

**Comments on the Relationship Between Connecticut's
Department of Energy and Environmental Protection and the
Public Utilities Regulatory Authority**

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I. Overview

- A. Connecticut's policymakers face a complicated, multi-part question: How does the state --
1. integrate policymaking, implementation and evaluation in the intersecting areas of energy, environment, and economic development;
 2. using the mechanisms of utility regulation and competitive markets to get the best possible performance from utilities and competitive sellers; while
 3. preserving the independence, professionalism, credibility and effectiveness of the utility regulators?
- B. In answering this question, Public Act 11-80 re-cast the relationship between the prior Department of Public Utilities Control (DPUC), now named the Public Utilities Regulatory Authority (PURA), and the newly formed Department of Energy and Environmental Protection (DEEP). Section 1(a) of Public Act 11-80 provides, in part:
- "The Public Utilities Regulatory Authority within the department [i.e., DEEP] shall be responsible for all matters of rate regulation for public utilities and regulated entities under title 16 of the general statutes and shall promote policies that will lead to just and reasonable utility rates."*
- C. In addition to placing PURA "within" DEEP, Public Act 11-80 makes several dozen decisions about the former DPUC's substantive scope, leaving some features with PURA and moving others to DEEP. Public Act 11-80, and subsequent DEEP decisions, have stimulated questions about how to create the most productive, effective relationship between DEEP and PURA. This document, requested by DEEP, seeks to identify, organize and explore those questions. **Part II** addresses the DEEP-PURA bureaucratic relationship. **Part III** discusses the DEEP-PURA substantive relationship. **Part IV** offers solutions, based on models that work in other states. In raising questions and offering solutions, I have assumed that the statute can be changed.
- D. This memorandum's questions and recommendations stem from preliminary judgments I have made based on studying the statute and meeting with several DEEP and PURA officials. I state these preliminary judgments here, so that readers can question them:

1. Public Act 11-80 admirably tries to create coherence in state policymaking by identifying every possible utility issue and placing responsibility for it somewhere. Ambiguities in both drafting and conception, however, leave multiple opportunities for overlaps and gaps in authority.
2. Those involved in Public Act 11-80, and in current efforts to implement it, have sought to distinguish four verbs -- "policymaking," "regulating utilities," "setting rates," and "implementing" -- using those perceived distinctions to allocate authority. These distinctions do not work well, however, because these four concepts all overlap: in law, in the minds of industry actors and in the activities of government decisionmakers throughout the United States. Allocating institutional responsibilities based on these concepts is not likely to succeed.
3. The motivations, desires and professionalism of the individuals I have met have been inspiring. Given this foundation, there are solutions that, if made soon at the statutory, institutional and interpersonal levels, can preserve Public Act 11-80's purposes while increasing its probability of success.
4. The result of the statutory and administrative decisions to date is that the PURA has less authority, less internal infrastructure, less independence -- and therefore, less credibility with the industry actors whose performance it must assess and compensate -- than any utility regulatory agency in the United States. I make this statement with full confidence that any objective person with utility regulatory experience will come to the same conclusion. It is not a close question.
5. Utility regulation's credibility -- the credibility that investors, large and small, depend on before investing billions in state-regulated utilities -- depends on regulation's special status and special procedures. In contested cases, utility regulators use expert witnesses, due process, cross-examination, public appearances, written opinions with full explanations, and accountability to the judicial system: professional and transparent, each reinforcing the other. Even in less formal procedures like rulemakings, high-quality regulation involves expert submissions, airing of all sides in public, and written explanations defensible in court. All these features signal the regulator's independence from influences unknown to the public. To the extent the reality, or perception, is that PURA decisions, before the fact or after the fact, can be influenced or

revised by DEEP, PURA loses the legitimacy that both ensures utility performance, and attracts the capital necessary to secure that performance.¹

II. The DEEP-PURA Bureaucratic Relationship

This analysis of the DEEP-PURA bureaucratic relationship addresses five components: (a) independence in substantive decisionmaking; (b) staffing; (c) budget-making, fund-raising and fund-spending; (d) PURA's relations with other government entities; and (e) PURA's public presence. The analysis identifies questions and decisions in each of those areas. It closes with some thoughts on the term "guided" -- the term from Section 51(e) that states the PURA-DEEP relationship in the context of the Public Act 11-80 preamble, the comprehensive energy plan and the integrated resource plan.

A. Independence in substantive decisionmaking

“Independence” here refers to PURA's authority and ability to act substantively, within statutory boundaries but otherwise based on its own judgment according to its own procedures -- without getting anyone's permission and without anyone stepping in to halt or obstruct its decisions.

1. The current statutory situation

Before Public Act 11-80, PURA was a distinct legal decisionmaking body, an independent commission. Despite the "within" language in Section 1(a), the statute does not change this independent decisionmaking status. It does remove the Chair's "department head" status, and assigns to DEEP much of PURA's prior subject matter responsibilities. But the Act does not diminish any of PURA's

¹ Two factors affect the usefulness of this document. First, it was produced under a personal services agreement that precluded a more comprehensive analysis: The budget cap was \$3000, and I aimed to complete the document within a week of the PSA's execution, to give readers maximum study time prior to a possible October legislative session. Second, I have been asked to consider taking on the PURA Chairmanship. While this memorandum is based on my nearly 30 years of utility regulation experience in almost every type of regulatory forum and proceeding, it is impossible to separate my own preferences from an objective presentation. I have given reasons for all recommendations, but readers should take this disclosure into account in assessing those recommendations.

Finally, I am not a member of the Connecticut Bar, and therefore am not licensed to give authoritative advice on Connecticut law. For any comment here on Connecticut law, readers should seek local counsel.

order-issuing powers, including but not limited to its obligation to ensure that rates are "just and reasonable." In terms of PURA's legal decisionmaking powers, the Act creates no subordinate or reporting relationship from PURA to DEEP; nor does it give DEEP any "responsibility for" PURA, with respect to PURA's legal decisionmaking powers.

- a. Is there any disagreement with this legal interpretation?
- b. If not, what actions might DEEP take to correct the misimpressions caused by press releases, official emails, press reports, organizational charts, statements and conversations that have used language like "under" (instead of "within"), "responsible for" and "reporting to" or otherwise implied or stated in some way that PURA's legal authority or practical decisionmaking power was subject to DEEP review or approval?

Even with clarity as to PURA's independent decisionmaking status, Public Act 11-80 raises many jurisdictional, organizational and budget questions regarding the roles of PURA and DEEP, many of which I address next and in Part III below.

2. Application of PURA's decisional independence to specific situations

- a. PURA decisions bind parties by declaring rights and responsibilities. These decisions take the form of orders and rules. Should DEEP have any role in these decisions? If so, where should that role be, on the spectrum from "informal input" to "power to overrule"?
- b. Should PURA decisions to initiate informal inquiries or formal proceedings, such as investigations, rulemakings, complaints, studies or informal public hearings, be subject to anyone else's approval before beginning?
- c. Once the PURA has begun any activity, whether formal or informal, that it believes is within its jurisdiction, should any non-PURA entity have the authority to require PURA to stop or pause that proceeding?
- d. Statutes aside, communication among agencies, done non-hierarchically, is always beneficial. What should be the procedure(s) when --

- (1) the DEEP Commissioner wishes to advise the PURA of his views on whether and how to handle a matter that is within PURA's jurisdiction?
- (2) the PURA wishes to advise the DEEP Commissioner on whether and how to handle a matter that is within the Commissioner's jurisdiction?

3. **Ex parte communications**

The term "within," as used in Section 1(a) of Public Act 11-80, could have multiple meanings in the context of cases before PURA. There is no ambiguity that a PURA decision can issue only upon the vote of two or three Directors. There is a question, however, as to who can and should act as a decisional advisor.

