UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LETICIA COLON DE MEJIAS, ET AL., Plaintiff,	:	NO. 03:18CV00817(JCH)
v.	:	
	;	
DANNEL P MALLOY, in his official capacity as Governor of the State of Connecticut, ET AL.	:	
Defendants.	:	JULY 20, 2018

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants respectfully submit this Motion for Summary Judgment as to all counts of Plaintiffs' Complaint dated May 15, 2018 pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rules 7 and 56. In support of this Motion, Defendants submit the accompanying Memorandum of Law and the jointly filed Local Rule 56(a)1 Stipulated and Agreed Statement of Undisputed Facts pursuant to Local Rule of Civil Procedure 56(a).

WHEREFORE, Defendants respectfully request that the Court grant this Motion for Summary Judgment as to all Counts.

THE DEFENDANTS

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Certificate of Service

I hereby certify that on July 20, 2018, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Philip Miller
Philip Miller
Assistant Attorney General

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In 2017, faced with a number of complicated and difficult revenue and budget decisions, the General Assembly chose to do what it had done on three other occasions since 2003, it directed that money be transferred from two legislatively created funds, the Conservation and Load Management ("C&LM") Fund and the Clean Energy Fund ("CEF"), collectively, the "Funds," into the General Fund. These Funds are financed in part by charges imposed by the Public Utilities Regulatory Authority ("PURA") on the electric bill of the customers of the State's two electric distribution companies ("EDCs"), the Connecticut Light and Power Company, d/b/a Eversource ("Eversource") and the United Illuminating Company ("UI"). Plaintiffs, all EDC Customers, brought suit, alleging that Public Act 17-2 (the "Act"), which directed these money transfers, violates both the Contracts Clause and the Equal Protection Clause of the United States Constitution. The Act does not.

With respect to the Contracts Clause claim, Plaintiffs argue that the statutes creating the Funds and the subsequent tariffs that PURA approved authorizing the charges contractually binds the State to use the money in the C&LM Fund and the CEF only for the purposes enumerated in the Funds' authorizing statutes. They argue that P.A. 17-2 impairs that contract. This argument is without merit. First, the only way that the State could be prohibited from

transferring money from the Funds into the General Fund is if the State contractually agreed not to do so, which the State has not done. There is no language in *any* statute that contains such a term. The statutes that created the Funds and set out their purposes are merely policy decisions that can be, and have been, revisited at any time. Additionally, the tariffs that PURA approved could not contain such a restriction because PURA cannot bind the State without the statutory authority to do so which, as mentioned above, is absent in this case. Moreover, there is no language in any PURA-approved tariff that prohibits the transfer of money out of the Funds into the General Fund.

However, even if the Court should conclude that a contract governing the use of money collected in the Funds somehow exists, P.A. 17-2 does not substantially impair that contract. Given that the Funds have repeatedly been used in the past to support the General Fund and concern a heavily regulated industry, Plaintiffs could not have a reasonable expectation that the Funds would not be used for other purposes at times. Additionally, P.A. 17-2 serves a legitimate state purpose, reallocating money for other general welfare needs of Connecticut citizens.

As to the Equal Protection claim, Plaintiffs argue that P.A. 17-2 is an unconstitutional tax because the only EDC Customers pay the charges. The customers of the seven small municipal electric utilities (collectively the "Municipal Utilities"), which serve approximately 5% of Connecticut households, do not pay them. This argument too is without merit. First, although the charges are taxes for purposes of federal law, P.A. 17-2 does not implement those taxes. Rather, the statutes that established the charges do, and Plaintiffs do not challenge those statutes. In addition, Plaintiffs lack standing to challenge P.A. 17-2 because, as taxpayers, they lack standing to challenge how the General Assembly chooses to spend taxpayer money. Moreover,

even if Plaintiffs had standing to challenge P.A. 17-2, they would fail on the merits because P.A. 17-2 contains no classification.

Should the Court dismiss Plaintiffs' federal causes of action, it should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims. It is particularly appropriate to do so in this case because those claims are barred both by the Eleventh Amendment and sovereign immunity and otherwise fail to state a claim.

BACKGROUND

I. ELECTRIC DISTRIBUTION IN CONNECTICUT

Electric distribution service in Connecticut is provided by two investor-owned public service companies, referred to herein as the EDCs, and seven small municipal electric utilities. Joint 56(a)(1) ¶ 17. Eversource serves approximately 1,244,000 residential and business customers, UI services approximately 338,000 customers and the municipal utilities serve a total of approximately 125,000 customers. Joint 56(a)(1) ¶ 18. The General Assembly has delegated its regulatory and ratemaking authority over the EDCs to PURA, a part of the Connecticut Department of Energy and Environmental Protection ("DEEP"). Joint 56(a)(1) ¶ 45. Municipal commissions perform those functions for the municipal electric companies. *Markley v. Dep't of Pub. Util. Control*, 301 Conn. 56, 59 (2011).

Each EDC operates pursuant to a tariff that is approved by PURA. Tariffs include rate schedules, terms of service, rules and regulations of service and standard template agreements the EDCs use in operating their electric distribution systems. Joint 56(a)(1) ¶ 46. PURA generally approves new tariffs for the EDCs four times a year. Joint 56(a)(1) ¶ 49.

II. CREATION OF THE FUNDS AND THE CHARGES AT ISSUE

"In 1998, the General Assembly passed No. 98–28 of the 1998 Public Acts (P.A. 98–28), which deregulated the state's electric power market." *Markley*, 301 Conn. at 59. Sections 33 and 44 of P.A. 98-28, now codified at Conn. Gen. Stat. §§ 16-245m(b) and 16-245n(c) respectively, created the C&LM Fund and the CEF respectively. One of the primary purposes of the deregulation effort was to lower EDC Customers' electric rates. To that end, § 20(a)(2) of P.A. 98-28 required PURA to establish a "standard offer," which, after including a number of services and charges, including two of the charges at issue in this case, "shall be at least ten per cent less than the base rates, as defined in section 3 of this act, in effect on December 31, 1996." *In Re United Illuminating Co.*, 99-03-35, 1999 WL 1066453 (Oct. 1, 1999). Because Municipal Utilities were not affected by these deregulation efforts, neither P.A. 98-28 nor P.A. 17-2 applied to them.

A. THE C&LM FUND

Public Act 98-28, now codified at Conn. Gen. Stat. § 16-245m directed PURA to "assess or cause to be assessed a charge of three mills per kilowatt hour of electricity sold to each" customer of the EDCs, and that the money collected in those Funds be used to implement conservation and load management programs. Conn. Gen. Stat. § 16-245m(a)(1). Section 16-245m(b) established the C&LM Fund and required the EDCs to create the CLM Fund, held separate and apart from other funds, to hold these monies. Conn. Gen. Stat. § 16-245m(b). This is the first charge at issue in this case. In 2011, as part of P.A. 11-80, the General Assembly authorized PURA to assess an additional charge of up to three mills per kilowatt hour known as a "conservation adjustment mechanism" ("CAM"). Joint 56(a)(1) ¶ 37. That charge is now

codified at Conn. Gen. Stat. § 16-245m(d)(1). This effectively doubled the size of the charges deposited into the C&LM Fund. *Id*. This is the second charge at issue in this case.

B. THE CEF

P.A. 98-28 also created the Renewable Energy Investment Fund, now the CEF, to be administered by Connecticut Innovations, Inc., which is also funded in part by EDC Customers. The administration of the Renewable Energy Investment Fund was spun off into an entity later renamed the Connecticut Green Bank ("Green Bank") (now codified at Conn. Gen. Stat. § 16-245n). Joint 56(a)(1) ¶ 29. The Green Bank is "a body politic and corporate, constituting a public instrumentality and political subdivision of the state of Connecticut established and created for the performance of an essential public and governmental function." Conn. Gen. Stat. § 16-245n(d)(1)(A). Section 16-245n(b) requires PURA to assess a charge of not less than one mill per kilowatt hour to EDC customers. The dollars collected pursuant to this charge are deposited into the CEF and may be used by the Green Bank for approved expenditures that promote investment in clean energy. Conn. Gen. Stat. § 16-245n(c). This is the third charge at issue. Collectively these three charges will be referred to as the "Charges."

C. THE GENERAL ASSEMBLY'S USE OF THE FUNDS

Conn. Gen. Stat. § 16-245m(a)(1) directs that the 3 mills charge "be used to implement the program as provided in this section for conservation and load management programs." Section 16-245n(b) requires that the 1 mill charge "be deposited in the [CEF] . . . ." and § 16-245n(c) states that the dollars deposited in the CEF are "for expenditures that promote investment in clean energy . . . ." However, on several occasions since the creation of those Funds, the General Assembly has amended either or both of those statutes to transfer a portion of the monies deposited into those Funds into the General Fund for other uses.

In 2003, just three years after the Funds came into existence, General Assembly enacted P.A. 03-2, § 20, *An Act Concerning Modifications to Current and Future State Expenditures and Revenues* (the "2003 Act"). The 2003 Act required PURA to approve the transfer of $30 million from the C&LM Fund to a dedicated account within the General Fund over a 30 month period. Joint 56(a)(1) ¶ 60.

Also in 2003, the General Assembly enacted Public Act 03-6 of the June 30 Special Session and Public Act 03-1 of the September 8 Special Session of the Connecticut General Assembly and §§ 16 245e to 16-245k of the General Statutes (collectively the "Securitization Statute"). Joint 56(a)(1) ¶ 61. The Securitization Statute provided that all of the revenues, or 4 mills, from the C&LM Fund and CEF, collected during fiscal years 2003-04 and 2004-05 be transferred to the General Fund unless PURA authorized the issuance of new securitization bonds authorized by the Securitization Statute on behalf of both utilities to sustain funding of the C&LM Fund and the CEF programs by substituting disbursements to the General Fund from proceeds of the bonds for such disbursements from the C&LM Fund and the CEF. *Id*. PURA thereafter approved the issuance of $220 million in bonds, with the proceeds deposited in the General Fund. The bonds were securitized and paid with the proceeds from the Funds. *Id*. The EDCs continued to divert funds from the CLM fund and the CEF to the General Fund until at least May, 2008. Final Decision, Docket No. 03-09-08RE01, *Application of the Connecticut Light and Power Company and the United Illuminating Company for Issuance of Financing Order – Funding for the Energy Conservation and Load Management Fund and the Renewable Energy Investment Fund*, 3-4 (April 30, 2008), copy attached as Exhibit 1.

