DOCKET NO.: HHB-CV21-6063122-S	:	SUPERIOR COURT
DIRECT ENERGY SERVICES, LLC	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	AT NEW BRITAIN
PUBLIC UTILITIES REGULATORY AUTHORITY	:	FEBRUARY 17, 2021

APPELLANTS' REPLY BRIEF

Plaintiffs-Appellants, Direct Energy Services, LLC; Direct Energy Business, LLC; Direct Energy Business Marketing, LLC; CleanChoice Energy, Inc.; and Retail Energy Supply Association ("RESA") (together, "Appellants") submit this reply brief in support of their Petition for Administrative Appeal[1] 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*.[2]

ARGUMENT

In their initial brief, Appellants demonstrated that their substantial rights have been prejudiced by the Marketing Restriction, Geographic Restrictions, and Resource Type Restrictions, and other requirements warranting reversal of the Decision.[3] The brief submitted by PURA, as well as the briefs submitted by the Department of Energy and Environmental Protection ("DEEP"), and Office of Consumer Counsel ("OCC"),[4] fail to justify the myriad defects in process and substantive error evident throughout PURA's administrative process. Instead, PURA seeks to distract from the core issues through inapposite procedural claims,

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

[2] Decision (Oct. 21, 2020) [ROR-0464 – ROR-0516] ("Decision").

[3] *See* Appellants' Brief (Jan. 8, 2021) (Entry No. 110) ("Appellants' Brief").

[4] Brief of the Defendant Public Utilities Regulatory Authority (Feb. 3, 2021) (Entry No. 113.00) ("PURA Brief"); Brief of Intervenor Department of Energy and Environmental Protection (Feb. 3, 2021) (Entry. No. 112.00) ("DEEP Brief"); Brief of the Office of Consumer Counsel (Feb. 3, 2021) (Entry No. 114.00) ("OCC Brief").

inapplicable legal standards, and inapt arguments. PURA ignores clear and binding appellate precedent in arguing that challenges based on constitutional rights and to PURA's statutory authority were waived. In arguing that substantial evidence exists to support the various requirements of the Decision, PURA relies almost exclusively on information ***not in the record***. Appellants have due process rights to notice and to be fully apprised of the facts on which the agency will act. Having failed to do so, PURA cannot now use the administrative appeal process to assert *post hoc* rationalizations for its decision based on undisclosed evidence.

I APPELLANTS DID NOT WAIVE ANY CLAIMS

PURA and OCC argue that Appellants' waived their free speech and Contracts Clause claims because the issues were not raised before PURA.[5] However, Appellants were not required to do so.

> [The] limitations on judicial review do not require courts to abstain entirely from entertaining questions that might have been, but were not, raised before the administrative tribunal. Reviewing courts retain considerable latitude, in ordinary legal proceedings, to consider matters not raised in the trial court. The standard for review of administrative proceedings similarly ***must allow*** for judicial scrutiny of claims such as constitutional error; jurisdictional error; or error in the construction of the administrative agency's authorizing statute.[6]

Moreover, because of a "well established common-law principle that administrative agencies lack the authority to determine constitutional questions," it would have been "pointless" for Appellants to raise all of their constitutional arguments before PURA.[7] Because Appellants' free speech and Contracts Clause claims raise constitutional challenges, Appellants were not required to raise those claims before PURA and are entitled to raise them initially before this Court.[8]

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[5] *See* PURA Brief, at 25-26, 41; OCC Brief, at 5-8.

[6] *Burnham v. Administrator, Unemployment Comp. Act*, 184 Conn. 317, 322 (1981) (citations omitted) (emphasis added).

[7] *See Ogden v. Zoning Bd. of Appeals of Town of Columbia*, 157 Conn. App. 656, 666 (2015) (internal quotation marks and citations omitted).

[8] *See id*.

PURA also asserts that Appellants waived the argument that PURA lacks statutory authority to impose the Geographic and Resource Type Restrictions.[9] First and foremost, Appellants were not required to raise that claim before PURA because an "error in the construction of the administrative agency's authorizing statute" may be raised on appeal even if it is not raised before the agency.[10] Thus, this issue is properly before this Court.

