APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. 33362

CITIZENS AGAINST OVERHEAD POWERLINE CONSTRUCTION, ET AL.
PLAINTIFF-APPELLANT

v.

CONNECTICUT SITING COUNCIL, ET AL.
DEFENDANTS-APPELLEES

BRIEF OF THE DEFENDANT-APPELLEE
OFFICE OF CONSUMER COUNSEL
WITH SEPARATE APPENDIX

FOR THE DEFENDANT-APPELLEE
OFFICE OF CONSUMER COUNSEL
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COUNTERSTATEMENT OF ISSUE

1. Should the dismissal of the Plaintiffs' appeal of the March 24, 2010 Connecticut Siting Council decision be affirmed on the alternate ground that, under Conn. Gen. Stat. § § 4-181a(a)(4) and 4-183(c), that agency's July 22, 2010 reconsidered decision was the only final decision in the subject proceeding for purposes of appeal?

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I. NATURE OF THE PROCEEDINGS AND COUNTERSTATEMENT OF FACTS

A. Nature of the Proceedings

The Office of Consumer Counsel ("OCC"), a party defendant to the present appeal, is the statutory advocate for consumer interests in all matters that may affect Connecticut utility ratepayers with respect to public service companies, per §16-2a of the Connecticut General Statutes ("Conn. Gen. Stat."). OCC was a party to the contested administrative proceeding before the Connecticut Siting Council ("CSC") which led to the instant appeal. The CSC proceeding was initiated as the result of an application by The Connecticut Light & Power Company ("CL&P") for Certificates of Environmental Compatibility and Public Need ("Certificate") for the "Connecticut Valley Electric Transmission Reliability Projects" (the "CL&P Application") pursuant to Conn. Gen. Stat. § 16-50g et seq. (See Certification of Partial Record, Superior Court Docket Entry #123, March Finding of Fact ("March FOF") at ¶ 1, Appendix to this Brief ("A") 78.)

The CL&P Application included two projects, designated as the Connecticut portion of the Greater Springfield Reliability Project ("GSRP") and the Manchester Substation to Meekville Junction Circuit Separation Project ("MMP"). (March FOF at ¶ 1, A78.) These projects were interdependent, insofar as the MMP was made necessary by the GSRP. (March FOF at ¶ 318, A132.)

The CSC docket to review the CL&P Application was consolidated to include a competing application from NRG Energy Inc. ("NRG"), pursuant to Conn. Gen. Stat. § 16-50*l*(a)(3), for consideration of a 530 MW combined cycle generating plant in Meriden, as a non-transmission alternative to the GSRP and MMP. (March FOF at ¶ 2, A78.) The

competing NRG application is not substantively relevant to this appeal. The consolidated docket was designated "Docket 370" by the CSC. (March FOF Cover Page, A73.)

On March 24, 2010, the CSC issued a decision granting a Certificate for the GSRP, denying without prejudice a Certificate for MMP, and denying NRG's application (the "March Decision"). (Cover Letter to March Decision, A53.) CSC's custom is to issue its agency decisions in the form of a trio of related documents, entitled respectively, "Findings of Fact," "Opinion," and "Decision and Order." In this case, the March Decision included a "Findings of Fact" applicable to all three projects, and separate "Opinion" and "Decision and Order" documents for each individual project, all of which were mailed together on March 24 as the then-final decision in the docket. (See A53 to A189.)

In the Opinion document relevant to the MMP ("MMP Opinion"), the CSC found that the MMP was needed as a consequence of the construction of the GSRP, in order to "make certain adjustments to help the system accommodate these higher power flows more reliably." (MMP Opinion at 2, A177.) An alternative to the MMP, the "MMP-V" had been developed during the course of the docket in order to provide further reliability improvements in the construction area. (MMP Opinion at 2, A177.) The CSC concluded it did not have sufficient information on the MMP-V to make a decision, and denied a Certificate for the MMP without prejudice. (MMP Opinion at 5, A180.)

In response to the March Decision, CL&P filed a petition for reconsideration of the denial of a Certificate for the MMP on April 7, 2010 pursuant to Conn. Gen. Stat. § 4-181a(a). (See Certification of Partial Record, Superior Court Docket Entry # 123, July Findings of Fact (Reconsideration) ("July FOF") at ¶ 5; A199.) The CSC granted CL&P's petition on May 6, 2010, and reopened Docket 370 to consider additional evidence

concerning the MMP. (Id. at ¶ 7, A200.) On July 22, 2010, on the seventy-fifth day after the agency had decided to reconsider the March Decision, the CSC issued its final decision in Docket 370, approving a Certificate for MMP, with variations from CL&P's Application ("July Decision"). (Decision and Order (Reconsideration), July 20, 2010 ("July D&O") at 1, A222).

