STATE OF CONNECTICUT
PUBLIC UTILITIES REGULATORY AUTHORITY

REVIEW OF FEASIBILITY,	:	DOCKET NO. 18-06-02
COSTS, AND BENEFITS OF PLACING	:	
CERTAIN CUSTOMERS ON	:	
STANDARD SERVICE PURSUANT	:	
TO CONN. GEN. STAT. § 16-245O(M)	:	SEPTEMBER 23, 2019

REPLY BRIEF OF WILLIAM TONG, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT

William Tong, Attorney General for the State of Connecticut ("Attorney General"), hereby files this Reply Brief in the above referenced matter. For the reasons described below, as well as those presented in the Attorney General's Brief filed September 16, 2019, the Public Utilities Regulatory Authority ("PURA" or "Authority") should place hardship electric customers on electric distribution company ("EDC") standard service pursuant to Conn. Gen. Stat. § 16-245o(m).

I. ARGUMENT

As fully discussed in the Attorney General's Brief, the evidence in this docket demonstrates that Connecticut's hardship customers who use a competitive electric supplier, as a class, experience significant financial harm. That harm is in part subsidized by the general class of electric ratepayers through state programs. It is therefore in the public interest of the State of Connecticut and the people of the State that those hardship customers be placed on standard service. The Attorney General will not repeat those arguments here. Instead, in this Reply Brief, the Attorney General will address the Retail Energy Supply Association's ("RESA") incorrect contention that placing hardship customers on standard service would violate the Contracts Clause of the United States Constitution.

A. Placing Hardship Customers on Standard Service Does Not Violate the Contracts Clause of the United States Constitution

In its Brief, RESA argues that placing all hardship customers on EDC standard service would violate the Contracts Clause of the United States Constitution. RESA Brief, 4-7. Specifically, RESA argues that placing hardship customers on standard service will disrupt existing supplier contracts, which would (1) create a "substantial impairment," (2) serve no legitimate public purpose; or (3) if such public purpose were established, the means to achieve that purpose would not be "reasonable or necessary." *Id*. RESA cannot prevail on any prong of this analysis.

The Contract Clause does not prohibit states from impairing contracts. To the contrary, it is well established that states may impair contracts, and may impair them substantially, when it is reasonably necessary to protect their citizens. *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367 (2d Cir. 2006).[1] As a result, even if a law actually impairs existing contractual rights, it will violate the Contracts Clause only if: (1) the impairment is "substantial;" and (2) the law is not "a 'reasonable' means to a 'legitimate public purpose'" such as remedying a general economic

[1] "Although facially absolute, the Contracts Clause's prohibition 'is not the Draconian provision that its words might seem to imply.' *Allied Structural Steel Co. v. Spannaus* (*Spannaus)*, 438 U.S. 234, 240, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). It does not trump the police power of a state to protect the general welfare of its citizens, a power which is 'paramount to any rights under contracts between individuals.' *Id.* at 241, 98 S.Ct. 2716; *see also W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433, 54 S.Ct. 816, 78 L.Ed. 1344 (1934) ("[L]iteralism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection."). Rather, courts must accommodate the Contract Clause with the inherent police power of the state 'to safeguard the vital interests of its people.' *Home Bldg. & Loan Ass'n v. Blaisdell (Blaisdell)*, 290 U.S. 398, 434, 54 S.Ct. 231, 78 L.Ed. 413 (1934); *see also Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983); *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 992–93 (2d Cir.1997). Thus, state laws that impair an obligation under a contract do not necessarily give rise to a viable Contracts Clause claim, *see U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 16, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367-68 (2d Cir. 2006).

problem. *Condell v. Bress*, 983 F.2d 415, 418 (2d Cir. 1993) (quoting *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977)); *see Buffalo Teachers*, 464 F.3d at 368; *Ass'n of Surrogates & Supreme Court Reporters Within City of New York v. State of N.Y.*, 940 F.2d 766, 771 (2d Cir. 1991). In the present case, RESA cannot show either that placing a certain subset of electric supplier customers on EDC standard service causes a substantial impairment or that it is not "a 'reasonable' means to a 'legitimate public purpose.'"

1. Any Contract Impairment is Insubstantial

Any impairment of the electric supply contracts at issue here is not substantial, and is therefore insufficient to support a Contract Clause claim. The U.S. Court of Appeals for the Second Circuit found the following regarding whether impairment to a contract is substantial:

> The primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted. Impairment is greatest where the challenged government legislation was wholly unexpected. When an industry is heavily regulated, regulation of contracts may be foreseeable; thus, when a party purchases a company in an industry that is "already regulated in the particular to which he now objects," that party normally cannot prevail on a Contract Clause challenge.

Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997) (internal citations omitted).

First, the PURA is statutorily charged with regulating the terms of service of all competitive electric suppliers in the state. Electric suppliers are subject to extensive state regulation in Connecticut. *See* Conn. Gen. Stat. §§ 16-245o through 245v. These statutes govern every aspect of electric supplier service, including the duration of the contracts, conditions governing a supplier's ability to increase its rates, renewable energy content, notice requirements, and more. There is simply no basis upon which RESA can claim any disruption of its reasonable expectations concerning the ongoing regulation of its contracts. Again, "[w]hen an industry is heavily regulated, regulation of contracts may be foreseeable[.]" *Sanitation*, 107 F.3d at 993.

