

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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

Petitioners,

For a Judgment Pursuant to New York CPLR Article 78

Albany County  
Index No. 874-16

- against -

NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondent.

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Adam Small, duly affirming the following statements in a manner calculated to awaken the conscience in accordance with his religious beliefs, states as follows:

1. I am General Counsel for Major Energy Services LLC and Major Energy Electric LLC (collectively, "Major Energy"). I have worked for Major Energy for the past 5 years, and my duties include overseeing regulatory compliance, marketing compliance and vendor contracts.

2. Major Energy currently has more than thirty employees working in various roles, including customer service, management, and clerical. Major Energy also contracts with outside vendors and sales representatives.

3. Major Energy has had a positive and compliant relationship with the Public Service Commission ("PSC") and the Staff of the Department of Public Service ("Staff"), and frequently interacts with the Commission to ensure that its customers are receiving optimal service.

4. I make this affidavit in support of Petitioners' motion for a stay prohibiting the PSC from enforcing its "Order Resetting Retail Energy Markets and Establishing Further Process" ("Reset Order"), issued February 23, 2016, without first providing adequate notice or satisfying the requirements of the New York State Administrative Procedure Act ("SAPA") and unlawfully mandating the rates that energy service companies ("ESCOs") can charge their customers.

#### **The Reset Order and Prior Proceedings**

5. On February 23, 2016, the PSC promulgated a regulation completely rewriting the rules of the retail energy market by requiring ESCOs such as Major Energy to change the terms of existing customer contracts for mass market consumers.

6. The Order requires ESCO contracts to comply with the following significant and sweeping changes:

Effective ten calendar days from the date of this Order, ESCOs shall only enroll new mass market customers or renew existing mass market customers in gas or electric service if at least one of the following two conditions is met: (1) enrollment where the contract guarantees that the customer will pay no more than were the customer a full-service customer of the utility; or (2) enrollment based on a contract for an electricity product derived from at least 30% renewable sources. In addition, ESCOs must receive affirmative consent from a mass market customer prior to renewing that customer from a fixed rate or guaranteed savings contract into a contract that provides renewable energy but does not guarantee savings. Finally, ESCOs that currently serve mass market customers through month-to-month variable rate agreements must enroll those customers in a compliant product at the end of the current billing cycle or return the customers to utility supply service.

7. In February 2014, the Commission adopted similar sweeping market changes, including protections aimed at low-income customers. (R. 3334, 3355-60).

8. Importantly, the February 2014 Order was stayed by the Commission and the low-income portion was never implemented due to privacy concerns.

9. With respect to the low-income aspect of the February 2014 Order, the intent of the low-income protections was to prevent waste of limited ratepayer and taxpayer funding for what the Commission perceived to be overpriced ESCO commodity services. (R. 3355-60).

10. The Commission's analysis was flawed because there is no way to know whether the rates that Staff considered to be "overcharged" included fixed prices or other bundled items of value that utilities simply don't provide.

11. Major Energy has never been specifically focused on only marketing to low-income customers, and therefore, participation in related regulatory issues has not been a priority for us.

12. Frankly, the idea of applying protections that were specifically aimed at low-income customers and protection of limited resources to the entire market does not make sense, since the rationale for the low-income protections was aimed at conserving limited state funds to help the most low-income customers, not to make adjustments to the mass market generally. (R. 3355-60).

13. We were, quite literally, taken by surprise when the Reset Order adopted the low-income proposal and applied it to all mass-market customers.

#### **Scherer Affidavit**

14. The Affidavit of LuAnn Scherer in Support of Respondent's Answer and Memorandum of Law, sworn to March 28, 2016 ("Scherer Aff. III"), contains many

inaccuracies and conclusory statements, and is, quite frankly, just as flawed as the Reset Order itself.

15. In fact, many of the claims in Ms. Scherer's affidavit are directly contradicted by the Commission's past orders, the Uniform Business Practices ("UBP") or by comments of the agency Staff in recent collaborative meetings.