Plaintiffs Citizens Against Overhead Powerline Construction ("CAOPC") and Richard Legere, an individual who is a member and executive director of CAOPC (together, "Plaintiffs"), filed their administrative appeal of the March Decision on May 7, 2010,[1] the day after the CSC granted CL&P's petition for reconsideration and reopened Docket 370. The Plaintiffs also filed an administrative appeal of the July Decision on or about September 3, 2010.[2] Both administrative appeals were subject to motions to dismiss filed by and supported by one or more party defendants.

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[1] The Tax and Administrative Appeals Court in New Britain assigned to Plaintiffs' first appeal the following docket number: HHB CV10-6004927.

[2] The Tax and Administrative Appeals Court in New Britain assigned to that second appeal the following docket number: HHB CV10-6006723.

On November 18, 2010, the Superior Court granted a motion to dismiss Plaintiffs' appeal of the July Decision for failure to serve.[3] Plaintiffs did not appeal that Superior Court decision. Thus the March Decision became the Plaintiffs' only remaining means to advance their arguments on appeal.

In the Superior Court proceeding below, CL&P moved to dismiss Plaintiffs' appeal of the March Decision, presenting multiple grounds for its motion. (See October 12, 2010 Memorandum of Law in Support of Connecticut Light & Power Company's Motion to Dismiss ("Dismissal Memorandum").) One CL&P contention was that Plaintiffs had failed to appeal from a final agency decision pursuant to Conn. Gen. Stat. § 4-181a(a), because Plaintiffs' appeal was filed the day after CSC decided to reconsider the March Decision and reopen Docket 370. (Dismissal Memorandum at 7-9.) In the Superior Court, OCC filed a statement of joinder with respect [*only*] to that particular CL&P contention.[4]

The Superior Court's initial ruling on CL&P's and OCC's contention that Plaintiffs had failed to appeal from a final agency decision was a one-sentence order --- stating a conclusion but offering no legal analysis. (Order of the Superior Court, November 22, 2010). In consequence, on January 4, 2011, OCC filed its Motion for Articulation with the Superior Court.[5] On January 21, 2011, the Superior Court granted that OCC motion and articulated its earlier ruling (the "Articulation"). As further set forth below, OCC believes the Superior Court's Articulation to be legally incorrect, insofar as it finds that an appeal may

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[3] See Memorandum of Decision on Motion to Dismiss, HHB CV 10-6006723, November 18, 2010.

[4] See Statement of Joinder by Office of Consumer Counsel, July 22, 2010.

[5] See Motion for Articulation or Clarification of Ruling by Office of Consumer Counsel, January 4, 2011.

be taken of a decision that has been reopened for reconsideration pursuant to Conn. Gen. Stat. § 4-181a, and in which a reconsidered decision is issued within 90 days.

On March 24, 2011, the Superior Court granted a motion to dismiss Plaintiffs' appeal of the March Decision for lack of standing.[6] On or about April 13, 2011, Plaintiffs appealed that Superior Court decision. That appeal has become the present one. As further set forth in Section II below, OCC believes the Superior Court's dismissal of the Plaintiffs' appeal of the March Decision should be affirmed, but on the alternate ground that the March Decision is not an appealable final decision.

B. Counterstatement of Facts

As further set forth in the Nature of Proceedings above, from a procedural standpoint the July Decision was plainly a reconsideration pursuant to Conn. Gen. Stat. § 4-181a(a). Docket 370 was reopened by the CSC and the July Decision was issued in response to CL&P's Request for Reconsideration. (July FOF at ¶ ¶ 5 and 7, A200.) In the case below, in Superior Court, the CSC filed its Certification of Partial Record on December 14, 2010 and its Second Certification of Partial Record on March 4, 2011 (together, the "Partial Record").[7] The Partial Record contains both the March and the July Decisions, which provide numerous facts which further demonstrate that the CSC treated the administrative docket which led to the July Decision, both legally and practically, as a reconsideration of the earlier docket which had led to the March Decision.