Second, RESA cannot credibly assert that its member companies' "reasonable expectations" were disrupted as the potential transfer of customers to standard service was entirely foreseeable. As noted in the Attorney General's Brief, the General Assembly enacted the legislation enabling PURA's review on whether hardship customers should be placed on standard service in 2014, more than five years ago. *See* Section 4 of Public Act 14-75, *An Act Concerning Electric Customer Consumer Protection.* Virtually every residential customer in the entire State of Connecticut – hardship or not – executed their current electric supply contract after the enactment of Public Act 14-75. Moreover, PURA initiated this docket to consider switching hardship customers to standard service in May of 2018, more than sixteen months ago. There is no legitimate basis upon which RESA can claim any disruption of its reasonable expectations in this heavily regulated industry, especially when it was put on notice more than five years ago that such contracts could be impaired.

2. P.A. 14-75 Serves a Legitimate Public Purpose and is Rationally Related to that Purpose

Even if RESA could establish that Public Act 14-75 substantially impaired any existing contracts, which it cannot, it remains constitutional. The legislature enacted Public Act 14-75, which is embedded in Conn. Gen. Stat. § 16-245o, in response to concerns over widespread abuses and unfair trade practices in the electric supplier marketplace. As the PURA has already determined:

> Conn. Gen. Stat. § 16-245o is a remedial statute, enacted by the legislature in response to problems in the electric supplier market. *See* Connecticut House Transcript, June 7, 2011 (stating that much of what is now Section 16-245o(h), "protects consumers…" and thereafter delineating the ways the amendment protected consumers). Section 16-245o is based on Conn. Gen. Stat. § 42-110b (CUPTA). Like CUTPA, Conn. Gen. Stat. § 16-245o should be "liberally construed in favor of those whom the legislature intended to benefit." *Andover Ltd. Partnership I v. Bd. of Tax Review*, 232 Conn. 392, 396, 655 A.2d 759 (1995); *see also* Conn. Gen. Stat. § 42-110b(d) ("It is the intention of the legislature that this chapter be remedial and be so construed."); *Hinchliffe v. Am.*

> *Motors Corp.*, 164 Conn. 607, 615 n. 4, 440 A.2d 810 (1981) (noting CUTPA is remedial and should be construed liberally in favor of consumers). Conn. Gen. Stat. § 16-245o was intended to benefit consumers and to protect them from the very tactics at issue in this investigation. The statute must be "construed to effect [its] purpose." *See State v. Cutler*, 33 Conn. Supp. 158, 161 (Conn. Ct. of Common Pleas 1976).

Final Decision, Docket 06-12-07RE07, *Application of Liberty Power Holdings LLC for an Electric Supplier License – Review of Allegations of Consumer Protection Violations,* 3-4. *See also* Final Decision, Docket 10-06-18RE02, *Application of Spark Energy, L.P. for an Electric Supplier License – Investigation into Marketing*, 6.

Such action to protect Connecticut consumers from predatory supplier misconduct is well within the General Assembly's authority. Indeed, discharging its inherent police powers for the protection of its citizens is the primary role of the state's legislative body. Any such actions are therefore reviewed under an extremely deferential standard that is akin to a rational basis test. In that regard, the U.S. Court of Appeals for the Second Circuit found the following:

> Generally, legislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test; that is, whether the legislation is a "reasonable" means to a "legitimate public purpose." *United States Trust Co.*, 431 U.S. at 22–23, 97 S. Ct. at 1517–1518. "As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* (citing *East New York Savings Bank v. Hahn,* 326 U.S. 230, 66 S.Ct. 69, 90 L.Ed. 34 (1945)).

Ass'n of Surrogates, 940 F.2d at 771.

Under this standard, even a law that substantially burdens existing contractual rights must be upheld if it is a reasonable means to achieve a legitimate public purpose. *Buffalo Teachers,* 464 F.3d at 367; *Condell,* 983 F.2d at 418; *Ass'n of Surrogates*, 940 F.2d at 771. "As is customary in reviewing [such legislation], courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Ass'n of Surrogates,* 940 F.2d at 771.

Given the reasons discussed above, Public Act 14-75 easily survives under this deferential standard.

II. CONCLUSION

The evidence in this docket demonstrates that Connecticut's hardship electric customers experience significant financial harm that is in part subsidized by the general class of electric ratepayers through state programs. It is in the public interest for PURA to implement the remedy the Legislature envisioned in Section 16-245o(m)—that hardship customers be placed on standard service. Such an order in no way violates the Contracts Clause of the United States Constitution. The Attorney General remains committed to defend the PURA and the legislature in enacting reforms to protect Connecticut consumers from unfair or unscrupulous conduct in the electric supplier marketplace.

Respectfully submitted,

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Service is hereby certified to
all parties and intervenors on this
agency's service list for this proceeding.

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