Moreover, PURA did not clearly articulate the scope of the Geographic and Resource Type Restrictions until it issued the Decision.[11] Prior to that, every applicable notice for comments indicated that any proposed restrictions would only apply to voluntary renewable offers ("VROs") billed through utility consolidated billing ("UCB").[12] Thus, Appellants did not have notice that PURA intended to impose the restrictions more broadly. As a result, Appellants are entitled to argue that imposing these restrictions exceeded PURA's statutory authority in the instant appeal.[13]

Further, RESA addressed the issue below. Specifically, RESA analyzed Connecticut General Statutes section 16-245o(h)(5) and (6) and cited case law to demonstrate that PURA lacks the authority to impose these restrictions.[14] Thus, RESA gave more than "only cursory

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[9] PURA Brief, at 16.

[10] *See Burnham*, 184 Conn. at 322.

[11] *See* Decision, at 2 n.2 [ROR-0467] (clarifying that the Decision applies to VROs billed through UCB ***and*** directly by suppliers).

[12] *See, e.g.*, Notice of Request for Written Comments (Nov. 26, 2019), at 2 [ROR-1211] ("A VRO can be separately marketed but would not be combined or bundled with a generation supply offer that is billed under consolidated billing.") (emphasis in original); Second Notice of Request for Written Comments (Jan. 29, 2020), at 3 [ROR-1322] ("Bundled VRO would be recovered through EDC consolidated billing as part of the supplier's generation supply rate per kWh").

[13] *See Burinskas v. Dept. of Soc. Svcs*, 240 Conn. 141, 153 n.15 (1997) (finding that an issue could be raised initially on appeal because it was only clearly articulated in the hearing officer's final report on reconsideration).

[14] *See* RESA's Exceptions, at 17 n.99 [ROR-0441].

attention" to the issue and provided "substantive discussion [and] citation of authorities."[15] Accordingly, RESA sufficiently raised this issue before PURA.

II THE GEOGRAPHIC RESTRICTIONS VIOLATE THE COMMERCE CLAUSE

PURA, DEEP, and OCC argue that the Geographic Restrictions do not violate the dormant Commerce Clause.[16] In doing so, PURA and DEEP argue that the Geographic Restrictions are not a matter of "economic protectionism" and do "not benefit in-state economic interests."[17] On the contrary, the Decision has the express purpose of "supporting local, sustainable, renewable energy sources."[18] In fact, the Decision recognizes that its purpose is to "subsidize" local renewable generation sources.[19] To serve this protectionist aim, the Decision prohibits suppliers from using RECs from renewable energy generators located in all states other than those of the New England, New York, and PJM control areas to support VROs sold in Connecticut.[20] This is the "clearest example" of a requirement that violates the dormant Commerce Clause.[21]

In an attempt to overcome this impermissible restriction, PURA, DEEP, and OCC argue that the Geographic Restrictions treat different products (i.e., different RECs) differently and that such action is permissible under *Allco Finance Limited v. Klee*, 861 F.3d 82, 101-108 (2d Cir.

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[15] *Cf. Cummings v. Twin Tool Mfg. Co., Inc.*, 40 Conn. App. 36, 45 (1996).

[16] *See* PURA Brief, at 18-23; DEEP Brief, at 7-14; OCC Brief, at 10-13.

[17] PURA Brief, at 20; *see also* DEEP Brief, at 9.

[18] Decision, at 1 [ROR-0466]; *see also id.* at 6 [ROR-0471] ("[T]he purpose of this docket was to bring Connecticut's VROs in line with Connecticut's goals of reducing local greenhouse gas emissions and supporting sustainable local renewable energy sources.") (internal quotation marks omitted).

[19] *See* Decision, at 34 [ROR-0499] ("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.") (emphasis added).

[20] *Id.* at 9 [ROR-0474].

[21] *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders.") (citations omitted).

