NEW YORK COURT OF APPEALS

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

*Appellants/Petitioners,*

*—against—*

NEW YORK STATE PUBLIC SERVICE COMMISSION,

*Appellee/Respondent.*

# NOTICE OF MOTION AND MOTION FOR LEAVE TO APPEAL

Dated: January 11, 2018

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NEW YORK STATE
COURT OF APPEALS

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**STATE OF NEW YORK**
**COURT OF APPEALS**

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-Appellants,*

*—against—*

NEW YORK STATE PUBLIC SERVICE COMMISSION

*Respondents-Appellees.*

**A.D. DKT NO. 523993**

## NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that on the annexed Memorandum of Law, and the record and briefs below, pursuant to Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice, Petitioners-Appellants will move this Court, at the Court of Appeals Hall, Albany, New York, on January 22, 2018, for an order granting leave to appeal to this Court from the

Memorandum and Order of the Appellate Division, Third Department, dated July 27, 2017, as amended on December 7, 2017.

Dated: Armonk, New York
January 11, 2018

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**NEW YORK COURT OF APPEALS**

NATIONAL ENERGY MARKETERS ASSOCIATION ET AL.,

*Petitioners-Appellants,*

*—against—*

NEW YORK STATE PUBLIC SERVICE COMMISSION,

*Respondents-Appellees.*

# MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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Dated: Albany, New York
January 11, 2018

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## CORPORATE DISCLOSURE STATEMENT

Petitioners-Appellants herein and their subsidiaries and parents are as follows:

National Energy Marketers Association

Residents Energy LLC, Genie Energy Ltd.; Genie Energy Int'l Corp.; Genie Oil and Gas, Inc.; Genie Retail Energy, Inc.; Genie Retail Energy Int'l, LLC; LED USA, LLC; IDT Energy, Inc.; IntelliMark Services, LLC; Mirabito Natural Gas, LLC; Retail Energy Holdings LLC; American Shale Oil Corp.; Genie Mongolia, Inc.; North American Energy, Inc.; Virtual Power Hedging, LLC; Town Square, LLC; Town Square Energy East, LLC; AMSO Holdings, LLC; AMSO Holdings I, Inc.; Evergreen Gas & Electric, LLC; American Shale Oil, LLC; Trupro Energy, LLC; Genie Energy Services, LLC; DMS Promotions, LLC; Diversegy, LLC; Diversegy Consultant Program, LLC; DiversegyPro, LLC; Genie Solar; Diversegy Consultant Program, LLC

Blue Rock Energy Inc.; Renovus Rock, LLC; Grand Island Solar, LLC; Western NY Energy Services, Inc.; Natural Gas Business Associates, Inc.; New York Energy, Inc.; BlueRock Solar, Inc.; BlueRock Energy Services, Inc.; Benchmark Services, Inc.

North American Power & Gas, LLC

Verde Energy USA New York, LLC: AES Venturess Holdings, LLC; AES, Ventures, LLC; Ampegy, LLC; Associated Energy Holdings, LLC; Associated Energy Services, LP; Bargain Energy LLC; Broadway Energy, LLC; Censtar Energy Corp.; Censtar Operating Company, LLC; CO2 Gas Processing Partners, LLC; Criterion Compression, LLC; Electric Holdco, LLC; Electric Now Holdings, LLC; Electricity Maine, LLC; Electricity N.H., LLC; Emblem Energy, LLC; E-Now, LP; Equibase, LLC; Fuelco Energy, LLC; Ideal Interaction, LP; Major Energy Electric Services LLC; Major Energy Services LLC; Maris Investment Company, LLC; Marlin IDR Holdings, LLC; Marlin Midstream Holdings, LLC; MaxMin Resources, LLC; MMLMCO Holdings, LLC; National Gas & Electric, LLC; NMD Holdings, LLC; NuDevco Capital GP I, LLC; NuDevco Energy Fund I, LP; NuDevco Midstream Development, LLC; NuDevco Midstream Land Company, LLC; NuDevco Partners Holdings, LLC; NuDevco Partners, LLC; NuDevco Retail Holdings, LLC; NuDevco Retail, LLC; Oasis Power Holdings,

LLC; Oasis Power, LLC; Provider Power Mass, LLC; Respond Power LLC; RetailCo Acquisition Co, LLC; Retailco Services, LLC
RetailCo, LLC; RSM Energy, LLC; Spark Energy , LLC; Spark Energy Gas, LLC; Spark Energy, Inc.; Spark HoldCo, LLC; Tarpon Gas Storage, LP; Tarpon Sparta Gas Storage, LLC; Tarpon Whitetail Gas Storage, LLC; TexEx Energy Operating, LLC; TGS Drilling, LP; TGS Holdings, LLC
TGS Land, LP; Timberland Growth Investments, LP; Timberland Holdings, LLC; Timberland New Growth, LLC; TxEx Energy Investments, LLC; Wahoo Enterprises, LLC; Wahoo Hirecar Funding, LLC; Wahoo Moneyball, LLC; White Stallion Energy Center, LLC; William K. Maxwell, III (Owner)
Xcal Holdings, LLC; Xcalibur Logistics, LLC; Verde Energy USA Trading, LLC; Verde Energy USA New Jersey, LLC; Verde Energy USA Pennsylvania, LLC; Verde Energy USA Illinois, LLC; Verde Energy USA Ohio, LLC; Verde Energy USA Massachusetts, LLC; Verde Energy USA Maryland, LLC; Verde Energy USA, Inc.; Verde Energy USA DC, LLC; Verde Energy USA Texas Holdings, LLC; Verde Energy USA Texas, LLC; Verde Energy USA Connecticut, LLC

Petitioners-Appellants, National Energy Marketers Association, BlueRock Energy, Inc., Residents Energy, LLC, and Verde Energy USA New York, LLC (hereafter "NEM" or "Petitioners"), respectfully submit this Memorandum in Support of their Motion for Leave to Appeal from the Third Department's Memorandum and Order (the "Order") dated July 27, 2017, as amended on December 7, 2017 (attached hereto as Exs. 1-3).

## PROCEDURAL HISTORY AND TIMELINESS

Petitioners-Appellants filed a Petition-Complaint against the New York Public Service Commission (the "PSC") in Albany County Supreme Court on March 3, 2016.[1] On July 22, 2016, the Supreme Court entered an Order disposing of the Petition-Complaint. On August 8, 2016, Petitioners-Appellants filed a notice of appeal of the Supreme Court's Order. The appeal was perfected, and in a decision dated July 27, 2017, the Third Department affirmed the Supreme Court's Order, on the grounds that the general introductory language in Article 1 of the Public Service Law (PSL)

[1] A separate proceeding was commenced by other parties in the same court, on the same date, challenging the same PSC Order. The parties agreed to treat the separate proceedings as effectively consolidated, and the Supreme Court resolved both proceedings in the same Order. The Third Department heard consolidated argument on the two appeals, and disposed of the appeals by issuing twin decisions that cross-reference one another. Both of the decisions are attached hereto. Both groups of Appellants concurrently filed motions for leave to appeal to this Court.

imparts to the PSC jurisdiction to regulate rates charged by private Energy Service Companies ("ESCOs") even though they are not "electric corporations" or "gas corporations" as those terms are defined in the specific section of the PSL that authorizes the PSC to oversee ratemaking for public utilities. NEM timely filed a Motion for Reargument or for Leave to Appeal in the Appellate Division on August 8, 2017. NY CPLR § 5513(b). The Third Department resolved that motion on December 7, 2017, by amending their Order and denying NEM's motion for leave to appeal to this Court. A copy of that Order was served on NEM by mail and received by NEM on December 12, 2017. A Notice of Entry for that Decision and Order was not filed or served upon NEM by Respondents. NEM timely filed the instant motion asking this Court to grant NEM leave to appeal. NY CPLR §§ 5514; 5513(b).

## JURISDICTION OF THIS COURT

The Court of Appeals has jurisdiction over this motion and the proposed appeal under NY CPLR § 5602(a)(1). This is a motion for leave to appeal from an Order of the Appellate Division, Third Department that affirms an Order finally determining an action originating in Albany County Supreme Court and completely disposing of the case.

## QUESTION PRESENTED FOR REVIEW

> Did the Appellate Division erroneously set new precedent by concluding that, where the specific provision in the Public Service Law (PSL) authorizing the PSC to regulate rates (Article 4. Ratemaking) charged by "electric corporations" and "gas corporations" (defined therein to mean only public utilities) does **not** extend to private energy service companies (ESCOs), the general introductory language in Article 1 of the PSL can be read to trump the specific provision and impart to the PSC general jurisdiction to regulate rates of other companies that are not electric or gas corporations as defined by the statute?

In its Order, the Third Department answered this question in the affirmative. The Order sets a dangerous, pervasive new standard that threatens to create nearly limitless – and legislatively unauthorized – administrative agency power based solely on an agency's general authorizing statute. Appellants respectfully submit that such a decision, with such far-ranging implications for recurring issues that impact the public in so many ways, warrants review by the Court of Appeals for two main reasons.

First, the Order directly impacts a specific issue of public importance that affects New York residents across the state, insofar as it broadly expands the PSC's authority to control how and from where New Yorkers purchase energy in the competitive retail energy market. The PSC will argue that the Order permits it to unilaterally eliminate consumer choice without legislative approval and return New York to an antiquated state of monopoly power that was eliminated two decades ago. A public proceeding

to review the retail energy markets on the basis of the Supreme Court's decision here was already noticed in December 2016 and is likely to conclude this year. The jurisdictional issue addressed in the Order, and that underlie the ongoing administrative proceeding, have far-reaching implications for New York residents across the state, and they warrant this Court's review.

