

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

FAMILY ENERGY INC., MAJOR ENERGY
SERVICES LLC, and MAJOR ENERGY ELECTRIC
LLC,

Index No. 874-16

Petitioners/Plaintiffs,

For a Judgment Pursuant to New York CPLR Article 78

v.

NEW YORK STATE PUBLIC SERVICE
COMMISSION,

Respondent/Defendant.

**REPLY MEMORANDUM OF LAW IN SUPPORT OF THE STAY AND
ANNULMENT OF THE RESET ORDER**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

FAMILY ENERGY INC., MAJOR ENERGY
SERVICES LLC, and MAJOR ENERGY ELECTRIC
LLC,

Index No. 874-16

Petitioners/Plaintiffs,

For a Judgment Pursuant to New York CPLR Article 78

v.

NEW YORK STATE PUBLIC SERVICE
COMMISSION,

Respondent/Defendant.

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
THE STAY AND ANNULMENT OF THE RESET ORDER**

PRELIMINARY STATEMENT AND EXECUTIVE SUMMARY

Petitioners/Plaintiffs Family Energy Inc., Major Energy Services LLC, and Major Energy Electric LLC (collectively, "Petitioners") submit this Reply Memorandum of Law in further support of: (1) their Amended and Supplemental Verified Petition and Complaint (the "Petition") seeking annulment of the "Order Resetting Retail Energy Markets and Establishing Further Process," issued by the New York State Public Service Commission ("PSC") on February 23, 2016 (the "Reset Order"); and (2) their application for a stay of enforcement of the Reset Order pending this proceeding's adjudication.

The Reset Order should be annulled for any of several independent reasons. First, inasmuch as the Reset Order limits what energy service companies ("ESCOs") can

charge residential and small-market non-residential customers, it constitutes ratemaking in excess of the PSC's jurisdiction. *See* Point I, *infra*. Second, the promulgation of the Reset Order was arbitrary and capricious. *See* Point II, *infra*. Third, the Reset Order violates Petitioners' rights under the Due Process Clauses of the United States and New York Constitutions, the Contracts Clause of the United States Constitution, and/or the Takings Clauses of the United States and New York Constitutions. *See* Point III, *infra*. Fourth, because it failed to publish appropriate advance notice of its intention to promulgate the regulations incorporated among the Reset Order's provision, the PSC violated the notice requirements of the State Administrative Procedure Act ("SAPA"). *See* Point IV, *infra*. Fifth and finally, because the PSC did not undertake any analysis of the environmental impact of the Reset Order's enforcement, its promulgation violated the State Environmental Quality Review Act ("SEQRA"). *See* Point V, *infra*.

Pending this proceeding's adjudication on the merits, the stay of the Reset Order, in effect since March 4, 2016, should remain in place. Absent a continued stay, Petitioners will sustain irreparable harm, including the loss of residential and small-market non-residential customers, necessary abandonment of contracts with vendors, and the ultimate shutdowns of their businesses. *See* Point VI, *infra*. Because such harm far exceeds the PSC's interest in subjecting ESCOs to ratemaking in excess of PSC jurisdiction and in violation of Petitioners' statutory and constitutional rights, the equities balance in Petitioners' favor. *See* Point VII, *infra*.

This reply memorandum closes with two final arguments: first, that this proceeding properly constitutes a hybrid CPLR Article 78 proceeding and declaratory judgment action (*see* Point VIII, *infra*); and second, that the amicus brief served by AARP

and MFY should be disregarded, inasmuch as relies almost entirely upon uncorroborated sources (including several sources self-published by AARP) that lie outside the record (*see* Point IX, *infra*).

Petitioners respectfully request that this Court maintain the pending stay of enforcement of the Reset Order, and ultimately grant the Petition to invalidate it.

STATEMENT OF FACTS

A reply statement of facts is set forth in the reply affidavit of Thomas F. Puchner, Esq., sworn to on May 9, 2016 (“Puchner Aff. II”). Other documents referenced herein include the Reply Affirmation of Jeffrey Donnelly, dated May 6, 2016 (“Donnelly Reply Aff.”); the Reply Affirmation of Adam Small, dated May 6, 2016 (“Small Reply Aff.”); the principal Affirmation of Jeffrey Donnelly, dated March 2, 2016 (“Donnelly Aff.”); the Affirmation of Levi Moeller, dated March 2, 2016 (“Moeller Aff.”); the Affidavit of James Egan, sworn to on March 2, 2016 (“Egan Aff.”); the principal Affidavit of Thomas F. Puchner, Esq., sworn to on March 3, 2016 (“Puchner Aff. I”); Petitioners’ principal Memorandum of Law dated March 3, 2016 (“Family Energy Mem.”); and the PSC’s Memorandum of Law served on March 28, 2016 (“PSC Mem.”).

ARGUMENT

POINT I

THE RESET ORDER WAS *ULTRA VIRES* AND EXCEEDED THE PSC’S JURISDICTION

The PSC insists that its decision to promulgate the Reset Order is entitled to deference “where . . . the subject matter lies within the [PSC]’s field of expertise.” PSC Mem. p. 36 (*citing Matter of N.Y. State Council of Retail Merchants v. Pub. Serv. Comm’n*, 45 N.Y.2d 661, 672 (1978)). That is not so in this proceeding. Whereas the PSC may be

entitled to deference with respect to its broad powers to regulate jurisdictional gas and electric corporations, it is not with respect to matters of statutory construction – for instance, whether ESCOs are “gas corporations” or “electric corporations” under the New York Public Service Law (“PSL”), and therefore whether the PSL allows the PSC to set the rates ESCOs charge their customers. *See Matter of Verizon N.Y., Inc. v. Pub. Serv. Comm’n*, 137 A.D.3d 66, 68-69 (3d Dep’t 2016).

Similarly, no deference is available to the PSC concerning statutory or regulatory interpretations that it asserts as its positions in litigation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (holding that “[d]eference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate”); *Jiggetts v. Perales*, 202 A.D.2d 341, 343 (2d Dep’t 1994) (“[i]nasmuch as it is the Department’s litigation posture, rather than its rulemaking authority, [which was in question], we do not apply the rule of due deference”) (citing *Bowen*, 488 U.S. at 213).

Given these principles, the PSC’s conclusion that it possesses the authority and the jurisdiction to subject ESCOs to the Reset Order is not subject to this Court’s deference. More important, it is incorrect. Because the plain language of the PSL, combined with the PSC’s past precedent, did not permit the PSC to set ESCOs’ rates, as the PSC did in the Reset Order, the Order is *ultra vires* and beyond the PSC’s jurisdiction, and should be annulled.

A. The Reset Order fundamentally misconstrues the bedrock ESCO regulatory scheme

As noted in the accompanying Counterstatement of Facts offered in the affidavit of Thomas F. Puchner, Esq., sworn to on May 9, 2016 (“Puchner Aff. II”), the four bedrock PSC orders regarding the regulatory scheme for ESCOs selling natural gas (the

“Gas Marketer Order”) and electricity (Opinions 96-12, 97-5 and 97-17) all included 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.

Further, the PSC expressly held in Opinion 97-17 that PSL Article 4 regulation was inapplicable to ESCOs, because they do not satisfy the PSL’s definitions of “gas corporations” or “electric corporations.” Opinion 97-17, at pp. 31-35. Moreover, the PSC repeatedly maintained that position in New York State Supreme Court, and in Opinion 97-17 adopted the holdings of Justices Keegan and Harris as **binding** on the issue.

In the Reset Order, the PSC rejects the entire “two-tier” regulatory scheme in place for two decades by claiming “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 p. 10 (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 ratemaking when it promulgated the Reset Order.** See PSL §§ 65(1) (“charges made or demanded by any . . . gas corporation [or] electric corporation . . . for gas, electricity or any service rendered . . . shall be just and reasonable”); 66(1), (5) (general supervision of gas and electric corporations and authority to determine rates that are “just and reasonable”); 72 (power to “fix just and reasonable prices”).

The Reset Order claimed “broad legal authority to oversee ESCOs, pursuant to its jurisdiction in Articles 1 and 2 of the Public Service Law,” and by virtue of ESCOs’ access to utility distribution services. Reset Order pp. 8-9 (*citing* PSL §§ 5, 53). It further commented that, in creating ESCO “eligibility requirements” and the “UBP in 2003,” the PSC had invoked PSL § 66(5) to direct utilities to incorporate those requirements into their tariffs. Reset Order p. 10. Importantly, however, none of these authorities stands for the proposition that the PSC may regulate the rates that ESCOs charge their customers.

Pursuant to PSL § 65, the authority to regulate utility rates extends only to services provided *by the utility*. By contrast, the rates that ESCOs charge are beyond the proper reach of the PSC, because 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 rate regulation. The Reset Order is *ultra vires* for this reason alone.

To the extent that the PSC relies on PSL § 66-d for authority to regulate gas ESCOs, its arguments are flatly contradictory and unconvincing. First, it argues that “the Legislature provided only limited authorization for gas restructuring.” PSC Mem. p. 24. Two pages later, however, it asserts “plenary” authority, including under § 66-d. In doing so, the PSC selectively quotes the statute. PSL § 66-d(2) reads:

The [PSC], upon its own initiative or upon application by a natural gas producer or a consumer of natural gas in any year and after notice and hearing shall, upon such terms and subject to such conditions as the [PSC] considers just and reasonable, have the authority to order any gas corporation to transport or contract with others to transport gas under contract for sale by such producer or owned by such consumer provided that, the [PSC] finds that the gas corporation has available capacity, that no undue burden shall be placed upon the gas corporation or its

ratepayers and that the ability of the gas corporation to render adequate service to its customers is not impaired.

Thus, 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* or the PSC’s authority to impose “just and reasonable” rates on gas ESCOs.

Likewise, *Rochester Gas and Electric Corp. v. Public Service Comm’n of State of New York*, 71 N.Y.2d 313 (1988), does not stand for the proposition that § 66-d, or any other PSL provision, authorizes the [PSC] to regulate ESCO retail gas rates. *Rochester Gas and Electric* involved a challenge to the PSC’s authority under § 66-d to compel the plaintiff (“RG&E”) to transport “non-owned gas” (*i.e.*, third-party-owned gas) using its facilities. The language quoted by the PSC (PSC Mem. p. 27) refers to the “regulatory compact” by which utilities, which hold government franchises and occupy the public right-of-way, are “clothed with the public interest” and undertake “duties which affect the public at large.” This “regulatory compact” *quid pro quo* has no relevance to competitive ESCOs, which are not “clothed with the public interest” and do not occupy the public right-of-way. Thus, *Rochester Gas and Electric Corporation* is simply inapposite.

B. The PSC’s justification for the Reset Order is circular and irrational

The PSC’s argument in support of its authority to promulgate the Reset Order is circular and meritless. The 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 Mem. pp. 24-25.¹

- The PSC therefore contends that the Reset Order did not “set the rates or otherwise determine[] the price that ESCOs can charge.” PSC Mem. p. 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. p. 26).²
- Instead of “setting ESCO rates” under Article 4, the PSC claims, the Reset Order “exercised [the PSC’s] Article 4 jurisdiction with respect to public utilities” to control the “contract offerings” that ESCOs can sell through utility retail access tariffs. PSC Mem. p. 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. pp. 26, 28.

The PSC therefore claims that it is entitled to invoke PSL Article 4 to establish “just and reasonable” rates for entities, such as ESCOs, that it concedes to be exempt from Article 4. 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* and affected by an error of law.

Matter of Campo Corp. v. Feinberg, 279 A.D. 302, 306 (3d Dep’t 1952), does not counsel otherwise. *Campo* concerned whether the PSC could prohibit the *provision of electricity service to submetering building owners*. Critically, the PSC necessarily had authority to regulate the utility’s sales of electricity to the submetering building owner: such sales by a

¹ The PSC contradicts itself, however, by arguing that ESCOs are “gas corporations” or “electric corporations” elsewhere in its memorandum of law (at pp. 28-31), and by construing the State Legislature’s amendment of HEFPA somehow to change the PSC’s Article 4 jurisdiction by implication. PSC Mem. p. 35.

² 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, sworn to on May 6, 2016 (“Donnelly Reply Aff.”).

utility fell squarely within the scope of the PSC's ratemaking authority. By contrast, utilities do not provide commodity service to ESCO customers. Nothing in PSL Article 4, therefore, authorizes the PSC to regulate the prices of retail commodity sales by ESCOs or other non-jurisdictional entities.

C. The purported "workably competitive presumption" fails

1. The "workably competitive presumption" is not supported by statutory authority or the foundational PSC orders

Notwithstanding the absence of authority for the Reset Order in PSL Article 4, the PSC further rationalizes that the Reset Order "is an appropriate exercise of the [PSC's] obligation to ensure that deregulated gas and electric commodity markets are workably competitive and to impose conditions needed to meet that goal." PSC Mem. p. 22. Neither the concept of a "workably competitive" market, nor the PSC'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, the PSC adopted it, 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 *electricity generation* bought and sold by utilities – a matter properly within the scope of the PSC's authority over utilities, and entirely different from the retail rates set by non-jurisdictional ESCOs. Simply put, the PSC cannot analogize to *Energy Association* or any other Court decision to confer jurisdiction unauthorized by any statute to regulate ESCOs' rates.

2. *Energy Association* and the *FERC* cases cited by the PSC are inapposite

Energy Association is distinguishable from this case, because it challenged various aspects of the PSC's authority pursuant to Opinion 96-12 to restructure traditional

regulated utilities, which themselves unquestionably lie within the PSC's Article 4 jurisdiction. Specifically, *Energy Association* rejected the utilities' argument that the PSC lacked authority to allow market rates for the "generation component of electric service." *Energy Association*, 169 Misc.2d at 936. See Puchner Aff. II, Ex. J, *Energy Association* Petition ¶¶ 77-78 (referring to prices of "electricity generators"). Thus, *Energy Association* concerned not retail prices for energy commodity, but rather generator and wholesale power generator pricing by utilities that are surely "electric corporations" under PSL Article 4.

Justice Harris held numerous of the utilities' claims to be non-justiciable, but in dicta referenced *Elizabethtown Gas Co. v. Federal Energy Regulatory Comm'n* ("*Elizabethtown Gas*"), 10 F.3d 866, 869 (D.C. Cir. 1993), and *Tejas Power Corp. v. Federal Energy Regulatory Comm'n* ("*Tejas Power*"), 908 F.2d 998, 1004 (D.C. Cir. 1990). Neither case supports PSC regulation of ESCOs' rates.

In *Elizabethtown Gas*, the petitioners challenged the Federal Energy Regulatory Commission's ("FERC's") approval of a natural gas pipeline company's ("Transco's") unbundled "merchant service" (or natural gas sales) at market-based rates under the federal Natural Gas Act ("NGA"). 10 F.3d at 868. The petitioners alleged that market-based rates could not be "just and reasonable" under the NGA. In response, the Court noted that, "when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Id.* at 870. The Court ultimately rejected the petitioners' challenge, because the record demonstrated that Transco would "be providing comparable transportation service with respect to all gas supplies whether purchased from Transco or its competitors." *Id.*

Tejas Power asserted that, “[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.” 908 F.2d at 1004. In *Tejas Power*, the Court overturned FERC’s approval of market-based rates, because the record did not contain substantial evidence to support the conclusion that “market forces will keep . . . prices in check.” *Id.* at 1005.

Both *Elizabethtown Gas* and *Tejas Power* involve questions of the applicability of “market rates” for “unbundled” services by an incumbent utility provider that could use its market power to influence prices. While such principles certainly apply to contemplated unbundled generation costs paid or charged by utilities, they are irrelevant to competitive entities, such as ESCOs, that have no such market power. In any case, the Reset Order seeks to remedy alleged marketing practices and price opacity, rather than “market power.” With over 200 ESCOs in existence (Reset Order p. 3), individual ESCOs do not wield the kind of horizontal or vertical market power at issue in the FERC cases.

