RETURN DATE: JUNE 29, 2021

THE UNITED ILLUMINATING COMPANY	:	SUPERIOR COURT
	:	
	:	JUDICIAL DISTRICT OF NEW BRITAIN
VS.	:	
	:	AT NEW BRITAIN
PUBLIC UTILITIES REGULATORY AUTHORITY	:	
	:	JUNE 11, 2021

PETITION FOR ADMINISTRATIVE APPEAL

To the Superior Court for the Judicial District of New Britain, on the 11th day of June 2021, comes The United Illuminating Company, appealing pursuant to Sections 4-183 and 16-35 of the Connecticut General Statutes from the Public Utilities Regulatory Authority's April 28, 2021 Final Decision in Docket No. 20-08-03, *Investigation Into Electric Distribution Companies' Preparation For And Response To Tropical Storm Isaias*, and complains and says:

PARTIES AND JURISDICTION

1. Plaintiff, The United Illuminating Company ("UI"), is a specially chartered Connecticut public service corporation with its principal place of business in Orange, Connecticut. UI is principally engaged in the business of transmitting, distributing, purchasing, and selling electricity to residential, commercial, and industrial customers. Its regulated service area includes seventeen cities and towns in the Greater New Haven and Bridgeport communities. UI was designated a party in the contested proceeding before the Public Utilities Regulatory Authority ("PURA" or the "Authority") designated as Docket No. 20-08-03, *Investigation Into Electric Distribution Companies' Preparation For And Response To Tropical Storm Isaias* (the "Tropical Storm Isaias Proceeding").

2. Defendant PURA is an agency of the State of Connecticut and is charged by statute with the regulation, supervision, and control of public service companies within Connecticut pursuant to Title 16 of the Connecticut General Statutes.

3. In addition to UI, the Authority recognized the following as parties to the Tropical Storm Isaias Proceeding: Office of Consumer Counsel; Commissioner of the Department of Energy and Environmental Protection; Office of the Attorney General; and The Connecticut Light and Power Company d/b/a Eversource Energy ("Eversource").

BACKGROUND AND TROPICAL STORM ISAIAS PROCEEDING

4. In response to the impact of storms occurring in 2011, the Connecticut Legislature enacted Public Act 12-148, An Act Enhancing Emergency Preparedness and Response ("Act").

5. Among other things, the Act added Conn. Gen. Stat § 16-32h, requiring PURA to "initiate a docket to establish industry specific standards for acceptable performance by each utility in an emergency to protect public health and safety, to ensure the reliability of such utility's services to prevent and minimize the number of service outages or disruptions and to reduce the duration of such outages and disruptions, to facilitate restoration of such services after such outages or disruptions, and to identify the most cost-effective level of tree trimming and system hardening, including undergrounding, necessary to achieve the maximum reliability of the system and to minimize service outages." Conn. Gen. Stat. § 16-32h(b). Conn. Gen. Stat. § 16-32h(d) identifies a list of items for PURA to address in the standards it establishes for acceptable performance in an emergency in which more than ten per cent of any utility's customers are without service for more than forty-eight consecutive hours. Pursuant to Conn. Gen. Stat. § 16-32e(a), an "emergency" includes events such as a hurricane or storm.

6. The Act also added Conn. Gen. Stat. § 16-32i to address enforcement of the standards promulgated by PURA under § 16-32h. Section 16-32i directs PURA to review the

performance of an electric distribution company after an emergency in which more than ten per cent of any the company's customers were without service for more than forty-eight consecutive hours and, if the company did not comply with any standard of acceptable performance in emergency preparation or restoration of service in an emergency adopted under § 16-32h, PURA (after a hearing in a contested case) may enforce those standards and levy civil penalties under § 16-41. As originally enacted in 2012, § 16-32i imposes a limit on the civil penalty, requiring that it "not . . . exceed a total of two and one-half per cent" of the electric distribution company's annual distribution revenue "for noncompliance in any such emergency."

7. Public Act 20-05 (Sept. Special Session) raised the maximum penalty in Conn. Gen. Stat. § 16-32i from 2.5% to 4%, but only effective upon passage of that public act on October 2, 2020.

8. Conn. Gen. Stat. § 16-41 requires that, if PURA believes a violation has occurred for which a civil penalty is authorized, it must notify the alleged violator with a notice of violation in accordance with subsection (c) of § 16-41.

9. For Tropical Storm Isaias, occurring in August 2020, the standards for evaluating performance in a storm emergency are embodied in a utility's emergency response plan ("ERP"), as established pursuant to the provisions of Conn. Gen. Stat. §§ 16-32h, 16-32i, and 16-41 in effect in August 2020.