Second, beyond the Order's impact on the everyday interactions of New York residents in the retail energy market, the Panel's reasoning sets a precedent that will be used by agencies statewide to expand the scope of their authority without legislative authorization. At bottom, agencies will cite the Order as endorsing the proposition that the general introductory language in an agency's authorizing statute (language that appears in almost every agency authorizing statute) imparts almost boundless jurisdiction to that agency to impose all types of regulations in that arena – even where the Legislature proceeds to enumerate in detail the specific powers that it wishes to impart to the agency. Such precedent represents a marked departure from the controlling law and impacts recurring and fundamental issues of statewide and public importance.

In addition to the far-ranging and harsh implications the Order threatens to have on recurring issues of statewide and public importance, the

Order is also inconsistent with (i) prior authority of this Court, (ii) and the rulings of other appellate courts in New York. Accordingly, Appellants-Petitioners respectfully request leave to appeal to this Court on those independent grounds.

## RELEVANT FACTS

This case concerns the PSC's unilateral decision to upend New York's retail energy market through an ultra vires exercise of authority that the Legislature did not grant the PSC in enacting and amending the PSL.

### a. The Parties

Appellants include several energy services companies ("ESCOs") that operate in New York and their trade association, National Energy Marketers Association – an international, non-profit association representing wholesale and retail marketers of natural gas, electricity, and related products. (A 44, R. 189 ¶¶ 9-20.) New York residents who elect to purchase gas or electricity from an ESCO voluntarily enter into arms-length contracts directly with the ESCO of their choice to serve as that customer's energy provider. (A 46, R. 191 ¶ 26.) The ESCO is then responsible for providing that customer with gas and/or electricity on agreed-upon terms. (Id.) The physical delivery of gas and electricity into that customer's home, along with the reading of customer's meters for billing purposes, remain the responsibility of the local

utility. (Id.) Every customer continues to pay the local utility for that service, and the utilities have a monopoly on those "delivery" services.

ESCO customers generally pay two bills: (i) a "supply" bill from the ESCO for the cost of the gas and/or electricity commodity that the customer purchased; and (ii) a delivery bill from the local utility for the cost of the transmission and delivery of the gas and/or electricity to the customer's home. (A 47, R. 192 ¶ 27.) The local utility often consolidates the ESCO's supply bill into the local utility's delivery bill and sends a single physical invoice to the customer. (Id.)

Appellants, like other ESCOs, thus provide an alternative to the monopoly in the supply of gas and electricity otherwise held by the regulated local utility company that serves each geographic region in New York. (Id. ¶ 28.)

Unlike local utilities, ESCOs do not have authority to produce or generate energy or to lay or maintain wires, pipes, or other gas or electric delivery fixtures. (Id. ¶ 29.) Instead, ESCOs contract with gas and electric wholesalers such as the New York Independent System Operator (NYISO) and PJM Interconnection LLC for their energy production, storage, and transportation services. (Id.) ESCOs may also enter into financial hedging

and option contracts to manage and optimize the cost and supply of the energy that they will need to purchase for their customers. (Id.)

Allowing customers to purchase energy from an ESCO creates a competitive environment in which multiple ESCOs and the local utilities compete to supply energy to the same customers. (Id. ¶ 30.) This competition provides customers with more competitively priced energy, better customer service, and substantially more choice than would otherwise be available from the monopoly-protected and price-regulated local utility company. (Id.) ESCOs, for example, offer a variety of products that local utilities do not offer, including fixed-rate contracts (whereby a customer elects for budgetary certainty and agrees to pay a fixed rate for gas or electric for a set period of time) and a host of "green" renewable energy options. (Id.)

The Commission consists of five members appointed by the Governor of the State of New York, with the advice and consent of the New York State Senate. (A 45, R. 190 ¶ 21.) The New York Public Service Law delineates the PSC's jurisdiction and authority. (Id.)

**b. The PSL and the New York Energy Market**

In 1910, the Legislature enacted Article 1 of the PSL to provide for the regulation and control of certain public utilities. See PSL Art. 1

(creating the PSC and describing its overall powers); People ex rel. New York, N.H. & H.R. v. Willcox, 2006 N.Y. 423, 430 (N.Y. 1911) ("Public Service Commissions were established... to provide for the regulation and control of certain **public service corporations**" (emphasis added)). Until the 1990s, the New York retail energy market consisted exclusively of monopolistic public utility companies. The PSL thus authorized the PSC to regulate that monopolistic market. In the 1980s and 1990s, however, the Legislature amended the PSL to empower the PSC to open up competition in the gas market (see PSL § 66(d)), which was later extended to the electric market. Competition emerged in the New York energy market in the form of ESCOs, and the PSC then considered ways to adjust the regulated aspects of the energy market to reflect its competitiveness.

### c. Public Utilities Argue That the PSC Must Regulate ESCOs; the PSC Concludes the Legislature Did Not Impart to the PSC Jurisdiction over ESCOs

As ESCOs increasingly entered the marketplace and competition ratcheted up, public utilities faced a regulatory disparity: While the PSC was heavily regulating public utilities' activities (consistent with the market historically being monopolistic), ESCOs were not subject to that regulation at all.

Public utilities asserted, accordingly, that the PSL's provisions governing "electric corporations" and "gas corporations" applied to ESCOs, thereby requiring the PSC to regulate ESCOs consistent with the PSL (and consistent with how the public utilities had been regulated). The utilities complained, for instance, that the Home Energy Fairness Practices Act ("HEFPA"), codified in Article 2 of the PSL, needed to be applied to ESCOs. *See* Case 94-E-0952, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services, Opinion 97-5, May 19, 1997, at 29 (goo.gl/3GrXBM). That Article sets forth discrete consumer-protection provisions, such as complaint handling procedures, meter reading mechanics, and billing transparency. It does not include any ratemaking provisions.

At that time, like the PSL's other relevant articles, Article 2 applied to only "electric corporations" and "gas corporations" as defined in PSL Article 1. *See* Former PSL Art. 2 § 30 ("This article shall apply to the provision of residential service by gas, electric and steam corporations and municipalities"); PSL Art. 1 § 2(11), (13) (defining "electric corporation" and "gas corporation" to include only entities that controlled the gas and electric physical infrastructure). In November 1997, public utilities and their representatives argued, accordingly, that the PSC had jurisdiction over

ESCOs and an obligation to regulate them because ESCOs were "'electric corporations" under the PSL and therefore subject to HEFPA under Article 2. (A 98-100, R. 322-24.) The PSC **rejected** that argument, and confirmed that ESCOs were not "electric corporations" as required for HEFPA to apply to them. (Id.) Approximately one month later, the PSC again concluded that it does not have jurisdiction over ESCOs pursuant to HEFPA or the PSL. (A 350-52, R. 7157-59; A 353-56, R. 7167-7170.) The PSC reasoned that the statute was "enacted to protect consumers against the abuse of monopoly power," which public utilities have and ESCOs do not. (Id.) The PSC made clear that interpreting Article 2 to apply to ESCOs would be inconsistent with the Legislature's intent. (Id.)

**d. Acknowledging that the PSL Did Not Apply to ESCOs, the Legislature Amends Only Article 2 To Give the PSC Limited Jurisdiction Over ESCOs**

In 2002, the Legislature confirmed that the PSL did not give the PSC authority over ESCOs, since ESCOs were neither "electric corporation[s]" or "gas corporation[s]" as defined therein. Wishing to extend HEFPA's consumer protections to ESCOs in addition to utilities, the Legislature voted to amend Article 2 and gave it a unique expanded jurisdictional scope – in contrast to the scope of the remaining articles that applied only to public utilities. Specifically, the Legislature added Section 53 to Article 2 of the

PSL, which section changed the definitions of "electric corporation" and "gas corporation" to include ESCOs "for purposes of this Article" 2 only. *See* PSL Art. 2 § 53; N.Y. Bill Jacket, 2002 S.B. 6778, Ch. 686. For the first time, accordingly, the Legislature gave the PSC limited jurisdiction over ESCOs – and limited that jurisdiction to Article 2 powers. That Article does not include any provision authorizing the PSC to set rates – which power is covered by Article 4, which statute the Legislature did not amend to include ESCOs. See PSL Art. 2 §§ 30-53. Since amending Article 2 to provide the PSC with limited jurisdiction over ESCOs, the Legislature has not since expanded the jurisdictional scope of any other article of the PSL and, accordingly, ESCOs have been subject only to Article 2's unique jurisdictional scope.

**e. The PSC Confirms That It Lacks Jurisdiction Over ESCOs Under Article 4—the Only Article That Provides the PSC Ratemaking Authority**

After the Legislature amended Article 2, expressly stating that the amendment was limited to that article alone (and not the ratemaking Article 4), the PSC's authority under the rest of the PSL (as relevant here) remained restricted to "electric corporations" and "gas corporations" as defined under

Article 1 (i.e., public utilities).[2] This included Article 4—which provides the PSC ratemaking authority over public utilities—as the PSC confirmed multiple times over several years.

