**COURT OF APPEALS**
**STATE OF NEW YORK**

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

*Petitioners-Appellants*,

*v.*

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

*Respondents-Respondents.*

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**BRIEF FOR PETITIONERS-APPELLANTS**

**Court of Appeals**
**APL-2018-00047**

**Appellate Division**
**Docket No. 524223**

**Albany County**
**Index No. 870-16**

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## PRELIMINARY STATEMENT

From the time of Thomas Edison's first lightbulb, people have had virtually no choice as to who would supply their power. Public utility companies functioned in government-approved monopolies and a change in geography was the only option people had to change their energy supplier. In the 1980s, reforms to the monopoly regime emerged as states introduced policy initiatives aimed at deregulating the energy industry. New York was one of the pioneers, and among the first to deregulate the energy market to allow consumers to have a choice in their energy consumption. In today's deregulated markets, consumers are still able to obtain service from public utilities at a government-regulated rate, but, if they chose, can elect service from other providers like energy service companies ("ESCOs") that may offer different pricing models or commodity sales bundled with other products. In short, during deregulation of the New York energy market, the Public Service Commission ("PSC") provided New Yorkers with customer choice by creating meaningful competition in the energy market. Today, approximately twenty percent of New York's electric and natural gas customers purchase their energy service from one of over two hundred ESCOs throughout the State.

Through the PSC's February 23, 2016 Order Resetting Retail Energy Markets and Establishing Further Process ("Reset Order"), the PSC sought to

severely limit that choice for residential customers in New York, including the current two million New York ESCO customers, by asserting control over ESCO rates—transforming ESCOs, in effect, into monopoly-protected and price-regulated public utilities. (*See generally Order Resetting Retail Energy Markets and Establishing Further Process* ("Reset Order"), NY PSC Case No. 15-M-0127 [Feb. 23, 2016].) The PSC had no authority to do so because the Public Service Law (the "PSL") authorizes the PSC to exercise ratemaking authority only as to public utilities alone. In what can most charitably be viewed as an act of judicial largesse, the Appellate Division, Third Department ("Appellate Division") erroneously sanctioned the PSC's claimed authority to regulate ESCO prices by inferring it through a prefatory provision of the PSL. (*See Matter of Retail Energy Service Ass'n v PSC*, 152 AD3d 1133, 1137-38 [3d Dept 2017] [A-169–A-171], reasoning that Section 5 of the PSL grants the PSC "general authority" over the sale of gas and electricity.) However, by imbuing the PSL with ratemaking jurisdiction that the Legislature itself did not plainly grant, the Appellate Division improperly endorsed the PSC's administrative overreach by substituting its judgment for that of the Legislature, thereby effectively re-writing the law without legislative authority or support. Thus, the Appellate Division's endorsement of the PSC's unlawful Reset Order represents a dangerous setback for the core tenants of separation of powers.

The questions before the Court turn on the propriety of the Appellate Division's decision upholding the PSC's unlawful enactment of sweeping price regulations on an industry intended to function through market-based principles. Definitively, the Legislature never granted the PSC the legal authority to employ such market controls. Further, as a pioneer in the development of competitive markets, when the PSC first opened the competitive retail markets, it never intended competition to be burdened by the strict controls that would be implemented under the unlawful commands of the Reset Order. Such heavy-handed regulation is in direct conflict with the PSC's stated objectives for the competitive markets when they were first opened in the late 1990s. Therefore, the PSC's Reset Order advances a price-control regime that is neither authorized by law, nor consistent with the core objectives for competitive retail markets or the PSC's earlier findings. These facts underscore the fundamental impropriety of the PSC's Reset Order and the Appellate Division's subsequent error in ratifying that action through a prefatory provision of the PSL.

The Appellate Division erred by allowing the general provisions of the PSL to override the specific provisions limiting the PSC's rate setting jurisdiction to electric and gas corporations. This, of course, upends longstanding jurisprudence and canons of statutory construction, and may well have unintended impacts on how agencies across the Executive Branch interpret their own jurisdiction. This

case provides the Court with an opportunity to reaffirm its longstanding commitment to confining the actions of administrative agencies to the enumerated bounds of their lawful authority granted by the Legislature.

This Court's determination on the propriety of the PSC's Reset Order will have far-reaching influence on New York's energy landscape. The outcome here will not only have statewide effects on the provision of energy to over two million New Yorkers that currently subscribe to ESCO-supplied energy services, but will also take away customer choice.

For the reasons set forth herein, Retail Energy Supply Association, Interstate Gas Supply, Inc., Accent Energy Midwest Gas, LLC, and Accent Energy Midwest II LLC (collectively, "Appellants") respectfully request that the Appellate Division's Memorandum and Order be: (1) reversed to the extent that it held that the PSC had jurisdiction to regulate rates charged by ESCOs; (2) reversed to the extent that it held that ESCOs do not maintain vested property interests in access to the distribution system; and (3) affirmed to the extent that it held that the PSC violated ESCO's constitutionally protected due process rights.

## QUESTIONS PRESENTED

1. Whether the PSC has sovereign authority to exercise jurisdiction of its own accord when such jurisdiction has not been created for it, expressly or implicitly, by the Legislature, and is accordingly not contained in the Public

Service Law nor can it be reasonably construed by applicable canon of statutory construction. The Appellate Division ruled in the affirmative, which Appellants contend was an error of law.

2. Whether the PSC has the power to regulate ESCO rates under PSL Article 1, where the Legislature has otherwise expressly limited such rate setting authority for the PSC to regulate the rates of public utilities in PSL Article 4. The Appellate Division's Memorandum and Order gave effect to the affirmative, which Appellants contend was an error of law.

3. Whether ESCOs' substantial investment of resources and longstanding recognition by the Legislature and State agencies create a constitutionally-protected property interest in ESCOs' right to continue business operations in New York State. The Appellate Division ruled to the contrary, which Appellants contend was an error of law.

## STATEMENT OF JURISDICTION

This Court has jurisdiction over Appellants' appeal of the Appellate Division, Third Department's Memorandum and Order decided on July 27, 2017, under N.Y. C.P.L.R. ("CPLR") 5602[a][1][i], as the Order finally determined the action and is not appealable as of right under CPLR 5601, and as Appellants' Motion for Reargument was denied by the Appellate Division on December 7, 2017. Permission by the Court of Appeals for leave to appeal, where the Appellate

Division refused such an appeal, is explicitly codified in CPLR 5602[a]. This Court granted Appellant's Motion for Leave to Appeal the Appellate Division's July 27, 2017 Memorandum and Order on March 27, 2018. Therefore, the Court has proper jurisdiction to hear this appeal (docketed as APL-2018-00047).

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. ESCOs in New York

The New York Legislature enacted the PSL more than a century ago to provide for the regulation and control of certain public utilities. (PSL §§ 1 *et seq*.) The PSC was charged with the PSL's administration. (*See* PSL § 4.) From the time of the PSL's enactment in 1910 until market deregulation in the 1980s and 1990s, the energy market was composed entirely of monopolistic public utility companies. (A-38.) By that very fact, the PSL applied to, and contemplated the PSC's regulation of, only public utility companies. But with deregulation came a new market participant: the ESCO. (A-38–A-39.) As correctly noted by the Appellate Division, "the Legislature authorized the PSC to open up the retail energy market by requiring utilities to transport gas commodities owned by other companies." (*Matter of Retail Energy Service Ass'n*, 152 AD3d at 1134-35, [A-166], citing PSL § 66-d; *Rochester Gas & Elec. Corp. v PSC*, 71 NY2d 313, 320-22 [1988].)

In the 1990s and 2000s, acting upon that legislative authorization, the PSC implemented various rules and policies to encourage competition in retail energy markets, opening New York State's retail electric and natural gas industries to competition by allowing ESCOs to use the transmission systems of the State's monopoly electric and gas utilities to deliver gas and electricity to consumers. (A-38.) In a 1996 Order, the PSC set forth its vision for the retail energy industry as follows:

> (1) effective competition in the generation and energy services sectors;
>
> (2) reduced prices resulting in improved economic development for the State as a whole;
>
> (3) increased consumer choice of supplier and service company;
>
> (4) a system operator that treats all participants fairly and ensures reliable service;
>
> (5) a provider of last resort for all consumers and the continuation of a means to fund necessary public programs;
>
> (6) ample and accurate information for consumers to use in making informed decisions; and
>
> (7) the availability of information that permits adequate oversight of the market to ensure its fair operation.