In 2005, the General Assembly again directed the transfer of $1 million per month from the CLM Fund to the General Fund for the period from August 2006 through July 2007.[1] Joint 56(a)(1) ¶ 63.

D. P.A. 17-2

In a 2017 Special Session on October 27, 2017, the General Assembly enacted 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* ("P.A. 17-2"). Joint 56(a)(1) ¶ 64. Section 683 of P.A. 17-2 amended Conn. Gen. Stat. § 16-245m by directing the transfer of $63,500,000 "from the Energy Conservation and Loan Management Fund and credited to the resources of the General Fund" for fiscal years 2018 and 2019. Joint 56(a)(1) ¶ 65. Section 685 amended Conn. Gen. Stat. § 16-245n by directing the transfer of $14,000,000 "from the Clean Energy Fund and credited to the resources of the General Fund" for the same two fiscal years. Joint 56(a)(1) ¶ 66. Subsequently, on May 15, 2018, the Governor signed P.A. 18-81 into law, which repealed § 683 of P.A. 17-2. Joint 56(a)(1) ¶ 67. Section 12 of P.A. 18-81 reduced the fiscal year 2019 transfer to the C&LM Fund by $10 million. *Id.*

The initial transfer of funds required by Section 683 of P.A. 17-2 (and Section 12 of P.A. 18-81) occurred on June 25, 2018. On that date, the EDCs transferred $63.5 million from the C&LM Fund to the General Fund. Joint 56(a)(1) ¶ 86. Also $14 million was transferred from the Clean Energy Fund to the General Fund. *Id.*

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[1] The Connecticut General Assembly also has transferred other monies collected from EDC Customers to the General Fund. In 2010, when "faced with a substantial state budget deficit, the General Assembly enacted P.A. 10-179, with the goal of expanding the state's present revenues without increasing the financial burden on taxpayers." *Markley*, 301 Conn. at 60. P.A. 10-179 authorized the State to issue "revenue recovery bonds," the proceeds of which transferred $956 million to the state's General Fund. *Id.* at 61. These bonds were financed by continuing a charge on EDC Customers' bills that would otherwise have expired. *Id.* In addition, P.A. 10-179 assessed a $40 million charge on EDC Customers for direct transfer to the General Fund.

ARGUMENT

I. P.A. 17-2 DOES NOT VIOLATE THE CONTRACT CLAUSE

Plaintiffs claim that P.A. 17-2 violates the Contract Clause by directing the transfer of money from the C&LM Fund and the CEF into the General Fund. Specifically, they assert that the tariffs approved by PURA authorizing the Charges "constitute contracts, pursuant to which the [EDC Customers] agreed to pay a charge for deposit into the [C&LM Fund and the CEF], in exchange for services rendered which includes efficiency and clean energy investments." Compl. ¶ 66. By transferring money out of the C&LM Fund and the CEF, Plaintiffs claim Defendants have impaired those contracts.

This argument fails for the following reasons. First, and most importantly, the State never contractually agreed to use the money deposited into the C&LM Fund and the CEF solely for the purposes enumerated in the Funds authorizing statutes. Rather, those statutes merely are legislative policy decisions that do not bind a future Legislature. Second, the tariffs approved by PURA cannot, as a matter of law, restrict the General Assembly's ability to transfer money from the Funds unless the General Assembly has delegated to PURA the authority to do so, which the General Assembly has not done. Third, tariffs are not contracts as they have none of the characteristics necessary to create bilateral contractual obligations enforceable by Plaintiffs or EDC customers. Lastly, even if the Court concludes that there is a contract, P.A. 17-2 does not substantially impair that contract and it serves a legitimate public purpose and is rationally related to that purpose.

A. THE GENERAL ASSEMBLY NEVER CONTRACTUALLY AGREED TO USE MONEY DEPOSITED IN THE FUNDS SOLELY FOR EFFICIENCY AND CLEAN ENERGY INVESTMENTS

Article I, Section 10, of the United States Constitution prohibits laws "impairing the Obligation of Contracts." For Plaintiffs to succeed on their Contract Clause claim, they first must establish that the State has contractually agreed that the money from the Charges, once deposited into the C&LM Fund and the CEF, will only be used for the purposes set out in the Funds' enabling legislation. This is because, even if there were a contract between the EDCs and Plaintiffs that sets out how the money in the Funds shall be used, which there is not, the EDCs and Plaintiffs cannot contract to bind the State without the State agreeing to be so contractually bound.

Here, the only possible language that arguably could bind the State is found in the statutes creating the Funds. Section 16-245m(a)(1) provides that the 3 mills charge "be used to implement the program . . . for conservation and load management programs." Section 16-245m(d)(1) directs PURA to "ensure the balance of revenues required to fund [the budget for the Conservation and Load Management Plan] is provided through a fully reconciling [CAM] . . . ." Lastly, with respect to the CEF, Conn. Gen. Stat. § 16-245n(b) directs PURA to assess the 1 mill charge "which shall be deposited into the [CEF] . . . .", and Section 16-245n(c) states that "any amount in said fund may be used for expenditures that promote investment in clean energy . . . ." None of these statutory provisions create contractual rights.

"[A] state may enter into contracts with citizens, the obligation of which the Legislature cannot impair by subsequent enactment." *Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 78 (1937). However, "legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the Legislature."

Id. When determining which category a legislative act falls into, "there exists a 'well-established presumption' against finding that a statute creates private vested contractual rights absent a clear showing of legislative intent to the contrary." *Pineman v. Oechslin*, 195 Conn. 405, 410–11 (1985) (quoting *Taliaferro v. Dykstra*, 434 F.Supp. 705, 710–11 (E.D.Va.1977)). "That presumption is rooted in each legislature's authority to revisit and to alter the policy decisions of its predecessors." *Cece v. Felix Indus., Inc.*, 248 Conn. 457, 465–66 (1999). Put another way, "'[t]he principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy.'" *Pineman*, 195 Conn. at 410 (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)).

As an example of a statute that merely declared state policy, in 1909, the New Jersey Legislature passed a law that provided in relevant part that, "[n]o principal or teacher shall be dismissed or subjected to reduction of salary in said school district . . . ." *Phelps v. Bd. of Educ. of Town of W. New York*, 300 U.S. 319, 320–21 (1937). In 1933, during the Great Depression, the legislature passed another law that permitted local school districts to reduce teacher salaries. *Id*. at 321. Thereafter, a group of teachers sued, alleging that the 1933 act violated that Contract Clause. *Id*. at 322. The United States Supreme Court held that the 1933 act did not violate the Contract Clause, explaining that, "[a]though the act of 1909 prohibited the board . . . from reducing the teacher's salary . . . we agree with the courts below that this was but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher." *Id*. at 323.

In contrast, in *Indiana ex rel. Anderson v. Brand*, the Supreme Court concluded that Indiana's 1927 Teacher Tenure Act was intended to provide teachers with certain contractual rights. 303 U.S. at 104. The Court based this in part on the fact that:

> The title of the [1927] act is couched in terms of contract. It speaks of the making and canceling of indefinite contracts. In the body the word 'contract' appears ten times in section 1, defining the relationship; eleven times in section 2, relating to the termination of the employment by the employer, and four times in section 4, stating the conditions of termination by the teacher.

Id. at 105. According to the Court, given the above language as well as an "[e]xamination of the entire act convinces us that the teacher was by it assured of the possession of a binding and enforceable contract against school districts." *Id*.

The statutory language in §§ 16-245m and 16-245n does not overcome the "well-established presumption against finding that a statute creates private vested contractual rights . . . ." *Pineman*, 195 Conn. at 410 (internal quotation marks omitted). Those statutes merely reflect the General Assembly's policy choice of how to use the money collected from the Charges. There is no language in those statutes, as there was in *Brand*, to suggest that the Legislature intended to be contractually bound by those decisions. Moreover, the fact that the General Assembly has directed the transfer of money out of the Funds on several occasions prior to the enactment of P.A. 17-2 underscores this conclusion. Determining the amount of money that the state should spend on energy efficiency and clean energy as compared to other public priorities from year-to-year is a quintessentially legislative function. For these reasons, the Court should conclude that §§ 16-245m and 16-245n do not contractually bind the State from transferring money from the C&LM Fund and the CEF into the General Fund.

B. THE TARIFFS APPROVED BY PURA CANNOT CREATE A CONTRACTUAL RIGHT WITHOUT LEGISLATIVE AUTHORITY TO DO SO

The Complaint indicates that the PURA-approved tariffs create a contractual right between the EDCs and their customers, with one of the terms being that the Charges paid by the customers shall be deposited into the Funds and used only for the purposes enumerated in the Funds authorizing statutes. Compl. ¶¶ 66-67. This argument fails because an agency cannot take any binding action in excess of its statutory authority. If §§ 16-245m and 16-245n do not create a contractual right to have the Charges used only for particular purposes, PURA cannot impose that contractual term through a tariff.

It is well-settled that "'only those with specific authority can bind the government contractually; even those persons may do so only to the extent that their authority permits.'" *State v. Lombardo Bros. Mason Contractors*, 307 Conn. 412, 463 (2012) (quoting *Gardiner v. Virgin Islands Water & Power Authority*, 145 F.3d 635, 644 (3d Cir.1998)). Thus the only way for Plaintiffs to establish that PURA has contractually bound the State through an approved tariff would be to "prove . . . that there is a precise fit between the narrowly drawn reach of the relevant statute[s], [§§ 16-245m and 16-245n], and the contractual language upon which the plaintiff depends." *Berger, Lehman Assocs., Inc. v. State*, 178 Conn. 352, 356 (1979). In other words, if §§ 16-245m and 16-245n do not authorize PURA to contractually bind the State to not transfer money out of the C&LM Fund and the CEF, then PURA cannot include that term in a tariff. Because, as was explained in Part I.A. above, §§ 16-245m and 16-245n do not create contractual rights, they necessarily could not authorize PURA to create any contractual rights.

Moreover, even if PURA was permitted to contractually limit the transfer of money out of the Funds through approval of tariffs, PURA never did so. Plaintiffs cannot point to any

document approved by PURA that indicates that money from the C&LM Fund and CEF cannot be transferred into the General Fund or used for purposes other than what is enumerated in §§ 16-245m and 16-245n.

