DOCKET NO: HHB-CV-22-6075973-S : SUPERIOR COURT

REENERGY HOLDINGS, LLC : JUDICIAL DISTRICT OF NEW BRITAIN

v. : TAX AND ADMINISTRATIVE APPEALS SESSION

CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION : MARCH 14, 2024

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MEMORANDUM OF DECISION

The plaintiff, ReEnergy Holdings, LLC (ReEnergy), appeals from a September 29, 2022 declaratory ruling (hereinafter, the declaratory ruling, or DEEP declaratory ruling) issued by the Department of Energy and Environmental Protection (DEEP) interpreting the terms of General Statutes § 16-245a(g). Section 16-245a(g) exempts certain facilities producing electricity through the burning of biomass fuels from the effects of a 2013 statute reducing the financial support for such facilities. The parties agree that ReEnergy has heretofore qualified for the applicable exemption by virtue of it entering into a qualifying power purchase agreement on or before June 5, 2013, as required by § 16-245a(g). Where the parties part company is over the length, or duration of the applicable exemption. DEEP's declaratory ruling found that the exemption ends when the qualifying power purchase contract comes to an end. ReEnergy argues that § 16-245a(g), by its plain terms, includes no such limitation. For the reasons set forth below, the court agrees with ReEnergy. Therefore, the court sustains this appeal. Pursuant to General Statues § 4-183(j), the court remands this matter to DEEP with instructions to interpret § 16-245a(g) in accordance with this memorandum of decision.

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FACTS

The following facts are not in dispute. In 1998, Connecticut passed legislation to encourage the production of energy through renewable resources, including the burning of

Electronic notice sent to all counsel of record:
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biomass materials like wood. In order to encourage the construction of energy facilities using biomass as a fuel, Connecticut created tradable Renewal Energy Credits (RECs) to help reduce the cost of building and operating such facilities. In 2013, in response to the increased scientific understanding that burning carbon based fuels, including wood, contributes to climate change, Connecticut enacted legislation intended to phase out the use of RECs to support certain biomass facilities. See P.A. 13-303. Nevertheless, in recognition of the fact that a withdrawal of the financial support provided by RECs might cause some renewable energy projects to fail, and thereby increase Connecticut's reliance on traditional fossils fuels (like oil), the legislature included an exemption in P.A. 13-303 for certain biomass projects. That exemption is codified in General Statutes § 16-245a(g) and states, "[o]n or before January 1, 2014, the Commissioner of Energy and Environmental Protection shall, in developing or modifying an Integrated Resources Plan in accordance with sections 16a-3a and 16a-3e, establish a schedule to commence on January 1, 2015, for assigning a gradually reduced renewable energy credit value to all biomass or landfill methane gas facilities that qualify as a Class I renewable energy source pursuant to section 16-1, provided this subsection shall not apply to anaerobic digestion or other biogas facilities, and further provided *any reduced renewable energy credit value established pursuant to this section shall not apply to any biomass or landfill methane gas facility that has entered into a power purchase agreement (1) with an electric supplier or electric distribution company in the state of Connecticut on or before June 5, 2013*, or (2) executed in accordance with section 16a-3f or 16a-3h. The Commissioner of Energy and Environmental Protection may review the schedule established pursuant to this subsection in preparation of each subsequent Integrated Resources Plan developed pursuant to section 16a-3a and make any necessary changes

thereto to ensure that the rate of reductions in renewable energy credit value for biomass or landfill methane gas facilities is appropriate given the availability of other Class I renewable energy sources." (Emphasis added.)

The parties agree that up until the declaratory ruling that is the subject of this appeal, ReEnergy qualified for the exemption set forth in § 16-245a(g). See In re ReEnergy Holdings, LLC, Response to Petition of Declaratory Ruling, September 29, 2022, Return of Record (ROR), at 1435 ("DEEP agrees that the Stratton and Livermore Falls Facilities meet the criteria for an exemption under C.G.S. §16-245a(g).") Nevertheless, in the declaratory ruling, DEEP stated that it "disagrees with the 'permanent' characterization of the exemption under C.G.S. § 16-245a(g), which would allow for ReEnergy to continue to claim Class I renewable status for its Facilities' output if it were to continually contract with a Connecticut electric supplier or electric distribution company." Id. DEEP ruled that "[o]nce the agreements that were signed prior to June 5, 2013 expire," ReEnergy's exemption is no longer applicable. Id.

LEGAL STANDARD

"Cases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Although the interpretation of statutes is ultimately a question of law . . it is well established practice of this court to accord great deference to the construction given a statute by the agency charged with its enforcement. . . . We have determined however that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny or to . . . a governmental agency's time-tested interpretation. . . . An

agency's interpretation of a statute is time-tested when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable." (Citations omitted; internal quotation marks omitted.) *Tilcon Connecticut, Inc.* v. *Comm'r of Env't Prot.*, 317 Conn. 628, 649, 119 A.3d 1158 (2015); see also *Planning & Zoning Commission* v. *Freedom of Information Commission*, 316 Conn. 1, 9, 110 A.3d 419 (2015) ("When a case presents only questions of law, an administrative agency's legal determinations are not entitled to any special deference, unless they previously have been subject to judicial review or to a governmental agency's time-tested interpretation. . . . Because statutory interpretation is a question of law, our review is *de novo*. . . .") (Citation omitted; internal quotation marks omitted.)