The remaining FERC cases cited by the PSC are similarly inapposite. *See Fed. Power Comm’n³ v. Texaco Inc.*, 417 U.S. 380 (1974) (market-based rates for wholesale small natural gas producers under the NGA); *California ex rel. Lockyer v. Fed. Energy Regulatory Comm’n*, 383 F.3d 1006 (9th Cir. 2004) (market-based wholesale electricity tariffs as “just and reasonable” under the Federal Power Act); *La. Energy & Power Auth. v. Fed. Energy Regulatory Comm’n*, 141 F.3d 364 (D.C. Cir. 1998) (market-based wholesale electricity and transmission rates); *Cajun Elec. Power Co-op., Inc. v. Fed. Energy Regulatory Comm’n*, 28 F.3d

³ The Federal Power Commission was replaced by the Federal Energy Regulatory Commission.

173 (D.C. Cir. 1994) (market-based wholesale electricity and transmission rates). Thus, all these cases cited in support of the PSC's purported "obligation" to ensure that "market-based rates pass muster" are based on the construction of federal statutes involving deregulation of market participants that had the ability to manipulate prices **charged in the wholesale energy and transmission markets. If these authorities are relevant to New York's energy markets at all, it is to prices charged by the utilities, not by ESCOs.**

Simply put, the PSC invented the term "workably competitive," without any statutory, regulatory, or case law authority to do so. Absent any basis for that term in the PSL, it cannot justify the Reset Order or its ratemaking for ESCOs.

D. ESCOs are not jurisdictional corporations under the PSL

The PSC further contends that it was empowered to issue the Reset Order, because ESCOs are "gas corporations" and "electric corporations" under the PSL. This argument also fails, for several reasons. First, PSC should be judicially estopped from arguing that ESCOs are jurisdictional corporations, because the PSC asserted to the contrary in at least three actions that were pending in this Court during the early days of gas and electric utility restructuring (as well as in Opinion 97-17). Second, the PSC's interpretation of the PSL is simply incorrect, and conflicts with the Keegan Decision in *PULP v. PSC I*, Opinion 97-17, and the common-law "regulatory compact."

- 1. The Commission should be judicially estopped from asserting that it has jurisdiction over ESCOs as "electric corporations" and "gas corporations"**

Judicial estoppel precludes a party who assumed a certain position in a prior legal proceeding and who secured judgment in his or her favor from assuming a contrary position in a subsequent action simply because his or her interests have changed. *Prudential Home Mortg. Co. v. Neildan Const. Corp.*, 209 A.D.2d 394, 395 (2d Dep't 1994). *See also*

Shepardson v. Town of Schodack, 195 A.D.2d 630, 632 (3d Dep’t 1993) (“New York applies the doctrine of judicial estoppel to prevent a party from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding or a prior proceeding.”), *aff’d*, 83 N.Y.2d 894 (1994). The doctrine of judicial estoppel is particularly available to prevent governmental litigants, such as the PSC, from “playing fast and loose with the courts.” *See American Ass’n of Bioanalysts v. N.Y. State Dep’t of Health*, 75 A.D.3d 939, 947 (3d Dep’t 2010); *Shepardson*, 195 A.D.2d at 632. Judicial estoppel should be applied here to prohibit the PSC from arguing that ESCOs, like traditional utilities, are “electric corporations” or “gas corporations” subject to the Reset Order’s ratemaking.

The Public Utility Law Project (“PULP”) has argued unsuccessfully **three separate times** before this Court that ESCOs should be regulated as utilities. In *PULP v. PSC I*, PULP claimed that:

34. HEFPA applies to every gas corporation serving residential customers.
35. Gas marketers and gas aggregators, including marketing subsidiaries of incumbent local gas distribution companies [utilities], are gas corporations subject to the requirements of HEFPA in PSL §§ 30 *et seq.*

See Puchner Aff. II, Ex. E (*PULP v. PSC I*, PULP Verified Complaint). PULP asserted the same allegations in its Amended Verified Complaint. *See id.*, Ex. F (*PULP v. PSC I*, PULP Amended Verified Complaint). The PSC answered both allegations with straight denials. *Id.* Ex. G (*PULP v. PSC I*, PSC Verified Answer, at ¶ 2; *PULP v. PSC I*, PSC Amended Answer, at ¶ 2).

Similarly, in *Energy Association*, PULP argued that PSC had “approv[ed] the provision of electric service to residential customers in violation [of] the rate filing and

nondiscrimination requirements of PSL § 65 and § 66, and the Home Energy Fair Practices Act.” See Puchner Aff. II, Ex. I (*Energy Association*, PULP Verified Petition, dated Oct. 15, 1996, at ¶ 30). PULP also argued that the PSC “unlawfully surrendered or delegated to electric corporations and the market its statutory duty under PSL §§ 66, 71 and 72 to fix just and reasonable rates.” *Id.* ¶ 24.

The plaintiff in that action likewise contended that:

[t]he Public Service Law of the State of New York sets forth detailed requirements regarding the obligation to serve, complaint procedures, billing, termination of service and other such matters. The Commission has no authority to exempt energy service companies that may arise in a deregulated environment from these statutory customer service requirements.

See Puchner Aff. II, Ex. J (*Energy Association*, EA Petition, dated Sept. 18, 1996, at ¶ 76). In its Answers, the PSC denied both allegations. See Puchner Aff. II, Ex. K (*Energy Association*, PSC Verified Answer to PULP, dated Oct. 21, 1996, at ¶ 15); *id.* Ex. L (*Energy Association*, PSC Answer to the Energy Association, dated Oct. 15, 1996, at ¶ 34). **Incredibly, the PSC’s counsel in this proceeding, Jonathan Feinberg, Esq., was “Of Counsel” on PSC’s Verified Answer to PULP, in which the PSC entered a denial of PULP’s allegations that ESCOs were electric corporations subject to HEFPA and PSL Article 4 rate regulation.**

In *PULP v. PSC II*, PULP made the same jurisdictional argument a third time:

ESCOs are “electric corporations” and “utility corporations” as defined by PSL §§ 2(13) and 2(24). As electric corporations they are subject to the requirements of PSL §§ 65 and 65-b. ESCOs are also subject to the provisions of the Public Service Law pursuant to PSL § 5-b.

Puchner Aff. II, Ex. P (*PULP v. PSC II*, Verified Complaint, at ¶ 52).

This time, the PSC moved to dismiss PULP's Verified Complaint, and argued that PULP's claims were barred by collateral estoppel because of Justice Keegan's decision in *PULP v. PSC I* and Justice Harris in *Energy Association*:

this Court's rejection of PULP's position on the merits regarding application of HEFPA . . . collaterally estops PULP

It is noteworthy that this is the third time PULP has attempted to attack a [PSC] decision on HEFPA grounds as part of its effort to force the [PSC] to treat new competitive entrants exactly the same as monopoly utilities. Prior to *PULP v. PSC*, PULP raised HEFPA claims in *Matter of Energy Ass'n v. Pub. Serv. Comm'n.* . . . which were rejected.

Puchner Aff. II, Ex. Q (*PULP v. PSC II*, PSC Notice of Motion and Supporting Affidavit of Jonathan Feinberg, Esq., sworn to Nov. 26, 1997, at ¶¶ 4-5) (emphasis added).

In a subsequent reply affidavit, the PSC asserted that “documents . . . show[ed] the [PSC] method for protecting customers of gas marketers, *inasmuch as neither Article 2 or Article 4 of the Public Service Law apply [sic] to such marketers.*” Puchner Aff. II, Ex. R (*PULP v. PSC II*, PSC Reply Affidavit of Jonathan Feinberg, Esq., sworn to on January 14, 1998, at ¶ 2) (emphasis added). **Remarkably, Jonathan Feinberg, Esq., authored both PSC submissions that argued to this Court in *PULP v. PSC II* that ESCOs were not gas or electric corporations – the opposite of what he argues in this proceeding.**

In *PULP v. PSC I*, *Energy Association*, and *PULP v. PSC II*, Mr. Feinberg and the PSC successfully argued that ESCOs were not “electric corporations” subject to HEFPA or Article 4. Now, nearly two decades later, they try to make the opposite argument to this Court. They should be judicially estopped from doing so.⁴

⁴ To the extent the Court declines to apply judicial estoppel, the PSC's prior inconsistent positions as to whether ESCOs are “gas corporations” or “electric corporations” should be considered judicial admissions carrying significant weight. See *Gomez v. City of New York*, 215 A.D.2d 353, 354 (2d Dep't 1995).

2. The PSC's construction of the PSL is incorrect

ESCOs are not “gas corporations” or “electric corporations” under the PSL, because: (1) ESCOs did not exist at the time the statute and its definitions were enacted (*see* Justice Keegan’s Decision in *PULP v. PSC I*, at p. 27; L.1907, c. 429 (“Public Service Commissions Law,” including the terms “gas corporation” and “electrical corporation”)); and (2) ESCOs lack “authority . . . to lay down, erect, or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places”⁵ (Opinion 97-17, pp. 34-35). Even so, the PSC argues that ESCOs are “gas corporations” because they “own[], operate[] or manag[e] . . . gas plant[s],” which include “real estate, fixtures and personal property, operated, owned, [or] used . . . to facilitate the manufacture, conveying, transportation, distribution, sale or furnishing of gas.” ESCOs operate gas plants, the PSC submits, in facilitating the sale of gas “over utility systems” and the use of “personal property in such sales.” PSC Mem. p. 29.

The PSC contends likewise that ESCOs are “electric corporations” because they “own[], operate[] or manag[e] . . . electric plant[s],” which include “real estate, fixtures and personal property, operated, owned, used . . . to facilitate the generation transmission, distribution, sale or furnishing of electricity for light, heat or power.” ESCOs operate electric plants, the PSC submits, in facilitating the sale of electricity “for use by ultimate consumers.” PSC Mem. pp. 29-30.

These arguments fail, because they are inconsistent with the PSC’s and this Court’s construction of the PSL and with the common-law “regulatory compact.” Both the “wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and

⁵ Contrary to the PSC’s argument, Opinion 97-17 was not limited in scope to the holding that HEFPA was not applicable to ESCOs. PSC Mem. p. 31. To the contrary, the Commission expressly rejected PULP’s argument that ESCOs were “electric corporations.” Opinion 97-17, pp. 33-35.

public places,” referenced in PSL § 66(1) and quoted in Opinion 97-17, and the “real estate, fixtures and personal property, operated, owned, [or] used” to facilitate furnishing of gas or electricity, referenced in PSL § 2(10) and (13) and quoted by the PSC, include **personal property in the nature of fixtures and durable goods used by utilities to furnish electricity and gas**. Such fixtures and property of the distribution system are owned, operated and managed by utilities – not by ESCOs themselves – pursuant to the utilities’ obligations under the PSL to provide distribution service to ESCO customers.

The terms “gas plant” and “electric plant,” moreover, have long been interpreted to bring within the PSC’s jurisdiction only public utilities that use the public rights-of-way for their “gas plant[s]” or “electric plant[s].” In *Matter of Penn-York Natural Gas Corp. v. Maltbie*, 164 Misc. 569 (Sup. Ct. Albany Cty. 1937), the petitioner alleged that it was not a “gas corporation,” and therefore not subject to the PSC’s jurisdiction. The Court commented that “[a] ‘gas plant,’ among other things, is property operated or used in connection with the conveying or transportation of natural gas. A ‘gas corporation’ is one which owns or operates a gas plant. . . . As such it can neither begin construction of a gas plant nor exercise any right or privilege . . . without first having obtained the permission and approval” of the PSC. *Id.* at 572.

In *Fulton Light, Heat & Power Co. v. Seneca River Power Co.*, 123 Misc. 585 (Sup. Ct. Otsego Cty. 1924), the Court similarly explained that the “definition of an ‘electric plant’ . . . refers to the construction of the plant. . . . Transformers are not mentioned but of course would be assumed to be a part of the plant.” *Id.* at 592. *Accord*, *Matter of Niagara Mohawk Power Corp. v. Pub. Serv. Comm’n of State of N.Y.*, 218 A.D.2d 421, 426-27 (3d Dep’t 1996) (holding that the owner of a cogeneration plant, whose retail sales of electricity were

challenged by the utility, was an “electric corporation” required to obtain “PSC approval before an electric company begins construction of an electric plant”).

“The duty [of a utility] to serve the public goes hand in hand with the privilege of exercising a special franchise [*i.e.*, to use the public right-of-way], with the consent of the local authorities, by the occupation of the public highways.” *People ex rel. Cayuga Power Corp. v. Pub. Serv. Comm’n, 2d Dist.*, 226 N.Y. 527, 532 (1919) (Cardozo, J.) (internal citations omitted). Opinion 97-17 relied upon this concept, often called the “regulatory compact,” to conclude that ESCOs, unlike utilities, were not electric corporations, because “‘electric utilities’ [have a] broad array of duties . . . in return for their exercise of a variety of powers traditionally reserved to the sovereign, including eminent domain and the use of public rights-of-way.” Opinion 97-17, pp. 34-35 (*citing Tismer v. N.Y. Edison Co.*, 228 N.Y. 156, 161 (1920) (Cardozo, J.) (noting that “the duty to serve would exist without the statute for it results from the acceptance of the franchise of a public service corporation”); *Matter of Penn. Gas Co. v. Pub. Serv. Comm’n, 2d Dist.*, 225 N.Y. 397, 406 (1919) (Cardozo, J.) (“Even without any statute, [a gas corporation] would be under a duty to furnish gas to the public at fair and reasonable rates. . . . The state in the adoption of this law has not imposed a new burden. It has not created a new duty. It has given new ‘sanction’ to ‘an inherent duty.’”); *Energy Association*, 169 Misc. 2d at 938-40 (discussing the utilities’ claim for entitlement to payment for “stranded costs”).

Thus, the PSC recognized in Opinion 97-17 that ESCOs are fundamentally different from utilities, because they do not have “electric plant[s]” or “gas plant[s]” in the public rights-of-way, and have no underlying duties to serve the public. To interpret ESCOs as “electric corporations” or “gas corporations,” therefore – as the PSC now does after

construing the PSL otherwise for nearly two decades – is incorrect and inconsistent with the language of the statute, Opinion 97-17, and common-law precedent. The PSC’s new-found construction merits no deference, and should be rejected by this Court.

E. The PSC’s arguments regarding the 2002 HEFPA amendments are unworkable and contradictory

The Home Energy Fair Practices Act (“HEFPA”) also does not support PSC jurisdiction to set ESCOs’ rates. Because ESCOs did not exist when HEFPA was enacted in 1981, the PSC itself and Justice Keegan in *PULP v. PSC I* originally held that HEFPA did not govern ESCOs.⁶ New York State did not enact amendments applying HEFPA to ESCOs until 2002. L.2002, c. 686, § 2.

The PSC claims that “the Legislature carefully modified PSL Article 2 to change the [PSC’s] construction that HEFPA did not apply to ESCOs,” and that PSL Article 1’s definitions of “gas corporation[s]” and “electric corporation[s]” “were broad enough to reach ESCOs” all along, notwithstanding Justice Keegan’s decision in *PULP v. PSC I* and the need for HEFPA amendments in 2002. PSC Mem. pp. 32-33. This assertion ignores the actual text of the HEFPA amendments, contravenes well-settled canons of statutory construction, and contradicts the PSC’s other arguments.

1. The PSC ignores the complete text of HEFPA

In its argument relying upon HEFPA, the PSC selectively omits language that specifically limits application of PSL Article 2.

PSL § 30 states:

This article shall apply to the provision of all or any part of the gas, electric or steam service provided to any residential

⁶ The argument that HEFPA governed ESCOs was also asserted by PULP and other parties in *Energy Association* and rejected by Justice Harris in his November 25, 1996 decision denying the petitioners’ claims “in all respects,” and in his April 18, 1997 decision finding those claims on re-argument to be “without merit.”

customer by any gas, electric or steam and municipalities corporation or municipality. It is hereby declared to be the policy of this state that the continued provision of all or any part of such gas, electric and steam service to all residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest.

(Emphasis added); *see also* L.2002, c. 686, § 2. The Legislature desired the provisions of PSL Article 2, therefore, to apply **only to “[t]his article,” i.e., Article 2 itself**. Omitting any mention of this limitation, as the PSC does from its argument, attempts to mischaracterize what the Legislature intended.

Likewise, the full text of PSL § 53, entitled “Application,” states:

For purposes of this article, a reference to a gas corporation, an electric corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers. No provision of this article or of this chapter authorizes or permits the provision of gas or electricity service by any such corporation or other entity in any manner other than in full compliance with the provisions of this article or to authorize the commission to waive compliance with any requirement of this article for any such corporation or other entity.

