TESTIMONY OF
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Before the Energy and Technology Committee
March 9, 2021

Re: S.B. No. 4, An Act Concerning Data Privacy, Net Neutrality, Cyber Security And Fairness In Data Usage In The New Age Of A Digital Workforce.

H.B. No. 6442, An Act Concerning Equitable Access To Broadband.

S.B. No. 991, An Act Articulating Fees On An Electric Distribution Customer's Bill.

S.B. No. 992, An Act Concerning Utility Company Text Message Communications.

My name is Vincent Pace. I am an Assistant General Counsel for Eversource Energy. I am offering Eversource's testimony on the above-listed bills that have been raised for public hearing.

a. Background on Eversource

Eversource transmits and delivers electricity to approximately 1.27 million customers in 149 municipalities in Connecticut; provides natural gas to approximately 246,000 customers in 74 towns in Connecticut; and our affiliate (Aquarion Water) provides service to approximately 216,000 customers in 52 towns in Connecticut. Approximately 50 percent of our employees are members of the International Brotherhood of Electrical Workers, the Utility Workers Union of America or The United Steelworkers covered by collective bargaining agreements. Our projects generate substantial tax revenues for Connecticut and its municipalities, and we are typically the top property tax payer in most of the towns we serve. For the fiscal year July 2019 through June 2020 alone, Eversource paid approximately $234 million in property taxes to Connecticut towns,[1] and for 2019 we paid an additional approximately $163 million in gross earnings tax to the State of Connecticut.[2]

b. S.B. 4, An Act Concerning Data Privacy, Net Neutrality, Cyber Security And Fairness In Data Usage In The New Age Of A Digital Workforce; & H.B. 6442, An Act Concerning Equitable Access To Broadband.

Eversource **requests reasonable changes** to Section 3 of S.B. 4 and Section 20 of H.B. 6442 (the "Bills").

Section 3 of S.B. 4 and Section 20 of H.B. 6442 appear to contain nearly identical provisions that seek to, among other things, expedite the process of attaching wireless and wireline communications attachments to utility poles. Eversource fully supports the State's goal to facilitate the attachment of such equipment to poles to provide enhanced communications services within our State. That important goal must, however, be

[1] Connecticut property taxes paid and to be paid from July 2019 through June 2020 by Eversource affiliates: CL&P $186,511,264; Yankee Gas $33,581,456; and Aquarion Water Co. $14,526,528.

[2] Gross earnings taxes paid in 2019 by Eversource affiliates: CL&P $141,188,143; Yankee Gas $21,939,623.

balanced with other important goals such as worker safety, reliable electric service, and the need to moderate bill impacts to electric ratepayers who support the cost of this work. Although Eversource supports the State's overall goal of providing enhanced communications services to our residents, it does not support Section 3 of S.B. 4 and Section 20 of H.B. 6442 in their current form. Therefore, we respectfully request the following reasonable changes to these specific Sections in the Bills.

i. Sec. 20(i) of H.B. 6442 & Section 3(i) of S.B. 4 – The Bill's Fixed Deadlines for Engineering and Construction Work Should Be Deleted or Modified

Both Bills state that whenever an applicant submits an application to attach communications equipment to a public utility pole – then the "owner or custodian of a public utility pole *shall*" grant a (i) temporary license within 30 days and (ii) a permanent license within 90 days.[3] In this case, the pole custodian is either Eversource, The United Illuminating Company, Frontier Communications Corporation or Verizon (the "Pole Owners").[4] These fixed deadlines are problematic for several reasons.

1. Pole Owners Do Not Control Existing 3rd Party Attachers. There are many other entities with *existing* communications attachments on utility poles such as municipalities, cable television companies, and landline telephone and broadband providers, all of whom are unaffiliated with Eversource and over whom Eversource has no legal control. If these existing third party attachers do not timely shift or move all of their existing attachments to make space to accommodate a proposed new pole attachment (or if the Bills' proposed single entity performing this work on all communications attachments fails to timely perform that work), then a Pole Owner such as Eversource cannot issue a license in the timeframes mandated by the Bills. In short, Eversource cannot compel a third party over whom it has no legal control to timely perform its respective work. This existing problem is not cured by the Bills.

