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NEW YORK SUPREME COURT
APPELLATE DIVISION—THIRD DEPARTMENT
A.D. DOCKET NO. ____

NATIONAL ENERGY MARKETERS ASSOCIATION; BLUEROCK ENERGY, INC., RESIDENTS ENERGY, LLC; AND VERDE ENERGY USA NEW YORK, LLC,

Petitioners-Appellants,

—against—

NEW YORK STATE PUBLIC SERVICE COMMISSION

Respondents-Appellees.

APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A STAY PENDING APPEAL

Dated: August 8, 2017

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PRELIMINARY STATEMENT

Appellants seek a stay of enforcement of an administrative action by the New York Public Service Commission (the "Commission" or the "PSC") that will force Appellants/Petitioners and hundreds of other energy services companies ("ESCOs") immediately to de-enroll and cease to provide service to all of their low-income customers simply based on those customers' financial status (the "Moratorium Orders" or "Orders"). ESCOs have been providing services to such New York customers (along with millions of other New Yorkers) – each of whom voluntarily elected to leave the local utility service and purchase their energy supply needs from the ESCO – for two decades. The Orders would immediately change that status quo on the basis of unfounded suppositions without any hearing or fact finding; on the basis of an impermissible after-the-fact papering of the record that is **currently in the process of being developed** in an ongoing administrative proceeding that commenced **after** the Orders were issued; and in violation of multiple constitutional and statutory rights. The administrative process here was completely backwards, as the Orders assume a conclusion before the (ongoing) evidentiary gathering and hearing process even commenced.

The Orders have been stayed multiple times already, including by the Commission itself for two years; by the Supreme Court (which stayed the Orders for months); and then again by the Commission itself pending resolution of the

claims Appellants had asserted. In fact, the Commission stayed the Order again just last month – but this time only with respect to selected ESCOs that are being permitted to continue business as usual for an indefinite period of time.

Appellants meet the standard for a stay: The merits of the appeal favor Appellants, and absent a stay, they will clearly suffer irreparable harm. With respect to the merits of the appeal, the Supreme Court's decision permits classically improper and backwards administrative agency rulemaking. This Court should be able to meaningfully review those serious errors before permitting the Commission to change the decades-old status quo – particularly where permitting the Orders to take effect will immediately and irreparably deprive ESCOs from servicing an entire demographic of customers each of whom voluntarily elected to switch to ESCO service, and in whom the ESCOS already invested. Causing Appellants to drop all of their low-income customers effectively ensures that the impact of the Commission's improper Orders will be irreversible, and undermines Appellants' opportunity for meaningful review of those Orders by this Court.

The decision on appeal, for example, (i) upholds an agency action as to which it is undisputed that, in blatant violation of SAPA, **there was no hearing or fact-finding** – or any meaningful opportunity to present evidence in any form for that matter; (ii) relies on summary, incomprehensible "data" from the ESCOs' competitors, which was not even in the original administrative record (because the

Commission obtained it *ex parte* and after the fact **during the litigation** challenging the Orders), and with respect to which data an **ongoing** administrative proceeding was commenced **after** the Orders were issued to develop, analyze, test and present the real data[1]; and (iii) relied on that data even though it suffers from deep flaws that the Commission itself has recognized.

With respect to irreparable harm, there was and remains no doubt that Appellants faced (and face) irreparable harm from permitting the Orders immediately to take effect and change the status quo, and the Supreme Court has granted multiple TROs on that basis. They will prevent Appellants from servicing a significant portion of the market, resulting in the loss of unquantifiable goodwill, market share, and customers, and forcing all low-income New Yorkers to purchase their energy from a single utility, depriving them of the right to choose their energy provider and products. By contrast, the Commission would not suffer any harm from a stay, consistent with the many stays that have already been imposed and self-imposed with respect to implementation of these Orders. Against this backdrop, the balance of equities strongly weighs in favor of the issuance of a stay simply to maintain the status quo. Appellants would move forward with perfecting their appeal promptly so that the Court can review the Supreme Court's decision

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[1] Initial testimony in that administrative proceeding is scheduled to be presented later this month, and hearings are scheduled for later this year.

and determine for itself this issue of critical importance to millions of New Yorkers.

SUMMARY OF RELEVANT FACTS

A. The ESCO Market

For two decades, New York has allowed and encouraged a free market for the supply of gas and electricity to all residents. As the Commission itself recognized, ESCOs provide New York residents with freedom of choice in purchasing their gas and electricity and serve as a counterbalance to prevent the monopolistic local utilities from exercising undue market power. The increased competition benefits New York residents with increased customer choice and better service. ESCOs also provide New York residents with the ability to enter into contracts to purchase renewably sourced energy, something that is important to many New Yorkers, or long-term, fixed-rate contracts – both of which products local utilities do not and cannot offer. These choices, particularly the ability to lock in long-term, low-cost rates via fixed-rate contracts, are of particular importance to low-income customers (who are often on fixed incomes) serviced by ESCOs.

