STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs-Petitioners,

-against-

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

Defendants-Respondents.

SUMMONS

Index No. 870-16

TO: Defendants-Respondents (as listed in the caption)

YOU ARE HEREBY SUMMONED and required to appear in this hybrid action/special proceeding, and serve upon counsel for Plaintiffs-Petitioners an answer to the Verified Complaint and Article 78 Petition in this action (to the extent not already required pursuant to the annexed Order to Show Cause with Temporary Restraining Order) within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after the service is complete (if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear to answer, judgment will be taken against you by default for the relief demanded in the annexed Verified Complaint and Petition.

Plaintiffs-Petitioners designate State of New York, Supreme Court, County of Albany as the place of trial. The basis of venue is pursuant to CPLR §§ 506(b)(2) and 7804.

Dated: March 3, 2016
Albany, New York

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

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Defendants-Respondents.

VERIFIED COMPLAINT & ARTICLE 78 PETITION

Index No. _____

Plaintiffs-Petitioners, Retail Energy Supply Association ("RESA"), Interstate Gas Supply, Inc. d/b/a IGS Energy, Accent Energy Midwest Gas LLC d/b/a IGS Energy, and Accent Energy Midwest II LLC d/b/a IGS Energy (collectively, "Petitioners") by and through their attorneys, Harris Beach PLLC, hereby allege the following claims against Defendants-Respondents Public Service Commission of the State of New York, Audrey Zibelman, Patricia L. Acampora, Gregg Sayre, and Diane X. Burman, in their official capacities as Commissioners of the New York State Public Service Commission, and Kathleen H. Burgess, in her official capacity as Secretary of the New York State Public Service Commission (collectively, "Respondents"):

INTRODUCTION

1. Petitioners bring this proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"), CPLR 3001 and State Administrative Procedure Act § 205, seeking an Order and Judgment staying enforcement of, and reversing, annulling, vacating, and/or

setting aside an Order Resetting Retail Energy Markets and Establishing Further Process issued by the Public Service Commission of the State of New York, then comprised of the Commissioners named herein (collectively, the "Commission"), on February 23, 2016 (the "ESCO Rate-Setting Order"). A true and accurate copy of the ESCO Rate-Setting Order is annexed hereto as **Exhibit A.**

2. The substance of the ESCO Rate-Setting Order's requirements – and the arbitrary deadline for compliance – will almost certainly destroy a valuable industry currently operating in this State and will effectively eliminate consumer choice. As more fully set forth herein, it is not within the statutory authority or the public interest for the Commission to eliminate a segment of the energy industry in New York State, particularly without the opportunity to be adequately heard.

3. Petitioners submit that this Court should find that the Commission's issuance of the ESCO Rate-Setting Order was in excess of its jurisdiction, was made in violation of lawful procedure, was arbitrary and capricious, constituted an error of law, and violated Petitioners' procedural and substantive due process rights protected by the United States and New York Constitutions.

PARTIES

4. Petitioner RESA is a national trade association that serves the interests of retail energy suppliers. RESA's members include seventeen (17) New York Energy Services Companies ("ESCOs") which collectively serve many tens of thousands of New York energy customers.

5. Petitioners Interstate Gas Supply, Inc., Accent Energy Midwest Gas LLC and Accent Energy Midwest II LLC, individually and collectively doing business as IGS Energy, are retail energy suppliers doing business in New York and have each received a letter of eligibility as an Energy Services Company from the New York State Department of Public Service d/b/a IGS Energy is a member of RESA.

6. Upon information and belief, Defendant New York State Public Service Commission is an administrative agency in the executive branch of the New York State government.

7. Upon information and belief, the Commission is comprised of commissioners Audrey Zibelman (Chairperson), Patricia L. Acampora, Gregg Sayre, and Diane X. Burman, as well as Secretary Kathleen H. Burgess. These individuals are named solely in their official capacities.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this special proceeding pursuant to Article 78 of the CPLR, as well as the common law of the State of New York.

9. Albany County is the proper venue for this proceeding pursuant to CPLR §§ 506(b)(2) and 7804.

HISTORICAL BACKGROUND

A. The Commission embraces competition with the private sector by breaking up the long-standing monopolies of the public utilities.

10. In the mid-1990s, the Commission issued a series of orders describing proposed principles to guide the transition of the New York energy industry from public utility monopolies to a competitive market. The Commission expressed its "commitment to encouraging competition in place of regulated monopoly" and its goal for "the development of a framework for movement toward a more competitive electric marketplace" (Case 94-E-0952, *Opinion and Order Regarding Proposed Principles to Guide the Transition to Competition*, Opinion 94-27, Dec. 22, 1994; Case 93-M-0229, *Order Instituting Phase II of Proceeding*, Aug. 9, 1994).

11. Thereafter, New York became one of the first states to develop an independent system operator ("ISO") to coordinate an electricity transmission grid with power supplied by public utility electric generators, and delivered by energy suppliers, including ESCOs, over the transmission wires to consumers.

