DOCKET NO. HHD-CV-12-6034434-S	:	SUPERIOR COURT
SOUND VIEW COMMUNITY MEDIA, INC. *Plaintiff*	:	JUDICIAL DISTRICT OF HARTFORD
v.	:	
STATE OF CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY, ET AL *Defendants*	:	AT HARTFORD APRIL 15, 2013

MOTION FOR SUMMARY JUDGMENT

The Defendant, State of Connecticut Public Utilities Regulatory Authority (PURA), hereby moves to for summary judgment in accordance with Connecticut Practice Book § 17-44, et seq. Plaintiff Sound View Community Media, Inc.'s (Sound View) Complaint asks this Court for a declaratory judgment that Public Act 08-159 is unconstitutional, or, in the alternative, no longer applicable. PURA asks this Court for a judgment that P.A. 08-159 IS constitutional and applicable. A Statement of Material Facts Not in Dispute with exhibits and A Memorandum of Law are attached.

DEFENDANT,
STATE OF CONNECTICUT
PUBLIC UTILITIES
REGULATORY AUTHORITY

GEORGE JEPSEN
ATTORNEY GENERAL

By: */s/ Robert L. Marconi*

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ORDER

The Motion for Summary Judgment, having been presented to the Court, is hereby GRANTED/DENIED.

By the Court:

_____

CERTIFICATION

I hereby certify that a copy of the above was emailed to the following on this 15th day of April, 2013, and subsequently mailed first class mail postage prepaid:

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DOCKET NO. HHD-CV-12-6034434-S	:	SUPERIOR COURT
SOUND VIEW COMMUNITY MEDIA, INC.	:	JUDICIAL DISTRICT
Plaintiff	:	OF HARTFORD
VS.	:	
STATE OF CONNECTICUT	:	AT HARTFORD
PUBLIC UTILITIES	:	
REGULATORY AUTHORITY	:	
Defendants	:	APRIL 15, 2013

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Defendant, State of Connecticut Public Utilities Regulatory Authority (PURA), has filed a Motion for Summary Judgment in accordance with Connecticut Practice Book §§ 17-44, et seq. This Memorandum of Law is respectfully submitted in support of said motion. The instant Complaint is a declaratory judgment action by Plaintiff, Sound View Community Media, Inc. (Sound View), a company located in Bridgeport, seeking to have this Court declare P.A. 08-159, codified at Conn. Gen. Stat. §§ 16-331ff and 16-331gg, declared unconstitutional, or, in the alternative, inapplicable. *See Complaint, Prayer for Relief.* Plaintiff is currently the cable television community access provider for the Bridgeport area, called Area Two (constituting the municipalities of Bridgeport, Stratford, Fairfield, Milford, Orange and Woodbridge). *See Complaint* ¶ *4.* Plaintiff's Complaint alleges that disagreements between it and Milford, Orange and Woodbridge and the Area Two Cable Advisory Council led to the enactment by the General Assembly of P.A. 08-159. *See Complaint,* ¶¶ *9-12.*

This act is the culmination of years of dispute over whether cable local governmental and educational channels should carry area-wide programming (the same programming for all municipalities in the cable area), generally the philosophy of Plaintiff Sound View, or whether these channels should be utilized mainly for town-specific programming (so that subscribers will see programming of meetings of their town boards and commissions and the like, not those of other towns in the cable area), the position of those towns who have intervened, as well as the Area Two Cable Advisory Council (Council), whose legal existence is challenged in this litigation. PURA is asking this Court to rule 1) that P.A. 08-159 is constitutional; and 2) the act should be interpreted as the co-sponsors intended (and indeed as it has been put into operation since its passage), including those provisions assuming the continued legal existence of the Council as an entity that receives and distributes funds ($100,000 annually) for the benefit of municipalities desiring town-specific programming. Given the uniqueness of Cable Area Two, and the unique animosity between towns and Plaintiff over the issue of area-wide versus town-specific programming, the legislature had a rational basis for enacting a solution ensuring funding for town-specific programming. Given the express provisions in the legislation for the role of the local cable advisory council, the legislation continued its existence, certainly at least for the specified function of P.A. 08-159.

I. CABLE TELEVISION LEGAL BACKGROUND

Cable television (originally called CATV or community antenna television) was developed in the late 1940's for communities unable to receive TV signals because of terrain or

distance from TV stations. PURA Statement of Material Facts Not in Dispute (SMF) ¶ 1. Cable television system operators located antennas in areas with good reception, picked up broadcast station signals and then distributed them by coaxial cable to subscribers for a fee. SMF ¶ 2. In 1950, cable systems operated in only 70 communities in the United States. These systems served 14,000 homes. SMF ¶ 3. By December 2011, there were more than 5300 systems serving approximately 60 million subscribers in more than 34,000 communities. *See the Federal Communications Commission website at* http://www.fcc.gov/encyclopedia/evolution-cable-television. *Id.* The Supreme Court of the United States has held that the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., confers upon the FCC "a circumscribed range of power to regulate cable television"; *FCC v. Midwest Video Corporation,* 440 U.S. 689, 696, 99 S.Ct. 1435, 1439, 59 L.Ed.2d 692 (1979). The FCC itself, in its principal over-all review of cable television, has acknowledged that its jurisdiction is concurrent with that of state and local governments and has sought to implement what it has characterized as "a deliberately structured dualism." *Cable Television Report and Order,* 36 F.C.C.2d 143, 207 (1972). This "dualism" is implemented, in part, by 47 U.S.C. § 541, which prohibits cable operators offering cable services without a franchise, and 47 U.S.C. § 522 (10), which defines the term "franchising authority" as meaning "any governmental entity empowered by Federal, State, or local law to grant a franchise."

In *Connecticut Television, Inc. v. Public Utilities Commission*, 159 Conn. 317, 269 A.2d 276 (1970), the Connecticut Supreme Court briefly described the start of cable television in Connecticut:

> In 1963 the General Assembly adopted Public Act No. 425, which became effective June 24, 1963, and is now chapter 289 (§§ 16-330 to 16-333) of the General Statutes (Rev. to 1966). The chapter requires the issuance of a certificate of public convenience and necessity by the public utilities commission, hereinafter called the commission, as a prerequisite to the construction or operation of a community antenna television system, commonly known as, and hereinafter called, CATV. Such a system is defined as 'any system operated in, under or over any street or highway for the purpose of providing antenna television service for hire.' General Statutes (Rev. to 1966) § 16-330. As a prerequisite to the issuance of a certificate by the commission, a public hearing is required, and, as a basis for the issuance of the certificate, hereinafter called a franchise, the commission is required to 'take into consideration the public need for the proposed service, the suitability of the applicant or, if the applicant is a corporation, of its management, the financial responsibility of the applicant and the ability of the applicant to perform efficiently the service for which authority is requested.' General Statutes (Rev. to 1966) § 16-331(b).
>
> Following the passage of chapter 289, many applications for CATV franchises were filed with the commission in which the applicants sought to serve various towns or groups of towns. Three applications were withdrawn prior to hearing, and, following protracted hearings, the commission dismissed or denied others and granted franchises to seventeen applicants.

Id., 159 Conn. at 320-321.

Applicants applied to the then-Public Utilities Commission (PUC) for CATV franchises (Certificates of Public Convenience and Necessity, or CPCNs) covering certain municipalities. The applications could be granted, denied, or, from time to time, granted for a different set of municipalities from those sought. *Id.*, 159 Conn. at 321-322.[1] See SMF ¶ 4. Eventually, the PUC and its successor agencies, including the Department of Public Utility Control (DPUC), and now the Public Utilities Regulatory Authority (PURA) approved 24 cable franchise areas

[1] For example, in *Connecticut Television, Inc., supra*, Ducci Electric Company, Inc., applied for a franchise to serve the towns of Thomaston, Torrington and Winsted, but the commission granted a franchise to Ducci for the towns of Barkhamsted, Goshen, Harwinton, New Hartford and Winchester and granted a franchise to another applicant for the towns of Torrington and Thomaston. *Id.*, 159 Conn. at 321-322.

encompassing every Connecticut municipality. SMF ¶ 5. A map of franchise areas is attached as Exhibit 1.

The ability of State and local franchising authorities, such as PURA, to require franchise holders to designate some of their channels for public, educational, or governmental use resulted from the enactment of Section 611 of the Cable Act of 1984 by Congress, a provision that became codified as 47 U.S.C. § 531. This provision states, in part:

> (a) Authority to establish requirements with respect to designation or use of channel capacity
>
> A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.
>
> (b) Authority to require designation for public, educational, or governmental use
>
> A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.
>
> (c) Enforcement authority
>
> A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b) of this section.

47 U.S.C. § 531(a)-(c). The constitutionality of 47 U.S.C. § 531 was upheld in *Time Warner Entertainment Co., L.P. v. Federal Communications Commission*, 93 F.3d 957 (D.C. Cir. 1996); *rehearing en banc denied*, 105 F.3d 723 (1996).

