18-3533-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Leticia Colon de Mejias, Connecticut Fund for the Environment, Inc., Fight the Hike, Energy Efficiencies Solutions, LLC, Best Home Performance of CT, LLC, Connecticut Citizen Action Group, New England Smart Energy Group, LLC, CT Weatherproof Insulation, LLC, Steven C. Osuch, Energy ESC, LLP, Jonathan Casiano, Bright Solutions, LLC,

Plaintiffs-Appellants,

v.

Dannel P. Malloy, in his official capacity as Governor of the State of Connecticut, Denise L. Nappier, in her official capacity as the Treasurer of the State of Connecticut, Kevin Lembo, in his official capacity as the Comptroller of the State of Connecticut,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Hon. Janet C. Hall, U.S.D.J.

BRIEF OF PLAINTIFFS-APPELLANTS
WITH SEPARATELY BOUND JOINT APPENDIX

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the nongovernmental corporate parties who are Plaintiffs in this matter hereby state that there are no parent corporations or any publicly held corporations that own 10% or more of the stock of any such corporate parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ..... Page(s)

Statutes **Pages**

JURISDICTIONAL STATEMENT

This is an appeal from an October 25, 2018 order granting the Defendants' motion for summary judgment, and denying the Plaintiffs' cross-motion for summary judgment. Judgment entered on October 25, 2018, and the district ocurt had subject matter jurisdiction over this civil case under 28 U.S.C. § 1331.

The Plaintiffs filed a timely notice of appeal pursuant to Fed. R. App. Proc. 3(a)(1) on November 26, 2018. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

The Plaintiffs' appeal is from a final judgment that disposes of all parties' claims in the underlying case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in concluding that Public Act § 17-2 as amended by Public Act § 18-81 (collectively, the "Act") does not violate the Contract Clause of the United States Constitution.

2. Whether the District Court erred in ruling that the Act does not constitute a tax on ratepayers in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCISE STATEMENT OF THE CASE

A. The Parties.

The Plaintiffs in this case are all ratepayers of investor-owned electric distribution companies in Connecticut, including Leticia Colon de Mejias, the Connecticut Fund for the Environment, Inc., Fight the Hike, Energy Efficiencies Solutions, LLC, Best Home Performance of Connecticut, Connecticut Citizen Action Group, New England Smart Energy Group, LLC, CT Weatherproof Insulation, LLC, Steven C. Osuch, Energy ESC, LLC, Jonathan Casiano, and Bright Solutions, LLC (collectively, "Plaintiffs"). Stip. Facts ¶¶ 1-12 (A87-111).

The Defendants in this case include the Governor, Treasurer, and Comptroller of the State of Connecticut (collectively, "Defendants"). *Id*. ¶ 13-15.

B. Electric Utility Service In Connecticut.

Electric distribution service in Connecticut is provided by two types of entities: (1) investor-owned electric distribution companies (the "EDCs"), and (2) municipal electric utilities (the "Municipal Utilities"). *Id*. ¶ 17. There are two EDCs: The Connecticut Light and Power Company, d/b/a Eversource ("Eversource") and The United Illuminating Company ("UI"). *Id*. The EDCs serve approximately 1.5 million residential and business customers in Connecticut. *Id*. ¶ 18.

There are seven Municipal Utilities, including the city of Groton, the borough of Jewett City, the second and third taxing districts of Norwalk (South Norwalk and East Norwalk), the city of Norwich, Bozrah Light and Power, and the town of Wallingford. *Id*. ¶ 17. The Municipal Utilities serve approximately 125,000 customers. *Id*. ¶ 18.

C. The Energy Funds.

In 1998, the Connecticut General Assembly passed P.A. 98-28, which authorized creation of the two funds at issue in this case: (1) the Energy Conservation & Load Management Fund (the "C&LM Fund"), which is codified at General Statutes § 16-245m; and (2) the Clean Energy Fund (the "CEF"), which is codified at § 16-245n. *Id*. ¶¶ 19, 22, 29. Collectively, these two funds will be referred to as the "Energy Funds."

1. The C&LM Fund.

Conn. Gen. Stat. § 16-245m governs the creation and disbursement of the C&LM Fund. Specifically, § 16-245m(a) directs the Public Utilities Regulatory Authority ("PURA" or the "Authority") to assess "a charge of three mills per kilowatt hour of electricity sold to each end use customer of an [EDC]" to implement conservation and load management programs. Section 16-245m(b) further requires the EDCs to deposit all of the funds collected from the surcharge

into the C&LM Fund, and to hold these funds "separate and apart from all other funds or accounts."

Conn. Gen. Stat. § 16-245m(d)(1) requires the EDCs, as well as the Natural Gas Utilities, to develop a Conservation and Load Management Plan (the "Plan") every three years. Stip. Facts ¶ 33. Pursuant to § 16-245m(d)(1), the purpose of the Plan is to "implement cost-effective energy conservation programs and market transformation initiatives." *Id.* PURA authorizes disbursements from the C&LM Fund by the EDCs to carry out the Plan.

If the budget needed to implement the Plan exceeds the revenues collected by the C&LM charge, PURA must make up the difference by assessing a second charge of no more than three mills per kilowatt of electricity sold to each EDC customer. Conn. Gen. Stat. § 16-245m(d)(1). This second charge is known as the "conservation adjustment mechanism" charge (the "CAM Charge"). Stip. Facts ¶ 37.

These two surcharges collect approximately $156 million per year from EDC Customers, which is provided to the C&LM Fund. *Id*. ¶ 39. These funds are used to support a variety of energy conservation programs which provide financial incentives to help Connecticut consumers reduce the amount of energy used in their homes and businesses. *Id*. ¶¶ 23-24. The C&LM Fund programs are reviewed by the Energy Efficiency Board ("EEB"), a group of advisors who utilize

their experience and expertise with energy issues to evaluate and consult with Connecticut's electric and natural gas utility companies on how programs should best be structured for and delivered to Connecticut consumers.[1] *Id*. ¶ 25.

2. <u>The Clean Energy Fund.</u>

Conn. Gen. Stat. § 16-245n governs the creation and administration of the CEF. Specifically, § 16-245n(b) requires PURA to assess a charge of not less than one mill per kilowatt hour to EDC customers, which shall be deposited into the CEF. *Id*. ¶ 30. The CEF is administered by the Connecticut Green Bank (the "Green Bank"). Conn. Gen. Stat. §§ 16-245n(b), (c). The Green Bank is a legislatively created financial institution that uses public and private funds to accelerate the growth of green energy technologies in Connecticut. *Id*. ¶ 31. The CEF receives approximately $10 per year from the average Connecticut household and, prior to the Sweeps, provided approximately $27 million a year for investments in clean energy projects. *Id*. ¶ 57.

For all Eversource customers, all of the surcharges assessed for the support of the Energy Funds are labeled on their bills as the "Conservation Charge,"

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[1] Many, but not all, Connecticut ratepayers are EDC customers—those customers who fund the C&LM Fund by payment of a surcharge on their electricity bills from the Electric Utilities. *Id*. ¶ 26. Customers of the Municipal Utilities do not contribute to the C&LM Fund. *Id*. ¶ 27. Since Customers of Municipal Utilities do not contribute to the C&LM Fund, they are not otherwise entitled to use C&LM Fund programs. *Id* ¶ 28.

"Conservation Adjustment Mechanism" and "Renewable Energy." *Id*. ¶ 58. For all UI customers, the three charges listed above are not broken out separately on their bills. Rather, they are combined with another charge not at issue in this case called the systems benefit charge. *Id*. ¶ 59.

