SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NATIONAL ENERGY MARKETERS ASSOCIATION; BLUEROCK ENERGY, INC.; BOUNCE ENERGY NY, LLC; DIRECT ENERGY BUSINESS MARKETING, LLC; DIRECT ENERGY BUSINESS, LLC; DIRECT ENERGY SERVICES LLC; ENERGETIX, INC.; GATEWAY ENERGY SERVICES CORP.; NORTH AMERICAN POWER & GAS, LLC; NYSEG SOLUTIONS, INC.; RESIDENTS ENERGY, LLC; and VERDE ENERGY USA NEW YORK, LLC, Petitioners/Plaintiffs, - against - NEW YORK STATE PUBLIC SERVICE COMMISSION, Respondent/Defendant.	Index No. 868-16 Justice Kimberly A. O'Connor

PETITIONERS/PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S REQUEST FOR AN UNDERTAKING

BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Tel.: (914) 749-8200
Fax: (914) 749-8300

Counsel for Petitioners/Plaintiffs

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Plaintiffs/Petitioners, National Energy Marketers Association; BlueRock Energy, Inc.; Bounce Energy NY, LLC; Direct Energy Business Marketing, LLC; Direct Energy Business, LLC; Direct Energy Services LLC; Energetix, Inc.; Gateway Energy Services Corp.; North American Power & Gas, LLC; NYSEG Solutions, Inc.; Residents Energy, LLC; and Verde Energy USA New York, LLC, submit this memorandum of law in opposition to the request for an undertaking by Defendant/Respondent, New York State Public Service Commission (the "Commission"), filed with the Court on March 8, 2016.

PRELIMINARY STATEMENT

The Commission's request that the Court impose a discretionary undertaking of nearly $100 million – almost double the amount requested at the March 4, 2016, hearing – should be summarily rejected for five independent reasons.

First, the plain language of the CPLR makes clear that, where the Commission concedes that it cannot articulate any financial harm it will suffer as a result of the stay, the law does not provide for an undertaking based on the Commission's claims about purported harm that may be incurred by non-parties. The operative section of the statute provides that an undertaking must be calculated based on the amount that would be paid in damages "**to the defendant**" if the plaintiff does not prevail. CPLR § 6312(b). In fact, the words "to the defendant" appear four times in the relevant statute. Id. Here, the Commission has not even tried to claim, much less submit any evidence to show, that the injunction would cause the Commission to incur any damages.

Second, the Commission cannot satisfy the foregoing "to the defendant" requirement by purporting to act in *parens patriae* on behalf of a limited subset of New York ESCO customers (i.e., those customers who are not currently in contracts with ESCOs, who would elect to enter into new contracts with ESCOs now, and who would not receive renewable energy under those

contracts). The ancient cases from the 1920s and 1930s cited by the Commission all predate the legislature's passage of the relevant provisions of the CPLR and do not purport to override the plain text of the CPLR. Moreover, to qualify for *parens patriae* standing, the Commission must show harm to its quasi-sovereign interests. The law is thus clear that a State agency has no *parens patriae* standing when it seeks to recover solely for the purported injury suffered by its citizens. The Commission has conceded this point by arguing that it is acting on behalf of ESCO customers and that the entire undertaking would in theory be distributed to those customers if the claims are dismissed. The *parens patriae* doctrine is thus inapposite.

Third, even if the Commission's requested undertaking were permissible under the CPLR (it is not) and even if the Commission had standing to make such a request (it does not), the Commission's request still fails because it is based on rampant speculation, unidentified or non-existent evidence, distortions of the record, and fundamentally flawed facts. Any request for an undertaking requires evidence of the actual damage that a defendant will suffer as a result of the injunction. Here the Commission does not (because it cannot) come close to presenting such evidence. In fact, the Commission ignores entirely that the electric rates it now claims to be problematic could be offered by ESCOs even absent the injunction (provided only that the energy includes a 30% renewable makeup). The Commission tries to compensate for these obvious failures by conjuring up new purported harms that "may" befall customers, including claiming – for the first time – that ESCOs "might" increase rates in light of Purchase of Receivables ("POR") programs. That alleged harm, however, is not even mentioned in the February 23 Order, was not referenced once at the hearing, is not supported by the record, is entirely speculative, and cannot now be used as a basis for an unsupportable request for an undertaking. Moreover, the law is clear that speculative damage calculations qualify at most for

a nominal undertaking.

