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COURT OF APPEALS

STATE OF NEW YORK

Matter of National Energy Marketers Association, et al.

Appellants,

-Against-

No. 21

New York State Public Service Commission

Respondent.

Matter of Retail Energy Supply Association, et al.

Appellants,

-Against-

No. 22

New York State Public Service Commission

Respondent.

20 Eagle Street
Albany, New York
March 19, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



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Appearances:

JASON P. CYRULNIK, ESQ.
BOIES SCHILLER FLEXNER LLP
Attorney for Appellants National Energy, et al.
333 Main Street
Armonk, NY 10504

DAVID G. BURCH, ESQ.
BARCLAY DAMON, LLP
Attorney for Appellants Retail Energy, et al.
125 East Jefferson Street
Syracuse, NY 13202

D. SCOTT BASSINSON, ESQ.
N.Y.S. DEPARTMENT OF PUBLIC SERVICE
Attorney for Respondent Public Service Commission
3 Empire State Plaza
17th Floor
Albany, NY 12223

Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar are appeals 21 and 22, the Matter of
3 National Energy Marketers Association v. the New York State
4 Public Service Commission and Matter of Retail Energy
5 Supply Association v. the Public Service Commission.

6 Counsel?

7 MR. CYRULNIK: Good afternoon, Your Honors. May
8 it please the court. Jason Cyrulnik on behalf of the NEM
9 appellants. My colleague and I are collectively - - -
10 would request four minutes rebuttal time, and we'll split
11 that evenly.

12 CHIEF JUDGE DIFIORE: Very well.

13 MR. CYRULNIK: Thank you, Your Honor. This
14 appeal asks whether the legislature imparted to the Public
15 Service Commission the authority to set the rates that
16 private energy service companies charge their customers for
17 - - -

18 CHIEF JUDGE DIFIORE: Counsel, if the Public
19 Service Commission does not have broad authority to
20 regulate access to utility infrastructure, how is it that
21 the Commission unilaterally opened the retail energy market
22 in the first place by ordering the infrastructure open to
23 the ESCOs.

24 MR. CYRULNIK: So Your Honor, I think the opening
25 of the market is different from the closing of the market.



1 I think the legislature imparted to the Public Service
2 Commission many areas in which it can oversee the market,
3 in particular areas including the one that we're focused on
4 today, Your Honor, rate making, the legislature made clear
5 what its intent was with respect to which entities the PSC
6 could - - - could regulate rates and which entities it
7 couldn't. Your - - -

8 JUDGE STEIN: They're generally regulating
9 conditions under which their access to the infrastructure
10 can either be obtained or maintained.

11 MR. CYRULNIK: So Your Honor, I think it - - - it
12 depends on what they're doing. I think if what - - - what
13 the PSC is doing is really an end run around the
14 legislative decision to limit rate making to utilities,
15 which couldn't be clearer from the text of the Article 4
16 that deals with rate making, couldn't be clearer from the
17 legislature's subsequent amendments to other articles, et
18 cetera. I think if that's what the PSC is trying to do and
19 use a back door of - - -

20 JUDGE RIVERA: I thought what they were trying to
21 do is just set a cap.

22 MR. CYRULNIK: Well, I think - - -

23 JUDGE RIVERA: Doesn't that go to what's just and
24 reasonable?

25 MR. CYRULNIK: Well, I think that setting a cap



1 is a manifestation of regulating rates. I think Your Honor
2 is right that the way - - - the way they try to - - - to
3 set - - - they tried to regulate rates here was to say the
4 rates can't exceed the rates that are charged by utilities.

5 JUDGE RIVERA: Isn't that the legislative intent?

6 MR. CYRULNIK: I don't think so, Your Honor. I
7 think the legislative intent is in Article 4, and - - - and
8 these words are ellipsised out of every single quote that
9 you see in respondent's brief with respect to Article 4.
10 The words that are excised out or ellipsised out are "rates
11 charged by electric and gas corporations". And those words
12 are in - - -

13 JUDGE RIVERA: But the point of competition is to
14 provide something beneficial to the public. And their
15 position is you're not providing anything - - - the ESCOs
16 are not providing benefit to the public because, first of
17 all, they're not charging less, and second of all, to the
18 extent they are charging more, they're not providing some
19 value for the premium.

20 MR. CYRULNIK: Your Honor, we agree that's the
21 position they have taken. We don't think the record
22 supports it at all. I don't think that that's - - -

23 JUDGE RIVERA: Well, let's say it did.

24 MR. CYRULNIK: Well, but I don't - - -

25 JUDGE RIVERA: Let's say it did.



1 MR. CYRULNIK: Right.

2 JUDGE RIVERA: Why wouldn't they be able to
3 regulate, in furtherance of the legislative goal, which is
4 to achieve a benefit for the consumer through the
5 competitive market?

6 MR. CYRULNIK: I think, Your Honor, two - - - two
7 things. Number one, eliminating the competitive market,
8 which is what the PSC would do, can possibly improve things
9 for - - - for consumers, that is to - - - to restore us to
10 a state of monopoly.

11 JUDGE RIVERA: Well, they didn't eliminate it;
12 they just said it's actually got to provide a benefit. And
13 so they've defined a range of benefit - - -

14 MR. CYRULNIK: Well, but the benefit - - -

15 JUDGE RIVERA: - - - including cost as well as
16 service.

17 MR. CYRULNIK: Right, what the PSC tried to do
18 here is say if you are not providing the benefit, ESCOs
19 can't exist, and if we determine that's the case, we're
20 going to be restored to a state of monopoly. So - - -

21 JUDGE GARCIA: Counsel, I have a more basic
22 question on that. Clearly there is some authority for the
23 PSC to regulate you, and maybe they don't have other
24 authority, maybe they don't have certain rate making under
25 a different article. My problem with this case is what are



1 we applying that to? Your regulation isn't here, right?
2 The regulation was thrown out by the Supreme Court here; it
3 hasn't been re-promulgated. So we're giving, kind of, an
4 advisory opinion on what authorities that the PSC may or
5 may not have over you without a concrete example of what
6 they've tried to exercise before us.

