FOIA/PA REQUEST
Case No.: 2016-0345
Date Rec'd: 3/7/16
Specialist:
Related Case:

Ennis, Tina

From:	Mark Harrington <Mark.Harrington@newsday.com>
Sent:	Friday, March 04, 2016 6:14 PM
To:	FOIA Resource
Subject:	[External_Sender] FOIA Request
Attachments:	Memorandum of Law (HBROC-2758329 v1).pdf

Nuclear Regulatory Commission
FOIL Request
March 4, 2016

Dear FOIA Officer

Under the U.S. Freedom of Information Act, I am requesting all information in the NRC's possession relating to two companies that previously conducted commercial work using radioactive materials regulated by the NRC and/or its predecessors:

Nuclear Chemical Disposal Co., Long Island, NY
Long Island Nuclear Service Corp., Smithtown NY.

References to these companies can be found on page 2 of the attached document.

My request includes all documents in the NRC's possession about these companies, including but not limited to, correspondence with the federal government, reports of activities and decommissioning, amounts of materials handled, reports of disposals, descriptions of the specific work done at these facilities, and all site investigation and remediation reports.
I can receive this information electronically at this address:
mark.harrington@newsday.com
or via disk at this address:
Mark Harrington c/o Newsday
235 Pinelawn Road
Melville, NY 11747

I can be reached at the above email address with any questions, or at this phone number:
631-843-2772.
Thank you.
Sincerely,
Mark Harrington
Staff writer
Newsday

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs-Petitioners,

-against- Index No. ______

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

Defendants-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S REQUEST FOR A TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

Plaintiffs-Petitioners Retail Energy Supply Association; Interstate Gas Supply, Inc. (d/b/a IGS Energy); Accent Energy Midwest Gas LLC (d/b/a IGS Energy); and Accent Energy Midwest II LLC (d/b/a IGS Energy) (collectively, the "Petitioners") respectfully submit this memorandum of law in support of their application for a temporary restraining order staying enforcement of the terms of an Order Resetting Retail Energy Markets and Establishing Further Process (the "ESCO Rate-Setting Order" or the "Order") issued by the Public Service Commission of the State of New York (the "Commission") on February 23, 2016.

Twenty years ago, the New York Legislature and the Commission deliberately deconstructed the public utility monopolies that previously generated and supplied power across the State to make room for competition. The breakup of the regulated utility monopolies allowed the free energy market to grow and thrive, and private energy services companies ("ESCOs") began to compete to develop attractive energy services and products for consumers. Participating in a free competitive market governed by principles of supply and demand, ESCOs have developed innovative products and services for sale in a vibrant market centered on customer choice. In the 14 states in which ESCOs currently participate in the electric market, customers have enormously benefited insofar as their energy costs have decreased overall, and they have the freedom to select among varying products catering to differing sets of priorities. Approximately 200 ESCOs currently operate in New York State, and they serve at least 1.4 million customers, who have chosen to leave the regulated public utilities in favor of purchasing ESCOs' creatively-tailored services. Petitioner Retail Energy Supply Association ("RESA") is a trade association consisting of 17 ESCOs in New York State.

Approximately three weeks ago, a news article was published heavily criticizing the Commission and the Governor for allegedly allowing certain ESCOs to engage in deceptive

marketing practices and unfair business practices. Notwithstanding that (a) the Commission's own statistics show that only a small percentage of ESCOs have been accused of engaging in such illegal practices, and (b) the State's adoption of a policy favoring a competitive market and consumer choice, in an apparent reflexive reaction to stinging media accusations, the Commission took the extraordinary step of issuing the ESCO Rate-Setting Order on February 23, 2016, to control ESCO prices offered to customers. The Order sends a strong message that the Commission and the Attorney General's office cannot be trusted with enforcing the existing consumer protection laws against a small handful of alleged bad actors in the retail energy market. Further, the ESCO Rate-Setting Order is an unconstitutional legislative act by an administrative agency with an expansive agenda, which has made a sweeping policy decision that monopoly pricing and monolithic commodity offerings in New York's energy sector are preferable to competition and customer choice.

Preliminarily, either the Commission was so fixated on taking swift action with respect to the bad press coverage that it failed to recognize it lacks authority to regulate ESCO prices or it is attempting to stealthily expand its authority. Though the Commission may have broad powers under Article 4 of the Public Service Law ("PSL") to regulate prices offered by regulated, monopolistic public utilities, the Legislature has never granted it the power to regulate prices offered by private competitors in a free retail market. In fact, the Commission itself has admitted on many occasions that "ESCOs are exempt" from price regulation under Article 4. The Commission completely overstepped its authority delegated by the Legislature in violation of the separation of powers set forth in the New York Constitution in issuing the ESCO Rate-Setting Order.

Moreover, the ESCO Rate-Setting Order was issued in clear violation of the State Administrative Procedures Act ("SAPA"). The Commission did not give ESCOs any warning of its intent to take control of what formerly were market-based prices with respect to an enormous segment of the retail energy market, nor did it provide anyone an opportunity to comment on: how to interpret the mandates contained in the Order; the advisability of price caps; whether the Commission had any authority to impose price restrictions on private competitors; the potential and certain impacts of price regulation; or the feasibility of implementing the rule. Worse still, the Commission proclaimed that this "immediate transition away from a retail market" to a price-controlled market would take effect in just 10 days (tomorrow, March 4, 2016). And the ESCO Rate-Setting Order requires the Chief Executive Officers ("CEO") of every single one of the 200 ESCOs in New York State to immediately submit to certifications of compliance with the Order. The Commission did not even attempt to minimize the extensive and transformational nature of the ESCO Rate-Setting Order, directing "that the transformation of the retail energy markets commence immediately."

Chaos has ensued after issuance of the ESCO Rate-Setting Order. Numerous ESCOs and ESCO trade associations filed requests for an extension of the effective date of the Order, carefully articulating why additional time was required to consider this "transformation" of the entire industry. The requests were denied. The Department of Public Service's staff ("Staff") held a 3-hour-long meeting via teleconference in attempt to answer questions raised by ESCOs, and by the end of the meeting it was obvious that the Staff had no answers to many critical questions, such as how ESCOs could even possibly comply with the Order within just 10 days. In the 9 days since issuance of the Order, the Staff has released three different versions of an unofficial "Guidance Document" that attempts to interpret the Order, and to explain the

mandates in the Order. Some drafts of the Guidance Document have been contradictory, and although the Staff has plainly worked around the clock over the last 9 days, it is apparent that even they are drowning in questions that they are simply unable to answer. Perhaps worst of all, the Staff has been unable to articulate the Commission's new "one-strike-you're-out" rule, which penalizes (in unknown ways) CEOs of ESCOs that do not comply with the confusing and vague Order by tomorrow.

The ESCO Rate-Setting Order is also arbitrary and capricious for a number of reasons. First, it imposes *price regulation* as a solution to *unfair business practices*, when enforcement mechanisms already exist for remedying unfair business practices. Second, the 10-day deadline for a complete transformation of an industry is also arbitrary and capricious, especially in light of the Order's astonishing scope. Third, the Commission offered no data or evidence to support its rulemaking, and its own published data contradict its statements that unfair business practices are so widespread and unmanageable as to justify government price control. In fact, (1) complaint rates for ESCOs were less than 0.1% of customers in 2015, (2) more than half of the customer complaints against ESCOs were lodged against only 5% of the industry, and (3) 38% of ESCOs doing business in New York received not even a single customer complaint within the last 13 months. Petitioners support the Commission's and the Attorney General's efforts to enforce consumer protection laws against bad actors, but they vehemently oppose being swept out of the market due to the bad acts of just a few. Fourth, the Commission has confused "value" to customers with "price," completely failing to consider the value of additional services offered by ESCOs – such as ESCOs' furnace inspection benefits, energy conservation consulting services, offering of fixed, predictable rates for customers concerned about long-term budgeting, etc. –

which are not available through the monopolistic public utilities, which offer unpredictable and frequently adjusted rates set by the Commission.

The ESCO Rate-Setting Order also violates Petitioners' constitutional rights in that it deprives them of vested property interests without just compensation or due process and is unconstitutionally vague.

The impact of the ESCO Rate-Setting Order is to transform/destroy the entire retail energy industry overnight. Within just weeks of the article's publication, the Commission completely eviscerated years of deliberate fostering of a free retail market through painstaking deregulation of the energy industry. Starting immediately upon the effective date of this Order, ESCOs will be barred from offering many of the innovative products and services they have invested heavily to develop and upon which many consumers have come to rely. To comply with the ESCO Rate-Setting Order, ESCOs must completely transform their products and services and, in some cases, may be forced to abandon any attempts to do business in New York. They are also faced with choosing between whichever they deem the lesser of two evils – (1) sign a CEO certification of compliance with an Order they do not even fully understand, and potentially face immediate, yet unknown penalties for a single violation, or (2) leave the New York energy market.

Given the Commission's obvious and frequently conceded lack of authority to issue the ESCO Rate-Setting Order, and the Commission's numerous other constitutional, statutory, and procedural violations, Petitioners are likely to succeed on the merits of their claims. In light of the severe, irreparable, and immediate harm that the ESCO Rate-Setting Order will have on an entire industry serving at least 1.4 million customers in New York State, the chaos and confusion surrounding interpretation and implementation of the Order, and the Commission's lack of any

legitimate or rational reason to demand compliance by March 4, 2016 (tomorrow), the balance of the equities tips in favor of a temporary restraining order and preliminary injunction.

FACTUAL BACKGROUND

A. The federal government and New York State recognize the existence of private competitors in the energy market and embrace competition with the private sector by breaking up the long-standing monopolies of the public utilities.

Until the early 1990s, energy in New York State was supplied by large, monopolistic public utility companies that owned the power plants as well as the transmission and distribution lines to deliver power to consumers. Accordingly, utilities took care of all aspects of energy supply. In the early 1990s, however, the federal government and a number of states, including New York, adopted policies designed to encourage competition in the energy markets by deliberately fragmenting the monopolistic public utility regimes to make room for a free market, open to energy service companies ("ESCOs"). As part of this policy initiative, in 1992, Congress passed the Federal Energy Policy Act, which established rules to enhance competition in the energy industry's wholesale level, and encouraged states to establish laws and rules to facilitate competition at the retail level.

New York was among the first of the states to explore a free energy market. In 1992, the New York legislature adopted Article 6 of the New York Energy Law entitled "Energy Planning," which created a State Energy Planning Board consisting of the Commissioner of the State Energy Office, the Chair of the Commission, and the Commissioner of Environmental Conservation. By 1994, the New York State Energy Planning Board issued a 3-volume, 20-year State Energy Plan, which included as objectives: "to promote economic growth by improving the economic competitiveness of business and industry in New York" and "to encourage customer choice and diversity in meeting energy service needs."

In 1993, New York's Public Service Commission (the "Commission") issued an Order instituting a "Proceeding on Motion of the Commission to Address Competitive Opportunities Available to Customers of Electric and Gas Service and Develop Criteria for Utility Responses" (*see* Case 93-M-0229, *Order Instituting Proceeding*, Mar. 19, 1993 [Tab 1]).[1] In that proceeding, the Commission recognized that "competition does exist and is likely to grow, given the proliferation of on-site generation and the opportunities for customers to leave utilities' systems, at least upstate." The opinion set forth the Commission's goal to determine how the existing public utilities could respond to that already-existing competition – for instance, by using flexible rates. The Commission also adopted guidelines for implementing flexible pricing by public utility companies for purposes of competing with the already-existing free energy market in New York (Case 93-M-0229, *Opinion and Order Regarding Flexible Rates*, Opinion 94-15, Jul. 11, 1994 [Tab 2]). This proceeding was subsequently split into two separate cases to examine competitive opportunities in the electric and gas markets independently. Over the next several years, numerous interested parties worked with the Commission to deregulate the monopolistic public utilities so as to allow for competition in both the electric and natural gas industries.