- a. In contested cases before PURA, what is the status of each of the following categories of DEEP employee, in terms of their legal ability to discuss the case with one or more PURA Directors? (a) DEEP employees in the Bureau, (b) the former DPUC employees who did not move to the DEEP Bureau, and (c) DEEP's executive team
- b. In a formal, contested PURA case, what if the PURA Chair or any Director wishes to make a DEEP employee a decisional advisor, or wishes to consult with the DEEP Commissioner (or his designee) on the case? Is this desirable? If so, what are lawful ways to make that happen?

4. **Informal communications**

- a. Assuming no obligation to seek approval, what are the options for DEEP and PURA informing each other of actions they intend to take, in advance?
 - (1) no obligation to communicate
 - (2) obligation to inform in advance
 - (3) obligation to consult
 - (4) obligation to obtain permission
- b. **Comment:** The answer for every state I know of: No regulatory commission is required to get anyone's permission to initiate or

terminate a proceeding. For every regulatory agency I know of, the utility regulatory commission has unconditional independence, legally and practically. There are variations in who notifies and discusses with whom, but I am not aware of any state where the Commissioners have to ask permission before doing any of these things.

5. Conclusion on independence in substantive decisionmaking

This Part II.A has stressed the importance of independence in substantive decisionmaking. Independence does not require insularity. Independent action does not mean surprise action or non-consultative action. Advance notice to other state officials, checking in, seeking input: these activities all are part of being effective, respected, collegial and influential with colleagues outside the agency.

But as discussed in the Overview, Wall Street's willingness to risk its billions on Connecticut's public utilities rests on the credibility of the state's utility regulators. That credibility depends, in turn, on professionalism and predictability, which depend, in turn, on independence. A perception that PURA decisions, before the fact or after the fact, can be influenced or revised by others, undermines PURA's legitimacy, not only with regulated utilities but also with the sources of capital that makes those utilities viable.

B. Staffing

1. Overview

- a. While Public Act 11-80 nowhere grants the DEEP Commissioner legal authority to influence (any more than any other official intervenor) a PURA action, the Act does make the DEEP Commissioner responsible for PURA's resources: its staffing, organization, budget and spending. The risk is that DEEP's responsibility for PURA's resources can become, indirectly and inadvertently, influence over PURA's decisions. The result can be to reduce PURA's independence: a situation that does not exist, as far as I know, for any utility regulatory agency in the United States (including places where the regulatory agency is "within" another agency).
- b. The possible paths of influence include:

- (1) denying the PURA staff positions (PURA will soon be lacking two of the most important individuals -- an Executive Director and a Director of Adjudication;
 - (2) requiring the hiring or retention of particular individuals;
 - (3) denying the PURA particular staff individuals expert in areas in which PURA wishes or needs to act; and
 - (4) moving key employees from PURA to DEEP, resulting in PURA's inability to carry out its work professionally and timely.
- c. To flesh out these concerns, I identify questions in five areas: independence on hiring or terminating staff, options for sharing staff, special legal needs, other special circumstances, and current staffing assignments.

2. Independence on hiring or terminating staff

In this context, "independence" does not mean independence from union rules, OPM budget procedures, or DAS requirements; it means the independence of PURA from any other influence or control, including that of DEEP officials.

- a. Should PURA independently determine its own staffing (subject to approved budgets, union rules and DAS procedures), in terms of recruitment procedures, mix of expertise, mix of experience, internal hierarchy and organization, promotion, succession, and termination?
- b. If not, who should make the decisions, based on what criteria and based on what input from PURA's leadership?
- c. In a "PURA within DEEP" context, are there ways to designate certain employees as ultimately subject to the PURA Chairman's oversight, so that he/she can set standards; hire, promote, nurture and terminate based on those standards; thus building internal culture and loyalty to PURA's mission?
- d. Can PURA independently hire an Executive Director to run the operation? (Public Act 11-80 eliminates the statutory Executive

Director position and makes the responsibilities the PURA Chairman's.)

- e. Can PURA independently hire a General Counsel to give legal advice on PURA decisions?

3. Options for sharing staff

- a. What are alternative procedures by which staff can go back and forth between a DEEP Bureau and PURA to work on different cases? Who would decide? Examples: Suppose PURA would like staff from Bureau --
 - (1) as witnesses in its cases,
 - (2) as decisional advisors in a formal case,
 - (3) as advisors before a case is initiated, and/or
 - (4) as a research think tank to provide ideas.
- b. What are the pros and cons of making DEEP Bureau staff available to PURA, when required or requested by the PURA Chair? Since PURA is making the major decisions on utility performance, its credibility (and the lawfulness of its decisions) depends on having adequate staff.

4. Special legal needs

- a. Does/should the PURA have guaranteed and direct access to an Attorney General employee to --
 - (1) advise on appeals of PURA decisions,
 - (2) handle appeals on PURA decisions, and
 - (3) hire outside counsel -- as selected by PURA -- to handle FERC and FCC cases?
- b. Or -- will/should decisions on the availability of AG assistance require DEEP approval first?
- c. Can PURA decide to use its own internal counsel for appeals of its decisions or is the required practice that the AG does it? If the latter is the practice, is it possible to have a designated Asst AG whom PURA can train and work culturally into PURA matters? Is

there anything about PURA being “within” DEEP that will change the present relationships between PURA and the AG’s staff?

- d. **Comment:** To carry out its independent statutory functions effectively and lawfully, PURA leadership needs a direct relationship with the AG and Assistant AGs. This unconditional access is especially necessary given the recent misconstruction of Public Act 11-80 as authorizing DEEP to send a letter to PURA stating that PURA "must halt" a proceeding that was within PURA's jurisdiction.

5. Other special circumstances

- a. PURA needs hearing officers for some of its cases. Public Act 11-80 currently makes PURA dependent on DEEP for those hearing officers. If the DEEP Commissioner does not assign hearing officer, does the statute preclude the PURA from appointing its own hearing officer -- directing a staff person to organize and hold a hearing so that the PURA commissioners can do other business rather than sit in the hearing?
- b. If there is a difference of opinion between the DEEP Commissioner and the PURA Chairman, about anything (statutory interpretation, PURA resource priorities, utility filings, FERC actions, ISO actions): To whom do the PURA lawyers owe their attorney-client loyalty? In particular, if a party appeals a PURA ruling to the state courts, is the AG’s client PURA or the DEEP Commissioner? Making the DEEP Commissioner the client undermines PURA’s independence because the aggrieved party could try to negotiate an outcome different from the decision the PURA deemed necessary under the statute.
- c. It is my understanding that occasionally the AG's office intervenes in PURA proceedings, separate from the Office of Consumer Counsel; and/or who represent the AG in FERC proceedings (separate from a PURA intervention at FERC). There are several Assistant AGs with strong experience in utility regulation. Would their skills and service be more productively (i.e., less duplicatively) used, if they joined the PURA staff?

6. Current staffing assignments

DEEP already has made many staffing decisions, shifting at least 20 PURA staff to DEEP, creating organization charts for both agencies and inserting staff names in boxes. It is my understanding that these decisions were made, by DEEP, not PURA, based on DEEP's view of what was necessary for DEEP's purposes, not based on PURA's view of what was necessary for PURA's purposes.

For both DEEP and PURA to function at the highest professional level, staffing decisions must reflect the purposes and priorities of both entities. That result is more likely if staffing and organizational decisions are made consultatively, involving as equal partners regulatory experts who can describe regulation's needs, and with the two agencies sharing a vision for the inter-agency relationship (such as one of the visions described in Part IV below). In subsection II.B.7 which follows I suggest some ways to rethink or supplement the recent staffing decisions – once decisionmakers have settled on one of the visions described in Part IV.