7 MR. CYRULNIK: So Your Honor, I think this is - -
8 - it's more specific than that. I think we had requested
9 below a declaration that the Public Service Commission does
10 not have the authority to set the rates that ESCOs charge,
11 whether it's by a cap, by anything. And if - - -

12 JUDGE GARCIA: Maybe they do, maybe they don't
13 have "rate making" authority, but how they promulgate a
14 regulation that may have some effect on your rates is
15 really the controversy. So maybe we could say, sure, you
16 know, they don't, but that doesn't answer the question of
17 whether this particular regulation is good or not good
18 because maybe, as I think Judge Rivera's questions may have
19 been getting at, this isn't a rate-making regulation.

20 So what are we supposed to decide, in a vacuum,
21 they do, they don't have rate-making authority over you,
22 they do, they don't have Article 4 authority over you? We
23 don't generally do that.

24 MR. CYRULNIK: Your Honor, where the relief
25 requested below was for precisely that declaration, I think



1 that it is fair - - - it is fair material for the Appellate
2 Court to review and for the Court of Appeals to review.

3 I think Your Honor is right that the devil is
4 going to be in the details. Once this court answers that
5 question and - - -

6 JUDGE GARCIA: So if we affirm the Appellate
7 Division's finding that whatever that particular provision
8 was in Article 4 didn't apply, and they didn't have
9 authority under that provision, that would be it? That's
10 basically what we could do here, or not, or reverse that;
11 that's what you're asking us to do?

12 MR. CYRULNIK: I think that's the controversy
13 before this court. I think once this court gives the
14 guidance and particularly considers the issue we raised,
15 whether or not the lower court erred in finding that the -
16 - - that the Public Service Commission does have
17 jurisdiction to set rates, I think that the - - -

18 JUDGE GARCIA: They didn't really find that.
19 They found a particular provision of this scheme didn't
20 apply because of the definitional section, but that isn't
21 the end of whether what they do is good or not good. So I
22 don't see how we can reach the ultimate issue of what they
23 did, which isn't before us, whether that falls within a
24 certain rate-making authority or not because that isn't
25 even here.

1 MR. CYRULNIK: Yeah, we respectfully submit, Your
2 Honor, that that is the discrete issue before the court.
3 That is the lower court found that there is rate making,
4 that there is the ability - - - the PSC has the ability to
5 set or control the rates the ESCOs charge. We think that
6 the plain language of the statute and the legislative
7 history make clear that can't be true.

8 And Your Honor's right; I think there will be
9 subsequent actions on the part of the PSC that will comply
10 with whatever this court pronounces, and we can see whether
11 or not there is a problem that that raises. But there is a
12 discrete issue before the court, and we think that it would
13 - - - it - - - it needs to be addressed, and we think it's
14 fundamental.

15 JUDGE WILSON: Chief, I have one question, if I
16 might.

17 CHIEF JUDGE DIFIORE: Yes, of course.

18 JUDGE WILSON: I don't understand, counsel, and
19 maybe you can clarify your position for me. Is it your
20 position that the PSC does not have the authority right now
21 to say forget the ESCO market, we're shutting everybody
22 out, utilities no longer have an obligation? Is that your
23 position? Or is it your position they don't have the power
24 to set rates?

25 MR. CYRULNIK: It's the latter, Your Honor. It's



1 that - - -

2 JUDGE WILSON: They could shut the whole thing
3 down, is your view?

4 MR. CYRULNIK: That's not our view, but that's -
5 - - that's not the issue - - - that's not the issue - - -

6 JUDGE WILSON: I'm not ask - - -

7 MR. CYRULNIK: - - - before the court.

8 JUDGE WILSON: I'm asking - - -

9 MR. CYRULNIK: You're asking just our view?

10 JUDGE WILSON: - - - about your view about the
11 power of the Commission. Does the Commission have the
12 power - - - let's say, after holding - - - you know, after
13 going through SAPA, to say this whole thing isn't working
14 out, utilities no longer have an obligation; do they have
15 that power?

16 MR. CYRULNIK: I think that would be problematic
17 under Boreali. I think that would be a policy-making
18 decision in which the legislature has repeatedly made
19 pronouncements regarding the ESCOs. And if that was going
20 to be - - - decision was going to be made, it would need to
21 be made at the legislative level. That is a major policy
22 decision that satisfies all four of the Boreali factors.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. CYRULNIK: Thank you, Your Honor.

25 MR. BURCH: Good afternoon, Your Honors. May it



1 please the court. David Burch, Barclay Damon, on behalf of
2 Retail Energy Supply Association.

3 I'd like to pick up with a question that was
4 asked previously, you know, are we aggrieved, essentially,
5 was Judge Garcia's question. If you look at Judge Zwack's
6 decision and then - - - and then the Appellate Division's
7 decision, they - - - they find jurisdiction and they remit
8 this to the PSC for further proceedings in accordance
9 therewith. We've now been faced with, you know, nearly two
10 years of - - -

11 JUDGE GARCIA: But we don't have that regulation
12 in front of us, right? It's not in effect. And what I
13 find, the Appellate Division, after going through Article
14 4, says: "We find that PSC's broad statutory jurisdiction
15 and authority over the sale of gas and electricity
16 authorized it to impose the limitations set forth in the
17 reset order." That's their holding. We don't have the
18 reset order. So I don't know how we reach that - - - I
19 mean, I think maybe we could reach whether or not that
20 provision in Article 4 covers you or not and agree or
21 disagree with the Appellate Division on that, but I don't
22 know how then we go on to say whether or not authority
23 authorizes the PSC to promulgate an order that isn't in
24 effect and isn't before us.