Connecticut incorporated the requirement that franchise holders designate some of their channels for public, educational, or governmental use through Conn. Gen. Stat. § 16-331, which states, in relevant part:

> (d) (1) . . . The authority shall have the discretion to determine the appropriate length of a franchise term, initial, renewal or transfer, and in making its decision shall consider the following without limitation: . . . (H) the quality of the operator's community access programming, including public access, educational access and governmental access programming, in accordance with the provisions of subdivision (3) of this subsection. . . .
>
> . . .
>
> (3) In evaluating the quality of community access programming the authority shall consider, without limitation, (A) compliance with federal laws governing noncommercial educational broadcast stations and public broadcast stations, and state laws governing community access, including, but not limited to, sections 16-333-31 to 16-333-36, inclusive, of the regulations of Connecticut state agencies; (B) compliance with the terms of the franchise certificate, which apply to community access; and (C) compliance with requirements involving community access contained in any order of the authority which applies to the community antenna television system.

Id. Additionally, Conn. Gen. Stat. § 16-331a (b) requires that, "Each company shall include all its community access channels in its basic service package." Conn. Gen. Stat. § 16-331a (k) provides for funding community access channels from fees imposed on cable subscribers.

The cable television companies, while having a statutory mandate to provide community access channels, also gets input from a cable television advisory council. Regulations Connecti-

cut State Agencies § 16-333-24 establishes cable television advisory councils for each cable area. Section 16-333-25 establishes how members are appointed, and how they are to be allocated by municipalities by population. Section 16-333-30 specifies the function of a council:

> Each advisory council may give advice to the management of the cable television company upon such matters affecting the public as it deems necessary. Each advisory council shall annually on a date not later than the thirty-first day of January, file a written report with the Department of Public Utility Control [now PURA] concerning its activities for the preceding twelve month period ending December 31.

Id. Additionally, Conn. Gen. Stat. § 16-331 (c) provides that PURA shall designate an advisory council as an intervenor in any contested case before PURA involving the cable television company that the advisory council is advising. Thus, the cable advisory councils have a role in advising the cable television companies about community access, as well as other matters.

The cable franchisee could be responsible for community access operations, but Conn. Gen. Stat. § 16-331a(c) provided an alternative model whereby a non-profit organization could seek, either over the opposition, or with the consent, of the cable franchisee, control over administering community access operations:

> (c) If a community-based nonprofit organization in a franchise area desires to assume responsibility for community access operations, it shall, upon timely petition to the department, be granted intervenor status in a franchise proceeding held pursuant to this section. The department shall assign this responsibility to the most qualified community-based nonprofit organization or the company based on the following criteria: (1) The recommendations of the advisory council and of the municipalities in the franchise area; (2) a review of the organization's or the company's performance in providing community access programming; (3) the operating plan submitted by the organization and the company for providing community access programming; (4) the experience in community access programming of the organization; (5) the organization's and the company's proposed budget, including expenses for salaries, consultants, attorneys, and

> other professionals; (6) the quality and quantity of the programming to be created, promoted or facilitated by the organization or the company; (7) a review of the organization's procedures to ensure compliance with federal and state law, including the regulations of Connecticut state agencies; and (8) any other criteria determined to be relevant by the department. If the department selects an organization to provide community access operations, the company shall provide financial and technical support to the organization in an amount to be determined by the department. On petition of the Office of Consumer Counsel or the franchise's advisory council or on its own motion, the department shall hold a hearing, with notice, on the ability of the organization to continue its responsibility for community access operations. In its decision following such a hearing, the department may reassign the responsibility for community access operations to another organization or the company in accordance with the provisions of this subsection.

Conn. Gen. Stat. § 16-331a(c).

Of the 24 Connecticut cable areas, 14 have public access provided by the cable franchisee, seven have community access provided by a third-party nonprofit organization covering the entire area (such as the Plaintiff, Sound View), two cable areas have separate nonprofit organizations for each municipality in the area, and one is split between the cable franchisee providing community access for one of the area towns, with separate third-party nonprofit organizations covering the other towns. SMF ¶ 6. See the attached Exhibit 2.

The cable areas covering Connecticut's major cities reflect this diversity. There are five Connecticut municipalities with a population greater than 100,000. SMF ¶ 7. They are (from most populous to least): Bridgeport, New Haven, Hartford, Stamford and Waterbury. See the attached Exhibit 3. Each of these major cities is located in a separate cable area. SMF ¶ 8. See Exhibits 1 and 2. Bridgeport is in Area 2, consisting of the municipalities of Bridgeport, Fairfield, Milford, Orange, Stratford and Woodbridge, and community access for the entire area is

provided by the Plaintiff, Sound View, a third party nonprofit organization. SMF ¶ 8. Hartford's cable area consists of Bloomfield, East Hartford, Hartford, Simsbury, West Hartford and Windsor, with community access provided by six separate nonprofit organizations (one for each municipality). *Id.* New Haven's area consists of Hamden, New Haven and West Haven, and community access for the entire area is provided by a single third party nonprofit organization. Stamford's cable area consists of Darien, Easton, Greenwich, New Canaan, Norwalk, Redding, Westport and Wilton, with Cablevision providing both cable service and community access service. *Id.* Waterbury's cable area consists of Middlebury, Prospect, Plymouth, Waterbury and Wolcott, and community access for the entire area is provided by a single third party nonprofit organization. *Id.* See Exhibits 1 and 3.

In 2007, the General Assembly enacted P.A. 07-253, which was designed to promote cable competition by allowing telecommunications companies to provide video services without having to obtain a time-limited franchise or being subject to rate regulation. Section 2 of P.A. 07-253, since codified as Conn. Gen. Stat. § 16-331e, required entities, other than cable companies, that seek to provide video services to file an application with the DPUC (now PURA) for a certificate of video franchise authority (CVFA). Conn. Gen. Stat. § 16-331e (e) requires PURA to grant the CVFA if certain conditions are met. The entities that receive CVFAs are called certified competitive video service providers. See Conn. Gen. Stat. § 16-1 (47). Providers are subject to some of the requirements that apply to cable TV companies, notably those regarding community access and consumer protection. See Conn. Gen. Stat. § 16-331e (c), which makes applicable the requirements of Conn. Gen. Stat. §§ 16-331g to 16-331*o*, inclusive. Certified competitive video

service providers, however, are not subject to other requirements that applied to cable TV companies, including obtaining and renewing a franchise for a specified number of years and being subject to rate regulation. In addition, the providers are not required to build out their systems, i.e., offer to provide service to all households in their service territories; however, they may not engage in redlining, i.e., they may not deny access to service to any group of potential residential customers based solely on the income of the residents in the area. See Conn. Gen. Stat. § 16-331g.

Section 13 of P.A. 07-253, since codified as Conn. Gen. Stat. § 16-331p, provides that 30 days after a certified competitive video service provider offers service in a cable company's franchise area, the cable company may seek a certificate of cable franchise authority (CCFA) from PURA. Unlike cable franchises, CCFAs are valid indefinitely and do not have to be renewed. (A cable company may also apply for a CVFA for any area that was outside of its franchise areas on or before October 1, 2007. See Conn. Gen. Stat. § 16-331e (a).)

II. UNDISPUTED FACTS

A. RENEWAL OF CABLEVISION'S FRANCHISE

In DPUC Docket No. 97-09-09, Application of Sound View Media for Designation as Area 2 Community Access Provider, decision dated November 25, 1998, the DPUC designated Sound View as a non-profit organization community access provider over the objection of Cablevision of Southern Connecticut, L.P., the incumbent cable television franchise holder. SMF ¶ 9. See Exhibit 4. See also SMF ¶ 10, DPUC Docket No. 05-04-09, Application of Cablevision of Southern Connecticut, L.P. for Franchise Renewal, (hereinafter "Cablevision Franchise

Renewal Decision"), decision dated November 22, 2006, Exhibit 5; *see also Complaint, ¶ 4.* While the title of the docket specified that it concerned the renewal of Cablevision's franchise, the case turned into the forum for the issues dividing Plaintiff Sound View and the intervening municipalities.

Plaintiff's Complaint noted that during the DPUC proceedings in DPUC Docket No. 05-04-09, the Cablevision Franchise Renewal case, there were differences of opinion between the Area Two Advisory Council and Sound View, and said that:

> The differences of opinion between Sound View and some members of the Area Two Advisory Council concerned the relative merits of town-specific community access program distribution versus system wide community access program distribution, and control over the funds paid by Cablevision subscribers in support of community access television.

Complaint, ¶ 8.

