To Be Argued By:
Jason C. Cyrulnik
Time Requested: 30 Minutes

APL-2018-00046
Appellate Division Docket No. 523993
Albany County Clerk's Index No. 868-16

COURT OF APPEALS
STATE OF NEW YORK

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.

BRIEF FOR PETITIONERS-APPELLANTS

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Dated: May 29, 2018

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CORPORATE DISCLOSURE STATEMENT

Appellants make this corporate disclosure statement pursuant to Rules 500.1[f] and 500.22[b][5]. Appellants and their subsidiaries and parents are as follows:

National Energy Marketers Association: none

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

BlueRock 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: none

Verde Energy USA New York, LLC: AES Ventures 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

QUESTIONS PRESENTED

QUESTION 1: 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), that the general introductory language in Article 1 of the PSL can be read to trump the specific provision and give the PSC general jurisdiction to regulate rates of companies that are not electric or gas corporations as defined by the statute?

ANSWER: Yes. The PSL does not impart to the PSC jurisdiction to regulate the rates private ESCOs charge for their optional products and services.

QUESTION 2: Did the Appellate Division erroneously conclude that ESCOs do not have a constitutionally protected property interest in their continued operations in New York despite their substantial investment of resources and the State's consistent encouragement and recognition of their right to serve New Yorkers?

ANSWER: Yes. New York law recognizes the property interest that ESCOs have in their continued operations under the circumstances and afford constitutional protections to efforts to interfere with or eliminate those property interests.

STATEMENT OF JURISDICTION

By Decision and Order dated March 27, 2018, this Court granted Petitioners-Appellants' motion for leave to appeal to the Court of Appeals, pursuant to CPLR 5602.

STATEMENT OF RELATED CASES

The Court also granted leave to appeal in the related case, Retail Energy Supply Association et al. v. Public Service Commission of New York et al., APL-2018-00047 (the "RESA Case"). The RESA Case challenges the same regulations at issue on this appeal and raises the same issues. Both the Appellate Division and Supreme Court consolidated the RESA Case with this case for purposes of oral argument.

Petitioners-Appellants, National Energy Marketers Association, BlueRock Energy, Inc., North American Power & Gas, LLC, Residents Energy, LLC, and Verde Energy USA New York, LLC (hereafter "NEM" or "Appellants"), respectfully submit this brief in support of their appeal from the Third Department's Memorandum and Order dated July 27, 2017 (the "Order"), which: (i) affirmed, in part, the judgment of the Supreme Court finding that the New York Public Service Commission has jurisdiction over the rates private energy service companies (ESCOs) charge customers with whom they contract; and (ii) reversed the Supreme Court's holding that ESCOs have a property interest in continued access to the utility energy distribution systems through which they have provided energy to millions of New Yorkers for over two decades.

PRELIMINARY STATEMENT

This appeal presents the critical question of the scope of the New York Public Service Commission's (the "PSC" or "Commission") authority over private companies. Specifically, this appeal concerns whether the New York State Legislature (the "Legislature") authorized the PSC to set the prices at which private parties may contract for the purchase of electricity and/or natural gas. The private parties at issue are independent energy service companies, or ESCOs, on the one hand, and their customers – each of whom voluntarily elects to contract

with the ESCO for the purchase of electricity and/or natural gas on agreed-upon terms.

For the last two decades, New Yorkers have been able to choose between buying their electricity and natural gas supply from their regulated local utility or from private, free-market ESCOs. There is only one local electric and natural gas utility company in any given geographic area. The local utility delivers the electricity or natural gas through its network of wires and pipes, but customers are able chose to have their energy supplied (through the local utilities' delivery network) by either that regulated local utility or by a private, free market ESCO.

Local utility company rates are regulated by the PSC, and their product offerings are extremely limited. In contrast, there are over 100 ESCOs that operate in New York's competitive market, offering an entirely voluntary set of alternative energy supply options. ESCOs differentiate themselves from the local utility in two main ways: (i) ESCO supply charges are set by the free market, and (ii) ESCOs can offer a variety of products and services that local utilities cannot – such as the ability to lock in fixed rates for long periods of time and the ability to use "green" or renewable energy products, to name a few.

All new energy customers are defaulted to the local utility. This means that <u>every</u> ESCO customer has voluntarily agreed to <u>leave</u> the local utility and its regulated rates and privately contract with his or her chosen ESCO on terms that

the customer wants because that consumer perceives value in free-market pricing or the other products or services offered by ESCOs.

Consistent with this customer choice between regulated or free-market supply, New York's Public Service Law (PSL) authorizes the PSC to regulate and set the rates of only the local utility and does not authorize the PSC to set the rates ESCOs charge for their many optional products and services. In PSL "Article 4. Ratemaking," the Legislature specifically imparted to the PSC the limited authority to set just and reasonable rates to be charged by "electric corporations" and "gas corporations" – which are defined therein to mean only the public utilities, which have monopolistic ownership and control of the electric and gas infrastructure throughout the state. That limitation made sense because the local utility is the default, i.e., non-voluntary, provider of energy supply, and at the time the Legislature imparted that authority to the PSC, those public utilities also had a monopoly over the sale of natural gas and electricity. ESCOs do not own gas or electric plants nor do they own the transmission wires and gas lines necessary for the delivery of utility services. Their very existence is premised on a competitive market environment, which is the antitheses of the local utility monopoly that existed before ESCOs started operating in New York in the mid-1990s.

These facts are not subject to any serious dispute. For decades, the PSC has repeatedly acknowledged that the regulatory scheme established by the Legislature

allows the PSC to set rates for only public utilities. The Legislature was equally clear that Article 4 does not give the PSC authority over ESCO rates. In addition to limiting the plain language of Article 4 to public utilities, the Legislature expanded the PSL in 2002 to give the PSC some limited authority over ESCOs, but expressly limited that amendment to only the consumer-protection provisions of Article 2 ("for the purposes of this Article") and did not make a similar amendment to Article 4, which sets the scope of the PSC's ratemaking authority (and limits it to public utilities).

Despite this well-established paradigm, in February 2016, the PSC reversed its position and unilaterally attempted to assert ratemaking authority over ESCOs in a "Reset Order" that sought overnight to eliminate consumer choice for the millions of New York's who privately contracted with ESCOs. That reversal came at a time when the political environment in the state had changed, and ESCOs came under attack by the PSC as part of a concerted effort to limit consumer choice in New York.

Although the Third Department recognized the statutory limitations of Article 4 of the PSL (as it had to), it erred in concluding that the general "introductory language" in the beginning of the PSL (Article 1) could be read to impart almost limitless authority to the Commission. The Panel reasoned that such general language could trump the specific limitations in the provision regarding

"Ratemaking" and that on the basis of the introductory language to the PSL, the PSC has "general jurisdiction" to set the rates charged by any company – even if they are not "electric corporations" or "gas corporations" as defined by the statute, and even if they are private companies with whom consumers voluntarily choose to contract on agreed-upon terms.

