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TO BE ARGUED BY: JASON C. CYRULNIK
15 MIN. OF ARGUMENT REQUESTED

NEW YORK SUPREME COURT
APPELLATE DIVISION—THIRD DEPARTMENT

NATIONAL ENERGY MARKETERS ASSOCIATION; BLUEROCK ENERGY, INC., BOUNCE ENERGY NY, LLC; DIRECT ENERGY BUSINESS MARKETING, LLC; DIRECT ENERGY BUSINESS, LLC; DIRECT ENERGY SERVICES, LLC; ENERGETIX, INC.; GATEWAY ENERGY SERVICES CORP.; NORTH AMERICAN POWER & GAS, LLC; NYSEG SOLUTIONS, INC.; RESIDENTS ENERGY, LLC; AND VERDE ENERGY USA NEW YORK, LLC,

Petitioners-Appellants,

—against—

NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondent-Appellee.

BRIEF OF PETITIONERS-APPELLANTS

Dated: December 20, 2016

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PRELIMINARY STATEMENT

This appeal presents the critical question of the scope of the New York Public Service Commission's (the "PSC" or "Commission") authority. Specifically, this appeal concerns whether the New York State Legislature (the "Legislature") authorized the PSC to control the electric and gas rates that independent energy service companies (ESCOs) charge their customers. The Supreme Court committed reversible error by stating that the PSC has jurisdiction to set ESCO rates. The PSC itself had repeatedly acknowledged for decades that it does not have ratemaking authority over ESCOs, as the regulatory scheme established by the Legislature allows the PSC to set rates only for the public utilities which have monopolistic ownership and control of the electric and gas infrastructure throughout the state. The Legislature did not authorize the PSC to set ESCOs' rates because ESCOs do not own or control the electric and gas infrastructure and are not monopolistic in any way, and customers who purchase energy products from ESCOs do so voluntarily and as a result of their shopping for products in a freely competitive market.

In February 2016, after pronouncing for decades its limited jurisdiction over ESCOs, the Commission suddenly reversed its position and unilaterally asserted ratemaking authority over ESCOs in a "Reset Order" that sought overnight to eliminate choice for the millions of New York residents who elect to purchase energy from hundreds of ESCOs across the state. This Court should reverse the Supreme Court's statement condoning the PSC's asserted ratemaking authority over ESCOs because it is contrary to the plain language of the controlling statutory scheme, the relevant legislative history, and the PSC's own pronouncements.

First, neither New York's Public Service Law (the "PSL") nor any other statute authorizes the PSC to set ESCO rates. The Legislature specifically addressed ratemaking (in

Article 4 of the PSL) and granted the PSC authority to set the rates of "electric corporations" and "gas corporations" only, which are specifically defined by statute as companies which own, operate or manage any gas or electric plant – the local public utilities. ESCO do not own gas or electric plants nor do they own the transmission wires and gas lines necessary for the delivery of utility services. The PSC's ratemaking authority is intended to control the monopolistic power that comes from owning the energy highway. Unlike public utilities, ESCOs do not own the energy highway and therefore fall outside the jurisdiction of the PSC's ratemaking authority. In fact, the PSC itself has been unequivocally clear that Article 4 of the PSL does not give it authority over ESCOs, and the Legislature has been equally clear that its 2002 expansion of the PSL to give the PSC limited authority over ESCOs was expressly limited to the specific consumer-protection provisions of Article 2 ("for the purposes of this Article") and does not give the PSC ratemaking authority over ESCOs.

Second, recognizing that the ratemaking section of the PSL (Article 4) plainly does not apply to ESCOs, the PSC resorts to citing other sections of the PSL (like the introductory language in Article 1) that do not concern ratemaking as a basis for its claimed authority to set ESCO rates. Those arguments fail, and for several independent reasons. As an initial matter, the law does not permit courts to ignore the contours of the specific statutory provision governing ratemaking in favor of "general" powers set forth in an introductory article to a statute. The Supreme Court's contorted reading of PSL Article 1 thus violates basic cannons of statutory interpretation, which require courts to interpret statutes in a way that gives meaning and effect to all the PSL provisions and not render entire portions of the PSL meaningless. Moreover, the Supreme Court's erroneous appeal to the PSC's general supervisory powers would essentially give the PSC *carte blanche* with regard to all energy matters – and in the process render

meaningless the Legislatures' extensive specific provisions delineating the scope of the PSC's authority.

Third, even if the PSC or the court were entitled to extend the Legislature's authorizing statutes (they are not), the PSC's effort to expand the scope of its jurisdiction to authorize the PSC to set the rates of ESCOs competing in the free market contradicts the essential premise upon which the ESCO market exists. ESCOs were founded on the premise that a competitive market is preferable from a consumer perspective to one without competition. The Legislature authorized the PSC to ensure that public utilities charge just and reasonable rates because they are monopolies by nature, and regulatory oversight of their rates was necessary to protect New Yorkers. Those problems by definition do not pertain to ESCOs, who compete in a marketplace and whose products New Yorkers are free to purchase or forego (in favor, for example, of the local public utility whose rates are regulated). That is why the Legislature did not authorize the PSC to set ESCOs' rates, and this Court should not permit the PSC to rewrite its legislative mandate in violation of fundamental tenets of statutory construction.

STATEMENT OF THE QUESTION PRESENTED

Whether the motion court erred by concluding that the Legislature has authorized the Commission to set ESCOs' rates in the New York retail energy market, where that conclusion contradicts the PSL's plain language, is inconsistent with the Commission's and the Legislature's historical conclusions regarding the Commission's jurisdictional limits under the PSL, and no other statutory basis for any such authority exists.

STANDARD ON THIS APPEAL

"This case presents a question of pure statutory interpretation, meriting *de novo* review." Jones v. Bill, 10 N.Y.3d 550, 553 (2008). Where the question presented is one "of pure statutory

reading and analysis, dependent only on accurate apprehension of legislative intent… *de novo* review is appropriate." Weingarten v. Board of Trustees of New York City Teachers' Ret. Sys., 98 N.Y.2d 575, 575-76 (2002) (determining whether Retirement and Social Security Law and Administrative Code of the City of New York allowed for New York City Teachers Retirement System's exclusion of certain income from teachers' pensionable salary base); see New York City Transit Auth. v. New York State Pub. Emp't Relations Bd., 8 N.Y.3d 226, 231 (2007) (applying *de novo* standard in considering propriety of New York Public Employment Relations Board's interpretation of its authorizing statute, the Civil Service Law); City of New York v. Comm'n of Labor, 100 A.D.3d 519, 520 (1st Dep't 2002) (applying *de novo* standard in considering propriety of New York State Department of Labor's interpretation of Labor Law).

STATEMENT OF THE NATURE OF THE CASE

I. THE PARTIES AND BACKGROUND

Appellants include several energy services companies ("ESCOs") that operate in New York and their trade association, National Energy Marketers Association – an international, non-profit association representing wholesale and retail marketers of natural gas, electricity, and related products. (A 44, R. 189 ¶¶ 9-20.)

