DOCKET NO.: HHB-CV23-6078177-S	:	SUPERIOR COURT
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AQUARION WATER COMPANY OF CONNECTICUT,	:	
	:	
Plaintiff-Appellant,	:	JUDICIAL DISTRICT
	:	OF NEW BRITAIN
V.	:	
	:	
PUBLIC UTILITIES REGULATORY AUTHORITY,	:	
	:	
Defendant-Appellee.	:	
	:	MAY 8, 2023

PLAINTIFF-APPELLANT'S REPLY BRIEF IN FURTHER SUPPORT OF REQUEST FOR STAY OF ENFORCEMENT OF AGENCY DECISION

THE PLAINTIFF-APPELLANT
AQUARION WATER COMPANY OF
CONNECTICUT

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– Its Attorneys –

I. Introduction

On March 30, 2023, Aquarion Water Company of Connecticut ("Aquarion" or the "Company") moved this Court for a stay of the Decision issued by the Public Utilities Regulatory Authority ("PURA") in Docket No. 22-07-01 (the "Decision"). On April 5, 2023, the Court entered the requested stay on a temporary basis to allow the parties time to submit additional briefing and present argument. Continuation of a partial stay is necessary and warranted to avoid irreparable harm to Aquarion and to serve the public interest.[1] For the reasons stated herein, PURA has offered no valid justification for the Court to lift the stay.

As a public service company operating under Conn. Gen. Stat. § 16-1(a)(3), Aquarion shoulders a fundamental obligation to customers requiring it to serve as a prudent and effective custodian of a water delivery system that demands constant investment to provide clean water to customers in 56 Connecticut towns. Where revenues are lagging behind costs, regulated public utilities have no recourse to obtain incremental revenues from any source other than customer rates. Under Conn. Gen. Stat § 16-19(a), customer rates cannot be modified except by petition to PURA and no utility may charge rates in excess of rates lawfully approved by PURA in a previous rate proceeding. Upon receipt of a petition under Conn. Gen. Stat § 16-19(a), PURA must investigate the proposed rate amendment to determine that any new base rates set in the proceeding: (1) conform to the constitutional principles in § 16-19e; and (2) are no more or less than "just, reasonable and adequate" for the critical service provided to customers. Conn. Gen. Stat § 16-19e(a)(4).[2]

Notwithstanding Aquarion's showing of a pressing need for an increase in base rates of $35.3 million to take effect on March 15, 2023, PURA's Decision unlawfully rejected the

[1] PURA's Decision sets forth a total of 43 "orders" implementing PURA's rate determinations. Exhibit 1 provides a list of the Orders giving effect to the Decision. Order Nos. 1, 2, and 3 effect the rate reduction. These three Orders are the only Orders that require a permanent stay.

[2] The Connecticut Supreme Court found that § 16-19e(a)(4) identifies the factors that PURA must consider when it establishes rates for public service companies, using language that tracks, almost verbatim, the language used by the U.S. Supreme Court in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). CL&P v. DPUC, 216 Conn. 627, 635 (1990).

Company's entire rate request and ordered a rate reduction, causing irreparable harm to Aquarion by unlawfully depriving the Company of: (1) a $35.3 million annual increase in revenues to be collected through ***new*** base rates; and (2) a $2 million reduction in annual revenues collected through ***existing*** base rates. Due to Connecticut's prohibition on retroactive ratemaking, there is no legal basis upon which Aquarion can seek to recoup past losses from customers resulting from the unlawful denial of a ***rate increase*** –i.e., even if Aquarion wins on appeal, PURA is barred by law from allowing Aquarion to recoup any of the past revenues that it should have had under PURA's decision, if lawfully determined.[3] Aquarion's irreparable harm will abate only at such time that new base rates are set. Whereas, holding the *status quo* would keep existing base rates, previously approved by PURA as "just and reasonable" in 2013, in place, thereby mitigating the irreparable harm to Aquarion by avoiding the ***prospective*** loss of $2 million annually. Although not alleviating the overall punitive effect of PURA's Decision, this outcome is significant for Aquarion given its declining financial condition -- exacerbated by PURA's unlawful denial of a critically needed rate increase. For customers, the *status quo* means continuing to pay for water service at rates previously approved by PURA and avoiding the risk of paying a surcharge at a later date to keep Aquarion whole, retroactive to March 15, 2023 (as proposed by PURA), layered on top of a ***prospective*** base-rate increase arising as a result of a remand to address PURA's errors.

In opposing the stay, PURA leads this Court down a path to serious legal error and harm to the public interest. PURA urges the Court to construe Conn Gen. Stat. § 4-183(k) as broadly authorizing the Court to contravene the longstanding prohibition on retroactive ratemaking; to allow the unlawful rate reduction to go into effect; and, ultimately, to institute a surcharge on customers to recover Aquarion's past losses in the event that it prevails on appeal – all while

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[3] The "prohibition on retroactive ratemaking" is well-established under Connecticut law. E.g., E. Connecticut Reg'l Water Co. v. DPUC, No. CV 970065168S, 1999 WL 545735, at *8 (Conn. Super. Ct. Jul. 16, 1999) ("[A]s a general proposition, a utility company is not ipso facto entitled on grounds of equity to charge higher rates than would otherwise be allowed in the present in an effort to recoup a perceived 'undeserved windfall' to its ratepayers in the past."); CL&P v. DPUC, 40 Conn. Supp. 520, 536 (Conn. Super. Ct. 1986) ("Rates are established for the future and it is the generally accepted rule that retroactive rate-making is beyond the power of a regulatory commission." (quotation marks omitted)).

ignoring the fact that the Court would be taking action, or directing PURA to take action, that PURA ***concedes*** it is legally barred from taking under longstanding Connecticut law. Aside from the fact that PURA's legal theory is contrary to Connecticut law, the momentous error that PURA fails to perceive or to convey to the Court is that, if Aquarion prevails on appeal, and the prohibition on retroactive ratemaking ***is contravened*** as a result of judicial action, Aquarion would be entitled to retroactive recovery of the ***total measure*** of its damages, which is the difference between PURA's invalid rate reduction (-$2 million per year), and the base-rate increase ultimately resulting from a remand proceeding correcting PURA's legal errors, as an "objective ascertainment" of the amount.[4]

Instead, PURA presents the Court with misleading math to minimize the irreparable harm, arguing that the dollar amount of $2 million per year is insufficient to trigger a threshold of irreparable harm.[5] (Obj. at 4-5.) Yet, staying the $2 million annual revenue reduction is ***not*** the measure of irreparable harm, but rather only a limited *mitigation* of that harm.[6] Notably, PURA has not explained how the Court can contravene the prohibition on retroactive ratemaking to obviate the need for the stay and then somehow limit compensation to Aquarion to the difference in base revenues with and without a stay (i.e., $2 million per year). Instead, if the prohibition on retroactive ratemaking is contravened by the Court so that the need for a stay is averted, the result

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[4] The case law of "several courts" cited by PURA affirms the objective calculation of damages to be the difference between the unlawful decision and the corrected decision on remand. (Obj. at 8-13); See, e.g., Gearhart v. Pub. Util. Com'n. of Or., 356 Or. 216, 227 (2014); Indep. Voters of Ill. v. Ill. Comm. Comm'n, 117 Ill. 2d 90, 105 (1987). This view is consistent with the general rule that, "[i]n order to award damages, a court must have evidence by which it can calculate the damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount." Ed Lally & Assocs., Inc. v. DSBNC, LLC, 145 Conn. App. 718 (Conn. App. 2013) (quotation marks omitted).

[5] Framing the irreparable harm as a "1% decrease from prior revenues" as compared to a "cumulative 27% increase upon Connecticut customers" is wholly disingenuous. (Obj. at 3-4.) Where costs *are exceeding revenue* by a substantial margin, there is material harm. In addition, the monthly increase for a typical customer that would have resulted from the Company's petition, without modification, was 10.5% or $5.46 per month. (LFE-001, Supp.2).

[6] Aquarion is not appealing every determination in the Decision that had the effect of reducing the $35.3 million in revenues that would have become effective March 15, 2023. The affidavit of Debra A. Szabo, CPA, Aquarion's Director of Rates and Regulation, quantified the impact of the specific errors subject to appeal as at least $15 million, subject to final determination of issues not quantified in her affidavit, plus the $2 million annual reduction in revenues. See Aquarion Administrative Appeal, Tab D, at Ex. A, pages 2, 6.

is that there is no basis to deny Aquarion recovery of its ***full, objective measure*** of damages represented by the difference between the revenues allowed by PURA's unlawful decision and the revenues that Aquarion should have received as of March 15, 2023, as corrected on remand. This is a pivotal point, highlighting the fact the PURA's theory opposing the stay is a ruse -- protecting the unlawful Decision while putting customers on the hook for a court-ordered surcharge ranging in tens of millions of dollars that would layer onto any base-rate increase resulting from a remand.[7]

Further, the context of this Decision is highly unusual and speaks volumes about Aquarion's likelihood of success on the merits. Aquarion's appeal petition lays out 12 individual counts with interrelated impact on the computation of new base rates following a remand order. Each of these 12 counts reflects patent legal error by PURA and PURA is unable to articulate even the barest of defenses to any of them. (Obj. at 20-22, 23-24.) Aquarion is likely to prevail on appeal because the claims are based on objective impairment of the Company's substantial rights, rather than matters of ratemaking discretion, raising serious questions about PURA's decisionmaking process and impartiality. Under the unusual circumstances where two of the three PURA commissioners have acknowledged that the Decision was arbitrary and capricious, in parts, and that its unrealistic return on equity would damage Aquarion's ability to raise capital;[8] and, the third commissioner has recently announced at a public press conference that "frankly it's not my concern what their shareholders make…," despite PURA's obligation under the U.S. Constitution and Connecticut statutory law to ensure that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks ... [and] should be sufficient to assure confidence in the financial integrity of the enterprise, so as to

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[7] PURA has not secured consent for this extraordinary and *ultra vires* remedy from the other parties and intervenors in the underlying agency proceeding who have the right to object to this approach on remand, which includes 56 Connecticut towns and three New York municipalities granted intervenor status by PURA over the objection of the Company. (Decision at 2.). Thus, while PURA argues for an outcome that exposes customers to incremental cost risk, PURA has no comfort to provide to the Court that all of the designated parties and intervenors will be amenable to this outcome.

[8] Aquarion Administrative Appeal, Tab A, Transcript of PURA Regular Meeting, March 15, 2023, at pages 11-12, 15-18.

maintain its credit and to attract capital," it becomes apparent that the Decision is not the product of good faith, quasi-judicial agency decision making by an impartial regulator, and thus is undeserving of any deference that might otherwise be afforded to agency action.[9] See Connecticut Light and Power Co. v. Department of Public Utility Control, et al, 219 Conn. 51, 55 (1991) (construing Conn. Gen. Stat. § 16-19e(a)(4)).

Accordingly, for these and other reasons stated below, the temporary stay should now be made permanent to preserve the *status quo* for Order Nos. 1, 2, and 3 of the Decision, until the errors of PURA's Decision can be rectified.

II. PURA's Proposition that the Court Can Contravene the Prohibition on Retroactive Ratemaking Is Manifestly Flawed.

PURA's central proposition is that any reliance on Connecticut's prohibition against retroactive ratemaking "entirely misses the salient question," which is not whether PURA is prohibited from retroactive ratemaking (it is), but rather, "whether the prohibition on retroactive ratemaking bars this Court from issuing a remand order which contemplates a PURA-ordered surcharge or refund," or alternatively, whether "the prohibition can be applied to courts when they conduct statutorily authorized reviews of rate-case decisions." (Obj. at 9, 13-14.) PURA suggests that Connecticut's statutory framework and case law support a distinction that would prohibit ratemaking actions undertaken by the administrative agency entrusted with ratemaking authority, while allowing a trial court's action to fashion a remedy to achieve the same ratemaking result. For the reasons delineated below, this is not correct. In fact, this is an illogical result that ignores the legal principles and public policy served by the prohibition, as constituted in state law.

At its essence, the prohibition against retroactive ratemaking arises from the principle that ratemaking is prospective rather than retroactive. E. Conn. Reg'l Water Co., 1999 WL 545735 at

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[9] The quoted statements were made at a televised press conference held at Essex Town Hall, Essex, CT, on April 26, 2023. In fact, the PURA commissioners do not have a consumer advocacy role under state law. This role is reserved by statute to the Office of Consumer Counsel and the Attorney General, among other interests. The PURA commissioners are quasi-judicial administrative officers with statutory obligations to balance the "financial integrity" of public service companies charged with providing essential services to customers and the public interest. See, e.g., Conn. Gen. Stat. §§ 16-19e(a)(4), 16-10a(a); 16-11.

*7 (Conn. Super. Ct. July 16, 1999). If PURA "were to allow the present collection of higher rates simply to compensate [the utility] for losses sustained in the past, it would have the practical effect of changing the previous rates to something higher. The law does not permit the department to make such changes." Id. at *8 (quotation marks and alterations omitted). Thus, for customers, the prohibition on retroactive ratemaking ensures that present consumers will not be required to pay for past deficits of the utility in their future payments, among other policy goals. Narragansett Elec. Co. v. Burke, 415 A.2d 177, 178-179 (R.I. 1980) (quoted in Brief of the State of Conn. Dep't of Pub. Util. Control, by Robert L. Marconi, Assistant Attorney General in OCC v. DPUC, 279 Conn. 584 (2006)) [hereinafter "DPUC Brief," see Exhibit 2]. Once base rates are lawfully set by the rate-setting authority, both utilities and customers are entitled to rely on those rates.

