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REORGANIZING ELECTRIC COMPANY TERRITORIES/POSSIBLE STATE TAKEOVER OF ELECTRIC COMPANIES

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You asked whether the state could adopt legislation to (1) break up Connecticut Light & Power's (CL&P) service area and require it to sell its assets to other utilities that would operate them or (2) take over the entire transmission and distribution system in the state and allow private companies to bid to serve regions in the state under private-public partnerships. You also wanted to know whether any there was precedent in other states for these measures.

The Office of Legislative Research is not authorized to provide legal opinions and this memo should not be considered one. Moreover, while this report covers major issues raised by your questions, it is not exhaustive.

SUMMARY

It appears that the state could break up CL&P's service territory and transfer the responsibility to serve the customers in these areas to other utilities, since CL&P was created pursuant to state charter and operates as a state-regulated utility. But doing so would require extensive legislation as well as compensation to CL&P for its investments that are not recovered in the sales of its assets to its successors. Transferring CL&P's responsibilities to other utilities would probably require the approval of the Federal Energy Regulatory Commission, the Independent System Operator – New England, and possibly other entities. It also appears that Connecticut could take over the state's entire transmission

and distribution system and allow companies to bid to serve regions under private-public partnerships, but this option raises similar issues.

There appears to be precedent in Connecticut and other states for the first option and in New York for the second option. PA 98-28, which partially deregulated the electric industry, and similar legislation in other states, may serve as a precedent for having CL&P transfer its transmission and distribution facilities and related responsibilities to other utilities. PA 98-28 effectively required CL&P and United Illuminating to sell their power plants and other generation assets to other generators. Similar provisions were included in legislation adopted in several other states that deregulated the supply part of the electric industry.

New York created the Long Island Power Authority (LIPA), which subsequently acquired the transmission and distribution system of the former Long Island Lighting Company (LILCO). LIPA has entered into agreements with a private company to operate and maintain the system, among other things.

If Connecticut acquired CL&P's assets by condemnation, it would have to comply with the jurisprudence on the Takings Clauses of the federal and state constitutions. Among other things, the taking would have to be for a public purpose and CL&P would have to receive compensation.

SPLITTING UP CL&P'S SERVICE TERRITORY

CL&P provides electric transmission and distribution to most of the state, pursuant to a charter initially granted by the legislature in 1881 to its predecessor, the Hartford Electric Light Company. CL&P also provides electric supply service to those customers in its service area that have not chosen a competitive supplier. CL&P is subject to an extensive body of federal and state law, notably Title 16 of the general statutes.

CGS § [16-10a](#) prescribes the procedures that the Department of Energy and Environmental Protection (DEEP) must follow in revoking the franchise of an electric company or other public service company (utility) that has failed to provide adequate service for a period of five or more years. (Although there is no case law on the subject, it appears that franchise is synonymous with charter.) If a franchise is revoked and the legislature is not in session, DEEP can grant a new franchise to a firm that it finds qualified and prepared to provide service within a reasonable period of time (by implication, the legislature would grant new franchises if it was in session). It appears that this provision does not allow DEEP to

revoke a franchise of a company that has failed to provide good service for less than five years. The statute does not address geographically limiting a company's franchise, although the power to revoke an entire franchise suggests that the state can limit its scope. The legislature could amend this statute to allow the revocation of the franchise under a broader range of circumstances and allow DEEP to award new franchises to utilities serving smaller areas.

In any case, breaking up CL&P's service territory and transferring responsibility to serve it would require compensating CL&P for its investments that were not covered by the sale of its assets to the successor utilities. Failing to do so could constitute a taking without just compensation, which is prohibited under the federal and state constitutions.

If the legislature pursued a service territory break-up and transfer, this would require extensive legislation. For example, the legislation would presumably have to specify, among other things, how

1. DEEP would ensure that the utilities that took over from CL&P were technically, managerially, and financially qualified to provide the services CL&P currently provides;
2. CL&P would be compensated for its investments that were not covered by the price paid by the successor utilities; and
3. to coordinate the successor utilities to ensure reliable service.

Since the Federal Energy Regulatory Commission has jurisdiction over the wholesale electric market and the transmission of electricity in interstate commerce, its approval would probably be required to reallocate responsibilities and powers among utilities in these areas. In addition, the new entities would need to meet the requirements of the Independent System Operator – New England, which administers the regional wholesale market, in order to participate in this market. CL&P also has a wide variety of contracts with market participants, e.g., contracts to buy power for the customers who have not chosen competitive suppliers, which would need to be addressed if other utilities assumed CL&P's responsibilities. In addition, CL&P has an agreement with the Independent System Operator – New England on the operation of its transmission lines, which would also need to be reviewed.

A possible precedent for splitting up CL&P's territory and having other utilities serve its customers is PA 98-28, which allowed competition in electric supply. The act effectively required CL&P and United

illuminating to put their power plants and other generation assets (e.g., long term contracts to purchase power from non-utility generators) up for sale. The act did not technically require the companies to put these assets up for sale, but if they had not they would have risked losing billions of dollars in stranded costs. These were costs the companies had incurred with the approval of the Department of Public Utility Control (DPUC- the predecessor to DEEP), whose continued recovery in rates was jeopardized with the opening of the supply market to competition.

PA 98-28 required the electric companies to submit plans for divesting themselves of their generation assets, with a separate plan required for their nuclear power plants. It provided for the recovery of their stranded costs from electric ratepayers to the extent to which the price they received for their assets was less than the book value of these assets.

Other states that opened their supply markets to competition imposed similar divestiture requirements on their electric companies. For example, California, Massachusetts, New York, and Rhode Island required full divestiture, while Maine and Texas required partial divestiture for large utilities. On the other hand, some deregulated states such as Michigan did not require divestiture.

