

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JOHN ARCARO, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

NORTH AMERICAN POWER AND:
GAS, LLC,

Defendant.

No. 3:16cv1921(WWE)

CLASS ACTION COMPLAINT

1. Plaintiff John Arcaro (“Plaintiff”), on behalf of himself and all persons similarly situated, by and through his attorneys, alleges as follows.

INTRODUCTION

2. Plaintiff brings this action on behalf of himself and a Class of all similarly situated customers in Rhode Island against Defendant North American Power and Gas, LLC (“NAP”), arising out of NAP’s unfair, deceptive, unconscionable and bad faith billing for “supplying” electricity to consumers.

3. NAP entices customers to sign up for its service by offering low initial rates for electricity. When the “teaser rate” period expires, however, customers are rolled over into a month-to-month variable rate plan with exorbitant rates.

4. NAP represents in its marketing materials and in its contracts that it offers a “variable rate” electricity plan to consumers that is tied to the market rate in the wholesale power market. However, contrary to NAP’s representations and obligations, NAP consistently and improperly charges an extraordinarily high premium rate for electricity *regardless* of fluctuations

in the underlying market price. Indeed, as set forth below, NAP routinely charges its consumers many multiples of the underlying market rate, notwithstanding NAP's representations that its variable rates "reflect" monthly wholesale electric prices and will be a "market based" rate.

5. Specifically, NAP's rates go *up* to match spikes in the underlying market price. However, when the market price goes *down*, NAP's rate remains at an inflated level several times higher than the market rate. This policy allows NAP to capture all the benefit of changing market prices for electricity, while placing all the risk on its customers. NAP is able to avoid any diminution in its profits when market rates for electricity go up by passing along the increases, while reaping all the benefit when electricity rates decline.

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

7. Plaintiff and other NAP customers have been injured by NAP's unlawful practices. Accordingly, Plaintiff, on behalf of himself and the Class, seeks damages, restitution and injunctive relief for NAP's violation of the Rhode Island Unfair Trade Practices and Consumer Protection Act (Count I), breach of express contract (Count II), and, in the alternative to Count II, breach of the covenant of good faith and fair dealing (Count III).

PARTIES

8. Plaintiff John Arcaro is a citizen of the State of Rhode Island. His domicile is in Rhode Island because he resides in Pawtucket, Rhode Island where he has his home, and it is his intent to continue living in Rhode Island.

9. Defendant North American Power and Gas, LLC is a limited liability company organized under the laws of Delaware whose principal place of business is located at 20 Glover Avenue, Norwalk, CT 06851.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this civil action under 28 U.S.C. § 1332(d) because this is a class action filed under Rule 23 of the Federal Rules of Civil Procedure, the amount in controversy exceeds \$5,000,000 and there are members of the Class who are citizens of a different state than Defendant NAP.

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

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because NAP resides in Norwalk, Connecticut.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

A. Energy Deregulation and the Role of Electric Suppliers

13. In the late 90s and early 2000s, many states moved to deregulate at least part of the electricity supply services then performed by large public utilities. Delivery of electricity to a consumer requires both the creation of electricity and the transmission of that electricity from the power plant to the consumer. The typical pattern was to require the public utilities to divest their power generation assets such as coal, gas and nuclear power plants. But, the regulated utilities continued distributing power from these power plants to consumers through transmission lines.

14. When deregulation occurred, the business of power *supply* was opened to competition and consumers were allowed to select the companies from whom they would purchase

their power. However, states generally set a “standard offer,” available to all customers in each public utility’s service area. The standard offer is typically a single, flat rate which is fixed for a period of months.

15. As a result of the deregulation of power supply, several different parties are now involved in the supply of electric power to consumers. Certain companies, such as Dominion, produce electric power (“Generation Companies”). Other companies, such as National Grid and the Pascoag Utility District in Rhode Island, distribute electricity from Generation Companies to the end user (“Distribution Companies”). Although some Generation Companies have sold power directly to consumers, most sell the power they generate on the wholesale market to companies that market to retail customers (“Electric Suppliers”).

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

17. Electric Suppliers play a middleman role: they purchase power directly or indirectly from Generation Companies and sell that electricity to end-user consumers. However, Electric Suppliers do not *deliver* that electricity to consumers. Rather, Generation Companies deliver the electricity to Distribution Companies, which in turn deliver the electricity to the ultimate consumer. Electric Suppliers merely buy electricity at the wholesale rate and then sell that power to end-users with a mark-up. Thus, Electric Suppliers are essentially brokers and traders: they neither make nor deliver electricity, but merely buy electricity from the Generation Companies and re-sell it to end users.

18. Like other Electric Suppliers, NAP purchases power on the wholesale market and sells it to consumers. The rates that NAP charges are not approved by states' regulatory authorities such as Rhode Island's Public Utilities Commission ("PUC"). Rather, NAP and other Suppliers are free to set their own rates for supplying electricity to consumers. And NAP, like all other suppliers, relies upon the Distribution Companies to deliver the electricity it purchases on the wholesale market to its customers. The Distribution Companies charge separately for their distribution-related services, using rates that are reviewed and approved by the states' regulatory agencies.