A. Connecticut Statutory Law Does Not Authorize the Court to Contravene the Prohibition on Retroactive Ratemaking.

1. Plain Language of Conn. Gen. Stat. § 4-183(k).

PURA's claim that this Court has power to provide Aquarion with broader relief on appeal than PURA could itself provide rests on Conn. Gen. Stat. § 4-183(k), which PURA contends authorizes this Court to provide "adequate compensatory or other corrective relief … at a later date," in lieu of a stay. Although Connecticut judicial precedent prohibits retroactive adjustments to utility base rates, PURA argues that the Court will be able to order retroactive relief in this appeal because: (1) Conn. Gen. Stat. § 4-183(k) provides for "broad" remedies; and (2) Conn. Gen. Stat § 16-19 "contemplates refunds or surcharges." (Obj. at 9, 11). This proposition fails the test of statutory interpretation, however, because neither provision of Connecticut statutory law authorizes the Court to create a remedy that would constitute retroactive ratemaking where PURA is legally prohibited from taking such action. For example, § 4-183(k) states:

> If a particular agency action ***is required by law***, the court, on sustaining the appeal, may render a judgment that modifies the agency decision, orders the particular agency action, or orders the agency to take such action as may be necessary to effect the particular action.

(emphasis added).

By its plain terms, § 4-183(k) simply establishes that the Court has the authority to direct PURA to do what PURA is required by law to do. Although PURA argues that this language "contains no limitation" on the Court's authority to order PURA to provide the remedy the Court deems appropriate; the exact opposite is true. (Obj. at 7). PURA fails to address the plain language of the statute with emphasis on the first nine words of the provision establishing the limitation that "***if*** a particular agency action is required by law …," this Court may take action to fulfill PURA's legal obligation. In this case, the "particular agency action … required by law" is the issuance of a final decision on Docket No. 22-07-01 that sets "just and reasonable" rates in accordance with § 16-19e(a)(4), no later than the end of the relevant statutory period (March 15, 2023).

Aquarion agrees that, were it to prevail on any of the 12 counts raised in this appeal, this Court has authority to direct PURA to modify its Decision to cure the errors sustained by the Court; to order Aquarion to take some action carrying out PURA's Decision; or to order PURA to take some action on remand to cure the legal flaws in its Decision. However, § 4-183(k) does not authorize this Court to engage in retroactive ratemaking where PURA cannot provide such a remedy on its own. No aspect of the statutory language allows the Court to undertake an action *expressly prohibited by state law,* such as implementing a surcharge to allow Aquarion to recoup past losses from customers.

Connecticut law is clear that the Court's first consideration in interpreting a statute must "be ascertained from the text of the statute itself and its relationship to other statutes." Conn. Gen. Stat. § 1-2z. When the meaning of the statutory language is "plain and unambiguous and does not yield absurd or unworkable results," the reviewing court is not to consider extra-textual evidence of meaning. Id.; see also Sena v. Am. Med. Response of Conn., Inc., 333 Conn. 30, 45–46 (2019). Here, the plain-language review does not reasonably empower the court to take an action that the "agency" could not itself take, nor that would contravene Connecticut state law. To the contrary, the plain language is distinctly focused on "actions required by law" and "the agency," empowering the Court to remedy PURA's invalid decision by taking lawful action that PURA should have taken. Thus, retroactive ratemaking is not a remedy available under § 4-183(k).

This proper reading of § 4-183(k) is bolstered by PURA's inability to cite any precedent to support its interpretation and Aquarion is not aware of any precedent in which a Connecticut court fashioned its own regulatory remedy pursuant to § 4-183(k). Instead, courts rely on § 4-183(k) to remand issues to an agency to address the next steps required by law.[10] PURA is asking this Court to be the first to construe § 4-183(k) as allowing a court to contravene state law that would be otherwise applicable to an administrative agency carrying out its legislative duties.

Moreover, even if the Court were to look beyond the plain language of the statute (which it should not do), it would find that the brief legislative history of § 4-183(k) confirms the plain-language reading and demonstrates that § 4-183(k) was based on existing law, providing a very restrictive power to courts. See Watson v. Howard, 138 Conn. 464, 469-70 (1952);[11] Conn. Law Revision Commission, Report and Recommendation of the Law Revision Commission Concerning the Uniform Administrative Procedure Act, S.B. 209, at 10 (February 1988) [Exhibit 3]. This brief legislative history, and the cases it cites, stand for the proposition that, if a court sustains a party's appeal of an administrative action, the court should identify the legal flaws in the agency's decision and then remand the matter to the agency to allow the agency to "proceed according to law." The legislative history does not express or imply an outcome where the court is authorized to fashion its own ratemaking remedies, such as a surcharge collecting past utility losses from customers, which PURA, as the ratemaking authority, cannot lawfully do.

Accordingly, by its express terms, § 4-183(k) does not authorize the Court to contravene the prohibition on retroactive ratemaking, where PURA is expressly barred from doing so.

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[10] See, e.g., OCC v. PURA, 2021 WL 761650, at *14 (Conn. Super. Ct. Jan. 14, 2021) (reversing and vacating PURA's final decision and remanding the matter to PURA with direction to reconsider United Illuminating's proposed 2019 rate in a manner "consistent with this opinion"); CL&P v. DPUC, 1995 WL 360777, at *4 (Conn. Super. Ct. June 9, 1995) (sustaining utility's appeal and remanding case to DPUC for further action).

[11] In Watson, favorably cited in the legislative history, the Supreme Court found error in the trial court's decision to remand to an administrative agency with directions on future steps to be taken. The Watson court made it clear that the next steps after remand are for the agency to decide, not the court, unless there is only one possible legal action for the agency to take in the circumstances. Id. at 470. Retroactive ratemaking, as proposed by PURA, does not fit within that narrow range of authority.

2. Other Statutory Provisions Cited by PURA.

PURA also erroneously relies on language in Conn. Gen. Stat. §§ 16-19(b) and (c), that PURA contends "unambiguously contemplates refunds *or surcharges*" when a public utility seeks to implement interim rates prior to regulatory approval or "fixed at the conclusion of any appeal." (Opp. at 9-10, emphasis added.) However, neither of these subsections uses the word "surcharge," nor even implies the possibility of a surcharge given the status of Connecticut law on the prohibition of retroactive ratemaking. Instead, these two subsections expressly – and exclusively – provide for the situation where the utility has collected amounts ***in excess*** of the final, lawful rate decision and the utility is subsequently required "to refund to its customers with interest such amounts as the company may collect from them," as stated in § 16-19(b).

Basic statutory interpretation dictates that, had the General Assembly intended to authorize a surcharge enabling a utility to recoup past losses from customers as a remedy in a final determination of a fully adjudicated base-rate proceeding, it would have provided for such a mechanism as it did in another subsection of § 16-19, namely 16-19(g).[12] See Town of Ledyard v. WMS Gaming, Inc., 338 Conn. 687, 699-700 (2021) (explaining the "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" (quotation marks and ellipsis omitted); State v. Heredia, 310 Conn. 742, 761-62 (2013) ("[W]hen a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed. That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or [nonaction] will have upon any one of them.") (quotation marks, alteration marks, and ellipsis omitted).

[12] PURA does not cite to Conn. Gen. Stat. § 16-19(g) in its Opposition because subsection (g) authorizes PURA to use a surcharge in relation to an interim rate decrease proceeding, which is a distinct administrative process whereby PURA is able to reduce rates temporarily. In the present case, however, the authority for PURA to set a surcharge following appeal of a final base-rate decision to retroactively collect a utility's past ***losses*** is conspicuously absent.

Neither subsection (b) nor (c) authorizes surcharges to customers that would recover past losses of the utility experienced through base rates, and therefore, these subsections do not contravene the prohibition on retroactive ratemaking. Rather, these two provisions "unambiguously" authorize a ***refund to customers*** where a utility has implemented increased base rates on a temporary basis pending the delayed issuance of a final rate determination by PURA or during the resolution of an appeal. In other words, §§ 16-19(b) and (c) operate ***to validate Aquarion's request*** of this Court, which is to allow (higher) existing rates to remain in place subject to refund to customers should Aquarion lose its appeal. Nothing in these subsections authorizes an override of the prohibition on retroactive ratemaking through a court-mandated surcharge effectively increasing prospective rates to customers to recover a retroactive loss.

B. "Actual Regulatory Precedent" Does Not Authorize the Court to Contravene the Prohibition on Retroactive Ratemaking.

"Actual regulatory precedent" also does not support PURA's proposition that the Court may contravene the prohibition on retroactive ratemaking. (Obj. at 7). For this proposition, PURA cites to a single case, CL&P v. PUCA, 176 Conn. 191 (1978), where the Connecticut Light & Power Company ("CL&P") prevailed on appeal after challenging PUCA's exclusion of certain discrete expense amounts from base rates.[13] PURA's recitation of this case is thoroughly misplaced given that there is no discussion of retroactive ratemaking in the decision and no mention of § 4-183(k) as a method of overriding the prohibition on retroactive ratemaking. In this decision, the Supreme Court found PUCA's decision denying recovery of these cost items to be "arbitrary." Id. 214-15. Accordingly, the Supreme Court remanded the matter to the trial court,

[13] In base-rate proceedings filed by CL&P and its affiliate the Hartford Electric Light Company ("HELCO") in 1977, PUCA excluded from base rates certain amortizations previously authorized for recovery but not yet fully paid back to CL&P and HELCO through customer rates, contending that the amortization was exhausted on CL&P's and HELCO's books. On judicial review, the Connecticut Supreme Court concluded that CL&P and HELCO were entitled to recover the entire original amount given that PUCA had previously authorized recovery of the original cost on an amortized basis in a previous ratemaking proceeding. CL&P, 176 Conn. at 213-215. "Amortization" occurs where a single cost item is allowed for recovery in rates but divided in equal, annual installments to constitute a recurring expense. In that case, even though a year or two was remaining on the installments in question, the PUCA incorrectly disallowed recovery of the remaining installments in rates.

the trial court vacated and remanded the decision to PUCA stating only that "the issues and time of recovery of uncollected amortization of expenses are … remanded to [PUCA] for further consideration."[14] Docket No. 143947, Dec. 19, 1978. CL&P proposed the surcharge to collect the designated amount.

PURA's only point in raising this case appears to be to create the opportunity to mention that CL&P, Aquarion's affiliate within the Eversource Energy enterprise, proposed to recover "said amounts" in the remand proceeding before the agency through a temporary surcharge, as if proposing a surcharge in one instance under entirely different circumstances commits Eversource and its affiliates to the principle that any and all circumstances on appeal may be addressed through a surcharge, thereby effecting an override of Connecticut law recognizing the prohibition on retroactive ratemaking. (Obj. at 8). However, the circumstances of CL&P v. PUCA, 176 Conn. 191 (1978), are totally distinct and, in fact, did not trigger an instance of retroactive ratemaking – as PURA acknowledges in a footnote in its Opposition to the Stay.[15] (Obj. at 9, fn.6.) Instead, the amounts allowed for recovery in that case were fixed, non-recurring, single year "installments" that were excluded from base rates and no change in base rates ultimately arose from the reviewing courts' invalidation of PURA's decision.

By comparison, Exhibit 5 shows that every element of the rate-setting formula for base rates is implicated in Aquarion's appeal. Consequently, should Aquarion prevail on appeal, it will be necessary for the Court to remand the matter to PURA for a new ratemaking proceeding with the direction for PURA to correct its legal errors, inevitably leading to a base-rate increase. Recovering the losses experienced by Aquarion calculated as the difference between the rates set in the unlawful Decision and the base rates set on remand ***is the essence of retroactive ratemaking***.

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[14] Exhibit 4 provides a copy of the relevant document.

[15] An explanation of the reasons that the circumstances in CL&P, 176 Conn. 191, ***did not*** constitute retroactive ratemaking is set forth the DPUC Brief filed by Robert L. Marconi, Assistant Attorney General in OCC v. DPUC, 279 Conn. 504 (2006). See Ex. 2.

C. Case Law from "Several Courts" Does Not Authorize the Court to Contravene the Prohibition on Retroactive Ratemaking.

PURA further argues that "several courts" have held that "retroactive ratemaking does not bar a reviewing court's remedies in an administrative appeal." (Obj. at 9, 10). However, this broad declaration is inaccurate and misrepresents the decisions so cited. None of the cases cited are Connecticut cases and none were decided in the context of Connecticut statutory and case law, where: (1) the prohibition on retroactive ratemaking is recognized under Connecticut law; (2) there is a statutory provision for stay of an agency decision (§ 4-183(g)); and (3) there is a unique statutory provision specifying the scope of the reviewing court's authority in providing a remedy for an agency decision subject to judicial review (§ 4-183(k)). Other important distinctions abound in the cited case law. For example, PURA cites In re Island Hi-Speed Ferry, LLC, 852 A.2d 524 (R.I. 2004), as establishing that the "general rule against retroactive ratemaking is not strictly applied when a court is attempting to remedy a utility commission's previous procedural mistakes." (Obj. at 10). However, this language is quoted verbatim from the ***dissenting opinion*** of Justice Flanders. 852 A.2d at 530-534 (Flanders, J., dissenting). In fact, the majority opinion rejected the appellant's challenge seeking a refund from the ferry company holding that, "any changes to the rates for [past ferry seasons] would constitute retroactive ratemaking by the [public utility commission]." Id. at 528.

Above all else, all of these cited cases involve the unifying principle that a refund of revenue to customers is necessary in circumstances where: (1) a utility requested a rate increase; (2) a public utility commission granted an increase in rates, which the utility began to collect; (3) the final rate decision was invalidated by the reviewing court rendering the higher rate to be unlawful; and (4) the utility is therefore directed to ***refund*** the revenues collected through the unlawful base rate that is "in excess" of the base rate previously approved by the public utility commission, which therefore constituted a violation of law. All states possess some version of Conn. Gen. Stat § 16-19(a), mandating that no utility company may charge rates in excess of those lawfully approved by the public utility commission in a previous rate proceeding. Thus, the

unifying principle of these cases is that statutory law ***demands*** a refund of revenues to customers where the rate increase is subsequently held unlawful, as is the case under Connecticut statutory law in §§ 16-19(b) and (c). Also, in these cited cases, the amount of the refund was determined by comparing the difference between the higher rates approved by the public utility commission (invalidated on appeal) and the lower rates resulting from a remand proceeding that implemented the reviewing court's decision on appeal, i.e., customers were made whole for the objective measure of their damages. See, e.g., Indep. Voters of Ill., 117 Ill. 2d at 105; Public Service Comm'n v. Southwest Gas Corp., 99 Nev. 268, 278 (1983).

