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Office of The Attorney General
State of Connecticut

September 30, 2011

Mary J. Healey
Consumer Counsel
Office of Consumer Counsel
10 Franklin Square
New Britain, CT 06051

Dear Consumer Counsel Healey:

You have requested a legal opinion concerning the Department of Energy and Environmental Protection's ("DEEP") request that the Public Utilities Regulatory Authority ("PURA") suspend proceedings in a pending contested proceeding, Docket No. 05-10-03RE04, Application of the Connecticut Light and Power Company to Implement Time-of-Use, Interruptible, Load Response, and Seasonal Rates – Review of Smart Meter Study, Deployment and Rate Pilot. Specifically you have asked:

1. Is direct DEEP oversight over PURA dockets permissible under § 89(h) of P.A. 11-80 and the UAPA? If so, to what extent?
2. Was it legal for DEEP to request that PURA not issue a final decision, given that PURA is a subordinate entity within DEEP?
3. Would it be appropriate for DEEP to appear and participate in PURA dockets as a party or intervenor, given the fact that PURA directors report to DEEP?

You further stated that the Office of Consumer Counsel ("OCC") "is concerned that DEEP may seek party or intervenor status in future proceedings before the PURA, which may impinge upon the due process rights of other parties since PURA is a subordinate entity within DEEP."

We conclude that DEEP's actions in this proceeding were entirely consistent with Public Act 11-80 ("P.A. 11-80" or "Act") and the Uniform Administrative

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Procedures Act (“UAPA”), Conn. Gen. Stat. § 4-166 et seq. We further conclude that your due process concerns are more appropriately raised under the existing procedures set forth in the UAPA.

In response to your first question, in P.A. 11-80, the legislature authorized the Commissioner of the DEEP to set energy policy prospectively through two energy planning proceedings, the Comprehensive Energy Plan (“CEP”) and the Integrated Resources Plan (“IRP”). See P.A. 11-80, §§ 51 and 89. These proceedings are not subject to the formal limitations and requirements of the UAPA. The legislature further provided, in Section 51(e) of P.A. 11-80, that:

[t]he decisions of the Public Utilities Regulatory Authority shall be guided by the goals of the Department of Energy and Environmental Protection, as listed in section 1 of this act, and by the goals of the comprehensive plan and the integrated resource plan approved pursuant to section 16a-3a of the general statutes, as amended by this act, and shall be based on the evidence in the record of each proceeding.

The legislature provided PURA, on the other hand, with plenary authority to issue final decisions in contested cases. “Any final decision, order or authorization of the Public Utility Regulatory Authority in a contested case shall constitute a final decision for the purposes of chapter 54.” P.A. 11-80, § 22. Thus, the legislature granted DEEP broad authority to set state energy policy going forward, and directed PURA to implement that policy in contested proceedings pursuant to the UAPA. DEEP has no statutory authority to exert direct oversight over PURA decision-making in contested proceedings.

Your second question asks whether it was legal for DEEP to request that PURA not issue a final decision given that PURA is a subordinate entity within DEEP. An Attorney General opinion is not an appropriate vehicle to question a decision rendered in a contested case proceeding under the UAPA. Rather, the UAPA is the proper vehicle to address such a matter providing all parties an opportunity to participate. Nevertheless, I note the following for your information.

PURA is the final decision-maker in contested administrative proceedings. While § 15 of P.A. 11-80 provides that PURA shall be “within the Department of

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Energy and Environmental Protection,” as noted above, the Act is equally clear that PURA is the sole and final decision-making authority in formal UAPA administrative proceedings. P.A. 11-80, § 22.¹ For the purpose of resolving administrative proceedings, PURA is not a “subordinate entity” to the DEEP.

DEEP’s statutory status is no different from any other interested participant in contested PURA proceedings. It is of course common and entirely appropriate for interested participants, including state officials and agencies, to state their positions and preferences before appropriate decision-making authorities in contested proceedings. Such participation better informs the decision-making authority and promotes the fairness and integrity of the administrative process.

