

RETURN DATE: DECEMBER 9, 2014

Holly Chandler and Devon Ann Conover,	:	SUPERIOR COURT
on behalf of themselves and all others	:	
similarly situated,	:	JUDICIAL DISTRICT OF HARTFORD
<i>Plaintiffs,</i>	:	
	:	
v.	:	
	:	
DISCOUNT POWER, INC.	:	
<i>Defendant.</i>	:	November 20, 2014

**CLASS ACTION COMPLAINT**

1. Plaintiffs Holly Chandler and Devon Ann Conover (“Plaintiffs”), on behalf of themselves and all persons similarly situated, by and through their attorneys, allege as follows.

**INTRODUCTION**

2. Plaintiffs bring this action on behalf of themselves and a class of all similarly situated customers against Defendant Discount Power, Inc. (“DPI”) arising out of DPI’s unfair, deceptive, unconscionable and bad faith billing for “supplying” electricity to residential consumers.

3. DPI represents in its marketing materials and in its contracts that it offers a “variable rate” electricity plan to residential consumers that is tied to the market rate in the wholesale power market. However, contrary to DPI’s representations and obligations, DPI consistently and improperly charges an extraordinarily high premium rate for electricity *regardless* of fluctuations in the underlying market price. Indeed, as set forth below, DPI routinely charges

its consumers *two, three, or nearly four times* the underlying market rate, notwithstanding DPI's representations that its variable rates "reflect" monthly wholesale electric prices.

4. Specifically, DPI's rates go *up* to match spikes in the underlying market price. However, when the market price goes *down*, DPI's rate remains at an inflated level several times higher than the market rate. Through this scheme, DPI subjects consumers to consistent and unlawful "heads I win, tails you lose" pricing.

5. This unfair and deceptive scheme of charging inflated electric prices that match *increases* in the underlying market price while failing to pass-along *decreases* is intentionally designed to maximize revenue for DPI.

6. Plaintiffs and other DPI customers have been injured by DPI's unlawful practices. Accordingly, Plaintiffs, on behalf of themselves and the class, seeks damages, restitution and injunctive relief for DPI's violation of CUTPA (Count I), breach of the implied covenant of good faith and fair dealing (Count II), and unjust enrichment (Count III).

### **PARTIES**

7. Plaintiff Holly Chandler is a resident of South Windsor, Connecticut.

8. Plaintiff Devon Ann Conover is a resident of Windham, Connecticut.

9. Defendant Discount Power, Inc. is a stock corporation organized under the laws of the State of Connecticut whose principal place of business is located at 6 Armstrong Road in Shelton, Connecticut.

### **JURISDICTION AND VENUE**

10. This Court has personal jurisdiction over DPI because DPI maintains its headquarters in Connecticut and because DPI has tens of thousands of customers in Connecticut and thereby conducts business in this state.

11. Venue is proper in this Court pursuant to Conn. Gen. Stat. § 51-345(a)(3) because Plaintiff Chandler is a resident of South Windsor, Connecticut.

### **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

#### **A. Energy Deregulation and the Role of Electric Suppliers**

12. Delivery of electricity to a consumer requires both the creation of electricity (supply) and the transmission of that electricity from the power plant to the consumer (distribution). In Connecticut, both functions were normally controlled by large public utilities – Connecticut Light & Power (CL&P) and United Illuminating (UI) – prior to 2000. In 2000, Connecticut moved to deregulate the business of electricity *supply*, while continuing to regulate electricity *delivery*. The public utilities were required to divest their power generation assets such as coal, gas and nuclear power plants. But, the regulated utilities continued distributing power from these power plants to consumers through transmission lines.

13. When deregulation occurred, the business of power supply was opened to competition and consumers were allowed to select the companies from whom they would purchase their power. However, Connecticut required that both CL&P and UI continue to offer regulated electric supply rates through a “standard offer” which is available to all customers in each public utility’s service area. The standard offer rates are set through an auction process for periods of time, usually six months to a year, and are reviewed and approved by the Public Utility Regulatory Authority (“PURA”).

