STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 15-M-0127 **In the Matter of Eligibility Criteria for Energy Service Companies.**

Case 12-M-0476 **Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State.**

Case 98-M-1343 **In the Matter of Retail Access Business Rules.**

Petitions for Rehearing of the Order Resetting Retail Energy Markets and Establishing Further Process I.D. No. PSC-18-16-00015-P

SAPA COMMENTS OF FAMILY ENERGY INC., MAJOR SERVICES, LLC AND MAJOR ELECTRIC LLC ON PETITIONS FOR REHEARING

Major Services LLC, and Major Electric LLC, and Family Energy, Inc. (collectively, "Petitioners") respectfully submit the following comments in response to the Public Service Commission's ("Commission" or "PSC") May 4, 2016 SAPA Notice seeking comments on Petitions for Rehearing of the Order Resetting Retail Energy Markets and Establishing Further Process, dated February 23, 2016 ("Reset Order"). As described more fully in the Petition for rehearing of the Reset Order, filed by Petitioners on March 24, 2016 ("Rehearing Petition"), which is fully incorporated herein, Petitioners support the vision of an improved retail energy market, with low-cost energy supply, market reliability and customer protections. However, Petitioners submit that the Commission committed a number of significant errors of law and errors of fact in adopting the Reset Order, which risk numerous harmful effects on Petitioners and other similarly situated ESCOs, and their customers. It is respectfully submitted that Petitioners, other members of the regulated community, and the public at large all deserve—and are legally entitled to—the opportunity to work with the Commission to develop sound regulatory changes in an orderly fashion

and without undue harm. To remedy legal and factual defects, and ensure lawful stakeholder participation, the Commission should grant Petitioners' requests for rehearing of the Reset Order in their entireties.[1]

I. Rehearing is Necessary Because the Reset Order is Afflicted with Numerous Errors of Law and Fact

Rehearing is appropriate where it is shown that the Commission committed an error of law or fact in promulgation of the challenged order. 16 N.Y.C.R.R. § 3.7(b). As described in detail in the Rehearing Petition, incorporated herein, and in pleadings in the underlying *Matter of Family Energy, Inc.* proceeding, the Reset Order suffers from numerous errors of law and fact and is therefore properly the subject of rehearing.

The Reset Order is legally and factually defective because it:

1. is *ultra vires* and exceeds the scope of the Commission's ratemaking authority;
2. is *per se* arbitrary and capricious as it contravenes the Commission's own rules;
3. is not capable of implementation;
4. violates Petitioners' due process rights under the State Administrative Procedure Act ("SAPA") and the United States and New York Constitutions;
5. violates SAPA's Rulemaking Requirements;

[1] These Comments are submitted with a full reservation of rights with respect to the claims and arguments made in pending litigation challenging the Reset Order in *Matter of Family Energy, Inc., et al. v. New York State Public Service Commission* (Index No. 874-16) or any other action or proceeding, on the ground that, among other things, it was promulgated in violation of the New York State Administrative Procedure Act and in excess of the Commission's jurisdiction and regulatory authority, is arbitrary and capricious, and violates the United States and New York Constitutions. Petitioners' participation in ongoing administrative proceedings, at any stage of the proceedings, including but not limited to collaborative meetings, technical conferences, comment submissions and rehearing petitions, are made without prejudice to the pending litigation, reserving all rights, and without waiver of any rights, claims or arguments. Petitioners incorporate by reference their previously filed comments in this proceeding, including their Initial Comments, filed Mar. 18, 2016; Reply Comments, filed April 4, 2016; Rehearing Petition, filed Mar. 24, 2016; Initial Comments on PSC Whitepapers, filed June 6, 2016; and Reply Comments on PSC Whitepapers, filed June 20, 2016, including all attachments to such submissions, such as their initial submissions to the Supreme Court and Reply Papers in *Matter of Family Energy, Inc.*

6. violates the Takings and Contract Clauses of the United States Constitution; and

7. violates the State Environmental Quality Review Act ("SEQRA").

Each one of these legal or factual defects, summarized below, independently requires that the Commission withdraw the Reset Order and grant Petitioners' request for rehearing.

A. The Reset Order is *ultra vires* and exceeds the scope of the Commission's ratemaking authority

The Reset Order is *ultra vires* and exceeds the scope of the Commission's ratemaking authority under the Public Service Law ("PSL"), which the Commission itself has recognized does not extend to rates charged by energy service companies ("ESCOs"). *See* Rehearing Petition, at 15-17.

By way of background, the four bedrock orders of the Commission regarding the regulatory scheme for ESCOs selling natural gas (the "Gas Marketer Order") and electricity (Opinions 96-12, 97-5 and 97-17) all include the basic concept of a utility as the Provider of Last Resort ("POLR"). The POLR concept incorporated a "two-tier" structure that allowed customers to choose ESCO service or full utility service, but required the utility to remain the POLR so that customers could "count on at least one supplier who will continue to provide service at reasonable rates." This structure was repeated in the Gas Marketer Order and Opinions 96-12 and 97-5, and was left undisturbed on rehearing in Opinion 97-17.

