SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NATIONAL ENERGY MARKETERS ASSOCIATION; BLUEROCK ENERGY, INC.; BOUNCE ENERGY NY, LLC; DIRECT ENERGY BUSINESS MARKETING, LLC; DIRECT ENERGY BUSINESS, LLC; DIRECT ENERGY SERVICES LLC; ENERGETIX, INC.; GATEWAY ENERGY SERVICES CORP.; NORTH AMERICAN POWER & GAS, LLC; NYSEG SOLUTIONS, INC.; RESIDENTS ENERGY, LLC; and VERDE ENERGY USA NEW YORK, LLC, Petitioners/Plaintiffs, against NEW YORK STATE PUBLIC SERVICE COMMISSION, Respondent/Defendant.	Index No. IAS Part Justice **VERIFIED ARTICLE 78 PETITION AND COMPLAINT**

Petitioners/Plaintiffs, National Energy Marketers Association; BlueRock Energy, Inc.; Bounce Energy NY, LLC; Direct Energy Business Marketing, LLC; Direct Energy Business, LLC; Direct Energy Services, LLC; Energetix, Inc.; Gateway Energy Services Corp.; North American Power & Gas, LLC; NYSEG Solutions, Inc.; Residents Energy, LLC; and Verde Energy USA New York, LLC ("Petitioners"), submit this Verified Article 78 Petition and Complaint against the New York State Public Service Commission (the "Commission"), with knowledge of their own acts and status and acts taking place in their presence, and upon information and belief as to all other matters, and allege as follows:

PRELIMINARY STATEMENT

1. This proceeding seeks to prevent the Commission from taking precipitous and irreversible action that will irreparably harm Petitioners and other energy services companies

("ESCOs"), which for years have provided valuable energy programs, choice, savings, and services to millions of New York residents.

2. For two decades the Commission has allowed and encouraged a free market for the supply of gas and electricity to New York residents. As the Commission itself recognized, ESCOs provide New York residents with the freedom of choice in purchasing their gas and electricity and prevent the monopolistic local utilities from exercising undue market power. The competition that follows from ESCO participation in the energy market benefits New York residents with lower rates, better service and increased customer choice. The ESCOs also provide New York residents with the ability to enter into long term, fixed-rate contracts, an option that the local utilities cannot and do not offer.

3. Without notice or any meaningful opportunity to be heard, the Commission issued an "Order Resetting Retail Energy Markets and Establishing Further Process" (the "Order") on February 23, 2016. **The Order effectively requires ESCOs immediately to terminate their relationships with hundreds of thousands of New York customers and hand those customers over to their competitor – the local utility company – unless the ESCO is prepared to guarantee in writing by 4:00 p.m. on Friday, March 4, 2016, that it will charge less[1] than whatever energy prices the local utility may charge in future**. The order provides no exception to this rate-guarantee requirement for ESCOs to be permitted to service gas customers. For electricity customers, the Order imposes the same requirement but states that the ESCO can

[1] Consistent with the Commission's failure to provided opportunity for review and comment of the new rules and requirements set forth in the Order, the Order is inconsistent and confusing as to whether ESCOs are obligated to charge customers less than the local utility, e.g., Order at 2 (requiring ESCOs to "guarantee savings in comparison to what the customer would have paid as a full service utility customer"), or simply to match the local utility's price, e.g., Order at 21 (requiring that an ESCO "guarantees that the customer will pay no more than were the customer a full-service customer of the utility"). This pleading refers generally to the requirement that ESCOs "guarantee savings" as set forth in the Order.

effectively charge consumers whatever price the ESCO wants to charge, provided that the ESCO is willing to provide electricity derived from at least 30% renewable sources.

4. The Commission's stated justification for this precipitous action is an increase in customer complaints to the Department of Public Services, which by its own admission, comprised less than 1,300 total complaints relating to dissatisfaction with energy charges in 2015, 80% of which were resolved by the ESCO within 14 days. Put in context, 1,300 complaints reflects a complaint rate of one-half of one-tenth of one-percent (0.05%) of New York ESCO customers. Moreover, for the vast majority of ESCOs, the number of complaints has actually decreased in the past year. The Commission's own statistics show that, if you include all but one ESCO (which is not a Petitioner here), the number of complaints in 2015 actually decreased by more than 11%, as compared with complaints lodged the prior year.

5. If allowed to go in effect, the Order will cause immediate and irreparable harm to Petitioners, their New York customers, and the hundreds of ESCOs and thousands of ESCO employees and vendors in New York and beyond. In its Order, the Commission takes an "act first, ask later" approach, which puts a gun to head of all ESCOs and requires them either to decide between two unreasonable choices: (i) guarantee that they will not charge more than what the non-competitive local utility may charge in the future, even if that necessarily means that ESCOs must operate at a loss, or else (ii) immediately send hundreds of thousands of their hard-earned and loyal customers to the ESCOs' competitor – that same local utility (which provider the customer previously had elected to leave). Heads you lose, tails you lose.