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

20. Under a Variable rate contract, the Supplier may vary the rate it charges on a periodic basis (often monthly).

B. North American Power's Excessive Rates

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

22. NAP represents in its contract that its Variable rate plan is based upon the wholesale market rate. Indeed, NAP’s Variable rate “Terms of Service” in Rhode Island make this express link, stating “[t]he variable rate may increase or decrease to reflect the changes in the wholesale power market.”¹

23. Moreover, the Rhode Island PUC’s “Consumer Protection Requirements for Nonregulated Power Producers” provides (at paragraphs II.D and E) that electric supply contracts “must be written in plain English” and that “[p]rice information should include *pricing elements*, *price change formulas*, and the potential for price volatility through variable rates or other mechanisms” (emphasis added).

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

25. Instead, and contrary to reasonable consumer expectation, NAP used its Variable rates as a pure profit center, increasing the rates charged to class members when wholesale prices rose, but staying at a level several multiples of the wholesale market rates when the wholesale prices fell.

¹ Rhode Island Customer Terms of Service form RI-TOS-GSE-121613-EN.

26. For example, the chart below sets forth (1) the average wholesale price (in dollars per kilowatt hour) of electricity delivered to Rhode Island customers² for most of the period that Plaintiff was enrolled with NAP;³ (2) the non-promotional variable rates NAP charged to Plaintiff in Rhode Island for those same months; and (3) the resulting percentage premium that NAP charged consumers over the wholesale rate on an average per-month basis:

Month	Total Wholesale Rate for Rhode Island (cents/kilowatt hour)	NAP Price (cents/kilowatt hour)	NAP's Spread (cents/kilowatt hour)	NAP's Price as Percentage of Wholesale Rate
May 2014	4.056	14.94	10.884	368%
June 2014	4.491	15.4906	10.9996	345%
July 2014	4.105	15.56106	11.45606	379%
August 2014	3.670	14.94	11.27	407%
September 2014	4.364	15.40706	11.04306	353%
October 2014	3.642	15.94	12.298	438%
November 2014	5.125	16.35706	11.23206	319%
December 2014	5.287	17.46806	12.18106	330%
January 2015	7.467	19.25406	11.78706	258%
February 2015	13.645	19.94	6.295	146%
March 2015	6.886	18.86906	11.98306	274%
April 2015	3.459	17.94	14.481	518%
May 2015	3.398	16.56806	13.17006	488%
June 2015	2.738	13.94	11.202	509%
July 2015	3.249	13.94	10.691	429%

² This is the “Total Wholesale Rate” paid by Suppliers, including not only the wholesale price of power but also all of ISO-New England’s charges, such as its charges for capacity, Net Commitment Period Compensation (NCPC), Ancillary Markets, and Wholesale Market Services, as reported in ISO New England’s monthly Wholesale Load Cost Reports.

³ The selection of months for which information is provided in Plaintiff’s pricing chart is driven by the months for which Plaintiff presently has copies of his bills. Upon information and belief, similar pricing differentials exist throughout most of Plaintiff’s period of enrollment with NAP and, indeed, the putative Class Period as a whole.

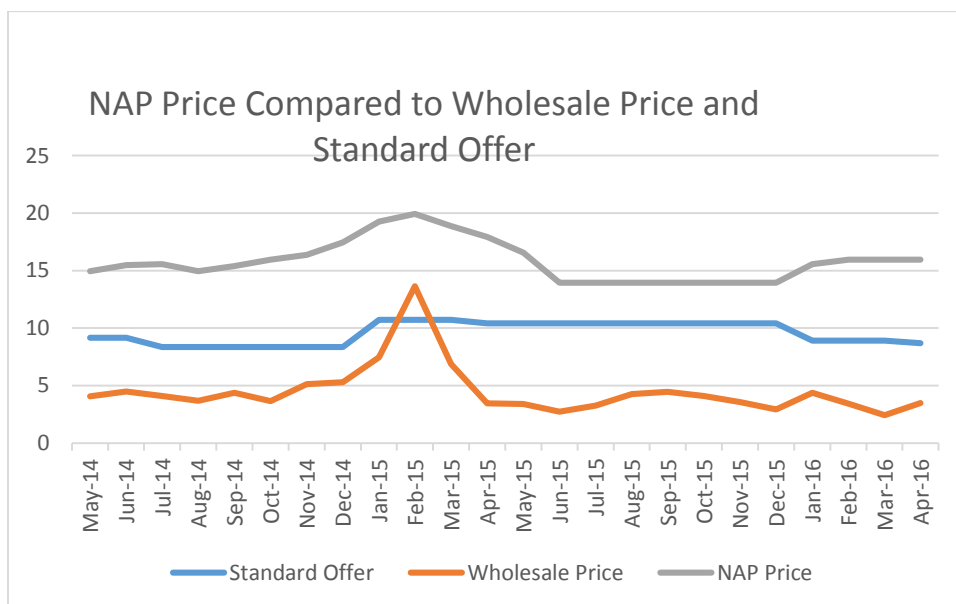
Month	Total Wholesale Rate for Rhode Island (cents/kilowatt hour)	NAP Price (cents/kilowatt hour)	NAP's Spread (cents/kilowatt hour)	NAP's Price as Percentage of Wholesale Rate
August 2015	4.268	13.94	9.672	326%
September 2015	4.461	13.94	9.479	312%
October 2015	4.092	13.94	9.848	341%
November 2015	3.569	13.94	10.371	390%
December 2015	2.932	13.94	11.008	475%
January 2016	4.382	15.5506	11.1686	355%
February 2016	3.423	15.94	12.517	466%
March 2016	2.430	15.94	13.51	655%
April 2016	3.472	15.94	12.468	459%

27. As the above table demonstrates, NAP's rates were wholly disconnected from the underlying wholesale rate of electricity. For example, while the wholesale rate declined from 4.364 cents per kilowatt hour in September of 2014 to 3.642 cents per kilowatt hour in October of 2014, NAP's price jumped from 15.41 cents per kilowatt hour to 15.94 cents, increasing NAP's spread from an already sky-high 11.04 cents to 12.3 cents per kilowatt hour.

