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. IAS Part Justice

PETITIONERS/PLAINTIFFS' MEMORANDUM OF LAW IN 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

This proceedings seeks to prevent the New York Public Service Commission ("Commission") from taking precipitous and irreversible action that will irreparably harm Petitioners/Plaintiffs ("Petitioners") and other energy services companies ("ESCOs"), which for years have provided savings and valuable energy programs and services to millions of New York residents.

For two decades the Commission has allowed and encouraged a free market for the supply of gas and electricity to New York residents. As the Commission itself recognized, ESCOs provide New York residents with freedom of choice in purchasing their gas and electricity and serves as a counterbalance to prevent the monopolistic local utilities from exercising undue market power. The increased competition benefits New York residents with lower rates, better service and increased customer choice. The ESCOs also provide New York residents with the ability to enter into long term, fixed-rate contracts, something which local utilities cannot offer.

Without notice or an opportunity to comment, on February 23, 2016, the Commission issued an "Order Resetting Retail Energy Markets and Establishing Further Process" (the "Order"). **The Order effectively requires ESCO to immediately terminate their relationships with hundreds of thousands of New York customers and hand those customers over to their competitor – the local utility company – unless the ESCO is prepared to guarantee in writing by 4:00 p.m. on Friday, March 4, 2016, that it will charge less[1] than whatever energy charges**

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[1] Consistent with the Commission's failure to provide Petitioners the opportunity to review and comment on the Order, the Order is inconsistent and confusing as to whether the ESCO is obligated to charge customers less than the local utility ("guarantee savings in comparison to what the customer would have paid as a full service utility customer" (Cyrulnik Aff. Ex. A at 2), or simply meet the local utilities price ("guarantees that the customer will pay no more than were the customer a full-service customer of the utility" (id. at 21)).

the local utility may charge in future. The order provides no exception to this rate guarantee requirement for gas customers. For electric customers, the Order imposes the same requirement but states that the ESCO can effectively charge consumers whatever price the ESCO wants to charge, provided that the ESCO is willing to provide electricity derived from at least 30% renewable sources.

The Commission's stated justification for this precipitous action is an increase in customer complaints to the Department of Public Services, which by its own admission, comprised less than 1,300 total complaints relating to dissatisfaction with energy charges in 2015, 80% of which were resolved by the ESCO within 14 days. Put in context, 1,300 complaints reflects a complaint rate of one-half of one-tenth of one-percent (0.05%) of New York ESCO customers. Moreover, for the vast majority of ESCOs, the number of complaints has actually decreased in the past year. The Commission's own statistics show that, if you include all but one ESCO (which is not a Petitioner here), the number of complaints in 2015 actually decreased by more than 11%, as compared with complaints lodged the prior year.

If allowed to go into effect, the Order will cause immediate and irreparable harm to Petitioners, their New York customers, and the hundreds of ESCOs and thousands of ESCO employees and vendors in New York and beyond. In its Order, the Commission takes an "act first, ask later" approach, which puts a gun to head of all ESCOs and requires them either to decide between two unreasonable choices: (i) guarantee that they will not charge more than what the non-competitive local utility may charge in the future, even if that necessarily means that ESCOs must operate at a loss, or else (ii) immediately send hundreds of thousands of their hard-earned and loyal customers to the ESCOs' competitor – that same local utility (which provider the customer previously had elected to leave). Heads you lose, tails you lose.

The Order should be declared void, and the Commission should be enjoined from enforcing it, because the Commission plainly does not have the jurisdiction or authority to fix the energy rates that Petitioners offer their customers – and the Commission has conceded as much. Moreover, even if the Commission had jurisdiction to regulate the prices ESCOs charge their customers, both the measure and mode of the Order arbitrarily and capriciously infringes on the rights of ESCOs and New York energy customers. A small number of customer complaints does not justify shutting down an industry, particularly when the Commission and the Attorney General have more than adequate enforcement tools at their disposal. Moreover, as detailed below (¶¶ 54-55, 63), a significant number of the complaints concerned the Commission's own actions – not actions taken by the ESCOs.

The Order also violates Petitioners' common law, statutory, and constitutional rights by, among other things, denying Petitioners due process and equal protection under the law. As the Order itself notes, a minimum period of sixty days is needed to evaluate and refine the intended and unintended consequences of the Order and the role of ESCOs as energy providers for New York customers. Notwithstanding that admission, the Commission refused to grant Petitioners and other ESCOs' requests for an extension of the unreasonable March 4, 2016, effective date of the Order.

The implementation of this Order will cause immediate and irreparable harm to the reputation, finances, and goodwill of Petitioners and other ESCOs, and will almost certainly drive many ESCOs out of business entirely. Conversely, there is no identifiable harm that will occur to anyone if the twenty-year status quo is maintained until after the Court can adjudicate this matter on the merits. Petitioners thus seek immediate relief from this Court to stay Ordering Clauses 1 through 3 of the Order before Petitioners, their New York customers, and the hundreds of ESCOs and thousands of ESCO employees and vendors in New York suffer irreparable harm.

STATEMENT OF FACTS

Facts relevant to this motion are set forth in detail in Plaintiffs' Verified Petition and Complaint ("Ver. Pet.") and the Exhibits to the Affirmation of Jason Cyrulnik dated March 3, 2016 (the "Cyrulnik Aff.").