New York residents who elect to purchase gas or electricity from an ESCO voluntarily enter into arms-length contracts directly with the ESCO of their choice to serve as that customer's energy provider. (A 46, R. 191 ¶ 26.) The ESCO is then responsible for providing that customer with gas and/or electricity on agreed-upon terms. (Id.) The physical delivery of gas and electricity into that customer's home, along with the reading of customers' meters for billing purposes, remain the responsibility of the local utility. (Id.) Every customer continues to

pay the local utility for that service, and the utilities have a monopoly on those "delivery" services.

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

Appellants, like other ESCOs, thus provide an alternative to the monopoly in the supply of gas and electricity otherwise held by regulated local utility companies. (Id. ¶ 28.)

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

Allowing customers to purchase energy from an ESCO creates a competitive environment in which multiple ESCOs and the local utilities compete to supply energy to the same customers. (Id. ¶ 30.) This competition provides customers with more competitively priced energy, better customer service, and substantially more choice than would otherwise be available from the monopoly-protected and price-regulated local utility company. (Id.) ESCOs, for example, offer a variety of products that local utilities do not offer, including fixed-rate

contracts (whereby a customer elects for budgetary certainty and agrees to pay a fixed rate for gas or electric for a set period of time) and a host of "green" renewable energy options. (Id.)

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

II. THE PSL AND THE NEW YORK ENERGY MARKET

In 1910, the Legislature enacted Article 1 of the PSL to provide for the regulation and control of certain public utilities. See PSL Art. 1 (creating the PSC and describing its overall powers); People ex rel. New York, N.H. & H.R. v. Willcox, 2006 N.Y. 423, 430 (N.Y. 1911) ("Public Service Commissions were established… to provide for the regulation and control of certain public service corporations."). Until the 1990s, the New York energy market consisted exclusively of monopolistic public utility companies. The PSL thus authorized the PSC to regulate that monopolistic market. In the 1980s and 1990s, however, the Legislature amended the PSL to empower the PSC to open up competition in the gas market (see PSL § 66(d)), which was later extended to the electric market. Competition emerged in the New York energy market in the form of ESCOs, and the PSC then considered ways to adjust the regulated aspects of the energy market to reflect its competitiveness. See, e.g., Case 94-E-0952, *Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition*, Opinion 94-27, Dec. 22, 1994 (goo.gl/3GrXBM).

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

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

(See A 348, R. 6793.) In connection with the legislative mandate toward competition, the PSC ordered the public utilities to restructure to accommodate competition from ESCOs. See, e.g., Case 94-E-0952, *Order Establishing Procedures and Schedule*, Oct. 9, 1996 (goo.gl/3GrXBM) (adopting process by which public utilities' restructuring was to proceed pursuant to Commission's orders).

III. PUBLIC UTILITIES ARGUE THAT THE PSC MUST REGULATE ESCOS; THE PSC CONCLUDES THAT IT DOES NOT HAVE JURISDICTION OVER ESCOS

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

Public utilities and other market participants asserted, accordingly, that the PSL's provisions governing "electric corporations" and "gas corporations" applied to ESCOs, thereby requiring the PSC to regulate ESCOs consistent with the PSL (and consistent with how the public utilities had been regulated). Participants complained, for instance, that the Home Energy Fairness Practices Act ("HEFPA"), codified in Article 2 of the PSL, needed to be applied to ESCOs. See Case 94-E-0952, *Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services*, Opinion 97-5, May 19, 1997, at 29 (goo.gl/3GrXBM). That Article sets forth discrete consumer-protection provisions, such as complaint handling

procedures, meter reading mechanics, and billing transparency. See generally PSL Art. 2. It does not include any ratemaking provisions.

At that time, like the PSL's other relevant articles, Article 2 applied to "electric corporations" and "gas corporations" as defined in PSL Article 1. See Former PSL Art. 2 § 30 ("This article shall apply to the provision of residential service by gas, electric and steam corporations and municipalities"); PSL Art. 1 § 2(11), (13) (defining "electric corporation" and "gas corporation" to include only entities that controlled the gas and electric physical infrastructure). In November 1997, public utilities and others argued, accordingly, that the PSC had jurisdiction over ESCOs and an obligation to regulate them because ESCOs were "'electric corporations" under the PSL and therefore subject to HEFPA under Article 2. (A 98-100, R. 322-24.) The PSC flatly rejected that argument, and confirmed that ESCOs were not "electric corporations" as required for HEFPA to apply to them. (Id.) Approximately one month later, the PSC again concluded that it does not have jurisdiction over ESCOs pursuant to HEFPA or the PSL. (A 350-52, R. 7157-59; A 353-56, R. 7167-7170.) The PSC reasoned that the statute was "enacted to protect consumers against the abuse of monopoly power," which public utilities have and ESCOs do not. (Id.) The PSC made clear that interpreting Article 2 to apply to ESCOs would be inconsistent with the Legislature's intent. (Id.)

IV. ACKNOWLEDGING THAT THE PSL DID NOT APPLY TO ESCOS, THE LEGISLATURE AMENDS ONLY ARTICLE 2 TO GIVE THE PSC LIMITED JURISDICTION OVER ESCOS

In 2002, the Legislature confirmed the PSC's position that the PSL did not give the PSC authority over ESCOs, since ESCOs were neither "electric corporation[s]" or "gas corporation[s]" as defined therein. Wishing to extend HEFPA's consumer protections to ESCOs in addition to utilities, the Legislature voted to amend Article 2 and gave it a unique expanded

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

V. THE PSC CONFIRMS THAT IT LACKS JURISDICTION OVER ESCOS UNDER ARTICLE 4—THE ONLY ARTICLE THAT PROVIDES THE PSC RATEMAKING AUTHORITY

After the Legislature amended Article 2 and expressly stated that the amendment was limited to that article alone, the PSC's authority under the rest of the PSL (as relevant here) remained restricted to "electric corporations" and "gas corporations" as defined under Article 1 (i.e., public utilities).[1] This included Article 4—which provides the PSC ratemaking authority over public utilities—as the PSC confirmed multiple times over several years.

For example, in 1997, the Public Utility Law Project argued that ESCOs were "electric corporations" under Article 4 and therefore subject to the PSC's ratemaking authority. (A 101-02, R. 325-26.) The PSC rejected that argument, plainly stating that "**PULP's assertion that**

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

ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect." (Id.; see also A 354, R. 7168 at 16 n. 1 (Commission stating that "ESCOs are not Article 4 corporations").) Nearly a decade later, and after the Legislature amended Article 2 to apply to ESCOs, the PSC maintained the same position, explaining that ESCOs "are exempt from Article 4 regulation." (A 358, R. 7183.)

Consistent with the PSC's repeated pronouncements that it lacks any ratemaking authority over ESCOs, Appellants and other ESCOs historically have never been required to submit proposed or current rates to the PSC for approval. (A 57, R. 202.) Nor has the PSC previously undertaken to set rates that ESCOs could charge or to prescribe a maximum rate that ESCOs could charge. (Id.) ESCOs are private companies, whose rates are subject to free market competition and whose ability to attract customers depends entirely on the customers' interest in voluntarily electing to purchase energy from a given ESCO.