There is no parallel statutory provision in any state in the U.S. that requires customers to hold their utility harmless for ***lost revenue*** experienced because rates put in place as a result of a final rate determination are "unlawfully" lower than the rates that would have been put in place had a valid rate decision been rendered. Nor does PURA provide any such authority, statutory or otherwise, supporting its premise that customers may be surcharged at the direction of this Court to make Aquarion whole for the amount of its past losses experienced due to PURA's invalid rate decision. Thus, PURA is advocating a legal theory that would put this Court in the position of granting retroactive recovery ***of any and all amounts*** restored to Aquarion as a result of this appeal effective to the date of PURA's decision on March 15, 2023, including interest for the time value of money lost during the pendency of the appeal – in order to keep the Company whole in lieu of a stay.[16] Aquarion calculates the retroactive amount that would be owed by customers to the Company as at least $17 million on a rolling 12-month basis, were the Company to prevail on all claims raised in the appeal, layered on top of a prospective rate increase of at least $15 million resulting from the Court's remand, with the $2 million rate reduction as the difference.[17]

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[16] Similarly, the customer refund provision in §§ 16-19(b) and (c) expressly provides for the inclusion of interest charges on any amounts wrongfully collected by the utility.

[17] Affidavit of Debra A. Szabo, CPA, Aquarion's Director of Rates and Regulation. See Aquarion Administrative Appeal, Tab D, at Exh. A, pages 2, 6.

III. PURA Misstates the Standard of Review Applicable to the Motion for Stay.

In Section IV.A of its Opposition, PURA initially correctly cites the applicable standard of review for the granting of a stay as set forth in Griffin Hospital v. Commission on Hospitals & Health Care, 196 Conn. 451 (1985). However, PURA then substitutes a *different* standard of review – applicable only on the *merits* of this action – in an erroneous attempt to portray the standard for granting of a stay as being more deferential to the agency than it actually is. (Obj. at 20-21.) The "deference" discussed by the Supreme Court in CL&P v. DPUC, 216 Conn. 627, 637 (1990), has no bearing on the question before the court here, which is whether to grant the requested stay under the Griffin factors. PURA relies on two Superior Court cases that, it contends, heighten the burden on applicants for a stay of government action and require a "strong showing" that the [agency's] decision was not supported by the record. (Obj. at 20.) These cases are City of Bridgeport v. Dept. of Social Services, 2001 Conn. Super LEXIS 1534, at *7 (Conn. Super. June 4, 2001), and Fleet Nat. Bank v. Burke, 45 Conn. Supp. 566, 570-71 (1998) (arguing that "'Courts will act with extreme caution where the granting of [a stay] will result in embarrassment to the operations of government.'"). However, neither Bridgeport nor Fleet National Bank modify the Griffin standard applicable here. Nowhere does Griffin contemplate that a particularly "strong showing" is necessary where the requested stay would "embarrass" the operations of government. Even if such requirements were grafted on to the Griffin standard, the present motion is distinguishable.[18]

Accordingly, PURA's argument is baseless and runs contrary to the rule specific to utility rate decisions long-established by the U.S. Supreme Court holding that a stay is appropriate where,

[18] First, Bridgeport involved a financial dispute between two governmental entities – a municipality and a state agency. Nowhere did the court contemplate any modification of the Griffin factors where a stay of agency action is sought by a utility. Further, the language in the Fleet National Bank case, warning of "embarrassment to the operations of government," is drawn from older cases that significantly pre-date Griffin and cannot be relied upon as authoritative guidance for the current standard. 45 Conn. Supp. at 571 (quoting Wood v. Town of Wilton, 156 Conn. 304, 310 (1968)). Even if Griffin required the court to consider potential "embarrassment" to government operations, no such embarrassment is present in this case. This case arises from a rate decision appeal procedure that is specifically authorized by statute, and the availability of a stay of agency action pending appeal is expressly provided for in § 4-183(f). To refrain from entering a statutorily authorized stay due to concern over "embarrassing" the agency would gut that essential remedy.

as here, there is a potential for an erroneous rate decision to cause irreparable harm. Prendergast v. N.Y. Tel. Co., 262 U.S. 43, 49 (1923) (affirming injunction *pendente lite* of utility rate decision because "if the rates prescribed [by the NY Public Service Commission] were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined").

IV. There Is No Risk of a "Slippery Slope" Because the Decision Is an Unlawful Outlier.

PURA argues that, if this Court were to grant a stay in this case, every rate case decision in the future will be stayed. (See, e.g., Obj. at 4.) A stay on these facts, according to PURA, is effectively a reimposition of the automatic stay that was removed from the statutory scheme in 1976. PURA further alleges that "if [Aquarion's] contention is accepted, public service companies can receive a stay whenever they contend that PURA's decision falls short of what the company believes it is entitled to." (Id. at 5). However, this overblown contention is pure exaggeration.

The strict legal standards and fact-specific assessments that underlie the stay process ensure that no such risk of a "slippery slope" exists. The Court need only assess the basic background of this matter to recognize this point. Here, the unique considerations that set this case apart include: (1) unique circumstances involving a utility request to change base rates for the first time in nearly 10 years, resulting in a base-rate reduction despite dramatic inflationary impacts over the decade and the unremunerated investment of hundreds of millions of dollars in the interim; (2) the issuance of a final decision replete with manipulations of evidentiary showings, rule changes without notice, extensive reliance on extra-record evidence, and contrived mathematical computations; and (3) the transcribed deliberations of two of the three Commissioners at the public meeting adopting the final decision acknowledging that the Decision was arbitrary and capricious in parts. Thus, the point is clear -- this Decision is a unicorn and not the product of good-faith agency decision making. Unless PURA has gone fully off the rails, the appeal of this Decision will be readily distinguishable from future appeals with none of the above-listed distinctive characteristics.

Similarly, PURA argues that courts are to act "with extreme caution when granting a stay [that] will frustrate the operations of government." (Obj. at 17-18.) However, when the case law is analyzed, what becomes clear is that the test to sustain the stay remains the same, i.e., the Court is asked to recognize that, in assessing the balance, it is weighing a request related to governmental action. PURA does not suggest – nor could it – that when a governmental agency's actions are arbitrary, capricious, or otherwise contrary to law, it should nonetheless be protected against an otherwise appropriate stay.

Moreover, broad judicial statements related to enjoining the government typically arise in cases where, for example, a party seeks to halt authorized governmental actions. E.g., Wood, 156 Conn. at 310 (seeking to enjoin town's selection for a refuse-disposal operation); Coombs v. Larson, 112 Conn. 236 (1930) (seeking to enjoin the enforcement of a residential zoning scheme); Fleet Nat'l Bank, 45 Conn. Supp. at 570-71 (seeking to enjoin Banking Commissioner's authority to enforce state statute against ATM charges to non-customers).[19] In other words, governmental agencies are not immune from a judicial stay. Rather, their actions may be stayed if the relevant test is satisfied under the particular circumstances at hand.

V. Aquarion Is Likely to Prevail on the Merits of the Appeal.

Aquarion is likely to prevail on the merits of the 12 counts put forth in the appeal petition for the reasons stated therein. PURA's Opposition addresses only the overall level of the rate decrease ordered by the Decision; (Obj. at 22-23); and Count Two of Aquarion's appeal. (Id. at 23-24.) Aside from broadly alleging that Aquarion will not prevail on the merits of the appeal, Section IV.B of the Opposition does not address the merits of the remaining 11 counts alleged by the Company. (Obj. at 22-23.) No specific details on the remaining 11 counts are argued or rebutted in Section IV.B of the Opposition, nor is any case law cited. Therefore, by default, PURA cannot prevail on this prong of the Griffin test.

[19] As the Supreme Court recognized in Wood, 156 Conn. at 310: "Of course, if the evidence clearly demonstrates that a particular method of refuse disposal will, at a given location, be a nuisance and that irreparable harm will result therefrom, the proposed operation may be enjoined."

Regarding Count Two, which PURA addressed in Section IV.C of its Opposition, Aquarion demonstrated that PURA arbitrarily denied recovery of the costs of infrastructure projects completed between September 1 and December 15, 2022. (Appeal Petition at ¶¶ 83-103.) Recognizing it has no valid justification for selecting the arbitrary cut-off date of August 31, 2022, PURA now attempts to create a new justification after-the-fact. Specifically, PURA now alleges that § 16-1-58 of its regulations authorized it to establish this arbitrary cut-off date. However, there is no reference to § 16-1-58 in the Decision and no indication that PURA ever considered it, prior to this appeal. Similarly, PURA alleges that § 16-1-58 did not allow Aquarion to introduce evidence on projects completed after August 31, 2022, unless PURA granted permission to do so. (Obj. at 24.) However, PURA's claim is contradicted by the record because evidence on the post-August 31, 2022 projects was filed in response to PURA's request for this data. (See Q-RRU-132, Q-RRU-133; 11/22/22 Tr. at 97, 98.) PURA therefore cannot claim that Aquarion failed to receive PURA's permission to submit this evidence when PURA itself directed Aquarion to file it.

Lastly, PURA concedes (as it must) that § 16-1-58 allows Aquarion to submit evidence on post-August 31, 2022 infrastructure projects within 30 days of the filing of its rate application. (Obj. at 24.) This concession is fatal to PURA's argument because Aquarion's original rate application included detailed evidence on post-August 31, 2022 infrastructure projects. (See, e.g., 08/29/22 Rate Application at Sched. B-2.2 B (1).)

VI. Conclusion

PURA's arguments to avoid a stay are without a basis in law. Aquarion's appeal has merit and the requested stay protects the public interest. The status quo should continue to be maintained by staying Order Nos. 1, 2, and 3 while the appeal is considered to avoid further irreparable harm to the company.

Respectfully submitted,

THE PLAINTIFF-APPELLANT
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– Its Attorneys –

CERTIFICATE OF SERVICE

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on May 8, 2023, 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

Decision Date		3/15/2023	
Order No.	**Topic**	**Order**	**Does Aquarion Seek a Permanent Stay?**
1	ACAM	On or after the issuance date of the Decision, the Company shall comply with updated ACAM results, where appropriate, to reflect adjustments the Authority has made in the Decision.	Yes
2	Rate Design	No later than 10 days after issuance of the Decision, the Company shall file as a compliance filing a revised single year rate design plan consistent with the Authority's findings contained in the Decision thatwill include revised tariffs and revenue proof.	Yes
3	Rate Design	No later than 10 days after issuance of the Decision, the Company shall design a three-tiered volumetric rate structure for singlefamily residential customers, with the first tier up to 9 CCF, the second tier above 9 to 20 CCF, and the third tier over 20 CCF	Yes
4	LIRAP	No later than 30 days after issuance of the Decision, the Company shall submit samples of each type of communication it will provide, including reenrollment communications and sample bills. Prior to filing such materials, the Company shall make the materials available to, at a minimum, OCC, EOE, and Operation Fuel for the organizations' review and feedback, with at least five business days' notice prior to the filing date.	No
5	LIRAP	No later than 30 days after issuance of the Decision, the Company shall submit as a motion for review and approval a detailed proposal to partner with the CAAs to enroll customers into the LIRAP, including the costs associated with the partnership and a draft memorandum of understanding to facilitate such arrangement, if approved.	No
6	LIRAP	No later than 30 days after issuance of the Decision, the Company shall submit as a motion for review and approval a detailed data-sharing proposal to share data with CL&P, Yankee, and DSS, including costs and a timeline to implement.	No
7	LIRAP	No later than 30 days after issuance of the Decision, the Company shall submit as a motion for review and approval a detailed cost proposal to configure its SAP system to allow for the addition of two or more LIRAP tiers, including a timeline for implementation of such proposal	No
8	Fee Free	No later than 30 days after issuance of the Decision, the Company shall implement the Fee Free program.	No
9	Performance Metrics	No later than May 1, 2023, the Company shall submit as a motion for review and approval the data for each year from 2017 through 2022 required to calculate each of the performance metrics in Section VI.B.5., Performance Metrics.	No
10	Diversions	No later than May 1, 2023, Aquarion shall submit as a compliance filing a detailed plan regarding how it will bring the Company's diversion permit and registration into compliance.	No
11	LIRAP	No later than one week after the Company's agreement with Operation Fuel regarding the administration of LIRAP is fully executed, and no later than 60 days after issuance of the Decision, Aquarion shall submit the agreement as a compliance filing. The agreement shall make clear the duration of its applicability and the process for establishing and revising applicable fees, among other things	No
12	LIRAP	No later than 60 days after issuance of the Decision, the Company shall implement LIRAP, as modified in Section VIII.F.1., Low-Income Rate Assistance Program, with an eligibility cap of 60% SMI.	No
13	Annual Conservation Expense	No later than 60 days after issuance of the Decision, the Company shall provide as a compliance filing projections associated with conservation expenditures to be made in the first rate year (i.e., March 15, 2023 – March 14, 2024), as well as for the subsequent two rate years. Such projections shall include, at a minimum, budgeted values on a per measure (or per sub-program) basis for administrative and customer incentive costs, as well as for the projected water and electricity (if applicable) savings.	No