Conn. Gen. Stat. §§ 16-245m and 16-245n provide that the monies collected for the Energy Funds may be used to reduce the state's peak demand for electricity, lower energy costs, lower carbon emissions through the implementation of the state's Plan, energy demand reduction and the state's Comprehensive Energy Strategy ("CES"), stabilize the energy grid, support low cost implementation of cost effective energy efficiency improvements in homes and residences and low cost financing of clean energy programs, such as solar photovoltaic installations, and projects backed by the Connecticut Green Bank. *Id*. ¶ 84. These funds support thousands of local energy efficiency and renewable energy jobs and millions of dollars invested annually in Connecticut's energy efficiency and clean energy economy. *Id*. ¶ 84.

D. PURA And Rate Making.

PURA is established pursuant to Conn. Gen. Stat. § 16-2 and is statutorily charged with regulating the rates and services of the EDCs and other public service companies operating in Connecticut. *Id*. ¶ 45. Each EDC operates pursuant to a tariff that is approved by PURA. *Id*. ¶ 46. Tariffs include rate schedules, terms of

service, rules and regulations of service, and standard template agreements that the EDCs use in operating their electric distribution systems. *Id.*

A tariff is "a public document setting forth the services being offered by a utility, the rates and charges for the services, and the governing rules, regulations, and practices relating to those services." 73B C.J.S. PUBLIC UTILITIES § 7. The approved tariffs for the EDCs include PURA-approved Eversource Terms and UI Terms (collectively, the "EDC Terms"). *Id.* ¶ 47. The EDCs must furnish their services in accordance with the tariffs, including the EDC Terms. *Id.* ¶ 48. The approved tariffs and terms and conditions of service apply to every entity furnished electric delivery service by the EDCs. *Id.* Tariffs include rate schedules, and are generally applicable to all EDC customers. *Id.* ¶ 49. The tariffs may be revised, amended, supplemented or changed from time to time by PURA either upon accepting a filing by the EDCs or upon PURA's direction to the EDCs, with which the EDCs comply by filing updated tariffs. *Id.* The tariff rate schedules approved by PURA for Eversource and UI, and paid by Plaintiffs, include the charges required by Conn. Gen. Stat. §§ 16-245m and 16-245n. *Id.* ¶ 50. The terms and conditions of service in the tariff impose two primary obligations on customers. In exchange for taking service from the EDCs, customers must pay their bills upon receipt and must provide the EDCs access to electric meters. Many other obligations are contained in each tariff. *Id.* ¶ 51. EDCs may discontinue service if

customers fail to comply with the obligations of the tariff. *Id*. ¶ 52. Plaintiffs pay tariff rates and thereby have accepted those rates as well as all of the approved EDC Terms. *Id*. ¶ 53.

The approved tariffs, including the EDC Terms, represent the entire written agreements between customers, including Plaintiffs and the State, and the EDCs. *Id*. ¶ 54. EDCs may not charge rates in excess of the rates approved by PURA and set forth in the rate schedules in their tariffs and those rate schedules are required to remain in effect until new rate schedules are approved by PURA. *See* Conn. Gen. Stat. § 16-19(a); Stip.Facts ¶ 55.

E. <u>The Act.</u>

In a 2017 Special Session on October 27, 2017, the General Assembly passed and thereafter the Governor signed into law P.A. 17-2, *An Act Concerning the State Budget for the Biennium Ending June 30, 2019, Making Appropriations Therefore, Authorizing and Adjusting Bonds of the State and Implementing Provision of the Budget* (the "Act"). *Id*. ¶ 64. Section 683 of the Act amended Conn. Gen. Stat. § 16-245m by directing the transfer of $63.5 million each year from the C&LM Fund to Connecticut's General Fund for fiscal years 2018 and 2019. *Id*. at ¶ 65. Section 685 of the Act amended Conn. Gen. Stat. § 16-245n by directing the transfer of $14 million each year from the CEF to the General Fund for fiscal years 2018 and 2019. *Id*. at ¶ 66.

When then-Governor Malloy signed the Act into law, he stated that "these sweeps (referred herein as "Sweeps" or "transfers") all require the state to take and deplete ratepayer funds intended to lower energy costs overall through investments in efficiency and conservation, and instead, use them to fill the General Fund coffers." *Id*. ¶ 68.

On May 15, 2018, the Governor signed P.A. 18-81, *An Act Concerning Revisions to the State Budget for Fiscal Year 2019 and Deficiency Appropriations for Fiscal Year 2018*, which reduced the amount of money transferred from the C&LM Fund to the General Fund in fiscal year 2019 from $63.5 million to $53.5 million. *Id*. ¶ 67. However, P.A. 18-81 left unchanged the $63.5 million transfer from the C&LM Fund for fiscal year 2018, and the $14 million transfer from the Clean Energy Fund for each of fiscal years 2018 and 2019. *Id*. Also on May 15, 2018, then-Governor Malloy issued a press release restating his opposition to the Sweeps. *Id*. ¶ 69.

As a result of the Sweeps, the EDCs and Natural Gas Utilities filed revisions to the 2018 Plan update on March 1, 2018, entitled the "Revised 2018 update." The revisions reflect a reduction overall of about 35.4% in the budget for the Plan's 2018 implementation. *Id*. ¶ 79.

In a letter responding to the Revised 2018 Update, the Deputy Commissioner of the state of Connecticut Department of Energy and Environmental Protection, Mary Sotos, wrote that the effect of the Sweeps:

> are already reverberating across our communities, causing significant disruption to economic investments. The diversions will result in lasting impacts to our homes, businesses, schools, clean energy workforce, and our electric grid. We acknowledge that this legislative diversion has effectively taxed all electric ratepayers, including non-profits and government entities, with a regressive effect on low-income households. The diversion increases Connecticut's businesses' and residents' utility bills by millions in unrealized savings.

Id. ¶ 80.

Deputy Commissioner Sotos went on to note that the Sweeps trigger the legislative diversion of two-thirds of the three mill monthly charge on electric bills and that "the Home Energy Solutions budget could be depleted by the third quarter of calendar year 2018, if not sooner." *Id*.

Many of the businesses which rely upon the C&LM Fund to compensate them for rendering energy efficiency services to Connecticut ratepayers, including Plaintiffs Colon, EEC, Best Home Performance, New England Smart Energy Group, CT Weatherproof Insulation, Steven Osuch, Energy ESC, Jonathan Casiano and Bright Solutions, have all received budget cuts as a result of passage of the Act. The passage of the Act has resulted in these named Plaintiffs losing revenues and implementing layoffs. *Id*. ¶ 85.

The required transfers for fiscal year 2018 occurred on June 25, 2018. *Id*.

¶¶ 74, 86. On that date, the Defendants swept $63.5 million from the C&LM Fund, and $14 million from the CEF.[2] *Id*. ¶¶ 86; Ex. 18A and 18B. The transfers for fiscal year 2019 are scheduled to occur on June 25, 2019. *Id*. at ¶ 74.

F. Relevant Procedural History.

The Plaintiffs commenced this action in the United States District Court for the District of Connecticut on May 15, 2018. The Plaintiffs' Complaint alleged, *inter alia*, that the Act violated the Contract Clause of the United States Constitution because it substantially impaired the Plaintiffs' right to receive benefits arising from their contracts with the utilities. The Complaint also alleged that the Act violated the Equal Protection Clause of the Fourteenth Amendment, in that the Act constitutes a tax on ratepayers that is not imposed on the customers of the Municipal Utilities.

On June 6, 2018, the parties held a status conference with District Judge Janet C. Hall, and agreed to resolve the issues raised in the Plaintiffs' Complaint by means of expedited cross motions for summary judgment. Doc. No. 17. Thus, on July 20, 2018, the parties filed cross-motions for summary judgment, as well as a Joint Stipulation of Facts pursuant to Local Rule 56(a)(1). Doc. Nos. 25, 26, 28.