25 MR. BURCH: No, I think the question before Your



1 Honors, respectfully, is, you know, what is the scope of
2 that authority. And I think that if you look to Judge
3 Zwack and the Appellate Divisions, they find this broad
4 jurisdictional authority over rates and then the - - - the
5 PSC's proceeding in accordance with that, and so - - -

6 JUDGE GARCIA: But they found, in the one that I
7 just read, is that they had authority to promulgate this
8 order, not a broad authority to do various, you know,
9 things that we could hyp - - - you know, hypotheticals we
10 could give. They found broad authority to do what they did
11 with the reset order. But what would we say? You do or
12 you don't have broad authority to do what? There is no
13 order.

14 MR. BURCH: To do what they did in the reset
15 order, and that's what I think Judge Zwack remanded and had
16 said: you have to follow proper notice proceedings under
17 SAPA, and that's what - - -

18 JUDGE GARCIA: But the order is no longer in
19 effect.

20 MR. BURCH: That's - - -

21 JUDGE GARCIA: And it's not been re-promulgated,
22 right?

23 MR. BURCH: I understand, Your Honor, and we
24 think that the court should weigh in and - - - and either
25 uphold or, in our view, reverse the lower court's decision.



1 JUDGE WILSON: But you're sort of assuming a
2 result after the SAPA process, right? I mean, it's
3 possible that the PSC does nothing.

4 MR. BURCH: Well, I don't think we're assuming
5 it. The Public Service Commission, in that proceeding, and
6 I believe in the briefs there are some citations to their
7 arguments, where they assert they have this jurisdiction.
8 So that's sort of a fundamental premise of what's going on
9 in front of the PSC today.

10 JUDGE GARCIA: But I think there have been some
11 new orders promulgated, if I'm not correct, which may be
12 going through various stages, and I'm not commenting on
13 them, but they seem to have been phrased differently than
14 this order.

15 MR. BURCH: Well, that's - - - I think the order
16 is, you know, in - - - kind of colloquially, are the low-
17 income orders. That's a separate fact.

18 JUDGE GARCIA: Right.

19 MR. BURCH: That's a separate proceeding. In
20 fact, RESA's not, you know, a party to that litigation.

21 If I might turn - - -

22 CHIEF JUDGE DIFIORE: Do you want to move to the
23 merits?

24 MR. BURCH: That's what I'd like to turn to, you
25 know, the question of - - - the question of, you know, what



1 did the legislature intend here to be the scope. I mean,
2 we - - - we have a - - - a good legislative record that
3 goes through decades. We have the legislature opening up
4 the markets to some degree. We have orders from the public
5 service commission implementing it.

6 JUDGE STEIN: Well, don't you also have a
7 history, over decades, of the PSC establishing various
8 requirements of - - - of the ESCOs through the UBPs?

9 MR. BURCH: Yes, Your Honor.

10 JUDGE STEIN: Okay. And where does the authority
11 for that come from?

12 MR. BURCH: Well, I think the UBPs are, you know,
13 not before the court, you know, whether they're valid or
14 not.

15 JUDGE STEIN: I know, but looking - - -

16 MR. BURCH: But the - - -

17 JUDGE STEIN: But you're asking us to look at
18 what the - - -

19 MR. BURCH: What the scope is.

20 JUDGE STEIN: - - - the PSC's authority is. So
21 I'm trying to ascertain, we know - - - well, at least your
22 colleague says that - - - that they have the authority to
23 require the utilities to allow access to the
24 infrastructure, and then the argument is, is that but they
25 don't have the authority to - - - to take it away. But



1 they - - -

2 MR. BURCH: Right.

3 JUDGE STEIN: But apparently they have authority,
4 because you haven't questioned it or - - - or challenged
5 it, to impose various restrictions and requirements and so
6 on through the UBPs. And my question to you is where do
7 you think that authority comes from?

8 MR. BURCH: And so that authority comes from the
9 ability of the Public Service Commission to regulate things
10 within its purview that are consistent with what the
11 legislature has said. So the legislature has said HEFPA
12 applies, Article 2 applies to ESCOs. UBPs can be
13 consistent with that. But - - -

14 JUDGE STEIN: Okay. But the UBPs came before
15 HEFPA, before Article 2, right?

16 MR. BURCH: Um-hum.

17 JUDGE STEIN: So that - - - that's - - -

18 MR. BURCH: And - - -

19 JUDGE STEIN: So my - - -

20 MR. BURCH: And at that time, in 1999, I think,
21 when the UBPs were issued, you know, and then 2002 we have
22 the HEFPA shortly thereafter, after there was some dispute
23 about whether it applied or not, legislature spoke. But
24 the UBPs also, you know, to the extent they're consistent
25 with general, you know, consumer protection things, that's



1 fine, but here you have the legislature saying rate-setting
2 jurisdiction is a very specific thing.

3 JUDGE STEIN: But they didn't have the right - -
4 - I think you say they didn't have the right to regulate
5 consumer protection things until the amendment to Article
6 2. My point, again, is is that the UBPs were there before
7 that amendment to Article 2.

8 MR. BURCH: And they were, and I was not involved
9 in any decisions on challenging it or not, and I don't know
10 that RESA was. But you know, the point is here we have
11 them trying to impose a regulation on rates which is
12 something the legislature specifically applied to
13 utilities, for good reason, because they're monopolies.

14 JUDGE RIVERA: But then does your argument boil
15 down to PSC can regulate you as much as they want, but they
16 can't touch what you want to charge?

17 MR. BURCH: They can't touch things that the
18 legislature spoke on.

19 JUDGE RIVERA: What else is there other than the
20 rates?

21 MR. BURCH: I - - - I could come up with
22 hypothetical things right now. We're talking about rates.
23 You know, conceivably, if they wanted to shut down the
24 market, I would agree with my colleague, that would be a
25 bridge too far.



1 JUDGE RIVERA: Why is that? Doesn't the statute
2 just say "may" as opposed to "must" open up that
3 infrastructure?

4 MR. BURCH: Well, I think they did open it up,
5 and now we've had decades of people using it. The - - -
6 and I see I'm out of time, but if it's okay, Chief, I'd
7 like to finish.

