

PRIVILEGED AND CONFIDENTIAL DRAFT

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-Plaintiffs,

- against -

STATE OF NEW YORK PUBLIC SERVICE
COMMISSION,Respondent-Defendant.

**VERIFIED PETITION
AND COMPLAINT**

Index No.

Date Filed:

Petitioners-Plaintiffs 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”) by and through their attorneys, Whiteman Osterman & Hanna, LLP, as and for their Verified Petition and Complaint herein allege as follows:

PRELIMINARY STATEMENT

1. In this hybrid CPLR Article 78 proceeding and declaratory judgment action, the Joint Utilities challenge Respondent-Defendant State of New York Public Service Commission’s (the “Commission” or “Respondent”) July 14, 2022 order that incorrectly interpreted Public

Service Law (“PSL”) § 73 to preclude utilities from exercising the right to petition 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.

2. The Joint Utilities are utility companies that distribute and transmit electricity and/or natural gas to customers in the State of New York.

3. Under the PSL, utility companies have long been permitted to recover the cost of providing utility services to customers through “just and reasonable” rates that are reviewed and approved by the Commission. Cost recovery recognizes the principle that to provide safe and reliable service, a utility must have a reasonable opportunity to earn revenue to cover its operating expenses and earn a reasonable return on capital invested. Thus, in New York, utility companies have long been permitted to charge rates approved by the Commission that provide this opportunity.

4. 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: (1) must provide residential customers a bill credit of \$25 for each full 24-hour period after the first 72 consecutive hours of the outage; (2) must provide residential customers reimbursement for food and prescription medications that spoiled due to lack of refrigeration; and (3) must provide small business customers reimbursement for food that spoiled due to lack of refrigeration (PSL § 73[1][a]–[d]). PSL § 73 further required that the Commission promulgate procedures, standards, methodologies and rules to implement the statute and define certain key terms (*id.* § 73[4]).

5. In addition to requiring the utilities to compensate impacted customers, PSL § 73 also requires that utilities absorb the costs of the bill credits and reimbursements, without recovery from their ratepayers (*id.* § 73[1], [2]).

6. The Legislature, however, included in the statute a provision 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.*).

7. Although PSL § 73 changes the default rule that a utility may recover its prudently incurred costs, it does not deprive utilities of the right and opportunity to petition the Commission for a waiver of the “No-Cost-Recovery” requirement, nor does it deprive the Commission of jurisdiction to grant a waiver when the facts show that it would be “fair, reasonable and in the public interest.” Rather, section 73(3) merely articulates what factors the Commission must consider when making that determination, including:

- (a) whether the company complied with their submitted emergency response plan . . . ;
- (b) whether any actions or omissions of the company contributed to the prolonging of the widespread prolonged outage;
- (c) the hardships endured by said company’s customers due to the widespread prolonged outage;
- (d) the severity of the widespread prolonged outage;
- (e) conditions on the ground during the widespread prolonged outage and the subsequent restoration;
- (f) balancing of the equities; and
- (g) any other criteria the commission deems in the public interest to consider

(*id.* § 73 [3]).

8. Thus, under PSL § 73, the utilities’ right and opportunity to ask for cost recovery and the Commission’s authority to allow cost recovery remain intact, so long as doing so would be “fair, reasonable and in the public interest” under the Commission’s analysis of the waiver factors.

9. On July 14, 2022, as directed by the Legislature, the Commission issued an order defining certain terms in the statute and promulgating rules to implement its requirements (the “Commission Order”). The Commission determined, however, 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.” The Commission Order is attached as **Exhibit A** and incorporated by reference herein.

10. The Commission’s statutory interpretation, which is a pure question of law that did not require any of the Commission’s specialized expertise and for which this Court does not owe the Commission any deference, contravenes the plain text of section 73(3) and ignores how the Legislature chose to structure the statute.