10. On August 4, 2020, Tropical Storm Isaias swept through the State of Connecticut, causing over 1,700 outage events in UI's service territory. UI's system documented 113,433 outages at the peak, which is equivalent to approximately 33% of its customer base, and 157,300 total outages over the course of the recovery period.

11. In response to Tropical Storm Isaias, UI's restoration efforts included, among other things, replacing 206 broken utility poles and 268 transformers, and repairing over 1,000

miles of downed wire. As noted in PURA's Final Decision, UI completed restoration to 90% of its customers with outages by the afternoon of August 7, 2020, and to 99% of those customers by 7:00 p.m. on August 10, 2020, and it completed full restoration at 1:19 a.m. on August 12, 2020. These timelines conformed to UI's ERP guidelines for an event of the magnitude of Tropical Storm Isaias.

12. On August 7, 2020, in the Tropical Storm Isaias Proceeding, the Authority issued a Notice of Proceeding and Orders for Emergency Response stating that it was initiating a broadly scoped investigation, by way of an uncontested hearing, of the electric distribution companies' ("EDCs") preparation for and response to Tropical Storm Isaias.

13. The Authority's procedural notices in the Tropical Storm Isaias Proceeding also indicated that consideration of penalties, including potential return on equity ("ROE") penalties, would follow in a subsequent, separate phase of the proceeding.

14. On August 14, 2020, in response to a motion by the Attorney General that the EDCs opposed, the Authority issued a revised Notice of Proceeding indicating that the Authority's investigation would be converted to a contested case and encompass determinations regarding compliance with performance standards and prudency of the EDCs' management of the Tropical Storm Isaias response.

15. On November 6, 2020, UI submitted its direct pre-filed testimony in the above-referenced docket, including the testimony of (1) Anthony Marone III, President and Chief Executive Officer of Avangrid Networks; (2) the Emergency Response Panel; (3) the Public Liaisons and Communications Panel; (4) the Vegetation Management Panel; and (5) the Customer Service Panel.

16. PURA conducted public comment hearings in October 2020 and evidentiary hearings, including a cost prudency hearing, in December 2020 and January 2021.

17. During the Tropical Storm Isaias Proceeding, the Authority requested no discovery, evidence, or briefing from any party on either: (1) the question of whether ROE penalties were warranted or legally authorized; and, if so, (2) what ROE penalty, if any, might bear a reasoned relationship to any findings of failures to manage the preparation for and response to the storm.

18. On March 19, 2021, PURA issued its Proposed Final Decision in the Tropical Storm Isaias Proceeding (the "Proposed Final Decision"). In the Proposed Final Decision, PURA indicated that it "may impose financial penalties, including, but not limited to, the disallowance of certain storm-related costs, in a future rate or cost recovery proceeding if the Authority finds that a utility has acted imprudently." In the Proposed Final Decision, PURA also indicated it "will consider and levy any appropriate fines and other penalties" including "return on equity ('ROE') penalties" in a later contested case, No. 20-08-03RE01. (Proposed Final Decision at 106.)

19. On April 12, 2021, UI filed Written Exceptions identifying errors of law and fact to the Proposed Final Decision.

20. UI took exception to a limited portion of the Proposed Final Decision that concluded that UI did not conform to applicable performance standards with respect to its Make Safe operations and restoration priorities. None of the parties in this docket alleged that UI's actions with respect to Make Safe or restoration priorities failed to conform to ERP standards or were imprudent.

21. UI took exception to the statement in the Proposed Final Decision that "[t]he civil penalty imposed pursuant to Conn. Gen. Stat. §§ 16-32i and 16-41 may not exceed a total ***four percent*** of the EDC's annual distribution revenue" (Proposed Final Decision at 9 (emphasis

added).) The Proposed Final Decision is silent on the fact that the threshold increase to 4 percent was implemented after Tropical Storm Isaias.

22. UI took exception to the Authority choosing to impose duplicative penalties for the same underlying conduct. The Proposed Final Decision suggested that a subsequent proceeding, a reopened Docket No. 20-08-03RE01, would encompass PURA's consideration of a range of "fines and other penalties" such as "return on equity ('ROE') penalties," "storm cost recovery disallowances," "civil penalties in accordance with" §§ 16-32i and 16-41, and "further remedial or enforcement orders." (Proposed Final Decision at 1.) However, § 16-32i provides the specific and exclusive grant of authority for PURA to impose penalties related to storm performance, subject to a statutory cap and the procedural due process requirements of § 16-41, and the general monetary penalty otherwise authorized in § 16-41 does not apply.