For example, in 1997, the Public Utility Law Project argued (on behalf of utilities) that ESCOs were "electric corporations" under Article 4 and therefore subject to the PSC's ratemaking authority. (A 101-02, R. 325-26.) The PSC rejected that argument, plainly stating that "**PULP's assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect**." (Id.; see also A 354, R. 7168 at 16 n. 1 (Commission stating that "ESCOs are not Article 4 corporations").) Nearly a decade later, and after the Legislature amended Article 2 to apply to ESCOs, the PSC maintained the same position, explaining that ESCOs "are exempt from Article 4 regulation." (A 358, R. 7183.)

Consistent with the PSC's repeated pronouncements that it lacks any ratemaking authority over ESCOs, Appellants and other ESCOs historically have never been required to submit proposed or current rates to the PSC for approval. (A 57, R. 202.) Nor has the PSC previously undertaken to set

[2] As discussed above in Parts III and IV, both the Legislature and the PSC already had recognized that ESCOs did not meet either of these Article 1 definitions.

rates that ESCOs could charge or to prescribe a maximum rate that ESCOs could charge. (Id.) ESCOs are private companies, whose rates are subject to free market competition and whose ability to attract customers depends entirely on the customers' interest in voluntarily electing to purchase energy from a given ESCO.

### f. The PSC Issues the Reset Order and Contradicts Its Own and the Legislature's Prior Pronouncements Regarding the PSC's Jurisdictional Limits

On February 23, 2016, the PSC issued the Reset Order, without providing the notice-and-comment period required under New York's State Administrative Procedures Act (SAPA). (See A 72-96, R. 252-76.) Ordering Clause No. 1 of the Reset Order stated that, effective just ten calendar days from the date thereof, Appellants and all other ESCOs had to cease serving millions of customers and return them to the local utility unless the ESCO provided a "guarantee that the customer will pay no more than were the customer a full-service customer of the utility." (A 92, R. 272.) Simply stated, the Reset Order purported to set a maximum rate that Appellants and other ESCOs could charge their customers by forcing them to meet or beat the rates charged by the local utilities (a guarantee requirement that would effectively force ESCOs to shut down and exit the market).

Attempting to justify its newly asserted purported jurisdictional authority to set ESCOs' rates in the face of the statutory limitations on the PSC's ratemaking jurisdiction and the PSC's repeated pronouncements to the contrary, the PSC took a scatter-shot approach. It claimed that: (i) it had "broad legal authority to oversee ESCOs, pursuant to its jurisdiction in Articles 1 and 2" of the PSL, citing specifically PSL Art. 1 § 5 and PSL Art. 2 § 53; and (ii) it could use its authority under PSL Art. 4 § 66(5) over "tariffed rules and regulations of electric and gas distribution utilities" to condition ESCOs' access to utility distribution lines on whatever the PSC chooses, including whatever pricing requirements it wished to impose. (A 79-80, R. 259-60.) The PSC thus contradicted its repeated assertions to market participants that it had no such jurisdiction over ESCOs and controverted the Legislature's prior conclusion that the PSL did not provide the PSC jurisdiction over ESCOs. Indeed, consistent with the PSC's and the Legislature's historical conclusions in that regard, the Reset Order fails to cite a single PSL provision specifically authorizing the PSC to set ESCOs' rates, nor does it claim (because it cannot claim) that the ratemaking provision of the PSL (Article 4) applies to ESCOs. (See id.)

Among the Reset Order's procedural deficiencies, moreover, were the PSC's failure to propose the new requirements as proposed rules, failure to

provide proper notice to the ESCOs or the broader community of interested parties including New York residents who would be forcibly handed over to the public utility for all energy services, and failure to afford ESCOs an opportunity for hearing and comment on the PSC's unprecedented and improper effort to engage in ESCO ratemaking. (A 20-24, R. 79-83.)

Appellants-Petitioners filed the underlying Petition-Complaint, challenging the PSC's Reset Order on multiple grounds, including because the PSC lacked the authority to unilaterally extend its jurisdiction to regulate ESCO rates for the first time in two decades.

**g. The Supreme Court Resolves Appellants' Petition-Complaint**

On July 22, 2016, the Supreme Court (Zwack, J.) issued a decision and order resolving the case in its entirety. With respect to the PSC's jurisdictional authority, the Supreme Court stated that the PSC could engage in ratemaking with respect to ESCOs. (A 18-20, R. 77-79.) Unable to identify any particular statutory provision that imparted to the PSC jurisdiction over ESCO rates, the Supreme Court instead inferred that conclusion from general references to (i) PSL Art. 1 § 5; (ii) PSL Art. 2 § 53; (iii) PSL Art. 4 §§ 65(1), 66(12)(f); and (iv) GBL § 349-d(11)-(12); and (v) the UBP. (See id.) In reaching that conclusion, moreover, the Supreme Court did not even address the plain language of the relevant statutes, the

legislative history (as detailed above, and in the parties' papers below), or the facts that:

- The PSL applies by its terms applies only to public utilities that have ownership and control over utility-related infrastructure (which ESCOs do not have);
- The PSL was created with the primary purpose of protecting consumers from public utilities' monopoly control over the market and decades before ESCOs even existed;
- The PSC has repeatedly pronounced that ESCOs are not "electric corporations" or "gas corporations," to which the PSL applies;
- The PSC has repeatedly pronounced that it has no ratemaking authority over ESCOs; and
- The Legislature made clear that the PSC did not have authority over ESCOs insofar as they are neither "electric corporations" nor "gas corporations" as those terms are defined in the PSL and in amending Article 2 to give the PSC limited jurisdiction over ESCOs, the Legislature made clear that it was not making a similar amendment to the ratemaking article (Article 4), providing that the amendment was being made "for purposes of this Article [2]" only.

On August 25, 2016, Appellants filed a Notice of Appeal from the portion of the Supreme Court's July 22 decision concerning the scope of the PSC's authority and jurisdiction to set rates in the retail energy markets. (See A 1-2, R. 3-4.) On July 27, 2017, the Third Department affirmed the Supreme Court's decision. The Panel agreed that Article 4 of the PSL did not apply to ESCOs (Ex. B, attached), but remarkably held that the introductory general authorizing statute of the PSL imparted general authority to the PSC that essentially permitted the PSC to impose any

regulations on the sale of electricity or gas – even where the Legislature limited the specific statute addressing ratemaking to public utilities. Appellants timely filed a motion for reargument or leave to appeal to the Court of Appeals, and the Panel amended the Order and otherwise denied that motion on December 7, 2017.

## ARGUMENT

A motion for leave to appeal should be granted where questions are presented that merit review by the Court of Appeals, such as when "issues are novel or of public importance, present a conflict with prior decisions of th[e] Court [of Appeals], or involve a conflict among the departments." 22 N.Y.C.R.R. § 500.22(b)(4).

Considering the critical policy implications of the Third Department's Order and the recurring issues of statewide importance that the Order affects, NEM seeks leave to appeal to this Court with respect to the relevant law and precedent set forth below.

The Third Department's affirmance of the Supreme Court's statement regarding the PSC's authority departed from fundamental tenets of statutory construction pronounced by this Court and threatens to upend the principles this Court has pronounced regarding administrative authority and statutory interpretation. This erroneous ruling establishes a new legal rule that (1)

will set a dangerous precedent for the scope of administrative usurpation of authority in abrogation of the limits set by the Legislature, and (2) will be used to upend the New York retail energy markets that service all New York residents across the state.[3]

## I. THE ORDER'S RELIANCE ON INTRODUCTORY LANGUAGE IN A GENERAL AUTHORIZING STATUTE SETS DANGEROUS PRECEDENT

The Order adopts the PSC's argument that the "general supervisory powers" allotted to an agency in the introductory provisions (in this case Article 1 § 5) of a comprehensive set of statutes (in this case, a statutory scheme consisting of more than two hundred sections of the PSL) essentially impart boundless authority to agencies and justify new powers never specifically authorized by the Legislature – and in this case new powers that the Legislature specifically declined to impart to the agency.

The Order recognizes that the statute specifically authorizing the PSC to regulate electric and natural gas rates (Article 4 of the PSL) applies only to rates charged by the monopoly public utilities, not ESCOs:

> We reject the PSC's contention that ESCOs constitute "gas corporations" subject to rate setting under Public Service Law article 4 (see Public Service Law § 55 [5]). By the same analysis,

[3] "This case presents a pure statutory interpretation, meriting *de novo* review." Jones v. Bill, 10 N.Y.3d 550, 553 (2008).

> ESCOs are not "electric corporations" under article 4 (see Public Service Law § 2 [12], [13]).

Order, at *3. The Order grounds that conclusion in the plain language of the rate-setting statute (Article 4) and the Legislature's subsequent decision in 2002 to amend other sections of the PSL – specifically, Article 2 concerning fraud consumer protections – to give the PSC limited authority over ESCOs, further confirming that the Legislature did not intend to expand the PSC's ratemaking authority (set forth in the unamended Article 4) to ESCOs.

But the Order goes on to hold that the Commission nevertheless has the power to regulate rates charged by non-utilities (ESCOs) because:

> Pursuant to Public Service Law § 5, '[t]he jurisdiction, supervision, powers and duties of the [PSC] shall extend . . . [t]o the manufacture, conveying, transportation, sale or distribution of gas . . . and electricity . . . to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same.' The emphasized language speaks to general authority over the sale of gas and electricity, followed by the specific extension of the PSC's jurisdiction over gas and electric plants.