7. Some possible solutions on staffing

- a. To ensure adequate staffing for both the DEEP and the PURA functions, there are several solutions. One is to budget, either through assessments or in other ways, for a substantial staff in both agencies. The other is for PURA to make more use of the statute allowing it to spend up to 250K per proceeding, fronted by the utility whose actions are at issue in that proceeding. It will be difficult to make this work in the water space, and possibly difficult also in the retail competition space. We need more thought on this one.
- b. Even if DEEP retains a substantial energy policy staff, as in the Vermont Department of Public Service model (discussed in Part IV below), it is desirable to have some rotation of that staff and PURA staff. Each group can learn much about decisionmaking process, record-building, policy coordination and negotiation, by seeing the process from both sides.
- c. These staffing options can be connected to several of the institutional options discussed in Part IV below.

C. Budget-making, fund-raising and fund-spending

1. Who should design and defend the PURA budget, in preparation for the OPM process? Options include:
 - a. PURA has independent power to do this.
 - b. PURA advises DEEP but DEEP makes the final decisions on what PURA budget gets submitted to the OPM process.
2. Once a total budget is established, what spending authority should the PURA Chairman have:
 - a. full spending authority (meaning, he directs, it happens if it's consistent with the budget)
 - b. spending authority only subject to approval by someone in DEEP
 - c. some mix
3. Who should determine the total fees collected from the utilities through the assessment process of Section 16-49?
4. Who should allocate those fees among OCC, Bureau (assuming it remains outside the PURA Directors' control)?
5. There is a provision authorizing PURA to hire consultants for a proceeding, up to 250K per proceeding. Who should decide when to hire consultants, what to pay them, what contract terms, when to pay?
6. Same question concerning expenditure of system benefit charge funds.
7. Internal spending: e.g., Travel by PURA directors and staff to professional conferences, out-of-state mtgs, or within the state: PURA decision or DEEP decision?
8. Who advises the PURA Chairman on the spending mechanics? (My understanding is there used to be a fiscal officer within PURA, answerable to the PURA Chairman and the PURA Executive Director. That fiscal person has now become a DEEP employee and been moved to Hartford.)
9. Suggested principle: There should not be a competition for resources between PURA and DEEP, with DEEP being the decisionmaker. Competition would affect PURA's decisionmaking independence.

D. PURA's relations with other government entities and stakeholders

1. In all states, it is common for the utility regulatory agency to have informal relationships with other government bodies, such as the Governor and his staff, legislature,, other state govt agencies, utilities, other stakeholders, and federal bodies (e.g., Congressional committees, CT Congressional delegation), Northeast Market entities, other state commissions, FERC, FCC, White House).
2. Should PURA have these independent relationships or should they be subject to DEEP review and monitoring, reporting, advance approval?
3. **Comment:** It would not be consistent with independent decisionmaking or independent voice, or with the need of others to work with PURA, for PURA to have its external relationships subject to DEEP review. No state regulatory commission has such a constraint.

E. PURA's public presence

Questions similar to the immediately preceding category exist for PURA's public presence. Here are examples in three categories.

1. Press

- a. Should PURA be free, subject to its Chairman's directives, to mold its public persona through visits with reporters, editorial boards, op-ed pieces?
- b. There should/should not be a non-PURA press person discussing PURA business without PURA authorization. These seems to be imprecision in the way DEEP communicates with the press about PURA. It is better if PURA does its own public relations.

2. **Web site:** The current web site now shows PURA as subsidiary to the DEEP. Is this necessary, and consistent with PURA's independence? Is there any reason for any DEEP approval of the PURA web site?

Comment: It is one thing to be "within"; another thing to be subsidiary. The FERC web site does not say anything about the Department of Energy, even though the FERC is within the DOE, for budget purposes. PURA's web site should be under PURA's control. PURA is an independent agency within the DEEP.

3. **Stationery and business cards:** Similar questions.

F. **What does "guided" mean?**

Public Act 11-80 Sec. 51(e) states that PURA is to be "guided" by the DEEP-approved energy plan, the DEEP-approved IRP and the goals in Sec. 1(a). The term "guided" (unless there is a Connecticut case law definition) does not produce a clear legal result. Clarity is necessary to avoid public disagreements, disappointments, gaps and overlaps. Here are three ways to think about the term. There may be other ways.

1. ***The plans are binding on PURA:*** PURA is obligated to do what the CEP and IRP say, approve any utility proposal consistent with the plan, and conduct any rulemaking necessary to carry out the plan. Put another way, there is a conclusive presumption that whatever the plan says is consistent with PURA's statutes, until the plan changes; and that there is an affirmative obligation in PURA to carry out the plans' goals. Failure to conduct these activities would subject PURA to a lawsuit by those aggrieved by the inaction. Question: Does this mean that PURA could not also take actions not called for by the plans, provided those actions do not undermine the plans?
2. ***The plans are advisory to PURA:*** The plans do not bind PURA. PURA is legally free to act as if the plans had not existed. At the same time, the PURA can rely on the plans as legal support for its actions, by stating in its orders that the plans represent legal policy, authorized by the Legislature.
3. ***The plans create a rebuttable presumption that PURA has an obligation to follow their directives:*** There is a rebuttable presumption that the plans constitute directives that PURA act consistently with them, by taking affirmative actions and eschewing actions that undermine the plans. PURA may avoid a plan requirement only if it finds that the plan's requirement no longer serves Connecticut's public interest. Such a finding would have to be based on a change in facts, not a difference of opinion over policy.

III. The DEEP-PURA Substantive Relationship

A. Substance Affected by 11-80: For Each Subject Area, Who Does What?

1. Although Public Act 11-80 obligates DEEP to carry out many measures, it does not explicitly diminish the DPUC's pre-11-80 rulemaking authority. This fact, along with the absence of DEEP statutory control over PURA, means that PURA could make policy in all its pre-existing issues spaces.
2. To avoid unnecessary overlap, it is better to establish, by statute or memorandum of understanding, common expectations for who does what. That way, each body can pursue its obligations actively, and be accountable for the outcomes; and the two bodies can work their way into a mutually supportive and mutually reinforcing relationship. The status quo will not easily produce that result.
3. The analysis necessary to solve the "Who does what?" challenge has three dimensions. Those dimensions are (a) policy area, (b) necessary actions within each area and (c) possible actors. We can expand on these dimensions as follows:

a. 10 Policy Areas

This list is an effort to identify all issue areas addressed by Chapter 16 and Public Act 11-80, to the extent those two bodies of law interact. This list does not include Chapter 16 PURA matters not addressed by Public Act 11-80, on the premise that DEEP would have no involvement. See Part III.C below for a brief discussion of the non-11-80 matters.