28. Accordingly, NAP routinely charges class members a Variable electric rate that is routinely *three or four times*, and occasionally as much as *five or six times*, higher than the underlying market rate. NAP also routinely increases its margin over wholesale rates regardless of movement in those underlying wholesale rates.

29. A variable rate creates less risk for the Electric Supplier, as it permits the Supplier to adjust its rates when there is a sudden spike in the wholesale price for power. If NAP's Variable rates were, as stated in the contract, designed to reflect changes in the wholesale price, they should be higher than prices for fixed rate contracts when wholesale prices are high, and lower when wholesale prices are low. In fact, NAP's Variable rates were continuously *higher* than the utilities'

fixed rate standard offers, *regardless* of the wholesale price for power, as shown in the following chart (using the National Grid price as the “Standard Offer”):



30. Moreover, NAP’s essential representation to consumers concerning its Variable pricing plan – that “[t]he variable rate may increase or decrease to reflect the changes in the wholesale power market” – is patently false. Although NAP *increases* its Variable rate in response to *rising* wholesale prices, NAP fails to *decrease* its prices in response to a *falling* wholesale market price. For example, when the wholesale price increased from 2.9 cents in December 2015 to 4.4 cents in January 2016, NAP’s Variable rate increased from 13.94 to 15.55 cents per kWh. But when the wholesale rate dropped in February 2016 to 3.4 cents, NAP again *increased* its Variable rate to 15.94 cents – and then left the Variable rate at that level in March 2016, when the wholesale price plummeted 30% to 2.4 cents per kWh.

31. Even when NAP’s price moved downward, it did not decline *nearly* as far or as fast as the wholesale price. For example, from February to May 2015, the wholesale price declined by 75 percent, from 13.645 cents to 3.398 cents per kilowatt hour, while NAP’s price declined a mere 17 percent, from 19.94 cents to a still-astronomical 16.57 cents per kilowatt hour. As a result,

NAP routinely priced its services at three, four, and even *five* times the price it paid to the companies that actually generated the power. At one point, NAP's price premium was an incredible **655 percent** of the wholesale price.

32. Notably, NAP charges these exorbitant premiums without adding any value to the consumer whatsoever. As detailed above, NAP does not either produce or transport electricity. It has no role in running or maintaining power plants or power lines; it does no hook-ups or emergency response. Indeed, NAP does not even handle customer billing: that, too, is handled by the Distribution Company. Essentially, all that NAP does is act as a trader in the transaction. Yet it charges several multiples of the amount the Generation Companies receive for making electricity and the Distribution Companies receive for transmitting power, maintaining power lines, and handling emergency services and customer billing and calls.⁴

33. Moreover, NAP's costs, other than its wholesale cost of power, were relatively fixed and could not have justified the massive increases and variations alleged above. For example, charges for ancillary and capacity charges and other regulatory costs did not fluctuate to any material extent and, in particular, did not fluctuate to a material extent in relation to wholesale power prices. NAP's other material costs were for operations, and included costs, for example, relating to rent, equipment, overhead, employees, etc. were also relatively fixed and could not justify the price variations alleged above.

⁴ For example, in October of 2015 National Grid in Rhode Island charged 4.3 cents per kilowatt hour plus a flat charge of \$5 for all of its distribution and transmission services, while NAP's price for its services was 13.9 cents per kilowatt hour. According to the U.S. Energy Information Administration, the average Rhode Island household uses 583 kilowatt hours per month. See <http://www.eia.gov/tools/faqs/faq.cfm?id=97&t=3>. Such an average household would have paid National Grid about \$30 that month for all of its distribution services, while paying NAP \$81 – nearly three times as much – for doing absolutely nothing that added value to the consumer.

34. Accordingly, NAP's essential representation to consumers concerning its Variable pricing plan – that the Variable rate would “reflect changes in the wholesale power market” – is patently false.

35. Based on the foregoing, Defendant's Terms and Conditions fail to disclose the pricing factors and determinants as required by applicable state regulation as alleged above.

C. Plaintiffs Suffered Injury Due To NAP's Improper Business Practices

36. Plaintiff Arcaro was on NAP's Variable rate plan from at least January 2014 through May 2016. His rates during that period ranged from 8.44 (the teaser rate in January 2014) to as high as 19.94 cents per kilowatt hour.

37. Plaintiff Arcaro paid NAP's exorbitant Variable electricity rates alleged above and thereby suffered monetary damages as a result of NAP's conduct as set forth above.

CLASS ACTION ALLEGATIONS

38. Plaintiff Arcaro brings this class action on behalf of himself and the following class (the “Class”) of similarly situated North American customers:

All persons enrolled in a North American Power & Gas, LLC, variable rate electric plan in connection with a property located within Rhode Island at any time within the applicable statutes of limitations preceding the filing of this action through and including the date of class certification.