16. At the outset, Ms. Scherer claims that "the vast majority of products available from ESCOs . . . do not include any energy-related value-added products" and that "the products generally include commodity-only variable or fixed-rate products, green energy products, and products that include a non-energy-related benefit like frequent flier miles or gift cards." (Scherer Aff. III, at ¶ 9).

17. The implication of this statement is that none of these products include value-added benefits. In fact, fixed-rate products have long been recognized by the agency as value-added products because they provide price-certainty to customers. (Such as in the February 2014 Order, R. 3344). Likewise, renewable energy products provide value-added services, as recognized implicitly by their retention in the Reset Order.

18. Ms. Scherer complains that variable-rate month-to-month contracts may be subject to price changes each month without notice or consent. (Scherer Aff. III, at ¶ 12). In fact, the Uniform Business Practices permit such changes as they exclude price changes from the definition of "material change" that would otherwise require notice. *See* UBP, Section 5(d). If anything, this problem reflects a regulatory failure (and one which is correctible).

19. Ms. Scherer claims that "[m]any mass market ESCO customers are victims of high-pressure sales tactics, deceptive marketing or both" (Scherer Aff. III, at ¶ 12)

and that nonetheless, where marketing practices violate the rules, “customers often have no evidence of that deception.” (Scherer Aff. III, at ¶ 14).

20. In fact, the Uniform Business Practices have required Third-Party Verification (“TPV”) since February 2015, when many of the measures adopted in the February 2014 Order took effect. This process ensures that no deceptive practices occur in the sales process and results in a recording that documents the sale and confirms its compliance with proper practices. TPV significantly reduces or eliminates the possibility of the kind of deception that Ms. Scherer complains about. The TPV script requires each customer to affirmatively respond to all questions before he or she can be enrolled into a Major Energy product.

21. Ms. Scherer makes the unbelievably broad and sweeping generalization that “I believe that most of the new or renewed contracts precluded by the Reset Order would result in customers paying higher prices for few or no benefits.” (Scherer Aff. III, at ¶ 16).

22. Unless Ms. Scherer has advance knowledge of commodity market prices, there is no way that she can make that prediction. Certainly, it cannot be ruled out that many customers might save money. This would particularly be the case, for example, if the customer is on a fixed-price product during a time of rising energy prices.

23. In fact, during recent collaborative meetings, Ms. Scherer acknowledged this in discussing the polar vortex. She stated that:

You know, the Commission has also said that a fixed-rate product is a value-added product. So, because, you know, it’s price certainty for customers. And if you were one of the people that had a value-added, fixed-rate product during the polar vortex you did, to the extent that ESCOs honored their agreements, which there were several that didn’t. But to the

extent that ESCOs honored their agreements, customers benefitted from lower prices.

*See Puchner Aff. II, Exhibit B (Collaborative Mar. 29, 2016, Excerpt #3).*

24. Ms. Scherer mentions various market advantages that she claims should allow ESCOs to offer a guaranteed savings product. For example, Ms. Scherer notes that ESCOs have “greater flexibility with respect to hedging practices.” (Scherer Aff. III, at ¶¶ 24-25).

25. However, as discussed more fully below, it is very difficult to compare or predict utility prices because of various factors, including the utilities’ ability to spread supply prices over time through rate cases.

26. Ms. Scherer acknowledged this several times during the recent collaborative meetings:

[I]t’s no secret that the utility can do off-cycle adjustments. That’s a big thing. I mean, if you can do true-ups for what happened in the third-quarter, you can do those true-ups in the fourth quarter. The ESCOs don’t have the ability to do that.

*See Puchner Aff. II, Exhibit B (Collaborative Mar. 28, 2016, Excerpt #1).*

I think...the discussion was that the parties talked about how difficult it was to benchmark against the utility price because of the inequities, the timing issues...

...

So, one of the examples...that I know you’re well aware of is the...during the polar vortex, NIMO was able to spread the cost of the impact of the polar vortex over a certain number of billing periods...over a six-month period. The ESCOs don’t really have the ability to do that and I mean some would argue that NIMO shouldn’t have been able to do it either.

*See Puchner Aff. II, Exhibit B (Collaborative Mar. 28, 2016, Excerpt #2).*

27. In another exchange, Ms. Scherer stated simply, “[y]ou’ve all kind of convinced us that the utility comparison is not the way to do it.” *See* Puchner Aff. II, Exh. B (Collaborative Mar. 28, 2016, Excerpt #4).

28. For these reasons, Ms. Scherer’s claim that ESCOs should be able to provide guaranteed savings due to their hedging abilities is not credible, since she concedes that utilities have the ability to spread costs over time through rate cases, a practice that she also concedes makes price comparison or prediction infeasible.

29. Ms. Scherer is also incorrect in her claim that the exemption for ESCO customers from local sales taxes supports guaranteed pricing. (Scherer Aff. III, ¶ 25). In fact, the tax savings is passed through to the customer and does not financially advantage the ESCOs.

30. Ms. Scherer also suggests that the guaranteed savings product is viable because “on information and belief, at least one ESCO offered a guaranteed savings product prior to the issuance of the Reset Order.” (Scherer Aff. III, at ¶ 26).

31. However, Ms. Scherer does not mention who this ESCO is or what the nature of their guaranteed product is, nor does she provide any information to support her claim that the product offering is economic.

32. Finally, Ms. Scherer cites to various complaint statistics as supporting the Reset Order. (Scherer Aff. III, at ¶ 13). However, Ms. Scherer does not indicate whether the referenced data is taken from the record and it does not appear to correspond with publicly available data of which I am aware. Indeed, the alleged complaint data contains no identifying information by which it can be verified or substantiated.

33. Ms. Scherer's complaint statistics reportedly provide data for the full calendar years of 2014 and 2015, but only part of 2013 and 2016. Review of the data only shows support for an increase in complaints in 2015 over the prior year, but is inconclusive for the remainder of the years provided. There is no support for the assertion that "customer complaints have increased **each year** since at least 2013" in the data provided. (Scherer Aff. III, at ¶ 13). This is representative of the kind of sweeping overstatements that the Commission relied on in the Reset Order.

34. Furthermore, even accepting the data as true, it actually undercuts the PSC's arguments regarding the supposed need for the Reset Order. This is because the data shows Major Energy had a total of 55 complaints over the period of April 2013 to March 2016, which represents less than 0.1% of Major Energy's mass market customers during that period—demonstrating that the Reset Order is not sufficiently justified.

35. Importantly, complaint statistics are just that. They do not reflect whether any alleged complaint, whether for misrepresentation, price or otherwise, was ever proven. In fact, the PSC's administrative complaint handling process does not provide for such allegations to be resolved in a manner where allegations are subjected to evidentiary proof.

### **Arbitrary and Capricious Agency Behavior**

36. The Reset Order and its imminent implementation have created serious uncertainty in the ESCO industry. The uncertainty is compounded by the fact that the Reset Order called for a "sixty-day period" during which further comments were to be solicited and the Commission would consider further refinements of the retail market,

including whether the requirements of the Reset Order “should be retained,” what other energy-related value-added services should be available, among other issues. (R. 3189, 3207-08).

37. Further, the Commission’s “Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers” and subsequent collaborative meeting process, with meetings held through March and April, raised additional questions and considerable market uncertainty regarding what products will be allowed, and when. (R. 3182-87).

38. Notwithstanding that the Commission’s papers assert the validity of the Reset Order, Staff’s comments in the recent collaborative meetings are critical evidence that the Order is fatally flawed and that the marketplace will be subject to continued uncertainty.

39. For example, the following are several important points that either suggest admitted flaws in the Reset Order or imminent changes that will create further uncertainty as our company tries, in good faith, to prepare for and comply with changes:

- Staff acknowledged the difficulty in comparing utility pricing to ESCO pricing, including the utilities’ ability to make adjustments using rate cases, such as NIMO spreading the costs of the polar vortex over subsequent billing periods, something which ESCOs cannot do. *See* Puchner Aff. II, Exh. B, Collaborative Meeting, Mar. 28, 2016, Excerpts #1 & 2. Without meaningful comparison, it is impossible to provide any guarantee without significant financial risk.
- A recognition that value-added products such as airline miles, coffee cards or gift cards have value because they provide behavioral motivation to get the customer to pay attention to their utility bills. *Id.* at Excerpt #3.
- That, following the Reset Order, the Commission tasked Staff with developing “benchmark pricing” (i.e. **an alternative** to utility pricing) for three additional products and that white papers would be issued regarding

such products. *See* Puchner Aff. II, Exh. B, Collaborative Meeting, Mar. 29, 2016, Excerpts #1 & 2.

- That the Commission has deemed fixed-rate products to be value-added and that such products benefitted customers during the polar vortex. *Id.* at Excerpt #3.
- That there were “significant gaps” in the Reset Order that needed to be addressed. *Id.* at Excerpt #4.
- That, Staff “feels confident” that if the Court’s stay is lifted, the Commission would provide ESCOs with a period of time before the limited product offerings of Reset Order are enforced, while the ongoing regulatory process continues. *Id.* at Excerpt #5.

40. All of this suggests a truly arbitrary regulatory process. First, without warning the agency attempted to strip ESCOs of valuable customers—and intentionally so. Further, these comments acknowledge that some of those customers targeted for termination based on lack of value-added services would have been receiving value-added services in the form of fixed-rate service. In fact, agency Staff acknowledged that the Reset Order’s underlying methodology is based on a flawed premise that utility prices are comparable and predicable for purposes of the guaranteed savings. Further, in the face of imminent loss of their customers and the need to fundamentally alter their business models, ESCOs still face the uncertainty that the PSC may change the rules **again** in the very short term because it has acknowledged that the Reset Order contains “significant gaps.”

41. Importantly, **on the day after** Ms. Scherer professed the urgency of enforcing the Reset Order and lifting the Court’s stay in her affidavit, she professed that she was “confident” that the Commission **would not** restrict ESCO marketing to the two compliant products required by the Reset Order for an unspecified “period” while the regulatory process continues.

### Reset Order Ambiguity

42. Under the current market design, it is difficult to develop a compliant product offering for mass market customers that guarantees savings compared to the utility. This is due to numerous factors, including: (1) the lack of transparency as to derivation of utility supply prices, (2) the ability of utilities to smooth supply prices over a period of time through rate cases, (3) the inconsistency in the timing of utility price changes across New York State, and (4) the inconsistency of methodology of determining utility prices. Of course, as noted above, Staff has conceded that comparison to the utility price is deeply flawed.

43. Further compounding these issues is the so-called guidance from the agency regarding implementation of the Reset Order. The PSC issued *three* “guidance” documents in the period after the Reset Order with continually changing information that did little to illuminate a feasible method with which an ESCO such as Major Energy can develop a compliant product. Moreover, the so-called guidance fails to address a number of pressing issues, including the details and applicability of the new “affirmative consent” requirement and details regarding development of complaint products, a problem that is exacerbated by the potential for the stay to be lifted before the ongoing regulatory process concludes and additional compliant products are permitted.

44. Importantly, agency Staff noted shortly after the Reset Order was issued that “the Order controls” —in other words, ESCOs rely on the guidance at their peril.

45. The difficulty of providing a compliant product is also exacerbated by the fact that Staff has promised that a mechanism to obtain data necessary to calculate what

the customer would have paid for service from the utility will be developed in the future through the Electronic Data Interchange system, but this will not be available until at least the 4th quarter of this fiscal year. Thus, the necessary tool for compliance is not even available yet. As a result, ESCOs are left without any real way to guarantee their product offerings are economic. They can only provide a “true up” after the fact (once the Electronic Data Interchange system is developed for this purpose). This places tremendous risk on the ESCOs, simply to offer a compliant gas or non-renewable electric product.

### **Irreparable Harm to Major Energy**

46. Major Energy will be irreparably harmed in several respects absent a stay of enforcement of the Reset Order until the merits of these proceedings are resolved.

47. Since there is not adequate data on which to predict utility prices, complying with the “guarantee” requirement would necessarily require us to place the company at financial risk for any customers that we offer a guaranteed savings product.

48. As explained by Ms. Scherer, this is because utilities have the ability to deem their customers “overcharged” for a period of time and then issue credits retroactively (referred to by Ms. Scherer as a “true up”). ESCOs attempting to predict utility rates in order to offer a guaranteed product would not know about these adjustments until after the fact. This creates an inability to use the utility price for comparison purposes (to support the Commission’s “overcharging” claim) and it also impedes ESCOs’ ability to offer guaranteed savings against uncertain utility rates.

49. Major Energy contracts with door-to-door sales representatives and we pay these individuals up front commissions with the expectation that we will make a profit

over the following months from these sales. In the event that we lose money on guaranteed savings customers, we will not recoup the expected revenue and will take a loss on the sales commission paid to sales representatives.

50. Further, if the Reset Order is enforced, it would also require the renegotiation of many existing agreements, including supply agreements with vendors, as well as third-party marketer agreements and could result in liability if orphaned contracts cannot be resolved by negotiation or due to inability to produce a financially viable compliant product. These agreements include Third Party Marketer Agreements, Sales office lease agreements, printing and distribution agreements, IT and service agreements and TPV vendor agreements.

51. Likewise, the uncertainty of the guidance and ongoing regulatory process means that we could very well develop a compliant product and modify contracts to offer that product only to have the PSC change the rules and render it non-compliant. This uncertainty places us in the difficult position of requiring significant resource expenditures to meet uncertain requirements, which may be imposed at any time if a stay is not in place.

52. Major Energy also faces irreparable harm because of the combined jeopardy created by the Reset Order's uncertain market rules (for such things as compliant products or "affirmative consent") with the elimination of "cure period" from the UBP's compliance process.

53. The elimination of the cure period means that an ESCO found to be in violation of the UBP a single time may be subjected to a Show Cause Order for revocation of its ESCO license without an opportunity to cure the alleged violation. Reset Order, at 18.

54. For example, an alleged failure to comply with ambiguous notice requirements or a single allegation of deceptive marketing practices, could result in a Show Cause Order for revocation.

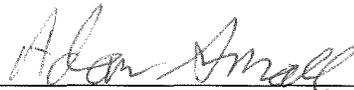
55. Likewise, the Commission could determine, after the fact, that one of our products developed in this period of extreme uncertainty was somehow non-compliant.

56. Loss of our license would be devastating to Major Energy, as it would require us to shut down our company in New York.

57. The risk of losing our license is particularly concerning due to the considerable uncertainty created by the Reset Order, the guidance and the subsequent agency process.

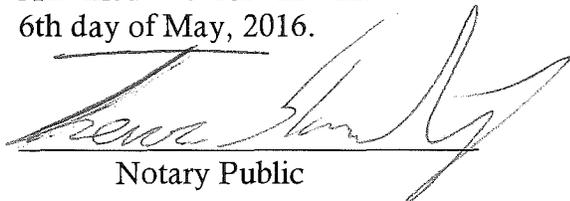
58. If Major Energy were to lose its license, its losses would be in excess of \$1,000,000.

59. Based on the above, absent a stay, Major Energy would suffer substantial and irreparable harm.



Adam Small, Esq.

Affirmed to before me this  
6th day of May, 2016.



Notary Public

Trevor A. C. Stanley  
02ST6329190  
Exp: 08/17/2019  
Rockland County  
New York State