

PETITION FOR DECLARATORY JUDGMENT TO DETERMINE THE LEGALITY OF
DOCKET NO. 19-01-52RE01, DOCKET NO. 21-07-29, AND THE POLICY WORKING
GROUP ACTIONS TAKEN PURSUANT TO THEM

SUBMITTED TO:

PUBLIC UTILITIES REGULATORY AUTHORITY, STATE OF CONNECTICUT

APRIL 23, 2024

BY

LOCAL 1298, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

I. STATEMENT OF APPLICATION

Executive Summary

The Communications Workers of America Local 1298 (“CWA Local 1298”), organized under the laws of Connecticut, hereby petitions for a declaratory judgment that

1. Decision and Order, Public Utilities Regulatory Authority (“PURA”), “PURA Investigation of Developments in the Third-Party Pole Attachment Process – Make-Ready,” Docket No. 19-01-52RE01 (May 11, 2022) (“One-Touch-Make-Ready-Decision” or “OTMR Decision”);¹
2. Decision and Order, PURA, “Single Visit Transfer Process for Double Poles,” Docket No. 21-07-29 (December 21, 2022) (“Single Visit Transfer Work Decision” or “SVT Decision”);² and
3. Policy Working Group actions taken pursuant to them,

are in excess of statutory authority, preempted by the National Labor Relations Act (“NLRA”), and arbitrary and capricious under General Statutes § 4-183(j)(6). The OTMR Decision, SVT Decision, and Policy Working Group actions together mandate that Frontier and other communications companies in Connecticut use third-party non-union contractors for bargaining unit work, without notice to or negotiation with CWA Local 1298. These decisions and actions—collectively referred to here as the “Third-Party Contractor Mandate”—unlawfully interfere with longstanding provisions of CWA Local 1298’s collective bargaining agreement with Southern New England Telecommunications (d/b/a Frontier Communications of Connecticut) (“Frontier”), exceed PURA’s statutory authority under state law, and violate federal law.

¹ A copy is attached as Exhibit 6 to the Declaration of David E. Weidlich dated April 23, 2024 (“Weidlich Decl.”).

² A copy is attached as Exhibit 9 to the Weidlich Decl.

CWA Local 1298 represents approximately 1,400 Frontier telecommunications workers across Connecticut. Its members are front line workers in Connecticut's efforts to stay connected. They have worked through the COVID-19 pandemic and natural disasters to protect the state's telecommunications grid and replace its aging infrastructure. CWA Local 1298 workers ensure that every Connecticut resident can stay connected to family, secure high-speed internet for school and work, and have access to critical information in times of need.

CWA Local 1298 has worked tirelessly since its establishment to represent the interests of Connecticut's telecommunications workers and to ensure their dignity and safety on the job. The heart of CWA Local 1298's ability to represent its workers is its right to collectively bargain. In addition to negotiating over wages, worker safety, and other terms and conditions of employment, CWA Local 1298 has bargained to limit the use of non-union contractors to perform work traditionally done by union members. Through a hard-fought negotiation process, CWA Local 1298 and Frontier have long agreed that Frontier shall make "every effort, consistent with the needs of the business, to use bargaining unit employees rather than outside contractors, to perform bargaining unit telecommunications work to be of extended duration." Weidlich Decl., Ex. 2 at 54 (CWA Collective Bargaining Agreement or "CBA"). Further, CWA Local 1298 and Frontier have agreed that when bargaining unit work must be contracted out, Frontier shall provide "prior notice of the decision to contract out such work . . . in those cases in which it is anticipated that the contracting out is not of an occasional nature." *Id.*

This long-observed notification process has ensured that CWA Local 1298 and Frontier could negotiate the impact of Frontier's use of non-union contractors and has provided a forum for CWA Local 1298 to secure meaningful concessions from Frontier. Such concessions include providing overtime to impacted bargaining unit members. Weidlich Decl. ¶ 19. The notification process required by the collective bargaining agreement is also critical to CWA Local 1298's ability to monitor adherence to the collective bargaining agreement's layoff and recall procedures. These procedures require that Frontier terminate any contract labor prior to laying off any bargaining unit members and that Frontier utilize any laid-off bargaining unit members prior to rehiring any contract labor. *Id.*, Ex. 2 at 15-17 (CBA). For decades, this communication process has preserved labor peace. PURA's adoption of the Third-Party Contractor Mandate has drastically undermined CWA Local 1298's collective bargaining agreement with Frontier by rendering this notification and negotiation process futile.

PURA adopted the One-Touch-Make-Ready ("OTMR") process³ in May 2022 and directed pole owners such as Frontier to abide by its requirements and timelines or face a civil penalty. Weidlich Decl., Ex. 6 at 17. Make-ready work typically consists of pole shifting, transferring, and the removal of double poles.⁴ To effectuate this framework, PURA established a Policy Working Group to "identify and address ongoing policy matters and more encompassing

³ One-Touch-Make-Ready is a process by which utility poles are made ready for new attachments, especially in broadband and telecommunications. The purpose of the OTMR process is that one team, instead of multiple teams, does all necessary make-ready work on a telecommunications pole. Weidlich Decl., Ex. 6 at 6.