LEGAL STANDARD

Temporary restraining orders and preliminary injunctions are provisional remedies designed "to maintain the status quo until there can be a full hearing on the merits." Pamela Equities Corp. v. 270 Park Ave. Cafe Corp., 881 N.Y.S.2d 44, 45 (1st Dep't 2009); see also Gerald Modell Inc. v. Morgenthau, 764 N.Y.S.2d 779, 784 (Sup. Ct. 2003); McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., 114 A.D. 2d 165, 172 (2d Dep't 1986) ("The purpose of a preliminary injunction is to preserve the status quo pending trial.") A court should enter a temporary restraining order where an applicant shows that immediate and irreparable injury, loss, or damage will result if the defendant is not restrained before the hearing on the preliminary injunction can be held. See N.Y. C.P.L.R. §§ 6301, 6313. A court should issue a preliminary injunction where a plaintiff shows (1) a likelihood of success on the merits, (2) danger of irreparable injury in the absence of such an injunction, and (3) a balance of equities tipping in the moving party's favor. Eastern Artificial Insemination Co-op. Inc. v. La Bare, 619 N.Y.S.2d 858, 859-60 (3d Dep't 1994).

All Petitioners seek here is to preserve the longstanding status quo pending a final resolution of their claims. As a result, the usual requirements are relaxed such that Petitioners have a "reduced degree of proof" in establishing its likelihood of success on the merits. Masjid Usman, Inc. v. Beech 140, LLC, 68 A.D.3d 942 (2d Dep't 2009); see also Ma v. Lien, 198 A.D.2d 186, 187 (1st Dep't 1993) ("Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced") (quoting Republic of Lebanon v. Sotheby's, 167 A.D.2d 142, 145 (1st Dep't 1990). Similarly, the balance of equities typically tilts in favor of the party seeking to preserve the status quo. CanWest Glob. Commc'ns Corp. v. Mirkaei Tikshoret Ltd., 804 N.Y.S.2d 549, 571 (Sup. Ct. 2005).

Section 7805 of the CPLR provides in relevant part that "[o]n the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review, upon terms including notice, security and payment of costs." N.Y. C.P.L.R. § 7805. Section 7805 provides a mechanism for the Court to stay enforcement of administrative orders being appealed through an Article 78 petition. This Court has the authority to "stay further proceedings" under CPLR 7805 and 2201 – including enforcement proceedings pursued by the Commission – where, as here, a party's constitutional rights are at stake. Fortuna v. Prusinowski, 870 N.Y.S.2d 742, 744 (Sup. Ct. 2008).

Petitioners also ask this Court to use its broad inherent discretion and under CPLR 3101 and 408 to grant expedited discovery so that Petitioners can timely obtain the "full disclosure of all matter material and necessary" to support their claims. Town of Pleasant Valley v. N. Y. State Bd. of Real Prop. Servs., 685 N.Y.S.2d 74, 79 (2d Dep't 1999). "[E]xpedited discovery is warranted where there is ample need for it," Stop BHOD v. City of New York, 881 N.Y.S.2d 367, 2009 WL 692080, at *14 (Sup. Ct. 2009), especially "to determine the extent of [a party's] unlawful conduct." Sylmark Holdings Ltd. v. Silicone Zone Intern. Ltd., 783 N.Y.S.3d 758, 774 (Sup. Ct. 2004). Given this case's urgency, expedited discovery would help ensure that Petitioners can vindicate their rights.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. The Order Is Invalid As a Matter of Law Because Its Terms Exceed the Commission's Jurisdiction

As a threshold matter, the Order is invalid because the Legislature never conferred jurisdiction on the Commission to set the rates that ESCOs can charge their customers.

"Generally, the powers of an administrative agency may not be implied, but are created by language of clear import, admitting of no other reasonable construction." Durant v. Motor Vehicle Acc. Indem. Corp., 20 A.D.2d 242, 247 (2d Dep't 1964); see Rivera v. City of New York, 1997 WL 539776, *5 (S.D.N.Y. Aug. 28, 1997) (explaining that it is a "well settled principle of New York law" that "[g]overnmental agencies have only those powers which are conferred expressly or by necessary implication; power is not to be inferred, and the principle of strict construction should be applied in interpreting statutory grants of power.")

The law is clear that an agency "determination is void where it is made either without statutory power or in excess thereof." Abiele Contracting, Inc. v. New York City School Const. Authority, 91 N.Y.2d 1, 10 (N.Y. 1997); see Durant, 20 A.D.2d 242, 247 (2d Dep't 1964) ("Unless the delegation of power to vary or amend statutory provisions is explicitly conferred by the Legislature on an administrative board or official, the exercise of the power is ineffective.") Indeed, "[a]n agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect empower themselves to rewrite or add substantially to the administrative charter itself." Tze Chun Liao v. New York State Banking Dep't, 74 N.Y.2d 505, 510 (N.Y. 1989).

In its Order, the Commission cited three provisions in the Public Service Law as purported bases for its jurisdiction to impose the maximum rate that Petitioners and other ESCOs could charge ("Rate Ceiling"): PSL Art. 1 § 5, Art. 2 § 53, and Art. 4 § 66(5). Cyrulnik Aff. Ex. A at 8-9. None of those Sections confers jurisdiction on the Commission to control Petitioners' rates.