C. PLAINTIFFS DID NOT AND COULD NOT HAVE CONTRACTED WITH THE EDCs THAT IN EXCHANGE FOR PAYING THE CHARGES THE EDCs WOULD NOT ONLY DEPOSIT THE MONEY IN THE FUNDS, BUT AGREED TO USE THE MONEY ONLY FOR EFFICIENCY AND CLEAN ENERGY INVESTMENTS

Plaintiffs theorize that the PURA-approved tariffs "constitute contracts, pursuant to which the [EDC Customers] agreed to pay a charge for deposit into the [Funds], in exchange for services rendered which includes efficiency and clean energy investments." Compl. ¶ 66. This argument fails at the most basic level. Tariffs do not create contracts enforceable by Plaintiffs for purposes of the Contract Clause.

Rates for utility provided services may be established in one of two ways: (1) by a tariff of general applicability; or (2) by contract between the purchaser and the seller of the service. The United States Supreme Court has clearly distinguished tariff rates from contract rates under the well-established *Mobile-Sierra* doctrine.[2] The *Mobile-Sierra* doctrine holds that freely negotiated contracts between sophisticated parties with equal bargaining power are presumed just and reasonable and the regulator may not disturb those contracts except upon a showing that doing so is necessary for the "public interest." *NRG Power Marketing, LLC v. Maine Public Utilities Com'n*, 558 U.S. 165, 172-4 (2010); *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1*, 554 U.S. 527, 531 (2008).[3]

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[2] The *Mobile-Sierra* doctrine originated from the Supreme Court's decisions on the same day in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) ("*Mobile*") and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956) ("*Sierra*").

[3] The *Mobile-Sierra* doctrine is in part similar to the analyses developed concerning state impairment of contracts under the Contract Clause discussed below. A regulator may impair contracts under *Mobile-Sierra*, but only upon a higher showing of public harm.

Tariff rates, on the other hand, are treated differently than contract rates because they have none of the characteristics necessary to create bilateral contract obligations enforceable by Plaintiffs or other EDC customers. First, tariff rates are set by an administrative process that is devoid of any direct negotiation or agreement among the buyers and sellers. "The tariff is an offer that the customer accepts by using the product." *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'n Int'l, Inc.*, 294 F.3d 924, 926 (7th Cir. 2002). Tariffs differ from private contracts in that they "are not subject to alteration one customer (or one clause) at a time." *Metro East*, 294 F.3d at 926. A tariff is a "take-it-or-leave-it proposition," not an "agreement" reached by individual negotiation. *Id*.

In Connecticut, tariff rates are set by PURA for each regulated utility pursuant to Conn. Gen. Stat. §§ 16-19, *et seq*., including the EDCs. Tariff rates reflect the cost to provide utility service, the cost to provide electric supply services, the costs associated with any legislative policy priorities such as the C&LM Fund and the CEF, as well as any taxes or fee obligations to the state or federal governments. While the EDCs and customers, generally by and through the ratepayer advocates, may participate in the PURA administrative rate-setting process, tariff rates are not negotiated between the EDCs and end-user customers or Plaintiffs.

Second, tariff rates differ from contract rates in that they are not unique to Plaintiffs or any specific EDC customer. Rather, they are rates of general applicability that apply to all similarly situated customers. Third, in the event that takers of EDC service pursuant to tariff rates, including Plaintiffs, believe that the EDC has failed to comply with the tariff requirements, their remedy is to petition PURA to remedy any failure to provide service as described in the tariff. *See* Conn. Gen. Stat. § 16-20. EDC customers, including Plaintiffs, do not have independent remedies at law for breach of contract with the EDCs.

In the present case, Plaintiffs did not negotiate with the EDCs, PURA or with the State any specific requirement that a portion of their rates would be allocated to the C&LM Fund or the CEF, and further did not negotiate that the monies in those funds would be used exclusively for the conservation and load management or to support clean energy. Rather, the Connecticut General Assembly – by and through PURA – unilaterally created the Funds, required that a portion of the rates paid by all EDC ratepayers would be contributed to those funds, and further directed that those funds could only be used as directed by the state, be it PURA, the DEEP Commissioner or the General Assembly itself. *See* Conn. Gen. Stat. §§ 16-245m; 16-245n. Plaintiffs, like all EDC customers, had no choice but to pay rates that included those charges if they wanted EDC service. Given the above, the PURA-approved tariffs do not create contracts for purposes of the Contracts Clause. Because there is no contract, there can be no violation of the Contract Clause.

D. EVEN IF AN ENFORCEABLE CONTRACT EXISTED, WHICH IT DOES NOT, PLAINTIFFS CANNOT ESTABLISH A VIOLATION OF THE CONTRACT CLAUSE

Even if the court were to assume that an enforceable contract somehow existed between Plaintiffs and either the EDC, PURA or the State that governed how the money collected in the C&LM Fund and the CEF must be spent, which it does not, Plaintiffs' Contract Clause claim must still fail. The Contract Clause does not prohibit states from impairing contracts. To the contrary, it is well established that states may impair contracts, and may impair them substantially, when it is reasonably necessary to protect their citizens. *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367 (2d Cir. 2006). As a result, even if a law actually impairs existing contractual rights, it will violate the Contract Clause only if: (1) the impairment is "substantial"; and (2) the law is not "a 'reasonable' means to a 'legitimate public purpose'"

such as remedying a general economic problem. *Condell v. Bress*, 983 F.2d 415, 418 (2d Cir. 1993) (quoting *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977)); *see Buffalo Teachers*, 464 F.3d at 367; *Ass'n of Surrogates & Supreme Court Reporters Within City of New York v. State of N.Y.*, 940 F.2d 766, 771 (2d Cir. 1991). In the present case, even if there was an enforceable contract in which EDC customers were a party, and governing the use of the Charges, Plaintiffs cannot show either that P.A. 17-2 causes a substantial impairment or that it is not "a 'reasonable' means to a 'legitimate public purpose.'"

1. Any Contract Impairment is Insubstantial

Even if the transfer of monies from the C&LM Fund and the CEF to the General Fund did impair some existing contractual rights, which it does not, any such impairment is not substantial, and is therefore insufficient to support a Contract Clause claim.

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

Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997) (*citing Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)).

Public Service companies are subject to extensive state regulation in Connecticut. *See Conn. Gen. Stat.* § 16-1, *et seq.* PURA is statutorily charged with regulating the rates and services of all public service companies in the State, including the EDCs. PURA is charged with balancing the public's right to safe, adequate and reliable utility service at reasonable rates with the provider's right to a reasonable return on its investment. PURA not only sets rates for the EDCs, it also structures those rates to include any taxes, fees or surcharges that may have been

established by the General Assembly.

The Plaintiffs cannot credibly assert that their "reasonable expectations" were disrupted as the transfer of the funds was entirely foreseeable. As noted above, the General Assembly has repeatedly redirected dollars from the C&LM Fund to the General Fund in the past. The General Assembly diverted C&LM Funds to the General Fund every year from 2003 through 2008. Indeed, in the eighteen years from the inception of the C&LM Funds in 2000 through the passage of P.A. 17-2, the General Assembly diverted money fully one-third of those years.[4] P.A. 17-2 is simply the most recent iteration of this fundamental legislative responsibility – the allocation of limited public funds to the priorities the General Assembly deems most important.

Finally, any disruption of reasonable expectations is further minimized because the dollars to be allocated to the General Fund make up only a third of the total funds collected for C&LM Fund. The year 2017 actual spending on Energy Efficiency was approximately $151 million. Joint 56(a)(1) ¶ 81. On June 25, 2018, the EDCs transferred $63.5 million from the C&LM Fund to the General Fund, and the Green Bank transferred $14 million from the CEF to the General Fund. Joint 56(a)(1) ¶ 86. Even after this transfer, the EEB plans to spend $120 million on Energy Efficiency in 2018. Joint 56(a)(1) ¶ 82. Both the Green Bank and the C&LM Fund will continue to collect and distribute funds in 2018 and 2019, albeit at somewhat lower levels than before the passage of P.A. 17-2 and P.A. 18-81. In 2019, the EEB estimates that it will spend approximately $159,000,000 on C&LM Fund programs. Joint 56(a)(1) ¶ 83.

[4] As noted above, the General Assembly also has transferred money from other EDC Customer funded revenue streams to the General Fund. *See* P.A. 10-179, *An Act Making Adjustments to State Expenditures for the Fiscal Year Ending June 30, 2011*.

2. P.A. 17-2 Serves a Legitimate Public Purpose and is Rationally Related to that Purpose

Even if the Court determines that P.A. 17-2 substantially impaired any existing contracts of EDC customers concerning the use of money in the C&LM Fund, it remains constitutional. To the extent that Plaintiffs allege that any "contract" obligation has been interfered with, that obligation is between Plaintiffs and the EDCs. Plaintiffs claim that when they pay the EDCs, the EDCs must contribute a portion of those rates to the C&LM Fund and the CEF and, moreover, EDCs must use the money in those funds for energy conservation, load management and clean energy. But that is not how Conn. Gen. Stat. §§ 16-245m and 16-245n work. Rather, these statutes only require the EDCs to collect the amount of money for these Funds approved by PURA, deposit the money into an account that is separate and apart from its other accounts and to spend it as directed by the State. The EDCs have done just that. The only difference here is that the State has decided to direct a portion of the C&LM Fund and the CEF to the General Fund. The EDCs continue to fully comply with their obligations under these laws.

Moreover, any claim that the interruption of Plaintiffs' contractual rights to have the C&LM Fund and the CEF used strictly for energy conservation and clean energy still fails to show that the General Assembly's action was not a reasonable means to achieve a legitimate public purpose. P.A. 17-2 transfers only a portion of the dollars that the EDCs collected from customers and placed in the Funds to another legislative priority, the State's General Fund.

The General Fund provides for all aspects of the State's welfare, including aid to municipalities, schools, higher education, social welfare – all priorities deserving of attention by the General Assembly. Such action is well within the General Assembly's authority, indeed, it is the primary role of the State's legislative body. It is therefore reviewed under an extremely deferential standard that is akin to rational basis.

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

Ass'n of Surrogates, 940 F.2d at 771 (emphasis in original).