In Opinion 97-17, which is still operative today, the Commission expressly held that ESCOs are exempt from the Commission's ratemaking authority under PSL § 4. Opinion 97-17, at 31-35. According to the Commission, because ESCO's "do not lay down,

erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under public property," they do not meet the statutory definition of an "gas corporation" or "electric corporation," and are therefore exempt from full-utility regulation under PSL § 4. In the intervening years, the Commission has repeatedly maintained this position in New York State Supreme Court and, as recently as 2012, in a proceeding underpinning the Reset Order, the Commission again reiterated that it "[does] not set or regulate the rates charged by ESCOs." Residential Market Order at 2. Indeed, in a related order in 2010, the Commission stated that: **"it is well understood that we [the Commission] lack authority to regulate the rates that an ESCO charges any customer (residential or nonresidential) . . . . neither an informal hearing officer <u>nor the Commission may determine that an ESCO's charges to its customer are improper</u>."**[2] Accordingly, it has been a truism of the ESCO market since its inception that the Commission does not regulate rates charged by ESCOs—until the Reset Order changed everything.

1. The Reset Order exceeds the scope of the Commission's authority under the Public Service Law

Despite decades of its own precedent exempting ESCOs from its ratemaking authority under PSL Article 4, the Commission now seeks to mandate the rates at which ESCOs can charge their customers, by requiring that ESCO rates be equal to or less than what the customer would be charged by the utility. Specifically, the Reset Order now claims the Commission has "authority to oversee ESCO participation in the residential and small commercial markets to ensure sufficient protection of the public interest and that the prices that consumers pay for those services are *just and reasonable*." Reset Order at 10

[2] Case 09-G-0289 - *Matter of the Rules and Regulations of the Pub. Svc. Comm'n, Contained in 16 NYCRR, in Relation to Complaint Procedures - Appeal by Ms. Laura Jacobsen of the Informal Decision Rendered in Favor of MX Energy*, Commission Determination (issued Aug. 23, 2010), at 7 (emphasis added).

(emphasis added). Because the PSL authorities for "just and reasonable" rates only arise in Article 4, **there can be no mistake that the PSC engaged in Article 4 ratemaking** outside the scope of its authority when it promulgated the Reset Order.

The Commission's argument is thus:

- The PSC "eschewed" PSL Article 4 regulation of ESCOs as "gas corporations" or "electric corporations" because they do not have "authority . . . to lay down, erect, or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways or public places." PSC Memorandum of Law[3] at 24-25.

- The PSC therefore contends that the Reset Order did not "set the rates or otherwise determine[ ] the price that ESCOs can charge." PSC Mem. at 26. Pursuant to the PSC's reasoning, ESCOs are free to charge any rate for their energy supply, so long as it is the same rate charged by the utility, or less. Even so, the PSC has set ESCOs' rates, even if it has only subjected them to a cap.

- The PSC then argues that the Reset Order "has not exercised [the PSC's] rate authority under [PSL] Article 4 to require revisions of existing ESCO gas and electric commodity contracts." PSC Mem. at 26).[4]

- Instead of "setting ESCO rates" under Article 4, the PSC claims, the Reset Order "exercised [the PSC's] Article 4 jurisdiction with respect

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[3] As further evidence of the Commission's legal errors, much of its legal support for the Reset Order was first introduced in its Memorandum of Law in the *Matter of Family Energy Inc.* litigation and related proceedings ("PSC Mem."). Of course, it is bedrock administrative law that the Commission cannot support its decision with information and reasoning that is not actually included in the Reset Order. *Matter of Nat'l Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n*, 16 N.Y.3d 360, 368 (2011) ("[I]t is . . . a bedrock principle of administrative law that a 'court in dealing with a determination . . . which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by that agency.*" "If the reasons an agency relies on do not reasonably support its determination, the administrative order must be overturned and it cannot be affirmed on an alternative ground that would have been inadequate if cited by the agency") (emphasis added).

[4] Nonetheless, all month-to-month variable rate customers, with whom ESCOs had rights, obligations and contract expectancies, are required to be changed to comply with the Reset Order. The same is true of fixed rate customers upon expiration of their current contract term. *See* Reply Affidavit of Jeff Donnelly, dated May 6, 2016 ("Donnelly Reply Aff."). A copy of the Donnelly Reply Aff. was filed with Petitioners' Initial Comments on PSC Whitepapers, filed June 6, 2016, at Attachment 3. For ease of reference a true and accurate copy of the Donnelly Reply Aff. is attached as Exhibit A. A true and accurate copy of the Reply Affidavit of Adam Small, Esq., dated May 6, 2016 ("Small Reply Aff.") is also attached hereto and incorporated herein, as Exhibit B.

to public utilities" to control the "contract offerings" that ESCOs can sell through utility retail access tariffs. PSC Mem. at 26.