23. UI took exception to the language in the Proposed Final Decision suggesting that UI could be subject to further prudence reviews for Tropical Storm Isaias notwithstanding the Authority's prudence review in the current docket, even though the Proposed Final Decision found that UI generally met acceptable standards of performance.

24. UI took exception to the Proposed Final Decision's proposal for cost disallowances for conduct that is deemed prudent and to offset storm costs with third-party costs. As a state agency, PURA's statutory authority does not include the power to offset alleged third-party damages or losses (such as costs incurred by municipalities and customers) against UI's storm costs.

25. UI took exception to the statement in the Proposed Final Decision that UI did not meet its ERP obligation with respect to restoration of service to predesignated municipal critical

facilities in Bridgeport, because the facilities were not "previously designated public emergency service institutions . . . as prioritized by municipal officials" under the ERP to be one of UI's first priorities in response to any storm event.

26. On April 19, 2021, PURA heard oral argument on the written exceptions to the Proposed Final Decision.

27. On April 28, 2021, PURA issued its Final Decision in the Tropical Storm Isaias Proceeding (the "Final Decision") and "ultimately concluded that UI generally met the standards of acceptable performance and conducted itself prudently and efficiently, with certain exceptions noted herein."

28. In the Final Decision, the Authority acknowledged that "Bridgeport did believe that UI generally coordinated well with the city and made public safety a priority."

29. The Final Decision did not remedy the errors of fact or law identified in UI's written exceptions, except that PURA now acknowledges that the civil penalty imposed pursuant to Conn. Gen. Stat. §§ 16-32i and 16-41, with respect to the time period of Tropical Storm Isaias in August 2020, may not exceed a total of 2.5% of an EDC's annual distribution revenue (and not the higher 4% figure in the statute as amended effective October 2, 2020).

30. The Final Decision imposed upon UI a penalty in the form of a reduction in UI's authorized ROE of fifteen (15) basis points for an indefinite term—a penalty not referenced in the Proposed Final Decision—and, as a result, the parties (contrary to PURA's own procedural orders) were unable to file written exceptions or present oral argument in response to that penalty before it was included in the Final Decision.

31. Until the issuance of its Final Decision, the Authority's conduct in this regard was consistent with its notices that PURA would only consider financial penalties, including a potential ROE reduction, in a *subsequent* contested case proceeding.

32. This rate reduction imposed on UI represents a substantial annual financial penalty of indefinite duration (likely in the range of $1 million per year), which PURA will apply to UI's rates in a subsequent contested case at PURA. PURA intends to implement the penalty by simply subtracting 15 basis points from UI's allowed ROE as determined for ratemaking purposes. In the Final Decision, PURA stated that it may appropriately reduce an EDC's ROE for its storm performance, whether due to a finding of imprudence, a failure to comply with established performance standards, or a determination of poor or deficient management. PURA stated that a reduction in ROE is intended in this instance to penalize an EDC for its performance failures in responding to Tropical Storm Isaias pursuant to Conn. Gen. Stat. § 16-32i and to create an "incentive" for better management of future storm responses. PURA also stated that the ROE penalty reduction ensures that rates satisfy the overall criteria for ratemaking set forth in Conn. Gen. Stat. § 16-19e. The Final Decision did not seek to correlate the chosen reduction of 15 basis points with any particular findings of deficient performance by UI, and it did not provide criteria for how and when the ROE reduction can be eliminated. Rather, it referred to the penalty as "indefinite." The Final Decision also did not—and could not outside of a ratemaking proceeding at which a proper record is made—determine that UI's rates following the ROE reduction would satisfy the criteria in § 16-19e.

PURA FINAL DECISION FINDINGS, CONCLUSIONS AND ORDERS

33. In its Final Decision, PURA stated that a utility "must reasonably comply with established performance standards and also must act prudently in making determinations on the information that is known or should have been known to the utility."

34. PURA found that UI took a reasonable approach to storm preparation, consistent with both its ERP and the Authority's previous guidance, declaring an Event Level 3 and preparing accordingly four days ahead of the predicted storm impact.

35. PURA concluded in its Final Decision that UI undertook a reasonable, prudent, and appropriate approach in issuing its event level declaration given the relative uncertainty in the forecasts. Therefore, as PURA found, UI was well-positioned to respond as Tropical Storm Isaias, and the forecasts, changed in terms of track and intensity. PURA also found that UI was reasonably well-prepared with adequate line resources to perform necessary restoration, response, and Make Safe duties.