(*Opinion and Order Regarding Competitive Opportunities for Electric Service* [Op No. 96-12 at 34], NY PSC Case No. 94-E-0952 *et al*. [May 20, 1996].)

As a result of this landmark opinion by the PSC, residential and business customers in New York were provided, for the first time, access to a competitive gas and electricity market. (A-38–A-39.)

Currently, there are two components to the provision of energy services to consumers. First, utility companies are responsible for the delivery of energy supplies and for responding to emergencies related to the delivery of energy to consumers. (A-38.) Second, either a utility company or an ESCO provides the supply of energy. (*Id*.) It is the consumers' right to choose whether to purchase their energy supply from a regulated utility or from a competitive ESCO supplier. (A-39.) As the PSC has noted, this ability to choose provides consumers the opportunity to better manage their energy costs and the ability to choose a more advantageous energy rate than what their utility supplies and to receive value-added services. (*See* Op No. 96-12, at 34-36.)

The PSC has long recognized the benefits of consumer choice for commodities. As the PSC wrote in Opinion No. 97-5:

> Establishing a robust ESCO industry is essential to bring effective competition to the retail electric markets. In adopting the policies herein, we have endeavored to strike a balance between encouraging ESCOs to enter the New York State energy market and ensuring that the risks to customers are minimized. We expect that these policies will result in a diversity of prices and service options that only a competitive market can deliver, while allowing customers to retain the level of protections they enjoy today if that is their choice. . . . We expect

> qualified ESCOs to be able to compete for retail electric customers. And as the market evolves, consumers should have access to uninterrupted electric service at reasonable rates and to adequate information ***to enable them to make choices among providers***, service or pricing options and their desired level of consumer protections. *(emphasis added).*

(*Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services* [Op No. 97-5 at 49-50], NY PSC Case No. 94-E-0952 *et al*. [May 19, 1997].) By increasing the number of options available to consumers, the PSC sought to provide better value for consumers and consumer access to the value added products and services that ESCOs provide.

The PSC correctly, and repeatedly, concluded that it had no authority to do so. (A-40–A-41.) The supporting logic was straightforward: the PSL "was enacted to protect consumers against the abuse of monopoly power," which ESCOs do not have. (A-41.) Accordingly, the PSL's application is restricted to statutorily-defined public utility companies: namely, "gas corporation[s]" and "electric corporation[s]." (*See* PSL §§ 2[11] and [13].) Unequivocally, as the Appellate Division recognized, ESCOs are neither gas corporations nor electric corporations. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1136-37, [A-168–A-169].)

Acknowledging that the PSL does not confer the PSC with general jurisdiction over ESCOs, the Legislature amended PSL Article 2 (the Home

Energy Fairness Practices Act ("HEFPA")) in 2002 to expand the definition of "gas corporation" and "electric corporation" solely for purposes of that Article. (A-42; *see also* PSL § 53.) Article 1's definitions, which do not include ESCOs, remained applicable to the rest of the PSL. (A-42–A-43.) This included Article 1, Section 5 and the PSC's ratemaking authority under Article 4—which, both by its terms and in long-standing PSC practice, had never reached ESCOs. (*Id*.)

ESCOs have never been required to submit their pricing information or marketing strategies to the PSC for approval. That is because they are private companies whose pricing is subject to free market competition. Their customer base is entirely dependent upon voluntary attraction and retention. Of course, introducing free market principles into the energy market was the point of allowing ESCOs to enter the market in the first place. (A-38–A-39.) To that end, the PSC consistently reiterated over the years that ESCOs "are exempt from PSL Article 4 regulation." (*Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, at 10, NY PSC Case No. 06-M-0647 [Nov. 8, 2006].) Importantly, the PSC itself has never looked to Section 5 to support rate making authority over any industry, let alone ESCOs.

**2. The Reset Order**

Through the Reset Order, the PSC reversed its own prior precedent and erroneously declared that it had ratemaking authority over ESCOs all along.

(A-91–A-115.) As license for this pronouncement, it cited its "broad legal authority to oversee ESCOs, pursuant to its jurisdiction in Articles 1 and 2 of the Public Service Law[.]" (A-98–A-99.) The Reset Order then attempted to cap ESCO commodity prices at exactly the rates of public utilities. (A-14, declaring ESCOs can only enroll or renew customers "where the contract guarantees that the customer will pay no more than were the customer a full-service customer of the utility.") In response, Appellants filed an Article 78 Petition challenging the Reset Order in its entirety. (A-34–A-62.) The subsequent litigation, as detailed further below, led to the arrival of this matter before the Court of Appeals.

### B. Procedural History

On March 3, 2016, Appellants filed a Verified Article 78 Petition & Complaint (the "Petition") (A-34–A-62) against the PSC and its various named officials (collectively, "Respondents") in Albany County Supreme Court (the "Trial Court"), Index No. 870-16, arising from the Reset Order.[1] Appellants' Petition disputed the PSC's newly-minted jurisdiction over ESCO pricing together with the manner in which the Reset Order was rolled out (the Reset Order gave the ESCO only ten days to comply with the Order). (*Id*.) Appellants filed their Petition by Order to Show Cause seeking a temporary restraining order enjoining the PSC

[1] Two separate actions contesting the Reset Order were also commenced against Respondents in the Trial Court: *National Energy Marketers Association, et al. v New York State Public Service Commission, et al*., Index No. 868-16 (the "NEMA Action"); and Family Energy Services, *Inc., et al. v New York State Public Service Commission, et al*., Index No. 874-16 (the "FESI Action").

from enforcing the Reset Order. (A-63–A-65.) On March 4, 2016, Justice Kimberly A. O'Connor granted the temporary restraining order. (A-65.) Respondents answered the Petition on March 28, 2016. (A-116–A-128.)

On July 22, 2016, the Trial Court issued a Decision and Order (the "Decision").[2] (A-8–A-33.) The Decision determined that the PSC had ratemaking jurisdiction over ESCOs to issue the Reset Order, but vacated the substantive provisions of the Reset Order on the basis that the PSC had violated procedural due process. (A-20–A-33). The Decision was entered with the Albany County Clerk on July 26, 2016. Appellants filed a Notice of Appeal on August 25, 2016, appealing the Decision insofar as it held that the PSC had ratemaking jurisdiction over ESCOs. (A-3–A-4). On October 13, 2016, the PSC filed a notice of cross-appeal, appealing the Decision to the extent it held the Reset Order violated procedural due process. (A-5–A-7). A copy of the Record Appendix and the Appellate Briefs filed by the parties are submitted herewith pursuant to 22 N.Y.C.R.R. § 500.22[c].

On July 27, 2017, the Appellate Division issued a Memorandum and Order deciding the Appeal (the "Memorandum and Order"). In sum, the Appellate Division "agree[d] with the Supreme Court that the PSC had jurisdiction to impose the rate limitations set forth in the Reset Order." (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1139, [A-171].) A Notice of Entry was filed with the

[2] The Decision also applied with equal force to the NEMA Action and the FESI Action.

Albany County Clerk on July 31, 2017, and Appellants were served with Notice of Entry the following day via overnight mail. The Appellate Division, thus, affirmed the Trial Court's Decision in full, although on different reasoning than that applied by the Trial Court. In so doing, the Appellate Division ignored the plain language of the PSL and well-established principles of statutory construction and, instead, judicially established jurisdiction for the PSC that the Legislature itself did not create.

On August 31, 2017, Appellants served a timely Motion for Leave to Reargue, or in the alternative, leave to appeal to the Appellate Division Third Department, pursuant to CPLR 5602.[3] On December 7, 2017, the Appellate Division issued a Decision and Order on Motion denying both requests (the "Decision and Order on Motion"). A Notice of Entry was filed with the Albany County Clerk on December 12, 2017, and Appellants were served with Notice of Entry the following day via overnight mail.