CGS §§ [16-262n](#) to [262r](#), inclusive, may also be relevant to this option as a model for transferring responsibility for utility service areas. These provisions allow DEEP to order a water company or municipal water utility to acquire a water company that is economically non-viable or that has failed to comply with a DEEP or Department of Public Health order regarding water quality or quantity. The acquired water company must transfer the real and personal property covered by the DEEP disposition order within 60 days. The costs of the acquisition must be recovered in the acquiring utility's rates. In addition, CGS § [16-262r](#) allows one water company to provide various services, including system operation and maintenance and emergency repairs, to another water company. The legislature could develop similar provisions for troubled electric companies.

TAKING OVER THE TRANSMISSION AND DISTRIBUTION SYSTEM

We have found no cases where the state owns the transmission and distribution system and private companies operate parts of this system in a public/private partnership. However, LIPA, a state-created authority, operates under a very similar model. An August 2011 [analysis](#) prepared for LIPA by the consulting firm the Brattle Group noted that LIPA's structure, in which the transmission and distribution system is owned

by a governmental body but operated by a private contractor, is “perhaps unique” in the utility industry.

LIPA is a municipal electric utility that owns the electric transmission and distribution system on suburban Long Island and provides electric service to more than 1.1 million customers in Nassau and Suffolk counties and the Rockaway Peninsula in Queens. It is the second largest municipal electric utility in the nation in terms of electric revenues and the third largest in terms of customers served. A private company, National Grid USA, maintains LIPA’s transmission and distribution system under a management services agreement.

The New York state legislature created LIPA following the Shoreham debacle. Prior to 1998, LILCO provided electric and natural gas service to Long Island. The company began construction of the Shoreham nuclear power plant in 1973. Subsequently, in the wake of the Three Mile Island and Chernobyl accidents, the Nuclear Regulatory Commission ordered nuclear plant operators to develop evacuation plans in cooperation with state and local governments.

In 1983, the Suffolk County Legislature voted that the county could not be safely evacuated in the event of a serious nuclear accident at the plant, and governor Mario Cuomo ordered state officials not to approve any LILCO-sponsored evacuation plan. Without these plans, the plant could not go into commercial operation.

Nonetheless, the plant was completed in 1984 and in 1985 LILCO received federal permission for low-power tests. The plant operated intermittently over the next two years. The plant did not provide commercial power, but these tests exposed its equipment to radiation.

The plant continued to face political opposition. In May 1989, LILCO agreed not to operate the plant in a deal with the state under which most of the \$6 billion cost of the unused plant was passed on to Long Island residents. As part of the deal, the legislature passed the [Long Island Power Authority Act](#), which created LIPA and authorized it to acquire LILCO’s securities and assets by purchase or condemnation. The transaction had two purposes: (1) to shut down and decommission the Shoreham plant and (2) to lower electric rates on Long Island. The act gave the state comptroller, attorney general, and other government agencies oversight over LIPA.

LIPA fulfilled its first purpose by completing the decommissioning of Shoreham in 1994 and surrendering its operating license to the Nuclear Regulatory Commission in 1995. To fulfill its second purpose, LIPA

became Long Island's non-profit retail electricity supplier when it acquired LILCO in May 1998 and took over the ownership and operation of its transmission and distribution assets on Long Island and its share of the ownership of the Nine Mile Point nuclear power plant in upstate New York. LIPA also acquired liabilities related to Shoreham and some power supply agreements. KeySpan Corporation (which was subsequently purchased by National Grid USA) acquired LILCO's other generation assets and its gas supply system.

LIPA has three operating agreements with National Grid USA: (1) a management services agreement for transmission and distribution system operations and maintenance services, (2) a power supply agreement, and (3) an energy management agreement for fuel management.

In 2007, the parties extended the management services agreement, established a new power plant purchase option for LIPA, and resolved certain outstanding financial issues. According to LIPA, the purpose of these negotiations was to provide significant ratepayer, reliability, and repowering benefits to LIPA's customers and to Long Island. The agreements resulted in net benefits to LIPA of \$236 million, plus an annual reduction of \$34 million in the management services fee LIPA pays to National Grid USA. Among other things, the renegotiations resulted in \$6 million in funding for transmission system improvements aimed at protecting against storm damage ("storm hardening"). It appears Connecticut could adopt the same model regarding CL&P.

CONSTITUTIONAL PROVISIONS

Both the Connecticut and U.S. constitutions bar states from taking private property except for "public use" and with compensation to the owner. In reviewing the U.S. constitutional requirements in *Kelo v. New London*, 545 U.S. 469 (2005), the U.S. Supreme Court noted that

... it has long been accepted that the sovereign [e.g., a state] may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.

Currently, electric companies in Connecticut act as common carriers with regard to their transmission and distribution systems. As of June 30, 2011, approximately two thirds of the power sold in the state was sold by the 31 competitive suppliers active in the market.

Since the court began applying the Fifth Amendment of the U.S. constitution to the states in the late 19th century, it has consistently interpreted “public use” broadly as “public purposes.” The Court’s subsequent policy has been to give deference to legislative bodies in their determination of what constitutes a public purpose. For example, in one case cited in *Kelo (Hawaii Housing Authority v. Midkiff*, 467 U. S. 229 (1984)), the Court upheld a Hawaii law that transferred ownership of land from lessors to lessees, for just compensation, in order to reduce the concentration of land ownership. The Court concluded that the state’s purpose of eliminating the “social and economic evils of a land oligopoly” qualified as a valid public use.

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