The Cablevision Franchise Renewal Decision reveals that to be the case, as the DPUC stated:

> The most contentious issue during the proceeding concerned the relative merits of town-specific community access program distribution versus franchise-wide community access program distribution and whether Sound View's performance in facilitating town-specific programming and responding to the needs and interests of the municipalities has been in the public interest. Sound View testified that, even before it became the community access provider in the franchise, its philosophy has favored system-wide programming distribution and that it made that philosophy clear to municipalities when it became the community access manager in 1999. Tr. 6/22/06, pp. 721 and 722.

Cablevision Franchise Renewal Decision (Exhibit 5), page 19.

While Plaintiff's Complaint initially mentioned "some members of the Area Two Cable Advisory Council," *Complaint, ¶ 8,* the Complaint later specifically mentioned three

municipalities, Milford, Orange and Woodbridge, as having differences with Sound View over the issue of town-specific programming versus system-wide programming. *Complaint, ¶ 9.* This is consistent with the DPUC's Cablevision Franchise Renewal Decision where the DPUC stated:

> Milford further claims that Sound View forced its philosophy of system-wide access programming distribution by cablecasting meetings of other towns on channel 79 in Milford. In 2005, MGAT provided a budget to the City of Milford for new video equipment and planned to increase the number of town meetings taped. Milford also claims that there was strong support for MGAT from Milford residents. Id., p. 3. The Agreement between Milford and Sound View was terminated in July 2005; Milford began cablecasting town-specific programming on channel 79 in January 2006. According to Milford, when Sound View learned that Milford was cablecasting town-specific programming to its residents, it ordered Cablevision to disconnect the "Milford channel 79." Milford Pre-Filed Testimony, p. 3. In April 2006, Milford asked the Department to grant it relief to allow for the return of town-specific cable programming. Id. By its August 4, 2006 Letter, the Department granted Milford's request for interim relief, subject to certain conditions.
>
> Milford testified that its residents have stated a clear preference to see local government programs on channel 79 and not those of other franchise towns whose actions are unlikely to affect them. Milford stated that under rare circumstances, there may be community access programming of a regional nature that its residents may want to see on channel 79. Tr. 6/19/06, pp. 329 and 330. Milford also claims that, since March of 2006, no access programming from Milford has been cablecast on channel 79. Milford Pre-Filed Testimony, p. 4; Tr. 6/19/06, p. 348. Milford testified that, when it asked for more time on channel 79 for its programs to be cablecast, Sound View refused. Sound View replied that it has never refused to air Milford programming on channel 78 or 79. Tr. 6/19/06, pp. 322 and 323. Milford believes that it should control channel 79 and estimates that it could currently produce approximately 16 hours of original, first-run programming in a typical two-week period. Id., p. 347.

Cablevision Franchise Renewal Decision (Exhibit 5), page 22; see also the pre-filed testimony of Milford Mayor James L. Richetelli, Jr., Exhibit 12, the pre-filed testimony of Mr. Philip Kearney,

a Member of the Area 2 Cable Advisory Council and the Milford Government Access TV Committee, Exhibit 13 (both submitted to the DPUC on or about June 15, 2006), and the joint brief of the Town of Orange and City of Milford, submitted to the DPUC on August 28, 2006, Exhibit 16. See also SMF ¶¶ 18, 19, 22.

In his pre-filed testimony, Mr. Kearney stated, in part, that "Sound View did not prioritize Milford programming, and in fact still imposes programming that is poorly produced (i.e. constant repeats of the monthly Stratford town meeting that is difficult to hear with any clarity), music videos and other non-governmental programming. On weekends a blue screen is shown for hours at a time." *See SMF ¶ 19 and Exhibit 13.*

The Town of Orange also expressed concern with Sound View, again over the issue of town-specific programming versus system-wide programming:

> Orange testified that it feared that Sound View's intent is to change the town-specific content currently being aired in the town. Orange wants a renewed franchise to include a mandate that all towns have access to educational and governmental access channels for town-specific purposes. James Zeoli Pre-Filed Testimony, p. 1. In 1998, the Town of Orange formed the Orange Government Access Television Committee (OGAT) to provide town residents with real time local government access through live broadcasting of Board of Selectmen meetings, as well as taped broadcast of other boards and commissions and events such as parades, fairs and cultural events. Sol Silverstein Pre-Filed Testimony, p. 1. OGAT, which has its own bylaws, is a commission of volunteers appointed by the first selectman. Tr. 6/21/06, pp. 432 and 431. Since 2001, OGAT has operated as an independent, permanent committee of the Town of Orange and its budget has increased from $3,000 in budget year 1999/2000 to $65,730 for budget year 2006/2007. OGAT's first live telecast was in 1999. Id., p. 3; Tr. 6/19/06, p. 411. OGAT testified that currently it could produce approximately 15 programs a month. Id., p. 410.
>
> OGAT also testified that it has been receiving positive feedback from residents since it began cablecasting on the government channel. OGAT states that Sound

> View's attempt to paint town-specific community access as a "Balkanization" of educational and governmental access is incorrect. OGAT cites Section 7.1 of Cablevision's Franchise Agreement with the Department which states, in part, "[t]he system will be configured to allow each channel to be sent to specific municipalities only or system-wide at the choice of the access user." Orange states that, because it is the access user and it wants channel 79 to be town-specific, it should be made so, in accordance with the FA. Orange Pre-Filed Testimony, p. 8. OGAT also testified that it would like to cablecast its own educational programs on channel 78. Tr. 6/19/06, pp. 408 and 411. In further support of its position, OGAT submitted approximately 1,200 petitions signed by residents of Orange, supporting the continuation of town-specific governmental access programming. Tr. 6/7/06, p. 68.

Cablevision Franchise Renewal Decision (Exhibit 5), pages 22-23; see also the pre-filed testimony of Orange First Selectman James M. Zeoli and Mr. Sol Silverstein, Chairman of the Town of Orange Government Access Television Committee, Exhibit 11, submitted to the DPUC on or about June 8, 2006, and the joint brief of the Town of Orange and City of Milford, submitted to the DPUC on August 28, 2006, Exhibit 16. See also SMF ¶¶ 10, 17,22.

Local members of the General Assembly, too, submitted their concerns to the DPUC. On or about April 12, 2006, James A. Amann, Speaker of the House of Representatives, submitted a letter to the DPUC requesting that the DPUC provide "authorization to provide town-specific programming to Cablevision subscribers in Milford, as well as, an order that Sound View Community Media cease any activities that obstruct such programming." *See Exhibit 8.* Also on or about April 12, 2006, State Representative Paul Davis submitted a letter to the DPUC, expressing support for "Town-Specific" government programming. *See Exhibit 9; SMF ¶ 15.*

Pursuant to Conn. Gen. Stat. § 16-331(f), an applicant for a certificate (or renewal) "shall finance the reasonable costs of a community needs assessment, conducted by an independent

consultant." The "Needs Assessor" so appointed was the firm of Moss & Barnett. The Needs Assessment, dated April 11, 2006, was submitted to the DPUC as part of DPUC Docket No. 05-04-09. SMF ¶ 11; *See Exhibit 6.* "Correspondence Regarding Public, Educational and Governmental Programming" was attached as Exhibit B to the Needs Assessment. *Id.; see Exhibit 7.*

The Needs Assessment stated, in part, that: "The towns of Milford, Orange and Woodbridge all emphasize a clear and unequivocal goal of utilizing the cable system to provide town-specific government access programming." The Needs Assessment also stated that the towns felt that their relationship with Sound View "is strained and difficult." The Needs Assessment stated that, "Fairfield emphasized a desire to promote a town-specific educational access channel and a desire for control of funding provided by town subscribers to support governmental and educational programming." *See Exhibit 6, Needs Assessment, page 39; SMF ¶ 12.*

The Needs Assessment found, in part, that "From Sound View's perspective the towns are attempting to modify the DPUC delegation of control of the PEG channels from Sound View back to the towns. Sound View strongly maintains that PEG programming is best handled by a single, centrally located provider which can transmit programming throughout the Franchise Area rather than on a town by town basis." *See Exhibit 6, Needs Assessment, page 39; SMF ¶ 13.* In analyzing the Needs Assessor's testimony, the DPUC noted that:

> The Needs Assessor testified that, while the Cablevision system is capable of narrowcasting programming to individual towns, only Orange and Woodbridge are doing so. M&B stated that, in response to letters it sent to the municipalities in the franchise, Milford, Orange and Woodbridge all want to utilize the community access channels to provide town-specific governmental access program-

> ming and stated that their relationships with Sound View are strained and difficult. In addition, Fairfield expressed a desire to promote town-specific educational access channel and to control the subscriber fees paid to Cablevision that support community access in the franchise. The Needs Assessor concluded that there is a strong interest in the franchise among the towns and the Advisory Council to commit resources to support town-specific programming and that the objective of narrowcasting can be achieved easily because the system is already configured to allow such narrowcasting. Needs Assessment, pp. 39 and 40. M&B testified that Cablevision was largely noncommittal on the issue of public, educational and governmental access operations. Id., p. 39.

Cablevision Franchise Renewal Decision (Exhibit 5), page 23; SMF ¶ 10.