The Third Department's ruling violates multiple fundamental tenets of statutory construction and sets a dangerous standard that threatens to create nearly limitless – and legislatively unauthorized – administrative agency power based solely on an agency's general authorizing statute. That is not the way the law works in New York (or any other jurisdiction for that matter), nor should it be. The PSC is a creature of statute, and its authority is circumscribed by statute. The Legislature defines the scope of agency authority in New York, and by excluding ESCO ratemaking in Article 4 and Article 2, clearly circumscribed the authority of the PSC with respect to non-electric or gas corporations. This is also perfectly consistent with ESCOs' role in the marketplace – to provide choice and options to customers – and the key distinction between regulated local utilities (which are regulated) and ESCOs (which are free-market based). Where the relevant statutes, legislative history and logic all demonstrate a clear limit to the ratemaking authority that the Legislature imparted to the PSC, the courts ought to honor that

and not permit the PSC to backdoor unlimited authority through a few words of introductory language to the PSL.

For the reasons detailed below, this Court should reverse the lower courts' decision condoning the PSC's asserted ratemaking authority over ESCOs because it is contrary to the plain language of the controlling statutory scheme, the relevant legislative history and the PSC's own historical pronouncements.

While this matter is of obvious importance to millions of New Yorkers who voluntarily contracted with ESCOs, it goes well beyond that. The Panel's decision, elevating introductory language in a statute into a provision that can be abused by agencies statewide at will to vastly expand the scope of their regulatory authority, carries far-ranging, dangerous implications for issues that impact the public in many ways, and would all but eviscerate long-standing fundamental principles of statutory construction.

STANDARD ON THIS APPEAL

"This case presents a question of pure statutory interpretation, meriting *de novo* review." Jones v. Bill, 10 N.Y.3d 550, 553 (2008). Where the question presented is one "of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent… *de novo* review is appropriate." Weingarten v. Board of Trustees of New York City Teachers' Ret. Sys., 98 N.Y.2d 575, 575-76 (2002) (determining whether Retirement and Social Security Law and

Administrative Code of the City of New York allowed for New York City Teachers Retirement System's exclusion of certain income from teachers' pensionable salary base); see New York City Transit Auth. v. New York State Pub. Emp't Relations Bd., 8 N.Y.3d 226, 231 (2007) (applying *de novo* standard in considering propriety of New York Public Employment Relations Board's interpretation of its authorizing statute, the Civil Service Law); City of New York v. Comm'n of Labor, 100 A.D.3d 519, 520 (1st Dep't 2002) (applying *de novo* standard in considering propriety of New York State Department of Labor's interpretation of Labor Law).

FACTUAL AND PROCEDURAL BACKGROUND

I. THE PARTIES AND BACKGROUND

Appellants are 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 54, R. 189 ¶¶ 9-20.)

New York residents who elect to leave their local utility and purchase electricity or gas 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 56, R. 191 ¶ 26.) The ESCO is responsible for supplying that customer with electricity and/or gas on agreed-upon terms, and the customer chooses from a

variety of options and corresponding prices. (Id.) The physical delivery of electricity or gas into that customer's home, along with the reading of customers' 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 (or the local utility, if an customer does not elect to contract with an ESCO) for the supply cost of the electricity and/or gas commodity that the customer purchased; and (ii) a delivery bill from the local utility for the cost of the transmission and delivery of the electricity and/or gas to the customer's home. (A 57, 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, provide an alternative to the monopoly in the supply of electricity and gas otherwise held by regulated local utility companies. (Id. ¶ 28.)

Unlike local utilities, ESCOs do not have authority to produce or generate energy or to lay or maintain wires, pipes, or other electric or gas 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 monopolistic and 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 electric or gas for a set period of time) and "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 55, R. 190 ¶ 21.) The PSL delineates the PSC's jurisdiction and authority. (Id.)

II. THE PSL AND THE NEW YORK ENERGY MARKET

In 1910, the Legislature enacted 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."). Until the 1990s, the New York 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 form of ESCOs, and the PSC then considered ways to adjust the regulated aspects of the energy market to reflect its competitiveness. See, e.g., Case 94-E-0952, *Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition*, Opinion 94-27, Dec. 22, 1994 (goo.gl/3GrXBM).

In doing so, the PSC embraced competition, expressing its "commitment to encouraging competition in place of regulated monopoly." Id. at 5. In 1996, for instance, the PSC touted the value of a competitive market and emphasized, in particular, the value that free market-based (rather than government-fixed) pricing presents:

> We expect enough players to participate so that no single provider of service dominates the market as a whole or any part of it, controls the price of electricity, or limits customer options. An effective market requires many buyers and sellers…. **Consumers should be able to choose not only their suppliers, but also the terms of their service through various contract options, including the design of their rates and the length of their contracts for service**.

(See A 358, R. 6793.) In connection with the legislative mandate toward competition, the PSC ordered the public utilities to restructure to accommodate competition from ESCOs. See, e.g., Case 94-E-0952, *Order Establishing Procedures and Schedule*, Oct. 9, 1996 (goo.gl/3GrXBM) (adopting process by which public utilities' restructuring was to proceed pursuant to Commission's orders).

There are three articles of the PSL that are cited in the various decisions below:

- **Article 4 (Ratemaking)** – which establishes the PSC's ratemaking authority over public utilities. See, e.g., PSL Art. 4 § 65.
- **Article 2 (Consumer Protection)** – sometimes referred to as the Home Energy Fair Practices Act or "**HEFPA**," which sets forth certain consumer-protection provisions like complaint handling procedures, meter reading mechanics, and billing transparency. See, e.g., PSL Art. 2 §§ 30-53.
- **Article 1 (General Jurisdiction)** – which introduces and describes certain parameters of the PSC's general jurisdiction. See, e.g., PSL Art. 1 § 5.

III. PUBLIC UTILITIES ARGUE THAT THE PSC MUST REGULATE ESCOS; THE PSC CONCLUDES THAT IT DOES NOT HAVE 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) and the legislative mandate in the PSL, ESCOs were not subject to that regulation at all.

Public utilities and other market participants 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). Participants 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, and it does not include any ratemaking provisions. See generally PSL Art. 2.

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 (public utilities). 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 others 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 108-110, R. 322-24.) The PSC flatly rejected that argument, and confirmed that ESCOs were not "electric corporations" and that the PSL, including Article 2, did not apply to ESCOs. (Id.) Approximately one month later, the PSC again concluded that it did not have jurisdiction over ESCOs pursuant to HEFPA or the PSL. (A 360-62, R. 7157-59; A 363-66, 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.)

IV. 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 the PSC's position 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 – but expressly limited that jurisdiction to Article 2 powers. As noted, Article 2 does not include any provision authorizing the PSC to set rates – which power is covered by Article 4, which 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.