8 CHIEF JUDGE DIFIORE: Of course, yes.

9 MR. BURCH: They - - - they, you know, opened the
10 market up. People have been acting in accordance. People
11 have made business decisions, invested a lot of money in
12 New York, and New York, you know, boils down to - - - and
13 this court's long recognized competition is a fundamental
14 principle of the policy of the State of New York. And that
15 starts in 1968 in this court's decision, *Aimcee v. Tomar*
16 *Products*, 21 N.Y. 2d 621. When a market's opened up,
17 there's competition. It should be allowed to continue and
18 prosper.

19 And the legislature can certainly speak to, you
20 know, what the boundaries of rates are, but here they did,
21 and they applied it to public utilities, gas and electric
22 corporations, which ESCOs are not. The Third Department
23 got that right. Thank you, Your Honors.

24 CHIEF JUDGE DIFIORE: Thank you.

25 Counsel?



1 MR. BASSINSON: Good afternoon, Your Honors. May
2 it please the court. Scot Bassinson on behalf of the New
3 York Public Service Commission.

4 Your Honors, the Commission's order here
5 implemented a legislative policy that's over a century old
6 to protect consumers who purchase essential gas and
7 electric service - - - utility service, by insuring that
8 such utility service, including its price, is just and
9 reasonable. The legislature's policy and the Commission's
10 jurisdiction over the sale of that essential energy applies
11 irrespective of who is selling the energy.

12 The Commission's authority is broad and specific
13 and clearly set forth in the plain statutory language of
14 the Public Service law and, more recently, the general
15 business law, legislative history and over a hundred years
16 of regulation and case law.

17 In addition, this court, over sixty-five years
18 ago, in Campo v. Feinberg, affirmed the Commission's broad
19 jurisdiction over the utility distribution system in
20 upholding a Commission determination to eliminate third
21 party resellers. In that case they were known as
22 submeterers. How that worked was the submeterers or
23 landlords would purchase the energy from the utility and
24 resell it to tenants. So they were third-party energy
25 resellers such as ESCOs are here.



1 JUDGE STEIN: So who's being regulated? Are the
2 ESCOs being regulated or are the utilities being regulated
3 in - - - in to whom they may or must open their - - - their
4 infrastructure?

5 MR. BASSINSON: Yes, the Commission regulates the
6 utilities directly and over there, under Sections 5 and 4
7 and 65 and 66, a direct regulation of the utilities and
8 their infrastructure, and the Commission in 1996 determined
9 to open the market to allow ESCOs access to that utility
10 distribution system.

11 And so, as in Campo, the Commission's
12 jurisdictional authority over the utility distribution
13 system is broad enough to encompass regulating the price
14 that ESCOs can charge for the commodity which is the same
15 thing that the submeterers were selling.

16 JUDGE WILSON: Well, does it make a difference to
17 your authority if - - - if the rule is phrased, say, option
18 one, ESCOs can't charge more than X, or it's phrased:
19 utilities do not have to allow an ESCO access unless the
20 utility is charging not more than X? Does that make a
21 difference to your authority the way that's phrased?

22 MR. BASSINSON: No, Your Honor, because both of
23 those things derive from the Commission's statutory
24 authority and duty to ensure that the essential energy
25 services, the utility service is - - -



1 JUDGE WILSON: Right, but one is - - - just to be
2 clear, one is a regulation of the utility and the other is
3 a regulation of the ESCO.

4 MR. BASSINSON: Yes, Your Honor, and they both
5 derive from the same duty to ensure safe and adequate
6 service at just and reasonable rates.

7 JUDGE RIVERA: So could you require that their
8 rates be twenty percent less than a utility?

9 MR. BASSINSON: That's not the issue before the
10 court, Your Honor.

11 JUDGE RIVERA: I'm just trying to get a sense of
12 the scope of the authority that you're arguing for on
13 behalf of the PSC. I understand that we're talking about a
14 cap and I get that, but my question is about the scope.

15 MR. BASSINSON: If it were determined that such a
16 rate were just and reasonable under the PSL, that's
17 possible, but this particular case, it was determined,
18 because the utility price for the commodity is, by
19 definition, just and reasonable under the Public Service
20 Law, that in order for ESCOs to continue to serve the
21 market they had to meet or beat that utility price.

22 JUDGE RIVERA: So let me ask you this. So that's
23 in furtherance of competition that benefits the consumer,
24 correct?

25 MR. BASSINSON: That's correct, Your Honor.



1 JUDGE RIVERA: So if it's exactly the same,
2 what's the benefit to the consumer? If it's the exact same
3 fee, where's the benefit?

4 MR. BASSINSON: For the commodity itself, it
5 would be the same price. So - - -

6 JUDGE RIVERA: But what's the benefit to the
7 consumer?

8 MR. BASSINSON: Well, if the ESCOs - - - and
9 again, the Commission's not in the - - - in the - - - you
10 know, it's not the Commission's duty to ensure that ESCOs
11 make a profit.

12 JUDGE RIVERA: I understand.

13 MR. BASSINSON: But if ESCOs find a way to either
14 hedge in the wholesale market or offer value-added energy
15 services, that would benefit the consumers, if they could
16 purchase the energy for below the cost of - - -

17 JUDGE RIVERA: So they might still give more at
18 the same price is what you're saying?

19 MR. BASSINSON: That's correct, Your Honor.
20 That's correct.

21 JUDGE RIVERA: But if they didn't, if it's
22 exactly the same, how does that help the consumer? I can
23 choose from the same four companies that - - - that give me
24 exactly the same thing, or - - - or a hundred companies.

25 MR. BASSINSON: Essentially, the energy is passed



1 through, and they get the service at the same price.

2 JUDGE RIVERA: So that sounds to me like an
3 argument for competition for the sake of competition, or
4 the existence of just more choices that are meaningless, at
5 the end of the day.

6 MR. BASSINSON: Well, it may be that the
7 Commission would consider that in determining whether the
8 market should continue. If there is no - - - the whole
9 purpose of the market was to benefit consumers. In fact,
10 goal number one was to lower the price for consumers.