B. The Commission Improperly Adopts, Re-Adopts, and Re-Adopts Again the Moratorium

The proceeding below challenged three successive Commission orders – the First Moratorium Order (the July Order), the Second Moratorium Order (the

September "Emergency" Order), and the Third Moratorium Order (the December Order) – all purporting to prohibit ESCOs from servicing low-income customers who had elected to leave the local utility and purchase from ESCOs the gas and electricity they needed for their homes. (As noted, the orders are collectively referred to as the "Moratorium Orders" or the "Orders"; see Exs. 2 & 3, and Ex. A to Ex. 1 of the August 8, 2017 Affirmation of George F. Carpinello ("Carpinello Aff.").

On July 15, 2016, the Commission entered an order titled: *Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies* (the "July Order"). (Ex. 2 to Carpinello Aff.) That Order imposed a "moratorium" on ESCO enrollments and renewals of low-income customers, *i.e.*, customers who participate in low-income energy assistance programs. Specifically, the July Order required local utility companies to place a block on low-income customer accounts so that they could no longer enroll with an ESCO. The July Order also required utilities to provide a list of low-income customers to ESCOs and for the ESCOs to forcibly de-enroll the low-income customers whom they currently service – irrespective of whether the low-income customers wanted to do so.

Following entry of the July Order, three petitions for rehearing were filed before the Commission challenging the validity of the July Order on various constitutional and jurisdictional bases. Appellant National Energy Marketers

Association ("NEM") challenged the July Order for, among other failures, failing to comply with the notice and comment requirements of SAPA. (See Ex. 3 to Carpinello Aff.)

On September 15, 2016, the Commission ruled on those petitions for rehearing by issuing an *Order on Rehearing and Providing Clarification* with an effective date of September 19, 2016 (the "Emergency Order" (Ex. 3 to Carpinello Aff.). In the Emergency Order, the Commission recognized the SAPA challenges but, in what can only be described as a "gotcha," the Commission nevertheless issued an order that reenacted the July Order "on an emergency basis pursuant to SAPA §202(6)" to avoid the SAPA requirements. (Id. at 6). The Commission's sole basis for its emergency action was its unsupported contention that "a general welfare emergency exists" and its veiled reference to the Commission's concern that this Court's July 22, 2016, Decision and Order invalidating the Commission's February 23, 2016, Reset Order was "frustrating the Commission's efforts to reform retail energy markets in the public interest." (Id.)

On September 27, 2016, Appellants filed a Verified Article 78 Petition and Complaint in Albany County Supreme Court. On September 28, 2016, following oral argument, the Court issued a temporary restraining order expressly prohibiting

the Commission from taking "any action" in furtherance of its proposed "low-income moratorium." (See Ex. 5 to Carpinello Aff.[2])

On October 5, 2016, the Commission published in the State Register a Notice of "Emergency/Proposed Rule Making" (the "Notice"). The Notice states that the "Commission, on September 15, 2016 adopted an order approving a temporary moratorium on new enrollments by energy service companies (ESCOs) of residential electricity and/or natural gas customers who are utility low-income assistance program participants (APPs); and requirements that ESCOs de-enroll all APP customers and move them to utility full service." (See Ex. E to Ex. 1 of Carpinello Aff. (First Amended Ver. Pet. (Notice of Rulemaking).) The Notice purported to double as both (i) support for the Commission's "emergency"

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[2] The TRO specifically provided:

> [P]ursuant to CPLR §§ 6301, 6311, 6313, and Article 78, pending a hearing and determination of this application, enforcement of the Moratorium Order is stayed, and Respondent, its agents, employees, successors, assigns and all persons acting in concert with it or on its behalf, or acting pursuant to the Moratorium Orders . . . are hereby temporarily restrained from acting on or implementing the Moratorium Orders in any way, ordered to refrain from taking any action in furtherance of the Moratorium Orders, and ordered to provide notice of this Order to all of Respondent's agents, officers, employees, successors, assigns, and all persons acting in concert with it or on its behalf . . . . (Ex. 5 to Carpinello Aff., (September 28 TRO) at 2-3.)

rulemaking of September 15, 2016 and (ii) "a notice of proposed rulemaking." Id. But the Notice also failed to comply with SAPA in multiple ways. It did not schedule a public hearing as required by SAPA § 201(b)(i), nor was any public hearing held with respect to the proposed Rule prior to the Commission's enactment of the Third Moratorium Order on December 16, 2016.