In the proceeding before the DPUC, the Office of the Attorney General (AG) advocated in support of municipalities calling for more town-specific programming. The DPUC noted:

> The AG believes that the Department should require that any municipality that desires town-specific educational and governmental access, and can demonstrate the basic competence to provide such programming, should be allowed to do so with a minimum of administrative burdens. In addition, the AG recommends that if Sound View is unwilling or unable to allow town-specific educational and governmental access programming, the Department should either return the responsibility for community access operations to the Company or seek another third-party provider. The AG states that the result of Sound View's philosophy has been that access viewers in towns that desire town-specific programming have lost out. AG Brief, pp. 2 and 8. The AG believes that the record is clear that Sound View is not meeting the community access needs of the residents and that the relationship between Sound View, certain towns and the Advisory Council have been severely strained. Id., p. 8.
>
> The AG also believes that the Department should implement a funding mechanism to ensure that sufficient community access funds are available to support town-specific operations. The AG suggests that the Department institute a mediation process to work out the details of such an arrangement. Id., p. 18.

Cablevision Franchise Renewal Decision (Exhibit 5), page 24; SMF ¶ 10. The Attorney General suggested that "the Department give the Advisory Council authority to allocate the funds to the municipalities." *Id., at 31; see also Exhibit 15, the AG's Brief, filed August 28, 2006; SMF ¶ 21.*

The Office of Consumer Counsel (OCC) shared many of the same positions of the AG. In its brief submitted to the DPUC on August 28, 2006, Exhibit 14, the OCC succinctly expressed the issue:

> Most specifically and beyond the social antagonism that has developed into a blood feud among many of the participants, including the Advisory Council and at least four of the six towns in the Franchise Area, the issue is basically the inability of the towns to control government access programming and allow subscribers within their towns to view government programming unique to their community.

Exhibit 14, page 21; SMF ¶ 20. The OCC further elaborated on an issue within that issue, that of funding: "Perhaps the most delicate problem facing the Department will be apportioning the funding for the operations of Sound View or any third party provider, with a centrally-located public access studio and programming for regional purposes, and funds to support of town-specific governmental and educational programming." *Exhibit 14, pages 22-23; SMF ¶ 20.*

The incumbent cable franchisee, Cablevision, advocated stripping Sound View of its responsibilities over educational and governmental access programming:

> Cablevision testified that it supports town-specific programming. Cablevision believes that Section 7.1 of the FA [Franchise Agreement] is still in effect, and that accordingly, governmental access programming should be cablecast on a town-specific basis, if a town so desires. Tr. 6/21/06, p. 490. The Company's proposed solution to the town-specific versus franchise-wide programming distribution issue is to change the manner in which community access is administered and managed in the franchise. Cablevision proposes that in a new term, Sound View continue to manage and administer public access only, and Cablevision, with the assistance of the Advisory Council, would administer educational and governmental access. Cablevision Pre-Filed Testimony, p. 23. Based on the responses and comments provided by the municipalities in the franchise and the results of the Needs Assessment, Cablevision concludes that franchise towns have not been adequately served by Sound View. In addition, the Company testified that it has become aware through its attendance at Advisory

> Council meetings that towns in the franchise that do not have town-specific governmental access channels would like to have such programming capability. Tr. 6/21/06, pp. 487 and 488. The Company expressed its belief that the educational and governmental access channels belong to the educational and governmental constituencies in the franchise. Cablevision testified that the Advisory Council is the appropriate entity to determine how the funds dedicated to educational and governmental access should be distributed to the towns. Tr. 8/14/06, p. 931. The Company also testified that it already has staff qualified to perform the administrative functions involved in managing educational and governmental access. Tr. 6/21/06, p. 500; Tr. 8/14/06, p. 932.

Cablevision Franchise Renewal Decision (Exhibit 5), page 24; SMF ¶ 10.

On November 22, 2006, the DPUC issued its decision granting renewal of Cablevision's franchise for Area Two. In its decision, the DPUC found that "it is in the public interest for Sound View and the municipalities to attempt to resolve the town-specific versus franchise-wide distribution issue through negotiation and compromise." *Cablevision Franchise Renewal Decision (Exhibit 5), page 28; SMF ¶ 10.* The DPUC ordered that, "If negotiations between Sound View and one or more than one municipality have not resulted in mutually acceptable programming scheduling policies by that date [January 31, 2007], Sound View and the municipalities will be subject to mandatory alternative dispute resolution (ADR) and the Department will attempt to resolve the issue by ADR mechanisms, pursuant to Conn. Gen. Stat. § 16-19jj." *Id.* The DPUC thus rejected "either relieving Sound View entirely of its responsibility as the manager of public, educational and governmental access or limiting its responsibility to public access operations only." *Id., at page 36.*

B. ENACTMENT OF PUBLIC ACT 08-159

Sound View pleaded that negotiations and DPUC mediation sessions did take place between several of the Area Two municipalities and Sound View subsequent to the Cablevision Franchise Renewal Decision. *Complaint, ¶¶ 10-11.* Nevertheless, by letter dated March 7, 2008, the Town of Orange reported to the DPUC that no agreement had been reached between Sound View and the Town on town-specific versus regional programming. *See Exhibit 17; SMF ¶ 23.* The General Assembly thus decided upon a different course of action, enacting Public Act 08-159 on June 12, 2008. Section 1 of P.A. 08-159 empowers towns to operate town-specific education and government public access channels. It is codified as Conn. Gen. Stat. § 16-331ff and states:

> (a) Any third-party nonprofit community access provider serving six municipalities, one of which has a population of more than one hundred thirty thousand, shall, upon request from any town organization, authority, body or official within its service territory, provide written consent, pursuant to its service provider agreements, for said town organization, authority, body or official to (1) operate education and government public access channels in that town, and (2) engage freely and directly the community antenna television company providing services in that town to use their headend equipment for dissemination of town-specific community access programming on such channels. Said third-party nonprofit community access provider must grant such written consent to said requesting town organization, authority, body or official within three business days. Written consent not provided within three business days shall be deemed granted.
>
> (b) If a third-party nonprofit provider fails to provide written consent within three days, pursuant to subsection (a) of this section, the Public Utilities Regulatory Authority shall, upon a request from a town organization, authority, body or official within the service territory of that third-party nonprofit community access provider serving six municipalities, one of which has a population of more than one hundred thirty thousand, (1) terminate, revoke or rescind such third party nonprofit provider's service agreement to provide public access program-

ming within one hundred eighty days, and (2) reopen the application process to secure a community access provider for each of the towns within the affected service territory.

Id. Section 2 of P.A. 08-159 shifts funding for educational and governmental community access programming to the advisory council and the municipalities. It has been codified as Conn. Gen. Stat. § 16-331gg:

> (a) A community antenna television company, a certified competitive video service provider that was providing service as a community antenna television company pursuant to section 16-331 on October 1, 2007, or a holder of a certificate of cable franchise authority that provides services within a service territory of a third-party nonprofit community access provider that serves six municipalities, one of which has a population of more than one hundred thirty thousand, shall direct the sum of one hundred thousand dollars per year from the funds collected from subscribers in said service territory that it provides to the existing third-party nonprofit community access provider serving six municipalities, one of which has a population of more than one hundred thirty thousand, directly to the service territory's community antenna television advisory council for developing town-specific education and government community access programming.
>
> (b) A community antenna television advisory council that receives funds pursuant to subsection (a) of this section shall distribute said funds in their entirety to a town organization, authority, body or official in the service territory of a third-party nonprofit community access provider serving six municipalities, one of which has a population of more than one hundred thirty thousand, to support the development of production and programming capabilities for town-specific education and government public access programming, pursuant to grant procedures and processes established by said council.
>
> (c) Any community antenna television advisory council that receives funds pursuant to subsection (a) of this section shall report annually to the Public Utilities Regulatory Authority all completed or planned disbursements of funds and certify that said funds were spent in their entirety and used for the public good in the creation of town-specific education and government public access programming for at least one of the towns in its service territory.

Id.

The debate over the legislation took place in both chambers on May 7, 2008. Senator Gayle S. Slossberg, a co-sponsor of the bill, spoke in favor and offered the reason behind it:

> Very simply, as the hour is late. This bill provides town-specific government access television programming to towns in Area 2 of the Cable Advisory Council.
>
> It's a very long story. I can't get, I'm not going to get into right now, but basically is that the towns in this district, there are six towns, have been unable, have been denied the ability to have town-specific programming on their public access television.
>
> What this will do is allow them to work with the current nonprofit third-party community access provider to develop town-specific programming and provide them with an opportunity to do so.
>
> It will also ensure that funding that was supposed to be going to them does actually go to them to help them in developing that town-specific programming. I'd ask for the support of the Chamber.