Fourth, the speculative nature of the Commission's requested undertaking is underscored by the fact that it has nearly doubled its baseless request for an undertaking to nearly $100 million in the course of a few days. More fundamentally, the Commission's request is predicated on obviously flawed assumptions, including that residential customers in the Niagara Mohawk region "lost" $16 million in January 2016. Apart from the fact that this number is totally unsupported, it is directly contradicted by Ms. Scherer's testimony (¶ 12) that the loss was closer to $5 million per month ($129 million over 24 months). The Commission's analysis is nothing more than a house of cards and is insufficient to support any undertaking, let alone the outrageous numbers the Commission cavalierly requests.

Fifth, the Commission's request for a nearly $100 million undertaking cannot be squared with the Commission's claim in open Court that it has been considering the ESCO restructuring called for in the February 23 Order for over two years, but for some unexplained reason never acted on it and never even informed the industry that it was considering acting on it. The Commission's claim of immediate and irreparable harm of nearly $100 million in the next 48 days begs the question of why the Commission did nothing to address some expected $1.5 billion in damages over the past two years, using the Commission's flawed assessment and numbers. Of course, the truth is that there is no merit to the Commission's claim of harm in the next 48 days, or in the last two years. Allowing consumers to choose their energy provider is not, and cannot credibly be spun, as causing consumers damages, and certainly is no basis for an undertaking.

ARGUMENT

I. THE COMMISSION HAS FAILED TO SHOW ITS ENTITLEMENT TO AN UNDERTAKING

The Commission has failed to show that the Court should impose a discretionary undertaking here for at least five main reasons.

First, as noted at argument, the Commission's unsupported speculation about purported harms some consumers who elect to purchase their energy from unspecified ESCOs in the next 48 days may suffer does not support its claim for an undertaking because the Commission's request directly contradicts the controlling plain language of CPLR §§ 6312(b) and 6313(c). See Melvin v. Union College, 195 A.D.2d 447, 447 (2d Dep't 1993) (applying CPLR 6312 where Article 78 petitioner sought injunctive relief). Those statutes provide that an undertaking (if any) can be fashioned based on the amount that would be paid "to the defendant" for its "damages and costs" resulting from the injunction. CPLR 6312(b); CPLR 6313(c) (incorporating by reference pertinent portions of CPLR 6312(b)). Those sections do not provide that an undertaking reflecting third parties' alleged harms can somehow be provided to a defendant for safekeeping or distribution to third parties. In response to the plain language of the operative statute, the Commission was able to cite (at 2-3) only ancient case law (New York Edison, Rockland Light & Power and Peoples Gas), without even acknowledging (let alone addressing the fact) that those decisions pre-date by decades the enactment of the operative statutes (CPLR §§ 6312(b), 6313(c), and 7805).[1] The Commission's failure to find even a single case supporting its position

[1] The Commission also misplaces its reliance (at 3) on Public Service Law ("PSL") § 65(a) and Campo Corp. for its claim that the Commission statutorily was authorized to issue the Order. PSL § 65(a) does not authorize the Commission to set ESCOs' rates. See Petitioners' March 3, 2016, Memorandum of Law In Support of Their Application By Order to Show Cause for a Temporary Restraining Order, Preliminary Injunction, and Expedited Discovery, at 6-9. Likewise, Campo Corp. does not support the Commission's position that it can set ESCOs' rates,

that the CPLR provides for an undertaking where the defendant cannot show that it would suffer any harm speaks volumes about the merits of the Commission's position.

Second, the Commission's baseless claim (at 3) that "an undertaking is appropriate . . . because the Commission . . . is acting as *parens patriae*" fundamentally misapprehends that limited doctrine. To act in the capacity of *parens patriae*, the law requires that the Commission "redress an injury to an interest that is separate from the interests of particular individuals." People of State of N.Y. by Abrams v. Seneci, 817 F.2d 1015, 1017-18 (2d Cir. 1987) (citing cases). Thus, even where a State agency purports to act on behalf of the economic well-being of the citizens of the State, if (as here) the damages sought are "not designed to compensate the state for those damages, the asserted presence of such damages cannot serve as the foundation for the state's authority to act . . . as the representative of its citizens." Id. (emphasis added); see also id. ("The state cannot merely litigate as a volunteer the personal claims of its competent citizens. . . . Where the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests. Thus, the state as *parens patriae* lacks standing to prosecute such a suit.") (citations omitted)); accord People of State of N.Y. by Vacco v. Operation Rescue Nat., 80 F.3d 64, 71-72 (2d Cir. 1996) ("New York's standing does not extend to the vindication of the private interests of third parties."); People ex rel. Spitzer v. Grasso, 54 A.D.3d 180, 198-99 (favorably citing and applying Seneci reasoning).