2. There Are No Volume Caps on the Number of New Pole Attachment Applications. The Bills do not take into consideration that presently there are no volume caps or limits on the number of new pole attachment applications submitted each month. Nor are there any requirements to provide Pole Owners with advance notice of new pole attachment applications. Whenever a substantial number of new applications are submitted in any month, without reasonable prior notice, it is not possible to timely issue licenses within the above-proposed timeframes. This existing problem is not cured by the Bills.

3. There is No "Force Majeure" Provision in the Bills. The Bills also do not take into consideration that "force majeure" factors (i.e., factors beyond the reasonable control of a Pole Owner) can prevent licenses from timely being issued in the proposed new timeframes such as weather conditions; the need to set a substantial number of new poles; the time delay to obtain an easement for a new pole or guy wire from a private landowner; the need to provide prior notice and secure consent under Conn. Gen. Stat. § 16-234 for tree trimming from abutting landowners; the provision of prior notice to and coordination with affected customers for scheduled power outages needed for this work, etc. These existing problems are not cured by the Bills.

4. An Increasing Volume of Work Cannot Be Performed Faster Without Cost Recovery. Under

[3] H.B. 6442, Sec. 20(i) (emphasis added); see also S.B. 4, Sec. 3(i)(emphasis added).

[4] Verizon's pole ownership is limited to a portion of Greenwich.

existing PURA precedent, Eversource cannot recover from applicants all of the costs it incurs to perform this communications-related work.[5] As a result, a portion of Eversource's cost is paid for by electric ratepayers.[6] But Eversource's current electric Distribution rate, which recovers an estimate of this cost, was last adjusted in its prior rate case using 2016 data. Because the number of new pole attachment applications submitted to Eversource in 2016 (4,599 applications in 2016) skyrocketed to 24,903 in 2019 and 17,166 in 2020,[7] the portion of electric rates that recovers this expense will need to be increased to pay for this increasing level of work performed under the Bills' accelerated time frames. In the alternative, PURA could order that a greater share of this cost should be recovered from the communications cost causer(s).

For all of these reasons, we request the Bills' fixed timeframes be deleted. We also recommend that this Committee continue to allow PURA to determine the appropriate timeframes. PURA has already exercised its authority to develop timelines for shifting equipment from an old pole to a new pole in general,[8] and to process new communications pole attachments.[9] PURA is equipped to decide these issues.

But if this Committee believes these sections of the Bills are necessary, then Eversource proposes a clarifying change in Exhibit 1 hereto that authorizes PURA to adjust these deadlines based on its expertise and recognizes that delays can result from factors outside of a Pole Owners' control such as weather. Exhibit 2 hereto contains clarifying language on how to ensure that sufficient revenues are available to fund the increasing workload in this area.

ii. Sections 20(a) & 20(c) of H.B. 6442 & Sections 3(a) & 3(c) of S.B. 4 – the One-Touch Make-Ready Provisions Need to Be Clarified to Ensure They Are Consistent

Section 20(c) of H.B. 6442 proposes to have PURA develop a "one-touch" make-ready process "for attachments of telecommunications service and broadband Internet access service facilities on public utility poles to be implemented by the owners of such public utility poles".[10] A similar provision appears in Section 3(a) of S.B. 4. One-touch make-ready means there will be one truck roll by a qualified crew to shift communications attachments and perform other work on a pole instead of multiple truck rolls by different

[5] PURA Docket No. 14-05-06, Application Of The Connecticut Light And Power Company To Amend Rate Schedules, Dec. 17, 2014 Decision at pp. 171-172,

[6] Id. at 172 (OCC stating "While Telecom/cable companies should be allowed to attach to utility poles, the OCC is unaware of any statutory or regulatory requirement that electric ratepayers must subsidize their attachment. . . . CL&P should be made whole for make-ready costs by the attachers, who are the cost causers, not by the CL&P ratepayers"; and "For the future, the OCC recommended that the Authority . . . develop a recurring or non-recurring rate for the [pole] attachers that provides the revenues necessary to reimburse CL&P fully for the cost of make-ready work in the communications gain.")