6. The Order should be declared void, and the Commission should be enjoined from enforcing it, because the Commission plainly does not have the jurisdiction or authority to fix the energy rates that Petitioners offer their customers – and the Commission has conceded as much.

Moreover, even if the Commission had jurisdiction to regulate the prices ESCOs charge their customers, both the measure and mode of the Order arbitrarily and capriciously infringes on the rights of ESCOs and New York energy customers. A small number of customer complaints does not justify shutting down an industry, particularly when the Commission and the Attorney General have more than adequate enforcement tools at their disposal. Moreover, as detailed below (¶¶ 54-55, 63), a significant number of the complaints concerned the Commission's own actions – not actions taken by the ESCOs.

7. The Order also violates Petitioners' common law, statutory, and constitutional rights by, among other things, denying Petitioners due process and equal protection under the law. As the Order itself notes, a minimum period of sixty days is needed to evaluate and refine the intended and unintended consequences of the Order and the role of ESCOs as energy providers for New York customers. Notwithstanding that admission, the Commission refused to grant Petitioners and other ESCOs' requests for an extension of the unreasonable March 4, 2016, effective date of the Order.

8. The implementation of this Order will cause immediate and irreparable harm to the reputation, finances, and goodwill of Petitioners and other ESCOs, and will almost certainly drive many ESCOs out of business entirely. Conversely, there is no identifiable harm that will occur to anyone if the twenty-year status quo is maintained until after the Court can adjudicate this matter on the merits. Petitioners thus seek immediate relief from this Court to stay Ordering Clauses 1 through 3 of the Order before Petitioners, their New York customers, and the hundreds of ESCOs and thousands of ESCO employees and vendors in New York suffer irreparable harm.

PARTIES

Petitioners/Plaintiffs

9. Petitioner National Energy Marketers Association ("NEM") is a national, non-profit trade association representing wholesale and retail marketers of natural gas, electricity, as well as energy and financial related products, services, information and advanced technologies throughout the United States, Canada, and the European Union. NEM's membership includes independent power producers, advanced metering, demand and load management firms, billing, back office, customer service and related information technology providers. Members of NEM, including several Petitioners in this action, provide energy supply services to New York residents. NEM's principal place of business is in Washington, D.C.

10. Petitioner BlueRock Energy Inc. is an energy services company with its principal place of business in Syracuse, New York. BlueRock Energy Inc. provides energy supply services to New York residents.

11. Petitioner Bounce Energy NY, LLC is an energy services company authorized to operate in New York. Bounce Energy NY, LLC provides energy supply services to New York residents.

12. Petitioner Direct Energy Business Marketing, LLC is an energy services company authorized to operate in New York. Direct Energy Business Marketing, LLC provides energy supply services to New York residents.

13. Petitioner Direct Energy Business, LLC is an energy services company authorized to operate in New York. Direct Energy Business, LLC provides energy supply services to New York residents.

14. Petitioner Direct Energy Services, LLC is an energy services company authorized to operate in New York. Direct Energy Services, LLC provides energy supply services to New York residents.

15. Petitioner Energetix, Inc. is an energy services company authorized to operate in New York. Direct Energetix, Inc. provides energy supply services to New York residents.

16. Petitioner Gateway Energy Services Corp. is an energy services company authorized to operate in New York. Gateway Energy Services Corp. provides energy supply services to New York residents.

17. Petitioner North American Power & Gas, LLC is an energy services company authorized to operate in New York. North American Power & Gas, LLC provides energy supply services to New York residents.

18. Petitioner NYSEG Solutions, Inc. is an energy services company authorized to operate in New York. NYSEG Solutions, Inc. provides energy supply services to New York residents.

19. Petitioner Residents Energy, LLC is an energy services company authorized to operate in New York. Residents Energy, LLC provides energy supply services to New York residents.

20. Petitioner Verde Energy USA New York, LLC is an energy services company with its principal place of business in Norwalk, Connecticut. Verde Energy USA New York, LLC provides energy supply services to New York residents.

Respondent/Defendant

21. Respondent, New York State Public Service Commission, consists of five members appointed by the Governor of the State of New York, with the advice and consent of the New York State Senate. The jurisdiction and authority of the Commission with respect to Petitioners and other ESCOs are delineated in the New York Public Service Law.