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[2] The State of Connecticut's fiscal year begins on July 1 of each calendar year and ends on June 30 of the following calendar year. *Id*. ¶ 73. The transfers pursuant to P.A. 17-2 occurred on or about June 25, 2018 for the 2018 fiscal year. *Id*. ¶ 74. The next transfers pursuant to P.A. 17-2 and P.A. 18-81 are scheduled to occur on or about June 25, 2019 for the 2019 fiscal year. *Id*.

On August 13, 2018, the parties filed their responses to the cross-motions for summary judgment. Doc. Nos. 30, 31. On September 13, 2018, the parties appeared for oral argument on the cross motions for summary judgment.

On October 25, 2018, the district court (Hall, J.) issued its memorandum and order ("MOD" or the "Decision") denying the Plaintiffs' motion for summary judgment, and granting the Defendants' motion for summary judgment. A180. The district court first addressed the Plaintiffs' Contract Clause claim. The district court correctly stated that "the threshold inquiry in a Contract Clause analysis is whether there exists a contractual obligation that has been impaired by state action." A188 (*citing Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)). Only if there exists a contractual arrangement that has been impaired by state action will the court engage in the required three-part analysis to determine whether the state law's impairment of the contract violates the Contract Clause. A190.

However, the trial court concluded that the Plaintiffs' Contract Clause claim failed as a matter of law because the Plaintiffs do not have any contractual rights as to how the Energy Funds are spent. A193. Thus, the trial court found that "there is no basis for concluding that the Act impairs any legal rights or obligations that are expressly set forth in the Plaintiffs' contracts with their EDCs." *Id*. As a result,

the trial court determined that there was no need to address the three-part Contract Clause analysis. A190.

In addition, the trial court rejected the Plaintiffs' Equal Protection claim. The trial court first determined that, as a matter of law, the Act is not a tax because "it does not appropriate money from the Plaintiffs." A202. In addition, the trial court found that the Plaintiffs lacked standing to challenge the state's decision to allocate revenue between the Energy Funds and the General Fund under the taxpayer standing doctrine. A203.

SUMMARY OF THE ARGUMENTS

The Plaintiffs' first argument is that the district court erred when it granted the Defendants' motion for summary judgment as to the Plaintiffs' Contract Clause claim. The district court reached its decision based solely upon its conclusion that "there is no basis to conclude that the Act impairs any contractual relationship between the plaintiffs and the EDCs." A190. However, the plain language of the tariff expressly affords ratepayers the contractual right to ensure that the Energy Funds are used for the purposes of promoting energy efficiency and conservation programs, which are available to all ratepayers. This conclusion is buttressed by the relevant PURA Decisions and state statutes, which are incorporated into the tariff, and require that the funds must be spent on energy efficiency and conservation programs, and not for any other purpose.

In addition, the Plaintiffs contend that the district court erred when it granted the Defendants' motion for summary judgment as to their Equal Protection claim. Because only EDC customers contribute to the Energy Funds, the Act assesses a tax on EDC customers, but not the customers of the Municipal Utilities. This decision to tax only the EDC customers does not rationally further any legitimate state interest, and therefore, violates the Equal Protection Clause.

The district court rejected this claim, because it found that Act is not a "tax." A202. In addition, the district court found that the Plaintiffs did not have standing to pursue their Equal Protection claim.

On appeal, the Plaintiffs contend that the district court erred in applying a due process analysis to its equal protection claim and that the Act constitutes a tax on the ratepayers because it transfers taxpayer funds to the General Fund, which serves general revenue raising purposes, while not taxing ratepayers of Municipal Utilities. In addition, the Plaintiffs contend that they have standing to bring their Equal Protection claim because they do not challenge the *expenditure* of tax dollars. Instead, the Plaintiffs contest the *collection* of funds into the General Fund by means of the Act.

I. THE TRIAL COURT ERRONEOUSLY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' CONTRACT CLAUSE CLAIM

A. Standard of Review.

This Court will review a district court's grant of summary judgment *de novo*. *Weinstock v. Columbia Univ*., 224 F.3d 33, 40 (2d Cir. 2000). In addition, because the proper interpretation of contracts at issue in this case is a question of law, the Court of Appeals will review them *de novo* as well. *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 655 n.9 (2d Cir. 2016).

B. The Act Substantially Infringes The Plaintiffs' Express Contractual Right To Have The Energy Funds Spent On Conservation And Clean Energy Programs.

The Contract Clause of the United States Constitution provides that no state shall pass any law "impairing the Obligation of Contracts." U.S. Const. art. 1, § 10. Although the plain language of the Contract Clause proscribes "any" impairment, "the prohibition is not an absolute one, and is not to be read with literal exactness like a mathematical formula. Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977). Rather, "we must attempt to reconcile the strictures of the Contract Clause with the essential attributes of

sovereign power, necessarily reserved by the States to safeguard the welfare of their citizens." *Id.*

The threshold inquiry in a Contract Clause analysis is "whether there is a contractual relationship." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). Indeed, "the Supreme Court has frequently instructed that federal courts must independently determine the existence of a contract and the nature and extent of its obligations in order to decide whether it enjoys the protection of the Contract Clause." *Pineman v. Oechslin*, 637 F.2d 601, 604 (2d Cir. 1981). Moreover, in assessing the validity of a Contract Clause claim, "we begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504 (1987); *see Nw. Nat'l Life Ins. Co. v. Tahoe Reg'l Planning Agency*, 632 F.2d 104, 106 (9th Cir. 1980) ("The challenged action must first be shown to substantially impair some contractual obligation.")

The question of whether a contract exists for the purposes of Contract Clause analysis "is an issue of both state and federal law." *Pineman*, 637 F.2d at 604. "Initially it is a question of state law, for only those arrangements enforceable as contractual obligations under state law are protected by the Contract Clause against impairment." *Id.* At the same time, however, there is a federal law component to the inquiry: "Federal courts must have the ultimate authority to

determine, as a matter of constitutional law, whether a particular arrangement, of the sort normally enforceable as a contract under state law, is a contract protected by the Contract Clause . . .." *Id*. Therefore, "the Supreme Court has frequently instructed that federal courts must independently determine the existence of a contract and the nature and extent of its obligations in order to decide whether it enjoys the protections of the Contract Clause." *Id*.

If the plaintiff in a Contract Clause action has shown the existence of a contract that has been impaired by state action, then the courts in this jurisdiction will engage in a three-part analysis to ascertain whether the state law's impairment of the contract violates the Contract Clause. Specifically, the courts will ask (1) if the contractual impairment is substantial; (2) whether the law serves a legitimate public purpose such as remedying a general social or economic problem; and (3) if such purpose is demonstrated, whether "the means chosen to accomplish this purpose are reasonable and necessary." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367 (2d Cir. 2006).

1. <u>There Is A Contract Between EDCs And The Ratepayers.</u>

Here, the district court found that it did not need to take up this three-part analysis because "there is no basis to conclude that the Act impairs any contractual relationship between the plaintiffs and the EDCs." A190. For this reason alone, the district court granted the Defendants' motion for summary judgment as to the

Plaintiffs' Contract Clause claim. *See id*. However, the district court's finding that the Act does not substantially impair any contract between the EDCs and the Plaintiffs is erroneous for a variety of reasons.