Thereafter, the Commission issued orders describing proposed principles to guide the transition of the New York energy industry from public utility monopolies to a competitive market (Case 94-E-0952, *Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition*, Opinion 94-27, Dec. 22, 1994 [Tab 5]; *see also* Case 93-G-0932, *Proceeding on Motion of the Commission to Address Issues Associated with Restructuring of the Emerging Competitive Natural Gas Market, Opinion and Order Establishing Regulatory*

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[1] References to "Tab __" throughout this Memorandum refer to tabbed orders submitted herewith to facilitate review of them.

Policies and Guidelines for Natural Gas Distributors, Dec. 20, 1994 [Tab 4]). In those orders, the Commission specifically expressed its "commitment to encouraging competition in place of regulated monopoly." The Commission also issued another opinion 1994, further elaborating on ways to "form the basis for the development of a framework for movement toward a more competitive electric marketplace" (Case 93-M-0229, *Order Instituting Phase II of Proceeding*, Aug. 9, 1994 [Tab 3]).

In April 1996, FERC issued landmark Orders 888 and 889, expressing its goal "to remove impediments to competition in the wholesale bulk power marketplace" by making "the monopoly owned transmission wires" that provided power through interstate commerce accessible to ESCOs for sale to consumers (75 FERC 61,080, Order No. 888, Apr. 24, 1996; 75 FERC 61,078, Order No. 889, Apr. 24, 1996; 18 CFR Part 37). Several years later, New York became one of the first states to develop an independent system operator ("ISO") to coordinate an electricity transmission grid with power supplied by public utility electric generators and delivered by energy suppliers, including ESCOs, over the grid to consumers.

In 1996, the Commission issued a vision statement regarding increased competition and customer choice in the generation and energy sectors (Case 94-E-0952, *Opinion and Order Regarding Competitive Opportunities for Electric Service*, Opinion 96-12, May 20, 1996 [Tab 6]). In that Order, the Commission stated: "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." The Commission explained the importance of consumer choice as follows: "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."

The Commission described the advantages of a competitive energy market, stating that "[t]he retail model introduces into the power market players that may have no direct interest in generation; instead, the energy service companies will have an incentive to find the most efficient means of obtaining and delivering power and to provide innovative service packages to customers." After this Order, all seven of New York's public electric utilities submitted restructuring plans reflecting divestiture of certain aspects of their monopolies (*see* Case 94-E-0952, *Order Establishing Procedures and Schedule*, Oct. 9, 1996 [Tab 7]).

B. The Commission repeatedly finds that ESCOs are not "electric corporations" or "gas corporations" under the Public Service Law.

By 1997, New York's energy industry was ready to transition from a monopoly controlled by regulated public utilities to a hybrid market where public utilities would continue to generate the power, but where private competitors operating in a free market would sell that power to consumers. Before launching into the free energy market, however, the Commission confronted whether the PSL's provisions governing "electric corporations" and "gas corporations" applied to ESCOs. Specifically, the Commission was forced to consider this question in the context of questions about the applicability of the Home Energy Fairness Practices Act ("HEFPA"), appearing in Article 2 of the PSL, to ESCOs (Case 94-E-0952, *Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services*, Opinion 97-5, May 19, 1997 [Tab 8]).

Article 2 of the PSL (*i.e.*, HEFPA) sets forth certain consumer protection provisions, including prohibitions against unfair business practices, detailed requirements with respect when a utility may terminate a customer's power for failure to pay bills, and rules for deferred payment

agreements, meter reading, notice required to customers, complaint handling procedures, handling of emergencies, and transparency with respect to rendering energy bills. HEFPA does *not* include any sections regarding authority to regulate prices offered to consumers. Rather, the Commission's authority to regulate rates for electric corporations and gas corporations is set forth in an entirely different Article of the PSL – Article 4.

When considering the impacts of breaking up the public utility monopolies, the Commission was forced to consider whether the provisions of HEFPA applied to ESCOs. At that time, HEFPA, like the remainder of the electric and gas articles of the PSL, was applicable to "electric corporations" and "gas corporations" as those terms were defined in Article 1 of the PSL (*See* PSL art. 2, § 30 [HEFPA "shall apply to the provision of all or any part of the gas, electric or steam service provided to any residential customer by any gas, electric or steam and municipalities corporation or municipality"]; PSL art. 1, §§ 11, 13 [definition "electric corporation" and "gas corporation"]). Advocates for application of HEFPA to ESCOs argued to the Commission that ESCOs should be considered "'electric corporations' under [the] Public Service Law" and therefore subject to HEFPA under Article 2 (*see* Opinion 97-5, p. 19). Those advocates argued that (a) HEFPA applies to all "electric corporations" and "gas corporations" (as those terms are defined in Article 1 of the PSL), (b) ESCOs qualify as "electric corporations" and "gas corporations" under those Article 1 definitions, and (c) ESCOs are therefore subject to HEFPA under Article 2 (*see id.*). The Commission considered, but ultimately rejected such arguments (*id.*).

In a second proceeding later that same year, the Commission confronted the same question, and it *again* found that the PSL's definitions of "electric corporation" and "gas corporation" set forth in Article 1 did not encompass ESCOs (*see* Case 96-E-0898, *In the Matter*

of Rochester Gas and Electric Corporation's Plans for Electric Rate/Restructuring Pursuant to Opinion 96-12, Dec. 24, 1997 [Tab 10]). The Commission specifically rejected the argument that "HEFPA applies to ESCOs by its terms, inasmuch as ESCOs are electric corporations under the Public Service Law," and confirmed that ESCOs "did not fall within the purview of" HEFPA (*id.*, pp. 1, 3). In rendering its decision, the Commission sided with those who pointed out that the statute "was enacted in the context of an energy market characterized by consumer dependency on" monopoly utilities; that when the statute was passed "the Legislature did not contemplate retail competition or ESCOs"; and "that the concept of an electric corporation reflects the traditional model of the utility, while ESCOs . . . are not electric corporations" under Article 1 of the PSL (*id.*, pp. 4, 8). In "resolving the questions of legislative intent," the Commission stated: ""We believe it is reasonable to conclude that the statute was enacted to protect consumers against the abuse of monopoly power" whereas "[i]n contrast, ESCOs do not possess monopoly power because they would not be the sole provider of energy" (*id.*, p. 9). Accordingly, in the new deregulated energy market in New York, ESCOs were not subject to any aspects of the PSL, which remained applicable only with respect to the public utilities.

C. <u>ESCOs voluntarily cooperate with the Commission to develop standardized procedures for their relationships with the public utilities.</u>

Even though ESCOs were not "electric corporations" or "gas corporations" under the PSL, they chose to participate in a working group created by the Commission to discuss standardizing key procedures to govern the relationships between "monopoly providers and [ESCO] competitors" (Case 98-M-1343, *Untitled Order*, Sept. 22, 1999 [Tab 15]). The requirements that emerged from those working group sessions in 1999 – entitled the Uniform Business Practices ("UBP") – were focused on ensuring the creditworthiness of ESCOs, developing practices for ESCOs to pay utility charges, developing procedures for initiating

service and terminating service, providing procedures for switching customers between service providers, preventing slamming by ESCOs, and creating a dispute resolution process (Case 98-M-1343, *Order Adopting Uniform Business Practices and Requiring Tariff Amendments*, Jan. 22, 1999 [Tab 11]; Case 98-M-1343, *Opinion and Order Concerning Uniform Business Practices*, Opinion 99-3, Feb. 16, 1999 [Tab 12]; Case 98-M-1343, *Order Granting Portions of Petitions for Rehearing*, Apr. 15, 1999 [Tab 13]; Case 98-M-1343, *Untitled Order*, Sept. 22, 1999 [Tab 15]); and Case 98-M-1343, *Untitled Order*, May 20, 1999 [Tab 6]) (together, the "UBP opinions").

In the above-referenced UBP opinions, the Commission distinguished between "utility parties" and "nonutility parties" (*i.e.*, ESCOs), noting that "[t]he nonutility parties generally support the attempt to provide more uniformity . . . to aid competition" (Opinion 99-3). In other words, despite the Commission's lack of authority to regulate ESCOs on the basis that they do not qualify as "electric corporations" and "gas corporations" under the PSL, ESCOs recognized that they were unlikely to be able to compete in the open energy market in New York State unless they collaborated with the Commission and public utilities to create procedures for doing business with the regulated public utilities.

D. <u>The Legislature amends the Public Service Law to apply certain consumer protection provisions to ESCOs but does not extend any other aspects of the Public Service Law, such as price regulation, to ESCOs.</u>

In 2002, the New York legislature enacted the Energy Consumer Protection Act, which amended Article 2 of the PSL (HEFPA) to apply to ESCOs, in addition to "electric corporations" and "gas corporations" defined in Article 1 (*see* Chapter 686 of the Laws of 2002; PSL § 53). The 2002 amendment to the PSL thus granted the Commission for the first time the power to regulate aspects of ESCOs' interactions and relationships with consumers. Immediately after the 2002 amendment to the PSL, the Commission began the process of promulgating regulatory

changes to effectively apply HEFPA's provisions to ESCOs, and ultimately adopted amended regulations in 2004 to implement the Legislature's amendments to HEFPA (*see* Case 03-M-0117, *Memorandum and Resolution Adopting Amendments to 16 NYCRR Pars 11 and 12*, Jun. 9, 2004 [Tab 16]).

The Legislature did not, as part of its 2002 amendment to the PSL, extend any article or provision (other than HEFPA) to ESCOs. For instance, Article 4, which grants Commission its power to regulate utility rates, remained applicable only to "electric corporations" and "gas corporations" as those terms were defined in Article 1 (*i.e.*, only public utilities). The Legislature therefore left ESCOs free to structure their own pricing and rate packages, and to market innovative energy products to consumers on the free energy market.

The Commission reiterated over the ensuing years that ESCOs "are exempt from PSL Article 4 regulation" (Case 06-M-0647, *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, Nov. 8, 2006 [Tab 17] [finding that ESCOs must provide price data to the Commission, but are not subject to price regulation] [citing Case 94-E-0952, Opinion 97-17, Nov. 18, 1997 (Tab 9), pp. 29-35 ("PULP's assertions that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect")]; *but see* Case 98-M-1343, *Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing*, Oct. 27, 2008 [Tab 18], p. 10 [asserting regulatory authority over ESCOs pursuant to Article 1 of the PSL, while acknowledging that "ESCOs are exempt from PSL Article 4 regulation"]).

