which is far more likely to advance Connecticut's clean energy goals because RPS requirements are mandatory.[113] Hence, the Marketing Restriction is more extensive than necessary to serve the purported interests.[114]

Consequently, the Marketing Restriction constitutes an impermissible restriction on commercial speech.[115] Appellants' substantial rights are prejudiced because the Marketing Restriction prohibits Appellants from exercising these constitutional free speech rights.

B. The Marketing Restriction Violates The Connecticut Constitution

Because the Marketing Restriction violates the First Amendment of the United States Constitution, it also violates Article first, section five of the Connecticut Constitution. Article first, section 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."[116] Article first, section 5, of the Connecticut Constitution provides: "No law shall ever be passed to

[112] *See Safelite Grp., Inc. v. Rothman*, 229 F.Supp.3d 859, 883 (D. Minn. 2017) (determining that commercial speech restrictions are "not narrowly tailored" when the state could "engage in its own speech to educate consumers").

[113] *See* Conn. Gen. Stat. § 16-245a.

[114] In addition, the Marketing Restriction is not necessary to accomplish the interests purportedly served by it because it is underinclusive. *See Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 266 (2d Cir. 2014). The Marketing Restriction applies only to suppliers. *See* Decision, at 32. Consequently, other entities in Connecticut's energy markets, such as registered electric aggregators, renewable energy generators or anyone else in Connecticut, are unaffected by the restriction and could refer to REC-supported VROs as containing "renewable energy." Accordingly, customers working with such entities may not receive the benefits that PURA contends the Marketing Restriction would provide.

[115] *Cent. Hudson Gas & Elec.*, 447 U.S. at 566.

[116] Conn. Const. Art. 1, § 4.

curtail or restrain the liberty of speech or of the press."[117] The Connecticut Constitution's protections of commercial speech are "at least as broad as the similar federal guarantee."[118]

In fact, the Connecticut Constitution offers additional protections against the impairment of free speech. The Connecticut Supreme Court has held that:

> [B]ecause, unlike the first amendment to the federal constitution: (1) article first, § 4, of the Connecticut constitution includes language protecting free speech "on all subjects"; (2) article first, § 5, of the Connecticut constitution uses the word "ever," thereby providing "additional emphasis to the force of the provision"; and (3) article first, § 14, of the Connecticut constitution provides a right to seek redress for grievances by way of "remonstrance," and therefore "sets forth free speech rights more emphatically than its federal counterpart"; these textual differences "warrant an interpretation separate and distinct from that of the first amendment."[119]

Consequently, this Court should give effect to the Connecticut Constitution's "broad and encompassing"[120] speech protections. In doing so, the Court may be guided by, among other things, the text of the Connecticut Constitution itself and examination of decisions by other states interpreting similar constitutional provisions.[121] For example, because the free speech provisions are similar,[122] this Court can be guided by the Pennsylvania Supreme Court's interpretation and find that the Connecticut Constitution "will not allow the prior restraint or other restriction of commercial speech by any governmental agency where the legitimate, important interests of

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[117] Conn. Const. Art. 1, § 5.

[118] *Grievance Comm. for the Hartford-New Britain Judicial Dist. v. Trantolo*, 192 Conn. 15, 24 n.5 (1984); *Trusz v. UBS Realty Inv'rs, LLC*, 319 Conn. 175, 193 (2015) (citations and internal quotation marks omitted).

[119] *Trusz*, 319 Conn. at 192-93.

[120] *Trantolo*, 192 Conn. at 24 n.5; *Trusz*, 319 Conn. at 193.

[121] *See State v. Linares*, 232 Conn. 345, 379 (1995) ("To determine whether our state constitution affords greater rights than the federal constitution, we consider the following 'tools of analysis': (1) the 'textual' approach—consideration of the specific words in the constitution; (2) holdings and dicta of this court and the Appellate Court; (3) federal precedent; (4) the 'sibling' approach—examination of other states' decisions; (5) the 'historical' approach—including consideration of the historical constitutional setting and the debates of the framers; and (6) economic and sociological, or public policy, considerations.").

[122] *Compare* Conn. Const., Art. 1, § 4 ("Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.") *with* Pa. Const. Art. 1, § 7 ("The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty . . . ").

government may be accomplished practicably in another, less intrusive manner." [123] Under this standard, because there are less intrusive ways of accomplishing the purported interests that PURA has asserted, such as adding additional description of RECs to the Rate Board, promoting VROs on the Rate Board, and enhancing the RPS, the Marketing Restriction impermissibly infringes free speech. Appellants' substantial rights are prejudiced because the Marketing Restriction prohibits Appellants from exercising these constitutional free speech rights.

C. The Marketing Restriction Could Infringe On Fully Protected Speech

The Marketing Restriction could be found to restrict noncommercial speech. While "the 'core notion' of commercial speech includes speech which does no more than propose a commercial transaction," other forms of speech combine commercial and noncommercial elements.[124] "Whether a communication combining those elements is to be treated as commercial speech depends on factors such as whether the communication is an advertisement, whether the communication makes reference to a specific product, and whether the speaker has an economic motivation for the communication."[125] Although "none of these factors alone would render the speech in question commercial, the presence of all three factors provides 'strong support' for such a determination."[126] Additionally, when commercial and noncommercial "components of a single speech are inextricably intertwined," the speech is treated as noncommercial, fully-protected speech.[127] Commercial and noncommercial components of speech are "inextricably intertwined" "*only* when a 'law of man or of nature makes it *impossible*' to separate commercial

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[123] *See Ins. Adjust. Bureau v. Ins. Comm'r for the Commonwealth of Pennsylvania*, 542 A.2d 1317, 1324 (Pa. 1988); *see also Pap's A.M. v. City of Erie*, 812 A.2d 591, 605-06 (Pa. 2002) (recognizing that Pennsylvania's commercial speech protections are broader than the First Amendment's protections).

[124] *Bad Frog Brewery,* 134 F.3d at 97 (*quoting Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983)).

[125] *Id.*

[126] *Id.*

[127] *See Riley v. Nat'l Fed'n of the Blind of No. Carolina, Inc.*, 487 U.S. 781, 796 (1988).

and noncommercial aspects of speech,"[128] Any restriction of fully protected speech must be narrowly drawn to serve a compelling government interest.[129] Under these standards, electric supplier use of the term "renewable energy" could constitute fully protected speech. For example, if the term is used in materials that are not an advertisement or do not make reference to a specific product, the materials might constitute fully protected speech.

In fact, the United States Supreme Court has determined that electric bill inserts discussing controversial issues of public policy constitute fully protected speech.[130] In that instance, the fully protected speech addressed the benefits of nuclear power.[131] Electric supplier materials using the phrase "renewable energy" could also discuss controversial issues of public policy, for example, climate change or the benefits of renewable power. Such materials would be comparable to the bill inserts that the United States Supreme Court has determined constitute fully protected speech and, consequently, would constitute fully protected speech. To survive scrutiny for infringing on such speech, the Marketing Restriction must be narrowly drawn to serve a compelling government interest.[132] However, the Marketing Restriction cannot survive this scrutiny because it is not narrowly tailored to any of the purported purposes asserted in support of it since each of those purposes could be accomplished without infringing on protected speech.

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[128] *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 961 (9th Cir. 2012) (*quoting Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989)) (emphasis in original).

[129] *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

[130] *See Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 540 (1980).

[131] *See Id.* at 532.

[132] *See Brown*, 564 U.S. at 799.

II. THE MARKETING RESTRICTION AND THE GEOGRAPHIC RESTRICTIONS VIOLATE THE COMMERCE CLAUSE

The Marketing Restriction impedes commerce in the national marketplace because it "impose[s] a regulatory requirement inconsistent with those of other states."[133] Likewise, the Geographic Restrictions impermissibly discriminate against RECs created outside the NEPOOL, New York, and PJM control areas (together, the "Permitted Control Areas").[134] As a consequence, the Marketing Restriction and the Geographic Restrictions violate the Commerce Clause of the United States Constitution.[135]

A. Legal Standard

"Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States."[136] The United States Supreme Court "has adhered strictly to the principle that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it."[137] Thus, "the negative or dormant implication of the Commerce Clause prohibits state . . . regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace."[138]

Specifically, a state law violates the dormant Commerce Clause if it "(1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden

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[133] *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 50 (2d Cir. 2007).

[134] *Cf. Granholm v. Heald*, 544 U.S. 460, 476 (2005) (concluding that allowing in-state producers to ship wine directly, while denying or severely limiting the right of out-of-state producers to ship wine directly constituted discrimination for the purposes of the Commerce Clause).

[135] *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009) ("[T]he negative or dormant implication of the Commerce Clause prohibits state . . . regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace.") (internal quotation marks and brackets omitted).

[136] U.S. Const. Art. I, § 8, cl. 3.

[137] *Allco Fin.*, 861 F.3d at 102 (*quoting Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976)) (internal quotation marks omitted).

[138] *Selevan*, 584 F.3d at 90 (internal quotation marks and alterations omitted).

on interstate commerce incommensurate with the local benefits secured, or (3) has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question."[139] In analyzing a challenged law under the dormant Commerce Clause, courts "first determine whether it clearly discriminates against interstate commerce in favor of intrastate commerce, or whether it regulates evenhandedly with only incidental effects on interstate commerce."[140] Discrimination may occur on the face of a law or regulation, through a discriminatory purpose, or by discrimination in effect.[141]

However, even when a state law is nondiscriminatory, if it nonetheless incidentally adversely affects interstate commerce, it still may violate the Commerce Clause.[142] This occurs "(1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states."[143] In these circumstances, courts employ a balancing test that will find a law violates the Commerce Clause if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[144] Moreover, "the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[145] When "the local interest

[139] *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (internal quotation marks and citations omitted).

[140] *Town of Southold*, 477 F.3d at 47.

[141] *See id.* at 48 (citations omitted).

[142] *See id.* at 50.

[143] *Id.* (internal quotation marks omitted).

[144] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

[145] *Id*.

involved could plainly have been promoted with a lesser impact on interstate activities, the state regulation has been held to violate the Commerce Clause."[146]

B. The Marketing Restriction Violates The Commerce Clause

The Marketing Restriction imposes a disproportionate burden on interstate commerce by creating marketing requirements that are in substantial conflict with a common regulatory scheme.[147] In particular, the Marketing Restriction prohibits suppliers from marketing VROs "as 'renewable energy' unless the offer is supported by an ownership interest in or PPA for a renewable resource used to serve the contract."[148] However, this prohibition is inconsistent with federal law and the law of other states.[149] Thus, the Decision's conclusions that a product can only be described as "renewable energy" if the supplier has entitlements to both the RECs and the energy from a renewable resource would create a requirement that substantially conflicts with federal law and the laws of other states by compelling sellers of VROs to market their products differently in Connecticut than in other states.[150] Consequently, the Marketing Restriction disproportionately burdens interstate commerce.

Because the Marketing Restriction disproportionately burdens interstate commerce, it violates the Commerce Clause if "the burden imposed on [interstate] commerce is clearly

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[146] *U.S. Brewers Ass'n, Inc. v. Healy*, 692 F.2d 275, 279 (2d Cir. 1982).

[147] *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 112 (2d Cir. 2001) ("A state regulation might impose a disproportionate burden on interstate commerce if the regulation is in substantial conflict with a common regulatory scheme in place in other states."); *see also Town of Southold*, 477 F.3d at 50.

[148] Decision, at 32.

[149] 16 CFR 260.15(a); EPA Definition; VT Guidance, at 1; 65-407-305 Me. Code. R. § 4(A)(7); N.H. Rev. Stat. Ann. § 374-F:3.V(f)(4).

[150] In the Decision, PURA denied the existence of a common regulatory scheme, asserting that the FTC's guidelines "do not have the force and effect of law." *See* Decision, at 33. However, doing so ignores states' adoption of the same standards and PURA's own reliance on the FTC's guidelines when evaluating renewable claims. *See* Docket No. 15-01-03, *Declaratory Ruling Regarding Conn. Gen. Stat. §16-1(a)(20), as Amended by PA 13-303 Concerning the Possible Double Counting of RECs*, Decision (Mar. 25, 2015) [Exhibit 1], at 9 (declining to "investigate Vermont retail electricity providers' voluntary actions when the FTC has given clear guidance to these providers intended to prevent the double-counting of renewable claims").

excessive in relation to the putative local benefits."[151] Here, the burden of the Marketing Restriction is high. Suppliers selling to customers with homes or businesses in multiple states will be able to advertise a VRO in all of the other New England states as a "renewable energy" product[152] but are not able to call it a "renewable energy" product in Connecticut.[153] However, customers will not understand this artificial distinction. As a consequence, Connecticut customers seeking to support "renewable energy" may simply forgo purchasing VROs; thereby, undermining PURA's stated goal of supporting the State's clean energy goals.[154]

By contrast, the putative benefits of the requirement are nonexistent. According to the Decision, the purported benefits of the Marketing Restriction are: (a) preventing customers from believing that "they are buying renewable energy" rather than RECs,[155] (b) increasing "education and transparency,"[156] and (c) reaching state clean energy goals by ensuring that customers understand that their purchase of local RECs subsidizes local renewable energy sources.[157] However, "RECs substantiate the claim that you are using a specific number of megawatt-hours of renewable electricity from a zero-emissions renewable resource."[158] Indeed, RECs "are the ***legal attribute*** of renewable energy."[159] In fact, Connecticut itself treats RECs as renewable

[151] *Pike*, 397 U.S. at 142.

[152] *See* VT Guidance, at 1; 65-407-305 Me. Code. R. § 4(A)(7) (allowing RECs to be used to substantiate renewable energy marketing claims); N.H. Rev. Stat. Ann. § 374-F:3.V(f)(4) (same).

[153] *Compare, e.g.*, VT Guidance, at 1; 65-407-305 Me. Code. R. § 4(A)(7); N.H. Rev. Stat. Ann. § 374-F:3.V(f)(4) *with* Decision, at 32.

[154] Decision, at 6.

[155] *Id.* at 32.

[156] *See id.* at 31-32.

[157] *See id.* at 34.

[158] *See* EPA Definition (emphasis removed).

[159] VT Guidance, at 1.

energy.[160] Moreover, prohibiting suppliers from describing REC-based VROs as "renewable energy" limits the information that customers could receive. It does not increase transparency or education or ensure that customers understand the effects of purchasing local RECs.

Furthermore, there are far less burdensome ways to clarify the definition of renewable energy for customers, increase education and transparency, and further Connecticut's clean energy goals, including changes to the Connecticut Rate Board and the Disclosure Label and enhancing the RPS.[161] Consequently, the burden of the Marketing Restriction is clearly excessive in relation to the non-existent value of the purported benefits.[162] Thus, the Marketing Restriction violates the Commerce Clause.[163] This violation of the Commerce Clause prejudices Appellant Suppliers' and RESA members' substantial rights because it will impede their ability to market products in a national, voluntary market in a consistent manner.[164]

C. The Geographic Restrictions Violate The Commerce Clause

Under the Geographic Restrictions, VROs are required to use RECs "sourced from NEPOOL GIS or the adjacent [sic] control areas of New York and PJM."[165] This restriction discriminates against interstate commerce and, thereby, violates the Commerce Clause of the United States Constitution.

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[160] *See, e.g.*, Conn. Gen. Stat. § 16-245a(a)(15) (requiring that, as of January 1, 2020, in Connecticut, "not less than twenty-one per cent of the total output or services of any . . . supplier . . . shall be ***generated*** from Class I renewable energy sources and an additional four per cent of the total output or services shall be from Class I or Class II ***renewable energy*** sources . . . .") (emphasis added); Conn. State Agency Regs. § 16-245a-1(c) (requiring suppliers to rely "exclusively" on RECs to establish that they satisfied this obligation).

[161] *See, e.g.*, RESA Second Notice Comments, at 11 [ROR-1340]; Starion Comments (Feb. 12, 2020), at 2 [ROR-1351]; Starion Energy, Inc.'s Comments re Third Notice of Request for Written Comments (Jun. 23, 2020), at 6-7 [ROR-1412 – ROR-1413].

[162] *Cf. Nat'l Farmers Org. Irasburg v. Comm'r of Agric., State of Conn.*, 711 F.2d 1156, 1163 (2d Cir. 1983).

[163] *Pike*, 397 U.S. at 142.

[164] *Cf.* Starion Comments (Dec. 20, 2019), Attachment A, at 1-2 [ROR-1285 – ROR-1286].

[165] Decision, at 9.

First, the Geographic Restrictions discriminate against interstate commerce facially because they impose commercial barriers on renewable generating facilities located outside the Permitted Control Areas. In fact, these geographic restrictions entirely deny generators located outside these control areas access to Connecticut's voluntary renewable market, while allowing generating facilities located in those areas, access to this market.[166] As a result, suppliers are denied access to RECs from generators outside the Permitted Control Areas to serve their Connecticut customers. Thus, the Geographic Restrictions favor renewable energy generators within the Permitted Control Areas at the expense of renewable energy generators located in other states and thereby discriminate against interstate commerce.[167]

Further, the Decision's Geographic Restrictions discriminate against interstate commerce in effect by placing restrictions on a previously existing, private market that extends beyond the borders of Connecticut.[168] In fact, the Decision itself recognized that there is a nationwide market for RECs that extends well beyond the Permitted Control Areas[169] and that those RECs can and have been used by suppliers to support VROs sold in Connecticut.[170] Prohibiting RECs generated outside of the Permitted Control Areas from being sold in Connecticut benefits the RECs generated in the Permitted Control Areas by providing them access to a market and burdens the RECs generated outside those areas by denying them access to that same market.[171]

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[166] *See* Decision, at 9 ("The Authority finds that all CEOP offers and all VROs must use RECs sourced from NEPOOL GIS or the adjacent control areas of New York and PJM.").