14. As a result of the deregulation of power supply, several different parties are now involved in the supply of electric power to residential consumers. Certain companies, such as Dominion, produce electric power (“Generation Companies”). Other companies, such as CL&P

and UI, distribute electricity from Generation Companies to the end user (“Distribution Companies”). Although some Generation Companies have sold power directly to consumers, including residential customers, most sell the power they generate on the wholesale market to companies that market to retail customers (“Electric Suppliers”).

15. The market for wholesale power in the New England States is under the administration of an independent, not-for-profit corporation formed in accordance with the recommendations of the Federal Energy Regulatory Commission, called ISO New England (for “Independent System Operator”). ISO New England coordinates and directs the generation and flow of electricity throughout the region, ensuring that electric supply exactly meets demand throughout the network. The wholesale market managed by ISO New England determines where and when electricity will be made by Generation Companies and the wholesale prices that will be paid for that electricity through competitive bids. “More than 500 companies participate in these markets, buying and selling between \$6-\$14 billion of electric power and related products annually.” <http://www.iso-ne.com/about/what-we-do/three-roles/administering-markets>. The bid process determines the Generation Company that will make each unit of electricity and the wholesale price each Energy Supplier will pay to each Generator for each unit of energy delivered to specific locations throughout the region such as Connecticut.

16. Electric Suppliers play a middleman role: they purchase power directly or indirectly from Generation Companies and sell that electricity to end-user consumers. However, Electric Suppliers do not *deliver* that electricity to consumers. Rather, Generation Companies deliver the electricity to Distribution Companies, which in turn deliver the electricity to the ultimate consumer. Electric Suppliers merely buy electricity at the wholesale rate and then sell that power to end-users with a mark-up. Thus, Electric Suppliers are essentially brokers and

traders: they neither make nor deliver electricity, but merely buy electricity from the Generation Companies and re-sell it to end users.

17. Like other Electric Suppliers, DPI purchases power on the wholesale market and sells it to consumers. DPI's prices are not approved by PURA. Rather, DPI and other Electric Suppliers are free to set their own rates for supplying electricity to consumers. And DPI, like all other suppliers, relies upon the Distribution Companies to deliver the electricity it purchases on the wholesale market to its customers. The Distribution Companies charge separately for their distribution-related services, using rates that are reviewed and approved by PURA.

18. Electric Suppliers may contract with consumers to supply electricity on either a "Fixed" or "Variable" rate basis. Under a Fixed contract, the Supplier agrees to supply electricity at a set rate for a certain number of months.

19. Under a Variable rate contract, the Supplier may vary the rate it charges on a periodic basis (often monthly). However, a Connecticut statute specifically requires that Electric Suppliers provide ordinary residential consumers with "written contract[s]" that "shall contain all material terms of the agreement" including "a clear and conspicuous statement explaining the rates that such customer will be paying" and "the circumstances under which the rates may change." Conn. Gen. Stat. § 16-245o(f)(2).

#### **B. DPI's Excessive Rates**

20. DPI has offered various Fixed and Variable rate plans, including contracts that charge a low promotional "teaser" rate which is fixed for a set number of months before automatically rolling into a Variable rate plan.

21. Throughout its contracts, marketing materials, and statutorily required disclosures, DPI represents that its Variable rate plan is based upon the wholesale market rate. Indeed, that is the entire hook by which DPI attracts consumers to Variable plans.

22. DPI's "Terms and Conditions of Service" also make this express link between the Variable rate charged by the company and the underlying market rate charged by wholesale Generation Services, stating "[t]he variable rate may fluctuate to reflect the changes in the wholesale power market." See <http://www.discountpowerinc.com/terms>.