First, the agency labeled the July Decision as a reconsideration of the March Decision. In the July Decision, the titles for the Findings of Fact, Opinion, and Decision and

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[6] See Memorandum of Decision, HHB CV10-6004927, March 24, 2011 at 22-23.

[7] The entire record of the CSC proceeding was never filed, as the motions to dismiss were heard and decided before the record was due.

Order each contain the word, "(Reconsideration)." (July FOF at 1, A199; July Opinion (Reconsideration) at 1, A216; July Decision and Order (Reconsideration) at 1, A222.) Also, the first page of that portion of the July Decision labeled "Opinion (Reconsideration)" recites that it arose from CSC's grant of CL&P's petition for reconsideration as to MMP.[8] (July Opinion (Reconsideration) at 1, A216.)

Second, the "Findings of Fact (Reconsideration)" portion of the July Decision closely tracks the counterpart portion of the March Decision. Specifically, CSC states that the July Findings of Fact supplement the March Findings of Fact, and that they incorporate by reference those earlier findings of fact. (July FOF at 1, footnote, designated with an asterisk, A199.)

Third, the Partial Record shows that these two CSC proceedings have identical administrative service lists. (March Decision Service List, A55 – A61; July Decision Service List, A192 – A198.) No party or intervenor which had been accepted into the docket which led to the March Decision was required to re-apply for participant status in order to become part of the docket which led to the July Decision.

The record facts reviewed just above make clear that the CSC treated its July Decision as the reconsidered successor to its March Decision pursuant to § 4-181a(a). In Part II of this Brief (*Argument*), supra, OCC explains the legal significance of this relationship between the two agency decisions.

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[8] The July "Findings of Fact (Reconsideration") portion of the decision, at its numbered ¶ ¶ 1, 5, and 7, contains similar recitals. A199-200

II. ARGUMENT

A. The Standard of Review is Plenary

OCC's contentions respecting Plaintiffs' appeal concern questions of law. Thus, the standard of review is plenary. Comm'n on Human Rights & Opportunities ex rel. Arnold v. Forvil, 302 Conn. 263, 273 (2011). The particular legal issue raised by OCC concerns the Superior Court's interpretation of statutory provisions as amended by a public act. With respect to issues of statutory interpretation, this Court has held as follows:

> The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.)

Id., quoting Grady v. Somers, 294 Conn. 324, 332-33, 984 A.2d 684 (2009) (*emphases added*).

The sound application of this standard of review to the case at hand should lead the Court to affirm the dismissal of the Plaintiffs' appeal, but on alternate grounds, as further set forth herein.

B. The Superior Court Incorrectly Treats the March CSC Decision as an Appealable Final Decision.

In the Superior Court proceeding below, CL&P offered four distinct grounds for its motion to dismiss the appeal below. (See Dismissal Memorandum.) As the first such ground, CL&P contended that Plaintiffs had failed to appeal from a "final decision", as required by Conn. Gen. Stat. § 4-183(a). (Dismissal Memorandum at 7.) CL&P explained that its "no final decision" contention was based on Connecticut Public Acts No. 06-32, An Act Concerning Reconsidered Agency Decisions and Appeals Under the Uniform Administrative Procedure Act ("PA 06-32"), A6-7a. (Dismissal Memorandum at 7.)

On November 22, 2010, oral arguments to the Superior Court were held, including with respect to PA 06-32 and its relevance to the pending litigation.[9] That same day, the Superior Court issued a short written order, as follows:

> THE DEFENDANT CONNECTICUT LIGHT AND POWER'S MOTION TO DISMISS IS DENIED ON THE ISSUE OF SUBJECT MATTER JURISDICTION ("NOT FROM A FINAL DECISION") BUT AS TO THE ISSUE OF AGGRIEVEMENT THE MATTER IS SET DOWN FOR AN EVIDENTIARY HEARING ON 12/17/10 AT 2:15 P.M. BEFORE COHN, J. IN COURTROOM 3F, 20 FRANKLIN SQUARE, NEW BRITAIN. BRIEFS WILL BE SCHEDULED FOLLOWING COMPLETION OF HEARING.