VI. THE PSC ISSUES THE RESET ORDER AND CONTRADICTS ITS OWN AND THE LEGISLATURE'S PRIOR PRONOUNCEMENTS REGARDING THE PSC'S JURISDICTIONAL LIMITS

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

the local utilities (a guarantee requirement that would effectively force ESCOs to shut down and exit the market). The Reset Order provided no exception to this rate-guarantee requirement for gas customers. It contained an identical requirement for sales to electricity customers, but provided an exception if the ESCO was willing to provide electricity derived from at least 30% renewable sources. (Id.)

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

Among the Reset Order's procedural deficiencies, moreover, were the PSC's failure to propose the new requirements as proposed rules, failure to provide proper notice to the ESCOs or the broader community of interested parties including New York residents who would be forcibly handed over to the public utility for all energy services, and failure to afford ESCOs an

opportunity for hearing and comment on the PSC's unprecedented and improper effort to engage in ESCO ratemaking. (A 20-24, R. 79-83.)

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

In light of the Reset Order's dramatic effect, its jurisdictional deficiency, and the PSC's blatant disregard of New York's SAPA requirements in issuing the Reset Order, ESCOs immediately sought extensions of its effective date and raised serious concerns about its propriety and practical effect. See Case 12-M-0476, participant filings between February 23 and March 2, 2016 (goo.gl/D5jq7L). The Reset Order threatened to eliminate the ESCO market overnight – undoing two decades of energy consumer choice in New York – because it not only deeply altered the market in ways that ESCOs could not have reasonably predicted, but its terms were likely impossible for ESCOs to abide. The PSC, consistent with its hyper-aggressive and ends-oriented approach, denied the dozens of extension requests, stating simply that "[t]he Commission provided clear justification for the urgent action taken and I [the PSC] decline to postpone the pressing and imperative changes directed in the Order." (A 103-04, R. 399-400.)

In the ensuing days, ESCO representatives asked PSC representatives basic questions about how the Reset Order would work and the justification therefor, and the PSC's representatives repeatedly conceded that they could not answer the ESCOs' questions, saying instead that the PSC would have answers after sixty days (more than seven weeks after the Reset Order would take effect). (A 68, R. 247 ¶ 5.) In short, the PSC did not even understand its own Order. In further recognition of the Reset Order's flaws, the PSC issued three self-contradictory guidance documents in rapid succession, each purporting to describe how the Reset Order would work in practice, but each conflicting with the other. (See A 105-113, R. 402-10; A 114-19, R. 430-35; A 120-25, R. 437-42.)

VIII. APPELLANTS AND OTHERS FILE SUIT, AND THE COURT ENTERS A TEMPORARY RESTRAINING ORDER ENJOINING THE RESET ORDER'S IMPLEMENTATION

On March 3, 2016, Appellants filed a hybrid Verified Article 78 Petition and Complaint, seeking a temporary restraining order and preliminary injunction by Order to Show Cause to enjoin the implementation of Ordering Clauses 1-3 of the Reset Order. (See generally R. 183-490.) In addition to Appellants' filing, other ESCOs and trade associations initiated two other actions seeking to enjoin the Reset Order's implementation.

In support of their application, Appellants asserted that the PSC's issuance of the Reset Order: (i) was invalid under CPLR 7803 because the PSC lacked jurisdictional authority to issue it and because the PSC's promulgation of that order was arbitrary and capricious; (ii) violated Appellants' due process rights under the New York State and United States Constitutions; and (iii) violated Appellants' rights under the Takings Clauses and Equal Protection Clauses of the Federal and New York State Constitutions, as well as the Contracts Clause of the United States Constitution. (See e.g., A 61-64, R. 206-09 ¶¶ 81-95.)

On March 3-4, 2016, the Supreme Court (O'Connor, J.), heard oral argument. Characterizing the Reset Order as the "game changer" that it was, the Supreme Court granted Appellants' request for a temporary restraining order and noted its "concern" that the PSC had exceeded its jurisdiction in promulgating the Reset Order. (A 34-37, R. 110-13 at 5:20-22, 12:22-13:7; A 39, R. 115 at 8:5-10 ("So you know, I certainly understand the arguments that are being made by the PSC, but I do believe that all of the issues articulated by the petitioners really lie in favor of granting this stay or temporary restraining order. So I am going to do that.").) The Supreme Court then set a scheduling for briefing and a hearing on the various motions to preliminarily enjoin the Reset Order.

IX. THE SUPREME COURT GRANTS APPELLANTS' MOTION FOR AN INJUNCTION AND INVALIDATES THE RESET ORDER

On March 28, 2016, the PSC filed its opposition to the motions for preliminary injunction and, on May 9, the ESCOs' representatives (including Appellants) filed their replies to the PSC's opposition.[2] (See, e.g., A 127-217, R. 6192-6282 (PSC Opp. Br.); A 218-274, R. 6320-6376 (NEM Reply Br.); A 311-346, R. 6583-6618 (RESA Reply Br.).) The Supreme Court (Zwack, J.) declined to hear additional argument on the motion for preliminary injunction and the claims, instead issuing a decision on the papers on July 22, 2016.

The Supreme Court concluded that the PSC's promulgation of the Reset Order improperly had blindsided ESCOs (A 20-25, R. 79-84) and enjoined the PSC from enforcing the Reset Order. First, the court found that the PSC had "simply denied [Appellants'] their procedural due process rights," including because the PSC failed to provide Appellants an opportunity "to be heard in a meaningful manner and at a meaningful time." (Id.) Second, finding that the Reset Order threatened "a major restructuring of the retail energy market – or even its collapse," the Court concluded that the "Reset Order [wa]s arbitrary and irrational" and therefore invalid because, among other reasons: (i) it bore no rational relationship to its stated goals; (ii) it imposed an "impossible," "unexplained[,] and harsh ten day implementation period for the Order"; and (iii) the issues the Reset Order sought to address could be addressed through appropriate consumer protection changes, rather than by overhauling the market. (A 24-27, R. 83-86.)[3]

[2] The parties agreed to treat the filings as effectively consolidated, and the PSC addressed them in one consolidated set of opposition papers.

[3] Indeed, while this appeal concerns the jurisdictional aspects of the Supreme Court's decision, the Reset Order's arbitrary and capricious nature was a significant focus of the parties'

With respect to the PSC's jurisdictional authority, however, the Supreme Court remarked that, in its view, the PSC was empowered to set ESCO rates. (A 18-20, R. 77-79.) Unable to identify any particular statutory provision that imparted to the PSC jurisdiction over ESCO rates, however, the Supreme Court instead inferred that conclusion from general references to (i) PSL Art. 1 § 5; (ii) PSL Art. 2 § 53; (iii) PSL Art. 4 §§ 65(1), 66(12)(f); (iv) GBL § 349-d(11)-(12); and (v) the UBP. (See id.) In reaching that conclusion, moreover, the Supreme Court did not even address the plain language of the relevant statutes, the legislative history (as detailed above, and in the parties' papers below), or the facts that:

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

On August 25, 2016, Appellants filed a Notice of Appeal from the portion of the Supreme Court's July 22 decision concerning the scope of the PSC's authority and jurisdiction to

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briefing before the Supreme Court, where Appellants pointed out that it was fundamentally illogical, bore no rational relationship to its purported purposes, relied on unsubstantiated assumptions, and was not based on any meaningful analysis. (See, e.g., A 246-259, R. 6348-6361.)

set rates in the retail energy markets, along with an accompanying Pre-Calendar Statement.[4] (See A 1-2, R. 3-4.) On November 2, Appellants filed with the Appellate Division a Notice of Unopposed Motion requesting that the Appellate Division find their Notice of Appeal timely pursuant to CPLR 5520(a) and stipulating that Appellants' appellate brief would be filed on December 20. On December 1, the Appellate Division granted that motion and set a deadline of December 20 for Appellants to perfect their appeal.