[167] *Cf. Granholm*, 544 U.S. at 476; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-51 (concluding that a statute imposing grade labeling requirements for apples imposed disparate costs on out-of-state apple sellers and constituted discrimination for the purposes of the dormant Commerce Clause).

[168] *See Selevan*, 584 F.3d at 95.

[169] Decision, at 1 ("Since 2005, nationwide REC markets emerged and matured, and suppliers began marketing offers that exceeded Connecticut's RPS.").

[170] *See id.* at 38 (Finding of Fact 2) (finding that the majority of VROs relied on "nationally sourced" RECs).

[171] *Cf. Granholm*, 544 U.S. at 476.

Moreover, the discriminatory effect of the Geographic Restrictions is not excused by the "market participant" doctrine. Under this doctrine, states are permitted to enter a market with the same freedoms and subject to the same restrictions as a private party.[172] Similarly, states are permitted to create markets.[173] However, here, because PURA is not a participant in the VRO market[174] and because it did not create that market,[175] this exemption is unavailable. By imposing geographic restrictions on the VRO market, PURA is acting as a regulator "impeding free private trade in the national marketplace."[176] Thus, the market participant doctrine does not cure the discriminatory effect of the Geographic Restrictions.

PURA relied on *Allco Finance* to conclude that the Geographic Restrictions are not improperly discriminatory.[177] However, *Allco Finance* supports the opposite conclusion—that the Marketing Restriction is improperly discriminatory. In that case, a Georgia-based renewable energy generator challenged the exclusion of its RECs from Connecticut's ***mandatory*** RPS program under the dormant Commerce Clause.[178] The court concluded that Connecticut's RPS did not discriminate against the Georgia-based renewable energy generator's RECs because RPS-compliant RECs were only capable of being produced by New England and adjacent-

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[172] *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 510 (2d Cir. 1995).

[173] *See Village of Old Mill Creek v. Star*, No. 17 CV 1163, 2017 WL 3008289 (N.D. Ill. Jul. 14, 2017), *17, *aff'd sub nom Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018); *Allco Fin. Ltd. v. Klee*, No. 3:15-CV-608 (CSH), 2016 WL 4414774 (D. Conn. Aug. 18, 2016), *24, *aff'd*, 861 F.3d 82 (2d Cir. 2017) (finding that when Connecticut created a market for ***mandatory*** RECs through the RPS, it was "not obligated to spread the benefit of that market to states that do not also bear the burden of the cost of the subsidy, which is ultimately paid by Connecticut ratepayers").

[174] *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976) (concluding that Maryland acted as a market participant when "it elected the payment of state funds in the form of bounties to encourage the removal of automobile hulks from Maryland streets and junkyards"); *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980) ("South Dakota, as a seller of cement, unquestionably fits the 'market participant' label more comfortably than a State acting to subsidize local scrap processors.").

[175] *See* Decision, at 1.

[176] *See Reeves*, 447 U.S. at 437; *cf. SSC Corp.*, 66 F.3d at 513 (concluding that the use of regulatory powers to control the actions of others characterizes acting as a regulator instead of as a market participant).

[177] *See* Decision, at 9-10.

[178] *Allco Fin.*, 861 F.3d at 102-103.

control-area-based generators.[179] By contrast, prior to the Decision, there was no requirement that, in the ***voluntary, competitive*** market, RECs supporting VROs be generated from any particular area(s).[180] In fact, the record evidence establishes that Connecticut customers are currently being served by nationally sourced VRO RECs.[181] Moreover, PURA itself recognized that RECs supporting VROs need not be generated in New England or even adjacent control areas.[182] Consequently, renewable generators in the Permitted Control Areas producing RECs used by suppliers for the Connecticut VRO market are similarly situated to renewable generators located outside the Permitted Control Areas. Thus, excluding the RECs from those generators from the Connecticut VRO market solely on the basis of their location is discriminatory and violates the dormant Commerce Clause.

Because the Geographic Restrictions discriminate against interstate commerce, they are "virtually invalid *per se* and will survive only if [they are] 'demonstrably justified by a valid factor unrelated to economic protectionism.'"[183] That is, "the burden falls on the State to justify it both in terms of the local benefits flowing from the [law] and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[184] Erroneously concluding that the Geographic Restrictions are nondiscriminatory, PURA made no effort to

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[179] *See id.* at 102, 107 ("[W]e conclude . . . that Connecticut's regulatory response to the needs of the local energy market has resulted in a ***noncompetitive*** REC product that is capable of being produced only by in-region generators, and that this distinguishes such generators from Allco's Georgia generator to the point that the enterprises should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause.") (internal quotation marks omitted) (emphasis added).

[180] *See* Decision, at 38 (Finding of Fact 2) (finding that the majority of VROs relied on "nationally sourced" RECs).

[181] *See* Hearing Transcript ("Tr."), at 74 [ROR-1492], 76 [ROR-1494] (stating that Starion offers a nationally sourced VRO that customers choose), 101 [ROR-1519] (describing a CEOP product that is sourced in part from national RECs).

[182] *See* Decision, at 9 (allowing RECs supporting VROs to be generated in the PJM control area); *see also* NEPOOL GIS Operating Rules (effective date: Jul. 1, 2020), Appendix 2.7B (listing the adjacent control areas as New York, the (Canadian) Maritimes, and Quebec).

[183] *Town of Southold*, 477 F.3d at 47.

[184] *Hunt*, 432 U.S. at 353.

meet this burden.[185] In fact, an array of nondiscriminatory alternatives actually are available. For example, PURA could advance Connecticut's clean energy goals by promoting VROs on its Rate Board or by enhancing mandatory RPS compliance obligations.[186]

Even if the Geographic Restrictions only have an incidental effect on interstate commerce,[187] they still violate the Commerce Clause if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[188] Here, the burden placed on commerce is "clearly excessive" when compared to the purported benefits of the Geographic Restrictions. While the Decision concludes that the Geographic Restrictions would further "Connecticut's clean energy goals,"[189] particularly the construction of renewable sources,[190] there is ***no*** record evidence that imposing these restrictions will lead to the construction of renewable resources.[191] In fact, the evidence establishes that the Geographic Restrictions will actually reduce consumer interest in VROs and inhibit the State's climate and renewable energy goals.[192] The Geographic Restrictions could cause prices for these products to rise to levels that customers simply will not pay.[193] This will reduce customer participation in the

[185] *See* Decision, at 10.

[186] *See, e.g.,* RESA Second Notice Comments, at 11 [ROR-1340]; Starion Comments (Feb. 12, 2020), at 2 [ROR-1351]; Starion Energy, Inc.'s Comments re Third Notice of Request for Written Comments (Jun. 23, 2020), at 6-7 [ROR-1412 – ROR-1413].

[187] At a minimum, because prohibiting RECs generated outside of the Permitted Control Areas from being sold in Connecticut while allowing RECs generated in those areas to be sold in Connecticut, burdens the RECs generated outside the Permitted Control Areas by denying them access to a market, the Geographic Restrictions have a disparate impact on non-local commercial entities. *See Town of Southold,* 477 F.3d at 50.

[188] *See Pike*, 397 U.S. at 142.

[189] Decision, at 10.

[190] *See id.* at 9; *Id.* at 9 n.10.

[191] *See, generally*, Record.

[192] *See, e.g.*, Tr. at 48, 109-11 [ROR-1466, ROR-1527 – ROR-1529].

[193] *See, e.g.*, Tr. at 109-11 [ROR-1527 – ROR-1529].; *cf. id*. at 48 [ROR-1466] ("The problem with that is that the cost of the program would be such, because we're competing with compliance RECs, that no one would enroll in it.").

voluntary renewable market[194] and, as a consequence, actually frustrate Connecticut's clean energy and climate goals.

Further, the record reveals that those same goals can be advanced by far less burdensome measures, including with VROs supported by RECs generated outside of the Permitted Control Areas.[195] Similarly, Connecticut's clean energy goals could be advanced with the elimination of the Resource-Type Restrictions, which prevent Class II, Class III, and other renewable energy sources (such as certain Connecticut based hydropower facilities) from supplying VROs.[196] Likewise, those State goals could be advanced by increased transparency and consumer education about VROs.[197]

Moreover, the Decision wantonly disregards consumer choice and the customer's ability to purchase a VRO product that is suitable to its needs, price considerations and/or preferences. For example, if a Connecticut customer would like to demonstrate its commitment to environmental sustainability and global carbon reduction via the purchase of a VRO supported by National Wind RECs (which are priced exponentially below a VRO supported by Connecticut Wind RECs), and the customer is aware of the choice it is making, the customer should be empowered to exercise that prerogative without limitations being imposed by the State. Thus, the burdens of the Geographic Restrictions are clearly excessive in relation to the putative benefits.[198] Consequently, the Geographic Restrictions violate the dormant Commerce Clause.[199]

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[194] Tr. at 48 [ROR-1466].

[195] *See id*.

[196] *See* Decision, at 10-13; *see also* Conn. Gen. Stat. § 16-1(a)(20) (defining "Class I renewable energy source").

[197] *See* Written Exceptions of Retail Energy Supply Association (Sep. 30, 2020), at 17-23 [ROR-0441 – ROR-0447].

[198] *Cf. Nat'l Farmers Org. Irasburg*, 711 F.2d at 1163 ("In the absence of any proof that the initial Connecticut inspection is more stringent or offers greater putative benefits than the earlier Vermont inspection of the same farm, the burden on Vermont shipments to Connecticut is excessive and in violation of the Commerce Clause.").

[199] *Pike*, 397 U.S. at 142.

This violation of the Commerce Clause prejudices Appellant Suppliers' and RESA members' substantial rights because they will not be able to sell VROs that include RECs that do not meet the Geographic Restrictions or derive revenues from such sales in Connecticut and, as a consequence, will forgo or lose substantial revenues.[200] Further, DES, DEB, and RESA members will incur significant costs to modify their VROs and to acquire supplies of RECs that comply with the new requirements.[201]

III. PURA EXCEEDED ITS STATUTORY AUTHORITY

PURA, as an administrative body, must act strictly within its statutory authority and does not have the authority to make law.[202] PURA's statutory authorization to exercise regulatory authority over VROs is limited, and no express statutory authority permits PURA to impose the Geographic Restrictions or the Resource Type Restrictions. Electric suppliers are required to make certain disclosures about their VROs.[203] However, Connecticut General Statutes section 16-245o(h)(5) imposes no restrictions on the locations or resources from which RECs may be sourced; it simply requires that suppliers disclose where the RECs supporting their VROs "are being sourced from"[204] and "the types of renewable energy sources."[205] Thus, PURA's authority does not include limiting the geographic locations or renewable energy source types from which RECs may be sourced.[206]

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[200] *See* DEB Interrogatory SEU-1 Response (May 21, 2020), Attachment A [ROR-0575]; DES Interrogatory SEU-1 Response (May 21, 2020), Attachment A [ROR-0582]; Starion Exceptions, at 3-4 [ROR-0454 – ROR-0455].

[201] *See, e.g.*, Tr. at 108-11 [ROR-1526 – ROR-1529] (discussing the costs of imposing geographic and resource type restrictions on RECs supporting VROs).

[202] *See, e.g.*, *Waterbury v. Comm'n on Human Rights & Opps.*, 160 Conn. 226, 230-31 (1971); *Salmon Brook Convalescent Home v. Comm'n on Hosps. & Health Care*, 177 Conn. 356, 363 (1979).

[203] *See* Conn. Gen. Stat. § 16-245o(h)(5), (6).

[204] *See* Conn. Gen. Stat. § 16-245o(h)(5) ("Each electric supplier shall disclose to the Public Utilities Regulatory Authority in a standardized format . . . where such additional credits are being sourced from . . . .").

[205] *See id.*

[206] *See* Conn. Gen. Stat. § 16-245o(h)(5), (6).

If the General Assembly had intended to impose geographic restrictions or resource type restrictions on VROs (or to give PURA that power), it knew how to do so and would have done so expressly. [207] Since the General Assembly did not, PURA cannot convey such authority upon itself. [208] Consequently, by imposing the Geographic and Resource Type Restrictions, PURA exceeded its statutory authority. In doing so, PURA prejudiced Appellant Suppliers' and RESA members' substantial rights because they will not be able to sell VROs supported by RECs that do not meet the new Geographic and Resource Type Restrictions or derive revenues from such sales in Connecticut. As a consequence, Appellant Suppliers and RESA members will forgo or lose substantial revenues.[209] Further, DES, DEB, and RESA members will incur significant costs to modify their VROs and to acquire supplies of RECs that comply with the new requirements.[210]

IV. PURA'S DECISION WAS AFFECTED BY ERROR OF LAW

PURA concluded that "[t]he RPS standards demonstrate the Connecticut General Assembly's increasing support for Class I resources, which the standards heavily preference above Class II and Class III RECs."[211] However, the RPS standards are mandatory requirements with which electric suppliers must comply and do not apply to VROs.[212] PURA also concluded that "[o]lder hydro projects are not included within the statutory definition of a Class I REC, indicating the General Assembly's desire to incentivize new projects."[213] However, the statutory

[207] *Perry v. Perry*, 312 Conn. 600, 624 (2014); *Doe v. Manso*n, 183 Conn. 183, 186 (1981).

[208] *See, e.g.*, *Waterbury*, 160 Conn. at 230-31.

[209] *See, e.g.*, Starion Exceptions, at 3-4 [ROR-0454 – ROR-0455] (stating that the Geographic and Resource Type Restrictions will prevent Starion from offering certain of its current product offerings).

[210] *Cf., e.g.*, Tr. at 108-11 [ROR-1526 – ROR-1529] (discussing the costs of imposing geographic and resource type restrictions on RECs supporting VROs).

[211] Decision, at 11.

[212] *See* Conn. Gen. Stat. § 16-245a; 16-243q.

[213] Decision, at 5 n.6.

definition of Class I RECs only applies to the mandatory RPS program.[214] The General Assembly has not expressed any requirement or preference for the resources that can or should be used to support VROs. In fact, all the General Assembly has required is that suppliers disclose to PURA "the types of renewable energy sources that will be purchased" and report "any changes to the types of renewable energy sources offered."[215] Consequently, by imposing the Resource Type Restrictions, PURA erred as a matter of law. PURA prejudiced Appellant Suppliers' and RESA members' substantial rights by imposing the Resource Type Restrictions erroneously because they will not be able to sell VROs supported by RECs that do not meet those new restrictions or derive revenues from such sales in Connecticut and, as a consequence, will forgo or lose substantial revenues.[216] Instead, DES, DEB, and RESA members will incur significant costs to modify their VROs and to acquire supplies of RECs that comply with the new requirements.[217]

V. THE NEW DISCLOSURE REQUIREMENTS WERE AFFECTED BY AN ERROR OF LAW AND WERE ARBITRARY, CAPRICIOUS, AND A CLEARLY UNWARRANTED EXERCISE OF DISCRETION

The Decision requires a "forward looking" Disclosure Label.[218] Specifically, the disclosure label to be "provided to the customer at the time of enrollment in the contract" would be required to "include the resource supporting the VRO and the location of that resource."[219] To satisfy this requirement, suppliers are permitted "to identify the type of resource and regional

[214] *See* Conn. Gen. Stat. § 16-245a.

[215] *See* Conn. Gen. Stat. § 16-245o(h)(5).

[216] *See, e.g.*, Starion Exceptions, at 3-4 [ROR-0454 – ROR-0455] (stating that the Geographic and Resource Type Restrictions will prevent Starion from offering certain of its current product offerings).

[217] *Cf., e.g.*, Tr. at 108-11 [ROR-1526 – ROR-1529] (discussing the costs of imposing geographic and resource type restrictions on RECs supporting VROs).

[218] Decision, at 39.

[219] *Id.* at 28.

control area."[220] However, suppliers would not be permitted to state that a VRO is "nationally sourced" or to include all possible energy sources that could support the VRO.[221] In developing these requirements, the Decision relies upon Connecticut General Statutes section 16-245o(h)(5)[222] and Connecticut General Statutes section 16-245o(h)(6).[223] However, these statutory provisions do not require the level of specificity the Decision imposes.

While Connecticut General Statutes section 16-245o(h)(5) requires disclosures of "where [the RECs] are being sourced from,"[224] it does not require that this disclosure have a specified degree of particularity. Because a disclosure that RECs are being sourced nationally discloses "where [the RECs] are being sourced from,"[225] such a disclosure satisfies the location disclosure requirement of Connecticut General Statutes section 16-245o(h)(5). Similarly, while Connecticut General Statutes section 16-245o(h)(5) requires disclosures of "the types of renewable energy sources that will be purchased," [226] it also does not require that this disclosure have a specified degree of particularity. Thus, it allows suppliers to disclose the types of renewable energy sources that will be purchased broadly. Likewise, Connecticut General Statutes section 16-245o(h)(6) simply requires disclosure of the "renewable energy content" of the VRO, without requiring that any type of granular information be provided.[227] Thus, neither Connecticut General Statutes section 16-245o(h)(5) nor Connecticut General Statutes section 16-245o(h)(6) require

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[220] *Id*.

