UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LETICIA COLON DE MEJIAS, ET AL.,	:	CIVIL ACTION NO.
Plaintiffs,	:	3:18 CV 00817 (JCH)
v.	:	
DANNEL P. MALLOY, in his official capacity as Governor of the State of Connecticut, ET AL.,	:	
Defendants.	:	AUGUST 13, 2018

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, and L. Civ. R. 7(d) and 56, the Plaintiffs respectfully submit this Opposition to the Defendants' Motion for Summary Judgment, which was filed with this Court on July 20, 2018.

I. THE SWEEPS REQUIRED BY P.A. 17-2 VIOLATE THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

The Defendants' Motion for Summary Judgment makes three principal arguments regarding the Plaintiffs' claim under the Contract Clause of the United States Constitution. First, the Defendants argue that the tariffs approved by PURA[1] in this case "do not create contracts enforceable by Plaintiffs for purposes of the Contract Clause." Defendants' Motion for Summary Judgment ("Def. Mot.") at 13. Second, the Defendants contend that even if an enforceable contract exists, P.A. 17-2 as modified by 18-81 does not substantially impair that contract. *Id*. at 16. Third, the Defendants assert that the Sweeps are rationally related to a legitimate public purpose. *Id*. at 18-19. All three of these arguments, however, are incorrect as a matter of law.

[1] Capitalized terms used herein without definition have the meanings ascribed to such terms in the Plaintiffs' Memorandum of Law filed with this Court in support of their Motion for Summary Judgment on July 20, 2018.

A. The Tariffs Create A Contract Between The Ratepayers And The Utilities.

The Plaintiffs contend that the tariffs constitute a contract between the electric distribution companies (the "EDCs") and their customers or ratepayers, including the Plaintiffs. (Stip. Facts ¶¶ 3, 6, 7, 10, 11-12, 16, 47-55). Indeed, the EDCs' own tariff documents, including the "Terms and Conditions for Delivery Service," expressly state:

> **These terms and conditions shall be deemed to be a part of every contract for service entered into by the Company**....

Exh. 5, ¶ 3D (emphasis added).[2] In addition, "**[t]he approved tariffs, including the EDC Terms, represent the entire written agreement between customers, including Plaintiffs and the State, and the EDCs**." (Stip. Facts ¶ 54) (Emphasis added.) Based solely upon these undisputed facts, this Court should conclude that the tariff documents create a contract between the Plaintiffs and the Utilities as a matter of law.

In response, the Defendants contend that tariffs are not contracts because they are form contracts that are not negotiated by the parties thereto. Def. Mot. at 14. Specifically, the Defendants note that tariffs "are treated differently from contract rates because they have none of the characteristics necessary to create bilateral contract obligations enforceable by Plaintiffs or other EDC customers."[3] *Id.* For instance, the Defendants point out that tariff rates are set by

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[2] See also, Exh. 7 at p. 3 (UI's Terms and Conditions): "The following Terms and Conditions are a part of all rates, . . . , and observance of them by the Customer is a condition necessary for initial and continuing supply of electricity by The United Illuminating Company ("Company"). . . . Each such revision, amendment, or supplement shall, on its effective date, become applicable to all Customers receiving service under such rate or service contract, as the case may be."

[3] The Defendants also argue that the Connecticut General Assembly never contractually agreed *not* to use money ratepayers pay into the C&LM Fund and CEF solely for energy efficiency and clean energy investments. Def. Mot. at 9-11. However, the Plaintiffs do not argue that their contractual rights flow from P.A. 17-2, as modified by P.A. 18-81, but rather from the terms of the tariffs as approved by PURA. Furthermore, Conn. Gen. Stat. § 16-19(a) creates the express statutory assurance—a binding agreement from the Connecticut General Assembly—that approved tariff rates shall remain in effect until PURA approves modifications. General Statutes § 16-19(a) states, in pertinent part: "any rate approved by [PURA] . . . shall be permitted until amended by [PURA]." This is the codification of the filed rate doctrine, and the General Assembly's contractual agreement *not* to use the money other than for its intended purpose until modified by PURA. In this case, there is no suggestion

PURA, a process that is "devoid of any direct negotiation or agreement among [*sic*] the buyers and sellers." *Id*. In addition, the Defendants note that the tariff "is a take-it-or-leave-it proposition, not an agreement reached by individual negotiation." *Id*.

In support of their argument that form contracts, such as tariffs, are not enforceable as a matter of law, the Defendants cite only to one case: *Metro East Center for Conditioning & Health v. Qwest Communications, Int'l, Inc.*, 294 F.3d 924 (7th Cir. 2002) (Easterbrook, J.). That case, however, does not support the Defendants' argument. Indeed, in that very case, the court clearly held that tariffs are enforceable contracts:

> **An 'agreement' for purposes of § 3 [of the Federal Arbitration Act] means no more than an offer and acceptance that produces a legally binding document. Tariffs, like contracts, have that quality**. The tariff is an offer that the customer accepts by using the product. The terms have legal effect; indeed, by virtue of federal law a tariff is more conclusive than a contract and is said to have the status of a regulation, though a tariff may also be enforced through suit just as a contract may be enforced. **No surprise that we have referred to tariffs as a species of contract**. **Tariffs differ from private contracts only to the extent that they are not subject to alteration one customer (or one clause) at a time or to nullification by a court on grounds such as unconscionability**.

Metro E. Ctr. for Conditioning & Health, 294 F.3d at 926 (emphasis added). Furthermore, the court noted: "**we have held that form contracts, offered on a take-it-or-leave-it basis, are agreements for purposes of the Arbitration Act. Tariffs are no different on this dimension**." *Id*. (Emphasis added.) Put another way, the *Metro East Center for Conditioning & Health* case expressly contradicts the Defendants' specious claim that form contracts, such as tariffs, do not create enforceable contracts. *See id*.