⁴ The term "double pole" refers to a damaged utility pole temporarily supported by a second pole.

disputes.” *Id.* at 56. The OTMR Decision tasked the Policy Working Group with “review[ing] . . . third-party contractor availability and retention,” and developing recommendations to implement the program. *Id.* at 58-59.

The Policy Working Group recommended that PURA undertake a pilot program applying the OTMR process to address double poles in twelve municipalities. Weidlich Decl., Ex. 7 at 2 (“Policy Working Group Report”). Specifically, the Policy Working Group recommended that all double pole removal and simple transfers⁵ under the pilot program be performed by a single “mutually agreed upon contractor” selected by the Policy Working Group. *Id.* In the SVT Decision, PURA adopted the Policy Working Group’s recommendation. *Id.*, Ex. 9 at 10-11, 20 (“Order 4”). PURA mandated that a single “mutually agreed-upon contractor,” selected by the Policy Working Group, perform “all simple transfers within the communications gain⁶ on all double poles,” in designated municipalities during specified time periods—commonly called “freezes”—during which no other telecommunications work can take place absent an emergency or customer complaint. *Id.*, Ex. 9 at 11-12, 14, 20 (“Order 4”). Pole owner compliance with the SVT Decision is enforceable by civil penalty of up to \$10,000 per violation. *Id.* at 18 n.16; see also General Statutes § 16-41(a).

Since PURA’s adoption of the SVT Pilot Program, the Policy Working Group has approved only two contractors, both of which are non-union. Weidlich Decl. ¶ 28. As a result, non-union contractors, hired outside the processes in CWA Local 1298’s collective bargaining agreement with Frontier, have obtained exclusive rights to SVT work in twelve municipalities. PURA has thus subjected Frontier to an effective Third-Party Contractor Mandate, in which PURA requires Frontier to utilize non-union contract labor for work traditionally performed by CWA Local 1298 members anywhere the SVT Pilot Program has been implemented. This Mandate interferes with the collective bargaining agreement.

The law is clear: PURA does not have the authority to interfere in CWA Local 1298’s collective bargaining agreement or intrude into the collective bargaining process. CWA Local 1298 thus seeks a declaratory judgment, pursuant to General Statutes § 4-176(a), that the OTMR Decision, the SVT Decision, and the Policy Working Group actions thereunder, have exceeded PURA’s statutory authority as defined by General Statutes § 16-42, are preempted by the NLRA, and are arbitrary and capricious under General Statutes § 4-183(j)(6).

⁵ “Simple” transfers refer to transfers that can be performed without reasonable expectation of a service outage or facility damage, and that do not require any splicing of existing communication attachments or relocation of an existing wireless attachments. Weidlich Decl., Ex. 6, Appendix A at 1. The term does not apply to transferred attachments that are located above the space dedicated to communications attachments or to the replacement of the pole itself. CWA Local 1298 has consistently advised PURA that even attachment work classified as “simple” is complicated, requires specialized knowledge, expertise, and experience, and can cause damage and danger to workers and the public if performed improperly. See, e.g. Weidlich Decl., Ex. 20 at 4-5.

⁶ The “communications gain” refers to the section of a utility pole reserved for communications attachment. It is typically located below the “electric gain,” the section of a pole reserved for electric power line facilities. See *PURA Investigation into the Tree Trimming Pracs. of Connecticut’s Util. Companies*, No. 12-01-10, 2014 WL 3830656, at *23 (June 25, 2014).

Background

For over twenty years, CWA Local 1298 members, or contractors covered by provisions of the collective bargaining agreement, performed make-ready work on all of Frontier's utility poles. Weidlich Decl. ¶ 4. This was core work to both linemen⁷ and engineers.⁸ These jobs sustained tens of thousands of workers and their families across Connecticut. *Id.* ¶ 2.

Specifically, in past emergencies when damaged poles needed to be removed, Frontier deployed bargaining unit members twenty-four hours a day, seven days a week to remove the damaged pole and set a new one. Weidlich Decl. ¶ 11. The power company and other companies with attachments on the pole would also dispatch their teams, who would shift their respective attachments and wires on the pole to the newly placed pole that same visit. *Id.* Lastly, CWA Local 1298 members would complete the job by shifting Frontier facilities and equipment to the new pole. *Id.* All this work would generally take place within one visit. *Id.* For night work, CWA Local 1298 members would typically receive overtime and paid sleep time. *Id.* The bargaining unit was responsible for all Frontier facilities and equipment on the pole. *Id.*