51 Sen. Proc., Pt. 17, 2008 Sess., pp. 5333-5334, remarks of Senator Slossberg; see Exhibit 18; SMF ¶ 24.

Senator Dan Debicella next spoke in opposition to the bill:

> Thank you, Mr. President. Mr. President, I rise in opposition to the amendment. I think the intention behind this is good. But as so often happens, we're passing legislation, whereas something's happening outside of this Chamber that could solve the problem. Right now, this legislation is narrowly tailored to apply to only a few situations, one of which is happening in the Greater Bridgeport region where six such towns, as Senator Slossberg mentioned, are trying to get some local access programming.
>
> And the issue of why I oppose this is twofold. One is that the person and the company who control the current license are in negotiations with the towns to actually give them that right to have local access programming. And I believe we should allow those negotiations to continue.

> But second, Mr. President, is more of a philosophical point, is that we are essentially, by passing this, overruling the DPUC in their decision to actually give out a license.
>
> And so if we believe it is good practice for us to second-guess the DPUC, for us to be going in and to changing licenses that they determined should be given out, then you should vote for this bill or this amendment.

51 Sen. Proc., Pt. 17, 2008 Sess., pp. 5335-5336, remarks of Senator Debicella; see Exhibit 18; SMF ¶ 24.

Finally, Senator Judith G. Freedman, another co-sponsor of the bill, spoke in favor of the legislation:

> Thank you, Mr. President. I stand in support of the amendment.
>
> As you know, Cablevision has two districts in our part of our state. Our part is the beneficiary of each town having their own providers for the PEG channels, and it does make a big difference.
>
> The Bridgeport system is entirely different, particularly with a third party provider. And the people that live in that part of the district don't have their own access.
>
> So this amendment will cure that ill and I think make it much better for the people who live in the towns of that part of the Cablevision area. Thank you.

51 Sen. Proc., Pt. 17, 2008 Sess., pp. 5336-5337, remarks of Senator Freedman; see Exhibit 18; SMF ¶ 24.

Only one legislator spoke on the bill in the House of Representatives. Representative Christopher L. Caruso, a co-sponsor, spoke briefly in favor of the legislation:

> Yes, Mr. Speaker. The amendment provides access to the Towns of Bridgeport, Fairfield, Milford, Orange, Stratford and Woodbridge for their nonprofit community access. I move adoption.

51 H.R. Proc., Pt. 20, 2008 Sess., p. 6669, remarks of Representative Caruso; see Exhibit 18; SMF ¶ 24.

The arguments of Senators Slossberg and Freedman and Representative Caruso ultimately prevailed over the opposition of Senator Debicella and P.A. 08-159 became law.

C. CHANGES IN CABLEVISION'S CERTIFICATES

As of the beginning of 2008, Cablevision Corporation held three CPCNs (cable franchises issued pursuant to Conn. Gen. Stat. § 16-331) through three affiliate: Cablevision Systems of Southern Connecticut, L.P. (covering the Bridgeport area – Area Two – the subject area of the instant case); Cablevision of Connecticut, L.P. (covering the ten town Stamford/Norwalk cable area); and Cablevision of Litchfield, Inc. (covering the eight-town Litchfield cable area). See both the Cablevision letter to the DPUC dated January 17, 2008 (Exhibit 19), and the DPUC decision letter, dated February 1, 2008 (Exhibit 20), in DPUC Docket No. 08-01-14. See also SMF ¶¶ 25-26. By letter dated January 17, 2008, Cablevision of Litchfield, Inc. applied to the DPUC for a CVFA pursuant to Section 2 of P.A. 07-253 (since codified as Conn. Gen. Stat. § 16-331e) to cover the entire State of Connecticut. SMF ¶ 25. The letter stated, in part, that "Upon the Department's grant of this application, Cablevision proposes to assign its Connecticut assets to the Company [Cablevision of Litchfield, Inc.] or an affiliated entity to hold the certificate of video franchise authority, and its existing CPCNs would be surrendered and its franchise agreements terminated." *Id.*, see Exhibit 19. By letter dated February 1, 2008, the DPUC approved the application of Cablevision of Litchfield, Inc., for all of Connecticut outside of the Litchfield cable

area. SMF ¶ 26, Exhibit 20. Conn. Gen. Stat. § 16-331e(a) provides, in part, that "A community antenna television company may apply for a certificate of video franchise authority pursuant to this section for any service area in which it was not certified to provide community antenna television service pursuant to section 16-331 on or before October 1, 2007." Because Cablevision of Litchfield, Inc. held a CPCN for the eight-town Litchfield cable area on or before October 1, 2007, its application to cover that portion of Connecticut was denied. SMF ¶ 26; Exhibit 20.

On June 17, 2008, Cablevision of Connecticut, L.P. and Cablevision Systems of Southern Connecticut, L.P. applied for separate CVFAs, each covering the entire State of Connecticut except their respective CPCN areas (Exhibit 21) and by letter dated July 2, 2008, the DPUC granted these applications (Exhibit 22). See the DPUC decision letter, dated July 2, 2008, in DPUC Docket No. 08-01-12 (Exhibit 22). See also SMF ¶¶ 27-28.

At this point, each Cablevision entity possessed a CVFA, albeit for all of Connecticut outside of the area for which each entity possessed a CPCN. Each of the Cablevision entities could have applied for (and presumably been granted) a CCFA for the area of its existing CPCN. That, however, did not happen. By letter dated July 7, 2008, Attorney Paul Corey of Brown Rudnick LLP, representing Cablevision, notified the DPUC that Cablevision was invoking Conn. Gen. Stat. § 16-331e(h)[2] to implement the following CVFA transfers:

> 1. Transfer from Norwalk Area to Bridgeport Area of the CVFA dated July 2, 2008, for service in the state including the Bridgeport Area; 2. Transfer from

[2] This provision states, "The certificate of video franchise authority issued by the authority is fully transferable to any successor in interest to the applicant to which it was initially granted. A notice of transfer shall be filed with the authority not later than fourteen business days after the completion of such transfer. The certificate of video franchise authority issued by the authority may be terminated by the certified competitive video service provider by submitting notice to the authority."

> Bridgeport Area to Litchfield Area of the CVFA dated July 2, 2008, for service in the state including the Litchfield Area; and 3. Transfer from Litchfield Area to Norwalk Area of the CVFA dated February 1, 2008, for service in the state including the Norwalk Area.

SMF ¶ 29; see Exhibit 23, the Brown Rudnick/Cablevision letter, dated July 7, 2008, in DPUC Docket No. 08-01-12.

About three years later, Cablevision sent a letter dated July 29, 2011, to PURA, which had since become the successor agency to the DPUC, advising PURA that:

> Pursuant to subsection (h) of Conn. Gen. Stat. § 16-331e, Cablevision of Connecticut, L.P., Cablevision Systems of Southern Connecticut, L.P., Cablevision of Litchfield, Inc. hereby notify the Public Utilities Regulatory Authority ("PURA") of the transfer of the certificates of video franchise authority ("CVFA") held by Cablevision of Connecticut, L.P., Cablevision Systems of Southern Connecticut, L.P. to Cablevision of Litchfield, Inc. With these transfers, Cablevision of Litchfield, Inc. will provide video service under three CVFAs in the municipalities formerly served by Cablevision of Connecticut, L.P. and Cablevision Systems of Southern Connecticut, L.P., as well as continuing to provide service in the Litchfield area. These transfers are effective immediately.

See DPUC Docket 08-06-12, Cablevision Letter of 7/29/2011, Exhibit 24; SMF ¶ 30.

Notwithstanding the changes in certifications, the entity that has been admitted as an intervenor in the instant case (but whose legal status is being challenged in the instant case), the Area Two Cable Advisory Council, has been receiving the sum of $100,000 each year after the passage of P.A. 08-159, and distributing the funds in accordance with the terms of the act from Cablevision. See Complaint, ¶ 22; Exhibits 27 & 28. See also SMF ¶¶ 31; 34, 35.

D. PETITION OF PLAINTIFF SOUND VIEW FOR A DECLARATORY RULING

On or about July 12, 2011, Plaintiff Sound View filed a petition for a declaratory ruling with PURA (hereinafter "Plaintiff's Petition"), which was docketed by PURA as PURA Docket No. 11-07-09 [not withstanding Sound View putting Docket No. 11-01-03 on the document]. *See PURA Docket No. 11-07-09, Exhibit 26.* Plaintiff's Petition asked that P.A. 08-159 (codified as Conn. Gen. Stat. §§ 16-331ff and 16-331gg) be declared as unconstitutional in that it violated "Sound View's rights to equal protection under the Fourteenth Amendment to the U.S. Constitution and under Article 1, §§ 1 and 20 of the Connecticut Constitution." In the alternative, Sound View sought a ruling "that P.A. 08-159 no longer is applicable because the designated recipient of the diverted funds, the Area Two Cable Advisory Council, legally ceased to exist as of July 7, 2008." *Id.*, at 2. Plaintiff further cited *City Recycling, Inc. v. State of Connecticut*, 257 Conn. 429, 778 A.2d 77 (2001) in support of its assertion that P.A. 08-159 violated its rights to equal protection. *Id.*, at 8.