Similarly, the Connecticut courts have routinely held that form contracts, including but not limited to the tariff between EDCs and their customers, are enforceable contracts. *See Conn.*

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that PURA approved any tariff modifications before the Defendants swept the money. The Defendants just took the funds and converted the money for use in the General Fund.

Light & Power Co. v. Proctor, 324 Conn. 245, 247 (2016) (holding that Connecticut Light & Power Company entered into implied-in-fact contract with the defendant for provision of electric services to a third party); *Powell v. Spruce Peak Realty, LLC*, CV095006181, 2009 Conn. Super. Lexis 2518, at *17-18 (Conn. Super. Sept. 16, 2009) ("**even if the court were to assume, *arguendo*, that the plaintiff was unable to negotiate the provisions of the contract and that it was presented in a take-it-or-leave-it fashion . . . courts have concluded that this alone will not transform a forum selection clause into an unenforceable adhesion contract**.") (Emphasis added). Likewise, the United States Supreme Court has routinely held that form contracts are enforceable in a variety of contexts. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (holding that forum-selection clause contained in three pages of terms and conditions attached to cruise ship ticket is enforceable).

The Defendants also invoke the federal *Mobile-Sierra* doctrine in support of their argument that tariffs are not contracts. Def. Mot. at 13. However, this "well-established" doctrine has nothing whatsoever to do with this case. In *NRG Power Mktg., LLC v. Maine Pub. Util. Comm'n*, 558 U.S. 165, 174 (2010), the United States Supreme Court recently restated *Mobile-Sierra's* core requirement as follows: the Federal Energy Regulatory Commission ("FERC") "must presume that the rate set out in a freely negotiated wholesale-energy contract meets the just and reasonable requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest." Thus, *Mobile-Sierra* cases involve *federal jurisdictional wholesale special contracts* (i.e., not tariffs) wherein typically a party or occasionally a third party seeks to abrogate special contract rates. *Id*. *Compare Morgan Stanley Capital Group, Inc. v. Public Utility Dist. No. 1*, 554 U.S. 527, 541 (2008) (parties to long-term special power contracts challenged supplier's rates); *NRG Power*

Mktg, 558 U.S. at 176 (*Mobile–Sierra* presumption also applies to third party challenges to special contract rates). By contrast, this case does not involve "freely negotiated wholesale-energy contracts," and neither party to this litigation is asking the Court to abrogate the rates set in the tariff. *See id*. Rather, this case involves *state jurisdictional retail customers* of EDCs seeking to enforce their *tariffs*. Accordingly, the *Mobile-Sierra* doctrine is wholly irrelevant to this case. *See id*.

The Defendants further contend that the Plaintiffs "do not have independent remedies at law for breach of contract with the EDCs." Def. Mot. at 14. Instead, the Defendants asseverate that the Plaintiffs' only remedy is to petition PURA for any failure to provide service as described in the tariff. *Id*. Thus, the Defendants appear to suggest that the Plaintiffs' claims should be dismissed for failure to exhaust their administrative remedies pursuant to Conn. Gen. Stat. § 16-20. *Id*.

The Defendants' argument, however, is incorrect as a matter of law. To begin, the Plaintiffs do not bring a claim for breach of contract against the EDCs; rather, their principal claim is that the Defendants enacted P.A. 17-2 as modified by P.A. 18-81, which substantially impairs their existing contracts with the EDCs. In addition, the reported cases make clear that Conn. Gen. Stat. § 16-20 does not contain an exhaustion requirement.[4] *See Seymour Water Co. v. Horischak*, 149 Conn. 435, 442 (1962); *Yankee Gas Servs. Co. v. Redding Life Care, LLC*, CV065002674S, 2009 Conn. Super. Lexis 1432, at *13 (Conn. Super. May 28, 2009). Indeed, "**the Connecticut Supreme Court has made a judicial determination that § 16-20 is not intended to be a party's exclusive remedy when the issue pertains to more than the**

[4] Conn. Gen. Stat. § 16-20(b) provides, in pertinent part, "If any public service company . . . unreasonably fails or refuses to furnish adequate service at reasonable rates to any person within the territorial limits within which the company has, by its charter, authority to furnish the service . . . the person *may bring* a written petition to the Public Utilities Regulatory Company alleging the failure or refusal."

reasonableness of the rate that a utility is charging." *Yankee Gas Servs.*, 2009 Conn. Super. Lexis 1432, at *13 (*citing Steele v. Clinton Elec. Light & Power Co.*, 123 Conn. 180, 187 (1937)) (finding that party is not required to exhaust the administrative remedies available to it under § 16-20) (emphasis added); *Seymour Water Co.*, 149 Conn. at 442 ("the jurisdiction provided under § 16-20 is not exclusive.")

Furthermore, the Defendants' theory that tariffs do not qualify as legally enforceable contracts would require this Court to set aside PURA approved electric tariffs that explicitly permit and require the EDCs to charge—and customers to pay—the Assessments in support of the C&LM Fund and CEF to support the Green Bank. This would require second-guessing the expert judgments of PURA and disregarding the filed rates and terms of service of the EDCs as well as PURA's finding that the public interest is served by the programs supported by the C&LM Fund.[5] The filed rate doctrine bars third-party interference with approved rates and tariff terms and conditions.[6] *See Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922); *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 417-20 (1st Cir. 2000).

