STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State	**)**	**Case 12-M-0476**
In the Matter of Retail Access Business Rules	**)**	**Case 98-M-1343**
In the Matter of Energy Service Company Price Reporting Requirements	**)**	**Case 06-M-0647**
In the Matter of Electronic Data Interchange	**)**	**Case 98-M-0667**

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)[1] hereby submits comments pursuant to the October 5, 2016, State Register Notice of Emergency/Proposed Rule Making on the "Prohibition on Enrollments, and De-Enrollment Requirements, on Energy Service Companies (ESCOs) Regarding Low-Income Customers," in the above-referenced proceedings.[2]

[1] The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies. The responses set forth herein should not be construed as a waiver of any rights, issues, or claims being adjudicated by the Court in the pending litigation concerning the Notice, all of which are expressly reserved.

[2] NEM incorporates herein all prior comments and petitions submitted in connection with the Commission's proceedings and orders concerning this subject matter, including NEM's petition for reconsideration concerning the July 15, 2016, Commission order titled: *Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies* (the "July Order"). The order at issue and the prior iterations of, and efforts to implement, that order, including the July Order and the subsequent emergency implementation of that order in September 2016, are collectively referred to herein as the "Moratorium Orders" or the "Orders."

The Moratorium Orders threaten to cause immediate and irreparable harm to hundreds of New York ESCOs and hundreds of thousands of New York low-income customers, as the forcible de-enrollment of hundreds of thousands of New York residents cannot be undone. NEM respectfully requests that the Commission suspend implementation of the Orders. NEM further requests that the Commission implement a process by which the data and assumptions upon which the Orders are based can be analyzed, tested, and discussed by interested parties – including by collecting reliable data and providing interested parties (including NEM and ESCOs) with an opportunity to challenge and understand the data on which the Commission purports to rely without proper testing. NEM disputes the predicate assumptions underlying the Orders, including that ESCOs "overcharge"; that ESCOs do not offer value-added products that benefit low-income customers; that the Commission does not have available to it sufficient mechanisms for protecting customers against UBP abuses by bad actors; and that the Commission has performed sufficient meaningful analyses of data to determine that low-income customers are best served by depriving them of the ability to choose their energy providers. For the reasons set forth below, NEM submits that adoption of the Orders without the foregoing process is contrary to the interests of low income customers, New Yorkers generally, and inconsistent with multiple constitutional, statutory, and common law protections and requirements as detailed below.

I. THE MORATORIUM ORDERS VIOLATE STATE AND FEDERAL LAW BY VIOLATING LOW-INCOME CONSUMERS' PRIVACY RIGHTS

The Moratorium Orders violate low-income consumers' privacy rights and will cause ESCOs to violate State and Federal Law. When the Commission issued the Orders it recognized that low-income consumers' privacy rights would be violated if information regarding their low-income status was provided to ESCOs. Notwithstanding the Commission's recognition of the privacy rights of low-income consumers and its prior acknowledgment that it could not simply

direct the utilities to provide ESCOs with lists of low-income customers to de-enroll without infringing those rights, the Commission reversed on the following theory set forth in the Order:

> ESCOs will not be provided with customers' APP [Assisted Program Participant] status. Instead, the utility shall place a block on all APP accounts preventing future enrollment with an ESCO. For existing APPs served by an ESCO, including customers who were not APP at the time of enrollment but subsequently become APP, the utility will inform the ESCO that a block has been placed on the account, that the ESCO is no longer eligible to serve the account, and that the customer must be de-enrolled at the expiration of the existing agreement.

(Ex. I to Cyrulnik Aff., at 11.[3])

In short, the Commission's new position on this issue reduces to the contention that everyone should bury their heads in the sand and pretend that when the local utility circulates lists containing thousands of customer names to be dropped pursuant to the Orders, those lists might include some names of customers who should be dropped for reasons other than their low-income status. That is silly, and everyone knows it.

To be sure, even the utilities do not buy into the Commission's hopeful effort to ignore reality. ESCOs' receipt of thousands of accounts they must de-enroll shortly after the effective date of the July Order most certainly would have informed the ESCOs of the low-income status of the customer – information that the Commission knows, pursuant to its own regulatory framework, must be kept confidential. Indeed, beyond providing information from which one could deduce whether an individual is a low-income customer, in taking steps to implement the Moratorium Orders, **utilities already have sent lists to ESCOs specifically identifying customers as low-income customers in direct violation of the law**. Ex. P to Cyrulnik Aff. (utility company National Grid sending ESCOs a notice of its implementation of the "Moratorium Order", including

[3] References to "Cyrulnik Aff." refer to the Affidavit of Jason Cyrulnik dated September 27, 2016, and filed in National Energy Marketers Association et al. v. New York Public Service Commission, Alb. Co. Index No. 5680-16.

by providing a list of "Current and pending ESCO customers that are no longer eligible for ESCO service in accordance with the Moratorium Order").

By way of background, the Low Income Home Energy Assistance Act ("LIHEAP"), 42 U.S.C. § 8621 et. seq., requires that in order for a state to receive funds pursuant to LIHEAP, the state must submit a plan on an annual basis for distribution of those funds. 42 U.S.C. § 8624(c). The State of New York's plan clearly and unequivocally promises confidentiality protection for low-income consumers, stating in Section 17 on "Program Integrity":

> All personally identifying information about a HEAP applicant or recipient is confidential and may be disclosed only for purposes of investigating or prosecuting suspected fraud or abuse, in cooperation with Federal or State authorities regarding LIHEAP audits or investigations, or with the written consent of the applicant or recipient.

(Cyrulnik Aff. Ex. Y, at Section 17.6.)

The New York Office of Temporary and Disability Assistance ("OTDA") recognizes the significance of this confidentiality commitment in Chapter 23 of its HEAP Manual, noting that "HEAP applicants/recipients have an expectation of privacy when they apply for a government program of assistance." See HEAP Manual, available at http://otda.ny.gov/programs/heap/HEAP-manual.pdf.[4] Federal regulations governing Social Security Income ("SSI") recipients – most of

[4] Moreover, Section 9 of New York's State plan contemplates:

> Each home energy vendor must sign a New York State HEAP vendor agreement to participate in both the regular and emergency components of HEAP. The vendor agreement provides that the home energy vendor agrees and assures to OTDA to not adversely treating household receiving assistance from HEAP because of such assistance under applicable provision of State law or public regulatory requirements.

