SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NATIONAL ENERGY MARKETERS ASSOCIATION; BLUEROCK ENERGY, INC.; BOUNCE ENERGY NY, LLC; DIRECT ENERGY BUSINESS MARKETING, LLC; DIRECT ENERGY BUSINESS, LLC; DIRECT ENERGY SERVICES LLC; ENERGETIX, INC.; GATEWAY ENERGY SERVICES CORP.; NORTH AMERICAN POWER & GAS, LLC; NYSEG SOLUTIONS, INC.; RESIDENTS ENERGY, LLC; and VERDE ENERGY USA NEW YORK, LLC, Petitioners/Plaintiffs, against NEW YORK STATE PUBLIC SERVICE COMMISSION, Respondent/Defendant.	Index No. IAS Part Justice

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

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PRELIMINARY STATEMENT

Nothing in the Commission's voluminous opposition papers justifies the draconian measures set forth in the February 23 Order, which if given effect would cause immediate and irreparable harm to Petitioners and the hundreds of thousands of New York customers that they serve. Relying on nothing more than unsupported assumptions, inapposite case law, and the *ipse dixit* of its Staff, the Commission asks this Court to allow it to radically restructure the decades old energy-supply market in New York – on virtually no notice whatsoever. This action would effectively force many ESCOs out of business and eliminate for many New York customers the choice, customized pricing plans, better service, and lower prices that ESCOs have provided. Critically, in the context of the instant motion, the Commission fails to identify any harm that would arise from maintaining the status quo until after this Court adjudicates on the merits the many serious issues raised in the pleadings.

In its papers, the Commission concedes that it is attempting to regulate ESCO rates despite the fact that it has never done so before and has repeatedly affirmatively maintained that it lacks jurisdiction to do so. The Public Service Law ("PSL") provides the statutory blueprint for the Commission's authority, in which blueprint the Legislature specifically confined the Commission's jurisdictional authority with respect to regulating energy prices to those charged by public utilities – and the Commission does not (because it cannot) point to any provision in the PSL that allows the Commission to engage in rate-setting for the 200 private ESCOs that serve New York customers. Tellingly, the Commission fails to cite a single case in which a court has found that the Commission has the authority to set rates that ESCOs can charge. Instead, the Commission relies on inapposite case law from other jurisdictions concerning other statutory schemes, and to New York cases that predate the entry of ESCOs into the New York market. None of that changes the glaring threshold fact that the Order is void because the Commission acted outside the scope of its jurisdictional authority. (See below, Part I.)

Even if the Commission had jurisdictional authority to issue the Order (and it did not), the Order is void for the additional threshold reason that the Commission failed to comply with the New York State Administrative Practices Act ("SAPA"). At its core, SAPA mandates that the Commission provide notice of any industry-wide changes to a regulatory regime, which surely includes the Order. On this front, the Commission has even less to say. In fact, after issuing the Order under review, and during the pendency of the TRO, the Commission conspicuously published a "Notice of Proposed Rulemaking" on April 6, 2016, which contained a proposed order eerily similar to the February 23 Order. By publishing a SAPA notice now, the Commission effectively concedes that the Order under review failed to satisfy SAPA. In the face of that tacit concession (and with remarkable hubris), the Commission nonetheless insists that it complied with SAPA because it published some other notice at some prior point in time that concerned in some tangential way ESCOs and mass-market consumers. But the Commission cannot reasonably purport to have complied with SAPA by pointing to a notice of rulemaking that did not even remotely describe the way in which the Order would fundamentally transform the retail energy market, or inform ESCOs that their days in New York were numbered. Those are basic requirements imposed by SAPA, and the Order's indisputable failure to comply with those requirements renders it void on that independent basis as well. (See below, Section II.)

The Order is also invalid for the independent reasons that it is arbitrary, unreasonable, and irrational. Without any factual support or analysis, the Commission purports to justify the Order on the grounds that the retail energy market for mass market consumers is not "workably competitive" and ESCOs fail to provide mass market consumers "energy-related value-added products and services." But the Commission – relying exclusively on the self-serving and wholly unsupported testimony of one of its staff who offers nothing more than speculation as to market conditions and whether and to what extent ESCOs could comply with the impossible standard set by the Order – fails to explain how eliminating ESCOs from the market (returning New York to last century's utility-monopoly scheme) could possibly <u>improve</u> competition or <u>increase</u> offerings of "value-added products." Indeed, as shown below and through unrebutted expert testimony, the Order would only undermine those objectives because it is premised on a fatally flawed understanding of competitive markets, ignores the valuable products and services ESCOs provide millions of consumers, and fails to account for the discipline ESCO participation has imposed on utility pricing. (<u>See below</u>, Section III.)

Finally, allowing the Order to go into effect would violate Petitioners' constitutional rights, including those guaranteed by the due process, equal protection, contract clause, and takings clauses of state and federal constitutions. In addition to failing to provide Petitioners with notice or an opportunity to be heard, the Order also paints a stark divide between the deferential and accommodative treatment afforded utilities and the repressive treatment afforded ESCOs. (<u>See below</u>, Section IV.) This Court thus should grant Petitioners' motion and stay the status quo until it can fully review the merits.

ARGUMENT

I. THE COMMISSION DOES NOT HAVE JURISDICTIONAL AUTHORITY TO SET ESCOS' RATES

As the Commission's own cited case law recognizes, "the Legislature of the State of New York – which is the embodiment of the People of the State of New York – has the right to delegate" regulation of energy service to the Commission, but only where "the Legislature promulgates necessary and appropriate guidelines" for the Commission's exercise of regulatory choices, "so that those choices will represent not the purely independent choice of the said PSC, but the intent of the Legislature." Energy Ass'n of N.Y. State v. PSC, 169 Misc. 2d 924, 927 (Sup. Ct. Albany Cnty. 1996). Within this balance of legislative and agency authority, courts have defined the Public Service Law as the "blueprint" that the Commission must follow in fulfilling its duty to govern energy resources within the State. Id.

Three Articles of the Public Service Law's "blueprint" are relevant to understanding the Commission's lack of legislative authority to set the rates that ESCOs can charge customers who voluntarily choose to purchase their energy from an ESCO, whether expressed as a maximum rate ESCOs can charge or otherwise:

- **Article 1 (General Jurisdiction) –** which concerns the scope of the Commission's jurisdiction generally. See PSL § 5.

- **Article 2 (Consumer Protection) –** sometimes referred to as the Home Energy Fair Practices Act or "HEFPA," which sets forth certain consumer-protection provisions.

- **Article 4 (Ratemaking) –** which establishes the Commission's rate-making authority over public utilities and in particular its power to ensure that public utility rates are "just and reasonable." PSL § 65.

In its brief, the Commission tries to blur the distinctions between these separate and defined statutes so that it can mix-and-match them to suit its ends. But the plain language of the PSL, consistent with the framework and history of the statutory enactments, establish clear and important differences among these three separate Articles:

- **Article 1:** The well-established rules of statutory construction establish that **Article 1**'s general grant of jurisdiction is subject to the more specific contours of the Commission's regulatory authority as set forth in the other Articles of the PSL. See, e.g., Estate of Allen v. Colgan, 190 A.D.2d 939, 940 (3d Dep't 1993) ("It is a well-settled principle of statutory construction that statutes must be construed in such a manner as to give meaning and effect to all their provisions and that a construction of one provision of a statute which would cancel or render another portion of a statute meaningless is impermissible."). In addition, the Commission itself has consistently confirmed that Article 1 definitions of "electric corporation" and "gas corporation" do not apply to ESCOs. See RESA Br. at 25-27.

- **Article 2:** In 2002, the Legislature enacted a new Section 53 of PSL Article 2 to include ESCOs within the definition of gas and electric corporations solely for purposes of Article 2 and its consumer-protection provisions. See RESA Br. at 27-30. As a result, **Article 2**'s consumer protections do apply to ESCOs. Article 2, however, does not contain a single provision conferring upon the Commission the authority to control rates, which power is covered by a separate provision of the PSL – Article 4.

- **Article 4**, including its grant of Commission rate-making authority, does not apply to ESCOs. The plain language of the statute applies only to local public utilities, and consistent with that indisputable fact, the Commission itself has long recognized that ESCOs "are minimally regulated and exempted from application of Article 4 of the Public Service Law." Case 06-M-0647 (Nov. 8, 2006) at 10 (emphasis added).

Thus, as detailed in NEM's opening brief (at 6-9), the statutory blueprint for Commission authority does not confer jurisdiction on the Commission to control ESCOs' rates as it attempts to do in the Order. The Court of Appeals has made clear that such agency overreach in the absence of jurisdiction is void, and this Court should thus invalidate the Order on that threshold ground. See Abiele Contracting, Inc. v. N.Y.C. School Const. Auth., 91 N.Y.2d 1, 10 (N.Y. 1997) (an agency "determination is void where it is made either without statutory power or in excess thereof"). Each of the Commission's attempts in its opposition brief to justify its regulatory overreach fails.

A. The Commission Admits that the Order Is Rate-Making

Notwithstanding the Commission's effort to deny the obvious for litigation purposes – baldly proclaiming (at 26) that it "has not set the rates or otherwise determined the prices that

ESCOs can charge"[1] – the PSC repeatedly admits that its Order engages in rate-making:

- The Commission relies on "use of its ratemaking authority" as justification for cutting off ESCOs' "access to electric facilities." PSC Br. at 27.
- The Commission contends that it is entitled to deference because it "has made a decision as to whether rates are just and reasonable and how any insufficiency will be addressed." PSC Br. at 36.
- The Commission argues that its "existing eligibility and complaint process" was "not sufficient" to effectuate the Commission's goals because "those processes do not address ESCO prices." PSC Br. at 38.
- The Commission claims that ESCO prices "cannot be deemed to result from the operation of a workably competitive market" and therefore the market cannot substitute "for PSC setting of a just and reasonable rate." PSC Br. at 46.
- The Commission admits that the Order is "intended to address" what it perceives as ESCOs' "unjust and unreasonable rates, and not only the behavior of individual bad actors." PSC Br. at 52.

B. The Commission Wrongly Relies on Its Article 4 Authority to Justify Its ESCO Rate-Making

Having conceded the obvious – that the Order is an act of rate-making – the Commission wrongly contends (at 46) that the Court should permit the PSC to set rates because it somehow "acted to meet its statutory responsibilities" in issuing the Order. The Commission argues (at 22) that it can satisfy its "statutory requirements for 'just and reasonable' rates" for the utilities only if the Commission ensures "that the market is workably competitive" so it can rely on that open market to generate just and reasonable rates. Of course, what the PSC omits from that line of reasoning is that the purported "statutory requirements" that supposedly authorize the

[1] The Attorney General and Utility Intervention Unit's amici curiae brief likewise depends (at 31) on the false premise that the "Reset Order does not exercise" the Commission's "rate-setting authority at all."

Commission to set just and reasonable rates are prescribed by PSL Article 4 – and the Commission has long recognized (as noted above) that ESCOs are "exempt" from Article 4. Indeed, in a recent order, the Commission itself ruled: "We do not set or regulate the rates charged by ESCOs."[2] (R. 3547.)