As may be seen, this Superior Court ruling states a conclusion but offers no legal analysis. In consequence, OCC filed its motion for articulation with the Superior Court. In that motion, OCC asked the Court whether it viewed its November 22, 2010 ruling as one

[9] See Order Granting Motion for Continuance, November 18, 2010 (Cohn, J.).

based in PA 06-32. (Motion for Articulation at 1.) The Superior Court's Articulation, issued on January 21, 2011, confirms that its November 22, 2010 written order was based on PA 06-32. That Articulation also sets out the Court's reasoning more fully. See Articulation at 2-3, A35 – A36.

In the Articulation, the Superior Court wrongly treats the March Decision as an appealable final decision. See Articulation at 2-3, A35-36. As set forth in Section II, supra, the July Decision was the reconsidered successor to the March Decision. Given that, under Conn. Gen. Stat. § § 4-181a and 4-183(c), as amended by PA 06-32, the March Decision is not an appealable final decision, as explained more fully below.

i. The March Decision is Not an Appealable Final Decision under Conn. Gen. Stat. § 4-181a(a), as amended by PA 06-32.

PA 06-32 amended subsections of two different statutes, Conn. Gen. Stat. § 4-181a(a) ("§ 4-181a(a)") and Conn. Gen. Stat. § 4-183(c) ("§ 4-183(c)"), in order to clarify the time to appeal agency decisions once a petition for reconsideration has been filed. A6-7a; see Section II.C, supra, for legislative history and background. PA 06-32 amended § 4-181a(a), in part, by adding subdivision (4), to provide as follows:

> Except as otherwise provided in subdivision (3) of this subsection, an agency decision made after reconsideration pursuant to this subsection shall become the final decision in the contested case in lieu of the original final decision for purposes of any appeal under the provisions of section 4-183, as amended by this act, including, but not limited to, an appeal of (a) any issue decided by the agency in its original final decision that was not the subject of any petition for reconsideration or the agency's decision made after reconsideration, (b) any issue as to which reconsideration was requested but not granted, and (c) any issue that was reconsidered but not modified by the agency from the determination of such issue in the original final decision.

§ 4-181a(a)(4) (*emphases added*), A1. As can be seen, this statutory subdivision sets forth a broad general rule that a reconsidered agency decision replaces any

former decision as the final decision in the case for purposes of appeal, with one limited exception not relevant to this appeal.[10] Id. In addition, § 4-181a(a)(4) also includes a more specific list of circumstances to which this broad rule applies. Id. The first such circumstance, "any issue decided by the agency in its original final decision that was not the subject of any petition for reconsideration or the agency's decision made after reconsideration," contemplates precisely the circumstances of this appeal. § 4-181a(a)(4)(a), A1.

Thus, under the plain and unambiguous language of § 4-181a(a)(4) (see Section II.A, Standard of Review), the reconsidered July Decision replaced the March Decision as the final decision for purposes of appeal. Moreover, a finding that the March Decision is not an appealable final decision is not an "absurd" or "unworkable" result under Conn. Gen. Stat. § 1-2z. This interpretation of the relevant statutes would simply have required Plaintiffs to wait until the July Decision was issued to file their appeal, or, if no decision was issued within the ninety day period for rendering a reconsidered decision under § 4-181a(a)(3), to wait forty-five days after that point. Conn. Gen. Stat. § 4-183(c)(3) & (4), A2.

[10] The only exception to that general rule is set out in subdivision (3) of this same statutory subsection. That exception is the circumstance where the agency, having decided to reconsider a decision, fails to render the reconsidered decision within 90 days of its decision to reconsider. In that event, the original final decision remains the final decision for any appeal purposes. This exception does not apply in the present litigation, since the July CSC Decision was issued on the 75th day of the relevant time period.

Rather, an "absurd" and "unworkable" result may be created by the Superior Court's interpretation in the Articulation, which would inevitably lead to piecemeal appeals contrary to the intent of PA 06-32, as further set forth in Section II.C of this brief, supra.

Under principles of statutory construction, where the meaning of the statute is plain and unambiguous, "extratextual evidence of the meaning of the statute shall not be considered. . .". Comm'n on Human Rights & Opportunities ex rel. Arnold v. Forvil, 302 Conn. at 273. Even if the language of § 4-181a(a)(4), set forth above, was not plain and unambiguous, OCC's interpretation of the language is confirmed by the Office of Legislative Research ("OLR") Bill Analysis for PA 06-32. OLR states as follows respecting the effect of this Public Act on Conn. Gen. Stat. § 4-181a(a):

> With one exception, the bill provides that a decision an agency issues in a contested case on reconsideration replaces its original decision as the final decision from which an appeal may be taken. [*Emphasis added.*]

OLR Bill Analysis of HB 5738 (as amended by House "A") at 6, A254; see also legislative history of PA 06-32 cited in Section II.C, supra.