(Cyrulnik Aff. Ex. Y at Section 9.4.) Accordingly, OTDA's model vendor agreement for suppliers of home heating fuels requires that "Households receiving assistance from HEAP will not be treated adversely because of such assistance under applicable provisions of State law and public regulatory requirements." See Vendor Agreement, available at https://otda.ny.gov/programs/heap/documents/Vendor-Agreement-Non-PSC.pdf. The Moratorium Orders violate this commitment that HEAP participants "will not be treated adversely because of such assistance" by

whom qualify as low-income customers within the meaning of the July Order by virtue of qualifying for SSI – also prohibit the dissemination of information about such beneficiaries. The July Order does not fit within the authorized circumstances under which the identities of SSI beneficiaries can be disclosed. See 45 C.F.R. § 205.50. In fact, the disclosure of the economic status or circumstances of these SSI recipients is expressly prohibited by 45 C.F.R. § 205.50(a)(2)(i)(B).

Instead of adhering to previously existing privacy regulations, the Commission chose in its July Order, again in abrogation of its SAPA requirements, to effectively modify the privacy obligations found in HEAP and other regulations. Perhaps in recognition of the thin ice it treaded upon in the July Order, in its Emergency Order the Commission seemingly sought to cure its blatant violation of low-income consumers' privacy rights by requiring utilities in their communications to ESCOs regarding low-income consumers to also include non-low-income, opt-out consumers in the list purportedly as a way to obfuscate the status of the low-income consumers. Such gamesmanship does not cure the problem, and the indisputable fact is that the utility companies have already provided lists specifically identifying by name low-income customers in their efforts to implement the Moratorium Orders. See e.g. Ex. Q to Cyrulnik Aff. (email from utility Central Hudson referencing the "low income moratorium" and announcing the utility is posting a list of "ineligible" customers). Moreover, once again the rule was adopted without any of the benefits and protections afforded by SAPA.

Actions impacting important privacy rights are not the role of a regulator but rather are the province of the legislature. In fact, the Commission tacitly acknowledged the ultra vires nature of

depriving only low-income customers of the freedom to choose their preferred energy provider, including to benefit from long-term fixed-rate plans or green alternatives that only ESCOs offer.

its Emergency Order, stating: "The Commission carefully weighed the privacy interests of APP [low-income] customers against customer protections and the proper administration of assistance programs and found this solution to strike the most appropriate balance." (Ex. S to Cyrulnik Aff., at 18.) The Commission does not point to any statutory authority or jurisdiction allowing it engage in such a balancing act. If the legislature believes it appropriate and otherwise legal to compromise privacy rights, it can pass such legislation. In the absence of such legislation, the Commission does not have the right to simply ignore important, existing privacy protections.

II. THE MORATORIUM ORDERS EXCEED THE COMMISSION'S JURISDICTION

New York law is clear that agencies may not intrude on the policymaking role of the Legislature. It is "the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 23 N.Y.3d 681, 697 (2014) (quoting Boreali v. Axelrod, 71 N.Y.2d 1, 13 (1987)). While the Commission refers to its "broad powers under PSL Articles 1 and 4" (Sept. 19 Order at 9), even a "broad" legislative grant of authority does not permit the Commission to intrude on the Legislature's policymaking role. See Boreali, 71 N.Y.2d at 6 (recognizing that the Legislature gave the Public Health Council "broad authority to promulgate regulations on matters concerning the public health," but that "the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative, body"). The Moratorium Orders bear all the hallmarks of impermissible agency intrusion on the policymaking role of the Legislature.

First, the Moratorium Orders reflect a "regulatory scheme . . . based solely upon economic and social concerns" in which the Commission has attempted to weigh its goals against the attendant costs and "reach a suitable compromise." Boreali, 71 N.Y.2d 1, 12 (1987). With the Moratorium Orders, the Commission has expressly concluded that "any reduction in customer choice" by eliminating competition in a substantial segment of the energy market "is outweighed by the overall benefit to all ratepayers and taxpayers, including APPs." (Ex. S to Cyrulnik Aff., at 16.) Similarly, the Commission by its own account "carefully weighed the privacy interests of APP [low-income] customers against customer protections and the proper administration of assistance programs and found this solution to strike the most appropriate balance." (Id. at 18.) "Striking the proper balance . . . among cost and privacy interests, however, is a uniquely legislative function." Boreali, 71 N.Y.2d at 12.

Second, the Moratorium Orders write "on a clean slate" with respect banning ESCOs from servicing segments of the energy market, rather than constituting the "'interstitial' rule making that typifies administrative regulatory activity." Boreali, 71 N.Y.2d at 12. The Commission is not implementing particular legislative policy guidance with interstitial rule-making. Rather, it relied in its July Order on its "broad legal authority to oversee ESCOs," and pointed to the Commission's authority to implement Uniform Business Practices (UBP) imposing conditions on ESCO eligibility. (Ex. I to Cyrulnik Aff., at 5-6.) The July Order provides a telling example of the sorts of requirements imposed by the UBP: "in 2003, ESCOs were required to submit sample standard customer agreements in order to be deemed eligible to provide electricity and/or natural gas in New York." (Ex. I to Cyrulnik Aff., at 6.) This sort of interstitial regulatory rulemaking stands in stark contrast to the policy goals advanced by the July Order's moratorium on service to low income customers.

Third, the Orders address issues that are independently being addressed by the Legislature. Boreali, 71 N.Y.2d at 13 (holding that where an "agency acted in an area in which the Legislature had repeatedly tried – and failed – to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" was an indicator that it had "exceed the scope of the authority properly delegated to it"). The Orders derive in part out of concerns regarding ESCOs' marketing and enrollment practices, and last year the Assembly introduced and unanimously passed Bill A.1903, which sought among other things "to prohibit a supplier of natural gas or electricity from making or directing an unauthorized change in gas or electric service, commonly known as slamming. This bill would further authorize the [Commission] to establish requirements for obtaining an authorization of a customer to effect a change in the customer's supplier of gas or electric service and for the verification of such change. . . ." *Available at* http://legislation.nysenate.gov/pdf/bills/2015/A1903. The bill "died" in the Senate in January 2016; the Assembly passed it again and it has been referred to the Energy and Telecommunications Committee. https://www.nysenate.gov/legislation/bills/2015/a1903.

Fourth, "no special expertise or technical competence in the field" is required to make the policy judgment reflected in the Order. Boreali, 71 N.Y.2d at 14. Rather, the Orders are premised on a sweeping categorical conclusion about ESCOs, a generalization concerning low-income customers, and a categorical exclusion of ESCOs from an entire market segment based on a judgment that the legislature would be equally capable of making without any special expertise or technical competence. In this regard, the Orders again stand in stark contrast to the UBPs the ESCOs relied on to support their jurisdictional authority. (Ex. I to Cyrulnik Aff., at 5-6.) The UBPs involve technical issues of compliance and eligibility that properly fall within the rule-making authority of agencies. By contrast, the Emergency Order clarifies that "the fundamental

issue" animating the Orders is the broad policy goal of "ensuring that ratepayer and taxpayer dollars which fund low-income assistance programs achieve their intended purpose" (Ex. S to Cyrulnik Aff., at 17, 19); see also Ex. I to Cyrulnik Aff., at 10-11 (appealing to the "legitimate governmental interest in practicing good stewardship of such monies" that are "funded by ratepayers and taxpayers" as basis for the July Order); Ex. S to Cyrulnik Aff., at 16 (the July Order's "moratorium was instituted not only for the protection and benefit of APPs, but for the benefit of ratepayers and taxpayers as a whole").