11. Section 73(2), which provides that “[a]ny costs incurred by a utility company pursuant to this section shall not be recoverable from ratepayers,” is not unconditionally prohibitory. Rather, subsection (2) uses the same “shall” language as the other requirements found in subsection (1), and section 73 is structured to allow the Commission to consider waiver petitions for all of the statute’s requirements.

12. Contrary to the Commission’s interpretation, both subsection (1)’s requirement that utilities compensate customers after widespread prolonged outages and subsection (2)’s requirement that utilities must absorb those costs without cost recovery from ratepayers are

“requirements of the statute” for which the Legislature has authorized the Commission to entertain waiver applications under subsection (3).

13. Had the Legislature intended the waiver provision to apply only to the bill credits and reimbursements required under subsection (1), as the Commission determined, then the waiver provisions would not have followed the subsection (2) “No-Cost-Recovery” requirement in the statute. Instead, the Legislature would have added the waiver provision as a subsection within subsection (1). Doing so would have clearly expressed the Legislature’s purported intent that only the bill credits and reimbursements required under subsection (1) were waivable and that the subsection (2) “No-Cost-Recovery” requirement was not.

14. But that is not how the Legislature structured section 73. Subsection (3)’s right to petition the Commission for a waiver was added *after both subsections (1) and (2)*, thus showing the Legislature’s intent that the utilities may ask for a waiver of either of those statutory requirements. Indeed, when read in context, subsection (2) clearly expresses the Legislature’s intent to change the PSL’s default rule that all prudently incurred utility costs are recoverable, but still preserves utilities’ right and opportunity to petition for a waiver of the new “No-Cost-Recovery” requirement and the Commission’s jurisdiction to entertain and grant those petitions after considering the factors that the Legislature has prescribed.

15. The subsection (2) “No-Cost-Recovery” requirement is a specific requirement of the statute. Without the Legislature including it, the default rule under the PSL would have remained that utilities’ costs are recoverable through Commission-approved rates. The Legislature intended to change that default rule here and so added a new requirement that costs incurred under subsection (1) are not recoverable from ratepayers. But based on the language and structure of the statute, that requirement is no more absolute than the statute’s other requirements, including the

requirement that utilities compensate customers under subsection (1), in that both sets of requirements are subject to the waiver provisions of subsection (3).

16. By the plain terms of PSL § 73, therefore, the subsection (2) “No-Cost-Recovery” requirement is a requirement of the statute that the utilities may petition the Commission to waive under subsection (3). Preserving the utilities’ right and opportunity to petition for a waiver does not guarantee that cost recovery will be granted in every instance. Rather, the Joint Utilities recognize that the ultimate determination of whether to grant such a waiver in a particular case is left to the Commission. But, the Commission’s determination that the utilities may not even ask for a waiver contravenes the plain language and structure of the statute.

17. The Commission’s July 14, 2022 order, to the extent it interprets section 73 to the contrary, is therefore arbitrary and capricious and should be annulled.¹

PARTIES AND VENUE

18. Each of the Joint Utilities is a gas corporation, electric corporation, gas and electric corporation, utility corporation or public utility corporation, as those terms are defined in the PSL.

19. Petitioner Central Hudson Gas & Electric Corporation maintains its principal place of business at 284 South Avenue, Poughkeepsie, New York.

20. Petitioner Consolidated Edison Company of New York maintains its principal place of business at 4 Irving Place, New York, New York.

21. Petitioner National Fuel Gas Distribution Corporation maintains its principal place of business at 6363 Main Street, Williamsville, New York.

¹ The Joint Utilities do not in this proceeding challenge any other portion of the Commission’s July 14, 2022 order except the Commission’s determination that PSL § 73(3) does not permit a utility to petition for a waiver from the requirements of section 73(2).

22. Petitioner Niagara Mohawk Power Corporation d/b/a National Grid maintains its principal place of business located at 300 Erie Boulevard, West Syracuse, New York.

23. Petitioners Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid maintain their principal place of business located at 2 Hanson Place, Brooklyn, New York.