Beyond its telling admissions, the Commission also fails to cite any authority that supports the proposition that the Commission has authority to set rates for ESCOs. Instead the Commission resorts to relying on inapposite cases that predate the existence of ESCOs in New York and that concern public utilities that are the subject of the PSL ratemaking provision, Article 4. The Commission, for example, cites a 1987 case – during which period ESCOs did not even exist in New York – stating generally that the Legislature has granted the Commission "the very broadest of powers" to regulate utilities which make the Commission "in this respect . . . the alter ego of the Legislature." Rochester Gas & Elec. Corp. v. PSC, 135 A.D.2d 4, 7 (3d Dep't 1987). That case concerned, however, the Commission's authority under Article 4 and does not once purport to speak to the scope of the Commission's authority to regulate non-utilities or ESCOs. The Commission likewise relies on pre-ESCO cases in which the Court of Appeals noted that "the setting of rates presents technical problems which have been left by the Legislature to the expertise of the PSC." PSC Br. at 23 (citing N.Y. State Council of Retail Merchants, Inc. v. PSC, 45 N.Y.2d 661, 662 (1978); Abrams v. PSC, 67 N.Y.2d 205, 217-18 (1986)). These cases merely acknowledge the uncontroversial and irrelevant fact that the

[2] The Attorney General and Utility Intervention Unit's amici brief appeals (at 29) to the Commission's "twenty-year history" of regulating ESCOs – as shown above, that twenty-year history shows that the Commission has never once regulated ESCOs' rates and has to the contrary viewed (and expressly pronounced) such regulation as beyond its scope.

Legislature delegated to the Commission the authority to set rates for public utilities under Article 4. That innocuous fact is not at issue in this proceeding.

Similarly, the Commission relies extensively on case law concerning the rate-making authority of the Federal Energy Regulatory Commission (FERC), a federal agency subject to federal statutory requirements entirely separate (and very different) from the terms of the Commission's authority under the PSL. Critically, unlike the Commission here, Congress have FERC express statutory rate-making authority over the entities at issue in the cases cited by the Commission. See 15 U.S.C.A. § 717c (West 2015) [Natural Gas Act]; 16 U.S.C.A. § 824d (West 2015) [Federal Power Act]. FERC's express statutory authority to monitor rates and set rates is the basis for all of the FERC cases on which the Commission relies, which FERC cases are thus irrelevant to the Order at issue in this proceeding.[3] The Commission's extensive reliance on these cases underscores its failure even to join issue on the dispositive jurisdictional flaw underlying the Order at issue in this proceeding.[4]

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[3] See PSC Brief at 22-23, relying on a series of inapposite FERC cases based on federal statutes imposing duties on and granting authority to FERC – not the Commission: Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870 (D.C. Cir. 1993) (FERC obligation to ensure "just and reasonable" rates is "mandated by" the Natural Gas Act); California ex rel. Lockyer v. FERC, 383 F.3d 1006, 1009 (9th Cir. 2004) (FERC is "obligated" under the Federal Power Act "to ensure that wholesale power rates are 'just and reasonable' . . . . Indeed, FERC's authority to determine whether wholesale rates are 'just and reasonable' is exclusive."); La. Energy & Power Auth. v. FERC, 141 F.3d 364, 365 (D.C. Cir. 1998) ("Federal Power Act requires" that rates be "just and reasonable") (citing 16 U.S.C. § 824d(a)); FPC v. Texaco Inc., 417 U.S. 380, 387, 394 (1974) (provision of just and reasonable rates is a "duty imposed by" the Natural Gas Act and is "mandatory" on FERC [formerly FPC]); Cajun Elec. Power Co-op., Inc. v. FERC, 28 F.3d 173, 180 (D.C. Cir. 1994) (evaluating FERC's obligations under the Federal Power Act); Tejas Power Corp. v. FERC, 908 F.2d 998, 1003 (D.C. Cir. 1990) (evaluating FERC's obligations under the Natural Gas Act).

[4] In their amici brief (at 31), the Attorney General and Utility Intervention Unit similarly invoke state statutes on price gouging and credit card surcharges as "akin" to the Order's price ceiling. The amici incorrectly refer to these statutes as "regulations" and argue that they are

In short, the Commission fails to identify any provision in Article 4 or any precedent supporting the proposition that the Commission has jurisdiction to set rates for ESCOs as it seeks to do in Ordering Clauses 1-3.

C. ESCOs' Exemption from Article 4 Is a Function of Legislative Decision-making, Not Agency Discretion

The Commission refers (at 24) to its "Eschewal" and "declination" of Article 4 authority over ESCO rates and service, as if to suggest that the Commission has had Article 4 authority all along, and simply did not care to exercise it. The Commission's attempt to rewrite history – and to rewrite the PSL – is demonstrably wrong.

The Commission itself has recognized that "Article 4 did not apply to ESCOs." PSC Br. at 58 (citing Opinion No. 97-17). Thus, the Commission's contention (at 65) that it "decided to regulate ESCOs more lightly than utilities" is disingenuous. By express legislative design, the Commission was conferred with jurisdiction to regulate only some, but not all, aspects of ESCOs' operations. The Legislature's decision to limit the Commission's regulatory authority over ESCOs makes perfect sense. As the Commission recognizes (at 65), ESCOs "lacked utility monopoly power." The Legislature's limited grant of jurisdiction over ESCOs thus reflects the fundamental differences between ESCOs (whose products customers voluntarily elect to

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"Like the Reset Order" because they impose "limits on the prices a business is permitted to charge" (31). Both of the cited statutes (General Business Law §§ 396-r and 518) reflect the exercise of legislative authority, not regulatory authority. See N.Y. Gen. Bus. Law § 396-r(1) ("Legislative findings and declaration") (emphasis added); Expressions Hair Design v. Schneiderman, 808 F.3d 118, 124 (2d Cir. 2015) ("When the bill proposing Section 518 was introduced in the New York legislature . . . ."). The amici's cited statutes thus demonstrate that the legislature knows how to address price-limits when it wishes to do so, and reinforce that the Commission lacks ratemaking authority where, as here, there is no legislative grant. The Commission's attempted ratemaking in the Order represents legislative policy-making, not agency rulemaking. See RESA Br. at 30-34.

purchase) and public utilities (who enjoy a monopoly over various aspects of consumers' energy needs).

Significantly, when ESCOs initially entered New York's energy market, the Commission considered the issue directly and expressly concluded that ESCOs were not subject to either Article 2 (Consumer Protection) or Article 4 (Ratemaking). See RESA Br. at 25-27. In response to that void, the Legislature acted to amend Article 2 (Consumer Protection) only, to clarify that "[f]or purposes of this article," ESCOs should be subject to Commission regulation. Id. at 27. The Legislature thus balanced competing policy goals: On one hand, the Legislature gave authority to the Commission to regulate ESCOs with respect to marketing and business practices, and on the other hand, the Legislature did not give the Commission any authority to set rates or otherwise use Article 4 as a means of impeding ESCOs' participation in the energy market. See id. at 27-28.[5]

Moreover, Section 66 of Article 4, which Section the Commission cites as the Article 4 statutory authority for the Order, applies on its face only to corporations 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). In other words, Section

[5] Curiously, the Commission argues (at 35) that "[i]f anything, the Legislative decision to subject ESCOs to Article 2" – but not to subject them to Article 4 – "undercuts the PSC's conclusion that ESCOs are exempt from Article 4." The Commission's reasoning makes no sense. If the Legislature disagreed with the Commission's determination that ESCOs were exempt from Article 4, it could have revised Article 4 just as it revised Article 2 to bring ESCOs within its scope. Instead, the Legislature did act to revise the statute by including ESCOs only in Article 2, and left Article 4 intact, expressly limiting its application to public utilities and exempting ESCOs, as confirmed by the Commission's rulings.

66 expressly applies only to utilities, not ESCOs. See Cyrulnik Aff. Ex. B at 103.[6] The PSC does not even attempt to argue (much less present any evidence) that the 200 ESCOs whose rates the Order purports to regulate have any such authority.

D. The Commission's Simplistic Assumption that the Power to Create Includes the Power to Destroy Ignores the Clear Statutory Limits of Its Authority

The Commission argues that because it exercised "authority delegated by the Legislature to create the retail markets" in which ESCOs operate, the PSC therefore by implication must have unfettered authority to do whatever it chooses to "fix" retail markets (PSC Br. at 24) – even if that means, as here, a complete "'reset' away from the ESCO model" (PSC Br. at 37). That logic would turn decades of extensive case law and legislation regarding regulatory authority and statutory interpretation on their heads. The Commission wrongly assumes that the regulatory power to "create" a market must also include the power to intervene in that market in any manner and to any extent the Commission wishes, including to "reset" the market back to a time before ESCOs existed. But simply because "the courts have recognized that to introduce competition . . . is well within the Commission's jurisdiction," Energy Ass'n, 169 Misc. 2d at 936 (emphasis added) does not mean that the Commission also has the unilateral power to limit or eliminate competition. ESCOs have been serving the New York energy market for two decades, and the Commission's jurisdiction is limited to what the Legislature has set forth in the "blueprint" it defined in the PSL, which represents the Legislature's considered judgment about whether and to what extent ESCOs should be regulated. The "blueprint" in the PSL does not

[6] "Cyrulnik Aff." refers to the March 3, 2016 Affirmation of Jason Cyrulnik in Support of Petitioners' Order to Show Cause (containing Exhibits A-V).

grant the Commission the authority to "reset" the market, decide rates ESCOs charge, or eliminate competition in the New York energy market, as the Order purports to do.

E. The Commission Cannot Engage in Impermissible Rate-Making Simply by Characterizing Its Action as Regulation of "Access" to Distribution Systems

The Commission also seeks (at 24-28) to ground its claimed authority to set the rates that ESCOs charge in the Commission's purported power to restrict access to distribution systems. The Commission cites two putative bases for its asserted "plenary authority to decide the conditions for access by gas commodity sellers to utility distribution systems": (i) its "general supervisory powers," and (ii) PSL § 66-d. Neither purported basis gives the Commission the authority to take the actions set forth in the Order.

As a threshold matter, the Commission does not cite any basis for similar "plenary authority" to condition access for electricity commodity sellers.

Moreover, the Commission's reliance on "general supervisory powers" with respect to gas sellers and PSL § 66-d is misplaced. First, basic rules of statutory construction belie the Commission's effort to rely on "general" powers to override the specific limitations on its regulatory power set by the Legislature in exempting ESCOs from the Commission's rate-setting authority. See Part I.F below. Second, PSL § 66-d merely authorizes the Commission "to order any gas corporations to transport or contract with others to transport gas under contract for sale" – in other words, it provides authority for the Commission to open access to gas distribution systems, not to restrict such access by imposing "conditions" on users of the distribution system that constitute unauthorized rate-setting.