CWA Local 1298's collective bargaining agreement with Frontier reflected the importance of this work to the union by establishing a system that allowed workers and management to negotiate the conditions under which this work would be contracted out. In a letter dated December 17, 2000, and added to the collective bargaining agreement as part of a supplemental agreement, Frontier's then vice-president for labor relations assured the union that "the company will make every effort . . . to use bargaining unit employees, rather than outside contractors, to perform bargaining unit telecommunications work expected to be of extended duration." Weidlich Decl., Ex. 2 at 54. To make good on that promise, the letter establishes that Frontier will give CWA Local 1298 "prior notice of the decision to contract out such work," including "information regarding the purpose, scope, and expected duration of the work," as well as the "reasons for the decision [to contract out]." *Id.* The letter further reflects an agreement that the union "will be given a full opportunity to discuss their views and review the impact the decision may have on their members," and that Frontier will "update the union on the progress of the work and any circumstances that might require modification to the original plans," as well as a "semiannual report outlining the number of contract people currently employed" in bargaining unit work. *Id.* Finally, Frontier agreed to submit disagreements that arise in this process to mediation. *Id.*

Frontier and CWA Local 1298 diligently followed the provisions of this agreement whenever Frontier had to contract out traditional bargaining unit work, including make-ready work. Weidlich Decl. ¶ 18. Before PURA's Third-Party Contractor Mandate, when Frontier wished to contract out bargaining unit work expected to be of extended duration, Frontier would notify the union of the purpose, scope, and expected duration of the contract work. *Id.* ¶ 19.

⁷ "Linemen," who are members of CWA Local 1298's bargaining unit, are referred to in the collective bargaining agreement as "sales and service technicians" and "outside plant techs." Weidlich Decl. ¶ 2 n.1.

⁸ "Engineers," who are members of CWA Local 1298's bargaining unit, are referred to in the collective bargaining agreement as "telecommunications specialists-ONE" and "outside network designers." Weidlich Decl. ¶ 2 n.2.

Frontier and CWA Local 1298 would then have a formal meeting to discuss and negotiate the terms of this contracting. *Id.*

Additionally, throughout the year, Frontier and CWA Local 1298 Vice Presidents hold meetings in which they discuss updates or changes to Frontier's use of contractors. Weidlich Decl. ¶ 20. CWA Local 1298 often submits a Request for Information following such meetings to obtain contracting information in writing. *Id.* Responses to Requests for Information allow CWA Local 1298 to pursue mediation or arbitration if it chooses, and to enforce provisions of the collective bargaining agreement, such as its layoff and recall procedures. *Id.*

Negotiations under this process often led to agreements to provide overtime to impacted bargaining unit members Weidlich Decl. ¶ 19. These steps lessened the impact of cheap competition on bargaining unit members and helped ensure quality jobs across the board. *Id.*; see also *id.*, Exs. 4 and 5 (agreements to provide overtime to impacted employees following notification of contracting and negotiation with CWA Local 1298). Now, PURA's Third-Party Contractor Mandate has rendered these provisions inoperable with respect to make-ready and SVT work. *Id.* ¶ 39.

Over the last two decades, reductions in quality union workforce and disinvestments in maintenance have led to a crisis in Connecticut's utility pole infrastructure. Tens of thousands of utility poles must be reattached to be made ready for new broadband and telecommunications attachments. Weidlich Decl. ¶ 22. Additionally, tens of thousands of unmaintained utility poles have fallen into disrepair or are supported by a second pole and left in that condition for years—a dangerous situation given that double poles are meant only as a temporary fix.⁹ *Id.* Frontier owns over 800,000 poles in Connecticut, thousands of which need make-ready work. *Id.*, Ex. 6 at 15. Employees of Frontier, either members of CWA Local 1298 or workers employed under the terms of their collective bargaining agreement, have performed make-ready work and removed double poles in areas where Frontier has been active for decades. *Id.* ¶ 10. This work constituted thousands of hours of work by our bargaining members. *Id.* ¶ 49.

PURA's recent actions have disrupted the longstanding process between CWA Local 1298 and Frontier regarding the use of contractors to perform bargaining unit work. To address the statewide backlog of make-ready work, PURA established an OTMR process for telecommunications pole attachment on May 11, 2022. See generally, Weidlich Decl., Ex. 6. The OTMR process, based on a Federal Communications Commission rule issued in summer 2018, requires utility pole owners and attachers to perform make-ready work that prepares poles for broadband and telecommunications infrastructure. See generally 47 C.F.R. § 1411. The OTMR

⁹ Double poles are meant to facilitate the transition of attachments from a damaged utility pole to a new, undamaged one. But often workers transfer only some of the attachments completely to the new pole, and the damaged pole remains standing for years. The damaged pole, already weakened, may collapse, causing damage to nearby properties, pedestrians, or attachments. See, e.g., Angela Carella, Co-owned Utility Poles Leave a Patchwork of Unsafe and Precarious Conditions, *CT Examiner* (Aug. 11, 2022), <https://ctexaminer.com/2022/08/11/co-owned-utility-poles-leave-a-patchwork-of-unsafe-and-precarious-conditions/>.

process purports to make pole attachments more efficient by having one work team, rather than several teams, perform all make-ready work in a single visit. Under the OTMR process, PURA requires pole owners to meet strict timelines and establishes an additional process by which pole owners hire third-party contractors from a pre-approved list to perform necessary make-ready work. Weidlich Decl., Ex. 6, at 17, 64 (“Order 1”); see also *id.* at Appendix B §(C). Pole owners and attachers are subject to penalties of up to \$10,000 per violation if they do not meet these timelines. Weidlich Decl., Ex. 9 at 18 n.16; see also General Statutes § 16-41(a).