Most fundamentally, however, the Commission did not undertake or provide for any meaningful process to cure the procedural and substantive deficiencies underlying its prior attempts to enact the Moratorium. The Commission did not conduct or notice any hearing or evidentiary process as required by SAPA; it did not hold any collaboratives with interested parties; and it did not cure the substantive deficiencies in the underlying orders.

The Notice provided 45 days for public comment. Appellant NEM submitted public comment contesting (i) the Commission's compliance with SAPA requirements; (ii) the Commission's improper reliance on a deficient evidentiary record, including its failure to collect verifiable data regarding ESCO rates, utility rates, and the different products each offer; (iii) the Commission's violations of customer privacy rights and considerations; (iv) the arbitrary and capricious nature of the Moratorium; (v) the Commission's authority to implement the Moratorium; and (vi) the constitutionality of the Moratorium.

The Commission summarily rejected NEM's comments without any meaningful review and, on December 16, 2016, it re-issued the enjoined Moratorium – for a third time – while the TRO prohibiting any action in furtherance of the Moratorium Orders was pending. The December Order substantively was identical to the one enjoined by the Supreme Court.[3]

On December 2, 2016, after publishing the Notice, the Commission noticed an extensive Evidentiary Proceeding and Hearing to address myriad problems that industry participants had identified in the "data" underlying the Orders (the "2017 Evidentiary Proceeding and Hearing"). The Commission had obtained that data *ex parte* from the local utilities – the ESCOs' competitors and primary beneficiaries of the Moratorium Orders – and **after** the action below had commenced. The 2017

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[3] The Supreme Court incorrectly concluded that the issuance of the Third Moratorium Order did not violate the TRO. The TRO prohibited the Commission from "taking any action in furtherance of the Moratorium Orders." The Supreme Court asserted that, because the July Order was displaced by the Emergency Order and the Emergency Order expired before the issuance of the Third Moratorium Order, the latter cannot have been an "action in furtherance of" either the July or Emergency Orders. That obviously and improperly exalts form over substance where the Third Moratorium Order substantively did exactly what the July and Emergency Orders did and what the TRO prohibited. Further, the Commission even specifically directed that the Third Moratorium Order be "implemented in an identical manner, and on an identical schedule, as was directed in the July Order, and clarified by the September Order, for implementation of a moratorium." (Ex. A to Ex. 1 of Carpinello Aff. (First Amended Ver. Pet.), at 19 (Third Moratorium Order). The Commission's gamesmanship in that regard sets a dangerous precedent for administrative rulemaking, and this Court should reject such tactics.)

Evidentiary Proceeding and Hearing commenced on January 26, 2017, and it is being administered by two Administrative Law Judges. By noticing that proceeding, the Commission (which has served hundreds of information requests in that proceeding) effectively has acknowledged that it does not yet possess the evidence necessary to reach any conclusions with respect to whether, in fact, ESCOs have overcharged *anyone*, in general, or low-income customers, specifically.

C. The Supreme Court's Decision

On June 30, 2017, Justice Henry Zwack issued a Decision and Order dismissing Petitioners' claims, denying discovery, and finding the Commission was not in contempt by re-issuing the enjoined Orders during the pendency of the TRO. (See Ex. 6 to Carpinello Aff.) A Notice of Appeal was filed July 11, 2017 and served on the Commission on July 12, 2017. See Id. at Ex. 7 to Carpinello Aff. As outlined below, the Supreme Court's decision was pervaded by reversible errors, including misapprehensions of fact and law.

LEGAL STANDARD

Under CPLR 5519(c), the Court may in its discretion grant a stay to maintain the *status quo* pending appeal after considering relevant factors, "including the presumptive merits of the appeal and any exigency or hardship confronting any party." The stay may be "conditioned, for example, on the prompt

prosecution of the appeal perhaps requiring that the appeal be noticed for a particular term or, depending on the calendar practice of the appellate court, for a particular day." CPLR 3319(c).

Petitioners here simply seek to preserve the longstanding status quo pending an appeal. Such a stay would prohibit "either side, absent appellate action, from enforcing the court's order." Dep't of Hous. Pres. & Dev. of City of N.Y. v. Vanway Overland Exp., 123 Misc. 2d 372, 374, 473 N.Y.S.2d 741, 743 (Civ. Ct. 1984); Oliver v. Broome Cty., 136 A.D.2d 793, 795, 523 N.Y.S.2d 253, 255 (1988).