39. Plaintiff reserves the right to modify or amend the definition of the proposed Class or to propose subclasses as might be necessary or appropriate.

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

41. The proposed Class meets all requirements for class certification. The Class satisfies the numerosity standard: on information and belief, North American has, at a minimum,

thousands of customers in Rhode Island. As a result, joinder of all class members in a single action is impracticable. On information and belief, Class members can be identified by NAP and Distribution Company records.

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

- a. Committed unfair or deceptive trade practices by its Variable electric rate policies and practices;
- b. breached its contract with regard to its Variable electric rate contracts;
- c. breached its covenant of good faith and fair dealing with regard to its Variable electric rate contracts;
- d. was unjustly enriched through its Variable electric rate policies and practices; and
- e. continues to commit wrongdoing through its Variable electric rate policies and practices.

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

44. Plaintiff is an adequate representative of the Class because he is a member of the Class and his interests do not conflict with the interests of the members of the class he seeks to represent. The interests of the members of the Class will be fairly and adequately protected by Plaintiff and his undersigned counsel, who have extensive experience prosecuting complex class action litigation.

45. Plaintiff's claims are typical of the claims of the Class because they arise out of the same conduct, policies, and practices of NAP with respect to its Variable electric rate policies and

practices. Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other putative class member.

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

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

CLAIMS FOR RELIEF

COUNT I

VIOLATION OF RHODE ISLAND UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT

48. Plaintiff Arcaro repeats and realleges the preceding paragraphs as though set forth herein.

49. Plaintiff Arcaro brings this count individually and as a class action on behalf of himself and the Class.

50. NAP is engaged in “trade” and “commerce” as it offers electricity for sale to consumers.

51. NAP’s conduct as alleged above constitutes unfair practices:

- a. NAP’s contracts do not accurately describe the rates the customer will be paying or the circumstances under which the rates may change.

- b. NAP's acts and practices with regard to its exorbitant Variable electric rates as alleged above are immoral, unethical, oppressive and unscrupulous.
- c. NAP's conduct is substantially injurious to consumers. Such conduct has caused, and continues to cause, substantial injury to consumers because consumers would not have paid such a high price for electricity but for NAP's immoral, unethical, oppressive and unscrupulous practices and procedures. Consumers have thus overpaid for their electricity and such injury is not outweighed by any countervailing benefits to consumers or competition. No benefit to consumers or competition results from NAP's conduct, nor could consumers reasonably have avoided the injury.

52. NAP's conduct as alleged above also constitutes a deceptive act or practice. NAP's Variable electric rate representations as set forth above were and are likely to mislead consumers and NAP intended that consumers rely upon those representations. A reasonable consumer would reasonably interpret Defendant's representations to mean that NAP's Variable rates track the underlying wholesale power rates (when in fact they do not). NAP's representations were material to a reasonable consumer and likely to affect consumer decisions and conduct, including purchases of power from NAP pursuant to Variable rate contracts.

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

54. The foregoing actions constitute unfair and deceptive practices in violation of the Rhode Island Unfair Trade Practices and Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1 *et seq.*

55. Plaintiff Arcaro and the Class are entitled to recover damages and other appropriate relief, as alleged below.

COUNT II

EXPRESS BREACH OF CONTRACT

56. Plaintiff repeats and realleges the preceding paragraphs as though set forth herein.

57. NAP's Terms of Service with customers expressly state that any "increase[s] or decrease[s]" to NAP's Variable rates would "reflect the changes in the wholesale power market."

58. As alleged herein, NAP's variable rates in fact bore *no relationship* to the wholesale price for power. While NAP's variable rates went up when the wholesale rate went up, NAP's rates did not commensurately *decrease* when wholesale markets fell – to the contrary, NAP's rates sometimes even went *up* even as wholesale rates were declining. As a result, NAP breached its contracts with customers as consumers were billed exorbitant electric rates several multiples of the wholesale market rate.

59. Plaintiff and members of the Class have sustained damages as a result of NAP's breach of contract as alleged herein.

COUNT III

BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

(in the alternative to Count II)

60. Plaintiff repeats and realleges the preceding paragraphs as though set forth herein.

61. All contracts contain an implied covenant of good faith and fair dealing, including Plaintiff's and all other Class members' contracts with NAP.

62. To the extent that NAP's Terms of Service with customers can be read to give NAP *discretion* concerning the monthly rates charged under Variable rate contracts (discretion that was,

nonetheless, constrained by the requirement that its exercise would “reflect the changes in the wholesale power market,” NAP failed to exercise that discretion in a manner that was consistent with the covenant of good faith and fair dealing.

63. As alleged herein, NAP has used its discretion to bill exorbitant rates that are not tied to the wholesale market and to *increase* the monthly Variable rate when wholesale markets rise, but not to commensurately *decrease* the monthly Variable rate when wholesale markets fall. As a result, consumers are billed exorbitant electric rates several multiples of the wholesale market rate.

64. NAP’s performance of its discretionary functions under the Terms of Service as alleged herein to maximize its revenue from Variable electric rates impedes the right of Plaintiff and Class members to receive benefits that they reasonably expected to receive under the contract.

