

**ORDER NO. 82315**

IN THE MATTER OF THE ACQUISITION OF CONSTELLATION ENERGY GROUP, INC., THE PARENT COMPANY OF BALTIMORE GAS AND ELECTRIC COMPANY, BY MIDAMERICAN ENERGY HOLDINGS COMPANY AND CONSTELLATION ENERGY HOLDINGS, LLC AND OF BALTIMORE GAS AND ELECTRIC COMPANY BY BGE HOLDINGS, LLC	* * * * * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND  _____  CASE NO. 9160  _____
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To All Parties of Record and Interested Persons in Case No. 9160:

This Order memorializes and expands upon the Public Service Commission’s (“Commission’s”) on-the-record rulings on Petitions to Intervene, establishes the procedural schedule and the ground rules for discovery, and defines the substantive scope of this proceeding.

On Monday, November 3, 2008, the Commission held a pre-hearing conference to consider the Petitions to Intervene filed in the proceeding, the issues list submitted by the parties, and a procedural schedule for the proceeding. Parties appearing through their attorneys at the hearing were: MidAmerican Energy Holdings Company, Constellation Energy Group Company, and Baltimore Gas and Electric Company (collectively, “Applicants”); Commission’s Technical Staff (“Staff”); Office of People’s Counsel (“OPC”); Maryland Industrial Customers; the Mayor and City Council of Baltimore; Maryland Energy Administration; International Brotherhood of Electrical Workers (“IBEW”); Washington Gas Energy Services; National Railroad Passenger Corporation; Nuclear Information and Resource Service; Beyond Nuclear; Public Citizen; the Maryland Public Interest Research Group; Maryland ACORN; Retail Energy Supply Association; Direct Energy Services LLC; Severstal Sparrows Point, LLC; and Electricite de France International, S.A.

## **Interventions**

At the November 3 conference, the Commission began by considering and granting the Petitions to Intervene for all petitioners other than Chris Bush and Jeffrey Hooke, whose petitions raise as-yet-unanswered questions about the interest(s) each seeks to represent in this case.

As a general matter, the Commission grants leave to intervene liberally, *i.e.*, unless existing parties adequately represent the person's interests or the issues the person seeks to raise are irrelevant or immaterial,<sup>1</sup> and our law expressly permits individuals to appear on their own behalf.<sup>2</sup> COMAR 20.07.01.04A requires, however, that "[a]ll parties, except individuals appearing in their own behalf, shall be represented by attorneys-at-law, who are duly admitted and enrolled to practice before the Court of Appeals of this State when the Commission is performing a quasi-judicial function as distinguished from a legislative, executive, or a ministerial function." Because the Commission is acting in its quasi-judicial capacity here, putative intervenors either must demonstrate that they seek to appear purely as individuals or, if they seek to represent entities or interests broader than their own, must appear through counsel.

The petitions filed by Messrs. Bush and Hooke raise, and fail to answer, questions about whether each seeks to appear solely as an individual or as a representative of organizations or classes to which they belong. Mr. Hooke's petition, for example, lists himself and the Maryland Tax Education Foundation in the signature block, at the address the Foundation lists on its website for "contributions and correspondence."<sup>3</sup> Both before and after filing his petition, Mr. Bush has sent correspondence to the Commission suggesting that he represents the interests of Maryland citizens generally. Unfortunately, neither was present at the conference to clarify his intentions. In response to questions from the Commission, OPC, the statutory representative of all residential ratepayers,<sup>4</sup> indicated that it would not object to either appearing as an individual, but would object if either sought to represent a group or class, and we cannot resolve OPC's

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<sup>1</sup> See Public Utility Companies Article §3-106(b).

<sup>2</sup> *Id.*, § 3-106(c)(2).

<sup>3</sup> Compare Petition to Intervene – Out of Time, Case No. 9160, Item 22 (Oct. 24, 2008) with <http://www.marylandtaxeducation.org/application.html> ("Contributions and Correspondence" section of Maryland Tax Education Foundation website).

<sup>4</sup> Public Utility Companies Article §§ 2-201 *et seq.*

objection on the present record. Accordingly, the Petitions of Messrs. Bush and Hooke are denied without prejudice, but both are granted leave until November 21, 2008 to file new Petitions that address these questions and demonstrate compliance with Public Utility Companies Article § 3-106 or COMAR 20.07.01.04.<sup>5</sup>

### **The Schedule**

*Second*, the Commission considered the procedural schedule proposed by Staff, which was based on a consensus of the parties after a conference call on October 30, 2008 among the parties that had filed Petitions to Intervene. Staff noted that IBEW and Mr. Bush raised objections to the proposed schedule. IBEW proposed (both orally and in a written response to the Staff's proposal) that the Commission hold a hearing on the direct testimony filed by the Applicants before the other parties file direct (reply) testimony. Mr. Bush proposed that the evidentiary hearings be held at night rather than during the business day. The Applicants responded that if the Commission held a hearing on their direct testimony before replies that it also should hold a hearing on the other parties' direct testimony before the Applicants file rebuttal testimony, and that such a *seriatim* hearing schedule would not fit within the statutory 180-day review period.<sup>6</sup>

After considering the parties' arguments, the Commission adopts the Staff's proposed procedural schedule, which is designed to bring this case to conclusion within 180 days of the Application and is set forth in the Ordered Paragraphs below. All formal proceedings will be held in the Commission's 16<sup>th</sup> floor hearing room during regular business hours.