E. <u>In 2014, the Commission proposed certain regulations to apply to low-income customers receiving public assistance, and thereafter ensued two years of discussions with interested parties (including ESCOs) about the advisability and feasibility of such regulations.</u>

On February 24, 2014, the Commission issued an order purporting to require ESCOs to guarantee savings or include energy-related value services to low-income customers participating in the Assistance Program – Assistant Program Participants ("APPs") (*see* Case 12-M-0476, *Order Taking Actions to Improve the Residential and Small Non-residential Retail Access Markets*, Feb. 25, 2014) (the "February 2014 Order"). However, many ESCOs petitioned the Commission for a rehearing of the February 2014 Order, urging it to first comply with the requirements of SAPA and to consider concerns about the advisability and feasibility of implementing the Order with respect to APP customers. Recognizing the existence of serious concerns about the mandates in the February 2014 Order, the Commission granted a rehearing and stayed the requirements of the Order to allow further comment and discussion given the "breadth and complexity of the February Order and the number of concerns raised in the Petitions" (*see* Case 12-M-0476, *Order Granting Requests for Rehearing and Issuing a Stay*, Apr. 25, 2014). Thereafter, interested parties engaged in a dialogue about whether and how the proposed rule to be applied to APPs, and the ESCOs even prepared their own proposals (*see* Case 12-M-0476, *Order Granting and Denying Petitions for Rehearing in Part*, Feb. 6, 2015, p. 4).

On February 6, 2015, the Commission issued an order that created a Staff-led collaborative, and instructed that collaborative to prepare a report containing recommendations regarding appropriate regulations to protect the interests of APPs (*see id.*). In a separate set of open proceedings regarding proposed amendments to the UBP, on July 28, 2015, the Staff released a "Staff Proposal" proposing changes to the UBP, and soliciting public comments (Case 98-M-1343, *Staff Proposal*, Jul. 28, 2015). Notably, the proposed changes to the UBP did not

include any "guarantee" of savings, such as the proposed guarantee for APPs set forth in the February 2014 Order that was stayed.

Meanwhile, after several meetings, on November 5, 2015, the Staff-led collaborative prepared and published its report, titled "Regarding Protections For Low Income Customers of Energy Services Companies" (Case 12-M-0476, Nov. 5, 2015) (the "Low Income Report"). The 67-page Low Income Report addresses a host of issues relating to ESCOs' ability to identify APP customers and compliant products. A very small section of the Low Income Report recounts that, during the dialogue among interested parties, some "consumer advocates" recommended extending the guaranteed savings mandate proposed with respect to APPs to *all residential* customers, not just APPs (*see id.*, p. 28-29). However, the Low Income Report states that the ESCOs and public utilities viewed such recommendations as outside the scope of the proceedings, which were focused on APPs only (*id.*, pp. 30-31). The Staff made no recommendations with respect to the suggestion made by the "consumer advocates," and did not include a discussion or analysis of the suggestion in the Low Income Report.

On December 1, 2015, the Commission issued a Notice seeking comments on the Low Income Report (Case 12-M-0476, *Notice Seeking Comments on Collaborative Report Regarding Protections for Low Income Customers of Energy Services Companies*, Dec. 1, 2015). Specifically, the Commission requested comments on the "implementation issues" addressed in the Low Income Report:

> "regarding the Commission's directive that when an ESCO serves a participant in a utility low income assistance program (Participant), it must either guarantee that the Participant will pay no more than would have been paid as a customer of the utility or provide the Participant with energy-related value-added products of services in a manner that does not dilute the effectiveness of the financial assistance programs"

(*id.*). The Notice requested comments specifically on the Collaborative' s recommended approaches for identifying energy-related value-added services and the mechanisms for ESCOs to identify which customers qualify as APPs without invading customer privacy (*id.*).

F. The Commission without warning issued a rule controlling ESCO prices with respect to *all residential and small non-residential customers* with service plans offering energy obtained from less than 30% renewable sources to be effective within just 10 days.

After expiration of the public comment period, on February 23, 2016, the Commission issued the order that is the subject of this proceeding (Case 12-M-0476, *Order Resetting Retail Energy Markets and Establishing Further Process*, Feb. 23, 2016 [Affirmation of Douglas A. Foss, Esq., dated March 3, 2016 ("Foss Aff."), Exh. A] [hereinafter the "ESCO Rate-Setting Order"]). Commission also issued a Notice seeking comments on the ESCO Rate-Setting Order (Case 12-M-0476, *Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers*, Feb. 23, 2016 [Foss Aff. Exh. B]). Notably, just several weeks before issuance of the ESCO Rate-Setting Order, the Commission faced intense criticism by the media for allegedly allowing ESCOs to engage in deceptive marketing practices and other unfair business practices without consequence.

The ESCO Rate Setting Order states:

> "In this Order, the Commission . . . takes action to immediately address the **unfair business practices** currently found in the energy services industry . . . . **Effective ten calendar days** from the date of issuance of this order, energy service companies (ESCOs) may only enroll mass market customers and renew expiring agreements with existing mass market customers based on contracts that **guarantee savings** in comparison to what the customer would have paid as a full service utility customer or provide at least 30% renewable electricity."

(*ESCO Rate-Setting Order*, pp. 1-2 [emphases added]). Finding (without providing any supporting data or statistics) that "ESCOs cannot effectively compete with commodity prices offered by utilities," the Commission directed "an immediate transition away from a retail market . . . without price protection" (*id.*, p. 2). The Commission's ESCO Rate-Setting Order, by

its own terms, "directs that the transformation of the retail energy markets commence immediately."

In support of its decision to regulate ESCO prices, the Commission cited "broad legal authority to oversee ESCOs, pursuant to Articles 1 and 2 of the Public Service Law (PSL)" (*id.*, p. 9). In a bold stroke to escape statutory constraints on its authority, which constraints the Commission had explicitly recognized in multiple earlier decisions, the Commission simply proclaimed the "authority to oversee ESCO participation in the residential and small commercial markets as further described below to ensure . . . that the prices that consumers pay for those services are just and reasonable" (*id.*, p. 10). The Commission also determined that its newly proclaimed authority to control ESCO *prices* was a necessary "restructuring" to protect consumers against *unfair business practices*, despite the existence of HEFPA and the UBP and their many enforcement mechanisms.

The ESCO Rate-Setting Order is made applicable not just to APPs, but to all "mass market customers," which the Order defines as "residential customers or small non-residential customers" (*id.*, pp. 4, 14, fns. 2, 21). Despite making the ESCO Rate-Setting Order effective within just 10 days, the Commission requested that parties consider and comment within 60 days as to "under what conditions ESCOs may enroll mass market customers on a going forward basis, including whether the requirements above should be retained" (*id.*, p. 20). In other words, the Commission seeks comments on a requirement that it wants to implement 50 days *before* the close of the comment period.

G. <u>Chaos ensues in the aftermath of the ESCO Rate-Setting Order.</u>

Numerous ESCOs and trade associations immediately filed requests for extensions of the effective date of the ESCO Rate-Setting Order, arguing lack of sufficient notice, explaining their inability to massively overhaul their entire residential and small non-residential businesses in just

10 days, raising serious concerns about how to interpret the unexpected mandates and how to communicate the regulatory changes to customers, expressing fear that doing business in New York State has been rendered impossible, and generally pleading for more time to engage in a dialogue about an unforeseen and unduly punitive transformation of the retail energy industry (*see generally* Case 12-M-0476 filings between February 23 and March 2, 2016). On March 2, 2016, the Secretary of the Commission denied these extension requests.

In apparent recognition of the confusing nature of the Order, the Staff planned an informal meeting for ESCOs to discuss their concerns and issued a draft "Department of Public Service Staff Guidance Document for Compliance with the February 23, 2016 Order Resetting Retail Energy Markets and Establishing Further Process" [Foss Aff., Exh. A] on Friday, February 26, 2016, providing an additional 6 pages of explanation of the ESCO Rate-Setting Order (the "Draft Guidance Document, Version 1"). The Draft Guidance Document, Version 1 clarified some aspects of the Order, but many questions remained unanswered, such as how the retail industry was expected to implement the mandates just days later. The Staff issued a notice to certain interested parties that the Draft Guidance Document, Version 1 was issued for purposes of facilitating discussion at an open meeting about implementation.

Accordingly, on Monday, February 29, 2016, the Staff hosted a meeting. During the meeting, when pressed with questions asking how portions of the ESCO Rate-Setting Order would work, the Staff repeatedly responded in sum and substance that such questions could be answered after close of the 60-day comment period. In other words, not even the Staff knew how the ESCO Rate-Setting Order was to function in material respects. They also could not advise those inquiring about timing of the Staff's new and revised contract approvals, which are necessary under the existing regulatory framework and essential to continue doing business, and

a host of other issues relating to implementation of the requirements set forth in the ESCO Rate-Setting Order.

Later that same day, the Staff issued a revised draft guidance document (the "Draft Guidance Document, Version 2"), attempting to answer some of the many questions raised during the Meeting. The guidance remained in "draft" form, and the Staff promised to issue a revised guidance document the next day.

On March 2, 2016, two days before the Rate-Setting Order was scheduled to go into effect, the Commission issued a *Notice Denying Request for Extension* ("Notice Denying Extension") (Foss Aff. ¶ 8). The two-page Notice summarily denies requests for extensions filed by approximately 25 entities. It states, in part, "Department staff issued a Guidance Document *today* and has conducted an informational meeting with interested companies to review the requirements of the Order. The Commission provided clear justification for the urgent action taken and I decline to postpone the pressing and imperative changes directed in the Order" (*id.* ¶ 8, Exh. E (emphasis supplied).) The "informational meeting" referred to in the Notice Denying Extension was the meeting hosted by Staff on February 29, 2016, discussed *supra*.

As stated in the Notice Denying Extension, the Commission issued a "Department of Public Service Staff Guidance Document for Compliance with the February 23, 2016 Order Resetting Retail Energy Markets and Establishing Further Process" (the "Draft Guidance Document, Version 3") on March 2, 2016, just two days before the ESCO Rate-Setting Order would take effect (*id.* ¶ 23.) The Draft Guidance Document, Version 3 included a significant amount of information that had not been provided in earlier guidance documents from the Commission. This information concerned the amount of notice ESCOs must give customers when switching them from one type of contract to another, the requirements for obtaining

affirmative consent from customers, and a customer's ability to provide electronic consent, among other topics (*id.* ¶ 23, Exh. J.)

H. <u>The ESCO Rate-Setting Order aims to address alleged "unfair business practices currently found in the energy services industry" by penalizing the entire private sector, when in fact only a small portion of the sector engages in such conduct.</u>

A review of the history of enforcement actions against ESCOs reveals that only a handful of the 200 ESCOs participating in the New York energy market have been targeted as so-called "bad actors" in the industry. Further, the consumer complaint statistics published on the Commission's website show that many ESCOs have been the subject of no, or very few, customer complaints.

As explained by the Attorney General's office, "[s]ince the Commission opened New York's energy market to retail competition, NYAG . . . has completed seven enforcement actions against ESCOs found to have engaged in fraudulent and illegal business practices" (*see* Case 12-M-0476, *Comments of Attorney General Eric T. Schneiderman*, Feb. 11, 2016). Given that the retail energy market has been open for almost 20 years, the Attorney General's statement reflects that it has enforced the rules prohibiting unfair business practices against ESCOs about once every three years. In a recent article issued on February 25, 2016, the Commission Chairwoman Audrey Zibelman stated that 200 ESCOs are currently operating in New York State, and that New York's entire energy market services a total of roughly 7 million residential electric customers and 4.3 million residential natural gas customers (Foss Aff., Exh L). For our purposes, we will assume that all natural gas customers are also electric customers – *i.e.*, that New York's entire residential energy market services a total of 7 million residential customers. According to Chairwoman Zibelman, "[m]ore than 20% of New York's residential and small commercial customers currently receive energy from ESCOs," which means ESCOs currently serve at a bare minimum 1.4 million customers in the State. With ESCOs operating in such a

massive market serving approximately 1.4 million customers in New York State, the fact that the Attorney General's office has completed only seven enforcement actions against 200 ESCOs in approximately 20 years is remarkable.