(Emphasis added); *see also* L.2002, c. 686, § 2. Once again, the PSC omitted the phrase, “for the purposes of this article,” from its discussion of HEFPA. The PSC’s construction of HEFPA as amended in 2002, therefore, relies upon an incomplete picture of what HEFPA actually says, and should be rejected.

2. The Commission’s construction of HEFPA contravenes settled principles of statutory construction

Even if the PSC had accurately portrayed the complete text of HEFPA, the PSC’s construction of its provisions fails regardless.

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 an indication that its exclusion was intended.

N.Y. STAT. § 74 (McKinney 2016). *Accord, Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013) (“we cannot read into the statute that which was specifically omitted by the legislature”).

If the definitions of “gas corporation” and “electric corporation” in PSL Article 1 were indeed “broad enough to reach ESCOs,” as the PSC now claims, no HEFPA amendments would have been necessary at all in 2002. Further, had the Legislature intended that the PSC’s jurisdiction to impose rate regulation, either directly or indirectly via utility tariffs, to extend to ESCOs generally, it could have amended PSL Articles 1 and 4 accordingly. Because it did not, the PSC cannot read into the PSL nonexistent authority to subject ESCOs to PSC ratemaking.

The PSC’s contrary view also contravenes the canon against surplusage, requiring that “effect and meaning must, if possible, be given to the entire statute and every part and word thereof.” N.Y. STAT. § 98. *Accord, Sanders v. Winship*, 57 N.Y.2d 391, 396 (1982). *Matter of Verizon N.Y., Inc. v. N.Y. State Pub. Serv. Comm’n*, 137 A.D.3d 66 (3d Dep’t 2016) is instructive. There, the Third Department rejected the PSC’s interpretation that would have rendered the term “trade secret” superfluous in the New York Freedom of Information Law. *Id.* at 69. Here, the PSC makes the same mistake: if the terms “gas corporation” and “electric corporation” in PSL Article 1 were indeed “broad enough to reach ESCOs,” there would have been no need for the 2002 amendments that applied

HEFPA to ESCOs. Those amendments were required, because ESCOs cannot be “gas corporations” or “electric corporations” as the PSL defines those terms.⁷

Because the PSL and past precedent at common law and from the PSC do not authorize the rate determination that the PSC applied in the Reset Order to ESCOs that serve mass-market customers, the Order is *ultra vires*, exceeds the PSC’s jurisdiction, and should be invalidated.⁸

POINT II

THE RESET ORDER WAS ARBITRARY AND CAPRICIOUS

Whether or not the PSC had jurisdiction to promulgate the Reset Order (which it did not), the Reset Order fails also because it “was made in violation of lawful procedure, was affected by an error of law [and] was arbitrary and capricious [and] an abuse of discretion.” CPLR 7803(3). The Reset Order should be annulled because it derives from the PSC’s arbitrary conclusions that the retail energy market is not “workably competitive,” subjects ESCOs to rate controls and energy source requirements that are not reasonably tailored to remedy any lack of workable competition in the market, and circumvents the PSC’s already published rules for adjudicating the customer complaints that the PSC claims to have necessitated the Reset Order’s adoption.

A. **Standard of review**

The PSC contends that this Court’s review of the Reset Order should be “highly deferential” toward the PSC. PSC Mem. p. 35. In doing so, the PSC relies upon

⁷ While arguing that it does not seek to regulate ESCOs’ rates pursuant to PSL Article 4, the PSC simultaneously contends that the 2002 HEFPA amendments somehow “undercut[]” and “arguably reversed” that conclusion. PSC Mem. p. 35. The contradiction merits no deference from this Court.

⁸ This Court also should reject the PSC’s assertion that Chapter 416 of the Laws of 2010 “confirms” the PSC’s alleged authority to impose the Reset Order. PSC Mem. pp. 33-34. Even if that enactment included language reserving PSC authority over licensing and marketing practices for ESCOs, it does not empower the PSC by implication to set the rates ESCOs may charge. Again, if the Legislature intended to subject ESCOs to rate regulation under PSL Articles 1 or 4, it could have done so expressly, but it did not.

various case law (*see id.* p. 36) in which the PSC has made ratemaking determinations that bind entities over which the PSC has jurisdiction. *See, e.g., Matter of City of New York v. Pub. Serv. Comm'n of State of N.Y.*, 29 A.D.3d 1152 (3d Dep't 2006) (PSC ratemaking under PSL Article 4); *Matter of Keyspan Energy Servs. v. Pub. Serv. Comm'n of State of N.Y.*, 295 A.D.2d 859 (3d Dep't 2002) (same); *Matter of N.Y. Tel. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 64 A.D.2d 232 (3d Dep't 1978) (PSC ratemaking under PSL Article 5). As discussed in Point I, *supra*, however, the PSC lacked jurisdiction to limit ESCOs' rates for energy supply, as the PSC did in the Reset Order. Absent such jurisdiction, the Reset Order is not entitled to the deference that the PSC requests.

B. The PSC's stated reasons for promulgating the Reset Order are arbitrary and capricious, and without a rational basis

Attempting to rationalize the Reset Order's provisions, the PSC asserted:

In light of . . . weaknesses of the predominant ESCO business model for mass market customers, *customers continue to voice their dissatisfaction with ESCO service through complaints to the Department [of Public Service]*. Despite the Department's recent modifications to the UBP to strengthen and enhance customer protections through changes in the marketing standards and customers enrollment procedures that ESCOs and their representatives must follow, abuses continue. These abuses lead to customer complaints filed with the Department, which have been steadily increasing. The total number of initial complaints received by the Department against ESCOs in 2015 was 5,044. Escalated complaints - complaints that are not initially resolved by the ESCO - number 1076 in 2015. The majority of the escalated complaints fell into three categories: 1) questionable marketing practices (30%); 2) dissatisfaction with the prices charged - no savings realized (25%); and 3) slamming - enrollment without authorization (22%). Based on the record in these proceedings and experiences in more informal consumer interactions at Public Hearings on many matters, the Commission is also cognizant of the fact that many more customers may not be satisfied with their services, but choose not to formally complain.

The Commission has repeatedly taken strong action in an effort to improve and strengthen these markets. However, based on the continued performance of these markets, the Commission concludes that, with the exceptions identified below, it is not in the public interest for ESCOs to provide commodity only supply products for mass market customers. *An immediate transition away from a retail market focused on commodity resale, to a market in which competitive energy service providers provide guaranteed savings to consumers or further clean energy goals, is warranted.*

Reset Order pp. 12-13 (emphasis added).

By its own admission, therefore, the PSC 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 PSC – a total of 5,044 in 2015 – amount to less than *one* percent of all ESCOs’ customers in New York. Family Energy Mem. p. 1; Puchner Aff. I, Exs. A, O. Also, if the complaint data related to one particular ESCO (not a Petitioner here) were removed, the number of complaints concerning the remaining ESCOs actually *decreased* in 2015. See NEMA Mem. p. 13. To rely upon customer complaints to justify application of the Reset Order to all ESCOs, moreover, disregards the PSC’s established procedures set forth in N.Y.C.R.R. Title 16, Part 12, for investigating and adjudicating customer complaints. Family Energy Mem. pp. 22-24.

For all these reasons, customers’ complaints about a portion of the ESCO industry do not offer a reasonable basis for the Reset Order’s promulgation and industry-wide application. The Reset Order, therefore, is arbitrary and capricious, and should be annulled. *Accord*, Family Energy Mem. pp. 20-24.

Perhaps recognizing this, the PSC belatedly contends that the Reset Order was necessary to safeguard the “presumption” that the ESCO industry be “workably competitive” in order to achieve “just and reasonable” “market-based” rates. *See* PSC Mem., Points I-II. Neither the concept of “workable competition,” nor a “presumption” concerning “market-based” rates, nor any alleged need to correct “flaws in the market . . . exacerbated by the purchase of receivables program” (PSC Mem. pp. 38-41) can justify the Reset Order, however, because they were not discussed or even mentioned therein.

“[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.*’” *Matter of Nat’l Fuel Gas Distrib. Corp. v. Pub. Serv. Comm’n*, 16 N.Y.3d 360, 368 (2011) (emphasis added) (quoting, in part, *Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991)). “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 adequate if cited by the agency.” *Id.* Federal case law cited by the PSC in its Memorandum of Law is in accord: “an agency’s order must be upheld, if at all, on the same basis *articulated in the order by the agency itself.*” *Fed. Power Comm’n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (emphasis added and internal quotations omitted). Hence, the PSC can rely only upon the rationale set forth in the Reset Order to justify its provisions. Absent discussion in the Reset Order of “workable competition” or the necessity of “market-based” rates, therefore, neither concept can save the Reset Order.

Instead, the PSC points to past orders, proceedings, and comments as its alleged “record basis” for determining that the ESCO mass market was not “workably

competitive.” PSC Mem. pp. 38-42. This does not change, however, that the PSC raised the concept of “workable competition” as its purported rationale for the Reset Order for the first time in opposing this action. The alleged needs to restore “workable competition” and fix supposed “market flaws” arising from utilities’ purchases of ESCOs’ receivables are *post hoc* justifications that cannot justify the Reset Order. *Accord, Scherbyn*, 77 N.Y.2d at 759 (rejecting consideration of “belatedly raised” grounds for agency decision); *Matter of Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 63 N.Y.2d 424, 440-41 (1984) (“[a] fundamental principle of administrative law . . . limits judicial review of an administrative determination solely to the grounds invoked by the agency”); *Matter of Home Depot USA, Inc. v. N.Y. State Pub. Serv. Comm’n*, 55 A.D.3d 1111, 1114 (3d Dep’t 2008) (ignoring agreement language upon which the PSC did not rely in the challenged determination).⁹

Because the PSC borrowed them for the first time in response to this lawsuit and this Court’s temporary stay of enforcement of the Reset Order, the concept of “workable competition” and the purported ESCO market flaws cannot justify the rationality of the Reset Order’s provisions.

C. The Reset Order is an arbitrary response to alleged conditions in the retail energy markets

Even if the retail energy markets were not “workably competitive,” as the PSC has alleged, the Reset Order’s proposed remedy itself is unreasonable, arbitrary, and

⁹ The PSC further submits that Petitioners are prohibited from challenging the rationality of the Reset Order, because they did not object to a February 2014 determination by the PSC that the retail energy markets were not “workably competitive.” PSC Mem. p. 43. This argument lacks merit: Petitioners had no obligation to object to a determination that cannot justify the Reset Order, which fails to discuss the PSC’s manufactured concept of “workable” competition. Family Energy has preserved its objection in any event, because it was a member of NEMA at the time NEMA petitioned for a rehearing on the PSC’s determination and specifically questioned the PSC’s conclusions concerning competition in the retail energy markets. *See* Point III(A)(1), *infra*.

capricious. All the PSC's attempted justifications for the Reset Order, discussed *seriatim*, are meritless, *post hoc* rationalizations for its provisions.

1. The guaranteed savings requirement is arbitrary

First, notwithstanding its lack of jurisdiction to mandate ESCOs' rates, the PSC contends that it was reasonable to limit how much ESCOs could charge residential and small-market non-residential customers for energy supply, because a fraction of them engage in deceptive marketing tactics and use inappropriate customer contracts. PSC Mem. p. 45. Even assuming some malfeasance among some ESCOs, the Reset Order was not an appropriate remedy. In Title 16, Part 12, of the New York Codes, Rules and Regulations ("N.Y.C.R.R."), the PSC has promulgated detailed procedures for investigating and adjudicating customer complaints concerning ESCOs' service and business practices. Family Energy Mem. pp. 20-24. Rather than use those procedures to rectify individual ESCOs' improper conduct, the PSC instead imposed rate controls on all ESCOs, regardless of their prior service records. Because the Reset Order assigns uniform, punitive consequences to all ESCOs for unspecified customer complaints without evaluation of their underlying facts, and thereby overrides the PSC's already established procedures for those complaints' adjudication, it is arbitrary and capricious and should be invalidated. *Accord, Matter of Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO v. State*, 229 A.D. 2d 286, 291 (3d Dep't 1997).

Second, the PSC relies upon two Federal cases to justify its perceived "need for a market reset" (PSC Mem. p. 46), but both of them are inapposite. *Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380 (1974), evaluated a Federal agency's authority to set market-based rates for wholesale small natural gas producers under the provisions of the

National Gas Act, a federal statute that is not at issue here. *Tejas Power Corp. v. Federal Energy Regulatory Comm'n*, 908 F.2d 998, 1004 (D.C. Cir. 1990), concerned competition for unbundled services offered by an incumbent utility provider that was able to use its market power to influence prices. Neither precedent relates to ESCOs or how they do business.

Third, the PSC asserts that ESCOs should be readily capable of adjusting to limits on their price, because they have “greater hedging and procurement flexibility than utilities.” PSC Mem. p. 47. This statement directly contradicts the PSC’s position in the Reset Order, that “some ESCOs may not possess the same level of capabilities in purchasing and hedging energy supply that utilities enjoy.” Reset Order p. 12. One of these contradictory statements, therefore, is entirely wrong.

Even more paradoxically, PSC Staff has essentially conceded during recently held Collaborative Meetings 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 PSC’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. See Puchner Aff. II, Ex. B (Collaborative Mar. 28, 2016, Excerpt #1 (noting that ESCOS “can do off-cycle adjustments” or “true ups” after the fact); *id.*, Excerpt #2 (noting the discussions about “how difficult it was 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”); *id.*, Excerpt #4 (noting that “[y]ou’ve all kind of convinced us that the utility

comparison is not the way to do it”). *See also* Small Aff. ¶¶ 47-48 (discussing utility retroactive “true ups” and the resulting inability to use utility prices for comparison purposes to offer a guaranteed product or to support the PSC’s “overcharging” claim).

Seemingly recognizing this, the PSC itself proceeds to “hedge,” and submit that ESCOs “arguably” should be able to operate subject to rate controls. PSC Mem. p. 47. The PSC fails to appreciate, however, that ESCOs lack the market advantages that the PSC alleges. Whereas traditional utilities have been accustomed to decades of control over what they can charge customers, ESCOs have not. As a consequence, due to the impossibility of developing a compliant product and modifying all its contracts in the PSC’s designated time frame, for example, Family Energy would be forced to put a full stop in place with respect to its workforce, thereby resulting in significant financial losses and caus[ing] major human resource issues. Donnelly Reply Aff. ¶¶ 79-95.

Suddenly limiting the rates ESCOs can charge residential and small-market non-residential customers for the first time in two decades, therefore, will irreparably harm ESCOs and their businesses. Rather than create a “workably competitive” market, it will ensure the unavailability of any ESCO market at all. As such, the rate controls imposed by the Reset Order are unreasonable, arbitrary, and capricious.

2. The eligible energy-related value-added service requirement is arbitrary

The Reset Order further requires any energy supply contract that does not limit what ESCOs can charge a residential or small-market non-residential 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. PSC Mem. p. 49. This, too, was arbitrary and capricious. The PSC 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. *Id.* p. 48. 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, PSC 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. Puchner Aff. II, Ex. B (Collaborative Mar. 28, 2016, Excerpt #3).

The requirement of an energy-related value-added service for ESCO products in the absence of rate controls likewise punishes all ESCOs for the alleged improper conduct of some, about whom customer grievances should be adjudicated and remedied pursuant to the procedures already provided by N.Y.C.R.R. Title 16, Part 12. The PSC complains, for example, that some ESCOs “offer[] a purportedly ‘energy-related value-added service’ of very low value, such as a single energy efficient lightbulb.” PSC Mem. p. 50. In response, the PSC should follow its existing rules to rectify such an abuse of the “energy-related value-added service” classification, rather than restrict the value-added services that the entire ESCO industry can make available, and thereby necessitate wholesale contract changes that will cause ESCOs to lose valuable variable-rate month-to-month (and expiring long-term fix-rate) customers to traditional utilities while they develop products compliant with the Reset Order. Donnelly Reply Aff. ¶ 92. To ignore the PSC’s long-standing procedures for rectifying ESCO abuses, in favor of limiting the value-added services any ESCO can offer, is arbitrary, capricious, and unreasonable.