[4] Appellants (Petitioners/Plaintiffs below) prevailed in the underlying litigation, and the Supreme Court vacated the PSC's "Reset Order" on various grounds. In its Decision and Order, however, the Supreme Court stated that the PSC did have jurisdiction to set ESCO rates and remanded to the PSC for further proceedings. Although Appellants believe that the Supreme Court's statement regarding the scope of the PSC's jurisdiction is dicta that is neither binding nor appealable, Appellants filed this appeal in light of this Court's decision in Matter of Feldman v. Planning Bd. of the Town of Rochester, 99 A.D.3d 1161 (3d Dep't 2012), which creates ambiguity as to whether a prevailing party should nevertheless file an appeal on an adverse statement in an otherwise favorable decision. In light of the gravity of the issue on which the Supreme Court opined – which is of industry-wide and state-wide importance – and the remand to the PSC, Appellants filed this appeal to ensure that this Court decides the critical issue of the scope of the PSC's jurisdiction, either by deciding this appeal on the merits, or by confirming that the Supreme Court's statements on this issue are dicta and do not have any precedential effect.

On December 2, 2016, the PSC acted on the Supreme Court's remand and re-noticed many of the same provisions as those in the Reset Order as part of a restructuring proceeding that will take place in the coming year. The notice is predicated on the same erroneous presumption that the PSC has ratemaking jurisdiction over ESCOs, in reliance on the statement in the Supreme Court's decision that is the focus of this appeal. See Case 98-M-1343, *Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits*, Dec. 2, 2016 (goo.gl/VXUoId).

ARGUMENT

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

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

The Reset Order sets the rates that private companies, ESCOs, can charge their customers for a variety of energy products. But the Legislature has not authorized the PSC to set ESCO rates. "[T]he powers of an administrative agency may not be implied, but are created by language of clear import, admitting of no other reasonable construction." Durant v. Motor Vehicle Acc. Indem. Corp., 20 A.D.2d 242, 247 (2d Dep't 1964). Where, as here, an agency is a "creature of statute," it "lacks powers not granted to it by express or necessarily implicated legislative delegation." Abiele, 91 N.Y.2d at 10; see also Durant, 20 A.D.2d at 247 ("Unless the delegation of power to vary or amend statutory provisions is explicitly conferred by the Legislature on an administrative board or official, the exercise of the power is ineffective.") (emphasis added). The Court of Appeals has rejected the same type of expansive misconduct that the PSC perpetrates here: "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. New York State Banking Dep't, 74 N.Y.2d 505, 510 (N.Y. 1989).

The Supreme Court reasoned that three articles of the PSL authorize the PSC's issuance of the Reset Order:

- **Article 1 (General Jurisdiction)** – which describes certain parameters of the PSC's general jurisdiction. See, e.g., PSL Art. 1 § 5.

- **Article 2 (Consumer Protection)** – sometimes referred to as the Home Energy Fair Practices Act or "HEFPA," which sets forth certain consumer-protection provisions. See, e.g., PSL Art. 2 §§ 30-53.

- **Article 4 (Ratemaking)** – which establishes the PSC's ratemaking authority over public utilities. See, e.g., PSL Art. 4 § 65.

(A 18-20, R. 77-79.) The court also identified GBL § 349-d (which established the "Energy Services Company Consumers Bill of Rights") and the UBP as purported sources of such authority. (Id.) None of these sources, however, authorize the PSC to set ESCOs' rates.

A. The PSC Admits that the Order Is Ratemaking

The Reset Order constitutes ratemaking on its face: It requires ESCOs to fix their rates at levels equal to or below the public utilities' rates.[5] (A 92, R. 272.) Although the PSC has at times sought to deny that indisputable fact – baldly claiming that it "has not set the rates or otherwise determined the prices that ESCOs can charge" (A 156-57, R. 6221-22) – the PSC itself repeatedly has admitted the obvious fact that the Reset Order constitutes ratemaking:

- The PSC relies on the "use of its ratemaking authority" as justification for cutting off ESCOs' "access to electric facilities." (A 158, R. 6223.)

- The PSC 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." (A 167, R. 6232.)

- The PSC argues that its "existing eligibility and complaint process" was "not sufficient" to effectuate the PSC's goals because "those processes do not address ESCO prices." (A 169, R. 6234.)

[5] The Reset Order is self-contradictory: In some places, it requires ESCOs to guarantee that they would beat local utility rates and, in other places, it requires ESCOs to match local utility rates. (Compare A 72-73, R. 252-53 (stating that, under the Reset Order, ESCOs may enroll customers only through "contracts that guarantee savings in comparison to what the customer would have paid as a full service utility customers") with A 86, R. 266 ("Regarding the guaranteed savings requirement, the ESCO must guarantee that the customer will pay no more, on an annual basis than the customer would have paid as a full service customer of the utility").)

- The PSC 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." (A 177, R. 6242.)

- The PSC 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." (A 183, R. 6248.)

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

Article 1 does not authorize the PSC to set ESCOs' rates because: (i) the general authority it provides to the PSC extends only to public utilities and does not extend to ESCOs; (ii) even if that general authority did extend to ESCOs, it does not include the specific power to set ESCOs' rates; and (iii) notwithstanding any general authority it has, the PSC's issuance of the Reset Order constituted invalid *ultra vires* policy-making.

1. Article 1 Does Not Provide the PSC Jurisdiction Over ESCOs

The PSC's jurisdictional theory with respect to Article 1 is that ESCOs purportedly are "electric corporations" and "gas corporations" under Article 1 §§ 2(10)-(13), and thus—the PSC claims—it has "plenary authority" over ESCOs under Article 1 § 5(1)(b). (A 156, R. 6222; A 159-161, R. 6224-26.) The PSC's sweeping assertion is wrong – it is contradicted by Article 1's plain language, the PSL's history, the PSC's own historical interpretation, and the Legislature's historical interpretation.

First, Article 1's plain language confirms that its jurisdictional scope does not reach ESCOs because they are not "electric corporation[s]" and "gas corporation[s]" as defined by Article 1 §§ 2(11), (13). Under those sections, a "gas corporation" or "electric corporation" is a company "owning, operating or managing any" gas or electric plant.[6] PSL Art. 1 §§ 2(11), (13).

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

ESCOs do none of those things. Rather, ESCOs sell electricity and gas to the consumer while the regulated public utilities own, operate, and manage the utility plants, which is a fundamental distinction the PSC itself has emphasized for two decades. (See A 197, R. 6262 ("Another relevant distinction between utilities and ESCOs is that utilities actually own the transmission and distribution facilities that serve customers, and are responsible for maintaining those facilities in good working order.").) The plain language of the statute thus cannot be squared with the PSC's newfound position that ESCOs are electric or gas corporations as defined under Article 1.