(Order, at *4 (emphasis in original) (citing Public Service Law § 5(1)(b) of Article 1.)

**The cited PSL section is the same introductory language that appears in virtually every major agency authorizing statute.** It introduces the PSC's general jurisdiction— it does not purport to impart

specific authority to the PSC, and certainly not to fix ESCOs' rates. Attributing controlling significance to that introductory language undermines the Legislature's decisions as to what specific authority to impart to the agency, and what authority to withhold. That in turn renders meaningless the more than two hundred more specific sections of the PSL that define the specific scope of the PSC's general jurisdiction over the "sale or distribution of gas . . . . and electricity" generally referred to in the introductory Article of the PSL.

Here, interpreting Article 1's general introductory language describing the PSC's general jurisdiction over the sale of electricity and gas to mean that the PSC has the authority to set rates charged for all such sales by non-public utilities renders meaningless the myriad other provisions in the PSL that impart to the PSC specific powers, including all of the sections in Article 4 authorizing the PSC to set rates for the sale of electricity and natural gas in New York –which power and statute the Legislature limited to monopoly public utilities, and not ESCOs.

Crediting a general statutory provision in the face of more specific provisions addressing that subject matter is precisely the type of improper legal reasoning the courts have consistently rejected, including the Third Department in Estate of Allen v. Colgan, 190 A.2d 939 (3d Dep't 1993).

There, this Court held that fundamental cannons of statutory construction require that an interpretation "give meaning and effect to all [of the PSL's] provisions" and that it not "render another portion of a statute meaningless." *Id.* at 940. Indeed, the PSL elsewhere empowers the PSC to act on numerous items including, as examples, setting public utilities' rates for gas or electricity (PSL Art. 4 §§ 66(5), 72), establishing billing practices (PSL Art. 2 §§ 38, 39); and compelling discovery, such as by inspections or compelling information by subpoena duces tecum (PSL Art. 4 §§ 66(8), (10); 80(6), (8); 89(c)(6), (8)). But nowhere does the PSL authorize rate-setting authority with respect to non-monopoly ESCOs.

The Order thus endorses a rule that renders meaningless each of the specific empowering provisions of the PSL. If Article 1 § 5 already gave the Commission "plenary authority" over the New York energy markets – including the power to fix all rates charged by anyone – then the Legislature would have wasted its time by undertaking the task of enumerating each of these powers including, most egregiously, the specific power to set public utilities' rates.

By overriding the Legislature's guidance on an agency's specific powers in the detailed sections following the introductory language of

statutory scheme, the Order tremendously expands the scope of administrative authority across state agencies.

For example, the New York State Department of Transportation ("DOT") is broadly charged with general authority over "transportation policy and planning for the state to meet the present and future statewide needs for adequate, safe, and efficient transportation facilities and services at reasonable cost to the people." (Transportation Law § 14(1).) Similarly, the New York State Department of Financial Services ("DOFS") is broadly charged with general authority over "the business of all banking organizations" and authorized to "insure the safe and sound conduct of such business, to conserve their assets, to prevent the hoarding of money, to eliminate unsound and destructive competition among such banking organizations and thus to maintain public confidence in such business and protect the public interest and the interests of depositors, creditors, shareholders and stockholders." (Banking Law § 10.)

Permitting an agency to claim carte blanche authority based on such general provisions – particularly where the Legislature went on to delineate the specific nature of the agency's authority through a comprehensive set of specific statutory provisions – sets an extraordinarily dangerous precedent that can have widespread consequences throughout New York. The Court of

Appeals' precedent pronouncing the rules of statutory construction specifically prohibits such elevation of a general statute in the face of a comprehensive statutory framework. Under that contrary, controlling precedent, courts must look to the specific statutes following an introductory statute to discern the scope of an agency's authority. A general grant of authority cannot be read to trump specific authorizing articles or render them meaningless or unnecessary. This Court should review the Order and clarify the extent to which an agency (or a court) can twist such general, introductory statutory language into a carte-blanche grant of authority that trumps the policy-making decisions that are earmarked for the Legislature.

## II. THE ORDER IS INTERNALLY INCONSISTENT

The Order is also internally inconsistent. In finding that the general introductory language granting the PSC authority over the distribution of electricity and gas confers on the PSC the authority to fix the rates private ESCOs charge for electricity and gas, the Order actually cites to Article 4 § 66(5) – which statute the Order held one page earlier plainly does not apply to ESCOs.

Specifically, after citing the general introductory language in Article 1 that describes the PSC's general jurisdiction, the Panel then stated:

> Importantly there is no dispute that the PSC is authorized to set 'just and reasonable' tariff rates for

> gas and electric corporations pursuant to Public Service Law articles 1 and 4 (Public Service Law § 66(5); see Public Service Law § 5[1][b]). In fact is the PSC's broad jurisdiction that enabled it to allow ESCOs access to utility systems in the first place. The PSC essentially maintains that this same authority allows it to impose limitations on ESCO rates as a condition to continued access. We agree.

Order, at *4.

But the Order had concluded one page earlier that the cited statute – PSL Article 4 § 66(5) – plainly does not apply to ESCOs:

> We reject the PSC's contention that ESCOs constitute "gas corporations" subject to rate setting under Public Service Law article 4 (see Public Service Law § 55 [5]). By the same analysis, ESCOs are not "electric corporations" under article 4 (see Public Service Law § 2 [12], [13]).

In this regard, NEM respectfully submits that the Order's reliance on a statutory provision to support its conclusion that the PSC has authority to set rates for ESCOs – after plainly concluding that the cited statutory provision does not apply to ESCOs – warrants review by this Court.

## III. THE ORDER ALSO REPRESENTS A SIGNIFICANT DEPARTURE FROM THE RULE PRONOUNCED IN BOREALI AND CONSISTENTLY APPLIED BY THIS COURT AND COURTS ACROSS THE STATE

In addition, the Order represents a significant departure from this Court's decision in Boreali v. Axelrod, 71 N.Y.2d 1, 8 (1987), which prohibits agency regulations that amount to policy-making, even where

(contrary to the case here) the authorizing statute does impart to the agency jurisdiction in the specified arena.

In Boreali, this Court struck down anti-smoking regulations issued by the New York Public Health Council (the "PHC"), a component of the Department of Health, even though the agency acted within the scope of its general powers. Id. at 8 (invalidating anti-smoking regulations because the regulation transgressed "the line between administrative rule-making and legislative policy making). Until this Order, the Appellate Division consistently applied that Court of Appeals precedent, including in its decision in Health Ins. Ass'n of America v. Corcoran, 154 A.D.2d 61 (3d Dep't 1990) (overturning State Health Department's ban on HIV testing to determine insurability as violating Boreali, where there was no legislative guidance and amounted to the "carte blanche" overreach of authority by a state agency). This Court also reaffirmed the Boreali rule more recently in 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 (2014) (invalidating City Health Department's restriction on cup sizes for "sugary beverages" because it amounted to legislative policy making and was based solely on the department's broad empowerment to enact a health code for the "security of life and health in the city").

In Hispanic Chambers of Commerce, the Court of Appeals identified three factors to which it looked in deciding whether a regulation constituted legislative policy-making: (i) the agency was choosing between public policy ends (by weighing its public health goals against the rule's economic consequences); (ii) the agency was acting "without benefit of legislative guidance, and did not simply fill in details guided by independent legislation"; and (iii) the relevant legislative bodies' failure to act on the issue "in the face of plentiful opportunity to act . . . constitute[d] additional evidence that the Board's adoption of the Portion Cap Rule amounted to making new policy, rather than carrying out preexisting legislative policy." Id. at 697-700.

The PSC's conduct here violates that line of precedent and satisfies all three of the elements the Court of Appeals identified in Hispanic Chambers of Commerce. First, as in those cases, the PSC's Order plainly concedes that the agency was weighing its purported consumer protection concerns against the "desire to preserve and improve the market." (A 182, R. 6247.) By its own assessment, accordingly, it engaged in "uniquely legislative" activity. Second, the Commission here indisputably worked from a "clean slate" – the Legislature has not enacted a single law addressing ESCOs' rates. Indeed, that is why the Commission and the Supreme Court here were

forced to rely on the Commission's "generalized authority" under Article 1 § 5, which does not even address the issue of rate-setting generally, much less with respect to ESCOs. Third, the Legislature here had considered issues overlapping with the Reset Order, including by considering and failing to pass legislation that would have amended Article 4 to apply to ESCOs for purposes only of a new subdivision and that would have banned unauthorized service changes (or "slamming"), which the Reset Order also addresses. See Senate Bill S2557 (goo.gl/2CRMkB); A 81, R. 261; A 90, R. 270 (Reset Order addressing the purported issue of "slamming"). The Legislature's consideration of the issues bearing on the Reset Order indicates that its content falls within the Legislature's purview – not the Commission's – and New York citizens are entitled to have their elected representatives weigh, consider, and decide those issues. See Boreali, 71 N.Y.2d at 8.

For this independent reason, the Order represents a marked departure from the controlling precedent that is applied by the courts across the state in reviewing agency regulations.

## CONCLUSION

For the foregoing reasons, Plaintiff-Appellants respectfully request that the Court grant their motion for leave to appeal.

## CONCLUSION

For the foregoing reasons, Plaintiff-Appellants respectfully request that the Court grant their motion for leave to appeal.