Appellants timely served a Motion for Leave to Appeal the Appellate Division's Memorandum and Order before the Court of Appeals, pursuant to CPLR 5602[a], on January 11, 2018. The Court of Appeals granted Appellants' Motion for Leave to Appeal on March 27, 2018. Appellants respectfully submit this Brief requesting that the Appellate Division's Memorandum and Order be:

[3] Petitioners in the NEMA Action also filed a separate motion to reargue, or in the alternative, for leave to appeal to the Court of Appeals.

(1) reversed to the extent that it held that the PSC has jurisdiction to regulate rates charged by ESCOs; (2) reversed to the extent that it held that ESCOs do not maintain vested property interests in access to the distribution system; and (3) affirmed to the extent that it found that the PSC violated ESCO's constitutionally protected due process rights.

## ARGUMENT

The PSC may exercise only those powers that the Legislature has granted or those incidental thereto or necessarily implied therefrom. (*New York Tel. Co. v PSC*, 59 AD2d 17, 19 [1977]; *see e.g. Brooklyn Union Gas Co. v PSC*, 101 AD2d 453 [3d Dept 1984]; *Niagara Mohawk Power Corp. v PSC*, 54 AD2d 255 [3d Dept 1976].) In issuing the Reset Order, the PSC acted beyond the scope of its statutory authority because it can only promulgate Orders "to further the implementation of the law as it exists; [it has] no authority to create a rule out of harmony with the statute." (*Finger Lakes Racing Ass'n v N.Y.S. Racing & Wagering Board*, 45 NY2d 471, 480 [1978].)

As explained in the discussion that follows, the PSC's Reset Order seeks to create rate setting authority which exceeds the lawful jurisdiction granted by the Legislature. Importantly, the PSL does not provide the PSC with either express or implied powers to regulate ESCO rates, and, prior to the Reset Order, the PSC had consistently held that the PSC's ratemaking authorities did not extend to ESCOs.

This is evidenced by the Legislature's 2002 amendment of the PSL to subject ESCOs to HEFPA, which did not extend such PSC oversight over ESCOs to include rate regulation.

Furthermore, the Appellate Division improperly applied prefatory language of the PSL to wrongly conclude that the PSC has broad statutory jurisdiction over ESCOs, which the Legislature did not enumerate. The Appellate Division's holding thereby violates the New York State Constitution by endorsing the PSC's unlawful claim to ratemaking authority where the Constitution vests such delegation authority to the Legislature alone. Finally, the Appellate Division improperly reversed the Supreme Court's finding that ESCOs have property interests in their continued access to the State's utility systems because ESCOs have made substantial investments of time and resources to conduct business in the State, and have otherwise complied with all requirements to carry out such business. ESCOs' access to the utility systems is necessary for their continued operations in the State. For these reasons, Appellants' prayer for relief should be granted.

## POINT I

## THE LEGISLATURE DID NOT GIVE THE PSC JURISDICTION TO CAP PRICES FOR ESCOS OR OTHER PRIVATE COMPANIES

### A. *The Public Service Law Does Not Contain Express Statutory Authority for PSC Ratemaking Jurisdiction Over ESCOs*

The powers of an administrative agency, like the PSC, are legislatively forged and statutorily codified. (*See Durant v Vehicle Acc. Idem. Corp*., 20 AD2d 242, 247 [2d Dept 1964], stating "the powers of an administrative agency may not be implied, but are created by language of clear import, admitting of no other reasonable construction"; *see also New York v New York Com. on Cable Television*, 47 NY2d 89, 92 [1979], holding that "[a]n administrative agency, as a creature of the Legislature, is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication." [citations omitted].) Thus, for the PSC to assert ratemaking jurisdiction over ESCOs, or other private entities, the Legislature must have conferred upon the PSC the authority to do so, and enumerated that power by statute (here, the PSL). A plain reading of the PSL makes clear that it contains no such authority.

Importantly, ESCOs are not covered under the plain language of Article 1 Section 5 because ESCOs do not qualify as either "electric corporations," or "gas corporations," as defined in Section 2. (*See* PSL, art 1, §§ 2[11], [13]; 5[1][b].) Under Article 1, a "gas corporation" or "electric corporation" is a company

"owning, operating or managing any" gas or electric plant. (*Id*.) ESCOs do not engage in any of these functions. Rather, ESCOs simply sell electricity and gas supply to the consumers which is then delivered to those customers using public utilities' transmission lines. It is the utilities that own, operate, maintain and manage the wires and cables. Indeed, the Third Department correctly rejected the PSC's assertion that ESCOs constitute such "electric corporations" and "gas corporations" under Article 1, which would subject them to the ratemaking regulations of Article 4. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1136-37, [A-168–A-169].)

And, until the PSC self-servingly argued to the contrary on appeal to the Appellate Division, the PSC also agreed. (*See* brief of Respondent Public Service Commission, *Matter of Retail Energy Service Ass'n*, Appellate Division, Third Department, Docket No. 524223, at 22-31, PSC arguing that ESCOs meet the statutory definition of gas and electric corporations.) Tellingly, the PSC did not cross-appeal the Appellate Division's determination that ESCOs are not electric or gas corporations under the PSL. Indeed, until the Reset Order, the PSC itself had repeatedly pronounced that ESCOs are not gas or electric corporations as defined by Article 1, stating the "assertion that ESCOs are electric corporations and therefore subject to PSL Article 4 regulation is incorrect." (*Opinion and Order Deciding Petitions for Clarification and Rehearing* [Op No. 97-17, at 34-35], NY

PSC Case No. 94-E-0952 [Nov. 18, 1997], concluding that ESCOs were not "electric corporation[s]" as defined by Article 1 and as referred to in Articles 2 and 4.) Even if Section 5 explicitly extended PSC jurisdiction over ESCOs, which it does not, Section 5 does not enumerate any rate setting authorities.

In addition, PSL Section 2[13] confirms that the Legislature intended to limit the PSC's rate regulation to "electric corporations" and demonstrates why the Appellate Division's decision was incorrect. That section, which defines the term "electric corporation," contains several express exclusions for entities that "sell" electricity, including railroads supplying power for railroad purposes, landlords serving their tenants, co-generation, small hydro, and alternate energy production facilities. (*See* PSL, art 1, § 2[13]; *see also* PSL, art 1, §§ 2[2-a], [2-b], [2-c].) The Legislature's purposeful and express exemptions for co-generation, small hydro, and alternative energy production facilities are well-documented in the PSL's legislative history, and were expressly made to exclude them from rate regulation. (Letter from Attorney General Abrams at 1, June 27, 1980, Bill Jacket, L 1980, ch 553, stating that the bill establishing subparts 2-a and 2-b to Section 2 of the PSL would "specifically exempt the rates charged and services rendered by those who produce electricity from a qualified cogeneration facility or a qualified alternative energy production facility from regulation by the [PSC]."; Letter from PSC Chairman Zielinski, June 23, 1980 at 3, Bill Jacket, L 1980, ch 553, stating

that the bill, which enacted subparts 2-a and 2-b to PSL Section 2, "exempts cogenerators from that ratemaking authority of the [PSC]…"; Budget Report on Bills at 5, July 15, 1981, Bill Jacket, L 1981 ch 843, stating that "[d]eregulation of rates charged for electricity produced by small hydroelectric facilities and exempts from various duplicative and/or unnecessary State environmental permit and approval requirements would be consistent with similar exemptions provided for alternative energy and co-generation facilities under 1980 Chapter 553.")

Significantly, the PSC has long held that the exception to the definition of "electric corporations" for these categories of electricity sellers exempted those sellers from rate regulation. (*See e.g. Declaratory Ruling on Qualifying Facility Status and Order Rescinding Lightened Ratemaking Regulation*, NY PSC Case No. 13-E-0234 [May 8, 2014]; *Declaratory Ruling Concerning Exemption from Regulation*, NY PSC Case No. 01-E-1407 [Dec. 19, 2001]; *Declaratory Ruling on Qualifying Facility Status and Order Rescinding Lightened Ratemaking Regulation*, NY PSC Case No. 13-E-0233 [Sept. 23, 2013].) This is because only Article 4 provides the PSC jurisdiction to regulate rates, and it is limited to electric and gas corporations.