JURISDICTION AND VENUE

22. This Court has jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR").

23. Venue is proper pursuant to CPLR §§ 506(b) and 7804(b).

FACTS

A. ESCOs Enhance Competition in the Market for the Supply of Gas and Electricity

24. In the 1990s, New York restructured its electricity and gas utility industries. As a result of that restructuring and deregulation effort, since 1996, the Commission has permitted and encouraged independent energy service companies – commonly referred to as ESCOs – to sell natural gas and electricity to New York customers.

25. As set forth in the Commission's May 20, 1996, Opinion and Order, one of the goals of inviting ESCOs to operate was to make sure that "[n]o competitor or group of competitors should be able to exercise undue market power over the other competitors" and to provide lower rates and increased customer choice for New York residents. PSC Case 94-E-0952 – In the Matter of Competitive Opportunities Regarding Electric Service, *Opinion and Order Regarding Competitive Opportunities for Electric Service*, Opinion 96-12 (May 20, 1996).

26. The status quo in New York is that a customer who chooses to purchase gas or electricity from an ESCO enters into an arms-length contract directly with the ESCO to serve as that customer's provider of gas and/or electricity. The ESCO will be responsible for ensuring that the customer is provided with gas and/or electricity at an agreed-upon price. The physical delivery of gas and electricity into that customer's home remains the local utility's responsibility, and the customer continues to pay the local utility for that service. The local utility also remains responsible for reading customers' meters and determining usage amounts for billing purposes.

27. Generally speaking, ESCO customers receive two bills: (i) a supply charge bill from the ESCO for the cost of the gas and/or electricity that the customer purchased from the ESCO; and (ii) a delivery bill from the local utility for the cost of the transmission and delivery of the gas and/or electricity to the customer's home. The local utility often consolidates the ESCO's bill into its delivery bill and sends a single invoice to the customer.

28. Petitioners, like other ESCOs, thus provide an alternative to the monopoly in the supply of gas and electricity otherwise held by regulated local utility companies.

29. Unlike local utilities, ESCOs do not have authority to produce or generate energy or to lay or maintain wires, pipes, or other gas or electric delivery fixtures. Instead, ESCOs contract with gas and electric wholesalers such as New York Independent System Operator and PJM Interconnection LLC for their energy production, storage, and transportation services. ESCOs may also enter into financial hedging and option contracts to manage and optimize the cost and supply of the energy that they will need to purchase for their customers.

30. Allowing customers to purchase energy from an ESCO creates a competitive environment in which multiple ESCOs and the local utilities compete to supply energy to the same customers. This competition provides customers with more competitively priced energy, better customer service, and substantially more choice than would otherwise be available from the monopoly-protected and price-regulated local utility company.

31. As the Commission itself recognizes, one of the many benefits that ESCOs provide New York customers is the ability to choose between variable-rate and fixed-rate contracts. A variable-rate contract is a contract that automatically renews on a regular basis (typically monthly) and allows the ESCO to raise or lower the price for gas or electricity based on the current market conditions. A fixed-rate contract provides the customer a fixed rate for gas (per

therm) or electricity (per kilowatt hour) for a fixed period time (typically twelve months). Regulated local utilities cannot offer fixed rate contracts – only ESCOs can.

32. The Commission maintains a website for New York customers that can be accessed on the internet at www.newyorkpowertochoose.com. The website provides customers information on different ESCO offerings as compared with those of the local utility. As of March 1, 2016, the website showed that a customer in Middletown, New York (zip code 10940), for example, could enter into a 12-month fixed rate contract with various ESCOs for as low as 6.95¢ per kilowatt hour. That same website also shows that the variable rate charged by the local utility (Orange and Rockland Utilities, Inc. ("O&R")) for the prior 12-month period ranged between 6.3¢ to 14.96¢ per kilowatt hour.

33. Similarly, that same customer also has the option of entering into a 36-month fixed rate contract for 7.9¢ per kilowatt hour. The variable rate charged by O&R for the prior 36-month period ranged from 6.3¢ (March 2015) to 15.9¢ (March 2014) per kilowatt hour. Thus, customers who contract with ESCOs for a fixed rate can save a substantial amount of money, avoid fluctuation in their energy supply cost, and increase certainty and predictability in their budgets.

34. Whether a customer contracts with an ESCO for a fixed-rate or variable-rate contract is a highly individualized decision that takes into account, among other things, the customer's energy usage, expectation about future energy prices and weather conditions, desire for certainty in pricing and budgeting, and other competitive choices.

35. ESCOs also provide New York customers with other benefits such as loyalty discounts, the ability to purchase energy from "green" or renewable energy sources, and other incentives. For example, many ESCOs offer customers a rebate or credit of up to $100 off their energy

costs, or similar incentives where the customer remains with an ESCO for an agreed-upon period of time. Other companies offer customers the opportunity to earn rewards points for every therm or kilowatt of energy purchased. Customers can redeem these rewards points for gift cards, electronics, appliances, jewelry, sporting goods, or other products. Some ESCOs also offer customers discounts on home security and monitoring services.