In its ESCO Rate-Setting Order, the Commission also cites its receipt of customer complaints as a reason that the retail energy market simply cannot exist without the Commission imposing price controls (*see* pp. 12-13). However, the Commission's recently published consumer complaint statistics (Foss Aff., Exh M) show that at most 0.3% of customers (5,044 of at least 1,400,000) filed ***initial*** complaints about ESCOs, and less than 0.1% of ESCO customers (1,076 of at least 1,400,000) escalated their complaints to the Commission. Further, according to the ESCO Rate-Setting Order, only 25% of the escalated complaints related to ESCO prices as opposed to already-prohibited unfair business practices (*see* p. 13).

The Commission's consumer complaint statistics also reveal that customer complaints were focused primarily on a small group of ESCOs. For example, 1,346 of the 5,044 initial complaints in calendar year 2015 were all against a single ESCO, and 57% of all the initial complaints in 2015 were against 10 ESCOs in the industry (*i.e.*, 5% of ESCOs). Adopting Chairwoman Zibelman's statistics indicating 200 ESCOs are currently participants in the New York energy market, the statistics reveal that only 62% of ESCOs (or 124) received complaints at all in 2015 and January 2016, meaning that 38% of ESCOs operating in New York State have received ***zero*** customer complaints in the last 13 months.

ARGUMENT

POINT I

THE COMMISSION LACKS JURISDICTION TO REGULATE ESCO PRICES, AND THE PORTION OF THE ESCO RATE-SETTING ORDER THAT MANDATES GUARANTEED SAVINGS SHOULD THEREFORE BE ANNULLED UNDER CPLR 7803 (2) AS *ULTRA VIRES* AND DECLARED TO BE AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION OF POWERS.

The Commission seeks to dramatically expand its authority in attempting to control ESCO prices via the ESCO Rate-Setting Order. The ESCO Rate-Setting Order requires ESCOs to charge customers no more for service than would the utility that otherwise would serve such customers, notwithstanding that the PSL does not grant the Commission the power to regulate the ESCO. Although the Legislature has granted the Commission the power to regulate prices imposed by public utilities as part of its free energy market policy, the Legislature specifically chose not to subject ESCOs to Commission price regulation.

Just weeks before issuing the ESCO Rate-Setting Order, the Commission faced criticism from the media for purportedly allowing certain ESCO bad actors to engage in deceptive marketing practices and unfair business practices without consequence. Rather than taking steps to improve enforcement of existing laws that already prohibit such practices, and an in apparent knee-jerk reaction to the bad press, the Commission overstepped its authority, making a sweeping legislative policy decision to control ESCO prices despite lacking authority from the Legislature to do so. The passing of the *ultra vires* ESCO Rate-Setting Order supports Petitioner's claim under CPLR Article 7803(2) because the Commission "is proceeding or is about to proceed without or in excess of jurisdiction." The ESCO Rate-Setting Order also violates the separation of powers doctrine embodied in the New York State Constitution, which vests the legislative authority in the Legislature, not in the Commission (NY Const., art III, § 1 ["The legislative power of this state shall be vested in the senate and assembly"]).

A. <u>When the Legislature Enacted the Public Service Law, It Did Not Grant the Commission the Power to Regulate Private Sector Energy Service Providers, Which Did Not Even Exist at the Time of the Law's Enactment.</u>

When the Legislature enacted the PSL in 1910, the entire energy industry was monopolized by public utility corporations. With the passage of the PSL, the Legislature created the Commission, to which it granted authority regulate those monopolistic public utilities to protect the consumer against abuses, such as unfair prices, that might otherwise result from the existence of monopolies in the energy industry. (*See* PSL art. 1 [describing the overall jurisdiction and powers of the Commission]; PSL § 65 [enacted by ch. 480 of the Laws of 1910, derived from Public Services Commissions Law sec. 66 enacted by ch. 489 of the Laws of 1907]). When granting the Commission the power to regulate prices under Section 65, the Legislature specified that its intent was to "provide for the regulation and control of certain <u>public service corporations</u>" (*id.* [emphasis added]). Accordingly, when the PSL was passed, the Commission's authority and jurisdiction was limited to regulation of public utilities operating in state-sanctioned monopolies.

In the early 1990s, the energy market in New York State began to shift from State-controlled monopolies to private competition. In 1994, the utilities made submissions to the Commission, explaining that they had begun to encounter competition from private energy companies, particularly in Upstate New York. (*See* Case 93-M-0229, Opinion 95-15, July 11, 1994 [Tab 2], pp. 5-9 [recognizing that "competition now confronts electric utilities in New York State, and is likely to grow in the future"]). In reaction to a growing private energy market, the Commission opened proceedings to solicit feedback about how the utilities could "be more competitive" with the existing private market participants, and the Commission thereafter began exploring possibilities for ways to alter its regulatory pricing controls over utilities to allow the

utilities to compete with the private sector (*i.e.*, with private competitors we now refer to as ESCOs) (*id.*).

Notably, neither the Legislature nor the Commission reacted to the emergence of private competition by taking steps to control prices offered by these private competitors. Rather, the State and the Commission embraced the concept of a free energy market, ultimately choosing to break up and deregulate the existing utility monopolies specifically for the purpose of creating more space in the energy market for competition by ESCOs. (*See generally* Case 94-E-0952, Opinion 94-27, Dec. 22, 1994 [Tab 5] [describing the "commitment to encouraging competition in place of regulated monopoly"], Case 94-E-0952, Opinion 95-7, Jun. 7, 1995 [Opinion and Order Adopting Principles to Guide the Transition to Competition]; Case 94-E-0952, Opinion 96-12, May 20, 1996 [Tab 6] [recommending that utilities divest themselves of portions of the market to make room for the free market]).

The ESCOs that were already operating in New York at the time supported the Commission breaking up the existing utilities, and therefore chose to collaborate with the State's efforts to break up the public utility company monopolies to create gaps in the market for private competitors. In so doing, ESCOs agreed to comply with certain standards designed to protect consumers in terms of reliability of service, and to provide greater transparency so that consumers could make educated decisions when selecting their energy service providers. (Case 94-E-0952, Opinion 97-5 [Tab 8]). The initial eligibility requirements promulgated by the Commission for ESCOs were focused exclusively on protecting consumers from interruptions with service and on providing for greater transparency; the requirements did not include any price controls, which would have undermined the entire concept of a free, competitive market.

B. <u>The Commission has previously ruled that the Legislature did not grant it authority to regulate ESCO prices.</u>

The Commission's rate-making authority exists pursuant to Article 4 of the PSL. Specifically, Section 65 in Article 4 grants the Commission the power to ensure that public utility rates are "just and reasonable." Over the years, the Commission has consistently recognized that its authority under Article 4 is limited to public utility companies, and ruled that ESCOs "are exempt from PSL Article 4 regulation" (Case 06-M-0647, *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, Nov. 8, 2006 [Tab 17] [finding that ESCOs must provide price data to the Commission, but are not subject to price regulation] [citing Case 94-E-0952, Opinion 97-17, Nov. 18, 1997, pp. 29-35 ("PULP's assertions that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect")]; Case 98-M-1343, *Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejected National Fuel Gas Distribution Corporation's Tariff Filing*, Oct. 27, 2008, p. 10 [Tab 18] [acknowledging that "ESCOs are exempt from PSL Article 4 regulation"]).

During the process of breaking up the public utility monopolies in 1997, the Commission first confronted the question of whether ESCOs were subject to the PSL - specifically, the Commission considered whether Article 2 of the PSL (*i.e.*, HEFPA) applied to ESCOs. HEFPA sets forth certain consumer protection provisions, including prohibitions against unfair business practices, detailed requirements with respect when a utility may terminate a customer's power for failure to pay bills, and rules for deferred payment agreements, meter reading, notice required to customers, complaint handling procedures, handling of emergencies, and transparency with respect to rendering energy bills. When considering the impacts of breaking up the utility

monopolies and the emergence of ESCOs, the Commission was forced to consider whether HEFPA applied to ESCOs.

At that time, in 1997, HEFPA (like the current price regulation sections under Article 4 of the PSL) was applicable to "electric corporations" and "gas corporations" as those terms were defined in Article 1 of the PSL (*See* PSL art. 2, § 30 [HEFPA "shall apply to the provision of all or any part of the gas, electric or steam service provided to any residential customer by any gas, electric or steam and municipalities corporation or municipality"]; PSL art. 1, §§ 11, 13 [definition "electric corporation" and "gas corporation"]). Advocating for application of HEFPA to ESCOs, certain groups argued to the Commission that ESCOs should be considered "'electric corporations' under [the] Public Service Law" (*see* Case 94-E-0952, Opinion 97-5, May 19, 1997, p. 19). Commission Opinion 97-5 explicitly rejected such arguments (*id.*).

In another proceeding later that same year, the Commission confronted the same question, and *again* found that the PSL's definitions of "electric corporation" and "gas corporation" set forth in Article 1 did ***<u>not</u>*** encompass ESCOs (*see* Case 96-E-0898, *In the Matter of Rochester Gas and Electric Corporation's Plans for Electric Rate/Restructuring Pursuant to Opinion 96-12*, Dec. 24, 1997 [Tab 10]). The Commission specifically rejected the argument that "HEFPA applies to ESCOs by its terms, inasmuch as ESCOs are electric corporations under the Public Service Law," and confirmed that ESCOs "did not fall within the purview of" HEFPA (*id.*, pp. 1, 3).

In rendering its decision, the Commission sided with those who pointed out that the statute "was enacted in the context of an energy market characterized by consumer dependency on" utility monopolies; that when the statute was passed "the Legislature did not contemplate retail competition or ESCOs"; and "that the concept of an electric corporation reflects the

traditional model of the utility, while ESCOs . . . are not electric corporations" under Article 1 of the PSL (*id.*, pp. 4, 8). In "resolving the questions of legislative intent," the Commission stated: ""We believe it is reasonable to conclude that the statute was enacted to protect consumers against the abuse of monopoly power" whereas "[i]n contrast, ESCOs do not possess monopoly power because they would not be the sole provider of energy" (*id.*, p. 9). Accordingly, in the new deregulated energy market in New York, ESCOs were not subject to any aspects of the PSL, which remained applicable only with respect to the public utilities.

C. The Legislature amended the Public Service Law in 2002 to subject ESCOs to Article 2 (HEFPA), and did not to similarly extend Article 4 (the Commission's price regulatory authority) to ESCOs.

In 2002, the Legislature decided that ESCOs should be subject to HEFPA after all. The Legislature therefore amended Article 2 of the PSL by adding a new section 53 to read as follows, in pertinent part: "*For purposes of **this article*** [*i.e.*, HEFPA], 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" (emphasis supplied). In other words, the Legislature in 2002 recognized (as the Commission had in 1997), that ESCOs did not fall within the definitions of "electric corporation" or "gas corporation" under Article 1 of the PSL. To ensure that the provisions of HEFPA were extended to apply to ESCOs, therefore, the Legislature specifically amended the definitions of "electric corporation" and "gas corporation" solely for purposes of Article 2 (HEFPA) to include not only public utilities, but also ESCOs. The legislative history for the 2002 amendment to HEFPA reflects that the Legislature thereby balanced competing policy goals – on one hand, the Legislature increased consumer protections with respect to deceptive marketing practices and unfair business practices, but, on the other hand, the Legislature avoided imposing too many regulations on ESCOs for fear that regulation would

inhibit ESCOs' participation in the free energy market (*see generally* NY Bill Jacket, 2002 S.B. 6778, Ch. 686 [Dec. 9, 2002]).