36. Regarding UI's damage assessment process, the Authority found that UI performed in a generally acceptable manner and that UI met applicable performance standards and acted prudently in assessing damage resulting from the tropical storm and securing resources for its storm response.

37. The Authority also found that UI demonstrated compliance with the acceptable standards of performance with regard to its municipal liaison program in response to Tropical Storm Isaias.

38. The Authority found that UI generally met the standards of acceptable performance in relation to its customer communications during Tropical Storm Isaias.

39. The Authority, in its assessment of UI's post-storm activities, found that UI did not in certain respects meet the standards of acceptable performance with regard to its Make Safe and Priority call duties. However, the Authority did not make any findings of imprudent conduct by UI.

40. The Authority noted that most of the comments received from municipalities located within UI's service territory were neutral or positive regarding UI's response to Tropical Storm Isaias.

41. The Authority found that "an indefinite 15 basis point reduction is reasonable, consistent with prior ROE reductions, and sufficient to properly incentivize improved storm response performance by UI."

42. However, the Authority failed to identify any evidence supporting the quantification of fifteen (15) basis points to be imposed for an indefinite and indeterminate length of time, nor did the Authority explain how it determined the penalty of 15 basis points in light of its particular findings in this docket, nor did it state how it will measure performance improvements or otherwise determine when the ongoing penalty will terminate, or how, once UI's allowed ROE is reduced by 15 basis points, UI's rates will necessarily satisfy the criteria for rates set forth in Conn. Gen. Stat. § 16-19e.

43. This arbitrary ROE penalty is an indefinite financial reduction that will harm UI's ability to attract investment for its operations, including for future storm preparation, which in turn will negatively impact its customers.

PURA'S FINAL DECISION VIOLATES APPLICABLE LAW

44. The Authority committed legal error by issuing the Final Decision and in the proceedings leading to the Final Decision. These errors caused prejudice to substantial rights of UI.

45. As an agency within the meaning of General Statutes § 4-166(1), PURA is subject to the provisions of Title 4, Chapter 54 of the Connecticut General Statutes, entitled "Uniform Administrative Procedure Act" ("UAPA").

46. The UAPA imposes limits on both the substantive and procedural actions of administrative agencies like PURA.

47. Under the UAPA, an agency's decision is unlawful if it is (i) in violation of statutory or constitutional provisions; (ii) in excess of the agency's statutory authority; (iii) made upon unlawful procedure; (iv) affected by errors of law; (v) clearly erroneous in light of the substantial evidence in the record; or (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Conn. Gen. Stat. § 4-183(j).

48. UI is timely appealing PURA's Final Decision pursuant to General Statutes §§ 4-183(a) and 16-35(a).

49. PURA issued an excessive penalty, in excess of PURA's statutory authority, made upon unlawful procedure, clearly erroneous in light of the substantial evidence in the record, and arbitrary or capricious and characterized by both an abuse of discretion and clearly unwarranted exercise of discretion.

50. The Final Decision is a final decision as defined in Conn. Gen. Stat. § 4-166(3).

51. UI is aggrieved by the Final Decision.

52. UI has exhausted its administrative remedies.

53. The Final Decision of the Authority, including the administrative findings, inferences, conclusions, and decisions therein, is:

(a) in excess of the Authority's statutory authority;

(b) made upon unlawful procedure;

(c) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and

(d) arbitrary and capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion.

54. In support of its conclusions, the Final Decision relies on numerous substantial errors of law and fact.

55. The Final Decision imposed an ROE reduction as a penalty to be applied in a future contested case, but PURA did not provide notice that ROE penalties, including penalties characterized as "incentives," were at issue in this docket. Indeed, by not including an ROE reduction in the Proposed Final Decision, PURA violated its own procedural orders allowing parties to file written exceptions to the Proposed Final Decision and present oral argument. Moreover, PURA had opened up a separate docket (No. 20-08-03RE01) in August 2020 and noted in the Final Decision (as it had previously noted in the Notice of Proceeding and Proposed Final Decision) it was doing so for the express purpose of considering in that separate docket what penalties are appropriate for noncompliance with storm performance standards. PURA cannot avoid the fact that the ROE reduction is a civil penalty within the meaning of Conn. Gen. Stat. §§ 16-32i and 16-41 simply by stating in the Final Decision that it is something other than a penalty. Imposing a penalty in the form of an ROE reduction in this docket was improper on this record, contrary to the requirements of the UAPA and of due process, lacked a sufficient basis on this record, was clearly erroneous and arbitrary and capricious, in violation of proper statutory and regulatory ratemaking principles, and in violation of the statutory limits for penalties for deficient storm performance.