Decision Date		3/15/2023	
Order No.	**Topic**	**Order**	**Does Aquarion Seek a Permanent Stay?**
14	Customer Complaints	No later than 60 days after issuance of the Decision, the Company shall submit a compliance filing detailing at minimum: a. metrics to be discussed at its meetings with EOE; b. written processes and procedures governing how KPI data is used to improve the efficacy of Aquarion's communications with customers; b. proposed standing agenda; c. proposed frequency of the meetings, which shall not be less than quarterly; and d. proposed Company attendees (by job title). Prior to submission of the compliance filing, the Company shall provide EOE no less than 15 business days to review and provide feedback on such proposal. To the extent that EOE's feedback is not incorporated, the Company's submission to the Authority shall include a detailed narrative as to why.	No
15	Customer Service	No later than 60 days after issuance of the Decision, the Company shall revise its customer notices (e.g., Welcome Letter, online application form, receipt upon collecting security deposit) to educate customers about the process of requesting a return of their security deposit and submit them as a compliance filing.	No
16	Customer Service	No later than 60 days after issuance of the Decision, the Company shall revise its application form to include the provisions of Conn. Agencies Regs. § 16-11-68(b) and its internal procedures so that in the event the form is being completed over the telephone, a prospective customer is made aware of the security deposit exemptions, and the Company shall submit such revised application form and internal procedures as a compliance filing.	No
17	LIRAP	No later than 90 days after issuance of the Decision, the Company shall submit as a compliance filing a proposal to eliminate the reenrollment process for LIRAP customers who change addresses within Aquarion service territory.	No
18	Conservation	No later than September 29, 2023, Aquarion shall: a. Hire a third party, approved by DEEP, to conduct a Withdrawal Impact Study at Bissell Brook and Cobble Brook; b. Conduct the Withdrawal Impact Study at Bissell Brook and Cobble Brook; and c. Submit the results of the Withdrawal Impact Study to DEEP and the Authority as a compliance filing	No
19	Performance Metrics	No later than January 15, 2024, and annually thereafter, the Company shall submit as a compliance filing detailed information regarding whether Aquarion met or exceeded each of the metrics in Section VI.B.5., Performance Metrics, during the previous calendar year. The compliance filing shall include an unlocked workable Excel spreadsheet providing the data on which the Company relied in making its determination	No
20	LSLR Program	No later than January 15, 2024, and annually thereafter, the Company shall submit as a compliance filing information regarding the LSLR Program, including at a minimum the number of Company service lines replaced in the previous calendar year, the number of customer service lines replaced in the previous calendar year, and information regarding the cost of such replacements and the associated funding source, such as the amount of DWSRF money applied	No

Decision Date		3/15/2023	
Order No.	**Topic**	**Order**	**Does Aquarion Seek a Permanent Stay?**
21	LIRAP	No later than February 1, 2024, and annually thereafter, the Company shall submit as a compliance filing the information on the enumerated list in Section VIII.F.1.j., Reporting Requirements, based on the data from the previous calendar year, i.e., January 1 through December 31. Aquarion shall work with EOE and OCC, as well as any other interested stakeholders, to develop additional recommended reporting requirements to track the benefits and drawbacks of LIRAP, including a mechanism for identifying and tracking LIRAP offsets, and to submit the recommendations with its annual compliance filing.	No
22	RAM	No later than February 1, 2024, and annually thereafter, the Company shall submit its annual RAM filing. Such filing shall include, among other things: a. The amount of the Aquarion officer compensation and the Management Fee that customers are paying through base rates and through the RAM, or conversely how much is being returned to customers through the RAM, in accordance with Sections VI.B.2.c, Officer Compensation, and VI.B.4, Management Fee Compensation, respectively; b. The revenue shortfall in a given calendar year resulting from the provision of LIRAP that the Company believes to be prudently incurred. The Company shall quantify and include a narrative explanation in its compliance filing of any variance of the annual RAM expenses (e.g., uncollectibles, payment plans, late payments, etc.) that may be impacted by the establishment of LIRAP; c. The amount of revenues collected from late payment fees, which shall be used as a "surplus" for RAM purposes that will serve to offset potential revenue shortfalls; and d. Information regarding the Company's actual bad debt expense.	No
23	RAM	No later than February 1, 2024, the Company shall submit in its 2023 RAM filing, the amount of bad debt expense to be measured against as the pro rata share of bad debt expense embedded in rates from the 2013 Decision and the amount included from this rate case as of the date of the Decision.	No
24	Fee Free	(Fee Free) No later than March 1, 2024, and annually thereafter, the Company shall file the following data for the immediately preceding calendar year: a. The number of credit/debit card payments; b. All costs associated with the following payment methods: i. credit/debit card payments; ii. checks; iii. payments in person at payment locations; and iv. payments online or by phone – One Time Payments; c. How quickly payments are being received from the date a bill issued; d. The number of credit card payments made by financial hardship customers, if the Company has implemented a customer code for such designation; e. The annual amount of uncollectibles; f. The qualitative improvements in customer satisfaction with the option; and g. The annual amount of write-offs.	No
25	EADIT	No later than March 15, 2024, the Company shall hire an independent third-party accounting firm, (i.e., not its current financial statement auditor) to perform a review to vet both the quantification and categorization of Aquarion's claimed EADIT in accordance with Section VI.E.4., Excess Accumulated Deferred Income Taxes, and shall submit the results of the review as a motion for review and approval. The cost of this review shall not be recoverable in rates	No

Decision Date		3/15/2023	
Order No.	**Topic**	**Order**	**Does Aquarion Seek a Permanent Stay?**
26	Annual Conservation Expense	No later than June 1, 2024, and annually thereafter, the Company shall provide an annual compliance filing indicating its performance associated with conservation expenditures during the previous rate year against the previously submitted targets.	No
27	LIRAP	No later than June 1, 2025, the Company shall explore a billing system modification that would allow for financial hardship coding of Aquarion's residential customers and submit as a motion for review and approval a detailed billing system modification proposal, including the costs and implementation timeline associated with the proposal.	No
28	LIRAP	No later than January 1, 2026, the Company shall submit a detailed proposal containing modifications to the LIRAP, such as a tiered discount, including the number of tiers and amount of the discount, changes to the eligibility requirement, and cost control measures, and a detailed proposal regarding the implementation of an arrearage forgiveness program. The proposals shall include the costs and an implementation timeline to make such modifications and implement an arrearage forgiveness program. The Company shall share its proposals with EOE and OCC, as well as any other interested stakeholders, at least 60 days prior to its filing and incorporate feedback prior to submission to the Authority	No
29	Annual Conservation Expense	No later than January 15, 2026, provided Aquarion has not filed an intervening rate proceeding, the Company shall submit as a compliance filing annual projections associated with conservation projections for the three years commencing March 15, 2026. Such projections shall include, at a minimum, budgeted values on a per measure (or per sub-program) basis for administrative and customer incentive costs, as well as for the projected water and electricity (if applicable) savings.	No
30	Annual Conservation Expense	No later than September 15, 2026, and every three years thereafter, the Company shall submit as a compliance filing the independent EM&V consultant's report regarding the consultant's review and assessment of Aquarion's conservation program results after every three years of implementation, including for the expenditures authorized in the Decision.	No
31	Communication	The Company shall meet with EOE on a regular basis, but no less than once per month, to discuss: a. Aquarion's planned and executed communications with customers, including through the provision of KPI data that is provided on an, at minimum, quarterly basis; b. Outstanding customer complaints, covering both those complaints and inquiries submitted to the Authority as well as those routed directly to the Company; and c. Performance metrics tied to customer complaints, including any improvements thereto, and how such metrics regarding customer complaints about water quality and quantity issues tied to infrastructure improvements.	No
32	Employee Time	The Company shall track the amount of time Aquarion employees spend volunteering during paid working hours. In its next rate case application, the Company shall provide an unlocked, workable Excel spreadsheet that details the requested information for each year between 2023 and through the test year proposed in the next rate proceeding	No

Decision Date		3/15/2023	
Order No.	**Topic**	**Order**	**Does Aquarion Seek a Permanent Stay?**
33	ESM	The Company shall calculate any future determination of the ESM ROE using the lesser of Aquarion's authorized equity position or the lesser of the actual equity carried position for the relevant period-end	No
34	LSLR Program	No later than 30 days prior to commencing its LSLR Program, the Company shall file as compliance a copy of its customer contract and any related materials associated with the LSLR Program	No
35	Acquisitions	The Company shall track all employee time spent on any future acquisitions, including mergers. As an addendum to the Company's next rate case filing, the Company shall append an unlocked, workable Excel spreadsheet that details the requested information for each year between 2023 and through the test year proposed in the next rate proceeding	No
36	LIRAP	The Company shall cross-file all motions and compliance filings required by this Decision that are associated with LIRAP in this docket and in the applicable current year's RAM proceeding.	No
37	LPCs	After implementation of LIRAP, the Company shall allow its customer service representatives to waive LPCs when establishing reasonable payment plans for customers receiving LIRAP. After implementation of a billing system modification required subsequent to a motion ruling on Order No. 27, the Company shall allow its customer service representatives to waive LPCs for financial hardship customers, including customers receiving LIRAP, when establishing reasonable payment plans	No
38	Rate Case	In its next rate case application, the Company shall provide: a. A breakdown of costs included in the planned annual conservation expense, as well as a cost-benefit calculation of the total conservation expense; and b. invoices provided by third parties for each year of conservation expenditures incurred in the intervening years between rate cases, along with a narrative and data that compares and contrasts the authorized annual conservation expenses with actual expenditures, as well as the savings targets compared to actual realized savings.	No
39	Rate Case	In its next rate case application, the Company shall provide a separate schedule for each O&M expense item included in the Test Year and for pro forma ratemaking purposes in the Rate Year.	No
40	Rate Case	In its next rate case application, the Company shall provide a separate schedule for SERP expense that includes a detailed breakdown of the actual amount of SERP expense proposed, both direct and allocated	No
41	Rate Case	As a prerequisite to cost recovery associated with prospective logger investments, the Company shall conduct a cost/benefit analysis of the installation of loggers compared to other leak detection tools or mitigation measures, and submit the results of such analysis coincident with any rate amendment application through which associated cost recovery is sought.	No
42	Rate Case	In its next rate case application, the Company shall provide an analysis of a program that uses the fees collected by the LPCs as "crisis grants" to be awarded to income-qualified customers who are most at risk for disconnection.	No
43	Rate Case	In its next rate case application, the Company shall provide an analysis of the type of customers who incur late payment charges; the average, maximum, and minimum late payment charges incurred by customers, by class, in a given year; and the impact LPCs have on uncollectibles.	No

Exhibit 2

2005 WL 6109632 (Conn.) (Appellate Brief)
Supreme Court of Connecticut.

OFFICE OF CONSUMER COUNSEL, Plaintiff-Appellant,

v.

STATE OF CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL & The Connecticut Light and Power Company, Defendants-Appellees.

No. 17465.
September 29, 2005.

Brief of State of Connecticut Department of Public Utility Control With Separate Appendix

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***i** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

CASES

*ii STATEMENT OF ISSUES

A. THE COURT'S STANDARD AND SCOPE OF REVIEW IS DE NOVO, BUT WITH A PRESUMPTION OF VALIDITY OF THE DPUC'S RULING. P.3

B. THE DPUC DID NOT ERR IN ALLOWING CL&P RECOVERY FOR ITS PENSION EXPENSE. P.7

*1 STATEMENT OF THE FACTS

The plaintiff, the State of Connecticut Office of Consumer Counsel ("OCC"), filed this administrative appeal from a decision of the defendant State of Connecticut Department of Public Utility Control ("DPUC" or "Department") in Docket Number 03-07-02RE01, *Application of the Connecticut Light and Power Company to Amend its Rate Schedules - December 31, 2003 Petition for Reconsideration,* dated August 4, 2004 (hereinafter, the "DPUC Decision", see DPUC Record, XI, Appendix to this Brief, pages A2 -A17). (Note: The "DPUC Record refers to the DPUC administrative record filed with the Superior Court, which is also called the Return of Record.) The appeal to the Superior Court was filed in accordance with Conn. Gen. Stat. § § 16-35 and 4-183 (Appendix to this Brief, pages A18 and A19-A25); the OCC's appeal to this Court from the Superior Court was filed in accordance with Conn. Gen. Stat. § 4-184 (Appendix to this Brief, page A25). The Connecticut Light & Power Company ("CL&P") is also a defendant.

This administrative appeal is the result of the DPUC reconsidering is final decision dated December 17, 2003 in Docket No. 03-07-02, *Application of the Connecticut Light and Power Company to Amend its Rate Schedules,* ("the underlying DPUC Decision"). (Note: Relevant excerpts of this Decision are reproduced in the Appendix to this Brief, pages A26- A39.) The underlying DPUC Decision denied recovery to CL&P of certain pension expenses. CL&P claimed that the DPUC created a regulatory asset of $15.7 million in pension expenses in its decision in DPUC Docket No. 92-11-11, *Application of The Connecticut Light and Power Company to Amend its Rate Schedules* (June 16, 1993) (hereinafter, the "1993 DPUC Decision") (Note: Relevant excerpts of this Decision are reproduced in the Appendix to this Brief, pages A40-A56.) CL&P filed its petition for ***2** reconsideration on or about December 31, 2003. DPUC Record, l. 1. On January 21, 2004, the DPUC agreed to reconsider the underlying DPUC Decision. DPUC Record, I. 2. Pursuant to a Notice of Hearing dated March 26, 2004, the DPUC held a hearing at its offices on April 12, 2004, and a further hearing on April 15, 2004. DPUC Record, VI. Briefs were filed by parties and intervenors, Record, VII, a Draft Decision was issued by the DPUC on June 24, 2004. DPUC Record, IX. Parties and intervenors filed written exceptions, DPUC Record, X, and the DPUC issued a Revised Draft Decision on August 2, 2004. The DPUC's final Decision after reconsideration (the subject of this appeal) was issued on August 4, 2004, DPUC Record, XI, Appendix, A2, reversing itself and agreeing with CL&P on the recovery of the pension expenses, but holding that the 1993 DPUC Decision did not create a regulatory asset, but permitted recorded deferred charges. (The DPUC also reversed itself on another issue that was the subject of the administrative appeal before the Superior Court, but is not the subject of the instant appeal before this Court.) The plaintiff OCC filed the initial administrative appeal to the Superior Court. After the filing of briefs and the hearing of oral argument, the Superior Court dismissed OCC's administrative appeal on the merits. *Office of Consumer Counsel v. Connecticut Department of Public Utility Control,* Docket No. CV 04-4001457-S, Superior Court of Connecticut, Judicial District of New Britain, Cohn, J. (2005), 2005 WL 1023309 (copy at Appendix to this Brief, pages A57-A61). The plaintiff OCC then filed the instant appeal with the Appellate Court and on July 13, 2005, this Court transferred the appeal to itself.