In addition to the formal proceedings identified in the schedule, however, the Commission will schedule at least three (3) evening public hearings in the BGE service territory to provide the opportunity for citizens to offer comments and input to the Commission. Unlike the formal proceedings, citizens wishing to speak at the evening public hearings need not intervene in this case or appear through counsel – those hearings

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<sup>5</sup> In addition, parties who have filed Petitions for Intervention – whether or not granted – must comply with Public Utility Companies Article § 3-108, which provides that “[u]nless notice is provided to each other party in a case before the Commission, a party or person acting on behalf of a party **may not contact ex parte a commissioner or hearing examiner regarding the merits of the case.**” (emphasis added) This includes e-mail correspondence, whether or not intended for a broader audience.

<sup>6</sup> See Public Utility Companies Article § 6-105(g)(6).

will be open to anyone. The schedule for the public hearings will be issued once the locations and dates have been confirmed.

### **Discovery**

*Third*, the Commission addressed and made certain rulings on the record regarding discovery scheduling and procedures:

- Discovery began at the close of the conference on Monday, November 3, 2008. All forms of discovery permitted by the Federal Rules of Civil Procedure are available to all parties, subject to the rulings set forth below.
- The Applicants shall maintain all documents they produce in response to all discovery requests in a central data room, the location of which should be set forth in a letter filed in the matter by the Applicants and served electronically on all parties no later than Friday, November 21, 2008. In addition, all such documents shall be posted in the Applicants' virtual data room as soon as practicable, except for documents protected by a confidentiality agreement.
- Responses to discovery requests are due within 10 business days of service, and any objections to discovery requests must be served within 5 business days of service. Discovery requests, responses and documents should be served on all parties unless a party asks not to receive copies of responsive documents. Electronic service of discovery requests, responses and documents is sufficient so long as the recipient acknowledges actual receipt, which the responding party should obtain and maintain, and hard copies shall be made available if electronic service is not successful.
- Although Commission proceedings are not governed strictly by the Federal Rules of Civil Procedure, the parties should consider those Rules and the U.S. District Court for the District of Maryland's

Discovery Guidelines as the principles governing the conduct of discovery in this case.<sup>7</sup>

- The parties shall consult with each other and attempt in good faith to resolve all disputes prior to making an objection and again prior to filing a motion seeking relief from the Commission. In the event parties are unable to resolve a dispute, the aggrieved party may file a motion for relief within 3 business days from service of the written objection. The opponent shall respond to the motion within 2 business days of service of the motion. The motion and response shall be in letter format, and shall each be limited in length to 3 single-spaced pages with a 12-point or greater font. The letters must specify the dates and times of all consultations for the purpose of resolving the dispute. The parties shall contact the Executive Secretary via phone or email to schedule a hearing, and shall provide the Executive Secretary an electronic copy of the motion and response.
- The parties shall prepare and submit for approval a confidentiality agreement that will govern discovery and all hearings in this case. The agreement shall provide, among other things, that the party designating a document for confidential treatment bears the burden of proof in connection with any challenge to that designation. As the Commission advised the parties at the hearing, confidentiality will be the exception in this case, not the rule, and every document that can be revealed and discussed publicly will be. The parties should make designation decisions accordingly.

### **Scope**

*Finally*, although the Commission has considered the issues list submitted by the Staff, the Commission will not restrict the issues to a list at this point. The statutory public interest standard encompasses a broad array of issues and leaves the Commission

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<sup>7</sup> See Local Rules of the United States District Court for the District of Maryland, Appendix A, available at <http://www.mdd.uscourts.gov/LocalRules/localrules2008b.pdf>.

the discretion to consider any others we find relevant.<sup>8</sup> The Commission views its authority, and its obligation, to analyze this transaction as requiring a thorough investigation that errs on the side of inclusion. *Accordingly, and as the Commission articulated at the hearing, the Commission will consider all issues bearing or potentially bearing on the public interest standard in § 6-105 of the Public Utility Companies Article, and specifically bearing on whether the Commission should approve the transaction, approve it with conditions or disapprove it.*