56. PURA may not impose a reduction to UI's ROE outside of a contested case ratemaking proceeding pursuant to Conn. Gen. Stat. §§ 16-19 *et seq.* That determination cannot be made piecemeal in a docket investigating storm performance, where there was no notice that

an ROE penalty was at issue, and where there was no evidence relevant to UI's ROE, including the quantification of that ROE or any adjustment to ROE or the financial effect and proportionality of the ROE penalty in relation to UI's conduct. A contested case ratemaking proceeding is the only proper forum for development and consideration of evidence bearing on the numerous factors for determining an overall acceptable rate structure that balances the interests of customers and the needs of UI to attract investment for its operations.

57. A penalty for failure to comply with established storm performance standards, regardless of the form it takes (including a reduction in ROE), is subject to the penalty cap in the relevant version of Conn. Gen. Stat. § 16-32i ("not to exceed a total of two and one-half per cent of such electric distribution . . . company's annual distribution revenue") and must be determined in the context of PURA's separate docket opened specifically for determining that penalty in a properly noticed docket for determining civil penalties under §§ 16-32i and 16-41, and based on findings from the record developed in that docket. PURA's decision to approve a specific ROE reduction in the Final Decision is contrary to the requirements and provisions of §§ 16-32i and 16-41 and inconsistent with due process. Before imposing a penalty, PURA also had to provide a means to quantify the dollar amount of the penalty, which also necessitated providing a means to determine when the penalty, and the supposed need for a performance incentive, would terminate. PURA's indefinite reduction of ROE is contrary to statute, made upon unlawful procedure, clearly erroneous, arbitrary and capricious, and an abuse or clearly unwarranted exercise of discretion.

58. A penalty for failure to comply with established storm performance standards is subject to the requirement in Conn. Gen. Stat. § 16-32i that "[a]ny such penalty shall be assessed in the form of credits to the accounts of ratepayers of such electric distribution or gas company." The ordered reduction in ROE is unlawful for failing to conform to this statutory requirement.

59. The ROE reduction of indefinite length approved by PURA in the Final Decision, in light of the record of this docket as a whole, is an excessive punitive fine in violation of the Eighth Amendment to the United States Constitution and Section 8 of Article First of the Connecticut Constitution.

60. If PURA were authorized to impose a penalty in the form of an ROE reduction for imprudence, then it erred because there are no imprudence findings for UI in the Final Decision. To the extent PURA imposed the ROE penalty due to a supposed failure by UI to comply in certain respects with established storm performance standards, then the reduction of 15 basis points for an indefinite length of time is clearly erroneous, arbitrary and capricious, and an improper exercise of discretion considering the record as a whole, particularly in light of PURA's own findings that UI mostly complied with those standards.

61. If the ROE penalty arose under Conn. Gen. Stat. § 16-19e(a)(5) ("prudent and efficient management"), the ROE reduction must be determined in a rate proceeding where evidence is taken on its impact to UI and whether it results in a fair and reasonable return as required under that statute.

62. The Final Decision's conclusion that UI did not conform to applicable performance standards with respect to its Make Safe and Priority call duties was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

63. In the Final Decision, PURA concluded that UI failed to report as many as eight incidents as minor accidents as required by Conn. Gen. Stat. § 16-16 and Conn. Agency Regulations §§ 16-16-2 and 16-16-3, thus subjecting UI to fines as high as $500 for each instance of a failure to report such accidents in a monthly report where PURA concluded these were continuing violations. PURA erred legally and factually in its finding and conclusion because, among other errors, the incidents relied on by PURA were not minor accidents within

the meaning of the relevant statute and regulations. Moreover, as with the ROE reduction, the Final Decision found this reporting violation without proper notice and in violation of its own procedural orders allowing parties to file written exceptions to the Proposed Final Decision and present oral argument, as it did not address UI's accident reporting in the Proposed Final Decision.

64. PURA, in its notices and in its Final Decision, stated that cost recovery was not at stake in this docket. Therefore, to the extent that PURA intends to apply any findings adverse to UI from this docket in a future docket to deny cost recovery to UI, the Final Decision was improper on this record, contrary to the requirements of the UAPA and of due process, and was clearly erroneous and arbitrary and capricious.

WHEREFORE, UI respectfully requests that this Court:

1. Sustain this appeal;

2. Reverse or vacate PURA's Final Decision dated April 28, 2021 in Docket No. 20-08-03 and remand to PURA for further proceedings in accordance with the Court's judgment; and

3. Grant such other relief in law or equity as is required or appropriate.

PLAINTIFF
THE UNITED ILLUMINATING COMPANY

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