- The end result, according to the PSC, is that it has exercised its rightful authority under PSL Article 4 to establish ESCO rates that are "just and reasonable." PSC Mem. at 26, 28.

This argument is circular, meritless and beset by errors of law. In sum, the Commission claims it is entitled to invoke PSL Article 4 to establish "just and reasonable" rates for ESCOs, despite years' worth of its own determinations that ESCOs are exempt from Article 4 jurisdiction. This assertion strains credulity: PSL Article 4 authority over jurisdictional entities is unavailable to allow the PSC to control the rates charged by non-jurisdictional ones. As such, the Reset Order was *ultra vires* by the Commission's own admission and Petitioners' request for rehearing must be granted.

Additionally, no other provisions of the PSL provide the Commission with jurisdiction to regulate the rates that ESCOs charge their customers. For example, pursuant to PSL § 65, the Commission's authority to regulate utility rates extends only to services provided by the *utility*. By contrast, the discrete services provided by ESCOs to their customers, whether they be electricity commodity, gas commodity or some combination thereof with value-added features, are manifestly not utility services subject to this form of rate regulation. The Commission's reliance on PSL § 65 is, therefore, legally erroneous and misplaced.

Likewise, the Commission also cannot rely on any "plenary" authority, including under PSL § 66-d, to justify its intrusion into ESCO ratemaking. Properly understood, in light of the whole statutory text, PSL § 66-d is solely concerned with enabling gas corporations to transport third-party-owned gas and ensuring that doing so does not unfairly impact the gas utility and its ratepayers. "Just and reasonable" in the

context of § 66-d therefore pertains to transportation rates paid to the gas corporation. The statute says nothing about the price of gas, nor does it authorize the Commission to impose "just and reasonable" rates on gas ESCOs. Similarly, the Home Energy Fair Practices Act ("HEFPA"), enacted before ESCOs even existed, or the State Legislature's amendments thereto, does not support the Commission's new claim that it has jurisdiction to set ESCO's rates.[5]

The Commission's *post-hoc* reliance on PSL §§ 65, 66-d, and HEFPA amendments as a basis for issuance of its Reset Order are legally defective. To be sure, nothing has changed in the way ESCOs provide commodity or in their basic non-ownership of utility facilities. This was the case in 1997, when the Commission determined that ESCOs were not subject to its ratemaking authority, and it remains true 20 years later. There is simply no provision of the Public Service Law, nor any other law or legal theory, that allows the Commission to make the jurisdictional about-face it does in the Reset Order. As such, the Reset Order is *ultra vires,* affected by errors of law, and Petitioners' request for rehearing should be granted.

2. The purported "workably competitive presumption" does not give the Commission authority to issue the Reset Order, and further ignores critical market realities

Notwithstanding the absence of authority for the Reset Order in the Public Service Law, the Commission further rationalizes that the Reset Order "is an appropriate exercise of the [its] obligation to ensure that deregulated gas and electric commodity

[5] On this point, the Commission's construction of HEFPA amendments in especially absurd. First, the State Legislature's amendments to HEFPA were expressly limited to PSL Article 2, which does not authorize ratemaking. Had the Legislature actually intended to extend the Commission's ratemaking authority, it would have amended PSL Article 1 or 4, which it did not. Next, if the definitions of "gas corporation," and "electric corporation" in PSL Article 1 were broad enough to reach ESCOs, as the Commission has since argued, then no HEFPA amendment would have been necessary at all in 2002 to justify the Commission's intrusion into ESCO ratemaking, which would have always existed. This incomplete and circular reasoning by the Commission must be rejected on rehearing.

markets are workably competitive and to impose conditions needed to meet that goal." PSC Mem. at 22. But neither the concept of a "workably competitive" market, nor the Commission's alleged obligation to achieve such a market by limiting ESCOs' rates, is mentioned anywhere in the PSL or any of the foundational PSC orders that deregulated energy supply.

Instead, it appears the Commission has erroneously adopted this standard, entirely out of context, from Justice Harris' decision in *Matter of Energy Ass'n of New York State v. Public Service Comm'n of State of New York* ("*Energy Association*"), 169 Misc. 2d 924 (Sup. Ct. Albany Cty. 1996), which concerned market-based rates for *wholesale electricity generation* bought and sold by utilities—a matter properly within the scope of the Commission's authority over utilities. The Commission cannot analogize to *Energy Association,* or any other Court decision, to confer jurisdiction unauthorized by any statute to regulate ESCOs' rates. The "workably competitive" presumption does not give the Commission the legal authority to issue the Reset Order.[6]

Moreover, by its reliance on the "workably competitive" presumption, the Commission reveals a fundamental, and factual, misunderstanding in how competitive markets work, and the role of ESCOs play in such a market. By its Reset Order, the Commission has incorrectly, and arbitrarily, focused its analysis of the retail energy market onto one factor—price results for ESCO customers. In other words, the Commission has determined that the retail energy market is not "workably competitive," because, according