ARGUMENT

I. ABSENT A STAY, APPELLANTS WILL BE IRREPARABLY HARMED

Appellants will suffer serious, immediate and irreparable harm in the absence of a stay pending appeal. By contrast, leaving the status quo in place (as it has been for years) to permit this Court to review the propriety of the Orders threatens no such harm, and is consistent with the fact that the Commission itself stayed its own orders for more than two years, and the Supreme Court has stayed the Orders on the basis of irreparable harm as well. In fact, the Commission recently stayed these Orders and permitted certain ESCOs to continue business as usual – but only with respect to 12 of the more than 170 ESCOs that operate in New York. (See Carpinello Aff. ¶ 7.)

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"). In the absence of injunctive relief, Appellants will suffer irreparable harm for at least three reasons.

First, if the Moratorium Orders are allowed to go into effect, Appellants will be required to immediately terminate agreements with all of their low-income customers and forcibly return them to local utility service – each such customer having elected to leave utility service and purchase energy from that ESCO. As a result, Appellants permanently will 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 "Appellant 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 Appellants 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 threatened).

Second, the Moratorium Orders will force Appellants to halt operations for an entire demographic – and likely to entire zip codes because Appellants will not know in advance whether they are marketing their services to customers whom they would have to drop. That will, in turn, force Appellants to incur losses that 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 Appellant's motion for preliminary injunction where damages "would be extremely difficult to calculate and . . . would be severely detrimental to Appellant's business"). Indeed, the Commission's recent decision to delay the Orders' application to twelve ESCOs would only exacerbate that harm, as Appellants would lose immeasurable market share to their competitors.

Third, "when alleged deprivations of constitutional rights are involved," as discussed supra Part I(F), "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).

II. THE MERITS OF THE APPEAL FAVOR APPELLANTS

A. The Supreme Court Erred by Ignoring the Multiple Ways in Which the Orders Violate SAPA

As a threshold matter, the Supreme Court erred in finding that—as a matter of law—Appellants and other stakeholders "cannot in good faith argue" that they did not have notice and an opportunity to be heard in connection with the Moratorium Orders. The Supreme Court did not even contest that the Commission failed entirely to notice or hold a single public hearing in connection with the Moratorium Orders. Instead, notwithstanding that undisputed failure, the Supreme Court found—as a matter of law—that the Commission had somehow provided

Appellants with the "requisite and ample 'opportunity to be heard in a meaningful manner at a meaningful time.'"

That finding relies on an obvious misapprehension of the law. The Supreme Court relied on Matter of Interstate Indus. Corp. v. Murphy for its assertion that the Commission was not required to fulfill the public hearing requirement of SAPA § 201(b)(i). 1 A.D.3d 751. That decision says no such thing. Instead, the court in Murphy found that SAPA did not apply at all. That court then concluded that, as a matter of constitutional law (i.e., not SAPA), the petitioner there was not entitled to a "formal trial-type hearing." There is no dispute that SAPA applies to the Orders here – indeed this Court has previously confirmed that undisputed conclusion. Retail Energy Supply Ass'n v. Pub. Serv. Comm'n of State, No. 524223, 2017 WL 3175964, at *5 (3rd Dep't July 27, 2017). The Supreme Court's conclusion that Murphy somehow absolves the Commission's duties to comply with SAPA § 201(b)(i) was thus error.

Beyond that threshold error, in deciding that Appellants had notice and an opportunity to be heard, the Supreme Court improperly relied on comment periods that predated the Order at issue, and all of the post-facto data on which it purported to rely, by years. Indeed, the Commission itself did not cite a single one of those comment periods in the December 2016 Order currently under review. Where "judicial review of an administrative determination is limited to the ground

invoked by the agency" in the order being challenged itself, the courts have consistently held that it is reversible error for the Supreme Court to rely on grounds or proceedings on which the Commission itself did not rely in its decision. Gabriele v. Metro. Suburban Bus Auth., 239 A.D.2d 575, 577 (2d Dep't 1997).

Further, as a matter of fact, the proposed rules discussed in the extraneous proceedings on which the Supreme Court relied were significantly different from the Order and therefore could not, as a matter of law, satisfy SAPA § 202(4-a). That section requires a new notice and comment period where an enacted rule constitutes a substantial revision to a previously noticed rule. None of the rules proposed during prior hearings contemplated banning all ESCO service to an entire demographic; the Order by contrast imposes precisely such a blanket ban – depriving New Yorkers of the opportunity to choose fixed-rate plans or renewable energy options just because of their income level. 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.") The status quo affords all New York residents the right to choose their energy provider and a variety of valuable programs, like

fixed-rate energy plans, free-energy consulting and consumption-saving promotional plans, and renewable energy plans. Utilities do not offer those options at all, and the Order deprives less wealthy New Yorkers from making any of those choices for themselves or their families.

On appeal, Appellants thus will show that the Supreme Court reversibly erred in concluding, as a matter of law, that the Commission satisfied its obligations under SAPA when it issued the Moratorium Orders.

