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,

Petitioners/Plaintiffs,

For a Judgment Pursuant to New York CPLR Article 78

v.

NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondent/Defendant.

REPLY AFFIDAVIT

Index No. 874-16

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

THOMAS F. PUCHNER, being duly sworn, deposes and says:

1. I am an attorney and member of the firm of Phillips Lytle LLP, attorneys for Petitioners Major Energy Services LLC, Major Energy Electric LLC, and Family Energy Inc.

2. I submit this affidavit in support of Petitioners' motion for a Judgment and Order annulling the Order Resetting Retail Energy Markets and Establishing Further Process ("Reset Order") issued by Respondent New York State Public Service Commission ("Commission" or "PSC") on February 23, 2016 and for a stay and/or preliminary injunction prohibiting the Commission from enforcing the Reset Order pending the adjudication of this hybrid action and proceeding.

3. Respondent's positions in the Reset Order and in its supporting answering papers are factually and legally contradicted by various statements by agency Staff in recent Collaborative Meetings ("Collaboratives") with the ESCO regulated community, which the Court will find illuminating. (Attached hereto, as **Exhibit A**, is a DVD containing true and correct copies of video recordings of Collaboratives held on March 15, 28 and 29, 2016; True and accurate excerpts of various key sections of the Collaborative meetings are transcribed and attached, as **Exhibit B**).[1]

4. Further, Respondent's positions are also contradicted by the history of gas and electric deregulation in New York which strongly supports Petitioners' claims that the Reset Order was *ultra vires,* as well as arbitrary, capricious and contrary to law, and based on errors of fact, among other fatal defects. Therefore, a counterstatement of facts is provided following the below discussion of the Collaboratives.

5. Finally, in response to the Commission's *post-hoc* rationale for the Reset Order's extension of authority to establishing "just and reasonable" rates for ESCO customers, the Court may also find illuminating the Commission's "Price Reporting Order" adopted in 2006, which carefully distinguished its "oversight" of ESCOs through data-based licensing requirements from rate regulation under Public Service Law Article 4.

COLLABORATIVE ADMISSIONS BY THE AGENCY

6. Respondent's admissions in the Collaboratives are highly relevant to this proceeding.

7. For example, while the Commission maintains in the Reset Order and supporting papers that ESCOs do not provide value-added products, Staff conceded in the

[1] Copies of the Collaborative video recordings were obtained from the Commission's website at http://www3.dps.ny.gov/W/PSCWeb.nsf/SN/Webcasts (last visited May 6, 2016).

Collaboratives that the Commission had previously determined that fixed-rate products are an example of value-added service.

> 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 **Exhibit B**, March 29, 2016 Collaborative, Excerpt #3.

8. Further, the Reset Order is based on the Commission's underlying comparison between utility and ESCO rates. Yet, Staff has conceded several times that such a comparison is flawed. For example, Ms. Scherer noted at the March 28 Collaborative that "[y]ou've all kind of convinced us that the **utility comparison is not the way to do it**." *See* **Exhibit B**, Mar. 28, 2016 Collaborative, Excerpt #4 (emphasis added).

9. Further, Ms. Scherer acknowledged several additional times that day that the comparison is faulty, stating that:

> [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 **Exhibit B**, Mar. 28, 2016 Collaborative, Excerpt # 1.

10. Indeed, in one case, Ms. Scherer even explained this central problem to someone who asked about it:

> I think, Erin, 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, Erin, 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 **Exhibit B**, Mar. 28, 2016 Collaborative, Excerpt #2.

11. In addition, the Commission's position in the Reset Order and answering papers is that other value-added products provide little or no value to customers. *See* Affidavit of LuAnn Scherer, sworn to Mar. 28, 2016 ("Scherer Aff. III"), at ¶¶ 9-10; Reset Order, at 2,4; Resp. Br., at 40.

12. In the Collaborative, Staff apparently recognized that non-energy related value-added products benefit consumers through behavioral motivation, once again completely contradicting the agency's official position:

> I'll suggest that airline miles, or coffee cards, or any kind of gift card has value. And if that's what's going to behaviorally motivate somebody to pay attention to their energy bill and is going to allow them to enter into the realm because they're interested in earning those points, that's what interests them, then that has value.

See **Exhibit B**, Mar. 28, 2016 Collaborative, Excerpt #3.

13. Further, notwithstanding Respondent's litigating position that only the two products permitted by the Reset Order should be allowed (allegedly in order to protect consumers from their own choices) Staff admitted that it was tasked with developing three additional products and establishing a "benchmark" price alternative to the utility comparison. For example, at the March 29 Collaborative, Ms. Scherer noted that "the Staff's position is that we were asked to come up with a mechanism for identifying a reference price for a variable with value-added (energy-related value added), a fixed, and a

fixed with energy-related value-added." *See* **Exhibit B**, March 29, 2016 Collaborative, Excerpt # 1. *See also id.*at Excerpt #2.

14. In addition, Staff admitted that there were "significant gaps" in the Reset Order that needed to be addressed through the regulatory process. *See* **Exhibit B**, Mar. 29, 2016 Collaborative, Excerpt #4.

15. Thus, at the same time that the ESCO community faces immediate shutdown or at least significant loss of customers, the agency has recognized: (1) that some prohibited products, in fact, add the type of customer value that Commission claimed was lacking in the Reset Order; (2) that other value-added products that were dismissed in the Reset Order, in fact, benefit consumers through behavioral motivation; (3) that the underlying comparison to the utility price, and its use as a benchmark, was flawed; (4) that there were "significant gaps" in the Reset Order; and (5) that, at the same time many ESCOs could be faced with shutdown or significant business harm on an immediate basis, the Commission had actively tasked Staff with developing other products and a different price comparison method.

16. All of this suggests arbitrary agency action in the extreme.

17. Yet, on the instant motion, the Court may find that the following quote from Ms. Scherer shocks the conscience:

> 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 **Exhibit B**, Mar. 29, 2016 Collaborative, Excerpt #5 (emphasis added).

18. 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 and/or preliminary injunction should be denied in order to protect customers from alleged overcharging.

19. **Importantly, this statement was made <u>one day</u> 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.

COUNTERSTATEMENT OF FACTS

20. In many respects, the Commission's answering papers recount revisionist history, literally cherry picking from its historic orders and court decisions to find anything that provides a *post-hoc* rationale for what is obviously an *ultra vires* and arbitrary Reset Order. In order to respond to the Commission's arguments, it is therefore necessary to recount the complex history of gas and electric deregulation in New York State. Importantly, the history reflects that the Commission has, over and over:

(1) issued orders determining that ESCOs should not be regulated as jurisdictional entities;

(2) issued orders providing that protections to ESCO customers were achieved by voluntary agreement of the ESCOs in return for transmission service—but not by assertion of regulatory authority for "just and reasonable rates" over ESCOs, directly or indirectly;

(3) issued orders expressly providing that its "oversight process" for ESCOs was a licensing regime;

(4) issued orders satisfying the statutory requirement of "just and reasonable" rates through the backstop of regulated utility supply subject to full Public Service Law regulation not through controls imposed on ESCOs; and

(5) submitted multiple pleadings to the Albany Supreme Court, sworn and otherwise, asserting that ESCOs were not "gas corporations" or "electric corporations" under the Public Service Law.

A. MONOPOLY UTILITIES AND HEFPA

21. Historically, utilities in New York were monopoly providers of electricity and gas to "captive" ratepayers that had no other alternative. The utilities' charges included "bundled rates" for various aspects of service, including supply, delivery, transmission, etc.

22. In 1981, the Legislature adopted the Home Energy Fair Practices Act ("HEFPA") as a "comprehensive set of residential utility customer protection rules," enacted as a new Article 2 of the Public Service Law. L. 1981, ch. 713; *Matter of Public Utility Law Project v. Public Service Comm'n*, Albany County, April 29, 1997, Index No. 4509-96, at 3-4 ("*PULP v. PSC I*"), at 3-4. (A true and accurate copy of the Decision and Order of Justice Keegan ("Keegan Decision") in *PULP v. PSC I* is attached hereto as **Exhibit C**).

23. HEFPA declares the State's policy that the "continued provision of 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." Public Service Law § 30. By its terms, HEFPA was originally applicable only to "gas corporations" and "electric corporations."[2] *See* Public Service Law § 30 (stating that "[t]his article shall apply to the provision of all or any part of the gas, electric or steam and municipalities corporation or municipality").

[2] It also applied to steam corporations and municipalities. *See* Public Service Law § 30.

24. HEFPA provides a number of protections to gas and electric customers. The statute was implemented with detailed regulations containing residential customer rights and responsibilities, including complaint procedures. *See* 16 NYCRR Parts 11 & 12.

25. Since HEFPA was adopted at a time when **only** monopoly utility service was available, it only applied to "gas corporations" and "electric corporations"—energy competition simply did not exist. However, in the 1980's and 1990's the process of deregulating or "unbundling" utility service began to be implemented in New York. HEFPA applicability (and the jurisdictional predicates thereto) has been a touchstone of multiple legal challenges to deregulation since the very beginning. Resolution of these issues by the Commission and the Courts is highly relevant and controlling of the powers sought to be exercised in the Reset Order.

B. THE GAS MARKETER ORDER AND *PULP V. PSC I*

26. In 1984, the Legislature enacted Public Service Law § 66-d, which provided the PSC with authority to order any "gas corporation to transport or contract with others to transport gas" to consumers in New York State. *See* Public Service Law § 66-d; L.1984, c. 519. L. 1985, ch. 790. The statute originally only applied to large gas customers, but was later amended to apply to all customers.

27. In 1996, the PSC issued an order implementing competitive gas supply for all utilities in New York. Case 93-G-0932 Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Order Concerning Compliance Filings (issued Mar. 28, 1996) ("Gas Marketer Order"). (A true and accurate copy of the Gas Marketer Order is attached as **Exhibit D**).

28. The Gas Marketer Order determined that the provisions of HEFPA, Public Service Law Article 2, would not be applied to gas marketers.[3] Rather, they would apply certain basic customer protections and gas marketer customer contracts would include an express waiver of HEFPA protections. *See* **Exhibit D** (Gas Marketer Order), at 19-21.

29. The PSC's order specified that if a gas marketer discontinued service, the customer would still receive gas service from the utility with HEFPA protections prior to any termination in order "to protect against potentially harmful situations." *See* **Exhibit D** (Gas Marketer Order), at 21.

30. Further, HEFPA protections would "remain in force for the [utility] component of services rendered." In contrast the "portion of the service resulting from the new relationships among the marketers, [utilities] and the customers will be based on **contractual agreements, tariff provisions and good customer principles**." *See* **Exhibit D** (Gas Marketer Order), at 19.

31. Specifically, the Commission required that:

> **each utility . . . require that marketers/aggregators seeking to obtain transportation services from [utilities] to sell gas to residential customers can do so if the following requirements are met**:
>
> 1. Contracts between the marketers and customers contain specific language advising customers of protections that have been waived in the transaction. Each marketer will file with the staff of our Consumer Services Division a copy of its standard contract.
>
> 2. A system to handle customer complaints is operational and that the PSC help and hotline numbers are provided to customers.

[3] The term "gas marketer" was adopted in the early deregulation of natural gas. In current practice, gas marketers are commonly referred to as ESCOs.

3. The bills will be clear and in plain language, and the staff of our Consumer Services Division shall receive a sample copy.

4. Procedures are in place to ensure customers receive adequate gas supply services. The procedures must provide that notifications to be sent at least 15 days before disconnection of supply service to allow customers the opportunity to pay the overdue bill or request service from another provider.

See **Exhibit D** (Gas Marketer Order), at 20 (emphasis added).

32. Thus, the terms of gas marketer service were adopted as requirements to be met by gas marketers in order to obtain transportation service from the utility. Notably, nowhere in the Gas Marketer Order does it condition service on "just and reasonable rates" or a "workably competitive" marketplace, but rather allows customers the backup choice of utility supply which is subject to the statutory requirement of "just and reasonable rates." This way the statutory requirement was always available to the customer and could be met by the utility. This concept would be further refined in the context of electric utility deregulation.

33. In July 1996, the Public Utility Law Project ("PULP") commenced a declaratory judgment action, *Matter of Public Utility Law Project of New York, Inc. v. New York State Public Service Commission,* (Albany County Index No. 4509-96) ("*PULP v. PSC I*"). PULP's lawsuit alleged that the PSC violated HEFPA by failing to apply its protections to the newly created competitive gas marketer entities. *See* **Exhibit C** (Keegan Decision).

34. Among other things, PULP asserted the following claims in its Verified Petition and subsequent Amended Petition):

34. HEFPA applies to every gas corporation serving residential customers; and

> 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 **Exhibit E** (*PULP v. PSC I*, PULP Verified Complaint, dated July 26, 1996) (emphasis added); **Exhibit F** *PULP v. PSC I*, Amended Verified Complaint, dated Sept. 24, 1996).[4]

35. **The PSC answered these allegations with straight denials. In other words, in 1996, the PSC filed sworn pleadings denying that gas marketers were "gas corporations" under the Public Service Law.** *See* **Exhibit G** (*PULP v. PSC I*, PSC Verified Answer, at ¶ 2; & **Exhibit H** (*PULP v. PSC I*, PSC Amended Answer, at 2).

36. On April 29, 1997, Justice Keegan issued a decision dismissing the PULP action on standing grounds.

37. However, the decision included a lengthy alternative holding on the merits of the dispute. This aspect of the Keegan Decision has provided the legal foundation for the PSC's ESCO regulatory scheme ever since. There were two essential conclusions of significance to this litigation. First, Justice Keegan held that HEFPA was inapplicable to gas marketers because they simply did not exist at the time the Legislature adopted HEFPA, stating that:

> The simple and inescapable truth is that HEFPA was enacted by the Legislature in 1981 as a consumer protection measure or utility customer's "bill of rights" at a time when residential gas, electricity and steam service were provided by regulated monopolies and competition had not yet been introduced for these utility services. Gas marketers, unbundling and utility

[4] True and accurate copies of the relevant pleadings in each of the historic ESCO cases referenced herein are taken from the respective Appellate Division Records and Briefs microfilms. Certification pages from the microfilm are attached to the first referenced document from each case.

> competition are not even mentioned or in any respect provided for in any of the provisions of HEFPA. . . . The provisions of HEFPA do not expressly apply to residential gas marketers who did not exist in this State when the Act was adopted, and thus it is not at all clear that HEFPA was ever intended to apply to the competitive gas marketer entities that were thereafter formed with the onset of unbundling and utility competition.

See **Exhibit C** (Keegan Decision), at 23-24.

38. With respect to the claim that gas marketers were "gas corporations" under the Public Service Law, the court held that:

> The court has reviewed plaintiffs' contentions that gas marketers are "gas corporations" subject to HEFPA (Public Service Law § 30; see Public Service Law §§ 10, 11 [define gas corporation and gas plant), and that gas marketers must be treated as a "utility" like LDC [local distribution companies i.e. utilities] for purposes of the Public Service Law in general and HEFPA and its implementing regulations in particular (*see* Public Service Law § 2 [23 and 24] [define "utility company" and "utility corporation"]; *see also* 16 NYCRR § 11.2 [a][1]). The court has not found any reported decision reaching that interpretation, and finds that the definitions—notably adopted long before unbundling was introduced—do not compel that conclusion.

Id. at 27 (bracketed text in original, except for definition of "LDC").

39. In other words, the Court concluded that HEFPA and the definition of "gas corporation" under the Public Service Law were inapplicable to gas marketers for the simple and inescapable reason that they did not exist when those provisions were enacted and were clearly not contemplated by the Legislature.[5]

[5] Justice Keegan's decision and order in *PULP v. PSC I* was upheld by the Appellate Division, Third Department solely on standing grounds. *Matter of Public Utility Law Project of New York, Inc. v. Public Serv. Comm'n*, 252 A.D.2d 55, 59 (3d Dep't 1998).

C. OPINION 96-12 AND *ENERGY ASSOCIATION V. PSC*

40. Unlike gas competition, there was no direct[6] deregulation legislation to spark the process of electric utility restructuring. Instead, the Commission completed electric deregulation of the State's electric utilities almost entirely through a regulatory process (and liberal interpretation).

41. The PSC's proceedings around deregulation culminated in a "vision" order, issued May 20, 1996, denominated Opinion 96-12. Case 94-E-0952 *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Regarding Competitive Opportunities for Electric Service (issued May 20, 1996) ("Opinion 96-12"). Puchner Aff., sworn to March 3, 2016 ("Puchner Aff. I"), at Exh. C.

42. Opinion 96-12 contained three steps: (1) it ordered electric utilities to file plans for how they would restructure in a competitive marketplace; (2) it rejected utilities' claims that consumers were required to pay rates that would recover all stranded costs (instead reserving stranded cost recovery for case-by-case review in individual proceedings); and (3) set out a Vision Policy for electric competition. *See generally* Puchner Aff. I, Exh. C (Opinion 96-12).

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[6] *See* PSL §§ 66(12-b)(b) (PSC may authorize utility wheeling of electricity purchased by industrial or commercial customers at rates that "adequately compensate the corporation for the use of its facilities"); 66-c (authorizing utilities to wheel electricity from alternate energy production, small hydro or co-generation facility if approved by the PSC); 66-g (authorizing PSC to require utilities to wheel electricity produced at natural gas well sites using indigenous natural gas supplies in New York). Wheeling is a generic term for a utility's transmission of electricity owned by others.

43. Opinion 96-12 included a number of key determinations for the future ESCO industry. Importantly, the order clarified exactly how the Commission differentiated its regulatory powers between ESCOs and utilities.

44. The Commission determined that utilities would serve as the backup "Provider of Last Resort" (or "POLR") with full protections of the Public Service Law (consistent with the framework provided in the Gas Marketer Order):

> all consumers will be assured of having an available provider of electricity. In this way, regardless of whether they take advantage of the new options, **consumers could at least count on the safe and adequate provision of electric services at reasonable rates.**

Id. at 27 (emphasis added).

45. The Commission expanded on the POLR concept in articulating its "goal" for "Continuing Customer Protections and the Obligation to Serve":

> **Statutory requirements make clear that our mandate is to ensure that all New Yorkers have access to safe and reliable service at just and reasonable rates. Each customer must be able to count on at least one supplier who will continue to provide service at reasonable rates** in the event that: (a) the customer chooses to make no change from its current situation, (b) a new supplier fails to meet its obligations, or (c) competitive alternatives are not yet available in the area.

Id. at 29-30 (emphasis added).

46. Thus, the Commission, again, referenced its statutory obligations for "just and reasonable" service in reference to utilities as the POLR. Importantly, if the requirement of "just and reasonable" rates applied to ESCOs, the proposition of a POLR would be completely unnecessary, at least as regards the statement that customers would be able to rely on "at least one supplier who will continue to provide service at reasonable rates."

47. As noted in our previous submissions, the Commission also expressly adopted a licensing regime for ESCOs:

> Another issue related to customer protections is whether to license or certify energy service companies. This seems to be an important step during the transition phase given the public's concerns about the credibility of the ESCOs. A further advantage of licensing ESCOs is that data can be gathered about how they are working, how many and what kind of complaints they are getting, and what level of service quality they are delivering. Additionally, a mechanism is needed to ensure that the companies are financially reliable.
>
> On the other hand, licensing places additional limitations on the marketplace, possibly limiting the growth of the ESCO market.
>
> **In our judgment, the need to protect consumers is paramount, and ESCOs should be licensed or certified by a state entity. The licensing requirements should provide basic information but should not be onerous.**

Id. at 74-75 (emphasis added).

48. The Energy Association of New York State ("EA") filed a legal challenge to Opinion 96-12 in September 1996, *Matter of Energy Association of New York State v. Public Service Commission of the State of New York*, (Albany County Index No. 5830-96) ("*EA v. PSC*"). PULP intervened in *EA v. PSC* as well.

49. The thrust of the Petitioners' case was that Opinion 96-12 exceeded the agency's authority in requiring utilities to file restructuring plans; that the PSC's rejection of the utilities' recovery of stranded costs violated the Public Service Law, as well as the "regulatory compact," and was otherwise unconstitutional; and that the PSC had violated SAPA.

50. However, both challengers included a virtually identical claim, analogous to what PULP had asserted in *PULP v. PSC I*, that ESCOs were "electric corporations" subject to the Public Service Law.

51. Specifically, 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." **Exhibit I** (*EA v. PSC*, PULP Verified Petition, dated Oct. 15, 1996, at ¶ 30; *see also* ¶ 24 (alleging that PSC violated PSL § 66, 71, and 72 because it "surrendered or delegated to electric corporations" its obligation to fix just and reasonable rates).

52. Similarly, EA argued 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.

Exhibit J (*EA v. PSC*, EA Petition, dated Sept. 18, 1996, at ¶ 76) (exhibits omitted).

53. **In its Answers to both Petitions, the PSC denied both allegations.**

54. **Thus, the Commission took the position for the second time that competitive ESCOs were not jurisdictional entities (this time "electric corporations") under the Public Service Law**. *See* **Exhibit K** (*EA v. PSC*, PSC Verified Answer to PULP, dated Oct. 21, 1996, at ¶ 15); **Exhibit L** (*EA v. PSC*, PSC Answer to EA, dated Oct. 15, 1996, at ¶ 34).

55. **Significantly, the PSC's counsel in this proceeding, Jonathan Feinberg, Esq. was of Counsel on PSC's Verified Answer to PULP, entering a straight**

denial of PULPs allegation the ESCOs were electric corporations subject to HEFPA and Article 4 rate regulation.

56. On November 25, 1996, Justice Harris issued a lengthy decision that denied the claims of both EA and PULP "in all respects." While the text of Justice Harris' November 25, 1996 decision did not directly address the ESCO's status as "electric corporations," all of the claims before the Court were necessarily denied. *See EA v. PSC*, 169 Misc.2d 924, 943 (Albany Cnty. Nov. 25, 1996).

57. On reargument and rehearing, the Court held that it had "examined all other arguments and requests for relief made by PULP and all other petitioners and/or intervenor-petitioners herein and finds them without merit." **Exhibit M** (*EA v. PSC*, Decision and Order on Rehearing/Reargument/Clarification, dated April 18, 1997).[7] Thus, Justice Harris made clear that all claims, including those related to ESCOs status as "electric corporations" subject to HEFPA and Article 4 rate regulation were denied.

D. OPINION 97-5 AND *PULP V. PSC II*

58. Following issuance of Opinion 96-12, the Commission continued the process of developing a deregulated retail electric market.

59. On May 19, 1997, less than a month after Judge Keegan's decision upholding the Gas Marketing Order, and some six-months after Judge Harris's decision upholding Opinion 96-12, the Commission issued another major order, denominated

[7] Only PULP and a related petitioner pursued appeals in the Appellate Division, Third Department. The court affirmed the Supreme Court's decision, holding that the petitioners lacked standing, based on its opinion in *PULP v. PSC I* (as well as its subsequent decision in PULP v. PSC II, discussed below). *See Matter of Energy Ass'n of State of N.Y. v. PSC*, 273 A.D.2d 708, 710-11 (3d Dep't 2000).

Opinion 97-5.[8] *See* Case 94-E-0952 *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Service (issued May 19, 1997) ("Opinion 97-5") (A true and accurate copy of Opinion 97-5 is attached hereto as **Exhibit N**).

60. Opinion 97-5 established various regulatory policies for retail electric service, including POLR requirements, consumer protections and oversight of ESCOs.

61. At the outset, the order reiterated the fundamental premise adopted in its vision-setting prior order:

> **In Opinion No. 96-12, we acknowledged our mandate to ensure that "all New Yorkers have access to safe and reliable service at just and reasonable rates." We stated that "[e]ach customer must be able to count on at least one supplier who will continue to provide service at reasonable rates . . . ."**

Exhibit N (Opinion 97-5), at 3 (quoting Opinion 96-12, at 28) (emphasis added).

62. With respect to consumer protections, the Commission adopted a "two-tier" approach, similar to that adopted in the Gas Marketer Order, with customers having access to protections of "HEFPA and related rules" from the POLR/utility and with other less onerous, (but nonetheless protective), "limited consumer protections" made applicable to ESCOs through the "oversight process." Opinion 97-5, at 22-23. These rules were applied "as a condition of using the facilities of the [utility] companies." *Id.* at 23.

63. During the proceedings before the PSC, PULP argued "that all electricity providers are 'electric corporations' under Public Service Law and subject to HEFPA." Opinion 97-5, at 19. The agency rejected that claim, stating that "HEFPA was

[8] Contrary to the Respondent's brief, Opinion 97-5 was not issued prior to Justice Harris' decision in *Energy Association*. Nor was it prior to the second decision by Justice Harris on rehearing/reargument/clarification.

not designed for non-monopoly[9] providers and we expect that if those rules were imposed, they would act as a barrier to entry for many ESCOs." *Id.* at 22. The order goes on to state that "[r]equiring that ESCOs comply with only a set of fundamental protections will promote their entry to the State and, on balance, will provide more customers with choice of provider that would imposing HEFPA on all ESCOs." *Id.*

64. As an additional rationale for the customer protection regime, PSC noted that "customers will have access to service from a POLR in addition to offerings of combinations of services and protections from ESCOs they may find more attractive." *Id.* Or, as stated in its restatement of the Vision Policy at the beginning of Opinion 97-5, customers choosing the ESCO service will continue to have the full Public Service Law protections of the POLR/utility, including the ability to "count on at least one supplier who will continue to provide [electric] service at reasonable rates." *Id.* at 3 (quoting Opinion 96-12, at 28).

65. The Commission also noted that "an ESCO would not be allowed to terminate electric service." *Id.* at 22. However, contrary to Respondent's inaccurate spin on Opinion 97-5 (Resp. Br., at 7), this was not the only reason—or even the principle one—that the agency decided HEFPA should not apply to ESCOs.

66. Opinion 97-5 is also notable for several other key points in relation to the ESCO "oversight process" that would later become the Uniform Business Practices. First, the Commission expressly noted that ESCO compliance requirements were implemented on a quid-pro-quo or "agreement" basis, but not based on overarching

[9] The original Opinion 97-5 contained a typographic error by including the word "monopoly" instead of "non-monopoly." Opinion 97-5, at 22. The error was corrected by a subsequent errata notice. *See* Case 94-E-0952 *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services - Errata Notice (issued May 27, 1997) ("Errata Notice"). (A true and accurate copy of the Errata Notice is attached hereto as **Exhibit O**).

regulatory authority. Simply put, the Commission stated **"we will require that ESCOs agree to provide specific and limited customer protection as a condition of using the facilities of the [POLR/utility] companies."** *Id.* at 23 (emphasis added).

67. As noted in our prior submissions, with respect to licensing regime, the Commission expressly determined that a licensing regime would be used. Opinion 97-5 states that: "[a]s we stated in Opinion 96-12, licensing energy service companies is one means of addressing the public's concerns about credibility of ESCOs." Opinion 97-5, at 30-31.

68. As an Appendix to Opinion 97-5, the Commission set forth a detailed "ESCO Oversight Process." The Section on "Suspension Criteria" included the "opportunity for a hearing" and review of eligibility for suspension on a "case-by-case basis." *Id.* at Appx B, p.3. This is classic licensing language.

69. In September, 1997, PULP and several individual plaintiffs commenced a third lawsuit against the Commission regarding its deregulation process, *Matter of Public Utility Law Project of New York, Inc. v. New York Public Service Commission*, (Albany County Index No. 5685-97) ("*PULP v. PSC II*"). *See* **Exhibit P** (*PULP v. PSC II*, Verified Complaint) (exhibits omitted).

70. PULP's challenge alleged that the Commission exceeded its statutory authority and violated the State Administrative Procedure Act. *Id.* at ¶ 37-60. Among the allegations in PULP's Verified Complaint—interposed in Supreme Court for the third time—was its argument that ESCOs were statutory electric corporations under the Public Service Law.

71. Specifically, PULP alleged:

> 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.

Id. at ¶ 52.

72. Instead of answering, the PSC moved to dismiss PULP's Verified Complaint. *See* **Exhibit Q** (*PULP v. PSC II*, PSC Notice of Motion and Supporting Affidavit of Jonathan Feinberg, Esq., sworn to Nov. 26, 1997) (exhibits omitted).

73. In relevant part, the PSC argued that PULP's claims were barred by collateral estoppel based on Justice Keegan's decision in *PULP v. PSC I*. PSC argued that:

> **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 Commission decision on HEFPA grounds as part of its effort to force the Commission 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.

Id, at ¶¶ 4-5 (emphasis added).

74. In a subsequent Reply Affidavit, PSC responded to PULP's arguments that collateral estoppel should not apply because gas marketers and ESCOs were treated differently under the Commission's regulatory scheme. The Reply Affidavit included various excerpts of orders relating to gas marketer consumer protections. The Commission argued that "[t]hese documents show the Commission [sic] method for protecting customers of gas marketers, **inasmuch as neither Article 2 or Article 4 of the Public Service Law**

apply to such marketers." **Exhibit R** (*PULP v. PSC II*, PSC Reply Affidavit of Jonathan Feinberg, Esq., sworn to Jan. 14, 1998, at ¶ 2) (emphasis added).

75. Thus, the Commission took the position that PULP's claims, which necessarily encompassed its claims that ESCOs were "electric corporations," were barred by collateral estoppel due to Justice Keegan's decision in *PULP v. PSC I* and Justice Harris' decision in *EA v. PSC*. Further, the Commission expressly stated that "neither Article 2 or Article 4" applied to gas marketers (as ESCOs selling gas commodity were then called).

76. **Notably, the author of both of these PSC submissions to the Albany County Supreme Court was Jonathan Feinberg, Esq. the same attorney appearing on their behalf in this proceeding.**

77. In a Decision and Order, dated September 1, 1998, Judge Teresi denied the Commission's motion to dismiss, rejecting its standing, collateral estoppel, exhaustion and non-justiciability defenses, but granted its motion to convert the declaratory judgment action into an Article 78.[10] **Exhibit S** (*PULP v. PSC II*, Teresi Decision and Order, dated Sept. 1, 1998).

E. OPINION 97-17 - CLARIFICATION AND REHEARING

78. Following issuance of Opinion 97-5, and notwithstanding that PULP's Supreme Court challenge was pending, the Commission continued its administrative proceedings on electric restructuring. Four parties petitioned the Commission for rehearing and for clarification of Opinion 97-5, on a variety of grounds. *See* Puchner Aff. I, Exh. D (Opinion 97-17).

---

[10] On appeal, however, the Appellate Division, Third Department agreed with PSC's standing arguments and dismissed the petition, citing its earlier decision in *PULP v. PSC I*. *See PULP v. PSC II*, 263 A.D.2d 879, 881 (3d Dep't 1999).

79. PULP asserted, among other claims, its now trademark argument that "ESCOs are electric corporations, not exempt from the statutory definition by virtue of any of the narrow and specific exemptions set forth in Public Service Law ("PSL") § (2)(13)." *Id.* at 23.

80. On November 18, 1997, while the Commission's motion to dismiss in *PULP v. PSC II* was still pending in Supreme Court, the Commission issued its order on the rehearing/clarification petitions, denominated Opinion 97-17.[11] *See* Puchner Aff. I, Exh. D (Opinion 97-17).

81. The Commission held that "the petitions should be denied," but decided to "clarify parts of Opinion 97-5 to ensure that implementation of our policies proceeds as expeditiously as possible." *Id.* at 2. Thus, PULP's argument that ESCOs were "electric corporations" under the Public Service Law **was denied**.

82. The Commission set forth detailed reasoning for its decision, essentially giving binding effect to the judicial decisions in *EA v. PSC* and *PULP v. PSC I*. *Id.* at 31-33.

83. The Commission specifically relied on Justice Keegan's decision in *PULP v. PSC I* that had, in dicta, rejected PULP's arguments that HEFPA applied because gas marketers were "gas corporations":

> Turning to PULP's claims regarding ESCOs' status as electric corporations and the corresponding statutory obligation to comply with HEFPA . . . . PULP's claims regarding HEFPA and the status of [gas] marketers as jurisdictional corporations were also made to, and rejected by, the court in *PULP v. PSC* (RJI #01-96-046955, Index No. 4509-96). . . . The court there

[11] At that time, Justice Keegan's decision regarding the Gas Marketer Order had been issued in *PULP v. PSC I* and Justice Harris' decision regarding Opinion 96-12 had been issued in *Energy Association v. PSC*. Both matters were then pending in the Appellate Division, Third Department. As noted above, PSC's motion to dismiss in *PULP v. PSC II* was still pending.

> responded by stating that "after careful review of the extensive submissions by all parties and amici, the court cannot agree with plaintiffs' contentions."

Id. at 31.

84. The Commission went on to quote Justice Keegan's analysis at length, as well as his conclusion that the Court "ha[d] not found any reported decision reaching [PULP's interpretation]" and that "the definitions in the PSL 'notably adopted long before unbundling was introduced—do not compel that conclusion.'" *Id.* at 32. As a result, the Commission rejected PULPs claim that it had erred by not applying HEFPA to ESCOs.

85. Finally, the Commission also addressed the related question of whether ESCOs were "electric corporations" subject to Article 4, also asserted by PULP. *Id.* at 34-35. The Commission responded by noting that:

> PULP's assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is incorrect. PSL § 66(1) provides that our general supervisory duties normally extend to those electric corporations that 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. . . ." Opinion No. 97-5 addresses ESCOs that do <u>not</u> lay, erect or maintain wires, pipes, conduit ducts or other fixtures in, over or under public property.

Id. at 34.

86. The PSC also cited to judicial case law interpreting Public Service Law § 2(13) ("electric corporation") in *Niagara Mohawk Power Corporation v. Public Service Commission*, 218 A.D.2d 421, 426-27 (3d Dep't 1996). *Id.* at 35.

87. Lastly, the Commission cited to judicial case holdings regarding the regulatory compact by which utilities have a "broad array of duties [that are provided] in

return for their exercise of power traditionally reserved to the sovereign, including eminent domain and the use of public rights-of-way." *Id.* (citing *Energy Assocs. v. PSC*,169 Misc.2d at 938; *Tismer v. New York Edison Co.*, 228 N.Y. 156, 161 (1920); *Matter of Penn. Gas Co. v. PSC*, 225 NY 397, 406 (1919)).

88. Importantly, nothing in the Commission's Opinion 97-17 rehearing or clarification points revisited the key premises of 97-5. The Commission left undisturbed its essential holdings that the utilities would have POLR responsibility (including ensuring that "at least one supplier who will continue to provide service at reasonable rates") and that the ESCO "oversight process" would be a licensing regime.

89. PSC's arguments that Opinion 97-17 rejected (or superseded) the licensing regime holdings of Opinion 97-5 are, therefore, flatly incorrect and reflect the agency's attempt to obfuscate. Respondent's Br. at 58-59. The licensing holding was left fully intact on rehearing and PSC knows quite well that an order denying rehearing does not "supersede" the underlying order in such a manner on issues where rehearing is denied.

90. However, the Commission did provide limited clarification in response to EA's requests for rehearing relating to the utilities' responsibilities, principally around future development of market-based generation supplied to utilities (which EA claimed was "vague"). *Id.* at 3-18.

91. The Commission also, as discussed above, rejected rehearing requests by PULP (and NYSEG) related to its statutory authority to issue Opinion 97-5, including rejection of the claim that ESCOs were "electric corporations" subject to HEFPA and Article 4. Opinion 97-17, at 21-35.

F. THE COMMISSION DISTINGUISHES ITS LICENSING REGIME FROM RATE REGULATION IN THE PRICE REPORTING ORDER

92. In November 2006, the Commission adopted an order requiring ESCOs to report their prices for publication on the agency's "Power to Choose" website, with the goal of increasing transparency in the residential retail market. *See* Case 06-M-0647 *Matter of Energy Service Company Price Reporting Requirements,* Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms (issued Nov. 8, 2006) ("Price Reporting Order"). (A true and accurate copy of the Price Reporting Order is attached hereto as **Exhibit T**).

93. In adopting the Price Reporting Order, the Commission addressed comments that the price reporting was "inconsistent with the existing regulatory framework for ESCOs under which they are minimally regulated and exempted from application of Article 4 of the Public Service Law." *Id.* at 9-10.

94. The Commission noted that its authority to regulate ESCOs was limited to its "oversight process" adopted in Opinion 97-5 requiring prospective ESCOs to "furnish data" in order to establish their eligibility under Public Service Law Article 1.[12] *Id.*

95. The Commission determined that reporting of prices was another "data" element that was an "extension of the ESCO's [sic] pre-existing PSL Article 1 obligation to furnish data." *Id.*

96. The Price Reporting Order went on to recognize that the Commission had expanded on the "data" requirements in the Uniform Business Practices ("UBP") by

[12] Petitioners **do not** concede that the Commission has jurisdiction under Article 1. Rather, the Commission's only jurisdiction is under Article 2. Otherwise there would have been no need for the Legislature to amend HEFPA in 2002. While Petitioners dispute Article 1 authority, the Price Reporting Order is insightful because it clearly differentiates ratemaking authority from licensing or so-called "eligibility."

adding various "standards and criteria" necessary to obtain and retain eligibility, such as creditworthiness standards, customer enrollment procedures and billing protocols. The Commission noted that "mandatory ESCO price reporting . . . **does not change the character of those requirements**" and "fits within the ESCO regulatory framework adopted in Opinion No. 97-5." *Id.* at 10 (emphasis added).

97. Further, the Commission distinguished the eligibility requirement for price reporting from full-utility regulation:

> Mandatory ESCO price reporting does not impose a regulatory burden on ESCOs similar to that imposed on utilities, or force ESCOs to assume responsibilities that resemble those utilities must bear. Fully-regulated utilities that tariff their prices are restricted to charging only the tariffed prices and can revise their tariffs only after securing regulatory approvals in accordance with law. In contrast, ESCOs, after reporting the snapshots of their generally-available prices, may revise them at any time subsequent to their submittal without seeking regulatory authorization. ESCOs also may offer products and prices, in addition to the price reported, that are not generally available. Therefore, the price reporting requirement is designed to properly recognize that ESCOs are competitive market participants distinguishable from fully regulated utilities that must tariff their prices.

Id. at 11.

98. Thus, in adopting the new price reporting requirement, the Commission was careful to ensure that its regulation was consistent with both the character of the ESCO eligibility structure and the competitive nature of the ESCO market.

99. The Commission made clear that its authority did not extend to the fundamental element of Article 4—regulation of prices.

THE MARKET CONTINUES TO FACE SIGNIFICANT UNCERTAINTY

100. Subsequent to the Court's temporary stay, the Commission continues its after-the-fact investigation of whether the changes imposed in the Reset Order should continue. This process was initiated by a Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers that was issued in tandem with the Reset Order. Case 15-M-0127 *In the Matter of Eligibility Criteria for Energy Service Companies*, Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers (issued Feb. 23, 2016) ("Notice Seeking Comments"). (A true and accurate copy of the Notice Seeking Comments is attached hereto as **Exhibit U**).

101. In addition to the Collaboratives discussed above, the Commission has recently issued several so-called "White Papers" on issues related to the Reset Order.

102. For example, there is a "Staff White Paper on Express Consent" proposing procedures related to the ambiguous "affirmative consent" requirement. Case 15-M-0127 *In the Matter of Eligibility Criteria for Energy Service Companies,* Staff White Paper on Express Consent (issued May 4, 2016) ("Express Consent White Paper"). (A true and accurate copy of the Express Consent White Paper is attached hereto at **Exhibit V).**

103. Ironically, even in the Express Consent White Paper, the agency uses interchangeably the separate terms "affirmative consent" (from the Reset Order) and "express consent" (which is derived from the UBP and statutory requirements in General Business Law 349-d (L. 2010, ch. 416)).

104. Among other uncertainties created by the Reset Order has been how to interpret the new term "affirmative consent" in relation to existing statutory and regulatory provisions requiring "express consent."

105. As the very issuance of a Express Consent White Paper suggests, there is still considerable uncertainty about what these terms mean and how they will be applied. Importantly, if the Reset Order becomes effective, compliance with the "affirmative consent" requirement will be critical to ESCOs' ability to retain existing and/or renewing customers, and any single alleged failure to comply could be grounds for an immediate Show Cause Order for revocation of an ESCO's license.

106. The agency also issued a "Staff White Paper on Benchmark Prices" in which Staff proposes to adopt "a formula for determining an appropriate not to exceed benchmark 'reference price' for a 12-month fixed price offering." Case 15-M-0127 *In the Matter of Eligibility Criteria for Energy Service Companies*, Staff White Paper on Benchmark Reference Prices (issued May 4, 2016) ("Benchmark Price White Paper"). (A true and accurate copy of the Benchmark Price White Paper is attached hereto at **Exhibit V).**

107. According to the proposal, the "purpose of [the] reference price formula is to establish a just and reasonable" price for 12-month fixed price electric and gas offerings. *Id.* at 2, 5. Importantly, the agency maintains that prices "at or below the reference price will be deemed to be just and reasonable" while prices above the reference price may be subject to "possible compliance action." *Id.* at 2, 5

108. Here again, absent a stay, ESCOs confront: (1) continued *ultra vires* ratemaking by the agency; and (2) further uncertainty as to what prices will be permitted for various products in the event the Reset Order becomes effective.

FAMILY ENERGY'S PRIOR PROCEEDING

109. In their proposed brief, Amici Attorney General and Department of State (Br. p. 12) misleadingly reference *alleged* marketing complaints in a 2013 proceeding (Case 13-M-0139) involving Family Energy. In fact, none of the referenced complaints were established based on evidence or an opportunity for a hearing and that proceeding was resolved without any consequences being imposed on Family Energy. Importantly, several consumer protection measures adopted by Family Energy in conjunction with that matter, including independent Third-Party Verification of new contracts and a business card to clarify that their sales representatives are from an ESCO, were later adopted by the PSC as the **industry standard** that took effect in 2014 and 2015. Donnelly Reply Aff., at ¶¶ 26, 73-78; R. 3360-65 (February 2014 Order); 3241 (February 2015 Order).

110. To the extent that PSC's Memorandum of Law (p. 61) claims that Family failed to "argue[] before the Commission that ESCO eligibility constitutes 'licensing,'" this argument is factually incorrect, also based on the 2013 proceeding. Family Energy, in fact, submitted an affidavit in that proceeding arguing that ESCO eligibility constitutes "licensing" requiring due process protections. *See* **Exhibit 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) (exhibits omitted).

PSC'S ADMINISTRATIVE RECORD IS IMPROPER

111. The only proceeding that was noticed in the State register pursuant to SAPA in this matter was Case 15-M-0127 *In the Matter of Eligibility Criteria for Energy Service Companies* ("Eligibility Proceeding"). *See* Puchner Aff. I, Exh. M (SAPA Notice).

Therefore, the only documents properly included as part of the administrative record available for notice and comment pursuant to SAPA are those documents filed in the Eligibility Proceeding.

112. Importantly, the February 2014 Order (R. 3334, 3355-60) involving low-income protections, as well as the Collaborative Report (R. 3756) and comments filed in relation to the low-income proceedings and on the Collaborative Report were not filed in the Eligibility Proceeding. Thus, the principal documents that PSC relies on for "notice" were not properly included in the record and cannot be relied on to support the Reset Order.

113. Indeed, the PSC's record filed in this matter is in excess of 5,000 pages, and includes **many documents** that were taken from proceedings other than the Eligibility Proceeding.

114. For the Court's assistance, attached hereto, as **Exhibit X**, is a list of those documents from PSC's administrative record that were filed in the Eligibility Proceeding (15-M-0127) and are properly part of the administrative record. **All other documents provided in PSC's administrative record are *dehors* the record.**

115. In addition, for the Court's convenience, attached hereto are true and accurate copies of the following documents:

Exhibit Y: Petitioners' Amended and Supplemental Verified Petition and Complaint, dated March 8, 2016

Exhibit Z: Respondent's Verified Answer to Amended Verified Petition and Complaint, dated March 28, 2016;

Exhibit AA: Petitioners' Notices to Admit, dated March 9, 2016;

Exhibit BB: Respondent's Statements in Reply to Requests for Admission, dated March 29, 2016; and

Exhibit CC: Confirmations of extensions, including (1) a filed stipulation dated April 5, 2016, extending the time for Petitioners to submit reply papers and rescheduling the hearing date; (2) e-mails between Petitioners, Respondent, and the Court dated April 22, 2016, extending the time for Petitioners to submit reply papers and rescheduling the hearing date; and (3) a letter from Petitioners to the Court, dated April 22, 2016, confirming the extension and rescheduled hearing date.

116. Based on the foregoing, and for the reasons set forth in Petitioners' accompanying papers, including their Reply Memorandum of Law and supporting Reply Affidavits filed herewith, as well as Petitioners' principal Memorandum of Law, dated March 3, 2016 and accompanying Affidavits, Petitioners respectfully request 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.

Thomas F. Puchner

Sworn to before me this
9th day of May, 2016.

Notary Public

EMILY C FRANZEN
Notary Public, State of New York
No. 01FR6254864
Qualified in Albany County
Commission Expires January 23, 20 20

Doc #01-2948794.3

Exhibit A

New York Public Service Commission
Collaborative Meeting Video Recordings

March 15, 28-29, 2016

Collaborative video recordings were obtained from the Public Service Commission's website at:

http://www3.dps.ny.gov/W/PSCWeb.nsf/SN/Webcasts (last visited May 6, 2016).

Exhibit B

New York Public Service Commission
Collaborative Meeting Transcript Excerpts

March 28-29, 2016

Collaborative Meeting, March 28, 2016

Excerpt #1

@ 2:29:31

LuAnn Scherer

[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."

Excerpt #2

@3:50:37

LuAnn Scherer

I think, Erin, 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, I'm not sure when we make a recommendation to the Commission, what our recommendation will be, I'm really hopeful that we can come up with something that we can all live with.

Ron Lucas

I just would like to . . . I don't want to beat a dead horse here, but you missed the presentation. I'd be glad to sit down with you and give you that part, but leaving the inequities aside (and there are inequities), it's a timing difference and we made that point that you can't compare a price that's set in June to after the fact a year later next June, you have to compare it at the prevailing conditions that are in effect when the price is set. So there is a timing issue that Luanne mentioned. So it's a little bit deeper than that and I'll be glad to sit with you to go over it, it's just not inequities, it's double the problems.

LuAnne Scherer:

So, one of the examples, Erin, 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.

Excerpt #3

@ 3:34:01

Scott Weiner

What is an example of a value-added product that has no value?

LuAnn Scherer

Let's talk about airline miles, for example.

Scott Weiner

Okay, but to me . . . But, I'll take up that argument and I'll suggest that airline miles, or coffee cards, or any kind of gift card has value. And if that's what's going to behaviorally motivate somebody to pay attention to their energy bill and is going to allow them to enter into the realm because they're interested in earning those points, that's what interests them, then that has value. Now, my concern—I'm just sharing my point of view—my concern is how, number one, is there a way to effectively distinguish airline miles from a thermostat, and B, is there a way to effectively ensure that the value that is being assigned to each of those specific adders is appropriate and not overreaching?

Excerpt #4

@ 2:08:22

LuAnn Scherer

Yeah. We agree with that. And that's very helpful. What we're hoping to hear from other people is alternatives to that. You've all kind of convinced us that the utility comparison is not the way to do it. So Matt has put a proposal out there. The proposal is everybody identify their average price and then we come up with a benchmark.

Collaborative Meeting, March 29, 2016

Excerpt #1

@ 13:00:00

LuAnn Scherer

Thank you. Just on that note, we . . . our position . . . the Staff's position is that we were asked to come up with a mechanism for identifying a reference price for a variable with value-added (energy-related value added), a fixed, and a fixed with energy-related value-added. So, I get that it is going to be difficult, but I also know what I was told I had to do. So, again, we can talk about how it's going to be hard to do it or how they can't do it but our goal is to come up with a way of doing it and that's what we're really hoping to get from this group. And, I heard you that it's impossible and that it's difficult.

Excerpt #2

@1:42:00

LuAnn Scherer

So I think we're still developing what we think the whole process is going to look like going forward. Staff has already started working on a white paper related to performance bonds. So it is likely that a white paper on performance bonds . . . or it's possible that a white paper on performance bonds would be issued for comment. And we basically . . . what the white paper is going to look like is what Staff would recommend to the Commission based on all the information we've gathered through comments, . . . there was a series of processes in the low-income proceeding . . . there might have been on in the eligibility proceeding, so it would be a white paper on performance bonds that we would issue for comment. We are thinking possibly there would be a white paper on reference pricing. There might be a white paper on energy-related value-added. There might be a white paper on the renewable issue which we still have to get our arms around a little bit. I mean again, there's two products out there. We want to identify additional products . . . so we're thinking that we would put together a Staff proposal then issue it for comment for additional thinking before we go to the Commission with the recommendation. That's our best thinking now. Again, we're still focusing on the June - July timeframe, so we've got a lot of work to do between now and then. That's about the best I can offer at this point.

Collaborative Meeting, March 29, 2016 (Cont.)

Excerpt #3

@ 2:22:37

LuAnn Scherer

"So I think the Commission Order in the ESCO low-income track, the ESCOs were allowed to offer residential either a guaranteed savings product or an energy-related value-added product designed to lower the customer's bill. That's how I recall the wording. So I think that was very specific to the low-income track. I there possibly are other energy-related value-added products which may not lower the bill, and we're struggling with this—defining it. 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."

Excerpt #4

@ 3:10:

LuAnn Scherer

And, I'll add to that. I mean the truth is we have some really good ESCOs out there that are providing energy-related value-added in the form of warranty programs or furnace repair programs or whatever we want to call them. To reiterate what Scott said, the reason we're here right now is to resolve that issue because we realized that the February 23rd order, there was a gap and that is one of the significant gaps. So that's why we're here, what we're talking about. It'll all be rolled up into something we recommend to the Commission.

Collaborative Meeting, March 29, 2016 (Cont.)

Excerpt #5

@ 2:04:31:

LuAnn Scherer

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.

Exhibit C

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.; SANDRA MYERS; PAUL D. TONKO; and DAVID HEPINSTALL,

Plaintiffs,

-against-

Decision and Order
Index #4509-96
RJI #0196046955

THE NEW YORK STATE PUBLIC SERVICE COMMISSION; the NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE; JOHN O'MARA, in his official capacity as Chairman of the New York State Public Service Commission and Chief Executive Officer of the New York State Department of Public Service; and H. CARL McCALL, in his official capacity as Comptroller of the State of New York,

Defendants.

(Supreme Court, Albany County, Motion Term)

(Justice Thomas W. Keegan, Presiding)

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KEEGAN, J.:

In a series of decisions and actions, the Public Service Commission (PSC) has accorded residential gas customers in this State the option of attempting to lower their gas bills by purchasing gas directly from non-utility gas marketers or aggregators ("gas marketers"), and having it transported to their residences by their Local Distribution Companies (LDC's) -- i.e., their local gas utility company. Plaintiffs have instituted this citizen-taxpayer and declaratory judgment action, challenging a PSC

Opinion, Order Concerning Compliance Filings in Case 93-G-0932 et al. (issued March 28, 1996), in which it concluded that the Home Energy Fair Practices Act ("HEFPA" [codified as Public Service Law article 2, § 30 et seq]) does not apply to gas marketers (see, Ex C to Verified complaint). Plaintiffs seek a declaration that the PSC's Order is unlawful, that gas marketers are subject to HEFPA'S provisions, and that all actions and expenditures to implement the order are unlawful.

BACKGROUND

The PSC has jurisdiction over the manufacture, conveyance, transportation, sale and distribution of natural gas in this State, and has been vested with the power and duty to carry out the Public Service Law (Public Service Law §§ 4, 5[1][b]). Traditionally, local utility companies had a monopoly which allowed them to provide natural gas to customers who could not purchase gas from a non-utility. The utilities charged a single rate set by the PSC, which rate was "bundled" to include the costs of the gas (the commodity) and transportation (from interstate pipelines[1] to the local utility pipeline systems to the customer).

Prior to the introduction of competition for natural gas service, the Legislature enacted HEFPA in 1981 as a comprehensive

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[1] In 1985, FERC began allowing LDC's to purchase directly from the producing states (bypassing interstate pipeline companies) and eventually limited the pipeline companies to transporting gas (see, PSC Mem. of Law [9-16-97], at p.4, n.4).

set of residential utility consumer protection rules.[2] It declares the policy of the State that the "continued provision of gas *** to 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" (Public Service Law § 30). To summarize, under HEFPA gas utilities must provide service upon request in accordance with HEFPA's provisions and provide notice for denial of service (Public Service Law § 31); terminate service in accordance with HEFPA (Public Service Law §§ 32, 33 & 34); reconnect service as provided by statute (Public Service Law § 35) and are subject to detailed billing limitations and requirements, e.g., relating to deferred billing, backbilling, budget payment plans, estimated bills, deposits, and prior notice of termination (Public Service Law §§ 36-42). HEFPA also specifies minimum procedures for handling residential customer complaints (Public Service Law § 43).

In 1984, to promote increased competition in the natural gas industry and the sale of gas indigenous to this State, the Legislature empowered the PSC to order natural gas utilities to carry non-utility (i.e., gas not owned by the utility) gas to consumers (Public Service Law § 66-d; see, R, G & E v. PSC, 71 NY2d 313 [upholding constitutionality of Public Service Law § 66-d[2]). It originally applied only to large gas users, but was amended to open competition -- at least theoretically -- to all customers (L.

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[2] Part 11 of 16 NYCRR contains the implementing regulations of HEFPA, governing residential customers' rights and responsibilities.

1985, c. 790 § 2 [eff. 8-1-85]). Following the Federal Energy Regulatory Commission's (FERC's) lead of fostering competition in the natural gas industry, including requiring "unbundling" -- i.e., separating the sale of gas and transportation services, the PSC in 1993 initiated a proceeding to examine how to facilitate evolving competition for consumers in the natural gas industry (see, Order Instituting Proceeding in Case 93-G-0932 [10-28-93] at Ex D to Exhibits to Affid. of Norlander). The PSC issued an order the following year allowing residential customers to aggregate, or combine, their usage in order to purchase natural gas from non-utility providers, and required LDC's, or utilities, to transport the gas for the gas marketers (Restructuring of the Emerging Competitive Natural Gas Market, Opinion 94-26, [December 20, 1994 Order]). The issue of HEFPA's applicability to gas marketers was raised but not resolved.

The PSC thereafter required all major utilities to file compliance tariffs by November 9, 1995, which were to govern the terms and conditions for gas transportation service for customers purchasing gas from gas marketers (see, Order on Reconsideration, Case 93-G-0932 [8-11-95]). After the compliance filings were filed and while they were being reviewed, the staff of the defendant Department of Public Service ("DPS"), Consumer Services Division, issued a Discussion Paper outlining how gas marketers would operate alongside LDC's. It proposed that gas marketers be allowed to include in their form contracts with residential gas customers waivers of HEFPA's customer protections (see, "Consumer Protections

in the Emerging Competitive Natural Gas Markets", at p. 4 [2-1-96], at Ex A to Verified Complaint). The staff proposal suggested that the relationship between gas marketers, LDC's and customers be based upon "contractual agreements, tariff provisions and good customer service" (id. at p. 2). For customers electing to purchase gas from gas marketers, consumer protections set forth in HEPFA and its implementing regulations would remain in force for the LDC component (e.g., transportation) of unbundled service, but not the gas marketer component (i.e., the purchase of the natural gas); alternately, any consumer wishing to avail herself of HEFPA's protections could choose all services provided by their LDC (i.e., transportation and gas) (id. at 4-5). To protect gas marketers' residential customers, staff proposed consumer protections as follow: PSC review of standard contracts (containing HEFPA waivers); creation of a customer complaint system; bills rendered in clear and plain language; and adequate procedures for prior notice of termination (id. at 7). Staff recognized a need to collect further information and for ongoing monitoring until the market develops, but indicated it "[did] not intend to impose onerous requirements that would slow the development of competition" (p. 3). Plaintiff, the Public Utility Law Project of New York ("PULP") and a party to the administrative proceedings, submitted comments to the DPS staff proposal, objecting to the PSC's requiring LDC's but not gas marketers to comply with HEFPA (see, Ex E to Exhibits to Affid. of Norlander).

THE CHALLENGED ORDER

The PSC then issued the order challenged in this action/proceeding, adopting the staff recommendation and concluding that it "adequately continues basic customer protections without inhibiting market development" (see, Order Concerning Compliance Filings, [hereinafter "the Order"] at p. 20 [March 28, 1996], at Ex C to Verified Complaint). The PSC Order directed utilities to provide transportation services to gas marketers to enable them to sell gas to residential customers, if the gas marketer complied with the consumer protections proposed by staff (summarized supra) and expressly adopted by the PSC; the PSC Order added that gas marketers must provide customers with PSC help and hotline numbers and provide CSD with sample customer bills (id. at p. 20). Significantly, the PSC Order specified that if a gas marketer discontinues its service, the customer will continue to receive gas service from the LDC with HEFPA's protections prior to any termination "to protect against potentially harmful situations" (id. at 20-21). The PSC directed DPS staff to monitor customer service to gas marketers' customers; to develop standard information to be conveyed to consumers; and to review standard contracts.

THE ACTION

Plaintiffs instituted this citizen-taxpayer and declaratory judgment action, seeking as relief a declaration that the PSC Order in issue is unlawful insofar as it relieves gas marketers of the obligation to provide the consumer protections accorded in HEFPA. Plaintiffs seek to enjoin any expenditures and actions to implement this PSC Order allowing gas marketers to provide service in violation of HEFPA. Plaintiffs contend in their Verified Complaint that HEFPA, by its terms, applies to gas marketers serving residential customers and the PSC is without power to exclude them from its coverage or deny consumers its protections (Verified Complaint, Ex A of Exhibits to Norlander Affid.). After defendants moved against the Verified Complaint, plaintiffs served an Amended Verified Complaint, incorporating by reference the entire Verified Complaint and adding the new claim that the PSC rule was adopted without compliance with the prior notice and publication requirements of State Administrative Procedure Act (SAPA) § 202, Executive Law §§ 101-a, 102, and NY Const, art IV, § 8 (Amended Verified Complaint, Ex C to Exhibits to Affid. of Norlander).

Plaintiff PULP is a not-for-profit corporation, a legal services organization and public interest law firm representing low-income consumers in utility and energy matters (Verified Complaint ¶ 6; Plaintiffs' Mem. of Law, p. 1, n. 1 [10-2-96]). As noted, it participated in the administrative proceedings leading to

the PSC Order it now challenges. The individual plaintiffs are citizen-taxpayers. Sandra Myers is a member of PULP's Board of Directors; State Assemblyman Paul Tonko is Chair of the Assembly Energy Committee; and David Hepinstall is Executive Director of the Affordable Energy Association (Verified Complaint ¶s 7-9). None of the individual plaintiffs participated in the PSC proceedings.

Numerous motions and cross-motions are pending before the court. The defendant State Comptroller moved, pre-answer, to dismiss the Verified Complaint, contending plaintiffs lacked standing and failed to state a cause of action against the Comptroller; the Comptroller similarly moved against the amended complaint when served (CPLR 3211). The PSC defendants have served an Answer and moved to convert the declaratory judgment action to an CPLR article 78 proceeding and to confirm the PSC Order, or, alternatively, for summary judgment on the declaratory judgment action based upon plaintiffs' lack of standing and on the merits. Plaintiffs cross-moved for summary judgment on their complaint and amended complaint, which all defendants oppose. There are two motions to appear as amicus curiae, and a motion for admission pro hac vice.

AMICUS CURIAE MOTIONS, et al.

Five companies collectively referred to as the "Marketing

Group"[3] have moved for leave to appear as amicus curiae in this action. They assert they are authorized to provide -- but do not yet provide -- natural gas to residential customers in this State, and will be "directly affected" by this Court's decision on the issue presented of whether they will be exempt from HEFPA's requirements in their sale of gas to residential customers (Affid. of Laura J.V. Szabo, Esq. [9-13-96]). Counsel for the Marketing Group, Nicholas Mattia, Esq., participated in oral argument before this court on February 13, 1997. The court determines that it would be prudent and helpful to grant the Marketing Group's request to appear as amicus curiae in this action, particularly where they participated in the PSC proceedings; members of the gas marketing industry will be directly affected by the decision herein and are not otherwise a party to this action, and there is no prejudice to or opposition by the parties, and their participation will not delay a determination in this action (see, CPLR 1012[a]; 1013). The unopposed motion of the Marketing Group is, therefore, granted. Further, the motion of Randall Rich, Esq., as attorney for Enron and of Nicholas W. Mattia, Jr., Esq., as attorney for the remaining Marketing Group amicus curiae for admission pro hac vice is granted, both attorneys having satisfied the court that they met the criteria of the rules of the court for such admission (see, 22 NYCRR 520.11; Affid. of Nicholas W. Mattia, Jr., Esq. [9-19-96] and

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[3] The "Marketing Group" includes Keyspan Energy Services, Inc.; Natural Gas Services, Inc.; U.S. Energy Partnership; Norstar Energy Limited Partnership; and Enron Capital & Trade Resources Corp.

Affid. of Randall S. Rich, Esq. [9-19-96]).

Another marketer of natural gas licensed to do business in this State -- UtiliCorp United Inc., d/b/a Broad Street Oil & Gas Co. -- requests[4] leave to file a memorandum of law, presumably as amicus curiae (see, proposed "Memorandum of Law" of UtiliCorp [9-16-96]). There being no opposition (the court assumes all parties received copies of UtiliCorp's proposed brief), the Court, in its discretion, determines that allowing UtiliCorp, as a gas marketer affected by the PSC Order in issue, to file its proposed brief is appropriate and will not delay the determination or prejudice plaintiffs. UtiliCorp's request is granted. Likewise, four[5] suppliers and marketers of natural gas collectively referred to as the "Indicated Marketers" have requested that the court accept their proposed and submitted "Amicus Memorandum of Law of Indicated Marketers" (dated Sept. 13, 1996). Their request is granted.

Finally, Helene E. Weinstein, Esq., has moved by Notice of Motion for an order granting leave to appear and file a brief as amicus curiae. Weinstein is a Member of the State Assembly and Chair of the State Assembly Judiciary Committee. Weinstein agrees with the plaintiffs herein that the PSC Order is invalid and should be annulled. Weinstein's affidavit and proposed amicus brief focus

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[4] UtiliCorp did not make a motion to appear as amicus curiae or submit supportive affidavits.

[5] The four "Indicated Marketers" are Coastal Gas Marketing, Inc.; Enserch Energy Services, Inc.; Natural Gas Clearinghouse; and Pan Energy Trading and Market Services, L.L.C.

on the negative impact of the PSC Order upon the State court system and the retraction of State policy and statutes providing for PSC administrative review and remedies for residential gas customer grievances (Affid. of Weinstein, Esq. [2-3-97], and attached Amicus Curiae Brief of Weinstein [2-3-97]). The defendants submitted letters indicating they do not object to Weinstein's motion; the PSC (see, Affid. of John J. Calcagni [2-10-97]; PSC Mem. of Law [2-10-97]) and the Marketing Group amicus (see, Affid. of Nicholas W. Mattia, Jr., Esq. [2-11-97]) submitted responses to Weinstein's arguments; and plaintiffs filed a response to defendants' responses (see, Affid. of Gerald Norlander, Esq. [2-12-97]), which the PSC rebutted (see, Letter of Lawrence G. Malone, Solicitor [2-12-97]). The court finds that the Weinstein amicus submissions contribute to and elevate the debate at hand and should be received. Weinstein's amicus curiae motion is granted.

STANDING

As noted, plaintiffs instituted this citizen-taxpayer action and declaratory judgment action, challenging the PSC's determination that HEFPA does not apply to gas marketers and seeking to enjoin the PSC's oversight expenditures related to these gas marketers. Plaintiffs claim standing to bring this action under common law principles of standing and pursuant to article 7-a of the State Finance Law ("State Finance Law") § 123-b, which authorizes any person "who is a citizen taxpayer *** [to] maintain

an action for equitable or declaratory relief, or both, against an officer or employee of the State who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property ***." (See, Verified Complaint at ¶ 33). The PSC defendants move for summary judgment, contending plaintiffs lack any standing. Defendant Comptroller moves to dismiss the Verified Complaint, also asserting plaintiffs lack of standing.

Standing is a threshold matter which must be resolved at the outset (see, Society of Plastics Ind. v. County of Suffolk, 77 NY2d 761, 769). The individual plaintiffs allege they are citizen-taxpayers and defendants do not contend otherwise (Verified Complaint ¶s 7-9). Plaintiff PULP is a not-for-profit corporation which alleges it pays state sales tax so as to qualify it for citizen-taxpayer standing under article 7-a, and defendants do not dispute as much (State Finance Law § 123-a). However, defendants contend that plaintiffs lack standing under § 123-b because they are, in reality, challenging the PSC's interpretation of a statute -- HEFPA -- as not applicable to gas marketers, and the PSC's administrative oversight and implementation of that interpretation, rather than alleging a wrongful expenditure or disbursement of state funds. Plaintiffs allege that the PSC is allowing gas marketers to sell gas on terms that violate HEFPA's protections by reviewing their form contracts and the LDC's tariffs, and promoting the sale of gas by these gas marketers by disseminating press

releases and preparing brochures and question/answer guides and disseminating information on toll-free lines and the PSC Web site. Critically, plaintiffs do not challenge these expenditures or the payment of PSC employee salaries as per se unlawful or outside PSC's authority except to the extent that they are alleged to be unlawful because based upon the PSC's erroneous interpretation of HEFPA as inapplicable to gas marketers. Plaintiffs' challenge is to the PSC's exempting gas marketers from HEFPA, and is not the same as alleging a wrongful expenditure/disbursement of State funds. Indeed, the PSC has express power over the sale of gas in this State (Public Service Law § 5 [1][b]) and the authority to review contracts and tariffs related thereto (Public Service Law § 66 [12]).

State Finance Law § 123-b does not confer standing to challenge any allegedly illegal agency action or determination simply because the agency devotes resources from its budget to effectuate its decisions or policies. Importantly, plaintiffs claim here is not that the PSC lacked the power to interpret HEFPA or to implement its interpretation, but that the interpretation itself is unlawful; the cost of reaching that interpretation and administering it are not ones fairly encompassing a wrongful expenditure or disbursement of State funds as contemplated by article 7-a (see, Matter of Gerdts v. State, 210 AD2d 645 [3d Dept 1994], lv denied 85 NY2d 810 [claim that conditions attached to permit were unlawful is not directed at expenditure of funds for purpose of State Finance Law § 123-b where agency had authority to

attach conditions, rejecting claim that expenditure of funds in connection with the imposition of unauthorized conditions is illegal and confers article 7-a standing]; see also, Matter of Schulz v. Warren County Bd. of Supervisors, 206 AD2d 672 [3d Dept 1994], lv denied 85 NY2d 805 [expenditure of funds in adoption of F.E.I.S. without SEQRA compliance does not make funds spent on preparing F.E.I.S. illegal so as to confer § 123-b standing]). While New York follows a liberal rule with regard to taxpayers' standing to challenge governmental action (see, Community Service Soc. v. Cuomo, 167 AD2d 168, 170 [1st Dept 1990]), the cases in which taxpayers have been accorded standing have involved challenges to the misapplication or disbursement of funds per se (see, Chester Civic Imp. Assn. v. NYC Transit Auth., 122 AD2d 715 [1st Dept 1986] [plaintiffs had State Finance Law and common law standing to challenge construction project approval as illegal and involving expenditure of State funds]; State Comm. Aid Assn. v. Regan, 112 AD2d 681 [3d Dept 1981], lv denied 69 NY2d 821 [taxpayers had standing to challenge substitution of Federal grant HEAP funds for State funds as a misapplication of State funds where grant is deemed "state funds"]; Matter of Gerdts, supra [petitioners had standing to challenge agency's participation in conferences, where claims were directed at expenditure of funds to engage in an activity that is alleged to be unauthorized]).

Plaintiffs distinguish that they are relying -- to establish article 7-a standing -- on State ongoing expenditures made to implement the unlawful PSC determination after it was

rendered, and not on expenses relating to the adoption of the PSC determination or the PSC administrative proceedings preceding its adoption, citing Childs v. Bane (194 AD2d 221 [3d Dept 1993], lv denied 83 NY2d 760) and Community Service Society v. Cuomo, supra. In Childs, the Third Department held that Niagara Mohawk had standing under State Finance Law 123-b to challenge the implementation of a D.S.S. regulation and administrative directive which it alleged would result in an unconstitutional disbursement and misapplication of State funds. The regulation governed eligibility for benefits consisting of assistance with paying utility bills by county social services departments. In Community Service Soc. v. Cuomo, supra, the First Department concluded that the taxpayers had article 7-a standing to challenge D.S.S.'s establishment and implementation of regulations which limited D.S.S. payments for certain services provided to Medicaid recipients. The court and the government defendants in Community Service appear to have recognized that implementation of the regulations would directly involve expenditure of State funds (id. at 169 and 170). Both Childs and Community Service Soc. involve challenges to regulations whose implementation were to have required allegedly wrongful misapplication, expenditure or disbursements of State funds; such claims are directed at the wrongful expenditure or application of funds per se pursuant to unlawful regulations (see, Gerdts, supra, 210 AD2d at 649 [discussion regarding conference participation/sponsorship]), as contemplated by State Finance Law § 123-b.

Plaintiffs herein do not allege that the PSC's oversight and review of the sale of gas by gas marketers are unlawful or unauthorized, but rather that the PSC's determination exempting them from HEFPA is illegal and contrary to HEFPA. These allegations concern statutory interpretation and not State expenditures as that term is intended in article 7-a. Accordingly, plaintiffs do not have standing pursuant to State Finance Law § 123-b to maintain this challenge to the PSC's order exempting gas marketers from compliance with HEFPA.

Plaintiffs also claim standing under common law principles, but fail to allege any facts demonstrating injury-in-fact, that is, that they would suffer direct harm and injury that are in some way different from the public at large (see, Society of Plastics Ind. v. County of Suffolk, 77 NY2d 761, 772-775; Matter of Schulz v. Warren County Bd. of Supervisors, supra, 206 AD2d at 674). The individual plaintiffs were not a party to the administrative proceedings which resulted in the PSC Order being challenged; they do not allege they were customers of gas marketers and thus failed to demonstrate they were aggrieved by the PSC Order exempting gas marketers from HEFPA (Society, supra, at 774-775). "That an issue may be one of 'vital public concern' does not entitle a party to [judicial] standing" (Society, supra, at 769), and the courts have exercised self-restraint in such matters to avoid "adjudication of generalized grievances more appropriately addressed by the representative branches" (id. at 773). Plaintiffs at most assert that the PSC's implementation and oversight of its

order violates HEFPA and will deny HEFPA consumer protections to potential gas marketer customers and perhaps deter consumers from exercising the option to partially switch from their LDC to gas marketers. These generalized claims are insufficient to show the individual plaintiffs will suffer direct harm, different in kind or degree from that of the public at large (id. at 774; Matter of Schulz, supra, 206 AD2d at 674; Matter of Gerdts, supra, 210 AD2d at 646). Likewise, P.U.L.P. fails to show that one or more of its members would have standing to sue, i.e., suffered direct harm from or were aggrieved by the PSC Order, for example, by virtue of being a customer or a gas marketer so as to establish associational or organizational standing for P.U.L.P. (See, Matter of Dental Society v. Carey, 61 NY2d 330, 333-334; see also, Society, supra, 77 NY2d at 775). Accordingly, none of the plaintiffs have standing to maintain this action against the PSC defendants under traditional, common law principles, and the amended complaint must be dismissed in its entirety.

ARTICLE 78 versus DECLARATORY JUDGMENT

The PSC contends that plaintiffs' action for a declaratory judgment should be converted to a CPLR article 78 special proceeding on the grounds that plaintiffs are challenging the PSC's compliance with a statute -- HEFPA -- and that an article 78 proceeding presumably in the nature of mandamus to review is the

appropriate vehicle in which to raise this challenge.[6] The Court of Appeals has recently endeavored to clarify when a challenge may be brought in an article 78 proceeding (see, NYCH&H Corp. v. McBarnette, 84 NY2d 194). The Court explained that while it is helpful to distinguish between generalized and individualized decision making by an agency, that distinction is not determinative (id. at 202-203). Instead, the court must look to whether the claim is encompassed within the grounds articulated in CPLR 7803 (id. at 204-205). Thus, where a quasi-legislative act of an agency is challenged on the ground that it "was affected by an error of law" (CPLR 7803[3]), a proceeding in the form prescribed by article 78 in the nature of mandamus to review can be maintained. McBarnette involved a challenge to the Health Department's methodology for computing Medicaid reimbursement rates as contrary to the governing statutes; the Court of Appeals ruled that such a claim was "plainly encompassed within the grounds for mandamus to review set forth in CPLR 7803[3]" even though it challenged rates of general applicability, and thus it could have been brought in the form of an article 78 proceeding.[7]

Likewise, here plaintiffs are challenging the PSC's allegedly incorrect construction of its governing statutes (HEFPA), which interpretation is one of general applicability to all gas

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[6] Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Ed. Servs., 77 NY2d 753, 757-758.

[7] The issue of article 78 versus declaratory judgment was relevant in McBarnette on the issue of statute of limitations. Defendants do not raise this issue in this action/proceeding.

marketers, rather than a challenge to an individual ad hoc decision affecting only certain gas marketers. Under the clarification authority of McBarnette, plaintiffs' claims are essentially that the PSC determination is "affected by error of law" (CPLR 7803[3]) and thus article 78 review in the nature of mandamus to review is available to address this challenge. Accordingly, if the court had concluded that plaintiffs had standing, it would have converted this declaratory judgment action to a special proceeding under CPLR article 78, and deemed the Verified Complaint to be a Verified Petition (see, Alexander, 1994 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7801:5, 1997 Pocket Part, at 3).

THE COMPTROLLER'S MOTION

The defendant Comptroller moved, pre-answer, to dismiss the Amended Complaint for plaintiffs' lack of any standing and failure to state a cause of action as against the Comptroller. For the reasons already discussed, the court finds that plaintiffs lack standing under either State Finance Law article 7-a or traditional common law principles to maintain this action against the Comptroller, and the Comptroller's motion to dismiss the Amended Complaint is therefore granted.

Even if plaintiffs had standing, they fail to state any cause of action against the Comptroller. Neither the Complaint nor the Amended Complaint allege any wrongful conduct or indeed any conduct by the Comptroller (see, Complaint at ¶ 13 for the sole

reference to the Comptroller). The Comptroller did not issue any determination being challenged, and did not participate, review or approve the PSC Order or actions at issue. Importantly, no relief is sought against the Comptroller. While the Comptroller has the constitutionally prescribed responsibility to audit all vouchers before payment and to audit all official accounts (NY Const, art V, § 1), plaintiffs do not allege that the Comptroller violated or failed to perform these duties; plaintiffs do not allege that the Comptroller had any obligation to overrule the PSC's interpretation of HEFPA and withhold budget appropriations, for example, designated for salaries of employees implementing the PSC's determination. There is no assertion in the pleadings that complete relief -- including injunctive relief -- cannot be awarded to plaintiffs and implemented without joinder of the Comptroller in this action, and no suggestion that the Comptroller would not abide by any such judgment (CPLR 1001[a]).

Plaintiffs' counsel's contention is meritless that the Comptroller's presence in this action is necessary for complete relief, including injunctive relief per State Finance Law § 123-b, to halt expenditures being used by the PSC to implement its erroneous determination (see, Affid. of Gerald Norlander, Esq. [10-2-96] in Support of Plaintiffs' Cross-Motion at ¶s 28-29). Article 7-a does not authorize or require the Comptroller is being named as chief financial officer of the State (see, Regan v. Cuomo, 182 AD2d 1060 [3d Dept 1992]) in all actions challenging expenditures of funds by State agencies (cf. State Finance Law § 123-b [2]), even

if restitution to the State of public funds is ordered (State Finance Law § 123-e[1]). The Comptroller is certainly bound by any judicial decree declaring an expenditure unlawful or enjoining an expenditure, and thus plaintiffs can obtain complete relief to which they claim entitlement without joining the Comptroller.

Further, the Comptroller is not a necessary party for resolution of plaintiffs' claims for attorney fees under State Finance Law §§ 123-g and 123-h. The special "citizen and taxpayer suit fund" created (§ 123-h) from which plaintiffs' attorney fees and costs may be awarded in citizen-taxpayer suits is in the custody of the Comptroller (see, § 123-h). However, this does not require that the Comptroller be joined in every such action since the Comptroller would be bound to any such judgment awarding fees or costs from such fund.

Accordingly, the Comptroller is not a necessary party and plaintiffs have failed to state any cause against the Comptroller, and thus the motion to dismiss is granted in its entirety. To the extent that plaintiffs cross-move for summary judgment as against the Comptroller, that cross-motion is further denied as premature, as issue has not been joined in this action as to the Comptroller (CPLR 3212[a]).

HEFPA AND GAS MARKETERS

Were this court to have concluded that plaintiffs have standing to challenge the PSC Opinion, the substantive and novel

issue presented in this action is whether the PSC erred or acted unlawfully in determining that HEFPA is inapplicable to gas marketers. Plaintiffs contend that the PSC "blinded by its desire for competition at any price, completely lost sight of the purpose of HEFPA and its realistic application" (Plaintiffs' Reply Mem. of Law at p. 17), exceeded its authority and disregarded the statutory language in exempting gas marketers from HEFPA. Plaintiffs submit that the Legislature intended that HEFPA's extensive consumer protections extend to all gas sales to residential customers, and that the PSC lacked the power to surrender its statutory duty under Public Service Law § 43 to adjudicate residential customer complaints in an administrative forum. Plaintiffs argue that additional legislation is required if gas marketers (or other new entrants into the residential gas business) are to be exempted from HEFPA's provisions, and that it was illogical and unlawful for the PSC to conclude that the sale of gas to residential customers by gas marketers is not governed by HEFPA but such sales by LDC's are so governed. After careful review of the extensive submissions by all parties and amici, the court cannot agree with plaintiffs' contentions.

The simple and inescapable truth is that HEFPA was enacted by the Legislature in 1981 as a consumer protection measure or utility customers' "bill of rights" at a time when residential gas, electricity and steam service were provided by regulated monopolies and competition had not yet been introduced for these utility services. Gas marketers, unbundling and utility

competition are not even mentioned or in any respect provided for in any of the provisions of HEFPA (see, Public Service Law article 2, §§ 30-50; contrast Public Service Law § 66-d [L. 1984, c. 519, § 2] [authorizing PSC to order LDC's to transport gas sold to a consumer by a third party]). Of course, the meaning of statutory language and the intention of the Legislature are first to be sought from the language of HEFPA, construing it according to its most obvious and natural sense; however, where the meaning of statutory language is unclear or ambiguous, the court must look to the legislative history and circumstances surrounding enactment in order to determine the legislative purpose (CSEA V. County of Oneida, 78 AD2d 1004 [4th Dept 1980], lv denied 53 NY2d 603. The provisions of HEFPA do not expressly apply to residential gas marketers who did not exist in this State when the Act was adopted, and thus it is not at all clear that HEFPA was ever intended to apply to the competitive gas marketer entities that were thereafter formed with the onset of unbundling and utility competition.

HEFPA was adopted as a comprehensive codification and consolidation of the rights and responsibilities of sellers of gas/electric/steam service and their residential customers. It declared State policy to be that "the continued provision of gas, electric and steam service to residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health or general welfare and is in the public interest" (Public Service Law § 30 [emphasis added]). An overview of the Act makes clear that it established certain obligations by

utilities with respect to the sale and furnishing of natural gas to residential customers, including the obligations to provide service promptly upon application (§ 31 [1]); to provide detailed notice of reasons for denial/termination and notice of the PSC's complaint handling procedures, with limitations on terminations (§§ 31[2]; 32); limitations on deposits (§ 36; see, 16 NYCRR § 11.12), estimated bills (§ 39; 6 NYCRR § 11.13), backbilling (§ 41; 6 NYCRR 11.14), late payment charges and other collection charges (§ 42; 16 NYCRR § 11.15); it contains obligations to offer budget or levelized payment plans (§§ 35, 38; 16 NYCRR §§ 11.10 and 11.11) and the obligation to notify consumers of the right to an administrative hearing and PSC determination of complaints and bill disputes (§ 43; see, 16 NYCRR Part 16). These provisions thus insured that residential utility customers -- who had nowhere else to turn -- could obtain service from the monopolistic utilities "without unreasonable qualifications or lengthy delays" (§ 30). Significantly, the PSC Opinion plaintiffs challenge herein absolutely does not alter that assurance, since residential consumers **retain the right to continue purchasing gas from their LDC safe in the knowledge that they are fully protected by HEFPA's protections and can continue to receive the service "without unreasonable qualifications or lengthy delays."** Only those who knowingly chose to forego the extensive HEFPA protections on the purchase of gas in exchange for competition-driven lower gas bills from gas marketers will receive service not covered by HEFPA, but such consumers retain HEFPA protections on the transportation and

delivery of the gas to their homes and the right to revert to their LDC for the purchase of gas and the full HEFPA umbrella.

The court agrees with the PSC that plaintiffs are attempting to apply HEFPA to an industry that was not in place or envisioned by the Legislature when HEFPA was enacted. The PSC Opinion applying HEFPA to LDC's but not gas marketers furthers the legislative objectives of ensuring the continued provision of utility service without unreasonable qualifications or lengthy delays. The PSC's powers and duties extend to the sale, transportation and distribution of gas (Public Service Law § 5 [1][b]) and it is vested with "all powers necessary or proper to enable it to carry out the purposes of [the Public Service Law]" (Public Service Law § 4 [1]). The Senate sponsor of HEFPA opined that the Act codified the basic provisions regarding the relationship between the utility and the customer "while giving discretion to the [PSC] to interpret those provisions in a way that will carry them out most effectively" (Mem. of Sen. Dale M. Volker, NY Legis Annual 1981, at pp. 375-376). The Consumer Protection Board recognized in supporting the Act that its "policy statement makes clear the public interest in the supply of gas *** to New Yorkers by regulated monopolies *** and that such entities have special responsibility to their customers, founded on the necessity of the service they provide to the preservation of the health and general welfare" (Memorandum of Support of Kathy A. Bennett [dated July 13, 1981], Counsel to State CPB, at Ex B to PSC Mem. of Law [9-16-96] [emphasis supplied]).

Plaintiffs make no credible claim that the Legislature contemplated or envisioned utility competition when it enacted HEFPA, and the available Legislative history and the provisions of HEFPA when read together clearly suggest that HEFPA was designed to ensure that residential customers were able to receive utility service on fair terms from the monopolistic utility providers. The PSC's Opinion respects the Legislative opening of competition in the gas industry; recognizes that HEFPA did not govern the subsequent advent of utility competitors that provide but one aspect of utility service; and gives effect to the Legislative intent to ensure that residential customers have access to prompt service from LDC's without unreasonable qualifications.

The court has reviewed plaintiffs' contentions that gas marketers are "gas corporations" subject to HEFPA (Public Service Law § 30; see, Public Service Law §§ 10, 11 [define gas corporation and gas plant]), and that gas marketers must be treated as a "utility" like LDC's for purposes of the Public Service Law in general and HEFPA and its implementing regulations in particular (see, Public Service Law § 2 [23 and 24] [define "utility company" and "utility corporation"]; see also, 16 NYCRR § 11.2 [a][1]). The court has not found any reported decision reaching that interpretation, and finds that the definitions -- notably adopted long before unbundling was introduced -- do not compel that conclusion.

In evaluating whether the PSC has acted outside the scope of its legitimate powers, the courts have engaged in a "realistic

appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment" (Matter of Niagara Mohawk Power Corp. v. PSC, 69 NY2d 365, 372, quoting Matter of Consolidated Edison v. PSC, 47 NY2d 94, 102, revd on other grounds 447 US 530). The PSC's realistic appraisal of HEFPA and the new entrants to the gas service industry promotes the legislative intent of HEFPA and of facilitating competition and reduced utility charges. The court is guided by the principle that the construction given a statute by an agency responsible for its administration should be upheld if not irrational or unreasonable, where the interpretation is not one of pure statutory reading and analysis dependent only on the accurate apprehension of legislative intent (see, Kurcsics v. Merchants Mut. Ins. Co., 49 NY2d 451, 459; Matter of Howard v. Wyman, 28 NY2d 434; Matter of CNG Transmission Corp. v. PSC, 185 AD2d 671 [4th Dept 1992]). The PSC has been delegated vast powers and is required to balance the conflicting interests of utilities and consumers and to endeavor to give effect to legislative intent in the context of a rapidly changing, technical industry. In fulfilling its obligations, it must adapt to the changing patterns in the industry (see, Matter of R, G & E v. PSC, 117 AD2d 156, 160 [3d Dept 1986]).

To summarize, neither the statutory or regulatory language, the legislative history, decisional law nor logic compels the conclusion urged by plaintiffs that gas marketers must be required to comply with HEFPA's provisions. The PSC's Opinion

ensures that all residential consumers will continue to be covered by HEFPA's protections unless they chose to trade the Act's protections for competitive gas prices in the purchase of gas from gas marketers. Consumers may simply do nothing, and fully retain the HEFPA consumer protections in all aspects of gas service from their LDC or local utility. Consumers who elect to purchase gas from their LDC's competitors (i.e., gas marketers) still receive limited protections (outlined supra; see, PSC Opinion at p. 20). The critical point is that HEFPA protections continue to be available through LDC's, giving effect to the fundamental legislative intent of ensuring service on reasonable terms (see, Public Service Law § 30). The PSC did not disregard HEFPA's terms or undermine its objectives. The court finds no basis upon which to declare the PSC Opinion unlawful or erroneous or to enjoin expenditures to implement it, or to conclude that it was arbitrary or capricious or affected by an error of law (Scherbyn, supra; CPLR 7803[3].

Finally, if the court were to reach the issues raised by plaintiffs that defendants violated various provisions of the State Administrative Procedure Act relating to notice, public comment and publication of rules (see, Amended Verified Complaint ¶ 41), I would conclude that the PSC's interpretation of HEFPA as inapplicable to gas marketers -- in the context of an order concerning individual utilities' compliance filings governing the terms and conditions for transportation services for residential customers purchasing from gas marketers -- is not a rule under SAPA

(see, SAPA §§ 102 [2][a], [b][iv]; 202; NY Const, art IV, § 8; Interport Pilots Agency v. Sammis, 14 F3d 133, 142 n. 2 [2d Cir 1994]; White v. Shalala, 7 F3d 296, 303-304 [2d Cir 1993]; see, also, Matter of NYC Transit Auth. v. NYS Dept. of Labor, 88 NY2d 225, 229-230). In any event, the PSC appears to have substantially and adequately complied with the notice, comment and filing requirements related to the compliance filings (SAPA § 202).

Accordingly, the PSC defendants' motion for summary judgment dismissing the Amended Verified Complaint is granted, plaintiffs' cross-motion for summary judgment is denied with prejudice and the defendant Comptroller's motion to dismiss the Amended[8] Complaint is granted. All motions to appear as amicus curiae are granted and the motion to appear pro hac vice is granted.

This memorandum shall constitute both the Decision and Order of this Court.

All papers, including this Decision and Order, are being returned to defendant PSC's attorneys. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of

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[8] The Comptroller's previous motion to Dismiss the Verified Complaint was rendered moot by plaintiffs' service of an Amended Verified Complaint (Shulz v. Pataki, Sup Ct, Albany County [Hughes, J.][10-4-96]), and otherwise is granted.

that section respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: Albany, New York
April 29, 1997.

Thomas W. Keegan, J.S.C.

PAPERS CONSIDERED:

(1) Comptroller's Notice of Motion to Dismiss the Complaint; Affirmation of James B. McGowan, Esq., (8-27-96).
(2) Memorandum of Law of Comptroller in Support of Motion to Dismiss Complaint.
(3) Comptroller's Notice of Motion to Dismiss Amended Complaint; Affirmation of James B. McGowan, Esq. (10-17-96) in Support and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment.
(4) Comptroller's Memorandum of Law in Support of Motion to Dismiss Amended Complaint.
(5) Notice of Motion to Appear as Amicus Curiae by Keyspan Energy Services, Inc., et al. ("Marketing Group"); Affirmations in Support (Laura J.V. Szabo, Esq. [9-13-96]); Nicholas W. Mattia, Esq. [9-12-96]; Steven Montorano [9-12-96] and attachments; Letter of December 20, 1996 from Nicholas Mattia, Esq.
(6) Defendants' Notice of Motion to Convert Action to Article 78 Proceeding, or for Summary Judgment; Affidavit in Support of Lawrence G. Malone, Solicitor to P.S.C. (9-19-96) and Affidavit of Michael Santarcangelo (9-6-96).
(7) Memorandum of Law of PSC in Support (9-16-96).
(8) Plaintiffs' Notice of Cross-Motion for Summary Judgment; Affidavit of Gerald A. Norlander, Esq. in Support and in Opposition to Defendants' Motions (10-2-96).
(9) Plaintiffs' Memorandum of Law in Support of Plaintiffs' Cross-Motion and in Opposition to Defendants' Motions to Dismiss and for Summary Judgment (10-2-96).
(10) PSC's Reply Memorandum of Law in Support of Summary Judgment and in Opposition to Plaintiffs' Cross-Motion (10-23-96).
(11) Plaintiffs' Reply Memorandum of Law in Support of Cross-Motion and in Opposition to Defendants' Motions (10-30-96).
(12) Affidavit for Plaintiff-P.U.L.P. of Trudi J. Renwick, Ph.D. (10-30-96) and attached exhibits.

Exhibit D

Exhibit D to the Reply Affidavit of Thomas F. Puchner, Esq. in Support of the Stay and Annulment of the Reset Order, sworn to May 9, 2016 in *Family Energy, Inc. v. Pub. Serv. Comm'n*, Albany County Index No. 874-16 is omitted.

A copy of **Exhibit D** is contained in DMM or the Public Service Commission's public website.

Exhibit E

SUPREME COURT: COUNTY OF ALBANY
STATE OF NEW YORK

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.; SANDRA MYERS; PAUL D. TONKO; and DAVID HEPINSTALL;

Plaintiffs,

- against -

VERIFIED COMPLAINT
Index No.

The NEW YORK STATE PUBLIC SERVICE COMMISSION; the NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE; JOHN O'MARA, in his official capacity as Chairman of the New York State Public Service Commission and Chief Executive Officer of the New York State Department of Public Service; and H. CARL MCCALL, in his official capacity as Comptroller of the State of New York;

Defendants.

INTRODUCTION

1. This is a declaratory judgment and citizen taxpayer's action seeking declaratory and injunctive relief under CPLR § 3001 and Article 7 of the New York State Finance Law from unlawful decisions, actions, and expenditures of state funds by the New York State Public Service Commission ("PSC" or "Commission") and the New York State Department of Public Service ("DPS").

2. In an opinion issued March 28, 1996 in PSC Case 93-G-0932, *Restructuring of the Emerging Competitive Natural Gas Market*, the PSC decided to allow "gas marketers" or "gas aggregators" to sell natural gas at retail to residential home heating and cooking customers by gas corporations under terms and conditions that violate Article 2 of the

Public Service Law ("PSL"), the Home Energy Fair Practices Act ("HEFPA"), PSL §§ 30 *et seq.*

3. HEFPA establishes rights and responsibilities for sellers of gas and their residential customers. More particularly, HEFPA establishes mandatory obligations upon every gas corporation with respect to the sale and furnishing of natural gas to residential customers, including:

a. The obligation to provide service promptly upon oral or written application by a residential customer (PSL § 31; 16 NYCRR § 11.3);

b. The obligation to provide detailed written notice of the reasons for any denial or termination of service to the customer, with notice to the customer of the opportunity to resolve any disputed charges through the PSC's complaint handling procedure (PSL §§ 31.2, 32.2(d), 33.1, 34.1, 16 NYCRR § 11.3 - 11.8);

c. Limitations on service deposits, including waiver of deposits for recipients of public assistance or supplemental security income benefits (PSL § 36, 16 NYCRR § 11.12);

d. Limitations on estimated bills, and requirements to read meters (PSL § 39, 16 NYCRR § 11.13);

e. Limitations on backbilling and stale bills (PSL § 41, 16 NYCRR § 11.14);

f. The obligation to offer budget or levelized payment plans (PSL § 38, 16 NYCRR § 11.11);

g. Limitations on late payment charges and prohibition of other collection

charges (PSL § 42, 16 NYCRR § 11.15);

h. The obligation to offer deferred payment agreements to customers in arrears facing termination of service (PSL § 35, 16 NYCRR § 11.10);

i. Obligations to notify customers of their right to an administrative hearing and determination by the PSC of complaints and disputed bills (PSL § 43);

j. Obligations to investigate and correct billing in shared meter situations (PSL § 52).

4. At the direction of the PSC, the defendant Department of Public Service ("DPS") is now spending State funds to receive and review form contracts of gas marketers and gas aggregators, and tariffs of local gas distribution companies, that allow or provide for the sale of gas to residential customers by the marketers and aggregators without their full compliance with the statutory requirements of HEFPA.

5. Plaintiffs seek a judgment of this Court declaring unlawful the PSC's decision allowing gas marketers and gas aggregators to abrogate HEFPA, enjoining the defendants from making any expenditure of State funds used by the PSC or the DPS to approve, implement, and promote the sale of gas by gas marketers and gas aggregators under terms and conditions that violate the statutory requirements of HEFPA, and enjoining the PSC and the DPS from approving or permitting any contracts or tariffs allowing gas marketers and gas aggregators to sell or facilitate the sale or furnishing of natural gas to residential customers when the terms and conditions of such sale or furnishing of gas would violate the statutory requirements of HEFPA.

PARTIES

6. Plaintiff Public Utility Law Project of New York, Inc. ("PULP"), is a not for profit corporation, and maintains offices at 39 Columbia Street, Albany, NY 12207. PULP is a party to the administrative proceedings involved in this case, and pays New York State sales tax on some of its purchases.

7. Plaintiff Sandra Myers resides at 265B Clinton Avenue, Albany, New York 12210. She is a citizen and taxpayer of the State of New York, and she is a member of the Board of Directors of PULP.

8. Plaintiff Paul D. Tonko resides at 137 Princeton Street, Amsterdam, NY 12010. He is a citizen and taxpayer of the State of New York. He is a member of the New York State Assembly, and is Chairman of the Assembly Energy Committee.

9. Plaintiff David Hepinstall resides at 123 West 93rd Street, New York, NY 10025. He is a citizen and taxpayer of the State of New York, and is Executive Director of the Affordable Energy Association.

10. Defendant New York State Public Service Commission maintains offices at Three Empire State Plaza, Albany, New York 12223.

11. Defendant New York State Department of Public Service maintains offices at Three Empire State Plaza, Albany, New York, 12223

12. Defendant John O'Mara is sued in his official capacity as the Chairman of the New York State Public Service Commission and Chief Executive Officer of the New York State Department of Public Service. He maintains offices at Three Empire State Plaza, 20th Floor, Albany, New York 12223.

13. Defendant H. Carl McCall is sued in his official capacity as the Comptroller of the State of New York. He maintains offices at the Governor Alfred E. Smith State Office Building, Albany, New York 12236.

FACTS

14. In a series of decisions and actions, the PSC has sought to create a competitive retail gas market. In Case 93-G-0932, *Restructuring of the Emerging Competitive Natural Gas Market*, Opinion No. 94-26 (issued December 20, 1994), the PSC stated its generic policies to guide the transition of the natural gas industry to a more competitive environment. The structure proposed by the PSC, *inter alia*, will allow multiple sellers of natural gas (including marketing subsidiaries or affiliates of incumbent local gas distribution companies) to compete for retail sales to customers in all service classifications. That opinion did not discuss the issue of compliance by the new market entrants with statutory requirements governing their service to residential customers. Instead, the Commission stated at pages 57 - 58:

> It is impossible now to anticipate all the questions that might arise as aggregation programs are attempted, much less answer those questions. As with any relatively novel proposal, there are many questions about customer aggregation. Some of them are largely matters of curiosity and will be answered as proposals are submitted, such as the identity of the marketers offering such services, their experience, the customers to whom such services appeal, and the reasons why those services might appear relatively more attractive than utility services. Others have an important bearing on existing policies, such as the extent to which consumer protection rules (both HEFPA and the non-residential rules) do or should continue to apply to customers participating in aggregation programs. And still others, involving the allocation of rights and responsibilities between LDCs, marketers, and customers, might go beyond mere matters of contract and would be subject to our primary jurisdiction.
>
> The solution is to require, at least initially, that aggregation

programs be submitted as joint proposals of the participating marketers and LDCs, and that any waivers of the existing rules, requirements, or policies that are necessary to make the programs work should be identified and justified in those proposals. The requested waivers would then be subject to review and approval before the programs could be implemented.

15. In an August 11, 1995 *Order on Reconsideration* in Case 93-G-0932, the PSC required all major gas utilities to file compliance tariffs by November 9, 1995, which, *inter alia*, will govern the terms and conditions for gas transportation service for customers choosing to buy their gas from marketers instead of the local distribution company. That order did not discuss the issue of compliance by the new marketers and aggregators with statutory requirements governing gas sales to residential customers.

16. On or about November 9, 1995, the incumbent gas utilities filed their compliance filings with the August 11, 1995 *Order on Reconsideration*.

17. The November 9, 1995 utility filings for gas transportation service did not propose that gas marketers and aggregators could avoid any of the statutory requirements of HEFPA governing the sale of gas to residential customers. Thus, at this stage of the case, there was no proposal that gas marketers and aggregators could avoid the requirements of HEFPA.

18. While the November 9, 1995 utility filings were under review, and on or about February 1, 1996, the Department of Public Service Staff ("Staff") issued a "Consumer Services Division Discussion Paper" entitled "Consumer Protections in the Emerging Competitive Natural Gas Markets" in which Staff proposed that gas marketers and gas aggregators be allowed to include in their form contracts with customers waivers of statutory residential customer protections contained in HEFPA, and the regulations

promulgated thereunder at 16 NYCRR Part 11. Staff proposed, *inter alia*:

> **CONSUMER PROTECTION - RESIDENTIAL**
>
> Transportation services for marketers/aggregators selling gas to residential customers may be provided by the LDC if the following requirements are met:
>
> 1. Contracts and/or service offerings between the marketers/aggregators and customers contain generic language advising the customers of protections that have been waived in the transaction. Each marketer/aggregator will file with staff a copy of its standard contract/service offering.
>
> 2. That a system to handle customer complaints is designed and operational.
>
> 3. Bills rendered are clear and in plain language.
>
> 4. Procedures are in place to ensure customers receive adequate prior notice of termination. Such notifications should be sent at least 15 days before discontinuance of service to allow customers the opportunity to pay the overdue bill or request service from another provider.
>
> Protections for residential customers of LDC's will remain in effect. However, we recommend that staff and the LDCs commence a review of the HEFPA law and Commission rules to determine what changes should be recommended. While we are working toward that goal, staff will recommend that aggregation proposals for residential customers go forward.

A copy of pages 1 - 6 of the February 1, 1996 Staff Discussion Paper is attached as Exhibit "A".

19. Plaintiff PULP and other parties to the proceeding submitted written comments on Staff's proposal. PULP objected, *inter alia,* to the creation of any dual standard of residential customer protection in which incumbent utilities are required to comply with HEFPA, while their gas marketing subsidiaries, along with other gas marketers and gas aggregators, are allowed to avoid compliance with HEFPA in their

sale of gas to residential customers.

20. The PSC issued an *Order Concerning Compliance Filings* in Cases 93-G-0932, *et al.*, on March 28, 1996. At page 2 of that order, the PSC referenced an appendix containing a summary of the parties' comments received and considered by the PSC in its determination. That summary, *inter alia*, reflects consideration by the PSC of the issues presented in this action, and states as follows regarding the applicability of statutory customer protections:

> PULP agrees with [the New York State Consumer Protection Board] that non-utility suppliers should be required to comply with HEFPA. PULP continues by stating that gas marketers and aggregators are "Gas Corporations" under the plain meaning of the Public Service Law and that the Commission has no discretion to waive HEFPA compliance by gas marketers and aggregators.
>
> Enron, KCS Marketing Co., Norstar Energy, L.P., and Tenneco declare that the critical threshold issue of jurisdiction must be resolved. They continue by saying that they strongly oppose the assertion of jurisdiction by the Commission over gas marketers and the contracts they enter into with their customers. They also state that the Commission should not rely on the broad definitions of "Gas Corporation" and "Gas Plant" under the Public Service Law as advocated by PULP.
>
> * * * *
>
> Protections for residential customers of LDC's will remain in effect. Staff issued a Discussion Paper and facilitated an open meeting which centered in part upon minimum requirements which it found necessary to insure that customers aggregated services were provided with adequate safeguards. Comments received from parties fell into two categories: those that argued for the full protection of the law and that rules must apply also to customers of marketers and those that insisted that the imposition of complicated requirements to obtain transportation services is, in effect, an effort to regulate marketers that would deter the evolution of competition.
>
> * * * *
>
> PULP notes that the Commission has no discretion to waive HEFPA compliance by gas marketers and aggregators or the statutory rights and remedies that residential customers have under the law and rules. It continues by stating that Commission acquiescence to or approval

of contract language advising customers of protections that have been waived would be tantamount to abandonment of its statutory obligations, for example, to resolve customer billing complaints under section 43 of the Public Service Law.

A copy of pages 41 - 47 of the appendix to the PSC's *Order Concerning Compliance Filings* containing the summary of parties' comments is attached to this complaint as Exhibit "B".

21. In its *Order Concerning Compliance Filings*, the PSC generally adopted the Staff proposal to allow gas marketers and gas aggregators of not to comply with HEFPA. In its discussion of consumer protections, the Commission Order states, *inter alia*, as follows:

Residential Service

Protections for residential customers of LDCs must remain in effect. Staff issued a Discussion Paper and facilitated a meeting among interested parties to consider how to ensure that customers' aggregated services will continue to be provided with adequate safeguards. Comments received from parties fell into two categories: some who argued the full protection of the law must apply also to customer of marketers, while others insisted that the imposition of complicated requirements to obtain transportation services is in effect an effort to regulate marketers and would deter the development of an active competitive market. We find staff's proposal adequately continues basic customer protections without inhibiting market development. Given the potential for competition to emerge and the need to continue to ensure against loss of heat-related service, staff, LDCs and interested parties should commence a review of the Home Energy Fair Practices Act (HEFPA) Rules (16 NYCRR, Part 11) to determine what changes if any should be recommended.

We direct each utility to require that marketers/aggregators seeking to obtain transportation services from LDCs to sell gas to residential customers can do so if the following requirements are met:

1. *Contracts between the marketers and customers contain specific language advising customers of protections that have been waived in the transaction. Each marketer must file with the staff of our Consumer*

Services Division a copy of its standard contract.

2. A system to handle customer complaints is operational and that the PSC help and hotline numbers are provided to customers.

3. The bills rendered will be clear and in plain language, and the staff of our Consumer Services Division shall receive a sample copy.

4. Procedures are in place to ensure customers receive adequate prior notice of termination of gas supply services. The procedures must provide that notifications be sent at least 15 days before discontinuation of supply service *to allow customers the opportunity to pay the overdue bill or request service from another provider.*

While marketers will be able to offer service, pursuant to the above consumer protection conditions, residential customers will continue to have full HEFPA protections; that is, should a marketer discontinue supply, the customer will continue to receive gas service from the LDC. The LDC then will be required to provide full HEFPA protection prior to termination. This is important to protect against potentially harmful situations. These provisions should also be stated in LDC tariffs offering aggregation services. (Emphasis added).

22. The PSC in the *Order Concerning Compliance Filings*, at pages 22 and 33, directed Staff to develop and disseminate "standard information" for residential customers regarding the purchase of gas from marketers and gas aggregators and the terms and conditions of such sales.

23. A copy of pages 19 - 22 and 32 - 33 of the *Order Concerning Compliance Filings,* containing the PSC's discussion of residential customer protections and relevant ordering provisions, is attached to this Complaint as Exhibit "C".

24. The Commission's March 28, 1996 *Order Concerning Compliance Filings* thus provides for full HEFPA protection for customers of incumbent gas corporations, while allowing the gas marketing subsidiaries of incumbent gas corporations, and other marketers and aggregators, to violate the requirements of HEFPA, including those

described in paragraph "3", above, regarding denials and terminations of service, customer deposits, backbilling, service complaints, disputed bills, shared meters, and PSC adjudication of complaints and disputed bills.

25. Following the Commission's March 28, 1996 *Order Concerning Compliance Filings,* the Brooklyn Union Gas Company ("Brooklyn Union") and other local gas distribution companies filed gas transportation tariffs enabling gas marketers to sell gas to residential customers without compliance with all statutory requirements of HEFPA. Brooklyn Union's tariff for Service Classification No. 17 states, *inter alia*:

> k) The Company [Brooklyn Union] will provide CTS [Core Transportation Service] service only to Customers who enter into agreements with third party sellers of gas [marketers] who meet the following requirements:
>
> 1) If the Customer is a residential customer:
>
> *The contract between the Customer and its third party supplier of gas must contain specific language advising the Customer of protections that have been waived under the Home Energy Fair Practices Act and Part 11 of the Commission's Regulations, 16 NYCRR §§11.1 et seq.* The third party supplier of gas must file its standard contract with the staff of the Consumer Services Division of the Public Service Commission. (*Emphasis added*).

26. The Brooklyn Union compliance tariff further provides that the marketer must have its own customer complaint system, must notify customers of PSC telephone numbers for complaints, and provide 15 days notice to the customer of termination. It does not require marketers to provide the full HEFPA protections to residential customers, including those itemized in paragraph "3" of this complaint. A copy of Brooklyn Union's Revised Tariff Leaf No. 110, effective July 1, 1996, is attached to this complaint as Exhibit "D".

27. The Department of Public Service, at the direction of the PSC has spent and is now spending State funds to review and approve the form contracts of gas marketers and aggregators, including those of gas marketing subsidiaries of incumbent local gas distribution companies, which purport to waive or abrogate statutory obligations of gas corporations under HEFPA. Upon information and belief, based on information provided by the Consumer Services Division of the Department of Public Service, it is reviewing form contracts for retail residential service submitted *ex parte* by gas marketers and aggregators, including some marketing subsidiaries of incumbent local gas distribution companies.

28. The Department of Public Service, at the direction of the PSC, is expending State funds to promote the sale of natural gas to residential customers by gas marketers and gas aggregators, including gas marketing subsidiaries of incumbent local gas distribution companies, who will be allowed to determine what residential customer rights will be, and how customer complaints will be resolved, rather than providing to residential customers the full protection of the statutory HEFPA requirements.

29. Expenditures of the PSC include the preparation and dissemination of a press release which states, *inter alia*:

CONSUMER PROTECTIONS

> In opening the local natural gas service markets to competition, the Commission is continuing its consumer protections. Under these protections, the local utility would continue to be subject to all existing Commission rules and regulations protecting consumer interests. Gas "marketers" seeking to sell natural gas to nonresidential customers in New York State must:
>
> o file with the Commission copies of standard contracts

setting forth what the customers' rights will be; and

- o establish a procedure for handling customer complaints

The above protections also apply to residential customers, for whom marketers must also:

- o issue plain language bills; and
- o provide 15 days notice of termination of service.

Further, local utilities and marketers are required to implement a public information process to notify customers of the new services available.

A copy of the PSC Press Release dated March 14, 1996 is attached as Exhibit "E".

30. Expenditures of the New York State Department of Public Service include the money spent to develop and distribute a new brochure that advises customers of a two-tier system of residential customer protection, with lesser protection for customers of gas marketers and gas aggregators. It indicates that customers who purchase gas from the local gas distribution company will have full HEFPA protection, while customers who purchase gas from a marketer will have their protections determined by the marketer's model contract. A copy of the brochure is attached to this complaint as Exhibit "F".

31. Expenditures of the New York State Department of Public Service include the money spent to develop and distribute a new question and answer guide for customers indicating that the rights of customers of gas marketers and gas aggregators is determined by their contracts, and that they are not be required to comply with all statutory HEFPA requirements. A copy of the question and answer guide is attached as Exhibit "G".

32. Other expenditures of the Department of Public Service to promote the sale

of natural gas by providers who do not obey all the statutory requirements of HEFPA include the preparation and dissemination of information provided to the public on a toll-free telephone line, 1-800-342-3377 and on a PSC World Wide Web site, http://www.dps.state.ny.us, and the ongoing operating and maintenance costs associated therewith.

33. Plaintiffs are citizens of the State of New York, they pay New York State taxes, and they have standing to bring this action to halt defendants' unlawful expenditures and illegal actions, under Section 123-b of the New York State Finance Law and under the common law principles established in *Boryszewski v. Bridges*, 37 N.Y.2d 361 (1975).

LEGAL CLAIMS

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, are gas corporations subject to the requirements of HEFPA in PSL §§ 30 *et seq*.

36. The PSC lacks power to diminish the rights and responsibilities of gas customers and gas corporations established by HEFPA, and lacks power to give gas marketers the power to establish new terms and conditions for their residential customers that abrogate or conflict with the statutory requirements of HEFPA.

37. The PSC's March 28, 1996 decision in Case 93-G-0932, *Restructuring of the Emerging Competitive Natural Gas Market*, unlawfully allows gas marketers or gas aggregators, including marketing subsidiaries of incumbent local gas distribution

companies, to sell or facilitate the sale or furnishing of gas to residential customers in violation of HEFPA, PSL §§ 30 *et seq*.

38. Defendants PSC, DPS, and O'Mara, in the course of their duties, have caused and are now causing a wrongful and illegal expenditure, misappropriation, misapplication, and disbursement of State funds or State property. They have spent and are continuing to spend State funds unlawfully to allow gas marketers and gas aggregators, including marketing subsidiaries of incumbent local gas distribution companies, to sell, furnish, or facilitate the sale of natural gas to residential customers without complying with all statutory requirements of HEFPA.

39. Plaintiffs are entitled to relief under Section 123-e of the New York State Finance Law, and CPLR § 3001, declaring unlawful the PSC's *Order Concerning Compliance Filings* in Cases 93-G-0932, *et al.*, issued March 28, 1996, insofar as it relieves gas marketers and gas aggregators from providing the statutory protections of HEFPA, and enjoining defendants from any further expenditures and actions to promote the unlawful operation of gas marketers and gas aggregators providing natural gas service to residential customers in violation of the statutory requirements of HEFPA.

40. Defendants are liable for attorney's fees and costs pursuant to State Finance Law § 123-g, and under CPLR § 8601 because the illegal decisions, actions, and expenditures of the PSC and DPS are without any statutory authority and lack any substantial justification.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court grant judgment in

favor of plaintiffs, awarding:

1. A declaratory judgment pursuant to Section 123-e of the New York State Finance Law and CPLR § 3001, declaring unlawful (a) the PSC's March 28, 1996 *Order Concerning Compliance Filings* in Cases 93-G-0932, *et al.*; (b) the approval by the PSC and DPS of the sale of gas to residential customers by gas marketers and aggregators pursuant to form contracts permitting the abrogation of statutory HEFPA requirements; and (c) the expenditures of State funds by DPS at the direction of the PSC and defendant John O'Mara, on the grounds that the Order, approvals, and expenditures permit gas marketers and gas aggregators to sell or facilitate the sale of natural gas to retail residential customers in violation of the Home Energy Fair Practices Act, PSL §§ 30 - 52.

2. Injunctive relief pursuant to Section 123-e of the New York State Finance Law, and incidental injunctive relief pursuant to CPLR § 3001, enjoining defendants PSC, DPS, and O'Mara to halt all their actions and expenditures to implement the PSC's March 28, 1996 *Order Concerning Compliance Filings*, insofar as it allows gas marketers and gas aggregators to violate statutory requirements of HEFPA, and permits standard contracts providing for the waiver of statutory HEFPA protections, and enjoining defendants from permitting gas marketers and gas aggregators to sell or facilitate the sale or furnishing of natural gas service at retail to residential customers without complying with the statutory requirements of HEFPA;

3. Costs and reasonable attorney's fees to plaintiffs pursuant to State Finance

Law § 123-g and the Equal Access to Justice Act, CPLR Article 86; and

4. Such other and further relief as the Court may deem just and proper.

July 26, 1996

Respectfully submitted,

B. Robert Piller, Esq.
Gerald A. Norlander, Esq.
Public Utility Law Project of New York, Inc.
39 Columbia Street
Albany, NY 12207-2717
Tel. (518) 449-3375

Attorneys for Plaintiffs PULP, Myers, and Hepinstall

Milton Amgott, Esq.
168 W. 86th Street
New York, NY 10024
Tel. (212) 580-2421

Attorney for Plaintiff Paul D. Tonko

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF ALBANY

Gerald A. Norlander, being duly sworn, deposes and says that he is the Deputy Director of plaintiff Public Utility Law Project of New York, Inc, in the above-entitled action; that he makes this affidavit pursuant to Section 123-c(2) of the State Finance Law; that he has read the foregoing complaint and knows the contents thereof and that the same is true to his own knowledge, except as to any matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

Gerald A. Norlander

Sworn to Before Me
This 26th Day of July, 1996

CHARLES BRENNAN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN COLUMBIA COUNTY
#4895577
COMMISSION EXPIRES APRIL 27, 1997

VERIFICATION

STATE OF NEW YORK
COUNTY OF ALBANY

Sandra Myers, being duly sworn, deposes and says that she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof and that the same is true to her own knowledge, except as to any matters therein stated to be alleged on information and belief, and as to those matters, she believes it to be true.

Sandra Myers

Sworn to Before Me
This 25th Day of July, 1996

CHARLES BRENNAN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN COLUMBIA COUNTY
#4895577
COMMISSION EXPIRES APRIL 27, 1997

VERIFICATION

STATE OF NEW YORK
COUNTY OF NEW YORK

David Hepinstall, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true to his own knowledge, except as to any matters therein state ! to be alleged on information and belief, and as to those matters, he believes it to be true.

David Hepinstall

Sworn to Before Me
This 25th Day of July, 1996

ROBERT E. GROSS
Notary Public, State of New York
No. 30-4636467
Qualified in Nassau County
Commission Expires March 30, 19 98.

Records & Briefs

Microfilmed for:

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Supreme Court of the State of New York
Third Department

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Declaration by Records Custodian

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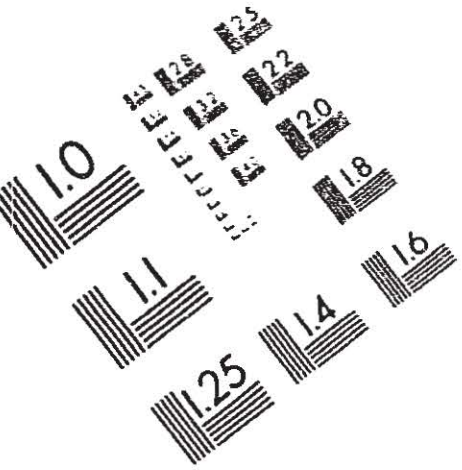

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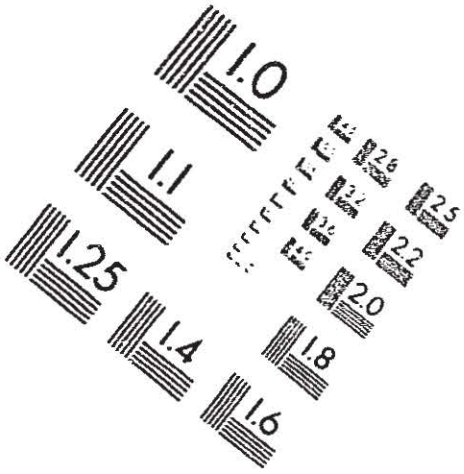
Association for Information and Image Management

1100 Wayne Avenue, Suite 1100
Silver Spring, Maryland 20910
301 587-8202



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1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
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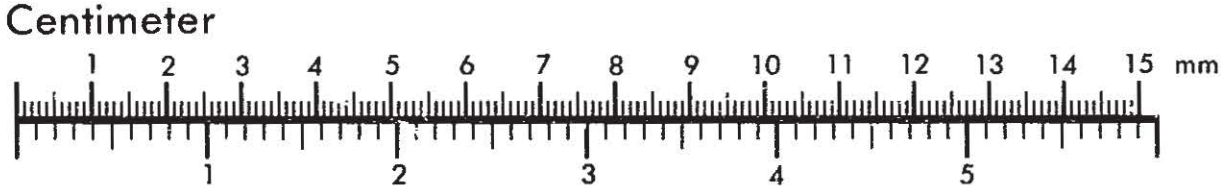

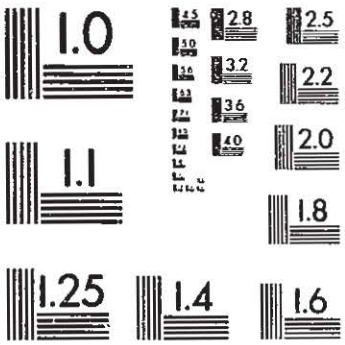

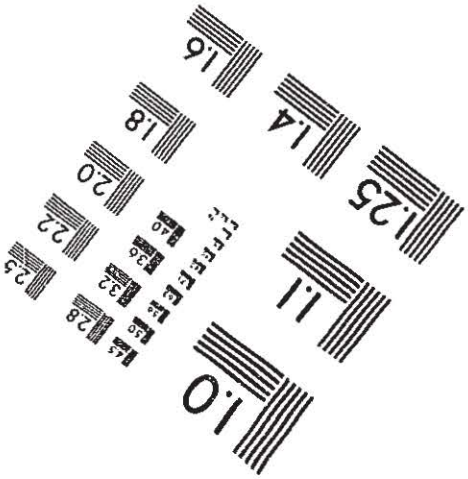

IMAGE EVALUATION TEST TARGET QA-3

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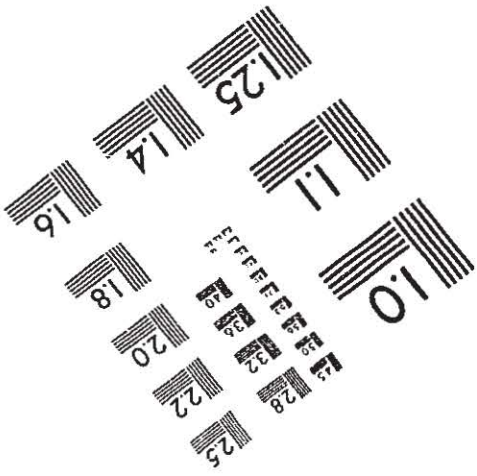

81649

3-98-1466

Supreme Court of the State of New York
Appellate Division - Third Department

AD Case No. 81649

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.;
SANDRA MYERS; PAUL D. TONKO; and DAVID HEPINSTALL;

Plaintiffs-Appellants,

v.

NEW YORK STATE PUBLIC SERVICE COMMISSION;
the NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE;
JOHN O'MARA, in his official capacity as Chairman of the New York State Public Service Commission and Chief Executive Officer of the New York State Department of Public Service; and H. CARL MCCALL, in his official capacity as Comptroller of the State of New York;

Defendants-Appellees.

RECORD ON APPEAL

Lawrence G. Malone, Esq., Counsel
Public Service Commission of the State of New York
Attorney for Defendants-Appellants Commission, Department of Public Service and Chair
(Jonathan Feinberg, Esq., Assistant Counsel)
Three Empire State Plaza
Albany, New York 12223-1350
Tel. (518) 474-8572

B. Robert Piller, Esq.
Gerald A. Norlander, Esq.
Charles J. Brennan, Esq.
Ben Wiles, Esq.
Public Utility Law Project of New York, Inc.
90 State Street, Suite 601
Albany, NY 12207-1715
Tel. (518) 449-3375
Attorneys for Plaintiffs-Appellants PULP, Myers, and Hepinstall

Dennis C. Vacco
Attorney General for the State of New York
Attorney for Defendant-Appellant Comptroller
The Capitol
Albany, New York 12224
(James B. McGowan, Assistant Attorney General, of Counsel)
(518)474-7642

Milton Amgott, Esq.
168 W. 86th Street
New York, NY 10024
Tel. (212) 580-2421
Attorney for Plaintiff-Appellant Paul D. Tonko

Albany County Clerk's Index No. 4509-96

Exhibit F

SUPREME COURT: COUNTY OF ALBANY
STATE OF NEW YORK

X

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.; SANDRA MYERS; PAUL D. TONKO; and DAVID HEPINSTALL;

Plaintiffs,

- against -

The NEW YORK STATE PUBLIC SERVICE COMMISSION; the NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE; JOHN O'MARA, in his official capacity as Chairman of the New York State Public Service Commission and Chief Executive Officer of the New York State Department of Public Service; and H. CARL MCCALL, in his official capacity as Comptroller of the State of New York;

Defendants.

X

AMENDED VERIFIED COMPLAINT
RJI No. 01-96-ST
Index No. 4509-96
Justice Keegan

For their amended verified complaint pursuant to CPLR § 3025, plaintiffs allege as follows:

1. The entire original verified complaint filed in this action on July 26, 1996, is repeated, realleged, and incorporated by reference as if set forth fully here.

2. A new paragraph "41" is added to the complaint as follows:

41. Upon information and belief, defendants PSC and DPS did not publish in the New York State Register prior notice of any proposed rulemaking to exempt gas marketers from complying with HEFPA, published no regulatory impact statement, regulatory flexibility analysis, or rural area flexibility analysis, did not provide time to receive public comments prior to final adoption of the rule, did not notify the legislature, and did not publish the final rule in the New York State Register and the official compilation of New York

Codes, Rules and Regulations, in violation of the New York State Administrative Procedure Act § 202, New York Executive Law §§ 101-a and 102, and the New York State Constitution, Art. 4 § 8. The basis for this information and belief is the investigation, inquiry and file review of plaintiff PULP's counsel.

3. A new paragraph "1-A" to the prayer for relief at page 16 of the original verified complaint is added as follows:

1-A. A declaratory judgment that the rule of defendants PSC and DPS exempting gas marketers from HEFPA is null and void because it was adopted in violation of the New York State Administrative Procedure Act § 202, New York Executive Law §§ 101-a and 102, and the New York State Constitution, Art. 4 § 8.

September 24, 1996

Respectfully submitted,

B. Robert Piller, Esq.
Gerald A. Norlander, Esq.
Public Utility Law Project of New York, Inc.
39 Columbia Street
Albany, NY 12207-2717
Tel. (518) 449-3375

Attorneys for Plaintiffs PULP, Myers, and Hepinstall

Milton Amgott, Esq.
168 W. 86th Street
New York, NY 10024
Tel. (212) 580-2421

Attorney for Plaintiff Paul D. Tonko

VERIFICATION

STATE OF NEW YORK
COUNTY OF ALBANY

Sandra Myers, being duly sworn, deposes and says that she is the plaintiff in the above-entitled action; that she has read the foregoing amended verified complaint and knows the contents thereof and that the same is true to her own knowledge, except as to any matters therein stated to be alleged on information and belief, and as to those matters, she believes it to be true.

Sandra Myers

Sworn to Before Me
This 24th Day of September, 1996

CHARLES BRENNAN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN COLUMBIA COUNTY
#4895577
COMMISSION EXPIRES APRIL 27, 1997

VERIFICATION

STATE OF NEW YORK
COUNTY OF ALBANY

David Hepinstall, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof and that the same is true to his own knowledge, except as to any matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

David Hepinstall

Sworn to Before Me
This 14 Day of September, 1996

CHARLES BRENNAN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN COLUMBIA COUNTY
#4655577
COMMISSION EXPIRES APRIL 27, 1997

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF ALBANY

Gerald A. Norlander, being duly sworn, deposes and says that he is the Deputy Director of plaintiff Public Utility Law Project of New York, Inc, in the above-entitled action; that he makes this affidavit pursuant to Section 123-c(2) of the State Finance Law; that he has read the foregoing amended verified complaint and knows the contents thereof and that the same is true to his own knowledge, except as to any matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

Gerald A. Norlander

Sworn to Before Me
This 27th Day of September 1996

CHARLES BRENNAN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN COLUMBIA COUNTY
#4895577
COMMISSION EXPIRES APRIL 27, 1997

Exhibit G

Verified Answer on behalf of Defendants New York State Public Service Commission, New York State Department of Public Service, and Chairman John O'Mara dated September 5, 1996

SUPREME COURT: COUNTY OF ALBANY
STATE OF NEW YORK

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.; SANDRA MYERS; PAUL D. TONKO; and DAVID HEPINSTALL,

Plaintiffs,

- against -

The NEW YORK STATE PUBLIC SERVICE COMMISSION; the NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE; JOHN O'MARA, in his official capacity as Chairman of the New York State Public Service Commission and Chief Executive Officer of the New York State Department of Public Service; and H. CARL MCCALL, in his official capacity as Comptroller of the State of New York,

Defendants.

VERIFIED ANSWER

Index No. 4509-96

RJI #01-96-046955

The Defendants New York State Public Service Commission (Commission), New York State Department of Public Service (Department) and John O'Mara, Chairman of the Public Service Commission and Chief Executive Officer of the New York State Department of Public Service, answering the Verified Complaint of Plaintiffs Public Utility Law Project of New York, Inc. (PULP), Sandra Myers, Paul D. Tonko and David Hepinstall, hereby:

1. Deny the allegations contained in paragraph 1 of the Complaint, except admit that the Plaintiffs have attempted to fashion this action as a citizen taxpayer suit seeking declaratory and injunctive relief under CPLR § 3001 and Article 7 of the New York State Finance Law.

2. Deny the allegations contained in paragraphs 2, 28, 33, 34, 35, 36, 37, 38, 39 and 40.

3. Deny the allegations contained in paragraph 3, and refer to the Home Energy Fair Practices Act (HEFPA), codified at Public Service Law sections 30 et seq. for its full content.

4. Deny the allegations contained in paragraph 4, except admit that the Consumer Services Division of the Department is processing form contracts of gas marketers and gas aggregators and the Gas and Water Division of the Department continues to review tariffs of local gas distribution companies.

5. Deny the allegations contained in paragraph 5, except admit that the Plaintiffs are seeking the relief listed therein.

6. Admit the allegations contained in paragraphs 6, 8, 10, 11, 12, 13, 16 and 17.

7. Deny information sufficient to form a belief as to the allegations contained in paragraphs 7 and 9.

8. Deny the allegations contained in paragraph 14, and refer to Commission Opinion 94-26, Restructuring of the Emerging Competitive Natural Gas Market, issued December 20, 1994 in Case 93-G-0932 for its full content.

9. Deny the allegations contained in paragraph 15, and refer to the Commission's August 11, 1995 Order on Reconsideration in Case 93-G-0932 for its full content.

10. Deny the allegations contained in paragraph 18, and refer to Plaintiffs' Exhibit A for its full content.

11. Deny the allegations contained in paragraph 19, and refer to the comments of PULP and other parties to Commission Case 93-G-0932 for their full content.

12. Deny the allegations contained in paragraphs 20, 21, 22, 23, 24, and refer to the Public Service Commission's March 28, 1996 Order Concerning Compliance Filings in Case 93-G-0932 for its full content.

13. Deny the allegations contained in paragraphs 25 and 26, and refer to Plaintiffs' Exhibit D for its full content.

14. Deny the allegations contained in paragraph 27, except admit that the Department of Public Service is reviewing form contracts.

15. Deny the allegations contained in paragraph 29, and refer to the Department of Public Service's press release (Pet., Ex. E) for its full content.

16. Deny the allegations contained in paragraph 30, except admit that the Department has developed a brochure and refer to the brochure (Pet., Ex. F) for its full and complete content.

17. Deny the allegations contained in paragraph 31, except admit that the Department has developed a question and answer guide and refer to the guide (Pet., Ex. G) for its full content.

18. Deny the allegations contained in paragraph 32, except admit that the Department has a toll free telephone line and a World Wide Web site.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

19. The Plaintiffs' claim under Article 7 of the New York State Finance Law should be dismissed because the Plaintiffs have not stated a cause of action under Article 7 of the New York State Finance Law and, in any event, lack standing.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

20. The Plaintiffs' action for a declaratory judgment should be converted to an Article 78 proceeding.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

21. The complaint of Plaintiffs Sandra Myers, Paul D. Tonko and David Hepinstall should be dismissed because none of these Plaintiffs appeared before the PSC in the proceeding leading to the PSC action under review.

AS AND FOR A STATEMENT OF THE GROUNDS OF THE ACTION BY DEFENDANT PUBLIC SERVICE COMMISSION:

22. The basis for the Commission's decisions in its Case 93-G-0932, sought to be reviewed in this proceeding, are embodied in the record before the Commission described in more detail below. The decision of the Commission is not in any way discriminatory, unconstitutional, inconsistent with the Commission's statutory responsibilities, an abdication of the Commission's or Department's or Chairman John F. O'Mara's duties under the Public Service Law, or otherwise unlawful in any manner. On the contrary, the Commission's and Department's actions are in all respects in conformity with the law.

23. Upon conversion to an Article 78 proceeding, the Defendants will present to the Court the orders, pleadings and other documents that constitute the record of the proceedings before the Commission upon which the determinations of the Commission were based. All of these documents are hereby made a part of this Verified Answer with the same force and effect as if fully set forth and alleged herein and as if duly certified copies of these documents were physically attached hereto.

WHEREFORE, Defendants request that the Court dismiss the Plaintiffs' claim under Article 7 of the New York State Finance Law, convert the remaining portions of the Plaintiffs' action for a declaratory judgment into a proceeding under

Article 78 of the Civil Practice Law and Rules, dismiss the complaints of Sandra Myers, Paul D. Tonko and David Hepinstall, confirm the Commission's determinations in all respects and provide such other relief as the Court deems just and reasonable.

Yours, etc.

Maureen O. Helmer
General Counsel to the
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-8572

Of Counsel

Lawrence G. Malone
Solicitor

Dated: September 5, 1996
Albany, New York

STATE OF NEW YORK:
:ss
COUNTY OF ALBANY :

LAWRENCE G. MALONE, being duly sworn, deposes and says that he is Solicitor to the Public Service Commission; that he has read the foregoing Verified Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; and the source of deponent's information and grounds for his belief as to the matters therein stated to be alleged upon information and belief are the official records relating to the matters set forth in this Answer on file in the office of the Public Service Commission; that the reason this verification is made by deponent and not by defendant Public Service Commission is that the defendant is a Department of the State of New York and deponent is its Solicitor.

Lawrence G. Malone

Sworn to before me this
5th day of September, 1996

LEONARD J. VAN RYN
Notary Public, State of New York
Qualified In Albany County
My commission expires 7/31/98

Exhibit H

SUPREME COURT: COUNTY OF ALBANY
STATE OF NEW YORK

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.; SANDRA MYERS; PAUL D. TONKO; and DAVID HEPINSTALL,

Plaintiffs,

- against -

The NEW YORK STATE PUBLIC SERVICE COMMISSION; the NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE; JOHN O'MARA, in his official capacity as Chairman of the New York State Public Service Commission and Chief Executive Officer of the New York State Department of Public Service; and H. CARL MCCALL, in his official capacity as Comptroller of the State of New York,

Defendants.

AMENDED VERIFIED ANSWER

Index No. 4509-96

RJI #01-96-046955

The Defendants New York State Public Service Commission (Commission), New York State Department of Public Service (Department) and John O'Mara, Chairman of the Public Service Commission and Chief Executive Officer of the New York State Department of Public Service, answering the Amended Verified Complaint of Plaintiffs Public Utility Law Project of New York, Inc. (PULP), Sandra Myers, Paul D. Tonko and David Hepinstall, hereby:

1. Deny the allegations contained in paragraph 1 of the Amended Complaint, except admit that the Plaintiffs have attempted to fashion this action as a citizen taxpayer suit seeking declaratory and injunctive relief under CPLR § 3001 and Article 7 of the New York State Finance Law.

2. Deny the allegations contained in paragraphs 2, 28, 33, 34, 35, 36, 37, 38, 39 and 40.

3. Deny the allegations contained in paragraph 3, and refer to the Home Energy Fair Practices Act (HEFPA), codified at Public Service Law sections 30 et seq. for its full content.

4. Deny the allegations contained in paragraph 4, except admit that the Consumer Services Division of the Department is processing form contracts of gas marketers and gas aggregators and the Gas and Water Division of the Department continues to review tariffs of local gas distribution companies.

5. Deny the allegations contained in paragraph 5, except admit that the Plaintiffs are seeking the relief listed therein.

6. Admit the allegations contained in paragraphs 6, 8, 10, 11, 12, 13, 16 and 17.

7. Deny information sufficient to form a belief as to the allegations contained in paragraphs 7 and 9.

8. Deny the allegations contained in paragraph 14, and refer to Commission Opinion 94-26, Restructuring of the Emerging Competitive Natural Gas Market, issued December 20, 1994 in Case 93-G-0932 for its full content.

9. Deny the allegations contained in paragraph 15, and refer to the Commission's August 11, 1995 Order on Reconsideration in Case 93-G-0932 for its full content.

10. Deny the allegations contained in paragraph 18, and refer to Plaintiffs' Exhibit A for its full content.

11. Deny the allegations contained in paragraph 19, and refer to the comments of PULP and other parties to Commission Case 93-G-0932 for their full content.

12. Deny the allegations contained in paragraphs 20, 21, 22, 23, 24, and refer to the Public Service Commission's March 28, 1996 Order Concerning Compliance Filings in Case 93-G-0932 and the Public Service Commission's September 13, 1996 Order Resolving Petitions for Rehearing for their full content (Exhibit A hereto).

13. Deny the allegations contained in paragraphs 25 and 26, and refer to Plaintiffs' Exhibit D for its full content.

14. Deny the allegations contained in paragraph 27, except admit that the Department of Public Service is reviewing form contracts.

15. Deny the allegations contained in paragraph 29, and refer to the Department of Public Service's press release (Pet., Ex. E) for its full content.

16. Deny the allegations contained in paragraph 30, except admit that the Department has developed a brochure and refer to the brochure (Pet., Ex. F) for its full and complete content.

17. Deny the allegations contained in paragraph 31, except admit that the Department has developed a question and answer guide and refer to the guide (Pet., Ex. G) for its full content.

18. Deny the allegations contained in paragraph 32, except admit that the Department has a toll free telephone line and a World Wide Web site.

19. Deny the allegations contained in paragraph 41, and refer to the Notices of Proposed Rulemaking, SAPA I.D. Nos. PSC-48-95-00013-P, PSC-48-95-00014-P and PSC-48-95-16-P through PSC-48-95-00024-P, published in the State Register on November 29, 1995 (Exhibit B hereto), the Notices of Adoption, SAPA I.D. Nos. PSC-48-95-00013-A, PSC-48-95-00014-A and PSC-48-95-4895-16-A through PSC-48-95-00024-A, published in the State Register on April 17, 1996 (Exhibit C hereto) and the Notice of Emergency Adoption and Notice of Proposed Rulemaking, SAPA I.D. No. 93-G-09325A4, published in the State Register on October 2, 1996 (Exhibit D hereto).

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

20. The Plaintiffs' claim under Article 7-A of the New York State Finance Law should be dismissed because the Plaintiffs have not stated a cause of action under Article 7 of the New York State Finance Law and, in any event, lack standing.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

21. The Plaintiffs' action for a declaratory judgment should be converted to an Article 78 proceeding.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

22. The complaint of Plaintiffs Sandra Myers, Paul D. Tonko and David Hepinstall should be dismissed because none of these Plaintiffs appeared before the PSC in the proceeding leading to the PSC action under review.

AS AND FOR A STATEMENT OF THE GROUNDS OF THE ACTION BY DEFENDANT PUBLIC SERVICE COMMISSION:

23. The basis for the Commission's decisions in its Case 93-G-0932, sought to be reviewed in this proceeding, are embodied in the record before the Commission described in more detail below. The decision of the Commission is not in any way discriminatory, unconstitutional, inconsistent with the Commission's statutory responsibilities, an abdication of the Commission's or Department's or Chairman John F. O'Mara's duties under the Public Service Law, or otherwise unlawful in any manner. On the contrary, the Commission's and Department's actions are in all respects in conformity with the law.

24. Upon conversion to an Article 78 proceeding, the Defendants will present to the Court the orders, pleadings and other documents that constitute the record of the proceedings before the Commission upon which the determinations of the Commission were based. All of these documents are hereby made a part of this Verified Answer with the same force and effect as if fully set forth and alleged herein and as if duly certified copies of these documents were physically attached hereto.

WHEREFORE, Defendants request that the Court dismiss the Plaintiffs' claim under Article 7-A of the New York State Finance Law, convert the remaining portions of the Plaintiffs' action for a declaratory judgment into a proceeding under Article 78 of the Civil Practice Law and Rules, dismiss the complaints of Sandra Myers, Paul D. Tonko and Lavid Hepinstall, confirm the Commission's determinations in all respects and

provide such other relief as the Court deems just and reasonable.

Yours, etc.

Maureen O. Helmer
General Counsel to the
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-8572

Of Counsel

Lawrence G. Malone
Solicitor

Dated: October 18, 1996
Albany, New York

STATE OF NEW YORK:
:ss
COUNTY OF ALBANY :

LAWRENCE G. MALONE, being duly sworn, deposes and says that he is Solicitor to the Public Service Commission; that he has read the foregoing Verified Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; and the source of deponent's information and grounds for his belief as to the matters therein stated to be alleged upon information and belief are the official records relating to the matters set forth in this Answer on file in the office of the Public Service Commission; that the reason this verification is made by deponent and not by defendant Public Service Commission is that the defendant is a Department of the State of New York and deponent is its Solicitor.

Lawrence D Malone
Lawrence G. Malone

Sworn to before me this
18th day of October, 1996

Cheryl L. Callahan
Notary Public, State of New York
Commission Expires 8/13/98