Under this standard, even a law that substantially burdens existing contractual rights must be upheld if it is a reasonable means to achieve a legitimate public purpose. *Buffalo Teachers*, 464 F.3d at 367; *Condell*, 983 F.2d at 418; *Ass'n of Surrogates*, 940 F.2d at 771. "As is customary in reviewing [such legislation], courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.*; *see Buffalo Teachers*, 464 F.3d at 369. Given the reasons discussed above, P.A. 17-2 (and P.A.18-81) easily survive under this highly deferential standard.

II. PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS BOTH PROCEDURALLY AND ON THE MERITS

In Count II, Plaintiffs allege that P.A. 17-2 violates the Equal Protection Clause because it treats EDC Customers differently than municipal customers. Specifically, Plaintiffs claim that P.A. 17-2 converts the "Charges" that the EDC Customers are paying in accordance with Conn. Gen. Stat. §§ 16-245m and 16-245n into taxes. Plaintiffs claim that this violates Equal Protection because municipal customers are not being forced to pay a similar tax.

Plaintiffs lack standing to bring this claim. Although Plaintiffs are correct that the Charges contained in §§ 16-245m and 16-245n should be classified as "taxes" for purposes of federal Equal Protection analysis, the movement of money from the C&LM Fund and CEF does not convert those Charges to taxes. Rather, the Charges are considered taxes at the point that they were collected by the EDCs from the customers in accordance with §§ 16-245m and 16-

245n. Plaintiffs do not challenge the constitutionality of §§ 16-245m and 16-245n, the statutes that impose the Charges. Rather, they solely challenge the movement of the money from the C&LM Fund and CEF to the General Fund. Plaintiffs lack standing as taxpayers to challenge this movement and use of money.

This claim also fails on the merits because P.A. 17-2 contains no classification on which to bring an Equal Protection challenge. Rather, P.A. 17-2 simply directs the transfer of money from the Funds into the General Fund.

A. THE CHARGES ARE CLASSIFED AS TAXES UNDER FEDERAL LAW

Plaintiffs claim that P.A. 17-2 operates as a tax in that it moves money from the C&LM Fund and CEF to the General Fund. Defendants do not dispute that, under federal law, the monies being transferred into the General Fund are classified as "taxes." However, that is not due to P.A. 17-2, but rather is due to the way that the Charges have been employed throughout the history of the Funds. The Charges are classified as taxes as a matter of federal law because the C&LM Fund and CEF are used to provide benefits to the general public, and, on several occasions, money from the Funds has been transferred to the General Fund.

In order to determine whether the Charges contained in §§ 16-245m and 16-245n should be classified as taxes under federal law, a court should look to how the money collected from the Charges is employed. "[T]he principal identifying characteristic of a tax, as opposed to some other form of state-imposed financial obligation, is whether the imposition 'serve[s] general revenue-raising purposes.'" *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 737 F.3d 228, 231 (2d Cir. 2013) (quoting *Travelers Insurance Co. v. Cuomo*, 14 F.3d 708, 713 (2d Cir.1993), *rev'd on other grounds, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995)). "Whether a measure serves 'general revenue-

raising purposes' in turn depends on the disposition of the funds raised." *Id*. "In general, courts 'have tended ... to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation.'" *Travelers Ins. Co.*, 14 F.3d at 713 (quoting *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir.1992)).

It cannot be disputed that the C&LM Fund and CEF provide a general benefit to the public. The C&LM Fund works to advance the efficient use of energy, reduce air pollution, reduce negative environmental impacts of greenhouse gas emissions, and promote economic development and energy security across the State. Joint 56(a)(1) ¶ 23. Additionally, the C&LM Fund offers Connecticut businesses and residents access to energy efficiency, renewable energy programs and investments that save money, promote electric reliability and reduce peak power usage, create jobs, help businesses compete, and reduce harmful greenhouse gas emissions that contribute to global warming. Joint 56(a)(1) ¶ 24. Likewise, funds from the CEF are used to help promote investments in clean energy. Joint 56(a)(1) ¶ 30.

In addition to being used for the above environmental programs, well before the passage of P.A. 17-2, money from the C&LM Fund and CEF was transferred into the General Fund and used for other purposes. As noted above, just three years after the C&LM Fund and CEF came into existence, a 2003 Act required the transfer of $30 million from the C&LM Fund to the General Fund over a 30 month period. Joint 56(a)(1) ¶ 60. Also in 2003, the Securitization Statute required the further diversion of dollars collected in the C&LM Fund to the General Fund until June 2008. *See* Decision, Docket No. 03-09-08RE-01, *Application of the Connecticut Light and Power Company and the United Illuminating Company for Issuance of Financing Order*, 3.

Then, P.A. 05-251 required PURA to divert another $12 million from the C&LM Fund to the General Fund over a 12 month period. Joint 56(a)(1) ¶ 63.

Clearly, the C&LM Fund and CEF do much more than "serve regulatory purposes" such as "deliberately discouraging particular conduct by making it more expensive," or "help[ing] defray the agency's regulation-related expenses." *San Juan Cellular Tel. Co.*, 967 F.2d at 685. The C&LM Fund and the CEF plainly provide a general benefit to the public and, at times, are used in part to supplement the General Fund. Therefore, the Charges should be considered "taxes" at the point the EDCs collected the money. *See Travelers Ins. Co.*, 14 F.3d at 713.

B. PLAINITFFS LACK STANDING TO CHALLENGE THE TRANSFERS ORDERED BY THE GENERAL ASSEMBLY IN P.A. 17-2

In Count II of the Complaint, Plaintiffs seek an order from this Court declaring that the monetary transfers directed by the General Assembly in P.A. 17-2 are unconstitutional because the transfers violate Plaintiffs' Equal Protection rights. As was mentioned above, Plaintiffs' theory is that, as taxpayers, they are being treated differently from allegedly similarly situated taxpayers that are customers of the Municipal Utilities. Plaintiffs lack standing to bring this claim because, other than a very narrow exception not applicable in this case, state taxpayers lack standing to challenge the manner in which their tax dollars are spent.

As the Second Circuit has explained, with respect to federal taxpayers seeking to challenge legislative spending decisions, "[t]he basic rule is that taxpayers do not have standing to challenge how the federal government spends tax revenue." *In re U.S. Catholic Conference (USCC)*, 885 F.2d 1020, 1027 (2d Cir. 1989) (citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)). The reason for this rule is that "the interests of the taxpayer are, in essence, the interests of the public at large." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 600 (2007). Given that, "deciding a constitutional claim based solely on taxpayer standing 'would be[,] not to

decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.'" *Id*. (quoting *Frothingham*, 262 U.S. at 489).

There is "a narrow exception to the general constitutional prohibition against taxpayer standing." *Hein*, 551 U.S. at 602. A taxpayer can establish standing to challenge the constitutionality of a federal spending program if two conditions are satisfied. First, "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Flast v. Cohen*, 392 U.S. 83, 102 (1968). Second, "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id*. at 102-03. The Court in *Flast* determined that "taxpayer standing is available to challenge Establishment Clause violations when the allegedly unconstitutional action was authorized by Congress under the taxing and spending clause of Art. I, § 8." *In re U.S. Catholic Conference*, 885 F.2d at 1027. Since then, "the Supreme Court has not extended the *Flast* exception beyond Establishment Clause claims." *Fischer v. Cruz*, No. 16-CV-1224(JS)(ARL), 2016 WL 1383493, at *3 (E.D.N.Y. Apr. 7, 2016).

Although *Flast* and *Hein* concerned federal taxpayers, the Supreme Court has held that the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006). This is because affording state taxpayers standing to challenge state tax and spending provisions "would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal

courts." *Id*. at 346. Applying the principles set forth in *Flast* to a Commerce Clause challenge of an Ohio franchise tax credit, the Court in *Cuno* concluded that Ohio taxpayers lacked standing to pursue their action because their Commerce Clause challenge did not satisfy the *Flast* test. *Id*. at 349 ("Plaintiffs thus do not have state taxpayer standing on the ground that their Commerce Clause challenge is just like the Establishment Clause challenge in *Flast*.").

Here, Plaintiffs do not argue that the P.A. 17-2 violates the Establishment Clause. As *Flast*'s narrow exception has not been extended to violations of the Equal Protection Clause, Plaintiffs lack standing as taxpayers to challenge P.A. 17-2's money transfers. *See, e.g.*, *Booth v. Hvass*, No. 00-1672 MJD/JGL, 2001 WL 1640141, at *4 (D. Minn. Aug. 13, 2001), *aff'd*, 302 F.3d 849 (8th Cir. 2002) ("Plaintiffs have cited no relevant precedent to support their argument that the Equal Protection Clause operates as a specific limitation on the taxing and spending powers of Congress, as required by *Flast*, and to the Court's knowledge none exists.").

C. PLAINTIFFS' EQUAL PROTECTION CHALLENGE TO P.A. 17-2 FAILS ON THE MERITS BECAUSE THAT ACT DOES NOT MAKE ANY CLASSIFICATIONS

Should the Court conclude that Plaintiffs have standing to challenge P.A. 17-2's money transfers, it nonetheless should dismiss Plaintiffs' Equal Protection claim because P.A. 17-2 does not make any classification, a requirement to bring such a claim.

"The Equal Protection Clause of the Fourteenth Amendment 'embodies a general rule that States must treat like cases alike, but may treat unlike cases accordingly.'" *Winston v. City of Syracuse*, 887 F.3d 553, 560 (2d Cir. 2018) (quoting *Vacco v. Quill*, 521 U.S. 793, 799 (1997)). "Whether a state law or policy satisfies this general principle, and what sort of review a court must apply, depends on the nature of the class of individuals the state or local government treats differently or the rights at issue." *Id*. However, "[b]efore we review any statute for an equal

protection violation . . . the challenger must demonstrate that it classifies persons in some manner." *United States v. Pitts*, 908 F.2d 458, 459 (9th Cir. 1990); *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988) ("[I]f the challenged government action does not appear to classify or distinguish between two or more relevant persons or groups, then the action—even if irrational—does not deny them equal protection of the laws."); *James v. City of Chester*, 852 F. Supp. 1288, 1297 (D.S.C. 1994) ("The equal protection guarantee of the Fourteenth Amendment only applies to governmental actions which classify individuals for different benefits or burdens under the law; it does not govern actions which do not classify individuals."). *See also Hayden v. Cty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (Exam did not classify on basis of race when "exam was administered and scored in an identical fashion for all applicants.").