In the OTMR Decision, PURA also created a Policy Working Group to develop and recommend specific policies and actions to PURA. Weidlich Decl., Ex. 6 at 66 (“Order 22”). PURA directed the Policy Working Group to establish a dispute resolution process and a means for pole owners and attachers to preapprove third-party contractors to perform the work. *Id.* (“Orders 23-24”). The Policy Working Group then recommended that PURA establish a Single Visit Transfer (“SVT”) Pilot Program (“SVT Pilot”) that applies the OTMR process to double poles. The Pilot Program implements the OTMR process in several municipalities and is subject to expansion should it prove successful. *Id.*, Ex. 9 at 11.

On December 21, 2022, PURA adopted the Policy Working Group’s SVT Pilot proposal almost wholesale in the SVT Decision, formally establishing the Third-Party Contractor Mandate. In relevant part, the SVT Pilot adopts the same preapproved contractor list that PURA required from pole owners and attachers in the OTMR Decision. *Id.*, Ex. 9 at 14.

Under the Third-Party Contractor Mandate, the Policy Working Group has exclusively assigned OTMR and SVT work to two third-party contractors not covered by the provisions of the collective bargaining agreement: Rocky Mountain Fiber and, as of December 2023, Phoenix Communications. Weidlich Decl. ¶ 28. The Policy Working Group has ordered the implementation of the SVT Pilot Program through “freezes” in New Britain, Winchester, Waterbury, Branford, Easton, East Haven, Hamden, Bridgeport, Fairfield, and Milford. *Id.* ¶ 31; see also *id.*, Ex. 11-18 (“Freeze Notices”). During these “freezes,” the Policy Working Group orders that their selected contractor, either Rocky Mountain Fiber or Phoenix Communications, perform *all* simple transfer make-ready work within the town. *Id.* ¶ 30; see also *id.*, Ex. 11-18. Attachers are prohibited from performing any transfer make-ready work in the town during the freeze, “unless authorized by the [Single Pole Attacher] to address emergency situations or customer complaints.” *Id.* Absent the Third-Party Contractor Mandate, this work would be done by bargaining unit members, or by contractors secured pursuant to CWA Local 1298’s collective bargaining agreement provisions. *Id.* ¶ 35.

PURA has indicated that it is considering expanding the Single Visit Transfer process beyond these “freezes” to “all Make-Ready work” in the future. Weidlich Decl. ¶ 33; *id.*, Ex. 19 at 5 (February 15, 2024 Policy Working Group Meeting Minutes). This expansion would further interfere with CWA Local 1298’s and Frontier’s decades-long agreement regarding the contracting out of work traditionally performed by the bargaining unit.

Since the implementation of the Third-Party Contractor Mandate, under the direction of PURA, Frontier has been required to utilize either Rocky Mountain Fiber or Phoenix Communications for SVT work but has not notified CWA Local 1298 as is required by the collective bargaining agreement. Weidlich Decl. ¶ 36. Rather, CWA Local 1298 has had to make requests for contractor information from Frontier on June 12, 2023, and January 11, 2024. *Id.* ¶ 39. In its response, Frontier did not include pertinent information regarding its use of Rocky Mountain Fiber for SVT Pilot Program work as the collective bargaining agreement demands. *Id.* In addition, CWA Local 1298 has received reports that Rocky Mountain Fiber has conducted work other than simple transfers and double pole removal during “freezes,” further encroaching on CWA Local 1298’s traditional work and collective bargaining agreement procedures. *Id.* ¶ 37.

II. DISCUSSION

PURA’s Third-Party Contractor Mandate is unlawful for three reasons. It (1) exceeds PURA’s statutory authority as defined by General Statutes § 16-42 by interfering with contracts between public service companies and their employees; (2) is preempted by federal labor law; and (3) is arbitrary and capricious under General Statutes § 4-183(j)(6).

A. PURA’s Third-Party Contractor Mandate exceeds its statutory authority as defined by General Statutes § 16-42

PURA is created and empowered by Title 16 of the Connecticut General Statutes. See General Statutes § 16-2(a). PURA purported to act pursuant to its statutory authority in enacting the Third-Party Contractor Mandate through the OTMR Process and the SVT Pilot Program. Weidlich Decl., Ex. 9 at 6 (citing, *inter alia*, General Statutes §§ 16-11, 16-18, 16-19e(a), 16-243, and 16-247h); Weidlich Decl., Ex. 6 at 3 (citing General Statutes § 4-181a and 16-9).

But PURA’s statutory authority is explicitly cabined: PURA lacks statutory authority to take an action that would “interfere in any manner with contracts between public service companies and their employees.” General Statutes § 16-42. Because the Third-Party Contractor Mandate interferes with CWA Local 1298’s collective bargaining agreement, it is *ultra vires* under General Statutes § 4-183(j)(2).