III. THE ORDERS DO NOT BEAR A RATIONAL RELATIONSHIP TO THE STATED GOALS AND ARE PREDICATED ON ERRONEOUS ASSUMPTIONS, UNRELIABLE DATA

The moratorium on low-income customers is unjustifiable and bears no meaningful relationship to the Orders' stated purpose, and is also not based on any reasonable factual record.

First, the moratorium imposes unreasonable terms that bear no relationship to the Moratorium Orders' stated purpose. The Orders require low-income customers to be forcibly transferred from ESCOs to local utilities and prohibit ESCOs from enrolling new low-income customers. The effect of the Orders, therefore, is to eliminate competition in New York's energy market segment for low-income consumers. That is an absurd result where the Commission itself invited and encouraged ESCOs and their shareholders to invest and participate in the New York energy market over the last two decades in order to provide a competitive marketplace for the benefit of all New York residents, regardless of income level. (Cyrulnik Aff. Ex. AA, at pp. 2-3).

The Orders obviously assume that low-income customers will be better off if they are subject to the monopoly pricing of local utilities based on the false premise that local utilities charge market rates. They do not. There is little or no correlation between what the local utility charges and market rates. Moreover, there is virtually no clarity or transparency into the local

utility's actual cost of the electric and gas commodities they purchase, as the local utility bury part of their costs in a host of line items that appear on customer bills, including in the delivery portion of those bills, for which there is no itemization or explanation.

The practical effect of the Orders is to significantly harm ESCOs not only by removing hundreds of thousands of their customers but also by the loss of good will the Orders will engender since low-income customers are not provided with any explanation for why they are being migrated to the utility and are instead being directed to direct their complaints with the ESCOs or being told by utilities that ESCOs were overcharging them and that that is the reason they are being transferred. The natural assumption from the customer's perspective will be that the ESCO with which he or she was enrolled engaged in some undefined wrongful behavior.

Second, the Orders also leave low-income customers without products and services they obviously want or need. (See Cyrulnik Aff. Exs. I & S.) Those products and services include more competitively priced energy, better customer service, and substantially more and varied choice than what those consumers experience from the monopoly-protected and price-regulated local utility company.

Low-income consumers, for example, will not be able to enter into long-term fixed-rate contracts for their electricity or gas supply needs because only ESCOs such as ESCOs can offer consumers those products. Utilities cannot offer those products and services. Fixed-rate contracts can provide consumers dramatic savings as compared with those of local utilities. As of September 24, 2016, for example, a customer in Suffern, New York (zip code 10901), could have entered into a 12-month fixed-rate contract with an ESCO for as low as 7¢ per kilowatt hour. See www.newyorkpowertochoose.com.

That same website also showed that the variable rate charged by the local utility (Orange and Rockland Utilities, Inc. ("O&R")) for the prior 12-month period ranged between 6.19¢ to 9.06¢ per kilowatt hour. That same customer also has the option of entering into a 36-month fixed-rate contract for 7.8¢ per kilowatt hour. The variable rate charged by O&R for the prior 36-month period ranged from 6.2¢ (April 2016) to 15.9¢ (March 2014) per kilowatt hour. In short, customers who contract with ESCOs for a fixed rate can save a substantial amount of money, avoid fluctuation in their energy supply cost, and increase certainty and predictability in their budgets.

ESCOs provide customers with other significant value-add benefits that utilities do not. The moratorium will cause low-income customers to lose these value-added benefits including: (i) loyalty discounts, which can provide credits of as much as $100 off their energy costs; and (ii) other benefits such as reward points entitling customers to gift cards, electronics, appliances, and other products. Indeed, one of the PSC Commissioners dissented from the July Order, noting that the July Order's moratorium was likely to have "an unintended consequence of chilling a market and access to potential opportunities for not only the low-income customers but all customers" (July 14, 2016 session, Tr. 30:2-20) and that the July Order provides no regulatory certainty since it "is silent on the conditions under which it may be lifted" (Tr. 26:13-27:2).

Thus, the Orders will harm low-income customers – not help them – further underscoring the extent to which the Orders are irrational, arbitrary, and capricious. See Cellular Tel. Co. v. Rosenberg, 82 N.Y.2d 364, 374 (N.Y. 1993) (agency decision invalid where the record shows no rational basis in support thereof); Coates v. Planning Bd. Of Inc. Vill. Of Bayville, 58 N.Y.2d 800 (1983) (agency determination invalid where "there [wa]s no evidence in the record showing that the [agency action] was necessary" to promote the action's stated purpose and in fact contradicted that purpose); Castle Props. Co. v. Ackerson, 163 A.D.2d 785, 786-87 (3d Dep't 1990) (agency

action invalid as arbitrary where, beyond speculation, record did not show that means employed furthered action's purpose).

Third, the Commission has failed to identify data that supports the moratorium. The Commission fails to cite a single analysis it commissioned or performed demonstrating the effect the Orders will have on New York's energy market, on efforts to promote renewable energy products and services, or on how the Orders will benefit low-income consumers. There is no showing, for example, that low-income consumers will be better off if they are subject to monopoly pricing of the local utilities and are denied the valuable products and services they previously selected.

Underscoring the absence of factual support for the moratorium is the fact that year-over-year, the number of complaints against ESCOs has plummeted in all major categories, including for alleged deceptive marketing practices. The data shows that initial complaints against ESCOs dropped by more than 60% (391 initial complaints in July 2015 compared to 139 initial complaints in July 2016); escalated complaints—which are complaints that are not initially resolved by the ESCO—dropped by more than 70% (97 escalated complaints in July 2015 compared to 27 escalated complaints in July 2016); and complaints alleging deceptive marketing dropped nearly 80% (213 complaints in July 2015 compared to 48 complaints in July 2016). (Id.). Thus, the data decidedly undermines any premise that the Orders are necessary because there is a pattern of ESCOs taking advantage of or otherwise engaging in wrongful behavior with respect to low-income consumers through marketing practices or the like.[5] And one Commissioner noted at the

[5] Consistent with the decreasing number of complaints as a result of increased enforcement, a rational response to customer complaints would be to continue to ramp up enforcement rather than rendering an entire segment of the energy market non-competitive.