2017) ("*Allco* Decision").[22] However, unlike the mandatory renewable portfolio standard ("RPS") program that was at issue in *Allco*, all RECs are similarly situated in the ***voluntary*** renewable market. For instance, in contrast to the mandatory RPS market discussed in *Allco*,[23] the national voluntary market does not depend on the structure of the regional transmission grids in order to deliver products to customers.[24]

In a further attempt to shoehorn PURA's actions within the *Allco* Decision, DEEP argues that PURA's new restrictions "created a 'new product'" that can be treated differently (i.e., that PURA is a market creator or market participant).[25] However, as PURA itself recognized, prior to the Decision, there was already a national market for voluntary renewables[26] through which Connecticut customers were receiving both locally and nationally sourced RECs.[27] PURA did not create this market nor is it acting as a participant in that market. Instead, through its new Geographic Restrictions, PURA is impermissibly restricting access to the Connecticut market in violation of the Commerce Clause.[28]

III THE MARKETING RESTRICTION UNLAWFULLY RESTRICTS SPEECH

OCC argues that the *Central Hudson* test does not apply to the Marketing Restriction because it only imposes a disclosure requirement.[29] However, this is simply inaccurate. The

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[22] *See* PURA Brief, at 21-23 (*citing Allco Finance Limited v. Klee*, 861 F.3d 82, 101-108 (2d Cir. 2017)); DEEP Brief, at 12 (same); OCC Brief, at 12 (same).

[23] *Allco*, 861 F.3d at 106-107.

[24] *See, e.g.*, Decision, at 1, 7 [ROR-0466, ROR-0472] (recognizing that a national market for voluntary RECs has existed since, at least 2005, and that customers in Connecticut are receiving products sourced from RECs throughout the United States).

[25] *See* DEEP Brief, at 12.

[26] Decision, at 1 [ROR-0466] ("Since 2005, nationwide REC markets emerged and matured, and suppliers began marketing offers that exceeded Connecticut's RPS.").

[27] *See* Decision, at 7 (Table 1) [ROR-0472]*; see also* Hearing Transcript ("Tr."), at 74 [ROR-1492], 76 [ROR-1494] (stating that Starion Energy, Inc. offers both a locally sourced and a nationally sourced VRO that customers choose).

[28] *See* Appellants' Brief, at 23-33.

[29] *See* OCC Brief, at 9-10.

Marketing Restriction is just that: a restriction that prohibits suppliers from describing their products in a truthful manner.[30] Thus, the *Central Hudson* test applies.[31]

PURA contends that the Marketing Restriction is permissible because it targets potentially deceptive or misleading commercial speech.[32] Such a contention is meritless. First and foremost, describing VROs backed solely with RECs as "renewable energy" is accurate, and supported by the federal government, other states and even PURA itself.[33] Further, the case upon which PURA relies is an early case in the development of commercial speech jurisprudence.[34] While *Virginia State Bd. of Pharmacy* contemplates, *in dicta*, the prospect of addressing issues related to deceptive or misleading speech,[35] *Central Hudson* and its progeny supply the standard for evaluating commercial speech protections under the First Amendment, including "commercial speech that is only *potentially* misleading."[36] Under this standard, "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive."[37]

The Marketing Restriction prohibits suppliers from truthfully describing their VROs and, thus, is more extensive than is necessary. Better informing customers does not require suppressing speech. PURA could effectively accomplish this purpose by providing customers

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[30] *See* Decision, at 32 [ROR-0497] ("The supplier may not market the product as 'renewable energy' unless the offer is supported by an ownership interest in or PPA for a renewable resource used to serve the contract.").

[31] *See* Appellants' Brief, at 12-22.

[32] *See* PURA Brief, at 26 (*citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976)).

[33] *See, e.g.*, 16 CFR 260.15(a); 65-407-305 Me. Code. R. § 4(A)(7); N.H. Rev. Stat. Ann. § 374-F:3.V(f)(4); Decision, at 32 [ROR-0497] ("The Authority acknowledges that this is a change from the current structure. For example, the Rate Board has a column labeled Renewable Energy").

[34] *See, e.g., Bad Frog Brewery Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 95-96 (2d Cir. 1998) (outlining the development of First Amendment commercial speech jurisprudence).

[35] *See Virginia State Bd. of Pharmacy*, 425 U.S. at 770-72.

[36] *Alexander v. Cahill*, 598 F.3d 79, 89 (2d Cir. 2010).