Dated: Armonk, New York
January 11, 2018

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*Attorneys for Petitioners-Appellants*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion for Leave to Appeal complies with 22 NYCRR 500.21 and 500.22.

Dated: Albany, New York
January 11, 2018

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*Attorneys for Petitioners-Appellants*

# Exhibit 1

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Supreme Court, Appellate Division
Third Judicial Department
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Clerk of the Court

(518) 471-4763
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http://www.nycourts.gov/ad3

Janis Cohen
Consultation Clerk

December 7, 2017

Honorable William J. Hooks
State Reporter
New York State Law Reporting Bureau
17 Lodge St.
Albany, NY 12207-2104

Re: 523993 - Matter of National Energy Marketers Association v New York State Public Service Commission

Dear Mr. Hooks:

The Court rendered a memorandum and order in the above-entitled case on July 27, 2017. Would you please add the following sentence at the end of line 3 on page 2:

> To the extent that petitioners herein raise additional arguments, we find such to be without merit.

Very truly yours,

Janis Cohen
Consultation Clerk

sao

cc: Jason C. Cyrulnik, Esq.
Jonathan D. Feinberg, Esq.
West Publishing Company
LexisNexis

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 7, 2017 523993

In the Matter of NATIONAL ENERGY MARKETERS ASSOCIATION et al.,

Appellants-Respondents, et al., Petitioners,

v

NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondent-Appellant.

(And Two Other Related Proceedings.)

DECISION AND ORDER ON MOTION

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Garry, J.P., Egan Jr., Lynch, Mulvey and Aarons, JJ., concur.

ENTER:

Robert D. Mayberger
Clerk of the Court

# Exhibit 2

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter of NATIONAL ENERGY MARKETERS ASSOCIATION et al.,

Petitioners/Appellants/Cross-Respondents,

- v -

NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondent/Appellee/Cross-Appellant.

**NOTICE OF ENTRY**

Docket No. 523993

PLEASE TAKE NOTICE, that the within is a true copy of a Memorandum and Order, Decided and Entered on the 27th day of July, 2017, in the Office of the Clerk of the Appellate Division of the Supreme Court, Third Department.

Dated: July 31, 2017
Albany, New York

Respectfully yours,

PAUL AGRESTA
General Counsel
Public Service Commission
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Three Empire State Plaza
Albany, NY 12223

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TO: **Via Overnight Mail**

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*State of New York*
*Supreme Court, Appellate Division*
*Third Judicial Department*

Decided and Entered: July 27, 2017 523993

---

In the Matter of NATIONAL ENERGY MARKETERS ASSOCIATION,
Appellants-Respondents,
et al.,
Petitioners,

v MEMORANDUM AND ORDER

NEW YORK STATE PUBLIC SERVICE COMMISSION,
Respondent-Appellant.

(And Two Other Related Proceedings.)

---

Calendar Date: June 8, 2017

Before: Garry, J.P., Egan Jr., Lynch, Mulvey and Aarons, JJ.

---

Boies Schiller & Flexner, LLP, Armonk (Jason C. Cyrulnik of counsel), for appellants-respondents.

Paul Agresta, Public Service Commission, Albany (Jonathan D. Feinberg of counsel), for respondent-appellant.

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Lynch, J.

Cross appeal from a judgment of the Supreme Court (Zwack, J.), entered July 26, 2016 in Albany County, which, among other things, partially granted petitioners' application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to review a determination of respondent resetting retail energy markets and establishing further process.

We affirm Supreme Court's judgment for the reasons set forth in Matter of Retail Energy Supply Assn. v Public Serv. Commn. (___ AD3d ___ [decided herewith]).

Garry, J.P., Egan Jr., Mulvey and Aarons, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

# Exhibit 3

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 SOULTIONS, INC.; RESIDENTS ENERGY, LLC; and VERDE ENERGY USA NEW YORK, LLC,<br><br>Petitioners/Plaintiffs,<br><br>- against -<br><br>NEW YORK STATE PUBLIC SERVICE COMMISSION,<br><br>Respondent/Defendant. | NOTICE OF ENTRY<br><br>Albany County Index No. 868-16 |

| | |
|---|---|
| RETAIL ENERGY SUPPLY ASSOCIATION, INTERSTATE GAS SUPPLY, INC. d/b/a IGS Energy, ACCENT ENERGY MIDWEST GAS LLC d/b/a IGS Energy, and ACCENT ENERGY MIDWEST II LLC d/b/a IGS Energy,<br><br>Plaintiffs-Petitioners,<br><br>- against -<br><br>PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, AUDREY ZIBELMAN, PATRICIA L. ACAMPORA, GREGG SAYRE, and DIANE X. BURMAN, in their official capacities as Commissioners of the Public Service Commission of the State of New York, and KATHLEEN H. BURGESS, in her official capacity as Secretary of the Public Service Commission of the State of New York,<br><br>Defendants-Respondents. | NOTICE OF ENTRY<br><br>Albany County Index No. 870-16 |

| | |
|---|---|
| FAMILY ENERGY INC., MAJOR ENERGY SERVICES LLC, and MAJOR ENERGY ELECTRIC LLC,<br><br>Petitioners,<br><br>For a Judgment Pursuant to New York CPLR Article 78<br><br>- against -<br><br>NEW YORK STATE PUBLIC SERVICE COMMISSION,<br><br>Respondent. | NOTICE OF ENTRY<br><br>Albany County<br>Index No. 874-16 |

PLEASE TAKE NOTICE, that the within is a true copy of a Decision/Order signed by Acting Supreme Court Justice Henry F. Zwack on July 22, 2016, duly filed and entered in the above-entitled actions and filed by the Clerk of the Court on July 26, 2016.

Dated: July 28, 2016
Albany, New York

Respectfully yours,

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Acting General Counsel
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JOHN C. GRAHAM
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STATE OF NEW YORK
SUPREME COURT 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 LC; ENERGETIX INC; GATEWAY ENERGY SERVICES CORP; NORTH AMERICAN POWER & GAS, LLC; NYSEG SOLUTIONS, INC.; RESIDENTS ENERGY, LLC; and VERDE ENERGY USA NEW YORK, LLC,

Index No. 868-16

ORIGINAL

Petitioners,

-against-

NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondent.

RETAIL ENERGY SUPPLY ASSOCIATION, INTERSTATE GAS SUPPLY, INC. d/b/a IGS Energy, ACCENT ENERGY MIDWEST GAS LLC d/b/a IGS Energy,

Petitioners,

Index No. 870-16

-against-

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, AUDREY ZIBELMAN, PATRICIA L. ACAMPORA, GREGG SAYRE, and DIANE X. BURMAN, in their official capacities as Commissioners of the Public Service Commission of the State of New York, and KATHLEEN H. BURGESS, in her official capacity as Secretary of the Public Service Commission of the State of New York ,

Respondents.

RECEIVED
JUL 26 2016
Public Service Commission
Office of Counsel

FAMILY ENERGY INC., MAJOR ENERGY SERVICES, LLC,
and MAJOR ENERGY ELECTRIC, LLC,

Petitioners

-against-

Index No. 874-16

For a Judgment Pursuant to New York CPLR Article 78

NEW YORK STATE PUBLIC SERVICE COMMISSION,
Respondents.

---

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJI: Index No. 868-16/870-16/874-16

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Appearances
continued: Public Service Commission of State of New York
Attorneys for Respondent:
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Jonathan D. Feinberg, Solicitor
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Albany, New York 12223

## DECISION/ORDER

Zwack, J.:

In these three Article 78 proceedings,[1] petitioners seek review and vacatur of the Order Resetting Retail Energy Markets and Establishing Further Process ("Reset Order") dated February 23, 2016. The petitions also seeks a preliminary injunction, staying the effective date of provisions "1" through "3" of the Reset Order, which was March 4, 2015. A temporary restraining order was issued by this Court (O'Connor, J) on March 8, 2016, staying implementation of the Reset Order until further order of this Court. Respondent has moved for an undertaking in connection with the stay, which is opposed by all petitioners. Leave to file briefs and participate in oral argument as Amici Curiae were filed by the Public Utility Law Project, New York State Attorney General's Utility Intervention Unit, American Association of Retired Persons, and MFY Legal Services. Oral argument was requested by all petitioners, but after a careful review of the petitions, affidavits, and documentation submitted, as well as the administrative record, the Court has determined the same to be unnecessary.[2] The Court also notes that petitioners have filed for a rehearing on the Reset

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[1]The matters were not consolidated, however, the arguments set forth by each petitioner are substantially the same, and all three petitions relate to one transaction, the implementation of the Reset Order. Where the petitions differ, if any, the same will be noted in this Decision and Order.

[2]Extensive oral argument was had prior to the granting of the stay.

Order.[3]

The Reset Order involves a change in the way energy service companies must deal with their retail and mass market customers. Among the new requirements: "Effective ten calendar days from the date of issuance of this order, energy service companies (ESCOs) may only enroll mass market customers and renew expiring agreements with existing mass market customers based upon contracts that guarantee savings in comparison to what customer would have paid as a full service utility customer or provide at least 30% renewable electricity."[4] To understand the scope of the Reset Order, the order explicitly directs "that the transformation of the retail energy markets commence immediately." The petitioners argue that the failure of the respondent to give any notice of the sweeping changes to the energy retailers who represent over 200 million electric and natural gas customers (or twenty percent of the energy market), the failure to solicit their input, and the failures of the order itself to describe how implementation, compliance and administration with the order are to be handled, and which will cause irreparable harm to the retail energy market, warrant the

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[3]New York Regulation Text, May 4, 2016, Petitions for Rehearing of the Order Resetting Retail Energy Markets and Establishing Further Process.