July 14, 2016 session the moratorium was based on an unreasonable rationale – i.e., that because the Commission's prior proposal "did not satisfy everyone . . . therefore we're issuing the moratorium" (Ver. Pet. ¶ 44 (quoting Tr. 28:13-18)), and that despite the Commission's premise for the July Order that ESCOs provide gas and electric service at comparatively higher rates with no value to low-income customers, the Commission knows "this is not true" for all ESCOs and there is nothing to support the statement in the July Order that ESCOs provide no value to consumers (id. (quoting Tr. 27:3-23 (Ex. J to Cyrulnik Aff.))). See Coates, 58 N.Y.2d at 802; Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany, 130 A.D.2d 1, 4 (1987) (agency action invalid where it failed to offer any supportive "empirical data or other satisfactory documentation"); Fitzner v. Beach, 174 A.D.2d 798, 799 (3d Dep't 1991) (finding mere consumer complaints insufficient to justify agency action); Nat'l Fuel Gas Distrib. Corp. v. Pub. Svc. Comm'n, 154 A.D.2d 31, 35-36 (3d Dep't 1990) (agency rate determination invalid where it lacked a "sound rationale"); Application of Long Island Lighting Co., 211 N.Y.S.2d 576, 579 (N.Y. Sup. Ct. 1961) (agency determination arbitrary and capricious, including because "[t]he record d[id] not substantiate" the agency's "conclusion[s].")[6]

NEM identifies below scores of missing data, and questions concerning the data that the Commission has cited, that at a bare minimum should be considered prior to implementing measures like this. (*See* Section VII, below.)

[6] Even if complaints against ESCOs concerning marketing practices had not dropped precipitously (which they have) and even if the Commission could set forth facts showing that some ESCOs have taken advantage of low-income consumers (they do not), there are rules already in place regulating ESCO marketing practices that enable the Commission to determine on a case-by-case basis whether disclosures to customers are sufficient for them to make informed decisions. To the extent the Commission feels that stricter controls are needed, it could have advocated modifications of applicable rules and regulations. There thus are other less harmful and less intrusive options that are available to the Commission other than an immediate moratorium, as this Court noted in the July Court Order.

IV. THE ORDERS ARE UNCONSTITUTIONAL

A. The Moratorium Orders Constitute an Unconstitutional Taking Under the U.S. Constitution

The Moratorium Orders violate the U.S. Constitution because they constitute a taking for which ESCOs will not receive just compensation. The determination of whether government action constitutes a taking inevitably requires "ad hoc, factual inquiries." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). In determining a taking's constitutionality, courts apply three factors identified in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978): (i) the regulation's economic effect on the property owner; (ii) the extent to which the regulation impairs investment-backed expectations, and (iii) the government action's character. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); see Loretto, 458 U.S. at 426 (noting that the "degree of interference with investment-backed expectations [] is of particular significance"); accord Kaiser Aetna v. U.S., 100 S.Ct. 383, 390 (1979). The scope of constitutionally protected investment-backed expectations is broad – it includes expectations arising from legislation, judicial precedent, custom and practice, and contracts. See Nixon v. U.S., 978 F.2d 1269, 1275-76 (D.C. Cir. 1992) (explaining that constitutionally protected entitlements can arise "in myriad ways" including "law" and "custom and practice"); Ruckelshaus, 467 U.S. at 1003 ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States").

ESCOs have an investment-backed property interest in operating in New York and in continued contractual relationships with their low-income customers. ESCOs' expectations are reasonable where New York State invited and facilitated the ESCOs' participation in the New York energy market. The Orders substantially impair the ESCOs' interests without just compensation because they force ESCOs to lose thousands of customers and to turn away

countless others, prohibit ESCOs' participation in the energy supply market for an entire demographic, undermine their ability to compete, and require them to take immediate steps to terminate agreements with thousands of customers who will then become utility customers.

B. The Moratorium Orders Violate the Contract Clause of the U.S. Constitution

The Orders violate the Contract Clause of the United States Constitution because they unreasonably impair ESCOs' contracts with low-income customers.

Under the Contract Clause, "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. Art, I, § 10, cl. 1. Upon a finding that state action constitutes an "impairment" of contract, courts undertake a two-step analysis. First, courts must determine whether the legislation operates to substantially impair contractual obligations. Ass'n of Surrogates and Supreme Court Reports Within City of New York v. State of N.Y., 940 F.2d 766, 771-72 (2d Cir. 2006). Second, if the impairment is more than "minimal," the court must examine "the nature and purpose of" the state rule to determine whether the rule "is a 'reasonable' means to a 'legitimate public purpose." Id. If the rule does not reasonably pursue a legitimate public purpose, it is invalid as unconstitutional. See id.

The Orders substantially interfere with ESCOs' contracts with their customers. As discussed above, the Orders direct ESCOs and other ESCOs to de-enroll existing customers who have ongoing contracts by unilaterally proclaiming that those contracts should be treated as terminated on the first day of the next billing cycle. (July Order at 16 ("With respect to customers on a variable rate, month-to-month contracts, the expiration of the agreement is at the end of the current billing period.") That substantially will interfere with the contracting parties' expectations, including because ESCOs will be forced to terminate products and programs, pursuant to which

both ESCOs and customers expected to benefit. Further, for the reasons discussed above, the Orders do not reasonably pursue a legitimate public purpose. The Orders are thus unconstitutional and should be invalidated.

C. The Moratorium Orders Violate the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment protects "every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[7] Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citations omitted). The Equal Protection Clause "is essentially a direction" to state actors "that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Similarly, the New York State Constitution provides that "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. Const. Art. I, § 11. "An agency of the State denies equal protection when it treats persons similarly situated differently under the law, and this difference may be created by the grant of a preference as well as by the imposition of a burden." Abrams v. Bronstein, 33 N.Y.2d 488, 492 (1974).

The New York and U.S. Constitutions require the state to show that the heavier burdens it imposes on ESCOs and other ESCOs relative to the public utilities rest on a "reasonably conceivable state of facts that could provide a rational basis for the classification." Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014) (quoting FCC v. Beach Commc'n, Inc., 508 U.S. 307, 313 (1993)). Arbitrary distinctions will not pass muster; indeed, courts have held that irrational economic regulations violate the constitutional entitlement to equal protection. See St. Joseph

[7] ESCOs assert the same claim under the New York Constitution. See N.Y. Const. Art. I, § 11.

Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) (affirming that there was no rational basis for a challenged rule where "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."); Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (holding that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose"). "[T]he [government's] chosen means must rationally relate to the state interests it articulates." St. Joseph Abbey, 712 F.3d at 223. "[M]ere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." Frost v. Corp. Comm'n of State of Okla., 278 U.S. 515, 522-23 (1929).

As discussed above (Parts I and II.A, B, C, D), there is no legitimate policy basis to implement the moratorium, compelling low-income customers to be subject to the monopoly whims of the local utilities just because of those residents' economic status. The moratorium is based on fatally flawed and unsupportable assumptions that low-income consumers will be better off as utility customers, that ESCOs somehow took advantage of all low-income consumers, and that low-income consumers are incapable of deciding for themselves which products or services are most advantageous. Treating ESCOs differently than local utilities in these circumstances does not further the purported policy justification for the Orders. The Orders thus fail because they will lead to preferential treatment for the utilities and undermine the Orders' stated purpose.

V. THE ORDER FOREGOES A HOST OF ALTERNATIVES TO THE MORATORIUM IN FAVOR OF THE BLUNT, SWEEPING, AND INAPPORPRIATE INSTRUMENT OF A MORATORIUM

There are multiple alternatives available to the Commission that fall far short of instituting the drastic, unwarranted and factually unsupported "moratorium" on all ESCO service to low income consumers. These alternatives include the development and implementation of Uniform Business Practices (UBP) revisions targeted at protections for low income consumers and delineation of ESCO marketing standards to achieve that goal. The Commission also has the authority to institute enforcement proceedings against an ESCO, subject to due process requirements, for potential violations of the UBP requirements for service.

The Commission can and should also consider fostering an accurate consumer understanding of the relative value ESCO offerings present in comparison with utility rates, which begins with utility delivery rate unbundling and transparent presentation of utility charges. In the absence of such baseline utility information disclosures, any requirements related to "guaranteed savings" cannot be meaningfully implemented.

In addition, the Commission should consider that there are competitive value-added product and service offerings currently being offered and provided in the marketplace to all consumers, including low income consumers, that provide real benefits in contrast to the utility "plain vanilla" variable rate commodity offering. Denying low income consumers the opportunity to access these competitive value-added products and services like everyone else in New York will prevent them from exercising their own judgment about the energy products and services that suit them the best and realizing the individual benefits of their choices. There is no reason that the Commission should impose such restrictions on New York customers simply because they do not earn enough money to warrant choice in the Commission's view.

Another viable alternative to a complete moratorium on ESCO service to low income customers that the Commission failed to consider was the competitive aggregation proposal that was included in the Low Income Collaborative Report. The Commission has approved CCA programs that could serve as a template for implementing a competitively-provided, low income aggregation program.

A. Uniform Business Practices and Commission Enforcement Proceedings

The Commission has a long history of engaging industry stakeholders in Staff-led collaboratives to review, develop and implement changes to the Uniform Business Practices (UBP), with the goal of establishing and refining standards for ESCO conduct, in response to perceived needs in the marketplace. Over the years, this approach has been successfully utilized to adopt the Customer Disclosure Statement "Schumer Box" in UBP Section 5,[8] UBP Section 10 Marketing Standards,[9] and the ESCO Consumers Bill of Rights,[10] among other measures. The reason the UBP collaboratives have been so successful is that Staff has solicited diverse industry viewpoints that are fully vetted so that rules reflect and fairly represent the concerns of all parties involved.

The Commission' sudden departure from this productive approach to addressing competitive market issues, and abandonment of a reasoned and deliberative process predicated on soliciting stakeholder input, is as unhelpful for low income customers and ESCOs alike as it is unwarranted. Instead, and without a record to support its actions, the Commission now proposes

[8] Cases 98-M-1343, 07-M-1514, and 08-G-0078, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing, issued October 27, 2008.

[9] Id.

[10] Case 98-M-1343, Order Implementing Chapter 416 of the Laws of 2010, issued December 17, 2010.

to adopt the classically inappropriate blunt instrument of a complete ban on ESCO sales to low income consumers. To the extent the Commission believes there was a lack of consensus on alternative proposals being considered during the collaboratives, the Commission should have directed Staff to reconvene the UBP collaborative working group to examine whether and what revisions should be made to protect low income consumers, including corresponding changes to ESCO Marketing Standards in Section 10. Adopting reasonable, tailored measures is a far more effective and fair approach to addressing concerns about low income customer service.

As NEM has repeatedly noted in its filings to this Commission, effective enforcement of behavioral standards established in the UBP is a strong deterrent against potential marketplace misconduct. If evidence that a particular ESCO has engaged in misconduct with respect to its marketing and sales to low income consumers is produced, the Commission has the enforcement tools to redress the individual ESCO's actions. In this context, it is clear that applying a complete moratorium applicable to all ESCO sales to low income consumers is an overly broad and unwarranted remedy that simply seeks to compensate for the Commission's refusal to enforce (or enhance) its own consumer protection standards.

B. Compliant Product Offerings

In a February 6, 2015, Order,[11] the Commission decided that ESCOs providing service to low income consumers must satisfy one of two conditions: It must either guarantee that the customer will pay no more than it would have paid as a full service utility customer, or it must provide the customer with energy-related value-added products or services "in a manner that does not dilute the effectiveness of the financial assistance programs." The Commission's reversal of

[11] Case 12-M-0476, et al., Order Granting and Denying Petitions for Rehearing in Part, issued February 6, 2015.

course, and apparent conclusion that no compliant products had been identified, cannot be squared with reality or the Commission's own repeated acknowledgments concerning value-added services.

As a threshold matter, meaningful utility delivery rate unbundling is needed for the Commission, ESCOs, and consumers to understand and properly compare the prices at issue – so as to avoid using artificially low utility default rates as a baseline for discussion. This has been an oft-repeated recommendation by NEM in this and other proceedings.[12] The failure to promote greater transparency and comparability in utility rates has been the actual source of consumer harm over the years because it has perpetuated consumer misunderstanding about the relative value of utility "plain vanilla" service relative to competitive ESCO product and service offerings.