36. With approximately 200 ESCOs currently operating in New York, Petitioners and other ESCOs have been able to provide New York residents with a variety of energy-supply options, cost-effective energy solutions, and valuable benefits. New York residents have benefited for nearly two decades from the competitive marketplace for energy supply, including by paying less than they otherwise would have paid had regulated utility companies maintained their monopoly over the supply of energy to New York customers.

B. The Order

37. On February 23, 2016, the Commission issued the Order, which absent an immediate stay, will dramatically and irreversibly change the ESCO market for retail energy in New York.

38. The Order provides in Ordering Clause No. 1 that effective March 4, 2016, Petitioners and other ESCOs may enroll new customers or renew existing customers only if the ESCO will provide a "guarantee that the customer will pay no more than were the customer a full-service customer of the utility." Order at 21. Simply stated, the Order requires Petitioners and other ESCOs to immediately terminate their relationships with hundreds of thousands of New York customers and hand those customers over to the ESCO's competitor – the local utility company (from whose service the customer had already elected to switch away) – unless the Petitioners and other ESCOs are prepared to guarantee they will charge less than whatever energy charges the local utility may charge in the future.

39. The Order provides no exception to this rate-guarantee requirement for gas customers. The Order contains an identical requirement for sales to electricity customers, but it provides that, if the ESCO is willing to provide electricity derived from at least 30% renewable sources, the ESCO can effectively charge whatever price it wants. A copy of the Order is attached hereto as Exhibit A and incorporated herein by reference.

40. Ordering Clause No. 2 of the Order provides that, even if an ESCO is able to provide customers the required guarantee or, for electricity customers a renewable energy product, the ESCO must still "receive affirmative consent . . . prior to renewing that customer from a fixed rate or guaranteed savings contract." Id.

41. Ordering Clause No. 3 of the Order provides that any ESCO that intends to enroll new customers or renew existing customers after March 4, 2016, must provide a certification to the Commission by 4:00 p.m. on March 4, 2016, that any enrollments will comply with the requirements of the Order.

42. Finally, Ordering Clause No. 4 of the Order (which is not the subject of this Petition) makes certain revisions to the Commission's Uniform Business Practices. These revisions were promulgated by the Commission to "facilitate timely and forceful Commission action against entities which violate the rules to the detriment of consumers and market development." Id. at 18.

43. The Commission issued the Order without first proposing the new requirements as proposed rules, without providing proper notice to the ESCOs, and without affording them an opportunity for hearing and comment on what is effectively a new and improper exercise of ESCO rate setting by the Commission.

44. Moreover, the Order itself recognizes and calls for a period of 60 days for the Commission to "consider what long-term conditions should be implemented for ESCO eligibility

and conditions for service." Id. at 20. Specifically the Order provides a 60-day period for the Commission to consider whether the requirements set forth in the Order "should be retained." Id.

45. The Order thus makes clear that, instead of providing the required notice and comment period, the Commission is going to "act first" by implementing the Order effective March 4, 2016, and then "ask later" whether the actions it took should be retained.

46. This act first, ask later approach fails to recognize that Petitioners and other ESCOs will already be irreparably harmed by losing a significant portion of their loyal customers, which customer base cost millions of dollars and took years to acquire.

47. The haphazard and rushed manner in which the Commission issued the Order is further reflected in the fact that the Commission apparently failed to satisfy its obligations under Article 8 of the New York Environmental Conservation Law, the State Environmental Quality Review Act, or "SEQRA". SEQRA was enacted in 1975 to "promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources," and to ensure that "all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations." N.Y. Envtl. Conserv. Law ("NY ECL") § 8-0101 (McKinney 2016). To that end, SEQRA requires all state agencies – including the PSC[2] – to prepare "an environmental impact statement on any action they propose or approve which may have a significant effect on the environment." NY ECL § 8-0109. "Actions" by definition include "policy, regulations, and procedure-making." NY ECL § 8-0105. New York's Department of Environmental Conservation has set forth "a statewide regulatory

[2] "All agencies . . . shall carry out [SEQRA's] terms." NY ECL § 8-0107. "'Agency' means any state or local agency." Id. § 8-0105.

framework"[3] of detailed procedures for how agencies should analyze any actions that "may" have significant environmental effects, codified at Title 6, Part 617 of the New York Code of Rules and Regulations ("NYCRR"). The Department of Public Service has set forth additional procedures for its implementation of SEQRA, codified at NYCRR Title 16, Part 7. "Environment" is defined broadly under the SEQRA regulations to mean "the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health." 6 NYCRR 617.2; see also 16 NYCRR 7.1 (adopting definitions of 6 NYCRR 617.2).