Nine of the area legislators, including two of the co-sponsors of P.A. 08-159 (Representative Kim Fawcett and Senator Gayle Slossberg) submitted a joint response to Plaintiff's Petition. The legislators' letter of September 16, 2011 to PURA (which referred to Sound View as SVCM) stated, in relevant part:

> In 2008, we strongly supported the adoption of legislation (name of public act-hereafter "2008 PEG Act") that empowered our communities with the resources they needed to address the public access needs of our constituents. Since that time, under the supervision of this Authority, the Area 2 Cable Advisory Council ("Council") and the municipalities in the SVCM area have worked together to effectively implement the provisions of this new law. In accordance with legislative intent, the funding provided to the Council has de-

> livered critical support to our local Education and Government access stations enabling them to produce extensive and high-quality town specific public access content. This funding allows our towns to broadcast local municipal government meetings, school events and other important community programs that SVCM would not air on its system before we adopted the 2008 PEG Act.
>
> C.G.S. 16-331gg established the legal requirement that Cablevision annually distribute $100,000 to the Council to support its local public access programming activity. This statute was adopted in 2008 (a year after the passage of the 2007 Video Franchising Act) for the express purpose of providing the Council with financial resources to support its town-specific public access programming activity. The legislature was aware of the fact that Cablevision was in the process of obtaining a CVFA certificate when the legislation was pending and it addressed that issue by drafting the statute to broadly apply to all video service providers (CVFA, CCFA and CPCN holders). Pursuant to the provision of the 2008 PEG Act, the Council has been receiving funds, expending funds on town-specific PEG programming, and as required filing annual reports with this Authority on its public access activities.

See PURA Docket No. 11-07-09, Exhibit 27; SMF ¶ 33.

Additionally, comments in opposition to Plaintiff's Petition were provided to PURA by Cablevision (Exhibit 29), the Area Two Cable Advisory Council (Exhibit 30), and the towns of Fairfield (Exhibit 31), Orange (Exhibit 32) and Woodbridge (Exhibit 33). *See PURA Docket No. 11-07-09, and Exhibits 29-33.*[3] *See also SMF ¶¶ 36-40.*

Sound View responded to these comments on or about September 23, 2011. *See PURA Docket No. 11-07-09, and Exhibit 35. See also SMF ¶ 42.*

On February 1, 2012, PURA rendered its Final Decision in Docket No. 11-07-09. The agency declined to issue a declaratory ruling in Plaintiff's Petition, saying:

[3] The City of Milford submitted a letter requesting intervenor status in PURA Docket No. 11-07-09 dated September 14, 2011. The City did not present any legal argument, but its letter stated, in part, that, "The City of Milford currently receives funding pursuant to C.G.S. 16-331gg to operate its government community access programming.

> The PURA does not have the jurisdiction to rule on the constitutionality of Conn. Gen Stat. §§16-331ff and 16-331gg. Since the Legislature has not made any substantive changes to these statutes, the PURA can not assume that the failure to act was not intentional. Accordingly, the PURA at this time declines to issue a declaratory ruling in response to SVCM's petition until such time as the Legislature takes action to amend any applicable statute(s).

See PURA Docket No. 11-07-09, and Exhibit 36. See also SMF ¶ 43.

E. THE FILING OF THE INSTANT CASE.

The instant Complaint is a declaratory judgment action filed by Plaintiff Sound View on August 6, 2012. Plaintiff is asking this Court for the same thing it asked in its Petition before PURA, namely to declare P.A. 08-159 declared inapplicable, or, in the alternative, unconstitutional. *See Complaint, Prayer for Relief.* PURA has filed a Motion for Summary Judgment and supporting documents and respectfully submits this brief in support of said motion.

III. ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT

In *Zielinski v. Kostsoris*, 279 Conn. 312, 901 A.2d 1207 (2006), the Connecticut Supreme Court set forth the standard to be met in deciding whether to grant summary judgment, holding that the burden is on the movant to exclude "any real doubt as to the existence of any genuine issue of material fact." *Id.*, 279 Conn. at 318. While much of what has been cited in the factual portion of this brief indicates conflicts between Plaintiff and certain municipalities and the Advi-

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The City would be adversely affected if Soundview were to prevail on its claims." A true copy is attached as Exhibit 34. See SMF ¶ 41.

sory Council, and between certain legislators, no material facts are in dispute, so the issues for the Court to resolve are purely matters of law. Summary judgment is thus appropriate.

B. PUBLIC ACT 08-159 IS CONSTITUTIONAL.

Plaintiff's first claim is that P.A. 08-159, codified as Conn. Gen. Stat. §§ 16-331ff and 16-331gg, is unconstitutional in that it violates Sound View's rights to equal protection under the Fourteenth Amendment to the U.S. Constitution and under Article 1, §§ 1 and 20 of the Connecticut Constitution. The Connecticut Supreme Court held most recently in *Markley v. Department of Public Utility Control,* 301 Conn. 56, 23 A.3d 668 (2011), that the Connecticut Constitution's equal protection clause has "a like meaning" to the Federal clause. *Id.,* 301 Conn. at 68. Thus, separate analysis is not needed for State and Federal equal protection constitutional claims.

The first question is under what standard Sound View's equal protection claim should be evaluated. As the Appellate Court held in *Golden v. Johnson Memorial Hospital*, 66 Conn. App. 518, 785 A.2d 234, *cert. den.*, 259 Conn. 902, 789 A.2d 990 (2001):

> When a statute is challenged on equal protection grounds ... the reviewing court must first determine the standard by which the challenged statute's constitutional validity will be determined.... When a statutory classification impinges upon an inherently suspect class or affects a fundamental personal right, the statute is subject to strict scrutiny and is justified only by a compelling state interest.... Otherwise, a statute will stand if the classification bears a reasonable relation to a legitimate state interest.
>
> . . .
>
> A right is fundamental for purposes of equal protection analysis if it is explicitly or implicitly guaranteed by the constitution. . . . The plaintiff's claim does not implicate any explicit or implicit fundamental rights; thus, we employ the rational basis test in reviewing it.

Id., 66 Conn. App. at 539-540 (internal citations omitted). In the instant case, Plaintiff has not asserted any right explicitly or implicitly guaranteed by either the State or Federal constitution; therefore, Sound View's equal protection claim should be evaluated on a rational basis test.

The rational basis test is not an opportunity for the Court to evaluate whether the legislature made the right policy choice in enacting the challenged legislation, for two decades ago, the Supreme Court of the United States held that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" and that it does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe,* 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). The Supreme Court said that for these reasons, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Id.* Finally, the Court held:

> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data . . . A statute is presumed constitutional, and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.

Id., 509 U.S. at 320-321 (internal citations and quotation marks omitted).

These principles were more recently reiterated by the Connecticut Supreme Court in *Markley v. Department of Public Utility Control, supra,* where the Court held that under the rational basis test, the equal protection clause is satisfied as long as "there is a plausible policy reason for the classification." *Id.*, 301 Conn. at 69. In order for one challenging the constitutionality of the statute to prevail, "the party challenging the legislation must negative every conceivable basis which might support it." *Id.*, 301 Conn. at 70.

In its petition to PURA for a declaratory ruling, Plaintiff Sound View cited *City Recycling, Inc. v. State of Connecticut, supra.* In that case, the Connecticut Supreme Court invalidated P.A. 97-300, § 2. As the *City Recycling* Court noted:

> Section 22a-208a (a), as amended by P.A. 97-300, § 2, prohibits the commissioner of the department of environmental protection (department) from approving, for a city with a population of greater than 100,000, the establishment or construction of "a new volume reduction plant or transfer station located, or proposed to be located, within one-quarter mile of a child day care center...." The statute also excepts from its purview existing volume reduction facilities and transfer stations without regard to their location. This case returns to us after the trial court, on remand from this court in a prior reservation for advice, made numerous factual findings, most significantly, "that the proposed expansion [by the plaintiff] of its facility presents no reasonable possibility of environmental hazards." We conclude that the statute in question violates the plaintiff's equal protection rights.

Id., 257 Conn. at 431-432, note omitted.