3. The limitation of eligible energy-related value-added services to renewable electricity products is also arbitrary

It was likewise arbitrary for the PSC 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 PSC’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. p. 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. Small Reply Aff. ¶¶ 53-58. 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.

It also incorrectly assumes that “most or all current mass market ESCO customers could be served under renewable products.” PSC Mem. p. 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. Moeller Aff. ¶ 9, Donnelly Reply Aff. ¶¶ 69-71.

On this point as well, PSC 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. *See* R. 3344 (Feb. 2014 Order); Puchner Aff. II, Ex. B. (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 residential and small-market non-residential customers with an electricity product consisting of at least 30% renewable sources, therefore, are unreasonable, arbitrary, and capricious remedies for the alleged absence of “workable competition” from the retail energy market.

D. To apply the Reset Order’s provisions to all ESCOs was arbitrary and capricious

The PSC further asserts that Petitioners challenge the necessity of the Reset Order as a result of the availability of procedures in N.Y.C.R.R. Title 16, Part 12, to adjudicate and remedy the complaints of ESCO customers. PSC Mem. p. 52. The PSC mischaracterizes Petitioners’ argument.¹⁰ To the contrary, Petitioners contend that the Reset Order was arbitrary and capricious because, in lieu of following its rules for resolving the complaints of ESCO customers, the PSC has applied a one-size-fits-all remedy for those complaints to the entire ESCO industry, regardless of an individual ESCO’s past service record. The PSC does not cite a single legal authority in opposition to this argument, because it cannot: indeed, “[a]n administrative agency acts arbitrarily and capriciously when it fails to conform to its own rules and regulations,” as the PSC has in promulgating the Reset Order. *Matter of Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-*

¹⁰ So, too, does the New York State Attorney General in its amicus brief to this Court. According to the Attorney General, Petitioners argue “that the possibility of PSC resolving individual complaints against ESCOs renders the Reset Order irrational or arbitrary.” AG Brief p. 25. That is not what Petitioners contend.

CIO v. State, 229 A.D.2d 286, 291 (3d Dep't 1997) (quoting *Matter of Era Steel Const. Corp. v. Egan*, 145 A.D.2d 795, 799 (3d Dep't 1988)).

In its attempt to justify ignoring the complaint resolution procedures set by N.Y.C.R.R. Title 16, Part 12, the PSC 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. p. 52. This is no excuse: it simply confirms that the PSC 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" (Puchner Aff. I, Ex. A, p. 13)¹¹ – an assertion for which the PSC offers no independent factual support – the PSC nonetheless was 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 do so, the Reset Order is unreasonable, arbitrary, and capricious, and should be annulled.

POINT III

THE RESET ORDER VIOLATED PETITIONERS' RIGHTS UNDER THE UNITED STATES AND NEW YORK CONSTITUTIONS

A. The PSC violated Petitioners' rights to procedural due process

Both the Federal and New York State Constitutions require due process before any person can be deprived of "life, liberty, or property . . ." U.S. CONST. amend

¹¹ The Attorney General employs similar conjecture in its amicus brief ("AG Br."). See, e.g., AG Br. pp. 29-30 ("many consumers may grow frustrated and choose not to lodge...complaints"), 39 (extrapolating limited regional pricing data to the rest of New York State, despite admittedly varying consumer usage), 40 (extrapolating that "some" ESCOs' voluntary offering of guaranteed pricing and/or renewable energy is economically feasible and appropriate for all ESCOs).

XIV, § 1; N.Y. CONST. art. I, § 6. In this regard, “[i]t is well established that . . . corporation[s] such as Petitioners are . . .] ‘person[s]’ within the meaning of the Fourteenth Amendment.” *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (citation omitted); *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 346-47 (2d Cir.), *cert. denied sub nom. Brodsky v. Consol. Edison Co. of N.Y., Inc.*, 537 U.S. 1045 (2002); *United Servs. Auto. Ass’n v. Curiale*, 88 N.Y.2d 306, 311 (1996). As the Supreme Court has observed:

[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

To determine whether a claim lies for a violation of constitutionally guaranteed rights to due process, the Supreme Court has developed a two-part inquiry. First, the Court must determine whether there is a constitutionally protected property interest. Second, if the Court determines that there is such a constitutionally protected property interest, it must then determine whether constitutionally sufficient due process has been provided. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

On both parts of this inquiry, Petitioners prevail. They have a property interest in their eligibility licenses to do business as ESCOs, and the Reset Order interfered with those licenses by imposing new rate and service controls – contravening two decades of PSC precedent prohibiting it from setting ESCOs’ rates – that condition an ESCO’s eligibility to do business with residential and small-market non-residential customers. Before the PSC issued the Reset Order, moreover, it afforded Petitioners no notice that it intended to implement those controls, and therefore no opportunity to be heard as to how

those controls would detriment their businesses. The Reset Order violated Petitioners' rights to procedural due process, and therefore should be annulled.

1. Petitioners' argument that their ESCO eligibility is a property interest is justiciable

As a threshold matter, the PSC contends that they are not subject to adjudication, because they are unripe for review, because Petitioners have failed to exhaust their administrative remedies for the PSC's infringement upon their property rights in their ESCO eligibility, and because Family Energy has waived its due process claim in any event. All these arguments lack merit.

A controversy is ripe when an administrative agency has "arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Matter of Gordon v. Rush*, 100 N.Y.2d 236, 242 (2003) (internal quotations and citations omitted). Because the Reset Order purports to interfere with Petitioners' prerogatives to set their customers' charges for energy supply, Petitioners have already suffered an actual and concrete injury – and will imminently sustain greater injury upon the Reset Order's enforcement, their due process claims are ripe.

The PSC characterizes the Reset Order as "merely amend[ing] the process for revoking ESCO eligibility," and therefore contends that any due process "claim would not accrue unless and until the Commission were to revoke an eligibility." PSC Mem. pp. 60-61. This is incorrect, because the Reset Order does much more than "merely amend" the UBPs' requirements for determining an ESCO's eligibility. Rather, the Reset Order imposes, among other things, new mandates – never before discussed in, let alone imposed by, the UBPs – (1) limiting how much ESCOs could charge residential customers, (2) controlling the sources of ESCOs' electricity products; (3) necessitating affirmative

consent by a mass-market customer for transition from a fixed rate or guaranteed savings contract with an ESCO to a contract that provides renewable energy but does not guarantee savings. Reset Order, pp. 21-22. The Reset Order also eliminates any “cure” period previously available to an ESCO to remedy a UBP violation. *Id.*

“[W]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary” to justify the provisional stay relief that Petitioners have requested. *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996) (quoting 11A Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2948.1 at 161 (2d ed. 1995)); *see also Lily Pond Lane Corp. v. Technicolor, Inc.*, 98 Misc. 2d 853, 854 (Sup. Ct. N.Y. Cty. 1979) (“Plaintiff has established that failure to preserve the status quo would result in deprivation of its constitutional right to due process. This alone demonstrates irreparable harm.”). Inasmuch as these new conditions on ESCO’s continued operation were issued in violation of Petitioners’ due process rights – *viz.*, without notice or an opportunity to be heard – Petitioners have sustained a constitutional injury ripe for remediation.

Petitioners’ due process claims are also ripe, because enforcement of the Reset Order will cause significant and permanent injury to Petitioners’ financial viability, business interests, and reputations. Absent any “cure” period previously afforded by the UBPs, potential lack of compliance with the Reset Order’s requirements concerning their rates and electricity sources for residential and small-market non-residential customers would imperil their continued operation: the PSC could swiftly revoke their ESCO eligibility, without any opportunity to come into compliance. Petitioners’ shutdown would bring about irreparable harm – including substantial employee layoffs and damage to contractual relationships with

their customers and third-party vendors – that further exemplifies the ripeness of Petitioners’ due process claims. See *Alside Div. of Associated Materials Inc. v. LeClair*, 295 A.D.2d 873, 874 (3d Dep’t 2002) (“loss of customer good will can constitute irreparable harm for preliminary injunction purposes”); see also *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (finding the loss of reputation, good will, and business opportunities constituted irreparable harm); *Canwest Global Commc’ns Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 872 (Sup. Ct. N.Y. Cty. 2005) (finding injury where companies had to fire employees, change suppliers, reduce advertising, and move operations, thereby resulting in loss of customers, revenue, and reputation).

The PSC’s suggestion that “[i]t remains to be seen whether the Commission will revoke the eligibility of any of the [Petitioners], or whether it will even commence any revocation proceedings,” is insincere. PSC Mem. p. 61. When Petitioners sought an extension of the PSC’s initial ten-day timeframe to comply with the Reset Order’s new eligibility requirements, the Secretary refused because, she purported, “[t]he changes required in the [Reset] Order are intended to *immediately* address the harms experienced by mass market consumers,” and the PSC had “provided clear justification for the *urgent* action” R. 3119 (emphasis added). To submit that ESCOs might retain their eligibility despite an inability to comply with the Reset Order contradicts the Secretary’s assertions. Because Petitioners would have faced imminent extinction, absent this Court’s stay of enforcement of the Reset Order, Petitioners present ripe due process claims.

Like ripeness, the doctrine of exhaustion of administrative remedies also does not bar Petitioners’ due process claims, whether or not Petitioners have “argued before the [PSC] that ESCO eligibility constitutes ‘licensing.’” PSC Mem. p. 61. “The exhaustion rule

is not an inflexible one. . . . It need not be followed, “for example, when an agency’s action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile, or when its pursuit would cause irreparable injury.” *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978).

Here, Petitioners challenged the Reset Order both as a violation of their rights to due process under the United States and New York Constitutions, and as an exercise beyond the PSC’s authority. Family Energy Mem. pp. 11-14, 24-26. To petition the PSC for an administrative rehearing immediately after the Reset Order’s issuance would have been futile, because: (1) it was scheduled to take effect on March 4, 2016 – *viz.*, only ten (10) days later – before any rehearing petition could have been adjudicated to afford Petitioners relief from the Reset Order’s provisions, and (2) the PSC denied Petitioners’ request for an extension of their time to comply. *Id.* pp. 26-28. Indeed, the PSC’s failure to notify Petitioners in advance of their intention to control what ESCOs could charge residential customers had deprived Petitioners of any opportunity to contest the validity of such rate control before the Reset Order’s issuance. Absent this Court’s initial stay of the Reset Order, moreover, Petitioners also would have sustained irreparable injury, for the reasons set forth in their principal memorandum of law and accompanying affidavits. *Id.* pp. 26-28; *infra* Point VI. For all of these reasons, Petitioners were excused from exhausting any administrative remedy for the Reset Order’s interference with their property rights.¹²

The PSC’s argument that Family Energy has waived its due process licensing claim likewise lacks merit. To the extent the PSC “was not afforded an opportunity to consider [the license argument]” (PSC Mem., Point III(A)(2)(D)), this was so only because

¹² In any case, Family Energy indeed argued before the PSC that ESCO eligibility constitutes “licensing” requiring due process protections. *See* Puchner Aff. II, Ex. W (Affidavit of Thomas Puchner, Esq., in Support of Family Energy, Inc. Response to PSC Order to Show Cause, sworn to on April 29, 2013, at ¶¶ 29-37).

the PSC afforded Family Energy no advance notice of its plan to impose rate and service controls in the Reset Order. Family Energy Mem. pp. 15-20. In 2014, the PSC proposed imposing new conditions upon ESCOs' supply of energy to low-income customers: never did the PSC itself propose subjecting ESCOs' service to any residential or small-market non-residential customer to ratemaking or electricity source limits. Petitioners could not waive a constitutional argument that it had no opportunity to present to the PSC due to a lack of notice of the PSC's unconstitutional Reset Order. *Matter of D'Agostino v. DiNapoli*, 24 Misc.3d 1090, 1097-99 (Sup. Ct. Albany Cty. 2009); see also *Matter of Alvarado v. State, Dep't of State, Div. of State Athletic Comm'n*, 110 A.D.2d 583, 584 (1st Dep't 1985).

Even if Family Energy had adequate notice of the Reset Order (which it did not), the PSC's waiver argument fails nonetheless, because Family Energy is a member of the National Energy Marketers Association ("NEMA") (Donnelly Aff. ¶ 5), which petitioned for a rehearing concerning the PSC's proposed restrictions upon ESCOs' service to low-income customers. As such, Family Energy did not waive its due process claim. All the Petitioners' constitutional arguments are justiciable, and should be decided in Petitioners' favor on the merits.

2. ESCO eligibility constitutes a license and a property interest under New York law

The Constitution does not create property interests. Rather, "their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed, except 'for cause.'" *Logan v. Zimmerman*

Brush Co., 455 U.S. at 430 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)).

State-issued licenses to engage in virtually any activity are constitutionally protected property interests because:

their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

Bell v. Burson, 402 U.S. 535, 539 (1971); see *Paul v. Davis*, 424 U.S. 693, 710 (1976).

New York law is in complete accord with respect to all manner of licenses.

See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585 (1985) (medical license); *Moore v. MacDuff*, 309 N.Y. 35, 38 (1955) (driver's license); *Honey Dippers Septic Tank Servs., Inc. v. Landi*, 198 A.D.2d 402, 403 (2d Dep't 1993) (waste disposal license); *Chrisley v. Morin*, 126 A.D.2d 977, 978 (4th Dep't 1987) (minority business certification); *Bender v. Bd. of Regents of the Univ. of the State of N.Y.*, 262 A.D. 627, 631 (3d Dep't 1941) (dental license); *Augat v. Dowling*, 161 Misc. 2d 225, 231 (Sup. Ct. Albany Cty. 1994) (health care facility license). It is well-established that licenses are valuable property rights that cannot be revoked without due process of law. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 586 (1985); *Hecht v. Monaghan*, 307 N.Y. 461, 467-68 (1954).

In its principal Memorandum of Law, Petitioners explained why their eligibility to conduct business as ESCOs constitutes a license and a property interest under New York law. Family Energy Mem. pp. 11-14. The PSC disagrees, because: (1) its Opinion 97-17 has superseded the ESCO licensing framework adopted in Opinion 97-5; (2) Petitioners' only "claim[ed]" property interest is their ability to use facilities actually owned

by utilities; and (3) the PSC retains “significant” discretion to strip Petitioners of their ESCO eligibility. PSC Mem. pp. 53-62. Each argument lacks merit, and does not defeat Petitioners’ property interests in their ESCO eligibility, for the reasons discussed *seriatim*.

a. **The ESCO Oversight Process established in Opinion 97-5 has not been superseded**

In its Opinion 97-5, the PSC adopted the “ESCO Oversight Process,” which expressly established a licensing regime for ESCOs. Family Energy Mem. pp. 13-14. Almost 20 years later, the PSC tries to distance itself from that licensing regime, by asserting that it was “superseded” by Opinion 97-17. PSC Mem. p. 58. This is not so, as demonstrated by Opinion 97-17’s own language.

In relevant part, Opinion 97-17 states (at pp. 34-35, emphasis added):

The model set forth in Opinion No. 97-5 *contemplates* an oversight process that would apply to ESCOs that do not lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under public property . . . Thus, PSL Article 4 need not be applied to ESCOs that do not have authority to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places. *As a result, a decision to exempt such ESCOs from PSL Article 4 regulation is consistent*

Far from “superseding” Opinion 97-5, Opinion 97-17 “contemplates [the] oversight process” that Opinion 97-5 adopted. As a result of that oversight, there was no need to subject ESCOs “that do not have authority to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures” to the provisions of PSL Article 4.

Further, Opinion 97-17 reflects that the Commission **denied** the petitions for rehearing. Puchner Aff. I, Ex. D (Opinion 97-17), at p. 2. Importantly, PSC is no doubt aware that a decision denying rehearing requests leaves intact the underlying Order unless the PSC decides to “abrogate or change” it in an order on rehearing. PSL § 22. In any case,

such a “changed” order “shall not affect any right . . . arising from or by virtue of the original order.” *Id.* In other words, unless specifically changed by the order granting rehearing, the original order (or any subset thereof) stands. Here, the rehearing petitions were denied and, in fact, none of the rehearing petitions even challenged the licensing regime adopted in Opinion 97-5. That licensing regime therefore continued to apply to ESCOs, notwithstanding the exemption of some of them from the requirements of PSL Article 4.

b. The PSC mischaracterizes the nature of Petitioners’ property interest

Second, Petitioners’ property interest at stake is their eligibility to operate as ESCOs in New York, rather than – as the PSC incorrectly contends – any “rights in their usage of utility facilities.” PSC Mem. pp. 54-57.