Moreover, even if the Commission had standing to act in *parens patriae* here (and it does not), as the Commission concedes, the harm at issue must affect "a sufficiently substantial

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a power that that the Commission concedes, and has repeatedly emphasized, the legislature has never provided to the PSC. See id.; Campo Corp. v. Feinberg, 279 A.D.302 (3d Dep't 1952).

segment of its population." See People of State of N.Y. by Abrams v. Holiday Inns, Inc., 656 F. Supp. 675, 676-78 (W.D.N.Y. 1984) (holding that state's allegations of violations of ADEA and Title VII of the Civil Rights Act of 1964 did not suffice to "allege an injury to a substantial segment of New York's population."). The only specific purported harm that the Commission cites in its Order, however, concerns less than 200 customer complaints about pricing over the course of the equivalent 48-day period last year (less than one half of one-tenth of a percent of the ESCO consumer market). That is not a "substantial segment" of New York's population. On that basis alone, the Commission's request for an undertaking fails where, by the Commission's own lights, its argument relies on the false premise that the Commission is acting in *parens patriae*.

Third, the Commission relies entirely on rampant speculation based on unidentified evidence and distortions of the record to identify purported consumer harms. The Commission first states in conclusory fashion (at 5) that the purported harm to ESCO customers "is clear" based on "multiple orders." Consistent with the Commission's disregard of evidence and fact-finding throughout these proceedings, however, it fails to identify or cite the purported "orders" to which it refers. The Commission then claims (at 5) that the temporary injunction purportedly will harm ESCO customers because (it says) Petitioners have "concede[d]" that it is "impossible for ESCOs to provide savings" compared to the utility. That claim is false and badly mischaracterizes the record. Petitioners can provide consumers savings and other significant benefits that utilities cannot provide (such as fixed rate contracts), and the Commission has repeatedly conceded as much. See March 3, 2016 Verified Petition, Index No. 868-16 (the "Ver.

Pet.") ¶¶ 28-36; March 3, 2016 Affirmation of Jason Cyrulnik (the "Cyrulnik Aff."), Exs. Q ¶¶ 6-12, R ¶¶ 6-12, S ¶¶ 6-12, T ¶¶ 6-12, U ¶¶ 9-14, V ¶¶ 6-12.[2]

Petitioners do object, however, to the Order's requirement that they guarantee savings in any and all circumstances as compared with the local utility, for the reasons discussed in the Verified Petition – but that plainly does not support the Commission's baseless assertion that the Petitioners "conceded" an inability to provide consumers savings in the absence of the temporary injunction.[3] The Verified Petition itself cites various examples of the savings many customers have experienced, and the Commission's bald claim that every energy consumer in New York is essentially incapable of deciding for themselves what rate structure they prefer for their homes is indefensible. Where the Commission's allegations of harm rely on conclusory assertions, unidentified evidence, and invented concessions, its claims amount to nothing more than speculation, which cannot support the undertaking requested here. Lelekakis v. Kamamis, 303 A.D.2d 380, 381 (2d Dep't 2003) (holding that Supreme Court "improvidently exercised its discretion" by basing undertaking on speculative damages); 7th Sense, Inc. v. Liu, 220 A.D.2d 215, 217 (1st Dep't 1995) (affirming Supreme Court's refusal to include purported damages in undertaking that were based on "conclusory and unsupported testimony"); W & G Wines LLC v.

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[2] See also Letter dated March 3, 2016, from Senator John A. DeFrancisco, Deputy Majority Leader, to Hon. Audrey Zibelman, Chair New York State Public Service Commission, attached hereto as Exhibit A (explaining the benefits of ESCO service that consumers would be deprived of if Ordering Clause No. 1 were enforced).