[37] *In re R. M. J.*, 455 U.S. 191, 203 (1982).

additional information about what they are buying when they choose to purchase "renewable energy."[38] Consequently, the Marketing Restriction does not survive *Central Hudson* scrutiny.[39]

IV PURA'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

PURA argues that substantial evidence supports the Resource Type Restrictions.[40] Notably, despite making such a claim, PURA cites ***no*** record evidence.[41] Instead, PURA infers legislative preferences for certain voluntary renewable products based on the statutorily required percentages for the mandatory RPS program.[42] However, the legislature has specifically addressed voluntary renewable programs and has expressed absolutely no preference for certain resources.[43] Instead, the legislature has simply required that specific disclosures be made about those resources.[44] If the legislature intended to narrow the resources eligible for VROs, it could have done so.[45]

PURA also argues that substantial evidence supports the Geographic Restrictions.[46] However, the only record evidence that PURA cites in support of this position is a statement at the hearing of Robert Maddox.[47] In it, Mr. Maddox stated generally that air flow into

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[38] Comments of Retail Energy Supply Association re Second Notice of Request for Written Comments (Feb. 12, 2020), at 11 [ROR-1340]; Starion Energy, Inc. 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].

[39] *See Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557, 570 (1980) ("The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression.").

[40] *See* PURA Brief, at 15-16.

[41] *See id.* PURA refers to the February 8, 2018 Comprehensive Energy Strategy, which is not part of the record (*see generally*, Record), and to the Decision itself, which, while part of the record, is not evidence.

[42] PURA Brief, at 15.

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

[44] *See id.*

[45] *Accord Perry v. Perry*, 312 Conn. 600, 624 (2014) ("[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly or to use broader or limiting terms when it chooses to do so.") (internal quotations and citations omitted).

[46] *See* PURA Brief, at 12-15.

[47] *See id.* PURA also cites the Decision itself, which, while part of the record, is not evidence.

Connecticut tends to come from the west and that most of the pollution coming into Connecticut comes from downwind. [48] This statement provides no support for allowing Connecticut customers to buy RECs from only some locations west of or downwind from Connecticut, but not others. At most, Mr. Maddox's statement supports prohibiting RECs generated in the north from being used to support Connecticut VROs.[49] PURA also asserts that it "relied on factual conclusions regarding fossil fuel displacement which were made in prior decisions."[50] However, those decisions are not part of the record.[51] Moreover, those decisions, like Mr. Maddox's statement, do nothing more than support allowing Connecticut customers to purchase RECs broadly from all regions south and west of Connecticut.[52] Thus, these decisions also do not support the Geographic Restrictions.[53]

PURA attempts to overcome the lack of evidence to support its Decision by relying "on its own specialized knowledge."[54] While an agency is permitted to evaluate evidence based on its specialized knowledge, it is not permitted to rely on that specialized knowledge as evidence

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[48] Tr. at 49-50 [ROR-1467 – ROR-1468] ("The air flow into Connecticut tends to come . . . from the west towards Connecticut. We know we're a tailpipe state, and most of the pollution coming in the state comes from down wind. So when we support the development of a renewable project in Pennsylvania, that helps clean up Connecticut's air. I don't necessarily know if the development of a renewable energy project north of Montreal does a lot for Connecticut's air.").

[49] *See id.*

[50] PURA Brief, at 15.

[51] *See generally*, Record.

[52] *See* Docket No. 03-07-16, *Investigation of Alternative Transitional Standard Offer Services for United Illuminating and CL&P Customers*, Interim Decision (Apr. 21, 2004), at 10 ("Demand for renewable resources that displaces demand for fossil fuel plants to the south and west of New England will provide environmental benefits to Connecticut."); Docket No. 07-01-09, *DPUC Consideration of the Connecticut Clean Energy Options Program for 2008*, Interim Decision (Sep. 27, 2007), at 6 n.3 ("Resources to the south and west of New England confer the most environmental benefits of criteria pollutant (e.g., SO2, NOx, particulates) reduction to New England.").