11 JUDGE RIVERA: Um-hum.

12 MR. BASSINSON: And that figured heavily in the
13 Commission's determination here that in order to make sure
14 that the price is reasonable for consumers you either meet
15 or beat the utility price.

16 JUDGE STEIN: So one of the provisions is is that
17 they can charge more if they provide some alternative
18 energy options. Is that - - -

19 MR. BASSINSON: That's correct. There was one
20 exception in this order which allowed ESCOs, theoretically,
21 to charge more if they committed to using thirty percent
22 renewable energy. And there's statutory authority for the
23 Commission to order that under Section 5(2). It requires
24 the Commission to encourage programs for environmental
25 issues and - - -



1 JUDGE STEIN: Are there other value-added things,
2 other than that, that you can give me examples of that - -
3 - that might provide me - - -

4 MR. BASSINSON: I would have to say the
5 Commission's been hard pressed to find them, and that is
6 why, over the years, since the - - - the market was opened,
7 the Commission has initiated several proceedings in order
8 to determine if the ESCOs are bringing anything - - - any
9 value-added services. What was found was that the price
10 was higher than what utilities charge, but it was difficult
11 to identify what - - - other than costing more for the
12 commodity, what the ESCOs were actually providing.

13 JUDGE WILSON: Do you have a view on the
14 aggrievement or mootness, ripeness issue?

15 MR. BASSINSON: Well, we did raise the
16 aggrievement issue in this court. We believe that the
17 applicants received the relief that they requested. They -
18 - - they filed an Article 78, and they sought invalidation
19 of the three ordering clauses, and that's what they got.

20 JUDGE FEINMAN: But they didn't get the
21 declaration they wanted, did they?

22 MR. BASSINSON: Well, Your Honor, the
23 declaration, they've - - - they haven't preserved that
24 issue before this court. They didn't raise it in either
25 brief before the Appellate Division, and they didn't raise



1 it in this court until their reply, and we haven't had an
2 opportunity. So we would argue that they just never
3 preserved that issue.

4 JUDGE STEIN: Well, if we were to find - - - you
5 - - - you also order mootness. If we were to find that it
6 was moot, then - - - then it was moot before the Appellate
7 Division, right? So wouldn't we have to vacate the entire
8 Appellate Division order including that part that
9 essentially, I think, says that you have the authority - -
10 - you had the authority to issue the - - - the reset order?

11 MR. BASSINSON: I have two responses, Your Honor.
12 First of all, no one has requested - - - the other side has
13 not requested that you invalidate the Appellate Division
14 order. But I would also point out - - -

15 JUDGE STEIN: But we might have to do that, if we
16 found that it was moot, wouldn't we? Well, let's just say
17 we would, then - - - then the effect would be,
18 theoretically, to throw it out, right?

19 MR. BASSINSON: If you were to invalidate the
20 order, it would no longer be in effect. But as far as the
21 jurisdictional issue, I would point out this - - - I forgot
22 which of you mentioned the low income order, but there is a
23 live order of the Appellate Division, Third Department,
24 relating to a similar order issued by the Commission
25 directing ESCOs to meet or beat utility prices with respect

1 to low income customers. And that order was upheld by the
2 Appellate Division, including the issue of jurisdiction
3 under a full Boreali analysis as well. So even if we were
4 to - - -

5 JUDGE RIVERA: But aren't you, in part, able to
6 move forward with that because of the decision by the
7 Appellate Division in this case because they had not
8 decided in favor of NEM and RESA that - - - that indeed the
9 PSC had the authority, wouldn't that litigation have been
10 dead in the water?

11 MR. BASSINSON: The - - -

12 JUDGE RIVERA: You couldn't move forward with
13 that, could you? You couldn't move forward with that
14 order.

15 MR. BASSINSON: In the low income order?

16 JUDGE RIVERA: Correct.

17 MR. BASSINSON: That's correct. But that order
18 was issued after - - - after the Appellate Division order
19 here, and - - -

20 JUDGE RIVERA: But that's my point. There are
21 consequences flowing from that order that affect them.
22 That - - - that's my point.

23 MR. BASSINSON: That's correct. So even if this
24 court were to invalidate the Appellate Division order on
25 aggrievement grounds or mootness grounds, the low income



1 order would still be in effect and would be settled law.
2 And I do note that the appellants, one of them is - - - NEM
3 appellants have chosen not to seek leave to appeal that
4 decision to this court.

5 JUDGE GARCIA: But let's say in the Supreme Court
6 they win, as you say, that it gets tossed, the rest of the
7 Supreme Court order is out there, you re-promulgate, you
8 comply with SAPA, they challenge again, wouldn't you come
9 in and say that you can't do that, you already got a
10 decision? So didn't they, in effect, have to appeal?

11 MR. BASSINSON: They would have to appeal the
12 Supreme Court order.

13 JUDGE GARCIA: But could they do that then? If
14 they didn't appeal, if what happened happened here and they
15 didn't appeal, and then you re-promulgate and you comply
16 with SAPA, then they come in to challenge, wouldn't you say
17 it's too late, you didn't appeal the other order, the
18 Supreme Court order stands?

19 MR. BASSINSON: We would certainly argue that the
20 low income Appellate Division order - - -

21 JUDGE GARCIA: Not the low income, this case - -
22 - this case. So if they hadn't appealed and said, look,
23 we won, let's go home, we won on SAPA grounds, and you went
24 out and you re-promulgated, in compliance with SAPA, and
25 now they want to challenge, would they have a problem



1 because they didn't appeal the original Supreme Court
2 order?

3 MR. BASSINSON: No, Your Honor, because they
4 weren't aggrieved by the original Supreme Court order.
5 They won what they sought. They sought invalidation of the
6 order. If the Commission, after its ongoing proceeding,
7 issues another order, they'll have an opportunity to
8 challenge that, if they're not happy with it, and they can
9 raise whatever issues they want to the Supreme Court.