The restriction imposed by § 16-42 is broad. First, the provision explicitly affirms that “nothing” in Title 16, PURA’s enabling statute, “shall be construed to authorize the Public Utilities Regulatory Authority to *interfere in any manner* with contracts between public service companies and their employees.” *Id.* (emphasis added). The statute does not define “interfere,” nor has counsel found case law or legislative history elaborating on the meaning of this term. Nevertheless, a dictionary definition provides that “interference” means “obstructing normal operations or intervening or meddling in the affairs of others.” Black’s Law Dictionary (11th ed. 2019).

Under the ordinary meaning of “interfere,” § 16-42 makes clear that PURA lacks authority to take actions that meddle with or intervene in subjects of collective bargaining. Furthermore, the plain text provides that PURA may not interfere “*in any manner*” with contractual obligations. General Statutes § 16-42 (emphasis added). This language provides strong protection for contracts, including against indirect as well as direct interference. See *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) (interpreting the phrase “participate in any manner” in 42 U.S.C. § 2000e-3(a) as “expansive and seemingly contain[ing] no limitations”). Thus, PURA must respect existing contractual obligations between public service companies like Frontier and their employees, like those in CWA Local 1298’s collective bargaining agreement. Action taken by PURA that interferes in any manner with the collective bargaining agreement is *ultra vires* and unlawful.

In the OTMR and SVT Decisions, PURA set out to address both the slow pace of make-ready work and the state’s backlog of double poles. Weidlich Decl., Ex. 6 at 2-3. PURA, however, chose an approach that exceeded its statutory authority. The OTMR Decision establishes a process by which public utility companies, including Frontier, may perform make-ready work on utility poles. *Id.*, Ex. 6, at Appendix B. The process described in the OTMR Decision assumes that utility companies will use contract labor. *Id.* at Appendix B § C. The later SVT Decision then adopted the Policy Working Group recommendations and implemented the OTMR Decision by *mandating* that utility companies use contract labor for all work under the SVT Pilot Program. *Id.*, Ex. 9 at 14. This Mandate has taken away the ability for public utilities companies, including Frontier, to use their own employees for SVT Pilot Program work. Instead, companies like Frontier are now obligated by PURA to use third-party non-union contractors for *all* simple transfer make-ready work in towns where the Pilot Program has been implemented.

The result of the Third-Party Contractor Mandate is that contract labor is the *only* option for pole owners and attachers.¹⁰ The only contractor approved by the Policy Working Group to perform SVT work for the first year of the pilot program was Rocky Mountain Fiber, a contractor not covered by the collective bargaining agreement. As of December 2023, the Policy Working Group added a second non-union contractor: Phoenix Communications. Weidlich Decl. ¶ 28. This Mandate completely excludes Frontier employees covered by the collective bargaining agreement from performing the make-ready work and interferes with the collective bargaining agreement’s process for using third-party contractors.

Furthermore, PURA’s practice of authorizing freezes in service of the OTMR process unlawfully interferes with the collective bargaining agreement. PURA directed the Policy Working Group to implement the SVT Pilot Program in twelve municipalities. Weidlich Decl., Ex. 9 at 14. The SVT Pilot Program requires all pole owners and attachers in those twelve municipalities to use one of two contractors: Rocky Mountain Fiber or Phoenix

¹⁰ Indeed, in a Policy Working Group call after the SVT decision, representatives from PURA reiterated that SVT work must be completed by a single pre-approved contractor. Weidlich Decl., Ex. 10 (“Working Group Minutes, October 10th, 2023”) (PURA Staff Attorney Brittany Wyman noting that “all attachers must use the same SVT contractor”).

Communications. *Id.*, ¶ 30, see also *id.*, Ex. 10 at 4 (Policy Working Group Minutes from October 10, 2023) (PURA Staff Attorney Brittany Wyman noting that “all attachers must use the same SVT contractor”). The mandate thus completely undermines the process CWA Local 1298 and Frontier agreed upon for contracting out traditional union labor, including make-ready work. *Id.*, Ex. 2 at 55. Because the SVT Pilot Program requires use of a single contractor for each municipality, PURA is directing pole owners and attachers, including Frontier, to use Rocky Mountain Fiber or Phoenix Communications and to disregard existing contracts with their employees.

In contrast to its disregard of CWA Local 1298’s collective bargaining agreement, PURA *declined* to interfere with labor contracts when it rejected a proposal to implement the SVT Pilot Program in municipalities that own their own poles and have collective bargaining agreements with local unions. PURA determined that inclusion of these municipalities in the SVT Pilot Program would result in “contractual issues” related to municipalities and their bargaining units. Weidlich Decl., Ex. 9 at 13. Thus, in the municipal context, PURA fulfilled its duty to avoid interference with contractual arrangements between public utility companies and their employees. The same respect was not extended to CWA Local 1298 and its contractual relationship with Frontier.