[7] PURA Docket No. 20-03-14, PURA Investigation Of Utility Pole Owners' Compliance With Orders Related To Pole Attachments, Nov. 20, 2020 Pre-Filed Testimony of Desiree Vazquez at p. 18, Table 1.

[8] See, e.g., PURA Docket No. 03-03-07RE01, DPUC Review of Public Utility Structures and Poles Within the Municipal Rights of Way – Compliance Review.

[9] See, e.g., PURA Docket No. 07-02-13, DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I; Docket No. 11-03-07, PURA Investigation into the Appointment of a Third Party Statewide Utility Telephone Pole Administrator for the State of Connecticut; Docket No. 11-03-07RE01, PURA Investigation into the Appointment of a Third Party Statewide Utility Telephone Pole Administrator for the State of Connecticut – Overlash Requirements; Docket No. 19-01-52, PURA Investigation of Developments in the Third Party Pole Attachment Process.

[10] H.B. 6442,Sec. 20(c) Lines 720-724.

communications companies to perform the same work.

Section 20(c) states that one-touch make-ready will only be performed on "attachments of telecommunications service and broadband Internet access service facilities". For safety reasons, it appropriately does not allow the crew performing all of the one-touch make-ready communications-related work to perform pole replacements and work on energized electric lines that are more dangerous tasks and require different training and skills.

But Section 20(a) of H.B. 6442 is inconsistent with Section 20(c) because Section 20(a) appears to allow the crew performing the one-touch communications make-ready work to also perform "all of the make-ready work".[11] Because "all" means "all", this text arguably allows a one-touch communications make-ready crew to also work on Eversource's energized electric lines. For this reason, Exhibit 2 hereto proposes clarifying changes to ensure that Section 20(c) is consistent with Section 20(a) of H.B. 6442 (and these changes should be made to the identical provisions that appear in Sections 3(a) and 3(c) of S.B.4). This change will ensure that, for safety reasons, only an electric distribution company's employees or pre-approved qualified electrical contractors can work on energized electric lines.

iii. H.B. 6442, Section 20(c) & Section 3(c) of S.B. 4 – Cost Recovery Is Needed for a Higher Volume of Work Performed on an Accelerated Basis

Section 20(c) of H.B. 6442 requires PURA to develop a one-touch make ready process that will "be implemented by the owners of such public utility poles".[12] In order to achieve Connecticut's and PURA's goal to expedite the existing pole attachment process, additional resources will be needed to process the skyrocketing number of new pole attachment applications. As a result, Exhibit 2 hereto proposes that text be added to Section 20 (and the corresponding text in Section 3 of S.B. 4) to ensure those entities performing this work obtain reimbursement of their prudently incurred costs.

c. S.B. No. 991, An Act Articulating Fees On An Electric Distribution Customer's Bill.

S.B. 991 orders that additional details "shall" appear on utility bills. It directs electric distribution companies ("EDCs") to separately identify on utility bills the systems benefit charge that funds state public policy programs; the Energy Conservation and Load Management Fund assessment that funds our State's energy efficiency programs; and the Clean Energy Fund that funds the Connecticut Green Bank.[13] S.B. 991 is unnecessary because Conn. Gen. Stat. § 16-245d already authorizes PURA to "develop a standard billing format". More importantly, pursuant to § 16-245d(a)(2), on February 8, 2021 PURA reopened a docket to determine whether changes are needed to existing utility bill formats, stating "this proceeding will examine whether the standard billing format . . . remains a useful tool and determine which specific modifications are warranted for implementation."[14] PURA has also issued a detailed regulation in R.C.S.A. § 16-245d-1 that

[11] Section 20(a), line 711-712.

