

To Be Argued By:
Jason C. Cyrulnik
Time Requested: 30 Minutes

APL-2018-00046
Appellate Division Docket No. 523993
Albany County Clerk's Index No. 868-16

COURT OF APPEALS
STATE OF NEW YORK

NATIONAL ENERGY MARKETERS ASSOCIATION, BLUEROCK ENERGY, INC., BOUNCE ENERGY NY, LLC; DIRECT ENERGY BUSINESS MARKETING, LLC; DIRECT ENERGY BUSINESS, LLC; DIRECT ENERGY SERVICES, LLC; ENERGETIX, INC.; GATEWAY ENERGY SERVICES CORP.; NORTH AMERICAN POWER & GAS, LLC; NYSEG SOLUTIONS, INC.; RESIDENTS ENERGY, LLC; AND VERDE ENERGY USA NEW YORK, LLC,

Petitioners-Appellants,

—*against*—

NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondents.

PETITIONERS-APPELLANTS' MOTION FOR REARGUMENT

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Dated: June 10, 2019

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Appellants respectfully submit this motion for reargument pursuant to Rule 500.24 of the Rules of Practice. Appellants request that the Court grant reargument with respect to the point of law, and on the ground, discussed below.

THE COURT’S DECISION

This appeal presented the critical question of the scope of the New York Public Service Commission’s (PSC) authority over private companies. This question arose in the context of the Legislature’s decision to directly impart to the PSC broad authority over public utilities (“gas corporations” and “electric corporations”) – ranging from setting their rates (Article 4) to regulating their billing and service practices (Article 2) – and the Legislature’s corresponding decision not to impart the same authority to the PSC over private companies that do not own or control New York’s energy infrastructure.

In its Opinion, this Court recognized the foregoing facts and their legal import. Specifically, in rejecting the PSC’s argument that ESCOs are electric and gas corporations as defined by the PSL, the Court noted that the PSC’s urged interpretation violated fundamental tenets of statutory interpretation this Court has consistently applied. Specifically, the Court pointed to the Legislature’s 2002 amendment of the PSL to impart to the PSC authority over ESCOs – but only for a

very specific, limited purpose, delineated in discrete sections of Article 2 of the PSL.

The Court thus held:

[A]doption of the PSC’s interpretation of the statutes would render Public Service Law § 53 meaningless. Section 53 provides that, for purposes of Public Service Law article 2 only – which addresses limited consumer protection measures – “a reference to a gas corporation, an electric corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers.” If the more general definitions of gas and electric corporations in Public Service Law § 2 covered ESCOs, there would have been no need for the legislature to enact section 53 in 2002.

ARGUMENT

But that exact reasoning also applies to undermine the PSC’s alternative argument, which the Court endorsed. Permitting the PSC to impose utility-type restrictions on ESCOs through the “back door” the decision contemplates similarly renders the 2002 legislative amendment meaningless – in the Court’s words, “there would have been no need for the legislature to enact section 53 in 2002” if the PSC already had the authority to impose all of those regulations on non-utilities by making them conditions for accessing utility lines. “Thus, acceptance of the PSC’s interpretation of” its conditional-access power “would require [the Court] to disregard the ‘accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be

avoided.” Opinion at 11 (quoting Matter of Springer v Bd. of Educ. of the City Sch. Dist. of the City of N.Y., 27 NY3d 102, 107 [2016], quoting Recovich v Consol. Edison Co., 78 NY2d 509, 515 [1991]).

In addition to rendering the 2002 amendment meaningless, the “conditioned access” reasoning in the Opinion yields other improper results. As applied to a price regulation, the reasoning in the Opinion could permit the PSC to regulate precisely the things the Legislature affirmatively elected not to allow the PSC to regulate with respect to ESCOs. In specifically recognizing that the PSL did not cover ESCO regulation at all in 2002, and then deciding to amend only one of the PSL’s articles (Article 2) to extend to ESCOs, the Legislature affirmatively decided not to do the same for Article 4 (price regulation).

Enabling the PSC to impose restrictions through “conditioned access” to utility infrastructure that it could not impose through direct statutory authorization would allow the PSC to bypass the very limits the Legislature imposed on it by expanding its authority over “gas and electric companies” (public utilities over which the Legislature gave the PSC the power to set rates) to regulate ESCOs – over which the Legislature specifically declined to permit the PSC to decide rates. The PSC repeatedly recognized its lack of jurisdiction over rates charged by non-utilities. *See* Case No. 94-E-0952, Opinion No. 97-17, Nov. 18, 1997, at 34-35 (holding that it is “incorrect” that ESCOs are “subject to PSL Article 4 regulation”) (goo.gl/YsGHsu);

Case 06-M0647, *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms*, Nov. 8, 2006, at 10 (recognizing that “ESCOs are exempt from PSL Article 4 regulation”) (goo.gl/QTaFbt).

Creating a back-door power of “conditioned access” that has the effect of permitting the PSC to regulate beyond the bounds that the Legislature has specifically delimited would conflict with this Court’s consistent jurisprudence regarding how statutes must be interpreted. See, e.g., *Andryeyeva v. N.Y. Health Care, Inc.*, No. 11, 2019 WL 1333030, at *8 (N.Y. Mar. 26, 2019) (“All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof.”) (quoting *McKinney’s Cons. Statutes* § 98); *Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018) (“A statute ‘must be construed as a whole’ and ‘its various sections must be considered together and with reference to each other.’”) (quoting *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 [1979]).