***3 ARGUMENT**

A. THE STANDARD AND SCOPE OF REVIEW.

Judicial review of decisions of the State of Connecticut Department of Public Utility Control is governed by Conn. Gen. Stat. § 16-35 and 4-183. Conn. Gen. Stat. § 16-35 provides, in part, that, "Any person, ... , aggrieved by any order, authorization or decision of the Department of Public Utility Control,..., in any matter to which such person was or ought to have been made a party or intervenor, may appear therefrom in accordance with the provisions of section 4-183. ..." This statute incorporates the provisions of Conn. Gen. Stat. § 4-183, rather than creating an independent right of appeal. *See Southern New England Telephone Company v. Department of Public Utility Control,* 64 Conn.App. 134, 139-140, 779 A.2d 817 (2001), certification granted, 258 Conn. 922, 782 A.2d 1252, appeal dismissed, 260 Conn. 180, 799 A.2d 294 (2002). *See also Connecticut Light and Power Company v. Department of Public Utility Control,* 40 Conn.Supp. 520, 516 A.2d 888 (1986). In that case, Judge Satter noted, "Pursuant to § 16-35 of the General Statutes, appeals from orders of the DPUC are governed by § 4-183 of the uniform administrative procedure act." *Id,* 40 Conn.Supp. at 528. Thus, cases interpreting the scope of judicial review under Conn. Gen. Stat. § 4-183 are controlling on this appeal.

The scope of review in an administrative appeal, such as this case, is limited. In *Lawrence v. Kozlowski,* 171 Conn. 705, 372 A.2d 110 (1976), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977), this Court, in reviewing an appeal from a decision of the Commissioner of Motor Vehicles, noted, "Judicial review of the commissioner's actions is governed by the Uniform Administrative Procedure Act (hereinafter the UAPA), ***4** and the scope of that review is very restricted." *Id.,* 171 Conn. at 707 (footnote omitted). The judicial review portion of the UAPA, Conn. Gen. Stat. § 4-183, states, in part:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that the 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.

Conn. Gen. Stat. § 4-183(j).

The standard of review is broader when the Court is deciding legal questions, rather than reviewing the agency's factual findings. In *Office of Consumer Counsel v. Department of Public Utility Control,* 252 Conn. 115, 742 A.2d 1257 (2000), the Connecticut Supreme Court held that while an "agency's factual and discretionary determinations are to be accorded considerable weight by the courts.... Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion ..." *Id.,* 252 Conn. at 120. Nonetheless, Connecticut's courts have long upheld the principle that the burden is on the plaintiff challenging an administrative decision. Lovejoy v. Water Resources Commission, 165 Conn. 224, 229, 332 A.2d 108 (1973); *Demma v. Commissioner of Motor Vehicles,* 165 Conn. 15, 16-17, 327 A.2d 569 (1973); *Baker v. Planning and Zoning Commission of the Town of Fairfield,* 212 Conn. 471,478-479, 562 A.2d 1093 (1989).

Further, merely finding error is insufficient for a reviewing court to reverse an agency decision. Section 4-183 (j) permits the Court to overturn an agency's decision only if "*the* ***5** *court finds that the substantial rights of the person appealing have been prejudiced*" because of certain enumerated errors or violations of law. Thus, the Court must find that the plaintiff was materially

prejudiced by the error. In *Merchant v. State Ethics Commission,* 53 Conn.App. 808, 733 A.2d 287 (1999), the Appellate Court, applying earlier rulings of this Court, held:
"[N]ot all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown." (Internal quotation marks omitted.) *Jutkowitz v. Department of Health Services,* 220 Conn. 86, 97, 596 A.2d 374 (1991). "An administrative hearing is not 'tainted' by procedural irregularities unless substantial rights of the parties have been prejudiced." *Owens v. New Britain General Hospital,* 32 Conn.App. 56, 69 n.5 , 627 A.2d 1373, affd, 229 Conn. 592, 643 A.2d 233 (1994).

Even assuming that the commission committed all of the procedural errors alleged, the plaintiff failed to show that his substantial rights were prejudiced by the actions of the commission. In the absence of showing prejudice, the plaintiff failed to show that his hearing was tainted by the alleged errors and that the fairness of the hearing was compromised. Under these circumstances, we will not vacate the decision of the commission.

Id., 53 Conn.App. at 826-827.

Last year, this upheld a DPUC decision, even after finding error, because the plaintiff failed to establish that the error prejudiced its substantial rights. *Tele Tech of Connecticut Corporation v. Department of Public Utility Control,* 270 Conn. 778, 855 A.2d 174 (2004). Thus, the plaintiff OCC has a dual burden: first, proving that the DPUC committed error, and, second, proving that the error(s) materially prejudiced it.

Finally, the DPUC notes that, while deciding issues of law, the scope of review of the Court is generally de novo, the Maine Supreme Court offered this insight in *Public Advocate v. Public Utilities Commission,* 718 A.2d 201 (Me 1998):
***6** Our review of the actions of the Commission is limited. "We defer to the Commission's choice of ratemaking methodologies or techniques." *Public Advocate v. Public Utils. Comm'n,* 655 A.2d 1251, 1253 (Me. 1995) (citing *New England Tel. & Tel. Co. v. Public Utils. Comm'n,* 448 A.2d 272, 279 (Me. 1982)). We review questions of law de novo, but "on questions involving the interpretation and application of technical statutes or regulations, we give deference to the administrative agency unless the statutes or regulations plainly compel a contrary result." *National Indus. Constructors, Inc. v. Superintendent of Ins.,* 655 A.2d 342, 345 (Me. 1995); se also *Argo v. Public Utils. Comm'n,* 611 A.2d 566, 569 (Me. 1992) ("a court will defer to an administrative agency's construction of a statute administered by it.").

Id., at 203.

In *Connecticut Light and Power Company v. Department of Public Utility Control,* 219 Conn. 51, 591 A.2d 1231 (1991), this Court indicated a similar deference:
In reviewing the administrative rate decision, the court must, therefore, "ensure that the agency's decisionmaking process was conducted pursuant to the appropriate procedures and that the outcome of the process reflects reasoned decisionmaking--a reasonable application of relevant statutory provisions and standards to the substantial evidence on the administrative record. Section 4-183(g) coupled with the presumption of validity that attends a DPUC rate order; *Woodbury Water Co. v. Public Utilities Commission,* [174 Conn. 258, 260, 386 A.2d 232 (1978)]; establishes a standard for judicial review that is appropriately deferential to agency decisionmaking, yet goes beyond a mere judicial 'rubber stamping' of an agency's decisions." *CL & P v. DPUC, supra,* 216 Conn. at 637, 583 A.2d 906.

Id.

Thus, the scope of review of the legal issues presented by the plaintiff OCC is de novo, but with a presumption of validity of the DPUC's Decision.

***7 B. THE DPUC DID NOT ERR IN ALLOWING CL&P RECOVERY FOR ITS PENSION EXPENSE.**

The underlying Decision of the State of Connecticut Department of Public Utility Control denied CL&P's requested recovery of its pension regulatory asset based on the view that CL&P proposed "creating a regulatory asset in that amount." See the underlying Decision of the DPUC, page 86. CL&P's position was that the DPUC, in its past decisions, created and recognized the subject expenses as a regulatory asset. In fact, the DPUC's past decisions created and recognized the subject pension expension expenses as recorded deferred charges that has been on CL&P's books for more than ten years. The difference is that recognizing the expenses as "recorded deferred charges" leaves "all ratemaking considerations of the deferred charges (including regulatory asset treatment and rate recovery) to be decided in a future rate case, at which all parties could present evidence on such issues." See the DPUC Decision after reconsideration (the subject decision of the instant administrative appeal), page 4, DPUC Record, XI, Appendix to this Brief, page A5.

In Docket No. 92-11-11, *Application of The Connecticut Light and Power Company to Amend its Rate Schedules* (June 16, 1993) (hereinafter, the "1993 DPUC Decision"), the DPUC stated that "[i]n the history of regulation in the State of Connecticut, 1993 is the worst year to be confronted with rate cases since the depression of the 1930's. CL&P, in recognition of the state of the economy, offered an alternate multi-year rate proposal ***8** intended to mitigate the rate shock of a potential 13.9% one-year rate adjustment." 1993 Decision at 7; Appendix to this Brief, page A51. The DPUC went on to note:

> Even with a multi-year proposal, the CL&P rate request of $358 million is the highest in its history. Could the ratepayers and the economy of the State survive such an increase? In fairness to the Company, several items in its increase request result from past legislative and state and federal regulatory mandates: the final increments of the Millstone Unit 3 and Seabrook Unit 1 rate base additions, the buyouts of two cogeneration units and the FAS 106 accounting change. In addition, there are substantial expenditures for the replacement of the Millstone Unit II steam generators, the extended nuclear outages of 1991-92, and a proposed Nuclear Performance Enhancement program, as well as the loss of revenue due to declining wholesale sales.

Id.

In Docket No. 92-11-11, CL&P submitted its estimated pension costs for fiscal years 1993 to 1995. Those costs were developed by CL&P's pension actuary in accordance with Financial Accounting Standards No. 87 ("FAS 87"). As one of a number of adjustments that the DPUC used to minimize the amount of the rate increase, the DPUC amortized a $68.3 million unrecognized pension gain over only an eight-year period, rather than the 18.3 years of amortization that was required by the FAS 87 accounting regulations. (The 18.3 years represented the average expected future working life of employees at that time.) That adjustment reduced CL&P's annual pension expense for ratemaking purposes by approximately $5 million per year for each of the three years of increases approved in that decision, or a total reduction of $15.7 million. *Id.* at 47; Appendix to this Brief, page A54.

In CL&P's written exceptions in DPUC Docket No. 92-11-11, it advised the DPUC of the potential for a write-off as a result of the DPUC's draft decision's deviation from the 18- year amortization period required by FAS 87. CL&P further advised the DPUC that the write-off could be avoided if the DPUC added certain language to the final decision to allow ***9** recognition of a regulatory asset for the difference between the pension expense recognized for ratemaking purposes and the amount required to be reflected on CL&P's books. See Docket No. 03-07-02, CL&P's December 31, 2003 Petition for Reconsideration (of DPUC Docket No. 03-07-02), DPUC Record, 1.1; Appendix to this Brief, pages A73-A74. Significantly, the precise language that CL&P requested in its exceptions to permit it to create a regulatory asset (in its view), or to record deferred charges (in the DPUC's ultimate view), and avoid a write-off was included by the DPUC in its final decision:

> the Authority recognizes the fact that as a result of using an eight-year amortization of the unrecognized net gain, the Company's pension expense for book purposes calculated under FAS 87 will be over $5 million higher [on an annual basis] than the amount to be included in rates. The Authority recognizes that, all other things being equal, ratemaking pension expenses in years 9 through 18 will be higher than the Company's FAS 87 booked pension expense.

Id., Appendix, page A74; also see Trial Court Decision, Appendix, page A58.

This case history establishes that the DPUC intended to allow CL&P to record deferred charges (CL&P argued to create a regulatory asset) to potentially allow future recovery of the difference between book and ratemaking pension expenses, even though the DPUC did not use the term "regulatory asset" as CL&P would have preferred. Accounting standards require a very high probability of recovery through future rates in order to permit a regulatory asset to be established on a utility's books. The DPUC was certainly aware of these accounting standards and that CL&P and its outside auditors would assume that the recorded deferred charges would be considered for recovery.

The next DPUC rate case Decision for CL&P was DPUC Docket No. 98-01-02. CL&P indicated that it was premature for CL&P to have requested recovery of the recorded deferred charges (again called a regulatory asset by CL&P) in that case and no mention ***10** was made of the subject charges in the DPUC Decision in that docket, yet the continued existence of the $15.7 million regulatory asset created by the 1993 DPUC Decision was reflected in the information filed in the case and was unchallenged. See DPUC Docket No. 03-07-02, CL&P Written Exceptions dated December 10, 2003 at 10; DPUC Record, I. 1; Appendix to this Brief, pages A74-A75.

CL&P's pension-related recorded deferred charges arose again in DPUC Docket No. 99-02-05, *Application of The Connecticut Light and Power Company for Calculation of Stranded Costs,* at 71 (July 7, 1999) (hereinafter, the "DPUC Stranded Cost Decision"), relevant excerpt included in the Appendix to this Brief, pages A112-A122., where CL&P requested stranded cost treatment for the generation portion of the unrecognized pension gain recorded deferred charges. The DPUC gave indications to CL&P's ability to recover these charges. Responding to arguments by the plaintiff OCC, the Attorney General and CIEC (Connecticut Industrial Energy Consumers) to eliminate the regulatory asset/recorded deferred charges, the DPUC stated "that it would be inappropriate to eliminate the regulatory obligation to recover the expense difference of the 1993-1995 unrecognized pension gain." DPUC Stranded Cost Decision at 71; Appendix to this Brief, page A121. Having explicitly reaffirmed the recorded deferred charges, the DPUC stated that its recovery "will be addressed in the Company's next rate case." *Id.* at 72; Appendix to this Brief, page A122. DPUC Docket No. 03-07-02 was "the Company's next rate case" following the DPUC Stranded Cost Decision. In this docket, CL&P proposed to recover the recorded deferred charges by amortizing it over four years.

Despite the DPUC's suggestion of the opportunity of future recovery, the plaintiff OCC's consultant in this proceeding sought to limit or negate recovery of the $15.7 million ***11** recorded deferred charges by seizing upon the phrase "all other things being equal", as used in the 1993 DPUC Decision. Tr. at 4700; DPUC Record, VI. 2. The phrase "all other things being equal", which was specifically requested by CL&P in its 1993 written exceptions, is "boilerplate" language for an economic analysis and is intended to isolate the effect of one factor on the overall analysis. As CL&P noted in a brief before the DPUC, in this instance, it was used to isolate the effect of the eight-year amortization period selected by the DPUC versus the 18.3-year period reflected in the actuaries' calculation under FAS 87, and to recognize that this approach results in lower ratemaking pension expense in the early years and higher ratemaking pension expense in the later years. The phrase "all other things being equal" did not mean that ratemaking pension expense would be greater in the future *only if* actual revenues and expenses matched the projections reflected in the DPUC's overall determination of base rates. Significantly, even though the plaintiff OCC opposed

recovery of the recorded deferred charges (what CL&P called a regulatory asset), it did not argue that neither a regulatory asset nor recorded deferred charges (for which the DPUC could later consider for recovery) had been created by the 1993 DPUC Decision. Rather, the plaintiff OCC's principal arguments were that since 1993, CL&P continued to over-collect for pension expenses from customers in the amount of $130.5 million, and that because the recorded deferred charges were recorded or the regulatory asset was created in 1993 and was not sought to be recovered by CL&P in DPUC Docket No. 98-01-02, it would be "retroactive ratemaking" to allow recovery of the recorded deferred charges at this time.