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

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

67. Plaintiff and members of the Class have sustained damages as a result of NAP’s breaches as alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the putative Classes, requests that this Court enter judgment against Defendant and in favor of Plaintiff and award the following relief:

- (a) Certification of the proposed Class;

(b) Injunctive relief enjoining NAP from charging exorbitant Variable electric rates under their current policies and from engaging in the wrongful, deceptive, unfair, and unconscionable practices alleged herein;

(c) Damages in an amount to be determined at trial, including actual, multiple, statutory and punitive damages;

(d) Disgorgement and restitution of all exorbitant rates paid to NAP by Plaintiff and members of the Classes as a result of the wrongs alleged herein;

(f) Pre- and post- judgment interest at the maximum rate permitted by applicable law;

(g) Attorneys' fees, costs, and expenses as available under the law.

(h) Such other and additional relief as the Court may find just and equitable.

JURY DEMAND

Plaintiff demands a trial by jury on all causes of action so triable.

DATED: June 20, 2016

PLAINTIFF JOHN ARCARO

/s/ Robert A. IZARD

By: Robert A. IZARD (ct01601)
Seth R. Klein (ct18121)
IZARD KINDALL & RAABE LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
(860) 493-6292

CERTIFICATE OF SERVICE

I, Seth R. Klein, hereby certify that on this 20th day of June, 2016, the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this document through the court's CM/ECF system.

 /s/ Seth R. Klein
Seth R. Klein

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAUL T. EDWARDS,
Plaintiff,

v.

CASE NO. 3:14-cv-1714 (VAB)

NORTH AMERICAN POWER
AND GAS, LLC,
Defendant.

RULING ON PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

Plaintiff Paul T. Edwards has brought a putative class action against North American Power and Gas, LLC (“NAPG”).¹ Mr. Edwards has filed a motion to amend his Complaint. Mot. to Amend Compl., ECF No. 52.² He asks the Court for leave to add Plaintiffs from Rhode Island and New Hampshire as well as claims under each respective state’s unfair trade practices law and claims under each state’s law for breach of contract and breach of the covenant of good faith and fair dealing. Am. Mot. to Amend Compl., ECF No. 52; *see* Proposed Am. Compl., ECF No. 52-1. He also seeks to add a breach of contract claim³ under Connecticut law. *See* Proposed Am. Compl. at Count IV, ECF No. 52-1. Finally, he asks to add an additional named Plaintiff, Gerry Wendrovsky, who resides in New York but owns property in Connecticut. *Id.* ¶9. NAPG opposes Mr. Edwards’s motion. Def.’s Opp. Br., ECF No. 53.

After the Motion to Amend the Complaint was filed, the Court issued an Order identifying some concerns about whether the allegations in the Complaint established subject matter jurisdiction sufficiently. Ruling Addressing the Court’s Subject Matter Jurisdiction, ECF

¹ The Court has summarized the allegations and procedural history in past Orders and will not do so in a fulsome way here. *See* Ruling on Def.’s Mot. to Dismiss, ECF No. 39; Ruling Addressing the Court’s Subject Matter Jurisdiction, ECF No. 60.

² He filed an amended version on December 29, 2015, which renders the earlier motion, Mot. to Amend Compl., ECF No. 45, moot.

³ Mr. Edwards notes that his claim for breach of the covenant of good faith and fair dealing is now alleged “in the alternative” to his breach of contract claim. *See* Proposed Am. Compl. at Count V, ECF No. 52-1.

No. 60. Mr. Edwards filed a Second Proposed Amended Complaint addressing these concerns to the Court's satisfaction. Am. Ex. A, Proposed Second Am. Compl., ECF No. 61. Accordingly, the Court can take up the Motion to Amend the Complaint. For the reasons that follow, the motion is **GRANTED IN PART** and **DENIED IN PART**.

I. Timeliness of the Motion

NAPG first argues that the Court should not evaluate Mr. Edwards's Motion to Amend his Complaint on the merits because it is untimely. NAPG's Opp. Br. 6-8, ECF No. 53. The Court agrees that the request is *nunc pro tunc* but finds that there is good cause to excuse the delay.

When a plaintiff moves to amend the complaint after the deadline for filing such a motion has passed, that party must establish "good cause" for the delay under Rule 16(b)(4), which depends primarily on the "diligence of the moving party." *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000). District courts may also consider "other relevant factors, including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants." *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 244 (2d Cir. 2007). Ultimately, the decision whether to allow a late motion to amend the complaint lies within the Court's discretion. *See id.*

In its Ruling on NAPG's Motion to Dismiss, the Court explicitly gave Mr. Edwards leave to amend his Complaint to add plaintiffs from other states.⁴ Mr. Edwards did not unduly delay in doing so. He filed his Motion to Amend six days after the first set of diverse plaintiffs retained him, and less than two months after the Court's deadline for adding plaintiffs had elapsed. Mot. to Amend Compl. ¶4, ECF No. 52; *see also United States v. Cohan*, No. 3:11-CV-

⁴ This case initially contained claims under New Hampshire, Maine, and Rhode Island law. Compl., ECF No. 1. The Court dismissed those claims without prejudice in its Ruling on the Motion to Dismiss, ECF No. 39, because Mr. Edwards as a Connecticut resident lacked standing to bring claims on behalf of the residents of other states.

