SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NATIONAL ENERGY MARKETERS ASSOCIATION; BLUEROCK ENERGY, INC.; RESIDENTS ENERGY, LLC; and VERDE ENERGY USA NEW YORK, LLC, Petitioners/Plaintiffs, - against - NEW YORK STATE PUBLIC SERVICE COMMISSION, Respondent/Defendant.	Index No. 05680-16 IAS Part I Justice

PETITIONERS/PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR APPLICATION BY ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND EXPEDITED DISCOVERY

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PRELIMINARY STATEMENT

The Commission's opposition brief and the Commission's actions since issuing the July Order confirm the following critical problems with the Moratorium Orders.

First, after Petitioners informed the Commission that its July Order violated SAPA and after this Court overturned a related Commission order for violating SAPA, the Commission itself suspended the July Order to avoid another judicial reversal. But instead of complying with SAPA, the Commission then doubled down on its SAPA violation by improperly re-adopting the Moratorium on a purportedly "emergency" basis. The Commission's brief confirms the obvious: There was no genuine emergency to justify suspension of the SAPA requirements, and the September "Emergency" Order was simply another Commission tactic designed to avoid SAPA compliance. Such gamesmanship should not be condoned.

Second, on September 30, 2016 – **after** the Commission issued the Moratorium – the Commission attempted to "paper the record" by using its *ex parte* administrative powers to obtain information from the local utilities on whether there is any actual evidence of higher ESCO gas and electric costs. Thus, by the Commission's own admission, the Moratorium Orders (including a purported claim of emergency) were not based on any legitimate evidence. Nor is the after-acquired evidence part of the administrative record supporting the Orders.

Third, when the Commission finally obtained the after-the-fact data in October 2016, it quickly became clear that the Commission did not fully understand the data provided by the local utilities and that the data was incomplete and misleading. At that point, Petitioners sought limited discovery to be able to understand and meaningfully respond to the after-the-fact data. The Commission objected to that discovery. The Commission's refusal to allow any legitimate review of its *ex parte* discovery is consistent with the fact that the information on which the Commission now relies is deeply flawed, incomplete, and effectively meaningless, as discussed below (Parts II-

IV). To the extent any conclusion can be drawn from the post-facto information, it is that thousands of New York residents (including low-income customers) save tens of millions of dollars a year by purchasing their energy from ESCOs.

Finally, the Commission's papers expose an incredible fact that is fatal to its case: Despite identifying as the "chief concern" underlying the Moratorium Order that "the subsidies provided to [low-income] customers through ratepayer and taxpayer funded assistance programs are essentially passed through to the ESCO" (Opp'n at 36), the Commission in fact has **no** evidence that those ratepayer or taxpayer dollars are in fact given to ESCOs. The Commission references certain assistance programs used to reduce the energy **delivery** charges – the amount low-income customers pay the local utility to deliver energy – but ESCOs do not offer delivery services and do **not** receive any of those funds. The funds at issue are paid directly to the utilities and applied to **their** services – a fatal fact that would not change at all if the Moratorium was implemented. Remarkably, the Commission does not even address this glaring void in its Orders or opposition brief and does not present any evidence (from the administrative record or in its after-acquired *ex parte* data) that the Moratorium will save a single taxpayer dollar, let alone the tens of millions on which the Orders purport to be predicated.

ARGUMENT

I. THE COMMISSION'S SAPA GAMESMANSHIP SHOULD NOT BE CONDONED

A brief timeline of the Moratorium Orders makes clear that the Orders violate SAPA and there is no emergency to justify suspension of the statutory SAPA requirements.

1. The Commission's brief acknowledges that, in February 2014, the Commission expressed "concerns about diminution of the effectiveness of the low-income assistance program" and proposed requiring ESCOs to provide those customers with guaranteed savings plans or value-added products like fixed-rate or "green" product offerings. Over the next two years, the Commission considered practical impediments to implementing the foregoing proposal, recognizing that privacy laws

prohibiting the disclosure of low-income customers' identities to ESCOs presented a problem for any solution that sought to single out low-income customers.

2. In December 2015, the Commission noticed a proposed rule whereby ESCOs' low-income customers must be provided guaranteed savings or be offered value-added products like fixed-rate or "green" plans.

3. In July 2016, without notice and to the surprise of ESCOs and New York residents alike, the Commission issued the Moratorium as part of the July Order without prior notice that it was ever considering such a drastic, sweeping measure.

4. Later that month, on July 22, 2016, this Court (Zwack, J.) invalidated a related February 2016 Commission Order seeking to restrict ESCO rights, finding among other violations that the Commissioned violated SAPA in adopting that order without proper notice and comment periods as required.

5. On September 19, 2016, the Commission recognized Petitioners' SAPA concerns and suspended the July Order. The Commission also immediately and improperly re-adopted the Moratorium on a purportedly "emergency" basis.

6. On September 27, 2016, this action was commenced, and after two days of argument, on September 28, 2016, this Court (O'Conner, J.) enjoined the Moratorium.

7. Two days later, on September 30, 2016, the Commission first sought evidence from local utility providers to understand the difference between rates charged by ESCOs and local utilities.

This timeline makes clear that the Commission itself recognized its July Order violated SAPA and attempted (improperly) to re-adopt the Moratorium on a purportedly "emergency" basis on the mistaken belief that that tactic would enable the Commission to sidestep SAPA. In addition, given that the Commission's purported concerns were over two years old and without evidentiary basis, there could not have been any genuine emergency to justify suspension of the Commission's SAPA requirement in September 2016.

The Commission's effort to circumvent SAPA is unconstitutional and sets a dangerous precedent for administrative agencies statewide. The Commission concedes that the real "emergency" was the Commission's fear that its July Order would again be invalidated by this Court (like its related February 2016 order) and that it sought to avoid the same result here by invoking the emergency exception. That is not an emergency, and the Court should reject the Commission's casual invocation of this limited exception to SAPA. The Commission's approach would eviscerate the fundamental statutory regime for agency rulemaking in New York, and flies in the face of decades of precedent applying those rules, including this Court's (Zwack, J.) invalidation of the related February 2016 Commission order earlier this year.

Faced with those damning facts, the Commission has fabricated an emergency by claiming that compliance with SAPA "would be contrary to the public interest because it would be detrimental to the *general welfare* of APPs, and would cause further erosion and waste of public funds intended for their assistance." (Ex. A to Pitucci Aff. (emphasis added).) This is not an emergency, and New York courts repeatedly have invalidated "emergency" rulemaking where the agency fails to articulate a genuine emergency.[1] <u>See, e.g.</u>, <u>Home Care Assoc. of New York State Inc. v. Dowling</u>, 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)); <u>Law Enforcement Officers Union Dist. Council 82, AFSCME, AFL-CIO by Engelhardt v. State</u>, 168 Misc.2d 781, 783 (Sup. Ct. Alb. Cnty. 1995) (emergency rulemaking must be limited to "genuine emergencies"); <u>Brodsky v. Zagata</u>, 165 Misc.2d 510, 514 (Sup. Ct. Alb. Cnty. 1995)

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[1] The Commission's after-the-fact appeal to the upcoming winter season as a basis for its claimed emergency is just as contrived and unavailing. Every year has a winter season (including the two years during which the Commission did nothing about a problem it now claims it must deal with on an emergent basis), and the upcoming winter is expected to be more mild than prior winters. Furthermore, the Moratorium does not even purport to change the amount of taxpayer or ratepayer subsidies during the upcoming winter for the reasons detailed in Part IV, below, and the Commission does not even attempt to dispute that fact.

(invalidating agency's emergency rulemaking where it paid "lip-service" to SAPA requirements but failed to articulate a real emergency).

Curiously, the only case cited by the Commission for the proposition that an ongoing issue can constitute an emergency confirms the obvious failures of the Moratorium Orders. In Empire State Assoc. of Adult Homes, Inc. v. Novello, 193 Misc. 2d 543 (Sup. Ct. Alb. Cnty. 2002), the court upheld an emergency regulation promulgated by the Department of Health ("DOH") to protect "the frail, disabled, and functionally impaired residents" of adult homes from "dangerous and unhealthy" conditions and matters of life and death ("a resident's death, attempted suicide, or involvement with alleged felonies"). The opposite is true here. There is no mortal danger, or even any danger to the health or welfare of low-income customers for that matter. The only alleged "harm" articulated by the Commission is financial, and that harm is not only speculative at best but – even as framed by the Commission – it would have existed for years with the Commission doing nothing to address that purported "emergency."

This Court can and should grant Petitioners' application on this threshold basis alone.

II. THE MORATORIUM ORDERS WERE NOT BASED ON ANY REAL EVIDENCE OF ESCO PRICING

On September 30, 2016 – more than two weeks after the September "Emergency" Order – the Commission issued an administrative, *ex-parte* "Interrogatory/Document Request" to the local utilities seeking bill comparisons "for the various ESCO commodity offerings provided within your service areas compared to the comparable default utility services" (the "*Ex-Parte* Interrogatory"). (See, e.g., NFG2 Response, at 1, attached hereto as Exhibit 1 to the November 29, 2016, Affirmation of Jason Cyrulnik ("11/29/2016 Cyrulnik Aff.").) Despite the *Ex-Parte* Interrogatory's recognition that this information was available for more than two years, it fails to explain why the Commission never sought this information or presented it to interested parties during the administrative proceeding, and before issuing the Moratorium Orders. (Id.)