12. In 1996, the Commission issued a vision statement regarding increased competition and customer choice in the generation and energy sectors (Case 94-E-0952, *Opinion and Order Regarding Competitive Opportunities for Electric Service*, Opinion 96-12, May 20, 1996). In that Order, the Commission explained the importance of consumer choice as follows: "Consumers should be able to choose not only their suppliers, but also the terms of their service through various contract options, including the design of their rates and the length of their contracts for service." The Commission described the advantages of a competitive energy market, including " incentive [for ESCOs] to find the most efficient means of obtaining and delivering power and to provide innovative service packages to customers."

B. The PSC finds that ESCOs are not subject to the Public Service Law.

13. In 1997, the Commission was confronted with the issue of whether the Public Service Law's provisions governing "electric corporations" and "gas corporations" applied to ESCOs. Specifically, the Commission was forced to consider this question in the context of questions about the applicability of the Home Energy Fairness Practices Act ("HEFPA"), appearing in Article 2 of the Public Service Law, to ESCOs (Case 94-E-0952, *Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services*, Opinion 97-5, May 19, 1997).

14. Article 2 of the Public Service Law (*i.e.*, HEFPA) sets forth certain consumer protection provisions, including prohibitions against unfair business practices, detailed requirements with respect when a utility may terminate a customer's power for failure to pay bills, and rules for deferred payment agreements, meter reading, notice required to customers, complaint handling procedures, handling of emergencies, and transparency with respect to rendering energy bills.

15. HEFPA does not include any sections imparting to the Commission authority to regulate prices offered to consumers. Rather, the PSC's authority to regulate rates for electric

corporations and gas corporations is set forth in an entirely different Article of the Public Service Law – Article 4.

16. When considering the impacts of breaking up the public utility monopolies, the Commission was forced to consider whether the provisions of HEFPA applied to ESCOs. At that time, HEFPA, like the remainder of the electric and gas articles of the Public Service Law, was applicable to "electric corporations" and "gas corporations" as those terms were defined in Article 1 of the Public Service Law (*see* PSL art. 2, § 30 [HEFPA "shall apply to the provision of all or any part of the gas, electric or steam service provided to any residential customer by any gas, electric or steam and municipalities corporation or municipality"]; PSL art. 1, §§ 11, 13 [definition "electric corporation" and "gas corporation"]).

17. Advocates for application of HEFPA to ESCOs argued to the Commission that ESCOs should be considered "'electric corporations' under [Article 1 of the] Public Service Law" and therefore subject to HEFPA under Article 2 (*see* Opinion 97-5, p. 19). Those advocates argued that (a) HEFPA applies to all "electric corporations" and "gas corporations" (as those terms are defined in Article 1 of the Public Service Law), (b) ESCOs qualify as "electric corporations" and "gas corporations" under those Article 1 definitions, and (c) ESCOs are therefore subject to HEFPA (*see id.*). The PSC, however, rejected such arguments (*id.*).

18. In another proceeding later that same year, the Commission confronted the same question a second time, and *again* found that the Public Service Law's definitions of "electric corporation" and "gas corporation" set forth in Article 1 did not encompass ESCOs (*see* Case 94-E-0898, *In the Matter of Rochester Gas and Electric Corporation's Plans for Electric Rate/Restructuring Pursuant to Opinion 96-12*, Dec. 23, 1997).

19. The Commission specifically rejected the argument that "HEFPA applies to ESCOs by its terms, inasmuch as ESCOs are electric corporations under the Public Service Law," and

confirmed that ESCOs "did not fall within the purview of" HEFPA (*id.*, pp. 1, 3). In rendering its decision, the PSC sided with those who pointed out that the statute "was enacted in the context of an energy market characterized by consumer dependency on" utility monopolies; that when the statute was passed "the Legislature did not contemplate retail competition or ESCOs"; and "that the concept of an electric corporation reflects the traditional model of the utility, while ESCOs . . . are not electric corporations" under Article 1 of the Public Service Law (*id.*, pp. 4, 8). In "resolving the questions of legislative intent," the Commission stated: ""We believe it is reasonable to conclude that the statute was enacted to protect consumers against the abuse of monopoly power" whereas "[i]n contrast, ESCOs do not possess monopoly power because they would not be the sole provider of energy" (*id.*, p. 9).

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

20. Even though ESCOs were not "electric corporations" or "gas corporations" under the PSL, they chose to participate in a working group created by the PSC to discuss standardizing key procedures to govern the relationships between "monopoly providers and [ESCO] competitors" (Case 98-M-1343, Untitled *Order*, Sept. 22, 1999).