First, Art. 4 § 66(5) sets forth the Commission's limited rate-setting powers and specifically limits that authority to "electric corporations." The only "electric corporations" that are subject to that rate regulation are "those that, as described in [Art. 4] Section 66(1), have 'authority . . . to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places." Cyrulnik Aff. Ex. B at 7-8; see PSL Art. 4 § 66(1). Petitioners and other ESCOs indisputably do not have any such authority, and are consequently not subject to the Commission's limited rate-setting powers delineated in Section 66(5). If any doubt remained, moreover, the Commission itself has conceded that any "assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation," including the "rate regulations" set forth in § 66(5), "is incorrect." Id. Ex. C at 34.

Second, unable to ground its asserted authority to impose the Rate Ceiling in Article 4, the Commission cites to Art. 2 § 53, which provides that "an electric corporation, a utility company, or a utility corporation, shall include . . . any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers." PSL Art. 2 § 53; Cyrulnik Aff. Ex. A at 9 n.12 . But that section does not authorize the Commission to set rates at all. As the Commission has expressly conceded, the scope of its jurisdiction over electric corporations set forth in Article 2 § 53 is limited to Article 2. Id. The cited language thus means that certain sections of Article 2 apply to ESCOs, but Article 2 does not contain a single provision providing the Commission authority to control rates.

Third, the Order references the general authorizing language in Art. 1 § 5. That Section also does not confer on the Commission authority to set the ESCOs' rates, either expressly or by necessary implication. As a threshold matter, the plain language of that Section does not expressly confer any such authority on the Commission, nor does the law permit a court to infer such authority therefrom. Id. Further, to the extent the Commission may argue that the general charge in Article I, Section 5 somehow confers on the Commission the authority to set rates with respect to the electricity market generally, such a reading impermissibly would render meaningless the PSL's more specific authorizing sections, including Sections 66(1) and 66(5), which already authorize the Commission to set the utilities' rates (and not those of the ESCOs). Estate of Allen v. Colgan, 190 A.D.2d 939, 940 (3d Dep't 1993) ("It is a well-settled principle of statutory construction that statutes must be construed in such a manner as to give meaning and effect to all their provisions and that a construction of one provision of a statute which would cancel or render another portion of a statute meaningless is impermissible.")

Any reliance on Article 1 also impermissibly contradicts the more specific and relevant provisions of the PSL. For example, Article 2 (which does address ESCOs) delineates the scope of the Commission's authority over them and plainly does not authorize the Commission to set ESCOs' rates; Article 4 § 66(5) (which does address electrical rate-setting) limits the Commission ratemaking authority to electrical companies – and not ESCOs – as the Commission itself concedes. See PSL Art. 2; PSL Art. 4 § 66(5); Cyrulnik Aff. Ex. C at 34. Thus, the Court should reject any contention that the general charge in Art. 1 § 5 provides the Commission rate-setting authority, where: (i) the PSL's specific provisions exclude ESCOs from being subject to any such authority; and (ii) the Commission already has conceded the same. See People v.

Mobil Oil Corp., 48 N.Y.2d 192, 200 (N.Y. 1979) (holding that "a general provision of a statute applies only where a particular provision does not").

Accordingly, this Court should invalidate the Order as void because the Commission exceeded its jurisdiction in issuing it. See Tze Chun Liao, 74 N.Y.2d at 510 (annulling agency's action where it was without statutory authorization to so act).

B. The Order Is Void as Baseless, Arbitrary, and in Violation of Law

Even assuming the Commission acted within the scope of its jurisdiction in issuing the Order (it did not), the Order nonetheless is void because it is baseless, arbitrary, and violates procedural laws. Under CPLR § 7803, agency actions may be challenged as being "in violation of lawful procedure," "affected by an error of law," or as "arbitrary and capricious." An agency decision "will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious." N.Y. State Ass'n of Cntys. v. Axelrod, 78 N.Y.2d 158, 166 (N.Y. 1991). "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." Id. Applying these standards, agency actions are void unless they "bear some rational relationship to the goals sought to be achieved, and [are] otherwise [] factually based." Kelly v. Kaladjan, 155 Misc. 2d 652, 655 (Sup. Ct. 1992).

When assessing whether the Order bears some rational relationship to the goals sought to be achieved and is otherwise factually based, this Court is limited to the grounds articulated by the Commission. "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 758 (1991) (quoted source omitted); see also Gabriele v. Metro. Suburban Bus Auth., 239 A.D.2d 575, 577 (2d Dep't

1997) ("[J]udicial review of an administrative determination is limited to the ground invoked by the agency").

The Order here is void because: (i) the Rate Ceiling is economically unjustifiable and bears no meaningful relationship to the Order's stated purpose; (ii) the Rate Ceiling is not based on any reasonable factual record; and (iii) the Commission breached requirements under the New York State Administrative Procedure Act in issuing the Order.