[6] Moreover, as fully set forth in Petitioners' Reply Memorandum of Law, none of the FERC cases cited for the Commission's *post hoc* workably competitive theory are applicable, since they all involved wholesale rates in interstate markets. *See* Reply Memorandum of Law in *Matter of Family Energy, Inc.* filed with Petitioners' Initial Comments on PSC Whitepapers (June 6, 2016) as Attachment 1, at 9-11

to the Commission, "most mass market customers participating in the market did not receive savings." PSC Mem. at 43.[7]

As an initial matter, if the Reset Order were truly intended to achieve customer cost savings, then one would expect a corresponding obligation for the utility to refund customers in that same locality whenever an ESCO beats the utility's price. But no such requirement is made of utilities under the Reset Order. Surely, then, the "workably competitive" market, as defined by the Commission, cannot be achieved until price guarantees are provided by all market participants. More importantly, the Commission's "workably competitive" definition is uneconomic because competitive markets simply do not guarantee lower prices, rather prices in a competitive market will go up and down. Indeed, price fluctuation is one of several features of a truly competitive market, which, in the case of the retail energy market, also includes innovative energy efficiency products and customer choice, both of which will be reduced if ESCOs exit the market because of the price and source guarantees of the Reset Order. *See Affidavit of Charles J. Cicchetti*, dated May 6th, 2016, at ¶¶ 57-59 ("Cicchetti Aff.").[8]

Nonetheless, contrary to the Commission's findings, ESCOs have generally outperformed utilities when all customer categories are compared, and full service retail prices in fact declined after ESCOs entered the retail energy market in 1997. Cicchetti Aff. at ¶ 25. Thus, even though the Commission's workably competitive definition is unsound and too narrowly focused on cost savings, an analysis of the market since ESCO entry

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[7] Citing Case 12-M-0476, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State, Order Granting Requests for Rehearing and Issuing a Stay (issued April 25, 2014), at 10-11.

[8] A true and accurate copy of the Ciccetti Aff. is attached hereto and fully incorporated as if set forth herein, as Exhibit C. In addition, a corresponding affidavit of John R. Morris, sworn to May 9th, 2016 ("Morris Aff.") is attached hereto and fully incorporated as if set forth herein, as Exhibit D.

factual rebuts the Commission's cost-savings concerns. Moreover, the Reset Order's "price fix" does not solve the "workably competitive" problem, as alleged by the Commission. If anything, application of the Reset Order will make the mass energy retail market *less* competitive by, in part, causing the exit of ESCOs who cannot comply with the Reset Order's price guarantees, and forcing customer migration to the remaining market participant—utilities. A return to the monopolized retail energy market of the early 1990s cannot be what the Commission has envisioned, but is exactly what will occur should the Reset Order stand.

For these additional reasons, the Reset Order is beset with, and based upon, factual errors and Petitioners' request for rehearing must be granted.

B. The Reset Order is *per se* arbitrary and capricious as it contravenes the Commission's own rules

It is well-settled rule of New York administrative law that an administrative agency acts arbitrarily and capriciously when it fails to conform to its own rules and regulations or comply with its own orders. In issuing the Reset Order, the Commission has done just that.

By its own admission, the Commission determined to "transition away from [the] retail market" and promulgate the Reset Order because of an allegedly voluminous number of customer complaints concerning ESCOs. This, however, was patently arbitrary and unreasonable. The number of complaints cited by the Commission – a total of 5,044 in 2015—amount to *less than one percent* of all ESCOs' customers in New York. Also, if the complaint data related to one particular ESCO were removed, the number of complaints concerning the remaining ESCOs actually *decreased* in 2015. The Commission's justification for promulgation of its Reset Order -*i.e.*, the absolute number of customer complaints

received—is factually incomplete and erroneous as it failed to quantitatively or qualitatively assess those complaints in the context of the ESCO market at large. Any statistically defensible analysis of complaints in the ESCO market shows that the Commission has drastically overstated the occurrence of customer complaints here. The Commission's factually erroneous analysis of customer complaints must not form the basis of such a far-reaching and consequential exercise of regulatory power. Given these factual errors, Petitioners' requests for rehearing should be granted.

Moreover, in relying upon customer complaints to justify application of the Reset Order to all ESCOs, the Commission has arbitrarily disregarded its own established procedures set forth in N.Y.C.R.R. Title 16, Part 12, for investigating and adjudicating customer complaints. Rather than availing itself of the complaint resolution procedures set forth in its own regulations, the Commission instead asserts that the Reset Order seeks to address ESCOs' conduct that "do[es] not rise to the level of deceptive marketing proscribed by the UBP," and/or for which "customers often have no evidence" to support their complaints. PSC Mem. at 52. This is no excuse: it simply confirms that the Commission has eschewed the necessary investigation and adjudication of ESCO customer complaints, in favor of subjecting all ESCOs to a single remedy regardless of the underlying facts of those complaints. Even if "many more consumers may not be satisfied with their services but choose not to formally complain"—again, an assertion for which the Commission offers no independent factual support (and, in fact, factual support to the contrary exists)—the Commission is nonetheless required to satisfy the requirements of N.Y.C.R.R. Title 16, Part 12, rather than punish all ESCOs for the alleged improper conduct of a few. Because it

failed to comply with its own rules and regulations, the Reset Order is *per se* arbitrary and capricious and legally erroneous and rehearing should be granted.