- (1) Statewide Energy Plan and Utilities' Integrated Resource Plans
- (2) Energy Conservation and Energy Efficiency
- (3) Generation Procurement
- (4) Wholesale Markets
- (5) Retail Competition (Including Standard Offer Service)
- (6) Retail Ratemaking and Other Retail Issues
- (7) Renewables and Distributed Generation
- (8) Reliability
- (9) Water
- (10) Miscellaneous

b. 9 Necessary Actions Within Each Policy Area

- (1) ***Establish general policy goals.*** Because of their generality, these goals guide rather than bind. "Guide" means they set priorities for action, establish the direction and purposes for action, and signal an intolerance for inaction.
- (2) ***Translate general policy goals into binding expectations for specific utilities.*** These expectations bind because they take the form of statutes, rules, orders or tariffs.
- (3) ***Determine whether a utility-initiated proposal is consistent with statewide goals.*** State-set goals and expectations usually require some utility action to start a procedural ball rolling, such as filing time-of-use rates, or proposing an infrastructure improvement plan. Not all utility proposals hit the mark on the first try; some initial proposals lack elements necessary for success. This step is about determining whether a utility proposal is consistent with statewide goals; it is distinct from reviewing or approving utility actions to carry out a proposal.
- (4) ***Determine whether a utility action satisfies the binding expectations, including consistency with its proposal.*** Once a utility makes a proposal and wins approval, it carries out the proposal. This is the action at issue here.
- (5) ***Direct a specific utility to make a proposal, take a specific action or refrain from taking a specific action.*** A utility might fail to propose or act where a proposal or action is required. Here someone must direct the utility to propose or act.
- (6) ***Establish utility compensation generally.*** This step refers to general ratemaking necessary to give the utility its legal entitlement to rates that provide a reasonable opportunity to cover its expenses and earn a reasonable return.
- (7) ***Establish utility compensation for particular actions.*** This step refers to situations where the statute, or good policy within the decisionmaker's discretion, requires compensation outside of a general rate case. Examples of

such compensation methods are riders, surcharges and passthrough clauses.

- (8) ***Evaluate policy success.*** No policy works exactly as planned or hoped. It is necessary always to build in continuous critique.
- (9) ***Revise policy elements.*** This refers to revising policy in response to the evaluation. Revising can take the form of modifying utility proposals, rules, orders, tariffs or statutes.

While this list displays nine distinct actions, sometimes the distinctions can blur, with the actor doing two things at once. Still, it is useful to consider which activities should go where, since clarity creates accountability.

c. 4 Possible Actors

- (1) In the context of regulating utility performance -- setting goals and expectations, taking action to meet those goals and expectations, awarding compensation (or penalties) and evaluating the results, there are four possible actors: ***Legislature, Utilities and competitive retail providers, DEEP, and PURA.***
- (2) There are of course many other participants: OCC, intervenors, fuel suppliers, ISO, FERC, other market participants, courts, all of whom can affect results. But the four entities listed are the ones having the legal ability to make or carry out policy.

4. The task is to allocate, for each 10 policy areas, the responsibility for the 9 necessary actions among the 4 actors. Before doing the exercise, we should consider criteria for making the allocation decisions. Here are 12 possibilities:

- a. speed decisionmaking
- b. build expertise
- c. ensure independence from non-factual factors
- d. inject long term thinking
- e. create consistency across government agencies
- f. ensure credible enforcement
- g. eliminate redundancy

- h. avoid suppression of dissenting views
 - i. create predictability and clarity for affected commercial entities
 - j. avoid forum-shopping
 - k. ensure transparency and accountability to the public
 - l. retain confidence of financial markets
5. One can then imagine filling out a matrix, where the columns are the 10 policies, the rows are the 9 actions, and one fills the cells in with one or more of the 4 actors, using the 12 criteria to decide. It sounds, and is, involved, but following a process like this makes decisionmaking clearer and more rigorous.
6. It goes (almost) without saying that the current statutes, combining pre-Public Act 11-80 and Public Act 11-80, have filled in every cell in the matrix. Using a systematic process to revisit those decisions can eliminate ambiguities, overlaps, and gaps. Caution: One can spend months debating toward the perfect answer, or searching for the 100 percent consensus. What is more important is getting clear answers, ones that aim eliminate gear-grinding, procedural awkwardness, inter-agency tension, duplication and forum-shopping. With those improvements, the actors can proceed comfortably, creating experience that allows us to assess and revise.
7. To avoid making a long memo overlong, I did not to restate each detail of the inquiry each time. Nor did I list here every possible provision in Public Act 11-80 that raises a question of how to allocate responsibilities. Instead, in each area I offered some relevant thoughts that would help us toward solutions.

B. Energy Plan and Integrated Resource Plan

1. Section 51 of Public Act 11-80 requires DEEP to produce, triennially, a "Comprehensive Energy Plan" ("CEP"). Section 89 of Public Act 11-80, amending 16a-3a, requires DEEP to produce an "integrated resource plan" ("IRP"). Both the CEP and the IRP will affect entities whose performance or actions are subject to PURA's Title 16 jurisdiction. Those entities include electric utilities, gas utilities, licensed competitive retail electricity suppliers, and possibly water companies, among other entities.
2. Section 51(e) states PURA's Title 16 decisions "shall be guided" by the plan; and those decisions "shall be based on the evidence in the record of each proceeding." (Here, "proceeding" refers, I assume, to the IRP)

proceeding and the energy plan proceeding, conducted per the statute by DEEP, not PURA.)

3. Here are questions and considerations that arise from this allocation of authority:

- a. **Formation of the IRP**

- (1) Under Section 89 of Public Act 11-80, the responsibility for creating a plan has moved from the utilities to DEEP. What are the pros and cons? Will utilities lay off those officials with technical expertise in planning? Is it realistic for DEEP personnel to match the expertise of utility personnel?

Comment: In every state I know of, the obligation to propose a plan is with the utility. The utility's legal obligation to serve requires it to retain the expertise to forecast demand and conceive of ways to meet that demand, including interacting with their peers around the country to advance the state of the art. While state commissions commonly create a plan framework and criteria -- the "table of contents" to a plan -- the utility's internal experts and consultants bring the main expertise into the room. And -- because the utility regulator (PURA's counterparts around the country) holds the keys to cost recovery, it can ensure that the quality of work on the plan meets the utility industry's highest standards. There is risk of losing this rigor if the responsibility for building a plan moves from the utility to an agency, and if the process for creating the plan is one in which the utility plays only a "consulting" role to DEEP, as new Section 16a-3a(a) provides.

- (2) Given its primary task of ensuring that utility performance and market performance serves the state's needs, what roles must/may/should PURA play in the formation of the energy plan and the IRP? The statute does not address this question. It appears, from a distance, that DEEP's present IRP work does not address the question either.

- (3) What are the possible/necessary/desirable linkages between the CEP and the IRP? For example: Must every element in the IRP have roots in the CEP, or can the IRP address matters not addressed in the CEP?

b. Legal effects of the plans

- (1) How detailed and prescriptive must/may/should the IRP be? Are details left to the PURA process or are they worked out in the DEEP process? For example:
 - (a) If the IRP requires the utilities to take particular actions, is the PURA able to decide that these actions should be taken not by the utilities but by some other entity, such as an independent provider of energy efficiency services or an independent provider of smart grid services or components?
 - (b) If the IRP establishes a quantity of power or type of power for the utility to procure, can the utility on petition to PURA modify that amount, or to self-build rather than procure -- or must the utility return to DEEP to seek a revision?
- (2) Will the energy plan and IRP declare rights and responsibilities, i.e., bind private entities to take certain actions or preclude them from taking actions? Do these entities, if aggrieved, have a path to judicial review? Is a path necessary to protect their constitutional rights, and any rights under pre-Act 11-80 statutes?
- (3) Given whatever legal effect the plans will have, exactly what procedures must/may/should DEEP follow to adopt the energy plan and the IRP? Are there advantages to using the PURA's array of procedures to carry out the hearing process and issue a decision, guided by parameters provided by DEEP?
- (4) Precisely what types of decisions is PURA required to make, and is precluded from making, once there is an approved IRP?