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

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> all real estate, fixtures and personal property owned, used or to be used for or in connection or to facilitate the manufacture, conveying, transportation, distribution, sale or furnishing of gas (natural or manufactured or mixture of both) for light, heat, or power, but does not include property used solely for or in connection with the business of selling, distributing or furnishing of gas in enclosed containers.
>
> An "electric plant" is defined as:
>
> all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, hear or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conducts used or to be used for the transmission of electricity for light, heat or power.
>
> PSL Art. 1 § 2.

provide for the regulation and control of certain public service corporations.").

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

For example, in November 1997, PULP argued that ESCOs were "electric corporations" and therefore were subject to Articles 2 and 4. See Case No. 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion No. 97-17, Opinion and Order Deciding Petitions for Clarification and Rehearing, Nov. 18, 1997, at 31-33 (goo.gl/YsGHsu.). The PSC rejected that argument and, in doing so, expressly adopted a New York Supreme Court decision, finding that ESCOs were not "electric corporations" for the following reasons:

- "The simple and inescapable truth is that HEFPA was enacted by the Legislature in 1981 as a consumer protection measure or utility customers' 'bill of rights' at a time when residential gas, electricity and steam service were provided by regulated monopolies and competition had not yet been introduced for these utility services. Gas marketers, unbundling and utility competition are not even mentioned or in any respect provided for in any of the provision[s] of HEFPA."
- "Plaintiffs make no credible claim that the Legislature contemplated or envisioned utility competition when it enacted HEFPA, and the available Legislative history and the provisions of HEFPA when read together clearly suggest that HEFPA was designed to ensure that residential customers were able to receive utility service on fair terms from the monopolistic utility providers."

- Article 1's definitions (including the definitions of gas and electric corporations) – which were "notably adopted long before" ESCOs existed – did not "compel th[e] conclusion" that ESCOs were "PSC-jurisdictional corporations."

Id. (emphasis added.) The PSC further reasoned that:

> PULP's assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect. PSL § 66(1) provides that our general supervisory duties normally extend to those electric 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 places…." Opinion No. 97-5 addresses ESCOs that do not lay, erect or maintain wires, pipes, conduits ducts or other fixtures in, over or under public property."

Id. at 34-35. Based on the foregoing, the PSC again concluded that ESCOs were not "electric corporation[s]" as defined by Article 1 and as referred to in Articles 2 and 4. Id. at 33-35.

Fourth, the Legislature agreed, a fatal, dispositive fact that the Supreme Court also ignored without explanation. In 2002, the Legislature amended one section of the PSL so that it would reach ESCOs (because it did not previously extend to ESCOs) – but did so only with respect to Article 2. The Legislature amended that article's jurisdictional scope to make it broader than the jurisdictional reach of Articles 1 (general authority) and 4 (ratemaking authority). Specifically, whereas before the amendment Article 2's references to "electric corporation[s]" or "gas corporation[s]" relied on the definitions of those terms in Article 1 (which the PSC found to exclude ESCOs), the Legislature added a new provision to Article 2 that provided broader definitions of those terms:

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

PSL Art. 2 § 53 (emphasis added). Recognizing, accordingly, that Article 1's definitions excluded ESCOs from the PSC's jurisdiction, the Legislature expanded the jurisdictional scope of Article 2. See, e.g., New York Bill Jacket, 2002 S.B. 6778, Ch. 686, B-201 Budget Report on Bills – Session Year 2002 ("When enacted in the 1980s, HEFPA covered traditional utility companies which provided the full range of consumer services – transmission and delivery, as well as the energy commodity – electric, gas or steam. As a result of energy competition, transmission and delivery utilities and commodity providers (ESCOs) have split. HEFPA now covers only transmission and delivery utilities. ESCOs, either former components of traditional energy companies or newly created, which provide electric, gas and/or steam are not regulated by HEFPA. This bill would require that, in addition to transmission and delivery utilities, all ESCOs be included under HEFPA [Article 2]" (emphasis added)); New York State Public Service Commission Brochure for Home Energy Fair Practices Act, available at: https://goo.gl/X7l8Ds ("In 2002, in light of the restructured competitive retail energy market, the New York State Legislature amended HEFPA [Article 2] to include energy service companies (ESCOs)").

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

Article 1 Electric Corporation Definition[7]	Post-Amendment Article 2 Jurisdictional Provision

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

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

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

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

Indeed, the PSC's interpretation inexplicably would reduce the Legislature's 2002 amendment of Article 2 to a pointless exercise. As discussed above, that amendment broadened Article 2's jurisdictional scope by extending it to "any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity." PSL Art. 2 § 53 (emphasis added). If Article 1's definition of "electric corporations" and "gas corporations" already reached entities that merely "sell or facilitate" the sale of electricity gas, as the PSC now claims (A 160-161, R. 6225-26), then the Legislature's amendment of Article 2 to include such entities would have been entirely unnecessary. Not only is that facially nonsensical, but it contravenes the basic

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

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

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

Even if the PSC has "general jurisdiction" over ESCOs under Article 1 (it does not), that jurisdiction plainly does not include the power to set ESCOs' rates. The Court below adopted (without explanation) the PSC's sweeping claim that it has "general supervisory powers" over ESCOs under PSL Art. 1 §§ 5(1)(b), 5(2), and that it therefore has *carte blanche* with respect to the New York energy industry. (A 19, R. 78; see A 156, R. 6222; A 159-161, R. 6224-226.) Those sections, however, only generally describe the PSC's general jurisdiction—they do not purport to impart the specific authority to fix ESCOs' rates, and for several reasons.

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

specific powers, including Article 4 – the specific statute that imparts ratemaking authority (and limits that authority to public utilities only). The Supreme Court's reading thus contravenes fundamental cannons of statutory construction requiring that an interpretation "give meaning and effect to all [of the PSL's] provisions" and that it not "render another portion of a statute meaningless." Estate of Allen v. Colgan, 190 A.2d 939, 940 (3d Dep't 1993). Indeed, the PSL elsewhere empowers the PSC to act on numerous items including, as examples, setting public utilities' rates for gas or electricity (PSL Art. 4 § 66(5), § 72), establishing billing practices (PSL Art. 2 §§ 38, 39); and compelling discovery, such as by inspections or compelling information by subpoena *duces tecum* (PSL Art. 4 § 66(8), (10), § 80(6), (8), § 89(c)(6), (8)). Under the PSC's interpretation, each of these empowering provisions would be meaningless: If Article 1 § 5 already gave it "plenary authority" over the New York energy markets – including the power to fix rates – then the Legislature would have pointlessly undertaken the task of enumerating each of these powers including, most egregiously, the specific power to set public utilities' rates.

In addition, under the Supreme Court's (and the PSC's) interpretation, the Legislature also would have wasted its time by specifically enumerating many other agencies' powers where they also have authorizing statutes. For example, the Department of Transportation is broadly authorized to:

> [C]oordinate and develop comprehensive, balanced, transportation policy and planning for the state to meet the present and future statewide needs for adequate, safe, and efficient transportation facilities and services at reasonable cost to the people.