In its September 1, 2011 filing in Docket No. 05-10-03RE04, DEEP asked PURA to suspend that proceeding “while the Bureau of Energy and Technology Policy conducts an open, public process over the course of the next few months to establish the state’s smart meter policy.” This request -- made in an open and public manner, with notice to all parties involved, and consistent with the UAPA and PURA’s established practices and procedures -- was not binding on PURA, as PURA alone is the final decision-maker in contested administrative proceedings. DEEP’s request was also consistent with the intent of P.A. 11-80, which fundamentally changed the manner in which energy policy is made in Connecticut. The Act created DEEP and charged it with setting energy policy for the entire state prospectively in the CEP and IRP. As a result, DEEP’s request that PURA suspend the ongoing CL&P’s smart meter proposal, Docket No. 05-06-04 – and PURA’s independent and voluntary decision to do so – was entirely in keeping with the new legislative requirements. Suspension would allow DEEP the opportunity to set smart meter policy on a state-wide basis and guide PURA decisions in the CL&P case and other subsequent proceedings.

As you know, on August 31, 2011, my Office filed a letter supporting DEEP’s request, asking that PURA suspend proceedings in both the CL&P case, Docket No. 05-10-03RE04, and United Illuminating Company’s smart meter and time of use rate proposal, Docket No. 05-06-04RE06. I did so because of the stated legislative intent that DEEP set smart meter policy for the state and quite

¹ Moreover, Directors of PURA are independent, “appointed by the Governor with the advice and consent of both houses of the General Assembly.” P.A. 11-80, § 15(a).

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simply because it made good sense to do so. Questions about smart metering and effective time of use rates are complicated. Despite the potential benefits of smart meters, it appears that the majority of jurisdictions are cautiously approaching implementation of this technology. Early leading states such as Texas, California and Colorado now face challenges related to their early implementation of smart metering. The issues are complex, requiring a cohesive, well-developed policy in this area. As a result, I stated in my August 31 letter that:

[t]his suspension will allow the DEEP an opportunity to solicit public comment and formulate its policies concerning the future of smart meters and time-of-use rates in Connecticut consistent with the legislative framework established under Public Act 11-80, "An Act Concerning the Establishment of the Department of Energy and Environmental Protection and Planning for Connecticut's Energy Future."

DEEP's September 1 request similarly sought such time to establish smart meter policy. The request was in my view legally appropriate, and I so advised DEEP before it sent the letter.

Your third question asks whether it "would be appropriate for DEEP to appear and participate as a party or intervenor, given the fact that PURA Directors report to DEEP." Again, under P.A. 11-80, PURA directors are the independent decision-makers in contested administrative proceedings. They do not "report to DEEP" when functioning in this capacity. The placement of PURA within DEEP does not affect the statutorily determined independence of PURA's decision-making authority. All UAPA protections designed to ensure the fairness and integrity of the administrative process (such as, for example, those provisions addressing *ex parte* communications pursuant to Conn. Gen. Stat. § 4-181) fully apply to PURA proceedings and govern DEEP's participation in such proceedings. As long as UAPA procedures are followed, DEEP may properly participate in a PURA proceeding.

Finally, you raise a concern about the "due process rights" of the parties. Although you do not explain why you believe the due process rights of the parties might have been impacted, we note that neither DEEP's letter nor PURA's decision to suspend the schedule in this matter suggests or imposes any limitations on the continued participation of other parties or intervenors in this

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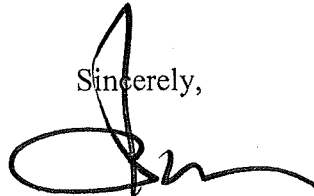
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proceeding. However, if you or other parties to the proceeding believe that DEEP's letter or the participation of any public official or entity impinges upon due process rights, the appropriate remedy remains the review processes already provided by the UAPA.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Jepsen", written over the word "Sincerely,".

GEORGE JEPSEN

cc: Commissioner Daniel C. Esty, DEEP
Chairman Kevin M. DelGobbo, PURA
Vice-Chairman John W. Betkoski, PURA
Director Anna M. Ficeto, PURA
Service List, PURA Docket No. 05-10-03RE04