The plaintiff OCC raised the same argument as to retroactive ratemaking in the DPUC Stranded Cost proceeding, and the DPUC rejected it. DPUC Stranded Cost ***12** Decision at 71; Appendix to this Brief at A121. Recovery of the recorded deferred charges could only be retroactive ratemaking if the recording of the deferred charges had been retroactive. In this case, the recorded deferred charges were recorded by the 1993 DPUC Decision (and reconfirmed by the DPUC's renewal of its promise of consideration of recovery in the next rate case decision in the DPUC Stranded Cost Decision). In fact, it could be argued that the plaintiff OCC's proposed denial of recovery of an authorized expense based on high past returns attained by CL&P's pension plan would itself be single-issue, retroactive ratemaking. The plaintiff OCC's comparisons of past allowed and actual pension expenses would in effect retroactively establish a pension tracker, while conveniently ignoring other CL&P costs that were higher than allowed levels, and then disallow the pension-gain regulatory asset based on the market returns experienced in the years after the DPUC authorizend the recorded deferred charges.

In its December 10, 2003, Written Exceptions in DPUC Docket No. 03-07-02, CL&P cited this Court's decision in *Connecticut Light and Power Company v. Public Utility Control Authority,* 176 Conn. 191, 405 A.2d 638 (1978), for the proposition that when the DPUC allows the recording of a deferred charge or the creation of a regulatory asset in order to limit the amount of a current rate increase by requiring recovery of the expense to be spread over a future period of amortization, it is arbitrary for the DPUC to not later consider recovery of the deferred expense. That decision is applicable in the instant case. This Court specifically laid out the factual situation and its holding:

As noted previously, the PUCA authorized HELCO and CL&P to amortize the expenses incurred as a result of Storm Felix and the Millstone I outage. On the books of HELCO and CL&P, the amortization period for Storm Felix expired in December, 1976, and for the Millstone I outage, in December, 1977. In its 1977 decisions, the PUCA disallowed as an expense the amounts ***13** claimed as amortization of Storm-Felix expenses and Millstone I expenses. The grounds given for the disallowance of the Storm-Felix amortization are that: (a) the expenses were completely amortized on the books of the company as of December, 1976, and (b) the amortization was disallowed previously on December 22, 1976, in Docket Nos. 760604 and 760605. The ground given for the disallowance of the Millstone I expenses is that the expenses would be completely amortized on the books of the utilities as of December, 1977. HELCO and CL&P claimed, in their petition for review, that the PUCA erred in disallowing these amortized expenses. The trial court sustained this claim, except as to any claim previously disallowed in Docket Nos. 760604 and 760605.

With respect to this issue, the claim of HELCO and CL&P is that they are entitled to recover fully as an expense the amount of amortization allowed, and that the amortization process does not begin, for rate-making purposes, until the amortization is first claimed, for rate-making purposes, as an expense in a test year. The defendants claim that the amortization period coincides with the period during which the amortization is proceeding on the books of the utility, and that the right to claim the amortization as an expense terminates when the amortization has been completed on those books.

The proper resolution of these conflicting claims begins with an inquiry into the purpose of the action of the PUCA in authorizing amortization of these expenses. By authorizing amortization of the expenses, the PUCA implicitly finds that HELCO and CL&P may properly include the expense as an expense for rate-making purposes; otherwise there would be no purpose for seeking, and granting, the authorization. The PUCA also implicitly finds, however, that, for rate-making purposes, all of the expense should not be included as an expense in one year.

One obvious reason for not permitting all of the expense to be included as an expense, for rate-making purposes, in one year is that otherwise customers might be faced with a sudden and precipitous rise in rates. Amortization permits any rate-increase

attributable to the amortizable expense to be spread over the period of amortization. The ultimate purpose of the amortization authorization is oriented toward the rate-making process, not the internal bookkeeping of the company.

Because the ultimate purpose of authorizing amortization is to enable the utility to claim the amortizable expense in rate-making proceedings, the ruling of the PUCA that amortization would not be allowed if the expenses had been fully amortized on the books of the company is inconsistent with the purpose of its order authorizing amortization. Because of that inconsistency, the ruling is "arbitrary" within the purview of General Statutes § 4-183(g)(6).

***14** On the other hand, the amortization authorization should not be construed to permit the utilities to delay unreasonably the time when the amortization is first claimed for rate-making purposes. To permit that "would have produced the unjust effect of imposing the burden of costs incurred [at an earlier date] on ... users [at a later date] and thereafter." *Petition of New England Telephone & Telegraph Co.,* 120 Vt. 181, 186, 136 A.2d 357, 361 (1957). The determination of the time when the amortization period begins to run, for rate-making purposes, is a matter that, in the absence of a statute or regulation or order specifically making that determination, has to be left to the sound discretion of the PUCA, to be exercised under the guidelines in General Statutes § 16-19e. Accordingly, we affirm the order of the trial court remanding to the PUCA, for further consideration, the issue of the extent, if any, to which amortization of expenses of Storm Felix and the Millstone I outage should have been allowed in connection with the 1977 applications. As suggested by the trial court, in that further consideration, the PUCA may consider the extent, if any, to which the rule in *Corey v. Avco-Lycoming Division,* 163 Conn. 309, 318, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116, 93 S.Ct. 903, 34 L.Ed.2d 699, is applicable to the issue.

Id., 176 Conn. at 213-215 (footnotes omitted).

The DPUC considered the arguments of CL&P, the decision of this Court in *Connecticut Light and Power Company v. Public Utility Control Authority, supra,* as well as the opposition to reconsideration of its underlying decision denying the expenses by the plaintiff OCC and the Attorney General (AG), and decided:
The Department agrees with the OCC and AG that the Department did not in Docket No. 92-11-11 establish a regulatory asset for the unrecognized pension gain. There is, it has been held, "a fundamental difference between a decision to record deferred charges and a decision to recover deferred charges ... A decision to permit recording of deferred charges has only an indirect impact on rates, and, therefore, is not subject to the same scrutiny as a decision to raise rates." *Business & Professional People v. Illinois Commerce Commission,* 146 III. 2d 175, 246 (1991). The Department's final Decision in Docket No. 92-11-11 permitted the recording of deferred charges, leaving all ratemaking considerations of the deferred charges (including regulatory asset treatment and rate recovery) to be decided in a future rate case, at which all parties could present evidence on such issues. In this proceeding, CL&P requested recovery of the deferred charges, and a full and complete record was created. Upon review of the record of the rate case and this reopener, the Department concludes that it is appropriate to allow CL&P to establish a regulatory asset to recover the unrecognized pension gain. As OCC states, ***15** CL&P's actual pension expense over 1993, 1994 and 1995 was below the allowed pension expense; however, the fact remains that, but for the Department's actions in reducing the unrecognized pension gain assumptions, the gap between allowed and actual would have been greater.

The Company proposed recovering $15.7 million over four years, with no return. According to the Company, a relationship no longer exists between the $15.7 million balance and the average remaining service life from 1992. The Company also states that while the $15.7 million balance could be recovered over the 13-year current average remaining service life of pension participants, the obligation was created over a 3-year period, and should be recovered over a similarly short period of time. Response to Interrogatory EL-6. Because the deferred amount, if considered an unrecognized pension gain today, would be amortized over 13 years to calculate pension expense, the Department concludes it is appropriate to recover that amount from customers over a 13-year period, with no return.

DPUC Decision, see DPUC Record, XI, Appendix to this Brief, pages A4-A5.

The DPUC also reminded the parties that, "its draft Decision in Docket No. 92-11-11 did not contemplate deferral of pension expense reductions caused by the Department's change in unrecognized pension gain assumptions. This concept was proposed by CL&P in its written exceptions and then appeared in the final Decision; both events occurred post- hearing." *Id.* The DPUC emphasized that its 1993 decision did not create a regulatory asset, as CL&P insisted, but recognized recorded deferred charges. In *Business and Professional People for the Public Interest v. Illinois Commerce Commission,* 146 III. 2d 175, 585 N.E.2d 1032 (1991), the Illinois Supreme Court noted the importance of recorded deferred charges:

While the Commission's position against limiting the amount of deferred charges may be correct for recording purposes, it is not appropriate for recovery of deferred charges. There is a fundamental difference between a rate case and a case involving only accounting procedures. A decision to permit recording of deferred charges has only an indirect impact on rates and, therefore, is not subject to the same scrutiny as a decision to raise rates. It is improper to assume, as the Commission did, that having met the criteria for ***16** recording deferred charges, Edison is automatically entitled to recovery of the full amount recorded. This is especially true because recovery of deferred charges is a deviation from the normal accounting procedures.

The purpose of the accounting variance is to protect Edison from adverse financial impact caused by the regulatory delay period, and to afford Edison the opportunity to recover these charges. The accounting variance should not be used to place Edison in a better position than it would have been in had synchronization been achieved. Just as it would be unfair to deny Edison recovery of its reasonable and prudent investment due to regulatory delays which the company could not control, so, too, would it be unfair if Edison were allowed to reap a windfall, at ratepayer expense, due to a regulatory delay which the ratepayers could not control. This is especially true in the present case in which at least a portion of the delay period is attributable to the illegal Sixth Interim Order to which the intervenors objected.

Id., 585 N.E.2d at 1062-1063.

The Court rejected the argument that allowing the utility to recover any deferred charges would violate the rule against retroactive ratemaking:

We next consider the intervenors' claim that allowing Edison to recover any deferred charges would violate the rule against retroactive ratemaking. Once the Commission establishes rates, the Act does not permit refunds if the established rates are too high, or surcharges if the rates are too low. (*Business & Professional People I,* 136 III. 2d at 209.) This rule is consistent with the prospective nature of the Commission's legislative function in ratemaking. In addition, this rule promotes stability in the ratemaking process. *Citizens Utilities Co. v. Illinois Commerce Comm'n* (1988), 124 III. 2d 195, 207.

The intervenors argue that recovery of deferred charges assesses a current surcharge on ratepayers to compensate Edison for the revenues it may have lost during the deferral period. The intervenors contend that this constitutes retroactive ratemaking and, therefore, is prohibited under the Act. Edison and the Commission respond that the rates established in this case allow only prospective recovery of capital investments incurred in the past. According to Edison this is exactly what happens in any rate case involving the addition of new plants to the rate base.

Edison notes that the Commission has never included the cost of the three plants in a valid rate order. Thus deferred charges are not intended to correct an error made in prior rate orders which had included these plants in rate base. Rather, Edison argues deferred charges are merely one aspect of the reasonable and prudent costs of the plants which should be included in rate ***17** base. We agree with Edison. The fact that deferred charges represent capital costs incurred in the past does not make recovery of these costs retroactive.

Id., 585 N.E.2d at 1061.

The Court also rejected the argument that recovery would violate the rule against single-issue ratemaking:

We now turn to the intervenors' argument that recovery of deferred charges constitutes single-issue ratemaking. Initially, we note that the rates in effect at the time the plants were placed in service, and at the time of the Remand and Rate Orders, were established in a rate order entered in 1985. References to increases and decreases in elements of the revenue requirement are relative to the data used in setting the rates in effect at the time of the Commission's orders.

The rule against single-issue ratemaking recognizes that the revenue formula is designed to determine the revenue requirement based on the *aggregate* costs and demand of the utility. Therefore, it would be improper to consider changes to components of the revenue requirement in isolation. Oftentimes a change in one item of the revenue formula is offset by a corresponding change in another component of the formula. For example, an increase in depreciation expense attributable to a new plant may be offset by a decrease in the cost of labor due to increased productivity, or by increased demand for electricity. (Demand for electricity affects the revenue requirement indirectly. The yearly revenue requirement is divided by the expected demand for electricity to arrive at a per kilowatt hour rate. If actual demand is more than the estimated demand used in the formula, the utility's revenues increase.) In such a case, the revenue requirement would be overstated if rates were increased based solely on the higher depreciation expense without first considering changes to other elements of the revenue formula. Conversely the revenue requirement would be understated if rates were reduced based on the higher demand data without considering the effects of higher expenses.

Id., 585 N.E.2d at 1061-1062.

In the instant case, the Trial Court accurately noted that the DPUC's Decision did no constitute single-issue ratemaking:

***18** The decision to allow the establishment of a regulatory asset is not affected by the rule against single-issue rate-making. That prohibition ensures that when a utility seeks agency approval of its revenue requirements, the utility fully disclose aggregate costs, rather than certain specific costs related to a component of its operation. The utility must divulge all aspects of its business, including possible savings, thereby possibly removing the need for greater revenue. The agency must not consider revenue requirements in isolation. *See Business & Professional People v. Commerce Commission,* at 1061. Here the DPUC was furnished the various costs that formed the basis of CL & P's proposed rate schedules and the agency conducted a review of these costs. The DPUC's decision allowing a regulatory asset for the pension gain was a portion of a multi-tiered process and cannot be labeled as single-issue rate-making.

The DPUC decisions relied upon by OCC on pages 12 and 13 of its brief do not support its contention that the DPUC is engaging in single-issue rate-making here. For example, in the matter discussed on page 13, United Illuminating Company was not allowed by DPUC to raise its rates "for pension costs alone" because the company did not consider the totality of its business circumstances. This situation is not analogous to the process followed by the DPUC in the decision under appeal.

Office of Consumer Counsel v. Connecticut Department of Public Utility Control, Docket No. CV 04-4001457-S, supra, Appendix to this Brief, page A60.