412(CSH), 2012 WL 4758142, at *1 (D. Conn. Oct. 5, 2012) (“[G]ood cause may be found where the movant learns of the facts supporting amendment after expiration of the relevant filing deadline....”). In the interim period, the parties have only engaged in document discovery, thus the prejudice NAPG will suffer if the Court allows Mr. Edwards’s late motion is limited.

Because the delay was minimal, Mr. Edwards’s counsel acted diligently in finding other diverse plaintiffs, and any prejudice suffered by NAPG will be minimal, the Court will accept Mr. Edwards’s late-filed Motion to Amend the Complaint and will proceed to review it on the merits.

II. Analysis of Motion to Amend the Complaint

Rule 15 provides that “[t]he court should freely” grant leave to amend “when justice so requires.” Fed. R. Civ. P. 15(a)(2). In considering whether to grant a litigant leave to amend, the Court considers such factors as undue delay, bad faith, dilatory motive, undue prejudice, and futility of amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993) (“The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith.”). A proposed amendment is futile if it fails to state a claim that would survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Lucente v. Int’l. Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002).

A. Proposed Rhode Island Addition

NAPG argues that adding a Rhode Island plaintiff, John Arcaro, and claims under Rhode Island law is inappropriate because another Rhode Island plaintiff has filed a putative class action against NAPG in the District of Connecticut, *Fritz v. North American Power & Gas, LLC*,

No. 3:14-cv-00634(WWE) (D. Conn.) and addresses the same conduct and legal claims.⁵

NAPG's Opp. Br. 8-16, ECF No. 53. Thus, NAPG asks the Court to refuse the amendment under the "prior pending action" or "first to file" doctrine. *Id.* Mr. Edwards agrees that his proposed Rhode Island claims are similar to those currently pending in the *Fritz* case. Pl.'s Reply Br. 2, ECF No. 54. But he argues that his Rhode Island case was filed first and that this Court should consolidate the Rhode Island aspect of his Proposed Amended Complaint with the *Fritz* case, rather than dismiss it. *Id.*

The Court agrees that the *Fritz* case addresses the same conduct and legal claims⁶ implicated by Mr. Edwards's proposed Rhode Island amendment. The Second Circuit has indicated that, under the prior pending action doctrine, "[w]here there are two competing lawsuits, the first suit should have priority, absent the showing of balance of convenience... or special circumstances... giving priority to the second." *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991) (citation and internal quotation marks omitted) (alterations in original). Mr. Edwards included Rhode Island claims in his initial Complaint filed in November 2014, four months before the Rhode Island claims in the *Fritz* case were initially filed.

However, the Court finds that the balance of convenience tips in favor of prioritizing the *Fritz* case. The *Fritz* case is already well into discovery on the Rhode Island claims. As a result, it would be more efficient to favor *Fritz* over the instant case. Moreover, Mr. Edwards's counsel explicitly asks that his Rhode Island case be consolidated with *Fritz*, not that it proceed parallel

⁵ The Rhode Island claims in the *Fritz* matter were first asserted in *Tully v. North American Power & Gas, LLC*, No. 15-cv-469 (WWE) (D. Conn.) in March 2015. These claims were consolidated into the *Fritz* case in June 2015. Order, ECF No. 58, *Fritz v. North American Power & Gas, LLC*, No. 3:14-cv-00634(WWE) (D. Conn.).

⁶ In *Fritz*, the plaintiff has brought claims under Rhode Island law for breach of contract and a violation of the state's unfair trade practices act. Am. Compl., ECF No. 69. The Court in *Fritz* granted a motion to dismiss on the breach of the covenant of good faith and fair dealing claim under Rhode Island law, but the initial complaint did contain such a claim. Order, ECF No. 68, *Fritz v. North American Power & Gas, LLC*, No.3:14-cv-00634(WWE) (D. Conn.).

to *Fritz* or instead of *Fritz*. Pl.’s Reply Br. 4-5, 4 n.3, ECF No. 54. Thus, he does not suggest that the Rhode Island aspect of this case be given priority.

The only remaining question is whether Mr. Edwards’s Rhode Island claims should be dismissed or severed from the instant matter and consolidated with *Fritz*. “The Court has broad discretion to determine whether consolidation or dismissal is appropriate” in this circumstance. *In re MF Global Hldgs., Ltd.*, 464 B.R. 619, 623 (Bankr. S.D.N.Y. 2012); *see also Adam*, 950 F.2d at 92 (“The decision whether or not to stay or dismissing a proceeding rests within a district judge’s discretion.”); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir.) (“The trial court has broad discretion to determine whether consolidation is appropriate.”), *cert. denied*, 498 U.S. 920 (1990); *see also e.g., Oram v. SoulCycle LLC*, 979 F. Supp. 2d 498, 502 (S.D.N.Y. 2013) (a trial court has discretion to sever claims from a case).

Where two pending actions address the same legal claims and conduct, a court may dismiss the second action as long as the “controlling issues in the dismissed action will be determined in the other lawsuit.” *Taylor v. Rell*, No. 3:05CV196(DJS), 2005 WL 2807223, at *2 (D. Conn. Oct. 24, 2005) (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §1360 (2d ed. 1990)). It may consolidate cases “when there are common questions of law or fact to avoid unnecessary costs or delay.” *Johnson*, 899 F.2d at 1284. Here, because the class has not yet been certified in *Fritz*, Mr. Arcaro’s legal claims may not be addressed if the Rhode Island claims in this case are dismissed. The Court also finds that there are common questions of law and fact, which would make consolidation appropriate here.

The Court may “sever any claim against a party” at its discretion. Fed. R. Civ. P. 21; *see also Garber v. Randell*, 477 F.2d 711, 714 (2d Cir. 1973) (“[T]he court’s power to sever claims and order separate trials is [] discretionary.”); *TLD Am. Corp. v. Mazuma Capital Corp.*, No.

3:15-cv-39 (SRU), 2015 WL 5116768, at *4 (D. Conn. Aug. 28, 2015) (“The decision whether to sever a claim is committed to the sound discretion of the trial court.”) (internal quotation marks and citations omitted). In determining whether to sever claims, the Court must consider the following factors: “(1) whether the claims arise of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims.” *Oram*, 979 F. Supp. 2d at 502-03; *see also Morris v. Northrup Grumman Corp.*, 37 F. Supp. 2d 556, 580 (E.D.N.Y. 1999) (same); *TLD Am. Corp.*, 2015 WL 5116768, at *4 (same).

The proposed Rhode Island claims are distinct from the other claims in this case and are likely to present slightly different questions of fact that are specific to the localized context of NAPG’s operation in Rhode Island. As noted above, judicial economy weighs heavily in favor of severing the Rhode Island claims and transferring them to the *Fritz* case. NAPG would also be prejudiced if it had to defend this lawsuit separately from *Fritz*. Finally, it is unclear at this stage whether the Rhode Island claims will have the same witnesses and evidence as claims involving other states, but the necessary witnesses and evidence will certainly be the same as in the *Fritz* matter. Thus, severance of the Rhode Island claims is appropriate here.

Because the Court has rejected the sole ground NAPG presents for dismissing the Rhode Island claims, the Court will allow Mr. Edwards’s Rhode Island amendments. For the reasons set forth above, it also orders that these Rhode Island claims and allegations be severed from this case and consolidated with *Fritz v. North American Power & Gas, LLC*, No. 3:14-cv-00634(WWE) (D. Conn.).

B. Proposed New Hampshire Addition

NAPG argues that the Court lacks jurisdiction over Mr. Edwards’s proposed claims under the New Hampshire Consumer Protection Act (“NHCPA”), N.H. Rev. Stat. Ann. §358-A *et seq.*, because they are exempt from the Act’s coverage. NAPG’s Opp. Br. 16-21, EF No. 53. He also contends that the proposed contract-based claims under New Hampshire law are essentially the same as the NHCPA claims and that the Court lacks jurisdiction over them for the same reason. *Id.* at 19. The Court does not believe that NAPG’s argument implicates jurisdiction but rather that Mr. Edwards’s proposed amendment fails to state a claim for a violation of the NHCPA under Federal Rule of Civil Procedure 12(b)(6). However, as explained further below, it will allow Mr. Edwards to add the New Hampshire Plaintiffs and their contract-based claims under New Hampshire law.

The NHCPA exempts from its coverage “[t]rade or commerce that is subject to the jurisdiction of” several regulators, including the “public utilities commission.” N.H. Rev. Stat. Ann. §358-A:3, I (“The following transactions shall be exempt from the provisions of this chapter: [t]rade or commerce that is subject to the jurisdiction of the bank commissioner, the director of securities regulation, the insurance commissioner, the public utilities commission, the financial institutions and insurance regulators of other states, or federal banking or securities regulators...”). In determining whether trade or commerce is exempt from the NHCPA’s coverage under this provision, the Court must examine the “statutes that define the [relevant] regulator’s powers and authority.” *LeDoux v. JP Morgan Chase, N.A.*, Civil No. 12-cv-260-JL, 2012 WL 5874314, at *6 (D.N.H. Nov. 20, 2012) (citation and internal quotation marks omitted). If the statutes “grant [the regulator] the authority to supervise or regulate the trade or commerce in which the defendant’s deceptive [or unfair] practice occurred, then that trade or

commerce is ‘subject to the jurisdiction of’ [that entity], and the [NH]CPA does not apply.” *Elmo v. Callahan*, Civil No. 10-cv-286-JL, 2012 WL 3669010, at *9 (D.N.H. Aug. 24, 2012) (citations omitted); *see also Rainville v. Lakes Region Water Co.*, 163 N.H. 271, 275 (2012) (“[T]he [NH]CPA does not apply to claims of unfair competition or deceptive practices in selling or distributing a service that is subject to the [public utilities commission’s] jurisdiction.”). The party claiming the exemption from the Act’s coverage has the burden of showing that the exemption applies. N.H. Rev. Stat. Ann. §358-A3, V.

Under New Hampshire law, the public utilities commission is empowered to generally supervise “all public utilities and the plants owned, operated or controlled by the same.” *Rainville*, 163 N.H. at 275 (quoting N.H. Rev. Stat. Ann. §374:3). The New Hampshire public utilities commission may also regulate “competitive electricity suppliers,”⁷ like NAPG, in various aspects of their businesses, other than price regulation and “including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protective and assistance requirements.” N.H. Rev. Stat. Ann. § 374-F:7, I; *see also Halifax-American Energy Co. v. Provider Power, LLC*, No. 218-2014-CV-00632, 2015 WL 10642711, at *5 (N.H. Super. Ct. Dec. 7, 2015). The commission is authorized to take various actions against competitive energy suppliers who “engage[] in any unfair or deceptive acts or practices in the marketing, sale, or solicitation of electricity supply or related services.” N.H. Rev. Stat. Ann. §374-F:7, III(a). These possible actions include the ability to assess fines, rescind residential consumer contracts, and order restitution to residential consumers. *Id.* § 374-F:7, III.