1. <u>The Rate Ceiling's Terms Are Unjustifiable and Do Not Support the Order's Purported Purpose</u>

The Rate Ceiling imposes economically unreasonable terms that bear no relationship to the Order's purpose. <u>See</u> Ver. Pet. ¶¶ 51-56. For instance, the Order provides that the Commission "requires utilities to flow the energy commodity to end-users at cost" <u>but</u>, at the same time, it requires Petitioners and other ESCOs to guarantee customers that they will meet or beat the rate charged by the local utility. Ver. Pet. ¶ 52. By requiring Petitioners and other ESCOs to sell energy at or less than the local utilities' cost, the Order <u>by definition</u> requires Petitioners and other ESCOs <u>to operate at a loss</u>. <u>Id.</u>; Cyrulnik Aff. Exs. Q ¶¶ 17-19, R ¶¶ 17-20, S ¶¶ 16-18; T ¶¶ 17-19, U ¶¶ 17-20, V ¶¶ 18-29. That is an absurd rule in any context, but even more so here where the Commission itself invited and encouraged ESCOs and their shareholders to invest and participate in the New York energy market over the last two decades. Ver. Pet. ¶¶ 24-25; Cyrulnik Aff. Exs. Q-V ¶ 3. Indeed, by the Order's terms, the Commission purports to "restructure" the New York energy market from one <u>inviting</u> competition via ESCO participation to one without competition, <u>in only ten days</u>. Cyrulnik Aff. Ex. A at 10.

The Order also assumes that local utilities charge market rates. They do not. There is little or no correlation between what the local utility charges and market rates. Moreover, there is virtually no clarity or transparency into the local utility's actual cost of the electric and gas commodities they purchase, as the local utility can bury part of their costs in a host of line items that appear on customer bills, including in the delivery portion of those bills, for which there is no itemization or explanation. Ver. Pet. ¶ 53; Cyrulnik Aff. Ex. U ¶ 15.

The practical effect of the Order is to require Petitioners to immediately terminate agreements with customers because Petitioners will not be in a position to guarantee savings relative to the local utility supply rates. Ver. Pet. ¶¶ 37-38. Once Petitioners and other ESCOs terminate customers, those customers will forcibly be migrated to local utilities. Id. The Order thus will result in a transfer of tens of thousands of customers from Petitioners and other ESCOs to their competitors – the local utility companies – which these customers previously had elected to abandon. Id.; Cyrulnik Aff. Exs. Q ¶ 19, R ¶ 19-20, S ¶ 18, T ¶ 19, U ¶ 19, V ¶ 19. In short, the Order fails to fulfill its purported purpose of improving competition for the benefit of customers and, instead, undercuts the ability of Petitioners and other ESCOs to compete with the local utilities. See Cyrulnik Aff. Ex. A at 2, 13. On that basis alone, the Order should be voided. See Long Island Lighting Co. v. Public Ser. Comm'n of State of N.Y., 199 A.D.2d 831, 833 (3d Dep't) (agency determination invalid where it would have subjected party to unreasonable economic conditions); Cellular Tel. Co. v. Rosenberg, 82 N.Y.2d 364, 374 (N.Y. 1993) (agency decision invalid where the record shows no rational basis in support thereof); Coates v. Planning Bd. Of Inc. Vill. Of Bayville, 58 N.Y.2d 800 (1983) (agency determination invalid where "there [wa]s no evidence in the record showing that the [agency action] was necessary" to promote the action's stated purpose and in fact contradicted that purpose); Castle Props. Co. v. Ackerson, 163 A.D.2d 785, 786-87 (3d Dep't 1990) (agency action invalid as arbitrary where, beyond speculation, record did not show that means employed furthered action's purpose).

The negative impact the Order will have on competition will harm not only Petitioners but also consumers. The Order will deprive consumers of a competitive energy market featuring more competitively priced energy, better customer service, and substantially more and varied choice than what consumers experience from the monopoly-protected and price-regulated local utility company. Ver. Pet. ¶ 30. Indeed, customers will lose the unique benefits that Petitioners and other ESCOs have offered them, which cannot be sustained if the Order takes effect and ESCOs are forced to operate at a loss.

Customers, for example, will not be able to enter into long-term fixed rate contracts for their electricity or gas supply needs because only ESCOs <u>such as Petitioners can offer</u> consumers those products. Ver. Pet. ¶ 31. Fixed rate contracts can provide consumers dramatic savings as compared with local utilities. <u>Id.</u> ¶¶ 30-33. As of March 1, 2016, for instance, a customer in Middletown, New York, would be able to enter into a 12-month fixed rate contract with various ESCOs for as low as 6.95¢. <u>Id.</u> By contrast, for the prior 12-month period, local utilities charged between 6.3¢and 14.96¢ per kilowatt hour. <u>Id.</u> The effect of the Order thus will be to deprive customers of fixed-rate options, which can afford customers substantial savings.

As another example, ESCOs provide customers with significant value-add benefits that utilities do not. <u>Id.</u> ¶¶ 31-36. The Order's requirement that ESCOs either drop customers or operate at a loss will cause customers to lose these value-added benefits including: (i) loyalty discounts, which can provide consumers credits of as much as $100 off their energy costs; and (ii) other benefits such as reward points entitling customers to gift cards, electronics, appliances, and other products. <u>Id.</u> These are bargained-for contractual benefits for which Petitioners' customers and other ESCO customers have paid consideration and that utilities do not offer. Thus, by crippling Petitioners' ability to compete, the Order is harming customers – not helping them – further underscoring the extent to which the Order is irrational, arbitrary, and capricious. Id.