V. THE PSC CONFIRMS THAT IT LACKS JURISDICTION OVER ESCOS UNDER ARTICLE 4'S RATEMAKING AUTHORITY

After the Legislature amended Article 2 and expressly stated that the amendment was limited to Article 2 alone, the PSC again confirmed that 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).[1] This included Article 4—which provides the PSC ratemaking authority over public utilities.

For example, in 1997, the Public Utility Law Project argued that ESCOs were "electric corporations" under Article 4 and therefore subject to the PSC's ratemaking authority. (A 111-12.) 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 364 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 368.)

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 67.) Nor has the PSC previously undertaken to set rates that ESCOs could charge or to prescribe a maximum rate that ESCOs could charge. (Id.) This makes sense because ESCOs are private companies,

[1] 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.

whose rates are subject to free market competition and whose ability to attract customers depends entirely on the customers' voluntarily electing to leave the local utility and purchase energy supply from an ESCO.

VI. 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 82-106.) Ordering Clause No. 1 of the Reset Order stated that, effective just ten calendar days from the date thereof, Appellants and 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 102.) Simply stated, the Reset Order purported to set a maximum rate that Appellants and other ESCOs could charge their customers by forcing them to guarantee that customers would save money by choosing an ESCO product instead of buying electricity or gas from the local utilities (a guarantee requirement that would effectively force ESCOs to shut down and exit the market). The Reset Order provided no exception to this rate-guarantee requirement for gas customers. It contained an identical requirement for sales to electricity customers, but provided an

exception if the ESCO was willing to provide electricity derived from at least 30% renewable sources. (Id.)

Attempting to justify its newly asserted purported jurisdictional authority to set ESCOs' rates in the face of its 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 89-90.) The PSC thus contradicted its repeated assertions to market participants that it had no such jurisdiction over ESCOs and controverted the Legislature's pronouncement that the PSL did not give the PSC jurisdiction over ESCOs (apart from Article 2 rules the Legislature amended in 2002 expressly to apply to 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. (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 local utilities they previously elected to leave, and failure to afford ESCOs an opportunity for meaningful hearing and comment on the PSC's unprecedented and improper effort to engage in ESCO ratemaking. (A 30-34.)

VII. THE PSC REFUSES TO EXTEND THE RESET ORDER'S EFFECTIVE DATE

In light of the Reset Order's dramatic effect, its jurisdictional deficiency, and the PSC's blatant disregard of New York's due process and SAPA requirements in issuing the Reset Order, ESCOs immediately sought extensions of its effective date and raised serious concerns about its propriety and practical effect. See Case 12-M-0476, participant filings between February 23 and March 2, 2016 (goo.gl/D5jq7L). The PSC, consistent with its aggressive and ends-oriented approach, summarily denied the dozens of extension requests, stating simply that "[t]he Commission provided clear justification for the urgent action taken and I [the PSC] decline to postpone the pressing and imperative changes directed in the Order." (A 113-14.)

VIII. APPELLANTS AND OTHERS FILE SUIT, AND THE SUPREME COURT ENJOINS IMPLEMENTATION OF THE RESET ORDER

On March 3, 2016, Appellants filed a hybrid Verified Article 78 Petition and Complaint, seeking to enjoin the implementation of the Reset Order. (See generally R. 183-490.) In addition to Appellants' filing, other ESCOs and trade

associations initiated two other actions seeking to enjoin the Reset Order's implementation.[2]

In support of their application, Appellants asserted that the Reset Order: (i) was invalid under CPLR 7803 because the PSC lacked jurisdictional authority to issue it and because the PSC's promulgation of that order was arbitrary and capricious, and (ii) violated Appellants' due process rights under the New York State and United States Constitutions. (See, e.g., A 71-74 ¶¶ 81-95.)

The Supreme Court (O'Conner, J.) granted a TRO enjoining the PSC from implementing the Reset Order. The Supreme Court (Zwack, J.) later decided the motion for preliminary injunction and the claims on the papers by decision dated July 22, 2016.

The Supreme Court concluded that the PSC's promulgation of the Reset Order was improper (A 30-35) and enjoined the PSC from enforcing the Reset Order. First, the court found that the PSC had "simply denied [Appellants'] their procedural due process rights," including because the PSC failed to provide

[2] 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 groups of Appellants concurrently filed motions for leave to appeal to this Court, and the Court granted both Appellants leave to appeal.

Appellants an opportunity "to be heard in a meaningful manner and at a meaningful time." (Id.) Second, finding that the Reset Order threatened "a major restructuring of the retail energy market – or even its collapse," the Court concluded that the "Reset Order [wa]s arbitrary and irrational" and therefore invalid because, among other reasons: (i) it bore no rational relationship to its stated goals; (ii) it imposed an "impossible," "unexplained[,] and harsh ten day implementation period for the Order"; and (iii) the issues the Reset Order sought to address could be addressed through appropriate consumer protection changes, rather than by overhauling the market. (A 34-37.)[3]

With respect to the PSC's jurisdictional authority, however, the Supreme Court concluded that the PSC was empowered to set ESCO rates. (A 28-30.) Unable to identify any particular statutory provision that imparted to the PSC jurisdiction over ESCO rates, the court purported to "infer" 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); (iv) GBL § 349-d(11)-(12); and (v) the Uniform Business Practices (UBP). (See id.) In reaching that conclusion, moreover, the Supreme

[3] Indeed, while this appeal concerns the jurisdictional aspects of the Supreme Court's decision, the Reset Order's arbitrary and capricious nature was a significant focus of the parties' briefing before the Supreme Court, where Appellants pointed out that it was fundamentally illogical, bore no rational relationship to its purported purposes, relied on unsubstantiated assumptions, and was not based on any meaningful analysis. (See, e.g., A 256-269, R. 6348-6361.)

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 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.

IX. APPELLANTS APPEAL THE SUPREME COURT'S FINDING THAT THE PSL IMPARTS TO THE PSC JURISDICTION TO SET RATES FOR PRIVATE COMPANIES LIKE ESCOS

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.[4] (See A 10-12) On July

[4] On December 2, 2016, the PSC acted on the Supreme Court's remand and re-noticed many of the same provisions as those in the Reset Order as part of a

27, 2017, the Third Department entered a decision affirming the Supreme Court's Order on the question of the Commission's jurisdiction. The Third Department found that the Supreme Court erred in concluding that Article 4 (Ratemaking) of the PSL applied to ESCOs, as the statute plainly limits its scope to "electric corporations" and "gas corporations" defined therein to mean only the public utilities that control New York's energy infrastructure. But the Panel went on to conclude that the general introductory language in Article 1 of the PSL is broad and that the introductory language could thus be read to trump the specific limitations on ratemaking set by the Legislature in Article 4.