10 Your Honors, under - - - I could address the
11 Boreali issues if you would - - -

12 CHIEF JUDGE DIFIORE: Please.

13 MR. BASSINSON: - - - like that. So the first
14 part of the analysis is what's the function of the Agency.
15 So in order to do that, let's look at - - - I sort of
16 conflate that with the first element of the four-part test.

17 So let's look at the legislative declaration of
18 policy, all right, because Boreali involves whether the
19 Agency is implementing a clear legislative policy. So I
20 would draw the court's attention to Public Service Law
21 Section 30, which is entitled "Residential Gas Electric and
22 Steam Service Policy", and it's the declaration of policy
23 by the legislature that the continued provision of electric
24 and gas service to residential customers is necessary to
25 preserve the health and general welfare and is in the

1 public interest. So it's an essential service according to
2 the legislature. That's the declaration policy.

3 We then go to the broad statutory grant of
4 authority to the Commission, and we start with Public
5 Service Law Section 5(1). Section 5 is entitled
6 "Jurisdiction, powers and duties of the public service
7 commission".

8 5(1)(b) states that the Commission has
9 jurisdiction, powers and duties over the entire range of
10 the generation and provision of energy, the manufacture,
11 conveyance, transportation, sale, or distribution of gas
12 and electricity. I draw the court's particular attention
13 to the word "sale". This first clause in 5(1)(b)
14 demonstrates the legislature's specific grant of authority
15 to the Commission to supervise, and it has jurisdiction and
16 duties with respect to the sale of the energy.

17 The second clause in 5(1)(b) after the - - -

18 JUDGE RIVERA: Regardless of the seller?
19 Regardless of the seller? Any seller?

20 MR. BASSINSON: Correct. That's correct, Your
21 Honor. It's over the commodity itself. It's over the
22 whole process: manufacture - - -

23 JUDGE RIVERA: The market.

24 MR. BASSINSON: - - - tran - - - correct.
25 Correct, Your Honor.



1 Then you go to PSL Section 4(1), which is one of
2 those, kind of, generic grants of broad authority in which
3 the Commission - - - the Public Service Commission has all
4 the power specified in the PSL and also all powers
5 necessary or proper to enable it to carry out the purposes
6 of the Public Service Law.

7 So that's the - - - we have the legislative
8 policy, we have the general broad statutory grant of
9 authority to the Commission, and then we get to Article 4
10 of the PSL which has more specifics with respect to the
11 Commission's jurisdiction over the utility distribution
12 system.

13 JUDGE WILSON: Can I back you up to 5(1)(b) for a
14 moment?

15 MR. BASSINSON: Sure.

16 JUDGE WILSON: Because I think, you know, the
17 string you read: "manufacture, conveying, transportation,
18 sale, distribution" finishes with "to gas or electric
19 plants". Right? So is it really the whole market, or is
20 it the sale, transportation, distribution, et cetera, to
21 the gas and electric plants?

22 MR. BASSINSON: Gas or elec - - - I would say
23 that the comma means that the jurisdiction - - - it offsets
24 the prior clause, so the jurisdiction, powers and duties
25 apply to those things and also to gas plants, electric



1 plants, and the persons or entities who own or operate
2 them. That's how I would read the provision.

3 So in Public Service Law Section 65(1), that
4 requires that gas corporations and electric corporations
5 provide service that is safe and adequate and just and
6 reasonable. That's the primary charge of the legislature
7 to the Commission to ensure that these essential energy
8 services are provided in a way that are safe and adequate
9 and just and reasonable.

10 Under 66, the Commission can determine whether
11 rates that are charged by these corporations are reasonable
12 or unreasonable and can set reasonable rates.

13 Under - - - so that's - - - that's the more
14 specific grant authorizing the Commission to regulate the
15 utility distribution system.

16 I see that I'm out of time. A few moments in
17 closing. In closing, Your Honors, the regulation of ESCO
18 sales is fundamentally the regulation of utility service
19 and is designed to protect consumers. That's the
20 legislature's policy, and the Commission has merely
21 implemented that policy.

22 If the court finds that the appellants are
23 aggrieved, and it decides to address the substance of the
24 issues here, we ask that the court affirm the lower court's
25 clear holdings that the Commission has the authority to



1 protect consumers by regulating ESCO's access to utility
2 distribution systems and preclude the utilities from
3 carrying overpriced energy.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MR. BASSINSON: Thank you very much, Your Honor.

6 CHIEF JUDGE DIFIORE: You're welcome.

7 Counsel?

8 MR. CYRULNIK: Thank you, Your Honor. And my
9 colleague, Mr. Burch, will have just a couple of points at
10 the end. I'll try to address as many as I can in the short
11 time that I have.

12 Your Honors, I think that, you know, Judge
13 Wilson's question hit the nail on the head. This is the
14 answer to the question that you asked in their brief. At
15 page 56 of their brief, Mr. Bassinson, answers the
16 question: "The Commission does not need the power over
17 ESCOs, as corporate entities, in order to impose a price
18 cap on ESCOs." That's their position. Their position is
19 that they can backdoor in regulation of ESCO prices without
20 regulating ESCOs. And that is antithetical to the basic
21 tenants of statutory interpretation that this court has
22 consistently pronounced.

23 Make no mistake about it, this is not an issue
24 where we are operating in a void or a vacuum. The
25 legislature spoke to this issue in 2002. The legislature



1 debunked everything that you just heard in the last two or
2 three minutes with respect to the meaning of Article 1. If
3 electric and gas corporations - - - and Article 1 generally
4 gave the PSC jurisdiction to do whatever it wanted to do in
5 this market and this space, the legislature wouldn't have
6 needed to debate and enact legislation in 2002 to change
7 the definition of the entities over whom the PSC had
8 jurisdiction with respect to Article 2.

9 JUDGE STEIN: Is there a difference between what
10 the PSC does under Article 4 with respect to the utilities
11 and how it sets the rates? Is it - - - are the rates that
12 it sets under Article 4 a maximum and a minimum as opposed
13 to what the effect of what it did here is - - - is to
14 impose just a maximum?