[221] *Id.* at 27.

[222] Conn. Gen. Stat. § 16-245o(h)(5) (requiring an electric supplier to disclose to PURA "the amount of additional renewable energy credits, if any, such supplier will purchase other than required credits . . . where such additional credits are being sourced from, and . . . the types of renewable energy sources that will be purchased").

[223] Conn. Gen. Stat. § 16-245o(h)(6) (requiring an electric supplier to disclose to customers the "renewable energy content" of VROs and to make available "information sufficient to substantiate the marketing claims about such content" on its website).

[224] Conn. Gen. Stat. § 16-245o(h)(5).

[225] *Id.*

[226] Conn. Gen. Stat. § 16-245o(h)(5).

[227] Conn. Gen. Stat. § 16-245o(h)(6).

advance disclosure of VRO information at the granular level that the Decision mandates. Thus, PURA erred in its interpretation of those statutory provisions.

The imposition of this requirement is also arbitrary and capricious because it unreasonably and without a rational basis deviates from PURA's current practice.[228] Currently, suppliers are only required to provide customers with a disclosure label based on historical information[229] and that label does not provide the level of specificity the Decision would mandate.[230] Further, the record evidence establishes that requiring suppliers to provide the specified level of granularity could have the effect of forcing them to breach agreements or find that they have misrepresented what they are ultimately actually able to provide.[231] Further, "the only documentation suppliers currently file regarding VRO RECs is Exhibit D in the annual RPS docket."[232] The annual RPS report is only submitted ***after*** RECs are retired.[233] Requiring suppliers to provide granular information of VROs in advance of retiring the necessary RECs is a significant deviation from current practice that it is so unreasonable as to be without rational

[228] *Cf. Conn. Light & Power Co.*, 40 Conn. Supp. at 535 ("When an accounting method is an express deviation from past practice and so unreasonable as to be without rational basis, the use of that method is arbitrary and capricious.").

[229] *See* Docket No. 07-05-33, *DPUC Administration of Disclosure Label Requirements and Examination of Direct Billing by Electric Suppliers*, Decision (Feb. 27, 2008) [Exhibit 2], at 7 (requiring that power source information on disclosure labels be based on NEPOOL GIS report data); *see also, e.g.*, Starion Interrogatory SEU-5 (Jun. 10, 2020), Attachment B [ROR-1095] (disclosure label dated January 29, 2016 reflecting power source data from 2014 NEPOOL GIS reports).

[230] *Compare, e.g.*, Starion Interrogatory SEU-5 (Jun. 10, 2020), Attachment B [ROR-1095] (disclosure label dated January 29, 2016) *with* Decision, at 37 (listing new standards for Disclosure Labels).

[231] *See* Tr. at 97-98 [ROR-1515 – ROR-1516 ("[W]e're conveying to the consumer the sources that we expect of the RECs that we expect to procure, and we expect that that's going to be the same as the RECs that we will ultimately retire. But you can't -- if I say that it's going to be 94.1 percent wind, for example, it might be 94.2 percent because of the RECs that are available and ultimately what the disposition of those RECs is when we retire them.").

[232] Decision, at 24; *see also id.* at 3 n.4.

[233] *See* Conn. Agencies Regs. § 16-245a-1(a) (specifying that RPS compliance reports "shall be submitted not later than October 15 of the following year").

basis.[234] Thus, it is arbitrary and capricious and constitutes a clearly unwarranted exercise of discretion. PURA prejudiced DES's, DEB's, and RESA members' substantial rights because they will be required to adjust their REC purchasing practices at considerable expense to comply with a requirement for advance disclosure of VRO information[235] and, ultimately, may find that they are unable to satisfy their customer obligations.[236]

VI. PURA VIOLATED THE UAPA, DUE PROCESS, AND COMMON-LAW RIGHTS TO FUNDAMENTAL FAIRNESS AND BASED ITS DECISION ON UNLAWFUL PROCEDURE

As a state agency, PURA is subject to the UAPA.[237] As a consequence, in a contested case, PURA must afford all parties the UAPA's procedural protections. Similarly, PURA must follow the UAPA's requirements in reaching its final decision. "In a contested case, each party . . . shall be afforded the opportunity . . . at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved."[238] Further, "due process of law requires that the parties involved have an opportunity to know the facts on which the [agency] is asked to act, to cross-examine witnesses and to offer rebuttal evidence."[239] The Connecticut Supreme Court has also recognized a common-law right to fundamental fairness in administrative hearings and required that conduct of a hearing not violate the "fundamentals of natural justice."[240]

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[234] *Cf. Conn. Light & Power Co.*, 40 Conn. Supp. at 535 ("When an accounting method is an express deviation from past practice and so unreasonable as to be without rational basis, the use of that method is arbitrary and capricious.").

[235] *Cf.* RESA Second Notice Comments, at 18 [ROR-1347] (indicating that changes in VRO requirements could expose suppliers to losses associated with existing REC procurement contracts).

[236] *See* Tr. at 97-98 [ROR-1515 – ROR-1516].

[237] Conn. Gen. Stat. § 4-166, *et seq*.

[238] Conn. Gen. Stat. § 4-177c(a).

[239] *Pizzola v. Planning and Zoning Comm'n*, 167 Conn. 202, 207 (1974).

[240] *Grimes v. Conservation Comm'n*, 243 Conn. 266, 273-74 (1997).

For years, PURA has recognized that materials, including comments, not adopted by a witness either in person at a hearing or by affidavit do not rise to the level of evidence.[241] Despite this, PURA imposed requirements affecting the marketing of VROs, including the Marketing Restriction, based on comments asserting that OCC's "past interaction with consumers reveals that many have expressed confusion about the VRO program."[242] Similarly, PURA imposed the Geographic and Resource Type Restrictions based on comments submitted by the Department of Energy and Environmental Protection ("DEEP").[243] Neither OCC nor DEEP presented a witness to sponsor its comments at the Hearing[244] or submitted an affidavit attesting to the accuracy of its comments.[245] Further, at the Hearing, no party was afforded an opportunity to cross examine OCC or DEEP about such comments.[246] By relying on comments that were not subject to cross examination to support its findings and conclusions, PURA violated the UAPA, as well as due process and fundamental fairness.[247] Consequently, PURA's Decision was based on unlawful procedure.[248]

PURA also violated the UAPA, due process and fundamental fairness by failing to make the parties aware of the information on which it would rely to support its Decision.[249] For instance, PURA based the Geographic Restrictions, in part, on facts about prevailing wind

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[241] Docket No. 14-07-20, *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers,* Motion No. 4 Ruling (Nov. 19, 2014) [Exhibit 3] ("Written Comments are not evidence . . . .").

[242] Decision, at 25.

[243] Decision, at 6, 12 (*quoting* DEEP First Notice Comments).

[244] Tr. at 133 [ROR-1551] (identifying witnesses at the Hearing).

[245] *See generally*, Record.

[246] *See generally, id.*

[247] *See* Conn. Gen. Stat. § 4-177c(a); *Pizzola*, 167 Conn. at 207; *Grimes*, 243 Conn. at 273-74.

[248] *See Thornhill v. Inland Wetlands Agency*, No. CV93 00348356 S, 1993 WL 540194 (Conn. Super. Ct. Dec. 17, 1993), *3 (concluding that a town's failure to follow its own procedure in an administrative proceeding constituted unlawful procedure).

[249] *See* Conn. Gen. Stat. § 4-180(c); *Pizzola*, 167 Conn. at 207; *Grimes*, 243 Conn. at 273-74.

patterns and a University of Connecticut climate overview.[250] Those facts, however, were not subject to cross examination or admitted into the evidentiary record.[251] Nevertheless, based on those facts, PURA concluded that resources in Canada or further west or south of New York and PJM are unlikely to provide any measurable benefits toward Connecticut's clean energy goals.[252] PURA concluded that Connecticut General Statutes section 4-178 allows it to "recognize 'judicially cognizable facts and of [sic] generally recognized technical or scientific facts within the agency's specialized knowledge.'"[253] However, Connecticut General Statutes section 4-178 requires that notice, and an opportunity to contest the material noticed, be provided to the parties before an agency takes notice of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge.[254] PURA did not provide the parties the required notice.[255] As a consequence, PURA further violated the UAPA, due process and fundamental fairness. PURA's actions prejudiced the Appellants' substantial rights because they will be compelled to incur added costs to create Connecticut-specific marketing materials,[256] to modify their VROs, and/or to acquire supplies of RECs that comply with the new requirements.[257]

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[250] Decision, at 8.

[251] *See generally,* Record.

[252] Decision, at 9.

[253] *Id.* at 8 (*quoting* Conn. Gen. Stat. § 4-178(6)).

[254] Conn. Gen. Stat. § 4-178(6), (7).

[255] *See generally,* Record.

[256] *Cf.* Starion Comments (Dec. 20, 2019), Attachment A, at 1-2 [ROR-1285 – ROR-1286] (marketing VRO to Connecticut and Massachusetts customers in a way that will be required to be revised to comply with the requirements of the Decision).

[257] *Cf., e.g.*, Tr. at 108-11 [ROR-1526 – ROR-1529] (discussing the costs of imposing geographic and resource type restrictions on RECs supporting VROs); RESA Second Notice Comment, at 18 [ROR-1347] (indicating that changes in VRO requirements could expose suppliers to losses associated with existing REC procurement contracts).

[257] *See* Tr. at 97-98 [ROR-1515 – ROR-1516].

VII. PURA'S DECISION WAS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE

The Decision's requirements were adopted without any supporting evidence and in direct contravention of the evidence presented on the record. The Marketing Restriction was not discussed at or before the Hearing.[258] The Marketing Restriction was first raised in PURA's Proposed Decision,[259] after the evidentiary record had closed. Consequently, there is no record evidence to support the imposition of the Marketing Restriction.[260] While the Decision cites Hearing testimony about the general function of RECs and the marketing of products containing them,[261] this simply "illustrates how complex the REC market is."[262] However, evidence that a market is complex is not the same as evidence supporting a specific measure to address that complexity. To support the Marketing Restriction, the Decision offers only mere speculation and general concerns, such as "potential" beliefs.[263] This does "not qualify as substantial evidence."[264] As a consequence, the adoption of the Marketing Restriction was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.[265]

PURA based the Geographic Restrictions on its finding that "resources in Canada or further west or south of New York and PJM are unlikely to provide any measurable benefits toward Connecticut's renewable energy goals."[266] However, there is no evidence suggesting that

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[258] *See generally,* Tr. [ROR-1419 – ROR-1551].

[259] *Compare* Record *with* Proposed Decision, at 27.

[260] *See generally,* Record.

[261] *See* Decision, at 31-32.

[262] *Id.* at 32.

[263] *Id*.

[264] *See River Bend Assocs.*, 269 Conn. at 71 (*superseded by statute on other grounds*, Conn. Gen. Stat. § 22a-41, *as recognized in Unistar Properties, LLC v. Conservation & Inland Wetlands Comm'n of Town of Putnam*, 293 Conn. 93 (2009)) (*citing Conn. Fund for the Env't, Inc. v. Stamford*, 192 Conn. 247, 250 (1984)).

[265] *Cf.* Conn. Gen. Stat. § 4-183(j) (An agency decision can be found to be clearly erroneous if it is not supported by "reliable, probative, and substantial evidence on the whole record."); *Bialowas*, 44 Conn. App. at 708-09.

[266] *See* Decision, at 9.

supporting renewable energy in other states does not help clean Connecticut's air.[267] In fact, the State of Connecticut has brought lawsuits alleging that power plants from states much farther south and west than Pennsylvania and outside of the ISO New England, New York and PJM territories are public nuisances that contribute to climate change that adversely affects the citizens of Connecticut.[268] PURA also relied on comments asserting that VRO RECs "sourced from outside New England . . . do not effectively further Connecticut's clean energy goals."[269] However, these comments are not evidence.[270] Further, even these comments only suggested that VROs supported by RECs generated outside New England "'***may*** not align with customers' intent when choosing electric supply options beyond the RPS.'"[271] This comment is nothing more than a conclusory statement based on speculation that does not constitute "substantial evidence."[272] In fact, the record evidence actually demonstrates that RECs sourced from beyond New England, New York, and the PJM footprint benefit Connecticut, advance Connecticut's clean energy goals, and respond to customer interest. Specifically, it was established at the Hearing that Connecticut is a "tailpipe state."[273] Pollution comes into Connecticut "from down wind"[274] and generally from the west.[275] Thus, supporting renewable energy in any state west of

[267] *See generally*, Record.

[268] *See, e.g., State of Conn. v. American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (2005) (seeking to abate public nuisance from, *inter alia*, Minnesota, Wisconsin, North Dakota, South Dakota, Colorado, Texas and New Mexico power plants to reduce the risk of threat and injury to Connecticut's citizens and residents from global warming).

[269] *See* Decision, at 6 (*quoting* DEEP First Notice Comments).

[270] Docket No. 14-07-20, *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers*, Motion No. 4 Ruling (Nov. 19, 2014) ("Written Comments are not evidence . . . .").

[271] *See* Decision, at 6 (*quoting* DEEP First Notice Comments, at 3 [ROR-1255]) (emphasis added).

[272] *See River Bend Assocs.*, 269 Conn. at 71 ("[M]ere speculation, or general concerns do not qualify as substantial evidence.") (citation omitted).

[273] Tr. at 50 [ROR-1468].

[274] *Id.*

[275] *See* Tr. at 49 [ROR-1467] ("And also, if we take a look at our air flow and things of that nature, the air flow into Connecticut tends to come, winds tend to blow from the west towards Connecticut.").

Connecticut "helps clean up Connecticut's air."[276] As a consequence, the imposition of the Geographic Restrictions was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.[277]

Substantial evidence also does not support the imposition of the Resource Type Restrictions. Instead, the record evidence establishes that imposing these restrictions will increase VRO costs, discourage customer participation in the voluntary renewable market, and negatively affect Connecticut's goals of supporting "sustainable local renewable energy sources."[278] Restrictions on VRO eligible technologies will further constrain the supply of available RECs and, as a consequence, further increase the cost to purchase those RECs.[279] In addition, imposing restrictions on the types of products that customers can purchase will not guarantee they will actually purchase those products. In fact, there are price points for voluntary renewable products that customers simply will not support.[280] The Resource Type Restrictions could cause prices for these products to rise to levels that customers simply will not pay.[281] This will reduce customer participation in the voluntary renewable market[282] and, as a consequence, actually frustrate Connecticut's clean energy and climate goals.

Moreover, imposing the Resource Type Restriction will also reduce the offerings available to consumers that support Connecticut clean energy resources. For example, under the Resource Type Restriction, suppliers will not be able to offer voluntary products to Connecticut

[276] Tr. at 50 [ROR-1468].

[277] *Cf.* Conn. Gen. Stat. § 4-183(j) (An agency decision can be found to be clearly erroneous if it is not supported by "reliable, probative, and substantial evidence on the whole record."); *Bialowas*, 44 Conn. App. at 708-09.

[278] *See* Notice of Request for Written Comments (Dec. 17, 2019), at 1 [ROR-1210].

[279] *See* Tr. at 129 [ROR-1547] (testifying that constraints on RECs used to support VROs based on region and technology would "very likely have price implications").

[280] *See, e.g.*, Tr. at 48 [ROR-1466], 109-11 [ROR-1527 – ROR-1529].

[281] *See, e.g., id*. at 109-11 [ROR-1527 – ROR-1529]; *cf. id*. at 48 [ROR-1466].

[282] *Id*. at 48 [ROR-1466], 109-11 [ROR-1527 – ROR-1529].

customers supported by certain in-state RECs (e.g., from hydro facilities that started operation before July 1, 2003)[283] even though those resources support the State's climate and renewable energy goals. This will reduce the options available to consumers, increase the price of RECs for VROs, and reduce investment in Connecticut's resources, jobs, and economy. Thus, the evidence shows that the Resource Type Restrictions actually will frustrate Connecticut's clean energy goals. Accordingly, PURA's adoption of the Resource Type Restrictions was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The lack of evidence on the record to support the Decision prejudices Appellants' substantial rights because they will be compelled to incur added costs to create Connecticut-specific marketing materials,[284] to modify their VROs, and/or to acquire supplies of RECs that comply with the new requirements.[285]

VIII. PURA'S DECISION WAS ARBITRARY, CAPRICIOUS, AND A CLEARLY UNWARRANTED EXERCISE OF DISCRETION

PURA's adoption of the Marketing, Geographic and Resource Type Restrictions was arbitrary, capricious, and characterized by abuse of discretion because they will actually frustrate the clean energy and climate goals that PURA attempted to rely to justify them.[286]

VROs are ***voluntary*** products. Customers can choose to purchase VROs, or not to purchase them. If customers think that VROs generally, or VROs sourced with RECs from particular locations, do not meet their needs, they will elect not to purchase them, and the market

[283] *See* Conn. Gen. Stat. § 16-1(a)(20).