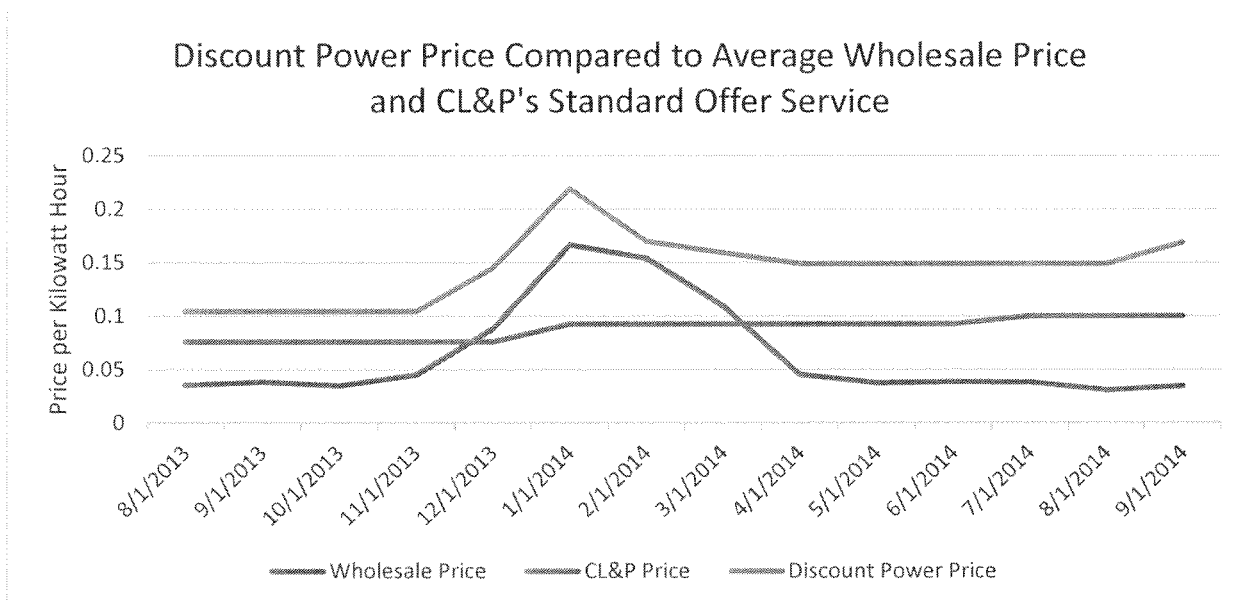
23. Accordingly, a reasonable consumer would understand that DPI's Variable rates fluctuate in a manner correlated with the underlying wholesale market rate, and that, although prices would go up when wholesale prices rose, they would also go down when wholesale prices decreased, enabling consumers to take advantage of market lows.

24. Instead, and contrary to reasonable consumer expectation, DPI used its Variable rates as a pure profit center, moving up in conjunction with wholesale prices when the wholesale prices were high, but staying at a level as much as *double, triple or almost quadruple* the wholesale market rate when the wholesale price was low.

25. For example, the chart below sets forth (1) the average wholesale price (in dollars per kilowatt hour) of electricity delivered to Connecticut for each month during the period from August of 2013 through September of 2014 as reported by ISO New England; (2) the rate DPI charged to consumers for those same months; and (3) the resulting percentage premium that DPI charged its consumers over the wholesale rate on an average per-month basis:

	<u>AUG-13</u>	<u>SEPT-13</u>	<u>OCT-13</u>	<u>NOV-13</u>	<u>DEC-13</u>	<u>JAN-13</u>	<u>FEB-14</u>	<u>MAR-14</u>	<u>APR-14</u>	<u>MAY-14</u>	<u>JUN-14</u>	<u>JUL-14</u>	<u>AUG-14</u>	<u>SEPT-15</u>
Average Wholesale	\$0.0353	\$0.0383	\$0.0345	\$0.0447	\$0.0880	\$0.1664	\$0.1539	\$0.1092	\$0.045	\$0.0373	\$0.0381	\$0.0379	\$0.0351	\$0.03447
DPI	\$0.1044	\$0.1044	\$0.1044	\$0.1044	\$0.1449	\$0.219	\$0.1699	\$0.1599	\$0.1499	\$0.1499	\$0.1499	\$0.1499	\$0.1690	\$0.1690
DPI Premium ABOVE Wholesale Price	196 %	173 %	203 %	134 %	65 %	32 %	10 %	46 %	233 %	302 %	293 %	296 %	381 %	390 %

26. The wholesale and DPI rates for August of 2013 through September of 2014 are likewise illustrated on the following graph (and, for purposes of comparison, the Standard Service Rate charged by CL&P during the same period):



27. As this chart illustrates, DPI consistently charges consumers a Variable electric rate that is substantially above the underlying wholesale market rate *and* above the standard service offer. Indeed, upon information and belief DPI’s non-promotional variable rates haven’t matched, much less beat, the standard offer fixed rates in over two years.