Because DEEP makes no argument that its interpretation of § 16-245a(g) is time tested or has been subject to prior judicial review (and there is no evidence in the record that it has been), the court concludes that DEEP's interpretation of § 16-245a(g) is not entitled to any judicial deference.[1] The court reviews DEEP's interpretation of the applicable provision of § 16-245a(g) *de novo*.

LEGAL ANALYSIS

The court concludes that the outcome of this case is controlled by the Connecticut Supreme Court's analysis and decision in *Glastonbury Co.* v. *Gillies*, 209 Conn. 175, 177, 550 A.2d 8 (1988) (hereinafter referred to as *Gillies*).

In *Gillies*, the parties stipulated to the following facts. "The Glastonbury Company (company), was licensed to sell fire and casualty insurance as of October 1, 1973, and life and

[1] The court concludes that ReEnergy is aggrieved by DEEP's declaratory ruling.

health insurance as of October 1, 1980, thereby making it an exempt or "grandfathered" organization under both subsections (b) and (c) of § 38-72a. In 1974, however, the company sold its entire insurance business and contractually promised not to engage in that business in Glastonbury or in any contiguous towns for at least five years. With the exception of a license to sell life and health insurance, all the company's licenses were, at that time or shortly thereafter, either transferred in the sale, cancelled or allowed to lapse." *Gillies*, at 177-78.

"In 1983, approximately one year after its license to sell life and health insurance lapsed, the company was relicensed by the insurance commissioner as an agency for both of these lines. In 1984, after approximately a nine year lapse, the company was relicensed by the commissioner as an agency for fire and casualty insurance. The company was also relicensed as a broker in all lines of insurance in 1984." *Gillies*, at 178.

"On February 24, 1987, the commissioner rescinded all the plaintiffs' insurance licenses stating that they had been "issued in error" as the company was in violation of § 38-72a. The commissioner concluded that, although the company had been, at one time, exempt from the prohibitions of § 38-72a, it had lost its exempt status because it failed to hold its licenses continuously after the dates for exemption set forth in the statute. . . . In rescinding the plaintiffs' licenses, the commissioner rejected the plaintiffs' claim that his prior issuance of the licenses estopped him from doing so." Id.

In deciding the *Gillies* case, the Connecticut Supreme Court concluded that the statute at issue was not ambiguous simply because it did not explicitly address the facts at issue in the underlying case. See *Gillies*, 209 Conn. at 180. Therefore, the court applied § 38-72a according to its plain terms. Id. The court held that "[i]t is our duty to 'interpret statutes as they are

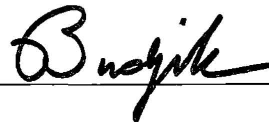
written. . . . Courts cannot, by construction, read into statutes provisions which are not clearly stated. . . . The intent of the legislature is to be found not in what it meant to say but in what it did say. . . . A statute 'does not become ambiguous merely because the parties contend for different meanings. . . .' Given an unambiguous statute, 'it is assumed that the words themselves express the intent of the legislature . . . and there is no need to construe the statute.'" (Citations omitted.) *Gillies*, 209 Conn. 179-80. The *Gillies* court then held that "the grandfather clauses in § 38-72a(b) and (c) say absolutely nothing about the consequences to an exempt organization if it allows its insurance licenses to lapse. Absent such language by the legislature, this court cannot 'engraft amendments onto the statutory language.' If the legislature had desired a continuous licensure requirement under § 38-72a(b) and (c) it could have inserted it into the statute. It is not the prerogative of the insurance commissioner or the court to do so. As we have stated in numerous other cases, 'it is not the province of a court to supply what the legislature chose to omit. The legislature is supreme in the area of legislation, and courts must apply statutory enactments according to their plain terms.'" (Citation omitted.) Id., at 181.

The court here applies the same reasoning and reaches the same result as the court in *Gillies*. The terms of § 16-245a(g) are plain and the court is obligated to apply those terms as the legislature chose to write them. Section 16-245a(g) includes no provision stating that a party who has previously held an exemption will lose that exemption if a qualifying power purchase agreement terminates or ends according to its terms. It is not this court's place (nor DEEP's) to add such a provision where the legislature declined to include it. Therefore, the court finds that DEEP's interpretation of § 16-245a(g) is incorrect as a matter of law and the court sustains ReEnergy's appeal.

Finally, the court rejects DEEP's argument that § 16-245a(g)'s provision allowing DEEP to review the schedule for reducing RECs and to make necessary adjustments to that schedule provides DEEP with discretion to revoke ReEnergy's exemption or to interpret § 16-245a(g) beyond its plain terms. The language cited by DEEP is limited to the setting of the reduced REC schedule and presumes that § 16-245a(g) applies to ReEnergy in the first instance. As set forth above, the court concludes that § 16-245a(g) does not apply to ReEnergy.

CONCLUSION

For all the foregoing reasons and pursuant to General Statues § 4-183(j), the court remands this matter to DEEP with instructions to interpret § 16-245a(g) in accordance with this memorandum of decision.



Budzik, J.