B. The Supreme Court Incorrectly Found as a Matter of Law That the Moratorium Orders Had a Reasonable Basis

The Supreme Court also incorrectly found, as a matter of law, that the Commission's basis for the Moratorium Orders was reasonable.

First, in finding that the Commission acted reasonably as a matter of law in issuing the Orders, the Supreme Court erred by relying on data that the Commission presented—for the first time—in its opposition to Appellants' Motion for Preliminary Injunction (the "Post-Facto Data"). Indeed, the Post-Facto Data – which is the linchpin of the entire Order – was not even included in the original administrative record, and was simply attached to the Commission's re-issuance of the Order in December – without any meaningful opportunity for review or comment. The Commission never "adduced" the data it presented to the Supreme Court in an administrative proceeding, as required; rather, it collected it *ex parte* after issuing the first and second Moratoriums and after this action was

commenced. Even when issuing the Third Moratorium Order, moreover, the Commission never presented the data in a proceeding where it could be analyzed, challenged, or where alternative data could be gathered and considered. Having failed to adduce that data in connection with the Order, the Commission was barred from relying on it to support those orders, and the Supreme Court erred by relying on it in this action. See Kelly, 96 N.Y.2d at 39 ("Judicial review of an administrative action in a CPLR Article 78 proceeding is *limited* to the facts and record **adduced** before the agency when the determination was made.") (emphasis added); accord City of Saratoga Springs v. Zoning Bd. of Appeals of the Town of Wilton, 279 A.D.2d 756, 760 (3d Dep't 2001).

Second, the Supreme Court erred by committing the independent error of embracing the Post-Facto Data without meaningful scrutiny, failing even to address the multiple and significant flaws that Appellants had identified. Indeed, although the Supreme Court acknowledged its obligation to find "reasonable support in the record" to uphold the Commission's action, it dismissed Appellants' claims out of hand without even addressing the significant evidence they submitted showing that the Commission's purported basis for the Orders was unreasonable. The Post-Facto Data, for instance, purported to compare ESCO pricing with utility pricing but, as the Appellants showed, the data cannot be considered reliable for that purpose where:

- The utilities themselves have cautioned that their pricing data cannot be relied on to compare ESCO pricing to utility pricing;

- Any comparison based on the Post-Facto Data amounts to an apples-to-oranges comparison because that data compares the prices of totally different products;

- The Post-Facto Data does not include actual utility pricing; it includes only estimates generated by the utilities themselves (the primary beneficiaries of the Moratorium Orders) without any explanation as to how the estimates were generated[4];

- It does not include actual ESCO pricing, including because it does not reflect pricing net of discounts, rebates, and promotions;

- The data does not even include data from the appropriate period; it is cherry-picks relevant dates reflecting only 15% of the available historical pricing data; and

- It included only "summary" figures – essentially a black box that prevented Appellants from exploring the data beyond its surface.

The Supreme Court thus erred in concluding that Appellants had not refuted the propriety of the Post-Facto Data. If there were any doubt, the Commission itself recognized these problems and initiated a now months-long administrative proceeding to gather data that may actually facilitate a useful comparison. That proceeding included months of discovery (which is ongoing as this brief is being written) and is set to include testimony from industry experts, many of whom will

[4] Moreover, there is virtually no clarity or transparency into the local utility's actual cost of the electric and gas commodities they purchase, as the local utility bury part of their costs in a host of line items that appear on customer bills, including in the delivery portion of those bills, for which there is no itemization or explanation. (Ex. 1 to Carpinello Aff., at ¶¶ 88-90).

be detailing the **hundreds of millions of dollars in savings** that ESCOs have generated for New Yorkers. These significant flaws in the Post-Facto Data—on which the Order is exclusively predicated—preclude the Supreme Court's finding, as a matter of law, that the Commission's issuance of the Orders was reasonable and not arbitrary. Indeed, there is nothing reasonable, and there is everything arbitrary, about the notion of presuming evidentiary conclusions that are still in the early stages of being formulated, tested, and analyzed.