28. Moreover, DPI’s essential representation to consumers concerning its Variable pricing plan –that the Variable rate is market-based, and that “[t]he variable rate may fluctuate to reflect the changes in the wholesale power market” – is patently false. Although DPI *increases* its

Variable rate in response to *rising* wholesale prices (as illustrated in the period from October 2013 through January 2014 above), DPI's barely moves in response to a *falling* wholesale market. For example, from February to June of 2014, DPI's variable price dropped a total of two cents per kilowatt hour – a decline of less than 12 percent. During the same period, the wholesale price dropped 11.6 cents per kilowatt hour – over *75 percent*. Indeed, while the average price for wholesale power fell each month from June to September of 2014, DPI's variable price actually *rose* by 13 percent.

29. Notably, DPI charges these exorbitant premiums without adding any value to the consumer whatsoever. As detailed above, DPI does not either produce or transport electricity. It has no role in running or maintaining power plants or power lines; it does no hook-ups or emergency response. Indeed, DPI does not even handle customer billing: that, too, is handled by the CL&P or UI. Essentially, all that DPI does is act as a trader in the transaction. Yet it charges several multiples of the amount the Generation Companies receive for making electricity and the Distribution Companies receive for transmitting power, maintaining power lines, and handling emergency services and customer billing and calls.<sup>1</sup>

### **C. Plaintiffs Suffered Injury Due To DPI's Improper Business Practices**

30. Plaintiffs were on DPI's Variable rate plan.

31. Plaintiffs reasonably relied on DPI's false statements that DPI's Variable rate was based on the underlying wholesale market rate.

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<sup>1</sup> For example, CL&P currently charges 6.4 cents per kilowatt hour plus a flat charge of \$16 for distribution services, while the most recent variable rate DPI has filed is 16.9 cents per kilowatt hour. According to the U.S. Energy Information Administration, the average household in Connecticut uses 731 kilowatt hours per month. <http://www.eia.gov/tools/faqs/faq.cfm?id=97&t=3> Such an average household will pay CL&P about \$63 this month for distribution services, while paying DPI \$124 – nearly twice as much.



32. Plaintiffs paid DPI's exorbitant Variable electricity rates and suffered monetary damages as a result of DPI's conduct as set forth above.

33. Indeed, Plaintiff Conover's rates were even higher than those reported by DPI as alleged in paragraph 26 above, in that her variable rate in December was 17.99 cents per kilowatt hour, 3 cents or 20% above DPI's reported rate, and an astronomical 9.19 cents over the wholesale rate, more than double.

34. Plaintiff Chandler's injury is even more extreme in that her variable rate in December was 19.99 cents per kilowatt hour, 5 cents (or 33%) above DPI's reported rate, and an astronomical 11.11 cents – well over double – the wholesale rate.

#### **CLASS ACTION ALLEGATIONS**

35. Plaintiffs bring this class action pursuant to Sections 9-7 and 9-8 of the Practice Book on behalf of themselves and the following class of similarly situated persons:

All persons enrolled in a Discount Power, Inc., variable rate electric plan in connection with a property located within Connecticut at any time within the applicable statute of limitations preceding the filing of this action through and including the date of class certification (the "Class").

36. Plaintiffs reserves the right to modify or amend the definition of the proposed Class.

37. Excluded from the Class are Defendant, including any parent, subsidiary, affiliate or person controlled by Defendant; Defendant's officers, directors, agents or employees; the judicial officers assigned to this litigation; and members of their staffs and immediate families.

38. The proposed Class and meets all requirements for class certification. The Class satisfies the numerosity standard. The Class is believed to number in the tens of thousands of persons as DPI has had over 30,000 residential customers in Connecticut according to information the company filed in PURA docket 13-07-18. As a result, joinder of all class members in a single

action is impracticable. On information and belief, class members can be identified by DPI and Distribution Company records. Class members may be informed of the pendency of this action by published and broadcast notice.