The Third Department also granted Respondent's cross-appeal and reversed the Supreme Court's decision, finding that the ESCOs do not have a property interest in their continued access to the utility distribution systems over which

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restructuring proceeding that is currently in process. The notice is predicated on the same erroneous presumption that the PSC has ratemaking jurisdiction over ESCOs, in reliance on the statement in the Supreme Court's decision that is the focus of this appeal. See Case 98-M-1343, *Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits,* Dec. 2, 2016 (goo.gl/VXUoId). The ALJs presiding over that proceeding denied Appellants' motion to stay those proceedings pending this Court's resolution of this appeal. (http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4927489E-D9C2-4F63-8382-760A29FB6FE1}) An interlocutory appeal of that decision and a request for a stay is pending before the Commission. (See http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={8E336DCC-AB78-4902-B25D-83DD7EEEFD16}.)

ESCOs have serviced millions of New Yorkers for two decades, and that ESCOs therefore are not entitled to constitutional due process protections. Appellants timely filed a Motion for Reargument or for Leave to Appeal in the Appellate Division on August 31, 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. NEM timely filed a motion asking this Court to grant NEM leave to appeal. NY CPLR §§ 5514; 5513(b). This Court granted NEM's motion on March 27, 2018, and set a briefing schedule for this appeal.

ARGUMENT

POINT I

THE LEGISLATURE DID NOT GIVE THE PSC JURISDICTION TO SET RATES FOR PRIVATE COMPANIES, LIKE ESCOS

An agency "determination is void where it is made either without statutory power or in excess thereof." Abiele Contracting, Inc. v. New York City School Const. Auth., 91 N.Y.2d 1, 10 (1997).

The Legislature has not authorized the PSC to set ESCO rates. "[T]he powers of an administrative agency may not be implied, but are created by language of clear import, admitting of no other reasonable construction." Durant v. Motor Vehicle Acc. Indem. Corp., 20 A.D.2d 242, 247 (2d Dep't 1964). The

PSC is a "creature of statute," and it "lacks powers not granted to it by express or necessarily implicated legislative delegation." Abiele, 91 N.Y.2d at 10; see also Durant, 20 A.D.2d at 247 ("Unless the delegation of power to vary or amend statutory provisions is explicitly conferred by the Legislature on an administrative board or official, the exercise of the power is ineffective.") (emphasis added). See Tze Chun Liao v. New York State Banking Dep't, 74 N.Y.2d 505, 510 (N.Y. 1989) ("An agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect empower themselves to rewrite or add substantially to the administrative charter itself.")

None of the relevant articles of the PSL authorizes the PSC to set the rates individual New Yorkers agree to pay for products and services they voluntarily contract to purchase from private companies like ESCOs.

A. The Specific Statute Authorizing Ratemaking ("Article 4. Ratemaking") Is Plainly Limited to Authorizing the Commission to Regulate Public Utility Rates and Does Not Authorize the PSC To Set Private ESCOs' Rates

Article 4 does not authorize the PSC to set ESCOs' rates because that article, including its grant of ratemaking authority to the PSC, plainly does not apply to ESCOs – as the PSC has long recognized.

Article 4 § 66(5) provides the PSC with ratemaking authority over "all persons, corporations and municipalities under its supervision" which is expressly limited in that same section (at subsection 1) to entities that have authority "to lay

down, erect or maintain wires, pipes conduits, ducts or other fixtures in, over or under the streets, highways and public place of any municipality for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors." PSL § 66(1). As discussed above in Part I(B)(1), only public utilities are corporations that have that authority; ESCOs are not, and are therefore not subject to the PSC's ratemaking authority under § 66(5), as the PSC repeatedly has recognized. See, e.g., Case No. 94-E-0952, Opinion No. 97-17, Nov. 18, 1997, at 34-35 (PULP's assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect") (goo.gl/YsGHsu); Case 06-M-0647, *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, Nov. 8, 2006 (holding that ESCOs "are exempt from PSL Article 4 regulation") (goo.gl/QTaFbt).

The Third Department correctly "reject[ed] the PSC's contention that ESCOs constitute 'gas corporations' subject to rate setting under Public Service Law article 4," reasoning that: "The term 'gas corporation' speaks to an entity 'owning, operating or managing any gas plant" (emphasis in original) and that the "plain meaning" of the term "plant" "speaks to a facility" that ESCOs do not own – consistent with the PSC's own repeated assertions for more than a decade. The two subsections of Article 4 cited by the Supreme Court – Article 4 §§ 65(1) and

66(5) – thus plainly do not apply to ESCOs that do are not "gas corporations" or "electric corporations" as defined therein.

Tacitly acknowledging that Article 4 does not authorize it to set ESCOs' rates, the PSC also sweepingly claimed that it could end run around that legislative decision to limit ratemaking to public utilities by citing Article 4 § 66-d, purportedly providing the PSC "plenary authority to decide the conditions for access by gas commodity sellers to utility distribution systems." (A 166, R. 6222.) As a threshold matter, the PSC's theory in this regard relates only to gas commodity sellers and not electric commodity sellers, and it thus fails to address the Reset Order's jurisdictional impropriety insofar as it sets ESCOs' electricity rates.

More fundamentally, however, the PSC's claim finds no support in the statutory text. Section 66-d (titled "Contract Carrier Authorization") states that the PSC shall "have the authority to order any gas corporation to transport or contract with others to transport gas under contract for sale by such producer or owned by such producer" on "such terms and subject to such conditions as the commission considers just and reasonable." PSL Art. 4 § 66-d. As with § 66(5), the reference here to a "gas corporation" is defined as a public utility and, by its terms, Section 66-d thus empowers the PSC to force public utilities to "transport gas" for third party producers and consumers (including ESCOs). See Rochester Gas and

Electric Corp. v. Pub. Serv. Comm'n of State of New York, 71 N.Y.2d 313, 318-19 (1988) (discussing how the legislature enacted § 66-d to enable the PSC to require gas utilities to open the pipelines to third parties whereas, before its enactment, § 66-d "only opened [utility] markets to local producers if a utility was willing" to do so) (emphasis added); See also A 146, R. 6201 (PSC describing Section 66-d as "provid[ing] the PSC with authority to require franchised providers of gas transportation of services [sic] to open their pipes to competitively priced gas.") (emphasis added.) Balanced against that is the Commission's obligation to ensure that: (i) the gas utility earns a "just and reasonable" rate in exchange for its forced delivery of gas commodity; (ii) that the gas utility has "available capacity"; and (iii) that the forced delivery of gas will not result in any undue burden to the gas utility's ratepayers. PSL Art. 4 § 66-d. That section thus does not empower the Commission to set the terms of ESCOs' contracts with third-parties; rather, it empowers the Commission to force gas utilities to deliver gas to third-parties. Indeed, the Commission incorrectly claims that its authority to open utility lines to competitively priced gas also somehow provides it with a far more expansive right to close utility lines on any terms it wishes.