Where the General Assembly has delegated to a state regulatory agency the authority to approve rates filed under a statutory scheme establishing rates, that filed rate "is made, for all purposes, the legal rate." *Keogh*, 260 U.S. at 163. The General Assembly "can claim no rate as a legal right that is other than the filed rate." *Montana-Dakota Utils.*, 341 U.S. at 251. The doctrine

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[5] See Stip. Facts ¶ 62: "[PURA] agrees with the [EDCs] and the other Parties to this proceeding that the *continuance of C&LM and Renewables funding*, as provided for by the issuance of this Financing Order, *is in the public interest*." (emphasis added.)

[6] The doctrine's bar "is not limited to 'rates' *per se*," but insulates from collateral attack any tariff terms and conditions that directly affect wholesale rates. *Nantahala Power & Light v. Thornburg*, 476 U.S. 953, 966 (1986); *see also Town of Norwood*, 202 F.3d at 416 ("[T]he filed rate doctrine sweeps more broadly and governs ancillary conditions and terms included in the tariff."); *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1040 (9th Cir. 2007) (filed rate doctrine "extends to . . . 'the services, classifications, charges, and practices included in the rate filing.' " (citation omitted)).

protects the primacy of the regulatory agency's determinations of rates: "No court may substitute its own judgment on reasonableness for the judgment of the Commission." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (relating to FERC's determination of wholesale rates).[7]

B. The Act Substantially Impairs the Contractual Rights of Ratepayers.

The Plaintiffs contend that P.A. 17-2 and P.A. 18-81 substantially impair the reasonable expectations of ratepayers under the tariff pursuant to the three-part test set forth in *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362 (2d Cir. 2006). Pl. Mot. at 11-31.

In response, the Defendants argue that "the Plaintiffs cannot credibly assert that their reasonable expectations were disrupted as the transfer of the funds was entirely foreseeable." Def. Mot. at 17. Specifically, the Defendants assert that "the General Assembly has repeatedly redirected dollars from the C&LM Fund to the General Fund in the past." *Id.* In addition, they claim, without any factual support in the record, that "the General Assembly diverted C&LM Funds to the General Fund every year from 2003 through 2008." *Id.*

However, the Defendants' claim regarding the frequency of such prior sweeps is inaccurate.[8] The General Assembly has *enacted legislation* that enabled Sweeps of the C&LM

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[7] The General Assembly also delegated to PURA the requirement that in setting rates and approving tariffs, PURA adhere to long-standing policy goals of the State of Connecticut, including that rates take into account the following principles: ". . . consideration for energy and water conservation, energy efficiency and the development and utilization of renewable sources of energy and for the prudent management of the environment. . ." Conn. Gen. Stat. § 16-19e(a)(3). The Sweeps disregard these policy principles as well.

[8] Even if the Defendants had factual support for their claimed number of sweeps over the last 15 years, the point is still legally irrelevant. The prior sweeps do not establish a reasonable expectation within the meaning of the Contract Clause any more than a bank robber could claim that prior successful robberies establish the reasonable expectation that the bank robber would strike again. What matters for the Contract Clause is "the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recyc. Indus., Inc. v. City of N.Y.*, 107 F.3d 985, 993 (2d Cir.1997). Where a "plaintiff could anticipate, expect, or foresee the governmental action *at the time of contract execution*, the plaintiff will ordinarily not be able to prevail." *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 53 (2d Cir. 1998). In this case, there is insufficient evidence in the record to suggest that the Plaintiffs foresaw government action at the time of contract execution and certainly none supports a claim that Plaintiffs made investments in Connecticut expecting sweeps to occur. Quite simply, Defendants cannot provide factual or legal support for the claimed reasonable expectation that could be legally relevant.

funds *on only two occasions in the past 15 years* prior to the passage of P.A. 17-2: in 2003 and 2005. Stip. Facts ¶¶ 60-63. There is nothing in the record to the contrary. As a result of the 2003 Act, PURA was required to approve the transfer of $30 million from the C&LM fund to the General Fund *over a 30 month period unless PURA approved a bond issuance alternative to replace the swept funds*, which it did. *Id*. ¶ 60-62.[9] The 2005 Act required PURA to divert $12 million from the C&LM Fund to the General Fund *over a 12 month period*. *Id*. ¶ 63.

Thus, while funds were diverted from the C&LM Fund to the General Fund over the course of several years, the General Assembly only passed laws enabling such sweeps on these two discrete occasions. Critically, the last time the General Assembly enacted a sweep was in 2005—more than 12 years before the passage of P.A. 17-2. Contrary to the Defendants' argument, the distant history of legislative action in this arena would not have given ratepayers reason to believe that any further sweeps of the C&LM Fund and CEF Fund were foreseeable in October 2017.[10]

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[9] The 2003 Act did cause disruption for the budding energy efficiency industry not for the amount involved, because the funds were returned for their intended use, but because of the mismatch timing during 2003 with the funds taken first before the end of the 2003 fiscal year of the State and then returned in the fall of 2003. In this way, the impact was felt, but small nonetheless.

[10] Defendants also point to another diversion of ratepayer-funded revenues, which occurred with P.A. 10-179 and is also not contained in the factual record. For this reason alone, this oblique effort to confuse this Court should be disregarded.

Moreover, the situation involving the expiring competitive transition assessment ("CTA") and the then-newly-created economic transition assessment charge ("ETC") enacted with Section 126 of P.A. 10-179 actually supports Plaintiffs' position in that the revenue stream at issue was not dedicated for a specific set of programs to benefit ratepayers and the General Assembly's change from the CTA to the ETC applied *prospectively*, not amounting to a *retroactive* legislative sweep of previously paid funds. Furthermore, PURA approved the tariff changes to implement the ETC *before* it happened. The CTA was originally used to reimburse EDCs for losses resulting from the difference between the fair market value of the power plants P.A. 98-28 directed the EDCs to divest and the book value of those assets. The General Assembly decided with P.A. 10-179 § 126 that, as those stranded assets were paid off for the EDCs, the revenue stream would continue and a new charge called the ETC would be added *prospectively* to tariffs to support a bond securitization transaction for the benefit of the General Fund. The Defendants' suggestion that there is any connection to the Sweeps at issue in this litigation is incorrect. *See* Docket No. 10-06-20, *Application of the Connecticut Light and Power Company and The United Illuminating Company for Issuance of Economic Revenue Recovery Bonds Financing Order*, September 29, 2010, (PURA decision implementing P.A. 10-179, § 126).