2. The Rate Ceiling Is Not Justified by Any Factual Record and Is Unintelligible

The Order's imposition of the Rate Ceiling is invalid because the Commission has failed to identify data that supports its conclusions. The Commission's stated justification for this precipitous action is an increase in customer complaints to the Department of Public Services, which by its own admission, in 2015, comprised less than 1,300 complaints relating to dissatisfaction with energy charges, 80% of which were resolved by the ESCO within 14 days. See Cyrulnik Aff. Ex. A at 12-13; Ver. Pet. ¶ 4. Put in context, 1,300 complaints reflects a complaint rate of one-half of one-tenth of one-percent (0.05%) of New York ESCO customers. Ver. Pet. ¶ 4. Moreover, for the vast majority of ESCOs, the number of complaints has actually decreased in the past year. Id. The Commission's own statistics show that, if you include all but one ESCO (which is not a Petitioner here), the number of complaints in 2015 actually decreased by more than 11%, as compared with complaints lodged the prior year. Id. That minimal number of rate-related complaints does not justify the Rate Ceiling, which forces ESCOs to operate at a loss and undercuts their ability to compete.[2]

Indeed, underscoring the absence of factual support for the Rate Ceiling, the Commission did not cite in its Order a single analysis of how it would affect consumers or the New York energy market. The Commission apparently assumed that the Rate Ceiling would simply result in favorable conditions for consumers. As discussed above, that is not the case, and the Rate Ceiling cannot stand where it lacks factual justification. See Coates, 58 N.Y.2d at 802; Save the

[2] Consistent with the decreasing number of 2015 complaints as a result of increased enforcement, a rational response to customer complaints would be to continue to ramp up enforcement rather than rendering an entire industry non-competitive.

Pine Bush, Inc. v. Planning Bd. of the City of Albany, 130 A.D.2d 1, 4 (1987) (agency action invalid where it failed to offer any supportive "empirical data or other satisfactory documentation"); Fitzner v. Beach, 174 A.D.2d 798, 799 (3d Dep't 1991) (finding mere consumer complaints insufficient to justify agency action); Nat'l Fuel Gas Distrib. Corp. v. Pub. Svc. Comm'n, 154 A.D.2d 31, 35-36 (3d Dep't 1990) (agency rate determination invalid where it lacked a "sound rationale"); Application of Long Island Lighting Co., 211 N.Y.S.2d 576, 579 (N.Y. Sup. Ct. 1961) (agency determination arbitrary and capricious, including because "[t]he record d[id] not substantiate" the agency's "conclusion[s].")

The Commission's failure, moreover, to engage in a meaningful fact-finding process is reflected in the Order's ill-defined terms. For example, the Order says repeatedly that, as a condition of continued customer enrollment, ESCOs must guarantee "that the customer will pay no more than" if she were a full-service utility customer. Cyrulnik Aff. Ex. A at 14-15, 21. Elsewhere the Order requires ESCOs to ensure "guaranteed cost savings" for customers. Id. at 5, 13, 16, 21. The Order thus simultaneously permits Petitioners and other ESCOs to meet utility rates while requiring them to beat those same rates. That is nonsensical. In addition, confirming the Commission's failure to promulgate a sensible Order, it has issued no less than three guidance documents (each of which is inconsistent with the other) in the six days preceding the March 4 certification deadline. See Cyrulnik Aff. Exs. M, O, P. At bottom, the Commission employed a plainly insufficient and irrational process in developing the Order, which resulted in an Order that undercuts its own purported purpose and which the Commission's staff does not even understand.[3] On these facts, the Order is invalid.

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[3] Consistent with the vagueness that plagues the Order, Commission staff repeatedly punted when asked routine questions about the Order's requirements during a February 29, 2016,

C. The Commission Violated SAPA in Issuing the Order

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

An agency action is considered to be a "rule" subject to SAPA where it is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers." Schwartfigure v. Hartnett, 83 N.Y.2d 296, 301-02 (1994) ("Respondent's 50% set-off policy for nonwillful overpayments is a rigid, numerical policy invariably applied across-the-board to all claimants without regard to individualized circumstances or mitigating factors, and as such falls plainly within the definition of a 'rule' for State Administrative Procedure Act purposes."); see also Alca Indus. v. Delaney, 92 N.Y.2d 775, 778 (1999) (holding rulemaking to be "any kind of legislative

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question-and-answer session, explaining that they would have to figure out answers during the 60-day period even though that period postdates the March 4 compliance certification deadline. Cyrulnik Aff. ¶ 5; id. Ex. V ¶¶ 22, 24. The Commission is thus asking ESCOs to certify that they will comply with an Order that the Commission does not yet understand and cannot fully explain.

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

or quasi-legislative norm or procedure which establishes a pattern or course of conduct for the future" as opposed to "ad hoc decision making based on individual facts and circumstances"). Here, the Order makes industry-wide changes to a regulatory regime and is therefore subject to SAPA. Energy Ass'n of New York State v. Pub. Serv. Comm'n of State of N.Y., 653 N.Y.S.2d 502, 516 (Sup. Ct. 1996) ("when the Commission approves or rejects a plan, or orders restructuring in a certain manner, it will be promulgating a rule and must take appropriate action under SAPA").