Here, Plaintiffs' Equal Protection claim challenges only the constitutionality of the transfers of money between the C&LM Fund and the CEF into the General Fund pursuant to P.A. 17-2. Compl. ¶ 80. However, the sections of P.A. 17-2 at issue contain no classification. Section 683 provides: "[n]otwithstanding the provisions of section 16-245m of the general statutes, for the fiscal years ending June 30, 2018, and June 30, 2019, the sum of $63,500,000 shall be transferred from the [C&LM Fund] and credited to the resources of the General Fund for each said fiscal year." Joint 56(a)(1) ¶65. Similarly, § 685 states: "[n]otwithstanding the provisions of section 16-245n of the general statutes, for the fiscal years ending June 30, 2018, and June 30, 2019, the sum of $14,000,000 shall be transferred from the [CEF] and credited to the resources of the General Fund for each said fiscal year." Joint 56(a)(1) ¶66.

These two sections do nothing more than direct the EDCs to transfer a portion of the money in their respective C&LM Funds into the General Fund over two fiscal years, and the Green Bank do likewise with the CEF. Because sections 683 and 685 do not classify or

distinguish between two or more individuals or groups, there can be no Equal Protection violation in this case.

D. EVEN IF PLAINTIFFS SOUGHT TO CHALLENGE THE STATUTES THAT ESTABLISHED THE CHARGES AT ISSUE ON EQUAL PROTECTION GROUNDS, THAT CHALLENGE WOULD FAIL

The Complaint alleges that Public Act 17-2 violates Plaintiffs' Equal Protection rights because it assesses a tax upon EDC Customers but not on the Municipal Utility customers. Compl. ¶ 77. As has been explained above, not only do Plaintiffs lack standing to challenge P.A. 17-2, but, even if they did have standing, their Equal Protection claim fails because P.A. 17-2 contains no classification to trigger an Equal Protection analysis. Instead, that classification is found in Conn. Gen. Stat. §§ 16-245m & 16-245n, as it is those statutes that direct who shall pay the Charges. Unsurprisingly, Plaintiffs do not challenge those statutes because, assuming the above sections violate the Equal Protection Clause, which they do not, the remedy could be ceasing the collection of the Charges from the EDC Customers, thereby greatly crippling the very programs Plaintiffs seek to protect. *See Heckler v. Mathews*, 465 U.S. 728, 740 (1984) ("[W]hen the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.") (quoting *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931)). Thus, Plaintiffs' failure to challenge the collection provisions contained in §§ 16-245m and 16-245n is fatal to their Equal Protection claim. However, should the Court conclude that it may review those collection provisions, as will be explained below, they satisfy Equal Protection analysis.

1. Standard of Review for Equal Protection Claims

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "This constitutional provision is 'essentially a direction that all persons similarly situated be treated alike.'" *Kisembo v. NYS Office of Children & Family Servs.*, 285 F. Supp. 3d 509, 523 (N.D.N.Y. 2018) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

To establish a violation of the Equal Protection Clause, Plaintiffs must satisfy a two-part test. "When a plaintiff alleges an equal protection violation (without also alleging discrimination based upon membership in a protected class), the plaintiff must plausibly allege [1] that he or she has been intentionally treated differently from others similarly situated and [2] no rational basis exists for that different treatment." *Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2d Cir. 2018) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). This is the situation in the present case. Plaintiffs are not alleging they are being discriminated because of their membership in a protected class, but because they are EDC Customers as opposed to Municipal Utility customers. As will be demonstrated below, Plaintiffs cannot satisfy either prong of this test.

2. EDC Customers are not Similarly Situated to Municipal Utility Customers

"To successfully assert an equal protection challenge, [Plaintiffs] must first establish that the two classes at issue are similarly situated." *Yuen Jin v. Mukasey*, 538 F.3d 143, 158 (2d Cir. 2008). "'[T]he government can treat persons differently if they are not similarly situated.'" *Jankowski–Burczyk v. INS*, 291 F.3d 172, 176 (2d Cir.2002) (quoting *Able v. United States*, 155 F.3d 628, 631 (2d Cir.1998)). Because Plaintiffs are not claiming membership in a protected

class, "[P]laintiffs 'must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.'" *Progressive Credit Union*, 889 F.3d at 49 (quoting *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006)). In fact, Plaintiffs "must be '*prima facie* identical' to the persons alleged to receive irrationally different treatment." *Id*. (quoting *Neilson v. D'Angelis*, 409 F.3d 100, 105 (2d Cir. 2005)). Moreover, "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have 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, 359 (1973). In the present case, Plaintiffs cannot demonstrate that, as EDC Customers, they are "*prima facie* identical" to Municipal Utility customers, primarily because EDCs and Municipal Utilities are subject to entirely different regulatory schemes and oversight.

The regulation of public service companies, including rate setting, is entirely a legislative act, whether done by the legislature itself or by a subordinate administrative body to which the authority has been delegated. *City of Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 8 (1909). Pursuant to Connecticut's statutory scheme, PURA "is primarily responsible for regulating the [EDCs]; General Statutes § 16–6b; whereas municipal commissions perform key regulatory functions such as rate setting for the municipal electric utilities; General Statutes § 7–216; within the parameters set by the legislature." *Markley v. Dep't of Pub. Util. Control*, 301 Conn. 56, 59 (2011). This alone is a significant difference between EDCs and Municipal Utilities, and, therefore, their respective customers. Because the General Assembly has chosen to permit municipalities to perform their own regulatory functions, the General Assembly chose not to subject those municipalities to certain environmental programs created as part of PURA's regulation of EDCs.

As part of its ratemaking function, the General Assembly has directed PURA to levy the Charges at issue. *See* Conn. Gen. Stat. § 16-245m(a)(1) & (d)(1); Conn. Gen. Stat. § 16-245n(b). These are the Charges that, in part, fund the C&LM Fund and the CEF. *Id.* In addition to its ratemaking role, PURA plays an active role in the operation of the C&LM Fund. Pursuant to § 16-245m(b), PURA must approve all disbursements that the EDCs wish to make from the C&LM Fund. Moreover, PURA establishes the amount of the CAM necessary to ensure that there is sufficient revenue in the C&LM Fund to support the Conservation and Load Management Plan approved by DEEP. Conn. Gen. Stat. § 16-245m(d).

Furthermore, it is significant that both the current C&LM Fund and the CEF came into existence as part of the State's deregulation efforts, which did not affect Municipal Utilities. "In 1998, the General Assembly passed No. 98–28 of the 1998 Public Acts (P.A. 98–28), which deregulated the state's electric power market." *Markley*, 301 Conn. at 59. Sections 33 and 44 of P.A. 98-28 created the C&LM Fund and the CEF respectively. One of the primary purposes of the deregulation effort was to lower EDC customers' electric rates. To that end, § 20(a)(2) of P.A. 98-28 required PURA to establish a "standard offer." Specifically, § 20(a)(2) provided that the standard offer, after including a number of services and charges, including the charges in §§ 16-245(a)(1) & 16-245n(d)(1), "shall be at least ten per cent less than the base rates, as defined in section 3 of this act, in effect on December 31, 1996." *In Re United Illuminating Co.*, 99-03-35, 1999 WL 1066453 (Oct. 1, 1999). In other words, EDC customers would be asked to fund additional charges toward environmental programs as part of an overall reduction in their electric rates. Because Municipal Utility customers were not affected by these deregulation efforts, they also were not required to pay into the C&LM Fund and the CEF. Given the separate statutory schemes controlling EDCs and Municipal Utilities and the manner in which the C&LM

Fund and the CEF were created, EDC customers, such as Plaintiffs are not "*prima facie* identical" to Municipal Utility customers.

3. The General Assembly had a Rational Basis for Requiring Only EDC Customers to Contribute to the C&LM Fund and the CEF

With respect to the second prong of the Equal Protection analysis, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Progressive Credit Union*, 889 F.3d at 49 (quoting *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 313 (1993)). Put another way, "rational basis review contemplates 'a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative *every conceivable basis* which might support it.'" *Id*. (quoting *Beach Commc'ns*, 508 U.S. at 314-15) (emphasis added). Thus, "'[a] State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification.'" *Winston v. City of Syracuse*, 887 F.3d 553, 560 (2d Cir. 2018) (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)). Moreover, "[a] sufficient reason need not be one actually considered by [the Legislature]." *Jankowski-Burczyk v. I.N.S.*, 291 F.3d 172, 178 (2d Cir. 2002); *Progressive Credit Union*, 889 F.3d at 49 ("[W]hether a conceivable reason for enacting a statute actually motivated or was considered by the legislature is 'entirely irrelevant for constitutional purposes,' because legislatures are not required to articulate their reasons for enacting statutes . . . .") (quoting *Beach Commc'ns*, 508 U.S. at 315).

The General Assembly's decision to require EDC Customers to pay the Charges for the C&LM Fund and the CEF but not Municipal Utility customers plainly satisfies this extremely deferential standard. As was explained above, the C&LM Fund and the CEF were created during the General Assembly's efforts to deregulate the State's electricity market. Municipal

Utilities were not part of that effort. The charges were added as part of an overall rate decrease. Thus EDC Customers would see a lower electric bill despite the addition of the charges. This would not have been so if charges were added to the bills of Municipal Utility customers. In addition, because the General Assembly chose to run the programs through the EDCs, all of the Charges necessarily had to be established by PURA, which does not have regulatory authority over the Municipal Utilities.

The Connecticut Supreme Court rejected a similar equal protection challenge in *Markley*. There, the plaintiff brought suit to challenge P.A. 10-179, which required the EDCs to "continue to charge their rate paying customers a fee that would otherwise have expired, with the proceeds going to the state's general fund." *Markley,* 301 Conn. at 59. The fee at issue originally was enacted in P.A. 98-28 as part of the State's efforts to deregulate the EDCs, and was designed to allow the EDCs to recoup some of the "stranded costs" caused by deregulation. *Id*. Because the Municipal Utilities were not part of the deregulation effort, their customers were not required to pay that fee. *Id*. at 60.

Shortly before the fee that CL&P customers were paying was set to expire,[5] and "faced with a substantial state budget deficit, the General Assembly enacted P.A. 10–179, with the goal of expanding the state's present revenues without increasing the financial burden on individual taxpayers." *Id*. To achieve this goal, P.A. 10-179 allowed "the charges to commence at different times for customers of CL&P and [UI] to correspond to the different anticipated expirations of their respective fees." *Id*. at 61. As has been discussed previously, P.A. 10-179 authorized the State to issue "revenue recovery bonds," the proceeds of which transferred $956 million to the State's General Fund. *Id*. These bonds were financed by continuing a charge on EDC

[5] "Based on the different timetables under which the two distributors implemented their fees, the CL&P fee was slated to expire on December 31, 2010, whereas the fee on United customers does not expire until October 1, 2013." *Markley*, 301 Conn. at 60.