The Appellate Division's ruling that ESCOs are subject to rate regulation notwithstanding that the lower court found them to not be "electric corporations" turns that long-settled regulatory scheme on its head by seemingly extending rate

regulation jurisdiction to companies that are expressly not electric or gas corporations. This appears to be an unintended consequence, and one that highlights the irrationality of the Appellate Divisions' holding.

Unlike Article 1's general jurisdiction, PSL Article 4 confers specific ratemaking jurisdiction. (PSL, art 4, § 66[5].) Indeed, as the Appellate Division correctly noted, ESCOs do not qualify as either "electric corporations" or "gas corporations" subject to rate setting under PSL Article 4 because they do not own, operate or manage gas or power plants. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1137 [A-168–A-169], referencing the definitions of gas and power plants under PSL, art 1, § 2.) ESCOs are therefore not subject to PSC rate setting authority under Article 4. (*Id.*) Again, the PSC has historically conceded this fact. (*See e.g. Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, at 10, NY PSC Case No. 06-M-0647 *et al*. [Nov. 8, 2006], stating that ESCOs "are exempt from PSL Article 4 regulation.")

Notably, the only place in which any sort of PSC jurisdiction over ESCOs can be found is in PSL Article 2 (HEFPA). The Legislature's 2002 amendment to Article 2's definitions was the first change to the PSL that subjected ESCOs to any form of regulation by the PSC. (PSL, art 2, § 53, expanding Article 1's definitions of "gas corporation" and "electric corporation" to include "any entity that, in any manner, sells or facilities the sale or furnishing of gas or electricity to residential

customers.") The entirety of the Article does not contain a single provision addressing ratemaking—whether for public utilities or ESCOs. Instead, as its name suggests, HEFPA consists of discrete consumer protection measures relating to billing practices, surcharges, and termination notices. (*See* PSL, art 2, §§ 30 *et seq*.) In short, Article 2 has nothing whatsoever to do with ratemaking; it is self-contained and entirely independent from PSL Article 4. Sound statutory construction prevents reading Article 2 § 53's definitions into any other PSL Article.

As previously stated by the Court, "[a] court's prime directive, in matters of statutory interpretation, is to give effect to the intention of the legislature." (*Rust v Reyer*, 91 NY2d 355, 360 [1998].) Article 1 § 2 contains general definitions applicable to the entirety of the PSL which apply unless another Article creates its own limited-purpose definitions. Accordingly, prior to the Legislature's amendment to Article 2 (HEFPA), Article 1's definitions of "gas corporation" and "electric corporation" applied to Article 2. As a result, at that time, HEFPA did not apply to ESCOs because ESCOs were not gas or electric corporations. Recognizing this, in 2002, the Legislature amended HEFPA precisely so that it would reach ESCOs. Significantly, the Legislature did not amend Article 1's general definitions (PSL, art 1, § 2)—which it would have done if it intended to expand the scope of the entire PSL to apply to ESCOs—and equally significantly,

as discussed in further detail below, it did not take the opportunity to amend Article 4's ratemaking jurisdiction to extend those powers to ESCOs either. (PSL, art 4, § 66[1] and [5]). Rather, the amendment, by its own terms, was limited to Article 2 and application of HEFPA to ESCOs. (PSL, art 2, § 53, "Application[.] For purposes of this article, a reference to a gas corporation [or] electric corporation…shall include…." (emphasis added).)

The Legislature's intent was only that HEFPA apply to ESCOs—nothing more. The remainder of the PSL was left unchanged. To conclude otherwise would defy logic and violate basic rules of statutory construction. (*See Kittredge v Planning Bd. of Town of Liberty*, 57 AD3d 1336, 1339 [3d Dept 2008], directing that "[i]n construing a statute, a court must attempt to harmonize all its provisions and to give meaning to all its parts, considered as a whole, in accord with legislative intent.") Where the Legislature had the opportunity to act, but did not, it must be inferred that that omission was intended. (*Chemical Specialties Mfrs. Ass'n v Jorling*, 85 NY2d 382, 394 [1995], stating that "what is omitted or not included was intended to be omitted or excluded.")

In this case, the Legislature's declared policy was that PSC oversight over ESCOs would be limited to the HEFPA amendments to Article 2 of the PSL alone. The Legislature's decision not to extend this definitional change to the entirety of the PSL was intentional and must therefore be respected and enforced. (*Raritan*

*Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997], stating that "[t]he courts are not free to legislate and if any unsought consequences result, *the Legislature is best suited to evaluate and resolve them.*") If the PSC believes that the Legislature's intended amendments to the PSL have resulted in unintended consequences or otherwise did not extend PSC authority far enough, then the PSC must seek greater authority through further legislative amendment rather than administrative fiat. (*See Campagna v Shaffer*, 73 NY2d 237, 242-43 [1989], stating that administrative agencies have "no power to declare through administrative fiat that which was never contemplated or delegated by the Legislature. An agency cannot by its regulations effect its vision of societal policy choices and may adopt only rules and regulations which are in harmony with the statutory responsibilities it has been given to administer.") Here, there is no evidence that the Legislature ever intended, nor contemplated, PSC oversight of ESCOs beyond the narrow bounds expressly established in Article 2 of the PSL. Therefore, the PSC may not now engage in regulatory activity for which they have not been authorized by the Legislature. (*See Campagna*, 73 NY2d at 242, stating that "[a]gencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator.")

Ultimately, a single legislative grant of ratemaking authority over anyone other than public utilities, including ESCOs, cannot be found in the PSL's entire corpus—from Article 1 to Article 11, and every provision therein. Therefore, the

PSC does not have express legal authority to impose its proposed rate regulation and related product restrictions detailed in the Reset Order.

Accordingly, as the PSC lacks any lawful authority to regulate ESCO pricing, the Court should reverse the Appellate Division's Memorandum and Order to the extent that it held that the PSC has lawful jurisdiction to regulate rates charged by ESCOs, and vacate the PSC's Reset Order in its entirety.

### B. *The Public Service Law Does Not Contain Implicit Authority for PSC Ratemaking Jurisdiction over ESCOs*

Just as ratemaking authority over ESCOs cannot be found within the express statutory language of the PSL, it also cannot be found by implicit legislative delegation to the PSC. An administrative agency like the PSC cannot bring into existence any power lacking a legislative mandate. (*See Abiele Contr. v New York City Sch. Constr. Auth.*, 91 NY2d 1, 10 [1997], holding a "creature of statute…lacks powers not granted to it by express or necessarily implicated delegation.") Under New York law, where a question is "one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency." (*Lorillard Tobacco Co. v Roth*, 99 NY2d 316, 322 [2003].) In such instances, no deference to the agency is required. (*Raritan Dev. Corp.*, 91 NY2d at 102, citing *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996].)

Further, "new language cannot be imported into a statute to give it a meaning not otherwise found therein." (*Raritan Dev. Corp.*, 91 NY2d at 105.) Courts "cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact." (*Id.* at 104-05, citing *Chemical Specialties Mfrs. Ass'n*, 85 NY2d at 394.) Rather, as previously stated, an inference must be drawn that "what is omitted or not included was intended to be omitted or excluded." (*Chemical Specialties Mfrs. Ass'n*, 85 NY2d at 394.)

Moreover, courts have long held that the implied power of an agency must rest on an express power, and in this case the PSC does not have an express power to enforce ratemaking authority over the ESCOs. (*See e.g. Rochester Tel. Corp. v PSC*, 87 A.D.2d 672 [3d Dept 1982], stating that the PSC "can only exercise such powers as are conferred upon it by the Legislature, or which are incidental to such power or necessarily implied therefrom"; *see also Niagara Mohawk Power Corp.*, 54 AD2d at 256.) In the absence of clear statutory authority, an agency may not take actions that cannot reasonably be implied from the statutory language. (*Rochester Tel. Corp.*, 87 A.D.2d 672, invalidating a PSC order directing a telephone company to flow through tax refunds where neither express nor implied statutory authority existed.)