In the PSL, the Legislature has established a framework by which the PSC has jurisdiction over behavior of non-utilities with respect to Article 2–related billing and services practices – but it has never expanded the PSC’s fundamental Article 4 utility ratemaking jurisdiction to encompass non-utilities. This Court has never before endorsed an approach that has the effect of rendering meaningless a clear and recognized statutory distinction drawn by the Legislature, and should not do so here.

Appellants thus respectfully submit that the Opinion overlooked this internal inconsistency in its Opinion and request that the Court grant reargument on this issue.

Appellants also submit that in citing Section 66-d as the basis for its “conditioned access” reasoning, the Opinion misapprehended the record demonstrating that Section 66-d concerns only gas commodity, and no similar provision applies to the provision electric commodity. In a footnote, the Opinion notes that there is no similar statute that covers electric commodity, but refers only to the fact that the PSC (not the Legislature) had adopted a similar scheme for the electric industry. The record demonstrates that there is no 66-d equivalent for the provision of electricity, and Appellants respectfully submit that this misapprehension also warrants reargument.

Dated: June 10, 2019
Armonk, New York

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Appellants make this corporate disclosure statement pursuant to Rules 500.1[f] and 500.21[f]. Appellants and their subsidiaries and parents are as follows:

National Energy Marketers Association: none

Residents Energy LLC: Genie Energy Ltd.; Genie Energy Int'l Corp.; Genie Oil and Gas, Inc.; Genie Retail Energy, Inc.; Genie Retail Energy Int'l, LLC; LED USA, LLC; IDT Energy, Inc.; IntelliMark Services, LLC; Mirabito Natural Gas, LLC; Retail Energy Holdings LLC; American Shale Oil Corp.; Genie Mongolia, Inc.; North American Energy, Inc.; Virtual Power Hedging, LLC; Town Square, LLC; Town Square Energy East, LLC; AMSO Holdings, LLC; AMSO Holdings I, Inc.; Evergreen Gas & Electric, LLC; American Shale Oil, LLC; Trupro Energy, LLC; Genie Energy Services, LLC; DMS Promotions, LLC; Diversegy, LLC; Diversegy Consultant Program, LLC; DiversegyPro, LLC; Genie Solar; Diversegy Consultant Program, LLC

BlueRock Energy Inc.: Renovus Rock, LLC; Grand Island Solar, LLC; Western NY Energy Services, Inc.; Natural Gas Business Associates, Inc.; New York Energy, Inc.; BlueRock Solar, Inc.; BlueRock Energy Services, Inc.; Benchmark Services, Inc.

North American Power & Gas, LLC: none

Verde Energy USA New York, LLC: AES Ventures Holdings, LLC; AES, Ventures, LLC; Ampegy, LLC; Associated Energy Holdings, LLC; Associated Energy Services, LP; Bargain Energy LLC; Broadway Energy, LLC; Censtar Energy Corp.; Censtar Operating Company, LLC; CO2 Gas Processing Partners, LLC; Criterion Compression, LLC; Electric Holdco, LLC; Electric Now Holdings, LLC; Electricity Maine, LLC; Electricity N.H., LLC; Emblem Energy, LLC; E-Now, LP; Equibase, LLC; Fuelco Energy, LLC; Ideal Interaction, LP; Major Energy Electric Services LLC; Major Energy Services LLC; Maris Investment Company, LLC; Marlin IDR Holdings, LLC; Marlin Midstream Holdings, LLC; MaxMin Resources, LLC; MMLMCO Holdings, LLC; National Gas & Electric, LLC; NMD Holdings, LLC; NuDevco Capital GP I, LLC; NuDevco Energy Fund I, LP; NuDevco Midstream Development, LLC; NuDevco Midstream Land Company, LLC; NuDevco Partners Holdings, LLC; NuDevco Partners, LLC;

NuDevco Retail Holdings, LLC; NuDevco Retail, LLC; Oasis Power Holdings, LLC; Oasis Power, LLC; Provider Power Mass, LLC; Respond Power LLC; RetailCo Acquisition Co, LLC; Retailco Services, LLC; RetailCo, LLC; RSM Energy, LLC; Spark Energy , LLC; Spark Energy Gas, LLC; Spark Energy, Inc.; Spark HoldCo, LLC; Tarpon Gas Storage, LP; Tarpon Sparta Gas Storage, LLC; Tarpon Whitetail Gas Storage, LLC; TexEx Energy Operating, LLC; TGS Drilling, LP; TGS Holdings, LLC; TGS Land, LP; Timberland Growth Investments, LP; Timberland Holdings, LLC; Timberland New Growth, LLC; TxEx Energy Investments, LLC; Wahoo Enterprises, LLC; Wahoo Hirecar Funding, LLC; Wahoo Moneyball, LLC; White Stallion Energy Center, LLC; William K. Maxwell, III (Owner) Xcal Holdings, LLC; Xcalibur Logistics, LLC; Verde Energy USA Trading, LLC; Verde Energy USA New Jersey, LLC; Verde Energy USA Pennsylvania, LLC; Verde Energy USA Illinois, LLC; Verde Energy USA Ohio, LLC; Verde Energy USA Massachusetts, LLC; Verde Energy USA Maryland, LLC; Verde Energy USA, Inc.; Verde Energy USA DC, LLC; Verde Energy USA Texas Holdings, LLC; Verde Energy USA Texas, LLC; Verde Energy USA Connecticut, LLC