Critically, when amending the PSL in 2002, the Legislature had an opportunity to modify the general definitions of "electric corporation" and "gas corporation" appearing in Article 1 of the PSL to include ESCOs. It chose not to. Alternatively, the Legislature could have amended Article 4 of the PSL, which grants the Commission the power to regulate public utilities' prices, to apply to ESCOs. It did not do that either. Had the Legislature done either of those two things, the Commission's power to regulate energy prices (set forth in Article 4) would have also been extended to ESCOs. However, the Legislature chose instead to make *only* Article 2 (HEFPA) applicable to ESCOs. The Legislature's deliberate omission of Articles 1 and 4 when bringing ESCOs within the purview of the PSL demonstrates, as the Commission itself has ruled, that the Legislature did not intend to grant the Commission any power to regulate ESCO prices.

Principles of statutory interpretation prevent the Commission or a court from interpreting the Legislature's action in amending only Article 2 as bringing ESCOs into the *entire* purview of the PSL (including Article 4 price regulation). To the contrary, under the principle of "expressio unius est exclusio alterius," the Legislature's decision in 2002 to amend Article 2, but not Article 4, to encompass ESCOs reflects the Legislature's intent *not* to permit the Commission to regulate ESCO prices. Specifically, New York Statutes provides:

> A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as in indication that its exclusion was intended.

(McKinney's Cons Laws of NY, Statutes § 74). Therefore, "the failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended"

(*Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce,* 21 NY3d 55, 60 [2013]; *see also Pajak v Pajak*, 56 NY2d 394, 396-97 [1982]).

Further, the law requires that "legislation is to be interpreted so as to give effect to every provision" and "[a] construction that would render a provision superfluous is to be avoided" (*Majewski v Broadalbin-Perth Cent. Sch. Dist.,* 91 NY2d 577, 587 [1998]; *Matter of OnBank & Trust Co.*, 90 NY2d 725, 731 [1997] [declining to read amendment is such a way as to render a portion of the statute superfluous]; McKinney's Cons Laws of NY, Statutes § 98[a] [requiring that "effect and meaning must, if possible, be given to the entire statute and every part and word thereof"]). To read a statutory provision as merely confirmatory is to render it superfluous and unnecessary, which is contrary to the rules of construction (*see* McKinney's Cons Laws of NY, Statutes § 98[a]).

If the definitions of "electric corporation" and "gas corporation" contained in Article 1 had already encompassed ESCOs before 2002, the Legislature would have had no need to amend Article 2 to apply it to ESCOs. As the cases above dictate, the Legislature's 2002 amendment to Article 2 cannot be interpreted as merely confirmatory; rather, the fact the Legislature felt the need to enact an amendment demonstrates that the PSL never applied to ESCOs, and that the Legislature intended to expand Article 2, *and only Article 2*, to encompass ESCOs. Any argument that Article 4 had already applied to ESCOs by virtue of ESCOs qualifying as "electric corporations" or "gas corporations" under Article 1 would therefore render the 2002 amendment to HEFPA superfluous.

The Legislature's amendment to the PSL in 2002 accordingly leaves no doubt that Article 4 remained applicable only to public utilities, not to ESCOs, and that the Commission therefore lacks authority delegated by the Legislature to regulate ESCO prices. In fact, the

Commission has even recognized as recently as 2012 that its price regulatory power does not extend to ESCOs, commenting: "We do not set or regulate the rates charged by ESCOs" (Case 12-M-0476, *Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State*, Oct. 19, 2012).

D. The Order's guaranteed savings mandate was *ultra vires* and amounts to an unconstitutional violation of the separation of powers.

When the Commission issued the ESCO Rate-Setting Order that regulates ESCO prices, it operated outside the scope of its authority delegated to it by the Legislature in Article 4 of the PSL. When an administrative agency acts without authority from the Legislature and passes laws reflecting independent policy decisions, it acts in violation of the doctrine of separation of powers (*see Boreali v Axelrod*, 71 NY2d 1 [1987]; *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Department of Health and Mental Hygiene*, 23 NY3d 681 [2014]). The Commission's *ultra vires* and unconstitutional action entitles Petitioners to injunctive and declaratory relief under CPLR 7803(2).

"Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute" (*Jones v Berman*, 37 NY2d 42, 53 [1975] [holding that "by adding a requirement not found in the existing State statute, the regulation as presently written is invalid"]; *McNulty v Chinlund*, 62 AD2d 682 [3d Dept 1978]). Additionally, "if an agency was not delegated the authority to enact certain rules, then it would usurp the authority of the legislative branch by enacting those rules" (*Greater New York Taxi Ass'n v New York City Taxi and Limousine Com'n*, 25 NY3d 600, 608 [2015]). "The constitutional principle of separation of powers . . . requires that the [l]egislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*id.* [citing *Bourquin v Cuomo*, 85 NY2d 781, 784 (1995)]).

The New York Court of Appeals has instructed courts to consider certain non-exclusive, non-determinative factors when determining whether administrative rule-making crosses the line into legislative policy-making, including: (a) whether the agency has "constructed a regulatory scheme . . . based solely upon economic and social concerns"; (b) whether the agency "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance"; (c) whether "the agency acted in an area in which the Legislature had repeatedly tried--and failed--to reach agreement"; and (d) whether the rules adopted by the agency required "special expertise or technical competence in the field" in question (*Boreali*, 71 NY2d at 11-14). The Court explained in *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce* that "the *Boreali* factors do not constitute rigid conditions, all of which must be met in order for petitioners to prevail" (23 NY3d at 699). Rather, courts should ultimately focus on the "central theme" of a *Boreali* analysis, which is that "an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than find[ing] means to an end chosen by the Legislature" (*id.* at 700).

For example, in *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce*, the Court of Appeals recognized that, with respect to the third *Boreali* factor, a tried but failed attempt by the Legislature is not necessary to show that an administrative agency's adopted rule is unconstitutional, finding that "inaction on the part of the state legislature . . . , in the face of plentiful opportunity to act if so desired, simply constitutes additional evidence that [the regulation in question] amounted to making new policy, rather than carrying out preexisting legislative policy" (*id.*). Also, in that case, the Court of Appeals noted that the fourth *Boreali* factor lacked significance under the facts and circumstances (*id.*).

Here, the guaranteed savings mandate in the Order crosses the line into legislative policy-making. "An agency that adopts a regulation . . . that interferes with commonplace daily activities preferred by large numbers of people must necessarily wrestle with complex value judgments concerning personal autonomy and economics. That is policymaking, not rulemaking" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce*, 23 NY3d at 699 [striking down a regulation passed by the New York City Board of Health that "significantly changes the manner in which sugary beverages are provided to customers"]). Currently, consumers in New York have a choice between energy service providers, and can select between various suppliers offering a number of different types of services and pricing schemes.[2] The creation of a competitive energy market in New York State was a State-sanctioned policy decision. Approximately 20% of consumers in the New York energy market (which includes essentially every household in the State of New York) have chosen to obtain their energy services through ESCOs.

In 2012, after analyzing two years of data, the Commission recognized that "customers of some ESCOs paid lower prices for electricity and/or natural gas than they would have were they full-service utility customers, some customers paid more, and some customers paid considerably more," also recognizing that "[s]ome of these price variations may reflect value-added services offered by ESCOs, such as fixed prices and electricity from renewable choices," which some consumers prefer notwithstanding the risk or consequence of overall higher prices (*see* Case 12-M-0476; *Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State*, Oct. 19, 2012 [Tab 18(A)]). Rejecting and abandoning the benefits of competition and customer choice that the Legislature plainly

[2] In fact, multiple affidavits submitted in support of this application demonstrate that many customers value the offerings of ESCOs, such as fixed price contracts, that they do not believe they receive from a public utility (White Aff., ¶¶ 6, 8; Affidavit of Brenda Crockett, sworn to March 2, 2016 ("Crockett Aff."), ¶¶ 14-15, 19-20).

supported, the Commission's ESCO pricing mandate "reflects a new policy choice" and it "interferes with common place daily activities preferred by large numbers of people" who have selected ESCO service providers as opposed to public utility providers.

The second and third *Boreali* factors also strongly support a finding that the guaranteed savings mandate is unconstitutional. As set forth above (*see supra* Point 1), the Legislature chose not to amend Article 4 to extend the Commission's price regulatory power to ESCOs when it amended Article 2 (HEFPA) in 2002 to apply to ESCOs. Just like in *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce*, therefore, "inaction on the part of the state legislature . . . , in the face of plentiful opportunity to act if so desired, simply constitutes additional evidence that [the regulation in question] amounted to making new policy, rather than carrying out preexisting legislative policy" (23 NY3d at 699).

In its attempt to combat recent negative press coverage about perceived lack of ESCO oversight and enforcement, the Commission ignored the Legislature's policy directives and the jurisdictional limitations imposed upon it by the Legislature in the PSL. The Commission certainly has the authority, after the 2002 amendments to the PSL, to enforce the provisions of HEFPA against "bad actor" ESCOs engaged in deceptive marketing practices or other unfair business practices. The entire purpose of expanding HEFPA customer protections to ESCOs was so that the Commission and enforcement arms of New York State could remedy unfair and deceptive practices, while at the same time permitting price competition and consumer choice to dictate energy market trends and prices. Rather than use these legislated and existing enforcement mechanisms, within just weeks of these press articles, the Commission completely eviscerated years of legislatively-encouraged and deliberate deregulation of the retail markets in favor of price competition, deciding that now the Commission should simply regulate ESCO

prices in the same manner it has regulated public utility prices in the past. But ESCOs are not the monopolistic public utilities that the Legislature enacted Article 4 of the PSL to protect consumers against. They are participants in a private, highly competitive market for energy services that the Legislature has specifically chosen not to regulate with respect to price. Accordingly, Petitioner respectfully requests that the Court enjoin the Commission's *ultra vires*, unconstitutional guaranteed savings mandate pursuant to CPLR 7803(2).

POINT II

THE ESCO RATE-SETTING ORDER SHOULD BE ANNULLED UNDER CPLR 7803(3) BECAUSE IT WAS ISSUED IN VIOLATION OF THE STATE ADMINISTRATIVE PROCEDURES ACT.

The ESCO Rate-Setting Order is also null and void because the Commission violated of the State Administrative Procedure Act's ("SAPA") clear requirements. Because the ESCO Rate-Setting Order was passed in derogation of SAPA, it was "made in violation of lawful procedure," and Petitioner is therefore entitled to relief under CPLR 7803(3).

SAPA governs administrative agency rule making and sets forth minimum requirements administrative agencies must follow to promote fairness and efficiency in the rule making process. SAPA Section 202 establishes certain procedures an agency must follow when promulgating rules. Among other requirements, an agency must publish notice of any proposed rule in the New York *State Register* and afford the public and other interested parties at least 45 days to submit comments on the proposed rule. The formal public notice and ensuing comment period provides an opportunity for thoughtful discussion of any proposed rule and allows the administrative agency to consider alternatives to its proposed rule.