C. The Reset Order is incapable of implementation

In many respects, the Reset Order is incapable of implementation, and cannot be complied with as a simple matter of fact. Indeed, the DPS Staff has essentially conceded as much during Collaborative Meetings, and the Commission's recent Notices further demonstrate that the agency is aware that the Reset Order suffers from fundamental errors of fact. Likewise, the very fact that Staff issued a multi-page Guidance Document—in three separate versions—is further evidence that the Reset Order suffers from significant factual defects.

1. The Commission admits that the guaranteed savings requirement is based on factually incompatible comparisons

During recently held Collaborative Meetings, DPS Staff has essentially conceded that comparison of ESCOs' rates to utility rates—either for price comparison or for price prediction (to offer a savings guarantee) —is not possible. Ms. LuAnn Scherer, the DPS's Deputy Director of Consumer Services, made a number of key admissions firmly establishing that utilities' ability to spread costs over time through rate cases (which ESCOs cannot do) makes comparison of prices between ESCOs and utilities infeasible. Specifically, Ms. Scherer commented that under the Reset Order:

- Utilities can "do off-cycle adjustments" or "true ups" after the fact, which ESCOs don't have the ability to do;
- it is "difficult [] to benchmark against the utility price because of the inequities, the timing issues" and explaining that "during the polar vortex, NIMO was able to spread the cost of the impact of the polar vortex over a certain number of billing periods . . . over a six-month period. The ESCOs don't really have the ability to do that . . . .."; and that

- "[y]ou've all kind of convinced us that the utility comparison is not the way to do it".

See Exhibit E, Collaborative Mar. 28, 2016, Excerpts #1, 2 and 4.[9]

Seemingly recognizing that its Reset Order requires comparison between incomparable rates, the Commission itself proceeds to "hedge," and submit that ESCOs "arguably" should be able to operate subject to rate controls. PSC Mem. at 47. The Commission fails to appreciate, however, the fact that ESCOs lack the market advantages that the Commission alleges, which are uniquely experienced by utilities. In addition to a utilities ability to spread costs over time through rate cases, which DPS Staff has acknowledged that ESCOs cannot do, there are a number of other significant differences between utilities and ESCOs which make it economically unreasonable and arbitrary to compare the two for purposes of the guaranteed price requirement. For example, utilities have different and more stable sourcing options than ESCOs, a larger and more diversified customer base which allows wholesale market price swings to be more easily absorbed, and can rely on assurances from the PSC that they will receive a just and reasonable rate. By regulatory design and circumstance, utilities face less risk and have relatively lower hedging costs than ESCOs do. ESCOs do not benefit from any of the same factors or assurances that utilities do, and the price comparisons made by the Commission in promulgation of its Reset Order are therefore factually unsound and unfair. Accordingly, Petitioners' request for rehearing should be granted.

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[9] *See* Affidavit of Thomas Puchner, sworn to May 9, 2016 (Puchner Aff. II"), at Ex. B ("Collaborative Excerpts"). A true and accurate copy of the Puchner Aff. II was filed as Attachment II to the Initial Comments of Family Energy, Inc., Major Energy Services, LLC and Major Energy Electric LLC on the PSC Whitepapers, filed June 6, 2016. A true and accurate copy of the Collaborative Excerpts is attached hereto as Exhibit E, for ease of reference.

2. ESCO compliance with the retroactive refund of the guaranteed savings requirement is impossible

Under the current market design, it is virtually impossible for ESCOs to provide a "guaranteed savings" product. This is due to numerous factors, including: (1) lack of transparency as to derivation of utility supply prices; (2) the ability of utilities to set prices below market rates through rate cases; (3) the inconsistency in the timing of utility price changes across New York State; and (4) the inconsistency of determining utility prices generally. Simply put, the "guaranteed savings" requirement mandates ESCOs to operate at a loss, or bear all of the considerable uncertainty of the energy commodity market. Such a scenario will lead to the exit of ESCOs from the retail energy market altogether, which surely could not be the intended purpose of the Reset Order.

Importantly, none of the solutions provided in the various Staff Guidance documents or the Reset Order answer this fundamental uncertainty—they simply offer a way to "true-up" customer accounts after-the-fact without understanding the complex financial and commodity transactions that support ESCO prices and products. Nor does this information offer a way to predict future utility rates. ESCOs in New York do not have the ability to benchmark from forward looking "price-to-compare" contracts, as exist in other States, and the DPS Staff has failed to provide equivalent forward-looking information to ESCOs. In this way and others, again, comparisons to utility default service pricing is factually inappropriate because utility rates are not fully unbundled and do not reflect an apple-to-apples costs compared to ESCO commodity prices. The Commission should grant Petitioners' request for rehearing to correct these, and other, factual errors underlying the Reset Order.