The Commission's reliance on the 1952 Campo case for the overly broad proposition that the Commission has "authority to control practices of non-jurisdictional entities through conditions on access to utility facilities" (PSC Br. at 28) is also unavailing. 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. v. Feinberg, 279 A.D. 302, 303 (3d Dep't 1952). Residential submetering had been prohibited in Brooklyn and Queens in 1928, but had not been forbidden in Manhattan and the Bronx. Id. The Commission then prohibited submetering in Manhattan and the Bronx through changes in the "rate structure" and "service classifications" of ConEd, the then dominant public utility. Id. at 303-05. The Commission's actions were statutorily authorized in that case because while the Commission "may not regulate submeterers," who "are not classed as public utilities by the Public Service Law," the Commission could nonetheless "regulate service classifications" and service rates "so far as the utility is concerned." Id. at 305-06 (emphasis added). Unlike in Campo where the Commission regulated the utility's service rates and classifications, the challenged Order in this case purports to regulate the rates of ESCOs, which "are not classed as public utilities by the Public Service Law," id., and over which the Commission lacks Article 4 rate-making authority.

F. The Commission Cannot Fall Back on Its Generalized Grant of Jurisdiction Where More Specific Statutory Guidance Clearly Establishes the Limits of the Commission's Rate-Making Authority

Unable to grapple with the relevant statutory provisions, the Commission (at 28-32) falls back on the introductory, generalized grant of jurisdiction set forth in Article 1. The Commission contends (at 31) that the generalized grant of jurisdiction under Article 1 provides it with the authority to issue the Order because Article 1 "allows the Commission to require that

ESCOs take steps to make sure that commodity markets are workably competitive."[7] The Commission does not even acknowledge – much less meaningfully address – that its overbroad appeal to the general grant of jurisdiction in Article 1 "would render meaningless the PSL's more specific authorizing sections, including Sections 66(1) and 66(5), which already authorize the Commission to set the utilities' rates (and not those of the ESCOs)" – as detailed in NEM's opening brief. Pet. Br. at 8. The Commission's attempt to rewrite the statutory regime by advancing an expansive interpretation of its general grant of jurisdiction over ESCOs to include ESCO rate-making impermissibly fails "to give meaning and effect to all [of the PSL's] provisions" and clearly asks this Court to construe one portion of the PSL in a manner that "would cancel or render another portion of a statute meaningless" – an improper approach that the courts consistently reject.[8] Estate of Allen, 190 A.D.2d at 940 (3d Dep't 1993).

As detailed above, the Legislature already addressed the PSC's lack of jurisdiction over ESCOs in 2002 and amended only Article 2 to confer upon the Commission jurisdiction to regulate some aspects of ESCOs' business – setting out in detail the scope of the Commission's regulatory authority over ESCOs. By contrast, the Legislature did not amend the rate-making

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[7] The Attorney General and Utility Intervention Unit's amici curiae brief likewise relies on the PSL's generalized grant of jurisdiction under Article 1 (at 27-31), and fails for the same reasons.

[8] Ignoring this fundamental canon of statutory construction, the Attorney General and Utility Intervention Unit contend in their amici brief (at 33) that the Commission's lack of statutory ratemaking authority over ESCOs "would leave PSC powerless to regulate the retail-energy market" because "ESCOs would be free to engage in any business or price practice that is not explicitly barred" by state law. This straw-man argument mistakes the fundamental defect in the Commission's jurisdiction: The Legislature has specifically addressed the scope of the Commission's ratemaking authority, and that authority encompasses only utilities, not ESCOs. Enforcing that narrow limitation in the Commission's jurisdiction does not limit the Commission to regulating only ESCO actions that are "explicitly barred" by state law.

statute (Article 4) – which did not apply to ESCOs – to now extend to ESCOs. 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 Court should reject the Commission's attempt to usurp legislative powers to rewrite the scope of its jurisdiction by misappropriating general authority to permit it to do what it cannot do under the relevant specific provisions of the PSL. The Court of Appeals has strongly rejected such efforts: "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." Tze Chun Liao v. N.Y. State Banking Dep't, 74 N.Y.2d 505, 510 (N.Y. 1989) (annulling agency's action where it was without statutory authorization).

In sum, because the Commission acted without jurisdictional authority in issuing the Order, the Order is void.

II. THE ORDER IS INVALID BECAUSE THE COMMISSION FAILED TO FOLLOW THE CLEAR REQUIREMENTS SET FORTH IN THE NEW YORK STATE ADMINISTRATIVE PROCEDURES ACT (SAPA) FOR NOTICING AND ISSUING SUCH ORDERS

In addition to exceeding its jurisdiction by regulating beyond its legislative mandate, the Commission also issued the extra-jurisdictional Order in clear violation of the New York State Administrative Procedures Act ("SAPA"), which is an independent threshold basis for invalidating the Order. See Med. Soc. of State of N.Y., Inc. v. Levin, 712 N.Y.S.2d 745, 753 (Sup. Ct. 2000) aff'd sub nom. Med. Soc'y of State of New York, Inc. v. Levin, 280 A.D.2d 309 (1st Dep't 2001) (holding that regulations were "invalid, null and void [] as a matter of law" where agency failed "to substantially comply with the clear mandates of the State Administrative Procedure Act"); Kahrmann v. Crime Victims Bd., 14 Misc. 3d 545 (Sup. Ct. 2006) (holding that a rule is not effective where agency did not adhere to the requirements of SAPA). As detailed in

Petitioners' opening brief, the Commission issued the Order on the same day that it issued a February 23, 2016, Notice Seeking Comments (the "February 23 Notice"). Cyrulnik Aff. Ex. A at 21. That is, the Commission requested ongoing comments and collaboration on the Order's directives that would "reset" the industry, while simultaneously demanding compliance with the Order before such comment and collaborative process was barely underway, let alone completed. Id.

Where, as here, an agency issues an order that makes industry-wide changes to a regulatory regime, that order constitutes rule-making subject to SAPA's clear and critical requirements. Energy Ass'n of New York State v. Pub. Serv. Comm'n of State of N.Y., 653 N.Y.S.2d 502, 516 (Sup. Ct. 1996) ("[W]hen the Commission approves or rejects a plan, or orders restructuring in a certain manner, it will be promulgating a rule and **must take appropriate action under SAPA**") (emphasis added). Nor is there any ambiguity as to what SAPA requires and how the Order here entirely ignores those plain requirements. At a bare minimum, for a rule to be deemed effective, SAPA "requires submission of a notice of proposed rule making to the Secretary of State for publication in the state register, followed by a public comment period, a public hearing (where applicable), and the filing and publication of a notice of adoption of the rule." Kahrmann, 14 Misc. 3d at 548; see SAPA §§ 202, 203. Even where an agency issues a proper and timely SAPA notice and provides for the requisite comment period, the law requires another notice and comment period where, after the comment period, the agency has made "substantial revisions" to the proposed rule. SAPA § 202(4-a); see also Cyrulnik Aff. Ex. I.

The Commission has little to say on this front. As a threshold matter, the Commission all but conceded the fatal problem by publishing a SAPA notice – in the form of a new Notice of

Proposed Rulemaking – on April 6, 2016, containing a proposed order substantially similar to the Order under review. Cyrulnik Reply Aff. Ex. 6 at 27[9]; PSC Br. at 73 n.45. These notices are a tacit acknowledgment (put charitably) that the Commission is well aware of the Order's obvious failure to comply with the statutory SAPA requirements.

After effectively conceding its failure to comply with SAPA, the Commission wrongly and vaguely contends (at 69) that it "reasonably apprised Petitioners that it was considering imposing rate and service conditions on their businesses" based on its prior "rulemaking notice, together with the substance of the proposed rule and subsequent developments in proceedings." The Commission's argument simply ignores away an express statutory regime that applies across agencies. An agency order is not SAPA-compliant where, as here, it has a different effect or addresses different issues than those in the notice of rulemaking. Period. The fact that the Commission published some notice in the state register does nothing to change the analysis. As detailed below, that notice plainly did not propose the rules promulgated in Ordering Clauses 1-3 (together, the "Rate Ceiling"), nor did it remotely summarize the contents of the Order so as to notify ESCOs of a forthcoming "reset" of the entire industry.

Specifically, to support its contention that it has complied with SAPA, the Commission relies on a Notice of Proposed Rulemaking published in the state register on August 12, 2015 [SAPA No. 15-M-0127SP1] (Cyrulnik Aff. Ex. A at 8) (the "August 12 Notice"), entitled "Amendments to the Uniform Business Practices of ESCOs," the purpose of which was "[t]o consider amendments to the Uniform Business Practices of ESCOs" as recommended in a report filed by Department of Public Service Staff on July 28, 2015 in case 15-M-0127. Cyrulnik Aff.

[9] "Cyrulnik Reply Aff." refers to the May 9, 2016 Affirmation of Jason Cyrulnik in Further Support of Plaintiffs' Application for a Preliminary Injunction.

Ex. H at 12; see also Ex. G (the "UBP Report"). For starters, the language of Ordering Clauses 1-3 does not appear anywhere in the August 12 Notice – as per the basic SAPA requirement. The Commission attempts to downplay the Notice's inadequacy by appealing to SAPA § 202(1)(f)(v), which allows – in instances where the complete text of the rule exceeds 2000 words – for the notice to "contain only a description of the subject, purpose and substance of such rule." But that exception is utterly irrelevant here – for two reasons: First, the substance of the proposed rule summary in the August 12 Notice as published in the state register addressed only issues related to the UBP[10] and said nothing about the Ordering Clauses that are the subject of this proceeding:

> The Public Service Commission is considering proposed amendments to the Uniform Business Practices filed by Department of Public Service Staff on July 24, 2015, in case 15-M-0127, which set forth the requirements that Energy Service Companies (ESCOs) must satisfy when providing electric or gas services in New York State. Alternatives to the recommendations made in the report may also be considered. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

(emphasis added.) The text of the August 12 Notice does not even reference Ordering Clauses 1-3, let alone propose their adoption, nor any service conditions that would restrict the types of products that ESCOs can offer. Similarly, the UBP Report also does not contain the language noticing Ordering Clauses 1-3. Additionally, the entire exception is irrelevant here because had the Commission actually intended to notice the Rate Ceiling and service conditions on August 12, it could easily have included the operative sections of the Order pertaining to Ordering

[10] In their Petition, Petitioners do not seek to stay the Ordering Clauses in the Order that do relate to amendments of the UBP and that do not purport to regulate the ESCOs' rates. In issuing the TRO, the Court recognized that fact and limited the stay to Ordering Clauses 1-3.

Clauses 1-3 (which are set forth using fewer than 300 words) in the State Register without coming close the 2,000 word limit.