It cannot fairly be argued that the Legislature, either expressly or impliedly, intended PSC rate setting authority to extend to ESCOs, since ESCOs are not referenced anywhere in Article 4. The Legislature enacted the PSL over a century ago, and nearly three quarters of a century before ESCOs even existed. Clearly, the Legislature did not intend, and could not have intended, to confer the PSC jurisdiction over something entirely non-existent at the time. Rather, the PSL's purpose was plain. As both monopolistic and public, the public utilities were unchecked by the market and consumer choice. PSL Article 4 served to check public utilities' unrestrained ratemaking because the public had no choice but to use their services, regardless of the price the monopoly utilities were charging. Indeed, until the Reset Order, the PSC agreed. (*Compare Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, at 10, NY PSC Case No. 06-M-0647 *et al*. [Nov. 8, 2006], holding that ESCOs "are exempt from PSL Article 4 regulation.", *with Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits*, at 4, NY PSC Case No. 15-M-0127 *et al*. [Dec. 2, 2016], questioning whether its own decisions "not to subject to ESCOs to Article 4 of the Public Service Law should be revisited.") In all events, the Legislature conferred neither express nor implicit ratemaking authority to the PSC over anyone but public utilities.

Thus, the PSC maintains neither express, nor implied, legal authority to impose its proposed rate regulation and product restrictions detailed in the Reset Order. Accordingly, as the PSC lacks any lawful authority to regulate ESCO pricing, the Court should reverse the Appellate Division's Memorandum and Order to the extent that it held that the PSC has lawful jurisdiction to regulate rates charged by ESCOs, and vacate the PSC's Reset Order in its entirety.

### C. *Prior to the Reset Order, The PSC Had Consistently Held That PSC Ratemaking Authority Did Not Extend to ESCOs*

Prior to the adoption of the 2002 amendments to HEFPA, ESCOs were also excluded from the PSC's jurisdiction under HEFPA. (A-40.) The PSC itself issued several decisions recognizing that neither HEFPA, nor Article 4, applied to ESCOs because:

> [ESCOs] are not utilities in the traditional sense and are not providing "utility service" as envisioned by those sections of the Public Service Law. For instance, they cannot either terminate or initiate receipt of gas by residential end users, which will continue to receive gas from LDCs if the market/customer relationship is ended. Application of HEFPA's requirements to marketers was not addressed by the Legislature, since marketers do not have control over the distribution of gas.

(*Order Resolving Petitions for Rehearing*, at 29-30, NY PSC Case No. 93-G-0932 [Sept. 13, 1996]; *see also Opinion and Order Deciding Petitions for Clarification and Rehearing* [Op No. 97-17], NY PSC Case No. 94-E-0952 [Nov. 18, 1997], quoting *Public Util. Law Project of New York v PSC*, Index No. 4509-96, slip op.

at 23-27 [Sup Ct, Albany County, Apr. 29, 1997]; *affd on other grounds*, 252 AD2d 55 [3d Dept 1998], stating that "[t]he simple and inescapable truth is that HEFPA was enacted by the Legislature in 1981 as a consumer protection measure for utility customers' 'bill of rights' at a time when residential gas, electricity and steam service were provided by regulated monopolies and competition had not yet been introduced for these utility services . . . . The provisions of HEFPA do not expressly apply to residential gas marketers who did not exist in this State when the Act was adopted, and thus it is not at all clear that HEFPA was ever intended to apply to the competitive gas marketer entities that were thereafter formed with the onset of unbundling and utility competition.")

The PSC also recognized that the ESCOs are not electric corporations under the PSL in an earlier order rejecting the claim of the Public Utilities Law Project ("PULP") that ESCOs must be subjected to all of the requirements imposed on regulated utilities under the PSL, including rate regulation under Article 4:

> PULP's assertion that ESCOs are electric corporations and therefore must be subject to PSL Article 4 regulation is **incorrect**. PSL § 66[1] provides that our general supervisory duties normally extend to those electric corporations that have "authority...to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places...." Opinion No. 97-5 addresses ESCOs that do not lay, erect or maintain wires, pipes, conduits ducts or other fixtures in, over or under public property . . . . The model set forth in Opinion No. 97-5 contemplates an oversight process that would apply to ESCOs that do not lay

> down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under public property. As a result, a decision to exempt such ESCOs from PSL Article 4 regulation is consistent with the express language of PSL § 66[1]; the case law heretofore interpreting PSL § 2[13]; and the holding that electric utilities' broad array of duties are in return for their exercise of a variety of powers traditionally reserved to the sovereign, including eminent domain and the use of the public rights-of-way (*See Energy Assn v PSC, supra*, at 938, citing *Tismer v New York Edison Co.*, 228 NY 156, 161 [1920] ["the duty to serve would exist without the statute for it results from the acceptance of the franchise of a public service corporation"] and citing *Matter of Pennsylvania Gas Co. v PSC*, 225 NY 397, 406 [1919].)

(*Opinion and Order Deciding Petitions for Clarification and Rehearing* [Op No. 97-17, at 58-60], NY PSC Case No. 94-E-0952 [Nov. 18, 1997].)

Therefore, the Reset Order breaks with long-standing precedent established by the PSC itself, and is entirely unsupported by any legal authority. Accordingly, the Court should reject the PSC's claimed authority to regulate ESCO rates, and vacate the Reset Order in its entirety.

### D. *The Legislature Amended the PSL to Subject ESCOs to HEFPA, But Not Article 4 of the PSL*

Subsequent to the PSC Orders recognizing that the PSC did not have jurisdiction over ESCOs pursuant to HEFPA or pursuant to PSL Article 4, the Legislature adopted the 2002 amendments to the PSL extending the application of HEFPA – but not PSL Article 4 – to ESCOs. Specifically, the Legislature amended

the PSL to add a new Section 53 to Article 2 providing that ESCOs were to be considered "gas corporations" and "electric corporations," *solely* for purposes of HEFPA. (PSL § 53; *see also National Energy Marketers Ass'n v PSC*, 53 Misc. 3d 641, 647 [Sup Ct, Albany County, July 22, 2016].)

Tellingly, the 2002 amendments to HEFPA were adopted to enhance PSC regulatory oversight of ESCO marketing activities, but did not grant the PSC rate setting authority over ESCOs. Surely, in light of such recent express amendments to the PSL, any suggestion that rate setting authority should be inferred is unfounded. If the Legislature had intended the PSC to have rate setting authority over ESCOs, it would have done so expressly, just as it did in granting the PSC authority over other actions by ESCOs in the HEFPA amendments. Because the PSC's general ratemaking authority over utilities does not apply to ESCOs, the Commission has failed to provide any legal support for its position that this authority was implicitly conferred by the Legislature.

The Albany County Supreme Court's Order correctly notes that this amendment required ESCOs to comply with HEFPA. (A-21.) The Legislature's application of HEFPA to ESCOs does not, however, extend the application of PSL Article 4 to ESCOs as well. The fact that the Legislature extended HEFPA to apply to ESCOs confirms that the Legislature understood such provisions of the PSL had previously not applied to ESCOs. This action also confirmed the Legislature's

intent and understanding that ESCOs would continue not to be considered electric or gas corporations for purposes of PSL Article 4.

Finally, because suppliers subject to HEFPA must accept all customers requesting service (except in very limited circumstances), the Legislature also confirmed its intent that ESCOs be provided with the opportunity, and obligation, to serve all classes of customers in the electric and gas markets. (PSL §§ 30, 53.)

Moreover, as noted above, the Reset Order is inconsistent with the PSCs past determinations over the past 20 years, where the PSC continuously rejected any ratemaking authority over the ESCOs. Nor can anything in the 2002 amendments to the PSL extending the application of HEFPA to the ESCOs even remotely be read to authorize the PSC to regulate the rates of the ESCOs. The Legislature's purposeful decision not to disturb these precedents by extending PSC ratemaking authority to ESCOs should be respected. Accordingly, in the absence of lawful, statutory authority for PSC regulation of ESCO rates, the Court should reverse the Appellate Division's Memorandum and Order to the extent that it held that the PSC has jurisdiction to regulate rates charged by ESCOs, and vacate the PSC's Reset Order in its entirety.