The Commission maintains a Power to Choose website (www.newyorkpowertochoose.com) with a stated purpose to allow New York residents to "compare offers" from ESCOs with the prices being charged by the local utilities. The Commission's Power to Choose website provides this information – as one would expect – by comparing the ESCO and local utility's per kilowatt (electric) or ccf (gas) charge. The website also notes: (i) whether the offering is for a fixed or variable rate; (ii) if fixed, for what time period; and (iii) whether the offering is for renewable energy (green), which is sold at a premium.

The *Ex-Parte* Interrogatory did not seek information in the same manner as the Commission's Power to Choose website. Instead, the *Ex-Parte* Interrogatory sought aggregate bill information (which includes but does not separate out the local utility delivery charge) and did not request the comparison information in the accepted manner. In addition, the *Ex-Parte* Interrogatory did not request any break-down of the ESCO pricing figures to account for its inclusion of premium products, like renewable energy (green) products or fixed-price products in the ESCO pricing figures. The failure to account for different products renders the Commission's comparison data utterly useless (as detailed in Part III, below).

Furthermore, because the *Ex-Parte* Interrogatory was issued only after the September "Emergency" Order, that data by definition cannot be part of the administrative record or this proceeding. The law directs a court to review only the administrative action and the record on which that action was based. Basile v. Albany College of Pharmacy of Union University, 279 A.D.2d 770, 772 (3d Dep't 2001) (holding that the trial court properly refused to consider the contents of an affidavit from the administrative agency that was not part of the administrative record). Here, the Commission sought to paper a record months after issuing the Moratorium, using *ex parte* administrative powers that deprived Petitioners and hundreds of other interested parties from even understanding, testing, and objecting to the unreliable data and conclusions that the Commission seeks to draw therefrom. On top of that, the data it received was a black box and does not facilitate any meaningful comparison of rates. On these facts, the glaring disconnect between the Commission's premises and the record it developed is fatal to the Moratorium Orders.

III. THE COMMISSION'S AFTER-THE-FACT DATA IS UNRELIABLE AND DOES NOT SUPPORT THE COMMISSION'S CONCLUSIONS REGARDING CLAIMED ESCO "OVERCHARGES"

In its brief and supporting documents, the Commission makes sweeping statements regarding how ESCOs charge their customers more than the local utilities for the same products. This claim is purportedly based on the after-the-fact data obtained exclusively from the local utilities (the ESCOs' competitors and beneficiaries of the Moratorium Orders) in response to the Commission's *Ex-Parte* Interrogatory. A cursory review of this data makes clear that it is entirely unreliable. Discussions held with Commission staff in early November confirmed that the Commission staff does not fully understand the data and that it needed to revise some of the data it presented to correct facial errors. Moreover, when Petitioners asked for limited discovery to try and understand the data, the Commission refused and objected to Petitioners' pending motion to compel.[2]

More fundamentally, the data and resulting Commission analysis and conclusions are highly flawed and unreliable. The utilities themselves have cautioned that efforts to compare

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[2] Petitioners have moved by order to show cause for targeted discovery, including a deposition, to more fully examine the after-the-fact and self-serving data that the PSC cited in its opposition papers. (<u>See</u> Petitioners'/Plaintiffs' Motion to Compel Discovery (filed Nov. 4, 2016).) That motion is pending and returnable simultaneous with this Motion.

ESCO prices with utility pricing based on utility data alone are fraught with problems that can result in entirely inaccurate and unfair comparisons. (See, e.g., National Grid disclaimer, Ex. 2, to 11/29/2016 Cyrulnik Aff.)

First, the data is apples and oranges insofar as it compares different products without accounting for those differences. For example, the data fails to account for the fact that ESCOs offer renewable energy products that, by definition, are supposed to be more expensive than both ESCOs' and local utilities' non-renewable energy. Indeed, many ESCOs charge a self-described "per kwh adder" plus a monthly fee for premium green energy. Comparing those prices with the prices customers pay for non-renewable energy from utilities is no more helpful than concluding that organic apples cost more than non-organic apples. Similarly, the data fails to account for the fact that ESCOs offer fixed-rate products that local utilities do not offer, by which customers elect to lock in prices that by definition can be lower or higher than those of the variable rates charged by utilities in subsequent months. Comparing those prices with the prices customers pay for fluctuating variable-rate products from utilities is like concluding that Bank of America overcharged customers with a 30-year fixed rate 4% mortgage if variable rates subsequently dip below 4%.

Second, the data does not even include the final pricing local utilities charge customers for a given period, but instead uses only placeholder estimated charges that the utilities can and do change after the fact during subsequent billing periods to "true-up" the placeholder charges to accurate prices. Again, the data cited by the Commission expressly disclaims its accuracy because of "out-of-period adjustments" that are not included in the figures presented, but the Commission uses the data anyway.[3]

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[3] See, e.g., 11/29/16 Cyrulnik Dec., Ex. 2 at 2 ("A comparison of a bill that includes ESCO charges with a utility bill in any single period may be affected by the ESCO's monthly adjustments

Third, the data does not even purport to capture actual net ESCO charges to customers and it fails to account for, among other significant amounts, all rebates and promotional amounts that ESCOs provide their customers directly. For example, some ESCOs provide customers a "Free Month," which gives customers free energy for an entire month of their choosing when they stay with an ESCO for a certain period of time. This is a valuable financial savings that the *Ex-Parte* Interrogatory and resulting data totally ignores, resulting in significantly inflated figures for the ESCO prices cited by the Commission.[4]

The failure of the Commission to properly analyze this data is particularly troubling because the bill calculators that many of the local utilities use expressly acknowledge these obvious shortcomings:

> If the supply service purchased from an ESCO includes a value-added feature such as a price that is fixed for a period of time, green energy, an energy equipment repair package or airline miles, the costs of this value-added feature may be reflected in the charges from your ESCO. The supply service provided by National Grid, however, does not include such value added services. Nor does the price comparison reflect any affinity rewards or rebates that might be provided by an ESCO, separately from a customer's utility bill. Keep this in mind when interpreting the results of this bill comparison.

(Ex. 2 to 11/29/2016 Cyrulnik Aff.)

Fourth, although the Commission and the local utilities have traditionally provided price-to-compare information on a per kilowatt (electric) or ccf (gas) basis, for these purposes the Commission chose to request and rely upon data in a different and entirely unreliable format that

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for prior periods, one-time charges or very short term changes in energy and natural gas prices. For example, National Grid implemented a one-time bill adjustment which reduced the amount billed in the month of February 2014 and increased the amount to be billed in subsequent months.").

[4] ESCOs provide a host of other valuable benefits to customers, including smart thermostats and consulting services, all of which are excluded from the figures provided by the utilities. (Ex. 2 to Cyrulnik Aff., at 1).

precludes any effort to audit, test, or otherwise identify errors in the numbers on which the Commission rests its conclusions. The data – which the Commission admits was obtained exclusively from the local utilities (who are the ESCOs' competitors and the primary beneficiaries of the Orders) – contains only "summary" figures that are essentially a black box that raise more questions than it answers. In this regard, the Commission concedes that it did not undertake any audit of the numbers provided by the utilities; that the ESCO pricing data is untested; and the comparison figures are skewed and unreliable.

Fifth, the Commission self-selected a limited, unrepresentative period (2014, 2015, and the early part of 2016) for which it requested pricing data from the utilities, comprising less than 15% of the available historical pricing data. A review of ESCO pricing for its two decades of existence would provide a far more complete basis for analyzing the core issues that the Commission purports to want to address. The Commission forewent any such meaningful analysis in its transparent effort to paper the outcome it wanted, rather than engage in a genuine analysis of the issues that affect New York residents.

In sum, the Commission asks this Court to review the propriety and constitutionality of the Moratorium Orders against the backdrop of inadmissible data that is wholly unreliable and (i) was available but not relied upon by the Commission in connection with the July or September Orders; (ii) was sought and obtained by the Commission only after both Orders were entered and the TRO was issued; (iii) was sought on an *ex-parte* basis; (iv) is not fully understood by Commission staff; (v) for which the Commission refuses to agree to even limited, targeted discovery; and (vi) which on its face does not even purport to capture apples-to-apples comparisons of any pricing – resulting in summary comparison figures whose accuracy is disclaimed even by the utilities who provided it. These issues are vital to any meaningful comparison and are subjects the Commission should at the very least understand; instead the Commission has set out to shield the data from any meaningful review or analysis – by itself or by the affected parties.

IV. THE COMMISSION'S AFTER-THE-FACT DATA CONFIRMS THAT TAXPAYER FUNDS ARE NOT PAID TO THE ESCOS AS THE COMMISSION CLAIMS

The Commission's Moratorium is predicated on a demonstrably false premise. Specifically, (i) the July Order claims (at 2) that "taxpayer funds that provide financial assistance to utility customers" are being passed through to fund ESCO overcharges, and (ii) the Commission's brief references concerns for saving taxpayer funds more than 25 times. The Commission's brief also confirms (at 36) that the "chief concern" underlying the Moratorium Orders is the Commission's belief that "subsidies provided to [low-income] customers through ratepayer and taxpayer funded assistance programs are essentially passed through to the ESCO." In reality, however, no taxpayer funds are passed through to the ESCOs at all. The assistance funds received by low-income customers are paid directly to the utilities and then credited against that customer's local utility delivery charges. But, ESCOs (who sell only supply) do not receive any of these delivery fees. (See Ex. 3 to 11/29/2016 Cyrulnik Aff., at 43 (Proceeding on Motion of the Commission to Examine Programs to Address Energy Affordability for Low Income Utility Customers).)