Against this backdrop, moreover, the Supreme Court (at 18) misplaced its criticism of Appellants for purportedly "fail[ing] to offer any actual alternative numbers based on the data shared with it by the utilities and the PSC." There was no alternative data adduced because there was no hearing, discovery process, or even collection or presentation of such evidence permitted. As noted, Appellants are currently gathering and preparing to present that "alternative data" through a process that the Commission commenced after the Orders were issued – in January 2017 – and is set for initial testimony at the end of this month and evidentiary hearing later this year. Appellants received the Post-Facto Data only after the Commission first issued the Moratorium Orders and Appellants were forced to challenge them in court, and, even then, the format of the Post-Facto Data prevented Appellants from auditing, testing, or otherwise identifying errors in the

data and the Commission refused to provide Appellants any related discovery.[5] Appellants were thus deprived of any meaningful opportunity to understand the data at a sub-surface level, which the Supreme Court only compounded by then refusing to provide Appellants any such discovery in this action while, in the same breath, attacking them for not providing alternative data. Further, where judicial review is limited to the administrative record, Appellants were prevented from submitting their own data to compare against the Post-Facto Data (even though, as discussed above in Part I(B), the Supreme Court erred in relying on the Post-Facto Data where it, too, was not adduced in any administrative proceeding). Dolan v. New York State Dept. of Civil Service, 304 A.D.2d 1037, 1039 (3d Dep't 2003).

Third, the Orders are predicated on a demonstrably false premise: That "taxpayer funds that provide financial assistance to utility customers" are being passed through to fund ESCO overcharges. In reality, however, the administrative record included no evidence that taxpayer funds were being given to ESCOs at all, and the evidence actually showed that no taxpayer funds are passed through to the ESCOs. The assistance funds received by low-income customers are paid directly

[5] In this regard, the Supreme Court wrongly denied Appellants' request for discovery in this action based on its assertion that "the PSC has voluntarily met every request made by NEMA." That unfounded statement finds no support in the record – which confirms that the Commission opposed a motion for discovery and did not provide Appellants any opportunity to pursue such critical information either in the administrative proceeding at issue or the litigation.

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. 9 to Carpinello Aff. (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 either. They income assistance program consists of a small percentage of the enormous profits the utilities earn from the energy delivery fees they charge New York residents, which the utilities allocate to lowering (while still maintaining the profitability of) the low-income customers' delivery charges for the utilities' delivery of energy. 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 Supreme Court ignored that the administrative record had failed to include 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). Such an obvious mismatch between the ordering clauses in an administrative order and the stated intention of the order is

grounds for invalidating the administrative action. See, e.g., National Energy Marketers Ass'n v. New York State Public Serv. Comm., 53 Misc.3d 641 (Alb. Cnty. Sup. Ct. 2016).

Fourth, the Supreme Court also ignored that the Commission did not even evaluate whether the Moratorium Orders would, in fact, have their intended effect. The Moratorium Orders purportedly were intended to secure lower energy rates for low-income customers, but neither the Commission nor the Supreme Court addressed the ample evidence showing that the Moratorium Orders would not have that effect at all. Appellants explained, for instance, that the Moratorium Orders' effect would be to eliminate competition in the market for low-income customers, thereby subjecting those customers to monopolistic utility pricing. The Commission failed, however, even to weigh whether the absence of competition resulting from the Moratorium Orders may increase prices to low-income customers, as is typical in monopolistic environments. (Indeed, concluding that a non-competitive market would have pro-consumer effects would of course contradict the Commission's longstanding position that competition in the energy market would decrease prices.)[6]

[6] Consistent with the Commission's failure to consider the Moratorium Order's likely effects, the Commission also failed to include a Regulatory Impact

Along the same lines, the Commission failed to consider whether low-income customers may suffer from the absence of ESCOs' unique product offerings.[7] ESCOs, for example, offer fixed-rate energy contracts from which low-income customers on fixed budgets may benefit. Those energy products will not be available on the market, thus depriving low-income customers of the opportunity to lock-in rates and to avoid unfavorable price fluctuations. In fact, recognizing the need for such product options, the Supreme Court erred by reasoning that "[u]tilities have always had to offer fixed rate billing – and ESCOs cannot claims that this is a unique service." That is flatly false and reflects one of several instances where the Supreme Court simply got the facts wrong. Although utilities offer fixed-rate billing, they do not offer any fixed-rate programs at all.[8] ESCOs, by contrast, offer customers the options of locking in fixed rates. That is, ESCO customers can lock-in a rate and pay the same amount every month without

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Statement, a Regulatory Flexibility Analysis, a Rural Area Flexibility Analysis, or a Job Impact Statement with its Notice of the Orders.

[7] ESCOs offer competitively priced energy, better customer service, and substantially more and varied choice than what those consumers experience from the monopoly-protected and price-regulated local utility company. (Id. ¶¶ 30-31).

[8] In other words, they offer customers the option of having their bills be the same month-to-month, but then customers are forced to pay a year-end true-up to bring their payments back to the total they would have paid under the utility rates.

a true-up such that, when rates increase, they can enjoy sub-market rates.[9] The Order at issue inexplicably eliminates such options for an entire New York demographic – likely the demographic that needs it most.