In addition, the magnitude of the earlier sweeps is dwarfed by the legislative Sweeps of the C&LM Fund and CEF Fund authorized by P.A. 17-2 and P.A. 18-81. Specifically, the 2003 sweep transferred only $30 million to the General Fund, while the 2005 Sweep transferred only $12 million. Stip. Facts ¶¶ 60, 63. Here, by contrast, P.A. 17-2 and P.A. 18-81 authorize the State to sweep $117 million from the C&LM Fund, as well as $28 million from the Green Bank's funds, for a total of $145 million over a two-year span. *Id*. ¶¶ 65-67, 75. In other words, the Sweeps authorized by P.A. 17-2 and P.A. 18-81 *are almost five times as large as the 2005 sweep, and about twelve times as large as the 2003 sweep*. *Id*. Put another way, a Sweep of $145 million, such as that authorized by P.A. 17-2 and P.A. 18-81, was not foreseeable simply because the General Assembly authorized far smaller sweeps more than 12 years previously.[11]

The Defendants also argue that "Public Service companies are subject to extensive state regulation in Connecticut." Def. Mot. at 16. In other words, the Defendants suggest that a history of regulation in an industry is a sufficient basis to reject a Contract Clause claim. *Id*. Once again, the Defendants' argument is incorrect as a matter of law. Indeed, the reported cases have consistently rejected this exact argument. *See Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998) ("**a history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause**.") (emphasis added); *Alliance of Auto Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32, 49 (D. Conn. 2013) (Hall, J.) ("Standing alone . . . a history of regulation is an insufficient basis on which to reject a Contract Clause challenge.")

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[11] Moreover, there are other important differences between the earlier Sweeps and the ones authorized by P.A. 17-2 and P.A. 18-81. For instance, the 2003 Sweeps included a securitization measure to protect the substantial public interest at stake. (*Id*. ¶¶ 60-62). Furthermore, in these prior situations the money was either returned or used for the same purposes as originally collected from ratepayers—renewable energy and energy efficiency measures. For all of these reasons, this Court should conclude that the type of Sweeps authorized by P.A. 17-2 and P.A. 18-81 were not foreseeable simply because the legislature authorized materially different sweeps of the C&LM Fund in 2003 and 2005.

"**The fact that some incidents of a commercial activity are heavily regulated does not put the regulated firm on notice that an entirely different scheme of regulation will be imposed**." *Chrysler Corp.*, 148 F.3d at 895 (emphasis added).

Furthermore, the Defendants' argument that the Plaintiffs cannot prevail on their Contract Clause claim because "the transfer of the funds was entirely foreseeable" misses an important component of the "foreseeability" analysis. Def. Mot. at 17. As the Second Circuit Court of Appeals expressly recognized in *Sanitation & Recycling Indus., Inc.*, 107 F.3d 985, 993 (2d Cir. 1997), the foreseeability of a government regulation is only relevant to the Contract Clause analysis in cases where a private party has actual or constructive knowledge that a government entity may enact a statute in a well-regulated industry, but that private party nevertheless elects to make a financial investment in such an industry. *See Sanitation & Recyc. Indus., Inc.*, 107 F.3d at 993 (recognizing that the issue of foreseeability is important because, "*when a party purchases a company in an industry that is already regulated in the particular to which he now objects, that party cannot normally prevail on a Contract Clause challenge*.") (italics added); *see Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.") In other words, a private party may not enter a heavily regulated industry, and later attempt to bring a claim for violation of the Contract Clause after a foreseeable government regulation impairs a private contract. *See id*.

In *Alliance of Automobile Manufacturers, Inc. v. Currey*, 984 F. Supp. 2d 32, 49 (D. Conn.) (Hall, J.), this Court recognized this important fact, and explained:

> As Judge Posner explained in a similar Seventh Circuit case, '**what was foreseeable [at the time of contracting] will have been taken into account in the negotiations over the terms of the contract.' In other words, the expected**

> **costs of foreseeable future regulation are already presumed to be priced into the contracts formed under the prior regulation**.

984 F. Supp. 2d at 49 (emphasis added). Thus, in a case where the private party was compensated in advance for bearing the burden of the regulation, "invalidating the regulation would give it a windfall." *Chrysler Corp*., 148 F.3d at 895.

This, however, is not such a case. Indeed, the ratepayers who decided to receive electric service from an EDC were required by law to pay the Assessments. Most importantly, such ratepayers are not in a position to receive any sort of "windfall" if the Sweeps authorized by P.A. 17-2 and P.A. 18-81 are invalidated. *See id*. In fact, the Plaintiffs in this case will not recover *any* money damages if their claims are successful. Rather, the Plaintiffs are merely asking this Court to restore funds from the General Fund to the C&LM Fund and CEF Fund so the funds can be used for their intended purpose. Accordingly, even if this Court concludes that the Sweeps were foreseeable (they were not), it should nevertheless conclude that the purported foreseeability of such legislative action does not impair the Plaintiffs' ability to prevail on their claim under the Contract Clause of the United States Constitution. *See id*.