Even the limited authority that the Commission cites regarding SAPA requirements confirms the error here. The Commission cherry picks language (at 70) in suggesting that the Order needs to be a "logical outgrowth" of the original proposed rule, but the Order here plainly does not come close to satisfying that standard. Revisions to a proposed regulation are a logical outgrowth only where the changes are "minor" and the expense or delay associated with issuing a new round of notice and comment are unnecessary because the current notice "would fairly apprise interested persons of the subjects and issues." Motor Veh. Mfrs. Assn. of U.S. v. Jorling, 152 Misc. 2d 405, 409 (Sup. Ct. Albany Cty. 1991) (holding that, despite revisions, the agency had complied with SAPA because the revisions merely clarified the rule and "petitioners [were] not in any way harmed by the changes"). The August 12 Notice (and the UBP Report referenced therein) could not reasonably have caused ESCOs "to have anticipated that [the Rate Ceiling and service conditions] might be imposed." Arizona Pub. Servs. Co. v. E.P.A., 211 F.3d 1280, 1299 (D.C. Cir. 2000).[11] Indeed, the August 12 Notice bears no resemblance to the monumental

[11] Unable to square its failure to notice with the controlling standards in New York, the Commission relies on several of non-binding federal cases, such as Arizona Pub. Servs., that involve other statutory schemes in support of its argument that the Order is a "logical outgrowth" of the Notice of Rulemaking. The Commission's resort to extra-jurisdictional case law is unsurprising – the rare instances in which New York courts have found a rule to be a "logical outgrowth" are not analogous to the situation here. For instance, in Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams, the court identified regulatory amendments as "logical outgrowths" where the agency had "eliminated the possibility of substantial prejudice" to the petitioners. 131 A.D.2d 205, 212 (3d Dep't 1987), aff'd, 72 N.Y.2d 137, 527 N.E.2d 274 (1988). Here, by contrast, Petitioners have shown that the Order's expansive and deleterious effects will likely cause them substantial prejudice, including by permanently forcing them out of the New York market. See Part V, below.

changes imposed by the Rate Ceiling or any other portion of the Order, and – even crediting the Commission's counterfactual contention that the documents are related (they are not) – the scope of the Order is indisputably far broader and far more damaging than anything the Commission included in any notice or prior document.

More specifically, in arguing that the Order is a logical outgrowth of a prior notice, the Commission contends (at 71) that ESCOs "should have known, even before July 2015, that the Commission might consider imposing rate and service controls" because the Commission included a topic in a Notice of Technical Conference as part of an inquiry about whether ESCOs should offer a standardized fixed price product and whether a single per unit rate should be imposed (R. 3151-53). That contention makes a mockery of the SAPA requirements and badly mischaracterizes the facts to boot. First, the Notice of Technical Conference is irrelevant on its face – as it was a request for industry input, not a notice of a proposed rulemaking, or even a statement of agency intent, as required under SAPA. Second, the very description on which the Commission relies plainly provides "that ESCOs would continue to be encouraged to offer additional products and services, including innovative services with energy management and other distributed energy resources (DER) attributes" regardless of whether standardized fixed-price product plan was adopted. R. 3153. There thus was no notice that there would be any effort on the part of the Commission to radically "reset" the entire New York energy market by prohibiting almost every existing ESCO product offering and making it practically impossible for ESCOs to continue to serve New York customers.[12]

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[12] On these facts, the Order is, at a bare minimum, a "substantial revision" requiring its own notice under SAPA because it includes "addition[s], deletion[s] [and] other change[s] in the

The Commission also argues (at 71-72) that the Order was adequately noticed because: (i) it is an extension of a February 25, 2014, order requiring "that ESCO community sales to low-income customers must either guarantee savings… or else must include energy-related value added services that may reduce the customer's overall energy bills"; and (ii) the Commission's November 15, 2015, Collaborative Report summarized a third party proposal to extend a potential guaranteed savings requirement to all residential customers. Neither of those documents, however, comprises proposed rules or expressions of the Commission's intent as required under SAPA. That order – limited to a small subset of New York customers – was vastly different from the one at issue here. The Commission also cites a collaborative report referencing a third-party's request that the PSC extend the guaranteed-savings requirement to all residential customers. That is obviously not a proposed rule or expression of <u>the</u> <u>Commission's</u> intent. In fact, the Commission itself publicly confirmed that fact by stating that the third party's comment was "beyond the scope" of the order that the Commission had proposed and declined to include it in the original collaborative reports. Cyrulnik Reply Aff. Exs. 12 ¶ 4, 8 ¶ 9. Furthermore, the extension of guaranteed savings from low-income customers to all retail customers obviously "materially alters [the] purpose, meaning or effect" of the August 12 Notice, which necessitates a new notice and comment period anyway. <u>Motor Veh. Mfrs. Assn. of U.S.</u>, 152 Misc. 2d at 409.

In sum, SAPA requires that the Commission detail the draconian and radical new requirements for enrolling or renewing residential or mass-market customers as a proposed rule, and provide for a comment period of at least 30 days. In the face of the Commission's failure to

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text [that] materially alter" the prior agency statements' "purpose, meaning or effect." <u>Motor Veh. Mfrs. Assn. of U.S.</u>, 152 Misc. 2d at 409.

do so before issuing the Order, the Order is void.[13] At bottom, none of the documents upon which the Commission relies constitutes notice of the Order within the meaning of, and as required by, SAPA. The Order is therefore void for that independent, threshold reason as well.

III. THE RATE CEILING IS BASELESS, ARBITRARY, AND IN VIOLATION OF LAW

Beyond these threshold dispositive problems, the Order also is substantively invalid because, as Petitioners showed in their opening brief, the Rate Ceiling is arbitrary, unreasonable, and irrational. The Commission's response to these substantive points falls far short of justifying the monumental actions they are seeking to take.

A. There Is No Rational Relationship between the Rate Ceiling and the Order's Purported Purposes

The Commission claims (at 38-42) that two purported findings justify the Rate Ceiling: (i) the mass market retail electricity and gas commodity markets allegedly are not "workably competitive"; and (ii) those markets allegedly are not providing consumers sufficient "energy-related value-added products and services." The Rate Ceiling, however, bears no rational and reasonable relationship to those purported findings, and for several reasons: Barring ESCOs from offering consumer choice does not increase competition (nor does the Order contain any finding or reasoning to the contrary), will not increase competition, will not increase offerings of "value-added products," and, in fact, will undermine both of those claimed goals. See Cellular

[13] It bears mention that the Commission all but conceded its SAPA failure at the temporary restraining order hearing. The Commission informed the Court that its failure to provide the requisite notice to ESCOs was specifically intended and by design. The Commission informed the Court during that hearing that it intended to issue the Order without giving ESCOs notice and time to restructure their product offerings in light of the new requirements. Cyrulnik Reply Aff. ¶ 4. That telling admission belies its current after-the-fact effort to rewrite history and pretend that the Petitioners (and the rest of the ESCO market) were put on notice months, or years, prior to the issuance of the Order, that such an Order was being proposed.

Tel. Co. v. Rosenberg, 82 N.Y.2d 364, 374 (N.Y. 1993) (agency decision invalid where the record shows no rational basis in support thereof); Coates v. Planning Bd. Of Inc. Vill. Of Bayville, 58 N.Y.2d 800 (1983) (agency determination invalid where "there [wa]s no evidence in the record showing that the [agency action] was necessary" to promote the action's stated purpose and in fact contradicted that purpose); Castle Props. Co. v. Ackerson, 163 A.D.2d 785, 786-87 (3d Dep't 1990) (agency action invalid as arbitrary where, beyond speculation, record did not show that means employed furthered action's purpose); Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany, 130 A.D.2d 1, 4 (1987) (agency action invalid where it failed to offer any supportive "empirical data or other satisfactory documentation").

First, the Rate Ceiling is invalid as arbitrary because the Commission failed to perform any analysis as to whether and to what extent the Rate Ceiling would affect consumers. Indeed, rather than undertaking a meaningful analysis of the Rate Ceiling's likely effect (or commissioning such an analysis), the Commission relies solely on Ms. Scherer's unsupported opinion and baseless speculation. Critically, the Commission failed to consider: (i) the likely reduction in ESCO market participation resulting from the Rate Ceiling and the effect that a more consolidated and less competitive market will have on utility pricing; (ii) the market discipline ESCOs have imposed on utility rates and conduct; and (iii) the natural price volatility of a competitive market. See Cicchetti Aff. ¶¶ 12, 14-21, 23, 25, 37-60, 62-64.[14] Having failed

[14] "Cicchetti Aff." refers to the May 6, 2016 Affidavit of Dr. Charles J. Cicchetti in Support of Plaintiffs/Petitioners' Application By Order to Show Cause for a Temporary Restraining Order, Preliminary Injunction, and Expedited Discovery. Dr. Cicchetti is a widely recognized expert in the energy filed, having served as the Chair of the Public Service Commission of Wisconsin starting in 1977, and served as a Commissioner until 1980. He is an economist with 46 years of experience in matters related to electricity, energy, and the environment, and he has provided expert testimony before regulatory commissions and courts on

to consider these basic criteria—which are critical to any meaningful analysis of the Order's effect on consumers and the New York energy market—the Commission's rationale underpinning the Rate Ceiling amounts only to arbitrary speculation, rendering it invalid.[15] See id.; Coates, 58 N.Y.2d at 802 (agency action invalid where record showed that agency failed to sufficiently consider actual effect of its order); Fitzner v. Beach, 174 A.D.2d 798, 799 (3d Dep't 1991) (agency action invalid where it relied on generalized objections instead of petitioners' expert analysis); Nat'l Fuel Gas Distrib. Corp. v. Pub. Svc. Comm'n, 154 A.D.2d 31, 35-36 (3d Dep't 1990) (agency rate determination invalid where it lacked a "sound rationale").

Second, the Rate Ceiling will not increase or improve competition but, instead, will decrease competition because it sets up an impossible standard for ESCOs. Specifically, the Rate Ceiling will force ESCOs out of business or out of New York due to the unreasonable requirement that ESCOs guarantee their rates in perpetuity as compared to local utilities whose: (i) operating conditions are fundamentally different from ESCOs'; (ii) have safety nets provided by the PSC that will ensure that the utilities will always operate profitably; and (iii) rates are highly difficult for ESCOs to discern with any reliability.

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matters related to determining the marginal cost, pricing, regulation, financing, valuation, and more, for electricity. He was the principal economist for the Environmental Defense Fund (EDF) in the very important Madison Gas and Electric rate design proceeding before the PSCW, as well as complementary proceedings in Michigan, California, and New York in the early 1970s. He also served as a member of the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC) and was Chair of NARUC's Committee on Implementing the National Energy Act of 1978 that included the Public Utility Regulatory Policies Act (PURPA).

[15] As discussed below at Part III.B, the Commission's rationale for why ESCOs purportedly can meet the Rate Ceiling's impossible standard and why it would benefit consumers amounts to a total of four speculative and false assumptions, thereby confirming that – despite the obviously high stakes – it has failed to undertake any meaningful analysis of the Rate Ceiling's realistic effect.

ESCOs face disproportionate risks as compared to utilities because they have different business models and operate under different regulatory regimes. Cicchetti Aff. ¶¶ 26-37. For example, utilities have more sources from which to purchase energy and a larger, more diverse customer base than ESCOs. As a result, market conditions have less effect on local utility rates than on ESCO rates. Id. ¶¶ 9-11, 33-36, 41. More specifically, utilities buy electricity and natural gas to satisfy a very large and diverse customer base, which includes (i) residential and small commercial consumers (i.e. mass-market consumers); and (ii) larger commercial, industrial, and government consumers. Id. ¶ 33. Utilities are thus able to spread the effect of wholesale market price fluctuations across their entire customer base. Id. ¶¶ 9-11, 33-34, 36, 41. By contrast, ESCOs – who serve mostly mass-market consumers – are not as well equipped to spread the effect of wholesale market price fluctuations because they do not have such a large and diverse customer base. Id. ¶¶ 9-11, 33-36, 41. Market shifts thus necessarily affect ESCOs (and their customers) more dramatically than utilities. Id.