In addition, the funds at issue are not taxpayer funds, but "ratepayer" funds – that is, a small percentage of the enormous profits the utilities earn from the energy delivery fees they charge New York residents is allocated to lowering (while still maintaining the profitability of) the low-income customers' delivery charges for the utilities' delivery of energy.[5] In short, the low-income assistance funds at the heart of the Moratorium Orders have **nothing** to do with ESCOs. They are taken from **utility profits** and credited to reduce the additional profits utilities take from charging low-income customers for the utilities' energy **delivery** services. **ESCOs do not see any of that money**. Put differently, the Commission has failed to present any evidence that the Moratorium will result in the reduction of taxpayer (or ratepayer) payments by even a single dollar.

This fact is fatal to the Commission's claimed impetus for the Moratorium Orders (and the claimed emergent need to implement them now). This Court recently invalidated a related Commission order, where the ordering clauses did not address the problem that purportedly prompted the Commission to act in the first place. (See Ex. K to 9/27/2016 Cyrulnik Aff., National Energy Marketers Ass'n v. New York State Public Serv. Comm., ---N.Y.S.3d----, 2016 WL 4004502 (Alb. Cnty. Sup. Ct. 2016). That problem is even more pronounced here, where the Orders purport to be based on protecting taxpayer funds, but in fact do not impact taxpayers one bit.

V. THE MORATORIUM ORDERS ARE ARBITRARY AND CAPRICIOUS, LIKE THE COMMISSION'S PRIOR ESCO ORDER THAT THIS COURT INVALIDATED EARLIER THIS YEAR

This Court recently overturned the Commission's February order restricting ESCO operations, finding that the administrative record did not demonstrate that the Order was tailored to the stated purpose and that it was thus arbitrary and capricious. Id. The Moratorium Orders at issue here are similarly arbitrary and capricious because the record does not include any factual

[5] To the extent the Commission references the New York State Home Energy Assistance Program ("HEAP") program, those funds are fixed one-time payments that are paid directly to utilities as well. HEAP provides low income customers a maximum of between $21 and $350 per year (http://otda.ny.gov/programs/heap/#regular-benefit), which is far less than the average annual delivery cost for New York energy consumers. (See e.g., https://www9.nationalgridus.com/niagaramohawk/non_html/NGRID_10_Yr_Typical_Bill.pdf https://www.coned.com/documents/average_monthly_electric_bills.pdf.)

basis justifying them or showing that they address their purported purposes. See N.Y. State Ass'n of Cntys. v. Axelrod, 78 N.Y.2d 158, 166 (N.Y. 1991); Kelly v. Kaladjan, 155 Misc. 2d 652, 655 (N.Y. Cnty. Sup. Ct. 1992). The Commission claims (at 34-35, 38) that the Orders further two purposes: (i) its "chief concern" that it must prevent taxpayer funds from being "passed through to ESCOs" to cover "overcharges"; and (ii) lowering low-income customers' energy costs. The Orders do not further either purpose (or low-income customers' interests, generally), and the Commission's arguments to the contrary (at 32-51) are devoid of record support.

First, as discussed above (Part IV), the Commission's "chief concern" cannot be squared with the undisputed fact that the assistance funds are "passed through" to the utilities, not the ESCOs. The concern is a fiction, and neither the Moratorium Orders themselves, nor the administrative record on which they are based, nor the belated record that the Commission has sought to introduce in this proceeding rebut that fatal fact.

Similarly, as discussed above (Part III), the Commission failed to demonstrate a reasonable basis for concluding that ESCOs "overcharge" customers at all – a core premise of the Orders. For example, the Commission's assertion that "competition has not generally resulted in price savings or any other corresponding value to residential ESCO customers" (Opp'n at 37, citing R. 310-313) is based only on its *ipse dixit* and not on any factual analysis. Indeed, the portion of the record on which the Commission relies includes only its bald assertion in February 2014 that there should be more price transparency in the market and increased ESCO product offerings, without citation to supporting evidence. Similarly, the Commission claims that "[r]esidential customers, including low-income customers, on average pay more when taking service from an ESCO." (Opp'n at 39 (citing R. 207-208).) Again, the Commission's conclusion is unfounded—the cited portion of the record does not even analyze the issue of whether ESCOs have, in fact, charged more than utilities, much less cite supporting evidence.[6] (Id.)

If there were any doubt about the inadequacy of the record, the Commission resolved that question by taking the unprecedented step of conducting its own previously undisclosed, unilateral, one-sided *post hoc* discovery—after it issued the Moratorium Orders and after the Court entered a TRO enjoining the Orders' enforcement.[7] It used its administrative powers over utilities to gather information it now claims supports its conclusion that low-income ESCO customers "pay on average more per month for both electricity and gas than they would as utility customers." (Opp'n at 38, 41 (citing Alch Aff. ¶¶ 12-21, Attachments C and D).) As a threshold matter, that after-the-fact data should be disregarded entirely because it is not in the administrative record (a fact the Commission touts in opposing Petitioners' motion to compel). (See Part II, above.) And, in any

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[6] The Commission's assertion (at 38) that Petitioners have somehow waived their right to argue that they do not "overcharge" customers is absurd. While the Commission's proposals in the record with respect to low-income customers do not include any proposed moratorium, as discussed above in Part I, the ESCOs contested the proposals that the Commission did make. Further, the ESCOs have consistently and repeatedly disputed the claim that they overcharge, including in this very proceeding. (Opening Br. at 24-25.) The Commission cites nothing to support its claim that ESCOs who have repeatedly disputed the Commission's baseless sweeping statements about ESCO pricing somehow conceded that fact during these proceedings. To the extent the Commission claims that Petitioners failed to exhaust administrative remedies, the Commission badly misstates the facts. Petitioners here diligently challenged the Commission's Orders, subject to the obvious qualification that the operative order was adopted on an emergency basis without notice or comment period. Furthermore, the Appellate Division has made clear that the exhaustion rule does not even apply where a party challenges an administrative action as "beyond its grant of power." Bankers Trust Corp. v. N.Y. City, 301 A.D.2d 321, 327 (1st Dep't 2002).

[7] Though the Commission claims to have obtained the discovery through its administrative powers, unilateral discovery taken in a special proceeding without leave of the court is improper and sanctionable. See In re Winiarsky, 104 A.D.3d 1 (1st Dep't 2012).

event, that data does not remotely support the Commission's conclusion for the reasons detailed in Parts III and IV, above.

Second, the record does not show that the Moratorium Orders will result in lower energy costs at all. In their opening brief, Petitioners pointed out (at 23) that the "[t]he effect of the Orders, therefore, is to eliminate competition" resulting in low-income customers being "subject to the monopoly pricing of local utilities," which could result in higher prices to low-income customers. Rather than addressing that fact head-on, the Commission's sole response (at 25-36) is that it has "discretion in balancing the factors involved in developing a competitive market." Whatever discretion the Commission might have, however, it indisputably cannot exercise that discretion arbitrarily or irrationally. The record contains no analysis of how monopoly pricing would affect customers. The Commission cannot reasonably claim that the Moratorium should be upheld as a product of proper discretionary balancing where it had no basis by which to weigh its anticompetitive effects.[8] Not only did the Commission fail to analyze those obvious anticompetitive effects, but the notion that depriving low-income customers of the right to choose their energy provider or product will ensure that they pay fair market rates is irrational.

In addition, the Moratorium Orders are unreasonable more generally because they deprive low-income customers of the many benefits ESCO products provide and that utilities cannot offer. For example, ESCO fixed-rate products can provide customers significant savings, cost certainty, and insulation from market fluctuations (in the instance of, for example, dramatic weather events like the recent "polar vortex") – benefits that are particularly important to many low-

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[8] The Commission also argues (at 33, 35-36) that the purported "balancing" it performed falls within its jurisdictional ratemaking authority. That contention is wrong, for the reasons discussed in Part IX, below.

income families on fixed budgets. The Commission itself for years acknowledged the benefit of ESCO fixed-rate products, which utilities cannot and do not offer.[9] http://www3.dps.ny.gov/W/PSCWeb.nsf/All/52770E53410005A185257687006F39D2?OpenDocument. In addition, ESCOs offer programs designed to lower customers' bills by reducing their energy consumption, including by providing them with "smart" thermostats and consulting services. (See Petitioners' Opening Br. at 25.) ESCOs also offer loyalty programs and rebate programs that can result in significant discounts for their customers. (Id.) The Commission admits that it has not undertaken any assessment of the financial impact or magnitude of those programs, but nevertheless dismissed them as "non-essential." Without this basic analysis, the Commission has failed entirely to show that it has a reasonable basis for concluding that the Moratorium will further low-income customers' interests, generally, or lower their rates, specifically.

Last, the Commission's repeated claim (at 34-35, 37) that it has "technical expertise" misses the mark. Whatever technical expertise the Commission may have, the Commission does not dispute that it failed to perform any technical analysis of many critical issues including: (i) the Orders' anticompetitive effects; (ii) an apples-to-apples comparison of ESCOs and utility rates ; (iii) the fair value of the unique product features ESCOs offer; and (iv) whether ESCOs' pricing appropriately reflects their products' unique features. These facts contrast starkly with

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[9] In now downplaying the benefits of those unique ESCO offerings, the Commission refers (at 39) to utilities' so-called "budget billing programs," described as "levelized payment plan[s]" under the relevant regulation (16 NYCRR § 11.11). Those are not fixed-rate products at all. Those billing programs temporarily help customers avoid the immediate impact of monthly rate fluctuations but ensure that participating customers ultimately bear the full downside of increased utility rates by paying true-ups to the utility. By contrast, the ESCOs' fixed-rate products permanently and genuinely protect customers from increased rates over time by allowing customers to lock-in long-term rates that are lower than the utilities' rates over the same time period without any eventual true-up.[9] (See Ver. Pet. ¶¶ 32-33.)

the facts in the cases the PSC cites. In Retail Merchants, for example, the Commission was considering the adjustment of a utility rate structure. See New York State Council of Retail Merchants, Inc. v. Public Svc. Comm'n, 45 N.Y.2d 661, 665-66 (N.Y. 1978). The Commission reached its conclusion there based on competing expert testimony on the key facts at issue that was subject to cross-examination. Id. at 666. Here, by contrast, the Commission relies on little more than its own conclusory statements to defend the Moratorium Orders.