[284] *Cf.* Starion Comments (Dec. 20, 2019), Attachment A, at 1-2 [ROR-1285 – ROR-1286] (marketing VRO to Connecticut and Massachusetts customers in a way that will be required to be revised to comply with the requirements of the Decision).

[285] *Cf.*, *e.g.*, Tr. at 108-11 [ROR-1526 – ROR-1529] (discussing the costs of imposing geographic and resource type restrictions on RECs supporting VROs); RESA Second Notice Comments, at 18 [ROR-1347] (indicating that changes in VRO requirements could expose suppliers to losses associated with existing REC procurement contracts).

[286] *See* Decision, at 9 (discussing "Connecticut's clean energy goals").

will react by offering products that customers actually want.[287] However, if due to artificial restrictions on the market, the only products available are those that do not satisfy the customers' needs or are those at price points beyond what customers are willing to pay, they simply will not purchase VROs.[288] Thus, imposing restrictions on what customers can purchase will not guarantee they will actually purchase those products. In fact, there are price points for voluntary renewable products that customers simply will not pay.[289] Both the Geographic and Resource Type Restrictions could cause prices for VROs to rise to levels that customers simply will not pay.[290] This will reduce customer participation in the voluntary renewable market[291] and, as a consequence, actually frustrate Connecticut's clean energy and climate goals. Thus, the Geographic and Resource Type Restrictions are arbitrary and capricious.[292]

The Geographic and Resource Type Restrictions also will frustrate Connecticut's clean energy and climate goals by curtailing customers' ability to choose products that they prefer and eliminate the support for the State's climate and renewable energy goals that such products provide. Customers are choosing VROs supported with nationally sourced RECs even when other VROs are available. For example, Starion offers two VROs in Connecticut, one sourced from RECs generated nationally, and one sourced from RECs generated in New England.[293] Some customers choose the nationally-sourced VRO, while other customers choose the New England-sourced VRO.[294] Thus, the record evidence establishes that Connecticut customers not

[287] *Accord* Tr. at 73-74 [ROR-1491 – ROR-1492].
[288] *See, e.g., id*. at 48 [ROR-1466], 109-11 [ROR-1527 – ROR-1529].
[289] *See, e.g., id*.
[290] *See, e.g.*, Tr. at 109-11 [ROR-1527 – ROR-1529]; *cf. id*. at 48 [ROR-1466].
[291] *Id*. at 48 [ROR-1466].
[292] *See Whipple Hydropower I*, 1990 WL 271044, at *6.
[293] *See* Tr. at 73-74 [ROR-1491 – ROR-1492].
[294] *See id*. at 74 [ROR-1492].

only intend to but, in fact, actually buy VROs sourced from locations throughout the United States even when a New England-sourced VRO is readily available to them. Denying customers access to nationally-sourced VROs will frustrate their ability to choose products that they prefer and eliminate the support for the State's climate and renewable energy goals that such products provide.[295]

Moreover, the Geographic Restrictions also frustrate Connecticut's clean energy goals because they are not motivated solely by local concerns.[296] Rather, those goals are motivated by, and designed as a response to, ***global*** climate change. Connecticut's seminal climate legislation is entitled An Act Concerning Connecticut Global Warming Solutions.[297] In addition, the Governor's Executive Order No. 3 is expressly premised on responding to challenges "affecting global climate."[298] Prohibiting Connecticut customers from supporting renewable energy outside of the Permitted Control Areas detracts from Connecticut's goals of fighting global climate change and mitigating the effects of global climate change on Connecticut residents[299] and is, therefore, arbitrary and capricious.[300]

The Decision is also arbitrary and capricious because PURA deviated from its past practice of recognizing that comments are not evidence[301] and because the imposition of the various restrictions was clearly erroneous in view of the reliable, probative, and substantial

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[295] *Accord id*. at 73-74 [ROR-1491 – ROR-1492].

[296] *See, e.g., American Elec. Power Co.*, 406 F. Supp. 2d 265 (seeking to abate public nuisance from, *inter alia*, Minnesota, Wisconsin, North Dakota, South Dakota, Colorado, Texas and New Mexico power plants to reduce the risk of threat and injury to Connecticut's citizens and residents from global warming).

[297] *See* P.A. 08-98, An Act Concerning Connecticut Global Warming Solutions.

[298] *See* Conn. Exec. Order No. 3 (Sep. 3, 2019), at 1.

[299] *Cf. American Elec. Power Co.*, 406 F. Supp. 2d 265.

[300] *See Whipple Hydropower I*, 1990 WL 271044, at *6 ("'Capricious' means, in ordinary usage, 'not guided by steady judgment, intent, or purpose . . . .'").

[301] Docket No. 14-07-20, *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers,* Motion No. 4 Ruling (Nov. 19, 2014) ("Written Comments are not evidence . . . .").

evidence on the whole record.[302] PURA's arbitrary and capricious actions in adopting the Decision prejudices Appellants' substantial rights because they will be compelled to incur added costs to create Connecticut-specific marketing materials,[303] to modify their VROs, and/or to acquire supplies of RECs that comply with the new requirements.[304]

IX. PURA'S DECISION VIOLATES THE CONTRACTS CLAUSE

Article I, Section 10 of the United States Constitution provides, in pertinent part: "No State shall . . . pass any . . . law impairing the obligation of contracts."[305] A law violates the Contracts Clause if it operates "as a substantial impairment of a contractual relationship."[306] 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."[307] 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.[308] Under the first prong,

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[302] *See supra* Section VII; *see also Conn. Light & Power Co.*, 40 Conn. Supp. at 535 ("When an accounting method is an express deviation from past practice and so unreasonable as to be without rational basis, the use of that method is arbitrary and capricious.").

[303] *Cf.* Starion Comments (Dec. 20, 2019), Attachment A, at 1-2 [ROR-1285 – ROR-1286] (marketing VRO to Connecticut and Massachusetts customers in a way that will be required to be revised to comply with the requirements of the Decision).

[304] *Cf., e.g.*, Tr. at 108-11 [ROR-1526 – ROR-1529] (discussing the costs of imposing geographic and resource type restrictions on RECs supporting VROs); RESA Second Notice Comments, at 18 [ROR-1347] (indicating that changes in VRO requirements could expose suppliers to losses associated with existing REC procurement contracts).

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

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

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

[308] *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006); *see Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32, 54 (D. Conn. 2013).

"[t]he primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted."[309] 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."[310] When a state law constitutes substantial impairment, the state must show a significant and legitimate public purpose behind the law.[311] A legitimate public purpose is one "aimed at remedying an important general social or economic problem . . . ."[312] 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."[313] 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."[314]

RESA members, DES, and DEB have existing contractual relationships with customers under which they provide VROs to Connecticut customers.[315] Some of these contracts include automatic renewal provisions.[316] Because it will disrupt the current expectations and obligations of both customers and suppliers under those contractual relationships, preventing those

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

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

[311] *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)).

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

[313] *See id.*

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

[315] *See, e.g.*, DES Interrogatory SEU-1 Response (May 21, 2020) [ROR-0579 – ROR-0581]; DES Interrogatory SEU-1 Response (May 21, 2020), Attachment A [ROR-0582]; Tr. at 74 [ROR-1492]; *see also* 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 . . . .").

[316] *See, e.g.*, Starion Interrogatory SEU-5, Attachment A (Jun. 10, 2020), at 1 [ROR-1092] (terms of service for a REC-based VRO containing an automatic renewal provision).

contractual relationships from renewing automatically pursuant to their existing terms would impair the contractual relationships between those customers and their electric suppliers.[317] This impairment will frustrate customers' and electric suppliers' reasonable contractual expectations (i.e., that their contracts will automatically renew at the end of their terms).[318] Further, the impairment will be substantial because it will result in one of two outcomes: (a) suppliers will no longer be able to serve those customers; or (b) suppliers and customers will be forced to buy products that meet the new requirements imposed by the Decision at potentially higher costs.[319] Because Connecticut law allows contracts between electric suppliers and customers to automatically renew,[320] neither suppliers nor customers could "anticipate, expect, or foresee" that PURA would seek to prevent such contracts from renewing automatically in accordance with their existing terms. Thus, the Decision will cause a substantial impairment of existing contractual rights and obligations.

Moreover, PURA did not establish a significant and legitimate public purpose to support this substantial impairment. Although PURA identified Connecticut's clean energy goals as the purpose for the Geographic and Resource Type Restrictions,[321] PURA did not demonstrate that preventing the automatic renewal of VRO contracts between customers and electric suppliers according to their existing terms will serve this purpose. In fact, as discussed above,[322] the

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

[318] *See 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).

[319] Decision, at 25 (limiting the basis upon which an automatic renewal of an existing contract can occur).

[320] *See* Conn. Gen. Stat. § 16-245o(h)(8) ("Nothing in this subdivision shall restrict an electric supplier from renewing a contract by clearly informing the customer, in writing, not less than thirty days or more than sixty days before the renewal date, of the renewal terms, including a summary of any new or altered terms, and of the option not to accept the renewal offer . . . ."); *cf.* Conn. Gen. Stat. § 16-245o(e) (requiring PURA to develop a contract summary form identifying, *inter alia*, "whether the contract will automatically renew").

[321] *See* Decision, at 9, 9 n.10, 10, 11.

[322] *See* Sections VII, VIII.

Geographic and Resource Type Restrictions will actually frustrate Connecticut's clean energy goals. Additionally, PURA did not consider any policy alternatives.[323] If PURA's intent was to facilitate the transition of customers away from contracts that do not comply with the new restrictions, more moderate alternatives were available. For example, PURA could have required that, in the renewal notices that are sent to customers,[324] suppliers advise customers of the new VRO requirements and offer them the choice of either automatically renewing to products consistent with the original terms of their agreement or purchasing (likely at a higher price) a VRO that complies with the Decision's new requirements. Thus, PURA's actions were not reasonable or necessary and violate the Contracts Clause. This violation prejudices DES's, DEB's, and RESA members' substantial rights because it will directly impair their rights to renew existing contracts automatically.

CONCLUSION

The Appellants have demonstrated that their substantial rights have been prejudiced because the Marketing Restriction, Geographic Restrictions, and Resource Type Restrictions, and other requirements are: in violation of constitutional or statutory provisions; in excess of PURA's statutory authority; made upon unlawful procedure; affected by errors of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and/or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Accordingly, Appellants respectfully request that the Court grant their Petition for Administrative Appeal.

[323] *See* Decision, at 25.

[324] *See* Conn. Gen. Stat. § 16-245o(h)(8).

PLAINTIFFS-APPELLANTS,

DIRECT ENERGY SERVICES, LLC; DIRECT ENERGY BUSINESS, LLC; DIRECT ENERGY BUSINESS MARKETING, LLC; CLEANCHOICE ENERGY, INC.; RETAIL ENERGY SUPPLY ASSOCIATION

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CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on January 8, 2021, to all attorneys and self-represented parties of record and to all parties who have not appeared in this matter and that written consent for electronic delivery was received from all attorneys and self-represented parties receiving electronic discovery:

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EXHIBIT 1

STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 15-01-03 DECLARATORY RULING REGARDING CONN. GEN. STAT. §16-1(a)(20), AS AMENDED BY PA 13-303, CONCERNING THE POSSIBLE DOUBLE COUNTING OF RECS

March 25, 2015

By the following Commissioners:

Arthur H. House
John W. Betkoski, III
Michael A. Caron

DECISION

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DECISION

I. INTRODUCTION

A. SUMMARY

In this proceeding, the Public Utilities Regulatory Authority concludes that Connecticut law does not preclude the use, for Connecticut renewable energy portfolio standard compliance, of renewable energy certificates associated with a current regulatory renewable energy program enacted by the State of Vermont. Though a renewable energy program currently scheduled to go into effect in Vermont on January 1, 2017 may preclude the use of associated renewable energy certificates, the Authority does not yet reach a decision on that program. Finally, the Authority determines that a current feed-in tariff program does not preclude the use of associated renewable energy certificates for Connecticut compliance.

B. PROCEDURAL HISTORY

On its own initiative, the Public Utilities Regulatory Authority (PURA or Authority) established Docket No. 14-05-36, PURA Working Group to Amend Regulations Concerning Renewable Portfolio Standards, to confer with stakeholders concerning amendments to §§16-245a-1 and 16-245a-2 of the Regulations of Connecticut State Agencies. By Notice of Proceeding and Request for Written Comments in that proceeding dated June 5, 2014, the Authority announced that it was conducting a fact-finding exercise based on desktop research and stakeholder communications to form a basis for PURA and stakeholders to engage in a process to clarify the treatment of Vermont SPEED RECs under the Connecticut renewable portfolio standards (RPS) and broader application to other potential double-counting situations. The Authority invited all interested persons to comment on the following issues, options (potential interpretations) and their implications:

- What are the relevant statutes and other requirements relating to:
    - CT prohibition under Conn. Gen. Stat. § 16-1(a)(20)
    - VT SPEED
    - Renewable energy claims (basis of rights conveyed by RECs; claims under FTC Green Guidelines or otherwise)
        - Environmental disclosure labeling requirements (retail supplier rules and regulations by state)
        - National Resources to help clarify marketing issues and best practices:
            - FTC (Federal Trade Commission) Green Guides
            - NAAG (National Association of Attorneys General) Guidelines
        - Other New England state laws and issues
- What actions, by whom, might constitute "claimed or counted by a load-serving entity, province or state toward compliance with renewable portfolio standards or

renewable energy policy goals in another province or state" under Conn. Gen. Stat. § 16-1(a)(20)?

- Does the VT Speed program trigger a claim under Conn. Gen. Stat. § 16-1(a)(20)?
    - Several perspectives are implicit in VT PSB decisions; filings made by parties under a docket in which PURA considered a petition to revoke eligibility for specific VT SPEED resources; RPS certification filing by GDF Suez for Ryegate biomass facility
- If so:
    - Would such a prohibition apply to all or a subset of RECs associated with MWh in the VT SPEED program?
    - If a subset, what subset and how would the specific RECs associated with that subset be determined?
- If so, what options are available to PURA to implement the provisions and identify which RECs to not recognize for RPS eligibility, through the NEPOOL GIS or otherwise?

Several interested persons submitted comments in response to the Authority's request. On July 21, 2014, the Authority held a Technical Meeting in Docket No. 14-05-36 to discuss the Vermont statutory programs and their impact on Conn. Gen. Stat. § 16-1(a)(20). Many comments were submitted subsequent to the Technical Meeting.

On January 5, 2015, the Authority established the instant declaratory ruling proceeding. By Notice of Taking of Administrative Notice dated January 6, 2015, the Authority entered the transcript of the Technical Meeting held on July 21, 2014, and all comments received in Docket No. 14-05-36 as evidence in the record of this proceeding.

The Authority did not conduct a hearing in this docket. The Burlington Electric Department (BED) requested that to the extent the Authority intends to rely upon non-legal information or submissions in reaching its draft decision, it requests an opportunity for an evidentiary hearing. February 6, 2015 Comments of BED. According to BED, such a hearing would be necessary to ensure that the facts being utilized by the Authority are accurate. *Id*. Conn. Gen. Stat. § 4-176(e) provides the Authority wide discretion in the conduct of a declaratory ruling. The Authority determined that no hearing is necessary because this declaratory ruling concerns a question of law, and sufficient facts were developed in Docket No. 14-05-36 upon which PURA can rule in this proceeding. Specifically, the limited question of law before the Authority is whether megawatt hours generated under the auspices of the Vermont SPEED program, as currently constructed, are excluded from Connecticut Class I RPS compliance by the definition of Class I renewable energy source set forth in Conn. Gen. Stat. §16-1(a)(20). The Vermont SPEED program is a renewable energy program first enacted by that state in 2005.

The Authority issued a proposed final decision on March 11, 2015. Parties and Intervenors were given opportunities to submit written exceptions to, and present oral arguments regarding, the proposed final decision.

C. PARTIES AND INTERVENORS

The Authority recognized the following as Parties to this proceeding: State of Vermont, Department of Public Service, 112 State Street, Montpelier, VT 05620-2601; City of Burlington Electric Department, 585 Pine Street, Burlington, VT 05401; Vermont Public Power Supply Authority, 5195 Waterbury-Stowe Road, Waterbury Center, VT 05677; Vermont Electric Cooperative, Inc., 42 Wescom Road, Johnson, VT 05656; Washington Electric Cooperative, Inc., 40 Church Street, P.O. Box 8, East Montpelier, VT 05651; Green Mountain Power Corporation, 163 Acorn Lane, Colchester, VT 05446; Office of Consumer Counsel (OCC), Ten Franklin Square, New Britain, CT 06051; and the Commissioner of the Department of Energy and Environmental Protection (DEEP Commissioner), 79 Elm Street, Hartford, CT 06106.

The Authority recognized the following as Intervenors to this proceeding: Vermonters for a Clean Environment; The WindAction Group; NextEra Energy Power Marketing, LLC; and GDF SUEZ Energy Generation, NA, Inc.

