

FILED

JUN 21 2018

HARTFORD J.D.

DOCKET NO. X07-HHD-CV-15-6060160-S

SHANE C. ROBERTS

v.

VERDE ENERGYUSA, INC.

SUPERIOR COURT

COMPLEX LITIGATION DOCKET

AT HARTFORD

JUNE 21, 2018

**MEMORANDUM OF DECISION GRANTING
MOTION FOR PARTIAL SUMMARY JUDGMENT**

PURA approval of a consumer contract doesn't bar consumers from suing over misleading language.

By virtue of General Statutes § 16-245 (c), and (d) (6), the Public Utility Regulatory Authority (PURA) periodically reviews and approves the standard service contracts of electrical suppliers. General Statutes § 16-245o (f) (2) requires these standard service contracts to include "a clear and conspicuous statement explaining the rates that such customer will be paying, including the circumstances under which the rates may change" General Statutes § 16-245o (j), in turn, provides that "[a]ny violation of this section [including § 16-245o (f) (2)] shall be deemed an unfair or deceptive trade practice under [CUTPA]."

In General Statutes § 42-110c (a) (1), CUTPA itself says that nothing in CUTPA shall apply to "[t]ransactions or actions otherwise permitted under law as

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administered by any regulatory board or officer acting under statutory authority of the state” But this general provision must yield to the specific application of CUTPA in the governing PURA statutes. CUTPA therefore applies to violations of PURA’s requirement of clear and conspicuous statements in service contracts.

Neither party in this case seems to dispute this. The real question is whether consumers may sue under CUTPA or whether the act grants that privilege exclusively to PURA. The act itself is silent. It doesn’t even say PURA *may* sue under CUTPA. It could easily have addressed PURA’s right and made it exclusive, but the statute merely makes violating the licensing rules a violation of CUTPA. This leaves us confronted by the Supreme Court’s 2004 holding in *Commission on Human Rights & Opportunities v. Board of Education* that expresses real reluctance to make remedial grants agency exclusive in light of “an obvious legislative ability to use appropriate *explicit* language to confer exclusive jurisdiction”¹ So CUTPA applies here, but nothing in the PURA statute says only PURA may apply it.

And why should it say who can sue? CUTPA itself says who may apply it. CUTPA authorizes the commissioner of consumer protection to act against CUTPA violators. And General Statutes § 42-110g says that along with the commissioner “[a]ny person who suffers an ascertainable loss [from a CUTPA violation] . . . may bring an action . . .to recover actual damages. A court may . . .provide such equitable

¹ 270 Conn. 665, 721-22.

relief as it deems necessary and proper.” By making PURA violations CUTPA violations, the PURA statutes authorize suits by consumers against electric service providers who violate PURA’s clear and conspicuous statement rules.

Verde, the electrical supplier defendant here, urges a different interpretation. It says that consumers should be allowed to sue where the approved language isn’t followed, but not otherwise. This might make sense if PURA had the exclusive right to sue under CUTPA, but the statute doesn’t say this. With no way to read this restriction into the text without rewriting it, Verde’s distinction must be rejected. The class representative Jurich and the class certified in this case may sue Verde under CUTPA.

But the class wants more. It wants the court to hold that Verde’s service terms violated CUTPA as a matter of law. The class has claimed that there is only one reasonable interpretation of Verde’s service contract. It says consumers would be charged “at a monthly variable generation rate” that would vary monthly with “market conditions.” The class says this can only mean that it would charge consumers the wholesale rates Verde obtains in the market because “generation rate” means the wholesale rate. The class then makes the uncontested point that Verde wasn’t charging class members the wholesale rate it pays for power and from this it avers that it must win.

But no such leap is warranted. There is no reason for the court to find that the service agreement unambiguously means wholesale rate when it says “generation

rate.” Perhaps this is a term of art. Perhaps the class’s interpretation of it is reasonable. But this is far from unambiguous. In fact, nothing the class offers provides any basis to believe its interpretation of “generation rate” is correct. It merely assumes this. And this is a bad assumption. Verde doesn’t make electricity. It buys it. If it sold the electricity for the same price it bought it Verde would be offering power to consumers without even making a profit. This appears wrong on its face. So far from plainly meaning what the class says it plainly doesn’t mean what the class says. The court holds that the service contract doesn’t plainly mean Verde customers would be charged Verde’s wholesale rate.

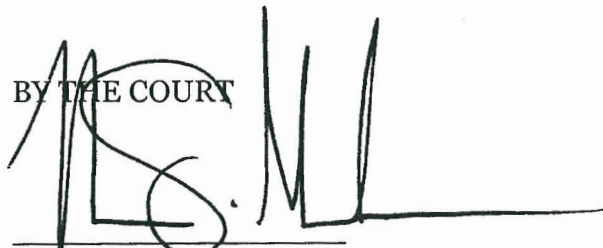
So what does it mean? The court can’t tell. A generation rate could mean the rate at which market forces permit Verde to “generate”—like generating a bill—a source and supply of power for consumer. The court finds the language ambiguous.

In an ordinary contract this would allow for extrinsic evidence to interpret the language. But here this at least means Verde has violated the PURA rule that requires “a clear and conspicuous statement explaining the rates that such customer will be paying, including the circumstances under which the rates may change” The statute then tells us what this means. Violating the PURA rules is an “unfair or deceptive trade practice” under CUTPA. The complaint alleges the disclosure violates the PURA rules and therefore CUTPA. The only thing that has changed is that the language is wrong because it is unclear instead of the language being both clear and

wrong. So, as a matter of law, Verde has committed an unfair or deceptive trade practice under CUTPA. On this question alone partial summary judgment is granted.

Nothing else is decided. The class says the court should declare the contract void and the class entitled to the difference between a reasonable charge and the actual charge. It describes this as a *quantum meruit* remedy. But the class has not pled such a claim nor has the court certified one. There court is also in no position to decide in response to this motion that CUTPA empowers the court to declare the service agreement void. There is also no evidence at this point that the CUTPA violation caused the class any ascertainable loss not to mention a loss discernible and common enough to permit class relief. There is the possibility of injunctive relief, but the class hasn't proposed any.

More is required. The court will schedule a conference to determine the next steps in the case.

BY THE COURT

Moukawsher, J.