VI. THE COMMISSION VIOLATED SAPA IN ORDERING A MORATORIUM WITHOUT NOTICE

As detailed in Petitioner's opening brief (at 7), the Commission all but admitted that it did not properly notice the July Moratorium Order by suspending that order on reconsideration and issuing it as an emergency order in September. In its opposition papers, the Commission nevertheless seeks to retreat from that admission and defend the Orders as "logical outgrowths" of the December 2015 notice concerning value-added products and guaranteed savings offerings.

The Commission's reliance on the "logical outgrowth" standard is badly misplaced for two reasons. First, the "logical outgrowth" rule was developed by federal courts and has been applied only sparingly by New York courts. See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Jorling, 152 Misc.2d 405, 409 (Alb. Cnty. Sup. Ct. 1991) (noting that the "logical outgrowth" rule is a federal standard). New York requires new SAPA notices where the proposed rulemaking contains changes that are "material and substantial." Starburst Realty Corp. v. City of N.Y., 132 Misc. 2d 878, 880 (N.Y. Cnty. Sup.Ct. 1986).

Second, the Commission does not come close to satisfying the federal rule either. Even under the federal rule, a "logical outgrowth" exists *only if* interested parties "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." Northeast Maryland Waste Disposal

Authority, 358 F.3d 936, 952 (D.C. Cir. 2004) (emphasis added), quoting City of Waukesha v. EPA, 320 F.3d 228, 245 (D.C. 2003). And the "logical outgrowth" standard does not extend to a rule that is not rooted in the specific proposal the agency had noticed because "[s]omething is not a logical outgrowth of nothing." Kooritzky v. Reich, 417 F.3d 1509, 1513 (D.C. Cir. 1994). The standard is also inapplicable where an entity would need to "divine [the agency's] unspoken thoughts." Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir. 1991). That is precisely the case here, where the Commission never once (during a two-year period of collaboratives and discussions) proposed a moratorium on ESCOs providing energy to low-income customers and where the proposed rulemaking outlined in the December 16, 2015, State Register Notice said nothing of the sort. That notice stated that the Commission was considering:

> proposed consumer protections for the low income customers of energy services companies (ESCOs) . . . [by] implement[ing] the Commission's directive that when an ESCO serves a utility low income assistance program participant (APP), it must either guarantee that the APP will pay no more than the APP would have paid as a customer of the utility, or serve the APP with energy-related value-added products without diluting the effectiveness of the financial assistance programs.

(Ex. F to 9/27/2016 Cyrulnik Aff., at 20.)

The Moratorium Orders, by contrast, completely ban ESCOs from providing energy to low-income customers. They substantially depart from the December 2015 Notice, altering not only the effect of the rule, but also its meaning and purpose. SAPA § 202(4-a) plainly requires a new notice of revision before considering adoption of such a substantially revised rule. See Medicon Diagnostic Laboratories, Inc. v. Perales, 145 A.D.2d 167, 170-171 (3d Dep't 1989) ("[R]evised regulatory impact and flexibility statements are required [by SAPA] when the rule as adopted includes a substantial change from the rule as proposed and the change requires modification of the statements" previously published by the agency), aff'd, 74 N.Y.2d 539

(1989); Siegal v. New York State Division of Housing and Community Renewal, 143 A.D.2d 430, 433 (2d Dep't 1988) (invalidating proposed amendments to Rent Stabilization Code where they were substantially revised from proposed rule); Summerson v. Barber, 93 A.D.2d 652, 655 (3d Dep't 1983) (striking down marketing order which as promulgated "differed substantially from the order proposed in the hearing notice").

The cases cited by the Commission merely confirm that the only revisions to rulemaking allowed without notice and comment are those that do not substantially alter the original proposed rule. In Industrial Liaison Committee of Niagara Falls Area Cham. of Comm. v. Williams, 131 A.D.2d 205, 210-11 (3d Dep't 1987), for instance, the Department of Environmental Conservation ("DEC") codified water chemical limits and issued a SAPA compliant notice of proposed rule-making stating that forthcoming scientific fact sheets would be disseminated to support the chemical discharge limits that would be adopted. Id. The court permitted the DEC to adopt limits that were consistent with those noticed sheets, where the specific amounts were "logical outgrowths" of the original proposal that clearly stated that the limits would be based on the fact sheets. Id.

In Motor Veh. Mfrs. Assn. of U.S. v. Jorling, 152 Misc. 2d 405, 409 (Sup. Ct. Albany Cnty. 1991), the "great majority of the changes asserted by petitioners were, in fact, requested by petitioners and actually lessen restrictions on sales and the burdens of complying with the administrative requirements." Id. at 408-09. On those facts, the court found that the revisions were a "logical outgrowth" of the proposed rule and did not alter its purpose, meaning or effect.

The revisions here completely change the energy market by forcing ESCOs to cease servicing their low-income customers and depriving an entire demographic of the right to choose an energy provider – a right they have enjoyed for two decades. Nothing in the proposed rule gave notice of such an outcome, nor would ESCOs have been able to divine this outcome from the Commission's proposed rule. The Commission claims (at 54) that it had "predicted" back in February 2014 (more than 18 months before promulgating the notice of proposed rulemaking) that if "an ESCO cannot or will not comply with these conditions, it can choose not to serve customers participating in utility low-income assistance programs or HEAP." Id. (internal citations omitted). But the Commission did not include that "prediction" in the notice of proposed rulemaking, and even if it had, there is an obvious and critical difference between ESCOs "choosing" not to do business with a low-income customer and being banned from serving an entire demographic.

VII. PETITIONERS HAVE STANDING TO CHALLENGE THE UNLAWFUL MORATORIUM ORDERS

The Commission incorrectly claims (at 76) that Petitioners do not have standing to challenge the Moratorium Orders.

To satisfy the standing requirement, a petitioner need establish only an injury in fact and that the injury is within the zone of interests protected by the regulation at issue. Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761,769 (1991). As the Court of Appeals repeatedly has made clear, "standing rules should not be heavy-handed." Ass'n for a Better Long Island, Inc. v. N.Y. State Dep't of Envt'l Conservation, 23 N.Y.3d 1, 4 (2014) (quoting Matter of Sun-Brite Car Wash v. Bd. of Zoning & Appeals of Town of N. Hempstead, 69 N.Y.2d 406, 413 (1987)). This view stems from the reluctance "to apply these principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review." Id. (citing Matter of Har Enters. v. Town of Brookhaven, 74 N.Y.2d 524, 529 (1989)).

Petitioners have standing to challenge the Moratorium Orders because they require ESCOs to engage in and facilitate violations of low-income customers' privacy rights. Specifically, the Orders require ESCOs to accept, review, and act on improperly disclosed confidential information about their customers' economic status. This requirement brings ESCOs into the relevant "zone of interest" as it necessarily gives ESCOs access to private information consumers expect will not be disclosed to third-parties, including ESCOs.

The Commission's argument (at 78) that Petitioners lack standing because other public interest groups have not challenged the Moratorium Orders is perplexing. The law considers whether the party challenging agency action has standing to assert a claim; it does not make that determination based on whether a different party also decided to challenge the administrative action. Where, as here, a petitioner establishes "a concrete interest in the matter the agency is regulating, and a concrete injury from the agency's failure to follow procedure," he has satisfied the test for standing. Assoc. for a Better Long Island, 23 N.Y.3d at 5.

VIII. THE MORATORIUM ORDERS VIOLATE IMPORTANT STATE AND FEDERAL PRIVACY LAWS

The Commission acknowledges (at 78-83) that the identities of low-income consumers to which it and the utilities have access is confidential and protected from disclosure by the New York State Home Energy Assistance Program ("HEAP") State Plan. Nonetheless, the Commission contends that: (i) it can override those statutory restrictions here based on exceptions permitting disclosure of confidential information in other circumstances; and (ii) it has the authority unilaterally to determine that consumer privacy concerns are subordinate to the Commission's desire to deny those same consumers their right to choose an energy provider. The Commission is wrong on both counts.

As detailed in Petitioners' opening brief (at 14), the New York Office of Temporary and Disability Assistance ("OTDA") administers the NY HEAP Plan and applies for funding from a block grant program administered by the federal government. As part of that function, the OTDA prepares and disseminates its Home Energy Assistance Program Manual (the "Manual"). (See http://otda.ny.gov/programs/heap/HEAP-manual.pdf.) The Manual requires that the confidentiality of low-income consumer information be protected, with only limited enumerated exceptions. (Id. at Chapter 23 ¶ B.) There is no exception permitting the disclosure of the confidential information to ESCOs, a fact that the Commission does not dispute (but conveniently ignores) in its opposition papers.

The Commission cites Section 17.8 of New York's HEAP submission to the federal government,[10] which permits certain disclosures to the regulated public utilities who receive benefit payments on behalf of participating customers. That section of course does not permit disclosure of consumers' private confidential information to ESCOs or other non-utility parties who are not receiving benefit payments on behalf of low-income customers. Simply put, the Moratorium Orders in effect unilaterally modify a plan submitted to and accepted by the federal government without citing any statutory or regulatory authority permitting that modification.