II. PARTIES' POSITIONS[1]

A. VERMONTERS FOR A CLEAN ENVIRONMENT AND RIDGEPROTECTORS

Vermonters for a Clean Environment and Ridgeprotectors state that the 2012 SPEED program triggers a claim under Conn. Gen. Stat. § 16-1(a)(20) to the extent Vermont entities are counting megawatt hours of generation toward Vermont SPEED goals while at the same time selling renewable attributes into the NEPOOL GIS for Connecticut RPS compliance. June 23, 2014 Comments, p. 3. Vermonters for a Clean Environment and Ridgeprotectors maintain that there is a serious double-counting of fuel use and air emissions that results from claims made by certain Vermont retail electricity providers. Tr. 7/21/14, pp. 38-43. They assert that the Vermont retail electricity providers making such claims should be stopped from making them. *Id*., p. 43. Vermonters for a Clean Environment and Ridgeprotectors further maintain that the 2012 SPEED program has present, operative pre-2017 goals. Tr. 7/21/14, p. 100; August 18, 2014 Comments, p. 4.

B. VERMONT DPS

The Vermont Department of Public Service (Vermont DPS) requests that the Authority find that the Vermont SPEED program does not trigger a claim under Conn. Gen. Stat. § 16-1(a)(20). According to the Vermont DPS, while an argument could be made that the SPEED program could trigger a claim under the Connecticut statute beginning calendar year 2017, no basis exists for any such claim regarding the current 2012 SPEED program. Tr. 7/21/14, p. 88; June 23, 2014 Comments, p. 6. Vermont DPS maintains that pre-2017, there is no present, operative goal for the 2012 SPEED

[1] This section recounts positions taken regarding whether megawatt hours generated under the Vermont SPEED program, as currently constructed, should be excluded from the definition of Class I renewable energy source set forth in Conn. Gen. Stat. § 16-1(a)(20). Positions taken on other issues in Docket No. 14-05-36 are not recounted here.

program that could trigger a claim under Conn. Gen. Stat. § 16-1(a)(20). June 23, 2014 Comments, p. 7.

Vermont DPS states that this proceeding is not an assessment of whether the SPEED program is ideal, and it is not a determination regarding specific representations made by individual entities; instead, it examines whether the SPEED program creates a structural system that results in double-counting, thus triggering Conn. Gen. Stat. § 16-1(a)(20). February 2, 2015 Comments, p. 2.

Vermont DPS also maintains that a third aspect of the SPEED program, known as the Standard Offer, does not trigger a claim under Conn. Gen. Stat. § 16-1(a)(20). According to Vermont DPS, the Standard Offer program is essentially a feed-in tariff. June 23 Comments of Vermont DPS, pp. 4-5. The Standard Offer program targets the development of 127.5 MW of SPEED resources by 2022. *Id*. However, the program's goal is to develop generating capacity, and the program does not have a megawatt hour requirement. *Id*., pp. 7-8.

C. GREEN MOUNTAIN POWER

Green Mountain Power maintains that the 2012 SPEED program goal does not trigger a claim under Conn. Gen. Stat. § 16-1(a)(20). Comments, p. 6. It states that the SPEED program does not trigger the Connecticut statute because the program is limited to wholesale purchase of renewable generation, rather than retail sale, and does not require that the MWH be sold to a utility's retail customers or otherwise be included in its portfolio of generation sources. *Id*. Green Mountain Power asserts that the 2012 SPEED goal was a one-time determination made in 2012, and places no ongoing goals on Vermont retail electric providers. *Id*.

D. NEXTERA ENERGY POWER MARKETING

NextEra Energy Power Marketing asserts that the SPEED program does not trigger a claim under Conn. Gen. Stat. § 16-1(a)(20). June 23, 2014 Comments, p. 7.

III. PURA ANALYSIS

A. INTRODUCTION

The limited question before the Authority is whether megawatt hours generated under the Vermont SPEED program, as currently constructed, should be excluded from Connecticut Class I RPS compliance by the definition of Class I renewable energy source set forth in Conn. Gen. Stat. § 16-1(a)(20). If so, RECs associated with those megawatt hours cannot be used by any electric supplier or electric distribution company to comply with the Class I requirement of Connecticut's renewable energy portfolio standard.

Renewable portfolio standards are one method of encouraging the construction and operation of renewable energy facilities. An RPS incentivizes renewable energy construction by placing an obligation on all retail suppliers to purchase renewable energy certificates. RECs are renewable attributes that are unbundled from the

underlying energy, and traded from electric generators to retail electric suppliers. For an RPS to function properly, RECs must be accounted for in a coordinated system that ensures the RECs are only claimed once by a retail electric supplier. This accounting system can also serve as the recognized means of compliance to a state regulator. For New England states with an RPS, the New England Generation Information System (GIS) performs these functions.

The GIS performs these functions by generally taking each megawatt hour of electric generation produced in the entire ISO-NE control area (plus imports), and assigning generating characteristics to each megawatt hour. Megawatt hours from non-renewable generation are not assigned "tradable" RECs. Renewable generating resources, on the other hand, originate RECs that can be transferred into retail electric supplier accounts. Checks and balances incorporated in the GIS Operating Rules and implemented in the GIS software ensure that RECs originated by renewable energy generators can only be claimed once by a retail electric supplier.

Though the GIS offers many advantages to RPS states, an RPS is only one method of encouraging the construction and operation of renewable energy facilities. Indeed, each state can conduct its own assessment as to whether it adopts an RPS or encourages renewable energy development in a different way. The State of Vermont enacted a program that does not rely on an RPS at this point in time, and instead currently relies on bilateral contracts. June 23, 2014 Comments of Vermont DPS p. 6.

Despite the fact that Vermont does not presently utilize an RPS, all of Vermont's generating resources are nonetheless assigned generating characteristics within the GIS. Consequently, a Vermont generator recognized as a renewable energy resource by Connecticut can originate RECs that can be used toward Connecticut RPS compliance, and can do so notwithstanding the fact that Vermont does not currently utilize an RPS. It is this current dynamic, the fact that Vermont originates RECs within the GIS, but does not itself have an RPS, makes Vermont unique among New England states, and raises questions as to whether Conn. Gen. Stat. § 16-1(a)(20) is implicated.

B. VERMONT SPEED 2012 GOALS

Because Conn. Gen. Stat. § 16-1(a)(20) excludes megawatt hours "claimed or counted … toward compliance with renewable portfolio standards or renewable energy policy goals in another province or state," the Vermont SPEED program must be analyzed with respect to its goals. The SPEED program has two fundamentally different goals and targets, as set forth in 30 V.S.A. § 8005(d):

> (d) Goals and targets. To advance the goals stated in section 8001 of this title, the following goals and targets are established.
>
> > (1) **2012 SPEED goal**. The Board shall meet on or before January 1, 2012 and open a proceeding to determine the total amount of SPEED resources that have been supplied to Vermont retail electricity providers or have been issued a certificate of public good. If the Board finds that the amount of SPEED resources coming into service or have been issued a certificate of public good

> after January 1, 2005 and before July 1, 2012 equals or exceeds 10 percent of total statewide electric retail sales for calendar year 2005, the portfolio standards established under this chapter shall not be in force. The Board shall make its determination by January 1, 2013. If the Board finds that the goal established has not been met, one year after the Board's determination the portfolio standards established under this subsection 8004(b) of this title shall take effect.
>
> (2) **2017 SPEED goal**. A State goal is to assure that 20 percent of total statewide electric retail sales during the year commencing January 1, 2017 shall be generated by SPEED resources that constitute new renewable energy. On or before January 31, 2018, the Board shall meet and open a proceeding to determine, for the calendar year 2017, the total amount of SPEED resources that were supplied to Vermont retail electricity providers and the total amount of statewide retail electric sales.

Prior to 2017, Vermont's SPEED program is dramatically unlike an RPS. The program encouraged the development of sufficient renewable SPEED resources to satisfy all incremental load between 2005 and 2012. Tr. 7/21/14, p. 48. If the program was unsuccessful in that goal, and did not satisfy all incremental load between 2005 and 2012 with renewable SPEED resources, then an RPS would be established. 30 V.S.A. § 8005(d)(1). Vermont determined that the 2012 goal was met, and did not implement an RPS at that time. June 23, 2014 Comments of Vermont DPS p. 4.

The 2012 goal is akin to a "snapshot" taken at that time. June 23, 2014 Comments of Vermont DPS pp. 6-7; Tr. 7/21/14 p. 16. Again, the 2012 goal assessed the SPEED program's progress, and if insufficient, directed immediate corrective action by implementing an RPS. The assessment took place in 2012, and the Vermont Public Service Board issued an order on December 18, 2012 determining that the 2012 SPEED goal was met. June 23, 2014 Comments of Vermont DPS p. 4.

Conn. Gen. Stat. § 16-1(a)(20) precludes the eligibility of megawatt hours "that **are** claimed or counted … toward … renewable energy policy goals." (emphasis added) Conn. Gen. Stat. § 16-1(a)(20). The SPEED program does not presently claim or count any megawatt hours toward an RPS, and it does not presently claim or count any megawatt hours toward any renewable energy program goal that lays claim to megawatt hours. There simply is no direct annual goal between 2012 and 2017 towards which megawatt hours are claimed or counted. As the Vermont DPS states, the SPEED law is silent as to what happens between 2012 and 2017 once the program was determined successful in 2012. June 23, 2014 Comments of Vermont DPS p. 7; Tr. 7/21/14, p. 16. While there does appear to be an overarching "glide path" goal over that timeframe to increase the percentage of renewable SPEED resources used,[2] no megawatt hours are presently counted toward any identifiable goal today.

[2] 30 V.S.A. § 8005(d)(2) attempts to assure that, beginning January 1, 2017, 20 percent of total statewide electric retail sales will be generated by renewable SPEED resources.

The question of whether megawatt hours **are** presently claimed or counted is critical. First, the Authority need not determine whether the 2012 SPEED goals might have precluded associated RECs in 2012 had Conn. Gen. Stat. § 16-1(a)(20) been amended at that time; the statute was amended in 2013, and does not preclude any RECs prior to January 1, 2014. Conn. Gen. Stat. § 16-1(a)(20). Second, the regulatory structure in any particular compliance year should not determine REC eligibility for all subsequent compliance years, particularly when a renewable energy facility can be constructed to last forty years if not more, and will produce megawatt hours over the facility's entire lifespan. For example, assume solely for the sake of argument that the 2012 SPEED program goal precluded the use of associated RECs in 2012. If Vermont adopted an RPS on the date of this decision and embraced the GIS for compliance, no argument can be made under Conn. Gen. Stat. § 16-1(a)(20) that megawatt hours from SPEED resources are forever precluded based upon the 2012 SPEED goal. Therefore, in any compliance year, the pertinent issue is whether megawatt hours **are** presently claimed or counted, and therefore precluded under Conn. Gen. Stat. § 16-1(a)(20).

For the foregoing reasons, the Authority concludes that Conn. Gen. Stat. § 16-1(a)(20) does not preclude megawatt hours from SPEED resources as a result of the 2012 SPEED goal because megawatt hours are not presently claimed or counted: 1) toward an RPS; or 2) toward an identifiable state renewable energy policy goal that lays claim to megawatt hours.

C. REPRESENTATIONS MADE BY VERMONT RETAIL ELECTRICITY PROVIDERS

This proceeding was initiated to determine whether megawatt hours generated under the Vermont SPEED program, as currently constructed, should be excluded from the definition of Class I renewable energy source set forth in Conn. Gen. Stat. § 16-1(a)(20). As set forth above, between 2012 and 2017, Vermont's SPEED statute itself does not trigger a claim under Conn. Gen. Stat. § 16-1(a)(20). However, the record is replete with concerns expressed by some commenters regarding potential double-counting of fuel use and air emissions by certain Vermont retail electricity providers. Tr. 7/21/14, pp. 38-43. They state that the Vermont retail electricity providers "should be stopped from making [these claims]." *Id*., p. 43.

The representations by Vermont retail electricity providers to customers are made of their own accord. No provision of the SPEED program's enabling law requires this action. Consequently, the questions presented to the Authority are: 1) whether Conn. Gen. Stat. § 16-1(a)(20) excludes SPEED RECs based upon the voluntary actions of Vermont retail electricity providers; and 2) if not, whether the Authority can or should take steps under other authority to prohibit the use of SPEED RECs toward Connecticut Class I compliance.

Because Conn. Gen. Stat. § 16-1(a)(20) excludes megawatt hours claimed or counted toward an RPS or "renewable policy goals in another province or state," it focuses on the use of those megawatt hours toward a state (or province)-mandated program. The Authority concludes that the voluntary actions of Vermont retail electricity providers to not implicate Conn. Gen. Stat. § 16-1(a)(20). Instead, the voluntary actions reflect the internal goals and motivations of the individual Vermont retail electricity provider, instead of a state (or province)-mandated program. The question presented is

therefore whether PURA can or should take steps under other authority to prohibit the use of SPEED RECs.

The voluntary actions of one Vermont retail electricity provider have been raised to the Federal Trade Commission (FTC). Specifically, on September 15, 2014, the Environmental and Natural Resources Law Clinic of the Vermont Law School submitted to the FTC a "Petition to Investigate Deceptive Trade Practices of Green Mountain Power Company in the Marketing of Renewable Energy to Vermont Consumers" (Petition). September 14, 2014 filing of The WindAction Group/Vermonters for a Clean Environment in Docket No. 14-05-36. The Petition asked the FTC to initiate an investigation and take appropriate enforcement action in relation to Green Mountain Power Corporation's representations to its customers and to the public regarding its provision of electricity.

In a letter dated February 5, 2015, the FTC's Division of Enforcement declined to initiate a formal investigation of the practices alleged in the Petition. February 10, 2015 filing of Green Mountain Power Company. At page 3, the February 5, 2015 FTC letter recounted the agency's regulations. FTC Letter, p. 3. The cited regulations provide as follows:

> (d) If a marketer generates renewable electricity but sells renewable energy certificates for all of that electricity, it would be deceptive for the marketer to represent, directly or by implication, that it uses renewable energy.

16 C.F.R. § 260.15(d). The letter also noted that the FTC's Green Guides "warn that power providers that sell null electricity to their customers, but sell RECs based on that electricity to another party, should keep in mind that their customers may mistakenly believe the electricity they purchase is renewable, when legally it is not." FTC Letter, pp. 3-4.

The FTC's Division of Enforcement did not prepare a claim-by-claim analysis of the statements identified in the Petition. FTC Letter, p. 4. It stated that "some of [the] unqualified claims [asserted in the Petition] raise concerns" in light of FTC principles regarding the claiming of renewable attributes. *Id*. The Division of Enforcement urged GMP to:

> …carefully review its current and future communications to ensure that Vermont customers, and other market participants, clearly understand that GMP sells RECs for many of its renewable facilities and thus has forfeited its right to characterize the power delivered from those facilities as renewable, in any way.

FTC Letter, p. 5. The Division of Enforcement expressly reserved the right to take further action if it identified concerns in the future. *Id*.

As the aforegoing demonstrates, the voluntary claims made by Vermont retail electricity providers related to SPEED resources have been properly raised to the federal consumer protection regime, and the FTC's Division of Enforcement has taken

the action it deems appropriate. In the Authority's view, the FTC Letter does more than merely ask Green Mountain Power to carefully review its marketing materials. The letter: 1) expressly articulates double-counting principles; 2) communicates to Green Mountain Power the expectation that it adhere to those principles; and 3) reserves the right for the FTC to take action if it finds in the future that Green Mountain Power has violated those principles.

Given this specific procedural and factual background, the Authority concludes that it will not take steps to preclude the use of RECs associated with the Vermont SPEED program based on the voluntary actions of Vermont retail electricity providers. This conclusion should not be construed to mean that PURA will never explore actions it can take to prevent double-counting of renewable attributes. Here, the federal consumer protection regime is addressing the issue in the manner it deems appropriate. PURA need not investigate Vermont retail electricity providers' voluntary actions when the FTC has given clear guidance to these providers intended to prevent the double-counting of renewable claims, the precise activity Conn. Gen. Stat. § 16-1(a)(20) seeks to prevent. Further, as discussed in the following section, it is very likely that the regulatory structure in Vermont will bring needed clarity and fully resolve the situation beginning January 1, 2017.

D. VERMONT SPEED 2017 GOALS

The Vermont DPS states that there is no need to address whether the SPEED 2017 goals would trigger Conn. Gen. Stat. § 16-1(a)(20). February 2, 2015 Comments of Vermont DPS, p. 5. The Vermont DPS notes that these goals do not become effective until 2017, and that the underlying statute creating these goals has been modified many times over the years, and is subject to revision yet again in the 2015 legislative session. *Id*.

The Authority agrees that it is premature to decide the application of Conn. Gen. Stat. § 16-1(a)(20) to the SPEED 2017 goals because the SPEED program is subject to change and is under active consideration at this time. However, the Authority also notes that current law includes two provisions that are particularly relevant to the issue of double-counting. Specifically, current law sets forth target amounts for **each** retail provider's annual electric sales beginning January 1, 2017. 30 V.S.A. § 8005(d)(4). Second, current law requires Vermont electricity retail providers to retain beneficial ownership of RECs associated with SPEED projects in the event an RPS comes into effect. 30 V.S.A. § 8005(b)(6). These provisions create a regulatory structure that is very unlike the currently operative SPEED 2012 regime.