[4]Language is found on page two of the 23 page order. Petitioners disagree on what the order requires, RESA petitioners, through the affidavits of Michael Scott White, Esq., argue there must be "a guarantee savings over the price paid by utility customers," Family Emergency petitioners interpret it as "the enrollment contract guarantees that the customer will pay not more than were the customer a full-serve customer of the utility." The language of the order is itself inconsistent, but the Court interprets it to mean the latter. See also Guidance Document dated March 3, 2016 "customer will pay no more than if customer were a full service customer of a utility."

vacatur of the order. Illustrative of the deficiencies with the Reset Order, respondent issued three Guidance Documents before the implementation of the order, announced that comments regarding the Reset Order could be submitted within 60 days from its issuance, and held a "discussion" about compliance on February 29, 2016. Although the Reset Order allowed companies to request extensions of time to implement the order, none of the requests were granted. Petitioners specifically argue that the Reset Order lacks a rational basis, is not supported by substantial evidence, is arbitrary and capricious in that no notice of the same was given, and constitutes a regulatory taking without just compensation in violation of the 5th amendment of the United States Constitution and Article 1, Section 7 of the New York State Constitution. Petitioners allege violations of the 14th amendment of the US Constitution and Article 1, section 7 of the state constitution. Petitioners further argue that respondent has no authority for its actions, as it cannot set rates for energy service companies, and this action is therefore ultra vires, an act beyond which it has been granted authority by the legislature. Further, in issuing the order without notice, the respondent has violated the State Actions and Procedures Law (SAPA).

National Energy Marketers Association ("NEMA") alleges that the Reset order violates the State's Environmental Quality Review Act, which provides that any agency's administrative action which "may" have environmental impacts must comply with the statute. Among the justifications for this argument, NEMA notes that many ESCOs are purchasers of renewable energy, and that the market will be affected if these ESCOs are put out of

business. These petitioners also seek expedited discovery in order to support the claims that the order is arbitrary, capricious, not supported by the evidence, and "designed to favor utility companies or other preferred constituents to the detriment of Petitioners and others similarly situated."

The Retail Energy Association ("RESA") asserts that the PSL does apply to ESCOs, and rather, these retail energy "companies" (not corporations) voluntarily cooperate with the PSC and PSL, and entered into the Uniform Business Practices ("UBP") to standardize key procedures between the "monopoly" providers and the ESCOs, or "utility parties" and "non-utility parties" — arguing ESCOs are therefore exempt from PSL Article 4, which regulates utility rates.

Family Energy argues that ESCOs exist by virtue of their "licensing" by the PSC, and as such, strict application of the Notice and Comment requirements of SAPA must be followed, which was not done when the Reset Order was made.

In support of their request for a preliminary injunction and vacatur of the order, all petitioners point to the total lack of guidance they have been given as to how to implement these sweeping changes, and cite to the loss of customers and customer confidence they will suffer as they struggle to comply with the Reset Order — which provides no direction as to how they are to meet the administrative challenges of implementation and compliance. For example, they argue ESCOs were given no guidance as to how to charge the same or less than the public utility prices, particularly as they have no way of knowing what those prices

are, and that question remains unanswered. With all requests for additional time having been denied, petitioners have no further recourse but to seek this injunction.

For its part, the PSC has filed a Verified Answer and raised several objections in point of the law. The first objection is this is not a hybrid action, but an Article 78, and should be converted to that; petitioners have failed to exhaust administrative remedies; and petitioners have failed to establish that the Reset Order is arbitrary, capricious, an abuse of discretion, or affected by error of law.

Respondent argues that ESCOs have no vested property rights in access to utility systems arising from the Commission's exercise of discretion to create a competitive market, particularly when customers are overcharged due to the unworkability of the market. This is not a rate setting order, according to respondents. Respondent argues that it has exercised its Article 4 jurisdiction with respect to *public utilities* to determine what prospective contract offerings ESCOs have to offer in order to retain access to utility distribution systems. Respondent argues that the it has authority to control access to public utility pipes and wires in order to maintain a competitive ESCO marketplace.

Respondents also argue that petitioners did not exhaust their administrative remedies with respect to that portion of its February 2014 which concluded that the market was not workably competitive and mass market consumers were not generally being offered energy-related value-added services or savings. Respondent argues that because it was not raised before the commission in any of the petitions for a rehearing, petitioners may not raise it in

this proceeding.[5] Respondent points out, as evidence of the unworkability of the market, that ESCO cannot beat the price of the monopoly provider, even though it receives tax benefits (Tax Law 1105-C). Respondent asserts ESCOs are charging higher prices while offering non-energy services of a very low value, like rewards programs (gift cards) rather than "innovative services of value to consumers".

In reply, petitioners challenge the Commissions assumptions that the retail market is not competitive, and that consumer complaints have increased when in fact consumer complaints have declined products they are buying.

A bit of discussion on the genesis of the retail energy market is in order. In 1996, the PSC began unbundling electric rates in distribution and commodity components in order to permit electric competition[6] — with the goal of lower utility bills and introduction of innovative products and services through retail competition and increased consumer choices (PSC Opinion 96-12). In 2002, the PSC adopted the Uniform Business Practices (UBPs) as a unified set of rules governing retail access (ESCO) programs to the various utilities. In 2002, the Legislature amended the tax law to create a utility delivery tax break for ESCO customers, with any tax on delivery to be phased out by 2003. In 2002, the Legislature amended PSL Article 2, to provide that the Home Energy Fair Practices Act (HEFPA) applied to the retail energy market, and given compliance with the consumer protections of

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[5]The Court was unable to locate any of the actual petitions for a rehearing in the Administrative record provided by the PSC, precluding review of this argument.

[6]Gas markets underwent this conversion in the mid-1980's.

the Act, ESCO could now terminate service to compel payment.

Following several related PSC staff investigations, respondent proposed that the retail energy market was not workably competitive for residential and small commercial customers. The Commission then ordered numerous modifications to the UBP and to utility tariffs (Case 12-M-0476, February 25, 2014). Among those orders was the directive that ESCOs serving low income assistance program utility customers (also Assistance Program Participants, or APPs) must either guarantee savings over what consumers would pay their utility or provide such consumers with energy related value added services that reduce the consumer's overall energy bill.[7] Following numerous petitions for a rehearing, the PSC stayed enforcement of the February 25, 2014 mandates.

The February 25, 2014 order was affirmed by order dated February 6, 2015, and ESCOs who serve a participant in a low income assistance program are required to guarantee that person will pay no more than what they would pay as a full service customer of a utility, or the ESCO must provide the customer with an energy related value added product or service which does not dilute the value of financial assistance program. As a part of the February 26, 2015 Order, the PSC launched a staff investigation into "requirements energy service companies must satisfy when providing electric or gas services in New York" in order to assess the revisions proposed in the UBP. A staff report was issued on July 28,

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[7]NYAG voiced concerns that the "publically supported assistance funds are pocketed by ESCOs, and they frequently charge customers a premium above the utilities' rates that greatly exceeds the subsidy." Case 12-M-0476, June 16, 2014 Reply of Attorney General Eric T. Schneiderman in response to Petitions for Rehearing, Reconsideration and Clarification.

2015, and comments were solicited by Notice dated August 12, 2015. Also in conjunction with this Order, the PSC convened a collaborative to determine a mechanism by which utility low income customers could be identified, and "to define energy-related value-added products and services that must be provided to assistance Program Participants to qualify for exemption from the price guarantee."[8] The Collaborative Report — *Collaborative Report Regarding Protections for Low Income Customers of Energy Services Companies* — was filed on November 5, 2015. As part of the collaborative, consumer advocates (The City of New York, Utility Intervention Unit of the New York State Department of State, Public Utility Law Project, and the American Association of Retired Persons) asserted that because of the difficulty identifying those low income customers because of confidentiality requirements, and the lack of quantifiable and identifiable energy-related value added products or savings, the protections being offered for low income customers should be made available across the board to all residential customers.[9] The report was then issued with Notice Seeking Comments on December 1, 2015— with the Secretary to the Commission extending the comment deadlines for initial and reply comments to January 29, 2016 and February 11, 2016. During the Collaborative and during the comment period, petitioners

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[8]Case 12-M-0476, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets (February 25, 2014).

[9] PULP and Public Advocate for New York concluded that ESCOs are simply not able to offer products that guarantee savings, and privacy issues made it unlikely that low income customers could be readily identifiable and consumer protections made this data sharing improbable. Further, changes in utility databases and other costs of maintaining a verification system would need to be transferred to the ratepayer.

NYSEMC, RESA, and NEMA opposed expansion of the protections discussed in the Collaborative Report to any customers beyond low income customers. It is clear is that the Commission adopted the alternative approach advocated by consumer groups, citing the non-competitive nature of the retail market, consumer complaints and marketing abuses, when it issued the Reset Order.