When a federal court is evaluating whether state action substantially infringes a contract for purposes of the Contract Clause, this Court must first begin with principles of contract interpretation under state law. *See Pineman*, 637 F.2d at 604 ("Initially it is a question of state law, for only those arrangements enforceable as contractual obligations under state law are protected by the Contract Clause against impairment.") Under Connecticut law, "a contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction." *Garcia v. City of Hartford*, 292 Conn. 334, 341 (2009). "The intent of the parties is to be ascertained by a fair and reasonable construction of the written words and the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." *Id*. Thus, "in construing an unambiguous contract, the controlling factor is the intent expressed in the contract, not the intent which the parties may have had or which the court believes they ought to have had." *Coppola Constr. Co. v. Hoffman Enters. Ltd. P'Ship*, 157 Conn. App. 139, 159 (2015).

"When interpreting a contract, we construe the contract as a whole and all relevant provisions are considered when determining the intent of the parties." *Shawmut Bank Connecticut, N.A. v. Connecticut Limousine Serv., Inc.*, 40 Conn. App. 268, 272 (1996). "A contract should be construed so as to give full meaning and effect to all of its provisions." *FCM Group, Inc. v. Miller*, 300 Conn. 774, 811 (2011). "Because parties ordinarily do not insert meaningless provisions in their agreements, every provision of a contract must be given effect if it can reasonably be done." *24 Leggett St. Ltd. P'ship v. Beacon Indus., Inc.*, 239 Conn. 284, 298 (1996). Of particular significance to this case, the Connecticut appellate courts have consistently held:

> Like any other contract, a collective bargaining agreement may incorporate by reference other documents, statutes, or ordinances to be included within the terms of its provisions. When a contract expressly incorporates a statutory enactment by reference, that enactment becomes part of a contract for the indicated purposes just as though the words of the enactment were set out in full in the contract.

Russo v. City of Waterbury, 304 Conn. 710, 721 (2012); *see Greene v. City of Waterbury*, 126 Conn. App. 746, 751 (2011).

In this case, it is clear from the undisputed record that the EDCs and their customers or ratepayers, including the Plaintiffs, have a contractual relationship.

(Stip. Facts ¶¶ 3, 6, 7, 10, 11, 12, 16, 47-55; Exh. 5 (A130-51); Exh. 7 (A153-71)).[3] The Utilities and each of their customers have freely entered into a contract for the provision of electric service and, in exchange, their customers agree to be bound by the terms of service and to pay charges incurred pursuant to the rate schedules, as approved by PURA. If customers do not wish to accept the EDC Terms, they can cancel service. *See Connecticut Light & Power Co. v. Proctor*, 324 Conn. 245, 247 (2016) (recognizing implied-in-fact contract between electric utility and ratepayer).

The Utilities' tariff documents establish the terms and conditions of the contract between the utility and the customer:

> . . . these Terms and Conditions shall be deemed to be a part of ***every contract for service*** entered into by the Company, and shall govern all classes of service where applicable, unless specifically modified by a provision or provisions contained in a particular rate or special written contract with a customer…. [i]f an application for service is accepted by the Company's duly authorized agent, or if service is supplied according to the provisions of such application or pursuant to contract either without modification or with supplemental agreement, it ***shall constitute an agreement between the customer and the Company for the supply of service.***

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[3] During oral argument on cross motions for summary judgment on September 13, 2018, counsel for the Defendants admitted that the contract between the electric utility customers and the EDCs includes the charges for the C&LM Fund and the CEF. Tr. P. 38, lines 2-10 and that the contract provides that those funds would be determined as to use by the commissioner according to the plan. *Id.* at lines 19-25.

Eversource Terms (A133, 138); UI Terms (A155).[4] (Stip. Facts ¶ 47).[5]

Each page of the tariff contains a reference to the PURA docket number and date in which each tariff page was last approved through the ratemaking process. *See, e.g.*, Exhs. 5, 7. The EDC Terms govern service for each customer at the customers' applicable rate schedule—that is, the amount charged per unit of electricity delivered, including ancillary charges. Stip. Facts ¶¶ 3, 6-7, 10-12. For each customer, the Utilities charge rates pursuant to a separate "Rate Schedule" applicable to that customer's rate classification. *Id*. ¶¶ 3,6-7, 10-12.

2. The Plain Language Of The Tariff Guarantees That The Energy Funds Are Used For Their Intended Purpose.

Critically, the plain language of the tariff expressly guarantees that the Energy Funds are used for their intended purpose: to promote energy conservation programs and clean energy programs which are available to all ratepayers. To begin, each and every ratepayer receives a billing statement from his or her EDC that includes a statement of "Total Charges for Electricity," which identifies seven

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[4] UI's Terms and Conditions state at the outset that "[t]he following Terms and Conditions are a part of all rates, where not inconsistent with such rates, and observance of them by the Customer is a condition necessary for initial and continuing supply of electricity by The United Illuminating Company." A155.

[5] Each Utility's tariff is also provided on its webpage. *See* www.eversource.com; www.uinet.com. *See* Plaintiffs' individual contract terms, which includes the relevant EDC Terms and the applicable rate schedule, at Stip. Facts ¶¶ 3, 6-7, 10-12 and associated exhibits.

discrete charges that are assessed to each ratepayer. A120. One of these charges is identified by Eversource as "The Combined Public Benefits Charge," which "represents a combination of three charges formerly know[n] as: Conservation and Load Mgmt Charge, Renewable Energy Investment Charge, and Systems Benefits Charge. This charge also includes the Conservation Adjustment Mechanism approved by the PURA in Docket No. 13-11-14." *Id*.

The tariff reiterates this explanation in two additional places. A117; A124-25. In addition, the UI tariff emphasizes that these "charges," including the Conservation Charge and the Renewable Energy Charge, must be paid by each ratepayer on a monthly basis. A158.

In addition, the UI tariff includes an "**Explanation of Charges**" that expressly specifies the purpose of these charges, and identifies how the funds raised by these charges should be spent:

> **Combined Public Benefits Charge** is the combination of the following three charges:
>
> **Conservation and Load Management Program**--*This is the charge to fund programs that promote energy conservation and efficiency*.
>
> **Renewable Energy Investment**--*To fund programs that promote the use of renewable (or environmentally friendly) fuel sources, such as solar power, wind, fuel cells, methane gas from landfills, biomass, trash-to-energy, and water*.

A167. This clear and unambiguous contractual language expressly states that these consumer charges are included *only* to fund programs that "promote energy

conservation and efficiency," as well as programs that "promote the use of renewable (or environmentally friendly) fuel sources." *Id*.

Moreover, this language expressly prevents any entity from taking control of the funds raised by these charges, and using such funds for any purpose other than that stated in the contract. *See id*. To take just one example, if the EDCs unilaterally decided to assume control over these funds from the Energy Funds, and instead use the funds to provide a special dividend for their company's shareholders, such an action would clearly infringe the contractual rights of ratepayers. *See id*. Similarly, the General Assembly's effort to redirect these funds from the Energy Funds to the General Fund constitutes an infringement of the ratepayers' express contractual rights. *See id*.

The district court's memorandum of decision evaluated this contractual language, but found that it "does not create any contractual obligation flowing to the Plaintiffs from the EDCs." A193. Instead, without any sustained legal or textual analysis, the trial court concluded that this language "is purely descriptive in nature." *Id*. Accordingly, the trial court found that there is no basis for concluding that the Act "impairs any legal rights or obligations that are expressly set forth in the Plaintiffs' contracts with their EDCs." *Id*.

The trial court's interpretation of this contractual language, however, is erroneous as a matter of law. To begin, its interpretation would render this portion

of the contract meaningless. Such a result is inconsistent with the principles of contract interpretation as applied in Connecticut. *See FCM Group, Inc.*, 300 Conn. at 811 ("A contract should be construed so as to give full meaning and effect to all of its provisions."); *24 Leggett St. Ltd. P'ship*, 239 Conn. at 298 ("Because parties ordinarily do not insert meaningless provisions in their agreements, every provision of a contract must be given effect if it can reasonably be done.")