Utilities also are not exclusively beholden to the wholesale energy market and its fluctuations because they can self-generate or trade energy with each other. Id. ¶¶ 9, 29. By comparison, ESCOs effectively purchase only from the wholesale energy market and, as a result, where wholesale prices increase significantly (for instance, during unpredictable cold spells, such as the Polar Vortex that occurred during the winter of 2013-2014 (id. ¶¶ 11, 28)), ESCOs' variable-rate products may experience greater volatility than utility rates. Id. ¶¶ 8-9, 27-29. In light of these fundamental operational distinctions between ESCOs and utilities, the Order's requirement that ESCOs guarantee to meet or beat utility prices is unfair and unrealistic – ESCOs and utilities cannot and do not react in the same way to market forces. Id. ¶¶ 8-9, 11-12, 26-29.

In addition, utilities benefit from regulatory protections, which is a luxury not available to ESCOs. Id. ¶¶ 30-33, 37. For instance, the Commission has an obligation to protect utilities' viability and where market conditions indicate that a utility may suffer a loss, the Commission may intervene to protect the utility.[16] See,e.g., Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n of N.Y., 69 N.Y.2d 365, 369 (N.Y. 1987) (explaining that "[i]n the exercise of its rate-making power, the Public Service Commission may not deny a utility a reasonable rate of return on its investment."). That intervention has included, for example, allowing a utility to increase rates at a later date to recoup short-term losses. Cicchetti Aff. ¶ 32. The Commission does not support ESCOs in the same way. Id. Unlike ESCOs, therefore, utilities have a legally mandated—and applied—"safety net." Id. ¶¶ 30-33, 37, 54; see Niagara Mohawk Power Corp., 69 N.Y.2d at 369. The Rate Ceiling's requirement that ESCOs guarantee their performance against utilities thus ignores the materially different regulatory regimes under which these entities operate.

ESCOs' inability to predict utilities' rates (or even know them in real-time), exacerbates the problems that the Commission's guaranteed savings requirement presents. Cicchetti Aff. ¶¶ 45-47. As the Commission concedes (at 47), "utility rates in any given month are not prospectively available to ESCOs." The Rate Ceiling thus would require ESCOs to operate in the impossible circumstance of not being able to know whether they are running a profitable

[16] This is because failing to do so could result in lower utility bond ratings and increased interest rate costs for the utility to maintain its infrastructure, which the utility then could pass onto consumers via higher energy prices. Cicchetti Aff. ¶ 31.

business. Cicchetti Aff. ¶¶ 45-47. That is absurd and preclusive of meaningful ESCO investment.[17]

Third, the inequitable nature of the Rate Ceiling's "true up" requirement also decreases the likelihood of future ESCO participation in New York. Id. ¶¶ 55. The vast majority of New York energy consumers are full utility customers and not ESCO customers. Cyrulnik Reply Aff. Exs. 1 ¶ 3, 2 ¶ 3, 3 ¶ 3, 8 ¶ 3. Yet, as discussed above, the Order is asymmetrical in that it does not require a utility to make a true-up to its customers where an ESCO beats the local utility's rates. Cicchetti Aff. ¶ 55. Though the Commission gives lip service to serving the interests of New York consumers, the Order would fail to provide most consumers with savings because utilities would have no incentive to beat ESCO prices. See id.

Fourth, the Rate Ceiling will undercut its own purpose by increasing commodity rates as a result of decreased competition due to reduced (or eliminated) ESCO participation. Cicchetti Aff. ¶¶ 38-52, 57, 62. Since their entrance into the market, ESCOs have played a critical role in disciplining utilities' rates. Id. at ¶¶ 14-21, 57-60. For approximately two decades, New York commodity consumers have enjoyed rates that on average have been relatively lower than they would have been had the market not been restructured in the late 1990s to allow for the participation of ESCOs. Id. at ¶¶ 14-21, 57. 62. The irrefutable discipline ESCO participation has placed on utility pricing over the past two decades will be removed as ESCO participation wanes or disappears as a result of the Order. Id.

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[17] The Commission, moreover, exacerbates the lack of utility-rate visibility by assuming that market rates are defined solely by what utilities charge. That is wrong. As Petitioners have shown, average rates charged by utilities have in many years been higher than rates charged by ESCOs and have in other years been lower than rates charged by ESCOs.

Fifth, contrary to the Commission's stated intent of increasing "energy-related value-add[s]," the true-up proposal punishes ESCOs for providing consumers benefits other than direct rate savings. Cicchetti Aff. ¶¶ 48-52, 58; Cyrulnik Reply Aff. Exs. 9 ¶¶ 1-6, 10 ¶¶ 1-6, 11 ¶¶ 1-6, 12 ¶¶ 6-17 (Exs. A-I). For example, in the case of fixed-rate products, consumers essentially shift the risk of market fluctuations onto ESCOs in exchange for the significant benefit of a locked-in price that allows consumers to predict and budget expenses. Cicchetti Aff. ¶¶ 48-52; Cyrulnik Reply Aff. Exs. 9 ¶¶ 4-6, 10 ¶¶ 4-6, 11 ¶¶ 4-6. ESCOs bear the risk of a market shift in exchange for the potential opportunity of securing an above-market rate (but only if market conditions allow). Cicchetti Aff. ¶¶ 48-52. A key driver of fixed-rate products is thus the consumer's interest in price certainty even if that certainty requires the consumer (depending on the market) to pay a modest premium. See id. By requiring ESCOs to provide retroactive refunds on fixed-rate products, however, the Order would punish ESCOs for providing consumers with the benefit of cost certainty by, in effect, requiring ESCOs to take on all of the downside market risks and none of the potential upside. Id. at ¶ 52. The Order thus guarantees that ESCOs will lose money on fixed-rate products, leaving ESCOs without any business justification to offer them. Id. The Order similarly will punish ESCOs for providing consumers other "value-add[s]" that utilities cannot provide, including energy usage reduction services, increased consumer choice, loyalty programs, and product offerings. Id. ¶ 58. By doing so, the Order affirmatively undermines its own stated purpose by depriving consumers of "energy-related value-add[s]."[18] See Cyrulnik Reply Aff. Exs. 9 ¶¶ 4-6, 10 ¶¶ 4-6, 11 ¶¶ 4-6, 12 ¶¶ 6-17 (Exs. A-I).

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[18] AARP and MFY Legal Service, Inc. contend in their amici brief (at 14-15) that the

Sixth, the Rate Ceiling will harm (rather than help) consumers in a variety of other ways. For example, the Order would force Petitioners to terminate agreements and relationships with customers, resulting in tens of thousands of customers forcibly being migrated to the local utilities. Cyrulnik Aff. Exs. Q ¶ 19, R ¶ 19-20, S ¶ 18, T ¶ 19, U ¶ 19, V ¶ 19. Likewise, it will result in the termination of thousands of jobs and vendor contracts, valued in the tens of millions of dollars. Cyrulnik Aff. Exs. Q ¶ 24, R ¶ 25, S ¶ 23, T ¶ 24, U ¶ 19, V ¶ 34.

In sum, the Commission has provided no evidentiary basis to justify the Rate Ceiling or any assumptions it has made as to the purported consumer benefits arising from the Rate Ceiling. Instead, it arbitrarily has imposed a measure that will only undermine the Commission's stated purposes because it will neither increase competition nor benefit consumers; to the contrary, it will decrease competition and harm consumers. See Cellular Tel. Co., 82 N.Y.2d at 374; Coates, 58 N.Y.2d at 802; Castle Props. Co., 163 A.D.2d at 786-87; Save the Pine Bush, 130 A.D.2d at 4. The Order is thus invalid.

B. The Commission Relies on False Assumptions

The Commission's conclusion that ESCOs can comply with the Order and that it benefits consumers relies on incorrect assumptions. Its sole bases for that conclusion are that (the Commission says): (i) "at least one ESCO was offering a guaranteed savings product" before the Order was issued; (ii) "ESCOs have greater hedging and procurement flexibility than utilities"; (iii) ESCOs benefit from certain tax savings; and (iv) the 30% renewables option in the Order is

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Rate Ceiling is justified because it protects consumers from the purported downside of introductory rate programs and a claimed practice they describe as "slamming." The Rate Ceiling does not, however, bear any reasonable relationship to either of these concerns. It proposes to remove ESCOs from the market and remove competition from the market. Indeed, if introductory rates or mistaken customer enrollment were the Commission's concern then it could restrict introductory rates and customer enrollment mechanisms.

a viable path forward for ESCOs. The Commission is wrong.

First, the Commission incorrectly assumes (at 47) "on information and belief" that, because a single ESCO purportedly has offered some type of a guaranteed product that is not described anywhere in the Commission's briefing, all (or even most) ESCOs can comply with the Order. That is a facially false premise—one unidentified ESCO trying to offer a product that had some form of guarantee does not mean all ESCOs sustainably can operate a business while complying with the specific requirements of the Order. The Commission fails, moreover, to set forth the terms of the "guaranteed" product offered by the unidentified ESCO, such as whether it was a short-term product (e.g., 3 months) or combined with other incentives or products. The Commission also fails to show that this unidentified ESCO at any time broke even (or is breaking even) on its guaranteed product or whether the ESCO is even still offering it.[19] Further, the Commission wholly disregards the significant business discrepancies from ESCO to ESCO, including their different investor profiles, cost profiles, and hedging strategies. Cyrulnik Reply Aff. Exs. 1 ¶¶ 4-5, 2 ¶¶ 5-6, 3 ¶¶ 5-6, 4 ¶¶ 4-5, 5 ¶¶ 5-6, 8 ¶¶ 6-7. In short, an allegation based only on "information and belief" that a single ESCO merely tried to offer a guaranteed product without more is not an appropriate basis upon which to conclude that ESCOs as a general matter sustainably can do so.

Second, the Commission incorrectly assumes that ESCOs can guarantee to beat utility rates because they have hedging capabilities and benefit from tax breaks. However, ESCOs' rates primarily are driven by market forces—their hedging strategies and tax benefits help them

[19] The Commission's argument relies entirely on Ms. Scherer's bare bones testimony that: "Based on information and belief, at least one ESCO offered a guaranteed savings product prior to the issuance of the Reset Order." Scherer Aff. ¶ 26.

mitigate market forces, not defy them. Cicchetti Aff. ¶¶ 46, 53-54. Nor does hedging provide ESCOs a unique advantage over utilities because utilities also hedge. Indeed, utilities have a hedging advantage over ESCOs. For example, by regulatory design and with the Commission's approval, utilities can recover hedging costs in their rates whereas ESCOs do not benefit from such regulatory accommodation. Id. Regardless, ESCOs cannot simply rely on hedging and tax benefits to, on demand, beat utility rates as the Commission mistakenly contends.