The Authority firmly believes that under current law, the Vermont Public Service Board would likely implement the current SPEED 2017 goals in a manner complementary to other New England states' RPS programs. However, the Authority also notes that proposed legislation in Vermont, if enacted, would provide more certainty today that SPEED 2017 goals would be administered in a way that is entirely compatible with other state RPS programs. February 2, 2015 Comments of Vermont DPS, Attachment A, pp. 35-36. The Authority applauds this effort to flesh out the impending Vermont RPS program.

As discussed above, the Authority agrees with Vermont DPS that it is premature at this time to decide the issue post-2017. However, the Authority notes that if the State of Vermont ultimately chooses to not utilize the GIS in its post-2017 regulatory structure, it is quite likely that Vermont SPEED RECs would be precluded by Conn. Gen. Stat. § 16-1(a)(20). At that point, Vermont's statutory structure will appear to claim megawatt hours (and beneficial ownership of renewable attributes) toward an identifiable regulatory requirement. In that event, it is extremely likely that RECs will have to enter the Vermont RPS system or the GIS, but not both.

E. VERMONT STANDARD OFFER PROGRAM

The Standard Offer program is another effort of the State of Vermont to encourage the construction and operation of renewable generating facilities. 30 V.S.A. § 8005a. The Standard Offer program is essentially a feed-in tariff under which Vermont utilities offer standardized power purchase agreements for renewable power at standardized prices. June 23 Comments of Vermont DPS, pp. 4-5. The goal for that program is to result in the development of 127.5 MW of SPEED resources by 2022. *Id*.

Vermont DPS states that the program targets the development of generating capacity, and does not have a megawatt hour requirement. *Id*., pp. 7-8. The program only tallies the nameplate capacity of the facilities under contract. Tr. 7/21/14, p. 87.

The pertinent issue is whether a program with a megawatt capacity goal results in double-counting under a statute that asks whether megawatt hours are claimed or counted elsewhere. Tr. 7/21/14, pp. 97; 128. However, no party presented a theory under which a megawatt capacity goal, in and of itself, results in double counting of megawatt hours. Indeed, no party contended that the Standard Offer program triggers a claim under Conn. Gen. Stat. § 16-1(a)(20).

The Authority concludes that the Vermont Standard Offer program does not count megawatt hours, and therefore no megawatt hours of the Standard Offer program are claimed or counted toward an RPS or renewable energy goal in contravention of Conn. Gen. Stat. § 16-1(a)(20). This provision is part of a statutory scheme that: 1) imposes a renewable energy portfolio standard on Connecticut retail electric suppliers; and 2) bases compliance upon a REC system that ensures against the double-counting of renewable attributes. The statute's remedy is to preclude double-counted RECs from Connecticut compliance. Therefore, a reasonable construction of the statute is that it ensures the sanctity of RECs used for compliance. If the goals of another state renewable energy program do not directly threaten the integrity of the megawatt hours used for Connecticut RPS compliance, these concerns would appear to fall outside of the scope of Conn. Gen. Stat. §16-1(a)(20).

IV. FINDINGS OF FACT

1. The State of Vermont enacted a renewable energy program that does not rely on an RPS at this point in time, and instead currently relies on bilateral contracts.

2. A Vermont generator recognized as a renewable energy resource by Connecticut can originate RECs that can be used toward Connecticut RPS compliance, and

can do so notwithstanding the fact that Vermont does not currently utilize an RPS.

3. The representations by Vermont retail electricity providers to customers are made of their own accord.

4. The FTC's Division of Enforcement declined to initiate a formal investigation of Green Mountain Power based upon practices alleged in a petition to the agency.

5. The FTC's Division of Enforcement issued a letter that articulates double-counting principles, and expects Green Mountain Power to adhere to those principles. Additionally, the letter states that the FTC reserved the right to take action if it finds in the future that Green Mountain Power has violated those principles.

6. Proposed legislation in Vermont, if enacted, would provide more certainty today that SPEED 2017 goals would be administered in a way that is entirely compatible with other state RPS programs.

7. The Vermont Standard Offer program is essentially a feed-in tariff under which Vermont utilities offer standardized power purchase agreements for renewable power at standardized prices.

V. CONCLUSION

The Authority concludes that the SPEED 2012 goal does not trigger a claim under Conn. Gen. Stat. §16-1(a)(20). The Connecticut provision precludes the eligibility of megawatt hours that are claimed toward another state's renewable energy program goals, and the SPEED 2012 program does not have identifiable numerical goals between 2012 and 2017. The Authority does not discount that voluntary representations made by Vermont retail electricity providers raise concerns. However, the federal consumer protection regime is addressing those concerns. Beginning January 1, 2017, the Vermont SPEED program may trigger a claim under Conn. Gen. Stat. §16-1(a)(20). However, the Authority concludes it is not necessary to make a final determination with respect to post-2017, particularly because legislative efforts are currently underway in Vermont to flesh out the impending post-2017 program. Finally, the Authority determines that Vermont's Standard Offer program does not preclude the use of associated renewable energy certificates for Connecticut compliance.

DOCKET NO. 15-01-03 DECLARATORY RULING REGARDING CONN. GEN. STAT. §16-1(a)(20), AS AMENDED BY PA 13-303, CONCERNING THE POSSIBLE DOUBLE COUNTING OF RECS

This Decision is adopted by the following Commissioners:

Arthur H. House

John W. Betkoski, III

Michael A. Caron

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Public Utilities Regulatory Authority, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

March 25, 2015

Jeffrey R. Gaudiosi, Esq.
Executive Secretary
Public Utilities Regulatory Authority

Date

EXHIBIT 2

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 07-05-33 DPUC ADMINISTRATION OF DISCLOSURE LABEL REQUIREMENTS AND EXAMINATION OF DIRECT BILLING BY ELECTRIC SUPPLIERS

February 27, 2008

By the following Commissioners:

Donald W. Downes
Anne C. George
Anthony J. Palermino

DECISION

DECISION

I. INTRODUCTION

A. SUMMARY

In this Decision, the Department of Public Utility Control approves the disclosure label content and format to standardize information provided by electric suppliers and electric distribution companies to consumers regarding generation sources, emissions and pricing information. The pricing information will reduce consumer confusion about their generation charges and assist them in making informed decisions when choosing an electric supplier. The Disclosure Label also includes questions that consumers should ask suppliers or aggregators before enrolling for service. Suppliers may opt to provide the actual answers to these questions as they relate to the price that was quoted to the customer.

B. BACKGROUND OF THE PROCEEDING

On May 18, 2007, the Department of Public Utility Control (Department) on its own motion initiated the instant proceeding pursuant to 16-245p(c) of the General Statutes of Connecticut (Conn. Gen. Stat.). Section 16-245p generally requires electric suppliers and electric distribution companies to submit information to the Department that will assist customers in making informed decisions when choosing an electric supplier. Section 16-245p(c) extends this policy by requiring electric suppliers and electric distribution companies to disclose directly to customers, in a manner prescribed by the Department and not less than annually, such information as the Department considers relevant.

Additionally, on May 25, 2007, Representative Vickie Nardello (Rep. Nardello), Vice Chair of the General Assembly's Energy and Technology Committee, requested that the Department examine the practices and operations of retail suppliers and aggregators involved in a study performed by her office and the Connecticut Citizens Action Group. Rep. Nardello also requested that the Department determine the information that is necessary for towns and school systems to make informed judgments about electricity contracts. The Department thereupon incorporated Rep. Nardello's request and supporting information into the proceeding in the instant docket.

On June 4, 2007, H.B. 7432, An Act Concerning Electricity and Energy Efficiency (the Act), was signed into law. Section 92(m) of the Act requires that, on or before July 1, 2007, the Department initiate a proceeding to determine whether electric supplier bills rendered pursuant to § 16-245d and any regulations promulgated thereunder sufficiently enable customers to compare pricing policies and charges among electric suppliers. On June 21, 2007, the Department issued a Notice of Scope of the Proceeding stating that Section 92(m) would be implemented in the instant proceeding, and that Rep. Nardello's request would be addressed.

C. CONDUCT OF THE PROCEEDING

Pursuant to a Notice of Request for Written Comments dated August 21, 2007, the Department sought comment from all currently licensed Connecticut electric

suppliers and registered aggregators. Pursuant to a Notice of Hearing dated September 26, 2007, a public hearing on this matter was held on October 12, 2007 and pursuant to Notice of Technical Meeting dated January 11, 2008, a technical meeting was held on January 18, 2008, both of which convened at the offices of the Department, Ten Franklin Square, New Britain, Connecticut. The Department issued a Draft Decision on February 15, 2008.

D. PARTICIPANTS

The Department's Service List for this proceeding consisted of The Office of Consumer Counsel, The Connecticut Light and Power Company, The United Illuminating Company and all Connecticut currently licensed electric suppliers and registered aggregators. All Service List entities were designated as participants to this uncontested proceeding. Appearances at the hearing and/or technical meeting were made by The Office of Consumer Counsel, Ten Franklin Square, New Britain, Connecticut 06051; The Connecticut Light and Power Company, 107 Selden Street, Berlin, Connecticut, 06037; The United Illuminating Company, 157 Church Street, P.O. Box 1564, New Haven, Connecticut 06501; Constellation New Energy, Inc., 800 Boylston Street, 26th floor, Boston, Massachusetts 02199; Direct Energy Services, LLC, 236 Huntington Avenue, Suite 306, Boston, Massachusetts 02115; Dominion Retail, Inc., 120 Tredegar Street, P.O. Box 26532, Richmond, Virginia 23219; Retail Energy Supply Association (RESA), Murtha Cullina, City Place 1, 185 Asylum Street, Hartford, Connecticut 06103-3469.

E. WRITTEN COMMENTS

Pursuant to a Notice of Request for Written Comments dated August 21, 2007, the Department sought guidance from The Office of Consumer Counsel (OCC), The Connecticut Light and Power Company (CL&P), The United Illuminating Company (UI) and all Connecticut licensed electric suppliers and registered aggregators. Specifically the Department sought comment on the development of a disclosure label that would be provided to customers pursuant to § 16-245p(c). The Department solicited input on the appropriate content, format and frequency for presenting standardized information on the disclosure label. Additionally, comment was sought on an appropriate method to provide consumers with information on generation-related billing and charges that have ensued as a result of the restructured electric market.

II. DEPARTMENT ANALYSIS

A. STATUTORY REQUIREMENTS REGARDING DISCLOSURE

Since the original disclosure label was developed by the Department in consultation with the Consumer Education Advisory Council, which was created by Public Act 98-28, An Act Concerning Restructuring of the Electric Industry, there has been a host of changes to which electric suppliers and electric distribution companies have been subjected that were not contemplated at the outset of electric restructuring. As a result, the Department believes that the original label required some essential modifications including additional educational information. In the instant docket, the Department has determined which elements of the label remain relevant and adequate

to assist consumers in making informed decisions in the current competitive electric market.

Power supply disclosure requirements in Connecticut were established by Conn. Gen. Stat. §§ 16-245p(a) and 16-245o(e). Pursuant to § 16-245p(a)**,** electric suppliers and electric distribution companies are required to submit information to the Department that will assist customers in making informed decisions when choosing an electric supplier. Whereas § 16-245p(a) caters to the needs of a customer shopping for electricity, § 16-245o(e) addresses the disclosure of information to a newly enrolled customer.

To address the situation of ongoing disclosure to an enrolled customer, § 16-245p was subsequently amended to include a subsection (c). With the addition of subsection (c), electric suppliers and electric distribution companies are required to disclose to customers, periodically and not less than annually**,** information the Department considers relevant in a manner prescribed by it.

The Department believes the approved disclosure label developed in the instant docket in conjunction with the Department's supplier pricing information on www.ctenergyinfo.com and the Electric Supplier Information Database (as discussed below) constitutes an appropriate method for disclosure to customers for all of the above purposes. Therefore, the label will be required for all suppliers and the electric distribution companies. With respect to the ongoing, periodic disclosure requirement of Conn. Gen. Stat. § 16-245p(c), distribution of the label may occur via email, supplier direct billing insert, other mailing or per customer request to a toll-free telephone number provided by the supplier. In Written Comments, Participant consensus was that the periodic distribution of the disclosure label should occur on an annual basis. The Department concurs that an annual periodic disclosure is sufficient.

Additionally, due to the potential complexity of pricing and contracts, the Department will include on the label a questionnaire, "Questions to Ask Suppliers and Aggregators," to provide residential and business consumers with a guide for understanding and gathering information about the components that comprise a supplier's electricity prices and contracts. The questionnaire contains relevant questions, terminology, and definitions for consumer reference when reviewing a supplier's price or comparing competitive price options offered by suppliers. To provide additional educational information regarding supplier pricing, the Department will develop a specific website which consumers can use to readily access supplier pricing options.

The last element of disclosure is the information the Department must collect and make available to customers. Conn. Gen. Stat. § 16-245p(b) requires the Department to maintain, and make available to customers, information about each electric supplier and each electric distribution company. The types of information to be collected and made available include, *inter alia*, rates and charges, resource mix percentages, and air emissions. The Department's "Electric Supplier Information Database is located at http://www.dpuc.state.ct.us/EL_Aggre.nsf. Suppliers must register on the website to setup an account for access to summit data. Subsequent to notification of approved

registration, the supplier must then login to submit data in order to access the instructions for submitting data.

The Department believes that this database will provide a suitable format for access to the above required information. All data submitted related to power sources, i.e. resources mix percentages and air emissions must be based on actual historical information from the supplier's annual GIS Reports from NEPOOL.

The Department will require all Connecticut licensed suppliers and the electric distribution companies to comply with the appropriate methods of disclosure for each statutory disclosure requirement as noted above.

B. THE DISCLOSURE LABEL

1. Elements of the Disclosure Label

In determining relevant content and formatting for the approved disclosure label, the Department incorporated input from Participants currently active in the competitive electric marketplace in Connecticut.

The original disclosure label, Attachment A to this decision, was divided into two sides with charts on the left and textual descriptions on the right. The charts displayed: the supplier's total generation services charge per kWh; CL&P's and UI's average delivery charge per kWh for residential customers; power sources, itemizing the sources for the supplier and the New England System; air emissions levels for carbon dioxide, nitrogen oxides and sulfur dioxide. The textual descriptions included explanations of: the total generation services charge and contract; the average delivery services charge for residential customers; power sources; and air emissions.

There was consensus among the Participants that as the result of numerous changes since the inception of the competitive electric market, certain revisions to the labels content are necessary. Specifically, Participants indicated that the inclusion of actual prices would divulge what suppliers consider proprietary pricing information and would be misleading as some suppliers do not offer an all-inclusive per kWh price and may change their prices as frequently as several times a day. RESA Written Comments, pp. 3-4; Constellation, Direct Energy, Dominion Written Comments, pp. 2-4. Several suppliers also noted that including the chart that itemized CL&P's and UI's per kWh delivery charges might cause further confusion as customers might somehow misconstrue this price as the supplier's price. Constellation, Direct Energy, Dominion, Written Comments, pp. 6-7.

Participants stated that itemizing the individual supplier power sources on the chart might mislead consumers to believe that this is the power or electrons actually delivered to them when, in fact, they are receiving system power. OCC, Written Comments, p. 1; CL&P, Written Comments, p. 3. Participants indicated that the air emissions chart would further mislead consumers as it represents the emissions for system power and not for a specific supplier's power sources. Additionally, since information on emissions is rarely solicited by supplier's customers, the omission of this information was recommended.

The Department agrees with many of the above-mentioned concerns regarding revisions to the label. The Department believes the removal of price information from the disclosure label is not consistent with Conn. Gen. Stat. § 16-245o(e). While that section requires electric suppliers to provide notice of the rates to be charged prior to the initiation of service, it does not mandate notice in any particular form. The Department agrees that including pricing information on the labels of commercial and industrial customers may not be appropriate since pricing and contract terms may vary for each customer. Since most suppliers require customers to sign a contract to receive service, the contract supplied to customers upon initiation provides the best notification of rates for commercial and industrial customers. The Department also does not believe it is necessary to provide pricing information for ongoing annual periodic disclosure to any enrolled customers, including residential customers. However the Department believes that price information should be included on the label for rates that are not negotiable and generally available to residential customers. The purpose of the label is to help customers compare the offerings of suppliers and standard offer service. Providing price information is the best way to compare offerings. Residential rates are generally not very complex so therefore the Department will require price information for retail rates. Based on developments the Department has observed in the market, it finds that the disclosure label should be enhanced to include additional information designed to help customers understand pricing policies. Therefore, the Department will require separate labels: one for all-inclusive, generally available rates on which the quoted customer price is stated per kWh, and; one for negotiated rates which are not generally available that indicates only whether the price per kWh is all-inclusive or not. Rates available to business customers will be based on the tariff that an individual supplier is willing to serve, e.g. CL&P Rates 30, 35, 41 or UI Rates GS, GST, LPT, etc.

The following revisions will be incorporated into the content of the first page of the approved disclosure label.