[12] H.B. Section 20(c), Lines 723-724.

[13] These 3 charges are currently combined on bills. See PURA Docket No. 05-06-04, 246 P.U.R.4th 357 (Jan. 27, 2006 Decision) ("The Company intends to combine the Conservation and Load Management Charge, Renewable Energy Charge and Systems Benefit Charge on customer bills and will implement this change in the first quarter of 2006. . . . The combined charge will be titled Combined Systems Benefits Charge on customer bills and shall be explained in a footnote that must remain on the bill.")

[14] Docket No. 14-07-19RE06, PURA Investigation Into Redesign Of The Residential Electric Billing Format – Five-Year Review, February 8, 2021 Notice of Proceeding at 1.

describes the data that must appear on EDC bills. Because PURA is presently exercising its authority to evaluate potential changes to EDC bills in a pending docket, S.B. 991 is unnecessary.

d. S.B. No. 992, An Act Concerning Utility Company Text Message Communications.

Sections 1 and 2 of S.B. 992 require copies of written communications sent to customers to also be sent via text to those customers who have elected to provide their cell phone number and who affirmatively consented to receiving such text communications.

The federal Telephone Consumer Protection Act ("TCPA"),[15] which is implemented by the Federal Communications Commission ("FCC"), prohibits utility companies from sending non-emergency[16] text messages to customers without their consent. Utilities found to be in violation of the TCPA are subject to potential fines and penalties.[17] In 2016, the FCC stated that "utility companies may . . . send automated texts to their customers concerning matters closely related to the utility service, such as a service outage or warning about potential service interruptions due to severe weather conditions, *because their customers provided consent to receive these calls and texts when they gave their phone numbers to the utility company*".[18]

S.B. 992's qualification that such texts will only be sent to "the phone number of the most recent mobile telephone . . . provided by such customer *unless such customer requests otherwise* . . ." appears to comply with the TCPA's requirement for customers to first provide their cell phone number and consent to receiving texts from their utility company.

i. Sec. 2 of S.B. 992

Eversource **supports** Section 2 of the Bill, which requires that – whenever a written notice of termination of utility service is sent to a residential customer – the sender shall simultaneously send a text to any cell phone number provided by the affected customer as long as the customer previously consented to receive texts from their utility company. Eversource supports this change because the context in which such texts will be sent is clear and Section 2 is narrowly tailored to a communication about termination of service.

ii. Sec. 1 of S.B. 992

In contrast, Eversource **opposes** Section 1 of the Bill in its current form. Section 1 is substantially broader by requiring utilities to send a text to each customer who provides a cell phone number whenever it "sends *any*

[15] 47 U.S.C. § 227.

[16] The TCPA expressly exempts from these prohibitions calls made for "emergency purposes". The FCC has defined "emergency calls" as "calls made necessary in any situation affecting the health and safety of consumers." 47 C.F.R. §64.1200(f)(4). These emergency calls do not require prior express consent of the called party, and therefore, for example, texts can be sent to consumers concerning power outages because such texts are relevant to the health and safety of customers.

[17] See Illinois Commerce Comm'n on Its Own Motion, Docket No. 15-0512, 2017 WL 2424022, at *111 (June 1, 2017) (stating that "violations of the TCPA are subject to significant penalties. A violator may be subject to actions by state Attorneys General, or private actions, in either case seeking recovery of damages up to $500 per violation (a liquidated amount), as well as injunctions prohibiting further violations. 47 U.S.C. §227(b)(3), (g).'").

[18] In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 31 F.C.C. Rcd. 9054 at P. 18 (2016) (emphasis added).

form of written communication to a customer" and it also requires utilities to use "*best efforts* to obtain current phone numbers from each customer."[19] Section 1 is problematic for several reasons.