21. The eligibility requirements that emerged from those working group sessions in 1999 – entitled the Uniform Business Practices ("UBP") – were focused on ensuring the creditworthiness of ESCOs, developing practices for ESCOs to pay utility charges, developing procedures for initiating service and terminating service, providing procedures for switching customers between providers, preventing "slamming" by ESCOs, and creating a dispute resolution process (Case 98-M-1343, *Order Adopting Uniform Business Practices and Requiring Tariff Amendments*, Jan. 22, 1999; Case 98-M-1343, *Opinion and Order Concerning Uniform Business Practices*, Opinion 99-3, Feb. 16, 1999; Case 98-M-1343, *Order Granting Portions of Petitions for Rehearing*, Apr. 15, 1999;

Case 98-M-1343, *Untitled Order*, Sept. 22, 1999); and Case 98-M-1343, *Untitled Order*, May 20, 1999).

22. In the UBP opinions, the Commission distinguished between "utility parties" and "nonutility parties" (*i.e.*, ESCOs), noting that "[t]he nonutility parties generally support the attempt to provide more uniformity . . . to aid competition" (Opinion 99-3). In other words, despite the PSC's lack of authority to regulate ESCOs (in contrast to "electric corporations" and "gas corporations") pursuant to the Public Service Law, ESCOs recognized that they were unlikely to be able to compete in the open energy market in New York State unless they worked with the Commission and demonstrated a willingness to cooperate with the public utilities.

D. The Legislature amends the Public Service Law to apply certain consumer protection provisions to ESCOs, but chooses not extend any other aspects of the Public Service Law to ESCOs.

23. In 2002, the New York legislature enacted the Energy Consumer Protection Act, which amended Article 2 of the PSL (HEFPA) to apply to ESCOs, in addition to the "electric corporations" and "gas corporations" as those terms are defined in Article 1 (*i.e.*, the public utilities) (*see* Chapter 686 of the Laws of 2002; PSL § 53).

24. The 2002 amendment to the Public Service Law granted the PSC the power to regulate certain aspects of ESCOs' interactions and relationships with consumers. Immediately after the 2002 amendment to the Public Service Law, the PSC began the process of promulgating regulatory changes to effectively apply HEFPA's provisions to ESCOs, and ultimately adopted amended regulations in 2004 to implement the Legislature's amendments to HEFPA (*see* Case 03-M-0117, *Memorandum and Resolution Adopting Amendments to 16 NYCRR Pars 11 and 12*, Jun. 9, 2004).

25. The Legislature did *not*, as part of the 2002 amendment to the Public Service Law, extend any article or provision *other than* HEFPA to ESCOs. Importantly, Article 4, which grants

PSC its power to regulate utility rates for services, remained applicable only to "electric corporations" and "gas corporations" as those terms were defined in Article 1 (*i.e.*, only public utilities). ESCOs remained free to structure their own rate packages, and market them to consumers on the free energy market.

THE UNDERLYING PROCEEDINGS AND THE COMMISSION'S ISSUANCE OF THE ESCO RATE-SETTING ORDER

A. Events leading up to issuance of the ESCO Rate-Setting Order.

26. On February 24, 2014, the Commission issued an order that purported to require ESCOs to guarantee savings or include energy-related value services to low-income customers participating in the Assistance Program – Assistant Program Participants (APPs) (*see* Case 12-M-0476, *Order Taking Actions to Improve the Residential and Small Non-residential Retail Access Markets*, Feb. 25, 2014).

27. Many ESCOs were forced to petition the Commission for a rehearing of that order. Recognizing the existence of serious concerns about the proposed rule, the Commission thereafter granted a rehearing and stayed the requirements of the February Order to allow further comment and discussion given the "breadth and complexity of the February Order and the number of concerns raised in the Petitions" (*see* Case 12-M-0476, *Order Granting Requests for Rehearing and Issuing a Stay*, Apr. 25, 2014). Thereafter, interested parties began a dialogue about the proposed rule to be applied to APPs.

28. On February 6, 2015, the Commission issued an order creating a Staff-led collaborative, and charged the collaborative to prepare a report containing recommendations regarding appropriate regulations to protect the interests of APPs (Case 12-M-0476). No mention was made concerning protection of interests of customer classes others than APPs.

29. On July 28, 2015, the Commission released a "Staff Proposal" proposing changes to the UBP, and soliciting public comments (herein "July 28 Staff Proposal") (Case 98-M-1343). The proposed changes did not include any "guarantee" of savings such as the requirement in the ESCO Rate-Setting Order that is the subject of this proceeding, and did not indicate that the Commission was contemplating rules that would affect any class of customers other than APPs.

30. On August 12, 2015, the Commission published a Notice of Proposed Rulemaking in the State Register (SAPA No. 15-M-0127SP1). The August 12, 2015 Notice did not set forth the language of any proposed rule, and instead referenced a July 24, 2015 Staff Report, which does not exist. Presumably, the Commission intended to refer to a July 28 Staff Proposal.

31. After several meetings, the Staff-led collaborative prepared and published its Report "Regarding Protections For Low Income Customers of Energy Services Companies" on November 5, 2015 ("November 5 Report").

32. On December 1, 2015, the PSC issued a Notice seeking comments on the November 5 Report regarding the program for APPs.