In addition, the trial court's conclusion that the express contractual language regarding the various charges in the "Explanation of Charges" section of the contract is not enforceable, including the "Combined Public Benefits Charge," would lead to an absurd result. *See New England Sav. Bank v. FTN Props. Ltd. P'Ship*, 32 Conn. App. 143, 145-46 (1993) ("In giving meaning to the language of a contract, we presume that the parties did not intend to create an absurd result.") Indeed, there are many other charges identified in the "Explanation of Charges" section of the tariff, including the "Late Payment Charge," the "Transmission Charge," the "Distribution Charge," the "Generation Service Charge," and so on. A167. If the contractual language regarding the "Combined Public Benefits Charge" is merely descriptive and is not enforceable, *then the related language regarding all of these other charges would be likewise unenforceable*. As a result, the courts would be required to find that consumers are not required to pay the late payment charge, transmission charge, distribution charge, or the generation service

charge. The tariffs do not contain express contractual language elsewhere with respect to these charges either, and it would be absurd to suggest that ratepayers need not pay these charges. The district court erred in concluding that the Energy Funds are not enforceable contract obligations of customers.

Moreover, the federal courts have repeatedly found that "Explanation of Charges" sections of consumer contracts for utility-type services qualify as binding contractual language. For instance, in *Smale v. Cellco P'ship*, 547 F. Supp. 2d 1181, 1183 (W.D. Wash. 2008), the plaintiffs, customers of Verizon, claimed that the defendant was liable for breach of contract because it failed to disclose that it would assess a charge to its consumers known as the "Effect of City Tax." The trial court granted Verizon's motion to dismiss, reasoning that its contract included a section entitled "Explanation of Charges" that notified consumers that the bill "may include other charges also related to our governmental costs." *Id*. at 1186. The trial court explained:

> A customer who did not understand the 'Effect of City Tax' assessment would naturally seek out the invoice's Explanation of Charges, and find the section describing Verizon's surcharges. That section would explain that the Effect of City Tax is a 'charge to recover or help defray costs of taxes and of governmental charges and fees imposed on' Verizon, and would explain that it is a Verizon Wireless charge, not a tax.
>
> [. . .]
>
> As described above, the court finds that, as a matter of law, the Agreement adequately discloses Verizon's right to impose fees 'related to' its governmental costs, whatever name it might ascribe to those fees.

Id. at 1186-87; *see Janda v. T-Mobile, USA, Inc.*, 2009 U.S. Dist. Lexis 24395, at *31-32 (N.D. Cal. Mar. 13, 2009) (plaintiffs failed to state claim for breach of contract against cell phone carrier where defendant's consumer contract "clearly stated that it would charge them a monthly fee, plus additional charges.") In sum, the trial court's cursory conclusion that language contained in the "Explanation of Charges" section of the tariff is not binding contractual language is belied by the many cases interpreting similar contractual language in consumer contracts.

3. **The Tariff Incorporates By Reference Relevant Statutes And PURA Decisions.**

In addition, the district court's interpretation of the tariff wholly ignores the statutes and PURA Decisions that are incorporated by reference in the tariffs. Indeed, these statutes and PURA Decisions clarify that ratepayers have a contractual right to ensure that the funds raised by surcharges are to be used for environmental conservation programs. *See Russo*, 304 Conn. at 721 (a contract "may incorporate by reference other documents, statutes, or ordinances").

For instance, each and every bill received by a ratepayer states that the Combined Public Benefits Charge "also includes the Conservation Adjustment Mechanism approved by the PURA in Docket No. 13-11-14." A120. This PURA Decision's Executive Summary states, in pertinent part:

> Pursuant to [§ 16(d)(1) of Public Act 13-298, An Act Concerning Implementation of Connecticut's Comprehensive Energy Strategy and

> Various Revisions to the Energy Statutes (the "Act")], the Authority performs a limited role with regard to the C&LM Plan, which consists primarily of ensuring funding for the C&LM Plan budgets approved by the Commissioner of the DEEP in the C&LM Plan Decision. Specifically, the Act requires that:
>
> 1. *The Authority must assess or cause to be assessed a charge of three mills per kilowatt hour of electricity* sold to each end use customer of an EDC *to be used to implement a program as provided in this section for conservation and load management programs*.

A213. (Emphasis added.)

Subsequently, Section II(B) of the Decision, which is entitled "Funding for the 2013-2015 C&LM Plan," states that the budget submitted by the EDCs "confirms that they will need to continue collecting the maximum allowable charge in 2014 to fund their C&LM Plan budgets, associated gross earnings taxes, lost margin, and carryover balance from 2013." A214. The Decision also states: "With respect to lost revenues, pursuant to § 66 of the Act, C&LP is entitled to recover its lost revenues associated with energy efficiency programs approved pursuant to Conn. Gen. Stat. § 16-245m." A217.

Section II(C) of the Decision makes clear that the C&LM Plan charges are no different than any other rate and ***must be used for their intended purposes or returned to ratepayers***.

> The CAM charges approved herein are designed to ensure funding for the budget established by the DEEP to the greatest extent possible, given the statutory cap. *Like the other mechanisms charged to customers that are not directly related to distribution service,* the CAM will be reconciled annually.

> *As with any utility rate, the CAM will not collect exactly what it is designed to in a given year due to fluctuations in actual vs. forecasted sales*. Program demand will have a large effect on actual expenditures relative to the budget. Large balances can accrue if, for example, there is lower than expected demand for program services. Due to the potential for large variances (and associated carrying charges) associated with fluctuations in sales and/or program demand, it is neither in the Companies nor ratepayer interest to have the CAM reconciled every three years. However, in an attempt to balance the potential negative effect of interest costs accruing on large variances with the general goal of state policy to avoid a "boom/bust" funding scenario and provide some funding flexibility, *the Authority will allow a maximum carryover not to exceed five percent of the current annual budget level*. At current budget levels, this provides the EDCs with an allowed variance of approximately $8.9M and the LDCs an allowed variance of approximately $2.2M, based on program budgets of $178,391,723 and $43,951,158, respectively. *Over-collection in excess of the allowed five percent variance must be returned to ratepayers through the CAM*. The Authority notes that a 15% "spend forward" policy was already approved in the C&LM Plan Decision and will be accommodated by the Authority within the confines of the statutory cap. The Companies are cautioned to exercise discretion if spending forward, as the Authority cannot ensure recovery in excess of the cap established by the Act. *The Companies will be directed to file an annual CAM reconciliation, showing the allowed budget, actual expenditures and variance with the allowed variance clearly stated in the filing*.

A216. (Emphasis added.) Put simply, the Sweeps authorized by the Act would effectively vitiate the PURA requirement that over-collection of CAM funds "must be returned to ratepayers through the CAM." *Id*. Specifically, since $49.5 million has already been Swept from the C&LM Fund in 2018 and $39.5 million will be redirected from the C&LM Fund to the General Fund in 2019, all funds "in excess of the allowed 5% variance" have been effectively confiscated by the General

Assembly, and will not be returned to the ratepayers, as mandated by the PURA Decision.[6] *See id*. In other words, Section II(C) of the PURA Decision, which is incorporated in the tariff by reference, plainly supports the Plaintiffs' position that the ratepayers have a contractual right to ensure that the monies in the Energy Funds are used for their intended purpose. *See id*.