Furthermore, the OTMR Decision itself interferes with the collective bargaining agreement’s presumption against outside contractors. See Weidlich Decl., Ex. 2 at 55 (Frontier shall make “every effort, consistent with the needs of the business, to use bargaining unit employees rather than outside contractors, to perform bargaining unit telecommunications work to be of extended duration.”). The OTMR Decision established timelines and requirements, enforceable by civil penalties, that effectively require attachers to use contract labor for work typically performed by bargaining unit employees. *Id.*, Ex. 6 at 59, Appendix C § 11; see also *id.* ¶ 42. PURA then delegated authority to the Policy Working Group to study available contractor resources and “encourage” their retention—a process that, as described above, resulted in a requirement to use one of two third-party contractors in the SVT Pilot Program. Weidlich Decl., Ex. 6 at 59. Not only does PURA nowhere explain why third-party contractors ought to be “encourage[d]” over union labor; PURA effectively conditions OTMR on their use by directing pole owners to “train and retain” contractors.

PURA insists that nothing in its OTMR Decision requires telecommunications companies to use contract labor. Weidlich Decl., Ex. 6 at 7 n.8. PURA maintains that attachers are merely permitted, not required, to use contractors, and that the OTMR process is optional. *Id.* But since that decision, PURA has made OTMR *mandatory* in twelve municipalities, *id.*, Ex. 9 at 14, and indicated that it may want to expand the Third-Party Contractor Mandate to all make-ready work. *Id.*, Ex. 19 at 5. Moreover, OTMR now comes with a requirement to use one of two contractors. *Id.*, Ex. 9 at 14; see also *id.* ¶ 28. In other words, attachers are not merely permitted to use contractors for an optional process; in at least twelve different municipalities, attachers *must* use one of two contractors to perform all simple transfer make-ready work. CWA Local 1298 is excluded from this labor in all twelve municipalities, because, due to their contract with Frontier,

they are not considered a third-party contractor. Weidlich Decl. ¶¶ 29, 45. Moreover, CWA Local 1298 did not receive notice or an opportunity to negotiate the terms of this contracting out according to their agreement with Frontier, *id.* ¶ 39, because PURA mandated the use of a contractor before they were able to exercise their contractual rights.

In sum, PURA's decisions and actions have created a Third-Party Contractor Mandate that interferes with—and indeed, supplants—the collective bargaining agreement's presumption against outside contractors and the process governing the use of such contractors by Frontier. PURA established a workflow process that prioritized contract labor, directed a new Policy Working Group to make recommendations regarding the process and how pole owners and attachers could exploit contractor resources, and then adopted and operationalized those recommendations by requiring pole owners and attachers to use one of two approved contractors for make-ready work in twelve municipalities. CWA Local 1298 could not challenge this process through the collective bargaining agreement's procedures for contracting out make-ready work. These actions by PURA repeatedly interfered in the collective bargaining agreement in excess of its statutory authority and should be set aside as *ultra vires*.

B. PURA's Third-Party Contractor Mandate is preempted by the National Labor Relations Act

The Third-Party Contractor Mandate, as effectuated by the OTMR Decision, the SVT decision, and the actions of the Policy Working Group, impermissibly regulates economic weapons intended to be left to the free play of market forces and is thus preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* See *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 150-151 (1976). *Machinists* preemption "preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Barbieri v. United Technologies Corp.*, 771 A.2d 915, 925 (Conn. 2001); see also *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 749 (1985) (NLRA preemption "protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated."). The primary inquiry for *Machinists* preemption is whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Machinists*, 427 U.S. at 148 (Justice Powell, concurring). State actions are preempted under *Machinists* when "1) . . . the state action regulated the use of economic weapons protected by the NLRA; 2) . . . the state action alters the economic balance between labor and management; and 3) . . . Congress [did not] expect[] the defendants to interfere in the bargaining process in the manner and to the extent they did." *New England Health Care, Employees Union, District 119, SEIU/AFL-CIO v. Rowland*, 221 F. Supp. 2d 297, 325 (D. Conn. 2002).

PURA's Actions regulate the use of economic weapons protected by the NLRA

The Third-Party Contractor Mandate regulates the use of economic weapons protected by the NLRA. The ability to collectively bargain is the quintessential means of self-help under the NLRA. *Division 1287 of the Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of America v. Missouri*, 374 U.S. 74, 82 (1963) (recognizing collective bargaining is the “essence of the federal scheme.”). Therefore, any state action which renders the negotiation or enforcement of a collective bargaining agreement futile, by “bind[ing] an employer . . . to a particular choice,” affects the bargaining process to a degree as to violate *Machinists. Roundout Electric Inc., v. NYS Dept. of Labor*, 335 F.3d 162, 169 (2d Cir. 2003).