Third, the Commission wrongly assumes that the Rate Ceiling's renewable option provides ESCOs with a viable path forward and is pro-consumer. As a threshold matter, the renewables option is not even available for gas products. Id. ¶ 63. But, with respect to electricity, consumers are not likely to benefit even if ESCOs could shift to a 30% renewables model. Id. ¶¶ 64-67. Moreover, under the Order, switching customers to a renewables product would require their consent and the Commission fails to provide any evidence that customers will consent with any frequency, particularly where the Order does not restrict rates on renewables products but does restrict rates on ESCOs' other products. Order at 14. The Commission is therefore incorrect to assume that ESCOs sustainably can comply under a renewables model—they cannot.

The renewables option, in any event, does not bear any reasonable relationship to the Commission's stated purpose of decreasing consumer prices. Under the Order's terms, ESCOs do not have to satisfy a rate guarantee for electricity as long as they offer a product sourced from at least 30% renewables. Cicchetti Aff. ¶ 64. In addition, the Commission has failed to show any meaningful relationship between a 30% renewables component and its purported desire to increase "value-add services" to the consumer. Id. ¶¶ 65-67. The renewables component is based on the assumption that consumers derive greater value from a 30% renewable product than the value consumers already are receiving from ESCOs' value-added services. Id. The Commission fails, however, to cite any factual support or analysis supporting that assumption. Id.[20]

The Commission's purported bases for assuming that ESCOs can comply with the Rate Ceiling and that the Rate Ceiling will further the Order's stated purposes are thus false and baseless, rendering the Order invalid. See Cellular Tel. Co., 82 N.Y.2d at 374; Coates, 58 N.Y.2d at 802; Castle Props. Co., 163 A.D.2d at 786-87; Save the Pine Bush, 130 A.D.2d at 4; Fitzner, 174 A.D.2d at 799; Nat'l Fuel Gas Distrib., 154 A.D.2d at 35-36.

C. The Commission Arbitrarily and Incorrectly Concluded that the Energy Market Needed a "Reset Away From an ESCO Model" and That ESCOs Were Not Providing 'Value-Add[]" Services

Even if there were a rational relationship between the Rate Ceiling and the Order's stated purposes (there is not), the Order is invalid because it is based on the Commission's arbitrary and baseless conclusions that (i) ESCOs are not providing energy-related value-adds to consumers; and (ii) the cherry-picked data on which the Commission relies shows that "a 'reset' away from an ESCO model" is required. PSC Br. at 37-42.

First, contrary to the Commission's claim, the record overwhelmingly shows that ESCOs provide consumers significant "energy-related value add[s]," including benefits that utilities cannot provide. See Cicchetti Aff. ¶¶ 48-49, 58; Cyrulnik Aff. Exs. Q ¶ 8-13, 15; R ¶ 8-12, 15; S

[20] Underscoring the Order's deep flaws, the Commission also attempts (at 48-51) to defend it on the basis of a so-called "Pathway Towards Expansion" pursuant to which (it claims) the Order's terms will expand. The Commission does not even attempt, however, to identify a single specific way in which it anticipates that the Order will be expanded, let alone provide factual support for any such prediction. The Commission cannot reasonably defend its Order on the basis of purely hypothetical and speculative descriptions of what may or may not happen in the future.

¶ 8-14, T ¶ 8-12, 15, U ¶ 10-14, V ¶ 8-14; Cyrulnik Reply Aff. Exs. 9 ¶¶ 1-6, 10 ¶¶ 1-6, 11 ¶¶ 1-6. For example, as discussed above at 28, ESCOs offer consumers fixed-rate contracts that the Commission concedes are of significant value, including because they provide consumers with (i) cost savings where market conditions so provide; and (ii) cost certainty, which consumers (and, in particular, low-income or fixed-budget consumers) highly value even if they end up paying an above-market rate. Cicchetti Aff. ¶¶ 48-49. As another example, reflecting the fact that consumers primarily focus on monthly bill amounts (as opposed to rates, on which the Commission heavily focuses), ESCOs aid their customers with energy-use reduction, thus helping them lower their monthly bills independent of the rates. <u>See</u> Cicchetti Aff. ¶ 68; Cyrulnik Reply Aff. Exs. 1 ¶ 6, 2 ¶ 7, 3 ¶ 7, 4 ¶ 6, 5 ¶ 7, 8 ¶ 8.

The Commission also apparently believes that current ESCO customers are wholly incapable of deciding for themselves which energy supplier provides them with the most value. Over twenty percent of New York energy consumers continue to elect to use ESCO services even though they are free to migrate back to their local utilities at any time. Cyrulnik Reply Aff. Exs. 1 ¶ 3, 2 ¶¶ 3-4, 3 ¶¶ 3-4; 4 ¶ 4, 8 ¶¶ 3-4. Those consumers clearly have concluded that they prefer ESCOs over their local utilities. <u>Id.</u> Exs. 9 ¶¶ 1-6, 10 ¶¶ 1-6, 11 ¶¶ 1-6. The Order necessarily would remove that consumer choice, all based on the Commission's flawed premise that consumers cannot and should not be allowed to make value-based judgments for themselves.

<u>Second</u>, the Commission baselessly concludes (at 42, 45-47) that the market "require[s] a 'reset' away from an ESCO model" in reliance on (i) the Commission's cherry-picked data showing a disparity between ESCOs' and utilities' average rates; (ii) ESCOs' inability to <u>guarantee</u> to beat utilities' rates; and (iii) purported customer complaints. None of these rationales justify any such "reset."

The alleged rate disparity that the Commission identifies is arbitrary and uninformative because (i) the data set underlying it is deeply flawed; and (ii) the Commission's conclusion drawn therefrom—that there "is something wrong with the market" requiring "a market reset" is false. PSC Br. at 46-47. In particular, the Commission sets forth rate comparisons from only a two-year time period (only ~10% of ESCOs' existence) and unjustifiably ignores (without explanation) the broader decades-long trend showing that ESCOs can and have beat the utilities' rates.[21] Cicchetti Aff. ¶¶ 14-15, 17, 19-21; (R. 4947.)[22] The data underlying the Commission's conclusion is therefore self-servingly selected. Even crediting that data set, a short time period in which there is a difference between ESCO rates and utility rates does not indicate a market failure as the Commission claims. Id. ¶¶ 14, 21-25. Rather, it merely shows a competitive market where wholesale conditions may at times require ESCOs (who do not benefit from market power relative to utilities) to increase rates. Id. ¶ 62.

Further, as discussed above at 24-26, the fact that ESCOs cannot guarantee to beat utilities' rates is not indicative of a market failure; it is indicative of ESCOs having fundamentally different business profiles and being subject to a less protective regulatory framework as compared to utilities. Id. ¶¶ 26-37, 62. Last, the purported customer complaints

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[21] As discussed above at 24-26, ESCOs' ability to beat utility rates does not equate to an ability to guarantee that they will do so in perpetuity where ESCOs and utilities operate under fundamentally different business models and regulatory regimes.

[22] In their amici brief, the Attorney General and Utility Intervention Unit rely (at 10, 21, 26) on the same flawed data. They also cite as evidence (at 11) a legal brief from another proceeding regarding purported Consolidated Edison charges. First, that brief is hearsay and does not even cite any evidence to support the assertions on which the Attorney General and Utility Intervention Unit rely. Second, even crediting that brief's baseless assertions, the purported data described therein also ignores that ESCOs have beat the utilities' rates (see Cicchetti Aff. ¶¶ 14-15, 17, 19-21), including because it (i) concerns only a single year of rates (2012); and (ii) relates only to a subset of customers of a single New York utility.

on which the Commission relies are (i) irrelevant to the Rate Ceiling to the extent they are not rate-related complaints; and (ii) statistically inconsequential and dubiously characterized for the reasons discussed in Petitioners' opening brief and which the Commission failed to even attempt to rebut.[23] Pet. Br. at 13; Cicchetti Aff. ¶ 61.

The Commission thus lacks any basis to implement the Order where the conclusions that purportedly justify it are baseless, contrary to reason, and result from a deeply flawed data set. Coates, 58 N.Y.2d at 802; Fitzner, 174 A.D.2d at 799; Nat'l Fuel Gas Distrib. Corp., 154 A.D.2d at 35-36.

IV. THE ORDER IS UNCONSTITUTIONAL

A. The Commission Deprived Petitioners and Other ESCOs of Due Process and the Order is an Unconstitutional Taking

In attempting to rebut Petitioners' procedural due process and Takings Clause claims, the Commission overwhelmingly relies (at 53-61) on its flawed position that Petitioners do not possess a constitutionally-protected property interest for two reasons: (i) Petitioners purportedly do not have any right to use utility infrastructure; and (ii) Petitioners' licenses to participate in the New York energy market purportedly do not amount to protected interests.[24] The Commission is wrong.

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[23] In their amici brief, the Attorney General and Utility Intervention also rely (at 20) on purported customer complaints but, for the same reasons, those complaints fail to justify the Rate Ceiling. Similarly, they also cite (at 20) commentary regarding purported marketing complaints. That is hearsay and, even crediting its accuracy, any purported marketing complaints do not bear a reasonable relationship to the Rate Ceiling. Indeed, any such issues can effectively be addressed through consumer protection measures in the UBP – not by taking the self-defeating step of removing competition from the marketplace via the Rate Ceiling.

[24] These are the sole bases on which the Commission attempts to rebut Petitioners' Takings Clause claim. The Commission's only other basis for rebutting Petitioners' due process

First, ESCOs are entitled to operate in New York because competition in the energy market is legally mandated and the Commission has facilitated the ESCOs' participation therein.

As this Court has recognized, the PSL, New York State law, and federal law all require that utilities' competitors have access to utilities' distribution facilities to prevent anticompetitive and monopolistic results. Energy Ass'n of New York State, 169 Misc. 2d at 932 (Sup. Ct. 1996). ESCOs' access to utility infrastructure is thus legally mandated. Further, the Commission claims that it legally is obligated to ensure that gas and electric commodity markets are competitive. PSC Br. at 22, 27. In light of that, the Commission facilitated ESCOs' participation in the market and did so in a manner consistent with the fact that as a matter of law ESCOs must be given access to utility infrastructure. See Energy Ass'n of New York State, 169 Misc. 2d at 932. The Commission's argument (at 54-55) that ESCOs merely are a product of the Commission's discretion is thus counterfactual—ESCOs compete in the New York energy market using utility infrastructure because the law mandates such inclusive participation, giving rise to a constitutionally-protected property interest. Spinelli v. City of New York, 579 F.3d 160, 169 (2d Cir. 2009) (finding "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 right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment…").

Second, the ESCO-eligibility regime embodied in the UBP—a licensing regime—confirms that Petitioners have a protected property interest. Section 2.A of the UBP states:

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claim is that Petitioners purportedly do not have constitutionally-protected interests in prospective customer contracts, which Petitioners address below at 42.

> This Section sets forth the process that an applicant is required to follow for a Department of Public Service (the Department) finding of eligibility to sell natural gas or electricity as an ESCO, that an ESCO is required to follow to maintain eligibility, and that a distribution utility is required to follow for discontinuance of an ESCO's or Direct Customer's participation in a distribution utility's retail access program.