Thus, the plain language of the PURA Decision, which is incorporated by reference in the tariff, expressly provide that the surcharges are to be used only "to implement a program as provided in this section for conservation and load management programs," as well as for "energy efficiency programs approved pursuant to General Statutes § 16-245m." *Id*. It is also significant that the PURA Decision cites to Conn. Gen. Stat. § 16-245m, which requires that the C&LM Fund be spent on "cost-effective energy conservation programs and market transformation initiatives." The failure to use the Energy Funds for these intended uses constitutes a breach of these contractual rights.

4. <u>Conn. Gen. Stat. §§ 16-245m And 16-245n Are Incorporated Into The Tariffs.</u>

The Connecticut courts have long held that "statutes existing at the time a contract is made become a part of it and must be read into it just as if an express

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[6] Pursuant to the Act, $63.5 million was taken from the Energy Funds in 2018, including $49.5 million from the C&LM Fund and $14 million from CEF. In 2019, $39.5 million is scheduled to be seized from the C&LM Fund and $14 million from the CEF on or about June 25, 2019..

provision to that effect were inserted therein, except where the contract discloses a contrary intention." *Deming v. Nationwide Mut. Ins. Co.*, 279 Conn. 745, 780-81 (2006). "It is important to emphasize, however, the limitation of this principle to the extent that it embraces alike those laws which affect the contract's validity, construction, discharge, and enforcement." *Id*. at 781. "Thus, although we incorporate a law as if an express term of the contract to construe the scope of validity of an obligation already embraced within the terms of the contract, we do not incorporate the law to create a substantive obligation where none previously had existed." *Id*.; *see Rizzo Pool Co. v. Del Grosso*, 240 Conn. 58, 76 & n.18 (1997) (incorporating statute limiting attorneys' fees "whenever there is an attorneys' fees clause in the commercial party's contract"); *Hatcho Corp. v. Della Pietra,* 195 Conn. 18, 23 (1985) (incorporating statutory definition into commercial lease).

Here, the relevant portions of Conn. Gen. Stat. §§ 16-245m and 16-245n are incorporated into the tariffs—the contracts—between EDCs and the ratepayers. Decision at 2. Both statutes make clear that the Energy Funds shall be used for energy conservation programs and market transformation initiatives—not for any other purpose, including the state's General Fund. For instance, Conn. Gen. Stat. § 16-245m(b) states: "The EDC shall establish an Energy Conservation and Load Management Fund which shall be held separate from all other funds or accounts.

Receipts from the charge imposed under subsection (a) of this section shall be deposited into the fund." In addition, Conn. Gen. Stat. § 16-245m(d)(1) states that EDCs "shall submit to the Energy Conservation Management Board a combined electric and gas Conservation and Load Management Plan . . . to implement cost-effective energy conservation programs and market transformation initiatives." Moreover, services provided under the Plan "shall be available to all customers of EDCs and gas companies." *Id*.

Likewise, Conn. Gen. Stat. § 16-245n(b) provides that PURA shall assess a charge "of not less than one mill per kilowatt hour charged to each end use customer of electric services in this state which shall be deposited into the Clean Energy Fund." Conn. Gen. Stat. § 16-245n(c) states that expenditures of this fund "may be used for expenditures that promote investment in clean energy in accordance with a comprehensive plan to foster the growth, development, and commercialization of clean energy sources . . . that serve end use customers in this state."

This Court should defer to the PURA Decision and hold that these statutes are incorporated into the tariff for the collection of the Energy Funds and the contractual obligation to use the Energy Funds for their intended purposes—an obligation which is already embraced within the terms of the tariff. As noted above, the tariff expressly states that the C&LM Program "is the charge to fund

programs that promote energy conservation and efficiency," and that the renewable energy investment is "to fund programs that promote the use of renewable (or environmentally friendly) fuel sources, such as solar power, wind, fuel cells . . .." A167. The PURA Decision, which itself is incorporated by reference into the tariff, provides that the surcharges are "to be used to implement a program as provided in this section for conservation and load management programs" or returned to ratepayers. A213.

The PURA Decision in Docket No. 13-11-14 makes clear that the requirements of Conn. Gen. Stat. §§ 16-245m and 16-245n are incorporated into the tariffs. Indeed, the PURA Decision expressly refers to Conn. Gen. Stat. § 16-245m and § 16(d)(1) of Public Act 13-298. A213, A216-17. In other words, this Court would not be incorporating a substantive obligation where none had previously existed; but rather, clarifying the existing contractual obligation to use the Energy Funds for the intended purposes.

The district court rejected this argument, finding instead that "there is no language in Sections 16-245m or 16-245n that suggests that the State of Connecticut entered into a contractual arrangement with the plaintiffs regarding how the Energy Funds would be used." A196. In support of this finding, the district court noted that these provisions "make clear that state government entities have full discretion over the use and disbursement of these Funds." *Id*. For

instance, Conn. Gen. Stat. § 16-245m(d)(1) gives the Commissioner of the Department of Energy and Environmental Protection ("DEEP") final authority to "approve, modify, or reject any Plan for spending money in the C&LM fund." *Id*. Conn. Gen. Stat. § 16-245n(c) provides that disbursements from the CEF may be made "upon the authorization of the Connecticut Green Bank, and in accordance with a comprehensive plan developed by the Green Bank." *Id*.

The district court's analysis, however, is overly simplistic. While §§ 16-245m and 16-245n require that any proposals for expenditure of Energy Fund monies be approved by a government official, both statutes expressly require that the Energy Funds be spent *only* for the limited purposes of energy efficiency and clean energy programs. Indeed, the district court recognized that these statutes "impose limitations on how the C&LM Fund and the Clean Energy Fund may be used." A196. Critically, nothing in these statutes allows *any* government official to authorize an expenditure of these funds for *any* other purpose. *See id*. Likewise, nothing in these statutes allows the General Assembly to redirect these funds for any other uses, such as transferring such monies to the General Fund. *See id*. Any argument to the contrary is belied by the plain language of these statutes. *See id*. Notwithstanding the district court's acknowledgement of the restrictions provided by state law, the district court recasts these statutory

constraints as "merely declaring a policy to be pursued until the legislature shall ordain otherwise." *Id*.

5. Tariffs are Valid and Enforceable Until Modified Per the Filed-Rate Doctrine and Conn. Gen. Stat. § 16-19(a).

Notwithstanding extensive briefing and oral argument on the legal force and effect of the filed rate doctrine, as codified in Conn. Gen. Stat. § 16-19(a), the trial court rejected more than one hundred years of common law on the force and effect of the filed rate doctrine and Connecticut's own statutory codification of the regulatory framework embedded into tariffs.[7]

The filed rate doctrine, which is also referred to as the "filed tariff doctrine," is a common-law rule that precludes actions contrary to the rates, terms and conditions contained in a tariff. Indeed, filed tariffs attain "the force of law and are not simply contractual." *AT&T Corp. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996). "Under the doctrine, filed tariffs govern a utility's relationship with its customers and have the force and effect of law until suspended or set aside." *Sw.*

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[7] Defendants acknowledged in their reply brief that Conn. Gen. Stat. § 16-19(a) is Connecticut's codification of the filed rate doctrine but erroneously claimed that the filed rate doctrine only applies to approved charges and not the panoply of other terms and conditions in tariffs. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 217 (Tex. 2002) (Filed rate doctrine applies to non-monetary terms of tariffs, including limitation of liability clauses). The trial court acknowledged the doctrine has been applied to the spectrum of regulated utilities and that it has been applied "not only to rates or charges, but also to non-price aspects of services." A198.

Elec. Power Co. v. Grant, 73 S.W.3d 211, 217 (Tex. 2002). Under the filed rate doctrine, regulated utilities cannot vary a tariff's terms with individual customers, discriminate in providing services, or charge rates other than those properly filed with the appropriate regulatory authority. *See id*.