3. The eligible energy-related value-added service requirement is arbitrarily designed

The Reset Order further requires that any energy supply contract that does not limit what ESCOs can charge a mass-market customer must offer an eligible energy-related value-added service, such as a guarantee of an electricity product derived from at least 30% renewable sources. This, too, is factually circumspect. The Commission opines that value-added products currently offered by ESCOs— "such as frequent flier miles or gift cards" – cannot "offer[ ] a value comparable" to what those ESCOs charge. This subjective generalization ignores the relative value that ESCOs' loyal customers may assign to such rewards, in contrast to the supposed savings they might realize from switching to utility service. Indeed, DPS Staff has conceded in recent Collaborative Meetings that such rewards should be considered value-added because they may provide customers "behavioral motivation" to focus on energy usage. [10] The Reset Order must not be allowed to stand on such subjective and erroneous generalizations, and the Commission should grant Petitioners' request for rehearing.

4. The limitation of eligible energy-related value-added services to renewable electricity products is irrational and inconsistent with the policy of the Reset Order

With respect to the renewables product, the Reset Order is particularly erroneous. As explained at length by the Commission, the Reset Order was aimed at the laudable goal of protecting customers from excessive costs. Unfortunately, because a price guarantee cannot be provided, ESCOs that intend to market under the new rules will realistically only be able to offer a renewable energy product (if a compliant product can even be developed) that may, in fact, cost the customers more money. This result is

[10] *See* Exhibit E (Collaborative Transcripts), March 28, 2016 Excerpt #3.

irrational and inconsistent with the central policy of the Reset Order itself. While renewable energy is a worthy goal, it was not necessarily the purpose of the underlying proceedings (or the Reset Order) itself to promote clean energy investment by ESCOs or their customers. Certainly, this does not advance the goal of price protection for mass-market customers.

It was further arbitrary for the Commission to identify only a single energy-related value-added service—namely renewable electricity—that an ESCO could provide customers to avoid controls on their rates. Contrary to the Commission's assertion, the pathway toward approval of additional energy-related value-added services that could comply with the Reset Order is not at all "clear," because the Order does not describe what they could be. PSC Mem. at 50. An ESCO must spend a "massive" amount of resources to devise what it regards to be an "innovative and beneficial" (*id.*) value-added product, but risk that product's ultimate rejection by the PSC. The Reset Order therefore places ESCOs interested in developing new energy-related value-added services in the position of failing to comply due to a complete lack of guidance as to what those services must entail.

The Commission also incorrectly assumes that "most or all current mass market ESCO customers could be served under renewable products." PSC Mem. at 51. This is not true: the Reset Order makes a renewable energy supply option possible only for electricity customers, not for gas customers. Hence, ESCOs providing solely natural gas are subject to the Reset Order's rate controls without exception. Even so, the Reset Order offers no evidence that enough renewable energy exists for all ESCOs to provide energy-related value-added services to the customers who desire them. On this point as well, DPS Staff has made admissions in the recent Collaborative Meetings that undercut the premise of imposing a single renewable energy value-added option. This is because Staff concedes that

the PSC in the past has identified fixed-rate products as a value-added products that provide price certainty to customers. (Collaborative, Mar. 29, 2016, Excerpt #3 (stating that "the Commission has also said that a fixed-rate product is a value-added product [due to] its price certainty for customers")).

The Reset Order's alternatives of controls on ESCOs' rates, or the requirement that ESCOs provide mass-market customers with an electricity product consisting of at least 30% renewable sources, therefore, are factually unsound remedies for the alleged absence of "workable competition" from the retail energy market, and should be reconsidered upon a grant of rehearing.

D. The Reset Order violated Petitioners' due process rights as set forth in SAPA

It is well-established that licenses are valuable property rights that cannot be revoked without due process of law. Pursuant to the Due Process Clauses set forth in the Fourteenth Amendment to the United States Constitution and Article I, § 6, of the New York Constitution, notice and an opportunity to be heard are necessary before the PSC may take Petitioners' property away. Here, each Petitioner's "eligibility" to operate as an ESCO in New York constitutes a license under SAPA and the Commission's own orders. Because the Reset Order seeks to deny Petitioners those licenses (or to severely curtail them) without affording them the notice or opportunity to be heard that SAPA Article 4 requires, the Reset Order is legally defective and violates SAPA and Petitioners' due process rights. Rehearing Petition, at 17-20.

Specifically, SAPA § 401(1) provides that "[w]hen licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning adjudicatory proceedings apply. For purposes of this act, statutes providing an

opportunity for hearing shall be deemed to include statutes providing an opportunity to be heard." As such, the UBP expressly state that consequences for an ESCO – i.e., "restrictions on an ESCO's opportunity to sell electricity and/or natural gas to retail customers" (Puchner Ex. B, § 2.D.6.b.) – "shall not be imposed until after the ESCO is provided notice and an opportunity to respond." *Id.* § 2.D.6.a.3.