Further, the PSC argued below that Article 4 somehow authorizes it "to control practices of non-jurisdictional entities through conditions on access to utility facilities" in reliance on Campo Corp. v. Feinberg, 279 A.D. 302 (3d Dep't

1952), an inapposite decision that is more than sixty years old. Campo concerned the practice of residential "submetering," where a landlord "buys current from a public utility at the wholesale rate and resells it through separate meters to individual tenants, usually at a retail rate." Campo Corp., 279 A.D. at 303. The PSC mandated that utilities sell directly to consumers, rather than for resale, which had the effect of eliminating submetering. Id. at 303-05. The court found that the PSC was authorized to prohibit that practice because the PSC could "regulate service classifications and impose reasonable conditions . . . so far as the utility is concerned." Id. (emphasis added). With respect to ESCOs (as opposed to submeterers), the circumstances are far different: unlike in Campo, where the PSC regulated the utility, the Reset Order purports to regulate ESCOs' rates directly. In addition, whereas submeterers were entirely unauthorized, the Legislature here legislatively provided for ESCO participation in the energy market and prescribed the scope of the PSC's limited jurisdiction over them, including by selectively amending Article 2 to extend to ESCOs, but not Articles 1 or 4, as the PSC itself has recognized. At bottom, the PSC's position that it can lever its mandate to direct public utilities to deliver energy to customers who purchase from an ESCO to impose on ESCOs whatever regulations it chooses is nothing more than an end-run around the statutory regime the Legislature enacted and the limited jurisdiction it imparted to the PSC over ESCOs.

B. The Legislature's Decision To Amend Article 2 To Apply to ESCOs Further Confirms That the Legislature Did Not Authorize the PSC To Set the Rates for Which ESCOs and Customers Privately Contract

Article 2 (HEFPA) addresses discrete consumer protection measures, such as termination notices, mechanical billing practices, and surcharges, and it conspicuously does not contain a single provision addressing ratemaking (for public utilities or ESCOs):

Article 2	
Section No.	Subject Matter Addressed
30	The legislative policy that it is in the public interest for customers to receive utility service without unreasonable qualifications or lengthy delays.
31	The customer application process for utility service.
32-35, 40, 46	The conditions under which utility providers may terminate or disconnect service to customers, their duties to reconnect service promptly, and customers' rights to designate third-parties as agents for notices of termination.
36	Required practices regarding customer security deposits.
37-38	Required practices regarding deferred payment agreements for customer arrears and levelized payments plans (with a back-end true up to bring payments up to the rate-level).
38-39, 44	Required practices for billing mechanics and informational notices.
41	The conditions under which utility providers cannot charge for past services or cannot revise upward past bills.
42, 45	Utility providers' ability to (i) levy certain discrete surcharges (e.g. penalties, fees, and interest); and (ii) permit their customers to pay their bills to a payment agent.
43	The mechanics of how customer complaints are addressed.
47	Utility-related apparatus inspections.

48	The utility-related emergency hotline.
49, 50	HEFPA's application to steam and water services.
51	The PSC's obligation to adopt rules and regulations to implement the PSL's other provisions.
52	The handling of accounts for customers who use shared meters.
53	The entities to which HEFPA applies.

None of these provisions concerns rates, much less provides the PSC with jurisdiction to fix ESCO rates – the subject of an entirely separate section of the PSL (Article 4).

Article 2's omission of any such authorization and its focus on discrete consumer protections is consistent, moreover, with ESCOs' role in the retail energy market. More specifically, the Legislature's decision to amend Article 2 only (and not Article 4) to include ESCOs in 2002 is sensible because ESCOs and public utilities are similarly situated with regard to the consumer protections that HEFPA provides, but not so with respect to ratemaking under Article 4. The PSC's ratemaking responsibility under Article 4 is to ensure that a "just and reasonable" rate is available to consumers by regulating the monopolistic public utilities' rates. By declining to extend the PSC's Article 4 ratemaking authority to ESCOs, accordingly, the Legislature preserved the market-based pricing pressure that ESCOs have introduced to the market while ensuring that a "just and reasonable" rate, in any instance, remained available to the market through the PSC's continued regulation of public utilities' rates.

C. Article 1 Does Not Authorize the PSC To Set ESCOs' Rates

The Third Department erred in concluding that the general, introductory language of Article somehow trumps the foregoing statutory framework and the specific statute covering ratemaking, thus somehow authorizing the PSC to set ESCO rates, for three reasons. First, the general authority referenced in Article 1 itself again concerns public utilities and not ESCOs (like the rest of the PSL, save Article 2). Second, even if that general authority did extend to ESCOs, it does not include the specific power to set ESCOs' rates and cannot trump the specific statutes that limit ratemaking authority to public utilities. Third, notwithstanding any general authority the PSC was given, the law prohibits *ultra vires* agency policy-making like the rate-setting policies in the Reset Order.

I. Article 1 Does Not Grant the PSC Jurisdiction Over ESCOs.

The PSC mistakenly contends that it has "plenary authority" over ESCOs under Article 1 § 5(1)(b). (A 166; A 169-161.) The PSC's sweeping assertion is wrong – it is contradicted by Article 1's plain language, the PSL's history, the PSC's own historical interpretation, and the Legislature's historical interpretation.

First, Article 1's plain language confirms that its jurisdictional scope does not reach ESCOs because they are not "electric corporation[s]" and "gas corporation[s]" as defined by Article 1 §§ 2(11), (13). As detailed above (Point I.A), under those sections, a "gas corporation" or "electric corporation" is a

company "owning, operating or managing any" gas or electric plant.[5] PSL Art. 1 §§ 2(11), (13). ESCOs do none of those things. Rather, ESCOs sell electricity and gas to the consumer while the regulated public utilities own, operate, and manage the utility plants, which is a fundamental distinction the PSC itself has emphasized for two decades. (See A 207 ("Another relevant distinction between utilities and ESCOs is that utilities actually own the transmission and distribution facilities that serve customers, and are responsible for maintaining those facilities in good working order.").) The plain language of the statute thus cannot be squared with the PSC's newly contrived contention that ESCOs are electric or gas corporations

[5] A "gas plant" is defined as:

> all real estate, fixtures and personal property owned, used or to be used for or in connection or to facilitate the manufacture, conveying, transportation, distribution, sale or furnishing of gas (natural or manufactured or mixture of both) for light, heat, or power, but does not include property used solely for or in connection with the business of selling, distributing or furnishing of gas in enclosed containers.

An "electric plant" is defined as:

> all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, hear or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conducts used or to be used for the transmission of electricity for light, heat or power.

PSL Art. 1 § 2.

as defined by Article 1.

Second, the PSL's history is consistent with Article 1 not reaching ESCOs. Indeed, the Legislature enacted Article 1 in 1910 – almost three quarters of a century before ESCOs even came into existence. The Legislature thus clearly did not intend to apply Article 1 to ESCOs and, in fact, the legislative history confirms that the PSL's stated purpose was to regulate only monopolistic public utilities. See PSL Art. 1 (creating the PSC and describing its overall powers); Willcox, 2006 N.Y. at 430 ("Public Service Commissions were established… to provide for the regulation and control of certain public service corporations.").