As the Commission reiterates its commitment to consider fully all credible, supported arguments, however, it reiterates as well the direction that parties *must* connect all arguments they raise *directly* to an articulable public interest. A party raising an issue must be prepared to prove, with legal authority and evidence that can survive cross-examination, that the Commission's disposition of that issue bears directly on whether we should approve or disapprove, or conditional approval of, the transaction. This proceeding is neither a broad policy forum nor an opportunity for the parties to litigate issues more properly addressed elsewhere. To the contrary, the Commission will decide this case on a fully and rigorously developed record that it will apply against the governing legal standard. Speculation, conjecture, hypothesis and unsupported contentions of fact or law will not enter into our analysis or decision. As the case proceeds, the Commission may draw its substantive boundaries more sharply, but for now, the parties should use the foregoing principles as their guide.

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<sup>8</sup> See Public Utility Companies Article § 6-105(g)(2) (“The Commission shall consider the following factors in considering an acquisition under this section: (i) the potential impact of the acquisition on rates and charges paid by customers and on the services and conditions of operation of the public service company; (ii) the potential impact of the acquisition on continuing investment needs for the maintenance of utility services, plant and related infrastructure; (iii) the proposed capital structure that will result from the acquisition, including allocation of earnings from the public service company; (iv) the potential effects on employment by the public service company; (v) the projected allocation of any savings that are expected to the public service company between stockholders and rate payers; (vi) issues of reliability, quality of service, and quality of customer service; (vii) the potential impact of the acquisition on community investment; (viii) affiliate and cross-subsidization issues; (ix) the use or pledge of utility assets for the benefit of an affiliate; (x) jurisdictional and choice of law issues; (xi) whether it is necessary to revise the Commission's ring fencing and code of conduct regulations in light of the acquisition; and (xii) any other issues the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience, and necessity.”)

Two issues that have attracted public attention merit a brief, specific mention. *First*, the Commission will consider – and directs the Staff to analyze and raise, to the extent other parties do not – whether approval of this transaction can or should be conditioned on an agreement by the Applicants to return the former BGE generating plants to BGE and/or to cost of service regulation. *Second*, the Commission also will consider arguments demonstrating that the public interest would be served by a *concrete and viable* alternative transaction, as well as arguments that aspects of the post-transaction company/companies counsel in favor of or against approval. The Commission will not, however, consider in a vacuum the possibility of alternative transactions, whether shareholders would benefit from an alternative transaction, whether the Board of Directors of Constellation Energy Group breached its fiduciary duties to shareholders in the course of considering or recommending the proposed transaction or any other argument not connected directly to the broader public interest.

For the purposes of this proceeding, the Commission requires that an original and 22 copies, and an electronic version, of all filings be submitted to Terry J. Romine, Executive Secretary, Maryland Public Service Commission, William Donald Schaefer Tower, 6 St. Paul Street, 16<sup>th</sup> Floor, Baltimore, Maryland 21202. The Commission encourages persons to use the Commission’s “e-Filing” System for the electronic filing. Details of the “e-Filing” System are found on the Commission’s web site, [www.psc.state.md.us/psc](http://www.psc.state.md.us/psc).<sup>9</sup>

IT IS, THEREFORE, this 14<sup>th</sup> day of November, in the year Two Thousand Eight by the Public Service Commission of Maryland,

ORDERED: (1) That the Petitions to Intervene filed in this proceeding, except for the Petitions submitted by Chris Bush and Jeffrey Hooke, are granted;

(2) That the Petitions to Intervene filed by Chris Bush and Jeffrey Hooke are denied without prejudice, and each has until Friday, November 21,

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<sup>9</sup> **Confidential filings** should **not** be made via the “e-Filing” System, as these electronic filings are immediately available for public viewing.

2008 to file a new Petition for further consideration that demonstrates his compliance with Public Utility Companies Article §3-106 and COMAR 20.07.01.04;

- (3) That the following procedural schedule is hereby adopted:
- (a) Reply Testimony shall be filed by January 7, 2009;
  - (b) Rebuttal Testimony shall be filed by January 28, 2009;
  - (c) Evidentiary Hearings shall be held the week of February 16, 2009 (a more detailed schedule of dates and time shall be issued by a further Notice);
  - (d) Initial Briefs shall be filed by March 16, 2009;
  - (e) Reply Briefs shall be filed by March 23, 2009; and
  - (f) Oral Argument (if necessary) shall be scheduled for March 26, 2009.

The Commission reserves its right to change the procedural schedule as necessary.

(4) That the Parties shall abide by the discovery procedure set forth in this Order; and

(5) That the Parties are directed to prepare and submit for approval a confidentiality agreement to be used in this matter.

By Direction of the Commission,

*/s/ Terry J. Romine*

Terry J. Romine  
Executive Secretary