B. The Commission Issues the ESCO Rate-Setting Order

33. After expiration of the public comment period, on February 23, 2016, the Commission issued the ESCO Rate-Setting Order that is the subject of this proceeding (Case 12-M-0476, *Order Resetting Retail Energy Markets and Establishing Further Process*, Feb. 23, 2016), as well as a Notice seeking comments on the new rules adopted by the ESCO Rate-Setting Order (Case 12-M-0476, *Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers*, Feb. 23, 2016).

34. Notably, just several weeks before issuance of the ESCO Rate-Setting Order, the Commission faced intense criticism by the media for allegedly allowing ESCOs to engage in deceptive marketing practices and other unfair business practices.

35. The ESCO Rate-Setting Order stated:

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

(*Order*, pp. 1-2 [emphases added]).

36. Finding (without providing any supporting data or statistics) that "ESCOs cannot effectively compete with commodity prices offered by utilities," the Commission directed "an immediate transition away from a retail market . . . without price protection" (*id.*, p. 2). The Commission's ESCO Rate-Setting Order, by its own terms, "directs that the transformation of the retail energy markets commence immediately."

37. In support of its decision to regulate ESCO prices, the Commission cited "broad legal authority to oversee ESCOs, pursuant to Articles 1 and 2 of the Public Service Law (PSL)" (*id.*, p. 9). Notwithstanding its earlier decisions recognizing that ESCOs are exempt from price regulation under Article 4, the ESCO Rate-Setting Order states that the Commission found that it had "authority to oversee ESCO participation in the residential and small commercial markets as further described below to ensure . . . that the prices that consumers pay for those services are just and reasonable" (*id.*, p. 10).

38. The Commission also found that controlling ESCO *prices* was a necessary "restructuring" to protect consumers against *unfair business practices*, despite the existence of HEFPA and its enforcement mechanisms.

39. A review of the history of enforcement actions against ESCOs reveals that only a handful of the 200 ESCOs participating in the New York energy market have been targeted as "bad

actors" in the industry. Further, the consumer complaint statistics published on the Commission's website show that many ESCOs have been the subject of no, or very few, customer complaints.

40. As explained by the Attorney General's office, "[s]ince the Commission opened New York's energy market to retail competition, NYAG . . . has completed seven enforcement actions against ESCOs found to have engaged in fraudulent and illegal business practices" (*see* Case 12-M-0476, *Comments of Attorney General Eric T. Schneiderman*, Feb. 11, 2016). Given that the retail energy market has been open for almost 20 years, the Attorney General's statement reflects that it has enforced the rules prohibiting unfair business practices against ESCOs about once every three years.

41. In a recent article issued on February 25, 2016, Commission Chairwoman Audrey Zibelman stated that 200 ESCOs are currently operating in New York State, and that New York's entire energy market services a total of roughly 7 million residential electric customers and 4.3 million residential natural gas customers. According to Chairwoman Zibelman, "[m]ore than 20% of New York's residential and small commercial customers currently receive energy from ESCOs."

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

43. The Commission's consumer complaint statistics also reveal that customer complaints were focused primarily on a small group of ESCOs. For example, 1,346 of the 5,044

initial complaints in calendar year 2015 were all against a single ESCO, and 57% of all the initial complaints in 2015 were against 10 ESCOs in the industry (*i.e.*, 5% of ESCOs). Adopting Chairwoman Zibelman statistics indicating 200 ESCOs are currently participants in the New York energy market, the statistics reveal that only 62% of ESCOs (or 124) received complaints at all in 2015 and January 2016, meaning that 38% of ESCOs operating in New York State have received ***zero*** customer complaints in the last 13 months.

44. Furthermore, the ESCO Rate-Setting Order is made applicable not just to APPs, but to all "mass market customers," which the ESCO Rate-Setting Order defines as "residential customers or small non-residential customers" (*id.*, pp. 4, 14, fns. 2, 21).

45. These changes were made without the adequate notice and opportunity for input from the ESCO industry.

46. In the last two years, the Commission considered issues and sought comments relating to concerns of APPs (low-income residential customers). The Commission emphasized the specific economic circumstances of APPs as the basis for developing unique standings for this limited customer group. At no time during those proceedings, was ever it stated that the Commission was contemplating new standards that would apply to *all* residential customers *and small commercial customers*.

47. The Commission also prescribed sudden and extreme limitations to the types of retail products ESCOs may market to mass market customers, and further, directed implementation of these limitations within ten (10) Calendar Days (i.e., by March 4, 2016).

48. Despite making the ESCO Rate-Setting Order effective within just 10 days, the Commission requested that parties consider and comment as to "under what conditions ESCOs may enroll mass market customers on a going forward basis, including whether the requirements above should be retained" (*id.*, p. 20).

C. Events subsequent to the Commission's issuance of the ESCO Rate-Setting Order.

49. The ESCO Rate-Setting Order offered interested parties the opportunity to request an extension of its March 4 effective date.