24. Petitioner New York State Electric & Gas Corporation maintains its principal place of business at 18 Link Drive, Binghamton, New York.

25. Petitioner Orange and Rockland Utilities, Inc., maintains its principal office located at One Blue Hill Plaza, Pearl River, New York.

26. Petitioner Rochester Gas and Electric Corporation maintains its principal office located at 180 S. Clinton Avenue, Rochester, New York.

27. Respondent the New York State Public Service Commission is a commission charged pursuant to Article 4 of the PSL with the regulation of public utility companies, including the Joint Utilities. The PSC maintains its principal office in the City and County of Albany, New York at the Empire State Plaza, Agency Building 3, Albany, New York.

28. Venue is proper in Albany County pursuant to CPLR 506(b) because the Commission made the determination complained of, and maintains its principal office, in Albany County.

PRINCIPLES OF COST RECOVERY

29. Under the PSL, utility companies may charge “just and reasonable” rates that are reviewed and approved by the Commission. These rates are intended to provide utilities with a reasonable opportunity to cover their costs and earn a reasonable rate of return.

30. The default rule in New York, therefore, is that a utility company may apply to the Commission to recover specific costs of operations and is generally entitled to recapture its prudently incurred costs through its rates.

31. When a utility applies to recover certain costs, the Commission may review the utility's expenses and costs and determine whether those costs were prudently incurred and, thus, should be borne by ratepayers.

PUBLIC SERVICE LAW § 73'S STATUTORY REQUIREMENTS AND WAIVER PROCESS

32. The Governor signed the bill enacting PSL § 73 into law in December 2021.

33. Section 73(1) provides that if utility customers experience "a widespread prolonged outage lasting at least seventy-two consecutive hours or more without having been resolved by the utility company," the utility must provide a \$25 bill credit to each affected residential customer for each 24-hour period that the outage lasts beyond the first 72 consecutive hours (*see* PSL § 73[1][a]).

34. The statute also requires the utility to reimburse affected residential customers for perishable food or prescription medication that spoils due to a lack of refrigeration, subject to certain limitations and proof requirements (*see* PSL § 73[1][b], [c]).

35. The statute also extends the utilities' reimbursement requirement for food spoilage to small business customers (*see* PSL § 73[1][d]).

36. To obtain reimbursement for spoiled food or prescription medication, section 73 requires the affected residential and small business customers to provide the utilities with an itemized list and/or proof of loss within 14 days of a covered outage (*see* PSL § 73[1][b], [c], [d]).

37. Upon receipt of an itemized list or proof of loss from an affected customer, the utility must pay the required reimbursements within 30 days (*see* PSL § 73[1][b], [c], [d]).

38. If, however, the utility petitions the Commission for a waiver of the statute's requirements to pay reimbursements or issue bill credits, the utility need not pay such compensation to customers while its petition is pending (PSL § 73[1][b], [c], [d]). If the Commission denies a utility's petition, it must then set a time period within which the utility must pay the required compensation.

39. Section 73 also changes the default rule under the PSL that all costs of the utilities are cost recoverable through their "just and reasonable" rates approved by the Commission.

40. Specifically, section 73(2) provides that "[a]ny costs incurred by a utility company pursuant to this section shall not be recoverable from ratepayers."

41. Directly after the two subsections containing the statute's mandatory requirements—required bill credits and reimbursements after outages lasting for more than 72 consecutive hours and the requirement that utilities not recover these costs from ratepayers—is a third subsection of section 73. Section 73(3) empowers utility companies to apply to the Commission for a waiver of the statute's requirements (*see* PSL § 73[3] ["Not later than fourteen calendar days after the occurrence of a widespread prolonged outage, a utility company may petition the commission for a waiver of the requirements of this section."]).

42. The Legislature's waiver provision places the burden of proof on the utilities to demonstrate that "granting the waiver is fair, reasonable and in the public interest" (*id.*). The Legislature also articulated new factors that the Commission must consider in making the determination of whether to grant a requested waiver (*id.*).