The filed rate doctrine applies to rate schedules, tariffs and contracts that have been approved by the regulatory agency because such filings have the effect of binding law. *See California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) ("Once filed with a federal agency, such tariffs are the 'equivalent of a federal regulation.'") *See also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) ("[T]he filed rate doctrine is not limited to 'rates' per se: our inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases."); *E.&J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1040 (9th Cir. 2007) ("[C]ourts have held that the principles underlying this doctrine preclude challenges to a wide range of [regulatory] actions, not just the act of literal rate filing").

The purpose of the filed rate doctrine is to ensure that the filed rates are the exclusive source of the terms and conditions by which the regulated company provides services covered by the tariff to its customers. *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 230 (1998) (Rehnquist, C.J., concurring) (Filed rate doctrine bars suits challenging rates, seeking to enforce rates that differ from the

filed rates, and also bars suits challenging services, billing, or other practices that have the effect of changing the filed tariff.) Ratepayers may sue under the filed rate doctrine to enforce the tariff. *Brown v. MCI WorldCom Network Servs*., 277 F.3d 1166, 1172 (9th Cir. 2002).

The foregoing authorities make clear that once the tariff and rate schedules are set, the filed rate doctrine protects the economic expectations of both utility investors and customers, and binds a utility to charge the government-approved or filed rates and obliges the customers to pay those charges, until rates are superseded and replaced by new lawful, duly-authorized rates on file.

No utility or customer has a vested right in the continuation of a particular rate (here, the Energy Funds) for electric service; however, every utility customer does have an expectation that concluded financial agreements will not be altered retroactively by government action (e.g. the contracts Plaintiffs entered into in reliance on the C&LM Fund or that the Green Bank has entered into to deploy the funds for clean energy projects with the CEF). Under the filed rate doctrine, the government does not have the authority to impair settled rights retroactively. *See Cent. Power & Light Co. v. P.U.C. of Tex.*, 36 S.W. 3d 547, 554 (Tex. Ct. App. 2000) ("Ratemaking has been likened to a legislative activity…[t]herefore, the constitutional prohibition on ex post facto or retroactive laws applies.")

The Legislature cannot reach back in time and impair the "regulatory contract" by reducing the parties' expectancies, which are assured by the contractual expectations of the filed tariffs: Specifically, that the C&LM Fund and CEF will be used to support the programs authorized in the Plan. *See* Conn. Gen. Stat. §§ 16-245m and 16-245n; A213, A216. The Legislature is constitutionally prohibited from reassigning a charge that it earmarked for a specific purpose under the "regulatory contract." *See e.g., Gearhart v. Pub. Util. Com'n. of Oregon*, 299 P.3d 533, 543 (Or. Ct. App. 2013) ("The filed-rate doctrine holds, generally, that any rate filed with and approved by the relevant ratemaking agency represents a contract between a utility and the customer and is conclusively lawful until a new rate is approved.") There are limits on legislative power in general and there are constitutional mandates that certain private expectancies and rights are protected from retroactive disruption by the government.

In this case, when the General Assembly created the C&LM and CEF pursuant to Conn. Gen. Stat. §§ 16-245m and 16-245n, it required PURA to approve the charges that are at issue in this case, which PURA did in the PURA Decision. In compliance, each utility filed tariffs that include the rate schedules assessing these charges along with the Eversource Terms and UI Terms, respectively, such that the approved tariffs of the EDCs include the contract language and surcharges that support the C&LM Fund and the Clean Energy Fund.

(Stip. Facts ¶¶ 53-58; Exhibits 5, 7). Under the filed rate doctrine, these tariffs and rate schedules are sacrosanct until modified in a subsequent PURA proceeding with revised filed tariffs.

Furthermore, Connecticut has codified the filed-rate doctrine in Conn. Gen. Stat. § 16-19(a), which provides in relevant part:

> No public service company may charge rates in excess of those previously approved by the Public Utilities Control Authority . . . except that any rate approved by the Public Utilities Commission, the Public Utilities Control Authority or the Public Utilities Regulatory Authority shall be permitted until amended by the Public Utilities Regulatory Authority . . . .

In other words, Connecticut's statutory requirements are the same as the filed rate doctrine—a utility cannot change rates until filed and approved and **approved rates remain in effect until amended** by PURA, the regulatory authority.[8] While utilities often invoke the filed-rate doctrine as a defense to liability, *Sw. Elec. Power Co.*, 73 S.W.3d at 217, the Ninth Circuit Court of Appeals in *MCI WorldCom* made clear that ratepayers have the same legal right to enforce the same

[8] The term "rate" in the filed rate doctrine refers to the entire tariff, not just the rate schedules. A regulatory agency's rate-making authority authorizes it to approve a tariff's provision limiting liability, for example, because a limitation on liability is an inherent part of the rate the utility charges for its services. *Sw. Elec. Power Co.*, 73 S.W.3d at 217. Both the filed rate doctrine and Conn. Gen. Stat. § 16-19(a) therefore apply to the non-rate portions of a utility's tariff.

filed-rate expectations and contract language as the utilities.[9] 277 F.3d at 1172. Tariffs and rate schedules are enforceable and the Defendants in this case should not have the power to eviscerate the reasonable and legitimate expectations of both the Plaintiffs and the Utilities set forth in the approved tariffs.

II. THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Standard of Review.

The Court of Appeals will review a district court's grant of summary judgment *de novo*. *Weinstock v. Columbia Univ*., 224 F.3d 33, 40 (2d Cir. 2000).

B. The Act Violates The Equal Protection Clause.

The Fourteenth Amendment of the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." However, the equal protection clause does not prevent the states from making reasonable classifications among persons. *W.& S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656-57 (1981). "Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have

[9] Conspicuously absent from participating in this litigation are the EDCs, which are also parties to the contracts invaded by the Sweeps and the Defendants' actions in enforcing the intent of the General Assembly in P.A. 17-2, as modified by 18-81. The EDCs are not harmed, however, by the Sweeps as whatever costs and losses result from the Sweeps are and will be passed through to the ratepayers. (See Stip. Facts ¶ 71).

large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 354-55 (1973).

In general, "statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose." *Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1997); *see W.& S. Life Ins. Co.*, 451 U.S. at 657 (tax should be sustained "if we find that its classification is rationally related to achievement of a legitimate state purpose.") "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Regan*, 461 U.S. at 547-48.

Here, the Plaintiffs argue that the Sweeps required by the Act constitute a tax on each of the EDCs' ratepayers. Because only EDC customers contribute to the Energy Funds, the Act assesses a tax on EDC customers, but not Municipal Utilities' customers. This decision to tax the EDC customers, but not the Municipal Utilities' customers, does not rationally further any legitimate state interest, and therefore, violates the Equal Protection Clause.

The district court rejected this claim for two discrete reasons. First, the district court found that the Act is not a tax on the ratepayers because "the plaintiffs have no recognizable property interest in the money that has been deposited in the Energy Funds." A202. Second, the district court concluded that

the taxpayer standing doctrine prevents the Plaintiffs from challenging the State's decision to allocate revenue between the Energy Funds and the General Fund." A203. The district court, however, is wrong on both counts.

C. The Act Is A Tax.

To begin, the district court defined a "tax" as a direct transfer of property from citizens to the government. A200-01. However, this definition is not supported by the leading cases in the Second Circuit. For instance, in *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 737 F.3d 228, 231 (2d Cir. 2013), the Court held:

> The principal identifying characteristic of a tax, as opposed to some other form of state-imposed financial obligation, is whether the imposition serves general revenue-raising purposes. Whether a measure serves 'general revenue raising purposes' in turn depends on the disposition of the funds raised.