Transportation Law § 14(1). Similarly, the New York State Department of Financial Services is broadly authorized as follows:

> [T]he business of all banking organizations shall be supervised and regulated through the department of financial services in such manner as to insure the safe and sound conduct of such business, to

> conserve their assets, to prevent the hoarding of money, to eliminate unsound and destructive competition among such banking organizations and thus to maintain public confidence in such business and protect the public interest and the interests of depositors, creditors, shareholders and stockholders.

Banking Law § 10. In light of these general authorizing provisions, the Supreme Court's interpretation renders pointless the numerous specific provisions that authorize the DOT and the DFS to undertake their roles. That is not only absurd and contrary to law, but it sets a dangerous precedent imparting to many agencies *carte blanche* authority in their respective fields.

Second, the Supreme Court's interpretation violates the basic principle that a "general provision of a statute applies only where a particular provision does not." People v. Mobil Oil Corp., 48 N.Y.2d 192, 200 (N.Y. 1979). The PSL addresses the PSC's ratemaking powers in Art. 4 §§ 66(1), 66(5) and 72, and those more specific sections limit the PSC's ratemaking authority to public utilities, not ESCOs (see below Part I(C)). The Supreme Court thus incorrectly reasoned that Article 1's more general provisions somehow trump the PSL's other, more specific and relevant provisions. See id.

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

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

Agencies cannot engage in policy-making based on a broad authorizing statute, even where (contrary to the case here) the enacted policy falls within that statute's parameters. The Court of Appeals' decision in Boreali is instructive. There, the New York Public Health Council (the "PHC," a component of the Department of Health), enacted anti-smoking regulations. See

Boreali v. Axelrod, 71 N.Y.2d 1, 8 (1987). Its purported statutory basis for that regulation was Section 225(5)(a) of the Public Health Law, which (similar to Article 1 § 5, here) generally authorizes the PHC to "deal with any matters affecting . . . the public health." The court found that the PHC's action in this regard was invalid because it amounted to the PHC using its general authority as a purported justification for its legislative policy-making in violation of the New York State's separation-of-powers doctrine (i.e., that "[t]he legislative power of this State shall be vested in the Senate and the Assembly"). Id. at 14; N.Y. Const. Art. III § 1. The court reasoned that while the general scope of the PHC's authority was constitutional on its face, the PHC's action undertaken pursuant to that authority "transgressed" the "line between administrative rule-making and legislative policy-making." Id. at 11.

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

competing ends." Id. Fourth, the court found that the PHC had not applied any special expertise or technical competence in promulgating the regulations. Id. at 13-14.

The Boreali court's reasoning was applied again more recently by this Court in Health Ins. Ass'n of America v. Corcoran, 154 A.D.2d 61 (3d Dep't 1990) and by the Court of Appeals in New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health and Mental Hygiene, 23 N.Y.3d 681 (2014). In Corcoran, the Health Commission relied on its general authorizing statute, which empowered it to regulate insurance policies where they "may be contrary to the health care needs of the public" (Insurance Law § 3217(a)(4)), as a basis for implementing a ban on HIV testing to determine insurability. Corcoran, 154 A.D.2d at 72. The court rejected that interpretation, finding that (i) its breadth would violate Boreali, where it would result in the Health Commission essentially having "*carte blanche*" to further its own objectives in the insurance industry; and (ii) the Legislature had not enacted any statute directly addressing the relevant issue (whether HIV test results should be used as a basis for insurability) and, as a result, the Health Commission generated its order from a "clean slate" rather than Legislative guidance. Id. at 74-75. This Court thus invalidated the Health Commission's order. Id.

In Hispanic Chambers of Commerce, the New York City Board of Health issued a "Sugary Drinks Portion Cap Rule" restricting the size of cups that restaurants could use when serving sugary beverages – relying on a statute broadly empowering it to enact a health code for the "security of life and health in the city." N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 23 N.Y.3d at 690. The Court of Appeals invalidated the Board's order, finding that it violated the separation of powers doctrine under Boreali. Specifically, the court found that: (i) the Board had engaged in legislative policy-making because it had chosen between public policy

ends by weighing its public health goals against the rule's economic consequences; (ii) there was no legislation "concerning the consumption of sugary beverages," and the Board had thus enacted the Portion Cap Rule "without benefit of legislative guidance, and did not simply fill in details guided by independent legislation"; and (iii) the relevant legislative bodies' failure to act on the issue "in the face of plentiful opportunity to act . . . constitute[d] additional evidence that the Board's adoption of the Portion Cap Rule amounted to making new policy, rather than carrying out preexisting legislative policy." Id. at 697-700.

The PSC's conduct here with regard to the Reset Order exhibits the same features that drove the Boreali, Corcoran, and Hispanic Chambers of Commerce courts to invalidate the agency orders in those cases.

First, as in those cases, the PSC here asserts that it weighed its purported consumer protection concerns against the "desire to preserve and improve the market." (A 182, R. 6247.) By its own assessment, accordingly, it engaged in "uniquely legislative" activity.

Second, the PSC here worked from a "clean slate" – the Legislature has not enacted a single law addressing ESCOs' rates. That is why the PSC and the Supreme Court here were forced to rely on the PSC's "generalized authority" under Article 1 § 5, which does not even address the issue of rate-setting generally, much less with respect to ESCOs.

Third, the Legislature here had considered issues overlapping with the Reset Order, including by considering and failing to pass legislation that would have amended Article 4 to apply to ESCOs for purposes only of a new subdivision and that would have banned unauthorized service changes (or "slamming"), which the Reset Order also addresses. See Senate Bill S2557 (goo.gl/2CRMkB); A 81, R. 261; A 90, R. 270 (Reset Order addressing the purported issue of "slamming"). The Legislature's consideration of the issues bearing on the

Reset Order indicates that its content falls within the Legislature's purview – not the PSC's – and New York citizens are entitled to have their elected representatives weigh, consider, and decide those issues. See Boreali, 71 N.Y.2d at 8.

Last, the PSC did not utilize any meaningful amount of technical expertise in promulgating the Reset Order. The PSC did not even purport to consider the Reset Order's effects on consumers, including: (i) the likely reduction in, or elimination of, ESCO market participation resulting from the Reset Order and the effect that a less competitive market will have on utility pricing; (ii) the market discipline that ESCOs have imposed on utility rates and conduct; (iii) the natural price volatility of a competitive market; and (iv) the adverse impact eliminating ESCO products will have on efforts to reduce energy usage and increased use of "green" energy[8] – services and products that only ESCOs (in contrast to the local utilities) provide customers. (See A 247-48, R. 6349-50; A 275-310, R. 6547-6582 at ¶¶ 12, 14-21, 23, 25, 37-60, 62-64.) In addition, in mandating that ESCOs guarantee that their rates would beat the utilities' rates, the PSC even ignored that ESCOs offer different products than utilities and operate under completely different business models. That is not "technical" decision-making.

The PSC's issuance of the Reset Order is thus on all-fours with the Boreali, Corcoran, and Hispanic Chambers of Commerce decisions – the PSC, without any guidance from the Legislature, issued its own order to address what it perceived to be problems in the energy market and thus unlawfully engaged in legislative policy-making. The Reset Order is invalid.