50. Numerous ESCOs and trade associations, including RESA, filed requests for extensions of the effective date of the ESCO Rate-Setting Order, arguing lack of sufficient notice, explaining their inability to massively overhaul their entire residential and small non-residential businesses in just 10 days, raising serious concerns about how to interpret the unexpected mandates and how to communicate the regulatory changes to customers, expressing fear that doing business in New York State has been rendered impossible, and generally pleading for more time to engage in a dialogue about the complete transformation of the retail energy industry (*see generally* Case 12-M-0476 filings between February 23 and March 3, 2016).

51. In apparent recognition of the confusing nature of the ESCO Rate-Setting Order, the Staff planned an open meeting for ESCOs to discuss their concerns, and issued the first version of a draft "Department of Public Service Staff Guidance Document for Compliance with the February 23, 2016 Order Resetting Retail Energy Markets and Establishing Further Process" on Friday, February 26, 2016 ("First Draft Guidance Document").

52. The First Draft Guidance Document attempted to provide an additional 6 pages of explanation of the ESCO Rate-Setting Order. Many questions remained unanswered, such as how the retail industry was expected to implement the mandates within just days of the ESCO Rate-Setting Order's issuance. The Staff issued a notice to all interested parties that the Guidance Document was issued for purposes of facilitating discussion at an open meeting about implementation.

53. Accordingly, on Monday, February 29, 2016, the Staff hosted a meeting in Albany which was linked by video and audio to rooms in New York City and Buffalo. In addition to

attendees in the three locations, over 500 people called in via telephone – an amount so unprecedented for a meeting with the Staff that there were not enough lines available for those calling in and additional arrangements had to be made.

54. The meeting lasted approximately three and a half hours, with many ESCO representatives asking similar questions about how they can possibly comply with certain deadlines and directives if they would have to breach other obligations they have to do so. Many expressed confusion as to how the ESCO Rate-Setting Order is to be implemented, what customers are to be told, and what potential complying products could look like. To a significant number of questions, the Staff answered by acknowledging that these are issues they will consider over the next 60 days and will work collaboratively with ESCOs to do so.

55. During the meeting with the Staff many questions were asked about whether if an ESCO submitted a compliant contract before the effective date of the ESCO Rate-Setting Order, the Staff would be in a position to approve so that ESCOs could actually market it to consumers. Approval is required before the contracts may be presented to consumers under the existing rules. The only response the Staff provided was that the Staff is assembling a team to review these proposed contracts "as soon as possible." In response to direct questions about whether the Staff would be able to review contracts in time for ESCOs to present them to customers immediately after the effective date of the ESCO Rate-Setting Order, the Staff was simply unable to provide answers. This was just one of many question-and-answer examples from the meeting showing that the Commission had not actually considered many important implications and consequences of the ESCO Rate-Setting Order.

56. To exacerbate concerns, the First Guidance Document provided by the Staff states that the Commission "may forgo the notice and cure period process and proceed directly with an

Order to Show Cause for eligibility revocation . . . against any ESCO that has a single violation of the Uniform Business Practices (UBP)."

57. Later in the day after the February 29 meeting, the Staff issued additional guidance document, attempting to answer some of the many questions raised during the Meeting ("Second Guidance Document"). The guidance remained in "draft" form, and the Staff promised to issue a revised guidance document the next day.

58. The Commission did not issue a guidance document on March 1, 2016, but did issue one during the afternoon of March 2, 2016 ("Third Guidance Document"). In the Third Guidance Document, the Commission included a significant amount of information that had not been provided in the two earlier guidance documents. This information concerned the amount of notice ESCOs must give customers when switching them from one type of contract to another, the requirements for obtaining affirmative consent from customers, and a customer's ability to provide electronic consent, among other topics. By issuing the ESCO Rate-Setting Order without providing detailed instructions on how ESCOs were expected to comply, the Commission created a moving target. Just two days before the ESCO Rate-Setting Order would take effect, that target remains in motion.

59. Also on March 2, 2016, the Commission filed a *Notice Denying Request for Extension* (Case 12-M-0476, March 2, 2016), denying the "numerous requests" it received for an extension of the March 4, 2016 effective date of the ESCO Rate-Setting Order, stating:

> The changes required in the Order are intended to immediately address the harms experienced by mass market customers. Department staff issued a Guidance Document today and has conducted an informational meeting with interested companies to review the requirements of the Order. The Commission provided clear justification for the urgent action taken and I decline to postpone the pressing and imperative changes directed in the Order.

(*Notice Denying Request for Extension*, at p. 2).

60. Having been denied an extension of the March 4, 2016 effective date of the ESCO Rate-Setting Order, Petitioners now seek relief from this Court.

61. Although the ESCO Rate-Setting Order provides that applications for rehearing may be filed within 30 days of February 23, no such rehearing will occur before the ESCO Rate-Setting Order becomes effective on March 4. Therefore, Petitioners have exhausted any administrative review that might otherwise be required of them to commence this proceeding.

FIRST CAUSE OF ACTION
CPLR 7804(2)

62. Petitioners repeat and re-allege each of the foregoing paragraphs of their Verified Petition as if set forth herein at length.