When the issue before the Court concerns the exercise of discretion by an administrative agency, it "cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Here, the Court is also mindful when reviewing decisions of the Commission that "(a)dministrative agencies are endowed by experience with greater expertise" (*Matter of Estrella v Bradford,* 146 Misc2d 48, 52 [Sup Ct, Albany County 1989]) and on issues of fact and policy it is appropriate to defer to the agency (*Matter of New York State Elec. & Gas Corp. v Public Service Commn. of State of New York*, 194 Misc. 2d 467, 470 [Sup Ct, Albany County 2002]) and "whose judgment in such matters will be set aside only it if can be shown that rational basis and reasonable support in the record are lacking (*New York Tel. Co. v Public Service Comm.*, 98 AD2d 535, 538 [3d Dept 1984]) Stated differently, PSC's determinations are entitled to substantial deference and must be affirmed unless they lack "any reasonable support in the record for the action taken" (*Matter of Campo Corp. v Feinberg*, 279 AD 302, 307 [3d Dept 1952]. "[A] court, in dealing with

a determination which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency" (*Matter of Nat's Fuel Gas Distrib. Corp. v Public Serv. Comm'n*, 16 NY3d 360, 368 [2011], quoting *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Servs.*, 77 NY2d 753,758 [1991]) .[10] "[A]n agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself" (*Fed. Power Comm'n v Texaco*, 417 US 380, 397 [1974]) and not by the agency's post order actions.

As an initial matter, the Court finds that it is counterintuitive to claim that the PSC lacks jurisdiction over the retail energy market. To say that once it was established by the PSC, with a set of guidelines for its regulation and connectivity to public utilities — the UBP which allows the Commission to oversee virtually every aspect of the market, from eligibility, to marketing and contracts, and policing abuses as they affect its customers — that the PSC cannot regulate these entities with consumer pricing requirements surely defies logic. "It is the duty of the Commission to prevent the imposition upon the public of unfair rates, and the creation of a rate base which is not justified" (*Matter of New York State Elec. & Gas Corp. v Public Serv. Commn. Of State of N.Y.*, 245 AD 131, 134 [3d Dept 1935]). PSL 53 clearly provides that Article 2 of the PSL applies to "any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers."

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[10]The motions for leave to appear and argue as amici curiae in this proceeding seek to address the issue of consumer complaints. In that regard, however, all the applications are supported by only attorney affidavits, which are not evidentiary (*Bronson v Algonquin Lodge Assn.*, 295 AD2d 681 681 [3d Dept 2002]).

Nor is the characterization by petitioners, that their "participation" with the PSC in the promulgation of the UBP was "voluntary", correct. In 1999, the Uniform Business Practices Act was enacted to regulate and standardize procedures by which ESCOs and public utility providers would operate, and by which ESCOs would pay utility services, initiate service and terminate service, provide procedures for switching between services, create a dispute resolution process, ensure credit worthiness of ESCOs, among other things. Compliance with all the UBP guidelines is mandatory, not voluntary. The PSC may have initially excluded the retail energy market from the requirements of Article 2 for purposes of application of HEFPA–Home Energy Fairness Practices Act,--but in 2002 the Legislature acted to require ESCOs compliance with the same.

Clearly, the Public Service Commission has the authority to establish public utility rates, in fact, it has been "recognized as the very broadest of powers" (Public Service Law 66[12][f]; *Matter of Kessel v Public Service Commission of the State of New York*, 136 AD2d 86, 92[3d Dept 1988]). The Public Service Law is replete with other references to this exact authority. PSL 5 refers to the Commission's broad statutory grant of authority over the sale of natural gas and electricity; PSL Art. 4, 65.1 provides in pertinent part that "All charges made or demanded by any such gas corporation, electric corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than that allowed by law or order of the commission."

General Business Law 349-d (11 &12) was enacted in 2010 and preserves the PSC's

authority over ESCO eligibility and marketing practices. Courts have upheld PSC decisions with respect to the operation of competitive markets in setting rates (*Matter of City of New York v Public Serv. Commn. of State of N.Y.*, 17 AD2d 581 [3d Dept 1963]; *Matter of Keyspan Energy Services v Public Serv. Commn. of State of N.Y.*, 295 AD2d 859 [3d Dept 2002]).

Further, the Court needs only to look to the purpose of the unbundling of the utility market to find the PSC's authority over the same— first, to increase market competition with the intention that the same would drive utility rates lower; and second, the development of value added energy related products, not the least of which were those products that would entail utilization of energy conservation techniques. PSL 5 encapsulizes the Legislative Intent with respect to energy conservation directing the PSC to "encourage all persons and corporations subject to its jurisdiction to formulate and carry out long range programs for the performance of their public service responsibilities with economy, efficiency, and care for the conservation of natural resources" (*Matter of Multiple Intervenors v Public Serv. Commn. of State of N.Y.*, 166 AD2d 140, 144 [3d Dept 1991]).

In addition to finding that PSC has jurisdiction over rates charged by retail energy companies, the Court finds that the Reset Order must be vacated for two reasons. First and foremost, the petitioners were simply denied their procedural due process rights. Albeit there is no specific statutory provision requiring the PSC give a retail energy provider notice in any particular manner (*Matter of Keyspan Energy Services Inc.*, 295 AD2d 859), nor is a hearing

required, as a present determination of future policy which may affect rates are not within the contemplation of a statute requiring a hearing (*Matter of Burstein v Public Serv. Commn. of State of N.Y.*, 97 AD2d 900, 901-902 [3d Dept 1983]), procedural due process in the context of an agency determination is applicable — meaning that the PSC must provide an opportunity to be heard in a meaningful manner and at a meaningful time (*Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 260 [2010]). All said, petitioners are entitled to notice of procedures "tailored, in light of the decision to be made, to 'the capabilities and circumstances of those who are to be heard' to insure they are given a meaningful opportunity to present their case" (*Mathews v Eldridge*, 424 US 319) — which on careful review of the extensive submissions by the parties (in excess of 5500 pages), was never afforded to the petitioners.

Although the PSC identifies a SAPA notice dated August 12, 2015 as the notice for comments which resulted in the Reset Order,[11] the Notice itself actually concerns proposed amendments to the UBP, amendments which "set forth requirements ESCOs must satisfy when providing electric or gas services in New York State." Reading the relevant staff report (July 28, 2015) the proposed changes involve faster switching time and other numerous other eligibility criteria including expertise, application fees, inactive ESCOs, standard contracts, material complaints, cure periods, brokers, and the dispute resolution process. The July 28, 2015 staff report does not include any mention of eliminating energy-related value-added

[11]Identified by respondent as SAPA No.15-M-0127SP1, it is not included in the administrative record.

products or a recommendation that the retail energy providers be required to provide a price guarantee, nor (after the Court's review of all of the comments) do any of the comments received by the PSC in connection in the August 12, 2015 notice. The Court notes that while PULP recommended at that time that the role of the retail energy market should be curtailed until such time as the PSC did a full study of consumer complaints and abuse by ESCOs, it did not recommend the that ESCOs be charged with guaranteeing the same price as full service utilities. It advocated greater consumer protections and better enforcement and oversight by the PSC. Certainly none of the comments received as a part of the August 12, 2015 Notice would give petitioners any inkling of the type of change which resulted from the Reset order. Petitioners simply were made aware of what would be required by the Reset Order in that August 12, 2015 Notice.

Also considered by the PSC in arriving at the Reset Order were the results of the Collaborative Regarding Protections for Low Income Customers of Energy Services. The title of the Collaborative identifies what a reasonable person would anticipate the focus group to be, and that is low income assistance customers. The Court specifically notes that the Staff Collaborative was conducted over a period of a year, with the ESCO petitioners fully participating in its process. There was much discussion of the consequences of extending the protections which were mandated for low income assistance customers to the all residential customers. Particularly, the issue was extensively briefed by petitioners prior to the issuance of the reset order. RESA submitted an extensive response to the PULP

proposal in a letter dated November 2, 2015, and acknowledged the proposal in a letter dated January 29, 2016, which includes the finding that "It is reasonable and rational to limit the standards adopted in this proceeding to APP customers and not expand them to include all residential customers" (Letter to Commissioner Burgess from Usher Fogel, Counsel, dated January 29, 2016).[12] NEMA also commented on the proposal, calling it outside the scope of the Collaborative and requesting it be rejected (November 2, 2015). New York State Energy Marketers Coalition (NYSEMC) commented that such action would "essentially negate retail choice in New York" and the Consumer Advocates' suggestion is unrelated to the issue of protections for low income consumers. These are just a few samples of the responses by petitioners to the consumer advocate's proposals. The responses, however, were clearly not tailored with the expectation that the consumer advocate's suggestion was part of the scope of the Collaborative, and there is repeated observation by both the PSC and participants in the collaborative that the proposal was "outside the scope of this proceeding."

The Collaborative originated from two provisions of the February 25, 2014 Order which directed ESCOs to obtain consent from the utility to provide information about low income assistance customers and then provide those customers with products that guarantee savings over what the customer would otherwise pay to the utility. To comply, ESCO must be able to "compare the actual customer bills to what the customer would have been billed at the utility's rates and, on at least an annual basis, provide any required refund as a credit

[12]The Fogel letter on behalf of RESA clearly reflects that an such expansion is a suggestion which goes beyond the original purpose of the Collaborative.

on the customer's bill." The order also provided that in the alternative, the ESCO must provide the customers "energy-related value-added services that are designed to reduce the customer's overall energy bill" and the directive further ordered that if an ESCO could or would not do this, it could choose not to service low-income assistance customers. The other provision of the Order directed further investigation into "energy related value added services." While the February, 2014 order discussed the PSC staff's extensive investigation into "realignment of the regulatory framework" due to "major weaknesses in the residential and small non-retail residential markets due to lack of accurate, transparent and useful information and marketing behavior that creates and too often relies on consumer confusion,"[13] no where in the document is there any suggestion that energy-related value added services would be totally eliminated — as they were in the Reset Order — or that all residential customers would be included in the low income assistance rate guarantee. As such, petitioners were *not* given sufficient notice that the Collaborative would lead to the Reset Order.