Furthermore, the Defendants argue that the Plaintiffs' reasonable expectations under the contract are not substantially infringed because the "year 2017 actual spending on Energy Efficiency was approximately $151 million." Def. Mot. at 17. However, the Defendants fail to mention that the EDCs budgeted $31,750,000 to the "State Diversion of Funds" during that calendar year. Stip. Facts ¶ 81. This represents a reduction overall of about 17.3% in the budget for the plan's implementation.[12] *Id*.

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[12] The Defendants' reference to the spending level of $151 million in 2017 is misleading in that the Sweeps did not impact the 2017 *calendar* year at all. Rather, the Sweeps occurred at the very end of the 2017-2018 *fiscal* year, thereby landing a double-punch to the industry and the ratepayers who funded the C&LM Fund and CEF in *calendar* year 2018, when the effects of the swept funds straddle both *fiscal* years in 2018.

The 2018 budget was hit by an even more devastating 35.4% *forecasted* reduction in Energy Efficiency spending and the EEB only plans to spend $120 million on Energy Efficiency in 2018. Stip. Facts ¶ 82. Moreover, during 2018, the EDCs budgeted approximately $63.5 million to finance the Sweeps. *Id.* However, the *actual* amounts swept from the Funds are even greater than the budgeted amount. Specifically, the actual amount swept on June 25, 2018 was $77.5 million. Stip. Facts ¶ 86; Exhs. 18A and 18B. Thus, during 2018, actual Energy Efficiency spending was reduced by more than 39% as a direct and proximate cause of the Sweeps authorized by P.A. 17-2. *Id.*

Worse yet, the total cost to Connecticut ratepayers as a direct result of the Sweeps may be many millions more than the dollar amount of the swept funds. *Id.* ¶ 71. Indeed, one State Senator testified that in sweeping $128 million, ratepayers could be responsible for paying an additional $180 million, when the expected energy efficiency benefits fail to deliver in the wholesale energy marketplace.[13] *Id.*

The undisputed facts also reflect that the Plaintiffs have already suffered substantial economic harm as a direct result of the Sweeps authorized by P.A. 17-2:

> **Many of the businesses that rely on the C&LM Fund to compensate them for rendering energy efficiency services to Connecticut ratepayers . . . have all received budget cuts as a result of the passage of P.A. 17-2. The effect of P.A. 17-2 has resulted in these named Plaintiffs losing revenues and implementing layoffs**.

Id. ¶ 85 (emphasis added). In addition, Mary Sotos, the Deputy Commissioner of the Connecticut Department of Energy and Environmental Protection ("DEEP"), noted that the Sweeps "trigger the legislative diversion of *two-thirds* of the three mill monthly charge on

[13] In 2019, the EDCs have budgeted $31.8 million for the Sweeps. Stip. Facts ¶ 83. This represents a reduction of 16.7%. *Id.*

electric bills," and that "the Home Energy Solutions Budget could be depleted by the third quarter of calendar year 2018, if not sooner." *Id.* ¶ 80. (Italics added.)

Ms. Sotos also stated that the effects of the Sweeps "are already reverberating across our communities, causing significant disruption to economic investments. The diversions will result in lasting impacts to our homes, businesses, schools, clean energy workforce, and our electric grid." *Id.* ¶ 80. In this context, it is worth recalling the words of Defendant Dannel Malloy, who stated: "It is my firm belief that these Sweeps will increase Connecticut residents' and businesses' energy costs, will curtail millions of dollars of private investment in Connecticut, will hamstring a growing alternative energy and energy efficiency industry that employs thousands of Connecticut residents, and will eliminate a crucial set of tools for helping businesses in the state with cost-saving energy investments." *Id.* ¶ 69. In sum, this Court should conclude that P.A. 17-2 and P.A. 18-81 substantially impair the Plaintiffs' reasonable expectations under their contracts with the EDCs. *See Buffalo Teachers Fed'n*, 464 F.3d at 367.

C. <u>The Sweeps Are Not Rationally Related To Any Legitimate Public Purpose.</u>

In support of their claim that the Sweeps serve a legitimate public purpose and are rationally related to that purpose, the Defendants argue that the Sweeps authorized by P.A. 17-2 and P.A. 18-81 are "reviewed under an extremely deferential standard that is akin to rational basis." Def. Mot. at 18-19. The Defendants appear to argue that the deferential standard applies because the General Assembly has transferred money from the C&LM Fund to the General Fund, which is purportedly "well within the General Assembly's authority; indeed, it is the primary role of the State's legislative body." *Id.* at 18.

The Defendants' argument, however, misstates the applicable law. In *Buffalo Teachers Federation*, the Second Circuit Court of Appeals held that this Court should apply a more

deferential standard of review for purposes of the Contract Clause analysis when the contract under review is a *private contract*; by contrast, where, as here, the contract at issue is a *public contract*, a less deferential standard is applied:

> When the law impairs a private contract, substantial deference is accorded to the legislature's judgments as to the necessity and reasonableness of a particular measure. Public contracts are examined through a more discerning lens. When the state itself is a party to a contract, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake. When a state's legislation is self-serving and impairs the obligations of its own contracts, courts are less deferential to the state's assessment of reasonableness and necessity.

Buffalo Teachers Fed'n, 464 F.3d at 369. Moreover, the Second Circuit emphasized that "the presence or absence of a state as a party to the contract is not determinative of the deference issue." *Id*. at 370. Rather, "the better rule . . . calls for focusing on whether the contract-impairing law is self-serving, where existence of a state contract is some indicia of self-interest, but the absence of a state contract does not lead to the converse conclusion." *Id*. In other words, a law is self-serving where "the state legislature 'welches' on its obligations as a matter of 'political expediency.' " *Id*. However, the Defendants did not address this test, or provide any analysis regarding why the less-deferential standard should apply under the applicable test. Def. Mot. at 18-19.

