STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Service Companies.	)	**Case 15-M-0127**
Proceeding on the Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State.	)	**Case 12-M-0476**
In the Matter of Retail Access Business Rules.	)	**Case 98-M-1343**

REQUEST FOR REHEARING
AND STAY OF DIRECT ENERGY SERVICES, LLC

Direct Energy Services, LLC respectfully submits this Request for Rehearing and Stay of the Commission's Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process issued in these proceedings on December 12, 2019 (the "Order") on behalf of itself and its affiliates doing business as Energy Service Companies ("ESCOs") in New York State (collectively, "Direct Energy")[1] pursuant to Rules 3.6 and 3.7 of the Commission's Procedural Rules, 16 N.Y.C.R.R. §§ 3.6 and 3.7 (2019).

SUMMARY OF POSITION

Absent rehearing, the Commission's action through the December 12, 2019 Order (the "Order") invites irreparable destruction to the New York customer choice marketplace—an about-face from the Legislature's repeated endorsements of the retail market—and would constitute reversible error on numerous troubling issues. The Order represents an unreasoned departure from

[1] Direct Energy's affiliates doing business in New York State include Gateway Energy Services Corporation, Direct Energy Business, LLC and Direct Energy Business Marketing, LLC.

established Commission precedent and imposes arbitrary reforms that were neither: (i) previewed to the parties as a possible outcome in applicable notices; nor (ii) meaningfully explored or addressed, if at all, in the underlying evidentiary record. To the extent the Order seeks to abrogate or interfere with existing customer contracts,[2] it also impermissibly runs afoul of several statutory and constitutional protections. For all of these reasons, at a *minimum*, Direct Energy respectfully requests rehearing, so the Commission has an opportunity to properly address aspects of the Order that will inflict irreparable harm and unnecessary damage on all New York market participants and the New York customers they serve.

THE PSC SHOULD STAY THE PROVISIONS OF THE ORDER PENDING RESOLUTION OF THE ISSUES RAISED IN THIS PETITION

In light of the serious flaws in the Order discussed herein, as well as the substantial customer confusion and disruption that will result in the event that the provisions of the Order are placed into effect before these flaws can be corrected, Direct Energy respectfully requests that the Commission stay the enforcement of the Order pending its decision on this rehearing request and for at least a further 60 days thereafter.[3] The Order directs immediate and sweeping changes to the marketplace that will present numerous operational challenges for all market participants (customers, ESCOs, and utilities alike). Direct Energy has significant concerns that immediate

[2] As discussed further *infra*, Direct Energy does not believe the PSC can abrogate existing customer contracts—including, but not limited to, customer contract provisions providing for automatic renewal of existing contracts. Accordingly, Direct Energy understands that in compliance with the Order it can continue to serve its existing customers in accordance with their contract terms. Similarly, Direct Energy interprets the Order as not requiring affirmative consent to migrate existing customers to any of the products permitted under the Order if Direct Energy can provide such a permitted product without changing terms of an existing contract. To the extent the Order does seek to interfere with the terms of any existing contracts or require affirmative consent to continue to serve where none would be required under any existing contract, Direct Energy objects for the reasons further discussed herein.

[3] Direct Energy anticipates that numerous other adversely-affected market participants may also be seeking rehearing and/or a stay of the Order's implementation pending the Commission's actions on rehearing. Direct Energy joins in such arguments, and reserves the right to assert them on appeal (if necessary), to protect its rights in seeking review of the Order.

implementation of the Order, as currently drafted, will lead to extensive confusion, unworkable (and ambiguous) timelines, and unnecessary market disruption. A stay of the Order's implementation will provide all market participants—and the Commission—with the time necessary to fully address concerns raised on rehearing and provide greater clarity around practical implementation issues.

INTRODUCTION AND BACKGROUND

The Order represents the culmination of a three-year process commenced by the issuance by the Commission's Secretary (the "Secretary") of a Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits issued December 2, 2016 (the "December 2, 2016 Notice"). In that Notice, the Secretary acknowledged that cost-of-service regulation of monopoly services can be "imperfect, administratively burdensome and untimely, and can lead to inefficient pricing."[4] The Secretary also acknowledged that competitive markets generally avoid these shortfalls through the operation of market mechanisms and consumer choice:

> Competitive markets tend to efficiently distribute and allocate resources in society because customers consider their own benefit when choosing how much to consume or to pay for a good or service. The actions of such consumers in a functioning competitive market generally drive prices to a state where marginal benefits equal marginal costs, since customers are not willing to purposefully pay any more than the minimum necessary to obtain the benefits they desire. Similarly, competitive markets tend to be efficient at encouraging sellers to produce goods and services for the lowest cost so as not to lose market share to their competitors.[5]

Expressing frustration that New York's experience with ESCOs had not lived up to her expectations in this regard, the Secretary established two procedural tracks in these proceedings: In Track 1, the Secretary established an evidentiary proceeding to address whether ESCOs should

[4] December 2, 2016 Notice, slip op. at 2.

[5] *Id*.

be completely prohibited from serving mass-market customers or whether the Commission's rules governing retail access should be modified "to provide guidance as to acceptable rates and practices of ESCOs, or to create enforcement mechanisms to deter customer abuses and overcharging . . . ."[6] In addition, the Secretary also posed 20 questions to be addressed to the parties participating in that hearing. In Track 2, the Secretary indicated that she would establish a collaborative track to determine whether new ESCO rules and products can be developed that would be acceptable to the Commission upon the completion of Track 1. On June 7, 2017, the Commission published a Notice of Proposed Rulemaking in conformance with the State Administrative Procedure Act ("SAPA"), which also requested comments on the 20 questions set out in the December 2, 2016 Notice (the "SAPA Notice").[7]

From November 29 to December 12, 2017, two Administrative Law Judges appointed by the Commission (the "ALJs") conducted evidentiary hearings into the 20 questions identified in the December 2, 2016 Notice and in the SAPA Notice. While most of the ESCOs doing business in New York State were parties to these proceedings at the outset, the vast majority of these ESCOs were allowed to withdraw from these proceedings to avoid having to respond to detailed discovery requests served on them by the Staff of the Department of Public Service ("DPS Staff"). Direct Energy did not withdraw from these proceedings and instead provided DPS Staff and other parties with detailed and highly confidential information concerning the prices and services it provided to customers, as well as its business plans and other competitively sensitive information.[8]

[6] December 6, 2016 Notice, slip op. at 4.

[7] New York State Register at 16-17 (June 7, 2017).

[8] Portions of this information were provided under a Protective Order that exempted protected materials from disclosure under New York's Freedom of Information Law.

Thereafter, the same attorneys representing DPS Staff in these proceedings served subpoenas seeking the same information requested in their discovery requests to all non-party ESCOs. Direct Energy is not aware of the extent to which these non-party ESCOs responded to these subpoenas, as the Commission denied even outside counsel for Direct Energy and other ESCOs any access to this information. Accordingly, Direct Energy does not know the extent to which this "secret information" informed the conclusions reached by the Commission in the Order, as Direct Energy never had the opportunity to review, supplement, or respond to whatever secret information was made available to the Commission but concealed from other stakeholders.

On May 9, 2019, the New York Court of Appeals issued its decision in *National Energy Marketers Association v. New York State Public Service Commission*.[9] In that decision, the Court of Appeals rejected the Commission's contention that it could regulate ESCOs as electric and gas utilities under the Public Service Law ("PSL"), but went on to hold that the Commission could nonetheless prohibit the utilities it regulates from providing delivery services to ESCOs that fail to comply with price caps imposed by the Commission:

> While ESCOs do not fall within the definition of "gas corporation" and "electric corporation" — and, therefore, are not subject to the PSC's direct rate-making authority under Public Service Law article 4 — we nevertheless conclude that, under its authority to regulate utilities' transportation of ESCOs' gas and electricity, the PSC may condition access to utility infrastructure upon ESCOs' compliance with a price cap on gas or electricity.[10]

After 10 months of discovery, 10 days of hearings producing 4199 pages of testimony and nearly 24 months of deliberation, the Commission finally issued the Order on December 12,

[9] 33 N.Y.3d 366 (2019).

[10] *Id*. at 348.

2019.[11] In the Order, the Commission determined that, effective 90 days after that date, ESCOs would essentially only be allowed to offer three kinds of service to new customers:[12] (1) a variable-price service guaranteed to be lower in price than the default service provided by the customer's distribution utility (a "guaranteed savings" product); (2) a fixed-price product guaranteed to be no more than five percent more expensive than the default service provided by the customer's distribution utility over the preceding 12 months; and (3) a service providing the customer with a service based upon at least 50 percent renewable energy, in addition to whatever renewable energy the ESCO was obligated to provide to the customer under the Commission's Renewable Energy Standard (a "clean energy" product).[13]

The Commission also ruled that ESCOs could meet this clean energy requirement only by purchasing Renewable Energy Credits ("RECs") from the New York State Energy Research and Development Authority ("NYSERDA") or from certain renewable resources qualified to supply RECs to NYSERDA, by making NYSERDA's Alternative Compliance Payment,[14] or by purchasing electrical output of any facility satisfying the definition of "renewable" established in the recently-adopted Climate Leadership and Community Protection Act ("CLCPA"),[15] but only

[11] Although there was a substantial record developed on certain topics raised in the December 2, 2016 Notice and the June 7, 2017 SAPA Notice, as discussed in greater detail *infra*, there was little to *no* record developed on many of the sweeping mandates ushered in by the Order—many of which constitute a surprising reversal of prior Commission decisions and a departure from expressed Legislative ratifications of those prior Commission decisions.

[12] With a limited exception, the Order bans all "value-added" products, with further instructions regarding the need for subsequent proceedings to evaluate and approve of any proposed value-added product offerings. It remains unclear how long those proceedings may take before ESCOs get any clarity on permissible value-added services. Moreover, it is unclear why certain current offerings (e.g., an ESCO providing customers a free nights and weekends offering) must immediately cease being offered where they are offered at no additional cost to the customer.

[13] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard, slip op. at 22 (Issued and Effective August 1, 2016).

[14] *See* Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting A Clean Energy Standard (Issued and Effective: August 1, 2016).

[15] Chapter 106 of the New York Laws of 2019.

if that electrical output is supplied in or delivered to consumers in New York State.[16] The CLCPA defines "renewable" resources as solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity.

In another sweeping, and yet unsupported decision, the Order also rejected the claims made by Direct Energy and other ESCOs that small commercial customers have benefited from retail access and should therefore be excluded from these restrictive requirements. The Order also established certain enhanced ESCO eligibility criteria, mandated certain pricing transparency measures, rejected proposals to impose additional restrictions on ESCO marketing practices, rejected ESCO proposals to replace the current system of consolidated utility billing with consolidated ESCO billing, rejected proposals to revise the Commission's current rules governing Purchase of Receivables; and directed the Commission's Staff to convene a collaborative on Track 2 issues.

ANALYSIS

As the Court of Appeals noted, the Commission's authority to regulate ESCOs arises from its power under PSL § 66.5 to amend the tariffs of the distribution utilities that ESCOs rely on to serve their customers whenever it finds such tariffs to be unjust, discriminatory or otherwise in violation of law.[17] But PSL §§ 66(5) grants this power to the Commission only after it has held a

[16] Order, slip op. at 76.

[17] *National Energy Marketers Assn. v. PSC*, 33 N.Y.3d 336, 350 (2019) ("In authorizing the PSC to ensure that the terms by which utilities provide ESCOs access to public infrastructure remain 'just and reasonable,' sections 65 (1) and 66-d (2) support the PSC's long-held position that it has the authority to regulate ESCOs' eligibility to transport energy over public utilities' infrastructure.").

hearing.[18] In light of this hearing requirement, and the fact that the Commission has in fact held an evidentiary hearing in these proceedings, the standard for review for the Order is specified in sections 7803.3 and 7803.4 of the Civil Practice Rules and Procedures ("CPLR"), which provide that:

> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.[19]

Direct Energy does not contest that the Commission has been granted discretion to oversee the New York retail marketplace; however, absent rehearing and modification of the current Order, the Commission will have transformed its discretion into unbounded latitude to arbitrarily destroy the competitive marketplace the Legislature has repeatedly ratified and endorsed.

I. THE COMMISSION'S DECISION TO IMPOSE PRICE CAPS ON ESCO FIXED-PRICE SERVICE IS ARBITRARY, CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Commission's Determination That The Prices Charged By ESCOs For Fixed-Price Service Are Unreasonable Is Not Supported By Substantial Record Evidence

The Commission begins its analysis of fixed-price service by asserting that "the record in this case establishes that customers who choose fixed-rate ESCO products frequently pay a

[18] Any contention that PSL §§ 66.5 and 72 do not require an evidentiary hearing must be rejected in light of the court's decision in *New York Telephone Company v. Public Service Commission*, 59 A.D.2d 17 (1977), *appeal denied*, 42 N.Y.2d 810 (1977). In that case, the Third Department of the Appellate Division made clear that where the PSL expressly requires that the Commission "shall hold * * * a hearing" prior to making an appropriate order in reference thereto, all interested parties must be permitted to call and cross-examine witnesses and to rebut adverse claims – in other words, an evidentiary hearing.

[19] CPLR § 7803.

significant premium for the product."[20] The Commission then goes on to reject the contention of its staff that "the majority" of ESCOs in New York charge excessive premiums, finding that "there is insufficient evidence in the record compiled in these proceedings to justify this claim."[21] Instead, the Commission claims, the record shows that "while some ESCOs charge a premium in that range, others charge a smaller average premium."[22] Importantly, however, the Commission does not point to any record evidence whatsoever concerning the level of such prices, nor does it make any effort to explain why those prices are in any way excessive in light of the benefits that the Commission acknowledges that consumers receive from fixed-price service.

This is hardly surprising, given the astonishingly poor, scant nature of the evidentiary record in this proceeding with respect to ESCO prices for fixed-price service. As the Commission's Staff candidly admitted, neither the utilities nor Staff can distinguish between those ESCO customers receiving fixed-price service and those receiving other forms of ESCO service.[23] Instead, the only sources for such information are the ESCOs themselves. But as previously noted, while the Commission initially made all ESCOs doing business in New York parties to these proceedings, it allowed the vast majority of those ESCOs to withdraw as parties without responding to discovery requests from Staff and other parties.[24] As a result, the record compiled

[20] Order, slip op. at 64.

[21] Order, slip op. at 66.

[22] Order, slip op. at 67.

[23] *See, e.g.*, Case 05-E-0934, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Central Hudson Gas & Electric Corporation for Electric Service*, Order Establishing Rate Plan, slip op. at 73-74 (Issued and Effective July 24, 2006) ("[T]he record shows there is a competitive market in Central Hudson's territory, which includes provision of fixed-price offers from competitive suppliers. Our consideration of these factors, and of the concerns that were raised by Staff, the Company and SCMC/RESA, result in our conclusion that the addition of utility-provided fixed-price options need not be required here.").

[24] After the Commission allowed those ESCOs to withdraw as parties, it belatedly sought to obtain information on the services they provided to their customers by serving subpoenas on most or all of them. None of the information obtained from those subpoenas was ever placed into the record in these proceedings, and it would therefore be highly improper for the Commission to base any determination made in these proceedings on this "secret" evidence.

by the Commission contains very little information on the prices ESCOs charge for fixed-price service—and certainly far less than would be necessary to support such sweeping price cap restrictions; restrictions which will result in few, if any, fixed-price offers to households and small commercial customers.

What little evidence there is in the record was largely provided by Direct Energy, which unlike other ESCOs, remained in these proceedings, responded to Staff's discovery requests, and submitted testimony clearly demonstrating that ESCO fixed-price service is fairly priced. Direct Energy witness Guy Sharfman testified that based on offerings for fixed-price service available from the Commission's own website, consumers in New York State could have achieved a savings of over $1.6 billion over the period from 2014 to 2016.[25] The competitive availability of these attractive prices for ESCO fixed-price service makes clear that regulation is not necessary to provide customers with fixed-price service at reasonable prices. Mr. Sharfman also demonstrated that Direct Energy's fixed-price offerings are in fact competitive with commodity services offered by New York's distribution utilities, even though fixed-price service is not offered to compete directly with a monthly variable product, like the New York distribution utilities' product. For example, if all of the customers of Central Hudson Gas & Electric Corporation ("Central Hudson") had taken fixed-price service from Direct Energy during the three year period from 2014 to 2016, they would have avoided the fluctuations of Central Hudson's commodity rates during that period while achieving a net savings of $11 million.[26] In light of this compelling and uncontroverted evidence, the Commission's conclusions with respect to the prices of ESCO fixed-price service are clearly unsupported by substantial evidence on the record as a whole.

[25] TR. at 392.

[26] Exhibit 13 at page 1.

B. The Commission's Determination That Imposing Price Cap Regulation On ESCO Fixed-price Service Would Produce Just And Reasonable Prices Is Arbitrary And Capricious

At a later point in the Order, the Commission states that "we share Staff's ultimate concern: any premium charged for a fixed-price product must be just and reasonable."[27] With no further analysis or explanation, the Commission then simply announces that fixed-price service will be subject to price caps based on past prices charged by utilities for default service, plus a 5 percent "risk premium":

> A trailing 12-month average utility supply rate offers a meaningful baseline against which to judge the reasonableness of the price of ESCO fixed-rate products, as it is a reasonable proxy in the absence of more detailed forecast data. Further, because a typical risk premium in financial markets ranges between 3.5% to 5.5%,125 we believe that a reasonable price premium associated with fixed-rate ESCO products would be 5%.[28]

The Commission offers no explanation whatsoever of how or why it determined that a 12 month historic utility price for zero-margin default service provide "a meaningful baseline" to judge the reasonableness of future ESCO fixed-price offerings, especially if the ESCO seeks to offer a 24 month or 36 month or longer fixed-price service. Nor did it explain why it concluded that its ability to set an appropriate price cap for fixed-price service was not constrained by what it candidly admitted was "the absence of more detailed forecast data." The Commission's decision to allow ESCOs to charge only a 5 percent premium over this flawed baseline is equally unsound, relying as it does on unexplained risk premiums in unidentified financial markets.

Underlying all of these flaws is the Commission's failure to make any effort to explain why price cap regulation of ESCO fixed-price service was even necessary. ESCOs have a long and

[27] Order, slip op, at 67.

[28] Order, slip op. at 67.

detailed history of providing fixed-price products to consumers to help customers manage their cash flow and price risk associated with electricity and natural gas service. Customers have found great value in these offerings and competition in fixed-price service is good for the market. As Direct Energy witness Chris Kallaher testified:

> Of particular note is the work done by Reputation Institute, which is summarized in Exhibits __ (DEP-5R) and ___ (DEP-6R). This work found that Direct Energy scored high with its customers across a number of parameters in the areas of performance, products and services, innovation, workplace, transparency and ethics, citizenship, and leadership. The work also showed that two of Direct Energy's major competitors in New York have very good reputations as well.
>
> The results of this work add to the implausibility of the picture Mr. Andruski and others paint of the New York market. Not only is it one in which every competitor is trying to lose by caring nothing for their customers, but it is also one in which one would expect to find a high degree of customers' dissatisfaction. After all, Staff and others recommend that ESCOs be banned from selling all current products or, worse, that retail access for mass market customers should be ended completely. To support such drastic measures, one would expect to find evidence of strong overall dissatisfaction with the market among a majority of the customers who, after all, will be the ones most affected by such measures. But Staff present no such evidence, only anecdotal complaint data that has undergone no statistically rigorous analysis at all. On the other hand, Direct Energy's customers, and the customers of two of its major competitors, show a high degree of satisfaction with the market. Their voices deserve to be heard.[29]

Moreover, as the Commission made clear in its June 1, 2005 order in Case 05-M-0332, the Commission has long relied on customer choice in competitive markets to ensure that ESCO prices are just and reasonable:

> In continuing, with the issuance of the Statement of Policy, our long-established policies for promoting development of retail energy competitive markets, we determined that competition "is the preferred means of promoting efficient energy services, [is] well-

[29] TR. at 584-589.

> suited to deliver just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation."[30]

The Commission has also recognized the successful nature of this policy, having found that its policies have in fact resulted in the creation of workably competitive markets for retail competition in New York State.[31]

To the extent that the Commission determined to ompose price cap regulation of either fixed or variable price ESCO service simply because ESCO charges sometimes exceed regulated utility rates for commodity service in the properly functioning competitive markets for retail access it has created, those actions cannot be reconciled with the requirements of reasoned decision making. As the United States Court of Appeals for the District of Columbia Circuit explained in *Mobil Pipe Line v. FERC*,[32] the mere fact that prices set by the operation of supply and demand in a properly functioning competitive market differ from those set by regulation does not constitute evidence of a market failure justifying regulatory interference:

> The Commission may have been led astray by its assessment that Mobil, if granted market-based rate authority, could raise rates on Pegasus by 15 percent or more. But the Commission calculated that figure by using Pegasus's *regulated* rate as the baseline. As FERC's expert staff explained, the 15 percent figure demonstrates only that Pegasus's regulated rate is below the competitive rate. The regulated rate does not reflect Pegasus's full value to Western Canadian crude oil producers and shippers. Therefore, the possibility that the market

[30] Case 05-M-0332, *In the Matter of Central Hudson Gas & Electric Corporation's Plan to Foster the Development of Retail Energy Markets*, Order Accepting Retail Access Plan, Modifying Rate Plan, And Establishing Further Procedures, slip op. at 22 (Issued and Effective June 1, 2005) (footnotes omitted), *quoting* Case 94-E-0962, *Competitive Opportunities Regarding Electric Service*, Opinion No. 96-12 (Issued and Effective May 20. 1996).

[31] *See, e.g.*, Case 05-E-0934, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Central Hudson Gas & Electric Corporation for Electric Service,* Order Establishing Rate Plan, slip op. at 73 (Issued and Effective July 24, 2006) ("Moreover, the record shows there is a competitive market in Central Hudson's territory, which includes provision of fixed-price offers from competitive suppliers.").

[32] 676 F.3d 1098 (D.C. Cir. 2012).

> rate might be higher than the regulated rate does not show that Pegasus possesses market power.[33]

This court ruling is particularly relevant in light of the Commission's previously-noted policy of excluding any profit margin from the utility commodity rates used to benchmark ESCO prices.

The Commission makes no effort whatsoever to explain why it is abandoning its previous successful approach and now believes that price cap regulation of ESCO's fixed-price service is required to ensure just and reasonable prices—or to explain how and why the price caps adopted in the Order will achieve such prices. These failures render the Commission's determination both arbitrary and capricious, as well as unsupported by substantial evidence.[34] This is particularly true in light of the clear and convincing evidence provided by Direct Energy demonstrating not only that competitive fixed-price service offerings were available to all customers, but that those service offering are fully capable of providing customers with stable prices at rates that are both competitive with, and at times cheaper than, utility default pricing.

II. THE PORTIONS OF THE ORDER IMPOSING PRICE CAPS ON ESCOS ARE ALSO AFFECTED BY AN ERROR OF LAW

As the Court of Appeals noted in its decision upholding the Commission's power to regulate ESCO prices, the Legislature has expressly charged the Commission with responsibility to oversee ESCOs in two enactments. First, PSL § 53 authorizes the Commission to regulate ESCO services to residential consumers under PSL Article 2, also known as the Home Energy Fair Practices Act. Second, PSL § 66-d authorizes the Commission to establish just and reasonable rates, terms and conditions for gas transportation services. Moreover, in adopting section 349-d

[33] 676 F.3d at 1103-04.

[34] *See Charles A. Field Delivery Service, Inc. v. Roberts*, 66 N.Y.2d 516, 520 (1985) ("[W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so. . . . Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made.")(citations omitted).

of the General Business Law to authorize the Attorney General to enforce prohibitions on certain types of abusive marketing and billing practices, the Legislature clearly specified that "[n]othing in this section shall be deemed to limit any authority of the [PSC] . . . which existed before the effective date of this section, to limit, suspend or revoke the eligibility of an [ESCO] to sell or offer for sale any energy services for violation of any provision of law, rule, regulation or policy enforceable by [the PSC]."

With these legislatively-endorsed regulatory powers comes a certain responsibility that the Commission has plainly disregarded in the Order by establishing confiscatory rate caps for ESCO variable and fixed-price services, both of which were set by the Commission on the basis of utility commodity costs, which do not include any profit margin, and with no record evidence concerning the extent to which ESCOs could operate successfully under those price caps. As the Court of Appeals noted in *Campagna v. Shaffer*,[35] administrative agencies may not use their rulemaking powers to achieve ends that are inconsistent with the objectives established for them by the Legislature. In that case, the Secretary of State used its rulemaking authority to adopt a rule prohibiting real estate brokers from soliciting any customers in certain locations in order to prevent an abuse known as "block busting." The Court found that this rule exceeded the Secretary's authority, because it banned a practice that the Legislature had directed the Secretary to regulate:

> The Legislature has explicitly enumerated the types of solicitation it views as forbidden blockbusting activity. Brokers are not to represent "that a change has occurred or will or may occur in the composition [of the neighborhood] with respect to race, creed, color, national origin * * * [and] that this change will or may result in undesirable consequences" (Executive Law § 296 [3-b]).
>
> The nonsolicitation order at issue leaps well beyond that legislative articulation and interdicts administratively all broker-initiated solicitation, not just the illegal solicitation as targeted by the

[35] 73 N.Y.3d 237 (1989).

> Legislature. Thus, the Secretary has gone beyond administering the written law and has, under color of regulatory authority, actually rewritten and extended the law. The agency cannot make unlawful what the Legislature still has on the books as lawful.[36]

Similarly, in *Boord v. O'Brien*,[37] the First Department of the Appellate Division held that the New York City Police Commissioner could not exercise delegated rulemaking authority with respect to hotel runners to adopt rules that would effectively prohibit hotel runners from doing business in New York City. As the court explained in that case:

> The commissioner could adopt regulations to effect the objects of the statute, but he could not substitute his own opinion of what was in the public interest and adopt regulations which would have the effect of eliminating the business and nullifying the statute.[38]

While these cases make clear that the Commission's authority to regulate ESCOs does not include the power to destroy ESCOs, the Commission made no effort whatsoever to determine whether ESCOs would remain viable under the price caps it established in the Order. While the negligible record on this topic is deeply flawed for the reasons noted above, there is substantial reason to believe that these new price caps were in fact intended to simply drive ESCOs out of business—in direct contravention of the Legislature's ratification of the Commission's prior determination to permit consumer choice through retail competition. In arbitrarily setting the price cap for variable-price service equal to distribution utility charges for default service, the Commission totally ignored the fact that its previous decisions artificially suppressed utility charges for default service by prohibiting the utilities from earning any profits whatsoever on their

[36] 73 N.Y.3d at 243.

[37] 277 A.D. 253 (1st Dept. 1950), *aff'd*, 302 N.Y. 890 (1951).

[38] 277 A.D. at 257.

sales of commodity service.[39] Fifteen years after the Commission took this action for the ostensible purpose of enhancing retail competition, the Order now transforms these artificially depressed prices for utility default service into a price ceiling for ESCOs as well.

Astonishingly, the Commission made no effort in the Order to determine whether ESCOs could operate successfully under this price cap or under the arbitrary cap, tied to historical utility rates, imposed by the Order on fixed-price service, which the Commission acknowledged entailed additional costs to provide. Indeed, in previous orders the Commission has candidly acknowledged that "ESCOs are unable or unwilling to [provide] a guaranteed savings product."[40] This is hardly surprising in light of the Commission's previously noted policy of prohibiting utilities from earning any profits on their commodity service.

While ESCO fixed-price service can frequently provide customers with competitive prices over longer periods of time, the fluctuating nature of utility default service makes it impossible to offer fixed-price service on a continuous basis under the price cap imposed by the Commission. In addition, this price cap will certainly limit the diversity of fixed-price offers and constrain the number and type of products. This is clearly illustrated by the following comparison of Direct Energy's fixed-price service and the default commodity service charges of Central Hudson over the period from 2014 to 2016:

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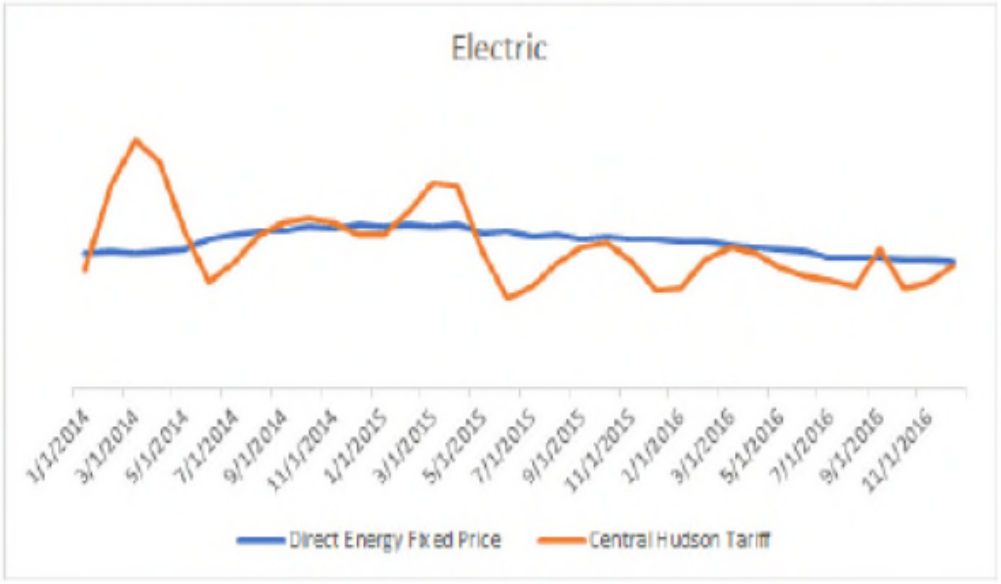
[39] *See, e.g.*, Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities*, Statement Of Policy On Further Steps Toward Competition In Retail Energy Markets, slip op. at 40 (Issued and Effective August 25, 2004). ("[I]n future rate proceedings, utilities should not propose fixed rate commodity tariffs or tariffs creating a profit center for commodity sales.").

[40] Case 12-M-0476, *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State*, Order Regarding The Provision Of Service To Low-Income Customers By Energy Service Companies, slip op. at 17 (Issued and Effective July 15, 2016).



Source: Exhibit 50 at page 1.

Despite the fact that customers on Direct Energy's fixed-price service would have achieved a *savings* over this three-year period as a whole, there are plainly substantial periods during which Direct Energy (and other similarly situated ESCOs) would almost certainly have been driven out of the New York marketplace, preventing them from providing such services to customers under the Commission's new price cap. Thus, the overall impact of the price caps adopted by the Commission in the Order is to destroy, rather than to reasonably regulate, ESCO fixed and variable-price service. For the reasons noted above, the authority granted to the Commission by the Legislature to regulate ESCOs does not extend to the adoption of such a blanket prohibition.

Moreover, it is entirely unclear how the Commission intends to preserve an efficient and "competitive market" where it has decreed that only a regulated utility can establish prices deemed just and reasonable. In so doing, it appears the Commission has explicitly declared that the New York "competitive market" is competitive in name only, and in contravention of prior Commission polices promoting the opening of retail markets to competition that have been ratified by the Legislature on several occasions. Furthermore, the goal of customer choice through retail

competition was to bring efficiency to the market, which would provide customers with choices that would not be available in a vertically-integrated monopoly. By imposing the utility default rate as a price cap on ESCO prices (fixed, variable, value-added or otherwise) the Commission will have reversed course and defeated the original goal of restructuring, which was to break the hegemony of the distribution utility through a robust retail sector.

III. THE COMMISSION'S DECISION TO APPLY THE REQUIREMENTS OF THE ORDER TO SMALL COMMERCIAL CUSTOMERS IS ARBITRARY, CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE

The question of whether the prohibitions adopted in the Order should apply not only to residential customers, but also to small commercial customers, was vigorously contested at the hearing. As the Commission candidly acknowledged in the Order, even small business managers require a high degree of commercial sophistication to be successful.[41] Moreover, many small business managers require the assurance of fixed-price services in order to meet price commitments made to their customers. It is therefore not surprising that the record makes clear that the majority of small commercial customers (52.8 percent) saved money using ESCO service over utility default service from 2014 to 2016 and that, according to the Commission's Staff, commercial electric customers collectively saved $940,000 over that period.[42]

The Commission selectively ignored all of this record evidence in ruling that small commercial customers should also be subjected to the requirements of the Order. Instead, the Commission offered up a stream of non-sequiturs that fall far short of reasoned decision-making and are wholly unsupported by substantial record evidence. Specifically, the Order states that:

[41] Order, slip op. at 106 ("Small non-residential customers may have more sophistication in entering contractual arrangements than most residential customers.").

[42] TR. at 402 lines 1 to 6 and 402 line 17 to 402 line 4.

> [T]he parties have offered no compelling reason to strip small non-residential customers of the protections they currently have. While ESCOs have presented an argument that inclusion in the mass market would limit small non-residential customer choice, they have not explained how small non-residential customer choice is limited. In fact, as the ESCOs acknowledge, small non-residential customers continue to contract with ESCOs for commodity service under the existing paradigm and none of these customers have come forward to say that their choices are restricted. There is no compelling reason to depart from the current definition of small non-residential gas customers. While RESA complains that any volumetric threshold standard is irrational because it fails to consider the customer's level of sophistication, we disagree. It is entirely reasonable to correlate the amount of a commodity used by a business to the level of attention a business owner likely dedicates to investigating ways to reduce his or her costs associated with that commodity. Of course, there always will be exceptions: some smaller customers will be quite savvy business owners and some larger customers will be less capable in that regard. Nevertheless, a volumetric standard remains a rational and administratively efficient means of estimating a customer's level of sophistication. [43]

These statements make no sense whatsoever. The assertion that Direct Energy and other ESCOs have failed to explain how application of the restrictions on ESCOs adopted in the Order will limit customer choice is absurd. By definition, the price cap provisions of the Order will prohibit ESCOs from providing small commercial customers with services that have provided those customers with stable, predictable and competitive prices. The mere fact that no small commercial customers "come forward" to complain to the Commission about the elimination of these beneficial supply arrangements hardly constitutes evidence that those customers are dissatisfied with the services they receive from Direct Energy and other ESCOs. As previously noted, Direct Energy submitted evidence demonstrating that "Direct Energy's customers, and the customers of two of its major competitors, show a high degree of satisfaction with the market."[44]

[43] Order, slip op. at 106-07.

[44] TR. at 584, line 6 to 585, line 12.

Other ESCOs have submitted similar evidence.[45] Moreover, the Commission's statement in the very next sentence of the Order that "it is entirely reasonable to correlate the amount of commodity used by a business to the level of attention a business owner likely dedicates to investigating ways to reduce his or her costs associated with that supply"[46] more likely explains why small commercial customers lack the resources to be more active in these proceedings.

The Commission's assertion that customer sophistication is correlated with customer size begs the real question here, which is whether small commercial customers are sophisticated enough to benefit from retail choice. The Commission's failure to address that fundamental question makes its determination to apply the requirements of the Order to such customers arbitrary and capricious. The fact that the only evidence in the record on this issue demonstrates that small commercial customers have in fact benefitted from retail choice shows that this irrational determination is also unsupported by substantial record evidence.

IV. TO THE EXTENT THAT THE ORDER WOULD ABROGATE ESCO RIGHTS, SUCH ACTIONS ARE AFFECTED BY AN ERROR OF LAW

To the extent that the Order were interpreted or applied in a way that caused an abrogation of the terms of any existing customer contracts, then in an abundance of caution Direct Energy submits the following additional arguments to ensure preservation of additional potential errors in the Order. Direct Energy notes that each of the below problems represent an independent problem with the Order that would invite error absent rehearing and modification.

[45] *See, e.g.*, Reply Brief of Agway Energy Services, p. 6.

[46] Order, slip op. at 106.

A. The Commission Is Without Authority Under The PSL To Abrogate Any Provisions Of ESCO Contracts

The Court of Appeals has repeatedly held that "The Public Service Commission possesses only those powers expressly delegated to it by the Legislature, or incidental to its expressed powers, together with those required by necessary implication to enable the Commission to fulfill its statutory mandate."[47] The Court of Appeals has also made clear that except in limited circumstances not applicable here, the Legislature has withheld from the Commission any power to abrogate existing contracts. Specifically, in *General Telephone Company v. Lundy*,[48] the Court of Appeals ruled that:

> Under our statutes, it is only an agreement between affiliates for "management, construction [or] engineering" services or for the "purchase of electric energy and/or gas" which need be filed by a telephone company for commission approval. In every other instance, the commission is powerless to *impair* the obligation or otherwise *invalidate* a utility's contract.[49]

Inasmuch as the Legislature has withheld from the Commission the authority to impair or invalidate utility contracts over which it has been granted "general supervision,"[50] except in limited circumstances not applicable here, it should be self-evident that the Legislature has similarly withheld from the Commission any authority to impair or invalidate existing ESCO contracts by, for example, abrogating the renewal provisions of those agreements.

Further proof that the Commission lacks the power to abrogate existing contracts is provided by the express language of PSL § 66.5, which restricts the Commission to establishing rates, charges and classifications "thereafter to be in force." Thus, the Commission is clearly

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[47] *Niagara Mohawk Power Corp. v. Public Service Commission*, 69 N.Y.2d 365, 368-69 (1987).

[48] 17 N.Y.2d 373 (1966).

[49] *Id*. at 378-79 (citations omitted, emphasis in original).

[50] N.Y. Pub. Serv. L. § 66.1 (McKinney 2011).

without authority to abrogate existing contracts. Accordingly, to the extent the Order seeks to interfere with Direct Energy's existing contract rights, the Order is also affected by an error of law in violation of CPLR § 7803.3 and must be withdrawn.

B. Abrogation of ESCO Contract Rights Is Arbitrary, Capricious and Not Supported By Substantial Record Evidence

In addition to exceeding the Commission's authority as noted above, any abrogation of Direct Energy's existing contract rights is arbitrary, capricious and not supported by substantial record evidence. Nowhere in the Order does the Commission make any effort whatsoever to explain why it has found it necessary to abrogate any existing ESCO contract rights in cases where the ESCO is fully capable of serving its current customers through its existing contracts without violating the requirements of the Order. Indeed, the Commission has taken precisely this position in permitting Direct Energy and other ESCOs to recover its cost of complying with the Commission's Clean Energy Standard from its customers, to the extent that its contracts permit such cost recovery.[51] In such circumstances, there can be "no rational basis" for abrogating any provisions of existing ESCO contracts. Thus, any such action could only be seen as arbitrary, capricious and an abuse of discretion in violation of CPLR § 7803.3.[52]

[51] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting A Clean Energy Standard, slip op. at 95 (Issued and Effective August 1, 2016) ("As the LSE obligation grows, ESCOs will have timed out of their fixed-price obligations . . . "). *See also National Fuel Gas Distribution Corp. v. TGX Corp.*, 950 F.2d 829, 837 (2d Cir. 1991) ("Thus, the Contract clearly envisioned governmental rulings like the PSC Order, and permitted TGX to continue the Contract in the aftermath of the PSC Order at a price consistent with that order.").

[52] *Arrocha v. Board of Education*, 83 N.Y.2d 361, 364 (1999).

C. Any Abrogation Of ESCO Contract Rights Would Represent An Adjudication Of The Rights Of The Parties Under The Contracts In Question That Cannot Be Sustained By The Record In These Proceedings And That Impermissibly Departs From Prior Commission Determinations Without Explanation

Moreover, as previously noted, the Legislature has specifically withheld from the Commission the power to impair or invalidate existing contracts. Accordingly, the only possible ground on which the Commission could claim the power to find and determine that changes to the types of services that ESCOs provide to their customers necessarily represent "material changes" to those agreements would be its limited powers to adjudicate the rights and responsibilities of the parties to those contracts. Any such adjudication would be subject to review under CPLR § 7803, which provides that such determinations must be overturned if they are either "arbitrary and capricious or an abuse of discretion" or if they are not supported by substantial evidence on the entire record. The Commission fails to cite to any record evidence to support any such interpretation of the provisions of these contracts, making clear that any such determination would be wholly unsupported by the evidentiary record in these proceedings.

This result is hardly surprising, as that record is deeply flawed on this issue due to the withdrawal of most ESCOs as discussed above. As a result, the record contains little or no evidence concerning the exact provisions of individual ESCO contracts with mass market customers. In such circumstances, any Commission determination that changes to the manner in which any ESCO serves its customers under its existing contracts somehow constitutes a "material change" to such contracts would also represent an unreasoned and irrational departure from prior Commission precedent.[53]

[53] *See Charles A. Field Delivery Service, Inc. v. Roberts*, 66 N.Y.2d 516, 519 (1985)(citation omitted).

Prior to the issuance of the Order, the Commission consistently allowed ESCOs to make changes in the types of service they provide to their customers to comply with new Commission requirements, so long as those changes complied with the provisions of each customer's contract. For example, when the Commission concluded that all Load Serving Entities, including ESCOs, were required to purchase Renewable Energy Credits and Zero Energy Credits as part of its Clean Energy Standard, the Commission made clear that ESCOs were allowed to flow the costs of those programs through to customers to the extent allowed by their contracts.[54] In recognition of this established policy, many contracts in the energy field, including ESCO contracts, have express provisions dealing with how the parties will handle regulatory change.[55] Any failure by the Commission to explain such a departure from its previous policy with respect to enforcement of ESCO contracts in the event of regulatory change therefore constitutes a further ground for overturning the Order.

D. Any Abrogation Of ESCO Contract Renewal Rights Would Violate The Protections For Contract Rights Established In The New York and United States Constitution

To the extent the Order does seek to abrogate existing provisions of Direct Energy's existing customer service agreements, such action would also violate the Contracts Clause of the United States Constitution. Under the Contracts Clause, a state is restricted from stripping contracting parties of their rights under a pre-existing contract. To the extent that the Order is construed as attempting to do just that—i.e., take control of Direct Energy and its customers' pre-existing contracts, order the terms amended, and change the duties owed by each party—it is an

[54] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting A Clean Energy Standard*, slip op. at 95 (Issued and Effective August 1, 2016) ("As the LSE obligation grows, ESCOs will have timed out of their fixed-price obligations . . . ").

[55] *See, e.g., National Fuel Gas Distribution Corp. v. TGX Corp.*, 950 F.2d 829, 837 (2d Cir. 1991) ("Thus, the Contract clearly envisioned governmental rulings like the PSC Order, and permitted TGX to continue the Contract in the aftermath of the PSC Order at a price consistent with that order.").

improper abrogation of existing contract rights. As such, the very terms and conditions that benefitted and were relied upon by private contracting parties would be hijacked by the Commission in violation of the Contracts Clause.

The Contracts Clause restricts the States from disrupting contractual arrangements. *See* U.S. Const., Art. I, § 10, cl. 1.[56] In order to determine if state action violates the Contract Clause, a Court considers: "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights."[57] Once substantial impairment is shown, a Court evaluates the means and ends of the state's action. *Id*. [S]ubstantial impairments are those that 'go to the heart of the contract,' 'affect [the] terms upon which the parties have reasonably relied,' or 'significantly alter the duties of the parties.'"[58] Further, the state's action is only deemed reasonable and appropriate if it is specifically tailored to address a significant and legitimate public purpose.[59] Similarly, New York also treats abrogation of any essential contract provision as a violation of the state's constitutional prohibition on taking of private property without just compensation.[60]

To the extent the Order is interpreted or applied in a way that would cause an abrogation of the terms of any existing customer contracts, the Order would act as a substantial impairment to the contracts between Direct Energy and its customers. The Order states:

> 1. Consistent with the body of this Order (Section III) and subject to any exceptions identified therein, effective 60 calendar days from the date of this Order, energy service companies (ESCOs) shall enroll new residential or small non-

[56] *Sveen v Melin*, 138 S.Ct. 1815, 1821, 201 L Ed 2d 180 (2018).

[57] *Id*.

[58] *Roberts v Cuomo*, 339 F. Supp. . 3d 36, 65 (ND NY 2018).

[59] *Police Benevolent Assn. of New York State, Inc. by Vilar v Cuomo*, 343 F. Supp. 3d 39, 63 (ND NY 2018).

[60] This additional issue is discussed further *infra* at Section VII; *see also Patterson v. Carey*, 41 N.Y.2d 714, 716, 363 N.E.2d 1146, 1149 (1977).

> residential customers (mass-market customers) or renew existing mass-market customer contracts for gas and/or electric service only if at least one of the following conditions is met: (1) enrollment includes a guaranteed savings over the utility price, as reconciled on an annual basis; (2) enrollment is for a fixed-rate commodity product that is priced at no more than 5% greater than the trailing 12-month average utility supply rate; (3) enrollment is for a renewably sourced electric commodity product that (a) has a renewable mix that is at least 50% greater than the ESCO's current Renewable Energy Standard (RES) obligation, (b) the ESCO complies with the RES locational and delivery requirements when procuring Renewable Energy Credits (RECs) or entering into bilateral contracts for renewable commodity supply, and (3) there is transparency of information and disclosures provided to the customer with respect to pricing and commodity sourcing.
>
> 2. Consistent with the body of this Order (Section III.D.3), effective 60 calendar days from the date of this Order, any mass-market customer contract for a fixed-rate commodity service that is subject to automatic renewal shall be renewed by the ESCO only as a contract for variable-rate, commodity-only service that includes a guaranteed savings over the utility price, unless the ESCO obtains affirmative customer consent to renew the contract as a fixed-rate contract that is priced at no more than 5% greater than the trailing 12-month average utility supply rate.[61]

These terms, to the extent they are interpreted or applied in a manner that would impose new contract terms on *existing* customer contracts, would substantially impair the terms the parties have reasonably relied upon, and would significantly alters the duties owed by Direct Energy. This is particularly true where most ESCO contracts contain automatic renewal provisions. These contracts, when renewed, do not act as new independent contracts—rather, it is an already-executed contract continuing to exist under the renewal language.[62]

V. THE PSC'S GREEN POWER REQUIREMENTS DISCRIMINATE AGAINST INTERSTATE COMMERCE

The Order also expressly discriminates against interstate commerce by banning non-New York green products. In particular, the Order provides that ESCOs may renew existing contracts,

[61] Order, slip op. at 108-09.

[62] *See e.g., Health Ins. Ass'n of Am. v Harnett*, 44 NY2d 302, 313 (1978) (holding that a renewal through continued payment and pursuant to the terms of a contract does not create a new contract; rather, it continues the pre-existing contract).

or enroll new customers, only if, among other qualifying conditions, it provides a "renewably sourced electric commodity product," and the ESCO "complies with the RES locational and delivery requirements when procuring RECs or entering into bilateral contracts for renewable commodity supply."[63] The effect of the "locational and delivery requirements" is to prohibit ESCOs from purchasing non-New York green products, even if those products otherwise comply with the state requirements. For instance, under the Order, Direct Energy could not satisfy New York's clean energy standards by acquiring RECs from another state.

A state statute or regulation violates the dormant Commerce Clause if it "(1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden on interstate commerce incommensurate with the local benefits secured, or (3) has the practical effect of 'extraterritorial' control of commerce occurring entirely outside the boundaries of the state in question."[64] Even where a statute or regulation is not clearly discriminatory, it nevertheless violates the dormant Commerce Clause where "the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." [65]

In this case, the Order's prohibition on non-New York green products is clearly discriminatory. On its face, the Order requires compliance with "RES locational and delivery requirements," which, in turn, prohibit ESCOs from procuring green products from non-New York providers. There is no justification for this facial discrimination, because non-New York green products are prohibited even to the extent that they otherwise comply with all state requirements. For the same reason, even if the Order's prohibition is somehow not deemed "clearly

[63] Order, slip op. at 108.

[64] *Selevan v. New York Thruway Authority*, 584 F.3d 82, 90 (2d Cir. 2009) (quotation marks and citation omitted).

[65] *Id.* at 95 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

discriminatory," it nonetheless imposes an impermissible burden on interstate commerce that "is clearly excessive in relation to the putative local benefits."

VI. THE PSC'S USE OF NEW YORK'S DISTRIBUTION UTILITIES TO FORCE ESCOS TO COMPLY WITH PRICE CAPS BASED ON THOSE UTILITIES' OWN CHARGES FOR COMMODITY SERVICE IS PREEMPTED BY SECTION ONE OF THE SHERMAN ACT

The Order requires that, in order to enroll new customers or renew existing customers, the enrollment must either "include[] a guaranteed savings over the utility price" or be "for a fixed-rate commodity product that is priced at no more than 5% greater than the trailing 12-month average utility supply rate."[66] Further, the Order provides that:

> [A]ny mass-market customer contract for a fixed-rate commodity service that is subject to automatic renewal shall be renewed by the ESCO only as a contract for variable-rate, commodity-only service *that includes a guaranteed savings over the utility price*, unless the ESCO obtains affirmative customer consent to renew the contract as a fixed-rate contract *that is priced at no more than 5% greater than the trailing 12-month average utility rate*.[67]

The effect of these provisions is to establish a price cap on services provided by ESCOs, and to set the cap based on the rates charged by utilities.

The price cap imposed by the order constitutes price fixing that is *per se* illegal and therefore preempted by the Sherman Act, 15 U.S.C. § 1. Courts employ a "two-step framework . . . to assess claims of preemption by § 1 of the Sherman Act."[68] First, a court considers "whether the restraints are unilateral" that is, "imposed by the government . . . to the exclusion of private control" or whether they are "hybrid" that is, "imposed by both the government and by granting private actors a degree of regulatory control over competition."[69] Although purely unilateral

[66] Order, slip op.at 108.

[67] *Id*. (emphasis added).

[68] *Connecticut Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22 (2d Cir. 2019).

[69] *Id*. at 28-29.

restraints are not subject to preemption, hybrid restraints are subject to preemption. The price cap effectuated by the Order here is a hybrid restraint. The Commission does not set maximum prices directly. Instead, its Order seeks to enforce the pricing decisions of the utilities as price caps applicable to ESCOs. Accordingly, it is an impermissible hybrid, rather than a unilateral, restraint. For the same reasons, the doctrine of state action immunity does not apply. In particular, the price fixing arrangement is not a "clearly articulated and affirmatively expressed state policy."[70]

Next, a court considers "whether the challenged provision brought about facially, or *per se*, unlawful restraints on trade, in which case they are preempted, or restraints that are subject to rule of reason scrutiny, in which case they are not."[71] The price caps imposed by the Order constitute unlawful horizontal price fixing, which is a *per se* violation of the Sherman Act.[72] Accordingly, the Commission's price fixing enactments of the Order are preempted for this additional reason.

VII. THE CONFISCATORY PRICE CAPS ADOPTED BY THE COMMISSION DEPRIVE ESCOS OF THEIR PROPERTY IN VIOLATION OF THE DUE PROCESS PROVISIONS OF THE UNITED STATES CONSTITUTION

Direct Energy has a protected property interest in its contractual relationships with its existing customers. The Order, absent rehearing and modification, appears to also operate as a regulatory taking in violation of the Takings Clause of the United States Constitution. The Commission's arbitrarily-selected price caps will have a significant economic impact, and will interfere with Direct Energy's (and other ESCOs) distinct investment-backed expectations.

[70] *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985) (*quoting Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (some punctuation omitted)).

[71] *Id.* at 29.

[72] *See United States v. Apple, Inc.*, 791 F.3d 290, 313-14 (2d Cir. 2015).

The Takings Clause of the Fifth and Fourteenth Amendments bars the taking of private property by the state without just compensation. *See* U.S. Const. amend. V. The clause applies to the states through the Fourteenth Amendment.[73] The initial threshold question is whether there is a protected property interest held by the Plaintiff.[74] Once a property interest is demonstrated, a Court conducts a fact-based analysis and looks to: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action,[75] If there is a significant decrease to of the value of the property interest, a regulatory taking may have occurred.[76] "To assess the severity of a regulations' economic impact, the court must compare the value of the property immediately before the governmental action that is alleged to cause the taking with the value of the same property immediately after that governmental action."[77] Once this change in value is established, this evidence of a taking acts as a basis for compensation for the claimant.

With regard to the character of the state action, the court will look to whether "the interference with property can be characterized as a physical invasion by government" or "aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good."[78] If the Order is allowed to take effect—particularly if the Order abrogates Direct Energy's existing contracts with its customers—there will be a massive reduction in the value of the Direct Energy contracts, warranting just compensation for such an expansive regulatory

[73] *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 472 n. 1, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).

[74] *1256 Hertel Ave. Assoc., LLC v Calloway*, 761 F.3d 252, 261 (2d Cir. 2014).

[75] *See Penn Cent. Transp. Co. v City of New York*, 438 U.S. 104, 124 (1978).

[76] *See Love Term. Partners, L.P. v United States*, 889 F.3d 1331, 1342 [Fed. Cir. 2018], *cert denied*, 139 S.Ct. 2744, 204 L Ed 2d 1133 (2019).

[77] *Love Term. Partners, L.P. v United States*, 889 F.3d 1331, 1343 (Fed Cir 2018), *cert denied*, 139 S.Ct. 2744, 204 L Ed 2d 1133 (2019).

[78] *Sherman v Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014).

taking.[79] It is a longstanding precedent that contracts can be a property within the meaning of the Fifth Amendment.[80]

Like many ESCOs, Direct Energy has made substantial investments in the New York energy and gas markets, and further entered into its existing contracts with its customers based on the expectation that such arbitrary price caps would not usurp their existing and ongoing value. The Order also oversteps the bounds of the right of a State to pass reasonable laws and regulations.[81] Although the Commission argues in the Order that the price caps are meant to provide a benefit to customers, it fails to recognize prices change, as do the costs associated with providing energy services, and there is no evidentiary support in the record indicating the Order will benefit customers in either the short or long run. In fact, it is imminently foreseeable that the Order will reduce competition and strip New York customers of their right to choose from a wide variety of energy service providers.

CONCLUSION

For all of the foregoing reasons, Direct Energy respectfully requests the Commission grant rehearing to meaningfully address the numerous problems with the Order that invite error. At a minimum, the Commission should grant an interim stay of the Order while it carefully evaluates

[79] The wide-sweeping impact of the Order on ESCOs lacks any evidentiary development, or support, in the underlying record—and for this additional reason—represents another arbitrary and capricious decision of the Commission.

[80] *See Lynch v United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L Ed 1434 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."); *Omnia Commercial Co. v United States*, 261 U.S. 502, 508, 43 S.Ct. 437, 437, 67 L Ed 773 (1923) ("The contract in question was property within the meaning of the Fifth Amendment…Contracts in this respect do not differ from other kinds of property."); *see also Ruckelshaus v Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L Ed 2d 815 (1984) (identifying contracts as a valid property interest for a Fifth Amendment Takings Clause claim.).

[81] *See Ruckelshaus v Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L Ed 2d 815 (1984).

the statutory, constitutional, and irreparable implications the Order will (absent rehearing and modification) inflict on energy consumers in New York and on the New York competitive retail marketplace.

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