The second reason the Reset Order must be vacated is that it bears little rational relationship to the February 2014 rehearing proceedings, the comments on the Staff report of July 28, 2015, or the November 5, 2015 *Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services.* The Reset Order, in its introduction, proposes to immediately take steps to remedy "unfair business practices", none

[13]Case 12-M-0476 February 20, 2014.

of which are addressed in the Collaborative Report, and which were only briefly described in the February 20, 2014 order. Consumer complaints were also addressed, again briefly, in the 2014 order, and the 2014 order and accompanying changes to the UBP set forth numerous consumer protections which would be enacted in order to improve customer knowledge and satisfaction. Given the very sweeping and comprehensive changes to the UBP, meant to improve the retail energy market, and the recommendation by the majority of commentators that further study be given to energy-related value added services, the Reset Order appears to be irrational, arbitrary and capricious. Also arbitrary and capricious is the "immediate transition" — the ten day period by which the Reset Order was to be implemented. Here, the Court agrees with the assessment made by all the petitioners: the implementation of the Reset Order in a time span of 10 days is not only unduly burdensome, it is impossible.

The respondent's activities immediately following the issuance of the Reset Order are a tacit admission that the notice given to petitioners was clearly inadequate. Immediately following the issuance of the Order, three Guidance documents were issued by PSC staff explaining compliance. The Order itself provided for comments for a sixty day period following its issuance. A conference was also held by phone between PSC staff and ESCOs. By far the biggest admission, however, was the issuance of a Notice on April 6, 2016 — which should have been issued prior to the Reset Order — that comments would be accepted on the following proposed action: "The commission is considering imposing limitations upon energy service company eligibility to provide service and prices for commodity-only services,

and the range of value added services with respect to residential and non-residential services." The Notice is entitled "Resetting Retail Markets for ESCO Mass Market Customers." On the Court's reading of the Notice, it invites comments on all of the provisions set forth in the Reset Order. Now, more than a bit late, the Notice also attempts to position respondent poised to enact a similar rule, if or when it winds up on the losing side of this Article 78 proceeding. However viewed, it all speaks volumes of petitioners being stripped of any meaningful opportunity to participate in the promulgation of the Reset Order.

Respondent argues that the petitioners are precluded from attacking it's February 2014 determination as to the "unworkability of the retail energy market", and it is therefore a rational basis for the 2016 Reset Order. The Court disagrees, mindful that the Commission's order must be upheld, if at all, on the same basis articulated in the order by the agency itself (*Fed. Power Comm'n*,417 US 380), judging "the propriety of the action solely on the grounds invoked by that agency" (*Matter of National Fuel Gas Distrib. Corp*, 16 NY3d at 368). The PSC determination to base the Reset Order on the unworkability of the market and consumer complaints bares no rational relationship to the February 25, 2014 order or the Collaborative on low income customers, or to the many comments made with respect to the UBP, which proposed significant changes which would strengthen consumer oversight and consumer protections. Reviewing the record of the 2014 proceedings, the 2015 proceedings, including the Collaborative Report and the comments on the report, what is abundantly clear is that Reset Order is the direct result of the Commission's inability to

identify who are low income assistance customers, and the inability to identify and quantify what was an energy related value added service or product — a rationale that was not articulated by the PSC. There was little concrete discussion about the "unworkability" of the market, and only a cursory discussion of consumer complaints. For their part, petitioners reasonably believed they were addressing consumer complaints, in part, by the comments and discussion concerning enhancements and modifications to the UBP. For example, the February 25, 2014 Order proposed price transparency, with the requirement that all utilities provide online bill calculators that would enable ESCO customers to compare their bill with that charged by the utility for the same energy in the current bill and the preceding 12 months. The Court also agrees with petitioners that the Reset Order is arbitrary and irrational in that it imposes the unexplained and harsh ten day implementation period for the Order, which amounts to a major restructuring of the retail energy market — or even its collapse. The Court is perplexed that implementation would be so immediate, when by the PSC's own admission so many questions remain. Here, the Court notes that the Order provides for a sixty day period immediately following the order which the PSC explains is to answer, among others, the question "Whether prospective ESCO sales to mass market customers, including renewal of expiring contracts, should be limited to products that include 'guaranteed savings' or a defined energy-related value added service."

For the reasons set forth above, the Court finds that the provision 1 through 3 of the Reset Order dated February 23, 2016 must be vacated.

Accordingly, it is

**ORDERED,** that the Article 78 petitions are granted to the extent that the provisions 1 through 3 of the Reset Order are vacated; and it is further

**ORDERED,** that the matter is remitted to the PSC for further proceedings, including Notice specific to the directives of the February 26, 2016 Reset Order, that is, the imposition of a rate for commodity only retail energy companies which guarantees a customer a rate equal to that charged by a full service utility–together with the Notice already given in April 6, 2016 Notice "Resetting Retail Markets for ESCO Mass Market Customers"; and it is further

**ORDERED,** that respondent's request for an undertaking is denied; and it is further,

**ORDERED,** that the Amici Curiae motions for leave to appear and argue are denied.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the Respondents. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: July 22, 2016
Troy, New York

Henry F. Zwack
Acting Supreme Court Justice

Papers considered on Index No. 868-16:

1. Verified Petition NEMA dated March 3, 2016;
2. Verified Answer dated March 28, 2016;
3. Petitioner's Reply Memorandum of Law in Further Support of Order to Show Cause dated May 9, 2016; Reply Affidavit of Charles J. Chicchetti, Ph.D., sworn to on May 6, 2016; Reply Affirmation of Jason Cyrulnik, Esq., dated May 9, 2016; Affirmations of Craig Goodman, Jason Klaben, Thomas Fitzgerald, William Kinneary, Alan Schwab, Christopher Kallaher, Mae Naber, Bruce Fischer, Thomas Luther, and Jessica Chiavara, all in further support of the Order to Show Cause, Exhibits"1" though "11";
3. Petitioners Reply Memorandum of Law in Opposition to respondent's request for an Undertaking dated March 9, 2016;
4. Reply Affidavit of Thomas Puchner, Esq. With Exhibits "A" through "CC".

Papers considered on Index 870-16:

1. Verified Petition of RESA dated March 3, 2016, Order to Show Cause with Temporary restraining Order dated March 8, 2016; Affidavit of Matthew White, sworn to on March 2, 2016 in support of the petition; Affidavit of Doreen McGuire, sworn to on March 3, 2016 in support of the petition; Affidavit of Brenda Crockett , sworn to on March 2, 2016 in support with Exhibits "A" and "B"; Affirmation of Douglas Foss dated March 3, 2016 with Exhibits "A" through "M"; Memorandum of Law Opposing Respondent's Request for an Undertaking dated March 9, 2016;
2. Verified Answer to Complaint and Article 78 Petition, Verified on March 28, 2016, with Attachment "A"; Affidavit of Luann Scherer in support of respondent's Answer and Memorandum of Law; Bench Memorandum of Law dated March 8, 2016 in support of request for an undertaking dated; Affidavit of Luann Scherer in support of request for undertaking; Affidavit of Luann Scherer in opposition to motion for a temporary restraining Order; Memorandum of Law dated March 28, 2016;
3. Reply Affidavit of Barbara Clay, sworn to on May 6, 2016; Reply Affidavit of John R. Morris, Ph.D., sworn to on May 9, 2016, with Exhibits "1" through "3"; Reply Affidavit of Matthew Scott White, Esq., (IGS Energy) sworn to on May 6, 2016; Reply Affirmation of Douglas Foss, Esq., dated May 9, 2016 with Exhibits Volumes 1 and 2 ; Reply Memorandum of Law in Support of Petitioners' Motion for Summary Judgment.

Papers considered on Index 874-16:

1. Amended and Supplemental Verified Complaint of Family Energy Inc., Major Energy Services, LLC and Major Energy Electric LLC, dated March 8, 2016; Affidavit of James Egan, sworn to on March 2, 2016; Affirmation of Levi Moeller dated March 2, 2016; Affirmation of Jeffrey Donnelly dated March 2, 2016; Affidavit of Thomas Puchner,

Esq., sworn to on March 3, 2016, together with Exhibits "A" through "T"; Memorandum of Law in Support of Stay and Annulment of Reset Order dated March 3, 2016;

2. Verified Answer
3. Reply Memorandum of Law in Support of Stay and Annulment of Reset Order dated May 9, 2016; Reply Affidavit of Thomas Puchner, sworn to on May 9, 2016; Reply Affidavit of Jeffrey Donnelly, sworn to on May 6, 2016; Reply Affirmation of Adam Small dated May 6, 2016.

Papers considered and submitted by PSC in conjunction with all petitions:

1. Affidavit of Luanne Scherer in Support of an Undertaking, sworn to on March 8, 2016;
2. Bench Memorandum of Law in Support of an Undertaking dated March 8, 2016;
3. Affidavit of Luanne Scherer in opposition to temporary restraining order;
4. Memorandum of Law of respondent PSC dated March 28, 2016;
5. Administrative Record.