By contrast, Plaintiffs have briefed this issue extensively in their Motion for Summary Judgment. Pl. Mot. at 24-26. In sum, this Court should apply the less-deferential test because the State is a party to the contract and has plainly acted in its own self-interest. The State, like the Plaintiffs, also pay the C&LM and Clean Energy Fund surcharges on its utility bills for State property. (Stip. Facts ¶ 44). By virtue of the Sweeps, therefore, the State has essentially funneled a substantial portion of its electric bill payments back to itself, and dealt itself a massive break on its utility bills. Thus, in the most literal sense, the General Assembly's legislation is "self-serving

and impairs the obligations of its own contracts," and the less-deferential standard of review applies. *See Buffalo Teachers Fed'n*, 464 F.3d at 369.

In addition, the tariffs are public contracts, in that the tariffs are established and governed by PURA, an administrative agency acting pursuant to statutes. Specifically, the ratepayers have paid charges that were included in the tariffs approved by PURA pursuant to Conn. Gen. Stat. § 16-19 *et seq*. All ratepayers of Eversource and UI, including the State of Connecticut, are customers and parties to contracts with the utilities pursuant to the tariffs approved by PURA.

In the alternative, the less deferential standard applies because the legislature has "welched on its obligations" pursuant to the tariffs applicable to the State itself as a ratepayer and the requirements of Conn. Gen. Stat. §§ 16-19(a), 16-245m and 16-245n, and the filed rate doctrine, as a matter of political expediency.[14] *See Buffalo Teachers Fed'n*, 464 F.3d at 370. Specifically, Conn. Gen. Stat. §§ 16-245m and 16-245n require PURA to assess the charges to fund the C&LM and CEF, as PURA did. However, by enacting P.A. 17-2 and P.A. 18-81, the General Assembly has reneged on its obligation to ensure that the tariffs used to fund the C&LM Fund and Clean Energy Fund will be used for the purpose of funding energy efficiency, conservation and clean energy programs and lowering the ratepayers' energy costs through investment into efficiency and conservation. *See id*. *See also*, Conn. Gen. Stat. § 16-19e(a)(3).

Under the less deferential standard, for impairment to be reasonable and necessary, "it must be shown that the state did not (1) consider impairing the contracts on par with other policy alternatives or (2) impose a drastic impairment when an evident and more moderate course

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[14] One of the Defendants in this case, Governor Dannel Malloy, appears to concede that the General Assembly's Sweeps of the C&LM and CEF Funds were the result of political expediency. The day this litigation was filed, Governor Malloy stated: "I strongly oppose these energy Sweeps and renew my call on the legislature to find recurring cuts in state expenditures *to replace these short-sighted, one-time revenues*." Stip. Facts ¶ 69 (italics added).

would serve its purpose equally well, nor (3) act unreasonably in light of surrounding circumstances." *See Buffalo Teachers Fed'n*, 464 F.3d at 371. The Plaintiffs have addressed this standard extensively in their Motion, and will not repeat it here. Pl. Mot. at 26-31. However, the Defendants do not address this test; nor do they explain why the Plaintiffs should not prevail under the less deferential standard. *See id*.

Nevertheless, the Defendants appear to argue that the Sweeps of funds from the C&LM Fund and Clean Energy Fund to the General Fund were reasonable and necessary because "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." Def. Mot. at 18. To the contrary, under the less deferential standard, which applies here, the courts have repeatedly rejected similar arguments. *See United States Trust Co. v New Jersey*, 431 U.S. 1, 29 (1977) ("a state cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.") Indeed, "a governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id*. at 26; *see Univ. of Hawaii Prof'l Assemb. v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999); *Donohue v. Paterson*, 715 F. Supp. 2d 306, 321 (N.D. N.Y. 2010). In sum, the Defendants cannot establish that the impairment is reasonable and necessary just because the General Assembly would like to use money from the C&LM Fund for the general welfare. *See Id*.

IV. THE LEGISLATIVE SWEEPS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Count Two of the Plaintiffs' Complaint alleges that the legislative Sweeps authorized by P.A. 17-2 and 18-81 violate the Fourteenth Amendment of the United States Constitution. Specifically, the Act requires the Defendants to sweep funds paid by citizens of the State from funds earmarked for energy efficiency, conservation and clean energy as surcharges on each ratepayer's electric utility bill, and transfer those funds for use in the General Fund of the State of Connecticut. (Stip. Facts ¶¶ 56-59). In so doing, the State is and will be effectively making the EDCs' ratepayers, including each of the Plaintiffs, contribute a tax to the General Fund in a manner it does not otherwise require of those citizens who are customers of the Municipal Utilities. (*Id*. ¶¶ 26-28).

In response, the Defendants concede that the funds being transferred into the General Fund from the C&LM Fund and the CEF Fund pursuant to Conn. Gen. Stat. §§ 16-245m and 16-245n qualify as a tax. Def. Mot. at 20. However, the Defendants contend that the Assessments are not classified as "taxes" as a result of the Sweeps authorized by P.A. 17-2 and 18-81. Instead, the Defendants argue that the Assessments "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." *Id*.