Third, as detailed above (Point I.A-B), the PSC itself has pronounced for years, repeatedly and emphatically, that ESCOs are not electric or gas corporations as defined under Article 1, admissions that the courts below ignored without explanation. In the 1990s, ESCOs' continued emergence prompted market participants, the PSC, and the courts to consider whether ESCOs were subject to HEFPA (Article 2 of the PSL), which mandated certain consumer protection measures such as meter reading rules and applied only to "electric corporations" and "gas corporations" as defined under Article 1. Contrary to the PSC's litigation position now, however, it concluded then that ESCOs plainly did not meet those Article 1 definitions and therefore were not subject to Article 2. (See Points I.A-B.)

Fourth, in 2002, the Legislature amended one section of the PSL so that it would reach ESCOs (because it did not previously extend to ESCOs) – but did so only with respect to Article 2. The Legislature amended that article's jurisdictional scope to make it broader than the jurisdictional reach of Articles 1 (general authority) and 4 (ratemaking authority). Specifically, whereas before the amendment Article 2's references to "electric corporation[s]" or "gas corporation[s]" relied on the definitions of those terms in Article 1 (which the PSC found to exclude ESCOs), the Legislature added a new provision to Article 2 that provided broader definitions of those terms:

> For purposes of this article, a reference to a gas corporation, an electric corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers.

PSL Art. 2 § 53 (emphasis added). Recognizing, accordingly, that Article 1's definitions excluded ESCOs from the PSC's jurisdiction, the Legislature expanded the jurisdictional scope of Article 2 – for the limited purpose of Article 2. See, e.g., New York Bill Jacket, 2002 S.B. 6778, Ch. 686, B-201 Budget Report on Bills – Session Year 2002 ("When enacted in the 1980s, HEFPA covered traditional utility companies which provided the full range of consumer services – transmission and delivery, as well as the energy commodity – electric, gas or steam. As a result of energy competition, transmission and delivery utilities and

commodity providers (ESCOs) have split. HEFPA now covers only transmission and delivery utilities. ESCOs, either former components of traditional energy companies or newly created, which provide electric, gas and/or steam are not regulated by HEFPA." (emphasis added)).

The nature of that amendment, moreover, confirms the materiality of the fact that ESCOs play no role with respect to utility plants whereas public utilities do. Indeed, the key difference between the jurisdictional scopes of Articles 1 and 2 (post-amendment) is that the latter now omits the former's requirement that an electric (or gas) corporation own, operate, or manage a utility plant:

Article 1 Electric Corporation Definition[6]	Post-Amendment Article 2 Jurisdictional Provision
The term "electric corporation," when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person… owning, operating or managing any electric plant.	For purposes of this article, a reference to a gas corporation, an electric corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers.

PSL Art. 1 § 2(13) (emphasis added); PSL Art. 2 § 53 (emphasis added). The Legislature thus agreed that Article 1's definitions of gas and electric corporations do not reach ESCOs because they do not operate utility plants.

[6] Article 1's definition of a "gas corporation" is substantively the same.

Despite the Legislature's and the PSC's own conclusions to the contrary, the PSC now pretends that ESCOs are electric and gas corporations under Article 1 on the theory that they purportedly "operate" gas and electric plants by merely "sell[ing] or facilitat[ing]" the sale of those commodities. That contorted reading is flatly inconsistent with Article 1's definitions of "electric corporation" and "gas corporation" because it ignores their express requirements that such companies actually "own[], operat[e], or manag[e]" the "real estate, fixtures and personal property" that physically deliver commodity (i.e., a "gas plant" or "electric plant"). PSL Art. 1 §§ 2(10)-(14).

The PSC's position also reduces the Legislature's 2002 amendment of Article 2 to a pointless exercise. Basic principle of statutory construction provide that statutes cannot be interpreted in ways that make them superfluous or unnecessary. See McKinney's Cons. Laws of N.Y. Statutes § 98(a) ("All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof."); Kittredge v. Planning Bd. of Town of Liberty, 57 A.D.3d 1336, 1339 (3d Dep't 2008) ("In construing a statute, a court must attempt to harmonize all its provisions and to give meaning to all its parts, considered as a whole, in accord with legislative intent.")

At bottom, the Supreme Court's conclusion that Article 1 provides the PSC jurisdiction over ESCOs requires this Court to: (i) disregard the plain language of Article 1; (ii) disregard the fact that ESCOs did not exist when Article 1 was enacted; (iii) disregard the PSC's own findings; (iv) disregard the Legislature's own interpretation; and (v) conclude that the Legislature wasted its time in amending Article 2 to make HEFPA extend to ESCOs. This Court should reject such absurd and impermissible results.

II. Article 1 Does Not Provide the PSC the Specific Power To Set ESCOs' Rates In Any Event.

Even assuming *arguendo* that the PSC has "general jurisdiction" over ESCOs under Article 1, that jurisdiction plainly does not include the power to set ESCOs' rates anyway. The Court below adopted (without explanation) the PSC's sweeping claim that it has "general supervisory powers" over ESCOs under PSL Art. 1 §§ 5(1)(b), 5(2), and that it therefore has *carte blanche* with respect to the New York energy industry. (A 29, R. 78; see A 166, R. 6222; A 169-171, R. 6224-226.) Those sections, however, only generally describe the PSC's general jurisdiction—they do not purport to impart the specific authority to fix ESCOs' rates, and for several reasons.

First, interpreting Article 1's general introductory language to include ratemaking authority renders meaningless the myriad other provisions in the PSL that provide the PSC with specific powers, including Article 4 – the specific statute

that imparts ratemaking authority (and limits that authority to public utilities only). The Supreme Court's reading thus contravenes fundamental cannons of statutory construction requiring 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." Estate of Allen v. Colgan, 190 A.2d 939, 940 (3d Dep't 1993). 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)). The Appellate Division's interpretation renders each of these empowering provisions meaningless: If Article 1 § 5 already gave the PSC "plenary authority" over the New York energy markets – including the power to fix rates – then the Legislature would have pointlessly undertaken the task of enumerating each of these powers including, most egregiously, the specific power to set public utilities' rates.

In addition, the Appellate Division's reliance on general introductory language to essentially create a boundless mandate means that the Legislature also wasted its time by specifically enumerating many other agencies' powers where similar language appears in the beginning of the agency's respective authorizing statute. For example, the Department of Transportation is broadly authorized to:

> [C]oordinate and develop comprehensive, balanced, 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 is broadly authorized as follows:

> [T]he business of all banking organizations shall be supervised and regulated through the department of financial services in such manner as 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. In light of these general authorizing provisions, the Appellate Division's interpretation renders pointless the numerous specific provisions that authorize the DOT and the DFS to undertake their roles. That is not only absurd and contrary to law, but it sets a dangerous precedent imparting to agencies *carte blanche* authority in their respective fields.