The UBP then goes on to specifically delineate (i) the bases for which ESCOs may become eligible; (ii) the bases for which such eligibility may be revoked; and (iii) its requirement that ESCOs be provided notice and an opportunity to be heard before their eligibility is revoked. Cyrulnik Reply Aff. Ex. 7 at **§§** 2.5, 2.6.[25] Petitioners have been licensed to act as ESCOs in the New York energy market pursuant to these criteria, and "once licenses are issued, as in [Petitioners'] case, their continued possession may become essential in the pursuit of a livelihood," thus creating a constitutionally-protected property interest. Bell v. Burson, 402 U.S. 535, 539 (1971); Spinelli v. City of New York, 579 F.3d 160 at 168-69 (holding that petitioner had property interest where interest was supported by licensing regime); Phillips v. VandyGriff, 711 F.2d 1217, 1222-23 (5th Cir. 1983) (finding that "de facto" licenses subject to due process requirements).

Third, the New York state legislature's amendments to the PSL, which facilitate and support ESCO operations, also confirm that Petitioners have a constitutionally-protected property interest in operating in New York. Specifically, as the Commission concedes, "[i]n 2002, the Legislature amended PSL Article 2 to reverse the PSC's conclusion that HEFPA did not apply to ESCOS. The Legislature required that ESCOs comply with the Consumer [sic]

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[25] The cited UBP language and provisions underscore the absurdity of the Commission's claim that "[n]othing in the UBP indicates that ESCO eligibility is intended to constitute a license." PSC Br. at 59.

protections of HEFPA, but in return the ESCOs were able to suspend the provision of utility distribution service to compel payment of unpaid ESCO commodity bills." PSC Br. at 9 (emphasis added). Thus, the New York state legislature amended the PSL to support and encourage ESCOs' participation by empowering them to shut off the lights in the face of unpaid bills. See Ezekwo v. New York City Health & Hospitals Corp., 940 F.2d 775, 783 (2d Cir. 1991) (holding that plaintiff's future business expectation was "a property interest entitled to [Due Process] protections" because state's conduct made that expectation "reasonable and well founded…").

ESCOs thus have a constitutionally protected interest in participating in the New York energy market where (i) the Commission has licensed them to do so; (ii) the PSL, New York state law, and federal law all require ESCOs to have access to utility infrastructure; and (iii) the laws have been amended to encourage, support, and solicit ESCO investment and participation. Indeed, against this backdrop, ESCOs have formed the reasonable and well-founded expectation that the Commission would not arbitrarily and unreasonably deprive them of a meaningful opportunity to participate in the New York energy market. See Ezekwo, 940 F.2d at 783; Spinelli, 579 F.3d at 169; Greene, 360 U.S. at 492.

That expectation prompted ESCOs—at the Commission's urging—to invest substantial funds into New York operations, including creating revenue streams, brand recognition, and customer goodwill. For the reasons discussed above at 24-26, without notice and an opportunity to be heard, the Order imposes impossible conditions on ESCOs' participation in the New York energy market, which will (i) wipe out their investments to date; and (ii) prevent them from pursuing their livelihood of selling energy in New York by forcing them out of business or out of the market. That is unconstitutional. See Phillips, 711 F.2d at 1222-23 ("denying a person collateral credentials or privileges practically necessary for pursuing an occupation is also actionable."); Ezekwo, 940 F.2d at 783; Spinelli, 579 F.3d at 169; Greene, 360 U.S. at 492.

The Commission's arguments to the contrary are unavailing. First, the Commission incorrectly claims (at 54) that utilities own the electric and gas delivery infrastructure, which (the Commission says) precludes Petitioners from having a property interest in operating in New York. As a threshold point, the Commission's factual premise is incorrect—the utility infrastructure is "quasi-public" and a "public right[]-of-way." Energy Ass'n of New York State, 169 Misc. 2d at 932 (emphasis added). Further, the Commission's position relies on the false legal premise that to have a constitutionally-protected "property interest," one must have an ownership interest over physical property (e.g., utility infrastructure). That is incorrect—constitutionally-protected property interests encompass intangible interests, including the right to run a business in pursuit of a livelihood without improper interference. See Spinelli, 579 F.3d at 169, 171.

The Commission similarly errs by claiming (at 54-55) that Petitioners cannot have a constitutionally-protected property interest to use utility facilities. PSC Br. at 55. The Commission mistakenly relies on General Motors and Rochester Gas for its position. General Motors, however, only concerns customers' property interests in utility property, which is far afield from whether ESCOs have a constitutionally-protected interest in participating in the New York energy market. See General Motors Corp. v. Public Service Comm'n of State of N.Y., 95 A.D.2d 876, 888 (3d Dep't 1983). The Commission's reliance on Rochester Gas also is misplaced. That court regarded a utility's interest in participating in the New York energy market as an "investment-backed expectation" protected against unconstitutional takings (i.e., a constitutionally-protected property interest). Rochester Gas & Elec. Corp. v. Public Service

Comm'n of State of N.Y., 71 N.Y.2d 313, 321, 324-25 (1988) (regarding plaintiff's expected scope of business as "property" and "investment-backed expectation[]" subject to "traditional due process principles" and constitutional takings analysis). Petitioners here have a similar constitutionally-protected interest and so Rochester Gas only further supports Petitioners' position. Id.[26]

Second, the Commission wrongly claims (at 59) that Petitioners do not have a constitutionally protected interest because the Commission retains discretion in connection with the ESCO licensing regime. Case law is clear that a protected property interest exists where, as here, a licensing regime provides for license revocation for cause and after notice and an opportunity to be heard, notwithstanding the state retaining some marginal discretion. See Spinelli, 579 F.3d at 169 (finding protected property interest despite state having some discretion over relevant licensing regime); Galvin v. New York Racing Ass'n, 70 F. Supp.2d 163, 172-73 (E.D.N.Y. 1998) (same). The Commission's argument, moreover, ignores that Petitioners' interests also arise out of the statutory framework (unrelated to licensing) that supports and enables their participation, discussed above at 36-37.

Third, the Commission mistakenly asserts (at 54-55) that Petitioners do not have any property interest in energy sale participation, because (it claims) PSL § 30 and Transportation Corporations Law (TCL) § 12 provide a right to use distribution facilities "only [to] utility

[26] Rochester Gas, however, is distinguishable from this case insofar as (i) the plaintiff there brought a substantive due process claim and (ii) the court found that the statute there did not amount to an unconstitutional taking because it had a *de minimis* effect on the plaintiff's property interest. Id. By contrast, Petitioners here bring a procedural due process claim and, as discussed above, the Order will deprive Petitioners of their reasonable and well-founded expectation of operating in New York. See Ezekwo, 940 F.2d at 783.

customers." That argument ignores the law discussed above, which mandates competition in the energy marketplace and, in any event, Petitioners do not rely on either PSL § 30 or TSL § 12.

Fourth, the Commission relies heavily (at 55-57) on Campo Corp., but that decision is irrelevant to Petitioners' procedural due process and Takings Clause claims. There, submetering was an entirely unregulated and unapproved practice that the Commission then prohibited. Campo Corp., 279 A.D. at 305-306. Submeterers, accordingly, lacked any basis to show that they had a constitutionally-protected interest in continuing that practice. By contrast, not only are ESCOs subject to certain regulations and are permitted entities but—consistent with the Energy Ass'n holding that competitors must have access to utility infrastructure—the legislature and Commission here have facilitated and supported ESCOs' investment and participation in the energy market.

Fifth, the Commission wrongly claims (at 57) that this court would exceed its jurisdiction and usurp the legislature's power by protecting Petitioners' constitutional rights. The state legislature enacted laws and state agencies promulgated rules giving rise to Petitioners' constitutionally protected interests, and thus it is exactly the courts that are empowered to protect those interests. See e.g., Spinelli, 579 F.3d at 169; Ezekwo, 940 F.2d at 783.

Sixth, the Commission incorrectly asserts (at 61-62) that Petitioners have waived their constitutional claims. The Commission claims that it was not afforded an opportunity to consider the Petitioners' arguments, but that falsely presumes that the Petitioners had a chance to make these arguments. For the reasons stated above at Part II, Petitioners did not have that chance because the Commission failed to provide Petitioners with sufficient notice of the Order. The Commission plainly cannot claim waiver where it failed to comply with its statutory and constitutional notice requirements.

Last, the Commission incorrectly claims (at 63-64) that Petitioners do not have constitutionally-protected interests in prospective customer agreements. As discussed above, Petitioners had a reasonable and well-founded expectation that they would be able to run their business without the Commission wrongfully depriving them of the value flowing therefrom, including their ongoing contracts with customers.

New York law and the Commission's own regulatory framework enabled, invited, and facilitated Petitioners' investment and participation in the New York energy market, giving rise to a constitutionally-protected interest. See Spinelli, 579 F.3d at 169; Ezekwo, 940 F.2d at 783; Greene, 360 U.S. at 492. For the reasons discussed above at Part III, the Order will deprive Petitioners of that interest by forcing them out of the market. Petitioners therefore are entitled to procedural due process before the Order's implementation, which the Commission failed to provide.

B. The Order Violates the Equal Protection Clause

Petitioners showed in their opening brief that the Order baselessly discriminates against ESCOs in favor of utilities. As discussed above, the Rate Ceiling's "true up" requirement discriminates against ESCOs and favors utilities by requiring ESCOs to provide customers a true up where they charge a higher rate than utilities, but not requiring utilities to do the same where ESCOs beat utility prices. That discrimination harms (or at best does not benefit) consumers because the vast majority of consumers are utility customers who will never receive the benefit of the lowest rate offered in their respective localities. Because it fails to benefit consumers, the true-up does not bear any rational relationship to the Order's stated purpose and is therefore unconstitutionally discriminatory. See Frost v. Corp. Comm'n of State of Okla., 278 U.S. 515, 522-23 (1929) (in weighing claimed basis for discriminatory classification, "mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis."); St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) (affirming that there was no rational basis for a challenged rule where "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."); Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (holding that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose").

The Commission (at 65-66) attempts to defend its discriminatory Order on three meritless bases: First, it argues that ESCOs can charge rates higher than utilities. But the same holds true for utilities, which can and have charged higher rates than ESCOs. Cicchetti Aff. ¶¶ 14-15, 17, 19-21. That distinction thus cannot reasonably justify discriminatory treatment of ESCOs. Second, the Commission argues that ESCOs were employing "deceptive marketing practices." However, even crediting the Commission's position (though it is false), the true-up's asymmetry does not address ESCOs' marketing practices, nor does it even benefit consumers more broadly where the vast majority of them are utility customers. Third, the Commission claims that the utilities' ownership and maintenance of transmission and distribution facilities justifies the true-up's asymmetry. But that cannot explain the Order's unequal treatment of ESCOs because the Rate Ceiling is in no way tailored to account merely for that cost discrepancy between ESCOs and utilities.

The Commission thus cannot justify the Rate Ceiling's discrimination against ESCOs in favor of utilities and it therefore violates the equal protection clause. See Frost, 278 U.S. at 522-23; St. Joseph Abbey, 712 F.3d at 226; Craigmiles, 312 F.3d at 224.