- (5) **Comment:** The difficulty in answering these questions, including the difficulty of predicting the effects of various answers, flows directly from the fact that two separate legal bodies, DEEP and PURA, are involved in addressing the performance of entities -- utilities -- who will have to take actions, or forego actions, under the plan.

c. Changes in facts underlying the IRP

- (1) What if PURA believes, determines or is concerned that changes in facts mean that an approved IRP no longer serves its statutory purpose?
- (2) For example, actions taken under an approved plan might cause costs that the PURA believes are not "just and reasonable" for ratemaking purposes. In this situation, is PURA bound to continue to approve utility actions consistent with that plan? Or, can PURA require the utility to change the plan, or can PURA change the plan (pursuant to its just and reasonable ratemaking authority)? Or is PURA required to approve cost recovery of all actions consistent with the plan?
- (3) Put another way, does DEEP's approval of an IRP supersede PURA's independent judgment of what is just and reasonable?
- (4) **Comment:** In all other states with which I am familiar, this problem of potential inconsistency does not exist because the agency approving the plan is the same agency that (a) approves actions taken under the plan and (b) rules on the related cost recovery. This is a good example of the awkwardness arising from two separate agencies addressing the utility's performance.
- (5) Who has the burden of modifying the plan if its prescriptions turn out to be unwise?
- (a) If a utility knows that facts have changed since the plan's issuance, such that carrying out a plan mandate is bad for Connecticut, is the utility off the hook provided it complies with the flawed plan

provision, or does the utility have a duty to seek change in the plan?

- (b) How about PURA: Is it obligated to allow recovery of any utility cost incurred to carry out the plan where elements of the plan itself have become unwise? What should happen in such a situation?
- (c) **Comment:** In all other states I know, changes to the plan occur at the regulatory agency because that is where the plan was approved.

d. Evidentiary issues

- (1) Can PURA base its decisions on evidence other than evidence in the record of each DEEP proceeding?"
- (2) Is PURA free to evaluate, in its proceedings, the credibility and weight of evidence from the energy plan and IRP proceedings, especially if that evidence was not gathered under contested case procedures such as cross examination, responsive testimony from adversaries? "Evidence" in regulatory proceedings is whatever any person offers as testimony. Not all that testimony, all the time, achieves professional, expert standards. Does the fact that PURA is "guided" by the CEP and the IRP mean that PURA must relax or abandon its usual standards of evidentiary quality?
- (3) In a PURA proceeding that is "guided" by DEEP's energy plan or IRP: If PURA needs to question someone from DEEP who participated in the creation of either document, can PURA require that person to present expert testimony or otherwise assist PURA's decisionmaking process? Or would PURA be able only to request, which request the Commissioner could deny? What then if PURA needs more evidence to make a judicially sustainable decision?

e. Implementation

- (1) New Section 16a-3a requires DEEP to "approve" the IRP; PURA "shall oversee implementation" per New Section 16a-3b. Exactly what does overseeing implementation involve?

- (2) What roles must/may/should PURA play as private entities whose actions are affected by the plan seek approvals from PURA for actions proposed to carry out the plan?
- (3) What roles must/may/should PURA play to enforce the plans if private entities fail to take required actions?
- (4) When PURA sets rates, may it disallow costs the utility argues were necessary to carry out a plan, where PURA sees a lower-cost way to achieve the same result? (A "no" answer would dramatically change ratemaking, which is rooted in the principle that a utility is entitled to recovery reflecting only the lowest cost means of achieving the required result.)
- (5) What are the relationships between the procurement plan and the IRP? (This question links to the question of how specific should be/must be the IRP.)

C. Energy Conservation and Energy Efficiency

1. Section 133 on energy efficiency

Section 133 requires PURA to have a proceeding on pros and cons of the electric utility earning a rate of return on its long-term investments in energy efficiency.

- a. No coordination problem here. Whatever is the energy efficiency goal or obligation, the PURA proceeding in profit can be fashioned to serve those goals.
- b. How will this PURA proceeding best take into account goals in the Comprehensive Energy Plan and the IRP? For example, if energy efficiency goals are mandates (either flowing from a statutory RPS-like standard or a binding IRP, and regardless of whether the "approver" of the IRP is DEEP or PURA), it is then PURA's function to ensure those goals are met cost-effectively. A question comparable to the IRP question then arises: What if the amount of energy efficiency called for by the plan turns out not to be a cost-effective amount?

- c. One clarification on this statutory provision: Under present ratemaking, a utility already can make a profit on an energy efficiency expenditure, if it's a capital investment. That's normal ratemaking. Is the question whether they can "earn a return" on current expenses, as distinct from a capital expenditure? In ratemaking, a utility does not earn a return on current expenses; it merely recovers those expenses. The question perhaps is whether they can make a profit running an energy efficiency business that involves expenses only, and therefore is not eligible for profit under traditional ratemaking.

2. Sec. 139: on-the-bill financing of energy efficiency

Section 139 directs DEEP to analyze on-the-bill financing of energy efficiency. A study of this subject's applicability to CT (there have been studies generally) will be very useful. Looking ahead:

- a. What are the pros and cons of PURA, as distinct from DEEP, creating a proceeding on this subject, where expert witnesses can address utility specifics?
- b. Alternatively Should DEEP delegate this to PURA, given the subject's overlap with PURA-jurisdictional billing?
- c. Once the analysis is complete, is the next step to order a result? Will the final decision on billing be a PURA decision?
- d. Would on the bill financing be an obligation only of the distribution utility or of licensed retail suppliers also? If the latter, who would be responsible for ensuring compliance (given that the statute seems to give both PURA and DEEP authority in the competitive retail supplier space).

3. 16-245m(c) and (d): Energy Conservation Management Board

These provisions substitute DEEP for PURA in energy conservation management board, which will approve conservation plans. What are the possible relative roles of DEEP and PURA in this space?

- a. To the extent the utility ends up with obligations, would PURA still carry out its traditional role -- still obligatory under Title 16 -- for ensuring that the utility carries out the obligations, and gets reasonable compensation?

- b. Is PURA free to decide that conservation goals should be carried not by the utility but by third parties?

4. Sections 97-98: Long-term supply and demand projection filings

These provisions require the utilities to file these projections with DEEP. DEEP commissioner can issue RFP for energy efficiency or generation.

- a. What are the pros/cons of having RFP designed and run by DEEP as compared to PURA or the utilities?
- b. Would the RFP winner have a contract with DEEP or with the utility?
- c. One approach in other states: the utility regulatory body hires a third party firm to design the procurement process. Utility then implements; consultant confirms that utility implemented properly; then utility is entitled to all purchase costs without further prudence review. This is how procurement and compensation are done in Ohio and, I believe, in other states where there is a procurement process managed by someone other than the utility.
- d. There is a question about the wisdom of taking the utility out of this area. If the utility is the purchaser of the generation or of the energy efficiency, it has to play some role in the contracting process, and should have the internal expertise to contribute. It is risky to let utility skills atrophy when those skills might become necessary in the future.
- e. *Comment:* This provision is one of several relating to procurement, where procurement responsibility seems to be spread around among the utilities, DEEP, PURA, and a statutory procurement manager (seemingly responsible and/or employed by to both bodies in different and possibly overlapping situations). See the next comment.

D. Generation Procurement

- 1. There are multiple provisions on procurement, with various roles, some seeming to overlap, on identifying purchase needs, designing RFPs and purchase contracts, carrying out RFPs and selecting winners, and

compensating the utility through cost recovery in retail rates. The statute seems to spread various responsibilities to various places without clear purpose.

2. The roles and relationships seem to vary depending on type or purpose of the generation. There is procurement for reliability, economics, RPS, behind-the-meter generation, procurement of energy efficiency needs, maybe more. Further, there are multiple players who could take on multiple roles: DEEP, PURA, procurement manager, outside consultant, the utilities themselves.
3. We might consider creating a matrix that identifies all the possible combinations of purposes and players; then assess the pros and cons of each, according to criteria such as administrative efficiency, cost-effectiveness, expertise in the short- and long-term. The key is also to ensure that all the decisions fit together as a whole.