## POINT II

## THE APPELLATE DIVISION IMPROPERLY FOUND THAT THE PSC HAS BROAD STATUTORY JURISDICTION OVER ESCOS WHEN THE LEGISLATURE ITSELF DID NOT INCLUDE SUCH JURISDICTION IN THE PLAIN LANGUAGE OF THE PSL

The Appellate Division's reliance on the introductory language in the PSL for the PSC's general authority sets a dangerous precedent that could be used by agencies statewide to expand the scope of their lawful authority without the requisite legislative authorization. Provisions similar to the introductory language in the PSL appear in most major agency authorizing statutes. Going forward, agencies may well cite the Appellate Division's decision as endorsing the proposition that the general introductory language in an authorizing statute imparts almost boundless jurisdiction to that agency, even when the Legislature goes on to enumerate in detail the specific powers that it intended to impart to the agency.

To the extent the Appellate Division found that the PSC itself could determine that ESCO price regulation was in the interest of public policy, and then pursue that self-proclaimed public-policy interest by latent jurisdictional power contained in PSL Article 1, the Appellate Division improperly permitted the PSC to overstep in violation of the separation of powers doctrine.

At the same time, when the Appellate Division created PSC ratemaking jurisdiction over ESCOs from the penumbras of Article 1 § 5—jurisdiction lacking even a thin veneer of statutory support—the Appellate Division wrongly endorsed

the PSC's unauthorized administrative overreach embodied in Reset Order. Either event warrants reversal of the Appellate Division's Memorandum and Order.

### A. *The Appellate Division Improperly Applied Prefatory Language of the Public Service Law to Create Regulatory Authority Unauthorized by the Legislature*

The Appellate Division searched the entirety of the PSL for express language conferring ratemaking jurisdiction over ESCOs to the PSC. As demonstrated above, there was none to be found. Without an express statutory grant for the PSC's claimed authority to regulate ESCO prices, the Appellate Division wrongly fashioned its own grant of authority from the prefatory language of PSL Article 1: "The jurisdiction, supervision, powers and duties of the public service commission shall extend under this chapter…[t]o the manufacture, conveying, transportation, *sale* or distribution of *gas…and electricity*…to gas plants and to electric plants and to the persons or corporations owning, leasing or operating same." (*Matter of Retail Energy Service Ass'n*, 152 AD3d at 1138, [A-169], citing PSL, art 1, § 5[1][b].) It concluded that "[t]he emphasized language speaks to general authority over the sale of gas and electricity, followed by the specific extension of the PSC's jurisdiction over gas and electric plants." (*Id*.) Decisively, the language says nothing of ratemaking authority at all. (*Id*.) Yet, the Appellate Division erroneously determined that the PSL's nebulous "broad

jurisdiction" granted under Article 1 § 5 allows the PSC to set rates for ESCOs. (*Id*.)

As an initial matter, this determination of "broad jurisdiction" over all rates misreads Article 1 § 5. This section grants broad jurisdiction over "gas plants and to electric plants and to the persons or corporations owning, leasing or operating same." (PSL, art 1, § 5[1][b]). Indeed, the statute does not say including without limitation "to gas plants and to electric plants," yet the Appellate Division reads the section as if it does. It is a well-established axiom that without clear Legislative intent, a court cannot read such clauses into statutes and fundamentally change the meaning of the statute in the process. (*See Chemical Specialties Mfrs. Assn.*, 85 NY2d at 394, stating that "new language cannot be imported into a statute to give it a meaning not otherwise found therein…. Moreover, a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact." [internal citations omitted].)

A general grant of authority ***cannot*** be read to render specific authorizing articles meaningless or unnecessary. Such precedent represents a marked departure from the controlling law. (*See Estate of Allen v Colgan*, 190 AD2d 939, 940 [3d Dept 1993]), stating that "[i]t is a well-settled principle of statutory construction that statutes must be construed in such a manner as to give meaning and effect to

all their provisions and that a construction of one provision of a statute which would cancel or render another portion of a statute meaningless is impermissible.") Moreover, "absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute," because "no rule of construction gives the court discretion to declare the intent of the law when the words are unequivocal." (*Raritan Dev. Corp.*, 91 NY2d at 107, quoting *Bender v Jamaica Hosp*., 40 NY2d 560, 562 [1976].)

Therefore, the Appellate Division wrongly applied the broad prefatory language of the PSL in a way that exceeds the lawful regulatory bounds authorized by the Legislature. Accordingly, the Court should reverse the Appellate Division's Memorandum and Order to the extent that it held that the PSC has lawful jurisdiction to regulate rates charged by ESCOs, and vacate the PSC's Reset Order in its entirety.

### B. *The Appellate Division's Misapplication of the General Business Law Allows for Agency Regulation That Is Unauthorized by the Legislature*

The Appellate Division then turned to General Business Law ("GBL") § 349-d, the ESCO Consumer Bill of Rights, for the sake of demonstrating a public policy interest in regulating ESCOs. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1138, [A-170].) The Attorney General—not the PSC—is exclusively charged with enforcing GBL § 349-d, but the PSC's previously-existing authority is legislatively reserved. (*Id*.) In other words, the PSC's authority before the

enactment of § 349-d simply remains as it was. Yet, the Order concluded "[t]hese express legislative reservations effectively acknowledge the PSC's existing authority to impose policies on ESCOs—which, in turn, buttresses the PSC's position that it is authorized to condition ESCO access to utility systems by capping ESCO rates[.]" (*Id*.) The Appellate Division's circular logic is conspicuous: the PSC now has ratemaking authority over ESCOs because it has always had ratemaking authority over ESCOs by virtue of Article 1 § 5 (which is silent as to ratemaking authority). And, according to the Appellate Division, the PSC's public-policy interests, as confirmed by GBL § 349-d, make clear such (implicit) authority was always there but never discovered.

In making this assertion, the Appellate Division court also ignores that prior to the enactment of GBL § 349-d, the PSC's sole assertion of jurisdiction over ESCOs was through the PSC's Uniform Business Practices ("UBPs"), which the PSC requires public utilities to maintain in their tariffs filed with and approved by the PSC under Article 4 of the PSL.

In contrast to the PSC's regulation of gas and electric prices pursuant to PSL Article 4, the UBPs, first adopted in 1999 to govern the relationship between ESCOs and customers, are designed to create a consistent set of operating practices for ESCOs. The UBPs' application is limited to eligibility requirements, consumer

protections (with respect to certain marketing practices), and billing practices. The UBPs do not provide the PSC with any authority to regulate rates.

Perhaps even more remarkably, the PSC actually opposed the enactment of Section 349-d, writing to the Governor that his signing of the law would "add little to the protections already afforded to ESCO consumers pursuant to the Commissions Uniform Business Practices." (Letter from PSC at 2, Aug. 5, 2010, Bill Jacket, L 2010, ch 416.) The PSC went on to write that "although the bill strives to benefit consumers, the limitations placed on the ESCOs raise the specter of fewer energy service options in the marketplace." (*Id.*)

Although administrative agencies are permitted to perform rulemaking to carry out laws enacted by the Legislature, they are constitutionally precluded under the separation of powers doctrine from exercising lawmaking functions, such as legislating policy. (*See Boreali v Axelrod*, 71 NY2d 1, 10 [1987]; *see also Mooney v Cohen*, 272 NY 33, 37 [1936].) Otherwise, the Legislature could delegate its constitutional power to an agency by simply articulating an ambitious policy statement in the prefatory language of a statute. (*See Levine v Whalen*, 39 NY2d 510, 515 [1976], holding that "the Legislature cannot pass on its law-making functions to other bodies…The delegation of power to make the law, which necessarily involves what it should be, cannot be done[.]")