Despite this procedural protection, the Commission failed to provide Petitioners and other parties any notice or opportunity to respond prior to issuing the Reset Order. The Reset Order's requirement that ESCOs either (1) guarantee that a retail customer will pay no more than a customer of an utility or (2) provide a contract for an electricity product derived from at least 30% renewable sources, significantly reduces Petitioners' customer base and revenue, forces layoffs of employees, and renders worthless the investments made in reliance upon the ESCO eligibility license requirements. The Reset Order so severely restricts an ESCO's opportunity to sell to retail customers that the Commission should have afforded ESCOs notice and opportunity to respond to the Order prior to its issuance. Because it did not, and because ESCO "eligibility" constitutes a license under New York law (and the Commission's prior orders), the Reset Order was issued in violation of Petitioners' due process rights reflected in SAPA § 401 and UBP § 2.D.6.a.3, and must be annulled. Rehearing Petition, at 21.

E. The Reset Order Violated SAPA's Rulemaking Requirements

Assuming that the Reset Order constitutes a "rule" pursuant to SAPA § 102(2)(a)(ii), the Commission's August 12, 2015 Notice also failed to satisfy SAPA § 202(1)(f)(v)'s requirement to specify the "the 'subject, purpose and substance'" of the Reset Order – particularly its imposition of restrictions on what ESCOs may charge their mass-

market customers. Nor did any other document, including the Notice of Technical Conference or the Report dated November 5, 2015, of the Collaborative Regarding Protections for Low Income Customers of Energy Service Companies (the "ESCO Collaborative Report—achieved the necessary "'substantial compliance' with [SAPA's] notice requirements." PSC. Mem. at 69; SAPA § 202(8).

Neither of these documents, nor the actual August 12 Notice claimed in the Reset Order, afforded ESCOs any notice of the Commission's intention to set the rates they could charge mass-market customers. As the Commission knows, such a mandate was mentioned only in a comment (1) made by organizations other than the PSC, (2) submerged within a record more than 5,000 pages long, and (3) resulting from a collaborative that purported to concern solely "protections for low income customers."[11] Moreover, Petitioners never received actual notice: in fact, the Petitioners here have submitted affidavits attesting that they were "taken by surprise" when the Reset Order's price controls were applied to all mass market customers. Donnelly Reply Aff. ¶ 19, Small Reply Aff. ¶ 13. Notwithstanding its substance, it is fundamentally unfair to order Petitioners and other parties to comply with a new regulatory regime they were not given notice of, nor opportunity to be heard on. The Reset Order should be annulled, and rehearing granted, for this independent reason.

F. The Reset Order Violates the United States and New York State Constitutions

The Reset Order not only abridges Petitioners' rights to due process, but it is also legally defective as it violates the United States and New York State Constitutions. Petitioners' request for rehearing should therefore be granted on these bases.

[11] Case 12-M-0476, Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies (dated Nov. 5, 2015).

1. The Reset Order violates the Contracts Clause of the United States Constitution.

The Contracts Clause of the United States Constitution requires that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. Const. art. I, § 10, cl. 1. Pursuant to this "Contracts Clause," a State may enact a law impairing a contractual relationship between two private parties only if the law is both "reasonable and necessary to serve an important public purpose." *U.S. Trust Co. of N.Y. v. State of New Jersey,* 431 U.S. 1, 25 (1977). But the Reset Order is neither reasonable, nor does it serve a substantial public purpose. Indeed, the Commission's claimed non-specific interest in "protect[ing] residential and small commercial consumers" is factually unsupported and fails to satisfy the threshold of significance, and cannot substantiate the Reset Order's constitutionality under the Contracts Clause.

First and foremost, the Reset Order does not serve a substantial economic purpose. While purporting that the Reset Oder will protect customers, the PSC utterly ignores the detrimental effect that the Reset Order will have on competition in the retail energy market, and on the customers participating in such a market. The Reset Order's enforcement would curtail or end ESCOs' service to mass-market customers, thereby forcing satisfied customers back into the service of the same utilities that they had previously (and voluntarily) abandoned.

Next, the Commission's justification for this instruction is factually unsupportable. According to the Commission, all this upheaval is necessary to remedy the complaints of *a fraction of one percent* of those customers. This is not a proportionate solution. There are more than one million ESCO customers in New York, constituting less than 6% of the State's overall population. Among these one million customers, the PSC

received only 5,044 complaints in 2015. Again, even assuming that each of the 5,044 complaints came from a separate ESCO customer, only approximate ½% of all mass-market ESCO customers complained about their service. Rather than promote competition in the retail energy markets, the Reset Order stands to restrict it in response to the protests of the few, and therefore does not serve a substantial public purpose.