The Commission also repeatedly recognized – but in its current order appears to ignore – that there are multiple competitive value-added product and service offerings that ESCOs currently provide to all consumers, including low income consumers. These products provide real benefits

[12] As NEM has repeatedly maintained in its comments since this case was first initiated:

> [C]omparing a snapshot of utility default rates with supplier rates makes an inherently flawed comparison of rates even worse by misstating the value of competitive products. First, the snapshot would be comparing a variable utility rate with an ESCO rate that may be fixed or variable or include a value added service. Importantly, the desirability of fixed versus variable pricing products versus other products will change over time depending upon conditions in the marketplace (and consumers' individual preferences). In addition, utility rate structures do not lend themselves to easy, or any, comparison with ESCO pricing. Utility delivery rates have yet to adequately unbundle the full retail costs of providing commodity-related services and continue to cross-subsidize the utilities' provision of default service. The competitive ESCO rates are therefore being compared to an artificially low, cross-subsidized utility default rate. The lack of utility versus ESCO product comparability coupled with utility rate subsidization not only impedes informed consumer decisions but actually misleads consumers in ways yet to be disclosed by New York utilities despite a decade of requests. However, the solution to that problem is to promote greater price transparency on the part of the utilities rate structure and to eliminate subsidies to the default service until or as they fully exit the commodity merchant function. The Commission already publicly and transparently posts ESCO pricing on the Power to Choose website. Yet, despite Commission Orders to do so, utilities have yet to investigate and appropriately disclose similar price transparency.

Cases 12-M-0476, 98-M-1343, 06-M-0647, Comments of the National Energy Marketers Association, dated January 25, 2015, at 7-8.

to customers – including rate stability from fixed rate contracts; the ability to better control energy usage through energy efficiency and demand response products; achievement of environmental goals through green energy products; providing home heating equipment and repair to consumers on an affordable basis; rewards, points and rebates for customer loyalty. These options provide critical choices to New Yorkers (regardless of their income level) – in stark contrast to the utility "plain vanilla" variable rate commodity offering that is available absent ESCO participation in the marketplace or service to the market segment. In the Commission's zeal to proscribe a narrow, regulatorily-determined formula of what constitutes "value-added" for low income consumers, it fails even to grapple with its own prior acknowledgments that the products and services mentioned above can yield the greatest benefits for these customers. It fails to acknowledge that individual consumers (wealthy or poor) place different, individualized perceived values for different energy products and services. The Commission's sudden reversal of course is also directly contrary to longstanding precedent encouraging ESCOs to offer fixed-rate products and other value-added services.[13]

A moratorium on ESCO service to an entire segment of customers in the State of New York will not encourage or incentivize ESCOs to make investments in providing an increased array of value added products to consumers. To the contrary, it increases the regulatory risks and costs of doing so and will result in fewer such offerings being made available to consumers going forward.

[13] The Commission determined in 2005 that, "a fixed price supply option is a service that could and should be developed and offered by the *competitive marketplace*," (emphasis added) and that a utility fixed price offer should not be available because it, "distorts the market, acts as a barrier against ESCO entry into the market, and is an obstacle to innovation in the market." Case 05-G-0311, Order Directing the Future Termination, Subject to Conditions, of a Fixed Price Offer, issued July 22, 2005, at 7-8.

C. Competitive Low Income Aggregation Proposal

The Low Income Collaborative Report included a competitive low income aggregation option that the Commission should consider implementing as well. Indeed, the Commission has approved Community Choice Aggregation (CCA) programs for customers, which would operate in a similar manner to a competitive low income aggregation program. The Commission determined that CCA programs can increase the benefits of retail competition for mass market customers by garnering, "more attractive energy supply terms than can be obtained by individual customers through the bargaining power that aggregation provides," and the, "competitive public process for choosing a supplier."[14] In that vein, a competitive low income aggregation program could be implemented building upon the CCA model that was previously adopted and for which the Commission has determined provide appropriate consumer protections. This seems particularly appropriate because the Commission determined that low income customers are allowed to participate in CCAs.[15]

VI. THE ORDERS DO NOT COMPLY WITH SAPA

A. To the Extent the Commission Seeks To Adopt The Order on an Emergency Basis, There Is No Proper Basis for the Commission's Use of Emergency Authority Pursuant to SAPA

The Commission has been considering the supposed problem underlying this order for many years. This timeline makes clear that there is no genuine emergency relating to low-income customers and no reason why the Commission cannot comply with SAPA's requirements.

[14] Case 14-M-0224, Order Authorizing Framework for Community Choice Aggregation Opt-Out Program, issued April 21, 2016, at 2.

[15] Cases 12-M-0476, 98-M-1343, 06-M-0647, 98-M-0667, Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies, issued July 15, 2016, at page 18, note 23; Case 14-M-0224, Order Authorizing Framework for Community Choice Aggregation Opt-Out Program, issued April 21, 2016, at 17.

As a state agency, the Commission must comply with the rulemaking procedures of SAPA. Section 1 of SAPA requires adherence to certain notice and hearing requirements, none of which were followed in this case. Instead, the Commission all but conceded its noncompliance by suspending its July Order and setting a new notice and comment period, but invoked Section 202(6) of the SAPA to forcibly impose the suspended rule **during the very notice and comment period**. That narrow exception to SAPA provides:

> If an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and that compliance with the requirements of subdivision one of this section would be contrary to the public interest, the agency may dispense with all or part of such requirements and adopt the rule on an emergency basis.

Given SAPA's objective "of providing the public with simple, uniform administrative procedures" and particularly because Section 202(6) allows a state agency to act without prior notice, Section 202(6) of SAPA is narrowly construed. Home Care Assoc. of New York State Inc. v. Dowling, 218 A.D.2d 126, 129 (3d Dep't 1996) (finding that even a federal order mandating compliance within 15 days does not constitute a sufficient "emergency" under Section 202(6) absent strict compliance with the requirements of Section 202(6)).

The Commission's implementation of emergency procedures under SAPA § 202(6) fails for three main reasons.

First, there is no emergency. As the Emergency Order itself notes, the Commission had expressed purported concerns regarding low-income customers more than two years ago. (Ex. S to Cyrulnik Aff., at 5.) Having sat on its hands for two years, the Commission cannot now credibly claim an emergency. The Commission's inability or unwillingness to properly comply with SAPA does not create an emergency, and if it did, such a rule would render SAPA a nullity.

Second, the Commission has not come close to articulating any emergency. Section 202(6) requires that an agency seeking to invoke the narrow exception to the SAPA requirements clearly set forth the existence of a "public health, safety or general welfare" emergency that is so vital that complying with the rulemaking requirements of SAPA would "be contrary to the public interest." The Commission here does not come close even to acknowledging that controlling standard. It pays lip service to the exception and simply parrots in the most general way the language of the statute.

The law is clear that such gamesmanship is impermissible. At a minimum, an agency seeking to adopt an emergency rule must "fully articulate in writing the circumstances which give rise to the adoption on an emergency basis so as to limit this method of rulemaking to genuine emergencies." Law Enforcement Officers Union Dist. Council 82, AFSCME, AFL-CIO by Engelhardt v. State, 168 Misc.2d 781, 783 (Sup. Ct. Alb. Cnty. 1995), citing Bill Jacket, L.1990, ch. 850, Sponsor's Memorandum, Assemblyman Sanders, Assembly Bill 10271–A, at 3("[u]nder this legislation, an agency would have to disclose the specific reason as to the need to adopt the emergency rule and why it was necessary to forgo the required notice and comment period that is required by SAPA"); Brodsky v. Zagata, 165 Misc.2d 510, 514 (Sup. Ct. Alb. Cnty. 1995).