[3] As another example of the Commission mischaracterizing the record, it claims that "[c]omplaints show that customers are deceived." That is misleading. Even crediting the Commission's portrayal of the complaints' substance (though they are hearsay and the Commission has not produced them), the approximately 1,500 "complaints" the Commission has identified relating to marketing suggest only—at a maximum—that less than one percent of customers have felt deceived. That does not approach all customers or even a significant number of customers as the Commission's language suggests.

Golden Chariot Holdings LLC, 46 Misc.3d 1202(A), *9 (Sup. Ct. 2014) (limiting bond only to "specific, foreseeable damages" and declining to account for "speculative" and "potential damages" in considering undertaking); Village of South Blooming Grove v. Village of Kiryas Joel Bd. Of Trustees, 49 Misc.3d 1212(A), *5 (Sup. Ct. 2015) (requiring only a "nominal undertaking" where "any potential damages that the respondents might sustain as a result of the preliminary injunction [we]re speculative.").

The Commission then further confirms (at 6) that it lacks a factual basis for its claim that the injunction will harm consumers by conjuring up new and meritless purported harms as a basis for its request. Specifically, the Commission claims for the very first time that it is concerned that ESCOs might increase rates in light of Purchase of Receivables ("POR") programs, and that this "is exactly the type of harm the Commission was concerned about in the Order." (March 8, 2016, Affidavit of Luann Scherer (the "Sherer Aff.") ¶ 11.) But the Commission never once cited POR programs in the Order, nor did it ever even mention the issue once during the hearing, much less described those programs' implications as "exactly the type of harm" it was focused on. The Commission is thus trying to invent new purported harms to bolster its flawed position. Further, the Commission's purported concern is misplaced because it mischaracterizes the relationship between ESCO rates and POR Programs. The Commission concedes, moreover, that any POR-related rate increases only "may" materialize, leaving its position as nothing more than newly invented speculation.[4]

[4] Similarly, the Commission goes so far as to claim that the injunction will harm consumers based on Ms. Scherer's personal "belie[f]" that such will be the case, a belief grounded in complaints purportedly received from less than 0.05% of ESCO customers. (See Scherer Aff. ¶ 8.)

Fourth, the Commission's rank speculation is compounded by its reliance on fundamentally flawed data sets. Any analysis of the claimed "damages" resulting from an injunction necessarily turns on comparing the status quo with the circumstances that would exist but for the injunction. See CPLR 6312(b). But both data sets cited by the Commission (at 5-7) fail even to address critical components of those circumstances, each of which materially would affect consumer conditions, including: (i) the ESCOs that can comply with Ordering Clause No. 1's option to provide energy with a 30% renewable makeup at whatever rates the ESCO elects to charge, regardless of the public utility rates; (ii) how many customers would be switched from non-renewable to renewable; (iii) how many customers would switch from variable-rate ESCO contracts to fixed-rate ESCO contracts; (iv) how many ESCOs would exit the New York retail energy market; (v) how many customers would be dropped by ESCOs; and (vi) the value of the contractual benefits that customers would lose due to reduced ESCO service. More fundamentally, the Commission's analysis makes unsupported and unfounded assumptions regarding the weather and energy costs over the course of the next 48 days. The Commission even uses January data (a month of high energy use) to compute purported losses for the months of March and April, which traditionally have much lower energy costs.

The Commission's failure to account for these variables reduces their request for an undertaking to what can at best be characterized as rampant speculation. The Commission fails to account for whether and how the enforcement of the renewables component of Ordering Clause No. 1 would affect consumers. Any ESCO electric consumer could enter into the same pricing plan on which the Commission's damages claims are based even if the Order were not stayed, provided that the energy included a 30% renewable component, thus obviating any need under the Order to guarantee savings to consumers. The Commission cannot have it both ways:

The Commission's own renewable alternative means that the injunction does not cause consumers any pecuniary harm because any rates exceeding utility electric rates would still be permissible under the Order and a result of the renewables component of Ordering Clause No. 1. Likewise, the Commission fails to consider whether and to what extent ESCOs would cease serving customers if Ordering Clause No. 1 were enforced. If (in the hypothetical world where Ordering Clause No. 1 were enforced) ESCOs were to drop 40%, or 60%, or 100% of their variable-rate customers, that obviously would affect the extent to which the Commission could reasonably claim that the injunction harms consumers, and each hypothetical drop rate would itself have a different effect on that alleged harm. But, the Commission has failed to even consider how many customers might be dropped if Ordering Clause No. 1 were enforced.