Customers' bills. *Id*. In addition, P.A. 10-179 assessed a $40 million charge on EDC Customers for direct transfer to the General Fund.

One of the plaintiff's claims was that P.A. 10-179 violated the Equal Protection Clause because it "arbitrarily 'taxes' ratepayers served by the [EDCs], but not residents of the towns within the six municipal electric utility districts." *Id*. at 68-69. The Connecticut Supreme Court concluded that P.A. 10-179 did not violate the Equal Protection Clause. *Id*. at 71. It held that "the legislature had a rational basis for structuring the bond program as it did, namely, to distribute broadly the burden of deficit reduction while ensuring that no ratepayers would be forced to pay more each month than the fee they had already been paying."[6] *Id*. The only way for the General Assembly to accomplish this goal was to (1) have EDC customers only begin paying the new fee upon the expiration of the fee for stranded costs; and (2) not impose the fee on Municipal Utility customers.

As was explained above, the goal of deregulation was to reduce the bills of EDC customers by at least 10%. By establishing the Charges at the same time overall rates decreased, EDC customers obviously would not see an increase in their bill due to the new Charges. Had the General Assembly chosen to place the new Charges on the Municipal Utility customers as part of P.A. 98-28, they would have seen a rate increase. As in *Markle*y, it would have been rational, as well as constitutional, for the General Assembly only to impose the Charges on EDC customers. Thus, the Charges found in Conn. Gen. Stat. §§ 16-245m & 16-245n do not violate the Equal Protection Clause.

[6] The Court "assumed without deciding" that EDC Customers and Municipal Utility customers were similarly situated for Equal Protection analysis. *Markley*, 301 Conn. at 69.

III. THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER PLAINTIFFS' STATE LAW CAUSES OF ACTION

Should the Court dismiss all of the federal causes of action, it should decline to exercise supplemental jurisdiction over the Plaintiffs' state law claims. The Second Circuit has stated that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). However, should the Court choose to exercise supplemental jurisdiction, the Court should dismiss them for the reasons set forth below.

A. THE ELEVENTH AMENDMENT BARS ALL STATE LAW CAUSES OF ACTION

The Complaint asserts three state law causes of action. Count III alleges that the money transfers violate Conn. Gen. Stat. § 16-245n(h). In Count IV, Plaintiffs claim that P.A. 17-2 violates Conn. Gen. Stat. § 12-412(8). Lastly, Count V asserts a claim of promissory estoppel on the theory that Conn. Gen. Stat. § 16-245n(h) constituted a clear and definite promise by the General Assembly that private parties relied on to their detriment. All three claims are based on either violations of state law or state common-law and seek declaratory and/or injunctive relief. The United States Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst*"), and its progeny establish that the Eleventh Amendment bars a federal court from awarding such relief based on a violation of state law or state common-law. Therefore, the Court must dismiss all state law claims.

Pennhurst "present[ed] the question whether a federal court may award injunctive relief against state officials on the basis of state law." *Id*. at 91. The Court answered that question in the negative, holding that "the Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law." *Id*. at 89.

In so holding, the Court explicitly and forcefully rejected the argument that the *Ex Parte Young*, 209 U.S. 123 (1908), exception to the Eleventh Amendment—which permits injunctive relief against state officials based on federal law under some circumstances—should extend to claims based on violations of state law. State sovereign immunity as reflected in the Eleventh Amendment plays a "vital role . . . in our federal system." *Pennhurst*, 465 U.S. at 99. "Nonetheless, the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Id*. at 105 (quoting *Ex Parte Young*, 209 U.S. at 160). The "need to reconcile competing interests" of state sovereign immunity and federal oversight that underlies the *Young* exception "is wholly absent . . . when a plaintiff alleges that a state official has violated *state* law." *Id*. at 106 (emphasis in the original). Indeed:

> [i]n such a case the entire basis for the doctrine of *Young* . . . disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id. Therefore, the Eleventh Amendment bars this Court from exercising jurisdiction over Plaintiff's claims for declaratory[7] and injunctive relief to the extent they are based on alleged

[7] In *Pennhurst*, the Court noted that the Eleventh Amendment's "jurisdictional bar applies regardless of the nature of the relief sought," *Pennhurst*, 465 U.S. at 100, and the Second Circuit

violations of state law or state common law. *Id*. at 118; *Delrio v. Univ. of Conn. Health Care*, 292 F. Supp. 2d 412, 419 (D. Conn. 2003) ("The state also has immunity under the *Eleventh Amendment* for state common-law claims."); *White v. Martin*, 26 F. Supp. 2d 385, 388 (D. Conn. 1998), *aff'd sub nom., White v. Comm'n of Human Rights, Opportunities*, 198 F.3d 235 (2d Cir. 1999) (*Pennhurst* "forbid[s] a federal court from awarding injunctive relief against state officials, sued in their official capacities, on the basis of a violation of state statutory or state common-law.").

B. SOVEREIGN IMMUNITY BARS ALL STATE LAW CAUSES OF ACTION

Even if the Eleventh Amendment does not bar this Court from addressing Plaintiffs' state law causes of action, because Defendants are being sued in their official capacities, assuming that the Court dismisses Plaintiffs' federal constitutional claims, the State's sovereign immunity bars all state law cause of action.

The Connecticut Supreme Court has long recognized that the common law doctrine of sovereign immunity bars suit against the State, except where the State, by appropriate legislation, consents to be sued. *Miller v. Egan*, 265 Conn. 301, 313 (2003); *Canning v. Lensink*, 221 Conn. 346, 349 (1992); *Horton v. Meskill*, 172 Conn. 615, 623 (1977); *State v. Kilburn*, 81 Conn. 9, 11

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has noted—consistent with the holdings of other circuits—that "[i]t is well settled that federal courts may not grant *declaratory* or injunctive relief against a state agency based on violations of state law." *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 93 (2d Cir. 1998) (emphasis added) (citing *Pennhurst*, 465 U.S. at 106); *see also Levine v. County of Westchester*, 828 F.Supp. 238, 242 (S.D.N.Y.1993), *aff'd without op.*, 22 F.3d 1090 (2d Cir. 1994) (citing *Pennhurst* and holding that "federal courts simply do not have jurisdiction to grant injunctive or declaratory relief pursuant to state law against state officials"); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 42-43 (1st Cir. 2006) (holding that *Pennhurst* applies to claims for declaratory relief); *Benning v. Bd. of Regents of Regency Universities*, 928 F.2d 775, 778 (7th Cir. 1991) (same); *But cf. Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153 n.15 (2d Cir. 2001) (noting in *dictum* that *Pennhurst* does not bar claim for declaratory relief).

(1908). "[S]overeign immunity . . . has deep roots in this state and our legal system in general, finding its origin in ancient common law." *DaimlerChrysler Corp. v. Law*, 284 Conn. 701, 711 (2007).

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Lyon v. Jones*, 291 Conn. 384, 396 (2009). "The practical and logical basis of the doctrine is today recognized to rest on this principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property." *Lyon*, 291 Conn. at 396-97; *Miller*, 265 Conn. at 314. "The public service might be hindered . . . and the public safety endangered, if the supreme authority of the state could be subjected to suit at the instance of every citizen, and thereby controlled in the use and disposition of the means required for the proper administration of government." *Textron, Inc. v. Wood*, 167 Conn. 334, 340 (1974) (citing *Fitts v. McGhee*, 172 U.S. 516 (1899)). Accordingly, the doctrine of sovereign immunity "protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable." *Shay v. Rossi*, 253 Conn. 134, 165 (2001), *overruled on other grounds*, *Miller v. Egan*, 265 Conn. 301 (2003). Moreover, because the State can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the State. *Fetterman v. Univ. of Connecticut, 192* Conn. 539, 550-51 (1984).

"Exceptions to [the sovereign immunity] doctrine are few and narrowly construed under our jurisprudence." *C.R. Klewin Northeast, LLC v. Fleming*, 284 Conn. 250, 258 (2007). A

litigant may overcome the presumption of sovereign immunity by demonstrating that "the legislature, either expressly or by force of a necessary implication, statutorily waived the state's sovereign immunity." *Id.* Alternatively, if a plaintiff has brought a claim for declaratory or injunctive relief, as opposed to money damages, and alleges that "the state officer or officers against whom such relief is sought acted in excess of statutory authority, or pursuant to an unconstitutional statute," *DaimlerChrysler Corp.*, 284 Conn. at 711 (quoting C. *R. Klewin, LLC,* 284 Conn. at 258), sovereign immunity will not bar the action. *Gold v. Rowland*, 296 Conn. 186, 212 (2010).

Only the second exception even arguably is applicable in this case.[8] In order to state a *'"substantial* claim that the state or one of its officers has violated the plaintiffs constitutional rights . . . the allegations of the complaint and the facts in issue must *clearly demonstrate* an incursion upon constitutionally protected interests."' *Markley*, 301Conn. at 68 (quoting *Columbia Air Servs.*, 293 Conn. at 358) (emphasis in original). In accordance with this standard, if a plaintiff cannot establish a federal constitutional violation, then sovereign immunity will bar any state law causes of action because there necessarily cannot be a substantial claim of a constitutional violation. *See Braham v. Newbould*, 160 Conn. App. 294, 310 (2015) (dismissing state law claims for "intentional infliction of emotional distress, negligent infliction of emotional distress, medical malpractice, negligence, and extortion and coercion" pursuant to sovereign immunity after concluding that plaintiff failed to establish and Eighth Amendment violation). Given this, if the Court dismisses Plaintiffs' federal constitutional claims, it must dismiss all state law causes of action pursuant to the doctrine of sovereign immunity.

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[8] The first exception to sovereign immunity only applies to claims for money damages. *See Columbia Air Servs., Inc. v. Dep't ofTransp.*, 293 Conn. 342, 351 (2009). This is an action for declaratory and injunctive relief. With respect to the third exception, it is not disputed that P.A. 17-2 authorizes Defendants to transfer money from the C&LM Fund and the CEF to the General Fund. Therefore, they cannot be acting in excess of their statutory authority by implementing P.A. 17-2. The issue in this case is whether P.A. 17-2 is constitutional.