The Commission has not even attempted to seriously meet the requirements for emergency rulemaking. Instead, the Commission's reason for employing § 202(6) is "to avoid needless litigation over SAPA" (Ex. S to Cyrulnik Aff., at 4) because there are "entities that will continue to employ litigation as a means of frustrating the Commission's efforts to reform retail energy markets in the public interest." (Id. at 6.) "Therefore, out of an abundance of caution, we hereby re-adopt the moratorium on an emergency basis pursuant to SAPA §202(6). We find that a general welfare emergency exists." (Id. at 6-7.)

That parties may challenge the Commission's continuing failure to follow SAPA through litigation or otherwise does not constitute an "emergency" by any stretch. To be sure, the Commission has been discussing possible restrictions on ESCO service to low-income customers for more than two years. (Emergency Order at 5.) In the interim, the Commission already has been chastised by this Court[16] for its failure to follow SAPA in the Commission's unyielding effort to remove meaningful energy options from low-income consumers. The July Court Order strongly admonished the Commission to follow SAPA, but instead of taking those admonitions to heart, the Commission has sought to sidestep them by declaring an "emergency" to get around both the July Court Order and the Commission's obligations under SAPA.

Third, the Commission failed to adhere to the procedural and substantive requirements of Section 202(6) in any event. In this regard, the Emergency Order is deficient in at least five different respects:

(1) The Emergency Order states that it is also an order of proposed rulemaking, but fails to give the date, time and place of any public hearing or hearings which are scheduled as required by Section 202(6)(d)(ii). Instead the order states that public comments will be sought sometime after the order is published in the State Register with no indication of when that will be. (Ex. S to Cyrulnik Aff., at 7.)

(2) Section 202(6)(d)(iv) requires a "statement of emergency" in which the Commission has to "fully describ[e] the specific reasons for [its] findings and facts and circumstances on which such findings are based" that led to the declaration of an emergency under Section 202(6). There is no Commission statement in the Emergency Order describing the nature

[16] *Nat'l Energy Marketers Ass'n v. New York State Public Service Comm'n*, --- N.Y.S.3d ---, 2016 WL 4004502, at *6-7, (Sup. Ct. Alb. Cnty. July 22, 2016) (the "July 22 Court Order").

and location of the general welfare need requiring adoption of the rule on an emergency basis, nor is there "a description of the cause, consequences and expected duration of such need" or "an explanation of why compliance with the requirements of [SAPA § 1] would be contrary to the public interest." Id. Finally, there is no statement explaining why the "current circumstance necessitates that the public and interested parties be given less than the minimum period for notice and comment." Id.

(3) The Commission also fails to give the effective date of the order as required by Section 202(6)(d)(v). Instead, the Commission simply states that it will become effective "upon publication of a Notice of Emergency Adoption and Proposed Rulemaking in the State Register." (Id. at 7.)

(4) Though Section 202(6)(d)(vi) requires the order to include "the specific date the emergency rule will expire," there is no such date in the Commission's Emergency Order.

(5) Finally, under Section 202(6)(d)(viii), the Commission was to "include a regulatory impact statement prepared pursuant to section two hundred two-a of this chapter or a statement setting forth that the regulatory impact statement will appear in the state register within thirty days of the effective date of the emergency rule", but there is no regulatory impact statement in the Emergency Order, nor does the order even acknowledge the Commission's obligation to provide such a statement, including in the State Register.

These deficiencies are fatal to the Commission's attempt at emergency rulemaking. See Gill v. New York State Racing and Wagering Bd., 816 N.Y.S.2d 695(Table), 2006 WL 756073, at *7 (Sup.Ct. N.Y. Cnty. Feb. 9, 2006) (invalidating emergency rule after finding the state agency articulated an emergency but failed to comply with the specific requirements of Section 202(6)),

affirmed 50 A.D.3d 494 (2008); Brodsky, 165 Misc.2d at 514 (invalidating emergency order and calling failure of state agency to comply with even minimal technical requirements of Section 202(6) "repugnant").

B. The Orders Violate SAPA

As noted above, the Commission did not satisfy the SAPA requirements for issuance of an "emergency" order. Apart from invoking the "emergency" exception to SAPA, the Commission's Moratorium Orders clearly do not comply with the most basic SAPA requirements demanding that the Commission provide the requisite notice and opportunity for ESCOs and other stakeholders to be heard before imposing this drastic measure.

SAPA "requires submission of notice of the proposed rule-making to the Secretary of State for publication in the state register, followed by a public comment period, a public hearing (where applicable), and the filing and publication of a notice of adoption of the rule." Kahrmann v. Crime Victims Bd., 14 Misc. 3d 545, 550 (Sup. Ct. 2006); see SAPA §§ 202, 203). Where, after notice and comment, "substantial revisions" have been made to the proposed rule, it is subject to another notice and comment period, typically at least 30 days. SAPA § 202(4-a).[17] Where an agency fails to follow the procedural requirements of SAPA, the rule does not become effective. Kahrmann, at 550.

An agency action is considered to be a "rule" subject to SAPA where it is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers." Schwartfigure v. Hartnett, 83

[17] To the extent the Order is not subject to exemptions related to SAPA § 102(2)(a)(ii), it must comply with the SAPA rules such as requirements to provide notice and comment of substantially revised proposed rules and regulatory impact statements.

N.Y.2d 296, 301-02 (1994) ("Respondent's 50% set-off policy for non-willful overpayments is a rigid, numerical policy invariably applied across-the-board to all claimants without regard to individualized circumstances or mitigating factors, and as such falls plainly within the definition of a 'rule' for State Administrative Procedure Act purposes."); see also Alca Indus. v. Delaney, 92 N.Y.2d 775, 778 (1999) (holding rulemaking to be "any kind of legislative or quasi-legislative norm or procedure which establishes a pattern or course of conduct for the future" as opposed to "ad hoc decision making based on individual facts and circumstances"). Here, the Moratorium Orders make changes to a regulatory regime concerning an entire market demographic and are therefore subject to SAPA. Energy Ass'n of New York State v. Pub. Serv. Comm'n of State of N.Y., 653 N.Y.S.2d 502, 516 (Sup. Ct. 1996) ("when the Commission approves or rejects a plan, or orders restructuring in a certain manner, it will be promulgating a rule and must take appropriate action under SAPA").