PURA's actions have rendered the bargaining process futile and prevented CWA Local 1298 from accessing self-help. PURA has required that “[a]ll Attachers with attachments within the communities in the SVT Pilot Program . . . each enter into a standard agreement with the selected contractor.” Weidlich Decl., Ex. 9 at 11. To this end, the Policy Working Group has required that all pole owners and attachers work with the same two non-union third-party contractors approved by the Policy Working Group, Rocky Mountain Fiber and Phoenix Communications, when implementing the OTMR process in Single Visit Transfers across the state. *Id.*, Ex 10 at 4. Further, PURA has required that pole owners utilize this contract labor for work in “frozen” areas by strict timeframes or risk a civil penalty. *Id.*, Ex. 9 at 18; see also *id.*, Ex. 6 at Appendix C §11.

PURA has therefore impermissibly “[bound] an employer . . . to a particular choice,” *Roundout Electric Corp.*, 335 F.3d at 169, and foreclosed CWA Local 1298 from pursuing effective negotiation under the collective bargaining agreement over the contracting out of work traditionally performed by bargaining unit members. Weidlich Decl. ¶ 44. Frontier cannot agree, after discussion pursuant to the collective bargaining agreement, to use bargaining unit members for Single Visit Transfer Pilot Program work without running afoul of the SVT Decision. *Id.* Frontier cannot agree, in federal mediation pursuant to the collective bargaining agreement, to use bargaining unit members for SVT Pilot Program work without running afoul of the SVT Decision. *Id.* ¶ 46. Frontier cannot agree, in binding arbitration pursuant to the collective bargaining agreement, to use bargaining unit members for SVT Pilot Program work without running afoul of the SVT Decision. *Id.* Further, the SVT Pilot Program has undermined any possible effectiveness of additional economic weapons of self-help CWA Local 1298 could use in this collective bargaining process, since PURA has foreclosed the possibility that their use could result in concessions from Frontier. *Id.* ¶ 48. The harm to CWA Local 1298's bargaining power is not abstract or hypothetical. CWA Local 1298 is scheduled to renegotiate our contract with Frontier in the fall, and through its Mandate, PURA has given Frontier an all-clear from its state regulator to quash CWA Local 1298's demands against the use of non-union contract labor and promotion of job security. *Id.* ¶ 49.

In sum, by mandating the use of non-union contract labor under threat of civil penalty, PURA has rendered negotiation, mediation, and arbitration pursuant to CWA Local 1298's collective bargaining agreement futile and has rendered any additional economic weapons CWA Local 1298 could use in that bargaining process ineffectual.

PURA's Third-Party Contractor Mandate alters the economic balance between labor and management

The Third-Party Contractor Mandate disturbs the balance of power between CWA Local 1298 and Frontier. A key factor in the balance between labor and management is the NLRA's requirement to bargain in good faith over mandatory subjects of bargaining. 29 U.S.C. § 158(a)(5). Without such a requirement, employers would be free to subvert the labor-management relationship by making unilateral changes to terms and conditions of employment without negotiating with representatives of their employees. See *National Labor Relations Board v. Katz*, 369 U.S. 736, 747 (1962). Importantly, contracting out of work has long been recognized as a statutorily mandated subject of bargaining under the NLRA. *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 211 (1964). Thus, state interference in good faith bargaining over the contracting out of work necessarily upsets the economic balance between labor and management and is preempted.

PURA's SVT decision requires that "[a]ll Attachers with attachments within the communities in the SVT Pilot Program would each enter into a standard agreement with the selected contractor," and the Policy Working Group has required the use of contractors for OTMR work traditionally performed by bargaining unit employees. Weidlich Decl., Ex. 9 at 11. Since the establishment of the OTMR and SVT programs, PURA has consistently and repeatedly ordered that attachers use third-party non-union contractors to complete work which otherwise would have been performed by bargaining unit members or would have been contracted out under the terms of the collective bargaining agreement. *Id.* ¶ 23. The Policy Working Group has continued to order this work be performed by third-party contractors, despite CWA Local 1298's warning that it violates their collective bargaining agreement. *Id.* ¶ 34.

As a result, Frontier has followed PURA's direction, under threat of civil penalty, and contracted out work which would otherwise be performed pursuant to CWA Local 1298's collective bargaining agreement, without bargaining with CWA Local 1298. PURA has thus undermined attachers' duty under the NLRA to engage in good-faith negotiations with CWA Local 1298 over contracting and has made a "discernible impact on the labor-management relationship," by sanctioning unilateral changes to terms and conditions of employment. *New England Health Care*, 221 F. Supp. 2d at 328.