In addition, both data sets fail to address or account for market-wide distinctions that bear on the purported harms that the Commission asserts, including: (i) the number of fixed-rate versus variable-rate contracts that ESCOs have with their customers; (ii) geographic market differences across the state; (iii) temporal differences in the market (i.e., market conditions in 2012 versus 2016); and (iv) differences across ESCOs (including their varying rate structures, rewards programs, business practices and profiles). These flaws are all the more pronounced where the Commission attempts to extrapolate its context-specific data to determine what all ESCOs rates would be, across all New York markets, for the injunction's duration, as compared to all utilities' rates. Much like the Order, the Commission's back-of-the-napkin arithmetic (at 6-7) contains no supportable analysis. It simply takes high-level data from one quarter of the New York market and – without regard to any of the above market-level distinctions – blindly extrapolates to the whole market, including by failing to account for Niagara Mohawk's generally lower rates compared to other utilities. By disregarding basic considerations like the

whole market's characteristics beyond particular service territories, the Commission has failed to offer this Court anything more than speculation.

It is no surprise that the Commission's demand for an undertaking cherry picks data and fails to account for any of these fundamental considerations. These are the very issues the Commission's Order failed to consider in the first place, as confirmed by its failure to cite any meaningful analyses of the likely outcomes of Ordering Clause No. 1, including its likely effect on consumers across the New York retail energy market.[5] Having failed to assess how Ordering Clause No. 1 would affect the market and consumers absent the injunction, the Commission is engaged in bare speculation, which the courts have repeatedly rejected. Lelekakis, 303 A.D.2d at 381; 7th Sense, 220 A.D.2d at 217; W & G Wines, 46 Misc.3d 1202(A) at *9; Village of South Blooming Grove, 49 Misc.3d 1212(A) at *5.

The Commission's reliance (at 8) on New York Edison, People's Gas, and Rockland Light & Power fails for the foregoing additional reasons as well. In each of those cases, the dispute concerned whether the utility could charge utility customers a specific Rate Y (a higher fixed rate) versus Rate X (a lower fixed rate). See New York Edison Co. v. Maltbie, 150 Misc. 200, 201 (Sup. Ct. 1934) (enjoined order required utilities to reduce rates by 6%); In re People's Gas & Electric Co. of Oswego, 122 Misc. 285, 286 (Sup. Ct. 1923) (enjoined order required rate for certain lighting and power motors to be reduced by $0.02 per kWh); Rockland Light & Power Co. v. Maltbie, 148 Misc. 22, 23 (Sup. Ct. 1933) (enjoined order required utility to use fixed reduced rates). The circumstances absent the injunction were thus clear: approximately

[5] Indeed, the commentary the Commission cites in support of the Order merely advocates that the Rate Ceiling should be imposed on all ESCO services without an actual analysis of the likely economic effects of Ordering Clause No. 1 in the New York retail energy market. (See Cyrulnik Aff. Ex. A at 5-7.)

the same number of customers would use the utility for their electricity needs (ESCOs did not exist in the 1930s), and they would be charged Rate X. Here, by contrast, the Commission makes countless assumptions about what the circumstances would be if the Order had gone into effect, as detailed above, and it does not even attempt to meaningfully analyze that scenario.

Fifth, the Commission's position "that immediate and irreparable harm will accrue to ESCO customers as a result" of the 48-day temporary injunction and in the sum of $98 million (or approximately $2 million per day) (Scherer Aff. ¶ 6) is undermined by its admission at the hearing that it has been considering issuing the Order for upwards of two years. That means, by the Commission's math, and assuming that the Commission's claim of harm were supported (it is not), the Commission's inaction has harmed New York consumers to the tune of $1.46 billion over the previous two years. The fact is that there is no harm to customers from an injunction – that is, there is no financial harm from allowing New York consumers to choose the energy provider of their choice. ESCOs that are violating marketing rules or engaging in deceptive practices are already subject to penalty, and those penalties can and should be used to redress any harm caused by such misconduct. No undertaking is needed (or appropriate) for the Commission properly to address any such misconduct. Finally, the Commission's submission also flies in the face of its representation to this Court just last week (in opposing the Petitioner's application for a stay) that the February 23 Order would not have any immediate impact on the market anyway in light of the notice requirements that preclude ESCOs from terminating contracts in any event.