The Commission purports to base its Orders on the Notice of Proposed Rulemaking published on December 16, 2015 [(Ex. S to Cyrulnik Aff., at 4-5, Ex. I to Cyrulnik Aff., at 4, citing December 2015 Notice, Cyrulnik Aff. Ex. F], but that publication does not and cannot satisfy Respondent's notice requirements. The December 16 publication decidedly did not put ESCOs on notice of the moratorium because the moratorium was never considered or proposed in that notice. Among other flaws, the December 16 publication does not disclose that if the ESCOs did not capitulate to other draconian proposals made by the Commission or other interested parties, the Commission would respond by seeking to impose a moratorium prohibiting ESCOs from servicing an entire class of New Yorkers.

In her dissent to the July Order, Commissioner Burman specifically pointed to the Commission's failure to comply with SAPA. Specifically, Commissioner Burman was concerned

that the Commission failed to give proper notice of the potential for a moratorium, saying the Commission never gave the option to the ESCOs of "if no resolution is found we will institute a moratorium." (Ex. J to Cyrulnik Aff., at 25:6-14.)

Because the Moratorium Orders were so substantially different from the December 2015 publication and exceed the scope of SAPA § 102(2)(a)(ii), the Commission was required to submit notices of proposed rule-making for notice and comment in accordance with SAPA prior to imposing any compliance obligations on ESCOs and other ESCOs. Instead, as noted above, in an effort to circumvent SAPA requirement, the Commission issued the Emergency Order without any legitimate basis to do so. (See above, Part I.) Any "rule" that the Commission purports to have promulgated pursuant to or as reflected in the Moratorium Orders is thus null and void. Med. Soc. of State of N.Y., Inc. v. Levin, 712 N.Y.S.2d 745, 753 (Sup. Ct. 2000) aff'd sub nom. Med. Soc'y of State of New York, Inc. v. Levin, 280 A.D.2d 309 (1st Dep't 2001) ("New Regulations are invalid, null and void and, as a matter of law, their promulgation by respondents was arbitrary, capricious and an abuse of discretion by reason of respondents' failure to substantially comply with the clear mandates of the State Administrative Procedure Act.")

VII. THE COMMISSION HAS FAILED TO GATHER, PRESENT, ANALYZE, AND AFFORD MEANINGFUL OPPORTUNITY FOR COMMENT ON THE DATA UNDERLYING THE ORDERS

The Commission relies heavily on the data it recently produced in litigation, which data it claims supports its assumption that the ESCOs overcharge as compared to the utilities, including in the Affidavit of Bruce Alch dated October 26, 2016, filed by the PSC in opposition to a Motion for Preliminary Injunction and purporting to summarize and rely on the data the PSC produced in that litigation on October 20, 2016 (the "Utility-Provided Data").

NEM and the ESCOs request the opportunity to meaningfully review, analyze and provide responses to all data on which the Commission is relying in entering the Moratorium Orders. To the extent the Commission is missing relevant data, we submit that the Commission has a responsibility to obtain it and properly analyze it so that the Commission's orders reality rather than the perceptions that the Commission has adopted in the absence of proper data. At a bare minimum, that includes speaking with person(s) with knowledge concerning the data relied upon by the Commission so that NEM and the ESCOs can understand (a) where and how the Utility-Provided Data was obtained, (b) the scope of the data received by the Commission, (c) the complete contents of the data, and (d) any relevant data that either was not turned over to the Commission or was not included in the Commission's responsive papers.

A. The Foregoing Materials Are Material and Necessary to the Proceeding.

The Commission claims that the Utility-Provided Data supports its conclusion that (1) as compared to local utilities, ESCOs overcharge customers for the same electric and gas products, and (2) through these alleged "overcharges" the ESCOs are siphoning off taxpayer and ratepayer subsidies meant for low-income utility customers. We have disputed both of those claims.

We have had no opportunity, among other things, to review and prove the correspondence or other communications that led to this new data; nor do we have knowledge of what data was considered – and what data was not considered – by the utilities and the Commission in tabulating the responses; nor have we been afforded any meaningful opportunity to determine the meaning and origin of the data that was provided or to test its validity.

The Utility-Provided Data is essentially a black box. On its face, the spreadsheets raise more questions than they answer, and they include thousands of summary figures that the ESCOs'

competitors (the local utilities) purport to have calculated – without any explanation for the methodology used to arrive at those figures. Remarkably, the PSC appears to be relying on the utilities' account of what ESCOs are charging their customers, rather than on information provided by the ESCOs themselves.

We cannot meaningfully test, analyze, or address the data without being able to understand its origin, meaning, and context. Some examples of the open questions include:

- The data includes only summary values for figures that purport to represent actual ESCO charges and utility charges. There is no raw data or calculations for individual customers that would be needed to validate the data.

- The data also does not segregate the multiple product offerings that ESCOs offer, nor does it indicate what efforts were undertaken to do so, or what analysis the PSC or the utilities undertook to determine how failure to disaggregate such product offerings would affect the rate-comparison exercise and resulting figures.

- The data does not indicate how, if at all, the utility-provided comparisons account for adjustments made to past-period bills, and the extent to which there are deferred costs not included in the line-item prices for utilities.

- The spreadsheets do not even identify for ESCOs the prices that are being attributed to each of them. Rather, it uses generic names when referring to ESCOs, such as "Supplier 011," depriving each affected party of the ability even to test the veracity of the data's claims with respect to the rates that the ESCOs themselves supposedly charge customers.

- The metadata on the spreadsheets reflects that they were modified by a Commission staff employee after they were created.

The Commission did not provide any data with respect to the core issues we have raised concerning the data, including how the data was compiled by the utilities, how (if it all) its accuracy was tested, and the meaning of the many disclaimers accompanying the data. It does not explain the methods applied by each utility when producing the data in the first place, which methodology is critical to the Commission's reliance on the data and our ability to meaningfully respond to it.

The Commission also has not presented any comprehensive summary and underlying data concerning the amount of "taxpayer" or "ratepayer" funds at issue, or any analysis as to how those funds will be impacted by implementation of the Moratorium Orders. These are basic facts that interested parties need to review and analyze in order to address the Commission's stated concerns about preserving those funds.

In sum, the Commission appears to have predicated its industry-changing Orders on ambiguous and manipulated data provided by the ESCOs' competitors – the local utilities – and now seeks to preclude the ESCOs from even analyzing or challenging that supposedly reliable data. It is in the public interest that interested parties be afforded a meaningful opportunity to understand, analyze, and address the data on which the Commission is relying in depriving hundreds of thousands of consumers of choice.

CONCLUSION

NEM appreciates this opportunity to offer comments on the foregoing issues and proposed rules.

Sincerely,

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Dated: November 21, 2016.