Among its objectives, SAPA prevents an administrative agency from issuing rules that are substantially different from those that have been proposed and commented upon. *Summerson v Barber,* 93 AD2d 652 (3d Dept 1983) is illustrative of this purpose. There, the Commissioner

of Agriculture provided notice of a proposed assessment on grapes that growers were selling to wineries (*id.*). The Department of Agriculture then issued an assessment on grapes that growers were selling and/or otherwise utilizing. The Third Department held that the assessment ultimately adopted by the department differed substantially from the one originally proposed and was accordingly void for failure to comply with SAPA's requirements. Specifically, the court held that "[t]he notice given was not only inadequate, but in fact was misleading in that petitioner Taylor Wine Company, Inc., which did not sell wine grapes, could correctly presume itself to be without the terms of the proposed order, obviating the need for it to appear or participate in the hearings" (*id.*).

Similarly, in *Medical Society of State of New York, Inc. v Levin*, 185 Misc 2d 536 (Sup Ct NY County), *aff'd* 280 AD2d 309 (1st Dept 2001), the court struck down a rule promulgated by the Superintendent of Insurance for failure to follow SAPA's notice and comment period requirements. There, the Medical Societies brought an Article 78 proceeding to annul new regulations altering the no-fault insurance system on ground that their promulgation by Superintendent of Insurance did not comply with SAPA. The subject no-fault regulations shortened time periods for filing notices of accident, proofs of claim, and proofs of work loss, provided insurers with right to demand examination under oath, and reduced penalties to insurers. The Medical Society asserted that the Department of Insurance failed to substantially comply with SAPA's notice and comment period and accordingly failed to consider viable alternatives to the perceived problems of abuse, such as targeted enforcement. The court agreed, and held that that the Department of Insurance failed to adequately provide notice of the new regulations, failed to fully consider their impact, specifically including the burdens associated with additional paperwork necessary for compliance with the new regulations, and failed to

consider alternatives. The court accordingly ruled "that the New Regulations are invalid, null and void and, as a matter of law their promulgation by respondents was arbitrary, capricious and an abuse of discretion by reason of respondents' failure to substantially comply with the clear mandates of the State Administrative Procedure Act."

The Commission has run afoul of SAPA in the past. In *Oil Heat Institute of Upstate New York v Public Service Com'n*, 90 AD2d 942 (3d Dept 1982), for example, Commission attempted to approve a conservation plan to establish technical criteria for oil-equipment audits. The Third Department held that Commission's action was void because it failed to meet statutory notice and comment requirements, stating:

> "It is clear that respondent's order, approving the revised plan submitted by Rochester Gas & Elec. Corp. which contained changes in the technical criteria, did not follow a public hearing. The changes deviated substantially from the technical criteria previously in place which petitioners had every right to expect would be continued in the absence of notice and opportunity to be heard at a public hearing. The commission's order, based upon approval only of a memorandum from its staff, failed to meet the statutory requirement, and is thus void."

In the ESCO Rate-Setting Order, the Commission acknowledges that it is making a rule broadly applicable to all ESCOs in the industry. Indeed, the rule will apply to all ESCOs and make sweeping changes in the industry by requiring all such ESCOs to guarantee to *all* of their customers the rates offered by public utilities or offer 30% renewable energy packages.

In support of its sweeping rule change, and in an attempt to demonstrate that it has complied with SAPA's notice requirement, the Commission relies on a notice it published in the New York *State Register* on August 12, 2015. (*See* Foss Aff., Exh. A [ESCO Rate-Setting Order], p. 8 ["Pursuant to the State Administrative Procedure Act (SAPA) § 202(1), a Notice of Proposed Rulemaking was published in the *State Register* on August 12, 2015 (SAPA No. 15-M-

0127SP1).”].)[3] The Commission’s notice in the *State Register* does not provide the language of any proposed rule and instead references a “July 24, 2015” report draft by Staff (by which the Commission presumably meant the July 28 Staff Proposal).[4] The Commission requests comments only on the July 28 Staff Proposal. The Staff Proposal literally has nothing to do with the rate-setting rules Commission ultimately issued in the ESCO Rate-Setting Order. Instead, the July 28 Staff Proposal covers unrelated issues such as treatment of inactive ESCOs, standardizing certain definitions, and imposing an ESCO application fee. The July 28 Staff Proposal does not contain any discussion of setting rates ESCOs may charge customers, much less a specific proposal to require ESCOs to guarantee to all residential and small non-residential customers savings compared to the rates offered by public utilities or to offer 30% renewable energy products. It is clear that the “Notice of Proposed Rule Making” relied on by the Commission in the ESCO Rate-Setting Order violates SAPA and renders the Order null and void.

In the event the Commission attempts to cite a “Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies” (the “Low Income Collaborative”) to argue that it has complied with SAPA, that should be rejected. As its title indicates, the Low Income Collaborative concerns only an ESCO program to provide beneficial rates to low income customers. ESCOs have worked collaboratively on this proposed program for approximately two years. Certain implementation issues have developed, including how to

[3] As evidenced by its attempt to rely on a “Notice of Proposed Rulemaking,” the Commission concedes that its Feb. 23 Order constitutes rule making. If the Commission attempts to backtrack and argue that the Feb. 23 Order does not constitute rule making, that argument must be rejected. The Feb. 23 Order broadly applies to all ESCOs in the industry, sets a general standard for all of them to follow, and is not applied to any individual ESCO based on a discrete set of facts or circumstances. As such, this constitutes a rule under New York law for SAPA compliance purposes (*see Cordero v Corbisiero*, 170 AD2d 216 [1991]).

[4] Although the notice in the State Registry provides notice for comments on a July 24, 2015 Staff Report, there is no such report. The Staff Report at issue is both dated and filed July 28, 2015. If there were not so many other more fundamental errors associated with Commission’s SAPA compliance here, more time would be devoted to the confusion associated with Commission seeking comments on a July 24, 2015 report that does not actually exist.

determine the identity and eligibility of low-income customers and measure the benefits offered by ESCOs versus public utilities. The Commission has solicited comments on these issues. For example, as recently as December 1, 2015, the Commission requested comments on the Low Income Collaborative with respect to the mechanisms needed to implement the program. In response, there have been extensive comments to the Low Income Collaborative discussing implementation issues.

Recently, on January 29, 2016, the Public Utility Law Project of New York ("PULP") submitted comments on the Low Income Collaborative that recognized that the Commission and other interested parties were trying to determine how to implement the rate program for low income customers, and PULP extensively discussed these issues. PULP noted that one way to "sidestep" certain implementation issues, such as the difficulty in identifying low income customers, might be to require ESCOs to guarantee beneficial rates for *all* residential customers. Indeed, PULP mentioned near the middle of its comments that one way to "completely sidestep the difficult complex processes under consideration" would be just to "extend[ ] the rate protection of low-income customers to *all* residential ESCO customers."

Petitioner RESA responded to the comment about expanding the low-income program by setting forth the obvious fact that any such proposal would be far beyond the scope of what was being considered. RESA then focused on what was actually being considered, *i.e.*, implementing a rate program for low income individuals. The Commission acknowledged RESA's response and moved on, discussing implementing a rate program for low-income individuals. The Commission then asked for additional comments on what was being considered. Each request for comment by the Commission was explicitly related to the issue of how to implement a rate program for low-income customers. Nevertheless, after a one-sided article criticizing

Commission oversight and enforcement with respect to ESCOs was published, the Commission suddenly and unexpectedly issued its new rule that ESCOs must guarantee to *all* of their residential and small non-residential customers, not just low-income customers, the rates offered by public utilities or offer 30% renewable energy products.

The Commission has made its new rule effective 10 days from the ESCO Rate-Setting Order, meaning March 4, 2016, and it has solicited requests for comments to come in *after* the rule becomes effective. Indeed, although the rule becomes effective March 4, 2016, the Commission invites "initial" comments on the rule by March 14, 2014, to determine whether it should even have this rule. The Commission asks parties to comment on the following: "Whether prospective ESCO sales to mass market customers, including renewal of expiring contracts, should be limited to products that include guaranteed savings or a defined energy-related value-added service. If not, precisely how should this requirement be broadened or narrowed?"

In light of the above SAPA provisions and related precedent, the Commission has clearly violated SAPA and, as a result, its new rule must be declared null and void. The Commission never submitted notice of the proposed rule that would require ESCOs to guarantee rates for all of their customers or provide 30% renewable energy packages, and never allowed for 45 days of comments on any such rule. The "notice" cited in the ESCO Rate-Setting Order has no relation to the rule the Commission ultimately made in the Order. Further, the Low Income Collaborative, which is not even identified by the Commission in support of its SAPA notice requirements, similarly has nothing to do with the rule Commission made in the ESCO Rate-Setting Order. SAPA requires the Commission to specifically provide public notice of any proposed rule, allow comments on the proposed rule, and thereby consider viable alternatives to

any proposed rule. Here, the Commission failed to do so. Instead, the Commission has issued a new rule and, incredibly, now seeks comments on whether it should have this new rule *after* it is already implemented. In sum, the ESCO Rate-Setting Order was issued in violation of SAPA.

Moreover, Commission has extended this new "rate guarantee" rule to include not just residential customers, but also to include "small non-residential customers." The lack of notice about making a rate guarantee for residential customers without notice is troubling enough, but Commission's decision to institute this guarantee for certain non-residential customers is an additional violation of SAPA's requirements.

Commission's failure to provide for notice of its rule and a comment period eliminated any opportunity for thoughtful discussion of the proposed rule and any consideration of reasonable alternatives. If Commission attempts to rely on the Low Income Collaborative to support notice, that argument fails. SAPA does not allow administrative agencies to "sidestep" implementation issues associated with a proposed rule or program by haphazardly issuing an entirely different program without notice. Indeed, an ESCO with minimal or no low income customers may have rightfully believed that it did not need to be extensively involved in the Low Income Collaborative.

The ESCOs that were engaged in the Low Income Collaborative have worked on issues associated with its implementation for several months. The parties to the Low Income Collaborative have not yet determined how the program may be implemented, but they have been working to resolve such issues, including how to measure the benefits provided by ESCOs versus public utilities. The irrational nature of the ESCO Rate-Setting Order is highlighted by the fact that the Commission has decided that ESCOs must implement these widespread and sweeping changes for *all* residential and small non-residential customers in just 10 days, when

months of discussions have not ironed out all issues and details associated with implementing certain changes for a subset of low-income customers. The Commission's decision to sidestep a meaningful discussion of these issues by providing no meaningful notice for comments before issuing and implementing its new broad rule renders the ESCO Rate-Setting Order null and void.

POINT III

THE ORDER SHOULD BE ANNULLED UNDER CPLR 7803(3) BECAUSE IT IS ARBITRARY AND CAPRICIOUS.

Under New York law, an administrative rule or regulation will be upheld "only if it has a rational basis, and is not unreasonable, arbitrary or capricious" (*see New York State Ass'n of Counties v Axelrod*, 78 NY2d 158 [1991] [striking an administrative ruling as arbitrary and capricious]). "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context" (*id.*at 166).

New York courts also strike a rule or regulation as arbitrary and capricious when the rule or regulation does not contain enough guidance as to how it will be implemented and applied (*see Law Enforcement Officers Union v New York State*, 229 AD2d 286, 291 [3d Dept 1997] ["Notably absent from the final rule are any objective guidelines as to how the Commission is to determine whether a particular inmate is 'suitable' or what factors the Commission will consider in determining whether an individual occupancy housing unity may be converted by DOCS to a double occupancy housing unit."]). Here, the Commission has not even attempted to "fill in the gaps" regarding how rate comparisons will be measured, the penalties for non-compliance, and a multitude of other matters.