The Commission also contends that the Court should defer to the Commission's attempted reasonable balancing act, trading low-income consumers' privacy rights and protections for the Commission's interest in denying those consumers the right to choose their energy provider. Setting aside the absurdity of the Commission's claim that it is somehow helping low-income residents by involuntarily publishing their confidential information to

[10] Ex. Y to 9/27/2016 Cyrulnik Aff.

deprive them of freedom to choose their energy providers, there is no statutory or regulatory authority authorizing the Commission to engage in such a balancing act in any event. The Commission's purported "balancing" is even more inscrutable where, as discussed above: (i) the Commission has no legitimate data to back-up its claim of ESCO "overcharge"; and (ii) taxpayer funds are not being used to fund ESCO charges. The Commission's only citation to legal authority (at 83) concerns a case (Matter of Civil Service Employees Assoc., Inc. v. New York State Public Employment Relations Board, 300 A.D.2d 929, 931 (3d Dep't 2002)) that considers whether an agency demonstrated a rational basis for departing from past precedent in interpreting its own rules. The question presented here, by contrast, is not whether the Commission can interpret its own rules but whether it has the authority to re-write state and federal privacy laws. It obviously does not.[11]

IX. THE MORATORIUM ORDERS ARE IMPROPER LEGISLATION BY THE COMMISSION IN EXCESS OF ITS JURISDICTION

The Commission argues (at 18) that ordering the Moratorium is not improper policymaking but "rather, an exercise of the same broad ratemaking authority that was used to allow ESCOs access to competitive retail markets."[12] But the Moratorium does not even purport

[11] The Commission also rehashes its claim that the inclusion of some non-low-income customers on the lists cloaks the otherwise confidential information regarding low-income customers. Petitioners' moving papers (at 12-14) detail the flaws in that argument, including that the lists provided by the utilities to the ESCOs expressly identify customers as "low-income" residents. (Pet. Br. At 13 (citing Ex. P to 9/27/2016 Cyrulnik Aff.).) The only remedy for these violations is a declaration that the Moratorium Orders are void and directing the destruction of the confidential information.

[12] The Commission thus relies (at 29) on a Third Department case commenting in the context of public utility rate-setting – a function expressly conferred upon the Commission by the controlling statute – that "in this respect" the Commission is the "alter ego of the Legislature." Rochester Gas & Elec. Corp. v. PSC, 135 A.D.2d 4, 7 (3d Dep't 1987).

to set rates: It impose a blanket ban on "ESCO enrollments and renewals of low-income customers" (Opp'n at 15) – regardless of the rates ESCOs charge.[13] By its own admission (at 26), the Commission seeks to exploit its control of "access to utility systems" as a means to "deny ESCOs the ability to market to an entire class of customers in order to ensure that those customers are not overcharged or the public welfare not otherwise harmed." This is not ratemaking; it is textbook policymaking.

The Commission argues (at 26) that it "created the retail energy market," as if that claim suspends the legal restrictions against administrative policymaking and confers on the Commission blanket jurisdiction to do whatever it pleases with respect to any aspect of the retail energy market. Indeed, in response to Petitioners' argument (at 16-22) that the Commission's Moratorium Orders improperly intrude on the policymaking role of the Legislature, the Commission (at 30) responds only that it is "unlike the agency" in the Court of Appeals' controlling Boreali decision prohibiting such agency policymaking because the Legislature here "has given the PSC broad discretion."

The Commission misapprehends the facts and the law. In Boreali, the Court of Appeals recognized that the Public Health Council's enabling statute "confers **broad powers**" on that agency and that "the heart of" the Court of Appeals' decision concerned "whether this **broad grant** of authority contravened the oft-recited principle that the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency." Boreali v. Axelrod, 71 N.Y.2d 1, 9, 15 (1987) (emphasis added). Indeed, the Court made clear: "**Even**

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[13] The Commission has repeatedly, for more than a decade, unequivocally disavowed jurisdiction over ESCO rates as well – until it reversed course earlier this year. The issue of whether the Commission is authorized even to set rates for ESCOs is the subject of a currently pending appeal to the Third Department.

under the broadest and most open-ended statutory mandates, an administrative agency **may not use its authority** to correct whatever societal evils it perceives." Id. (emphasis added). The Commission's reliance (at 30) on the "broad discretion" granted by its enabling statute (claiming that the PSC is "unlike the agency in Boreali") thus fundamentally misapprehends controlling New York law. The Commission's cited cases (at 30) for its purportedly "broad discretion" show only that the Commission has broad discretion to undertake administrative action,[14] not to usurp the Legislature's policymaking function by imposing a blanket ban on ESCO service to low-income customers. The Commission cites no case that carves out the Commission from the controlling rule set forth by the Court of Appeals: "Striking the proper balance . . . among cost and privacy interests, however, is a uniquely legislative function." Id. at 12 (emphasis added). Instead, the Commission simply states (at 30-31), without citation, that "the Commission's weighing of consumers' privacy interest falls within its delegated power to achieve legislative goals."

The Commission's attempt (at 31) to characterize its blanket ban on ESCO service to low-income customers as an "interstitial" rule because the Commission "established" the retail energy market reflects a dangerous misapprehension of the legal restrictions and standards

[14] See Abrams v. PSC, 67 N.Y.2d 205, 212 (1986) (Commission was authorized to set utility rates to enable Con Ed to recoup $41 million it expended on its "unfinished Cornwall Pump Storage Facility," over Attorney General's challenge to passing along the cost to customers of Con Ed's "investment in an unused and abandoned project"); N.Y. State Council of Retail Merchants, Inc. v. PSC, 45 N.Y.2d 661, 666 (1978) (Commission could set utility rates based on time-of-day considerations where "expressly authorized by statute" to do so); St. Lawrence Gas Co. v. PSC, 42 N.Y.2d 461, 464 (1977) (Commission had discretion over utility rate adjustments, including utility's claim for "going value adjustment"); Multiple Intervenors v. PSC, 166 A.D.2d 140, 142-43 (3d Dep't 1991) (Commission was authorized to provide "recovery of lost profits and incentive payments" to utilities for "demand side management" programs, in which "utilities undertake to encourage energy conservation by their customers," under the legislative authorization to "promote energy conservation" under PSL § 5(2)).

governing the scope of its jurisdiction as a state agency. The Commission appears to believe that any rule involving the retail energy market is "interstitial" and permissible, but the Commission does not cite a single similarly drastic, policy-based "interstitial" rule that has ever been upheld by a court of law. Indeed, the sorts of rules the Commission typically promulgates are (i) enactment of Uniform Business Practices, as Petitioners noted in their opening brief (at 17) and the Commission studiously ignores; and (ii) rate-setting for utilities as expressly prescribed in the statute, which the Commission tries (at 31), unconvincingly, to analogize to the Moratorium Orders here. The Moratorium Orders do not propose "just and reasonable" rates that ESCOs must charge low-income customers—they ban ESCO operations entirely and exclude all low-income residents from energy choice.

The Commission also claims (at 31) that if it does not have the jurisdiction to eliminate low-income customers' right to choose an energy provider, then the "creation of the retail market" two decades ago would have to be regarded as "an unlawful exercise of legislative authority" because it is "not 'interstitial.'" That conclusion does not follow at all. The Legislature expressly granted the Commission "the authority to order any gas corporation to transport or contract with others to transport gas under contract for sale," N.Y. Pub. Serv. Law § 66-d(2), and "[r]efusal to deliver a competitor's electricity, while delivering one's own, would create a preferential use of the distribution system (contrary to Public Service Law § 65[3]) and otherwise violate State and Federal antitrust laws." <u>Energy Ass'n of N.Y. State v. PSC</u>, 169 Misc. 2d 924, 933 (Sup. Ct. Albany Cnty. 1996). Consistent with the Legislature's mandate, "the courts have recognized that to <u>introduce</u> 'competition into a monopolistic marketplace and thus lower prices to consumers' is well within the Commission's jurisdiction." <u>Id.</u> at 936 (emphasis added). But the Commission's established statutory and long-recognized authority to introduce competition does not permit the Commission to engage in policymaking decisions by selectively and discriminatorily eliminating competitive access – ignoring the controlling rule from the Court of Appeals that policymaking including balancing "cost and privacy interests," as the Commission attempts to do with the Moratorium Orders, is "a uniquely legislative function." Boreali, 71 N.Y.2d at 12.

The Legislature's recent attempts to enact legislation related to the same concerns driving the Moratorium Orders underscore the impermissible legislative policymaking character of the Commission's actions. (See Petitioners' Br. at 17-18.) The Commission tries (at 32) to downplay this telling fact by dismissing it as just "once instance of legislative inaction." The Commission is wrong on the facts. In fact, similar versions of the legislation were previously introduced at legislative sessions in 2009-2010 (Bill A3245), 2011-2012 (Bill A8433, S6455), and 2013-2014 (Bill A351A, S3442A). (See https://www.nysenate.gov/legislation/bills/2015/a1903 ("Versions Introduced in Previous Legislative Sessions").) The Commission's attempt (at 32) to distinguish this repeatedly failed legislation as addressing a different question of "whether ESCOs have misbehaved in acquiring low-income customers" is similarly unconvincing given that by the Commission's own account (at 24) it seeks to "IMPOSE A MORATORIUM ON ESCO **MARKETING** TO LOW-INCOME CUSTOMERS" (bold emphasis added)—the very policy issue implicated by the repeatedly failed proposed legislation.[15]

[15] The Commission's attempt to distinguish the motives of the Legislature in proposing bills addressing ESCO marketing practices from the motives of the Commission in issuing the Moratorium Orders also flies in the face of the Commission's September Order, in which the Commission relied (at 17) on the purportedly "lengthy record of ESCO slamming and deceptive marketing" as putative justification for refusing to allow low-income customers to "'opt-out' of the moratorium."