In short, the Commission enacted the Moratorium Orders by assuming the conclusion of an evidentiary proceeding that still has not even proceeded to submission of opening testimony, without any actual evidence to support it. The Commission also assumed – again without evidence, a hearing, or any meaningful analysis, that the Order would have its intended effect, and did not even consider their potential unintended consequences. The Supreme Court erred by rubber-stamping those errors.

C. The Supreme Court Incorrectly Found that Appellants Were Required to Pursue a Waiver of the Third Moratorium Order

The Supreme Court also incorrectly found that Appellants were required to pursue a waiver under the Third Moratorium Order rather than pursuing this action, which predated that Order. Ex. 6 to Carpinello Aff. (Decision & Order), at 20.

For starters, the waiver provision is not an administrative remedy.[10] An "administrative remedy" is a non-judicial remedy provided by an administrative

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[9] Further underscoring the Supreme Court's misstatement of the facts, it incorrectly asserted that a fixed-rate energy contract is somehow not a "value added energy product" where the undisputed evidence is that the Commission itself has acknowledged that it is. (Ex. 8 to Carpinello Aff., at 4.)

agency, and a "remedy" is "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." The waiver provision does not propose to prevent or redress the wrong that the Third Moratorium threatens; it purports only to provide a mechanism that would impose similar problematic conditions on ESCOs who want to accept them. That is, even if the Commission provides an ESCO a "waiver," that empowers it only to service low-income customers in a non-competitive market where utilities wield monopoly power because they can set a price ceiling. See Pascazi v. N.Y. State Bd. of Law Examiners, 2017 WL 2587899, at *1 (3d Dep't June 15, 2017) (administrative

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[10] The text of the waiver provision reads as follows:

> If an individual ESCO wishes to offer a guaranteed savings program to APP customers it may petition the Commission for a waiver of the prohibition within 30 days of the issuance of this Order. ESCOs seeking such a waiver must be able to demonstrate their willingness to develop a program that ensures delivery of the claimed savings. These assurances should include at a minimum the following: (a) an ability to calculate what the customer would have paid to the utility; (b) a willingness and ability to ensure that the customer will be paying no more than what they would have been paid to the utility; and (c) appropriate reporting and ability to verify compliance with these assurances. In the event an ESCO requests such a waiver the Commission will review it and, in addition to the above elements, will consider other conditions it determines are necessary to protect consumers.

waiver provision not an administrative remedy required to be pursued where it "could not have addressed petitioner's argument"); see also Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 500 (2d Cir. 2004) ("Monopoly power is 'the power to control prices or exclude competition.'").[11]

Even if it were an administrative remedy, moreover, it was not one "available to [Appellants]." The Commission included the waiver provision only in the Third Moratorium Order dated December 16, 2016 – three months after this Proceeding commenced on September 28, 2016. In addition, Appellants bore no obligation to pursue the waiver mechanism where the Moratorium Orders threaten irreparable harm and Appellants' constitutional rights (as discussed infra Parts I(F); See e.g., Watergate II, 46 N.Y.2d at 57(exhaustion rule "is not an inflexible one" and "need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power . . . "or when resort to an administrative remedy would be futile . . . or when its pursuit would cause irreparable injury").

[11] Indeed, the Commission has never even claimed that this waiver provision constitutes an administrative remedy, in this proceeding or otherwise – the Supreme Court concluded as such *sua sponte*.

D. The Supreme Court Ignored the Limits on Administrative Policymaking Prescribed by the Court of Appeals

The Supreme Court ignored entirely the Order's violation of Boreali v. Axelrod, 71 N.Y.2d 1, 13 (1987), and its progeny. Even if the Commission's general authority over the sale of energy could be extended to ESCOs,[12] that does not include the specific authority to categorically prohibit ESCOs from serving subsets of the market, including low-income customers. In that regard, the Supreme Court failed to address the Moratorium Orders' violation of Boreali and its progeny.

It is "the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 23 N.Y.3d 681, 697 (2014) (quoting Boreali v. Axelrod, 71 N.Y.2d 1, 13 (1987)). While the Commission refers to its "broad powers under PSL Articles 1 and 4" (Sept. 19 Order at 9), even a "broad" legislative grant of authority does not permit the Commission to intrude on the Legislature's policymaking role. See Boreali v. Axelrod, 71 N.Y.2d 1, 6 (1987) (recognizing that the Legislature gave the Public

[12] The issue of the scope of the Commission's jurisdiction is the subject of a separate appeal.

Health Council "broad authority to promulgate regulations on matters concerning the public health," but that "the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative, body").