The PSC mischaracterizes Petitioners’ property interest in order to draw an inapposite analogy to *Matter of Campo Corp. v. Feinberg*, 279 A.D. 302 (3d Dep’t 1952). *Campo Corp.* concerned an electric utility corporation’s proposal to cease selling wholesale electric current to landlords for the purpose of submetering.¹³ *Id.* at 304. The PSC noticed and scheduled hearings on the proposal, and took testimony from the utility company and submeterers. *Id.* After conclusion of the hearings, the PSC entered an order authorizing the utility company to prohibit submetering. *Id.*

The submeterers’ subsequent challenge to the PSC’s order did not succeed. While acknowledging that the PSC could not directly regulate submeterers, the Third Department observed that “it was within the regulatory power of the commission to direct

¹³ Submetering is the practice by which the owner or operator of a building buys current from a public utility and resells it through separate meters to individual tenants. *Campo Corp.*, 279 A.D. at 303.

the respondent company not to furnish electric energy otherwise than direct to consumers and through company meters.” *Id.* at 306. Noting that “[the submeterers] have no vested rights, constitutional or statutory, in the practice of submetering,” because it was conducted “under the shadow of the regulatory power” the PSC held over utilities, the Court held that the petitioners had invested in submetering at their own risk, and that they lacked any property interest in its practice, which the PSC could properly ban. *Id.* at 306-07.

In its analogy, the PSC overlooks an essential and distinguishing factor: that the PSC had ignored, but never expressly approved, the *Campo Corp.* submeterer petitioners’ purchase or sale of current before the PSC prohibited it. Petitioners in this proceeding, by contrast, have been licensed to operate as ESCOs in New York upon satisfying the eligibility requirements *affirmatively established* by the PSC in the UBPs. They have invested in and grown their businesses in New York *in reliance upon* their past UBP compliance. Because the PSC sanctioned ESCOs’ prerogative to charge their own rates and determine their own energy supply sources for two decades before the PSC issued the Reset Order, the PSC’s blind indifference to the submetering that it eventually foreclosed in *Campo Corp.* does not defeat Petitioners’ property rights in their ESCO eligibility.

The PSC’s analogy also fails because, in *Campo Corp.*, the PSC necessarily had authority to regulate the utility’s sales of electricity to the submetering building owner. Indeed, such sales by a utility fell squarely within the scope of the PSC’s ratemaking authority. By contrast, utilities do not provide commodity service to ESCO customers. As noted *supra*, nothing in PSL Article 4 authorizes the PSC to regulate the prices of retail commodity sales by ESCOs or other non-jurisdictional entities.

The PSC's citation to PSL § 66(5) is inapposite, as that statute only pertains to its supervision of regulated "person[s], corporations and municipalities under its supervision" (*i.e.*, those subject to PSL Article 4) and the PSC's authority to make findings that any such supervised entity's "rates, charges or classifications or the acts or regulations [thereof] . . . are unjust, [or] unreasonable." A hearing on notice is, in fact, a prerequisite to the PSC's authority to make a finding under PSL § 66(5). Following such a finding, the PSC is required to provide a further hearing on notice according to the procedures set forth in PSL § 72. A careful review of these sections establishes that: (1) they are aimed solely at the regulated utilities; (2) nothing in them supports the PSC's claim that it can use Article 4 ratemaking authority over utilities to set indirectly the prices that ESCOs may charge; and (3) even if the PSC were correct, the PSC nonetheless failed to comply with its own hearing procedures in PSL §§ 66(5) and 72. Indeed, neither the prerequisite hearing to a PSL § 66(5) finding nor the PSL § 72 "opportunity to be heard" were provided to Petitioners.¹⁴

c. The PSC does not retain significant discretion over ESCO eligibility

The PSC further contends that the "discretionary" nature of the UBPs "denies [Petitioners] any protected property rights." PSC Mem. p. 59. This, too, is incorrect, because the UBPs limit the PSC's prerogative to determine an ESCO's eligibility to do business in New York.

Pursuant to UBP § 2.C., the New York Department of Public Service "*shall* review [an ESCO's] application package and conduct EDI Phase I testing as required for each applicant." (Emphasis added.) If the applicant submits the required information and the EDI testing is successfully completed, the DPS "*shall*" advise the applicant accordingly.

¹⁴ Thus, the multiple levels of notice and hearing for which PSL § 66(5) provides suggest that, if it were applicable at all, it would support Petitioners' property interest in their ESCO eligibility licenses, because the statute includes strong pre-deprivation notice and hearing requirements that trigger SAPA § 401(1).

Id. (emphasis added). Moreover (and more important), the Reset Order's requirements with respect to ESCOs' rates and sources for their products to residential and small-market non-residential customers afford ESCOs *no* discretion whatsoever: it must guarantee that a mass-market customer will pay no more than it would if it were a full-service customer of the utility or offer that customer an electricity product derived from at least 30% renewable sources in order to comply with the Reset Order and operate in New York. *See* Reset Order p. 21.

The regulatory system established by the PSC in the UBPs and the Reset Order, therefore, imposes mandates that condition Petitioners' rights to operate as ESCOs, and that restrict the PSC's discretion to strip their eligibility. For this reason, and because the PSC has retained the licensing regime set forth in Opinion 97-5 and contravened two decades of settled precedent by subjecting ESCOs to rate and service controls in doing business with small-market customers, the PSC fails to undermine Petitioners' arguments demonstrating their property interests in ESCO eligibility. Family Energy Mem. pp. 11-14.

3. The PSC violated Petitioners' due process rights when it issued the Reset Order without affording Petitioners notice or an opportunity to be heard

Once a property interest is established (which it has been), the Due Process Clause of the Fourteenth Amendment is triggered, and the question then to be determined is what process is due. *See* U.S. CONST. amend XIV. The answer to that question is found in case law interpreting the Due Process Clause. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 541. In this regard, the requirements of the due process clause are, of course, a matter of federal law. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). However, "the New York State Constitution's guarantee of . . . due process [is] virtually coextensive with th[at] of the U.S. Constitution." *Coakley v. Jaffe*, 49 F. Supp. 2d 615, 628 (S.D.N.Y. 1999) (citations omitted).

In order to evaluate the procedural due process that is due, Courts must balance “three distinct factors,” namely: (i) “the private interest that will be affected by” implementation of the PSC’s recommendations; (ii) “the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (iii) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Pursuant to these guidelines, due process generally requires the state to provide both adequate notice and a meaningful hearing before depriving an owner of his property. *Id.*; *Brody v. Vill. of Port Chester*, 434 F.3d 121, 135 (2d Cir. 2005). Petitioners received neither before the PSC issued the Reset Order.

a. Petitioners had no notice

It is well settled that a “fundamental requirement of due process is reasonable notice sufficient to apprise the party” of the bases upon which the state intends to deprive it of a property interest “so as to enable [that party] to adequately prepare and present a defense.” *Comm’n of Soc. Servs. of Chemung Cty. ex rel. Rynkowski v. Pronti*, 227 A.D.2d 705, 706 (3d Dep’t 1996) (quoting *Fitzgerald v. Libous*, 44 N.Y.2d 660, 661 (1978)); accord, *Aprile v. LoGrande*, 89 A.D.2d 563, 564 (2d Dep’t 1982), *aff’d*, 59 N.Y.2d 886 (1983). In fact, case law is clear: adequate notice is always mandated when property interests might be affected, and the extent of the notice to be provided depends, in principal part, on the nature of the interests to be affected. *Galvin v. N.Y. Racing Ass’n*, 70 F. Supp. 2d 163, 176 (E.D.N.Y. 1998) (and cases cited therein).

Here, the PSC does not dispute that the PSC itself gave Petitioners no notice of its intention to mandate ESCOs' rates or sources of their electricity products for all residential and small-market non-residential customers until the PSC issued the Reset Order on February 23, 2016. The only "notice" that the PSC claims of these requirements came in an ESCO Collaborative Report dated November 5, 2015, discussing "a proposal, *offered by various consumer advocates*, to extend [limits on ESCOs' rates and electricity sources] to *all* ESCO customers." PSC Mem. p. 72 (emphasis added); *accord*, R. 3786-89. The opinions of those "advocates," however,

cannot substitute for notice from the agency. Even if a party knows that a commenter has made some novel proposal to an agency during a rulemaking, the party cannot be expected to respond unless it has some reason to believe the agency will take the proposal seriously. Actual notice, then, depends on awareness that the agency, despite its failure to alert the public, is considering adopting what the commenter has suggested. . . .

Nat'l Min. Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 531-32 (D.C. Cir. 1997)

(emphasis added and internal citations omitted).

The PSC cannot (and does not) point to any mention in its SAPA Notice dated August 12, 2015 – or elsewhere in a record more than 5,000 pages long – that it contemplated implementing third parties' overbroad suggestions – made in a collaborative organized to discuss only ESCOs' service only to low-income customers – that the PSC should regulate ESCOs' rates and electricity sources for *all* residential and small-market non-residential customers. Providing such notice would have imposed little burden on the PSC, which issued a new SAPA notice of the Reset Order's provisions on April 5, 2016. PSC Mem. p. 73 n.45. Had Petitioners received appropriate notice of the PSC's intended regulation, they could have commented to the PSC about how the Reset Order's rate and

electricity source controls would result in, among other things, (1) a significant number of staff layoffs; (2) the loss of thousands of customer contracts due to the need to return the customer to the utility supply system until (if even feasible) a compliant product offering could be developed; (3) the permanent loss of many of those customers due to the difficulty in recapturing their business; (4) lost revenue that will easily surpass one million dollars for both Petitioners should the Reset Order remain in effect; and (5) forfeiture of millions of dollars of investments made in compliance with existing law that will no longer be profitable or even legal under the Reset Order. Family Energy Mem. pp. 26-28.

Because Petitioners' interests in notice of the PSC's intended regulation far exceeded the PSC's interest in secrecy, proper notice was required, yet denied by the PSC. *Broughton v. Chrysler Corp.*, 144 F.R.D. 23, 26 (W.D.N.Y. 1992), *aff'd*, 992 F.2d 319 (2d Cir. 1993); *Christiano v. Whalen*, 92 Misc. 2d 96 (Sup. Ct. Monroe Cty. 1978).

b. Petitioners were denied an opportunity to be heard

Absent advance notice of the PSC's contemplation to promulgate the Reset Order's rate and electricity source regulations, Petitioners had no opportunity to be heard as to those regulations' detrimental effects on their businesses.

The right to a fair hearing before an agency requires that each party to a proceeding should be apprised of the facts at issue, and have an opportunity to challenge the validity of the agency's conclusions. *Heaney v. McGoldrick*, 286 N.Y. 38, 45-46 (1941); *see Hecht v. Monaghan*, 307 N.Y. 461, 470 (1954) ("the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."). As such, an agency's failure

to provide these protections violates due process. See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973) (a hearing “could not, consistently with due process, act on the basis of undisclosed evidence that was never made part of the record before the agency”); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) (“due process entitles the citizen at some stage to have notice, to be informed of the facts on which the agency relies, and to have an opportunity to rebut them”); *Simpson v. Wolansky*, 38 N.Y.2d 391, 395 (1975) (party is entitled “to be fully apprised of the proof to be considered, with the concomitant opportunity to cross-examine witnesses, inspect documents and offer evidence in rebuttal or explanation”); *Giorgio v. Bucci*, 246 A.D.2d 711, 713 (3d Dep’t 1998) (Administrative Law Judge’s failure to allow petitioner the opportunity to cross-examine witnesses or offer testimony “den[ie]d him due process of law”); *N.Y. Tel. Co. v. Pub. Serv. Comm’n*, 59 A.D.2d 17, 19 (3d Dep’t 1977) (petitioner was entitled to a full public hearing, and not “merely a review by respondent [Commission] and its staff of petitioner’s written filing”); *Scarpitta v. Glen Cove Hous. Auth.*, 48 A.D.2d 657, 658 (2d Dep’t 1975) (“[e]ssential among the minimal standards which must be observed are the right to confront and cross-examine adverse witnesses and the right to challenge the evidence upon which the authority relies in making its determination”); *Hilton Hotels Corp. v. Epstein*, 14 A.D.2d 399, 402 (4th Dep’t 1961) (“there is the right to produce material and proper testimony that might affect the result”), *aff’d*, 11 N.Y.2d 978 (1962).

Without proper notice, Petitioners could not comment on or challenge the PSC’s reasoning underlying the rate and electricity source controls that the Reset Order mandated, and that changed the terms of their eligibility licenses that had permitted them and other ESCOs to set their own energy supply prices for two decades. Absent affording

Petitioners this opportunity to be heard, the PSC violated Petitioners' rights to due process and SAPA § 401.¹⁵ See also Family Energy Mem. pp. 14-15.

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

The Reset Order not only abridges Petitioners' rights to due process and constitutes a taking without just compensation, but also violates the Contracts Clause of the United States Constitution. Petition ¶¶ 86-90.

“No 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). Claims brought under the Contracts Clause require consideration of three factors:

(1) whether the contractual impairment is in fact substantial; if so, (2) whether the law serves a significant public purpose, such as remedying a general social or economic problem; and, if such a public purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and appropriate.

Donohue v. Paterson, 715 F. Supp. 2d 306, 318 (N.D.N.Y. 2010). All three factors balance in favor of Petitioners, and against the constitutionality of the Reset Order.

¹⁵ The PSC further contends that SAPA § 401 does not entitle licensees such as Petitioners “to a pre-revocation evidentiary hearing” because the UBPs offer ESCOs only an “opportunity to respond” before their eligibility may be terminated. PSC Mem. p. 60. This does nothing to defeat Petitioners' argument. Without notice from the PSC that it planned to promulgate the Reset Order's rate and electricity source controls, Petitioners had no opportunity to respond to that proposed regulation, and thereby were denied due process. Further, the PSC's contention is factually incorrect, as the licensing regime adopted by the PSC expressly included an “opportunity for a hearing.” See Puchner Aff. II, Ex. O (Opinion 97-5), at App'x B, p. 3 (discussing “Suspension Criteria” and stating that “[a]n ESCO found ineligible will be offered an opportunity for a hearing”). To the extent the UBPs inartfully describe it as an “opportunity to respond,” they are in error.

First, the Reset Order substantially impairs Petitioners' service contracts with their customers. In determining whether an impairment of contract is substantial, the primary consideration is "the extent to which reasonable expectations under [a] contract have been disrupted." *Donohue*, 715 F. Supp. 2d at 318. Also relevant are the "extent[s] to which the challenged provision provides for gradual applicability or grace periods," and to which an industry is (or is not) regulated. *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 53 (2d Cir. 1998).

Here, the Reset Order has defeated Petitioners' reasonable expectations under the service contracts with their residential and small-market non-residential customers. Altogether, Petitioners have more than 200,000 such New York customers, with whom Petitioners have made contracts permitting termination of service for any of enumerated reasons upon 15 days' notice: the contract automatically renews absent the customer's written termination notice. Donnelly Reply Aff., Ex. A.

The PSC contends that Petitioners have no reasonable expectation of continued relationships with their customers because, on account of the "size" of the ESCO industry, "no participant can reasonably expect that any of its customers will not be solicited and acquired by another participant." PSC Mem. pp. 63-64. This has not proven true, however. Historically, the vast majority of Petitioners' customers have allowed their service contracts to renew automatically. Donnelly Reply Aff., Ex. A. Yet the Reset Order prevents this from continuing: it requires Petitioners to revise their pre-existing service contracts with small-market customers, and thereby deny customers the automatic renewal provisions for which they and Petitioners bargained. *See* Reset Order p. 21. This a substantial impairment of Petitioners' and their customers' rights under those contracts.

Accord, Roletc, Inc. v. Finlay Hydrascreen USA, Inc., 917 F. Supp. 67, 69 (D. Me. 1996) (finding substantial impairment in a State statute that voided the parties' contractual withdrawal options, because it had altered "the economic relationship the parties had established voluntarily before the statute").