48. The PSC's own regulations set forth its procedures for complying with SEQRA requirements:

> When the commission is the lead agency with respect to an action that may have a significant adverse effect on the environment and a hearing concerning such action is required by statute, the commission will file a copy of the draft environmental impact statement (EIS) which has been prepared, together with a notice of its completion and a notice of hearing . . . . The commission will cause the notice of hearing to be published at least 14 days in advance of the hearing in a newspaper of general circulation in the area of the potential effects of the action. The hearing will commence no less than 15, nor more than 60 days after the filing of the draft EIS.

16 NYCRR 7.3(a). Documentation of the agency's SEQRA determinations "must be maintained in files that are readily accessible to the public and made available on request," 6 NYCRR 617.12(b)(3), and properly published, 6 NYCRR 617.12(c).

49. The Commission apparently failed to comply with its SEQRA obligations in issuing the Order. The Order reflects a "major reordering of priorities that may affect the environment,"

[3] 6 NYCRR 617.1(e).

such that it is expressly disqualified from Type II treatment under the DEC's SEQRA regulations, 6 NYCRR 617.5(c)(20), and it is a "major change[] in priorities with respect to policies, regulations and procedures," again expressly disqualified under the Commission's own regulations, 16 NYCRR 7.2(a). Thus, at a minimum, the Commission was required to complete an EAF to determine "the environmental significance or non-significance" of the Order. 6 NYCRR 617.2.

50. The environmental significance of the Order may be significant. By requiring Petitioners and other ESCOs to guarantee customer savings compared to public utility prices, the Order will effectively put at least some ESCOs out of business by forcing them to become insurers against unforeseeable risks associated with price fluctuations. On its face, this re-ordering of the energy market has far-reaching potential environmental implications that would require detailed analysis to be fully understood. Yet the Commission does not appear to have conducted any such analysis, abdicating its SEQRA duties. Moreover, the ESCOs that would be put out of business by the Order are major purchasers of Renewable Energy Credits, which promote carbon-neutral, renewable forms of energy. Again, the Commission has conducted no analysis of the environmental significance of wiping out the purchase of these Renewable Energy Credits.

C. The Guarantee Requirement is Fundamentally Flawed and Without Basis

51. The guarantee requirement imposed by the Commission rewrites the economics of New York's ESCO marketplace and requires Petitioners and other ESCOs to restructure their businesses in fundamental ways within a period of just ten calendar days.

52. First, the guarantee requirement is fundamentally illogical. The Order specifies that the Commission "requires [local] utilities to flow the energy commodity to end-users at cost." Id. at

12. At the same time, the Order now requires Petitioners and other ESCOs to guarantee customers that the ESCO will charge less than the commodity price of the local utility. The Order thus purports to require Petitioners and all other ESCOs to sell energy at or below cost. In other words, the Order directs Petitioners and all other ESCOs to operate at a loss in providing energy to the New York residents who elect to buy energy from the ESCO.

53. Second, the Order assumes that local utilities charge market rates. They do not. There is little or no correlation between the local utility charges and market rates. Moreover, there is virtually no clarity or transparency into the local utility's actual cost of the electric and gas commodities they purchase, as the local utility can bury part of their costs in a host of line items that appear on customer bills, including in the delivery portion of those bills, for which there is no itemization or explanation.

54. Third, unlike ESCOs, local utilities can recoup losses in the supply charge in future periods. The Commission's grant of a cost recovery to Niagara Mohawk Power Corporation ("NiMo") in 2014 is one such example. In January 2014, the Commission allowed NiMo – a local utility – to charge customers artificially low rates (i.e., below market price) and then to recover $32 million of losses, with interest, in later periods. By allowing this cost recovery, NiMo was able to sell energy to its customers at a loss and substantially undercut all the ESCOs, which had to pay market prices for the energy commodity they were purchasing for customers. NiMo then turned around and obtained a waiver from the Commission to recover all its losses plus interest to compensate for losses sustained during the predatory pricing period.

55. If the Order would have been in place in 2014, it would have required Petitioners and other ESCOs to meet NiMo's predatory and below market price. Unlike NiMo, whose prices are

regulated by the Commission, Petitioners and other ESCOs do not have a mechanism for recovering such losses.