The Moratorium Orders bear all the hallmarks of impermissible agency intrusion on the policymaking role of the Legislature. In particular, they: (i) reflect a "regulatory scheme . . . based solely upon economic and social concerns" in which the Commission has attempted to weigh its goals against the attendant costs and "reach a suitable compromise" (Boreali, 71 N.Y.2d at 12); (ii) write "on a clean slate" by banning ESCOs from servicing segments of the energy market, without legislative direction, but instead based solely on their purported "broad legal authority to oversee ESCOs"; (iii) address issues that are independently being addressed by the Legislature; and (iv) are not the product of the Commission having exercised any "special expertise or technical competence in the field"; indeed, they have not even engaged in any meaningful fact-finding to support the Orders (see supra Part I(B). On these facts, the Moratorium Orders violate Boreali and its progeny, and the Supreme Court reversibly erred in failing to address that independent basis to strike them down. Boreali, 71 N.Y.2d at 13; see also New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City

Dep't of Health and Mental Hygiene, 23 N.Y.3d 681, 690 (2014); Health Ins. Ass'n of America v. Corcoran, 154 A.D.2d 61, 72 (3d Dep't 1990).

E. The Supreme Court Incorrectly Found that the Moratorium Orders Complied with Low-Income Consumers' Privacy Rights

If not stayed, the Orders permit the disclosure of highly confidential information, including the identities of hundreds of thousands of low-income consumers, in violation of the New York State Home Energy Assistance Program ("HEAP") State Plan. The Supreme Court rejected such concerns on the grounds that: (i) the Commission can override those statutory restrictions here based on exceptions permitting disclosure of confidential information in other circumstances; and (ii) the Commission 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. That is wrong on both counts.

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 Supreme Court does not address in its decision (and that the Commission ignored in its Order).

The Supreme Court rejected the privacy violations on the grounds that Appellants do not have standing to challenge them. That is wrong. Appellants are being directed to participate in the privacy violations, and as such have standing to protest the forcible enlistment of their services to further the Commission's improper actions in violation of federal and state laws. Moreover, to the extent the Supreme Court found that it could defer to the Commission's balancing of low-income consumers' privacy rights and protections against the Commission's interest in denying those consumers the right to choose their energy provider, there is no basis in the relevant statute for that either. The Orders direct Appellants to participate in viewing New Yorkers' private confidential information, which Appellants need to then further disclose to a host of parties who are simply not authorized to view or use that information. 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.

F. The Supreme Court Incorrectly Found That the Moratorium Orders Are Constitutional

The Supreme Court wrongly decided that the Moratorium Orders do not substantially interfere with Appellants' contracts with their customers and thus should be invalidated for violating the Contract Clause of the United States and New York State Constitution. The Orders direct Appellants and other ESCOs to de-enroll existing customers who have ongoing contracts by unilaterally proclaiming that those contracts should be treated as terminated on the first day of the next billing cycle. (Ex. 2 to Carpinello Aff., at 16 ("With respect to customers on a variable rate, month-to-month contracts, the expiration of the agreement is at the end of the current billing period.") That substantially interferes with the contracting parties' expectations, including because Appellants will be forced to terminate products and programs, pursuant to which both Appellants and customers expected to benefit. Indeed, the overwhelming majority of ESCO customers who have a right to cancel their contracts in any given month choose to remain with that ESCO. The law looks to the practical effect of the administrative action, Healy v. Beer Inst., Inc., 491 U.S. 324, 342 (1989), and the Commission did not even purport to undertake any analysis of those facts.

III. A BALANCING OF THE EQUITIES FAVORS APPELLANTS

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 Appellants far outweighs any possible prejudice claimed by the Commission. Appellants 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 Ex. 1 to Carpinello Aff., ¶¶ 135-147). Contrary to the serious harm posed to Appellants in the absence of a stay, no harm to the Commission could arise from maintaining the status quo; nor does it pose a threat to public health or safety.

Where (as here) Appellants seek only to preserve the status quo, the balance of the equities tilts in their favor. See 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 Appellant."); accord Masjid Usman, 68 A.D.3d 942, 943 (2d Dep't 2009); State v. City of New York, 713 N.Y.S.2d 360, 361 (2d Dep't 2000). Because allowing Appellants to continue to operate will preserve the status quo pending appeal and afford this Court an opportunity to engage in meaningful review of the Orders, a stay is appropriate and should be granted.

IV. APPELLANTS AGREE TO AN EXPEDITED SCHEDULE FOR THE APPEAL IN ORDER TO MINIMIZE THE TIME REQUIRED FOR THE STAY.

Appellants will agree to an expedited schedule for the appeal to reduce the length of the stay. Appellants already have filed a Notice of Appeal and propose to perfect their appeal within two months if a stay is granted.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that the Court preserve the status quo by entering an order staying enforcement of the Orders pending appeal.

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Armonk, New York

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