Second, the Appellate Division's interpretation violates the basic principle that a "general provision of a statute applies only where a particular provision does not." People v. Mobil Oil Corp., 48 N.Y.2d 192, 200 (N.Y. 1979). The PSL addresses the PSC's ratemaking powers in Art. 4 §§ 66(1), 66(5) and 72, and those

more specific sections limit the PSC's ratemaking authority to public utilities, not ESCOs. The Appellate Division thus incorrectly reasoned that Article 1's general provisions somehow trump the PSL's specific, relevant provisions.

III. The PSC's Reliance on Article 1§ 5 To Justify the Reset Order Constitutes Unlawful Policy-Making.

Even if Article 1 provided the PSC jurisdiction over ESCOs (it does not), the PSC's reliance on Article 1 § 5's general charge as a basis for the Reset Order constitutes policy-making in violation of the New York State Constitution's separation-of-powers doctrine. The Appellate Division did not even address this independent fatal flaw in the Reset Order.

Agencies cannot engage in policy-making based on a broad authorizing statute, even where (contrary to the case here) the enacted policy falls within that statute's parameters. This Court's decision in Boreali is instructive. There, the New York Public Health Council (the "PHC," a component of the Department of Health), enacted anti-smoking regulations. See Boreali v. Axelrod, 71 N.Y.2d 1, 8 (1987). Its purported statutory basis for that regulation was Section 225(5)(a) of the Public Health Law, which (similar to Article 1 § 5, here) generally authorizes the PHC to "deal with any matters affecting . . . the public health." The Court found that the PHC's action in this regard was invalid because it amounted to the PHC using its general authority as a purported justification for its legislative policy-making in violation of the New York State's separation-of-powers doctrine

(i.e., that "[t]he legislative power of this State shall be vested in the Senate and the Assembly"). Id. at 14; N.Y. Const. Art. III § 1. The Court reasoned that while the general scope of the PHC's authority was constitutional on its face, the PHC's action undertaken pursuant to that authority "transgressed" the "line between administrative rule-making and legislative policy-making." Id. at 11.

The Court's bases for that finding were similar to the facts here. First, the Court reasoned that the PHC's basis for the antismoking regulations—its weighing of "health concerns, cost and privacy interests"—confirmed that it had improperly engaged in a "uniquely legislative function," particularly where the Legislature had not provided the PHC guidance on how to weigh those competing concerns. Id. at 12-13. Second, the Court found that, when enacting the regulations, it had not merely "fill[ed] in the details of broad legislation describing the over-all policies to be implemented," but rather "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." Id. at 13. Third, the Court reasoned that the Legislature's failed attempt to agree on legislation regarding the same issues that the antismoking regulations addressed showed that the PHC had improperly acted in a legislative role. Id. It explained that "it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult societal problems by making choices among competing ends." Id. Fourth, the Court found that the PHC had not applied any

special expertise or technical competence in promulgating the regulations. Id. at 13-14.

The Boreali Court's reasoning was applied again in ensuing decision, including the Appellate Division's decision in Health Ins. Ass'n of America v. Corcoran, 154 A.D.2d 61 (3d Dep't 1990) and this Court's decision 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). In Corcoran, the Health Commission relied on its general authorizing statute, which empowered it to regulate insurance policies where they "may be contrary to the health care needs of the public" (Insurance Law § 3217(a)(4)), as a basis for implementing a ban on HIV testing to determine insurability. Corcoran, 154 A.D.2d at 72. The Appellate Division rejected that interpretation, finding that: (i) its breadth would violate Boreali, where it would result in the Health Commission essentially having "*carte blanche*" to further its own objectives in the insurance industry; and (ii) the Legislature had not enacted any statute directly addressing the relevant issue (whether HIV test results should be used as a basis for insurability) and, as a result, the Health Commission generated its order from a "clean slate" rather than Legislative guidance. Id. at 74-75. The court thus invalidated the Health Commission's order. Id.

In Hispanic Chambers of Commerce, the New York City Board of Health issued a "Sugary Drinks Portion Cap Rule" restricting the size of cups that restaurants could use when serving sugary beverages – relying on a statute broadly empowering it to enact a health code for the "security of life and health in the city." N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 23 N.Y.3d at 690. This Court invalidated the Board's order, finding that it violated the separation of powers doctrine under Boreali. Specifically, the Court found that: (i) the Board had engaged in legislative policy-making because it had chosen between public policy ends by weighing its public health goals against the rule's economic consequences; (ii) there was no legislation "concerning the consumption of sugary beverages," and the Board had thus enacted the Portion Cap Rule "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 with regard to the Reset Order exhibits the same features that drove the Boreali, Corcoran, and Hispanic Chambers of Commerce courts to invalidate the agency orders in those cases.

First, as in those cases, the PSC here asserts that it weighed its purported consumer protection concerns against the "desire to preserve and improve the market." (A 192.) By its own assessment, accordingly, it engaged in "uniquely legislative" activity.

Second, the PSC here worked from a "clean slate" – the Legislature has not enacted a single law addressing ESCOs' rates. That is why the PSC and the Supreme Court here were forced to rely on the PSC'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 91, R. 261; A 100, 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 PSC'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.

Last, the PSC did not utilize any meaningful amount of technical expertise in promulgating the Reset Order. The PSC did not even purport to consider the Reset Order's effects on consumers, including: (i) the likely reduction in, or elimination of, ESCO market participation resulting from the Reset Order and the effect that a less competitive market will have on utility pricing; (ii) the market discipline that ESCOs have imposed on utility rates and conduct; (iii) the natural price volatility of a competitive market; and (iv) the adverse impact eliminating ESCO products will have on efforts to reduce energy usage and increased use of "green" energy[7] – services and products that only ESCOs (in contrast to the local utilities) provide customers. (See A 257-58; A 285-320 ¶¶ 12, 14-21, 23, 25, 37-60, 62-64.) In addition, in mandating that ESCOs guarantee that their rates would beat the utilities' rates, the PSC even ignored that ESCOs offer different products than utilities and operate under completely different business models. That is not "technical" decision-making.

The PSC's issuance of the Reset Order is thus on all-fours with the Boreali, Corcoran, and Hispanic Chambers of Commerce decisions – the PSC, without any guidance from the Legislature, issued its own order to address what it perceived to

[7] The PSC not only failed to do this, but it also failed to meet its statutory obligation to prepare an environmental impact statement under Article 8 of the New York Environmental Conservation Law, the State Environmental Quality Review Act, or "SEQRA." (A 61-63¶¶ 47-50.)

be problems in the energy market and thus unlawfully engaged in legislative policy-making.