Moreover, the very issues of concern that the PSC cited as reason for its sweeping changes in the Reset Order were previously debated by the Legislature in 2010. The result at that time was not a legislative authorization for the PSC to regulate ESCO rates, but simply an expansion of the Attorney General's authority to take prosecutorial action against certain abusive sales and marketing behaviors. (*See* Assembly Sponsor's Mem in Support, Bill Jacket, L 2010 ch 416, at 2-3, 5; *see also* Letter from Assembly Sponsor Gianaris, Aug. 10, 2010, Bill Jacket, L 2010, ch 416, stating that the purpose of the 2010 amendments was to expand consumer safeguards and "empower[] the Attorney General and individual consumers to pursue judicial redress.")

Accordingly, in the absence of any statutory authority supporting the imposition of price regulations on the ESCO marketplace, the Court should reverse the Appellate Division's Memorandum and Order to the extent that it held that the PSC has lawful jurisdiction to regulate ESCO rates, and vacate the PSC's Reset Order in its entirety.

### C. *The Appellate Division's Decision Violates The New York State Constitution Which Vests Authority to Delegate Ratemaking in the Legislature Alone*

The New York State Constitution states that "[t]he legislative power of this state shall be vested in the senate and the assembly." (NY Const art III, § 1.) Similarly, Article IV vests the executive power in the governor, and Article VI

vests the court system with judicial powers. (*See* NY Const art IV, VI.) The Court has recognized "that these separate grants of power to each of the coordinate branches of government imply that each branch is to exercise power within a given sphere of authority. (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 821 [2003], citing *Clark v Cuomo*, 66 N.Y.2d 185, 189 [1985].) Separation of powers "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." (*Id*. at 821-22 [internal citation omitted].)

Through the Reset Order, the PSC seeks to implement ratemaking policies that would have a monumental influence, not only on the competitive retail marketplace, but on the entire energy industry in the State. Indeed, ratemaking powers are explicitly delegated within the PSL. (*See* PSL Article 4.) If the Legislature intended to authorize the ratemaking authority the PSC asserts, the Legislature would have done so explicitly, as it did in the case of public utilities.

Just recently, the Court reaffirmed its commitment to the principle that "[f]undamental policy choices epitomize legislative power as balancing of differing interests is a task of the multimember, representative Legislature is entrusted to perform under our constitutional structure." (*People v Francis*, 30 NY3d 737, 751 [2018], citing *Saratoga County Chamber of Commerce*, 100 NY2d at 823.) The Third Department's holding betrays this longstanding legal

norm by wrongly authorizing the PSC to implement ratemaking regulations outside the proper legislative channels for enacting such sweeping policies. The Reset Order's unauthorized policymaking is in direct conflict with the New York State Constitution and blatantly violates the core principles of separation of powers.

Accordingly, as the PSC lacks any lawful authority to regulate ESCO pricing, the Court should reverse the Appellate Division's Memorandum and Order to the extent that it held that the PSC has lawful jurisdiction to regulate rates charged by ESCOs, and vacate the Reset Order in its entirety.

## POINT III

## THE APPELLATE DIVISION IMPROPERLY REVERSED THE SUPREME COURT'S FINDING THAT ESCOS HAVE A PROPERTY INTEREST IN CONTINUED ACCESS TO UTILITY SYSTEMS

Preliminarily, the Appellate Division properly affirmed the Supreme Court's finding that the PSC violated Appellants' due process rights by failing to comply with proper SAPA requirements. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1139-40 [A-171–A-172].) Prior to the PSC's issuance of the Reset Order, Appellants had no notice that the PSC planned to require either guaranteed savings, or 30 percent renewable electricity contracts for the entire market of mass market consumers. Consequently, as affirmed by the Appellate Division, the PSC's Reset Order did not afford ESCOs with the required due process. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1139-40, [A-172], finding that the PSC

failed to comply with mandated SAPA notice requirements in its adoption of the Reset Order; *see also* SAPA, art 2, §§ 202 *et seq.*; *Matter of Keyspan Energy Servs. v PSC*, 295 AD2d 859, 861 [2002].)

Nevertheless, on the issue of Appellants' property rights, the Appellate Division erred by improperly reversing the Supreme Court's finding that ESCOs have vested property rights in their ability to continue business operations in New York. The Legislature, as well as the Supreme Court, have recognized the legitimate and vested property rights of ESCOs due to their substantial investments of time and capital in New York State. (*See* A-54–A-56; A-71.) Assuming for argument that the PSC has the lawful authority to regulate ESCO prices (which Appellants dispute), it is a clear violation of ESCOs' rights to due process for the PSC to implement the Reset Order which enacts broad-brushed price regulations with reckless disregard for ESCO costs.

The Reset Order requires ESCOs, which offer commodity-related services only, to charge no more for the energy they sell than do utilities. Utilities must sell energy at cost, but profit substantially from transmission and delivery. By mandating that ESCOs cannot charge consumers more than the utilities, the Reset Order fundamentally deprives ESCOs of entirely lawful business opportunities, in which they have a vested right given their substantial investment of resources. (*See* A-54–A-56; A-71.) Unlike public utilities, ESCOs derive no profit from transmission and

distribution services. Thus, requiring ESCOs to charge the same prices for their products as the utilities effectively eliminates ESCOs' ability to recover their operating costs, much less turn a profit.

Companies cannot constitutionally be subjected to regulations that depress prices below reasonable levels. (*See Tenoco Oil Co. v Dep't of Consumer Affairs*, 876 F2d 1013, 1023 [1st Cir. 1989].) In *Tenoco Oil*, the First Circuit observed that "[p]rice controls imposing confiscatory ceilings and having the effect of driving gasoline wholesalers from the . . . market might perhaps be deemed so irrational as to exceed legislative power, constituting a taking without due process." (*Id.* at 1023.) ESCOs have invested substantial amounts of time and money in the New York market, based on the reasonable expectation that they would be allowed the continued freedom to independently negotiate prices directly with their customers and conduct profitable businesses.

The Appellate Division erroneously found that ESCOs do not have a property interest in continued access to the utility systems. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1139, [A-171].) This finding wrongly overlooks the fact that constitutionally-protected interests "can arise in myriad ways" (*Nixon v United States*, 978 F2d 1269, 1276 [D.C. Cir. 1992]), including express or implied agreements, custom and practice, and use over an extended period of time. (*Id.* at 1276; n.18.)

The New York Legislature has recognized ESCOs' right to compete and do business in the State. Several statutes reflect the Legislature's acceptance of ESCOs' participation in the New York energy market (*See e.g.* PSL § 53; GBL § 349-d; Tax Law § 1105-C.) These legislative enactments evidence ESCOs' vested rights to do business in New York.

Furthermore, the PSC recognizes its own role in encouraging ESCOs participation and inclusion in the competitive marketplace. As the PSC stated in 2000, "[w]e have done much in the past few years to assist in creating competitive energy markets in New York and to bring their benefits to all consumers." (Joint Record 'R', R-1450.)

Thus, ESCOs have vested interests in their right to continue doing business in the State, as evidenced by their investment of substantial resources in New York's energy market, the Legislature's recognition and accommodation of ESCOs' participation in the market, and the PSC's active encouragement of competition between ESCOs and utilities. The PSC's Reset Order represents a dramatic reversal of New York's once-welcoming approach to retail energy markets which had previously encouraged substantial private investment from ESCOs. Now, by mandating that ESCOs must guarantee savings compared to utilities' prices, the PSC's Reset Order fundamentally deprives ESCOs of their vested right to continue doing business in New York.

The Appellate Division's decision cites two cases in support of its rejection of Appellants' claim that ESCOs have a property interest in continued access to utility system by which they conduct their business. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1139, [A-171].) Both cases are easily distinguishable from the case at hand.