15 MR. CYRULNIK: I think it sets - - - by setting a
16 - - - it's not really a maximum or a minimum; it sets the
17 rates. It reviews the rates by the - - - that the utility
18 has, through a whole process of - - - which includes
19 utilities needing to make a profit. What they've done over
20 here is they said an ESCO cannot operate unless they're
21 charging those rates.

22 And this is an important factual point for Your
23 Honor's benefit. ESCOs often - - - it speaks to - - - to
24 several questions in terms of what - - - what benefits are
25 provided. ESCOs offer a variety of products including



1 fixed-rate products. So that means an ESCO - - - if I
2 enter into a contract with an ESCO, I am - - - I am given
3 the opportunity to pay a fixed rate for the next year, two
4 years, three years, just like a mortgage.

5 Under the PSC's order, if that rate ends up going
6 down, if the regular variable rate goes down, I am being
7 overcharged because I committed to paying twelve cents a
8 kilowatt hour instead of what ended up being ten. But of
9 course there's a benefit to the consumer because they chose
10 voluntarily, because they wanted the fixed rate, just like
11 I chose a thirty-year mortgage, one of my friends chose an
12 APR that had a variable rate mortgage.

13 Under this rate reg - - - rate-setting
14 regulation, they can essentially say every ESCO here is
15 overcharging simply because a customer elected to enter
16 into a fixed-rate agreement. That's not fair. That's not
17 what the legislature had in mind. And the legislature made
18 this clear in enacting its amendments. Rate setting is a
19 separate power. It doesn't - - -

20 JUDGE STEIN: Well, wouldn't that be an argument,
21 then, that what it's doing isn't fair and reasonable?
22 Isn't that a different argument?

23 MR. CYRULNIK: Your Honor, I think it's also
24 unfair and unreasonable. And I think that is a separate
25 argument. But I think there's a threshold problem here.



1 And they don't get past go if they don't have the authority
2 to set ESCO rates, nor do they need the authority to set
3 ESCO rates. ESCOs are a voluntary slice of the market.
4 Any consumer who doesn't want to buy from an ESCO doesn't
5 have to buy from an ESCO. Any consumer who doesn't want a
6 fixed-rate product need not have it. You don't need rate-
7 setting regulatory authority - - -

8 JUDGE RIVERA: Yeah, but the legislature's made
9 clear that the point of opening the market is to benefit a
10 consumer, and you don't need 300 choices that are giving
11 you the same choice, right?

12 MR. CYRULNIK: Your Honor - - -

13 JUDGE RIVERA: Which is their - - - I understand
14 you may have a different position, but they're arguing that
15 unless the price you charge is exactly the same, because
16 you're not doing anything more than the utility's doing, or
17 you're actually offering something for the premium, that
18 that's not just and reasonable.

19 MR. CYRULNIK: Yeah, but your - - -

20 JUDGE RIVERA: It doesn't meet what the
21 legislature intended.

22 MR. CYRULNIK: So two quick points, Your Honor,
23 to respond. One, the legislature never even uttered the
24 words "just and reasonable" with respect to prices that
25 consumers pay. It's about what utilities, at the time that



1 it was enacted, monopoly utilities charged. And the reason
2 was clear: if the utilities can charge whatever they want
3 to in a monopoly, and we all need electric and we all need
4 gas, we have no choice but to be at their mercy.

5 So the legislature, they ellipsis out the thirty-
6 nine, I think it is, times that Article 4 refers to gas and
7 electric corporations only, and then the legislature spoke
8 to this issue in 2002 and said we are only changing those
9 references to gas and electric corporations for purposes of
10 Article 2. Only - - -

11 JUDGE WILSON: So let's assume for a moment that
12 the PSC can't set ESCO rates. Assume that. Why can't the
13 PSC say to traditional utilities, you don't have to make
14 your lines and pipes available unless an ESCO is charging
15 less than your rate?

16 MR. CYRULNIK: So I don't want to evade the
17 question, I just want to point out that's not the - - -

18 JUDGE WILSON: I know. I understand that's not -
19 - -

20 MR. CYRULNIK: To Your Honor's point, that's not
21 - - -

22 JUDGE WILSON: - - - what they said.

23 MR. CYRULNIK: I think that would be an end run
24 around the legislative intent. I think that the - - - the
25 PSC - - -



1 JUDGE WILSON: Doesn't the statute authorize
2 that?

3 MR. CYRULNIK: I don't think so. There's not a
4 single citation to a statute that says that the PSC gets to
5 decide whether or not a particular ESCO or a group of ESCOs
6 or ESCOs generally get to use those lines. That was
7 enacted - - - and to the questions that were asked earlier,
8 it may have been enacted in - - - in '99, some of those
9 protections, but most of those protections are coterminous
10 with the things the legislature spoke to in Article 2. And
11 if they weren't, they very well might not have been proper.
12 But it wasn't raised because shortly thereafter the
13 legislature spoke and said here's what we're going to allow
14 you to do.

15 So to Your Honor's question directly, I think it
16 would be wrong to allow the PSC to essentially open up a
17 back door. And back door is the wrong word; it's basically
18 a gaping hole that - - - that upended the entire - - -

19 JUDGE RIVERA: But it isn't the reality that if
20 you look at the legislative history, look at the
21 legislative trends, it's let's deal with the monopoly,
22 competition, we believe, is a good thing, let's allow the
23 opportunity for that. And then, as moving forward, it's
24 the legislature trying to ensure that there's actually a
25 benefit and that there are protections for consumers. And



1 if that's not what's happening in the market, why don't
2 they have the authority to say we're going to try and
3 figure out a way to make that happen in the market? Maybe
4 eventually they'll decide they can't.