43. The Legislature's waiver factors are unique to section 73. These factors demonstrate that while the Legislature intended to circumscribe how the Commission determines whether to grant a waiver of the statute's requirements, including the subsection (2) "No-Cost-

Recovery” requirement, it did not intend to eliminate the Commission’s authority to waive those requirements under appropriate circumstances.

44. Indeed, the legislative history of section 73 confirms that the Department of Public Service believes that the waiver provision applies to all requirements within the statute, including the subsection (1) bill credit and reimbursement mandate *and* the subsection (2) No-Cost-Recovery mandate. A copy of the Bill Jacket to Senate Bill 4823(A), which adopted section 73, is attached as **Exhibit B** (at 11 [outlining the bill credit and reimbursement and No-Cost-Recovery mandates and noting that “[u]tilities may apply to the Commission for a waiver from these mandates”]).

45. Finally, the Legislature directed the Commission to “promulgate procedures, standards, methodologies and rules necessary to implement the provisions of this section. Such rules and regulations shall define the terms ‘widespread prolonged outage’, ‘small business customer’ and ‘proof of loss’” (PSL § 73[4]).

46. PSL § 73 became effective on April 21, 2022.

THE JOINT UTILITIES’ COMMENTS AND THE COMMISSION’S JULY 2022 PUBLIC SESSION

47. In accordance with PSL § 73(4), on April 11, 2022, the Commission issued a Notice of New Proceeding and Comment Solicitation that included proposed definitions, processes, and procedures that the Department of Public Service (“DPS”) staff recommended. A copy of the Commission’s April 11, 2022 notice is attached as **Exhibit C** and incorporated by reference herein.

48. Thereafter, on May 20, 2022, the Joint Utilities submitted comments to the Commission, recommending certain changes to the proposed procedures “to prevent the imposition of what is essentially unlimited liability on the Joint Utilities with no opportunity for cost recovery even when the outages were the result of events outside of a utility’s control.” A copy of the Joint utilities’ comments is attached as **Exhibit D** and incorporated by reference herein.

49. In their comments, the Joint Utilities asked the Commission to clarify that the waiver provision set forth in subsection 3 of Section 73 permits a utility company to apply for waiver of the statutory mandate prohibiting cost recovery.

50. As the Joint Utilities asserted, construing the waiver provision to allow a utility the opportunity to petition for relief from the requirement that it not obtain cost recovery would permit a utility company to seek economic relief when its actions to restore power after a storm are reasonable. Any other construction of the statute would effectively impose “potentially unlimited financial obligations on utilities without the opportunity for cost recovery” even where the utility bears no fault, casting the utility as an “insurer[] against major storms and the more frequent heat waves that may result from climate change” (Ex. D, at 2).

51. The Joint Utilities’ comments further made clear that they were advocating for a construction of the statute that would permit them the opportunity to petition for a waiver of the “No-Cost-Recovery” requirement, which ultimately would be within the Commission’s determination to grant or deny after analyzing the waiver factors that the Legislature articulated (*id.*).

52. Further, the Joint Utilities’ interpretation of section 73 would ensure prompt reimbursement to customers, as the statute was adopted to promote, while allowing the Commission to later determine, in its discretion, whether recovery of those specific costs would be “fair, reasonable and in the public interest” (PSL § 73[3]).

53. For instance, if a utility company elected to not seek a waiver from the subsection (1) bill credit and reimbursement requirement, but only to apply for a waiver of subsection (2)’s “No-Cost-Recovery” requirement, the utility would still have to process customers’ reimbursement claims within the initial 30-day payment period and issue the required bill credits.

The Commission would then decide whether granting a waiver of the “No-Cost-Recovery” requirement would be “fair, reasonable and in the public interest.” In that scenario, the remedial purpose of the statute would be served because the affected customers would be promptly reimbursed for their losses even as the utility’s petition for cost recovery remained pending before the Commission.

54. The Commission, however, determined that a utility company can never even ask the Commission to waive the “No-Cost-Recovery” requirement of the statute. Instead, the Commission established an all-or-nothing scenario in which the utility could petition only to avoid compensating customers, but not for the lesser included relief of cost recovery, that would lead to unreasonable and objectionable results for the very customers that the statute is intended to protect.

55. The Commission determined that once a widespread prolonged outage has commenced, “[a]n affected Utility shall notify its customers by noon the following calendar day, that the 14-day window provided by PSL §73 to file for reimbursement for loss has begun and clearly state the deadline for when customers must request reimbursement” (Ex. A, at 28). As such, customers will receive this notification and then may be told soon thereafter that reimbursement claims are on hold while the Commission decides the utility’s waiver petition.

56. The Commission could avoid creating such confusion and objectionable delays to payment of customer compensation—particularly after customers experience a widespread prolonged outage—by allowing utilities to seek only a waiver of the “No-Cost-Recovery” requirement of the statute.

57. On July 14, 2022, the Commission held an open public session to vote on the draft Commission Order. A copy of the Commission’s public session transcript is attached as **Exhibit E** and incorporated by reference herein.

58. During the Commission's July 14, 2022 public session, Commissioner Diane X. Burman recognized that construing section 73(3) as only allowing a broad waiver from the compensation requirements of subsection 1 would be inconsistent with the text, structure, and purpose of the statute:

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.* But the reality is, is the first subdivision talked about giving money to customers. So the only waiver then [that] would come under the draft order is, if the company does not want to pay the existing customers who have their request for the credits and reimbursements.

. . .

[O]n its face, the statute *doesn't say in the section*, oh no, this section that says, *waiver is applicable, but we didn't mean subdivision two which says cost recovery.*

(see Ex. E, at 45-48 [emphasis added]).

59. Commissioner Burman also explained that the Commission's interpretation of section 73 violated the very purpose for why the Legislature adopted it:

So my issue is [] that we are actually setting up a system where we are telling utilities, fight on the payment that is there under the intent of [a] statute that was just to try to get money to the customers . . . the reality is [the utilities are] saying, look, we don't necessary agree here. We have some issues. *We 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* because as you see from A through G [of Subdivision 3], all of these reasons apply on why we should not be forced to pay, *but we're paying*, and *we're just actually asking* [to have cost recovery].

(Ex. E, at 47 [emphasis added]).

60. In short, as Commissioner Burman noted, it would be “illogical” to permit utility companies to apply for a waiver to avoid paying the bill credits and reimbursing their customers’ covered losses altogether, but at the same time prohibit utilities from applying for cost recovery where they voluntarily agree to reimburse their customers’ losses, *even* where the utility is not at fault.

61. The Commission’s interpretation of section 73, denying the utilities’ right and opportunity to petition for a waiver of the “No-Cost-Recovery” requirement, may hurt the same customers that the statute is intended to protect.

62. Indeed, as Commissioner Burman also stated, the statute’s remedial purpose would be better served if the waiver provision applied to the prohibition on cost recovery, as it would be a better circumstance for “the company [t]o say, *we are going to pay the customers because it’s the right thing for us to do pursuant to the intent behind Section 73. However, we’re going to seek a waiver [of cost recovery], because we are all in agreement, it’s not the fault of the utility of the outage*” (*id.* at 26-27 [emphasis added]).

THE COMMISSION’S JULY 14, 2022 DETERMINATION

63. Notwithstanding the comments raised by Commissioner Burman and the Joint Utilities, the Commission adopted the Commission Order containing a construction of the statute that is inconsistent with its plain terms.

64. In its July 14, 2022 Order, the Commission read a provision into the statute that does not exist and concluded that Joint Utilities were prohibited from asking the Commission to waive section 73(2)’s “No-Cost-Recovery” requirement.

65. Specifically, the Commission mistakenly concluded “that the text of PSL § 73(2) expressly precludes cost recover from customers” and that “[a]lthough subdivision (3) authorizes

a utility to ‘petition the commission for a waiver of the requirements of this section,’ the Commission does not read the phrase ‘requirements of this section’ to apply to subdivision (2)” because that language is “unconditionally prohibitory” (Ex. A at 29-30).

66. 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.*).

67. It further found 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.*).

68. Because the Commission’s interpretation of section 73 in that regard is arbitrary and capricious, the Joint Utilities have been forced to commence this proceeding.

AS AND FOR A FIRST CAUSE OF ACTION

(The PSC’s Order Is Arbitrary and Capricious Because It Contradicts PSL § 73’s Plain Text, Structure, and Purpose)

69. The Joint Utilities repeat and reallege each of the foregoing allegations as if fully set forth herein.

70. The Commission’s July 14, 2022 order is arbitrary and capricious because it is inconsistent with the plain terms and legislative purpose of PSL § 73, as well as the general principles governing cost recovery in New York.

71. Deference to the Commission’s reasoning is not required in this instance, because its interpretation of PSL § 73 presents a question of pure legal interpretation of statutory terms, and does not involve any of the Commission’s special expertise.

72. The plain text of PSL § 73 supports the conclusion that utility companies should be permitted to petition for a waiver of subsection (2)'s requirement that the utilities must absorb all costs incurred under section 73 without cost recovery.

73. Contrary to the Commission's determination, section 73(3) does not state that it only applies to subsection 1 of the statute.

74. Rather, section 73(3)'s waiver provision applies to all "requirements of the statute," including the "No-Cost-Recovery" requirement contained in section 73(2).

75. The Legislature's structure of section 73, with subsection (3)'s waiver provision following the new requirements in subsections (1) and (2), also confirms the Legislature's intent that the utilities may petition the Commission to waive all of those requirements, rather than just the first requirements of subsection (1), as the Commission arbitrarily determined.

76. Because the Commission contradicted the plain terms and structure of section 73 and read extra-textual terms into the statute without authority to do so, the July 14, 2022 order should be annulled to that extent.

77. Furthermore, the plain terms of section 73 and its legislative history demonstrate that the statute's purpose is remedial in nature, to ensure that customers are made whole by financially compensating them for financial losses suffered during widespread outage events.

78. The Commission's interpretation of section 73(3) is inconsistent with the statute's purpose, because by denying utilities the right to petition for the more limited relief of cost recovery, it would incentivize utilities to apply for a complete waiver of the subsection (1) compensation requirements. This, in turn, would delay payments to the affected customers, as Commissioner Burman explained.

79. Furthermore, the Commission effectively determined that PSL § 73 deprived the Commission of its usual authority to permit cost recovery of the utilities' costs. The statute does not do that on its face, however.

80. Rather, the Commission concluded that section 73 was intended to repeal the Commission's authority to allow cost recovery by mere implication.

81. Repeal of statutory authority by implication is disfavored, and it was not what the Legislature intended here.

82. Accordingly, the Commission's order should be annulled as arbitrary and capricious to the extent that it interpreted section 73(3) as not permitting the utilities to apply for a waiver of section 73(2)'s "No-Cost-Recovery" requirement.

AS AND FOR A SECOND CAUSE OF ACTION

(If the Commission's Interpretation of PSL § 73 is Correct, The Statute Deprives the Joint Utilities of Procedural Due Process Under the Fifth and Fourteenth Amendment to the United States Constitution)

83. The Joint Utilities repeat and reallege each of the foregoing allegations as if fully set forth herein.

84. Should the Court conclude that the Commission's interpretation of section 73 to deny the Joint Utilities the right and opportunity to petition the Commission for a waiver of the "No-Cost-Recovery" requirement of the statute is correct, it would deprive the Joint Utilities of their constitutional right to procedural due process.

85. 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 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]).

86. Utilities have a protected property interest in the funds that they must pay to compensate affected customers under PSL § 73(1).