E. Wholesale Markets

1. The Northeastern wholesale markets' effects on Connecticut require someone to do the following:
 - a. Analyze those market factors that affect Connecticut.
 - b. Determine positions to take in NE discussions (ISO, NEPOOL, Governors, utilities in all the states, other commissions).
 - c. Determine positions to take at FERC.
 - d. Build alliances with other states for multi-state solutions.
 - e. Auction emissions rights.
 - f. Ensure that utilities and licensed retail sellers act in a way consistent with competitive markets.
 - g. Design intra-CT solutions that reduce its vulnerability to NE market rules and market imperfections.
2. The question is how to allocate these responsibilities among PURA, DEEP, CT's utilities, Governor's office, others.

3. Related: Section 96's assignment to DEEP of responsibility for reviewing merchant transmission lines. Merchant transmission lines raise questions of consistency with the state energy plan and the utilities integrated resource plan, siting, cost recovery, market competitiveness, redundancy and intersection between FERC and state jurisdiction. For each of these concerns, who, as between DEEP and PURA, can best address them?
4. **Comment:** In every New England state and, as far as I know, every U.S. state, that agency is the utility regulatory agency. (Vermont involves both the utility regulatory agency and the Dept. of Public Service. Other states might involve entities along with the utility regulatory agency.) Whoever takes on this role, it remains PURA's responsibility to ensure that the jurisdictional utilities behave prudently in the market, taking responsible positions and making responsible purchase and investment decisions.

F. Retail Competition and Retail Service

1. In General

- a. Various sections of Public Act 11-80 put both PURA and DEEP into the retail competitive market space. There is both overlap and unclear handoffs. Here is a partial list:
 - (1) Section 91, amending 16-244c, directs PURA to hold a proceeding on cost of billing services utilities provide to competitive retail sellers, as well as standard service costs and last resort costs.
 - (2) Section 104, amending 16-245(g)(12) requires competitive suppliers to offer time-of-use rates and file them with PURA. It is not clear what PURA's powers and responsibilities are with respect to these filed rates. For example, can PURA create guidelines that the rates have to follow?
 - (3) Section 105 requires DEEP to require EDCs to notify customers of availability of time-of-use meters.
 - (4) Section 112 requires DEEP to have a proceeding on discounted low-income rates.
 - (5) Section 113, amending 16-245o, requires DEEP to approve forms by which customers can opt out of having their

names released to suppliers. rules on marketing by suppliers and aggregators. Section 113 also has many other provisions relating to the retail relationship. It is not always clear whether DEEP or PURA is responsible for ensuring compliance with these provisions.

- (6) Section 114 requires suppliers to provide direct billing and specifies bill information.
- (7) Section 120 has a no-shutoffs rule for households with infants with health issues
- (8) Sec. 91, amending 16-244c(i) (among other things) requires DEEP to issue regs re defaulting supplier.
- (9) 16-245y(c) references DEEP reporting on the applicants it licensed, but PURA does the licensing under 16-245.
- (10) Sec. 91, amending 16-244c(k)(1) says "department" issues retail competitors' licenses. I assume it means PURA.
- (11) PURA is to establish methods by which customers learn of alternative offers.
- (12) Section 113 has DEEP and PURA involved in rules on switching and solicitations, and enforcement of these rules.
- (13) Section 114, amending Sec. 16-245d(a), has Department doing regs on billing format, but 114(a)(2) refers to billing format developed by the "authority."
- (14) Privacy: Public Act 11-80 113(a): DEEP does a form for customer privacy concerns.

b. **Comment:** There does not seem to be a clear line predictably dividing responsibility in the retail competition and retail relationship space. The retail customer experience is central to the success of retail competition. If the experience is bad, customers will stay with the standard offer, and competition will fail. It makes sense to put all responsibility for the health of retail competition -- including assessing the rules to date -- in one place.

2. **Standard Offer:** There is a similar need for clarity and consistency in the standard offer provisions. For example:
- a. Sec. 16-244c(a)(1): PURA sets the rate for the standard offer.
 - b. But 16-244c(a)(2) says DEEP sets the standard offer.
 - c. Then 16-244c(c)(2) has PURA regularly setting the price.
 - d. 16-244c(d)(1) has DEEP directing disco to offer standard service options.
 - e. 16-244c(2)(A) has PURA developing those options in a contested case. Here the disco is doing the bidding, whereas elsewhere the PURA was.
 - f. Section 93: Requires the "Protection Bureau of Public Utility Control" upon request of an electric distribution company, to initiate a docket regarding the buy-down of such company's current standard service contract to reduce customer bills. This "Bureau" appears nowhere else in Public Act 11-80.

G. Retail ratemaking

As with the retail marketing subject, Public Act 11-80 involves both DEEP and PURA in retail ratemaking issues. Here are some examples. It seems tidier to put all ratemaking issues in one place.

1. Sec. 90, amending 16-244c(c) DEEP reporting to legislature on ways to lower electric rates.
2. 16-19f(b): PURA obligated to look at rate design
3. 16-19e(b): PURA to look at new pricing principles
4. Section 105: DEEP must require each disco to tell customers re TOU meters
5. Public Act 11-80 sec 91, amending 16-244c(1): uncollectible amounts are determined by DEEP, for purposes of EDC billing customers of electric suppliers.
6. Low income issues receive special mention:

- a. Public Act 11-80 Section 112 requires DEEP to do a proceeding on discounted low income rates. But much of the rest of Section 112 refer to the "department" clearly meaning PURA because of references to existing DPUC programs. For example: Section 112(d) refers to "normal rate-making procedures of the department" which necessarily must mean to PURA, since DEEP does not have "normal rate-making procedures."
- b. Public Act 11-80 Section 120: Prohibits termination/refusal to reinstate certain utility services for customers with a child up to 24 months old who lives in the household, has been admitted to the hospital, and has received discharge papers on which the physician has indicated that utility service is needed for the child's health and well-being.
- c. Public Act 11-80 Sec. 48. Section 16a-41b: PURA Chair is member of the Low Income Energy Advisory Board

H. Renewables and Distributed Generation

- 1. The statutes assign various roles to the two agencies, some contracts subject to PURA approval and some subject to DEEP approval. Here is a partial list of the activities and obligations:
 - a. PURA certifies clean energy sources: 16-1(a)(45)
 - b. Section 107 requires EDCs to solicit long-term contracts for sub-1 MW, customer-side Class I projects. PURA to review.
 - c. Section 108: 6 year procurement plans filed w and approved by PURA.
 - d. Section 110 requires PURA approval of 15-yr wholesale contracts sub-2 MW on customer side.
 - e. Section 121 requires LDCs to provide "virtual net metering" to muni customers. DEEP to do proceeding for admin processes and specs.
 - f. Section 127 has DEEP approving 1-5 MW projects in Class I. DEEP-approved costs are the limit of cost recovery (to be authorized, presumably, by PURA).

- g. Section 129: DEEP to analyze ways to reduce RPS compliance costs to ratepayers, and to assess feasibility of increasing the RPS.
 - h. Section 139: DEEP, in consultation with the public service companies, to analyze on-bill financing of renewable efficiency investments.
2. It is not clear who has the obligation to assess the effectiveness of the entire renewable and DG effort. Neither agency is barred from doing so.
 3. The most important tasks are:
 - a. Determining the public's tolerance for rate increases associated with renewable energy; only with knowledge of the tolerable "budget" can we make rational decisions about how much to spend, on what.
 - b. Determining the state's preferred mix of various power sources
 - c. Designing the market processes by which that mix is procured
 - d. Monitoring the markets to ensure they work as hoped
 - e. Certifying energy sources
 - f. Promoting the state's interest so as to attract renewable energy producers
 - g. Ensuring that regional market mechanisms are consistent with the state's renewable energy goals
 - h. Overseeing the success of the entire effort and reporting the evaluations to the Legislature

I. Reliability

1. Public Act 11-80 Sec. 97, amending 16-50r: Utilities' reliability reports go to Siting Council and to DEEP.
2. Public Act 11-80 Sec. 98: DEEP can issue RFPs to address reliability concerns.

