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NEM: Case Law Does Not Support NY PSC's Attempt To Regulate ESCO Prices Through Reset Order

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New York's Public Service Law (PSL) does not confer to the PSC ratemaking authority over ESCOs, and the PSC has not cited any case law supporting its reset order which the PSC has attempted to justify in part based upon its PSL obligation to ensure just and reasonable rates, the National Energy Marketers Association and ESCOs said in a reply brief in support of an injunction against enforcement of parts of the PSC's reset order.

Article 4 of the PSL addresses ratemaking, and establishes the Commission's ratemaking authority over public utilities, and in particular its power to ensure that public utility rates are, "just and reasonable."

While other sections of the PSL which do not address ratemaking, grant jurisdiction over certain ESCO activities, such as Article 2 consumer protection provisions, NEM said that, "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"

"[T]he 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," NEM said

While the PSC has said that it, "has not set the rates or otherwise determined the prices that ESCOs can charge," via the reset order, NEM's reply brief cites the PSC's initial brief as, in fact, resting the reset order on the PSC's alleged ratemaking authority. According to NEM, the PSC's brief states that the PSC relied on the, "use of its ratemaking authority" as justification for cutting off ESCOs', "access to electric facilities," and that the PSC contended 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."

According to NEM, the PSC's brief also said that the reset order, "intended to address," what the PSC perceives as ESCOs', "unjust and unreasonable rates, and not only the behavior of individual bad actors."

However, NEM said that, "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," as the only cases cited by the PSC addressed public utilities specifically and predate the existence of ESCOs, or cite FERC precedent, with NEM noting that, aside from being subject to a different statutory framework, FERC was granted express statutory authority to monitor rates and set rates

NEM further said that the PSC 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

NEM was joined in its brief by 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.

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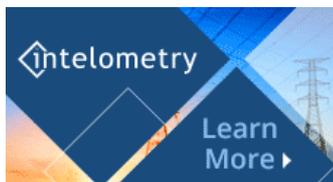
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