X. THE MORATORIUM ORDERS ARE UNCONSTITUTIONAL

A. The Moratorium Violates Petitioners' Due Process Rights

Petitioners' opening brief details multiple due process violations, including the Commission's failure to comply with SAPA (Part II.C), exceeding its jurisdictional authority (Part II.B), and implementing a moratorium that is unsupported by the factual record and has no rational relationship to the stated purpose of protecting taxpayer funds from erosion (Part II.D).

In addition to those violations, Petitioners also showed (at 29-30) that ESCOs have an investment-backed property interest in operating in all market segments in New York and in maintaining its relationships with the low-income customers they invested millions to acquire. The Commission contends that Petitioners do not possess a constitutionally-protected property interest because (i) Petitioners purportedly do not have vested rights to use utility infrastructure; and (ii) Petitioners' investment-backed property interests are not protected interests. The Commission is wrong.

As a preliminary matter, the Commission's factual premise—that the "electric and gas transmission and delivery infrastructure [] is owned by the utilities" (Opp'n at 62)—is itself incorrect. The utility infrastructure is "quasi-public" and a "public right[]-of-way." Energy Ass'n of New York State, 169 Misc. 2d 924, 932 (Sup. Ct. Albany County 1996). But that factual error is beside the point because constitutionally-protected property interests arise even where a party does not have an ownership interest over physical property (e.g., utility infrastructure); due process also protects intangible interests, such as the right to run a business in pursuit of a livelihood without improper interference. See Spinelli v. City of New York, 579 F.3d 160, 169-71 (2d Cir. 2009) (finding "strong" property interest "in operating a business"). Having secured licenses to service the energy needs of all New York residents, Petitioners and other ESCOs invested substantial funds to create revenue streams, brand recognition, and customer goodwill, including with respect to providing services to low-income consumers. Those facts create protectable property interests in continuing to serve all customer classes because "once licenses are issued, as in [Petitioners'] case, their continued possession may become essential in the pursuit of a livelihood." Bell v. Burson, 402 U.S. 535, 539 (1971); Spinelli, 579 F.3d at 168-69 (finding property interest where petitioner had participated in licensing regime despite state having some discretion to oversee that regime); Phillips v. VandyGriff, 711 F.2d 1217, 1222-23 (5th Cir. 1983) (finding that "de facto" licenses subject to due process requirements). The Moratorium will force Petitioners to shut down operations with respect to an entire market segment and wipe out substantial investments ESCOs have made to date cultivating relationships with low-income customers. That is unconstitutional.

That is particularly true here, where the laws have been amended to encourage, support, and solicit ESCO investment and participation in the New York energy market. In fact, competition in the energy market is legally mandated, and the Commission itself has facilitated ESCO participation and investment in that market. The PSL, New York State law, and federal law all require that utilities' competitors have access to distribution facilities to prevent anticompetitive and monopolistic results. Energy Ass'n of New York State. 169 Misc. 2d at 932. The Commission does not cite any authority permitting the Commission to return New York to an anticompetitive marketplace by eliminating competition for an entire market segment.[16] The mandate for ESCOs to access utility infrastructure to facilitate competition is not limited to the

[16] The Commission mistakenly asserts (at 62-63) that Petitioners do not have any property interest in energy sale participation, because (it claims) PSL § 30 and Transportation Corporations Law (TCL) § 12 provide a right to use distribution facilities "only [to] utility customers." That argument ignores the law that mandates competition in the entirety of the energy marketplace. In any event, Petitioners do not rely on either PSL § 30 or TSL § 12.

wealthy, and gives rise to a constitutionally-protected property interest in operating in New York across demographics and market segments. In addition, the New York State Legislature amended the PSL to support and encourage ESCOs' participation by empowering them to shut off a customer's lights in the face of unpaid bills. See Ezekwo v. New York City Health & Hospitals Corp., 940 F.2d 775, 783 (2d Cir. 1991) (holding that plaintiff's future business expectation was "a property interest entitled to [Due Process] protections" because state's conduct made that expectation "reasonable and well founded"). As a result, ESCOs have a reasonable and well-founded expectation that the Commission cannot and would not arbitrarily and unreasonably deprive them of a meaningful opportunity to participate in entire segments of the energy market. See Ezekwo, 940 F.2d at 783; Spinelli, 579 F.3d at 169; Greene, 360 U.S. at 492. The Commission does not confront any of these facts or distinguish the foregoing law.

The cases the Commission cites (at 63-66) actually confirm the due process violations here. The Commission cites Campo Corp. (Opp'n at 63-65), which approved the Commission's ban on a practice known as "submetering." But the Commission misapprehends the core holding in Campo: The court found that submetering was an entirely unregulated and unapproved practice that the Commission proceeded to prohibit. Campo Corp. v. Feinberg, 279 A.D. 302, 305-06 (3d Dept. 1952). Submeterers thus could not show that they had a constitutionally-protected interest in continuing that unauthorized practice. By contrast, (i) ESCO operations are subject to extensive oversight and regulation – consistent with the holding in Energy Association that competitors must have access to utility infrastructure – and (ii) the Legislature and Commission here facilitated and encouraged ESCOs' investment and participation in servicing the energy needs of all New York energy customers (as detailed above).

The Commission's citation to Rochester Gas also supports Petitioners' claims here. In that case, the court found a utility's interest in participating in the New York market to be a constitutionally-protected property interest – endorsing the proposition that an "investment-backed expectation" is protected against unconstitutional takings. Rochester Gas & Elec. Corp. v. Public Service Comm'n of State of N.Y., 71 N.Y.2d 313, 321, 324-25 (1988) (plaintiffs' expected scope of business was "property" and "investment-backed expectation[]" subject to "traditional due process principles" and constitutional takings analysis).[17] That holding thus confirms the applicability of due process protections here. Finally, the Commission cites (at 63) General Motors for the proposition that Petitioners cannot have a constitutionally-protected property interest in using utility facilities. But that case concerned customers' property interests in utility property, not whether ESCOs have a constitutionally-protected interest in participating in all segments of the New York energy market. See General Motors Corp. v. Public Service Comm'n of State of N.Y., 95 A.D.2d 876, 888 (3d Dep't 1983).

Last, the Commission disputes (at 65-66) Petitioners' property interest in continued contractual relationships with their own customers on the theory that those expectations are too speculative. The undisputed facts show otherwise: The overwhelming majority of ESCO customers who have a right to cancel their contracts in any given month remain with that ESCO. (11/29/2016 Cyrulnik Aff., at ¶9). The law looks to the practical effect of the administrative

[17] Rochester Gas is distinguishable from this case insofar as (i) the plaintiff there brought a substantive due process claim and (ii) the court found that the statute there did not amount to an unconstitutional taking because it had a *de minimis* effect on the plaintiff's property interest. Id. Here, by contrast, Petitioners bring a procedural due process claim and, as discussed above, the Orders will have a substantial effect on Petitioners because they would deprive Petitioners of their reasonable and well-founded expectation of maintaining thousands of low-income customers. See Ezekwo, 940 F.2d at 783.

action, and the Commission did not even purport to consider those facts – which confirm the due process violations here.

B. The Moratorium Orders Constitute an Unconstitutional Taking

In defending against its Takings Clause violations, the Commission invokes (at 74) the same mistaken assumption that ESCOs do not have any protectable property interests. For the reasons outlined above and in Petitioners' opening brief, Petitioners and other ESCOs have investment-backed property interests in operating in all market segments in New York and in their continued relationships with low-income customers. (See Part X.A, above.)

The Commission also wrongly contends (at 75) that Petitioners' Takings Clause claim is premature because Petitioners "have not obtained a final administrative decision regarding the application of the moratorium to Petitioners' 'property,' nor utilized available state procedures for obtaining just compensation.'"[18] The Commission does not (because it cannot) identify any state procedures that Petitioners must first follow before challenging the constitutionality of the Moratorium Orders under the Takings Clause here.

C. The Moratorium Orders Violate the Contract Clause

The Commission contends (at 69) that the Moratorium Orders do not violate the Contracts Clause because the Orders "only affect expiring and future agreements." That misstates the facts and the law.

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[18] The case upon which the Commission relies is inapposite because it concerned the taking of real property which, in stark contrast to our case, the decision under review did not "conclusively determine whether respondent will be denied all reasonable beneficial use of its property" Williamson County Regional Planning Commn. v. Hamilton Bank, 473 U.S. 172, 194 (1985), and the government "provided an adequate process for obtaining compensation." Id. at 194-95.

The Orders will have an immediate and profound effect on Petitioners' businesses because Petitioners and other ESCOs will be forced to de-enroll thousands of existing customers, most of whom have been longstanding, loyal customers. The result will be to substantially interfere with and impair existing expectations of ESCOs and their customers with respect to ongoing relationships and agreements, which is prohibited under the Contracts Clause. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241-49 (holding state law unconstitutional where it affected private company's contractual obligations where law was not "necessary to meet an important general social problem."); Shantz v. O'Sullivan, 11 A.D.3d 22, 24-30 (3d Dep't 2004); New Jersey Retail Merchants Assn v. Sidamon-Eristoff, 669 F.3d 374, 386 (3d Cir. 2012); United Healthcare Ins. Co. v. Davis, 602 F.3d 618, 627-31 (5th Cir. 2010); Equipment Mfrs. Institute v. Janldow, 300 F.3d 842, 849-62 (8th Cir. 2002); Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237, 1243-52 (3d Cir. 1987); Continental Illinois Nat'l Bank and Trust Co. of Chicago v. State of Wash., 696 F.2d 692, 697-702 (9th Cir. 1983); Garris v. Hanover Ins. Co., 630 F.2d 1001, 1004-07 (4th Cir. 1980); see also 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).