3. Comments

- a. It is not clear what DEEP does with these reports. The treatment of reliability costs and cost recovery mechanisms has been the regulatory agency's responsibility, in Connecticut and elsewhere. Because of this responsibility, the regulatory agency also must monitor the relationship between demand and resources. Doing so enables it to order infrastructure expansion, and/or respond appropriately to utility requests for infrastructure cost recovery.
- b. There are some states where a separate entity is responsible for making independent forecasts, to ensure an alternative to the utility's forecast. Indiana, for example, has an arrangement with Purdue University to make forecasts.
- c. DEEP can use this information as input to the Comprehensive Energy Plan and the IRP, and to make recommendations to PURA re infrastructure cost recovery mechanisms.

J. Water

1. Public Act 11-80 Sec. 5, amending Section 4-67e: Eliminates of DPUC from coordination study re redundancy and inconsistency, including review of reg authority over water cos
2. Public Act 11-80 Sec. 76, amending Section 25-33o: PURA Chair sits on Water Planning Council, along with the DEEP.
3. Other than these changes, it appears that PURA's water regulatory authority is unchanged by Public Act 11-80. This means that the traditional approach, where the regulatory agency is fully responsible for the performance of water utilities, is unchanged. Given that fact, it makes sense to return PURA as a participant in any inter-agency coordination of water regulatory activities. The Water Planning Council can be the forum for this coordination, notwithstanding the Section 4-67e elimination of DPUC from the past redundancy study.

K. Miscellaneous

1. **Management audits:** Public Act 11-80 Sec. 23 modifying 16-8: 16-8(b)(1): PURA can carry out management audits "within available appropriations." But 16-8(b)(2) has the audits funded by the utilities. Is

this a conflict or does the appropriations process limit PURA's access to utility funding?

2. ***Penalties:*** Who imposes -- PURA or DEEP? Public Act 11-80 Sec. 24, modifying 16-8a(d) (authority issues does penalties); Public Act 11-80 Section 113(i): "Department" does penalties -- but the internal reference is to DPUC traditional authority.
3. ***Who is issuing video service provider certificates?*** 16-1(a) (47) (added by Public Act 11-80 Section 13) refers to PURA as the certifier. 16-49(1) (added by 11-80 Sec. 30) refers to DEEP issuing franchise.

L. Substantive issues outside Public Act 11-80

Although Public Act 11-80 places PURA "within" DEEP, Public Act 11-80's substantive provisions do not include the full range of PURA's pre-11-80 authority, such as authority over performance in water, telephone, gas, and cable industries.

1. Statutorily, does DEEP have any more say in this aspect of PURA's business than did the DEP prior to Public Act 11-80?
2. Is it permissible, desirable, and lawful for DEEP officials to contact PURA staff or officials on any matters in these areas? Under what circumstances?

IV. Solutions

As stated in Part I, the goal is to:

1. integrate policymaking, implementation and evaluation in the intersecting areas of energy, environment, and economic development;
2. using the mechanisms of utility regulation and competitive markets to get the best possible performance from utilities and competitive sellers; while
3. preserving the independence, professionalism, credibility and effectiveness of the utility regulators.

This Part IV presents options for solving this equation. First it states principles to guide the options.

A. Key Principles

1. For any particular subject, a utility should be accountable for its performance to only one agency. Having to please two masters encourages forum-shopping, subtracts government accountability and adds work for everyone.
2. To describe utility regulation as "setting-rates" is inaccurately narrow. The purpose of utility regulation is performance: (a) performance of utilities whose services are subject to regulation, and (b) performance of markets that provide unregulated services. Utility regulators regulate performance by establishing the performance standards, determining if the utility has met those standards, then providing compensation appropriate for performance. Competitive markets, when properly structured and monitored, have the same purpose.
3. Because setting rates necessarily includes setting standards, there is the potential for PURA-DEEP overlap for any subject area that Public Act 11-80 assigns to DEEP. Overlap creates the two-masters problem. But removing the rate-setting agency from responsibility for setting performance expectations makes the rate-setting agency passive, the wrong result for an era demanding new thinking and new policies. It is possible to avoid passivity and overlap by doing what other states do: Place the substantive authority to set standards and enforce them through compensation (i.e., ratemaking) with the utility regulator. That is the system in every other state.

4. At the same time, there remains strong reason for some governmental entity to do the deep thinking, integration and policy initiation (as distinct from resolution) necessary to anticipate challenges and influence priorities. That work can come through a cooperative relationship between PURA and DEEP, as discussed in the Options section next.

B. Options

1. Options in the abstract

- a. If we (a) distinguish "policy initiatives" from "decisions" -- where "policy initiatives" (relating to utilities) are actions to initiate inquiry but do not bind a utility, whereas "decisions" bind a utility, there are at least 6 possible DEEP-PURA relationships:

- (1) All policy initiatives come from DEEP, all decisions come from PURA.

No state follows this model.

- (2) All policy initiatives come from DEEP, all decisions come from DEEP.

No state follows this model. All states have utility regulators with large powers (except Connecticut, whose PURA has fewer powers than any other utility regulatory agency in the United States -- if we assume a space occupied by DEEP cannot be occupied by PURA).

- (3) Some policy initiatives come from DEEP, other policy initiatives come from PURA; some decisions come from DEEP, other decisions come from PURA.

No state follows this model. No state precludes its regulatory agency from initiating policy proceedings relating to utilities. Further, decisions relating to utility services come from the utility regulator, not from another agency.

- (4) Some policy initiatives must come from DEEP, some of the same policy initiatives can come from PURA; other policy initiatives must come or can come from PURA; some

policy initiatives must come from PURA, some of the same policy initiatives can come from DEEP; some decisions must come from DEEP, some of the same decisions (or decisions affecting the DEEP decisions) must or can come from PURA.

(a) *This is the Connecticut model, after Public Act 11-80. No other state has these types of overlapping authorities. Vermont is a possible exception, but because all decisionmaking is within the utility regulatory agency the overlaps of policy initiation are infrequent and respectful.*

(b) This model does not include the statement "some policy initiatives canNOT come from PURA," because the Connecticut statutes do not take any policymaking initiatives away from PURA (if we assume that ratemaking authority includes the authority to set expectations that lead to rate recovery.) That Public Act 11-80 allocates some policy initiatives to DEEP does not mean the statutes bar PURA from taking those same initiatives. Unless corrected, that overlap will be a continuing source of awkwardness.

(5) All policy initiatives can come from PURA, all decisions come from PURA.

This is the model for almost every state commission in the country. Note that a Governor, state Dept. of Energy, consumer advocate and any stakeholder can always petition for a policy initiative, but this does not happen often (with the exception of Vermont -- see below).

(6) Any policy initiative can come from DEEP, any policy initiative can come from PURA; all decisions come from PURA.

This is the Vermont model, with one major exception: The Vermont Dept of Public Service has some decisionmaking authority in the area of procurement. This model works well because the

VDPS, as the arm of the Governor, is empowered to articulate policy vision and goals, can bring initiatives to the Public Service Board, can fashion priorities, reach proposed settlements with the utilities, and has a substantial staff to do so; but at the same time, all players recognize that decisional authority is in one place only -- the Public Service Board. There is no forum shopping (except occasional trips to the Legislature, which is unavoidable).