56. Fourth, the Order is indifferent to whether ESCOs offer customers fixed or variable rate products. Fixed rate products offer customers significant price protection, something which local utilities cannot offer and a value-added which the Commission ignored. The Commission itself has repeatedly recognized that fixed-rate products are value-added products for consumers. Following its issuance of the Order, the Commission acknowledged its prior statement about the inherent value of fixed-rate products, reiterated that it was not backing away from that position, but noted that it was still considering how that fact and admission should interact with the Order's failure to permit ESCOs to continue to offer customers the opportunity to enter into such value-added products. Notwithstanding those admissions, the Commission denied dozens of requests to stay the effective date of the Order to permit the Commission to consider such issues before effecting such widespread change and irreparable harm on the energy marketplace and the two hundred ESCOs that service it.

D. The Order is Premised on a Flawed Analysis

57. The Order is further premised on two flawed assumptions.

58. First, the Order claims that customers "purchasing commodity only from ESCOs are unlikely to obtain value commensurate with the premium paid in excess of the cost that would be paid as a full service customer of the utility." The Commission proffers no real evidence for this assumption. Moreover, the Order applies to all ESCOs irrespective of what products or services they offer.

59. Second, the Order tries to support its flawed assumption by pointing to customer complaints, which the Commission claims have been "steadily increasing." The Order points to

a total of 5,044 complaints filed in 2015 of which the Commission concedes (as it must) only 25% (or 1,261) related to "dissatisfaction with the prices charged." Id. at 12-13.

60. The Department of Public Service publishes a Monthly Report of Consumer Complaint Activity. The Report for December 2015 lists over 140 ESCOs that received complaints in 2014 and 2015. One company (not a Petitioner here) accounted for 27% of the complaints in 2015 and 10% of the complaints in 2014. Setting that one company aside, the number of complaints actually decreased by 11% from 2014 (4,185) to 2015 (3,698).

61. Similarly, escalated complaints, which are complaints that are not initially resolved by the ESCO, dropped by 16% between 2014 and 2015, not accounting for that same company. Moreover, these numbers also show that only a limited subset of complaints is being escalated, as the ESCOs are doing a significantly better job at resolving customer complaints and concerns.

62. The Commission's claim that complaints are steadily increasing is not an industry phenomenon that requires drastic and unprecedented actions by the Commissions. Indeed, for more 99% of the ESCOs, the number of initial complaints dropped, the number of escalated complaints dropped, and the ratio between the two also dropped.

63. Finally, at least some of the complaints complained of by the Commission were likely caused by the $32 million NiMo charge back. As the Retail Energy Supply Association ("RESA") noted in connection with the NiMo chargeback:

> The Commission's action in this Order will likely cause an uptick in consumer complaints against ESCOs, as customers will compare the Commission sanctioned capped utility rate against the higher market based rates associated with ESCO variable service. The ESCOs that are subjected to these complaints will have done nothing inappropriate; nevertheless, their rating on the Scorecard will suffer.

Case 14-E-0026, Comments of RESA (February 21, 2014).

E. The Commission Does Not Have Jurisdiction or Authority to Set ESCO Rates

64. The purpose of deregulating the market for energy supply was to allow for a competitive marketplace in the supply of gas and electricity. Unlike local utilities – whose rates are set by the Commission pursuant to the express grant of authority set forth in Article 4 of the Public Service Law – there is no provision in the governing laws or regulations authorizing the Commission or other regulatory agency to set or mandate the rates charged by Petitioners or other ESCOs.

65. Consistent with that fact, Petitioners and other ESCOs historically have not been required to submit proposed or current rates to the Commission for approval. Nor has the Commission previously undertaken to set rates that Petitioners or other ESCOs could charge or to prescribe a maximum rate that Petitioners or other ESCOs could charge.

66. Consistent with the fact that the PSC is not authorized to set or control rates that ESCOs charge their customers, Article 2 of the Public Service Law, which applies to ESCOs, does not authorize the Commission to set rates at all. And consistent with the fact that Article 4 § 66(5) of the PSL – which plainly does not apply to ESCOs – is the statute that addresses rate-setting, the Commission itself has taken the position that the statute does not authorize the Commission to set rates or to set maximum rates charged by ESCOs.

67. Contrary to its jurisdictional mandate, the Commission's Order effectively purports to set a maximum rate that Petitioners and other ESCOs can charge their customers by forcing Petitioners to meet or beat the rates charged by the local utilities.

68. Moreover, with respect to gas products, the Order does not provide any alternative to the economically unfeasible requirement of guaranteeing cost-savings to customers over a

period of time of their choosing. And neither the Order nor any other document issued by the Commission or its staff provides appropriate guidance as to how the Commission will review and enforce the renewable energy option with respect to electricity customers. As a practical matter, therefore, if the Order is allowed to go in effect, Petitioners and other ESCOs will be forced to offer guaranteed savings products on the pain of handing their customers back to their competitor – the local utility.