39. There are questions of fact and law common to the Class which predominate over any questions affecting only individual members. The questions of law and fact common to the Class arising from DPI's actions include, without limitation, whether DPI:

- a. violated the Connecticut Unfair Trade Practices Act ("CUTPA") by its Variable electric rate policies and practices;
- b. violated CUTPA by failing to comply with its statutory obligation to provide written Variable rate contracts that contain "a clear and conspicuous statement explaining the rates that such customer will be paying" and "the circumstances under which the rates may change";
- c. breached its covenant of good faith and fair dealing with regard to its Variable electric rate contracts;
- d. was unjustly enriched through its Variable electric rate policies and practices; and
- e. continues to commit wrongdoing through its Variable electric rate policies and practices.

40. The questions set forth above predominate over any questions affecting only individual persons, and a class action is superior with respect to considerations of consistency, economy, efficiency, fairness and equity to other available methods for the fair and efficient adjudication of this controversy.

41. Plaintiffs are adequate representatives of the Class because they are members of the Class and their interests do not conflict with the interests of the members of the class they seek to represent. The interests of the members of the Class will be fairly and adequately protected by

Plaintiffs and their undersigned counsel, who have extensive experience prosecuting complex class action litigation.

42. Plaintiffs' claims are typical of the claims of the Class because they arise out of the same conduct, policies, and practices of DPI with respect to its Variable electric rate policies and practices. Plaintiffs have suffered the harm alleged and have no interests antagonistic to the interests of any other putative class member.

43. Maintenance of this action as a class action is a fair and efficient method for the adjudication of this controversy. It would be impracticable and undesirable for each class member who suffered harm to bring a separate action. In addition, the maintenance of separate actions would place a substantial and unnecessary burden on the courts and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of all class members.

44. Notice can be provided to Class members by using techniques and forms of notice similar to those customarily used in other class actions.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **VIOLATION OF THE CONNECTICUT UNFAIR TRADE PRACTICES ACT, CONN. GEN. STAT. § 42-110A, ET SEQ. ("CUTPA")**

45. Plaintiffs repeat and reallege the preceding and subsequent paragraphs as though set forth herein.

46. Plaintiffs bring this count individually and as a class action pursuant to Sections 9-7 and 9-8 of the Connecticut Practice Book on behalf of themselves and the Class.

47. DPI is engaged in “trade” and “commerce” as it offers electricity for sale to consumers within this state.

48. DPI’s conduct as alleged above constitutes unfair practices:

- a. DPI’s acts and practices offend public policy as established by statute. Specifically, Conn. Gen. Stat. § 16-245o(f)(2) requires DPI to provide consumers with “written contract[s]” that “shall contain all material terms of the agreement” including “a clear and conspicuous statement explaining the rates that such customer will be paying” and “the circumstances under which the rates may change.” As alleged above, DPI’s contracts do not accurately describe “the rates the customer will be paying” or “the circumstances under which the rates may change.”
- b. DPI’s acts and practices with regard to its exorbitant Variable electric rates as alleged above are immoral, unethical, oppressive and unscrupulous.
- c. DPI’s conduct is substantially injurious to consumers. Such conduct has caused, and continues to cause, substantial injury to consumers because consumers would not have paid such a high price for electricity but for DPI’s immoral, unethical, oppressive and unscrupulous Variable electric rate practices and procedures. Consumers have thus overpaid for their electricity and such injury is not outweighed by any countervailing benefits to consumers or competition. No benefit to consumers or competition results from DPI’s conduct, nor could consumers reasonably have avoided the injury.

49. DPI’s conduct as alleged above also constitutes a deceptive act or practice. First, DPI’s Variable electric rate representations as set forth above were and are likely to mislead

consumers. Second, Plaintiffs and other reasonable consumers reasonably interpreted Defendant's representations to mean that DPI's Variable rates track the underlying wholesale power rates (when in fact they do not). Finally, DPI's representations were material to a reasonable consumer and likely to affect consumer decisions and conduct, including purchases of power from DPI pursuant to Variable rate contracts.