The substantiality is compounded by: (1) the requirement that all ESCOs comply within ten days after the Reset Order's issuance,¹⁶ (2) the refusal of the PSC to extend this deadline upon request (Puchner Aff. I, Ex. T), (3) the absence of any cure period to afford ESCOs an opportunity to fix any non-compliance with the provisions of the Reset Order or the amended UBPs, and (4) the surprise of the PSC's position that ESCOs are gas or electric corporations subject to rate regulation after the PSC had maintained otherwise publicly and to this Court for almost two decades prior. Prior to the Reset Order's promulgation, therefore, Petitioners could not have foreseen that the PSC would suddenly regulate ESCOs' rates, require amendments within days to their service contracts with small-market customers, and eliminate any cure period to remedy the good-faith mistake of any ESCO in its efforts to comply with the Reset Order. For these reasons, the Reset Order substantially impaired Petitioners' service contracts with small-market customers.

Second, the Reset Order does not serve a substantial public purpose. The PSC "must do more than mouth the vocabulary of the public weal" in order to establish the necessity of the Reset Order and its impairment of Petitioners' contractual obligations.

McGrath v. R.I. Ret. Bd., 88 F.3d 12, 16 (1st Cir. 1996); see *Bailey v. State*, 500 S.E.2d 54, 66 (N.C. 1998) (noting that "the courts are not bound by just any rationale put forward by the

¹⁶ For example, the PSC contends "it remains to be seen whether [it] will revoke eligibility . . . [or] even commence any revocation proceedings." PSC Mem. p. 61. This assertion is contrary to the Reset Order's requirement that all ESCOs comply within only ten days after the Reset Order's promulgation.

legislature to justify” a statute that impairs contractual obligations). A “pretextual objective, or one that reasonably may be attained without substantially impairing . . . contract rights,” does not suffice. *McGrath*, 88 F.3d at 16.

The PSC’s claimed non-specific interest in “protect[ing] residential and small commercial consumers” 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 Order will protect customers, the PSC utterly ignores the detrimental effect that the Reset Order will have on competition in the retail energy market. The Reset Order’s enforcement would curtail or end ESCOs’ service to residential and small-market non-residential customers, thereby forcing satisfied customers back into the service of the same utilities that they had previously (and voluntarily) abandoned.

All this upheaval is necessary, the PSC contends, 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. *See Puchner Aff. I, Ex. O*. Among these one million customers, the PSC received only 5,044 complaints in 2015. *Puchner Aff. I, Ex. A*, pp. 12-13. Even assuming that each of the 5,044 complaints came from a separate ESCO customer, only approximate ½% of all small-market ESCO customers complained about their service. *Id.* 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. *See W. Nat’l Mut. Ins. Co. v. Lennes*, 46 F.3d 813, 821 (8th Cir. 1995) (finding that a statute benefiting only a few members of a class of individuals could not achieve a

significant or legitimate public purpose, and thereby violated the contracts clause); *Shell v. Metro. Life Ins. Co.*, 380 S.E.2d 183, 191 (W. Va. 1989) (deeming legislation “designed to protect a narrow class of citizens” unable to satisfy a “substantial public policy”).

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. *Accord*, *Bailey v. State*, 500 S.E.2d at 67 (invalidating a law that interfered with retirees’ contractual rights, because “less drastic” action could have equalized taxation of state and federal employees); *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So.2d 774, 782 (Fla. 1979) (striking down a statute that did not use the “least restrictive means possible” to require the deposit of leasehold rents with the Court during a tenant’s litigation against his landlord); *Brevard Cty. v. Fla. Power & Light Co.*, 693 So. 2d 77, 81 (Fla. Dist. Ct. App. 1997) (establishing that a statute may not infringe upon contractual rights “greater than is necessary to achieve the stated public purpose”).

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 PSC could 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. *See* Point II, *supra*. Alternatively, the PSC could have undertaken a gradual approach toward implementing the Reset Order, and afforded ESCOs adequate opportunity to obey, rather than impose a strict 10-day compliance deadline without any cure period available. The PSC did neither.

Because the PSC 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 unreasonable and inappropriate to achieve the PSC's claimed purpose. 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, the Reset Order violates the Contracts Clause of the United States Constitution, and should be invalidated for this independent reason.

C. 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). Because enforcement of the Reset Order threatens to eliminate Petitioners' businesses as ESCOs among residential and small-market residential customers, without affording them just compensation, the Reset Order should be annulled as an unconstitutional regulatory taking.

Courts determine whether the government has engaged in a taking "by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action – that have particular

significance.” *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (internal quotation marks omitted). Pursuant to this standard, 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).

Such is true here. All three factors identified by the Supreme Court in *Kaiser Aetna* balance in favor of Petitioners, upon whom the Reset Order will have a severe economic impact. In reliance upon their ESCO eligibility licenses, property interests (as discussed *supra*) allowing them to supply energy to residential and small-market non-residential 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). Donnelly Aff. ¶ 10; Moeller Aff. ¶ 24. These investments were reasonable: Petitioners appropriately assumed, given common-law authority and the PSC’s position over nearly two decades concerning the absence of PSC jurisdiction to set ESCOs’ prices, that the PSC could not and would not compromise the profitability of their service to residential and small-market non-residential customers by limiting what ESCOs could charge.

Petitioners’ assumption unexpectedly proved incorrect when the PSC 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. Donnelly Aff. ¶ 17. As such, Petitioners’ use of their licenses to supply energy to residential and small-market non-residential customers will no

longer be economically viable. Additionally, because the Reset Order removes the cure period previously available to ESCOs, Petitioners risk their ESCO eligibility entirely in even trying to develop a product that the PSC later deems unsatisfactory.

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 and investments to supply energy to residential and small-market non-residential customers, the Reset Order violates the Takings Clauses of the United States and New York Constitutions. For this reason, and because it also abridges Petitioners' rights under the Due Process and Contracts Clauses, the Reset Order should be annulled.

POINT IV

THE PSC PROMULGATED THE RESET ORDER IN VIOLATION OF SAPA

Assuming that the Reset Order constitutes a "rule" pursuant to SAPA § 102(2)(a)(ii), the PSC does not dispute Petitioners' conclusion, set forth in their principal Memorandum of Law, that the Notice dated August 12, 2015, 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. Family Energy Mem. p. 18. Tacitly recognizing this conclusion's merit, the PSC "has filed a [new] SAPA notice with respect to the Reset Order and the accompanying notice for publication in the State Register on April 5, 2016." PSC Mem. p. 73 n.45. In doing so, the PSC acted "directly at odds" with its "litigation position" that seeks to defend the adequacy of notice prior to the Reset Order's initial promulgation. *Nat'l Ass'n of Mfrs. v. United States Dep't of Labor*, 1996 WL 420868, *17 (D.D.C. July 22, 1996). The Reset Order should be set aside for this reason alone.

The PSC argues that two documents other than the August 12 Notice – namely a Notice of Technical Conference dated April 29, 2015 (R. 3144-55) and a Report dated November 5, 2015, of the Collaborative Regarding Protections for Low Income Customers of Energy Service Companies (the “ESCO Collaborative Report,” R. 3756-3822) – achieved the necessary “‘substantial compliance’ with [SAPA’s] notice requirements.” PSC Mem. p. 69; SAPA § 202(8); *Matter of Indus. Liaison Cmte. of Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137, 144 (1988). The PSC is wrong, in that neither of these documents, nor the actual August 12 Notice claimed in the Reset Order, afforded ESCOs any notice of the PSC’s intention to set the rates they could charge mass-market customers. Notwithstanding its substance, the Reset Order should be annulled for this independent reason.

A. The April 2015 Notice of Technical Conference provided no notice of the Reset Order’s controls on ESCOs’ rates

Contrary to the PSC’s assertion, its Notice of Technical Conference dated April 29, 2015, did not “initially set forth” the Reset Order’s limits on ESCOs’ pricing to mass-market customers. PSC Mem. p. 71. That Notice proposed only that “ESCOs *that offer a fixed price product* could be required to offer one or more products which conform to a standard product definition.” R. 3152 (emphasis added). The PSC surmised that definition could include, for example, a “fixed term,” a “single per unit rate,” a “specific early termination fee,” the absence of “additional supply products or requirements bundled into the price,” or a reversion “to a variable priced product with no early termination charge” “at the end of the [fixed] term” R. 3152-53.

The April 2015 Notice of Technical Conference contemplated that ESCOs themselves could set these parameters up front only for their fixed-price products – which no

ESCO was required to offer in any event. Nowhere in that April 2015 Notice of Technical Conference, however, did the PSC portend that it would “consider imposing rate . . . controls,” as it required in the Reset Order. PSC Mem. p. 71. Absent any mention that the PSC – rather than individual ESCOs – might mandate how much ESCOs could charge their customers governed by fixed-price contracts, the April 2015 Notice of Technical Conference afforded Plaintiffs no notice of the “subject, purpose [or] substance” of the Reset Order’s ratemaking constraints. SAPA § 202(1)(f)(v).

B. The ESCO Collaborative Report provided no notice that the PSC intended to set ESCOs’ rates

The ESCO Collaborative Report likewise was insufficient. It contemplated only possible conditions the PSC might set upon an ESCO’s sale of energy commodity to “low-income” participants “in utility low income assistance programs and HEAP,” rather than PSC control over the rates charged by ESCOs to all their mass-market customers. R. 3357. Collaborative participants’ comments advocating for such rate control, without more, did not satisfy SAPA’s notice requirements. The PSC’s contrary position assumes that “substantial compliance with the SAPA notice provision is measured by the federal ‘logical outgrowth’ test” (PSC Mem. p. 70), and that the Reset Order was a logical outgrowth of the ESCO Collaborative Report (*id.* p. 71). Neither assumption is true.

First, the PSC points to no case law adopting a “logical outgrowth” test as New York’s standard for evaluating whether the notice of a proposed rule complies with SAPA. In *Matter of Industrial Liaison Committee of Niagara Falls Chamber of Commerce v. Williams*, 131 A.D.2d 205 (3d Dep’t 1987), *aff’d*, 72 N.Y.2d 137 (1988) (cited at PSC Mem. p. 70), the Court commented in dicta that “background ‘fact sheets’ . . . which contained the scientific data supporting” water quality standards promulgated by the New York State

Department of Environmental Conservation (“DEC”) “*appear[ed]* to be ‘logical outgrowths’ of the original proposals” set forth in the DEC’s SAPA notice (*Williams*, 131 A.D.2d at 208, 212 (emphasis added)), but did not pronounce that any “logical outgrowth” of a proposed rule could be issued without a new notice. Several years later, in *Matter of Motor Vehicle Manufacturers Ass’n of United States, Inc. v. Jorling*, 152 Misc. 2d 405 (Sup. Ct. Albany Cty. 1991), *aff’d*, 181 A.D.2d 83 (3d Dep’t 1992), this Court recognized that “Federal courts have phrased the test” of a notice’s satisfaction of the Federal Administrative Procedure Act “as whether the final rule is a ‘logical outgrowth’ of the proposed rule,” before concluding more broadly that it “must look at [a] revision within the context of the entire proposed regulation” to evaluate SAPA compliance. *Id.* at 409.

Simply put, no New York State Court has held that a SAPA notice is sufficient to cover any “logical outgrowth” of a proposed rule, even if that notice fails to satisfy SAPA’s mandate to specify the “subject,” “purpose,” or “substance” of the rule that a New York administrative agency ultimately promulgates. SAPA § 202(1)(f)(v). Because a rulemaking notice’s compliance with SAPA “is not a matter which rests within the [PSC’s] particular and specialized expertise, [t]he statute” itself – rather than the PSC’s attempt to import Federal case law construing a Federal enactment – determines the “uniform administrative procedures that State agencies must follow in their rule making, adjudicatory and licensing processes” *Williams*, 72 N.Y.2d at 143-44. Because neither the Notice nor the ESCO Collaborative Report presaged any restrictions on how much ESCOs could charge small-market customers or how electricity products marketed to those customers could be sourced, it did not satisfy SAPA’s requirement to set forth the “subject, purpose and substance” of the PSC’s contemplated rulemaking. Family Energy Mem. pp. 17-20.

Second, even if the “logical outgrowth” test were the standard for measuring SAPA compliance in New York (which it is not), the PSC did not satisfy it. “Given the strictures of notice-and-comment rulemaking,” a Federal “agency’s proposed rule and its final rule may differ only insofar as the latter is a ‘logical outgrowth’ of the former.” *Envtl. Integrity Project v. Env’tl. Protection Agency*, 425 F.3d 992, 996 (D.C. Cir. 2005) (citing, *inter alia*, *Shell Oil Co. v. Env’tl. Protection Agency*, 950 F.2d 741, 750-51 (D.C. Cir. 1991)). In Federal administrative law, “a final rule is a ‘logical outgrowth’ of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *Envtl. Integrity Project v. Env’tl. Protection Agency*, 425 F.3d at 996 (internal quotation marks and citations omitted). Hence, “[t]he ‘logical outgrowth’ doctrine does not extend to a final rule that finds no roots in [an] agency’s proposal . . . , nor does it apply where interested parties would have had to ‘divine [the agency’s] unspoken thoughts’” *Id.* (quoting, in part, *Ariz. Pub. Serv. Co. v. Env’tl. Protection Agency*, 211 F.3d 1280, 1299 (D.C. Cir. 2000)).

Given these standards, Federal Courts have “refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities,” particularly in response to comments that request rulemaking beyond what the agency has noticed to the public. *Envtl. Integrity Project v. Env’tl. Protection Agency*, 425 F.3d at 996. Several cases are illustrative. In *International Union, United Mine Workers of America v. Mine Safety & Health Administration* (“*United Mine Workers*”), 407 F.3d 1250 (D.C. Cir. 2005), for example, the petitioner argued that notice of a proposed rule to set a *minimum* air velocity standard for ventilation of underground mines was inadequate to predict the *maximum* air velocity standard eventually promulgated. The Court agreed, not only because the Mine Safety and

Health Administration had previously pronounced in the Federal Register that it would set no such maximum velocity requirement, but also because the Court “rejected the notion” that “comments . . . urging the Secretary [of the Administration] to set a maximum velocity cap, [without] indication by the Secretary that she was intending to do so,” could sufficiently “inform the public ‘of how, or even whether, the agency [would] choose’” to act. *Id.* at 1260-61 (quoting, in part, *Shell Oil*, 950 F.2d at 751).

In *Horsehead Resource Development Co. v. Browner* (“*Horsehead Resource Development*”), 16 F.3d 1246 (D.C. Cir. 1994), the Court likewise invalidated rules setting the Environmental Protection Agency’s (“EPA’s”) dual standards for emissions of both carbon monoxide and hydrocarbons from “cement kilns burning hazardous waste fuel.” *Id.* at 1267. The EPA’s rulemaking notices were held inadequate, even though they portended controls on either carbon monoxide or hydrocarbon emissions in the alternative, “because notice of individual parts of a proposed rule is not necessarily notice of the whole.” *Id.* This was so, even though the EPA had claimed to rely upon “comments submitted on issues that were to become critical parts of the final rule, as well as . . . meetings it held with industry,” because the Court “rejected bootstrap arguments predicating notice on public comments alone.” *Id.* at 1268. “Ultimately,” the Court reasoned, “notice is the agency’s duty” under the Federal Administrative Procedure Act, notwithstanding the “logical outgrowth” test. *Id.*

Shell Oil similarly concerned two hazardous waste treatment rules, “neither of [which] was to be found among the proposed regulations” set forth in two rulemaking notices published in the Federal Register. *Shell Oil*, 950 F.2d at 750. The United States Environmental Protection Agency (“EPA”) argued that notice of the rules nonetheless satisfied the Federal Administrative Procedure Act, “because certain of the comments

received in response to the rulemaking appeared to anticipate both . . . rules.” *Id.* Calling this assertion of “implied notice . . . unimpressive,” the Court annulled the challenged rules:

An agency, of course, may promulgate final rules that differ from the [notice’s] proposed regulations. . . . *But an unexpressed intention cannot convert a final rule into a “logical outgrowth” that the public should have anticipated.* Interested parties cannot be expected to divine the EPA’s unspoken thoughts. . . .