- b. *Here is another lens to look through:* Where the statute explicitly assigns a policy area to DEEP, and the utility's performance in that area will affect its rates, here are possibilities for the DEEP-PURA relationship:
- (1) ***PURA alone:*** PURA establishes expectations through a rulemaking proceeding; then decides methods of compensation; then assesses performance; then awards compensation.
 - (2) ***DEEP stimulates PURA:*** DEEP asks PURA to do all the things listed above, specifying the issues needing attention but not specifying answers. PURA is (a) obligated, or (b) not obligated, to have the proceeding.
 - (3) ***DEEP proposes to PURA:*** Same as above except that DEEP makes a proposal at each stage of the PURA proceeding.
 - (4) ***DEEP constrains PURA:*** Same as above except that PURA must accept the DEEP proposals under certain circumstances, such as (a) if all intervenors agree, or (b) if the utility and DEEP agree, (c) if consistent with the statute. (This option is not permitted by the statute. DEEP has no authority to constrain PURA.)
 - (5) ***DEEP supersedes PURA:*** DEEP does everything except cost recovery; PURA is required to allow all prudent costs associated with a DEEP-ordered action. [Whether DEEP can do this is unclear in the statute; I am aware of no other state that does constrains or supersedes the utility regulator]

- c. Part IV.B.2 below presents variations on these six models that are consistent with the principles stated in Part IV.A. These options are not all mutually exclusive.

2. Practical options

a. *Put PURA within DEEP for "administrative purposes only:"*

This is necessary (but not sufficient) for ensuring PURA's independence, in terms of law, practical reality and public perception. Absent APO status, no PURA decision about personnel, budget, public presentation, rulemakings or orders will be free of doubt about its independence. Attempting to draw a line between contested cases and other activities, or between "policymaking" and "implementation," making the relationship independent in some contexts but not independent in others, does not work. A regulatory agency's legal and practical influence extends beyond contested case orders; it includes all those actions that create a culture of excellence in policymaking and implementation.

b. *Return the DEEP's "Bureau" staff back to PURA, where it had been historically and where it is in most other states.*

The PURA Chairman then can mold a culture that achieves the statutory goals. This approach is with PURA independence. To have staff be available to PURA only when DEEP officials think it useful is not consistent with independence. In this latter instance, utility officials would find it productive to lobby DEEP to influence that resource allocation, when instead they should be building a performance-oriented relationship with PURA.

- (1) The idea of a specialized staff responsible for thinking ahead – a strategic arm -- makes sense. State utility commissions often have such a group. Keeping that unit within PURA enables cross-fertilization and staff rotations, allowing the PURA Chair can build a staff culture that over time attracts excellence.
- (2) Regardless of where it is – within PURA (as in most states) or within DEEP (as in Vermont), the Bureau can have the authority to present ideas. When placed within DEEP, it is even possible to state in law that if the Bureau makes a specific proposal, PURA is obligated to investigate and

decide. In this way the DEEP's priorities guide the PURA's priorities.

- c. ***Clarify that all DPUC initiation authority and decisional authority, as it existed pre-Public Act 11-80, continues to reside in PURA; and vest in a DEEP-sited Bureau the right to initiate cases before PURA and have them heard by PURA.*** That is roughly how it works in Vermont. The Vermont Department of Public Service (which is not independent; it works for the Governor) has a relatively large staff -- larger than the Board (the Board is the utility regulator and is independent of the Governor) -- and often initiates proceedings before the Board.
- (1) DEEP can file a request that PURA hold a proceeding on any matter that could affect utility performance. PURA would be obligated to initiate that proceeding. DEEP thus can set an agenda, generate questions, identify challenges and solutions, ensure that no good ideas are left behind. DEEP can present witnesses, even negotiate with utilities and other market actors, then propose settlements to PURA. This approach allows DEEP to influence PURA's priorities and frame issues. But it avoids the problem of subjecting the utility to duplicative masters.
 - (2) PURA would also be able to request that DEEP present a case on a particular subject.
 - (3) Given these various ways to initiate a case, it would be good for PURA and DEEP leadership to meet regularly to discuss priorities; thereby avoiding any awkwardness that could arise if each entity tries to beat the other to the punch in initiating policy development. There is plenty of work and plenty of credit to share. If we get the work done, and get it done well, the credit will be there.

V. Conclusion

- A. Public Act 11-80 placed PURA "within" DEEP, transferred much of PURA's historic activities to DEEP, and left unclear how PURA should exercise its remaining authority. Those statutory decisions, and some of DEEP's actions under the statute, have caused legal uncertainty, procedural uncertainty, and staffing uncertainty. Connecticut's PURA now has less policy scope, and less clarity about the policy scope it does have, than any utility regulatory agency in the United States.
- B. Nor is the public perception positive. The statute does not place PURA "under" DEEP in any respect; there is no PURA decision or action that DEEP can legally compel, overrule or supersede. Yet there is a perception, supported by conversation inside and outside state government, and by DEEP-produced organizational charts, DEEP press statements, and DEEP internal memoranda, echoed by press reports, that PURA is indeed "under" DEEP, that PURA "reports to" DEEP, that DEEP senior employees "have responsibility for" PURA, and that DEEP can "make PURA do things."
- C. There is a need, therefore, not only to rethink the institutional relationships but also to restate them publicly, to correct the current impressions of PURA as subordinate. The changed message must be more than verbal; it must be believed before it is stated. Absent clarity on these issues, Connecticut will have difficulty attracting and retaining top-notch Commissioners and staff, and creating a succession plan made critical by the foreseeable retirements of PURA staff veterans.
- D. Critical to the success of our energy, environmental and economic development policies is the performance of our utilities. We are expecting them to modernize infrastructure, diversify power sources, protect against terrorism, educate and empower consumers to make efficient decisions, find new ways to reduce emissions, all while lowering costs. Strong utility performance requires a strong utility regulator, to ensure that performance occurs and to compensate the performers appropriately. We should be focusing not on weakening PURA but on strengthening it – a goal in no way inconsistent with building a strong role for DEEP.
- E. **Recommended next steps:** Here is a process that I believe would help bring these issues toward resolution:
 - 1. Clarify for all decisionmakers that, as explained in Part IV, there are four possible models for the DEEP-PURA relationship:

- a. Keep the status quo created since passage of Public Act 11-80.
 - b. Move the Bureau back into PURA, and restore PURA's "departmental" status and its policymaking roles in all or most of the matters that Public Act 11-80 transfers to DEEP. PURA can remain within DEEP "for administrative purposes only."
 - c. Leave the Bureau in DEEP, but revise the DEEP-PURA relationship to be like the Department of Public Service-Public Service Board relationship in Vermont (where all regulatory decisions are made by the Board but where DPS has ability to initiate proceedings at the Board), thereby restoring to PURA the substantive scope it had prior to Public Act 11-80.
 - d. Variations on these three concepts.
2. Once these options are clear to all, create a small group of top DEEP officials, Governor's staff, PURA officials and knowledgeable lawyers, and legislative leaders, to assess the options. With discussion, a consensus could develop on which of those options meets the goal of institutional relationships that can pursue a unified energy-environment-economic development policy while rebuilding PURA into the professional, credible, respected agency it must be for this effort to succeed.
 3. If that consensus does develop, work through each and every allocation of authority that is presently in Public Act 11-80, assigning responsibility carefully per the three-dimensional matrix discussion in Part III.A. ***As labor-intensive as it seems, I believe there is no substitute for working through the matrix, after a consensus has developed on the general PURA-DEEP relationship.***
 4. Then, redraft Public Act 11-80 accordingly (also fixing the many drafting glitches, such as those in procurement and licensing that seem to have both entities doing the same things).
 5. This seems like a lot of work after the General Assembly already sweated through Public Act 11-80. Further one might see a risk to public credibility by admitting the need for revisions. But a year from now no one will care much about the current bumps; what they will care about is how much more smoothly all is running.