CONCLUSION

For the reasons set forth above and those detailed on the record during the March 4, 2016, heading, Petitioners respectfully request that the Court deny the Commission's request for an undertaking.

Dated: March 9, 2016
Armonk, New York

By: /s/ Jason Cyrulnik

Jason C. Cyrulnik
Motty Shulman
William D. Marsillo
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Tel.: (914) 749-8200
Fax: (914) 749-8300
Counsel for Petitioners/Plaintiffs

EXHIBIT A

THE SENATE
STATE OF NEW YORK

ALBANY OFFICE
416 CAPITOL
ALBANY, NEW YORK 12247
PHONE 518-455-3511
E-MAIL
jdefranc@nysenate.gov

DISTRICT OFFICE
STATE OFFICE BUILDING - ROOM 800
333 EAST WASHINGTON STREET
SYRACUSE, NEW YORK 13202
PHONE 315-428-7632
WEBSITE
defrancisco.nysenate.gov

SENATOR JOHN A. DeFRANCISCO
DEPUTY MAJORITY LEADER

March 3, 2016

Hon. Audrey Zibelman
Chair New York State Public Service Commission
Empire State Plaza
Agency Building 3
Albany, N.Y. 12223-1350

Dear Chairwoman Zibelman:

On February 23,2016, the NYS Public Service Commission issued an order entitled Resetting Retail Energy Markets and Establishing Further Process. The order dictates, among other things, that as of March 4, Energy Service Companies(ESCOs) are prohibited from enrolling new mass market(residential and small commercial) customers or renewing customers currently on a fixed or month-to-month variable product, unless the ESCOs guarantee customer savings, or provide a product that provides at least 30% renewable energy.

Hundreds of thousands of customers in the state are likely to be abruptly impacted by this decision, because the order impacts all contract renewals, as well as new enrollments. Many customers receiving commodity service from ESCOs on a month to month basis will receive discontinuance notices, or notice of new offerings in which they might not have an interest. Many customers enjoying the security of fixed price contracts will no longer be offered this option, since ESCOs will be required to guarantee savings off a utility rate that is not published and is unknown to both customers and their suppliers. This is of particular concern to heating customers, who are used to such arrangements, whether they heat with oil or natural gas.

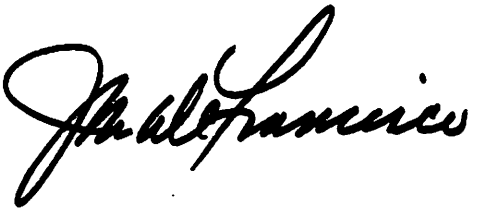
Given the anti-competitive dictates of the order, and the unreasonable period in which ESCOs must certify compliance, there is simply not enough time for ESCOs to design compliant service offerings, and to disentangle previous arrangements that might have included value-added services such as equipment maintenance, energy efficiency, energy management, or even non-energy promotional type offerings.

Many ESCOs have requested an extension to respond to the requirements of the order, while the details and nuances can be understood and worked out by the Department Staff, ESCOs, customers and other interested parties. Absent an extension at the end of this week, hundreds of thousands of consumers will lose their current service package, and without reasonable notice, start to be switched from the energy supplier of their choice to the local utility. This switch will take place during the winter period and will likely result in many customers losing money and paying higher than necessary energy costs.

In addition without an extension, many ESCOs who have responsibly provided service to customers since the beginning of retail choice will be forced out of business in New York. This will in turn impact thousands of New York residents that ESCOs directly or indirectly employ. Finally, the substantial destruction of the retail market would likely result in hundreds of millions of dollars of lost revenue to the State of New York, through the loss of personal income tax and other collections.

So by this letter I am asking that the start date of your order be postponed 60 days from March 4th to at least May 3rd 2016.

Very truly yours,



John A. DeFrancisco
State Senator

JAD/jm
Enclosure
Cc: Hon. Kathleen H. Burgess
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman