SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NATIONAL FUEL GAS DISTRIBUTION CORPORATION, NEW YORK STATE ELECTRIC & GAS CORPORATION, THE BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID NY, KEYSPAN GAS EAST CORPORATION D/B/A NATIONAL GRID, NIAGARA MOHAWK POWER CORPORATION D/B/A NATIONAL GRID, ORANGE AND ROCKLAND UTILITIES, INC., AND ROCHESTER GAS AND ELECTRIC CORPORATION,

Petitioners,

- against -

STATE OF NEW YORK PUBLIC SERVICE COMMISSION,

Respondent.

Index No.

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MEMORANDUM OF LAW IN SUPPORT OF THE JOINT UTILITIES' VERIFIED PETITION

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Petitioners Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY, KeySpan Gas East Corporation d/b/a National Grid, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (collectively, "Petitioners" or the "Joint Utilities") respectfully submit this memorandum of law in support of their Verified Petition and Complaint.

PRELIMINARY STATEMENT

In this hybrid CPLR Article 78 proceeding and declaratory judgment action, the Joint Utilities challenge the July 14, 2022 order of Respondent-Defendant State of New York Public Service Commission (the "Commission" or "Respondent") that incorrectly interpreted Public Service Law ("PSL") § 73 to deny utilities the right and opportunity to petition the Commission for a waiver of the statutory requirement that utilities absorb the costs of compensating customers after service outages of 72 consecutive hours or more without recovery from their ratepayers, even where the utility bears no fault for the outage or its duration.

In section 73, the Legislature imposed new requirements and costs on utilities in New York following widespread prolonged power outages. Utilities must provide their affected customers will bill credits and reimbursements, and

must absorb the costs of doing so without recovery from their ratepayers. The Legislature, however, included a provision in the statute immediately following these requirements that allow utilities to "petition the commission for a waiver of the requirements of this section" (PSL § 73[3]). The plain text and structure of the waiver provision preserves utilities' right and opportunity to petition the Commission to allow recovery of the new section 73 costs, and only changes how the Commission is required to consider those waiver petitions.

The Commission's order, however, adopted a contrary interpretation. The Commission determined that utilities can never petition for a waiver of the statutory requirement that they absorb these customer compensation costs without cost recovery, because the language of section 73(2) is "unconditionally prohibitory" and thus is not a "requirement of this section" that is subject to waiver (Commission Order, at 30). The Commission's interpretation is arbitrary and capricious, and should be annulled.

The language of section 73(2), requiring utilities to absorb the section 73 costs without cost recovery, is as much a "requirement of the statute" as are the subsection (1) compensation requirements. Subsections (1) and (2) use the same "shall / shall not" language, and are not phrased in a way that would deny forever utilities the right and opportunity to petition the Commission to determine whether cost recovery may be appropriate. Moreover, the Legislature intentionally placed

the subsection (3) waiver provision immediately following both of the subsections (1) and (2) requirements, indicating its intent that the waiver process apply to both.

The Joint Utilities do not ask this Court to guarantee that they will receive cost recovery after any or every outage. Rather, they merely seek to ensure that they will continue to have the right and opportunity to petition the Commission to allow recovery of their costs in cases where recovery is "fair, reasonable and in the public interest" (PSL § 73[3]). This Court should therefore annul the Commission's July 14, 2022 order to the extent that it determined that section 73 does not permit the utilities to petition for a waiver of the requirements of section 73(2).

STATUTORY AND REGULATORY BACKGROUND

Under the Public Service Law, utility companies may recover the cost of providing utility services to customers through "just and reasonable" rates reviewed and approved by the Commission (*see generally* PSL § 65[1]). Cost recovery recognizes the principle that to provide safe and adequate service, a utility must have a reasonable opportunity to earn revenue to cover its operating expenses and to earn a reasonable return on capital invested. Thus, the Commission has a long-standing "policy of generally favoring the recovery of whatever expenditures a utility can demonstrate to have been prudently incurred" (*Matter of Abrams v*

Public Serv. Commn. of State of N.Y., 67 NY2d 205, 214-215 [1986]; *accord Matter of Hinchey v Public Serv. Commn*, 144 AD2d 136, 138 [3d Dept 1988]).

In 2022, the Legislature imposed new costs on utilities. Under section 73 of the PSL, the Legislature provided that in the event of a widespread prolonged power outage lasting at least 72 consecutive hours, utility companies must provide: (1) residential customers a bill credit of $25 for each full 24-hour period after the first 72 consecutive hours of the outage; (2) residential customers reimbursement for food and prescription medications that spoiled due to lack of refrigeration; and (3) small business customers reimbursement for food that spoiled due to lack of refrigeration (PSL § 73[1][a]–[d]). Section 73 further required the Commission to promulgate procedures, standards, methodologies, and rules to implement the statute and to define certain key terms (*id.* § 73[4]).

In addition to requiring the utilities to compensate impacted customers, section 73 also changes the default rule for cost recovery by requiring that utilities absorb these new costs without recovery from their customers (*id.* § 73[2] [the "No-Cost-Recovery" requirement]). The Legislature, however, enacted a provision in section 73 allowing utilities to "petition the commission for a waiver of the requirements of this section" (*id.* § 73[3]). The waiver provision places the burden of proof on the utilities to demonstrate that a waiver of any of the statute's requirements is "fair, reasonable and in the public interest" and directs the

Commission to consider certain enumerated factors in determining whether to grant a waiver (*id.*). Thus, although PSL § 73 changes the default rule that a utility may recover its prudently incurred costs on a case-by-case basis, it is not an unconditional ban on the utilities petitioning for a waiver of the "No-Cost-Recovery" requirement. And it does not deprive the Commission of jurisdiction to grant a waiver of the "No-Cost-Recovery" requirement when the facts show that allowing cost recovery would be "fair, reasonable and in the public interest" (*id.*).

THE COMMISSION'S JULY 14, 2022 ORDER

In implementing section 73's mandates, however, the Commission reached the opposite conclusion. On July 14, 2022, the Commission issued an order defining certain terms in the statute and promulgating rules to implement its requirements (Verified Petition, Ex. A [the "Commission Order"]). The Commission determined that the utilities may not petition for a waiver of section 73(2)'s "No-Cost-Recovery" requirement, because "the Commission does not read the phrase 'requirements of this section' to apply to subdivision (2), which contains language that is unconditionally prohibitory" (Commission Order, at 30).

In addition, the Commission reasoned, "allowing for cost recovery of the costs of credits and reimbursements provided pursuant to PSL §73 would essentially require that customers pay the Utility for the credits the Utility provided to customers. This would undermine the objective of PSL §73, which is to provide

customers with compensation when they experience a widespread prolonged outage. PSL §73(2) is subsidiary to PSL §73(1)" (*id.*). It further argued that "[i]f a Utility requests a waiver of the requirements of PSL §73(1), and demonstrates that waiver of those requirements is fair, reasonable, and in the public interest, then there would be no need to waive PSL §73(2)" (*id.*).

Because the Commission's order contradicts the text, structure, and purpose of section 73, the Joint Utilities bring this proceeding to vindicate their right under the statute to petition the Commission for a waiver from section 73(2)'s requirement that they not recover the cost of customer compensation from ratepayers.

ARGUMENT

THE COMMISSION'S INTERPRETATION OF SECTION 73 OF THE PUBLIC SERVICE LAW TO PROHIBIT UTILITIES FROM PETITIONING FOR A WAIVER OF THE NO-COST-RECOVERY REQUIREMENT IS ARBITRARY AND CAPRICIOUS

In enacting Section 73, the Legislature did not deprive utilities of the right to petition for cost recovery, nor the Commission of its authority to entertain and decide such petitions. To the contrary, the text and structure of section 73 show that the Legislature intended to allow utilities to petition for cost recovery, notwithstanding the requirements of section 73(2), subject to the Commission's review of the waiver criteria under section 73(3). Notably, acknowledging that, section 73 preserves the utilities' right to petition for a waiver of the "No-Cost-

Recovery" requirement does not guarantee that the Commission will grant cost recovery in any or every instance. Rather, the Commission will decide each waiver petition on its own facts, and grant cost recovery only when it is "fair, reasonable and in the public interest" (PSL § 73[3]).

Because the Commission's interpretation of section 73 contradicts its plain text, structure, and purpose, the July 14, 2022 order should be annulled, to the extent it prohibits utilities from filing petitions for waiver of subsection (2)'s "No-Cost-Recovery" requirement.

A. The Commission's Interpretation of Section 73 Conflicts With Its Plain Text.

"[T]he primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature" (*Verneau v Consol. Edison Co. of New York, Inc.*, 37 NY3d 387, 395 [2021] [internal punctuation and citation omitted]). To determine legislative intent, this Court must begin—and here can end—its inquiry with the plain language that the Legislature has chosen (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006]; *Matter of Theroux v Reilly*, 1 NY3d 232, 239 [2003] ["When interpreting a statute, we turn first to the text as the best evidence of the Legislature's intent."]; *Riley v County of Broome*, 95 NY2d 455, 463 [2000]). Where, as here, the words used are unambiguous, their plain meaning must control (*see Burton v New York State Dept. of Taxation and Fin.*, 25 NY3d 732, 739 [2015]; *Jones v Bill*, 10 NY3d 550, 554 [2008]; *Riley*, 95

NY2d at 463; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]).

Importantly, here, this Court need not defer to the Commission's interpretation of the statute because it involves only a pure question of law that does not require any special administrative expertise—namely, whether subsection (2) is one of the "requirements of this section" that utilities may petition the Commission to waive (PSL § 73[3]; *see Matter of Suffolk Regional Off-Track Betting Corp. v New York State Racing and Wagering Bd.*, 11 NY3d 559, 567 [2008] ["Deference to administrative agencies charged with enforcing a statute is not required when an issue is one of pure statutory analysis."]; *see also e.g. Matter of Sbriglio v Novello*, 44 AD3d 1212, 1214 [3d Dept 2007] [declining to afford deference to an agency's statutory interpretation because "the words 'written approval' in Public Health Law § 2802 (7) are not used in any 'technical' sense 'such that [respondent] has a greater competence in interpreting the statute than the courts,'" quoting *Matter of Judd v Constantine*, 153 AD2d 270, 272-273 (3d Dept 1990)]).

The Legislature's choice of language in section 73 is plain and unambiguous. Section 73(1) and 73(2) lay out the requirements of the section. Section 73(1) includes several discrete requirements. After a power outage lasting more than 72 consecutive hours, the utilities shall provide $25 bill credits to

affected customers for each 24-hour period that the outage lasts beyond the first 72 consecutive hours (*see* PSL § 73[1][a]). The utilities must also reimburse affected residential and small business customers for losses of perishable food that spoiled due to lack of refrigeration, and residential customers also for spoiled prescription medicine (*see id.* § 73[1][b], [c], [d]). The law requires utilities to set up a compensation program for their impacted customers, with deadlines that are set in the statute for customers to submit claims for reimbursement (*see id.* ["Residential utility customers shall provide the utility company an itemized list of all food spoiled or proof of loss of food spoiled within fourteen days of the outage."]). Subsection (1) imposes an additional requirement that utilities pay the reimbursement claims within 30 days of receipt (*see id.*).

Subsection (2) of section 73 then requires that the utilities absorb those new costs of operating a public utility service without cost recovery from their customers (*see id.* § 73[2] ["Any costs incurred by a utility company pursuant to this section shall not be recoverable from ratepayers."]). In so providing, the Legislature changed the default rule under the Public Service Law that generally allows utilities to petition the Commission to permit recovery of all of the utilities' costs, and permits the Commission to grant cost recovery when the utilities' costs were prudently incurred (*see* PSL § 65[1] ["All charges made or demanded by any such gas corporation, electric corporation or municipality for gas, electricity or any

service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission."]; *see e.g. Hinchey*, 144 AD2d at 138 [confirming determination of Commission to allow cost recovery of a utility's investment in a nuclear power plant because it was prudent]).

For costs incurred under section 73, rather than allow the default rule to govern, the Legislature created a new rule that the utilities would pay these costs on their own. Section 73, however, does not deprive utilities of the right to petition for cost recovery or the Commission of its normal authority to entertain the utilities' cost recovery applications. The Legislature followed the statutory requirements in section 73(1) and (2) with section 73(3), which authorizes the utilities to "petition the commission for a waiver of *the requirements of this section*" (PSL § 73[3] [emphasis added]). This provision provides utilities the opportunity to petition for a waiver of the "No-Cost-Recovery" requirement in the same manner as the law's other requirements, and for the Commission to adjudicate whether such a waiver is "fair, reasonable, and in the public interest" (*id.*).

The requirement that the utilities absorb the costs of compensating customers under section 73 without cost recovery is unambiguously one of the requirements of the statute. Indeed, had the Legislature not added subsection (2)'s "No-Cost-Recovery" requirement to the statute, the utilities' costs to compensate

customers under section 73(1) would have been subject to the Public Service Law's general rule that the utilities may request approval from the Commission to recover of all of their prudently incurred costs. In section 73, the Legislature sought to change that default rule to generally exempt these specific costs from the utilities' normal cost recovery requests. But by including the subsection (3) waiver mechanism, the Legislature did not prohibit cost recovery altogether, and deprive utilities of the typical right to petition the Commission to recover its costs of customer compensation. Rather, under section 73, cost recovery is not the default rule, but utilities may still petition for the Commission to allow the recovery of these costs on a case-by-case basis.

The Commission's determination that subsection (3)'s waiver provision does not apply to subsection (2)'s "No-Cost-Recovery" requirement does not make sense in light of the words that the Legislature chose. The Commission reasoned that subsection (2)'s "No-Cost-Recovery" requirement is not a requirement of the statute because it "contains language that is unconditionally prohibitory" (Verified Petition, Ex. A, at 30). But subsection (2) does not contain "unconditionally prohibitory" language. It does not state that the utilities may "never" request or the Commission may "never" grant cost recovery. Indeed, subsection (2)'s language—the utilities "shall not" obtain cost recovery for section 73 costs—mirrors subsection (1)'s language that provides the utilities "shall" pay the bill credits and

reimbursements. The Legislature could have framed subsection (2) as mandatory rather than prohibitory, and the requirement of the statute would have remained the same.[1] Because the Commission does not dispute that subsection (3)'s waiver provision allows utilities to petition for a waiver from subsection (1)'s compensation requirements entirely (Commission Order, at 30), it was arbitrary to determine that the same language used in subsection (2) deprived utilities of the right and opportunity to petition for a waiver of the "No-Cost-Recovery" requirement.

If the Legislature wished to limit the subsection (3) waiver provision to only subsection (1)'s requirements and not to subsection (2)'s requirements, it could have said so by adding language to that effect (*see e.g. Kuzmich v 50 Murray St. Acquisition LLC*, 34 NY3d 84, 93 [2019], *rearg denied* 33 NY3d 1135 [2019], *cert denied* 140 S Ct 904 [2020] [declining to adopt defendant's construction of statute that was contrary to its plain terms, and holding that "if the legislature intended" to adopt defendant's construction, "it easily could have so stated"]). It did not add any such limiting language, but rather decided that the waiver provision should apply to all of the "requirements of this section" (PSL § 73[3]).

[1] For example, subsection (2) could have read: "Utilities shall be required to absorb any costs incurred pursuant to this section without cost recovery from ratepayers," and it would still contain the same requirements.

The Commission's mistaken interpretation of section 73 adds a new exception to the statute that the Legislature did not include. By determining that the subsection (3) waiver provision only allows for waivers of the subsection (1) compensation requirements, the Commission read new words into subsection (3) that the Legislature never intended. Section 73(3) states "a company may petition the commission for a waiver of the requirements of this section" and the Commission's interpretation effectively added an additional clause: "*except for those requirements set forth in subsection 2*." The Legislature omitted those words from the statute precisely because it did not intend to exclude any of section 73's requirements from the waiver process. The Commission's attempt to add those words in anyway, by arbitrarily interpreting section 73 as it has, improperly traverses into the legislative domain, well outside of the Commission's well-defined jurisdiction, and should be annulled (*People v Page*, 35 NY3d 199, 208 n4 [2020] [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"], *cert denied sub nom. Page v New York*, 141 S Ct 601 [2020]; *see also* Statutes § 76 [McKinney's] ["[T]o interpret a statute where there is no need for interpretation, to conjecture about or to add to or to subtract from words having a definite meaning, or to *engraft exceptions where none exist* are trespasses by a court upon the legislative domain." (emphasis added)]).

Importantly, reading section 73 to preserve the utilities' right and opportunity to petition for a waiver of the "No-Cost-Recovery" requirement does not guarantee that cost recovery will be granted in every instance. Whether to grant a waiver remains up to the Commission, after it considers the Legislature's waiver factors (*see* PSL § 73[3]). The Commission's July 14, 2022 determination, concluding that the utilities may not even ask for a waiver of the "No-Cost-Recovery" requirement, is arbitrary and capricious and should be annulled (*see e.g. Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 33 NY3d 336, 348 [2019] ["the PSC's reading of section 2 contradicts the plain statutory language, violating the fundamental canon of construction that, when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (quotation marks and alterations omitted)]).

B. The Commission's Interpretation of Section 73 Ignores How the Legislature Structured the Statute.

As pointed out by Commissioner Burman during the Commission's deliberations at the July 14, 2022 public session, the Commission's interpretation of section 73 overlooks how the Legislature structured the statute. Because the subsection (3) waiver provision follows directly after the requirements of the statute articulated in subsections (1) and (2), it must apply to both.

It is well established that a statute "must be construed as a whole and its various sections must be considered together and with reference to each other" (*Colon v Martin*, 35 NY3d 75, 78 [2020] [internal quotation marks, ellipses and citations omitted]; *see also Estate of Youngjohn v Berry Plastics Corp.*, 36 NY3d 595, 603-604 [2021] [holding that courts should "harmonize[]" all "interlocking provisions" of a statute]). Importantly, a statute's provisions should be read "sequentially" to "give the statute a sensible and practical over-all construction" (*Matter of Long v Adirondack Park Agency*, 76 NY2d 416, 420 [1990]).

Here, the Commission's interpretation overlooks these settled principles of statutory construction. The first two subsections of PSL § 73 fully articulate the statute's requirements: utilities must provide the bill credits and reimbursements when an outage lasts for more than 72 consecutive hours and must absorb the costs of doing so without cost recovery (*see* PSL § 73[1], [2]). Only then did the Legislature add subsection (3)'s waiver provision, immediately following the first two subsections, to allow the utilities to petition to the Commission for a waiver of *any* of the statute's requirements, and to state what factors the Commission must consider in deciding whether to grant a waiver (*see id.* § 73[3]).

Commissioner Burman aptly noted the Legislature's intentional structuring of section 73 at the Commission's July 14, 2022 public session:

> Commissioner Burman: The reality is that I disagree with where we are saying that the waiver cannot include cost recovery. I think that goes

> against actually the intent of the statute. First of all, it's Section 1, Section 2, Section 3, Section 4 . . . . *When you get to the section on the waiver, it's right after the section that said, no cost recovery*.

(Verified Petition, Ex. E, at 45-46).

Department of Public Service General Counsel Robert Rosenthal, in opposing the enactment of section 73, similarly acknowledged that the structure of the statute would allow utilities to exercise their right to petition for cost recovery:

> Part B of this legislation amends the Public Service Law to require gas and electric corporations to provide residential customers with: (1) a credit of $25 on the balance of their bill for each 24-hour period of service outage that occurs for more than 72 consecutive hours after an emergency event; and (2) reimbursement for any medication and food that expires or spoils due to a service outage that lasts longer than 72 consecutive hours after an emergency event. The bill extends food spoilage requirements to small businesses, and prohibits cost recovery from ratepayers. *Utilities may apply to the Commission for a waiver from these mandates*.

(Ltr from Robert Rosenthal, Gen. Counsel, Dept. of Pub. Serv., Recommending Disapproval, July 21, 2021, Bill Jacket, L 2021, ch 786, at 11 [emphasis added]).

Had the Legislature intended the interpretation of section 73 that the Commission has now adopted, it would not have structured section 73 as it did, with subsection (3)'s waiver provision immediately following subsections (1) and (2)'s requirements of the statute. If the waiver only applied to the compensation requirements of subsection (1) and not to the subsection (2) "No-Cost-Recovery" requirement, the Legislature would have placed the waiver provision within subsection (1). Had the Legislature chosen that structure, then its supposed intent

to limit the waiver provision to the subsection (1) compensation requirements would have been clear. That, however, is not how the Legislature chose to structure section 73.

Because the Legislature intentionally chose to place the subsection (3) waiver provision directly following the subsection (2) "No-Cost-Recovery" requirement, the Court should respect that choice, hold that the utilities may petition the Commission for a waiver of the "No-Cost-Recovery" requirement, and annul the Commission's July 14, 2022 determination to the contrary.

C. The Joint Utilities' Interpretation Is Consistent with Section 73's Purpose and Avoids Absurd Results.

The Commission's second stated basis for interpreting section 73(3) to not allow the utilities to petition for cost recovery was that allowing cost recovery would undermine the statute's intent to "provide customers with compensation when they experience a widespread prolonged outage" (Commission Order, at 30). The Commission reasoned that allowing cost recovery "would essentially require that customers pay the Utility for the credits the Utility provided to customers" (*id.*). The Commission's concern, however, is vastly overblown.

First, allowing the utilities to petition for cost recovery of the section 73 costs does not guarantee that the Commission will grant that request. The Joint Utilities' construction of the statute does not automatically grant them cost recovery. Rather, the Joint Utilities' construction would simply give utility

companies *the right and opportunity to petition* for a waiver of the "No-Cost-Recovery" requirement, which would be within the Commission's discretion to grant or deny after considering the seven equitable criteria in section 73(3).

Second, the Commission's construction of section 73 to bar utilities from filing petitions for cost recovery undermines the statute's purpose of providing prompt reimbursement to customers affected by widespread prolonged outages. In its July 14, 2022 Order, the Commission recognized that one of the fundamental purposes of the statute is to provide prompt reimbursement to customers. In fact, the Commission endeavored to establish procedures that would not "needlessly prolong" the time in which customers could claim reimbursement for losses (Commission Order, at 27-28).

Yet, the Commission's arbitrary interpretation of the waiver provision would often lead to delays in compensating customers. Under the Commission's interpretation of the statute, utility companies, which may not be at any fault for the outage or its duration, have only one option to seek some form of economic relief: file a petition with the Commission to waive the compensation requirements of subsection (1) entirely. Doing so, however, suspends the utilities' obligations to pay the customer compensation until an undetermined later date after the Commission had reviewed and decided the waiver request (*see* PSL § 73[1][b], [c], [d] ["if the utility company has applied for a waiver pursuant to subdivision three

of this section, such utility company shall reimburse the customer within a time period to be determined by the commission after the commission renders a decision on the waiver request"]). As Department General Counsel Rosenthal acknowledged, the Commission's determination of a waiver request may take quite a long time (Ltr from Robert Rosenthal, Gen. Counsel, Dept. of Pub. Serv., Recommending Disapproval, July 21, 2021, Bill Jacket, L 2021, ch 786, at 12 ["As Commission, rather than Department, action is required by the bill, this cannot be accomplished within the 45-day deadline due to (1) the complexities involved in this review, and (2) the need to abide by [State Administrative Procedure Act] notice and comment requirements as the bill does not exclude such determinations from SAPA."]).[2]

The Commission's interpretation thus actually incentivizes utilities that believe they are not responsible for a prolonged outage after a massive storm like Superstorm Sandy to petition for complete waivers and delay the payment of the required bill credits and reimbursements as long as possible. That undermines the

[2] Section 73(3) provides that the Commission shall decide whether to grant a waiver petition within 45 days after it was submitted. Because the statute does not specify a consequence or divest the Commission of jurisdiction to decide the petition after the 45-day period has lapsed, that time limit is merely directory (*see Grossman v Rankin*, 43 NY2d 493, 501 [1977] ["The courts have repeatedly held that unless the language used by the Legislature shows that the designation of time was intended as a limitation on the power of the body or officer, the provision is directory rather than mandatory."]; *Matter of Clifford v New York State Employees Retirement Sys.*, 123 AD2d 1, 4 [3d Dept 1986] ["Limits in regard to the time in which an agency must act are generally construed as discretionary in the absence of express limits on the authority of the agency to act after the time period."]).

undisputed legislative purpose to get the money in the hands of the customers as promptly as possible.

Under the Joint Utilities' interpretation, in contrast, the utilities could make a different decision. For example, rather than applying for a complete waiver of its obligation to compensate customers, a utility could elect to pay its customers promptly and instead petition the Commission only to recover its costs. In such an instance, the utility company would still reimburse customers within the normal 30 days. And even if the Commission took its time in deciding whether cost recovery would be "fair, reasonable and in the public interest," the customers would be no worse off for the delay (PSL § 73[3]). This scenario best serves the statute's remedial purpose, because the affected customers would be promptly reimbursed for their covered losses.

Where the Commission determines that cost recovery is appropriate, the practical impact of cost recovery on the affected customers would be miniscule. An example can help illustrate the point. If a widespread prolonged outage were to affect 10,000 customers for 96 consecutive hours, and each customer submitted proof of loss of food and prescription medication totaling $500,[3] the utility would be responsible for $250,000 in bill credits and $5 million in reimbursements, for a

[3] It is very unlikely that every customer sustains a covered loss during an outage, and even more unlikely that every customer submits a proof of loss to the utility under section 73(1) after the outage concludes, but this is just for illustration of a plausible hypothetical scenario.

total of $5.25 million in section 73 costs. Con Edison, for example, has a total of approximately 3.3 million electric customers (Con Edison, Inc., Our Businesses, *available at* https://www.conedison.com/en/about-us/our-businesses). If the Commission granted cost recovery, the affected Con Edison customers would have received $525 in bill credits and reimbursements shortly after the outage and, on average, would later pay back only $1.59 through increased rates.

This is normal in utility ratemaking. For example, all New York State utilities have programs that provide discounts to low-income customers funded through rates. That funding mechanism, in turn, marginally increases the rates paid by low-income customers. Yet in both examples, the Commission determined that the concentrated benefits to the intended customers far outweigh the diffuse costs. The Commission's stated concern that the affected customers would have to "pay the Utility for the credits the Utility provided to customers" is not supported by the facts and does not show that the Legislature intended to preclude utilities from petitioning for a waiver allowing cost recovery (Commission Order, at 30).

Contrary to the Commission's stated concern, granting cost recovery does not authorize the utilities to take with one hand what they are giving customers with the other. Unlike the Commission's interpretation, the Joint Utilities' construction of the statute merely provides an alternative pathway of reimbursing customers in instances where the utility company might otherwise be entitled to,

but nevertheless does not pursue, an absolute waiver of the section 73(1) compensation requirements. In that instance, the utility company can say, as Commissioner Burman explained, "[w]e are voluntarily going to pay. We are not going to fight the folks who didn't show us enough proof because we perhaps believe that they just couldn't show us that proof. And so we're going to pay, but we'd like some cost recovery" (Verified Petition, Ex. E, at 47). And, most importantly, the plain language interpretation of section 73, which secures the utilities' right and opportunity to petition the Commission to waive the "No-Cost-Recovery" requirement of the statute, does not entitle the utilities to a grant of cost recovery in every case. The Commission will be responsible for deciding each waiver request based upon its own facts and the section 73(3) waiver criteria.

The Commission's order is illogical to the extent that it interprets section 73 as permitting utility companies to apply for a waiver to avoid paying compensation altogether but denying the utilities the opportunity to seek the lesser-included relief of cost recovery. This Court should therefore reject the Commission's interpretation that would lead to such "objectionable, unreasonable or absurd consequences" for the very customers that the statute seeks to protect (*Long v State*, 7 NY3d 269, 273 [2006]). Rather, this Court should hold that section 73 allows the utilities to simply ask the Commission to permit cost recovery, recognizing that the ultimate decision is the Commission's to make.

D. The Commission's Interpretation of Section 73 Would Improperly Effect a Repeal of its Own Authority by Implication.

The Commission's July 14, 2022 order effectively determined that Public Service Law § 73 deprived the Commission of all of its usual authority to permit cost recovery of the utilities' costs. The statute does not do that on its face, however. Rather, the Commission concluded that section 73 was intended to repeal the Commission's authority to allow cost recovery by mere implication. But as New York courts have long recognized, repeal of statutory authority by implication is disfavored, and it was not what the Legislature intended here.

It is well settled that all "provisions of the applicable statutory scheme must be construed together" in a manner that "renders them compatible and achieves the legislative purpose" of the statute (*Covert v Niagara County*, 172 AD3d 1686, 1688 [3d Dept 2019]). "Absent an express manifestation of intent by the Legislature – either in the statute or the legislative history – the courts should not presume that the Legislature has modified an earlier statutory grant of power to an agency" (*Matter of Consol. Edison Co. of New York, Inc. v Dept. of Envtl. Conservation*, 71 NY2d 186, 195 [1988]). As the Court of Appeals has explained, "[t]he Legislature is hardly reticent to repeal statutes when it means to do so; a statute generally repeals a prior statute by implication only if the two are in such conflict that it is impossible to give some effect to both" (*Iazzetti v City of New York*, 94 NY2d 183, 189 [1999] [quotation marks omitted]). Therefore, "[i]f by any

fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted" (*Consol. Edison Co. of N.Y., Inc.*, 71 NY2d at 195).

Here, a perfectly reasonable interpretation of section 73 is available that would not result in the disfavored repeal by implication of the Commission's authority to entertain and grant petitions for recovery of section 73 costs: the subsection (3) waiver provision applies equally to both subsection (1)'s bill credits and reimbursement requirements and subsection (2)'s "No-Cost-Recovery" requirement. That interpretation, which the Commission arbitrarily rejected, recognizes that the Commission generally has authority to allow cost recovery through just and reasonable rates, where the costs to be recovered were prudently incurred (*see generally Abrams*, 67 NY2d at 214-215 ["[T]he PSC has characterized as 'long standing' its own policy of generally favoring the recovery of whatever expenditures a utility can demonstrate to have been prudently incurred."]; *see also Matter of Crescent Estates Water Co. v Public Serv. Commn. of State of N.Y.*, 77 NY2d 611, 617 [1991]).

Because the Legislature is presumed to know what laws on are the books at the time it adopts a new statute (*Easley v New York State Thruway Auth.*, 1 NY2d 374, 379 [1956]), it knew that the general rule under the PSL is that utilities may ask for recovery of its prudently incurred costs and the Commission may determine

whether cost recovery is warranted. Section 73(2) was intended to change that default rule to provide that, for the utilities' new section 73 costs, it is the utilities' responsibility to absorb those costs. As discussed above, that provision is not "unconditionally prohibitory," as it lacks any language that specifically divests the Commission of its general authority, in rate setting, to allow recovery of a utility's section 73 costs.

To the contrary, the Legislature specifically authorized an exception to the new default rule by creating the waiver mechanism. Thus, rather than divesting the Commission of any of its authority to consider and determine cost recovery requests for section 73 costs, the Legislature simply intended to change *how* the Commission analyzed and decided those requests—varying the normal prudence rule for cost recovery to require instead a showing that cost recovery of section 73 costs is "fair, reasonable and in the public interest" (PSL § 73[3]).

The Commission's contrary interpretation would lead to unreasonable or objectionable results for the very customers that section 73 is intended to protect. The Legislature's inclusion of the waiver provision implies that it understood that the Commission could grant certain waiver petitions, after considering the required waiver factors. In those instances, for example, under the Commission's mistaken interpretation of the statute, the Commission may approve denying customers any compensation at all when, under the Joint Utilities' interpretation, the Commission

could have simply allowed for cost recovery and the affected customers would have had the compensation that the Legislature intended.[4]

Because the Legislature did not, in section 73, expressly divest the Commission of its authority to entertain and determine cost recovery requests for section 73 costs, and a reasonable construction of section 73 is available that preserves both the Commission's normal rate-setting authority and the intention of section 73 to "to provide meaningful, defined compensation to customers of gas and electric corporations experiencing prolonged service outages" (Verified Petition, Ex. B, at 5), this Court should annul the Commission's July 14, 2022 order to the extent that it interpreted section 73 to repeal by implication the Commission's authority to entertain applications for recovery of section 73 costs.

E. This Court Should Avoid Construing Section 73, as the Commission Has, in a Way That Could Render It Unconstitutional.

Finally, courts in New York must "avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided" *(Alliance of Am. Insurers v Chu*, 77 NY2d 573, 585 [1991]). As the United States Supreme Court has held, the Takings Clause of the Fifth Amendment to the "Constitution protects utilities from being limited to a charge for their property serving the public

[4] The Commission has also required utilities to widely announce that reimbursements and credits are available by noon the day following a widespread prolonged outage. The waiver process, as the Commission has interpreted it, however, forces utilities to contradict that announcement if applying for a complete waiver of the required compensation that they told the customers would be available.

which is so 'unjust' as to be confiscatory. If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments" (*Duquesne Light Co. v Barasch*, 488 US 299, 307 [1989] [citations omitted]).

Utilities' right and opportunity to petition for cost recovery is how they obtain the process that is due under the Constitution. The Commission does not grant cost recovery in every case, but the right to petition for a waiver under section 73(3) ensures that the utilities have an opportunity to be heard and present their evidence for why they believe the Commission should conclude that cost recovery is warranted. Under the Commission's construction of section 73, however, the utilities would be deprived of any process whatsoever before they are forced to absorb the required compensation costs. That would deny the utilities their procedural due process rights and contravene the Fifth and Fourteenth Amendments (*see id.*; *see also Matter of 1133 Ave. of Ams. Corp. v Public Serv. Commn. of State of N.Y.*, 62 AD2d 787, 788 [3d Dept 1978] ["In the absence of a specific statutory notice provision, the controlling standard is procedural due process. In the context of an administrative proceeding, a party (such as petitioners herein) whose property interests may be affected, is entitled to procedures tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to

present their case." (cleaned up)]; *see also e.g. Wisconsin Bell, Inc. v Bridge*, 334 F Supp 2d 1127, 1140 [WD Wis 2004] ["either under § 252 or the due process clause, TDS is entitled to present evidence and argument supporting its position" at a rate-setting hearing]).

This Court can avoid that unconstitutional construction of section 73. By concluding that section 73(3)'s waiver provision preserves utilities' right and opportunity to petition the Commission to allow recovery of the compensation costs from ratepayers, the Court will be interpreting section 73 in a way that guarantees utilities the process that is due under the Constitution and preserves section 73's constitutionality. So construing the statute, based upon its structure, ensures that section 73 does not limit rates to such an extent as to be confiscatory under the Fifth and Fourteenth Amendments to the U.S. Constitution, without preserving utilities' due process rights that guarantee the opportunity to petition for cost recovery of the new section 73 costs (*see* Ltr from Robert Rosenthal, Gen. Counsel, Dept. of Pub. Serv., Recommending Disapproval, July 21, 2021, Bill Jacket, L 2021, ch 786, at 12 ["Of further concern is the fact that the bill prohibits recovery of reimbursement payments from ratepayers. While that is a laudable effort to protect ratepayers, it may lead to legal action by utilities claiming that it is an unconstitutional taking due to a lack of due process."]; *see generally Duquesne Light Co.*, 488 US at 307).

The Court should therefore annul the Commission's July 14, 2022 order that threatens section 73's constitutionality.

CONCLUSION

For these reasons, and those set forth in the Joint Utilities' Verified Petition, the Commission's July 14, 2022 Order should be annulled to the extent that it interpreted Public Service Law § 73 to prohibit utilities from petitioning the Commission for a waiver of the statute's "No-Cost-Recovery" requirement.

Dated: November 14, 2022
Albany, New York

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CERTIFICATION OF COMPLIANCE WITH UNIFORM CIVIL RULE 202.8-B

I hereby certify the foregoing Petitioners-Plaintiffs' Memorandum of Law in Support of the Verified Complaint and Petition, exclusive of caption and signature block, comprises 6,876 words, which is in compliance with the limitation provided under Uniform Civil Rule 202.8-b.

Dated: November 14, 2022

ROBERT S. ROSBOROUGH IV