The Trial Court also correctly rejected the plaintiff OCC's argument that the DPUC had engaged in redoactive ratemaking:

> Nor does the allowance of the regulatory asset constitute retroactive rate-making. The DPUC had properly reserved the $15.7 million amount and "red flagged" it for further action. This does not amount to retroactive rate-making. There is no question that rate-making must, in general, be prospective, *Business & Professional People, supra* at 1061. Here, however, the DPUC was not illegally revising a rate previously set; rather the agency was giving finality to an issue previously left unresolved. The court concludes in favor of the defendants on the first issue raised by OCC.

Id., Appendix to this Brief, page A60.

This Court should uphold the trial Courts well-reasoned decision. It is simply a matter of the DPUC, concerned about the adverse effect on Connecticut's economy and ratepayers if the DPUC adhered too strictly to proper accounting standards, not including ***19** certain expenses, but "red flagging" these expenses for future consideration, and then working these expenses into the rates as soon as practicable. The plaintiff OCC would have the DPUC adhere to a far more rigid process. In response, the DPUC finds the guidance of the Rhode Island Supreme Court in *Narragansett Electric Company v. Burke,* 415 A.2d 177 (1980) appropriate: Turning to the prohibition against retroactive ratemaking, we recognize that the commission justifiably expressed concern over the applicability of this judicially created rule set forth in such decisions as *Bristol County Water Co. v. Harsch, R.I., 120 R.I. 223, 386 A.2d 1103 (1978), and Narragansett Electric Co. v. Burke, R.I., 119 R.I. 559, 381 A.2d 1358 (1977).* No rule should be blindly applied, however, without prior consideration of the underlying policy that originally precipitated its adoption. Such an approach ensures that the application of the rule in a particular instance will not undermine its original purpose. *See Asplin v. Amica Mutual Insurance Co., R.I.,* 121 R.I. 51, 394 A.2d 1353 (1978).

The rule against retroactive ratemaking serves two basic functions. Initially, it protects the public by ensuring that present consumers will not be required to pay for past deficits of the company in their future payments. The Supreme Court of New Jersey has expressed this legitimate concern as follows:

"The present practice, as set forth in these cases, is fair to the public utility, for it can act as speedily as it sees fit to move for a correction of inadequate rates, and it is fair to the consumer in safeguarding him from surprise surcharges dating back over years that he had a right to assume were finished business for him and possibly over years when he was not even a consumer." *New Jersey Power & Light Co. v. State Department of Public Utilities, Board of Public Utility Comm'rs,* 15 N.J. 82, 93, 104 A.2d 1, 7(1954). *See Western Oklahoma Gas & Fuel Co. v. State,* 113 Okla. 126, 239 P. 588 (1925).

The rule also prevents the company from employing future rates as a means of ensuring the investments of its stockholders. *Georgia Ry. & Power Co. v. Railroad Commission of Georgia,* 278 F. 242 (N.D. Ga. 1922). If a utility's income were guaranteed, the company would lose all incentive to operate in an efficient, cost-effective manner, thereby leading to higher operating costs and eventual rate increases.

Id.

***20** In the present case, the DPUC's actions violate neither of these principles. The DPUC is not retroactively reaching back to force consumers to pay a past deficit, nor is it establishing an investment insurance policy for investors, but rather utilizing a figure established in 1993, that, but for the serious adverse effect an even higher rate increase would have had on Connecticut, would have been incorporated into the rates at that time. Thus, CL&P is not reaping a windfall, but only what the DPUC would have incorporated into the rates had it could at the time. The plaintiff OCC's claim should be rejected by this Court.

CONCLUSION

The State of Connecticut Department of Public Utility Control respectfully requests that this Court affirm the decision of the Trial Court dismissing the appeal and upholding its decision.

End of Document

Exhibit 3

JOINT
STANDING
COMMITTEE
HEARINGS

JUDICIARY
PART 2
230-615

1988

State of Connecticut

LAW REVISION COMMISSION
LEGISLATIVE OFFICE BUILDING
20 TRINITY STREET
HARTFORD, CONNECTICUT 06106

DAVID D. BIKLEN
Executive Director

DAVID L. HEMOND
Staff Attorney

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Staff Attorney

Report and Recommendations of the Law Revision Commission Concerning the Uniform Administrative Procedure Act Senate Bill 209

February 1988

Introduction

In January 1985, the Law Revision Commission began a review of amendments to the Uniform Administrative Procedure Act (UAPA) proposed by the Administrative Law Section of the Connecticut Bar Association. The law of administrative procedure has developed rapidly as state governments have relied increasingly on administration of the law through its agencies. In particular, there is an awareness that the law must both allow effective regulation and ensure due process to those who are regulated.

This project is the first comprehensive review of the UAPA since its adoption in 1971. Interest in revising the UAPA has been engendered, in part, by adoption of the 1981 Model State Administrative Procedure Act by the Uniform Law Commissioners.

The Law Revision Commission conducted its review in conjunction with numerous legal authorities with private, corporate, and governmental experience in administrative law. The Commission has concluded that revision of the UAPA is warranted in the interest of fair and effective administration of the laws. A version of the Commission's recommendations for revision was submitted to the 1987 legislative session as Senate Bill 1111. The bill was favorably reported by the Government Administration and Elections Committee but died on reference to the Judiciary Committee. The Commission recommends enactment of a revised version of that bill in this session.

Brief Summary

Briefly, the bill:

- Sets standards for intervention by interested parties in a declaratory ruling proceeding and in a contested case. See sections 11 and 21.

- Allows regulation-making to begin after passage of a Public Act, but before its effective date, so that the regulation can become effective immediately on that effective date. See section 3.

- Clarifies the authority of hearing officers to conduct hearings. See section 16.

- Delineates what information constitutes the record of a contested case. See section 13(d).

- Clarifies the effective date of and notice required of a final decision. See section 18.

- Requires indexing of final decisions. See section 19.

- Clarifies when ex parte contacts are allowed. See section 20.

- Clarifies when a final decision can be reconsidered or modified. See section 22.

- Permits full agency review of preliminary rulings, where necessary. See section 23.

- Clarifies the requirements for service and filing of appeals. See section 24.

- Clarifies when the UAPA applies to an agency proceeding. See section 25.

Detailed Summary

More specifically, the bill would do the following:

Section 1. (Section 4-166 of the General Statutes). Definitions.

This section amends section 4-166 as follows:

(1) Agency. The definition of "agency" in subsection (a) was rewritten for style and to clarify that, not only is the legislature, as a whole, an exempt body, but also that each house and all legislative committees are exempt.

(2) Contested case. This definition has been amended to clarify that a proceeding on a petition for a declaratory ruling is not a contested case.

(3) Final decision. The term is defined for the first time. "Final decision" includes the final agency action in a contested case, a declaratory ruling, or a decision made after reconsideration. A "final decision" does not include an intermediate agency order.

(4) Hearing officer. The term is defined for the first time.

(5) Intervenor. The term is defined as a person permitted to participate in an agency proceeding under section 11 or section 21. Some agencies already have regulations concerning the status of intervenors.

(8) Party. The term is restated to more usefully determine who should be a party and how parties are, in practice, identified. The consumer counsel is an example of a party identified under subsection (8)(B) but not under (8)(A). An agency, unless it is the presiding agency, may be a party. See definition of "person."

(9) Person. An agency, unless it is the presiding agency, is included within the meaning of "person."

(10) Presiding officer. The term is defined for the first time.

(11) Proposed final decision. The term, as used in section 17, is now defined.

(14) Regulation-making. The term is now defined.

Section 2. (Section 4-167). Organization description to be adopted. Rules of practice. Public inspection of regulations.

The deleted portions of this section referring to final decisions have been transferred to section 19.

Subsection (b) is amended to provide that a regulation may not be enforced against a person without notice or knowledge of its contents until it has been available for inspection and has been published or a notice of it has been published in the Law Journal.

Section 3. (Section 4-168). Regulation-making procedure.

This section amends and reorganizes part of section 4-168.

Subsection (c) permits an agency to begin the regulation-making process between the date of enactment of the enabling legislation and the legislation's effective date. It may be important that implementing regulations be in place, or nearly in place, on the effective date of a public act. Agencies presently may not have this necessary regulation-making authority before the effective date of the enabling public act.

Section 7. (Section 4-172). Filing with secretary of the state. Certified copies. Effective date. Publication.

This section amends section 4-172(b)(2) and assures that, although a regulation may be adopted before the effective date of a public act, the regulation cannot take effect until the act's effective date. See section 3.

Section 9. (NEW). Regulation-making record.

This section requires each agency to maintain a regulation-making record for each regulation it adopts. The record is to be kept as public information to facilitate a more structured and rational consideration of proposed regulations, and to assist the judicial review of the validity of regulations. Subsection (c) makes clear that the requirement of such a record does not mean that the regulations made must be based exclusively on the regulation-making record or judicially reviewed exclusively on the basis of that record. See section 3-112 of the Model State Administrative Procedure Act (1981) and the comment thereto.

Section 10. (Section 4-175). Declaratory judgment. Availability and procedure.

Section 4-175 is amended by removing the requirement that a declaratory judgment may be sought only in the Hartford-New Britain judicial district.

A declaratory judgment may be sought if the agency fails to take an action required by section 11 with sixty days, or fails to issue a declaratory ruling within 180 days, or declines to issue a ruling. The regulation-making record must be before the court when it is determining the validity or applicability of a regulation.

Section 11. (Section 4-176). Declaratory rulings.

This section expands and clarifies the declaratory ruling provisions of section 4-176. Although a proceeding for a declaratory ruling is not a contested case (section 1(2)), a declaratory ruling is a final decision that may be appealed to the court--the decision, facts and reasoning, and record are available for judicial review.

A declaratory ruling is used to determine the applicability of a regulation or final decision, or, in a new provision, the validity of a regulation. The validity of a regulation may be questioned, for example, when doubtful procedures are used in adopting the regulation.

Agencies are required to adopt regulations outlining the administrative process for requesting a declaratory ruling. The act requires notice of the petition for the ruling and notice of the agency action. A process for intervening is set forth.

Within sixty days of receiving a petition for a declaratory ruling, the agency must take one of five specified actions regarding the petition. The agency is deemed to have declined to issue a declaratory ruling if one is not made within 180 days. Under section 11, if the agency fails to take one of the five actions required within sixty days, or declines, specifically or by inaction, to issue an order, the petitioner may seek a declaratory judgment in the superior court. Since, in this case there is no decision and record to review, the superior court action is de novo.

This section is based, in part, on section 2-103 of the Model State Administrative Procedure Act (1981).

Section 12. (NEW). Hearings before agency or hearing officer.

This section specifies that a hearing can be held before either hearing officers or agency members.

Section 13. (Section 4-177). Contested case: Notice of hearing, default, informal disposition, record.

The act amends section 4-177, transferring former subsection (c) to section 14 and describing participation in a hearing in more detail.

New subsection (c) (former subsection (d)) has been rewritten. The term "informal disposition," when used to describe a "stipulation, agreed settlement, consent order, or default" is confusing and has been removed.

Former subsection (e) (now (d)) expands the list of items to be included in the record to give a more complete picture of the contested case.

Former subsection (g) is transferred to section 18.

See section 4-221 of the Model State Administrative Procedure Act (1981).

Section 14. (NEW). Contested case: Hearing procedure and participation.

This section expands on contested case procedures that are briefly addressed in section 4-177(c). This section, together with section 21, explicitly describes a

presiding officer's authority over a hearing. In particular, the presiding officer may permit persons other than parties or intervenors to make statements. Such statements must be under oath or affirmation and if the presiding officer plans to consider such a statement, parties may rebut the statement and cross-examine the person making the statement.

Part of this section is based on section 4-211 of the Model State Administrative Procedure Act (1981).

Section 16. (NEW). Contested case: Subpoenas and production of records, physical evidence, papers and documents.

The UAPA does not presently describe the presiding officer's authority over the hearing and the agency's right to seek superior court enforcement of the presiding officer's orders. This section, together with section 14, explicitly provides the presiding officer and agency with those necessary powers.

Section 17. (Section 4-179). Contested Case: Proposed final decision. When required.

The act amends section 4-179, requiring that a proposed final decision be made prior to rendition of the final decision if the matter is heard by (1) a hearing officer who is not empowered to make a final decision, or (2) an agency if a majority of the persons who are to render the final decision have not attended the hearing or read the record. A final decision adverse to a party may not be made until the parties have been served with the proposed final decision and have been given an opportunity to "file exceptions and present briefs and oral argument."

A proposed final decision must be written and contain the reasons for the decision and the issues of fact and conclusions of law necessary for the decision.

Section 18. (Section 4-180). Contested case: Final decision; effective date.

The act amends section 4-180 and includes section 4-177(g) in the first sentence of subsection (c).

In subsection (a), the agency's time to render a final decision is changed from ninety days after "the close of evidence and the filing of briefs" to ninety days after the later of the close of evidence or the filing of briefs.

Under subsection (b), an "interested person" may no longer request a court order that the agency render a final decision. Only a "party" may seek such an order.

If a final decision is adverse to a party, it must contain findings and conclusions. The name of each party and most recent mailing address furnished to the agency by the party must be noted in the decision. Under section 24, notice of an appeal must be given only to listed parties at the addresses shown.

The decision must be personally delivered or sent by prepaid mail, certified with return receipt. The decision is effective when personally delivered or mailed, or at a specified later date. The required use of certified or registered mail should make it easier to establish the mailing date of a decision.

Section 19. (NEW). Final decisions: Public inspection and indexing.

This section incorporates the public inspection requirement of section 4-167. An agency may not rely on a final decision unless it is available and indexed. The indexing requirement is new. The section is based on section 2-102 of the Model State Administrative Procedure Act (1981).

Section 20. (Section 4-181). Contested case: Ex parte communications.

This section expands section 4-181 to include concepts found in section 4-213 of the Model State Administrative Procedure Act (1981). In particular, ex parte contacts in contested cases are forbidden not only with agency members who are to render a decision but also with hearing officers, parties, other agencies, and interested persons.