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

The Commission has failed to rebut Petitioners' argument that the Order violates the Contract Clause. Petitioners showed that the Order would cause a range of contracts to be terminated as a result of ESCOs shutting down or reducing operations. See Allied Structural Steel Co. v. Spannaus, 98 S.Ct. 2716, 2721-25 (holding state law unconstitutional where it affected private company's contractual obligations where was not "necessary to meet an important general social problem."); Shantz v. O'Sullivan, 11 A.D.3d 22, 24-30 (3d Dep't 2004); New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 386 (3d Cir. 2012); United Healthcare Ins. Co. v. Davis, 602 F.3d 618, 627-31 (5th Cir. 2010); Equipment Mfrs. Institute v. Janklow, 300 F.3d 842, 849-62 (8th Cir. 2002); Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237, 1243-52 (3d Cir. 1987); Continental Illinois Nat'l Bank and Trust Co. of Chicago v. State of Wash., 696 F.2d 692, 697-702 (9th Cir. 1983); Garris v. Hanover Ins. Co., 630 F.2d 1001, 1004-07 (4th Cir. 1980); see also Ass'n of Surrogates and Supreme Court Reports Within City of New York v. State of N.Y., 940 F.2d 766, 771-72 (2d Cir. 2006).

The Commission's responses are meritless. It claims that the Reset Order cannot impair Petitioners' contracts with their customers because (i) the Order's express language applies only to prospective customer agreements; and (ii) Petitioners cannot have a constitutionally-protected interest in expected future business. The Commission's response fails to address, however, that the Order holds Petitioners to an impossible standard (as discussed above at 24-26) and, accordingly, will require Petitioners to downsize or leave the market. That operational reduction will result in the cancellation of existing customer and vendor agreements worth over tens of millions of dollars. Cyrulnik Aff. Exs. Q ¶ 24, R ¶ 25, S ¶ 23, T ¶ 24, U ¶ 19, V ¶ 34.

The Commission's focus on prospective contracts is therefore unavailing and, having failed to address Petitioners' existing agreements, it has failed to rebut Petitioners' Contract

Clause claim where, as discussed above at Part III, the Order neither serves a legitimate public purpose nor does it pursue those purposes in rational, reasonable, and necessary ways.

V. THE ORDER WILL CAUSE PETITIONERS IRREPARABLE HARM

The Commission's argument (at 79-83) that the Order will not cause Petitioners irreparable harm is incorrect and relies on its misstatement of the law and its mischaracterization of the record.

First, the Commission wrongly suggests (at 80) that the loss of customer goodwill, reputational damage, and being forced to cease operations do not constitute irreparable harm. The law is clear that they do and, tellingly, the Commission failed to even attempt to address a single one of the relevant cases that Petitioners included in their opening brief. See Pet. Br. at 23-25 (citing Second on Second Cage, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 272-73 (1st Dep't 2009); Confidential Brokerage Svcs., Inc. v. Confidential Planning Corp., 85 A.D.3d 1268, 1269 (3d Dep't 2011); Alside Div. Of Associated Materials Inc. v. Leclair, 295 A.D.2d 873, 874 (3d Dep't 2002); Quinones v. Board of Managers of Regalwalk Condominium I, 242 A.D.2d 52, 57 (2d Dep't 1998); Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc., 764 N.Y.S.2d 1, 3 (1st Dep't 2003)).

In addition, the Commission misplaces its reliance (at 80) on Optivision and Quinones in arguing that Petitioners' damages would not be irreparable. In Optivision (a non-binding federal case), the court found that the plaintiff's claimed damages were not irreparable because they were limited to lost profits and the plaintiff even provided the Court a dollar value that it sought as compensation. Optivision, Inc. v. Syracuse Shopping Center, Assoc., 472 F. Supp. 665, 685-86 (N.D.N.Y. 1979). By contrast, here, Petitioners cannot quantify their damages where imposing the Order would likely (i) prevent their continued operation; (ii) force them to irreparably terminate customer relationships, thus damaging their customer goodwill; and (iii) deprive them of constitutional rights. Q ¶¶ 17-25, R ¶¶ 17-26, S ¶¶ 16-24, T ¶¶ 17-25, U ¶¶ 17-28, V ¶¶ 18-35; see Cicchetti Aff. ¶¶ 38-52, 57, 62; Second on Second Cage, 66 A.D.3d at 272-73; Leclair, 295 A.D.2d at 874; Cmty. Charter Sch. v. Bd. of Regents of the Univ. of N.Y., 2013 WL 10185566, at *17 (Sup. Ct. June 18, 2013). Further, Quinones supports Petitioners' position and not the Commission's. There, the court found that the movant had established irreparable harm by showing that it would be forced to cease operations "and would likely permanently lose most, if not all, of their established clients." Quinones, 242 A.D.2d at 57. Here, Petitioners have shown exactly that.27

Second, the Commission contests (at 80-81) that Petitioners have not factually shown a likelihood of irreparable harm. However, Petitioners have shown that they will suffer the irreparable harms identified above, as attested to in their Verified Petition, their several affidavits, and as expert testimony confirms. Ver. Pet. ¶¶ 5, 8, 56, 70-80; Cyrulnik Aff. Exs. Q ¶¶ 17-25, R ¶¶ 17-26, S ¶¶ 16-24, T ¶¶ 17-25, U ¶¶ 17-28, V ¶¶ 18-35; see Cicchetti Aff. ¶¶ 38-52, 57, 62. The Commission claims that this evidence amounts only to "conclusory allegations." That is untrue – each Petitioner testified in detail to the Order's likely effect on business operations. Expert testimony then goes further to describe, from an economics perspective, how

[27] The Commission's assertion (at 79) that money damages are not irreparable is irrelevant. While Petitioners will suffer money damages if the Order is imposed in full, they do not rely on money damages to show irreparable harm here. The Commission also misapprehends Petitioners' position by asserting (at 81) that "it is unclear how providing guaranteed savings or renewable energy would harm ESCOs' reputation or goodwill among their customers." That is not what Petitioners argue. As discussed above in Part III, the Order will harm Petitioners' reputations and goodwill amongst their customers because, among other things, it subjects Petitioners to an impossible standard that would force Petitioners to abandon customer relationships and exit the market.

the Order will affect the New York energy market, including by forcing ESCOs out of the market to consumers' detriment. Cicchetti Aff. ¶¶ 38-52, 57-58, 62, 66.

By contrast, the Commission's entire factual position (at 81-82) reduces to Ms. Scherer's *ipse dixit*, who (i) lacks any identified basis to opine on economics and market forces; and (ii) draws conclusions based entirely on unsupported and false assumptions as explained above in Part III. Petitioners have thus shown irreparable harm in the absence of an injunction and the Commission has failed to rebut Petitioners' showing.

VI. THE BALANCE OF THE EQUITIES FAVORS A PRELIMINARY INJUNCTION

The Commission incorrectly claims (at 76-79) that the balance of equities does not favor a preliminary injunction.

The Commission contends that if the Order is enjoined, customers will suffer a potential hardship of purported overcharges and bases that contention on two items: the Scherer affidavit and record evidence. However, neither shows that enjoining the Order would cause customers any hardship, let alone hardship to the tune of "millions of dollars," as the Commission insists.

Analyzing the purported "hardships" that the Commission claims would arise from issuance of an injunction must account in some way for the circumstances that would arise if the injunction were not granted. The Scherer affidavit, however, only cites data from <u>a single month from a single utility from a fractional region of the state</u> and then extrapolates that data across the entire state. That methodology is flawed on its face, including because it fails to account for several critical components of a hypothetical world but for the injunction, such as: (i) ESCOs' compliance with Ordering Clause No. 1's option to provide electricity with a 30% renewable makeup at whatever rates ESCOs choose to charge; (ii) how many electricity customers would switch from non-renewable to renewable products; (iii) how many customers would switch from variable-rate ESCO contracts to fixed-rate ESCO contracts; (iv) how many ESCOs would exit the New York retail energy market; (v) how many customers would be dropped by ESCOs; (vi) the value of the contractual benefits that customers would lose due to reduced ESCO service; and (vii) changes in weather and energy costs over time.[28]

Similarly, the only record evidence that the Commission relies on are rate comparisons from just a two-year time period, which ignores (without explanation) the decades-long trend showing that ESCOs can and have beat utilities' rates and otherwise disciplined price behavior in the energy markets. Cicchetti Aff. ¶¶ 14-21; (R. 4947). On these facts, the Commission has failed to show any hardship if the injunction is granted – it has only generated self-serving and unreasonable figures that do not reflect reality.[29]

By contrast, Petitioners have provided detailed testimony, from multiple market participants, in addition to expert testimony, all of which confirms that the Order will cause them deep and irreparable harm, including the failure of their businesses. See Part V above. Petitioners also have shown that, contrary to the Commission's assertion, the Order will actually harm consumers, not help them. See Part III above. The Commission's claims to the contrary

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[28] In this regard, it is worth noting that Ms. Scherer relies on January data (a month of high energy use) to compute purported losses for all other months, most of which have much lower energy costs.

[29] The Commission also misplaces its reliance on Koppell and McDonald. Neither supports the proposition that a government agency can defend its rulemaking on the basis of purported consumer harms. McDonald concerned a private party's enforcement of a legislatively-enacted law. McDonald v. North Shore Yacht sales, Inc., 134 Misc. 2d 910, 916-17 (Sup. Ct. 1987). In Koppell, the state was the movant seeking to enjoin market participants' violations of a legislatively-enacted law. People by Koppell v. Alamo Rent A Car, Inc., 162 Misc. 2d 636, 639-42 (1994). By contrast, here, the market participants are the movants and the state is not enforcing a law embodying the legislature's judgment. To the contrary, it is defending its own rulemaking that is not the product of any legislative judgment on the flawed premise that it unilaterally can define and prosecute consumers' interests based merely on its own conjecture.

(at 77-78) rely on its bald assumptions that: (i) ESCOs can simply transfer most or all renewal customers to a guaranteed savings product; (ii) ESCOs' tax treatment and hedging strategies free them from market constraints; and (iii) the Order's green requirement is a panacea for the impossible standard that the Order imposes on ESCOs. For the reasons discussed above in Part III.B, however, each of those assumptions is false. The balance of hardships thus weighs in favor of Petitioners.

VII. PETITIONERS PROPERLY BROUGHT THIS ACTION AS A HYBRID PROCEEDING

The Commission argues (at 84) that Petitioners improperly brought their claims in a hybrid proceeding because the relief purportedly sought pursuant to their declaratory judgment claim is available in an Article 78 proceeding. The Commission is wrong. For example, Petitioners' declaratory judgment claim seeks a declaration that the Commission lacks the jurisdictional authority to impose the Order on ESCOs, including by setting their rates. See Ver. Pet. ¶¶ 83-88. That declaratory remedy is available under CPLR Article 30 and not Article 78. The Petitioners thus properly brought this action through a hybrid proceeding.

CONCLUSION

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

Dated: May 9, 2016
Armonk, New York

By: /s/ Jason C. Cyrulnik

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