[8] The PSC not only failed to do this, but it also failed to meet its statutory obligation to prepare an environmental impact statement under Article 8 of the New York Environmental Conservation Law, the State Environmental Quality Review Act, or "SEQRA." (A 51-53, R. 196-98 ¶¶ 47-50.)

C. Article 4 Does Not Authorize the PSC To Set ESCOs' Rates

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

Article 4 § 66(5) sets out the PSC's limited ratemaking authority:

> The commission shall: Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, charges or classifications or the acts or regulations of any such person, corporation or municipality are unjust, unreasonably, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe…. the just and reasonable rates, charges and classifications thereafter to be in force for the service to be furnished.

PSL Art. 4 § 66(5) (emphasis added). The same section (at subsection 1) provides that the corporations "under [the PSC's] supervision" (and thus those that are subject to the PSC's ratemaking authority) are only those 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). As discussed above in Part I(B)(1), however, only public utilities are corporations that have that authority; ESCOs are not, and are therefore not subject to the PSC's ratemaking authority under § 66(5), as the PSC repeatedly has recognized. See, e.g., Case No. 94-E-0952, Opinion No. 97-17, Nov. 18, 1997, at 34-35 (PULP's assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect") (goo.gl/YsGHsu); Case 06-M-0647, *Order Adopting ESCO Price Reporting*

Requirements and Enforcement Mechanisms, Nov. 8, 2006 (holding that ESCOs "are exempt from PSL Article 4 regulation") (goo.gl/QTaFbt). While the Supreme Court accurately characterized PSL § 66 as providing the PSC "authority to establish public utility rates," it inexplicably concluded that such authority extends to ESCOs, failing even to address the PSC's historical assertions that it does not have ratemaking authority over ESCOs.

For similar reasons, the Supreme Court erred in referencing Article 4 § 65(1) as a basis for the Reset Order's jurisdictional propriety. (A 19, R. 78.) That section mandates that "[e]very gas corporation, every electric corporation and every municipality shall furnish and provide such service, instrumentalities, and facilities as shall be safe and adequate and in all respects just and reasonable." Like Section 66(5), however, Section 65(1) applies only to "gas corporation[s]" and "electric corporation[s]" as defined in the statute, and ESCOs are neither (Part I(B)(1), above).

In addition, acknowledging that Article 4 does not authorize it to set ESCOs' rates, the PSC sweepingly claimed that it could end run around that legislative decision by relying on Article 4 § 66-d, purportedly providing the PSC "plenary authority to decide the conditions for access by gas commodity sellers to utility distribution systems." (A 156, R. 6222.) As a threshold matter, the PSC's theory in this regard relates only to gas commodity sellers and not electric commodity sellers, and it thus fails to address the Reset Order's jurisdictional impropriety insofar as it sets ESCOs' electricity rates.

More fundamentally, however, the PSC's claim finds no support in the statutory text. Section 66-d (titled "Contract Carrier Authorization") states that the PSC shall "have the authority to order any gas corporation to transport or contract with others to transport gas under contract for sale by such producer or owned by such producer" on "such terms and subject to

such conditions as the commission considers just and reasonable." PSL Art. 4 § 66-d. As with § 66(5), the reference here to a "gas corporation" is defined as a public utility and, by its terms, Section 66-d thus empowers the PSC to force public utilities to "transport gas" for third party producers and consumers (including ESCOs). See Rochester Gas and Electric Corp. v. Pub. Serv. Comm'n of State of New York, 71 N.Y.2d 313, 318-19 (1988) (discussing how the legislature enacted § 66-d to enable the PSC to require gas utilities to open the pipelines to third parties whereas, before its enactment, § 66-d "only opened [utility] markets to local producers if a utility was willing" to do so) (emphasis added); See also A 136, R. 6201 (PSC describing Section 66-d as "provid[ing] the PSC with authority to require franchised providers of gas transportation of services [sic] to open their pipes to competitively priced gas.") (emphasis added.) Balanced against that is the Commission's obligation to ensure that (i) the gas utility earns a "just and reasonable" rate in exchange for its forced delivery of gas commodity; (ii) that the gas utility has "available capacity"; and (iii) that the forced delivery of gas will not result in any undue burden to the gas utility's ratepayers. PSL Art. 4 § 66-d. That section thus does not empower the Commission to set the terms of ESCOs' contracts with third-parties; rather, it empowers the Commission to force gas utilities to deliver gas to third-parties. Indeed, the Commission incorrectly claims that its authority to open utility lines to competitively priced gas also somehow provides it with a far more expansive right to close utility lines on any terms it wishes.

Further, the PSC has claimed that Article 4 somehow authorizes it "to control practices of non-jurisdictional entities through conditions on access to utility facilities" in reliance on Campo Corp. v. Feinberg, 279 A.D. 302 (3d Dep't 1952), an inapposite decision that is more than sixty years old. Campo concerned the practice of residential "submetering," where a landlord "buys

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

D. Article 2 Does Not Authorize the PSC To Set ESCOs' Rates

The Supreme Court also erred by relying on Article 2 (HEFPA) for its conclusion that the PSC was authorized to issue the Reset Order. Article 2, in fact, does not contain a single provision even addressing ratemaking (for public utilities or ESCOs). Rather, it addresses discrete consumer protection measures, such as termination notices, mechanical billing practices, and surcharges:

Article 2

Section No.	Subject Matter Addressed
30	The legislative policy that it is in the public interest for customers to receive utility service without unreasonable qualifications or lengthy delays.
31	The customer application process for utility service.
32-35, 40, 46	The conditions under which utility providers may terminate or disconnect service to customers, their duties to reconnect service promptly, and customers' rights to designate third-parties as agents for notices of termination.
36	Required practices regarding customer security deposits.
37-38	Required practices regarding deferred payment agreements for customer arrears and levelized payments plans (with a back-end true up to bring payments up to the rate-level).
38-39, 44	Required practices for billing mechanics and informational notices.
41	The conditions under which utility providers cannot charge for past services or cannot revise upward past bills.
42, 45	Utility providers' ability to (i) levy certain discrete surcharges (e.g. penalties, fees, and interest); and (ii) permit their customers to pay their bills to a payment agent.
43	The mechanics of how customer complaints are addressed.
47	Utility-related apparatus inspections.
48	The utility-related emergency hotline.
49, 50	HEFPA's application to steam and water services.
51	The PSC's obligation to adopt rules and regulations to implement the PSL's other provisions.
52	The handling of accounts for customers who use shared meters.
53	The entities to which HEFPA applies.

Not a single one of these provisions even concerns rates, much less provides the PSC with jurisdiction to fix rates ESCOs can charge for their many energy products purchased by customers in a free market.

Article 2's omission of any such authorization and its focus on discrete consumer protections is consistent, moreover, with ESCOs' role in the retail energy market. More specifically, the Legislature's amendment of Article 2 only (and not Article 4) to include ESCOs is sensible because ESCOs and public utilities are similarly situated with regard to the consumer

protections that HEFPA provides but not so with respect to ratemaking under Article 4. The PSC's ratemaking responsibility under that article is to ensure that a "just and reasonable" rate is available to consumers by regulating the monopolistic public utilities' rates. By declining to extend the PSC's Article 4 ratemaking authority to ESCOs, accordingly, the Legislature preserved the market-based pricing pressure that ESCOs have introduced to the market while ensuring that a "just and reasonable" rate, in any instance, remained available to the market through the PSC's continued regulation of public utilities' rates.