The statute targeted City Recycling, Inc., a Stamford facility, and no other person or entity. *Id.*, 257 Conn. at 449-450. The *City Recycling* Court noted that the debate in the House of Representatives over the legislation was contentious, with representatives opposing the legislation saying that local commissions in Stamford had the power to prevent City Recycling from

expanding its operations without the need of legislation. *Id.*, 257 Conn. at 450-452. Most important to the Supreme Court was the trial court's finding that, "The plaintiff's facility has no adverse affect on public health or safety." *Id.*, 257 Conn. at 438. While a child care facility located on Crescent Street was the cause of this legislation, the Supreme Court found 1) "with respect to truck traffic, the plaintiff's application to the department shows that trucks going to the plaintiff's facility would continue to avoid Crescent Street" and that the truck traffic would be spread out during the course of the day; 2) "with respect to any fire hazards, although some of the materials to be received by the plaintiff may be combustible, the application provides for fire and emergency precautions"; 3) "with respect to groundwater, the proposed facility would not pose a groundwater problem because all processing occurs inside" and there would be no contact with rainwater; 4) "because the local building codes require that asbestos and lead be removed prior to the granting of a demolition permit, friable asbestos, which is asbestos that can flake and become airborne, is not a concern"; 5) "a volume reduction facility such as the plaintiff's proposed project is allowed to receive in its load 10 percent residue, or nonrecyclables, which must be removed within twenty-four hours" so that there are no barrels of residue material that remain at the plaintiff's facility and the plaintiff removes both recyclables and residue on a daily basis; 6) "dust and airborne debris would not create any hazard"; 7) "waste oil and batteries would not be accepted by the plaintiff under the certificate granted to it by the board" 8) "from the outside, the operations would not appear any different except that the building would seem larger"; 9) "noise from the plaintiff's proposed facility would not increase the overall noise level"; and 10)

"materials that would be received by the plaintiff would neither attract nor sustain pests." *Id.*, 257 Conn. at 439-441.

Additionally, the trial court found that but for P.A. 97-300, § 2, "is highly probable that the plaintiff's application would have passed the department's technical review process, and that the plaintiff would have received a permit from the department to operate in its present location as a multiproduct, nonhazardous recycler of paper, wood, construction and land clearing debris." *Id.*, 257 Conn. at 441. While the plaintiff could not describe itself as a group facing unequal treatment, the Connecticut Supreme Court, applying the U.S. Supreme Court's "class of one" analysis in *Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), recognized "successful equal protection claims brought by a class of one, where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*, 257 Conn. at 447-448 (internal quotation marks omitted). In holding the legislation unconstitutional, Supreme Court held:

> Although rational basis review imposes a heavy burden and permits "an imperfect fit between means and ends"; *Heller v. Doe,* supra, 509 U.S. at 321, 113 S.Ct. 2637; there is a limit to the hypothesizing that we will undertake in order to sustain the constitutionality of a statute. See *id.* ("even the standard of rationality ... must find some footing in the realities of the subject addressed by the legislation"). The specific factual findings made by the trial court directly negate every conceivable rational basis for the legislation. Furthermore, this legislative history and record compel the conclusion that this legislation was aimed at this corporate citizen. These findings and this legislative record provide such a limit, and support the conclusion that the legislative action was arbitrary and without a rational basis. Consequently, we conclude that § 22a-208a (a), as amended by P.A. 97-300, § 2, is unconstitutional as applied to the plaintiff.

Id., 257 Conn. at 452-453.

In the instant case, P.A. 08-159 bears one similarity to P.A. 97-300, § 2, namely that under its terms, it is only applicable to one entity, cable Area Two, in that Bridgeport is the only city in Connecticut with over 130,000 people.[4] That similarity, however, is the only similarity to the *City Recycling, Inc.* situation. When one looks at cable Area Two as a cable area in the abstract, or at the specific events involving Plaintiff Sound View and the intervening municipalities, the General Assembly clearly had a rational basis to enact legislation to remedy a unique situation.

In *Lavoie-Francisco v. Town of Coventry*, 581 F.Supp.2d 304 (D.Conn. 2008), *affirmed by summary order*, 352 Fed.Appx. 464 (2d Cir. 2009), the District Court held, "'[A] class-of-one plaintiff must show, among other things, an extremely high degree of similarity between [herself] and the persons to whom [she] compare[s] [herself] in order to succeed on an equal protection claim.' *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir.2008) (internal quotation marks omitted)." *Id.*, 581 F.Supp.2d at 312. When examining cable Area Two in the abstract, there is little similarity to any other cable area. As noted earlier, of the 24 cable franchise areas in Connecticut, only five contain major cities of over 100,000 people. Of those, only three areas (the areas containing Bridgeport, New Haven and Waterbury) have a single third party nonprofit organization administering community access service. The New Haven area is compact, consisting of just three municipalities: New Haven itself and two towns directly bordering it, Hamden and West Haven. The Waterbury area, too, is compact compared to Area Two, consisting of Waterbury and four towns bordering it: Middlebury, Plymouth, Prospect, and Wolcott. (See the dis-

[4] While Hartford's cable area also consists of six municipalities, the city itself misses the 130,000 population thresh-

cussion on pages 7-8 of this Brief.) Area Two, by contrast, sprawls from Fairfield to Woodbridge, with three of its six towns located in Fairfield County (the city of Bridgeport and two towns bordering it, Fairfield and Stratford), and the other three towns located in New Haven County (Milford, Orange and Woodbridge). See Exhibits 1-3. Unlike the Waterbury and New Haven areas, Area Two does not consist of a group of towns clustered around or all bordering one major city. Indeed, it is hard to think of anything in common that the people of Woodbridge and the people of Bridgeport would want to both see on a local government broadcast channel.

Added to the geographic uniqueness of cable Area Two is the history of the conflict between some of the towns (and their representatives both on the Area Two Cable Advisory Council and the General Assembly) and Sound View. The Court need not go further than Plaintiff's Complaint itself to get an idea of the nature of the conflict. Plaintiff pleaded that the conflict "concerned the relative merits of town-specific community access program distribution versus system wide community access program distribution, and control over the funds paid by Cablevision subscribers in support of community access television." *Complaint,* ¶ *8.* Paragraph 9 specifically mentioned the three New Haven County towns in the area – Milford, Orange and Woodbridge – as having differences with Sound View.[5]

Paragraphs 6 and 7 of Plaintiff's Complaint specifically referenced the DPUC decision in DPUC Docket No. 05-04-09, the *Cablevision Franchise Renewal Decision* (Exhibit 5), and that decision stated that Plaintiff Sound View has a philosophy that "has favored system-wide pro-

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old by less than 6,000 people. See Exhibit 3.

[5] Notwithstanding the failure of the Complaint to specifically mention the Town of Fairfield, it, too preferred to promote town-specific programming. (See page 13 of this Brief and the cited DPUC decision.)

gramming distribution." *Id.*, at 19. The problem, in a nutshell, was stated by Milford. It "testified that its residents have stated a clear preference to see local government programs on channel 79 and not those of other franchise towns whose actions are unlikely to affect them." *Id.*, at page 22. Logically, residents of Milford would want to see proceedings of the *Milford* City Council, **not** the *Bridgeport* City Council; Milford town meetings, **not** Stratford town meetings. Woodbridge residents likewise would want to see proceedings of the *Woodbridge* Board of Selectmen, not another town's Board of Selectmen or a City Council of another municipality. Not only is this a municipal desire, it is also Federal policy. In *Time Warner Cable of New York City v. City of New York*, 943 F. Supp. 1357 (S.D.N.Y. 1996), *affirmed, Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997), the District Court, in discussing PEG (public, educational, and governmental) television, held:

> Congress did not enact the Cable Act PEG provisions in a vacuum. The PEG provisions reflect an understanding of the industry standard and prior government regulation under the 1972 FCC regulations. Congress intended to codify this understanding by ensuring franchising authorities could continue to require cable operators to provide public channels for individual and community access, educational channels for educational institutions, and **governmental channels to show local government at work.**

Id., 943 F. Supp. at 1385, emphasis added.

The Court also noted that the House Report on the legislation said that, "PEG channels also contribute to an informed citizenry by bringing local schools into the home, **and by showing the public local government at work.**" *Id.,* 943 F. Supp. at 1387, emphasis added. The idea of showing "local government at work" was clearly not an academic exercise to show political science professors how various vocal governments operate, but rather to show the viewers

how *their* local government works – or does not work. In affirming the District Court on appeal, the Second Circuit said:

> Congress illustrated the scope of "E" and "G" channels in the following terms: "Educational access allows local schools to supplement classroom learning and to reach out to teach those who are beyond school age or unable to attend classes. **The governmental channel allows for a local 'mini-C-SPAN'**...." S.Rep. No. 102–92, at 52–53 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1185–86. Though these examples do not necessarily define the limits of "E" and "G" categories, they indicate the general nature of the programming that Congress expected would be carried on the channels it was requiring cable operators to reserve for use by franchising authorities.

Id., 118 F.3d at 926, emphasis added. Again, the word "local" is presumably used not to illustrate local government in an academic abstract, but to show the *viewer's* local government.