Indeed, the Commission ironically undermines the premise of the Moratorium Orders by conceding that the market for low-income customers is functioning as it should in a competitive marketplace: "There are over 200 ESCOS operating in New York . . . [and] no participant can reasonably expect that any of its customers will not be solicited and acquired by another participant." (Opp'n at 70.) Put differently, low-income customers currently can and do weigh the alternatives and decide for themselves based on their own needs and interests where to purchase their energy needs—be it from another ESCO or the local utility. By the Commission's own reasoning, then, the Moratorium Orders are unreasonable, unnecessary, and unconstitutional intrusions into an already competitive and free marketplace.

D. <u>The Moratorium Orders Violate the Equal Protection Clause</u>

Petitioners showed in their opening brief that the Moratorium Orders discriminate against ESCOs in favor of utilities (22-28) and they also unconstitutionally discriminate against low-income customers.

With respect to the Moratorium Orders' discrimination against ESCOs, the Commission now contends that favoring utilities is justified because utilities are "heavily regulated" such that "the Commission can ensure that all customers are treated fairly" (Opp'n at 71), "ESCOs have been employing deceptive marketing practices to acquire and overcharge customers," (<u>id.</u> at 72), there is a "clearly legitimate governmental purpose in practicing good stewardship of [assistance funds]," (<u>id.</u>), and "utilities actually own the transmission and distribution facilities that serve customers" and so – The Commission claims – the Moratorium is necessary because ESCO use of those facilities has not developed into a "workably competitive" market (Opp'n at 72-73). None of those purported reasons has merit.

<u>First</u>, whether utilities are "heavily regulated" is beside the point. Low-income customers and other customers obviously rejected utilities in favor of the services provided by ESCOs. The Commission fails to explain how leaving low-income customers to the monopolistic whims of local utilities and forcing those customers to accept what they already rejected will result in "fair" treatment, irrespective of the regulatory regime.

<u>Second</u>, the Commission fails to cite to any evidentiary support for its contention that ESCOs as a general matter have targeted low-income customers with deceptive marketing practices such that a moratorium is necessary. To support that sweeping and unfounded generalization, the Commission cites to the Affidavit of Bruce Alch and excerpts from a February 20, 2014, Order. (<u>See</u> Opp'n at 72 (citing Alch Aff. ¶¶ 9-10 and R304-05).) Mr. Alch's statements, however, are nothing more than self-serving anecdotes with no record citations at all, let alone evidence sufficient to shut down ESCO participation in an entire market segment. (<u>See</u> id.) And the February 2014 Order simply

states in general and conclusory fashion that "the residential and small non-residential markets have also generated a number of complaints concerning ESCO marketing practices." (Id.) There is no citation to any evidentiary support specifying whether and to what extent low-income customers were impacted by the alleged marketing practices, which ESCOs engaged in the allegedly wrongful conduct, how many complaints were within the definition of "a number of complaints," what those alleged complaints entailed, and whether any corrective actions were ever taken.

That the Commission cannot proffer any evidence to support the Moratorium Orders and must resort to anecdote and gross generalizations is unsurprising. As Petitioners demonstrated in their opening brief (at 26-27), year-over-year the number of complaints against ESCOs has plummeted in all major categories, including for alleged deceptive marketing practices. Regardless, to the extent there were legitimate concerns with ESCO marketing practices, the Commission could and should use the authority it has to regulate those marketing practices. It did not have to resort to a discriminatory and unconstitutional moratorium to mask its refusal to discharge those duties.

Third, the Commission does not (because it cannot) point to any regulation or law giving it the power to be the "steward" of taxpayer or ratepayer funded programs, which is a function that is decidedly in the province of the legislature that enacted those programs.

Fourth, utilities' ownership of transmission and distribution facilities does not justify the Moratorium's asymmetry. As the Commission noted, there are some 200 ESCOs operating in New York; as a result, low-income customers can decide to leave one ESCO and enroll with another or leave an ESCO and return to the local utility. Some low-income customers have chosen to enroll with and remain customers of ESCOs because those customers obviously have decided that they prefer the products and services offered by ESCOs. Effective customer choice and the ability to move between competitors are plain evidence of a "workably competitive" market without the need for correction, and the Commission has failed to proffer evidence to the contrary.

Last, the Moratorium Orders' unlawful discrimination against low-income customers is an independent violation of the Equal Protection Clause because it lacks a rational basis. As discussed above in Part V, the Orders' terms lack any rational relationship to their stated goals or the interests of low-income customers. Indeed, there is no evidentiary basis for the Commission's conclusion that the Order will purportedly lower low-income customers' energy costs or that it will save taxpayer money somehow. Where the Order lacks any such basis and facially discriminates against individuals on the basis of their "low-income," it violates the Equal Protection Clause. See Bush v. City of Utica, N.Y., 558 Fed. Appx. 131, 134 (2d Cir. 2014) (equal protection claim upheld where government's policy discriminated on basis of individuals' residence in "low-income neighborhood"); Hammond v. Housing Auth. and Urban Renewal Agency of Lane Cty., 328 F. Supp. 586, 587-88 (D. Or. 1971) (equal protection violation found where municipality discriminated on basis of individuals' receipt of welfare benefits).

XI. THE MORATORIUM ORDERS WILL CAUSE IRREPARABLE HARM

The Commission does not rebut any of the core forms of irreparable harm that the Moratorium Orders will cause. Instead, it argues (at 86) that the Orders cannot cause irreparable harm because they "preserved the validity of any pre-existing contracts." The Commission's error here is clear: The law looks to the practical effect of an action, not to the question of whether the action will cause a formal breach of contract. But for the Moratorium, the overwhelming majority of the hundreds of thousands of low-income customers on indefinite long-term contracts would continue as ESCO customers (as they have for years and years). (Fitzgerald Aff. ¶¶ 24-26; Ver. Pet. ¶¶ 93-94.) The parties thus expect an enduring business relationship. The Commission's forcible and immediate termination of those relationships will abruptly undermine that expectation, causing lost goodwill, and significant (but difficult to quantify) lost revenue. (See Ver. Pet. ¶ 97.)

As detailed in Petitioners' opening brief (at Part II.D), forcibly de-enrolling hundreds of thousands of customers will obviously negatively affect Petitioners' goodwill in the market and cause permanent customer loss – a classic form of irreparable harm that New York courts consistently have recognized. See Alside Div. Of Associated Materials Inc. v. Leclair, 295 A.D.2d 873, 874 (3d Dep't 2002) (finding irreparable harm on the basis of customer loss and good will); accord Confidential Brokerage Svcs., Inc. v. Confidential Planning Corp., 85 A.D.3d 1268, 1269 (3d Dep't 2011); Second on Second Cage, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 272-73 (1st Dep't 2009); Quinones v. Board of Managers of Regalwalk Condominium I, 242 A.D.2d 52, 57 (2d Dep't 1998); Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc., 764 N.Y.S.2d 1, 3 (1st Dep't 2003). In fact, as detailed in the Petition, dozens of customer calls since the Orders were issued and before the TRO was entered confirm that customers are angry about their forcible de-enrollment and are directing their frustration toward the ESCOs for abandoning their customers.[19] The damage to Petitioners' good will and reputation independently warrant injunctive relief. (Ver. Pet. ¶ 97.)

The termination of customer relationships also causes unquantifiable financial harm to Petitioners and New York low-income residents. Id. ¶¶ 96-103, 106; see Willis of New York, Inc. v. DeFelice, 750 N.Y.S.2d 39, 42 (1st Dep't 2002) (finding irreparable harm where losses were "impossible, or very difficult, to quantify.") Most of the long-term customer contracts at issue continue for indefinite periods of time and it is therefore very difficult to quantify the revenue Petitioners would lose due to their termination. Further, by forcing ESCOs to stop

[19] To support this assertion, the Commission cites the 9/27/2016 Cyrulnik Aff. Ex. P as a purported example of a letter to customers that was "carefully crafted not to allege fault by any particular ESCO… [saying that customers] must return to utility service," but that exhibit does not include any letter.

servicing approximately 400,000 low-income customers, the Orders will cause them to shut down a large portion of their operations, resulting in irreparable harms such as unquantifiable job losses and lost revenue to New York State. The Commission ignores these classic forms of irreparable harm in opposing the motion.[20]

The Commission's claim (at 88) that the irreparable harms here are "purely speculative" is unsupported rhetoric: There is ample, straightforward evidence of irreparable harm, including (i) the indisputable fact that the Orders would cause diminished ESCO operations and customer loss of unquantifiable amounts for an immeasurable duration (Ver. Pet. ¶¶ 96, 98-103); and (ii) Petitioners' receipt of customer complaints (undermining their goodwill) responding to the Commission's efforts to implement the Orders (Ver. Pet. ¶ 97). See, e.g., Confidential Brokerage, 85 A.D.3d at 1269; Second Cage, 66 A.D.3d at 272-73.[21]

Further, the Commission's argument that "the moratorium is not permanent" is disingenuous where the Commission itself cannot even identify whether or when the moratorium will sunset. (See Opp'n at 85-86 (stating only that the Commission "is open to considering lifting the moratorium").) Moreover, as noted above, because Petitioners' relationships with low-income customers have undefined durations, even a "temporary" moratorium will cause

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[20] The Commission also argues (at 87) that there can be no irreparable harm here because Petitioners purportedly have not shown that they have a "property interested [sic] associated with their business," but it has not and cannot cite any authority showing that Petitioners bear that burden.