⁷ New Hampshire law also allows for the operation of “competitive electricity suppliers” in the New Hampshire marketplace that are not “public utilities.” N.H. Rev. Stat. Ann. §374-F:7, I (describing “competitive electricity suppliers” as being distinct from “public utilities”).

The foregoing language indicates that the public utilities commission has authority to supervise or regulate NAPG's conduct alleged to have violated the NHCPA in this case. Thus, Mr. Edwards's proposed additions are within the jurisdiction of that commission and are exempt from the NHCPA's coverage. The Court is not persuaded by either of the arguments Mr. Edwards makes to the contrary.

First, Mr. Edwards argues that, based on the rules governing the public utilities commission's operations, that the commission lacks jurisdiction over the conduct that allegedly supports an NHCPA violation. Reply Br. 8-9, ECF No. 54. But New Hampshire law indicates that in evaluating whether a claim falls under the exemption to the NHCPA, the Court's focus should be on the statute that empowers the relevant regulator, not its implementing rules. *See Rainville*, 163 N.H. at 275 (“[T]o determine when offering for sale or distribution a service is ‘subject to the jurisdiction of’ the [public utilities commission for the purposes of the NHCPA], we examine the *statutes* that define the [commission's] powers and authorities.”) (emphasis added). Mr. Edwards cites no authority justifying an examination of the public utilities commission's rules, particularly whereas here, there is unequivocal language addressing the issue in the statute.

Second, Mr. Edwards also argues that while his claims of deception may be exempt from the NHCPA's coverage, his claims of unfair conduct are not. Reply Br. 9, ECF No. 54. He reasons that the public utilities commission's authority covers the types of disclosures required, not conduct in the marketplace. As described above, the plain language of the statute indicates otherwise. Moreover, the New Hampshire Supreme Court has indicated that, in determining whether claims fall under this exemption to the NHCPA, the relevant issue “is not whether a party's *deceptive practice* is subject to the [regulator's] jurisdiction, but whether the practice

occurred in the conduct of ‘*trade or commerce*’ that is subject to the [regulator’s] jurisdiction.” *Rainville*, 163 N.H. at 276 (emphasis in original); *accord Elmo*, 2012 WL 3669010, at *10 (finding that the NHCPA’s exemption did not apply because the deceptive acts occurred while the defendant was practicing law, not trading securities, and only the latter was a trade or commerce that fell under the jurisdiction of a regulator, exempting it from the NHCPA). Thus, the distinction Mr. Edwards seeks to draw between his unfairness and deception claims is not one recognized under New Hampshire law.

Accordingly, Mr. Edwards’s proposed NHCPA claim is futile, because his allegations implicate conduct that is exempted from the Act’s coverage. His request to add a claim under the NHCPA to the case is denied on that basis. The Court is unconvinced, however, that the New Hampshire contract-based claims should be dismissed for the same reasons. NAPG does not identify any aspect of the NHCPA that affects the validity of the proposed contract-based claims. Because NAPG makes no other arguments suggesting that these claims are futile or should be dismissed for any other reason, the Court will permit Mr. Edwards to add them to this case.

III. Conclusion

For all of the foregoing reasons, the Motion to Amend the Complaint, ECF No. 52, is **GRANTED IN PART** and **DENIED IN PART**. The Court will allow Mr. Edwards to add allegations and legal claims pertaining to NAPG’s conduct in Rhode Island and orders that those claims and allegations be severed from this case and consolidated with *Fritz v. North American Power & Gas, LLC*, No. 3:14-cv-00634(WWE) (D. Conn.). Mr. Edwards is directed to file a new complaint, containing only his Rhode Island allegations and claims, on the docket in this case within twenty-one (21) days of the date of this Ruling. Once this complaint is filed, the

Clerk is directed to consolidate the Rhode Island aspect of this case with *Fritz v. North American Power & Gas, LLC*, No. 3:14-cv-00634(WWE) (D. Conn.) by filing the complaint containing only the Rhode Island allegations and claims in the *Fritz* matter.

With respect to this case, the Court will allow Mr. Edwards to add the proposed New Hampshire Plaintiffs to the case, asserting claims of breach of contract and breach of the covenant of good faith and fair dealing under New Hampshire law. It will not allow him to add a claim under the NHCPA, because this claim is futile. The Court will also allow Mr. Edwards to add a breach of contract claim under Connecticut law and to add Mr. Wendrovsky as a Plaintiff. In addition to the Rhode Island complaint, Mr. Edwards is directed to file a second amended complaint in this matter containing only the allegations and claims that the Court has allowed to proceed in this case, and excluding the Rhode Island claims and the NHCPA claim, within twenty-one (21) days of the date of this Ruling.

SO ORDERED this 1st day of June 2016, at Bridgeport, Connecticut.

/s/ Victor A. Bolden
Victor A. Bolden
United States District Judge