The legislators, too, addressed the need for the legislation. As earlier noted, Senator Slossberg, a co-sponsor, told the Senate that, "the towns in this district . . . have been denied the ability to have town-specific programming on their public access television" and that the legislation will "allow them to work with the current nonprofit third-party community access provider to develop town-specific programming and provide them with an opportunity to do so" and "ensure that funding that was supposed to be going to them does actually go to them to help them in developing town-specific programming." 51 Sen. Proc., Pt. 17, 2008 Sess., pp. 5333-5334, remarks of Senator Slossberg. The solution adopted by the General Assembly is indeed similar to the recommendation of the AG before the DPUC – giving the Advisory Council authority to allocate funds to the municipalities to support town-specific programming. *Cablevision Franchise Renewal Decision (Exhibit 5), pages 24, 31; see also Exhibit 15, the AG's Brief before the DPUC, filed August 28, 2006, page 18.*

PURA is not asking the Court to "judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe*, supra, 509 U.S. at 319. Rather, the Court must decide whether there is a "plausible policy reason for the classification." *Markley v. DPUC, supra*, 301 Conn. at 70. In the instant case there do exist plausible policy reasons. They include:

1) Area Two is unique in the nature of Connecticut cable areas with major cities served by a single third-party nonprofit organization. The area is not compact, but rather a line of towns from Fairfield to Woodbridge, divided equally between three Fairfield County municipalities and three New Haven County municipalities, with little interest, in any, in common for area-wide governmental programming.
2) The area has a history of contention between the three New Haven County towns (according to Plaintiff's Complaint) and Plaintiff Sound View (located in Bridgeport), with the DPUC adding Fairfield on the side of the other towns. The contention is between towns favoring town-specific programming and Plaintiff Sound View favoring system-wide programming.
3) According to Plaintiff's Complaint, the DPUC itself recognized the conflict so that, even when retaining Sound View in its position of third-party nonprofit organization administrator of public access channels in Area Two, DPUC ordered mediation sessions between Sound View and the towns.
4) Notwithstanding Plaintiff Sound View's contention that the mediation was making progress toward a resolution, the Town of Orange indicated that as late as March 7, 2008, no agreement had been reached (Exhibit 17). Shortly thereafter, the General Assembly exercised its prerogative to enact a legislative solution.

The burden is on Plaintiff Sound View to negate "every conceivable basis" which could support P.A. 08-159. *Markley v. DPUC, supra*, 301 Conn. at 678. Plaintiff cannot possibly meet that burden and the act is constitutional.

C. PUBLIC ACT 08-159 IS FULLY APPLICABLE.

In its Complaint, Plaintiff Sound View pleaded that Sound View sought a ruling before PURA "that sections 16-331ff and 16-331gg of the Connecticut General Statutes are no longer applicable because the designated recipient of the funds, the Area Two Cable Advisory Council legally ceased to exist as of July 7, 2008." *Complaint, ¶ 18.* This issue regards not the constitutionality, but rather the interpretation of P.A. 08-159, as codified as Conn. Gen. Stat. §§ 16-331ff and 16-331gg. The Court's "fundamental objective is to ascertain and give effect to the apparent intent of the legislature." *Tayco Corp. v. Planning & Zoning Commission*, 294 Conn. 673, 679, 986 A.2d 290 (2010). In doing so, the Court first considers the text of the statute and its relationship to other statutes. Conn. Gen. Stat. § 1-2z. "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." *Tayco*, 294 Conn. at 679.

The plain language of the portion of P.A. 08-159, § 1, codified as Conn. Gen. Stat. § 16-331ff, is clear and unambiguous. It does not mention any cable advisory council, but rather requires Plaintiff, "upon request from any town organization, authority, body or official within its service territory" to operate education and government public access channels in the town to use Plaintiff's equipment. If Plaintiff fails to provide its consent, PURA shall revoke Plaintiff's authorization as the community access provider. Conn. Gen. Stat. § 16-331ff.

The more complex issue is that of the validity of Conn. Gen. Stat. § 16-331gg, and the crux of the issue is contained in subsection (a):

> (a) A community antenna television company, a certified competitive video service provider that was providing service as a community antenna television company pursuant to section 16-331 on October 1, 2007, or a holder of a certificate of cable franchise authority that provides services within a service territory of a third-party nonprofit community access provider that serves six municipalities, one of which has a population of more than one hundred thirty thousand, shall direct the sum of one hundred thousand dollars per year from the funds collected from subscribers in said service territory that it provides to the existing third-party nonprofit community access provider serving six municipalities, one of which has a population of more than one hundred thirty thousand, directly to the service territory's community antenna television advisory council for developing town-specific education and government community access programming.

Id.[6]

Cable service in Area Two is now being provided by Cablevision of Litchfield, Inc. under a CVFA. The first question now is whether that entity is covered by Conn. Gen. Stat. § 16-331gg. Carefully examining Conn. Gen. Stat. § 16-331gg and related statutes, it is clear that Cablevision is a certified competitive video service provider that was providing service as a community antenna television company pursuant to section 16-331 on October 1, 2007. The term "certified competitive video service provider" is defined in Conn. Gen. Stat. § 16-1 (47):

> "Certified competitive video service provider" means an entity providing video service pursuant to a certificate of video franchise authority issued by the authority in accordance with section 16-331e. "Certified competitive video service provider" does not mean an entity issued a certificate of public convenience and necessity in accordance with section 16-331 or the affiliates, successors and assigns of such entity or an entity issued a certificate of cable franchise authority in accordance with section 16-331p or the affiliates, successors and assignees of such entity.

Id.

[6] The clear intent of the legislative history is that the phrase, "that provides services within a service territory of a third-party nonprofit community access provider that serves six municipalities, one of which has a population of more than one hundred thirty thousand" applies to all three categories, notwithstanding the absence of a comma after

As a holder of a CVFA, Cablevision of Litchfield, Inc. is a "certified competitive video service provider" except that the second sentence of the definition *excludes* former CPCN (Conn. Gen. Stat. § 16-331) holders. Cablevision of Litchfield, Inc. is a successor to Cablevision of Southern Connecticut, L.P., and the former CPCN holder. Conn. Gen. Stat. § 16-331gg, however, is expressly written to *include* former Conn. Gen. Stat. § 16-331 CPCN holders, and thus negates the exception for the limited purposes of Area Two. Further, because Conn. Gen. Stat. § 16-331gg (a) makes reference to the "service territory's community antenna television advisory council" without regard to whether the cable provider was licensed as a "community antenna television company, a certified competitive video service provider that was providing service as a community antenna television company pursuant to section 16-331 on October 1, 2007, or a holder of a certificate of cable franchise authority," the clear intent is that the Area Two Cable Advisory Council continues to exist, regardless of the type of authorization under which Cablevision operates.

Additionally, Conn. Gen. Stat. § 16-331i establishes a "State-wide Video Advisory Council." It provides:

> (a) There shall be a State-wide Video Advisory Council, **whose membership is made up of one representative from each of the existing advisory councils established pursuant to section 16-331**. A certified competitive video service provider shall biannually convene a meeting of said council. No member of the State-wide Video Advisory Council shall be an employee of a community antenna television company or a certified competitive video service provider. For the purpose of this subsection, an employee includes any person working full time or part time or performing any subcontracting or consulting services for a

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the term "certificate of cable franchise authority." We believe that there is an ambiguity regarding this phrase that permits resort to the legislative history cited in this Brief.

> community antenna television company or a certified competitive video service provider.
>
> (b) The certified competitive video service provider shall provide funding to such State-wide Video Advisory Council in the amount of two thousand dollars per year.
>
> (c) Members of the State-wide Video Advisory Council shall serve without compensation. For the purpose of this subsection, compensation shall include the receipt of any free or discounted video service.

Id., emphasis added. Thus, the legislature presumed that, even if service is provided in an area by holders of CVFAs, local area advisory councils will continue to exist and members will serve on the new State-wide Video Advisory Council.

Plaintiff's reading renders Conn. Gen. Stat. § 16-331gg meaningless. As the Connecticut Supreme Court held in *Housatonic Railroad Company, Inc. v. Commissioner of Revenue Services*, 301 Conn. 268, 21 A.3d 759 (2011):

> We presume that "the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *Semerzakis v. Comm'r of Soc. Servs.*, 274 Conn. 1, 18, 873 A.2d 911 (2005). The plaintiff argues that *§§ 12-33* and *12-597* apply simultaneously as alternative appeal provisions. This reading would, however, render *§ 12-597* superfluous because *§ 12-597* does not add any substantive rights or procedures that do not already exist by virtue of *§ 12-33*, which was enacted prior to *§ 12-597*.

Id., 301 Conn. at 303.

Given a choice between interpreting Conn. Gen. Stat. § 16-331gg so as to render it meaningful, and rendering it meaningless, this Court must interpret it in a way that preserves its legislative intent and meaning.

IV. CONCLUSION

For the reasons stated in this Brief, this Court should find P.A. 08-159 both constitutional and viable. PURA thus asks this Court to render summary judgment in favor of PURA and so declare P.A. 08-159 constitutional and applicable to Plaintiff Sound View and that the Area Two Cable Advisory Council still has legal existence and standing.

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CERTIFICATION

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