C. ALL OF THE STATE LAW CAUSES OF ACTION FAIL TO STATE A CLAIM

1. Plaintiffs Lack Standing to Bring Count III

In Count III, Plaintiffs allege that P.A. 17-2 violated Conn. Gen. Stat. § 16-245n(h) because transferring money out of the CEF and into the General Fund somehow "constitutes a limitation or alteration of the rights vested in the [Green Bank] . . . ." Compl. ¶ 84. Plaintiffs lack standing to bring this claim because there are no allegations that any Plaintiff has had a contract with the Green Bank that has not been fully performed.

"Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words, statutorily aggrieved, or is classically aggrieved." *Handsome, Inc. v. Planning & Zoning Comm'n of Town of Monroe*, 317 Conn. 515, 525 (2015) (internal quotation marks omitted). There is nothing in § 16-245n(h) that permits a person to bring an action against the State, therefore, a plaintiff must establish classical aggrievement in order to maintain this cause of action.

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

Wilcox v. Webster Ins., Inc., 294 Conn. 206, 214–15 (2009) (internal quotation marks omitted).

Plaintiffs cannot satisfy either prong. Conn. Gen. Stat. § 16-245n(h) provides in relevant part that the State "does hereby pledge to and agree with **any person with whom the Connecticut Green Bank may enter into contracts** . . . that the state will not limit or alter the rights hereby vested in said bank until such contracts and the obligations thereunder are fully met

and performed . . . .” (Emphasis added). There are no allegations that any Plaintiff entered into a contract with the Green Bank, let alone that the Green Bank has failed to perform its obligations. Therefore, Plaintiffs cannot establish either a personal interest, to say nothing of demonstrating how that interest has been harmed. Thus Plaintiffs lack standing to bring Count III.

Moreover, even if one or more Plaintiffs had alleged that the Green Bank had failed to fully perform a contract, the remedy is not a declaratory judgment action. Rather, because § 16-245n(b) does not contain a waiver of sovereign immunity, that Plaintiff would be required to bring a breach of contract claim with the Office of the Claims Commissioner. *See DaimlerChrysler Corp. v. Law*, 284 Conn. 701, 723 (2007) (“When a plaintiff brings an action for money damages against the state, he must proceed through the office of the claims commissioner . . . Otherwise, the action must be dismissed for lack of subject matter jurisdiction under the doctrine of sovereign immunity.” (citation omitted; internal quotation marks omitted).

2. P.A. 17-2 is not a Sales and Use Tax

Plaintiffs allege in Count IV that P.A. 17-2 creates a Sales and Use Tax. They further allege that, because Conn. Gen. Stat. § 12-412(8) exempts a 501(c)(3) from paying the Sales and Use Tax, that the rights of Plaintiff CFE are being violated. This theory is flawed for several reasons, the first of which is that P.A. 17-2 is not a Sales and Use Tax as a matter of law.

The Sales and Use Tax is found in Chapter 219 of Title 12 of the Connecticut General Statutes. *See* Conn. Gen. Stat. § 12-406 (“This chapter is known and shall be cited as the ‘Sales and Use Taxes Act’”.). Section 12-412 provides in relevant part:

> **Taxes imposed by this chapter** shall not apply to the gross receipts from the sale of and the storage, use or other consumption in this state with respect to the following items . . . (8) Organizations exempt from federal income tax under Section 501(a) of the Internal Revenue Code of 1986 . . . .

Conn. Gen. Stat. § 12-412(8) (emphasis added). Section 12-412 makes clear that the exemption Plaintiff CFE claims P.A. 17-2 violates only applies to sales and use taxes found in Chapter 219. No part of Chapter 219 has been amended to include sections 683 and 685 of P.A. 17-2. Hence, those sections are not part of the Sales and Use Tax subject to the exemption in § 12-412(8). Therefore, Plaintiff CFE's claim fails.

Moreover, even if P.A. 17-2 created a new Sales and Use Tax, which it does not, Plaintiff CFE's remedy is not to bring a declaratory judgment action and seek to have P.A. 17-2 struck down. Rather, Plaintiff CFE must exhaust its administrative remedies and seek a refund with the Commissioner of the Department of Revenue Services ("DRS") pursuant to Conn. Gen. Stat. § 12-425. Until Plaintiff CFE has exhausted its administrate remedies, a court lacks subject matter jurisdiction over this claim. *See Blass v. Rite Aid of Connecticut, Inc.*, 51 Conn. Supp. 622, 631 (Super. Ct. 2009), *aff'd*, 127 Conn. App. 569 (2011) ("By affording an aggrieved applicant for a refund of miscollected sales tax an appeal to this Court . . . [§ 12-422] makes clear the intention of the legislature to require all persons who wish to obtain refunds of overpaid sales tax to utilize such statutory procedures to obtain the full measure of relief to which they are equitably entitled by reason of the overpayment. A plaintiff's failure to exhaust such remedies before bringing suit for miscollection of sales tax in any other kind of legal proceeding is a defect in the subject matter jurisdiction of this Court.").

3. If P.A. 17-2 Actually Created a Sales and Use Tax, the Entire Case Would be Barred by the Tax Injunction Act

If the Court disagrees with the above analysis and concludes that sections 683 and 685 constitute sales and use taxes, then this entire action would be barred by the Tax Injunction Act ("TIA").

With respect to federal court jurisdiction, the TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The TIA applies to suits for both declaratory and injunctive relief. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) ("[B]ecause Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes, we hold that the Act prohibits declaratory as well as injunctive relief."). For the TIA to be satisfied, two conditions must be satisfied. First, the charge must constitute a "tax." *Hattem v. Schwarzenegger*, 449 F.3d 423, 427 (2d Cir. 2006). Assuming that the Court disagrees with Defendants' analysis in Part III.C.2, this prong necessarily is satisfied, as the viability Count III hinges on the fact that sections 683 and 685 of P.A. 17-2 created Sales and Use Taxes.

The second requirement of the TIA is that "the state remedies available to plaintiffs must be 'plain, speedy and efficient.'" *Id*. (quoting *Cuomo*, 14 F.3d at 713). "Such a remedy exists where the available state-court procedures satisfy certain 'minimal procedural criteria,' including a 'full hearing and judicial determination at which [a taxpayer] may raise any and all constitutional objections to the tax.'" *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 737 F.3d 228, 233–34 (2d Cir. 2013) (quoting

Rosewell v. LaSalle Nat. Bank, 450 U.S. 503, 512, 514 (1981)). "The availability of typical 'state administrative and judicial procedures' through which a party can ultimately challenge the validity of the tax in court satisfies these criteria." *Id*. (quoting *California v. Grace Brethren Church*, 457 U.S. 393, 412 (1982)). As was shown above, the imposition of a Sales and Use Tax may be challenged by bringing a claim for refund to the Commissioner of DRS. Should the Commissioner deny the refund claim, a party can appeal that determination to the Superior Court in accordance with Conn. Gen. Stat. § 12-422 ("Any taxpayer aggrieved because of any order, decision, determination or disallowance of the Commissioner of Revenue Services under section 12-418, 12-421 or 12-425 may . . . take an appeal therefrom to the superior court for the judicial district of New Britain . . . .").

Plaintiffs argue that the TIA is not applicable in this case because of what is known as the "multiplicity of suits rationale." *May Trucking Co. v. Oregon Dep't of Transp.*, 388 F.3d 1261, 1272 (9th Cir. 2004). Plaintiffs assert that because the taxes at issue could affect every EDC customer, resulting in thousands of state court refund claims, the TIA would not bar this action. This is an incorrect reading of that exception.

The United States Supreme Court has explained "that there may be extraordinary circumstances under which injunctive or declaratory relief is available even when a legal remedy exists. For example, if the 'enforcement of the tax would lead to a multiplicity of suits . . .' equity might be invoked." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 591 n. 6 (1995) (quoting *Dows v. Chicago*, 11 Wall. 108, 110, 20 L.Ed. 65 (1871)). However, "the multiplicity-of-suits rationale for permitting equitable relief extends only to those situations where there is a real risk of 'numerous suits

between the same parties, involving the same issues of law or fact.'" *Id*. (quoting *Matthews v. Rodgers*, 284 U.S. 521, 530 (1932) (emphasis added)). If the multiplicity of suits exception applied whenever numerous plaintiffs would be required to bring separate lawsuits, this exception would swallow the TIA rule, as almost every tax affects thousands if not millions of people. Therefore, if the Court concludes that sections 638 and 685 of P.A. 17-2 create sales and use taxes, then the TIA bars this entire action.

4. Plaintiffs Lack Standing to Bring a Promissory Estoppel Claim

Because Count V is based on the same language in § 16-245n(b), for the same reasons given in Part III.C.1, Plaintiffs cannot maintain a claim for promissory estoppel. Again, there is no claim that any Plaintiff "entered into financial relationships with the Green Bank in reliance upon the General Assembly's promise that the Green Bank will fully satisfy all of its obligations." Compl. ¶ 95. Nor is there any evidence that the Green Bank has failed to satisfy any of its obligations. Additionally, as with Count III, Plaintiffs' remedy is not a declaratory judgment or an injunction, but money damages, which must be obtained through the Claims Commissioner. *See People Sav. Bank of New Britain v. T.R. Paul, Inc.*, No. CV 970571700S, 2000 WL 175490, at *8 (Conn. Super. Ct. Jan. 27, 2000) ("[T]here is an adequate remedy at law such that an injunction ought not issue. . . . If there is indeed a sustainable case of promissory estoppel, then the array of contractual remedies exist, including money damages and perhaps specific performance.") (citation omitted)). Thus, Count V fails to state a cause of action.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment and dismiss the Complaint in its entirety.