69. The Commission has therefore improperly and unlawfully purported to set a maximum rate Petitioners and other ESCOs can charge their customers.

F. Absent an Injunction, Petitioners will Suffer Irreparable Harm

70. Because the month-to-month contracts Petitioners have with their current New York customers are not already in compliance with the newly pronounced requirements (i.e., the contracts do not guarantee savings compared to utility rates as set forth in the Order), Petitioners immediately will be required to send notices to their New York customers terminating their existing agreements if the Order is permitted to take effect,.

71. Petitioners will be faced with losing and turning away tens of thousands of customers, which cost millions of dollars, and took years of investment, to acquire. That loss alone will cause incalculable harm to Petitioners' business and good will. Once returned to the local utility, the customers will be difficult, if not impossible, to be reacquired in the near term. Once agreements with customers are terminated, it is impossible to determine the number of customers Petitioners will be able to re-enroll.

72. Separate from any customer that is terminated as a result of the Order, Petitioners' goodwill and reputation also will suffer immeasurably if Petitioners are forced to cancel

contracts with so many customers who affirmatively had elected to leave the local utility to purchase energy from an ESCO.

73. The harm to Petitioners from the loss of current and prospective customers is immeasurable, including because customer duration varies. A particular customer can represent anywhere from two months to five years of value.

74. Further, because Petitioners will have to terminate agreements with customers and will have no ability to determine whether or when any customers will re-enroll, or how much Petitioners will need to spend to re-acquire their customers, Petitioners will need to terminate hundreds of employees who are responsible for servicing New York customers.

75. Additionally, the loss of so many customers in such a short period will also cause an imbalance in Petitioners' energy-hedging portfolio. Petitioners enter into transactions designed to hedge their energy purchases to account for the possibility that the market behaves very differently than expected, such as due to extended periods of extreme cold. Petitioners enter into hedging transactions several months in advance to lock in supply for the best pricing relative to the number of customers they have and expect to have. A sudden, substantial, and unexpected reduction in the number of customers that Petitioners service will mean that Petitioners will have spent too much on hedging transactions relative to their customer base.

76. The Order will also interfere with Petitioners' contracts with their customers. At least one member of Petitioner NEMA, for example, has contracts with New York customers that give the customer an option to select one month that the ESCO will provide free of charge, if the customer purchases energy from the ESCO for a twelve-month period. The customer can choose to be credited the amount of their highest monthly bill over the

applicable twelve-month period. The one-free-month program thus provides participating customers with an approximately 8% annual savings. If the Order is not stayed, such contracts and programs will unfold differently from what the contracting parties had anticipated and agreed to at the time they contracted, as the Order effectively forces the ESCO to terminate its customers prior to the triggering date for some of these key benefits or incentives.

77. The Order thus severely interferes with Petitioners' ability to continue to provide New York residents with the competitive benefits Petitioners have been able to provide for years, denies Petitioners' entitlement to just and reasonable rates, constitutes an uncompensated taking, and undercuts Petitioners' contracts with customers and third parties.

78. There is one group of market participants, of course, that will benefit greatly from the Order – the regulated local utility companies.

79. The Commission did not provide any, let alone adequate, notice or consult with Petitioners or other ESCOs prior to issuing the Order. Upon information and belief, however, the Commission did meet with, take input from, and through the Order provide benefits to representatives of local utility companies.

80. Specifically, most of the customers who are terminated by Petitioners and the approximately 200 other New York ESCOs starting tomorrow will have nowhere else to turn except for their local utilities for the supply of gas and electricity. The effect of the Order will be to take customers away from Petitioners and other ESCOs and to deliver them back to the local utility companies that those customers previously elected to leave. The progress made over the past two decades in developing a truly competitive energy

marketplace will be reversed such that the utility companies again will enjoy monopoly power over the supply and delivery of energy.

CLAIMS

FIRST CAUSE OF ACTION

(AGENCY ACTION INVALID AS IN EXCESS OF JURISDICTION AND ARBITRARY AND CAPRICIOUS: C.P.L.R. § 7803)

81. Petitioners re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

82. By engaging in the conduct described in this Petition, Respondent has violated, and unless enjoined will continue to violate, Article 78 of the CPLR. Among other legal errors, for example, the Commission acted without jurisdiction in issuing the Order; there is no rational basis between the stated objectives of the Order and the terms or effect of the Order; and the Commission issued the Order without the requisite supporting record evidence or a proper factual inquiry. As a result, Respondent acted arbitrarily and capriciously, outside its authority, and in a manner that has violated Petitioners' common law, statutory, and constitutional rights.