The Commission purports to base its Order on the Notice of Proposed Rulemaking published on August 12, 2015 [SAPA No. 15-M-0127SP1] (Cyrulnik Aff. Ex. A at 8), but those notices underscore Respondent's failure to comply with their notice requirements. The Commission's referenced notices decidedly did not put Petitioners on notice of the requirements now being imposed because the requirements at issue were not part of those notices. The Commission published two Notices of Proposed Rule Making in the August 12, 2015, New York State Register (the "August 12 Notices"). Cyrulnik Aff. Ex. H. The first of the two August 12 Notices is entitled "Recommendations to Accelerate Switching Between Utility Service and an ESCO," the purpose of which was "[t]o consider recommendations to accelerate switching between utility service and an ESCO" as outlined in a report filed by Department of Public Service Staff on July 24, 2015, in Case 12-M-0476 (the "Switching Report"). Id., at 10; see also Cyrulnik Aff. Ex. F. The Switching Report does not even discuss or outline in any way the substance of the Order in question; rather, it recommends that "No changes be made at this time to require off-cycle switching" and that interested parties should submit a report by April 1, 2016. Cyrulnik Aff. Ex. F at 21. Such recommendations cannot be construed to provide notice of a forthcoming Rate Ceiling and overhaul of the entire market.

The second notice from the August 12, 2015, New York State Register related to ESCOs is entitled "Amendments to the Uniform Business Practices of ESCOs," the purpose of which was "[t]o consider amendments to the Uniform Business Practices of ESCOs" as recommended in a report filed by Department of Public Service Staff on July 28, 2015 in case 15-M-0127. Cyrulnik Aff. Ex. H at 12; see also Ex. G (the "UPB Report"). Although the UPB Report generally discusses issues of consumer protection addressed in the February 23 Order, it makes no mention of the industry-wide enrollment or renewal restrictions that were included in the Order. The UPB Report contains recommendations concerning the applications that must be submitted by would-be and existing ESCOs, but does not address the possibility of a Rate Ceiling or sea change in the way in which Petitioners and other ESCOs will have to conduct their business. Cyrulnik Aff. Ex. G at 10-11.

As is plainly stated in the August 12 Notices, the Commission's purpose was to consider certain recommendations or proposed amendments filed by Commission staff, but neither of the August 12 Notices, nor the underlying Reports, put Petitioners on any notice of the contents of the Commission's February 23 Order regarding the enrollment or renewal of residential or mass market customers under economically indefensible terms that guarantee savings. Because the February 23 Order was so substantially different from the August 12 Notices and exceeds the scope of SAPA § 102(2)(a)(ii), the Commission should have submitted proposed rule-making for notice and comment in accordance with SAPA prior to imposing any compliance obligations on Petitioners and other ESCOs.

That the Commission issued a February 23, 2016, Notice Seeking Comments on the Order (the "February 23 Notice"), requesting ongoing comments and collaboration on the Order's contents further underscores the fact that the Commission failed to give Petitioners notice, failed to comply with SAPA, and acted haphazardly in issuing the Order. Cyrulnik Aff. Ex. D. The February 23 Notice contains requests for comment that go to the heart of the Ordering Clauses at the center of Petitioners' request for relief, namely "[w]hether prospective ESCO sales to mass market customers, including renewal of expiring contracts, should be limited to products that guarantee savings." Id. at 1. The February 23 Notice requests that initial comments be submitted by March 14, 2016, and March 28, 2016 (id. at 2), but the Order requires that Petitioners take various actions as early as March 4, 2016, prior to the close of the new notice and comment period. Cyrulnik Aff. Ex. A at 21. That the Commission is still seeking comments on the Order further demonstrates that the Commission failed to follow the proper rule-making process here.

Any "rule" that the Commission purports to have promulgated is thus null and void based on its arbitrary and capricious rulemaking. Med. Soc. of State of N.Y., Inc. v. Levin, 712 N.Y.S.2d 745, 753 (Sup. Ct. 2000) aff'd sub nom. Med. Soc'y of State of New York, Inc. v. Levin, 280 A.D.2d 309 (1st Dep't 2001) ("New Regulations are invalid, null and void and, as a matter of law, their promulgation by respondents was arbitrary, capricious and an abuse of discretion by reason of respondents' failure to substantially comply with the clear mandates of the State Administrative Procedure Act.") That is particularly true here, where the improperly noticed rules represent a sweeping set of changes that threaten to destroy hundreds of businesses and affect millions of New York residents.

D. The Commission's Actions Are Unconstitutional

1. The Commission's Breach of Its Statutory Obligations Deprives Petitioners and Other ESCOs of Due Process

In light of its substantive and procedural deficiencies, the Order also violates Petitioners' due process rights. Due process requires that, before being forced to forfeit a property interest, parties must be provided with "notice and the opportunity to be heard." Spinelli v. City of New York, 579 F.3d 160. Any deprivation of a property interest, "at a minimum," must "be preceded by notice and opportunity for hearing." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). This "right to prior notice" is "central to the Constitution's command of due process." United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993).[5]