63. Petitioners have exhausted their administrative remedies, or alternatively, they need not exhaust their administrative remedies due to exceptions to the rule of exhaustion, including futility and constitutional rights.

64. In issuing the ESCO Rate-Setting Order, the Commission exceeded the authority granted it by the Legislature under Public Service Law.

65. The Public Service Law does not authorize the Commission to regulate ESCOs with respect to price for the provision of retail energy services.

66. The portion of the Public Service Law that grants the Commission the power to regulate prices applies only to public utilities, and has never applied to ESCOs.

67. The ESCO Rate-Setting Order nevertheless purports to regulate the rate at which an ESCO may sell energy services that are not derived from at least 30% renewable sources, by requiring ESCOs to guaranty and certify that customers contracting to purchase such services will pay no more than if they were full-service customers of a public utility.

68. Because the Legislature has not granted the Commission the authority regulate ESCO prices, the price regulation contained in the ESCO Rate-Setting Order was in excess of the Commission's jurisdiction.

69. The Commission's *ultra vires* price regulation also violates the separation of powers doctrine embodied in Article III, section 1 of the New York State Constitution, which vests the legislative authority in the Legislature.

70. Accordingly, Petitioners are entitled to an order reversing, annulling, vacating and/or setting aside the ESCO Rate-Setting Order as void as the product of the Commission's *ultra vires* action.

SECOND CAUSE OF ACTION
CPLR 7804(3)

71. Petitioners repeat and re-allege each of the foregoing paragraphs of their Verified Petition as if set forth herein at length.

72. Petitioners have exhausted their administrative remedies, or alternatively, they need not exhaust their administrative remedies due to exceptions to the rule of exhaustion, including futility and constitutional rights.

73. In issuing the ESCO Rate-Setting Order, the Commission violated lawful procedure by not adhering to the requirements of State Administrative Procedure Act, including § 202, which provides that an agency shall publish notice of any proposed rule in the New York State Register and afford the public and other interested parties at least 45 days to submit comments on the proposed rule.

74. The Commission's Notice of Proposed Rulemaking and the Report referenced therein failed to provide adequate notice that the Commission was contemplating requiring ESCOs to

guarantee to all of their residential and small non-residential customers the rates offered by public utilities and/or to offer 30% renewable energy packages.

75. Because the Commission never gave proper notice, the Commission's adoption of such rules pursuant to the ESCO Rate-Setting Order violates SAPA and renders the ESCO Rate-Setting Order null and void.

76. The Commission's issuance of the ESCO Rate-Setting Order further violated the requirements of State Administrative Procedure Act in that it set an effective date for the rules adopted by the ESCO Rate-Setting Order which was earlier than the deadline for submission of public comments on those rules.

77. The Commission's issuance of the Order further violated lawful procedure and was arbitrary and capricious in that the ESCO Rate-Setting Order, *inter alia*: (a) set an unrealistic effective date of 10 days from issuance of the ESCO Rate-Setting Order, without providing any reasonable basis for such a short deadline; (b) failed to provide meaningful guidance as to how the requirements set forth in the ESCO Rate-Setting Order will be implemented and/or applied, including how rate comparisons will be measured in order for ESCOs to satisfy the guaranteed savings condition; (c) failed to determine the penalties for violations of the new rules set forth in the ESCO Rate-Setting Order; and (d) failed to set forth a rational basis and reasoned elaboration of the facts that allegedly supported adoption of the rules set forth in the ESCO Rate-Setting Order.

78. The Commission failed to provide a rational basis or a reasoned elaboration of how using either a price guarantee or a 30% renewable energy package – or any renewable energy component – constitute valid measures of determining whether a "value" has been offered to ESCO customers. The ESCO Rate-Setting Order failed to set forth any findings based on any facts regarding what ESCO customers have saved or not saved in terms of rates, or any rational basis for its determination of what advances value to customers.

79. The Commission in wholesale fashion also failed to substantiate the basis for its conclusion that ESCO customers have historically not achieved rate savings. Even if this conclusion were supported by fact, which is not set forth or substantiated in any way, such conclusion does not constitute a rational basis for capping rates charged to ESCO customers.

80. The Commission's issuance of the ESCO Rate-Setting Order violated lawful procedure, was affected by an error of law, and constitutes an abuse of discretion.

81. The Commission's issuance of the ESCO Rate-Setting Order is contrary to the facts and to the law, is arbitrary and capricious, is founded upon conclusions that are unsupported by facts, and is thus insufficient as a matter of law.

82. The Commission's issuance of the ESCO Rate-Setting Order, without any factual or rational basis set forth therein, requires this Court to annul the ESCO Rate-Setting Order in its entirety as arbitrary and capricious.

83. Accordingly, Petitioners are entitled to an order reversing, annulling, vacating and/or setting aside the ESCO Rate-Setting Order.

THIRD CAUSE OF ACTION
(Regulatory Taking)

84. Petitioners repeat and re-allege each of the foregoing paragraphs of their Verified Petition as if set forth herein at length.