Thus, the Superior Court should have granted CL&P's Motion to Dismiss on the basis that the March Decision was not an appealable final decision under § 4-181a(a). However, the Superior Court's Articulation makes no mention whatsoever of the substantive rule created by PA 06-32 as it amended § 4-181a(a)(4). See Articulation, A34-36. Instead, the Superior Court only considered (in part) how PA 06-32 amended Conn. Gen. Stat. § 4-183(c) (Articulation at 2-3, A35 – A36), which concerns the time to appeal, as set forth below.

ii. The March Decision is Not an Appealable Final Decision under Conn. Gen. Stat.§ 4-183(c), as Amended by PA 06-32.

Conn. Gen. Stat. § 4-183(c), as amended by PA 06-32, sets forth the time to appeal, in relevant part, as follows:

> (1) within forty-five days after mailing of the final decision under section 4-180 . . . or (2) within forty-five days after the agency denies a petition for reconsideration of the final decision pursuant to subdivision (1) of subsection (a) of section 4-181a, or (3) within forty-five days after mailing of the final decision made after reconsideration pursuant to subdivisions (3) and (4) of subsection (a) of section 4-181a . . . or, (4) within forty-five days after the expiration of the ninety-day period required under subdivision (3) of subsection (a) of section 4-181a if the agency decides to reconsider the final decision and fails to render a decision made after reconsideration within such period, whichever is applicable and is later . . . .

§ 4-183(c), A2. Subdivision (1) of § 4-183(c) is the time period for appeal for final decisions not subject to a motion for reconsideration. Id. It preexisted PA 06-32. Subdivisions (2) through (4) are the time periods applicable to decisions subjected to a motion for reconsideration, and were added by PA 06-32, along with the phrase "whichever is applicable and is later." PA 06-32, A6a-7.

While the phrase "whichever is applicable and is later" is tucked at the end of subdivision (4), it makes no sense applied to only the time period delineated within that subdivision. § 4-183(c), A2. Rather, a careful reading demonstrates that the phrase "whichever is applicable and is later" modifies all of the preceding subsections, requiring an appealing party to choose the appeal period that is both applicable to it and later than any other potentially applicable time period within those subsections. Id. This approach of mandating that the later period is applicable is consistent with the manner in which PA 06-32 amended § 4-181a(a) to define the

final decision, for purposes of appeal, as the later, reconsidered decision as to all issues. A6-7a.

If the Superior Court believed that the time frames provided in subsections (1) and (3) were both applicable (see Articulation at 2, A35), the later time frame provided for reconsidered decisions in subsection (3) should have controlled. Thus, reading 4-183(c) alone, without the additional benefit of the context provided by 4-181a(a), the Plaintiffs' appeal of the March Decision should have been dismissed.

However, the Superior Court failed to consider the effect of the phrase "whichever is applicable and is later" in its analysis of § 4-183(c). See Articulation, A34. Rather, the Superior Court explains its interpretation of PA 06-32 as follows:

> Public Act 06-32 amended § 4-183(c) in order to confer subject matter jurisdiction over an appeal if taken within forty-five days of a reconsidered decision . . . The purpose of Public Act 06-32 was to correct the situation where an appeal on certain discrete issues, not reconsidered by an agency, would often be considered untimely if filed concurrently with the appeal of the reconsideration. The purpose was not to penalize an appellant who filed an appeal before reconsideration was completed by the agency.

Id. at 2 (*emphases in original*), A35.

Thus, the Articulation (at 2-3, A35-36) in effect concludes that § 4-183(c), as amended by PA 06-32, is permissive rather than restrictive, allowing the Plaintiffs to choose whether to appeal the March Decision or the July Decision. Id. The Superior Court emphasized the word "*or*" between each of the subdivisions of Conn. Gen. Stat. § 4-183(c) in citing that statute, as if the four appeal time periods listed in the subdivisions of § 4-183(c), as amended, provide a menu of options for an appellant. Id.