As detailed above (Parts I(A), (B)(1)-(2), and (C)), the Commission has deprived Petitioners of due process by (i) exceeding its authority; (ii) implementing the unreasonable Rate Ceiling that neither bears any relationship to the Order's purported purpose nor has any factual justification; and (iii) issuing the Order in breach of SAPA's procedural requirements. Petitioners also have a significant property interest in operating in New York: They have invested substantial funds in the state, creating revenue streams, brand recognition, and customer goodwill. Similarly, they have a property interest in maintaining their ongoing contractual relationships with their customers who – under the status quo operating conditions – overwhelmingly renew their ongoing contracts with Petitioners. Cyrulnik Aff. Exs. Q ¶¶ 3, 19, 21, 24; R ¶¶ 3,19, 22, 25; S ¶¶ 3, 18, 20, 23; T ¶¶ 3, 19, 21; U ¶¶ 3-4, 17, 27; V ¶¶ 3, 20, 31, 34. Petitioners reasonably expect to maintain these property interests where New York State (i) actively encouraged and solicited the ESCOs' investment and participation in the New York energy market; and (ii) instituted a statutory regime to accommodate the ESCOs' participation in the market free of State-controlled rates. Id. The Order thus violates Petitioners' due process rights where it deprives them of their property interests without meaningful notice and on unreasonable and unjustified terms.

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[5] Petitioners assert the same claim under the New York Constitution. See N.Y. Const. Art. I § 6.

2. The Order Constitutes an Unconstitutional Taking under the U.S. Constitution

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

As noted above (Part I(B)(1)-(2), (D)), Petitioners have an investment-backed property interest in operating in New York and in continued contractual relationships with their customers and that expectation is reasonable where New York State invited and facilitated the ESCOs' participation in the New York energy market. The Order substantially impairs the Petitioners' interests without just compensation because it forces Petitioners to operate at a loss, undermines their ability to compete, and requires them to take immediate steps to terminate agreements with tens of thousands of customers who will then become utility customers.

3. The Order Violates the Contract Clause of the U.S. Constitution

The Order violates the Contract Clause of the United States Constitution because it unreasonably impairs Petitioners' contracts with their customers.

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

The Order substantially interferes with Petitioners' contracts with their customers. As discussed above (Part (B)(1)-(2)), the Order will force Petitioners and other ESCOs to take steps to terminate customer agreements as early as tomorrow. That substantially will interfere with the contracting parties' expectations, including because Petitioners will be forced to terminate long-term rewards programs, pursuant to which both Petitioners and customers expected to benefit. Further, for the reasons discussed supra Parts I(B)(1)-(2), the Order does not reasonably pursue a legitimate public purpose. It is thus unconstitutional and should be invalidated.

4. The Order Violates the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment protects "every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[6] Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citations omitted). The Equal Protection Clause "is essentially a direction" to state actors "that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Similarly, the New York State Constitution provides that "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. Const. Art. I, § 11. "An agency of the State denies equal protection when it treats persons similarly situated differently under the law, and this difference may be created by the grant of a preference as well as by the imposition of a burden." Abrams v. Bronstein, 33 N.Y.2d 488, 492 (1974).

The New York and U.S. Constitutions require the state to show that the heavier burdens it imposes on Petitioners and other ESCOs relative to the public utilities rest on a "reasonably conceivable state of facts that could provide a rational basis for the classification." Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014) (quoting FCC v. Beach Commc'n, Inc., 508 U.S. 307, 313 (1993)). Arbitrary distinctions will not pass muster; indeed, courts have held that irrational economic regulations violate the constitutional entitlement to equal protection. See St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) (affirming that there was no rational basis for a challenged rule where "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."); Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (holding that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose"). "[T]he [government's]

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

chosen means must rationally relate to the state interests it articulates." St. Joseph Abbey, 712 F.3d at 223. "[M]ere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis." Frost v. Corp. Comm'n of State of Okla., 278 U.S. 515, 522-23 (1929).

As discussed above (Part I(B)(1)-(2)), there is no legitimate policy basis to implement the Rate Ceiling distinguishing between utilities on the one hand and Petitioners on the other, where that distinction does not further its purported policy justification and where the distinction in fact leads to preferential treatment for the utilities and undermines the Order's stated purpose.

II. PETITIONERS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Petitioners will suffer serious, immediate and irreparable harm in the absence of a temporary restraining order and injunctive relief. Irreparable harm is present where no adequate remedy at law exists. Data Track Account Servs., Inc. v. Lee, 291 A.D.2d 827, 8727 (4th Dep't 2002); Bisca v. Bisca, 437 N.Y.S.2d 258, 261 (Sup. Ct. 1981) (holding irreparable injuries are those that "cannot be repaired, restored, or adequately compensated in money, or where the compensation cannot be safely measured"). Petitioners would suffer immediate and irreparable harms in the absence of injunctive relief for at least four reasons. Cyrulnik Aff. Exs. Q ¶¶ 20-25, R ¶¶ 21-26, S ¶¶ 19-24, T ¶¶ 20-25, U ¶¶ 21-28, V ¶¶ 30-35.

First, under the terms of the Order, Petitioners will be required to immediately terminate agreements with customers, which effectively will require Petitioners to halt operations on a significant portion of their business. That, in turn, will harm New York consumers and Petitioners' employees and cost the State of New York millions of dollars in lost revenue. Petitioners, like other ESCOs, compete in the marketplace by purchasing or selling hedging contracts, promising value-added services, or entering into fixed-term contracts. The evaluation and development of compliant products, logistics of supply procurement, and requisite training that would be associated with the products mandated by the Order all require considerable time (i.e. at least a period of months) for implementation, which makes compliance with the Order while remaining operational impossible or nearly so. Likewise, forcing Petitioners' chief executive officers to provide a certification of intent to comply with the Order by tomorrow (March 4) as required by Ordering Clause No. 3 does nothing to help Petitioners or other ESCOs remain operational. Without the ability to provide a certification and the existence of compliant products, Petitioners' customers will forcibly be returned to the local utility at the end of their current billing cycle – without regard to the fact that those customers elected to purchase energy from Petitioners and other ESCOs.