The Defendants principally rely upon *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 737 F.3d 228, 231 (2d Cir. 2013) in support of their argument. However, that case does not support the Defendants' argument that the collection of fees pursuant to Conn. Gen. Stat. §§ 16-245m(a)(1) and 16-245n(b) qualifies as a tax.[15] In that case, the Second Circuit Court of Appeals held that "**the principal identifying characteristic of a tax, as opposed to some other**

[15] In addition, *Shumlin* addresses the specific question of "whether a state assessment qualifies as a tax *for the purposes of the [Tax Injunction Act]*." 737 F.3d at 231. In this case, by contrast, the Defendants do not invoke the Tax Injunction Act ("TIA") as a defense to the Plaintiffs' equal protection claim. Nor do the Defendants attempt to explain whether the definition of tax for the purposes of the TIA is somehow relevant to this case. Nevertheless, even if this Court determines that this analysis is pertinent to this case, the Assessments do not qualify as a "tax" under this definition. *See id*.

form of state-imposed financial obligation, is whether the imposition serves general revenue-raising purposes." *Shumlin*, 737 F.3d at 231 (emphasis added).

> Whether a measure serves general revenue raising purposes in turn depends on the disposition of the funds raised. **If the proceeds are deposited into the state's general fund (rather than being directly allocated to the agency that administers the collection, for the purpose of providing a narrow benefit to or offsetting costs for the agency), the imposition will generally be seen as serving the general benefit of the state, and thus as a tax**.

Id. (Emphasis added.) Thus, the courts in this jurisdiction have generally held that a charge to members of the public constitutes a tax where the funds are paid into the State's general fund. *See id*. ("Generating Tax" qualifies as a tax where it is classified as a "tax" and the proceeds are directed into the state general fund); *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 713 (2d Cir. 1993) (surcharges qualify as tax where the funds raised are paid into state's general fund).

Here, it is undisputed that the Assessments required by Conn. Gen. Stat. §§ 16-245m and 16-245n are specifically earmarked for the C&LM Fund and CEF. Stip. Facts ¶¶ 20-22. Pursuant to the plain language of these statutes, such funds are not directed into the state's General Fund. Accordingly, these Assessments should not be classified as "taxes" under the authorities cited in the Defendants' own motion. *See Shumlin*, 737 F.3d at 231; *Travelers Ins. Co.*, 14 F.3d at 713. Instead, these Assessments do not qualify as taxes until they are swept into the General Fund pursuant to P.A. 17-2 and 18-81.

Next, the Defendants contend that the Plaintiffs lack standing to challenge th*e manner in which their tax dollars are spent*. Def. Mot. at 22. However, the Plaintiffs' claim under the Equal Protection Clause does not contest the Defendants' *expenditure* of their tax dollars. Instead, the Plaintiffs allege that when the ratepayers' funds are swept into the General Fund pursuant to P.A. 17-2 and 18-81, the ratepayers will be subject to taxation in a manner not required of those citizens who receive electrical services from the Municipal Utilities. Thus, the

argument made by the Defendants, as well as the cases cited at pages 22-24 of their memorandum, appear to be irrelevant to the claim actually made by the Plaintiffs.

The Defendants also argue that the Plaintiffs' Equal Protection Clause challenge to P.A. 17-2 and 18-81 fails "because that Act does not make any classifications." Def. Mot. at 24. To the contrary, the contested sections of P.A. 17-2 and 18-81 expressly make distinctions between two classes of people: those who receive electrical services from EDCs, and thus contribute to the C&LM and the CEF Funds, and those who do not. *See* P.A. 17-2 §§ 683, 685; 18-81 § 12. Specifically, those who contribute to these Funds are charged a tax, while those who do not make such a contribution are not so charged. Therefore, the rational basis test applies. *See Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) ("statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose."); *Winston v. City of Syracuse*, 887 F.3d 553, 560 (2d Cir. 2018) ("If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.")

Next, the Defendants contend that EDC customers are not similarly situated to customers of the Municipal Utilities. Def. Mot. at 27. Where, as here, a plaintiff alleges an equal protection violation without also alleging discrimination based upon membership in a protected class, "the plaintiff must plausibly allege that he or she has been intentionally treated differently from others similarly situated and no rational basis exists for that different treatment." *Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2d Cir. 2018). "In order to succeed, the plaintiffs must demonstrate that they were treated differently than someone who is *prima facie* identical in *all relevant respects*." *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005).

Here, customers of the EDCs are similarly situated to customers of the Municipal Utilities in all relevant respects. *See id*.; *cf. Markley v. Dep't of Pub. Util. Control*, 301 Conn. 56, 69 (2011) (assuming, without deciding, that customers of Municipal Utilities and EDCs are similarly situated). Both customers of the EDCs and customers of the Municipal Utilities are residents of the State of Connecticut. Moreover, both classifications of electrical consumers purchase identical electrical services for their residences and businesses. Indeed, there is no record evidence of any difference between the electrical services provided by the EDCs and the Municipal Utilities. However, only the EDC ratepayers are required to pay the tax to the General Fund. *See id*.

Nevertheless, the Defendants argue that EDC customers are not substantially similar to Municipal Utility customers "primarily because EDCs and Municipal Utilities are subject to entirely different regulatory schemes and oversight." Def. Mot. at 28. For instance, the Defendants point out that PURA is responsible for regulating the EDCs, while municipal commissions perform key functions for the Municipal Utilities, such as rate setting. *Id.* However, the Defendants do not explain why this is a *material difference* that would impair the Plaintiffs' equal protection claim. *See Neilson*, 409 F.3d at 104.

The Defendants also argue that the EDC customers are different from Utility customers because "the General Assembly has directed PURA to levy the Charges at issue." Def. Mot. at 29. In other words, the Defendants contend that the EDC customers are different from Utility customers because they are the subject of differential treatment by the government. It would be somewhat paradoxical for this Court to accept the Defendants' argument that the EDC customers are materially different from Utility customers on the basis of the Defendants' own decision to tax one group, but not the other. This Court should reject the Defendants' claim.

In addition, the Defendants contend that there is a rational basis for Conn. Gen. Stat. §§ 16-245m(a)(1) and 16-245n(b), which direct PURA to levy the Assessments. Def. Mot. at 29-32. Specifically, the Defendants state:

> 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.