To the contrary, it is the circumstances of the case and the agency action that determine the proper time to appeal under § 4-183(c), not the choice of the appellant. The

first subdivision establishes the time to appeal final decisions not subjected to a motion for reconsideration. § 4-183(c)(1), A2. The next three subdivisions establish the time to appeal agency decisions subjected to a petition for reconsideration, dependent upon the agency's reaction to the petition for reconsideration. § 4-183(c)(2), (3) and (4), A2. The phrase "whichever is applicable and later" mandates a choice among the options. Id. That choice, in the instant circumstances, was the later July Decision. Thus, under the plain language of § 4-183(c), Plaintiffs' appeal should have been dismissed.

iii. The Superior Court Failed to Apply PA 06-32 as a Whole, Thereby Rendering Certain Portions a Nullity.

Under principles of statutory construction, PA 06-32 should be read to interpret its amendments to § § 4-183(c) and 4-181a(a) harmoniously, and not to read some clauses so as to nullify others. See Foley v. State Elections Enforcement Comm'n, 297 Conn. 764, 793 (2010) (finding that "[w]hen construing a statute, we do not interpret some clauses in a manner that nullifies others, but rather read the statute as a whole and so as to reconcile all parts as far as possible."). The Articulation renders the § 4-183(c) "whichever is applicable and later" language, and the definition of a final decision within § 4-181a(a)(4), as nullities. It does so despite the fact that reading these two sections harmoniously is easy to do, as the two sections complement rather than contradict each other, as explained above. In fact, the relevant subdivision of § 4-183(c) for purposes of this appeal, subdivision (3), specifically refers to § 4-181a(a)(4), which provides that a timely final decision rendered upon reconsideration becomes the final decision in the contested case "in lieu of the original final decision for purposes of appeal." § 4-181a(a)(4) (emphasis added), A1.

Reading PA 06-32 as a whole requires a different determination than that made in the Articulation. However, if this was not the case and the Superior Court was correct in its reasoning that § 4-183(c) provides a menu of options for appellants and is thus permissive rather than restrictive, § 4-181a(a)(4) more specifically states that a timely reconsidered decision constitutes a final decision "in lieu of" the original decision for purposes of appeal. A1. Another applicable principle of statutory construction is that a more specific statute governs a less specific statute that might otherwise be controlling. See Housatonic R.R. Co. v. Comm'r of Revenue Servs., 301 Conn. 268, 301-02 (2011). Thus, if any conflict existed between the two sections, the language of § 4-181a(a)(4) would control, and the Plaintiffs' appeal should have been dismissed.

Thus, under principles of statutory construction, § 4-183(c) and § 4-181a(a)(4), read separately or together, required the dismissal of Plantiffs' appeal by the Superior Court. PA 06-32 creates a clear, coherent statutory scheme, to govern [*as its title says*] "reconsidered agency decisions and appeals" under the UAPA. The Superior Court's Articulation fails to consider and apply all of PA 06-32's several statutory rules. Plainly, the Court should have granted that part of CL&P's motion to dismiss which was grounded in PA 06-32.

C. In the Public Interest, the Appellate Court Should Dismiss the Plaintiffs' Appeal on the Basis Stated Here.

OCC is aware that multiple issues have been raised in this appeal by Plaintiffs and also by the other defendants (i.e., CSC and CL&P). See the several Preliminary Statement(s) of Issues on Appeal, as filed during April and May 2011 in this Appeal.

Nonetheless, OCC respectfully suggests that the Appellate Court should dismiss the Plaintiffs' appeal on the basis stated herein, in furtherance of the public interest.

First, the approach OCC recommends would be the simplest path for this Court to travel. It is an approach based on the application of clear and straightforward statutes. Certainly, the question of whether or not the March CSC Decision was an appealable final decision, at all, should be treated as the threshold issue in this litigation --- as the issue most appropriate for the Appellate Court to address first.

Second, and fundamentally, if the Appellate Court applies the provisions of PA 06-32 to the case at hand, it thereby would provide an important service to the administrative law bar. This is because the Superior Court's Articulation has introduced an important and troubling uncertainty into Connecticut's judicial process for administrative appeals. To the extent that the judicial approach which underlies that Articulation continues to inform litigants proceeding under the Uniform Administrative Procedure Act ("UAPA"), PA 06-32 would become almost a nullity.

i. OCC and the History of this Issue

OCC was closely involved in the litigation which gave rise to the enactment of PA 06-32. In 2002, OCC filed an administrative appeal of a Department of Public Utility Control ("DPUC") decision involving the Yankee Gas Services Company ("Yankee").[11] In that connection, OCC had to choose between appealing the original DPUC decision and appealing a reconsidered DPUC decision. OCC appealed the original decision based on the then-existing judicial guidance on point --- specifically, a January 2001 Superior Court decision rendered by Henry Cohn, J. See The Southern New England Telephone

[11] OCC v. DPUC et al., CV 02-0513718S.