Second, the effect of the Order will be that Petitioners will permanently lose customers, goodwill, and their ability to operate, each of which are independent bases for a finding of irreparable harm. See Second on Second Cage, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 272-73 (1st Dep't 2009) ("We reject HST's argument that the loss of the goodwill of a viable, ongoing business does not constitute irreparable harm warranting the grant of preliminary injunctive relief."); Confidential Brokerage Svcs., Inc. v. Confidential Planning Corp., 85 A.D.3d 1268, 1269 (3d Dep't 2011) ("The loss of clients and goodwill could create irreparable harm."); Alside Div. Of Associated Materials Inc. v. Leclair, 295 A.D.2d 873, 874 (3d Dep't 2002) (finding irreparable harm where "plaintiff will not only lose business, but will also suffer a dilution of the good will it has developed with its customers. Such a loss of customer good will can constitute irreparable harm for preliminary injunction purposes."); Quinones v. Board of Managers of Regalwalk Condominium I, 242 A.D.2d 52, 57 (2d Dep't 1998) ("The plaintiffs have also established that they would suffer irreparable harm in the absence of the injunction, in that they would be forced to close down their day care operation entirely and would likely permanently lose most, if not all, of their established clients."); Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc., 764 N.Y.S.2d 1, 3 (1st Dep't 2003) (holding harm irreparable where customer goodwill and creditworthiness threatened).

Third, an injury is irreparable where, as here, the Plaintiffs' losses are "impossible, or very difficult, to quantify." Willis of New York, Inc. v. DeFelice, 750 N.Y.S.2d 39, 42 (1st Dep't 2002); see also Gundermann & Gundermann Ins. v. Brassill, 46 A.D.3d 615, 617 (2d Dep't 2007) ("Lost goodwill and lost opportunity are damages which are difficult to quantify."); Jacob H. Rottkamp & Son, Inc. v. Wulforst Farms, LLC, 17 Misc. 3d 382, 388 (Sup. Ct. 2007) ("Damage to business reputation and good will can be difficult or impossible to quantify and demonstrates irreparable harm, as opposed to injury that can be compensated with damages"); IXIS N. Am., Inc. v. Solow Bldg. Co. II, L.L.C, No. 102059/07, 2007 WL 2274426, at *3 (Sup. Ct. Aug. 9, 2007) (granting plaintiff's motion for preliminary injunction where damages "would be extremely difficult to calculate and . . . would be severely detrimental to plaintiff's business").

Finally, "when alleged deprivations of constitutional rights are involved," as outlined in Section I.D, above, "no further showing of irreparable injury is necessary." Cmty. Charter Sch. v Bd. of Regents of the Univ. of N.Y., 2013 WL 10185566, at *17 (Sup. Ct. June 18, 2013) (citations omitted).

III. THE BALANCE OF EQUITIES FAVORS INJUNCTIVE RELIEF

When evaluating the balance of the equities, a court need only "look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." Ma v. Lien, 604 N.Y.S.2d 84, 87 (1st Dep't 1993). Here, the prejudice to Petitioners far outweighs any possible prejudice claimed by the Commission. Petitioners will suffer substantial and irreparable harm in the absence of the requested injunctive relief through the losses associated with terminating its relationships with existing customers and being forced to turn away prospective new customers. (See supra, Part II.) Contrary to the serious harm posed to Petitioners in the absence of injunctive relief, allowing Petitioners to operate pending the resolution of this dispute poses no harm to the Commission, nor does it pose a threat to public health or safety.

Where (as here) Petitioners seek only to preserve the status quo, the balance of the equities tilts in their favor because, unless a TRO is issued, the Defendant "will be free to take additional actions which may cause [Plaintiffs] further irreparable injury." CanWest, 9 Misc. 3d at 872; see also Green Harbour Homeowners' Ass'n, Inc. v. Ermiger, 67 A.D.3d 1116, 1117 (3d Dep't 2009) ("As there is no proof of prejudice and the injunction preserves the status quo, the equities balance in favor of plaintiff."); Masjid Usman, 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.") (citations omitted); State v. City of New York, 713 N.Y.S.2d 360, 361 (2d Dep't 2000) ("Although the State may not ultimately prevail on the merits, the equities lie in favor of preserving the status quo while the legal issues are determined in a deliberate and judicious manner.") Because allowing Petitioners to continue to operate will preserve the status quo pending a final judgment, injunctive relief is appropriate and should be granted.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court preserve the status quo by entering an order staying enforcement of Ordering Clauses 1-3 of the Order and temporarily restraining and preliminarily enjoining Respondent from enforcing Ordering Clauses 1-3 of the Order, until Petitioners' claims can be resolved on the merits. The Court should further order expedited discovery here and grant Plaintiffs' Article 78 Petition.

Dated: March 3, 2016
Armonk, New York

By: ______________________

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