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

Unable to find any specific basis under Articles 1, 2, and 4 of the PSL for the PSC's purported authority to issue the Reset Order, the Supreme Court also accepted (without meaningful explanation) that such authority arises out of (i) General Business Law (GBL) § 349-d; (ii) the PSC's vague assertions of its purported duty to create "workably competitive markets" and to prevent rates "from becoming unjust and unreasonable"; and (iii) ESCOs' agreement to the Uniform Business Practices (UBP). None of these purported bases, however, authorize the PSC to issue the Reset Order.

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

In addition, the Supreme Court's assertion that Subsections (11) and (12) of GBL § 349-d purportedly "preserve[]" the PSC's ability to set ESCOs' rates is wrong. (A 19-20, R. 78-79.) Those sections state:

> Nothing in this section shall be deemed to limit any authority of the public service commission… which existed before the effective date of this section, to limit, suspend or revoke the eligibility of an energy services company to sell or offer for sale any energy services for violation of any provision of law, rule, regulation or policy enforceable by such commission or authority.

GBL § 349-d(11).

> Nothing in this section shall be deemed to limit any authority of the public service commission… which existed before the effective date of this section, to adopt additional guidelines, practices, policies, rules or regulations relating to the marketing practices of energy services companies to residential and commercial customers, whether in person (including door to door), or by mail, telephone or other electronic means, that are not inconsistent with the provisions of this section.

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

Second, the PSL does not authorize the PSC to maintain "workably competitive" markets or to prevent ESCOs' rates "from becoming unjust and unreasonable." In fact, neither the PSL nor any case law authorizes the PSC to enact rules to keep the retail energy market, in general, "workably competitive"; the PSC appears unilaterally to have undertaken that invented "duty." Indeed, with respect to rates in the retail energy market, the PSL always – and without legislative

change – has authorized the PSC to undertake a specific task: To ensure that the public utilities' rates are "just and reasonable." See, e.g., PSL Art. 4 § 66(5). The Legislature declined to extend that authorization to entities other than public utilities and for good reason: As discussed above, customers are vulnerable to public utilities exploiting their monopoly power to price gouge whereas customers do not have that same vulnerability to non-monopolistic entities (e.g., ESCOs) whose services customers voluntarily and freely elect to purchase and can drop at any time. In fact, every single provision in the PSL relating to the PSC's duty to ensure that rates are "just and reasonable" is located in Article 4, which, for the reasons discussed above in Part I(C), does not apply to ESCOs.

For this reason, the case law that the Supreme Court and the PSC cited for the proposition that the PSC can intervene in the market as it pleases to make ESCOs' rates purportedly more "just and reasonable" is irrelevant. For example, the Supreme Court cited City of New York v. Pub. Serv. Comm'n, 17 A.D.2d 581 (3d Dep't 1963) and Keyspan Energy Svcs., Inc. v. Pub. Serv. Comm'n, 295 A.D.2d 859 (3d Dep't 2002), but those cases merely support the uncontroversial and undisputed proposition that the PSC has rate-setting authority with respect to "public utilit[ies]." City of New York, 17 A.D.2d at 586; Keyspan Energy, 295 A.D.2d at 862. The PSC seeks to rewrite this Court's holdings into a broad jurisdictional mandate that the Legislature simply did not provide the PSC.

In addition, the PSC extensively cited cases concerning the ratemaking 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 PSC's authority under the PSL. Critically, unlike the PSC here, Congress expressly gave FERC statutory ratemaking

authority over the entities at issue in the cases that the PSC cites. See 15 U.S.C.A. § 717c (West 2015) [Natural Gas Act]; 16 U.S.C.A. § 824d (West 2015) [Federal Power Act].[9]

The PSC also has relied on Energy Ass'n of New York State v. Pub. Serv. Comm'n of State of N.Y., 169 Misc. 2d 924 (Alb. Cnty. Sup. Ct. 1996), for the proposition that it issued the Reset Order based on the "broad authority delegated by the Legislature to create the retail markets." (A 155, R. 6220.) That Supreme Court decision, however, addressed whether it was within the PSC's authority to set "just and reasonable" public utility rates by introducing market competition (in the form of ESCOs) that would apply downward pressure on utility rates. There was thus a nexus between the PSC's undisputed statutory authority and mandate to ensure that public utilities' rates were just and reasonable and the creation of a competitive market, where the latter would further the reasonableness of utilities' rates. Here, however, there is no such nexus between the PSC's statutory mandate to keep utilities' rates just and reasonable and the prospect of eliminating ESCO competition via the Reset Order. Indeed, the PSC does not even claim that the Reset Order will somehow lower utilities' rates or otherwise make them just and reasonable. By requiring ESCOs to meet or beat utilities' rates, moreover, the Reset Order

[9] See A 153-54, R. 6218-19, relying on a series of inapposite FERC cases based on federal statutes imposing duties on and granting authority to FERC – not the PSC: 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).

confirms that the PSC views those utility rates as just and reasonable, and those rates are available to all customers. (See A 92, R. 272.) The PSC's theory, accordingly, that it unilaterally can eliminate the competitive market does not follow from its premise – that it helped create the competitive market. Creating a competitive market furthered the PSC's statutory mandate to ensure that utility rates are just and reasonable whereas eliminating ESCO competition obviously does no such thing (and no one claims, moreover, that utility rates are not currently satisfying that standard to begin with).

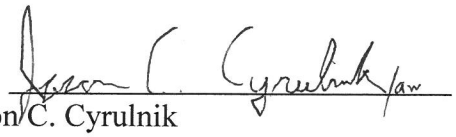
Third, the Supreme Court erred by concluding, without citation, that "[i]n 1999, the Uniform Business Practices Act was enacted to regulate and standardize procedures by which ESCOs and public utility providers would operate." (A 19, R. 78.) As a threshold matter, there is no such thing as "the Uniform Business Practices Act," much less one that was "enacted" for the purposes that the Supreme Court described. The court confused that with the Uniform Business Practices (UBP), which is a set of rules issued by the PSC that resulted from industry-wide collaboration with market participants. See, e.g., Case 98-M1343, *Untitled Order*, Sept. 22, 1999; id., *Order Adopting Uniform Business Practices and Requiring Tariff Amendments*, Jan. 22, 1999; id., *Opinion and Order Concerning Uniform Business Practices*, Opinion No. 99-3, Feb. 16, 1999); id., *Order Granting Portions of Petitions for Rehearing*, Apr. 15, 1999; id., *Untitled Order*, May 20, 1999). ESCOs' compliance with the UBP is not mandated, however, by any particular statute, and the UBP, accordingly, cannot provide the PSC with an expanded jurisdictional mandate to fix ESCOs' rates independent of the PSL itself. Like every other agency in New York, the PSC must abide by the jurisdictional scope that the Legislature set.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the Order of the Supreme

Court, Albany County, finding that the PSC had the authority and jurisdictional basis to set rates in the retail energy markets, should be reversed.

Dated: December 20, 2016
Armonk, New York

By: 

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