- The chart with the supplier's total generation services charge in cents per kWh will be eliminated, and replaced with the following statements:
  - "Your generation price per kWh is all-inclusive" or "Your generation price per kWh is not all-inclusive." The supplier includes the applicable statement on the label. This statement will include the actual price quoted in the contract per kWh for generally available rates only.
  - Below the above statement, the applicable term "all-inclusive" or "not all-inclusive" is then defined as follows:
    - "All-inclusive means the price you were quoted in your contract **xxxx per kWh** (for residential and small businesses only suppliers will insert the generally available price here for residential and small businesses only) includes all charges related to the generation portion of your electricity. See section/page _____ of your contract.
    - "Not-all inclusive" means the price you were quoted in your contract does NOT include all charges related to the generation portion of your electric bill and there will be additional charges assessed. (This statement is used for non-residential and other than small businesses.) See section/page _____ of your contract.

- An explanation of electric Generation Service Charges will follow the statement above.
- The chart with CL&P's and UI's Average Delivery Service Charge per kWh and the description will be replaced with a statement indicating that the customer must also pay a delivery charge to CL&P or UI.
- The Power Sources chart will be located above the power sources description.
- The Air Emissions chart is eliminated, but the air emissions description will remain.
- The two boxes with contact information for the supplier and the Department will remain at the bottom of the page.

Prices will be required only for all-inclusive offerings, so consumers will be able to make an apples-to-apples comparison of the supplier price to the distribution company's GSC on a cents per kWh basis. The electric generation service pricing on the label must appear for generally available, all-inclusive offers for residential and business customers. The label will also indicate the effective period (from date to date, the month or quarter, etc.) of the price and date until which the offer is valid. All of the other information listed above would also apply to the residential label.

As previously mentioned, Participants felt that any listing of an individual supplier's power sources would be inconsistent with the nature of electricity delivery and mislead customers to believe that electricity from these sources is actually delivered directly to them. Therefore, the Power Sources chart will be revised to list the New England Power Pool System Mix using a limited number of power sources which will be provided, for purposes of this label, to the Department by the NEPOOL GIS administrator from relevant GIS Report data. Suppliers will be notified by the Department as to the location of the label's power sources chart as provide by NEPOOL GIS, which will be accessible via a link on www.ctenergyinfo.com.

Although there may be some confusion on the part of customers, suppliers may distinguish their products based on the resources they use to produce electricity. This is particularly important for renewable offerings, but could apply to other resources as well. The Department, therefore, will allow suppliers to modify the power source chart to provide known resources. The chart includes a statement that these known sources are part of the NEPOOL System Mix. Resources listed should be owned by the supplier, backed by bilateral contracts or backed by Renewable Energy Credits (RECs) for renewable sources. Any such itemization of known resources by a supplier, for renewable products or other, will be subject to audit and/or compliance filing.

The Disclosure Label format and content may be revised as determined necessary by the Department to correspond with any pertinent market or system changes. The Department will require strict adherence to the content and format of the label to allow ease of supplier comparison by consumers. However, minimal latitude will be permitted with respect to graphics and presentation of supplier's logo/company name. The Department will provide a link from its website to each supplier's website location for its current Connecticut disclosure label. The Department will require each supplier to provide a permanent website address where their label will reside.

The Original Disclosure Label, Attachment A, and the approved Disclosure Labels, Attachment B, are located at the end of the Decision.

To alleviate confusion related to the selection of a supplier, the label will also include a second or reverse-side page titled ”Questions to Ask Suppliers and Aggregators” listing a series of consumer inquiries for suppliers and/or aggregators. The questionnaire is described in further detail in the following section. The Department will require suppliers to submit sample copies of their disclosure label incorporating the revisions noted above, as shown in Attachment B.

2. “Questions to Ask Suppliers or Aggregators”

The Department is concerned that consumers are not prepared to readily engage in the competitive electric market and effectively compare supplier offers to select the offer that best suits their energy needs. Over the past six months, the Department has received numerous calls from business consumers who are ill-equipped to engage in the contract process with suppliers and are struggling to understand the components of the electricity charges on their bills. The OCC reinforced this concern stating that customers need to understand the risks associated with line-item charges on supplier bills and how this differs from what they would receive under Standard Service or Supplier of Last Resort Service. OCC, Written Comments, pp. 2-3.

This concern was also expressed in a letter to the Department from Rep. Nardello, dated May 25, 2007, which has been incorporated into the record in the instant docket. Specifically, Rep. Nardello had noted that a municipal electric buying pool with over a dozen towns had contracted for a fixed rate that allowed numerous pass-through charges. According to the letter, the method used to determine the rates for such pass-through charges, specifically Reliability-Must-Run (RMR) and Locational Forward Reserve (LFR), was not explained to the pool customers. In order to calculate the accuracy of the charges, an analysis of the billings was undertaken which was further complicated by the fact that the pass-through charges were often billed retroactively. This situation illustrates the potential complexity involved in understanding some supplier contracts, pricing and terminology.

As required by Conn. Gen. Stat. § 16-245d, the Department promulgated regulations to establish “a standard billing format that enables customers to compare pricing policies and charges among electric suppliers”. Regulations of Connecticut State Agencies (Conn. Agencies Regs.) Section 16-245d-1(b) sets forth the minimal requirements for the content of electric supplier bills.

To determine compliance with the Conn. Agencies Regs, the Department requested all suppliers submit a sample of their current billing used to direct bill their Connecticut business customers as permitted per Statute. In addition, the Department requested suppliers include any supplemental information they distribute to customers to enable them to understand their bills.

Upon examination of the submitted bill samples and supplemental information, the Department noted that there are a variety of bill presentations many of which list unfamiliar, complex charges that are likely to cause customer confusion. Some of the

supplemental information merely itemized the locations of sections of the bill while others provided a detailed explanation of the terminology, charges, and how the charges are billed. This range in bill presentation and supplemental information amongst suppliers creates difficulty for consumers in comparing and understanding different suppliers' pricing and billing.

To alleviate both residential and business consumers' confusion and facilitate the comparison of supplier pricing policies and charges, the Department has developed a questionnaire "Questions to Ask Suppliers and Aggregators" as a second page to the Disclosure Label, to provide residential and business electric consumers with a guide for understanding and gathering information about the components of supplier electricity prices and contracts. The questions are listed below.

- Are you licensed to do business as a supplier or aggregator in Connecticut?
- What is your price per kWh? Is the price per kWh all-inclusive?
- If NOT – what are the other generation-related charges or fees (related to system reliability or other) and the price of each? (Ask per kWh or monthly for your usage.) Are these generation-related charges billed as direct pass-throughs or not? If not, what charges are and are not? These questions may apply ONLY to business customers.
- Is price fixed or variable? If variable, how does it vary? By time of use, by amount used or other?
- If the price changes, when and how will I be notified?
- I use about 500 kWhs per month. (This is an example. Use your own monthly consumption.) What are my monthly savings on your rate?
- How does your price per kWh compare to the price I am paying CL&P or UI for Standard Service? Does your price follow CL&P's or UI's price increases or decreases?
- What is the length/term of the agreement?
- Is a deposit or enrollment fee required? If YES, How much?
- Is there a credit check, a required deposit, cancellation or late payment fees and what is the cost for each?
- Will I receive one bill or two?
- Do you offer a choice of energy sources, such as renewable energy?
- How can I receive disclosure labels in the future? (email, toll-free telephone request, bill insert or mailing)
- What is the contact name, phone number, and customer service hours?
- Do you offer any other services?
- Any additional information

The questionnaire, page two of Attachment B at the end of the Decision, will be utilized on the residential and the business disclosure labels.

Additionally, the Department encourages suppliers to provide a price calculator on their websites to assist consumers in calculating costs when comparing various prices.

C. SUPPLIER PRICING INFORMATION

To facilitate retail choice in Connecticut, the Department intends to provide pricing information to residential and business consumers via the internet, through the Department's consumer service and outreach units, and via the disclosure label. The Department sought comment on this matter from the Participants in attendance at the January 18, 2008, hearing in the above noted proceeding. Tr. 1/18/08, pp. 370-438.

In general, the Participants believe that the Department should provide prices for offers that are "generally available" from suppliers and that reflect an all-in price for generation services to all consumers to have an apples-to-apples comparison to each distribution company's total cost for generation services. The Participants caution against trying to provide information for business customers, notably those with demand metered load. As such, the Participants recommend that the Department focus on providing information to the residential class. Id.

As suggested by the Participants, the Department reviewed the pricing information provided in New York State, on the web site www.powertochooseny.com. Tr. 1/18/08, pp. 376 and 385. Based on a review of that web site, and the input from the Participants to this proceeding, the Department intends to provide a table to demonstrate the following information:

- Then current distribution company all-in cost for generation services;
- Name and/or logo of each supplier or aggregator;
- Toll-free phone number of each supplier or aggregator;
- Price(s) being offered; and,
- Narrative description of each offer.

The following provides more detail regarding this initiative. The company name/logo will be used to link consumers directly to the supplier's web site. In addition, each supplier will be required to submit their toll free number. The then current price(s) will be displayed (maximum of two decimal places). These prices will be for generally available offers and must reflect the all-in cost of generation services, providing an apples-to-apples comparison to each distribution company's GSC price. Finally, suppliers or aggregators must submit a brief description (not to exceed 150 characters) of each pricing plan. The Department may modify the description to accommodate the data base that will be used for this information. Similar to the New York site, the Department may include a column that would link visitors to each supplier's standard disclosure label. The following table is a sample of what will appear on the website.

Company	Price (per kWh)	Description
Distribution Company	11.25	GSC rate for January through June 2008.
Supplier 1	9.8	Variable price that changes monthly.
	10.5	One-year fixed price.
Toll Free Number	11.7 - 9.7	On-peak off-peak price offered under a time-of-use rate.
Supplier 2	9.8	Variable price that changes monthly.
Toll Free Number	10.5	Six-month fixed price.

The Participants expressed concern regarding the disclosure of confidential pricing plans or individually negotiated offers and also noted that prices offered to larger customers can change daily or even periodically throughout the day. As such, it would be impractical to attempt to provide these prices. The Department does not seek to disclose confidential pricing terms nor is it attempting to provide information about prices that change frequently i.e., daily or throughout the day. Instead, the Department seeks to present prices for generally available offers, i.e., prices that are available to an entire customer class or rate tariff, and that are typically available for a month, several months or one-year. As noted by the Participants, this type of pricing is generally offered to residential customers. Therefore, the Department will focus on residential prices. However, some suppliers may be willing to offer this type of pricing to C&I customers. Therefore, the option to present prices for business customers will be available to all suppliers and aggregators.

Based on the foregoing, the Department will establish the following procedures for suppliers to following when submitting their pricing information. The Department may modify these standards from time-to-time as necessary.

- All pricing must be submitted under Docket No. 07-05-33, DPUC Administration of Disclosure Label Requirements and Examination of Direct Billing By Electric Suppliers, on a form to be prescribed by the Department;
- All prices must reflect the all-in cost of providing generation services, that is, the full requirements cost of generation;
- Suppliers must disclose the utility and rate class (i.e., tariff) to which the price applies;
- Suppliers participating in the Referral Program approved in the Decision dated October 10, 2007, in Docket No. 05-08-05RE02, must include the one-year fixed price being offered under that program;
- Suppliers participating in the Referral Program must include the applicable time-of-use price[1];
- Suppliers must submit any change in pricing three business days in advance of the change;
- Distribution company prices will be listed first;
- Suppliers will then be listed alphabetically.

The Department will require this information to be submitted in order to provide accurate and timely information to consumers. In addition, this website will link to the Department's "Electric Supplier Information Database" at http://www.dpuc.state.ct.us/EL_Aggre.nsf for those seeking further information.

[1] Participating suppliers must offer Time-of-Use rates as a condition of their participation in the Referral Program. See, Decision dated October 10, 2007, in Docket No. 05-08-05RE02, DPUC Investigation Into the Process By Which Customers Can Choose An Electric Supplier When Initiating Electric Service – Amended Referral Program, p. 4.

III. CONCLUSION AND ORDERS

A. CONCLUSION

In this Decision, the Department of Public Utility Control determined the Disclosure Label content and format to standardize the information provided by electric suppliers and distribution companies to customers regarding generation sources, emissions and pricing information. The Department believes the revisions to the Label are necessary to provide consumers with information relevant in the current competitive marketplace. Periodic distribution of the Disclosure Label for suppliers, via email, direct billing insert (from supplier), customer request via toll-free telephone number or other mailing, will be on an annual basis. Distribution companies may utilize these same methods for its annual disclosure. The Label also will be distributed in conjunction with the supplier contract prior to initiation of customer service and for re-enrollments and will include the effective date of the price offer as indicated in Attachments B.

The Department also includes a questionnaire, "Questions to Ask Suppliers and Aggregators", on the Disclosure Label to provide consumers with a guide for understanding and gathering information about the components of a supplier's electricity prices, contracts and billing. Suppliers may elect to provide the specific answers to these questions as appropriate to the price quoted to the customer.

The Department may revise the disclosure label as necessary to accommodate changes in the electric market. To facilitate retail choice in Connecticut, the Department will develop a website for supplier pricing information to provide improved access to and greater detail on prices for residential and small commercial and industrial consumers via the internet. Additionally, the Department will utilize its website's "Electric Supplier Information Database" to provide consumers with access to additional information required, per statute, to be reported by suppliers.

B. ORDERS

1. Effective 90 days after the date of this Decision, suppliers and electric distribution companies will comply with the required disclosure requirements as discussed in Section II.A. Compliance with Conn. Gen. Stat. §§ 16-245p(a) and 16-245o(e) will be fulfilled via distribution of the disclosure label upon initiation of service, for re-enrollments, for annual periodic disclosure and for the purpose of providing consumers with information to assist them in choosing an electric supplier. Periodic disclosure required by § 16-245p will be on an annual basis through use of the disclosure label via email, supplier direct billing insert, other mailing or per customer request to a toll-free telephone number provided by the supplier.

2. No later than 45 days after the date of this Decision, each licensed supplier offering service to Connecticut retail consumers will submit, under the instant docket, its copy of the approved two-page standard disclosure label including the "Questions to Ask Suppliers and Aggregators" and incorporating all revisions as noted in Section II.B.

3. Effective 90 days after the date of this Decision, in compliance with Gen. Stat. §§ 16-245p(b), suppliers must post the information, i.e. rates and charges, resource mix percentages and air emissions to the Department's "Electric Supplier Information Database" as discussed in Section II.A.

4. Within five business days of the effective date of this Decision, suppliers will submit their rates for posting to the Department's website as discussed in Section II.C.

DOCKET NO. 07-05-33 DPUC ADMINISTRATION OF DISCLOSURE LABEL REQUIREMENTS AND EXAMINATION OF DIRECT BILLING BY ELECTRIC SUPPLIERS

This Decision is adopted by the following Commissioners:

Donald W. Downes

Anne C. George

Anthony J. Palermino

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

February 28, 2008
Date

ATTACHMENT A – ORIGINAL DISCLOSURE LABEL

XYZ Company Generation Services Disclosure Label

Each licensed electric suppliers in Connecticut are required to develop and disclose to their customers information about its power supply. This information on this disclosure label allows consumers to compare prices, sources of power and emissions. The data on power sources and emissions is taken fron the NEPOOL regional Generation Information System.

For the xx Quarter 2008

for Residential Customers (or for small C&I Customers)

XYZ Total Generation Services Charge in cents per kWh

Rate abc	fixed/variable/other	xx.xx per kWh

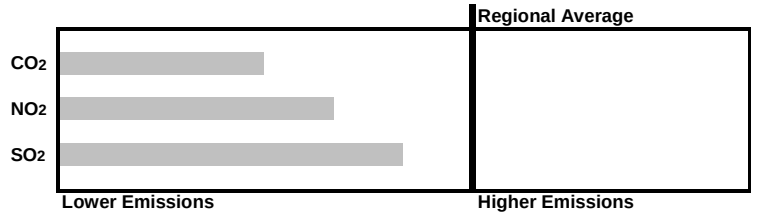
All customers also must pay a delivery charge to CL&P or UI.
Average Delivery Service Charge - cents per kWh for Residential Customers

CL&P	x.xxx per KWh	**UI**	x.xxx per kWh

Power Sources

Power Source	XYZ Sources	New England System Average
Biomass	0.0%	0.0%
Coal	0.0%	0.0%
Hydro: Large	0.0%	0.0%
Hydro: Small	0.0%	0.0%
Municipal Solid Waste	0.0%	0.0%
Natural Gas	0.0%	0.0%
Nuclear	0.0%	0.0%
Oil	0.0%	0.0%
CT Class I Renewable	0.0%	0.0%
CT Class II Renewable	0.0%	0.0%
Wind	0.0%	0.0%
System Power*	*	*
Total	**100%**	**100%**

Air Emissions
(pounds per MWh)



XYZ Company
Customer Service: (XYZ company's customer service address, toll-free telephone number and website).

Total Generation Service Charge and Contract

The Total Generation Services Charge is the all-inclusivel price you will pay for generation services per kWh. The generation service charge was calculated by dividing the total price (including the energy charge and any other charges, such as a customer service charge) by the number of kWhs. This price should be compared per kWh to the price of generation services on your current bill to determine the difference you will pay. (Check recent bills to determine your rate class and average monthly use). Check your Energy Supply Agreement for more information on your terms and condition of service, as well as other information, such as supplier and customer responsibilities.