See also Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 713-14 (2d Cir. 1993) (surcharges are taxes because "both raise revenue which is ultimately paid into the State's general fund.") In other words, the question of whether a revenue-raising device is a fee or a tax is determined based upon the *disposition* of the funds raised, *not whether the funds are taken directly from the taxpayers*. *See id*. Here, the Act transferred monies from the Energy Funds, which have a very specific, limited purpose—to spend monies on clean energy projects—to the General Fund, which "serves general revenue-raising purposes." *See Shumlin*, 737 F.3d at 231.

In addition, the undisputed legislative history of the Act reflects that several members of the Connecticut General Assembly characterized the Act as a tax during and after legislative debates on the measure. *See Key Air, Inc. v. Comm'r of Rev. Servs.*, 294 Conn. 225, 233 (2009) (where meaning of statute is ambiguous, the Connecticut courts "look for interpretive guidance to the legislative history and circumstances surrounding its enactment . . .") For instance, during the June 2017 debate on Public Act 17-2, Senator Suzio stated:

> **I believe there's a hidden tax. [. . .] It's not gonna show up in our budget as any kind of a tax or even a nickel of cost. But the cost is gonna be very real to Connecticut consumers. And, you know what? It's the worst kind of tax. It's $300 million dollars for nothing**. They're gonna pay a penalty for our decision. I think that is not only unfortunate, I really think it's a betrayal of many Connecticut families who have paid this money and now will get nothing for it and will have to pay the penalty for it.

June 2017 debate, p. 35-36. (Stip. Facts ¶ 71)

Moreover, the district court erred in applying a due process analysis to the Plaintiffs' equal protection claim, and therefore confused the analysis in concluding that the definition of a "tax" requires a direct transfer of property from citizens to the government. For instance, the trial court relied on *Chatterjee v. Comm'r*, 277 Conn. 681, 695 (2006), pinpoint citing to a due process holding, for the proposition that Plaintiffs must have a legitimate property interest in or claim of entitlement to the Energy Funds in order to conclude that the Act operates as a

tax. A201. However, *Shumlin*, 737 F.3d at 231 teaches that the trial court's analysis is misplaced.

Finally, the district court's analysis failed to acknowledge that the Act would eviscerate the requirement that over-collection of CAM charges must be returned to ratepayers, and would therefore result in a direct transfer of property from ratepayers to the State. *See* PURA Decision, Docket No. 13-11-14, § II(C) (A214-16). As noted *infra*, Section II(C) of the PURA Decision requires that any over-collection in excess of the allowed 5% variance be returned to the ratepayers. However, if tens of millions of dollars are redirected from the C&LM Fund to the General Fund, there would be no way to calculate the "over collection of funds" from the CAM charges, and consequent refund of such funds to the ratepayers. In fact, all such funds would be confiscated by the General Assembly, and not returned to the ratepayers, as mandated by the PURA Decision.

Critically, there is no reasonable dispute that the ratepayers have a property interest in any portion of the "over collection of funds" described in the PURA Decision because they have a legitimate claim of entitlement to it. *See Chatterjee*, 277 Conn. at 695 (to have a property interest, a person must "have a legitimate claim of entitlement to it.") In other words, the transfer of these funds to the General Fund pursuant to the Act constitutes a direct transfer of funds from the

ratepayers to the State, and therefore would constitute a "tax" under the district court's definition of the term. *See id*.

D. The Taxpayer Standing Doctrine Does Not Deprive The Plaintiffs Of Standing In This Case.

The trial court also erred when it found that the Plaintiffs lack standing based upon the taxpayer standing doctrine. "The basic rule is that taxpayers do not have standing to challenge how the federal government *spends tax revenue*." *In re United States Catholic Conf.*, 885 F.2d 1020, 1027 (2d Cir. 1989). However, "a taxpayer has standing to challenge the *collection* of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2007).

Here, the trial court incorrectly characterizes the Plaintiffs' Equal Protection claim as a challenge to the State's *expenditure* of tax revenue. A204. However, the Plaintiffs' claim does not contest the State's expenditure of its tax dollars. Instead, the Plaintiffs allege that when the ratepayers' funds are swept into the General Fund pursuant to the Act, ratepayers are subject to taxation in a manner not required of those who receive electrical services from the Municipal Utilities. In other words, the Act will require the EDCs' ratepayers, including each of the Plaintiffs, *to contribute a tax to the General Fund in a manner it does not require*

of those citizens who are customers of the Municipal Utilities. The Plaintiffs clearly have standing to make such a claim. *See Hein*, 551 U.S. at 599.

In addition, taxpayer status is only insufficient to confer standing to bring a lawsuit seeking to hold a government action or a statute unconstitutional "*in the absence of an articulable injury-in-fact that is distinct from the injury suffered by all such citizens or taxpayers*." *Fischer v. Cruz*, 2016 U.S. Dist. Lexis 47131, at *7-8 (E.D. N.Y. Apr. 7, 2016). Here, however, the Plaintiffs have suffered an injury-in-fact as a result of the Act.

Indeed, as a result of the Sweeps, Plaintiffs have suffered and will continue to suffer considerable economic harm. Some of the Plaintiffs rely on the C&LM Funds and CEF to operate their energy-efficiency businesses, upgrade and improve their homes and commercial buildings, and reduce their energy bills through conservation measures. Stip. Facts ¶¶ 1-3, 6, 8-12. Other Plaintiffs have interests dedicated to expanding energy efficiency, renewables and conservation while reducing greenhouse gas emissions that benefit all ratepayers (*Id*. ¶¶ 4-5) and promoting social, economic, and environmental justice in Connecticut (*Id*. ¶ 7). All of these Plaintiffs pay their electric bills – thereby contributing themselves to the C&LM Fund and CEF revenues being swept – and they all rely on contractual expectations that the ratepayer funds they pay to support the C&LM Fund and CEF will be used for the purposes bargained for in the approved tariffs and rate

schedules. (*Id*. ¶ 53). Because of this bargained-for exchange and reliance, the Sweeps to support the State's General Fund and reduction in available C&LM Funds and CEF revenues harm the Plaintiffs and their businesses directly.

Specifically, as a result of the Sweeps, the Plaintiffs: (1) will pay increased electric rates on account of decreased efficiency savings (*Id*. ¶¶ 33-34, 71); (2) have lost and will continue to lose business opportunities related to energy efficiency investments supported by the C&LM fund (*Id*. ¶¶ 23-24, 83-84); and (3) have experienced or will experience reduced or eliminated access to funding for energy conservation and efficiency measures for their homes and business (*Id*. ¶¶ 84-85). Both the DEEP, and the Governor of the State of Connecticut have acknowledged these harms, with the DEEP noting that the Sweeps "are already reverberating across our communities, causing significant disruption to economic investments. The diversion will result in lasting impact to our homes, business, schools, clean energy workforce, and our electric grid." (*Id*. ¶ 80). At least one member of the Legislature has declared the Sweeps as equivalent to theft of ratepayer funds. (*Id*. ¶ 70).

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Plaintiffs respectfully request that this Court reverse the memorandum and order of the district court,

which granted the Defendants' motion for summary judgment, and denied the Plaintiffs' motion for summary judgment.

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CERTIFICATION OF COMPLIANCE WITH TYPE VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 12,384 words, pursuant to Local Rule 32.1(a)(4)(A).

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Dated: March 8, 2019.

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was served *via* Notice of Electronic Filing for parties or counsel who are registered to received electronic filings (as set forth below), and, served *via* First Class U.S. Mail, postage prepaid, to all other parties exempt from electronic filing, on this **8th** day of **March 2019**.

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