THE DEFENDANTS

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Certificate of Service

I hereby certify that on July 20, 2018, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Philip Miller
Philip Miller
Assistant Attorney General

EXHIBIT 1

STATE OF CONNECTICUT

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

DOCKET NO. 03-09-08RE01 **APPLICATIONS OF THE CONNECTICUT LIGHT AND POWER COMPANY AND THE UNITED ILLUMINATING COMPANY FOR ISSUANCE OF FINANCING ORDER - FUNDING FOR THE ENERGY CONSERVATION AND LOAD MANAGEMENT FUND AND THE RENEWABLE ENERGY INVESTMENT FUND**

April 30, 2008

By the following Commissioners:

John W. Betkoski, III
Donald W. Downes
Anthony J. Palermino

DECISION

I. INTRODUCTION

A. BACKGROUND OF THE PROCEEDING

By Decision dated October 28, 2003 in the above-captioned proceeding, the Department of Public Utility Control (Department) approved the issuance of 220 million dollars of tax-exempt rate reduction bonds as securitization to sustain funding of conservation and load management programs administered by The Connecticut Light and Power Company and The United Illuminating Company and the renewable energy investment program administered by Connecticut Innovations, Inc. The issuance of those bonds was authorized by Public Act 03-6 of the June 30 Special Session and Public Act 03-01 of the September 8 Special Session of the Connecticut General

Assembly and §§16-245e to 16-245k of the General Statutes of Connecticut (Conn. Gen. Stat.) as amended.

Section 126 of Public Act 07-242, An Act Concerning Electricity and Energy Efficiency, provided that the sum of ninety-five million dollars would be appropriated to the Treasurer, from the General Fund, from the budget surplus of the fiscal year ending June 30, 2007 to provide funding for the Energy Conservation and Load Management Fund (C&LM) and the Renewable Energy Investment (REI) fund and costs associated with such funding. The ninety-five million dollar amount was derived from preliminary estimates calculated by the Treasurer. Subsequently, in the State's Budget Act, the amount actually appropriated for these programs was eighty-five million dollars based upon later estimates of funds that would be available. See Section 21 of Public Act No. 07-01, June Special Session.

By Decision dated October 10, 2007, and to comply with the revised Conn. Gen. Stat. § 16-245e provisions, the Department, on its own motion, reopened the above-captioned proceeding as an uncontested docket in order to review the revisions to the statutes and to take any actions necessary to implement the statutory directives.

B. CONDUCT OF THE PROCEEDING

No hearing on this matter is required. Based upon the quality of the responses to Department's interrogatories, and the fact that no Participant requested a hearing, the Department deems it unnecessary to conduct a hearing.

C. PARTICIPANTS

The Department granted Participant status to the Connecticut Clean Energy Fund, 200 Corporate Place, Rocky Hill, CT; The Connecticut Light and Power Company (CL&P), P.O. Box 270, Hartford, CT 06141-0270; ENE, 15 High Street, Chester, CT 06412; the Office of Consumer Counsel, Ten Franklin Square, New Britain, CT 06051; Office of the Treasurer (Treasurer), 55 Elm Street, Hartford, CT 06106; and The United Illuminating Company (UI), 157 Church Street, P.O. Box 1564, New Haven, CT 06506-0901.

II. DEPARTMENT ANALYSIS

A. STATUTORY REQUIREMENTS

Public Act No. 07-1 of the June Special Session of the Connecticut General Assembly amends Conn. Gen. Stat. § 16-245e of the Conn. Gen. Stat. by adding subsection (1) as follows:

> (1) Funds appropriated to the Treasurer in section 21 of this act shall be used by the Treasurer for the purpose of (1) defeasing some or all of the state rate reduction bonds maturing after December 30, 2007, by irrevocably depositing with the bond trustee in trust such appropriation to be used for the scheduled payments of principal and interest on the said state rate reduction bonds and paying operating expenses, (2) purchasing

state rate reduction bonds maturing after December 30, 2007, in the open market on such terms and conditions as the Treasurer determines to be in the best interest of the state for purposes of satisfying such bonds, or (3) defeasing or satisfying some or all of the state rate reduction bonds maturing after December 30, 2007, by a combination of the methods described in subdivisions (1) and (2) of this subsection. Such appropriation is for the purpose of paying debt service on bonds or other evidences of indebtedness and related costs and expenses provided for in the indenture. After the defeasance or satisfaction of all outstanding state rate reduction bonds, the trustee shall deliver to the Treasurer or apply in accordance with the instruction s of the Treasurer all moneys held by it not necessary to defease or satisfy such bonds or allocated to pay operating expenses. Such funds shall be first applied to satisfy any unpaid operating expenses. After payment of the operating expenses, seventy-five per cent of such remaining amounts shall be paid to the Energy Conservation and Load Management Fund, established pursuant to section 16-245n, as amended by this act, and twenty-five per cent of such remaining amount shall be paid to the Renewable Energy Investment Fund, established pursuant to section 16-245n, as amended by this act. The Treasurer and the finance authority have the authority to take any necessary and appropriate actions to implement the defeasance or satisfaction of the state rate reduction bonds and the payment of all operating expenses so that the amount of state rate reduction charges which before defeasance secured the state rate reduction bonds can be applied to the Energy Conservation and Load Management Fund and the Renewable Energy Investment Fund.

B. PARTICIPANTS' IMPLEMENTATION STEPS

The Treasurer, CL&P and UI met to discuss the defeasance of the Rate Reduction Bonds (RRBs) that are the subject of the instant docket. In addition, the Participants discussed the steps that would follow the defeasance including the elimination of the RRB Charge and the distribution of any excess funds (funds not allocated to operating expenses) held by the Trustee to the C&LM and REI funds. Treasurer's Cover Letter, p. 1.

1. Targeted Date of Defeasance

The Treasurer anticipates that as of a date in May, 2008, the funds in the Collection Account, when added to the State Contribution of $85 million and the Reserve Fund (the debt service reserve fund established under the Indenture), will be sufficient to defease the RRBs and provide for the payment of Operating Expenses. The Treasurer expects to complete the defeasance closing within three weeks of the date when it is determined sufficient funds are available, and the definitive Closing Date will be known at least seven days in advance. The Treasurer will notify the Department and CL&P and UI of the Closing Date when definitively set. Response to Interrogatory EL-1.

2. Defeasance Collateral

The Indenture under which the RRBs were issued establishes the conditions that must be satisfied to be defeased as follows:

a. That the Trustee of the Defeasance Escrow account holds Defeasance Collateral in such amount that bears fixed interest at such rates and maturities sufficient to pay all remaining interest and principal payments due on the RRBs;
b. That the sufficiency of the Defeasance Collateral in the Defeasance Escrow to discharge the RRBs is verified by a certified public accountant; and
c. That all obligations under the Indenture to the Trustee have been provided for.

Upon defeasance, the RRB holder's rights under the Indenture are effectively terminated and the holders must look exclusively to the Defeasance Escrow for payment on the RRBs.

The Treasurer intends to use United States Treasury Certificates, Treasury Notes and Treasury Bonds – State and Local Government Series (SLGs) to fund the Defeasance Escrow. Response to Interrogatory EL-2. Response to Interrogatory EL-2.

3. Other Required Steps

Besides the most important steps of determining the adequacy of the Defeasance Escrow amount and the amount needed for operating expenses, the Treasurer indicated that there is a potential liability for a rebate payable to the Internal Revenue Service in connection with the RRBs contingent on the SLGs' interest rate and the termination payment received or due upon the termination of the Investment Agreement held in the Reserve Fund. Further, Escrow terms must be reached with the Trustee and the Escrow Fund must be put in place. Instructions must be given to the Trustee to order and purchase the SLGs for the Defeasance Escrow and to move funds from various accounts so that money will be available to pay for the SLGs. Finally, notice of the defeasance must be given by the Treasurer in accordance with the RRB issuance Continuing Disclosure Agreement. The Treasurer notes that certain Servicing Agreements will continue to be in place until the fall of 2008 to ensure that all billed RRB Charges are collected, and CL&P and UI have discharged their reporting and other duties. Response to Interrogatory EL-3.

4. Post-Closing Measures

After the closing, and a full accounting of the funds necessary for the defeasement accounts including necessary operating expense is performed, the remaining funds (Distributable Funds) will be allocated to the REI Fund at a 25% rate, and between CL&P and UI at a combined 75% rate. While the total RRB payment requirement is that CL&P pays 80.58% to UI's 19.42%, the amount distributable to them

can be affected by lower or higher collection rates by the utilities. Response to Interrogatory EL-4.

Both CL&P and UI (collectively Companies) state that the day after the Treasurer completes the defeasance of the RRBs, the two Companies will each file a Routine RRB True-Up Letter with the Department, decreasing each Company's RRB Charge attributable to the defeased bonds down to zero. The Companies would also submit a corresponding compliance rate filing with equal offsetting adjustments to the C&LM fund and REI fund charges to reflect removal of the RRB Charge from the Competitive Transition Assessment charge. Response to Interrogatory EL-5.

The Companies also requested required authorization from the Department to amend their respective customer bills to delete (in the case of UI) or amend (in the case of CL&P) the RRB Charge footnote to reflect the elimination of the RRB charge. Id. The Department hereby grants such authorization.

III. CONCLUSION AND ORDERS

A. CONCLUSION

The Department has reviewed the procedures to be undertaken by the Office of the Treasurer and CL&P and UI with respect to the defeasance of the Revenue Reduction Bonds in May, 2008, and is satisfied that the requirements of Conn. Gen. Stat. §§ 245e and 16-245k would be met, the Bond Indenture and other requirements related to the RRBs would not be violated, and the best interest of Connecticut's electric ratepayers would be served.

B. ORDERS

1. The Treasurer shall notify the Department and CL&P and UI of the Closing Date when definitively set.

2. Within 10 days of the final disbursements of the Distributable Funds, the Treasurer shall report the amount of Distributable Funds allocated to the REI Fund and the C&LM funds controlled by CL&P and UI.

3. Within 10 days of the closing, CL&P and UI shall submit a compliance rate filing with equal offsetting adjustments to the C&LM fund and REI fund charges to reflect removal of the RRB Charge from the Competitive Transition Assessment charge.

4. The day after the Treasurer completes the defeasance of the RRBs, CL&P and UI shall each file a Routine RRB True-Up Letter with the Department, decreasing each Company's RRB Charge attributable to the defeased bonds down to zero.

DOCKET NO. 03-09-08RE01 **APPLICATIONS OF THE CONNECTICUT LIGHT AND POWER COMPANY AND THE UNITED ILLUMINATING COMPANY FOR ISSUANCE OF FINANCING ORDER - FUNDING FOR THE ENERGY CONSERVATION AND LOAD MANAGEMENT FUND AND THE RENEWABLE ENERGY INVESTMENT FUND**

This Decision is adopted by the following Commissioners:

John W. Betkoski, III

Donald W. Downes

Anthony J. Palermino

CERTIFICATE OF SERVICE

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

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

April 30, 2008
Date