Even if the [new] rules had been widely anticipated, *comments by members of the public would not in themselves constitute adequate notice.* Under the [Federal Administrative Procedure Act], “notice necessarily must come – if at all – from the Agency.” . . . [H]ere, the ambiguous comments and weak signals from the agency gave petitioners no such opportunity to anticipate and criticize the rules or to offer alternatives. Under these circumstances, the [new] rules exceed the limits of a “logical outgrowth.”

Id. at 750-51 (emphasis added) (*citing and quoting, in part, Small Refiner Lead Phase-down Task Force v. United States Envtl. Protection Agency*, 705 F.2d 506, 548-49 (D.C. Cir. 1983)).

Pursuant to these precedents, the Reset Order cannot claim to be a “logical outgrowth” duly noticed by the ESCO Collaborative Report or the February 2014 PSC order that scheduled that Collaborative (the “February 2014 Order”), for at least two reasons. First, nowhere in those documents did the PSC propose regulating the prices ESCOs could charge or the products ESCOs could offer to residential or small-market non-residential customers **as a whole**. Instead, the PSC purported only to entertain regulation of ESCOs’ prices and products offered to certain *low-income* residential customers. This distinction is critical, because such limits would only condition an ESCO’s eligibility to recover payment from the Home Energy Assistance Program (“HEAP”) for service to low-income customers, rather than prohibit ESCOs from servicing residential customers entirely. As the PSC explained in the February 2014 Order,

[I]n at least one utility service territory, customers participating in the utility's low-income assistance program are more likely to obtain their energy commodity from an ESCO than customers who do not participate in these programs. We are concerned about the use of ratepayer and taxpayer funds intended to assist low income customers instead paying ESCOs for higher priced commodity without corresponding value to the customer. . . .

Therefore, we agree, *in part*, with the recommendation of utilities, [the New York State Attorney General's Office] and PULP [*i.e.*, the Public Utility Law Project]/AARP. Specifically, we require that ESCOs serving customers participating in utility low income assistance programs must do so with products that guarantee savings over what the customer would otherwise pay to the utility. . . . Alternatively, ESCOs may also provide these customers energy-related value-added services that are designed to reduce customers' overall energy bills *If an ESCO cannot or will not comply with these conditions, it can choose not to serve customers participating in utility low income assistance programs or HEAP.*

R. 3355-58 (emphasis added).

The February 2014 Order therefore did not portend the "rate . . . controls" that the PSC admits that the Reset Order eventually imposed two years later. PSC Mem. p. 71. To the contrary, it contemplated only conditions upon an ESCO's receipt of reimbursement for service to participants in HEAP or other low-income energy assistance programs that would fund the purchase of an ESCO's energy commodity on the participant's behalf. The express purpose of the February 2014 Order was to prevent waste of limited ratepayer and taxpayer funding in order to spread the benefit of that funding to as many low-income customers as possible, not to make adjustments to mass markets generally. R. 3355-60. Absent any indication that the PSC planned to limit what ESCOs could charge entire classes of customers – be they residential or small-market non-residential – the February 2014 Order did not satisfy SAPA's notice requirements.

Indeed, Petitioner Family Energy notes that its business model does not focus on marketing to low-income customers, because those customers' demand for electricity and gas is simply too low. As a result, Family Energy does not focus on low-income regulatory proceedings, did not participate in the low-income collaborative, and did not comment on the Collaborative Report. It was, therefore, "taken by surprise" when the Reset Order was adopted and applied to all mass-market customers. Donnelly Reply Aff. ¶¶ 15-19. The Major Energy Petitioners were equally surprised. Small Aff. ¶ 13.

Second, as was true in *United Mine Workers, Horsehead Resource Development*, and *Shell Oil*, administrative comments of various outside "advocates" – rather than the regulating agency itself – did not suffice as notice of the Reset Order. According to the Collaborative Report, the City of New York, the Utility Intervention Unit ("UIU") within the New York Department of State, PULP, and AARP had expressed support for "extending the ESCO low income customer protections . . . to all residential customers" R. 3787. Nowhere in the Collaborative Report, however, did the PSC suggest that it might mandate such an extension, or dispute that it would go "beyond the scope of this phase of Case 12-M-0476 which was limited entirely to developing the standards applicable only to low-income customers." R. 3788.

Had the PSC anticipated subjecting ESCOs to "rate and service controls" (PSC Mem. p. 71) as a result of the comments of the City of New York, the UIU, PULP, and AARP, it should have published a new SAPA notice describing those controls and offering a new opportunity for comment. *Natural Resources Defense Council v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988), is illustrative. That case challenged the EPA's promulgation of a single emissions standard after the EPA had previously published notice that it intended to

set three alternative standards that would govern different circumstances. The Court held that the single emissions standard, proposed in a comment offered by the New York State Attorney General, was a “logical outgrowth” of the original notice, only because the EPA had responded to the Attorney General’s comment by issuing a second notice that sought further comment on, and alerted the public to the EPA’s evaluation of, the single emissions standard. *Id.* at 1243. In doing so, the Court held, the EPA had satisfied the Federal Administrative Procedure Act’s notice requirements, but had “stretche[d] the concept of ‘logical outgrowth’ to its limits.” *Id.*

The PSC, by contrast, stretched those limits to their breaking point. It never issued any SAPA notice forecasting its intention to implement the proposal of New York City, the UIU, PULP, and AARP – in a proceeding that only sought comment on “protections for low income customers of [ESCOs]” (R. 3756) – to require ESCOs to submit to “rate and service controls” (PSC Mem. p. 71) in their contracts with any residential and small-market non-residential customers. In relying upon those out-of-context comments of others, rather than its own published statements, to justify the Reset Order, the PSC metaphorically seeks to “look[] over a crowd and pick[] out [its] friends” – an exercise that “does not comprise adequate notice” under SAPA or the “logical outgrowth” test. *Envtl. Integrity Project*, 425 F.3d at 998 (quoting, in part, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

C. Petitioners’ alleged “actual notice” of the Reset Order’s provisions does not suffice under SAPA

The PSC further contends that Petitioners’ “actual notice” of the Reset Order’s provisions appeared among the comments mentioned in the ESCO Collaborative Report, and excuses the PSC’s failure to comply with SAPA’s notice requirements. PSC

Mem. pp. 74-75. Federal Courts have rejected this argument in applying the “logical outgrowth” test advanced by the PSC, however, because

knowledge [of a possible regulatory action] *cannot substitute for notice from the agency*. Even if a party knows that a commenter has made some novel proposal to an agency during a rulemaking, the party cannot be expected to respond unless it has some reason to believe the agency will take the proposal seriously. *Actual notice, then, depends on awareness that the agency, despite its failure to alert the public, is considering adopting what the commenter has suggested. . . .*

Nat'l Min. Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 531-32 (D.C. Cir. 1997)

(emphasis added and internal citations omitted).

Pursuant to this standard, no such actual notice existed. As discussed *supra*, before the PSC issued the Reset Order, the PSC never alerted ESCOs or the public that it contemplated mandating the amounts ESCOs could charge, or the sources of electricity ESCOs could supply, to residential or small-market residential customers. 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”

R. 3756. To conclude that this was sufficient notice under SAPA

would turn notice into an elaborate treasure hunt, in which interested parties, assisted by high-priced guides (called “lawyers”), must search the record for the buried treasure of a possibly relevant comment. Inevitably, many parties will not attempt this costly search and many others will fail in their search. The agency will not get the informed feedback it needs, the parties will feel unfairly treated, and there will be a meager record . . . to review.

Small Refiner Lead Phase-down Task Force, 705 F.2d at 550. For these policy reasons, the

PSC’s argument that four commenters’ off-topic opinions in the ESCO Collaborative Report

satisfied SAPA's notice requirements must fail, and the Reset Order should be annulled. The PSC's argument must be rejected for factual reasons as well, because Petitioners never received actual notice: both were "taken by surprise" when the Reset Order's price controls were applied to all mass market customers. See Donnelly Reply Aff. ¶ 19, Small Aff. ¶ 13.

POINT V

THE RESET ORDER VIOLATES SEQRA

In promulgating the Reset Order, the PSC not only ignored SAPA's notice requirements, but also failed to perform any analysis of the environmental impact that would result from the Reset Order's enforcement. The Reset Order therefore violates 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 in Title 6, Part 617, of the New York Codes, Rules and Regulations ("N.Y.C.R.R."), and should be annulled for this independent reason.

"No agency," such as the PSC, "involved in an action may undertake, fund or approve the action until it has complied with the provisions of [SEQRA]." 6 N.Y.C.R.R. § 617.3(a). "Actions" include "agency planning and policy making activities that *may* affect the environment and commit the agency to a definite course of future decisions," as well as "adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that *may* affect the environment." 6 N.Y.C.R.R. § 617.2(b)(2)-(3) (emphasis added); *see also* 16 N.Y.C.R.R. § 7.1 (PSC regulations adopting the definitions in 6 N.Y.C.R.R. § 617.2). If the action is one which may have a significant adverse environmental impact, an environmental impact statement

must be prepared before the action may be undertaken. *Matter of Long Island Pine Barrens Soc’y, Inc. v. Planning Bd. of Town of Brookhaven*, 80 N.Y.2d 500, 511 (1992).

The purpose of SEQRA is plain: to require agencies to incorporate environmental considerations directly into their decision making and, where necessary, to modify an action to mitigate adverse environmental effects. *Matter of Coca-Cola Bottling Co. of N.Y. v. Bd. of Estimate of City of N.Y.*, 72 N.Y.2d 674, 679-82 (1988); see also *Matter of Billerbeck v. Brady*, 224 A.D.2d 937, 937-38 (4th Dep’t 1996). SEQRA reflects a legislative determination to inject environmental considerations into governmental decision-making. See *Matter of N.Y. City Coal. to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348 (2003); *Matter of Coal. for Future of Stony Brook Vill. v. Reilly*, 299 A.D.2d 481, 483 (2d Dep’t 2003).

Stated differently:

[SEQRA] guarantees that agency decisionmakers “will identify and focus attention on any environmental impact of [the] proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices.”

Vallone, 100 N.Y.2d at 348 (quoting, in part, *Matter of Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414-17 (1986)). SEQRA is designed to “force[] agencies to ‘strike a balance between social and economic goals and concerns about the environment.’” *Matter of Spitzer v. Farrell*, 100 N.Y.2d 186, 190 (2003) (internal citation omitted) (quoting, in part, *Matter of Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d at 414).

Here, the PSC should have prepared an appropriate environmental impact statement before it promulgated the Reset Order, because the Reset Order’s enforcement may affect the environment. 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.¹⁷ Donnelly Reply Aff. ¶ 71.

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. *See* Small Aff. ¶ 56, Donnelly Reply Aff. ¶ 71, Donnelly Aff. ¶¶ 20-34, Moeller Aff. ¶¶ 19-35, Egan Aff. ¶¶ 11-15. Accordingly, to the extent that the Reset Order constitutes a "rule"¹⁸ (or even "policy making"), it is an "action" that may affect the environment, and that required SEQRA review.

No such review took place, however, even though the PSC is obligated to strictly comply with SEQRA's procedural mandates. *Matter of Merson v. McNally*, 90 N.Y.2d 742, 750 (1997); *Matter of King v. Saratoga Cty. Bd. of Sup'rs*, 89 N.Y.2d 341, 347-48 (1996) (noting that "strict, not substantial, compliance [with SEQRA] is required"). As explained by the Court of Appeals:

¹⁷ There can be no serious debate that using renewable energy is environmentally beneficial and, therefore, that an energy purchase structure that increases the use of renewable energy sources (such as from ESCOs), has inherent and significant environmental benefits for all New Yorkers. In contrast, a decrease in ESCO participation in the retail energy marketplace will necessarily result in decreased offerings of renewable energy.

¹⁸ Petitioners argue, in the alternative, that the Reset Order constitutes a licensing determination, as the PSC has repeatedly acknowledged that an entity's eligibility to serve as an ESCO is a license under SAPA. *See* Point III(A)(2), *supra*.

SEQRA's policy of injecting environmental considerations into governmental decisionmaking is "effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations." Strict compliance with SEQRA is not "a meaningless hurdle. Rather, the requirement of strict compliance . . . insure[s] that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

Vallone, 100 N.Y.2d at 348 (internal citations omitted) (quoting, in part, *Matter of Merson v. McNally*, 90 N.Y.2d at 750; *Matter of King v. Saratoga Cty. Bd. of Sup'rs*, 89 N.Y.2d at 348).

Nothing in the more than 5,000-page record reflects any effort by the PSC to obtain an environmental impact statement before it promulgated the Reset Order. As such, the PSC failed to comply with SEQRA, and the Reset Order should be invalidated for this reason alone.

POINT VI

ENFORCEMENT OF THE RESET ORDER SHOULD BE STAYED TO AVOID IRREPARABLE HARM TO PETITIONERS

In order to obtain a stay of enforcement of the Reset Order, Petitioners must demonstrate not only a likelihood of success on the merits (which they have), but also (1) irreparable injury absent stay relief and (2) a balance of equities in their favor. CPLR 6301, 6311, 6312; accord, *Doe v. Axelrod*, 73 N.Y.2d 748 (1988). Petitioners satisfy both criteria.

Without a stay, Petitioners will suffer irreparable harm in several respects. First, the PSC's violation of Petitioners' constitutional rights under the Due Process, Contracts, and Takings Clauses would constitute irreparable harm to them *per se*. Family Energy Mem. pp. 26-27. Second, as explained by the principal affidavits of Jeffrey Donnelly, Levi Moeller, and James Egan, and the reply affidavits of Mr. Donnelly and

Adam Small, the Reset Order's enforcement will cause Petitioners to lose vendors and mass-market customers, will require job losses among ESCOs' employees and contracted sales representatives, will undermine the value of Petitioners' investments in new product offerings that presumed the absence of rate controls, will subject ESCOs to liability for their obligations under orphaned contracts, and will imperil the long-term viability of the ESCO market. These are irreparable harms, because they "cannot be adequately compensated by money damages." *35 N.Y. City Police Officers v. City of New York*, 2006 WL 1160578, *3 (Sup. Ct. N.Y. Cty. Mar. 3, 2006). *Accord, Rex Med. L.P. v. Angiotech Pharmaceuticals (US), Inc.*, 754 F. Supp. 2d 616, 621 (S.D.N.Y. 2010) ("A company's 'loss of reputation, good will, and business opportunities' from a breach of contract can constitute irreparable harm.") (*citing Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004)). Unless the Reset Order is suspended pending this proceeding's adjudication, Petitioners will face bleak prospects for attempting to recapture lost customers, repairing relationships with third parties essential to their businesses, and maintaining their long-term viability, even if the Reset Order were eventually invalidated.

Third, by revoking the "cure" period previously available, the Reset Order now jeopardizes every ESCO's eligibility in the event of a good-faith mistake in attempting to comply with the Reset Order, the UBPs, or other PSC regulations. This threat to Petitioners' businesses is real: as explained by the reply affidavit of Thomas F. Puchner, Esq., ESCOs cannot rely upon the PSC to provide effective guidance as to what constitutes a compliant product, because the PSC's purported "guidance" regarding the Reset Order's provisions has continued to change over the past several weeks. The lack of clear and consistent guidance will not stop the PSC, however, from concluding that an ESCO has

violated the Reset Order – notwithstanding its best efforts to comply – and revoking that ESCO’s eligibility license.

Once such eligibility is revoked, an ESCO has two options: (1) to shut down by laying off staff and breaking contracts with customers and vendors, or (2) to challenge the revocation by rehearing or in Court. Even if an ESCO successfully challenges revocation, its continued viability is in peril: while such a challenge would be pending, the ESCO would be required to return all its customers to the utility, and lay off workers and abandon its contracts in any event. Upon restoration of its eligibility, the ESCO would need to try recapturing past customers and re-establish its business – an exceedingly difficult task. *See Canwest Global Commc’ns Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 872 (Sup. Ct. N.Y. Cty. 2005) (“the loss of reputation, goodwill and business opportunities constitutes irreparable harm”) (citing *Register.com*, 356 F.3d at 404).

The PSC acknowledges that an ESCO would sustain irreparable harm if it were “driven out of business, forced to close, or otherwise [required to] suffer serious and permanent harms.” PSC Mem. p. 80. Because the Reset Order’s enforcement will have precisely this effect, as demonstrated by Petitioners’ accompanying affidavits, a stay is necessary pending this proceeding’s adjudication on the merits.