An agency member may communicate with other members and may receive assistance from those staff who have not received ex parte communications forbidden under subsection (a). The section is not intended to prohibit a party or intervenor from discussing purely procedural matters, such as the date, time, or place of a hearing, with the hearing officer or the agency.

Section 21. (NEW). Contested case: Parties and intervenors.

The UAPA currently fails to address when a person may intervene in a contested case, although section 4-166(5) implies such a right. This section allows a person who has a legitimate interest, but insufficient to justify full party status, to participate. If the conditions of subsection (a) are met, the presiding officer must grant a person status as a party.

If the conditions of subsection (b) are met, the presiding officer may grant the person status as an intervenor and, under subsection (d), limit participation in the proceeding.

The five-day requirement of subsections (a) and (b) may be waived by the presiding officer on the showing of good cause.

The section is based on section 4-209 of the Model State Administrative Procedure Act (1981).

Section 22. (NEW). Contested case: Reconsideration and modification of final decision.

Under section 4-183(b), the UAPA currently mentions reconsideration of a final decision only in context of determining the time for seeking judicial review. Under section 4-183(e), the UAPA currently addresses agency modification of its decision only if an agency is considering additional evidence at the direction of a court on appeal. The act permits easier application of these procedures by setting detailed standards for reconsideration of final decisions and by allowing modification of a decision in two new circumstances.

Subsection (a) of the act permits reconsideration of a final decision to correct a problem discovered within fifteen days of the mailing or delivery of the decision. After receiving a timely petition for reconsideration, the agency uses a two-step process. The agency has twenty-five days after the filing of a petition to decide whether to reconsider the final decision. If the agency decides to reconsider, it then has a reasonable time to issue a new final decision affirming, modifying or reversing the original final decision.

A petition for reconsideration is not a prerequisite for seeking judicial review (section 24) and does not stay the time to appeal. If, however, the reconsideration petition is granted, the agency's subsequent action affirming, modifying, or reversing the final decision is, under section 1(3), a new final decision to which a new appeal period applies.

If, at some later date, conditions change, subsection (b) permits modification of the decision at that time. Any such modification must, of course, adequately consider the rights of persons who have acted in reliance on the original final decision. Subsection (c) permits an agency to make clerical corrections in the final decision.

Section 23. (NEW). Review of preliminary, procedural or evidentiary rulings made at hearing.

This section permits a majority of the agency decision-makers to review a preliminary, procedural, or evidentiary ruling made at a hearing conducted by a hearing officer or by less than a majority of the agency decision-makers. Such a review could be conducted only if it were permitted by agency regulation and if review were sought before the final decision were rendered.

Section 24. (Section 4-183). Appeal to superior court.

Right of appeal. The filing of a petition for reconsideration is not a prerequisite to filing an appeal. The provision giving preeminence to federal time periods for appeals is removed.

Interlocutory appeals. Section 4-183(a) currently provides for an interlocutory appeal if a later review "would not provide an adequate remedy." The act requires a two-part test to permit such an interim appeal. An appeal is permitted if (1) it appears likely that the person will qualify to appeal the final decision, and (2) postponement of the appeal would result in an inadequate remedy.

Procedure for filing appeal and affidavit of service or sheriff's return. The term "appeal" is substituted for "petition." Service of the appeal on the agency and parties may be made either by mail or by sheriff within forty-five days of the mailing or personal delivery of the final decision. Failure to serve parties other than the agency that rendered the final decision within the forty-five days is not a jurisdictional defect. Such failure to serve does, however, subject the appeal to dismissal on a showing of prejudice. The persons appealing must serve the parties listed in the final decision at the addresses listed.

The appeal must also be filed in the court within forty-five days. Use of the forty-five day period for agencies, parties and the court should reduce some of the confusion inherent in the present thirty-day and forty-five-day periods. In extending the appeal period fifteen days, the advisory committee decided to eliminate the fifteen-day grace period that is permitted in some circumstances under present section 52-49 (see section 30).

Within fifteen days of filing the appeal in court, the person appealing must file with the court a description of the service actually made. On a showing of prejudice to a party not served, the court may dismiss the appeal.

Record for judicial review. The agency must transcribe for the court the entire record of the agency proceeding.

Review confined to record. Under present law, the only exception to the rule that the review must be confined to the record is when an irregularity not shown in the record is alleged. The act adds one more topic where proof may be taken in court - where "facts necessary to establish aggrievement are not shown in the record." Because agency proceedings do not ordinarily treat this topic specifically, agency records may not disclose sufficient facts to permit a reviewing court to determine the issue. Because the issue of aggrievement does not reflect on the agency's decision, the court, itself, should be able to take the evidence without returning the case to the agency.

Scope of review; if agency action required by law. Subsections (j) and (k) rewrite former subsection (g) for clarity, but the standards for sustaining an appeal - formerly in subsection (g) - are not changed. A court must affirm the agency's decision unless substantial rights of the person appealing have been prejudiced in one of six circumstances. If the court finds such prejudice, it must sustain the appeal. Ordinarily, the court would take no other action. The court may, however, remand the case to the agency for further proceedings (such a remand is a final judgment), or, if a particular action is required by law, modify the agency decision or order a particular agency action. (See Watson v. Howard, 138 Conn. 464 (1952).) A decision ordering a "remand for further proceedings in accordance with this opinion" "merely summarizes the consequences of the trial court's decision sustaining the appeal, i.e., that the appeal having been sustained, it is the duty of the administrative agency to proceed according to law." Hartford v. Hartford Electric Light Co., 172 Conn. 13, 14 (1976).

Section 25. (Section 4-185). Applicability of chapter.

This section describes how the act applies to pending administrative cases, provides that all agencies are subject to the UAPA unless explicitly exempted in the act.

Section 26. (Section 4-186). Exemptions from chapter and applicability in special circumstances.

This section gathers from various scattered places throughout the statutes references to the various boards and agencies that are exempt from the UAPA and describes how the UAPA is applicable to other agencies in special circumstances.

Section 28. (Section 51-197b). Administrative appeals.

The scope of review provisions of this section differ from the scope of review in UAPA appeals (section 26; section 4-183(j)). Thus, to eliminate the conflict, this section is amended to make it inapplicable to UAPA appeals.

Section 29. (Section 52-49). Appeals from administrative agencies, when returnable.

The return day provision of this section is unnecessary in the light of Practice Book Section 256 which treats administrative appeals as civil actions and section 52-48 which governs civil action return days.

Section 30. (Section 52-593a). Right of action not lost where process served after statutory period, when.

This section is designed to prevent the loss of a cause or right of action when process has been timely delivered to an authorized officer for service, but such service was not effected by that officer until after the time limited by law within which such action may be brought. This section with its fifteen-day grace period, is made inapplicable to administrative appeals because the time to file such an administrative appeal has been extended for fifteen days under section 24 (section 4-183).

Sections 31 through 98.

These sections of the General Statutes contain cross-reference language to the provisions of the UAPA. These references must be modified to reflect the changes made in the UAPA.

Section 97. Repealer.

Section 4-170a (Review of old regulations), section 4-185a (Validation of certain actions), and section 4-189 (Repeal of inconsistent sections) are repealed as unnecessary. The provisions of section 4-187 (Unemployment compensation, employment security and manpower appeals), section 4-188 (Employment security division and the board of mediation and arbitration exempt), and 4-188a (Requirements for exemption of constituent units of state system of higher education) are included within section 4-186 (Exemptions from chapter and applicability in special circumstances) and thus are repealed.

Connecticut Law Revision Commission

UAPA Amendments Committee
1985-1988

Committee:

William R. Breetz, Jr., Esq. - Chairman

Honorable David M. Borden -Judge of the Appellate Court

Raphael L. Podolsky, Esq.

David D. Biklen, Esq. - Reporter/Drafter

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David Silverstone, Esq.
Silverstone & Koontz

Colin C. Tait, Professor
University of Connecticut School of Law

Robert P. Wax, Esq.
Northeast Utilities

Exhibit 4

STATE OF CONNECTICUT

No. 143947

THE CONNECTICUT LIGHT & POWER COMPANY, a Connecticut corporation of Berlin, Conn., THE HARTFORD ELECTRIC LIGHT COMPANY, a Connecticut corporation of Wethersfield, Conn., and NORTHEAST UTILITIES, a public holding company of Berlin, Conn.	:	SUPERIOR COURT (formerly Court of Common Pleas)
VS.	:	
CONNECTICUT PUBLIC UTILITITES CONTROL AUTHORITY, an agency of the State of Connecticut; OFFICE OF CONSUMER COUNSEL, a consumer oriented agency of the State of the State of Connecticut; THE TOWN OF EAST LYME, a municipal corporation within New London County; THE CITY OF HARTFORD, a municipal corporation within Hartford County; and THE CONNECTICUT CITIZENS ACTION GROUP, INC., a Connecticut non-profit corporation of Hartford, Conn.	:	J.D. HARTFORD-NEW BRITAIN DECEMBER 19, 1978

PRESENT: HON. ALFRED V. COVELLO, JUDGE

JUDGMENT

(Revised to conform with decision of the Connecticut Supreme Court, Vol. XL, No. 14 Connecticut Law Journal, October 3, 1978)

This action, dated November 3, 1977, in the nature of an appeal from the action of the defendant, Connecticut Public Utilities Control Authority, approving only partial rate increases for plaintiff, Connecticut Light & Power Co. (Administrative Docket No. 770319) and plaintiff, The Hartford Electric Light

Company (Administrative Docket No. 770320) came to this Court on the Fourth Tuesday of November, 1977, when the parties appeared and when the defendant, Office of Consumer Counsel, filed its cross appeal from said decisions. Said action came thence to December 6, 1977 when the Court, on motion, allowed The Town of East Lyme, The City of Hartford, The Office of Consumer Counsel and The Connecticut Citizen Action Group, Inc. to intervene as co-defendants and thence to the present time when the parties appeared and were at issue, as on file.

The Court, having heard the parties, finds Northeast Utilities and the Office of Consumer Counsel aggrieved persons for the purpose of maintaining the appeal and cross-appeal.

The Court, having heard the parties, finds that the rates set, the nuclear capacity factor and many of the adjustments established by the Connecticut Public Utilities Control Authority in the two proceedings appealed herein, provided the plaintiff-utilities with a fair and reasonable reflection of their test year expenses and operations and with a fair return on their common equity without the requirement of any additional factor to reflect attrition, other than factors considered and utilized by the Public Utilities Control Authority, and that there is a logical and rational basis in the administrative record for these conclusions. The Court however finds error in the termination of the uncollected amortization of expenses from the outages at

Millstone, from Storm Felix, and from deferred fuel costs and in the requirement of bonding, with interest, of the portion of funds received as depreciation to recover for the negative salvage value of nuclear power stations. With respect to the unrecovered amortized Storm Felix expenses, recovery may not include that portion which, on the same amortization schedule previously in effect could have been recovered during that period in which rates were in effect pursuant to the Authority's 1976 rate decisions in Docket Nos. 760604 and 760605.

Whereupon, it is adjudged that the appeals of Connecticut Light & Power Company, The Hartford Electric Light Company, and Northeast Utilities and the cross-appeal of the Office of Consumer Counsel are dismissed. The order of the Public Utilities Control Authority with respect to bonding, with interest, of the negative salvage portion of funds received as depreciation is vacated and the issues and time of recovery of uncollected amortization of expenses are remanded to the Public Utilities Control Authority for further consideration.

BY THE COURT,

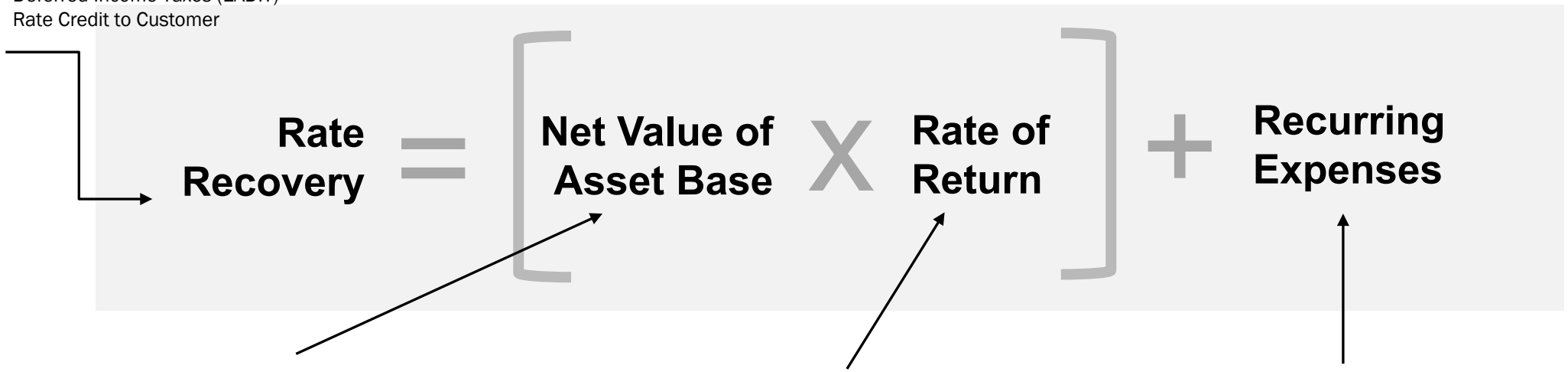
Covello, J.

Exhibit 5

Exhibit 5
Revenue Requirement – Ratemaking Equation

Every element of the ratemaking equation is implicated in the Aquarion appeal.

- Count 12 -- Excess Accumulated Deferred Income Taxes (EADIT) – Rate Credit to Customer



- Count 2 – Third Segment Excluded Capital Additions
- Count 3 – Second Segment Excluded Capital Additions
- Count 5 – Computation of Asset Base
- Count 6 – Computation of Asset Base

- Count 10 – Return on Equity
- Count 11 – Capital Structure

- Count 4 – State & Federal Income Tax Calculation Error
- Count 7 - Employee Incentive Compensation
- Count 8 – Deferred Conservation Expense
- Count 9 – Rate Case Expense