5 MR. CYRULNIK: Yeah.

6 JUDGE RIVERA: Maybe they think they can.

7 MR. CYRULNIK: So Your Honor, I think there are -
8 - - I'll try to answer it short because I know I'm over
9 time, but I think the answer to that question is, if you
10 look at the PSC's brief itself, pages 25 through 29, they
11 cite four instances where the legislature responded to what
12 they thought were problems with the ESCO market. They cite
13 PSL 32(d) - - - 32(5)(d), PSL 30, and GBL 349. Each of
14 those is introduced by the PSC in its brief as the
15 legislature saw a problem with ESCOs, now that ESCOs were
16 introduced, and the legislature acted. They enacted this
17 statute and this statute and this statute.

18 That speaks volumes about how the legislature can
19 and does and intended to reserve the right to legislate
20 with respect to ESCOs. That's not the same thing as saying
21 we're not getting involved, we're going to let the PSC do
22 everything it wants to because this is part of the energy
23 market.

24 And I think this really reduces to that discrete
25 question. This is a statutory interpretation issue, and if



1 there is a regulation that's promulgated that's
2 inconsistent with the statutory express language, the
3 legislative history, in that regard, the amendment in 2002,
4 and the PSC's own admissions, I think it's - - - I think
5 it's proper for this court to reverse.

6 And I don't want to test the court's patience,
7 but if I can have just fifteen seconds to address the
8 mootness issue on this point.

9 CHIEF JUDGE DIFIORE: You may.

10 MR. CYRULNIK: To Judge Garcia's question. I
11 think there is - - - I think there is an order before this
12 court. It was promulgated. It was the reset order. I
13 know the reset order's not in effect, but there was a
14 request below, very clear; it was a count to declare that
15 reset order, the regulations with respect to price on the
16 ESCOs, as an invalid, ultra vires exercise of the PSC's
17 authority. It couldn't have been clearer. The reason it
18 wasn't raised below is because the first time we ever heard
19 a mootness argument was in their opposition brief in this
20 court.

21 But to Your Honor's question, absolutely, that
22 was an issue that - - - on which we're aggrieved because
23 the court then remitted this for further proceedings. And
24 not only is there a further proceeding going on, but it
25 denied us the declaration, and then the low-income order



1 was based on the very same order that's before Your Honors
2 right now. So it's bootstrapping to say, well, the third -
3 - - and he - - - and Mr. Bassinson told you what he's going
4 to do; he's going to use the low-income order, which was
5 based on the order below, that is before this court right
6 now, he's going to use that as a basis for saying the ESCOs
7 don't get to raise this issue anymore.

8 So it's clear - - - we're clearly aggrieved, we
9 see the writing on the wall, we know what's going on over
10 here, and that's why we properly preserved the right to
11 challenge Judge Zwack's and the Third Department's decision
12 with respect to the discrete issue that we raised in our
13 pleading and that we were aggrieved on. The idea that the
14 PSC has the authority to set ESCO rates is antithetical to
15 the PSL and it can't be squared with this legislative
16 history.

17 CHIEF JUDGE DIFIORE: Thank you, Mr. Cyrulnik.

18 MR. CYRULNIK: Thank you, Your Honor, and thank
19 you for the extra time. I apologize.

20 CHIEF JUDGE DIFIORE: Mr. - - - you're welcome.

21 Mr. Burch?

22 MR. BURCH: Thank you, Your Honors, and I will be
23 brief and try not to repeat anything. But thank you for
24 allowing me a brief amount of rebuttal time.

25 You know, when you look at what the legislature



1 did here, I think they set up a scheme that's organically
2 grown where you have utilities being regulated. One thing
3 I would correct from respondent's argument is the - - - the
4 PSC certainly has the ability and the responsibility to
5 make sure utility rates are just and reasonable. The
6 Public Service Law doesn't say ESCO rates have to be just
7 and reasonable. Obviously we hope, through competition,
8 that they are. And this is really about consumer choice
9 and the legislature, you know, setting up a system - - -

10 JUDGE STEIN: Well, but the purpose of this
11 wasn't just to give them the choice to either get more
12 expensive energy or less expensive energy because somebody
13 - - - some nice young person came to their door and said,
14 oh, why don't you buy your gas and electric from me. I
15 mean, that wasn't the purpose. So - - - so to say that - -
16 - that the Public Service Law doesn't say that ESCO rates
17 have to be fair and just doesn't fit, to me, within the
18 legislative purpose and scheme.

19 MR. BURCH: I'm not arguing that they shouldn't
20 be fair and just. Obviously we hope competition sets them
21 in a fair and just way. I'm saying they don't have the
22 power to set them.

23 And to address your example of someone coming to
24 the door - - -

25 JUDGE STEIN: Well, the question is: do they



1 have the power to set up the system to ensure that the
2 rates being charged in the - - - for - - - for utilities is
3 fair and reasonable - - - are fair and reasonable.

4 MR. BURCH: And Your Honor, I think the
5 legislature clearly has spoken on that, and they say, yes,
6 you can regulate the rates of utilities, no, you can't
7 regulate the rates of ESCOs. If they wanted to put that
8 power into place, they have had times when this was hotly
9 debated in the legislature, and they came out with a scheme
10 that - - - that they did. And it's not this one.

11 And you know, to address your hypothetical of,
12 you know, someone coming to the door, there are all kinds
13 of consumer protection statutes in place, and rightly so.
14 No one wants bad actors in this market, and the government
15 has powers. Yeah.

16 JUDGE STEIN: I'm not suggesting that they be bad
17 actors; I'm just suggesting that - - - that the - - - the
18 purpose of the system is to enhance the likelihood that
19 consumers will receive the best prices for their utilities.

20 MR. BURCH: And again, I'd go back to the
21 legislature spoke on this, there's competition; that's the
22 broad policy of the state, except for limited circumstances
23 like where there's monopolies acting. It's not for the
24 Public Service Commission to make this decision. This is a
25 very big policy choice. The legislature should make that



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decision, and they haven't. Thank you, Your Honors.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Matters of National Energy Marketers Association v. NYS Public Service Commission and Retail Energy Supply Association v. NYS Public Service Commission, Nos. 21, 22 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: March 24, 2019