First, the Appellate Division cites *Niagara Mohawk Power Corp. v N.Y. Dept of Transp.*, a case in which a public utility sued the Department of Transportation for significant increases in permit fees for the location of transmission lines across State-owned lands. (*Matter of Retail Energy Service Ass'n*, 152 AD3d at 1139, [A-171], citing *Niagara Mohawk*, 224 AD2d 767, 767-68 [3d Dept 1996].) There, the court found that because the Department of Transportation had enumerated statutory authority to regulate the price and application of such permits, Niagara Mohawk did not have a valid property interest. (*Id.* at 768.) In clear contrast to the explicit statutory authority cited by the court in *Niagara Mohawk*, no such authority exists for the PSC to impose the price regulations proposed in the Reset Order. Tellingly, there is a complete absence of any statutory support directly enumerating PSC authority to implement such price regulations on ESCOs. Therefore, the Appellate Division's citation to *Niagara Mohawk* is misguided and should be rejected as invalid precedential support the

Appellate Division's erroneous finding that ESCOs do not maintain vested property interests.

Another significant difference is that in *Niagara Mohawk*, the petitioner was a heavily-regulated public utility, rather than private entities like ESCOs. As previously explained, ESCOs entered the New York energy market under the expectation that that the State would encourage the development of robust competitive markets founded on market-based principles. Instead, the Reset Order proposes unauthorized price regulations that conflict with the objectives and fundamental principles underlying the core function of competitive markets. Clearly, a public utility's expectation of a property interest in the placement of transmission infrastructure on public lands cannot fairly be equated to ESCOs' rational anticipation that New York's *competitive* energy markets would indeed remain free from arcane price regulations that the PSC purposefully opened the competitive energy markets to avoid.[4] The Reset Order represents a dramatic and puzzling reversal of the PSC's initial collaborative approach to attracting private investors. ESCOs relied on the PSC's stated commitments to market-based

[4] Before opening the retail marketplace, the PSC stated that a core principle in opening the competitive energy markets was that "increased emphasis should be placed on market-based means or competitively neutral approaches to preserve research, environmental protections, cost effective energy efficiency and fuel diversity." *Opinion and Order Adopting Principles to Guide the Transition to Competition*, NY PSC Case No. 94-E-0952 [Op No. 95-7 at 6] [June 7, 1995].)

competitive energy markets, and correspondingly, ESCOs made substantial investments to establish business operations in New York.

The second case cited by the Appellate Division as authority for their erroneous findings is *Campo Corp. v Feinberg*, a 66-year-old decision that involved narrow issues related to utility submetering contracts with landlords. (*See Matter of Retail Energy Service Ass'n*, 152 AD3d at 1139, [A-171], citing *Campo*, 279 AD 302, 306-07 [3d Dept 1952].) Irrefutably, ESCOs are not public utilities and are therefore not subject to the same level of heightened oversight from the PSC. Importantly, the outcome in the *Campo* case turned on the PSC's proper "exercis[e] of its statutory authority to regulate the practice and rate classifications of public utilities." (*Id.* at 306.) The *Campo* court reasoned that utilities had no vested rights in the practice of submetering because such a practice was neither sanctioned, nor specifically prohibited, under any statutory or common-law right to purchase and resell electric current from a public utility. (*Id.*) The court further stated that "the practice [of submetering], while tolerated, has been criticized many times by the commission. Whatever investments petitioners may have in the practice must be held to have been made at their own risk in view of the foregoing." (*Id.* at 306-07) This is clearly not analogous to the present case where the PSC actively created and encouraged private investment (i.e. the formation and

development of ESCOs themselves) to establish robust competitive energy markets in the State.[5]

Furthermore, in *Campo*, the PSC changed the utility's rates and rejected claims that customers had a vested interest in those utility rates. Here, in contrast, the PSC is seeking to regulate the ESCOs directly. Because the PSC did not seek to regulate submeters directly in *Campo*, that case does not apply here where the PSC has wrongly claimed authority to regulate ESCO rates.

Indeed, New York's retail energy marketplace is not simply an "off-the-books" kind of side-practice with landlords engaged by a heavily regulated public utility (as was the case in *Campo*). Instead, ESCOs' access to the energy distribution system is fundamental to the State's commitment to developing competitive markets.

Significantly, although ESCOs do not obtain "licenses," they are required by the UBP to apply for "eligibility status," which should be deemed a vested property interest. Fundamentally, any activity which requires government permission is equivalent to a license (or otherwise granted authority) to engage in that authorized activity. To secure this approved status, ESCOs must complete a

[5] The PSC explicitly stated that "increased customer choice among types of services and prices to be paid should mean allowing customers throughout the State the opportunity to choose among a number of suppliers (such as generators and energy service companies (ESCOs)) of electricity and other services. Customers will be able to choose to lower their levels of electric service in return for economic benefits." (*Opinion and Order Regarding Competitive Opportunities for Electric Service*, NY PSC Case No. 94-E-0952 [Op No. 96-12 at 28] [May 20, 1996].)

retail access application process which requires submittal of financial information, contract forms, and other verification documents. (*See* Uniform Business Practices for ESCOs ("UBP"), at 6-7, NY PSC Case No. 98-M-1343 [Feb. 2016].) ESCOs are only allowed to serve customers in New York if they are determined by the Department of Public Service to be "eligible," and may thereafter be issued of a "letter of eligibility." (*Id.* at 7.) Then, there is an application process for eligibility and approval by the incumbent utility, which includes a financial creditworthiness review, completion of the EDI Phase III testing and execution of any operating and billing agreements. (*Id.*) The applicant may not actively market to or enroll customers in a utility service territory until both the DPS and utility filing requirements have been completed. Beyond this, there are also requirements in the UBP for maintaining an ESCO's eligibility status, which requires submission of compliance reporting information annually. (*Id.* at 7-10.)

Therefore, given these rigorous eligibility requirements, ESCOs maintain a distinct property interest through their legitimate claim to entitlement to eligibility to serve New York energy customers. (*See generally Board of Regents v Roth,* 408 U.S. 564, 576 [1972], holding that "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.")

Notably, the Appellate Division referenced no statutory authority directly authorizing the Reset Order's proposed price regulations. Instead, the Division's only offered statutory authority for PSC regulation of ESCO rates is a contorted and invalid interpretation of the PSL's prefatory language. The Appellate Division's reasoning is in direct conflict with the *Campo* court, which referenced clear statutorily authority permitting the PSC's regulation of the sale of electricity by public utilities. (*See Campo*, 279 AD at 306.)

Without reliable access to the distribution system, ESCOs would be entirely unable to provide their energy products to consumers, thus thwarting the PSC's explicit intention for robust competitive markets. As the Appellate Division's decision acknowledged, "the Legislature authorized the PSC to open up the retail energy market by requiring utilities to transport gas commodities owned by other companies." (*Matter of Retail Energy Service Ass'n*, 152 AD3d at 1134-35, [A-166], citing PSL § 66-d; *Rochester Gas & Elec. Corp.*, 71 NY2d at 320-22.) Therefore, the Legislature specifically provided ESCOs a statutory means to access the distribution system where other mandatory requirements are met. Unlike in *Campo*, where the utility was engaging in unauthorized activities, ESCOs are presently engaged in serving New York energy customers at the specific behest and encouragement of the Legislature and the PSC. Clearly, depriving ESCOs of

right their property interest in exercising their statutorily authorized access to the distribution system is neither just, nor lawful.

Therefore, the Appellate Division's cited authority does not support their conclusion that ESCOs do not have a vested property interest in the continuance of business operations in New York. Given ESCOs' significant investment of time and capital to develop the New York market, and their codified right to access the distribution system (PSL § 66-d), it is clear that ESCOs maintain sufficient property interests to require due process protections.

Accordingly, the Appellate Division erred in reversing the Supreme Court's finding that ESCOs have a vested property interest in their continuance of business activities in New York. The Reset Order, which was authorized by the PSC in violation of SAPA, infringes on ESCOs' vested property rights without due process and must therefore be vacated in its entirety.

## CONCLUSION

For the reasons set forth herein, the Appellate Division's Memorandum and Order dated July 27, 2017, should be: (1) reversed to the extent that it held that the PSC had jurisdiction to regulated rates charge by ESCOs; (2) reversed to the extent that it held that ESCOs do not maintain vested property interests in access to the distribution system; and (3) affirmed to the extent that it held that the PSC violated ESCOs' constitutionally protected due process rights.

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