Even assuming, *arguendo*, that the Reset Order did serve a substantial purpose (which it does not), the Reset Order also violates the Contracts Clause because it does not employ "reasonable conditions . . . of a character appropriate" to accomplish its stated purpose. *U.S. Trust Co.*, 431 U.S. at 22. In order to satisfy the test of reasonableness and appropriateness, a statute must "not . . . impose a drastic impairment [of contracts] when an evident and more moderate course would serve its purposes equally well." *Id.* at 31. Even though the PSC has received complaints from only a small portion of unidentified ESCOs' mass market customers, it issued the Reset Order to impose sweeping rate and electricity source restrictions on all ESCOs in the mass market, without regard to any individual ESCO's record of service to its customers. Rather than summarily punish all ESCOs by ordering widespread changes to the industry, the Commission should have acted to address each customer complaint, as required by its established procedures in the N.Y.C.R.R. for complaint investigation and adjudication.

Because the Commission could and should have pursued more narrowly tailored strategies to rectify the complaints that it has fielded from a fraction of one percent of ESCOs' mass-market customers, the Reset Order's restrictions on rates charged and electricity supply offered to those customers are legally and factually erroneous. For this reason, and because the Reset Order does substantial harm to Petitioners' contractual

obligations to mass-market customers and does not serve a significant public purpose in any event, Petitioners' request for rehearing should be granted. Rehearing Petition, at 31.

2. The Reset Order is a regulatory taking without just compensation, in violation of the United States and New York Constitutions

The United States and New York Constitutions prohibit the taking of private property, such as Petitioners' ESCO eligibility licenses (as discussed *supra*), for public use without just compensation. U.S. CONST. amend. V; N.Y. CONST. art. I, § 7(a). Generally, an unconstitutional taking occurs upon the promulgation of a regulation that deprives the economically viable use of one's property. *Malta v. Bd. of Zoning Appeals of Town of Perinton*, 159 A.D. 2d 959, 960 (4th Dep't 1990). The Supreme Court requires courts to consider the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action, when determining whether a taking has occurred. *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (internal quotation marks omitted).

Enforcement of the Reset Order will have a severe economic impact upon Petitioners, and others in the retail energy market. In reliance upon their ESCO eligibility licenses—property interests (as discussed *supra*) allowing them to supply energy to mass-market customers—Petitioners have made significant investments in hedged commodities; and have spent substantial funds to draft, advertise for, and establish variable rate and fix-rate service contracts that the Reset Order requires to become obsolete upon expiration of the current term (month-to-month or otherwise). These investments were reasonable: Petitioners appropriately assumed, given common-law authority and the Commission's position over nearly two decades concerning the absence of its jurisdiction to set ESCOs'

prices, that the Commission could not and would not compromise the profitability of their service to mass-market customers by limiting what ESCOs could charge.

Petitioners' assumption unexpectedly proved incorrect when the Commission issued the Reset Order. Upsetting years of precedent, the Reset Order's ratemaking and electricity supply controls interfere with Petitioners' reasonable investment-backed expectations, in that development of a compliant product that could be sold at or under the price charged by the utility is virtually impossible. As such, Petitioners' use of their licenses to supply energy to mass-market customers will no longer be economically viable. Because the Reset Order's ratemaking, imposed in the face of almost twenty years of prohibitive precedent, deprives Petitioners of the economically viable use of their eligibility licenses and investments to supply energy to mass-market customers, the Reset Order violates the Takings Clauses of the United States and New York Constitutions. For this reason, Petitioners' request for rehearing on the Reset Order should be granted. Rehearing Petition, at 30.

G. The Reset Order violates SEQRA

Although the Reset Order allows an ESCO to guarantee that at least 30% of the electricity provided to a residential customer will derive from renewable energy sources, it will actually reduce mass market customers' utilization of those sources in New York. This is so, because utilities (*i.e.*, the alternative to ESCOs) have no equivalent incentive to originate additional energy supplies from renewable energy sources beyond the State-mandated minimum requirements. ESCOs have a significant incentive to deliver cost-effective renewable energy, by contrast, as a means of distinguishing themselves from

utilities and attracting environmentally-conscious customers. Thus, ESCOs frequently offer more renewable energy options than utilities do for mass-market customers.

Because the Reset Order's enforcement will require the shutdown of many ESCOs in New York, the migration of ESCO customers back to utility service will inevitably result, and the use of renewable energy sources among mass-market customers will likely decrease. Accordingly, to the extent that the Reset Order constitutes a "rule" (or even "policy making"), it is an "action" that *may* affect the environment, and the Commission was required to, but did not, perform an analysis of the Order's environmental impact. Consequently, the Commission has erroneously violated Article 8 of the New York Environmental Conservation Law (known as the State Environmental Quality Review Act, or "SEQRA") and the related regulations set forth at 6 NYCRR Part 617, and rehearing should be granted for this independent reason. Rehearing Petition, at 31-33.

CONCLUSION

Petitioners appreciate the opportunity to submit these Comments regarding the Petition for Rehearing in response to the Commission's SAPA notice. Petitioners reserve the right to submit additional Comments as needed.

Dated: June 20, 2016

Respectfully submitted,

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