Company v. Connecticut Department of Public Utility Control, 2001 Conn. Super. LEXIS 6 (January 3, 2001) (finding that those issues not being reconsidered by an agency must be appealed from the original decision).[12]

Yankee moved to dismiss that OCC appeal, contending that OCC had taken its appeal from the wrong DPUC decision. In April 2003, the Superior Court (George Levine, J.) granted that Yankee motion. Office of Consumer Counsel v. Connecticut Department of Public Utility Control, 2003 Conn. Super. LEXIS 1161 (April 24, 2003) (construing then-existing statutes and case law to require appeal from the reconsidered decision so as to avoid piecemeal appeals.)[13] This development meant that conflicting Superior Court guidance on point now existed.

OCC promptly took a further appeal of Judge Levine's decision.[14] OCC thereby sought to revive its substantive DPUC/Yankee litigation, by obtaining resolution from a higher court of the procedural uncertainty which then existed as to the construction and application of the relevant UAPA provisions to agency decisions upon reconsideration. Many members of Connecticut's administrative law bar were following this OCC appeal closely, given its potentially wide implications.

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[12] OCC, in another earlier administrative appeal, had successfully relied upon this "SNET" decision to oppose a utility motion to dismiss. See OCC v. DPUC, CV 99-0497238, CV 99-0498854, 2001 Conn Super LEXIS 2738, at *9-10 (September 21, 2001), A42.

[13] A copy of that Superior Court decision was filed in the present litigation, on November 15, 2010, as part of CSC's Supplemental Citation of Authorities. Judge Levine's decision provides a thoughtful and thorough review of the history of case law and legislative amendments which led up to that decision. OCC v. DPUC, CV 02-0513718, 2003 Conn. Super. LEXIS 1161 (April 24, 2003), A48.

[14] OCC v. DPUC et al., docketed first as A.C. 24226, and later as S.C. 17158.

While this OCC appeal was pending, OCC and Yankee settled the underlying substantive dispute.[15] In that connection, OCC and Yankee contemplated withdrawal of the OCC appeal. Nonetheless, the parties to that litigation (including the DPUC) agreed with a suggestion by Judge Levine that it would be helpful for the Supreme Court to retain jurisdiction of this OCC appeal because even though the OCC/Yankee substantive dispute had been mooted, the procedural uncertainty created by the conflict in Superior Court decisions remained, and that uncertainty affected many litigants. However, in September 2004, the Supreme Court denied an OCC motion asking the Supreme Court to retain jurisdiction of the appeal, based on the "capable of repetition, yet evading review" exception to the mootness doctrine.

Thereafter, at the urging of the Administrative Law Section of the Connecticut Bar Association ("CBA"), a bill was raised to resolve the above-described conflict of Superior Court authority, through amendment of the UAPA. The legislative history of PA 06-32 makes clear that this statute came to the General Assembly, and was enacted, as a direct result of this conflict of Superior Court authority, and of OCC's inability to obtain appellate judicial resolution of that conflict, as more fully set forth below.

The written testimony of Mary Alice Moore Leonhardt, representing the CBA Administrative Law Section and filed with the Judiciary Committee on March 14, 2006,

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[15] OCC and Yankee filed their settlement with DPUC in April 2004, and the agency approved that settlement in August 2004. See DPUC Docket No. 01-05-19RE05, Application of Yankee Gas Services Company for a Rate Increase, Phase 1 – 2003 IERM Filing, Decision of August 4, 2004.