87. Section 73(2)’s requirement that the utilities absorb the costs of paying customer compensation without cost recovery then is a deprivation of the utilities’ property interest in those funds.

88. The Commission’s interpretation of section 73 to prohibit utilities from ever petitioning the Commission for a waiver of the “No-Cost-Requirement” requirement turns the legislative deprivation of utilities’ property interest in the customer compensation funds into a denial of the utilities’ procedural due process rights.

89. Indeed, Department General Counsel Rosenthal specifically noted this issue in the Department’s opposition to the bill that enacted section 73:

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.

(Ex. B, at 11).

90. It is well established that before the State may deprive a utility of property, it must provide the utility with due process of law, specifically, notice and an opportunity to be heard.

91. In section 73, the waiver process provided for in subsection (3) provides utilities with the process that is due under the Constitution.

92. Thus, under the Constitution’s procedural due process safeguards, the Joint Utilities have the right to be heard and present evidence to the Commission to demonstrate why recovery

of section 73 costs from their ratepayers through “just and reasonable” rates is appropriate and to avoid rates that are constitutionally confiscatory.

93. The Joint Utilities’ procedural due process rights are preserved by interpreting section 73 as continuing to allow the utilities the right and opportunity to petition the Commission for a waiver of the “No-Cost-Recovery” requirement because it would ensure the Joint Utilities notice and the opportunity to be heard before section 73(2) requires the utilities to absorb all of the costs of customer compensation without recovery from ratepayers.

94. The Commission’s contrary interpretation, prohibiting the utilities from ever filing a petition to the Commission to waive section 73’s “No-Cost-Recovery” requirement, would violate the Joint Utilities’ rights to procedural due process under the Constitution, because it deprives utilities of the right and opportunity to ever petition the Commission for cost recovery.

95. In the event that the Court determines that the Commission’s interpretation is correct, section 73 should be declared unconstitutional.

WHEREFORE, Petitioners respectfully request that this Court issue an order and judgment: (1) annulling as arbitrary and capricious the July 14, 2022 order of Respondent-Defendant State of New York Public Service Commission to the extent that it interpreted Public Service Law § 73(3) as denying utilities the right and opportunity to petition the Commission for a waiver of section 73(2)’s “No-Cost-Recovery” requirement; (2) declaring that all utilities that are subject to Public Service Law § 73 have the right and opportunity to petition the Commission for a waiver of section 73(2)’s “No-Cost-Recovery” requirement; (3) in the alternative, and only to the extent that the Court determines that the Commission’s interpretation of Public Service Law § 73 is correct, declaring section 73 unconstitutional to the extent that it violates utilities’

procedural due process rights under the Fifth and Fourteenth Amendments to the United States Constitution; and (4) granting the Joint Utilities such other and further relief as the Court deems just and proper.

Dated: November 14, 2022
Albany, New York

WHITEMAN OSTERMAN & HANNA LLP



BY:

Robert S. Rosborough IV, Esq.
Gabriella R. Levine, Esq.
Attorneys for Petitioners
One Commerce Plaza
Albany, New York 12260
Telephone: (518) 487-7600
rrosborough@woh.com

VERIFICATION

STATE OF NEW YORK :
COUNTY OF ALBANY : ss.:

ROBERT S. ROSBOROUGH IV, ESQ., an attorney duly admitted to the practice before
the State of New York, hereby affirms under the penalties of perjury as follows:

1. I am a member of Whiteman Osterman & Hanna LLP, attorneys for Petitioners-Plaintiffs in this matter.

2. I have read the foregoing Verified Petition and Complaint and the same is true to my own knowledge, except those matters stated to be upon information and belief, and as to those matters, I believe them to be true. The source of my belief is my review of the pertinent documents and information provided by my client.

3. The reason why this verification is made by me and not Petitioners is that Petitioners do not reside within the County of Albany.

Hubert Hubert IV

ROBERT S. ROSBOROUGH IV, ESQ.

Dated: November 14, 2022