D. The PSC Has No Other Jurisdictional Basis to Set ESCOs' Rates

Unable to find any specific basis under Articles 1, 2, and 4 of the PSL for the PSC's purported authority to issue the Reset Order, the Appellate Division (A 11-12) also appeared to reason (without meaningful explanation) that such authority arises out of General Business Law (GBL) § 349-d. That statute decidedly does not authorize the PSC to issue the Reset Order or otherwise engage in ratemaking for ESCOs.

First, GBL § 349-d in fact undercuts the assertion that the Legislature authorized the PSC to set ESCOs' rates. Titled the "Energy services company consumers bill of rights," that statute merely provides for certain legislatively enacted consumer protections that ESCOs are required to follow. Not only is the fact that the Legislature acted to provide for such consumer protections facially inconsistent with the PSC's claim that the Legislature has delegated such responsibilities to the PSC, but the Legislature omitted from those consumer protections any reference to ESCOs' rates. That omission cannot reasonably be squared with the court's conclusion that GBL § 349-d authorizes the PSC to set ESCOs' rates.

In addition, the Appellate Division's assertion that Subsections (11) and (12) of GBL § 349-d purportedly preserved the PSC's ability to set ESCOs' rates is wrong. (A 29-30.) These sections merely prevent GBL § 349-d from overriding other statutory provisions by which the PSC has jurisdiction over ESCOs – they do not, however, provide the PSC any authority to set ESCOs' rates. Nor is their reference to the PSC having certain jurisdictional authority over ESCOs remarkable. Indeed, these sections were enacted in 2010, eight years after the Legislature amended Article 2 (HEFPA) to provide the PSC jurisdiction over ESCOs with respect to a variety of consumer-protection mandates (but not with respect to ratemaking) and forewent amending Article 4 (ratemaking) to extend to ESCOs.

POINT II

THE APPELLATE DIVISION ERRED IN REVERSING THE SUPREME COURT'S FINDING THAT ESCOS HAVE A PROPERTY INTEREST IN CONTINUED ACCESS TO UTILITY SYSTEMS

The Appellate Division also erred in summarily reversing the Supreme Court's conclusion that ESCOs have a constitutionally protected property interest in access to the utility distribution systems and thus a right to procedural due process. The Appellate Division reversed that conclusion without explanation, the entirety of the court's decision on this point reducing to the following single sentence:

> We do agree that Supreme Court erred to the extent that it found that ESCOs have a property interest in continued access to utility systems (see Matter of Niagara Mohawk Power Corp. v. New York State Dept. of Transp., 224 AD2d 767, 767-768 [1996], appeal dismissed 87 NY2d1054, lv denied 88 NY2d 899 [1996]; Campo Corp. v. Feinberg, 279 AD 302, 306-307 [1952]."

(See A 12.)

The two cited cases do not say anything of the sort. In the 1952 Campo case, which the Appellate Division cited without explanation, this Court declined to find a constitutionally protected interest in submetering – an entirely unregulated and unapproved practice that the PSC then prohibited. Campo Corp., 279 A.D. at 305-06. That underscores the contrasting facts here: ESCOs are subject to licensing, regulation, and express legislation governing their rights and responsibilities as participants of the New York energy market; and the ESCOs' reasonable and well-founded expectation that the PSC would not arbitrarily and unreasonably deprive them of a meaningful opportunity to participate in that market has prompted ESCOs—at the PSC's urging—to invest substantial funds into New York business operations for more than a decade, including creating revenue streams, brand recognition, and customer goodwill.

Under those circumstances, ESCOs' protected property interests are well established under state and federal law, regulations, and contracts. State and federal antitrust laws, as well as the PSL, "prohibit utilities from denying

competitors use of their distribution facilities in order to maintain monopolies." Energy Ass'n of New York State v. Pub. Serv. Comm'n of State of N.Y., 169 Misc. 2d 924, 932 (Alb. Cnty. Sup. Ct. 1996). ESCOs' access to utility infrastructure is thus legally mandated. Indeed, the PSC itself argued in the Reset Order that it is legally obligated to ensure that gas and electric commodity markets are competitive. Thus, ESCOs compete in the New York energy market using utility infrastructure because the law mandates such inclusive participation, giving rise to a protected property interest. See Spinelli v. City of N.Y., 579 F.3d 160, 169 (2d Cir. 2009) ("strong" property interest "in operating a business and, stated more broadly, pursuing a particular livelihood");Greene v. McElroy, 360 U.S. 474, 492 (1959). The Legislature further reinforced ESCOs' property interests through amendments to the PSL that, by the PSC's own account, "allowed ESCOs to suspend the provision of utility distribution service to compel payment of unpaid ESCO commodity bills." (PSC Br. at 6.) See Ezekwo v. N.Y.C. Health & Hosps. Corp., 940 F.2d 775, 783 (2d Cir. 1991) (plaintiff's future business expectation was property interest entitled to due process protection where state's conduct made that expectation "reasonable and well founded").

Importantly, the UBP (R. 6437-6503) establish a detailed ESCO-eligibility licensing regime, delineating among other things: (i) ESCO eligibility

requirements; (ii) bases for revoking ESCO eligibility; and (iii) a requirement that ESCOs are provided notice and an opportunity to be heard (UBP § 2.D.6.a.3) before their eligibility is revoked. (R. 6444-6453.) Appellants have been licensed to act as ESCOs in the New York energy market pursuant to these criteria, and "once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood," creating a protected property interest. Bell v. Burson, 402 U.S. 535, 539 (1971); Spinelli, 579 F.3d at 168-69 (petitioner had property interest supported by licensing regime); Phillips v. VandyGriff, 711 F.2d 1217, 1222-23 (5th Cir. 1983) (de facto licenses subject to due process requirements). The Appellate Division did not address any of this precedent in summarily reversing the Supreme Court's holding that ESCOs have constitutionally protected property interests in access to the distribution systems and are entitled to due process protections.

CONCLUSION

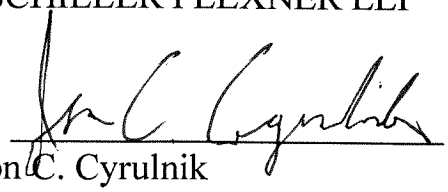
For these reasons, Appellants respectfully submit that this Court should reverse the decision and order of the Appellate Division, Third Department, dated July 27, 2017, to the extent it found that (i) the PSC had the authority and jurisdiction to regulate the rates ESCOs charge their customers in the retail energy markets and (ii) that ESCOs do not maintain vested property interests in the access they have to the utility distribution systems. Appellants also respectfully request

that the Court award them their costs and expenses in bringing this appeal, and such other further, and different relief that this Court deems just and equitable.

Dated: May 29, 2018
Armonk, New York

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

By: 
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CERTIFICATION PURSUANT TO CPLR 2105

I, Jason C. Cyrulnik, hereby certify that I compared the foregoing paper(s) to the originals on file with the New York State Supreme Court, Appellate Division, Third Department, and found them to be a true and complete copy thereof.

Dated: May 30, 2018

Jason C. Cyrulnik