SECOND CAUSE OF ACTION

(DECLARATORY AND INJUNCTIVE RELIEF)

83. Petitioners re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

84. Each legal error described in this Petition independently warrants declaratory and injunctive relief in favor of Petitioners, including, but not limited to, on the grounds that the Order is unauthorized by New York law, the Commission acted without jurisdiction in issuing the Order, the Commission acted arbitrarily and capriciously, and the Order violates Petitioners'

constitutional rights.

85. Absent appropriate equitable relief, Petitioners will suffer irreparable harm, including loss of their customer bases and loss of good will.

86. Money damages would be insufficient to compensate Petitioners for the harm they will suffer if the Order is permitted to take effect.

87. Petitioners are entitled to injunctive relief, temporarily and permanently enjoining Respondent from implementing or otherwise enforcing Ordering Clauses 1-3 of the Order.

88. Petitioners further are entitled to declaratory relief, including but not limited to, a declaration that Ordering Clauses 1-3 of the Order are void and unenforceable; that the Commission exceeded its authority in issuing the Order; and that the Commission violated Petitioner's constitutional rights.

THIRD CAUSE OFACTION

(DENIAL OF DUE PROCESS: FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION)

89. Petitioners re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

90. By engaging in the conduct described in this Petition, including, for example, by failing to give Petitioners notice of the proposed rules and requirements pronounced in the Order or a meaningful opportunity to be heard, Respondent has violated, and unless enjoined will continue to violate, Petitioners' rights under the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

FOURTH CAUSE OF ACTION

(DENIAL OF DUE PROCESS: ARTICLE I, SECTION 6 OF NEW YORK CONSTITUTION)

91. Petitioners re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

92. By engaging in the conduct described in this Petition, including, for example, by failing to give Petitioners notice of the proposed rules and requirements pronounced in the Order or a meaningful opportunity to be heard, Respondent has violated, and unless enjoined will continue to violate, Petitioners' rights under the Due Process Clause of Article I, Section 6 of the New York Constitution.

FIFTH CAUSE OF ACTION

(DENIAL OF CONSTITUTIONAL PROTECTIONS: TAKING WITHOUT COMPENSATION, VIOLATION OF CONTRACTS CLAUSE, AND DENIAL OF EQUAL PROTECTION)

93. Petitioners re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

94. By engaging in the conduct described in this Petition, Respondent has violated, and unless enjoined will continue to violate, Petitioners' rights under the Takings Clause of the Fifth Amendment, the Takings Clause of Article I, Section 7 of the New York Constitution, the Contracts Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, as made enforceable through 42 U.S.C. § 1983 and the Equal Protection Clause of Article 1, Section 11 of the New York Constitution.

95. If the Order is given full effect, for example, it will force Petitioners to lose customers in violation of the Takings Clause under the United States and New York constitutions, interfere

with contracts that Petitioners have with their customers in violation of the Contracts Clause, and will result in a transfer of customers from Petitioners to their competitor – the local utility companies, all in violation of Petitioners' rights to Equal Protection under the law.

PETITIONERS ARE ENTITLED TO DISCOVERY

96. Petitioners will seek expedited discovery, including as to the purported bases upon which the Order relies and Respondents' activities and relationship with non-party utility companies that will support Petitioners' claims based on a violation of Petitioners' rights and other claims. Such discovery is warranted to provide Petitioners with information showing that the Order is arbitrary, capricious, not supported by evidence, and designed to favor utility companies or other preferred constituents to the detriment of Petitioners and others similarly situated.

JURY DEMAND

97. Petitioners demand a trial by jury in this action on each of their claims.

NO PRIOR APPLICATION

98. No prior application for this or any similar relief has been made in this Court.

PRAYER FOR RELIEF

Petitioners respectfully request that this Court

a. issue a temporary restraining order, on an expedited basis, that stays the status quo and specifically Ordering Clauses 1 through 3 of the Order;

b. preliminarily and permanently enjoin the Commission and any member of any staff assisting or acting on behalf of the Commission from enforcing, implementing, or giving effect to Ordering Clauses 1-3 of the Order;

c. grant Petitioners their costs, including attorneys' fees to the extent authorized by law;

d. declare that the Order violates Petitioners' constitutional, statutory, and common law rights as set forth herein and in Petitioners' accompanying Memorandum of Law; and

e. grant Petitioners such other, further and different relief as the Court determines to be just and proper, including relief further or consequential to Petitioners' request for declaratory relief to the extent set forth above.

Dated: March 3, 2016

BOIES, SCHILLER & FLEXNER LLP

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Attorneys for Petitioners/Plaintiffs

I declare under penalty of perjury under the laws of the State of New York to the best of my knowledge that the foregoing is true and correct.

This the 3rd day of March, 2016.

Alan Schwab