POINT VII

THE BALANCE OF THE EQUITIES FAVORS THE PETITIONERS

“The ‘balancing of the equities’ ... requires the court to look to the relative prejudice to each party accruing from a grant or a denial of a stay.” *Ma v. Lien*, 198 A.D.2d 186, 187 (1st Dep’t 1993). Because the irreparable harm to ESCOs’ businesses and their viability as going concerns “is more burdensome ... than [any] harm” that stay relief would

cause the PSC to suffer, the equities balance in Petitioners' favor. *Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep't 2009).

The PSC contends that the balancing of the equities must account for the interests of unidentified ESCO customers who are non-parties to this proceeding. PSC Mem. p. 77. This would be inappropriate. The cases upon which the PSC relies for its proposition are distinguishable, in that they concern applications for injunctive relief under the New York General Business Law's consumer fraud statutes, which condition the award of a provisional remedy upon the plaintiff's demonstration of an injury to the public at large, rather than to a single consumer. *McDonald v. N. Shore Yacht Sales, Inc.*, 134 Misc. 2d 910, 917 (Sup. Ct. Nassau Cty. 1987). Petitioners do not allege consumer fraud, but rather the PSC's ratemaking in excess of its jurisdiction and its violation of Petitioners' rights under SAPA, SEQRA, and the United States and New York Constitutions.

Further, PSC's opposition to a stay is significantly undercut by recent admissions of its Deputy Director of Consumer Services, LuAnn Scherer. In the recent Collaborative Meetings she stated:

We are working towards identifying additional products, and this is way outside my comfort zone because I'm not an attorney, **but I feel confident that when this stay is lifted there will be a period within which the ESCOs will be able to continue to offer products without, that are not the two identified products . . . until we work through this.**

See Puchner Aff. II, Ex. B, Mar. 29, 2016 Collaborative; Excerpt #5 (emphasis added).

Thus, by Ms. Scherer's admission, she felt "confident" that if the Court's stay is lifted, ESCOs will be allowed to continue offering products that do not comply with the Reset Order for a period of time. This position **completely contradicts** the Commission's arguments during this proceeding/action that the stay should be denied in order to protect

customers from alleged overcharging. Importantly, this statement was made **one day** after Ms. Scherer filed a sworn affidavit arguing the exact opposite, to wit: that “the granting of an injunction would cause substantial and immediate harm to mass market customers.” Scherer Aff. III, at ¶ 23.

Importantly, with respect to the unidentified ESCO customers, an analogy to the class-action context is also on point. It is well-established that class actions or representative actions must incorporate procedural safeguards to protect absent plaintiffs' due process rights. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)). For example, in class actions, absent plaintiffs must have

notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel Additionally, . . . due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Phillips Petroleum, 472 U.S. at 812 (internal citations omitted).

Here, the PSC invokes ESCOs' customers' alleged interests to argue against stay relief, without having provided those customers with any of the procedural safeguards required by a representative action. Consequently, the PSC has afforded satisfied ESCO customers – a substantial percentage, given that only about one half of one percent of them have complained about their service – no opportunity to rebut the PSC's characterization of the public interest, or to explain why they desire continued energy supply from ESCOs pursuant to the terms of their pre-existing contracts. Absent customers' participation as

parties to this proceeding, the PSC's self-serving claim of the public interest in the Reset Order's enforcement should play no role in the balancing of the equities.

Even so, any harm to customers without the Reset Order's enforcement would be negligible at most. Under the terms of the Reset Order, ESCOs would be able to refund so-called "overcharges" at the end of each year after the customer's enrollment in a guaranteed-savings product. Customers subject to longer-term contracts would continue to be protected under the UBPs by mechanisms such as mandatory third-party verification, which ensures that the customer fully understands the material terms of his or her contract. See Donnelly Reply Aff. ¶ 26. Most important, more than 99% of ESCOs' residential customers have not made any complaint to the PSC about their service. *Accord*, Donnelly Reply Aff. ¶¶ 38-40. By contrast, as discussed *supra*, Petitioners would sustain significant irreparable harm upon the Reset Order's enforcement.¹⁹ Because Petitioners' interests in protecting their businesses, their employees' jobs, and their relationships with customers and vendors from the pernicious effects of the Reset Order outweigh the PSC's interest in expediency, the equities balance in Petitioners' favor.

¹⁹ The PSC's conclusory assertions disputing the irreparable harm the Reset Order's enforcement will cause Petitioners to suffer should be disregarded. The PSC has minimal, if any, knowledge of the operating costs and processes of running an ESCO: therefore, the PSC's speculation that "ESCOs will be required to make some changes to their product offerings but *should* be able to continue operating" (PSC Mem. p. 79) (emphasis added) merits no deference. Indeed, the PSC offers no empirical data to demonstrate that Petitioners' operations will continue to be profitable notwithstanding the Reset Order's enforcement. That is in contrast to the multitude of sworn affidavits from Petitioners' representatives with detailed knowledge of their ESCO business.

POINT VIII

**THIS IS A PROPER HYBRID ARTICLE 78 PROCEEDING AND
DECLARATORY JUDGMENT ACTION, AND SHOULD NOT BE
CONVERTED TO AN ARTICLE 78 PROCEEDING ALONE**

Notwithstanding the merits of the Petition, styled as a hybrid Article 78 proceeding and declaratory judgment action, the PSC asks that it “be converted in [its] entirety to [an] Article 78 proceeding[] pursuant to CPLR § 103(c).” PSC Mem. p. 83. The Court should decline this invitation, because only a portion of Petitioners’ causes of action seek the relief or review available pursuant to CPLR Article 78.

An Article 78 proceeding can only procure “[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition.” CPLR 7801. Pursuant to CPLR 7803, review of the Reset Order in an Article 78 proceeding is limited to the following questions: (1) whether the PSC failed to perform a ministerial, non-discretionary duty; (2) whether the PSC proceeded without jurisdiction; (3) whether the PSC made a determination in “violation of lawful procedure,” or that was “affected by an error of law or was arbitrary and capricious or an abuse of discretion;” or (4) whether the Reset Order was “supported by substantial evidence.” *N.Y. Civil Liberties Union v. State*, 4 N.Y.3d 175, 183-84 (2005) (“mandamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial”). Accordingly, Petitioners’ First, Second and Third Causes of Action, seeking annulment of the Reset Order as issued in an “arbitrary, capricious, and illegal manner”; and Petitioners’ Fourth and Eighth Causes of Action, requesting the Reset Order’s invalidation because it is affected by errors of law, properly present questions enumerated by CPLR 7803(2)-(4).

By contrast, Petitioners' Fifth, Sixth, Seventh and Ninth Causes of Action, seeking a declaration of the Reset Order's unconstitutionality and money damages pursuant to 42 U.S.C. § 1988,²⁰ are properly brought as plenary claims.²¹ See *Matter of Greenberg v. Assessor of Town of Scarsdale*, 121 A.D.3d 986, 989 (2d Dep't 2014) (recognizing that a hybrid proceeding can simultaneously assert causes of action pursuant to Article 78 and plenary causes of action "seek[ing] damages and declaratory relief," and converting the petition into a hybrid action and proceeding because the "claims involve[d] common questions of law and fact that [were] suitable for joinder"). Even if, as the PSC contends, Petitioners could have brought a single Article 78 proceeding to challenge the Reset Order's promulgation, this did not prohibit Petitioners from asserting plenary causes of action for a declaratory judgment to "challeng[e] the constitutionality of a statute or administrative act, or [to] claim that [the PSC] is acting in violation of a statute to deprive them of valuable rights" *Halpern v. Lomenzo*, 35 A.D.2d 41, 43 (3d Dep't 1970) (citing, *inter alia*, *Bd. of Educ., Cent. Sch. Dist. No. 1 of Towns of Otego v. Rickard*, 32 A.D.2d 135, 138-39 (3d Dep't 1969); *Rock Hill Sewerage Disposal Corp. v. Town of Thompson*, 27 A.D.2d 626 (3d Dep't 1966)). Petitioners were entitled to seek a declaratory judgment to remedy the PSC's violation of their constitutional rights, and they properly did so.

²⁰ The PSC contends, without citing any authority, that 42 U.S.C. § 1988 permits "recovery of attorney fees [only] in actions brought under the federal civil rights enforcement statutes." PSC Mem. p. 85 n.48. It is well-settled, however, that attorneys' fees are available under 42 U.S.C. § 1988 when, as is true here, "relief is sought on both State and Federal grounds," even if the Court ultimately imposes a remedy based upon State law grounds only, provided that "the [Federal] constitutional claim is substantial and arises out of a common nucleus of operative fact as the State claim." *Giaquinto v. Comm'r of N.Y. State Dep't of Health*, 11 N.Y.3d 179, 191 (2008) (quoting *Thomasel v. Perales*, 78 N.Y.2d 561, 567-68 (1991)).

²¹ The PSC does not dispute that an injunction, requested in Petitioners' Ninth Cause of Action, may be sought as proper relief in an Article 78 proceeding. See *Durham v. Vill. of Potsdam*, 16 A.D.3d 937 (3d Dep't 2005) (failure to seek injunctive relief mooted the petitioner's Article 78 proceeding).

Indeed, contrary to the PSC's contention, hybrid actions and Article 78 proceedings alleging that an administrative agency determination has violated a litigant's constitutional rights are routinely adjudicated by New York Courts. *See, e.g., Matter of Auguste v. Hammons*, 285 A.D.2d 417 (1st Dep't 2001) (hybrid proceeding seeking restoration of Medicaid benefits by the New York City Department of Social Services, a declaratory judgment that the Department's termination of benefits was unconstitutional, and damages pursuant to 42 U.S.C. § 1988); *Beers v. Inc. Vill. of Floral Park*, 262 A.D.2d 315 (2d Dep't 1999) (hybrid proceeding to compel public library to reinstate employee and to obtain damages pursuant to 42 U.S.C. § 1983); *Pokoik v. Dep't of Health Servs., Cty. of Suffolk*, 237 A.D.2d 368 (1st Dep't 1997) (hybrid proceeding for mandamus to compel and to remedy the alleged violation of a constitutional right by a County Department of Health Services).

The cases upon which the PSC relies, by contrast, do not concern hybrid action-proceedings, and are therefore inapposite. Some of them seek review of individualized contracts or rates (*see, e.g., Walton v. N.Y. State Dep't of Corr. Servs.*, 8 N.Y.3d 186, 192-93 (2007); *Solnick v. Whalen*, 49 N.Y.2d 224, 231-32 (1980)), whereas the Reset Order is a regulation of general applicability to all ESCOs. Others concern efforts to bring a constitutional claim in a declaratory judgment action to circumvent the four-month statute of limitations applicable to Article 78 proceedings. *See, e.g., N. Elec. Power Co., L.P. v. Hudson River-Black Regulating Dist.*, 122 A.D.3d 1185 (3d Dep't 2014); *N.Y. City Health and Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 205 (1994); *Walton*, 8 N.Y.3d at 194-95; *Solnick*, 49 N.Y.2d at 233. Here, the PSC does not (and cannot) argue that Petitioners' claims are untimely, because this hybrid action and proceeding was commenced within only ten days after the promulgation of the Reset Order.

Petitioners properly asserted their constitutional claims in causes of action styled to seek declaratory and injunctive relief and money damages pursuant to 42 U.S.C. § 1988. Should this Court disagree, the proper remedy is not dismissal of those causes of action, but rather their conversion to claims for relief pursuant to CPLR Article 78. CPLR 103(c); *Greenberg*, 121 A.D.3d at 990.

POINT IX

THE AARP/MFY AMICUS BRIEF HAS LITTLE VALUE, IF ANY, AND SHOULD BE DISREGARDED

AARP and MFY have offered a 17-page brief dated March 28, 2016, as amici curiae in support of Respondent's position on the merits ("AARP Brief"). The AARP Brief provides little legal analysis: citing only to two PSC Orders and a single statute, it does not attempt to defend the Reset Order's legal sufficiency, but rather makes only high-level policy arguments reliant on news articles outside the record. It merits little deference, and should be ignored.

As a threshold matter, AARP and MFY do not offer copies of the news articles referenced in the AARP Brief as exhibits to the affirmation of Susan Ann Silverstein, Esq., in support of their motion for leave to serve an amicus brief. Those articles consequently are not before the Court in admissible form. *Accord, Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980); *Syracuse Equip. Co., Inc. v. Lebis Contracting, Inc.*, 255 A.D.2d 992, 993 (4th Dep't 1998). To rely upon such evidence outside the record would be "improper and prejudicial," and the articles should be disregarded in their entirety. *Matter of Beverly Farms, Inc. v. Dyson*, 53 A.D.2d 720, 721 (3d Dep't 1976).

Even if copies of those articles were provided to the Court, moreover, they would be hearsay in any event. *Georgian Motel Corp. v. New York State Liquor Auth.*, 184

A.D.2d 853, 855 (3d Dep't 1992); *Peckman v. Mutual Life Ins. Co. of New York*, 125 A.D.2d 244, 247 (1st Dep't 1986); *Simmons v. Van Alstyne*, 65 A.D.2d 869, 871 (3d Dep't 1978) (“The record indicates that the respondents’ evidence introduced . . . was based entirely upon conjecture and hearsay, and the agency’s representative having admitted the determination . . . was based upon newspaper articles.”). A “newspaper article . . . constitute[s] nothing more than unreliable hearsay information devoid of any indicia of reliability.” *Pedro v. Burns*, 210 A.D.2d 782, 783 (3d Dep't 1994).

Most important, the news articles upon which the AARP Brief relies offer no credible support for the Brief’s assertions. *See, e.g., Bank of New York v. Hunt*, 95 A.D.3d 687, 687 (1st Dep't 2012) (rejecting “non-specific news articles” as “insufficient factual evidence” in support of a motion). Seven of them, in fact, were self-published by AARP, and set forth AARP’s own studies, assertions, and opinions as authority, without independent factual corroboration. *See, e.g.,* AARP Brief, p. 4 (*citing* Erik Kriss, *NY’s ESCOs Charged Highest Electronic Prices in Nation Last Year; AARP Urges Probe*, AARP New York (Dec. 28, 2015), *available at* <http://bit.ly/1ZIGMCn>).

Other articles cited by the AARP Brief do not even concern ESCOs. For example, the AARP Brief relies upon a Federal Bureau of Investigation webpage entitled “Common Fraud Schemes.” AARP Brief, p. 13 (*citing* Fed. Bureau of Invest., *Common Fraud Schemes - Fraud Target: Senior Citizens*, *available at* <http://1.usa.gov/ZEpiHW> (last visited Apr. 5, 2016)). This Internet web page discusses a variety of fraudulent practices and how senior citizens can avoid them, but it does not mention any practices concerning the purchase or sale of energy. *Id.* The AARP Brief also references articles describing predatory tactics allegedly used by a single company that is not a party to this action, in order to

extrapolate inappropriately that all ESCOs engage in the same reprehensible conduct. AARP Brief, p. 12 (*citing Jan Ransom, Locals get a shock: aggressive utility sales reps harass Inwood, N.Y. DAILY NEWS (July 29, 2014, 6:53 pm), available at <http://nydn.us/1XHrF4L>*); *id.* p. 14 (*citing Paul post, New Yorkers scammed by Dallas-based Ambit Energy, ONEIDA DAILY DISPATCH (Apr. 19, 2015, 7:51 am), available at <http://bit.ly/1VvA1Oo>*). “Such non-specific news articles” cannot provide a credible basis for balancing the equities among the parties. *Bank of New York v. Hunt*, 95 A.D.3d at 687.

Because the AARP Brief offers virtually no legal arguments supporting the Reset Order’s promulgation, and primarily relies upon hearsay news items – including self-published articles – that are outside the record and that are unrelated to the parties in this action or even to ESCOs generally, it should be disregarded.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Petitioners’ principal Memorandum of Law dated March 3, 2016, Petitioners respectfully request that the Petition be granted, that they obtain judgment on the merits of their plenary causes of action, that the Reset Order be annulled, and that its enforcement be stayed and/or preliminarily enjoined pending the adjudication of this hybrid action and proceeding.

Dated: Buffalo, New York
May 9, 2016

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