Average Delivery Service Charges for Residential Customers

The Average Delivery Service Charge is an average per kWh of all the itemized charges on your bill for CL&P or UI to deliver the electricity to residential customers. It does NOT include the price of the Generation Services Charge. The average delivery charge may vary according to your particular rate and usage.

Power Sources

Your electricity is transmitted across the New England electric system, which receives electricity from power plants throughout the region to meet the requirements of all customers in New England. Electric suppliers are responsible for generating and/or purchasing electricity that is added to the electric system in an amount equal to your electricity use. Connecticut requires that licensed electric suppliers provide some of their energy from Class I, Class II and Class III renewable energy sources. Electricity production from renewables has less of an impact on the environment than that produced from fossil fuels. Connecticut's required percentage of renewable power increases each year until 2020. "System Power" is power purchased in the New England wholesale/ spot market that can not be identified by a specific generation plant or source.

Air Emissions

In the air emissions chart, XYZ company's emissions rates for the power sources supplied to you (shown by the gray shaded area on the chart) are compared to the New England regional average emissions for each of the following:

Carbon Dioxide (CO_2) is released when coal, oil, natural gas, trash, methane and biomass are burned. Carbon dioxide, a greenhouse gas, is a major contributor to global warming.

Nitrogen Oxides (NO_x) is formed when fossil fuels, trash, methane and biomass are burned at high temperatures. They contribute to acid rain and ground-level ozone (or smog), and may contribute to respiratory illness. NO_x also accelerates vegetative growth in lakes and costal waters which may lead to oxygen deprivation which is destructive to fish and other aquatic life.

Sulfur Dioxide (SO_2) is formed when fuels containing sulfur are burned, primarily coal, oil and trash. Health risks associated with SO_2 include asthma, respiratory illness and aggravation of existing cardiovascular disease. SO_2 combines with water and oxygen in the atmosphere to form acid rain, which raises the acid level of lakes and streams, is detrimental to crops and forests and accelerates the deterioration of buildings and monuments.

For more information: contact the Connecticut Department of Public Utility Control, Ten Franklin Square, New Britain, CT 06051, toll-free at:
1-888-922-DPUC(3782) or at: www.dpuc-electric-choice.com

ATTACHMENT B – APPROVED DISCLOSURE LABEL FOR RESIDENTIAL CUSTOMERS, PAGE 1 OF 2

XYZ Supplier Disclosure Label

For Residential Customers – from Date to Date or period

Price offer valid until (supplier to fill in date)

This label provides information on the New England regional electric system power sources and the air emissions related to electricity generation. For additional information on suppliers' prices, power sources and air emissions, visit **www.ctenergyinfo.com** **Shopping for Electricity** and **Electric Supplier Information Database.**

Each licensed electric supplier in Connecticut is required to disclose to its customers information related to pricing. You must check your contract for specifics on price, term/length of contract, and any other charges, fees, deposits or requirements for which you are responsible.

Your electric energy generation price per kWh (kilowatt-hour) is (*supplier to select either* all-inclusive or Not all-inclusive).

All-inclusive – means the price you were quoted in your contract **xxx per kWh** includes all charges related to the generation portion of your electric bill.

or

Not all-inclusive – means the price you were quoted in your contract **xxxx per kWh** does NOT include all charges related to the gereration portion of your electric bill and there will be additional charges assessed.

See (section#/page #/Name of Section) in your contract.

See page 2 of this label for "Questions to Ask Suppliers and Aggregators".

Electric Generation Charges

Electric/energy generation charges are what you will pay for the energy supplied to you. These include the electric energy charge per kWh and any other energy/generation related charges or fees (such as system reliability related charges or customer charge, etc.) that the supplier may have you pay in addition to the per kWh charge. The price you pay may be all-inclusive or not. You should compare the price per kWh (and include any additional charges) to the kWh price of energy/generation on your current bill to determine what the difference will be. (Check recent bills to determine your rate class and average monthly use). Check your Generation Supply Agreement/Contract for more information on what's included in your price, the terms and conditions of service, and other information including supplier and customer responsibilities. (refer to the State of Connecticut Department of Public Utility Control's **Supplier Questionnaire** for more detailed questions to ask Supplier.

Electric Delivery Charges

You must also pay Delivery Service Charges to CL&P or UI to deliver the electricity to your home or business. Delivery Charges do NOT include what you pay for your electric energy generation.

Power Sources	Known Sources	New England Power Pool System Mix
Coal	%	%
Natural Gas	%	%
Oil	%	%
Nuclear	%	%
Connecticut Qualified Renewable Sources	%	%
Other, Misc.	%	%
Total	**%**	**100%**

Supplier Known Sources are disclosed separately, but are part of the system mix. System Mix source: NEPOOL GIS Reports

Power Sources

Your electricity is transmitted across the New England electric system, which receives electricity from power plants throughout the region to meet the requirements of all customers in New England. The "**New England Power Pool System Mix"** represents the percentage of power supply from each source on the regional system. Electric suppliers are responsible for generating and/or purchasing electricity that is added to the electric system in an amount equal to your electricity use. To promote the development of renewable/clean sources, Connecticut requires that licensed electric suppliers provide specific percentages of their energy (which increase each year until 2020) from renewable or clean sources: CT Class I, Class II and Class III renewables.

Class I renewable sources include solar power, wind power, fuel cells, methane gas from landfills, ocean thermal power, sustainable biomass, wave or tidal power, low emission advanced renewable energy conversion technologies, certain run-of-river hydropower. **Class II renewable** sources include trash-to-energy, certain biomass facilities, certain run-of-river hydropower facilities. **Class III renewable** sources include CT commercial and industrial facilities using combined heat and power systems with at least 50% operating efficiency, or creating electricity savings from CT Energy Efficiency Fund programs. Electricity generation from renewables has lower emissions and less of an impact on the environment than that produced from conventional fossil fuels.

Air Emissions from Power Sources

The air emissions listed below are produced when certain fuels are used to generate electricity.

Carbon Dioxide (CO2) is released when coal, oil, natural gas, trash, methane and biomass are burned. Carbon dioxide, a greenhouse gas, is thought to be a major contributor to global warming.

Nitrogen Oxides (NOx) is formed when fossil fuels, trash, methane and biomass are burned at high temperatures. They contribute to acid rain and ground-level ozone (or smog), and may contribute to respiratory illness. NOx also accelerates vegetative growth in lakes and coastal waters which may lead to oxygen deprivation which is destructive to fish and other aquatic life.

Sulfur Dioxide (SO2) is formed when fuels containing sulfur are burned, primarily coal, oil and trash. Health risks associated with SO2 include asthma, respiratory illness and aggravation of existing cardiovascular disease. SO2 combines with water and oxygen in the atmosphere to form acid rain, which raises the acid level of lakes and streams, is detrimental to crops and forests and accelerates the deterioration of buildings and monuments.

XYZ Supplier
Customer Service: address,
toll-free telephone number and website

For more information: contact the Connecticut Department of Public Utility Control,
Ten Franklin Square, New Britain, CT 06015;
toll-free at: 1-888-922-DPUC(3782) or visit www.ctenergyinfo.com

ATTACHMENT B – APPROVED DISCLOSURE LABEL FOR BUSINESS CUSTOMERS, PAGE 1 OF 2

XYZ Supplier Disclosure Label

For Business Customers– from Date to Date or period
Price offer valid until (supplier to fill in date)

This label provides information on the New England regional electric system power sources and the air emissions related to electricity generation. For additional information on suppliers' prices, power sources and air emissions, visit **www.ctenergyinfo.com** **Shopping for Electricity** and **Electric Supplier Information Database.**

Each licensed electric supplier in Connecticut is required to disclose to its customers information related to pricing. You must check your contract for specifics on price, term/length of contract, and any other charges, fees, deposits or requirements for which you are responsible.

Your electric energy generation price per kWh (kilowatt-hour) is (*supplier to select either* all-inclusive or Not all-inclusive).

All-inclusive – means the price you were quoted in your contract includes all charges related to the generation portion of your electric bill.
or
Not all-inclusive – means the price you were quoted in your contract does NOT include all charges related to the gereration portion of your electric bill and there will be additional charges assessed.
See (Section #/page #/Name of Section) in your contract.

See page 2 of this label for "Questions to Ask Suppliers and Aggregators".

Electric Generation Charges

Electric generation charges are what you will pay for the energy supplied to you. These include the electric energy charge per kWh and any other energy/generation related charges or fees (such as system reliability related charges or customer charge, etc.) that the supplier may have you pay in addition to the per kWh charge. The price you pay may be all-inclusive or not. You should compare the price per kWh (and include any additional charges) to the kWh price of energy/generation on your current bill to determine what the difference will be. (Check recent bills to determine your rate class and average monthly use). Check your Generation Supply Agreement/Contract for more information on what's included in your price, the terms and conditions of service, and other information including supplier and customer responsibilities. (refer to the State of Connecticut Department of Public Utility Control's **Supplier Questionnaire** for more detailed questions to ask Supplier.

Electric Delivery Charges

You must also pay Delivery Service Charges to CL&P or UI to deliver the electricity to your home or business. Delivery Charges do NOT include what you pay for your electric energy generation.

Power Sources	Known Sources	New England Power Pool System Mix
Coal	%	%
Natural Gas	%	%
Oil	%	%
Nuclear	%	%
Connecticut Qualified Renewable Sources	%	%
Other, Misc.	%	%
Total	**%**	**100%**

Supplier Known Sources are disclosed separately, but are part of the system mix. System Mix source: NEPOOL GIS Reports

Power Sources

Your electricity is transmitted across the New England electric system, which receives electricity from power plants throughout the region to meet the requirements of all customers in New England. The "**New England Power Pool System Mix"** represents the percentage of power supply from each source on the regional system. Electric suppliers are responsible for generating and/or purchasing electricity that is added to the electric system in an amount equal to your electricity use. To promote the development of renewable/clean sources, Connecticut requires that licensed electric suppliers provide specific percentages of their energy (which increase each year until 2020) from renewable or clean sources: CT Class I, Class II and Class III renewables.
Class I renewable sources include solar power, wind power, fuel cells, methane gas from landfills, ocean thermal power, sustainable biomass, wave or tidal power, low emission advanced renewable energy conversion technologies, certain run-of-river hydropower. **Class II renewable** sources include trash-to-energy, certain biomass facilities, certain run-of-river hydropower facilities. **Class III renewable** sources include CT commercial and industrial facilities using combined heat and power systems with at least 50% operating efficiency, or creating electricity savings from CT Energy Efficiency Fund programs. Electricity generation from renewables has lower emissions and less of an impact on the environment than that produced from conventional fossil fuels.

Air Emissions from Power Sources

The air emissions listed below are produced when certain fuels are used to generate electricity.
Carbon Dioxide (CO2) is released when coal, oil, natural gas, trash, methane and biomass are burned. Carbon dioxide, a greenhouse gas, is thought to be a major contributor to global warming.
Nitrogen Oxides (NOx) is formed when fossil fuels, trash, methane and biomass are burned at high temperatures. They contribute to acid rain and ground-level ozone (or smog), and may contribute to respiratory illness. NOx also accelerates vegetative growth in lakes and coastal waters which may lead to oxygen deprivation which is destructive to fish and other aquatic life.
Sulfur Dioxide (SO2) is formed when fuels containing sulfur are burned, primarily coal, oil and trash. Health risks associated with SO2 include asthma, respiratory illness and aggravation of existing cardiovascular disease. SO2 combines with water and oxygen in the atmosphere to form acid rain, which raises the acid level of lakes and streams, is detrimental to crops and forests and accelerates the deterioration of buildings and monuments.

XYZ Supplier
Customer Service: address,
toll-free telephone number and website

For more information: contact the Connecticut Department of Public Utility Control,
Ten Franklin Square, New Britain, CT 06015;
toll-free at: 1-888-922-DPUC(3782) or visit www.ctenergyinfo.com

ATTACHMENT B – APPROVED DISCLOSURE LABEL – QUESTIONNAIRE, PAGE 2 OF 2

Supplier Questionnaire Questions to Ask Electric Suppliers or Aggregators	Yes or No	Explanation/ information
1. Are you licensed to do business as a supplier or aggregator in Connecticut?		
2. What is your price per kWh? a) Is the price per kWh all-inclusive?		
b) If NOT – what are the other energy/generation related charges or fees (related to system reliability or other) and the price of each? (Ask per kWh or monthly for your usage.) This question may apply ONLY to business customers.		
c) Are all these generation-related charges billed as direct pass-throughs or not? If not, what charges are and are not? These questions may apply ONLY to business customers.		
3. Is the price fixed or variable? a) If Variable, how does it vary? By time of use, monthly, by amount used, or other?		
4. If the price changes, when and how will I be notified?		
5. I use about 500 kWhs per month. (This usage is an example. Use your own monthly consumption.) What are my monthly savings on your rate?		
6. How does your price per kWh compare to the price I am paying CL&P or UI? Does your price follow the CL&P's or UI's price increases and decreases?		
7. What is the length of the agreement/contract?		
8. Is a deposit or enrollment or other similar fee required? If YES, how much?		
9. Is there a credit check, late payment or other fees? If YES, how much is each?		
10. Will I receive one bill or two?		
11. Do you offer a choice of energy sources, such as renewable energy?		
12. How can I receive disclosure labels in the future? (email, mailing or by request to toll-free telephone number)		
13. What is the contact name, phone number and customer service hours?		
14. Do you offer any other services?		
15. Any additional information		

Charges Business Customers May See on Their Bill: Electricity prices are volatile due to electric system and market conditions and fuel costs. Business customers' bills may show additional itemized charges associated with the risks/volatility of generating electricity. These electric generation-related or federal charges may or may not be included in your per kWh charge. Such charges are associated with electric system reliability and may or may not include these charges or others:

Congestion Charges – the cost of bringing online more expensive local generation plants to meet supply shortages due to transmission bottlenecks or outages

Capacity Charges – the cost of ensuring adequate availability of electric generating units to the New England system to provide for the peak electricity consumption of all customers

Locational Forward Reserve (LFR) – the cost associated with incentives in specific service areas for off-line generating units to start quickly to provide enough operating reserves for peak system reliability in a emergency event

Reliability Must Run (RMR) – the cost for more expensive generating plants to operate to provide power reserves to meet system reliability and voltage requirements when the system needs these plants to operate in particular power-constrained areas

EXHIBIT 3

STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY

November 19, 2014
In reply, please refer to:
Docket No. 14-07-20
Motion No. 4

Stephen J. Humes, Esq.
Holland & Knight LLP
31 West 52nd Street
New York, NY 10019

Re: Docket No. 14-07-20 – PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers

Dear Attorney Humes:

The Public Utilities Regulatory Authority (Authority) acknowledges receipt on November 18, 2014, of Verde Energy USA, Inc.'s (Verde) request that the Authority take administrative notice of the following evidence contained in Docket No. 13-07-18, PURA Establishment of Rules For Electric Suppliers and EDCs Concerning Operations and Marketing in the Electric Retail Market:

- Verde's Objections and Responses to the Office of Consumer Counsel's (OCC) Second Set of Interrogatories OCC-21 to OCC-51, dated February 3, 2014;
- Written Comments, Direct Energy Services, LLC and Direct Energy Business, LLC, dated March 19, 2014; and
- Transcript, March 27, 2014, Vol. I, Pages 1285-1547, which contains the live testimony and cross-examination of Susan M. Baldwin and Helen E. Golding.

The Authority hereby grants Verde's request with respect to the Transcript that contains the live testimony and cross-examination of Susan M. Baldwin and Helen E. Golding.

The Authority denies Verde's request with respect to the Written Comments of Direct Energy Services and Direct Energy Business, submitted on March 19, 2014. Written Comments are not evidence, and Direct Energy Services and Direct Energy Business can submit those comments in this docket if they so wish.

The Authority also denies Verde's request with respect to its Objections to OCC's Interrogatories OCC-21 to OCC-51, as these Objections are legal arguments and not evidence, and Verde has not demonstrated how they would be useful in the instant proceeding.

Based on the foregoing, the Authority hereby takes administrative notice of the following documents and materials, which have been entered into the record of this instant proceeding:

- Docket No. 13-07-18 Transcript, dated March 27, 2014, Vol. I, Pages 1285-1547, which contains the live testimony and cross-examination of Susan M. Baldwin and Helen E. Golding; and

- Verde's Responses to Interrogatories OCC-21, 23, 25, 26, 27, 28, 33, 34, 39, 40 and Attachment OCC-37, dated February 3, 2014, and Supplemental/Revised Responses to OCC-22, 24, 35, 36 and 41, submitted on March 21, 2014, in Docket No. 13-07-18.

Sincerely,

PUBLIC UTILITIES REGULATORY AUTHORITY

Nicholas E. Neeley
Acting Executive Secretary

cc: Service List

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Case Name:	DIRECT ENERGY SERVICES, LLC Et Al v. PUBLIC UTILITIES REGULATORY AUTHORITY
Type of Transaction:	Pleading/Motion/Other document
Date Filed:	Jan-8-2021
Motion/Pleading by:	ROBINSON & COLE LLP (050604)
Document Filed:	110.00 BRIEF
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