First, the term "best efforts" is defined by courts as requiring an amount of time and cost to be spent that is substantially above-and-beyond what is commercially reasonable. "Best efforts" means "all actions rationally calculated to achieve a . . . stated objective, *to the point of leaving no possible route to success untried*";[20] and a "provision requiring best efforts imposes extraordinary duties of assiduity: a very high standard of care, regardless of whether the required efforts might be commercially unreasonable. . . ."[21] Ordering an entity to use "best efforts" imposes a substantially higher legal duty than the typical duty to use "commercially reasonable efforts"[22] to achieve a goal. Ordering utilities to spend an uncapped amount of time and customer money under a "best efforts" standard searching for updated customer cell phone numbers is not commercially reasonable. A more equitable solution would be to require a utility to use "commercially reasonable" efforts to look for any updated cell phone numbers for customers.

Second, the Committee should evaluate with PURA, OCC and other stakeholders whether they see value in ordering a utility company to send a text whenever "*any form* of written communication" is sent to a customer. For example, utilities are required to send non-critical information such as paper bill inserts that contain graphics, charts and other communications to customers, and further discussion is warranted to determine whether a text should be sent whenever "any form" of non-critical written communications is sent to a customer. A more equitable solution would be to have PURA use its expertise to designate which specific written communications must be texted to customers.

Thank you for considering this testimony. Our engineers and technical personnel would be pleased to answer any questions you may have about this testimony.

[19] (Emphasis added.)

[20] Black's Law Dictionary, at Best Efforts (11th ed. 2019)(emphasis added.)

[21] Bryan A. Garner, Garner's Dictionary of Legal Usage 108 (3d ed. 2011)("The orthodox view is that a contractual provision requiring best efforts imposes extraordinary duties of assiduity: a very high standard of care, regardless of whether the required efforts might be commercially unreasonable. . . .")(emphasis added).

[22] See, e.g., AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. CV 2020-0310-JTL, 2020 WL 7024929, at *91 (Del. Ch. Nov. 30, 2020).

PROPOSED CLARIFYING AMENDMENTS

EXHIBIT 1

Amendment to H.B. 6442, Section 20(i), Lines 771-775[23]

Any applicant for a public utility pole attachment license made to the owner or custodian of a public utility pole shall be granted a temporary license within thirty days, or such other time period established by the authority, of submitting a complete license application and a permanent license within ninety days, or such other time period established by the authority, of submitting a complete license application, provided, however, compliance shall be excused due to any delay caused by any event of force majeure or any act or omission by a third party over whom the owner or custodian of a public utility pole has no legal control.

EXHIBIT 2

Amendment to H.B. 6442, Section 20(a), Lines 707-711 and 20(c), Lines 720-723[24]

20 (a) As used in this section: (1) "Make-ready" means the modification or replacement of a public utility pole, or of the lines or equipment on the public utility pole, to accommodate additional facilities on the pole; and (2) "One-touch make-ready" means make-ready in which the person attaching new equipment to a public utility pole performs all of the make-ready work. Notwithstanding any provision in this section to the contrary, only an electric distribution company or such company's authorized agent or contractor can perform work on electric distribution facilities and can install, reinforce or remove any pole for which such electric distribution company is the sole owner or custodian.

. . .

20(c) On or before January 31, 2022, the authority shall develop a one-touch make-ready process in an uncontested proceeding for attachments of telecommunications service and broadband Internet access service facilities on public utility poles to be implemented by the owners of such public utility poles. The authority shall initiate a contested case in accordance with the provisions of chapter 54, in which it issues a final decision no later than October 1, 2022 that establishes a methodology authorizing an owner of such public utility poles to timely recover, pursuant to cost causation principles, such owner's prudently incurred costs for the performance of all of such owner's work under section 20 of this Public Act from (A) such owner's customers though a reconciling component of electric rates as determined by the authority that is nonbypassable when switching electric suppliers, (B) each person or entity that benefits from such work, or (C) a combination of the persons and entity(ies) in subsections (A) and (B).

[23] Corresponding changes are proposed to S.B. 4, Section 3(i) Lines 250-254.

[24] Corresponding changes are proposed to S.B. 4, Sections 3(a) and 3(c).