[53] While it is accurate that PURA "defined the eligible geographic range for RECs for the Connecticut Clean Energy Options Program to include NYISO and PJM" (PURA Brief, at 13), unlike the VRO market, that program was created by PURA. *See, e.g.*, Docket No. 03-07-16, *Investigation of Alternative Transitional Standard Offer Services for United Illuminating and CL&P Customers*, Second Interim Decision (Oct. 20, 2004).

[54] PURA Brief, at 40.

without notice,[55] which PURA did not provide.[56] "The proper inquiry for a reviewing court, when confronted with an administrative agency's reliance on non-record information provided by its technical or professional experts, is a determination of whether the challenged material includes or is based on any fact or evidence that was not previously presented at the public hearing in the matter."[57] Here, the information that "emissions from states in the northeast have a more direct impact on Connecticut's air quality than emissions from states in the western United States"[58] was not raised at the hearing.[59] Because this information was not raised at the hearing, PURA could not properly rely on it to support the Geographic Restrictions.[60]

V THE DECISION VIOLATES THE CONTRACTS CLAUSE

PURA argues that the Decision does not violate the Contracts Clause by prohibiting suppliers from automatically renewing existing VRO contracts, according to their terms, without ensuring that the VRO components of these contracts comply with the Decision.[61] Relying on a North Carolina case about perpetual leases, PURA asserts that the automatic renewal provisions in suppliers' existing VROs should not be respected because "courts do not favor perpetuities."[62] The standard applicable to leases in North Carolina has no bearing on electric supply contracts in Connecticut, whose law allows such contracts to contain automatic renewal provisions.[63]

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[55] *See* Conn. Gen. Stat. § 4-178(6), (7).

[56] *See generally*, Record.

[57] *Buddington Park Condo. Ass'n v. Planning and Zoning Comm'n of the City of Shelton*, 125 Conn. App. 724, 732 (2010) (*quoting Norooz v. Inland Wetlands Agency*, 26 Conn. App. 564, 573-74) (internal quotation marks omitted); *see also* Conn. Agencies Regs. § 16-1-38(e) (providing for notice and an opportunity to contest the material).

[58] Decision, at 8 [ROR-0473].

[59] *See generally*, Tr. [ROR-1419 – ROR-1550].

[60] *See Buddington Park*, 125 Conn. App. at 732; *Marshall v. DelPonte*, 27 Conn. App. 346, 352-53 (1992) (concluding that reliance by an agency on non-record information that had not been noticed would be impermissible under Connecticut General Statutes section 4-178(7)).

[61] *See* PURA Brief, at 41-42.

[62] *Id.* at 41 (*citing Oglesby v. McCoy*, 255 S.E.2d 773 (N.C. App. 1979)).

[63] *See* Conn. Gen. Stat. § 16-245o(e).

Moreover, PURA fails to point out that Connecticut courts have specifically recognized that "perpetual renewals" can occur when the language of the agreement is clear that was what the parties intended.[64]

In further support of its position, PURA asserts that voiding existing VRO contracts' automatic renewal provisions serves the purpose of "requiring renewed contracts to be consistent with its new VRO rules."[65] However, PURA's restrictions on automatic renewal do not ensure this will occur. On the contrary, they ensure that existing VRO contracts will expire. Because VROs are ***voluntary*** products, the customers with expiring VRO contracts need not and, as the evidence in the record establishes, likely will not enroll in new VROs that meet the new requirements established by the Decision.[66] Additionally, if PURA's intent was to facilitate the transition of customers away from contracts that do not comply with the new restrictions, far more moderate alternatives were available.[67]

CONCLUSION

For all of the foregoing reasons and those set forth more fully in Appellants' Brief, the Court should sustain this appeal and reverse the Decision.

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[64] *See Lonergan v. Connecticut Food Store, Inc.*, 168 Conn. 122, 125 (1975) ("Courts do not favor perpetual leases, however; thus a provision in a lease will not be construed as conferring a right to a perpetual renewal '***unless*** the language is so plain as to admit of no doubt of the purpose to provide for perpetual renewal.'") (citations omitted) (emphasis added).

[65] PURA Brief, at 41.

[66] *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.").

[67] *See* Appellants' Brief, at 50.

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