50. The foregoing unfair and deceptive practices directly, foreseeably and proximately caused Plaintiffs and the Class to suffer an ascertainable loss when they paid an exorbitant premium for electricity over wholesale market rates.

51. Plaintiffs and the Class are entitled to recover damages and other appropriate relief, as alleged below.

## **COUNT II**

### **BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

52. Plaintiffs repeat and reallege the preceding and subsequent paragraphs as though set forth herein.

53. A covenant of good faith and fair dealing is implied in all contracts in Connecticut, including Plaintiffs' and Class members' contracts with DPI.

54. DPI's Terms of Service with customers gives DPI discretion concerning the monthly rates charged under Variable rate contracts and any "increase[s] or decrease[s]" to the rate "to reflect the changes in the wholesale power market."

55. As alleged herein, DPI has used its discretion to bill exorbitant rates that are not tied to the wholesale market and to *increase* the monthly Variable rate when wholesale markets rise, but not to commensurately *decrease* the monthly Variable rate when wholesale markets fall.

As a result, consumers are billed exorbitant electric rates several multiples of the wholesale market rate.

56. DPI's performance of its discretionary functions under the Terms of Service as alleged herein to maximize its revenue from Variable electric rates impedes the right of Plaintiffs and other Class Members to receive benefits that they reasonably expected to receive under the contract.

57. On information and belief, DPI's actions as alleged herein were performed in bad faith, in that the purpose behind the practices and policies alleged herein was to maximize DPI's revenue at the expense of its customers and in contravention of their reasonable expectations as customers of DPI.

58. DPI has breached the covenant of good faith and fair dealing in the Terms of Service through its Variable electric rate policies and practices as alleged herein.

59. Plaintiffs and members of the putative Class have sustained damages as a result of DPI's breaches as alleged herein.

### **COUNT III**

#### **UNJUST ENRICHMENT**

60. Plaintiffs repeat and reallege the preceding and subsequent paragraphs as though set forth herein.

61. DPI has been, and continues to be, unjustly enriched as a result of its wrongful conduct alleged herein to the detriment of Plaintiffs and the Class.

62. DPI has been enriched by a benefit in the form of payment of exorbitant Variable electric rates.

63. DPI's enrichment was at the expense of Plaintiffs and the Class.

64. It would be unjust to allow DPI to retain the benefit.

65. Plaintiffs and the Class are entitled to disgorgement and restitution of all wrongfully-obtained gains received by DPI as a result of its wrongful conduct alleged herein.

66. Plaintiffs and members of the Class have no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and the putative Class, request that this Court enter judgment against Defendant and in favor of Plaintiffs and award the following relief:

- (a) Certification of the proposed Class;
- (b) Injunctive relief enjoining DPI from charging exorbitant Variable electric rates under their current policies and from engaging in the wrongful, deceptive, unfair, and unconscionable practices alleged herein;
- (c) Damages in an amount to be determined at trial, including actual and punitive damages;
- (d) Disgorgement and restitution of all exorbitant rates paid to DPI by Plaintiffs and the putative Class as a result of the wrongs alleged herein;
- (f) Pre- and post- judgment interest at the maximum rate permitted by applicable law;
- (g) Attorneys' fees, costs, and expenses as available under the law.

PLAINTIFFS



By: Robert A. Izard  
Seth R. Klein  
Nicole A. Veno  
IZARD NOBEL LLP (Juris No. 410725)  
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	:	
v.	:	
	:	
DISCOUNT POWER, INC.	:	
<i>Defendant.</i>	:	November 20, 2014

**STATEMENT OF AMOUNT IN DEMAND**

The amount, legal interest or property in demand is in excess of FIFTEEN THOUSAND DOLLARD (\$15,000) exclusive of interest and costs.

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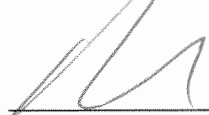
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	:	
v.	:	
	:	
DISCOUNT POWER, INC.	:	
<i>Defendant.</i>	:	November 20, 2014

**JURY TRIAL DEMAND**

Plaintiffs hereby demands trial by jury.

PLAINTIFFS

  
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