stated that enactment of the bill would eliminate a variety of litigation difficulties, including multiple piecemeal appeals, that had arisen on account of conflicting state Superior Court opinions. See Conn. Joint Standing Committee Hearings, Judiciary Committee, Part 7, 2006 Session, pp. 2236 – 2238 (written testimony of Attorney Mary Alice Moore Leonhardt, dated March 14, 2006, submitted to the Judiciary Committee), A251 – A253. Ms. Leonhardt, in verbal testimony to the Judiciary Committee on that same day, added that this matter had made its way to the state Supreme Court, but had not been dealt with by that Court, due to a settlement by the parties. See Conn. Joint Standing Committee Hearings, Judiciary Committee, Part 7, 2006 Session, March 14, 2006, pp. 2092 – 2095 (Testimony of Attorney Mary Alice Moore Leonhardt), A246 – A249. On the floor of the House, Representative Spallone recounted the gist of this Leonhardt testimony, in order to explain why the bill in question had been raised. See 49 H.R. Proc., Part 5, April 12, 2006, pp. 1390 - 1393 (remarks of Representative Spallone, 36th), A239 – A242.

ii. Service to the Administrative Law Bar

OCC believes that the Appellate Court should take this opportunity to clarify the applicable law, because OCC has a strong continuing interest in the question of how PA 06-32 applies to agency decisions being reconsidered and to possible administrative appeals thereof. Further, the Court's grant of this motion would assist not only OCC, but also all members of the state's administrative law bar.

OCC asks the Appellate Court to resolve the present litigation by applying PA 06-32's provisions to it, on account of the far-reaching implications that the Appellate Court's failure to do so might have. If the scope and meaning of PA 06-32 is not clearly decided by this Court, then at least two such broader implications could exist.

First, careful plaintiffs will take "protective appeals" of multiple agency decisions, so as to meet all possible definitions of "final decision" that the courts might consider correct. Second, absent such protective appeals by plaintiffs, defendants may file motions to dismiss in instances where the existence of multiple agency decisions warrants the possible grant thereof.

Broader litigation developments of this type actually did occur during what we might call the "gap" period, from April 2003[16] until enactment of PA 06-32. For instance, OCC filed four different protective appeals raising identical legal issues, precisely on account of the then-uncertainty over which DPUC decision would be the correct one to appeal.[17] And OCC is aware that, within OCC's practice areas, during this same time period at least three other plaintiffs had taken similar protective steps in connection with their own administrative appeals.[18]

So far as OCC is aware, this practice of "protective" administrative appeals ceased as of October 1, 2006, which was the effective date of PA 06-32. OCC certainly stopped taking such protective actions from that time.

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[16] Judge Levine's decision created the prior conflict in Superior Court authority under discussion here when it was released in April 2003.

[17] Each of those OCC administrative appeals was taken from various agency determinations, all issued in the same DPUC docket. The civil docket numbers assigned to those several OCC appeals were: CV 04-0525528; CV 04-0525584; CV 04-0525583; and CV 04-0526651.

[18] The Connecticut Light and Power Company ("CL&P") took a protective appeal of a DPUC initial decision, even though that agency had already granted CL&P's petition for reconsideration. The civil docket number for that protective appeal was: CV 04-0525533. The City of Norwalk filed protective appeals of two related decisions issued by CSC. The civil docket numbers assigned for those appeals were: CV 03-0524145 and CV 03-0523065. Also, the Connecticut Resources Recovery Authority filed protective appeals of two DPUC decisions. The civil docket numbers for those appeals were: CV 03-0519466 and CV 03-0518859.

Any re-emergence of such piecemeal litigation, raising issues that ought to be uncontroversial following the enactment of PA 06-32, would serve no one's interests and is contrary to principles of judicial economy.

III. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Court should dismiss the Plaintiffs' appeal, but should do so on an alternate ground. Specifically, the Court should affirm the Superior Court's dismissal of the March CSC Decision on the ground that, under Conn. Gen. Stat. § § 4-181a(a)(4) and 4-183(c), the Plaintiff failed to appeal from a final decision, as the CSC's July Decision was the only final decision in the subject proceeding for purposes of any appeal under Conn. Gen. Stat. § 4-183.

OCC respectfully requests that the Court, having so held, remand this matter to the Superior Court for further proceedings in accordance with this Court's determinations, and grant such other relief in law or equity as is required or appropriate.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the materials here being filed comply with Connecticut Rules of Appellate Procedure § 67-2 and that the font is Arial 12. I also certify that a copy hereof was mailed on January 11, 2012, first class postage prepaid, to The Honorable Henry S. Cohn, Judge of the Superior Court (Tax and Administrative Appeals), Judicial District of New Britain, Twenty Franklin Square, New Britain, CT 06051, and to all counsel and/or *pro se* parties of record, in accordance with Connecticut Rules of Appellate Procedure § 62-7 *et seq.*, as follows:

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