Id. at 31. However, the facts relied upon by the Defendants to support its rational basis theory are not a part of the record in this case, and they are not based upon admissible evidence. Specifically, there is no admissible evidence to support the Defendants' assertions that (1) The charges were added as part of an overall rate decrease; or (2) EDC Customers would see a lower electric bill despite the addition of the charges. For this reason alone, this Court should not consider any of these purported facts as part of Defendants' motion for summary judgment. *See* Fed. R. Civ. P. 56(c)(1) (a party must support assertion by "citing to particular parts of materials in the record"). "Plaintiffs are required to present admissible evidence in support of their allegations; allegations alone, without evidence to back them up, are not sufficient." *Censor v. ASC Techs. of Conn., LLC*, 900 F. Supp. 2d 181, 192 (D. Conn. 2012).

Moreover, the Defendants mischaracterize the claims stated by the Plaintiffs' Complaint. Indeed, the Plaintiffs do not allege that Conn. Gen. Stat. §§ 16-245m(a)(1) and 16-245n(b) violate the Equal Protection Clause. Instead, the Plaintiffs argue that the legislative Sweeps authorized by P.A. 17-2, §§ 683 and 685 and 18-81, § 12 violate the mandate of equal protection because it effectively requires the EDCs' ratepayers to contribute a tax to the General Fund that the Municipal Utilities' customers do not pay. *See Neilson*, 409 F.3d at 104. The Defendants do

not even attempt to proffer a rational basis for the legislative Sweeps authorized by P.A. 17-2 and 18-81, which are the statutes challenged by the Plaintiffs' equal protection claim in this case.

Furthermore, the Defendants' citation to *Markley v. Department of Public Utility Control*, 301 Conn. 56 (2011), is inapt. There, the plaintiff challenged P.A. 10-179, § 126 *et seq*. on equal protection grounds. *Markley*, 301 Conn. at 66-67. P.A. 10-179 required customers of the EDCs to pay a fee, but allowed the charges to commence at different times for customers of Connecticut Light & Power and United Illuminating Company. *Id*. at 61-62. The Supreme Court held that the plaintiff could not prevail on his equal protection claim because the legislature had a rational basis for structuring the financing order as it did: "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 already had been paying." *Id*. at 71. The Court further held that "the antecedent question of whether to tie deficit reduction to taxpayer's electricity purchases is a policy issue that rests with the legislature and lies beyond the purview of this Court." *Id*.

The Defendants cite to *Markley* for the proposition that the Assessments required by Conn. Gen. Stat. §§ 16-245m and 16-235n do not violate the Equal Protection Clause. Def. Mot. at 32. Specifically, the Defendants reason that "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 *Markley*, it would have been rational . . . for the General Assembly to impose the Charges only on EDC customers." *Id*.[16]

[16] Again, there are no facts in the record to support the Defendants' claim that the Charges were established at the same time overall rates decreased, or that otherwise EDC customers obviously would not see an increase in their bill due to the new Charges. Defendants created these fanciful facts out of whole cloth to cloak the absence of any rational basis to support the Sweeps but, alas, the Emperor has no clothes. *See "The Emperor's New Clothes"*

Of course, none of this is relevant to the Plaintiffs' claim that the Sweeps authorized by P.A. 17-2 and 18-81 violate the Equal Protection Clause. Indeed, the Defendants do not even attempt to argue that *Markley* helps to provide a rational basis for those Sweeps. Moreover, the Charges assessed by Conn. Gen. Stat. §§ 16-245m(a)(1) and 16-245n(b) are materially different from the taxes assessed to ratepayers by way of P.A. 17-2 in at least one significant respect: the Charges are assessed *prospectively*; that is, ratepayers are required to pay such charges from the date of the legislative enactment forward.[17] By contrast, the legislative Sweeps authorized by P.A. 17-2 and 18-81 tax ratepayers *retrospectively*. In other words, fees were originally collected from ratepayers for energy efficiency and clean energy purposes pursuant to Conn. Gen. Stat. §§ 16-245m(a)(1) and 16-245n(b); subsequently, these same funds were transferred to the General Fund and converted to taxes *long after they had been collected*. Therefore, the rationale offered in support of Conn. Gen. Stat. §§ 16-245m(a)(1) and 16-245n(b) does not suffice to establish a rational basis for the legislative Sweeps authorized by P.A. 17-2 and 18-81.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Plaintiffs respectfully request that the Court deny the Defendants' Motion for Summary Judgment and grant the Plaintiffs' Motion for Summary Judgment as to Count I (Declaratory Judgment – Contracts Clause, U.S. Const. Art. 1, § 10), Count II (Declaratory Judgment – Equal Protection Clause, U.S. Const. Am. 14, § 1), and Count VII (42 U.S.C. § 1983) of their Complaint dated May 15, 2018.[18]

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by Hans Christian Andersen, April 7, 1837, wherein during the emperor's parade in his invisible clothes before his subjects, a child declares: "But he isn't wearing anything at all!" Here, the Court should likewise find that the Defendants' justification is invisible and, therefore, there is not even a rational basis supporting the Sweeps.

[17] Likewise, as indicated above, the charges authorized by P.A. 10-179 at issue in Markley only applied *prospectively*.

[18] The Plaintiffs withdraw Count III (violation of General Statutes § 16-245n(h)), Count IV (Sales and Use Tax Statute), and Count V (Promissory Estoppel) of their Complaint.

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was served *via* Notice of Electronic Filing for parties or counsel who are registered to received electronic filings (as set forth below), and, served *via* First Class U.S. Mail, postage prepaid, to all other parties exempt from electronic filing, on this **13th** day of ***August, 2018***.

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