85. ESCOs have invested substantial amounts of time and money in the New York market based on their expectations that they would be allowed the continued freedom to independently negotiate prices directly with their customers and conduct profitable businesses

86. ESCOs have invested substantial resources in their New York businesses and their relationships with customers in New York, and therefore have vested property rights in their businesses.

87. Prohibiting ESCOs from charging prices for energy products that are any higher than prices charged by public utilities requires ESCOs to run their business at a loss.

88. Unlike public utilities, ESCOs derive no profit from transmission and delivery services.

89. ESCOs will suffer significant losses as a result of being forced to charge unreasonably low rates if the ESCO Rate-Setting Order is in effect.

90. As a result of the ESCO Rate-Setting Order, ESCOs will lose many existing customers to the public utilities, destroying relationships the ESCOs have been developing for years.

91. The Commission's previously stated policy goals include fostering competition and encouraging customer choice. The ESCO Rate-Setting Order runs contrary to these goals by reducing competition in the New York energy market and shrinking the range of options available to New York consumers.

92. On February 26, 2016, RESA filed an application for an extension of the deadline to comply with the ESCO Rate-Setting Order, which has been denied.

93. Because the ESCO Rate-Setting Order represents a final, determinative position that arbitrarily discriminates against ESCOs in such a way that they will be deprived of their vested property interests in their businesses, it constitutes a regulatory taking of the ESCOs' vested property interests in their businesses without just compensation, in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 7 of the New York State Constitution, and without due process of law, in violation of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 6 of the New York State Constitution.

94. Accordingly, Petitioners are entitled to an order declaring the ESCO Rate-Setting Order unconstitutional under the Fifth and Fourteenth Amendments of the U.S. Constitution and

Article I, Sections 6 and 7 of the New York State Constitution, as well as just compensation for the taking and damages pursuant to 42 U.S.C. §1983.

FOURTH CAUSE OF ACTION
(Violation of Substantive Due Process)

95. Petitioners repeat and re-allege each of the foregoing paragraphs of their Verified Petition as if set forth herein at length.

96. A violation of substantive due process occurs where the government acts beyond its authority, without justification, or commits other egregious misconduct, or where government action is motivated by political pressure rather than legitimate regulatory concerns.

97. ESCOs have vested property interests in their New York businesses, which will be irreparably damaged and rendered unprofitable by the ESCO Rate-Setting Order.

98. The Legislature has intentionally declined to include ESCOs in the definitions of "electric corporation" and "gas corporation" in Article 1 of the Public Service Law, and has intentionally declined to grant the Commission authority to regulate ESCOs' energy prices alongside public utilities' energy prices in Article 4 of the Public Service Law.

99. Article 4 of the Public Service Law, which grants the Commission authority to regulate prices charged by electric and gas corporations, does not apply to ESCOs.

100. The Commission therefore has no lawful authority to regulate prices charged by ESCOs.

101. By purporting to regulate the prices charged by ESCOs, the ESCO Rate-Setting Order exceeds Commission's lawful authority and constitutes a violation of ESCOs' substantive due process rights.

102. Further, upon information and belief, the impetus for the ESCO Rate-Setting Order was negative press coverage regarding the Commission and the ESCO industry, not a decision based on legitimate regulatory concerns.

103. Because the Commission's action in issuance of the ESCO Rate-Setting Order was motivated by political pressure rather than legitimate regulatory concerns, it constitutes a violation of ESCOs' substantive due process rights.

104. Accordingly, Petitioners are entitled to an order declaring that the ESCO Rate-Setting Order is void and unenforceable as it constitutes a violation of Petitioners' rights to substantive due process under the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 6 of the New York State constitution, as well as damages pursuant to 42 U.S.C. § 1983.

FIFTH CAUSE OF ACTION
(Unconstitutional Vagueness)

105. Petitioners repeat and re-allege each of the foregoing paragraphs of their Verified Petition as if set forth herein at length.

106. The ESCO Rate-Setting Order cannot be understood by a person of ordinary intelligence, does not provide explicit standards for those who must apply it, and creates a risk of arbitrary and discriminatory enforcement, in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 6 of the New York State Constitution.

107. The ESCO Rate-Setting Order is unconstitutionally vague to the extent it: (i) poses a condition of ESCOs' contracts with new customers that requires a guarantee "that the customer will pay no more than were the customer a full-service customer of the utility," without any guidance regarding how this calculation should be made; (ii) requires the Chief Executive Officer (CEO) or an equivalent corporate officer of each ESCO to file a certification with the PSC by 4:00 p.m. on March 4, 2016, certifying that any new customer enrollments will comply with the new conditions,

without specifying what penalties, if any, will be imposed on a CEO who fails to file such a certification or who files a certification that proves to be incorrect; (iii) "impose[s] consequences on ESCOs where there is a material pattern of consumer complaints regarding matters under the ESCO's control, such as marketing practices, even where those complaints do not reveal any violations of the UBP," without specifying what conduct to avoid, without specifying what standards the Commission will apply in enforcing this provision, and without defining the consequences to be imposed for any violation.