Congress intended that states not interfere in collective bargaining in this manner

Congress did not intend to allow PURA to interfere in the collective bargaining process through orders like the OTMR Decision, the SVT decision, or the Policy Working Group's actions. To justify these decisions and their intrusion into the collective bargaining process, PURA repeatedly appeals to the "efficient development and deployment" of public infrastructure. Weidlich Decl., Ex. 6 at 1. However, the Supreme Court and Connecticut courts have made clear that pursuit of efficiency alone cannot justify invading the collective bargaining process. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618-19 (1986) (concluding that the City of Los Angeles could not "ensure uninterrupted service to the public by prohibiting a strike by the unionized employees of a privately owned . . . company" and could not "condition a franchise renewal in a way that intrudes into the collective-bargaining process"); *Division 1287*, 374 U.S. at 80 (holding that state interference in the collective bargaining process via "emergency legislation" which prohibited a strike against a public utility company, utilized in the name of "protect[ing] the public from threatened breakdowns in vital community services," was preempted by the NLRA); *New England Health Care*, 221 F. Supp. 2d at 330 (holding that a state's allocation of anticipatory Medicaid benefits to nursing homes and non-striking workers was preempted under the NLRA, and rejecting that argument that "the State['] . . . important interest in ensuring that an appropriate level and quality of care is maintained in nursing homes . . . do not provide a wholesale justification for interference with District 1199's lawful labor activities."). PURA's Third-Party Contractor Mandate is preempted.

C. PURA's OTMR Decision is arbitrary and capricious in violation of the Connecticut Uniform Administrative Procedure Act

Agency decisions exceed the agency's statutory authority under the Connecticut Uniform Administrative Procedure Act ("UAPA") if they are "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." General Statutes § 4-183(j)(6). Agency decisions must be the result of "reasoned decisionmaking," namely "a reasonable application of relevant statutory provisions and standards to the substantial evidence on the administrative record." *Office of Consumer Counsel v. Dept. of Public Utility Control*, 279 Conn. 584, 592 (2006). Because PURA failed to respond to CWA Local 1298's legal arguments in advance of its decision, PURA's adoption of its Third-Party Contractor Mandate cannot be the result of reasoned decision-making.

CWA Local 1298's brief in Docket No. 19-01-52RE01 advanced three legal arguments. First, CWA Local 1298 argued that the OTMR framework would violate General Statutes § 16-42, which forbids PURA from interference with its collective bargaining agreement. Weidlich Decl., Ex. 20 at 2, 6-10 (CWA Local 1298's Brief to PURA for Docket No. 19-01-52RE01). Second, CWA Local 1298 argued that, through its prior decisions, PURA had established an affirmative policy of exercising care and caution to avoid interference with collective bargaining agreements. *Id.* at 2-3. Third, CWA Local 1298 argued that the adoption of the OTMR framework

was preempted by federal law. *Id.* at 3-4. In its decision, PURA gave no reasoned basis for rejecting any of these arguments.

PURA's only response to the first argument, that the OTMR framework exceeds its authority under § 16-42, was a cursory statement in a footnote that CWA Local 1298 had failed "to identify how permitting third-party contractors to employ an optional OTMR process interferes with the collective bargaining agreement." Weidlich Decl., Ex. 6 at 7, n.8. In fact, CWA Local 1298 had cited specific provisions of its collective bargaining agreement implicated by the OTMR framework and explained the interference that would result from PURA's actions. *Id.*, Ex. 20 at 2, 6-10. The agency failed to include any findings of fact or conclusions of law in the record to justify its rejection of the interference argument, as it was required to do by General Statutes § 4-180(c). Instead, the agency merely made a conclusory statement that CWA Local 1298 had not carried its burden of persuasion. Because the agency gave no reasons at all for its rejection of CWA Local 1298's argument, as far as the record of decision is concerned, it has no reasons. *Id.* Making a decision without reasons is arbitrary and capricious, and thus, unlawful.

Second, CWA Local 1298 cited three cases it argued evidenced a policy of PURA taking affirmative care to avoid any possibility that its actions could create incidental interference with labor agreements. Weidlich Decl., Ex. 20 at 2-3 (citing *In re Connecticut Natural Gas Corp.* 148 P.U.R.4th 239 (Dec. 15, 1993); *Re Southern New England Telephone Co.*, No. 92-09-19, 1993 WL 378949 (July 7, 1993); and *Connecticut Independent Utility Workers, Local 12924 v. Dep't. of Public Utility Control*, 312 Conn. 265 (2014)). PURA's only response to this argument was the facile observation that the cases are "factually distinguishable." *Id.*, Ex. 6 at 7, n.8. The agency failed to identify any relevant factual distinctions it relied upon. *Id.* That a case is "factually distinguishable" is not a reasoned basis on which to depart from its holding or rationale, without further explanation.

Finally, PURA failed to make *any* reference or response to CWA Local 1298's argument that its decision was preempted by federal law. See Weidlich Decl., Ex. 6. Because PURA provided no reason whatsoever for rejecting this argument that can be considered by a reviewing court, its decision was *per se* unreasoned decision-making and arbitrary and capricious.

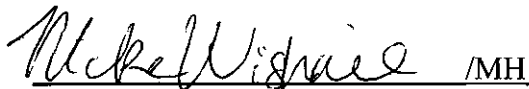
CONCLUSION

For the foregoing reasons, the Third-Party Contractor Mandate exceeds PURA's statutory authority, is preempted by the NLRA, and is arbitrary and capricious under General Statutes § 4-183(j). PURA should therefore issue a declaratory judgment finding that the OTMR Decision, SVT Decision, and Policy Working Group actions taken pursuant to them are unlawful and setting aside and vacating them.

Signed,



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