Further, the Commission's rule should be declared null and void because the entire premise underlying it – that customers have not achieved rate savings – is not substantiated. An administrative agency such as the Commission must document and substantiate its conclusion

when making a rule (*New York State Assn. of Counties v Axelrod*, 78 NY2d at 168 ["[O]ur ruling is based on petitioner's demonstration that DOH failed on these facts to document and substantiate its conclusion."]). In its ESCO Rate-Setting Order, the Commission has made no findings based on any facts regarding what customers have saved or not saved in terms of rates. The Commission's hasty rulemaking, and the conclusions on which its new rule is apparently founded, starkly contrast with the Commission's prior examination of two years of ESCO data in 2012 (Case 12-M-0476, *Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State*, Oct. 19, 2012). Before issuing that Order, the Commission and Staff examined actual data, and found that some customers save money utilizing ESCOs, and some do not (*see id.*, p. 4-5 & fn. 5). Here, on the other hand, the Commission has not set forth that it has examined *any* data, much less two years of data, to support its rule. As such, the ESCO Rate-Setting Order must be struck as arbitrary and capricious rule.

The Commission effectively concedes that it has not yet set forth objective standards for this new sweeping change, if it ever will, by providing for a post-rule comment period and organizing several post-rule meetings and teleconferences and issuing heavily-revised guidance documents to attempt to flesh out the details of its new rule. Indeed, Commission continues to rollout redlined versions of what it believes compliance should look like, with many gaps left to fill. As such, the rule as written fails as arbitrary and capricious (*see id.* ["Therefore, absent any objective standards for implementing the program, the regulation as written is arbitrary and capricious."]).

The 10-day deadline for ESCOs to comply with the new rules is also arbitrary and capricious because it is completely unrealistic. Given that even the Staff could not describe how

it would be possible for ESCOs to get new contracts approved and be ready (*See generally* Foss Aff., ¶¶ 13-22), clearly the deadline was not based on any rational analysis of the industry, the impact on communications and relationships with consumers and the ability of the industry to undergo such changes in such a short time.

Moreover, the ESCO Rate-Setting Order is null and void because it contravenes the governing statute – the PSL. New York courts will strike a rule or regulation as arbitrary and capricious when the rule of regulation contravenes a legislative enactment (*see Trump–Equitable Fifth Avenue Co. v Gliedman*, 62 NY2d 539, 545 [1984] [striking an administrative regulation because "the interpretation, as embodied in a regulation, directly contravenes the plain words of the [governing] statute."]). Here, as more fully discussed in Point I, the Commission has contravened the plain language of the PSL because it has decided to set rates for ESCOs when the Legislature has confined its authority to setting of rates charged by public utilities. Although the Commission may regulate ESCO marketing and advertising under Article 2 of the PSL (HEFPA), it may not set ESCO rates under Article 4. The very purpose of ESCOs is that they let the free market have a say in the types of products and services available, and are not subject to rates set by the Commission. The ESCO Rate-Setting Order is arbitrary and capricious because instead of using authorized powers under Article 2 to penalize and regulate a few "bad actor" ESCOs with respect to alleged deceptive marketing and unfair business practices, the Commission seeks to hold the entire industry to unrealistic and entirely unreasonable rate-setting standards. The Commission's decision to act outside of its authority and rule over that which the Legislature has not allowed it to rule, is arbitrary and capricious.

In sum, the ESCO Rate-Setting Order must be declared null and void because it is arbitrary, capricious and not rationally related to the Commissions' stated goals. The ESCO

Rate-Setting Order is based on the illogic of punishing all for the sins of but a few, using authority it repeatedly has disavowed and will serve only to undermine the value provided to ESCO customers the Commission purportedly seeks to ensure.

POINT IV

THE ORDER SHOULD BE ANNULLED BECAUSE IT EFFECTS AN UNCONSTITUTIONAL REGULATORY TAKING, VIOLATES ESCOs' SUBSTANTIVE DUE PROCESS RIGHTS, AND IS UNCONSTITUTIONALLY VAGUE.

The ESCO Rate-Setting Order should be annulled because it violates the Fifth and Fourteenth Amendments of the U.S. Constitution. The constitutional violations are threefold. First, the Order constitutes a regulatory taking without just compensation because it imposes unjust and unreasonable price controls that will drive ESCOs out of business. Second, the Order exceeded the Commission's legal authority and was arbitrary and irrational, violating the ESCOs' rights to substantive due process. Third, the ESCO Rate-Setting Order is unconstitutionally vague and must be declared void. Petitioner RESA and the ESCOs it represents are entitled to damages and a judgment invalidating the Order pursuant to 42 USC § 1983, which provides a private right of action for the deprivation of constitutional rights by a state actor.

A. Regulatory Taking

The ESCO Rate-Setting Order must be annulled because it effects an unconstitutional regulatory taking in violation of the Fifth Amendment. The Order requires ESCOs, private companies which offer commodity-related services only, to charge no more for the energy they sell than do utilities, which must sell energy at cost but profit substantially from transmission and delivery. By mandating that ESCOs cannot charge New York consumers more than the utilities' prices, the ESCO Rate- Setting Order fundamentally deprives ESCOs of their business, in which

they have a vested right because they have invested substantial resources (Affidavit of Matthew Scott White, sworn to March 2, 2016 ("White Aff."), ¶ 30). The Order will drive ESCOs from the New York energy market. Unlike public utilities, ESCOs derive no profit from transmission and distribution services. Thus, requiring ESCOs to charge the same prices for their products as the utilities effectively eliminates the ESCOs' ability to recover their operating costs, much less turn a profit. Companies cannot constitutionally be subjected to regulations that depress prices below just and reasonable levels (*Tenoco Oil Co. v Dep't of Consumer Affairs*, 876 F2d 1013, 1023 [1st Cir 1989]).

The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. It is well settled that "property may be regulated to a certain extent, [but] if regulation goes too far it will be recognized as a taking" (*Pennsylvania Coal Co. v Mahon*, 260 US 393, 415 [1922]). When this happens, section 1983 grants the property owner the right to commence, in either federal or state court, an inverse condemnation proceeding seeking just compensation for what was taken (§ 1983; US Const, am 5). A court determining whether a taking has occurred engages in an *ad hoc*, factual inquiry into the circumstances (*Atlas Corp. v United States*, 895 F2d 745, 757 [Fed Cir 1990]). Factors that have particular significance include the character of government action, the regulation's economic impact on the plaintiff, and the extent to which regulation has interfered with distinct investment-backed expectations (*id.*). A taking occurs where the regulation is arbitrary, discriminatory, or demonstrably irrelevant to the policy underlying the regulation (*Tenoco Oil*, 876 F2d at 1021). Before a plaintiff can assert a regulatory taking claim, the administrative agency must have reached "a final, definitive position" regarding the application of the

regulation (*Williamson Cty. Reg'l Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172, 191 [1985]).

The ESCO Rate-Setting Order constitutes a regulatory taking because it will have drastic and dire economic effects on ESCOs, it interferes with ESCOs' investment-backed expectations of being able to compete in the New York market, it arbitrarily discriminates against ESCOs, and it undermines the Commission's stated policy goal of encouraging competition (*see supra* Point I.D). Prohibiting ESCOs from selling their products at prices higher than those charged by the public utilities, which are required to sell their energy products at cost and which derive their profits from transmission and distribution services, will have the practical effect of driving ESCOs out of business (White Aff., ¶¶ 20-31). In *Tenoco Oil*, the First Circuit observed that "[p]rice controls imposing confiscatory ceilings and having the effect of driving gasoline wholesalers from the Puerto Rico market might perhaps be deemed so irrational as to exceed legislative power, constituting a taking without due process" (876 F2d at 1023).

Although the Order contemplates the possibility of reevaluating ESCOs' eligibility criteria after 60 days, the severity of its impact constitutes a taking. In addition to the losses ESCOs will suffer by being forced to charge unreasonably low rates while the ESCO Rate-Setting Order is in effect, the Order will irreparably damage customer relationships the ESCOs have spent years and significant resources cultivating. The ESCOs have invested substantial amounts of time and money in the New York market, based on the reasonable expectation that they would be allowed the continued freedom to independently negotiate prices directly with their customers and conduct profitable businesses. Even a temporary regulation can be so onerous that companies will be unable to recover their cumulative losses and will be forced out of business (*id.* at 1027). Under such circumstances, the agency's action "is, for all practical

purposes, rendered final" (*id.*). The Commission has taken this action against the entire ESCO industry in response to the conduct of a few alleged bad actors. Thus, the Order is arbitrary, at least when applied to the vast majority of ESCOs that conduct their businesses ethically and responsibly. Furthermore, the Order undermines and runs contrary to the Commission's own stated goals of encouraging competition and options for consumers.

Finally, *Williamson County*'s requirement of a "final, definitive position" has been satisfied because the Order immediately takes effect on March 4, 2016, and Petitioner RESA's application for an extension of the deadline was denied on March 2, 2016. (Foss Aff. ¶ 8.) Although the ESCOs may seek a rehearing of the Order, the Commission is not required to grant or deny that request for 30 days after the request is filed (PSL § 22). Even if such an application were granted, the damage would already be done. Thus, a petition for rehearing is, at best, a remedial option under these circumstances. There is no requirement to resort to remedial procedures before bringing a section 1983 action (*Williamson County*, 473 US at 193).

Because the Order represents a final, determinative position that arbitrarily discriminates against ESCOs in such a way that they will be deprived of their vested property interests in their businesses, a regulatory taking has occurred. The Fifth Amendment requires that the Order be annulled or, in the alternative, that the State provide just compensation for the taking.

B. Substantive Due Process

The Commission's Order also must be annulled because it deprives ESCOs of their property without due process of law, in violation of the Fourteenth Amendment. The Commission acted arbitrarily and without legal authority by attempting to regulate the prices ESCOs may negotiate with their customers. The Order was a knee-jerk reaction to negative coverage of the Commission and the ESCO industry in the media, not a decision based on legitimate regulatory concerns. The Due Process Clause has a substantive component that

protects individual liberty against certain government actions regardless of the procedures used to implement them (*Interport Pilots Agency, Inc. v Sammis*, 14 F3d 133, 144 [2d Cir. 1994]). Economic regulations violate due process when the government acts in an arbitrary or irrational way (*Carolina Power & Light Co. v United States,* 48 Fed Cl 35, 42 [Fed Cl 2000]). A court may find a deprivation of substantive due process where the government acted beyond its authority, without justification, or committed other egregious misconduct, or where the government action was motivated by political pressure rather than legitimate regulatory concerns (*Southview Associates, Ltd. v Bongartz*, 980 F2d 84, 104 [2d Cir 1992] [citing *Brady v Town of Colchester*, 863 F2d 205, 215-16 (2d Cir 1988), and *Del Monte Dunes, Ltd. v City of Monterey*, 920 F2d 1496, 1508 (9th Cir 1990)]).