108. Therefore, the ESCO Rate-Setting Order is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 6 of the New York State Constitution.

109. Accordingly, Petitioners are entitled to a declaratory judgment that the ESCO Rate-Setting Order is void as unconstitutionally vague and are entitled to damages pursuant to 42 U.S.C. § 1983.

SIXTH CAUSE OF ACTION
(Injunctive Relief)

110. Petitioners repeat and re-allege each of the foregoing paragraphs of their Verified Petition as if set forth herein at length.

111. Unless the Court restrains Respondents from enforcing the terms of the unlawful ESCO Rate-Setting Order, RESA's members and the Member Petitioners will suffer irreparable injury for which they have no adequate remedy at law.

112. The substance of, and timetable prescribed by, the ESCO Rate-Setting Order, in combination with the material issues yet to be clarified by the Commission (including determining what constitutes a value added product and calculating its value) will cause ESCOs to suffer irreparable harm.

113. The Commission's actions after issuance of the ESCO Rate-Setting Order established that the Commission itself is not yet certain how an ESCO might comply with the ESCO Rate-Setting Order's requirements, and what penalties will be imposed on those who are not able to do so by the arbitrary compliance deadline.

114. Absent a preliminary and permanent injunction, ESCOs will be prevented from enrolling new customers, and renewing existing customers, while they consider the operational challenges and financial implications associated with meeting the requirements in terms of pricing and energy source guarantees, as well as whether their CEOs can certify compliance.

115. Even if ESCOs are subsequently able to determine means to comply with the requirements (and those means are profitable enough to be worth pursing), ESCOs will unlikely be able to reacquire the customers they were forced to drop to the utility in the midst of the confusion created by the ESCO Rate-Setting Order.

116. Absent a preliminary and permanent injunction, the Commission's improper attempt to regulate ESCOs in terms will result in the effect of irreparably harming ESCO's relationships with their existing customers that they devoted significant time and energy to secure.

117. By reason of the foregoing, Petitioners are entitled to an injunction preliminarily and permanently enjoining and restraining Respondents and their representatives from enforcing the terms of the ESCO Rate-Setting Order.

118. Petitioners have no adequate remedy at law.

WHEREFORE, Petitioners respectfully requests that the Court enter an order:

A. On the First Cause of Action, reversing, annulling, vacating and/or setting aside the ESCO Rate-Setting Order as made in excess of the Commission's jurisdiction and in violation of the doctrine of separation of powers;

B. On the Second Cause of Action, reversing, annulling, vacating and/or setting aside the ESCO Rate-Setting Order as arbitrary and capricious, an abuse of discretion, and/or made in violation of lawful procedures; and

C. On the Third Cause of Action, issuing judgment declaring that the ESCO Rate-Setting Order constitutes an unconstitutional taking under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 6 and 7 of the New York State Constitution, as well awarding just compensation for the taking and damages pursuant to 42 U.S.C. §1983;

D. On the Fourth Cause of Action, issuing judgment declaring that the ESCO Rate-Setting Order is void and unenforceable as it constitutes a violation of Petitioners' rights to substantive due process under the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 6 of the New York State constitution, and awarding damages pursuant to 42 U.S.C. § 1983.

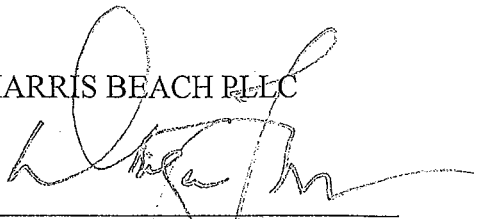
E. On the Fifth Cause of Action, issuing judgment declaring that the ESCO Rate-Setting Order is void as unconstitutionally vague, and awarding Petitioners damages pursuant to 42 U.S.C. § 1983;

F. On the Sixth Cause of Action, granting Petitioners an injunction preliminarily and permanently enjoining and restraining Respondents and their representatives from enforcing the terms of the ESCO Rate-Setting Order; and

G. Awarding RESA such other, further or different relief as this Court deems just and proper.

Dated: March 3, 2016
Albany, New York

HARRIS BEACH PLLC



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VERIFICATION

STATE OF NEW YORK)
COUNTY OF ALBANY) SS:

DOUGLAS A. FOSS, being duly sworn, deposes and says: that he is a member of the law firm of Harris Beach PLLC, counsel for the Plaintiffs-Petitioners, in the within action, and makes this verification pursuant to CPLR 3020(d)(3) on the basis that none of the Plaintiffs-Petitioners are in the county where he has his office. Deponent has read the foregoing Verified Complaint and Article 78 Petition, knows the contents thereof; and verifies that the same is true on the basis of information and belief, based upon the books and records in possession of deponent and conversations with representatives of Plaintiffs-Petitioners.

DOUGLAS A. FOSS

Sworn to before me
this 3rd day of March, 2016.

Notary Public

Paula Jean Mueller
Notary Public, State of New York
No. 01MU6332060
Qualified in Greene County
Commission Expires October 26, 2019

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