[21] The Commission's argument (at 87) that Petitioners have "provided no fact-based analysis to support" showing irreparable harm is meritless. The Commission cites Kurzban and Metropolitan Package but, in contrast to Petitioners here, the movants there had failed to provide factual evidence that the alleged irreparable harm would be sustained. See Benjamin Kurzban & Son, Inc. v. Board of Education of the City of New York, 129 A.D.2d 756, 756 (2d Dep't 1987); Metropolitan Package Store Assoc., Inc. v. Koch, 80 A.D.2d 940, 941 (3d Dep't 1981).

irreparable harm both because it will end relationships that ESCOs invested significantly to establish, and because it is impossible to quantify the lost customer base and revenue Petitioners will suffer during that period.[22]

Second, as discussed above in Part X, the deprivation of constitutional rights constitutes an independently sufficient type of irreparable harm to support a preliminary injunction. See, e.g., Cmty. Charter Sch. v. Bd. of Regents of the Univ. of N.Y., 2013 WL 10185566, at *17 (Sup. Ct. Erie Cnty. June 18, 2013).

Third, the Commission's unlawful disclosure of hundreds of thousands of New York residents' identities as low-income customers will cause irreparable harm. See Part VIII, above; Ver. Pet. ¶ 95; see Rose v. Levine, 37 A.D.3d 691, 692-93 (2d Dep't 2007) (injunction award affirmed where, absent injunction, irreparable harm would be caused to plaintiff's "protected right of privacy" due to unauthorized dissemination of his personal information).

XII. THE BALANCE OF EQUITIES STRONGLY FAVORS INJUNCTIVE RELIEF

Conceding that it will suffer no harm from injunctive relief, the Commission argues (at 88-91) that the harm to ESCOs is outweighed by low-income customers' purported interest in having their ESCO service—which they voluntarily selected over utility service—forcibly terminated. This argument is inscrutable, and for several reasons.

[22] The cases upon which the Commission relies (at 85) are inapposite. Each case cited by the Commission featured claims of irreparable harm that concerned quantifiable lost profits or that were unsubstantiated by the record. See Sterling Fifth Assocs. v. Carpentille Corp., Inc., 5 A.D.3d 328, 329 (1st Dep't 2004) (lost profits); Optivision, Inc. v. Syracuse Shopping Center Assocs., 472 F. Supp. 665, 685 (N.D.N.Y. 1979) (lost profits); GFI Secs. LLC v. Tradition Asiel Secs., Inc., 21 Misc. 3d 1111(A), *7 (N.Y. Cnty. Sup. Ct. July 28, 2008); Ivy Mar Co., Inc. v. C.R. Seasons, Ltd., 907 F. Supp. 547, 565-66 (E.D.N.Y. 1995).

First, the Commission has no basis to substitute its judgment for that of consumers. The indisputable fact is that every customer who will be turned over to the utilities voluntarily elected to exercise his right to choose and to purchase his energy needs from an ESCO rather than the local utility. Thus, the balance of equities – setting aside the harm to the ESCOs, who are the only party to this action that face any harm at all – favors the status quo, and not assuming that the Commission's judgment trumps each and every customer's judgment.

Second, the Commission claims (at 88 (citing Alch Aff. ¶ 9)) that "ESCOs are marketing to these customers, promising savings that are seldom, if ever, realized" based only on Mr. Alch's unsubstantiated and self-serving beliefs. Indeed, the paragraph of the Alch affidavit on which the Commission relies conclusorily states that the Commission's review of unidentified "marketing tactics" and unidentified phone call transcripts led him to form the personal "belie[f]" that unidentified ESCOs rely upon "customer's lack of knowledge or understanding when marketing and enrolling customers." (Alch Aff. ¶ 9 (emphasis added).) The Commission then asserts (at 88-89 (citing Alch Aff. ¶ 10)) that it has "been inundated with complaints" about ESCOs but fails to describe basic information about those purported complaints, like the number, content, or the specific ESCOs that were the subject of the purported complaints. The reasons for those omissions are straightforward: (i) as Petitioners demonstrated in their opening brief, the number of complaints concerning ESCOs has dropped precipitously over the past year or longer; and (ii) as of October 28, 2016, over the previous twelve months there were only 2,459 customer complaints, reflecting a complaint rate of less than one tenth of one percent (0.1%) of New York ESCO customers.[23] (See Office of Consumer Services, Monthly Report on Consumer

[23] These figures reflect a greater than 50% decline year-over-year in customer complaints. Id.

Complaint Activity, September 2016, at 14-16, available at https://goo.gl/C1BsMv.) The Commission thus has no reasonable basis to condemn an entire industry in reliance on Mr. Alch's personal beliefs, where those beliefs are at best based only on a statistically insignificant number of complaints, unidentified "marketing tactics," and unidentified telephone calls.

Third, the Commission incorrectly argues (at 89 (citing Alch Aff. ¶ 11, Attachments C and D)) that low-income customers purportedly "are being overcharged in every utility service-territory," relying on data collected from utilities without Petitioners' knowledge or input. As discussed above (Parts II-IV), that data fundamentally is flawed and those conclusions are nothing more than assumptions and guesses based on a nonexistent record and a refusal even to gather the requisite data needed to undertake a serious analysis.[24]

Fourth, the Commission pivots (at 89-90) to invoking the purported concerns of non-low-income customers who are subsidizing low-income customers' selection of ESCO products that the Commission claims offer non-essential "extra gadgets or services." That claim is predicate on the Commission's error in claiming that assistance funds are being "passed through" to ESCOs, whereas the record demonstrates the exact opposite. Where the Commission has failed to show that the amount or use of even one dollar of those assistance funds will be redirected as a result of the Moratorium Orders, the Commission's argument is senseless.

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[24] The Commission also baselessly claims, in an unusually phrased sentence, that "[e]vidence exists that certain ESCOs specifically target low-income neighborhood [sic] where often English is a second language." Its basis for that assertion (R. 323) does not refer whatsoever to ESCOs making any such effort, or even customers' primary or secondary languages. In any event, the UBP – which regulates ESCOs' marketing and sales efforts – contains myriad provisions ensuring that customers are provided multi-lingual marketing materials and access to translators that prevent language barriers from affecting consumer decision-making. (See, e.g., State of New York Public Service Commission Uniform Business Practices, at "Section 10: Marketing Standards," Parts C(1)(f)-(g), C(2)(e), C(2)(g)(4), C(4)(e), available at: https://goo.gl/yv9cWg.)

At bottom, the Commission has not proffered credible evidence that enforcing the Moratorium is reasonably warranted or that the Commission is a better judge of low-income customers' interests than the customers themselves who—with the benefit of the UBP's extensive consumer protections—chose ESCO service over utility service. The Commission seeks unilaterally to override approximately 400,000 customers' voluntary choices, based on Mr. Alch's unsubstantiated beliefs and nonexistent, or at best fundamentally flawed, data.

By contrast, Petitioners at this point seek only to maintain the status quo, which alone weighs heavily in favor of injunctive relief. See Masjid Usman, Inc. v. Beech 140, LLC, 68 A.D.3d 942, 943 (2d Dep't 2009) ("A balance of the equities likewise favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action."); accord Green Harbour Homeowners' Ass'n, Inc. v. Ermiger, 67 A.D.3d 1116, 1117 (3d Dep't 2009); State v. City of New York, 713 N.Y.S.2d 360, 361 (2d Dep't 2000). In addition, Petitioners have shown that the imposition of the moratorium will cause them significant hardship. As discussed above in Part XI, in the absence of injunctive relief, Petitioners and others will suffer irreparable harm flowing from their immediate termination of customer relationships. The balance of equities thus favors injunctive relief.[25]

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[25] The Commission argues (at 91-93) that Petitioners should not have brought this action as a hybrid proceeding because (i) all of the relief sought is available under Article 78 and (ii) Petitioners are not challenging the constitutionality of any legislation. Both arguments are wrong. Among other things, Petitioners seek a declaration as to the scope of the Commission's jurisdictional authority to ban ESCO market participation in general – relief that is not available under Article 78 and that is not even dependent on the Court's invalidation of the Orders. See CPLR 7803; Ver. Pet. ¶¶ 109-114; Siwek v. Mahoney, 379 N.Y.S.2d 1014, 1016 (Sup. Ct. 1976) ("Essentially the distinction between a declaratory judgment and an Article 78 proceeding is that in a declaratory judgment yo[u] test the basic scope and validity of a statute pursuant to which officials are acting whereas in an Article 78 proceeding you deal with actions brought to have officials take legally mandated administrative action."), overturned on other grounds by, Siwek v. Mahoney, 39 N.Y.2d 159 (N.Y. 1976); New York State Ass'n of Counties v. Axelrod, 150

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief and supporting materials, Petitioners respectfully request that the Court preserve the status quo by entering an order staying enforcement of the Moratorium Orders and temporarily restraining and preliminarily enjoining Respondent from enforcing the Ordering Clauses of the Moratorium Orders, until Petitioners' claims can be resolved on the merits. The Court should further order expedited discovery here and grant Plaintiffs' Article 78 Petition.

Dated: November 29, 2016
Armonk, New York

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A.D.2d 845, 847 (3d Dep't 1989) ("Constitutional challenges to a legislative act may not properly be brought through the vehicle of an article 78 proceeding.") (citations omitted). In these circumstances, the proper course of action is to commence a hybrid proceeding and pursue both types of relief together – which is precisely what Petitioners here have done.