As discussed above, the ESCOs have vested property interests in their New York businesses that will be irreparably damaged and rendered unprofitable by the ESCO Rate-Setting Order. Substantive due process is violated where the government infringes on such a property interest in an arbitrary or irrational manner (*Cine SK8, Inc. v Town of Henrietta*, 507 F3d 778, 784 [2d Cir 2007]). The Commission's issuance of the ESCO Rate-Setting Order was irrational because it acted beyond its legal authority. As discussed in Point I, *supra*, the Legislature has intentionally declined to include ESCOs in the definitions of "electric corporation" and "gas corporation" in Article 1 of the PSL, and has intentionally declined to grant the Commission authority to regulate ESCOs' energy prices alongside public utilities' energy prices in Article 4 of the PSL. Thus, the ESCO Rate-Setting Order exceeds Commission's lawful authority and constitutes a violation of ESCOs' substantive due process rights.

Furthermore, as described more fully in Point III, *supra*, the ESCO Rate-Setting Order is arbitrary and irrational. Expecting ESCOs to comply with the Order on a mere 10 days' notice—

when even the Staff could not articulate how it would be possible for the ESCOs to do so—is the very definition of irrationality. (*See generally* Foss Aff. ¶¶ 13-20.) The order is arbitrary for the additional reason that it punishes an entire industry operating throughout New York State for the conduct of a few bad actors. Making matters worse, the Order appears to be a hasty and politically-motivated overreaction to negative press coverage regarding the Commission and the ESCO industry. That the ESCO Rate-Setting Order resulted from political pressures rather than legitimate policy and regulatory concerns seems obvious, given that it contradicts and subverts the Commission's stated goals of encouraging competition and consumer choice (*see supra* Point I.D).

In sum, the Order exceeded Commission's legal authority, was arbitrary and irrational, and was motivated by politics and bad press. Any one of these reasons would be sufficient to find a substantive due process violation. Taken together, they compel the conclusion that the Order must be invalidated, and the ESCOs are entitled to damages pursuant to 42 U.S.C. § 1983 (*see Williamson County*, 473 US at 197).

C. Void-for-Vagueness

The ESCO Rate-Setting Order should also be annulled because it is unconstitutionally vague, in violation of the Due Process Clause of the Fourteenth Amendment. The Order fails to specify the procedures ESCOs must follow to be in compliance and fails to provide explicit standards for Staff to apply when enforcing the Order. The void-for-vagueness doctrine is "one of the most fundamental protections of the Due Process Clause" (*Thibodeau v Portuondo*, 486 F3d 61, 65 [2d Cir 2007] [citation and internal quotation marks omitted]). It requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and that "laws must provide explicit standards for those who apply" because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on

an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (*Village of Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 US 489, 498 [1982] [quoting *Grayned v City of Rockford*, 408 US 104, 108-09 (1972)]). A law may be challenged on its face as unduly vague if it is impermissibly vague in all its applications (*id.* at 497).

The Order is unconstitutionally vague on its face. Most notably, the first condition governing ESCOs' contracts with new customers requires the contract to guarantee "that the customer will pay no more than were the customer a full-service customer of the utility" (ESCO Rate-Setting Order, p. 21). However, the Order provides no guidance regarding how this calculation should be made. For example, some utilities change their rates on a quarterly basis while others do so semiannually. Due to this variation, it is impossible to guarantee savings when the rates are not foreseeable at the time the contract is signed (Crockett Aff., ¶ 30; White Aff., ¶ 22). Customers and ESCOs should be able to negotiate fixed rates for services so that each party knows exactly what to expect. Requiring the contracts to be fixed to fluctuating and unpredictably updated utility rates not only removes the freedom of choice ESCOs and customers have previously enjoyed, but also creates a cloud of uncertainty regarding the amounts an ESCO will actually be able to realize under its contracts.

The Order exacerbates the vagueness problem by requiring the Chief Executive Officer (CEO) or an equivalent corporate officer of each ESCO to file a certification with the Commission by 4:00 p.m. on March 4, 2016, certifying that any new enrollments will comply with the new conditions (Order at 21). However, the Order does not specify what penalties, if any, will be imposed on a CEO who files a certification that proves to be incorrect. This problem goes to the void-for-vagueness doctrine's core concerns that a person of ordinary intelligence

cannot understand the terms of a vague regulation, and that a vague law or regulation will lead to arbitrary and discriminatory enforcement. Furthermore, because the terms and requirements of the Order are so ill-defined, the CEOs are effectively required to certify compliance with conditions they cannot understand, presumably under the threat of some penalty still to-be-determined.

The modifications to the UBP contained in the Order present an entirely separate but equally troubling vagueness problem. Under the revised UBP, the Commission asserts authority to "impose consequences on ESCOs where there is a material pattern of consumer complaints regarding matters under the ESCO's control, such as marketing practices, *even where those complaints do not reveal any violations of the UBP*" (ESCO Rate-Setting Order, p. 19 [emphasis added]). Under this draconian modification, "[t]he Commission has broad discretion to determine when the volume and pattern of complaints requires action" (*id.*). Thus, an ESCO will be subject to "consequences" whenever the Commission, in its unfettered discretion, determines that an ESCO has received too many complaints, even if that ESCO has in fact done nothing wrong. This new UBP provision does not inform an ESCO what conduct to avoid (because customers may complain about anything), does not provide the Commission with explicit standards to apply, and does not define the consequences to be imposed for a violation. It also does not consider that many complaints are likely to result from ESCOs' compliance with the Order, as many customers who prefer fixed income energy contracts will receive notices that they no longer have that option.

The unconstitutional vagueness of the Order manifested in the confusion surrounding the Order's rollout and implementation. On February 29, 2016, just four days before the Order went into effect, the Commission conducted an informal meeting to provide guidance to industry

representatives. The Commission held the meeting in three conference rooms and provided 500 phone lines so that interested parties could participate via teleconference (Foss Aff. ¶ 11). This proved insufficient to handle the volume of participants and questions posed to the Commission; the Staff was forced to scramble to provide more telephone lines (Foss Aff. ¶¶ 11-12). The sheer volume of questions posed by industry representatives, many of them savvy and experienced veterans of the energy business, amply demonstrates that a person of ordinary intelligence cannot determine what is required or prohibited by the Order (*see Village of Hoffman Estates*, 455 US at 498). Even more troubling was the Staff's inability to answer many of the questions. The transcript of the hearing reflects numerous occasions when the Commission failed to answer questions or stated that answers would be provided following the 60-day comment period, long after the ESCO Rate-Setting Order takes effect (*See generally* Foss Aff. ¶¶ 13-20).

The confusion continued after the meeting. An email sent to ESCO representatives by LuAnn Scherer, Deputy Director of the Department of Public Service's Office of Consumer Services, on the evening of February 29, 2016, underscores the Order's vagueness. The email provided a second revised Guidance Document, promised that more revisions to the document were forthcoming, and stated that a "Q&A doc" would be provided the following day (White Aff., ¶ 33; Foss. Aff., ¶ 21). Ms. Scherer's message shows that even the Staff was still in the process of interpreting the Order and working out its meaning and practical effects. Note that this email was sent less than 96 hours before the ESCO CEOs were required to file their compliance certificates.

Finally, on March 2, 2016, just two days before the ESCO Rate-Setting Order would take effect, the Commission issued the Draft Guidance Document, Version 3 (Foss Aff. ¶ 21, Exh J). The Draft Guidance Document, Version 3 included a significant amount of information that had

not been provided in earlier guidance documents from the Commission. This information concerned the amount of notice ESCOs must give customers when switching them from one type of contract to another, the requirements for obtaining affirmative consent from customers, and a customer's ability to provide electronic consent, among other topics. (*See id.*) By issuing the ESCO Rate-Setting Order without providing detailed instructions on how ESCOs were expected to comply, the Commission created a moving target. Just two days before the ESCO Rate-Setting Order would take effect, that target was still in motion.

The foregoing establishes that the Order is unconstitutionally vague because it cannot be understood by a person of ordinary intelligence, it does not provide explicit standards for those who must apply it, and it creates a grave risk of arbitrary and discriminatory enforcement. Therefore, it violates the Due Process Clause of the Fourteenth Amendment and should be declared void for vagueness.

POINT V

ESCOs WILL SUFFER IRREPARABLE HARM WITHOUT TEMPORARY RELIEF

Under New York law, "[a] complete loss of a business constitutes irreparable harm" (*see e.g., Semmes Motors, Inc. v Ford Motor Co.*, 429 F2d 1197 [2d Cir 1970]). The loss need not be total for the Court to find irreparable harm, as long as it is so great as to seriously compromise the company's ability to continue in its current form (*see Galvin v New York Racing Ass'n*, 70 F Supp 2d 163, 170 [EDNY 1998]). The accompanying affidavit of Mr. Matthew White explains that the Commission's new rules may result in a total destruction of ESCO business in New York (White Aff., ¶¶ 20-31). This alone constitutes irreparable harm. Mr. White further details that some of the irreparable harm is actually difficult to predict because the ESCO Rate-Setting Order is so vague as to certain requirements and penalties. For example, a CEO certification is

required by March 4, 2016, but it is practically impossible for any CEO to develop compliant procedures and certify that complying products will be available in such a short period of time. This is especially true because there is a great deal of confusion in the industry about the meaning of the ESCO Rate-Setting Order and additional compliance guidance is necessary. Perhaps above all else, ESCOs will be forced to no longer offer their customers packages and options that would otherwise be available, severely impairing ESCOs' customer goodwill, a hallmark of irreparable harm (*see e.g. Frank May Associates, Inc. v Boughton*, 281 AD2d 673 [3rd Dept 2001]).

Moreover, as set forth throughout this Memorandum, the Commission's new rules violate important constitutional rights. As such, the new rules amount to *per se* irreparable harm. In *Mitchell v Cuomo*, 748 F2d 804, 806 (2d Cir 1984), the Second Circuit held that "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." In *Jolly v Coughlin*, 76 F3d 468, 482 (2d Cir 1996), the court affirmed the "presumption of irreparable injury that flows from a violation of constitutional rights." Indeed, "it is the alleged violation of a constitutional right that triggers a finding of irreparable harm" (*id.*). This has caused courts to characterize an alleged deprivation of constitutional rights as a "*per se* irreparable harm" (*Scelsa v City Univ. of New York*, 806 F Supp 1126, 1135, 1146 [SDNY 1992]).

POINT VI

A BALANCE OF THE EQUITIES FAVORS ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

The equities clearly tip in favor of granting a temporary restraining order and preliminary injunction to preserve the status quo. Without any factual or other basis, or any showing of harm that will arise absent its new rules, the Commission has decided that these new rules must be

enforced within 10 days of their issuance, *i.e.*, by tomorrow, March 4, 2016. There is simply no logic to the Commission's decision. As demonstrated by the Commission's *ad hoc* rollout of three different versions of what has now become a 9-page "Guidance Document" in the days leading up to the ESCO Rate-Setting Order's effective date, the Commission's decision has caused severe confusion among all interested parties, including the Staff charged with trying, but failing, to fully answer all of the questions. Allowing the effective date to go forward will serve to drive ESCOs out of the market, thereby limiting the public's options for meeting their energy needs, and otherwise impose severe hardships on ESCOs in terms of determining what the Commission is trying to order here and how to comply with that order, if they can. There is no basis, much less any basis offered by the Commission, for implementing these rules on the particular date of March 4, 2016. Given the importance of the issues to be reviewed, including Commission's *ultra vires* conduct, its violations of SAPA, and its infringement on constitutional rights, the equities favor granting the relief requested herein to preserve the status quo.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Court should grant a temporary restraining order and preliminary injunction, together with any and all additional relief the Court deems just and proper.

Dated: March 3, 2016

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