

PETITION OF: MAYOR AND CITY  
COUNCIL OF BALTIMORE

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IN THE

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CIRCUIT COURT

FOR JUDICIAL REVIEW OF THE  
DECISION OF THE MARYLAND  
PUBLIC SERVICE COMMISSION

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FOR

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BALTIMORE CITY

IN THE CASE OF THE COMMISSION'S  
INVESTIGATION INTO A RESIDENTIAL\*  
ELECTRIC RATE STABILIZATION AND  
MARKET TRANSITION PLAN FOR  
BALTIMORE GAS AND ELECTRIC  
COMPANY  
CASE 9052

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Part 20

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Case No.: 24-C-06-003976

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**ORDER**

This is an action by the Mayor and City Council of Baltimore (the “City”) for judicial review of the Order of the Public Service Commission (“PSC” or the “Commission”) in PSC Case No. 9052 (Order No. 80764), which Order was issued on April 28, 2006. Having reviewed the entire agency record, the City’s petition, the memorandum in support of the petition, the various memoranda in opposition to the petition, the City’s reply memorandum, and having heard the arguments of counsel at a hearing on May 30, 2006, the Court, pursuant to Rule 7-209, hereby **REVERSES AND VACATES** Order No. 80764 and **REMANDS** this matter to the Commission for further proceedings consistent with this Order.

These proceedings have been briefed, argued and decided on an expedited basis. The PSC Order No. 80764, from which the City has appealed, was issued on April 28, 2006. The City’s petition for judicial review was docketed with this Court on May 2, 2006. Following an initial hearing on the City’s motion for stay, the Court entered an Order dated May 10, 2006, staying implementation of PSC Order No. 80764 and setting a very fast schedule for disposition

of this case. Both the PSC and the Baltimore Gas and Electric Company (“BGE”) sought unsuccessfully to have the Court of Special Appeals lift the stay. While the appeals of the stay order were pending, BGE filed a motion for a limited remand with this Court and that motion was joined by the PSC<sup>1</sup> and the Office of People’s Counsel (“OPC”). It was opposed by the City. Along with its memorandum in support of its petition for judicial review, the City filed a notice of filing exhibits and motion to supplement the record. The exhibits filed in support of the City’s petition were 42 in number and the PSC opposed the motion to supplement, with respect to 9 of those documents, numbered 13, 14, 17, 18, 19, 21, 22, 33 and 42. The Court’s rulings on the pending motions are contained in this Order.

While the parties cavil about the subject matter of this case, the “elephant in the room” is the Electric Customer Choice and Competition Act of 1999, pursuant to which BGE entered into a restructuring settlement, approved by the Commission, which capped residential electric rates through June 30, 2006. On March 7, 2006, a PSC staff report indicated for the first time that the lifting of the cap on residential electric rates on July 1 of this year will result in a 72% rate increase for residential customers of BGE. Despite this Court’s expedited schedule, there are complex issues which remain to be determined and the July 1 deadline, which the Court earlier stated “looms very large,” is just 31 days away.

Recognizing the extremely limited time frame presented here, counsel for the respective parties have been cooperative with the Court in presenting their respective positions clearly and thoughtfully. For reasons that the Court cannot explain, the City has no allies before it. Aligned with BGE in opposition to the City’s petition are the PSC, OPC and Washington Gas

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<sup>1</sup> Counsel for PSC withdrew this support at oral argument.

Energy Services, Inc. (“WGES”), a competitive supplier of electricity, that is anxious for the cap to be removed and market rates to apply in order for it to compete effectively with BGE in the Maryland residential electricity market.

The debate between the parties in this Court has been over the scope of the Court’s review. The opposing parties insist that the procedures for establishing a wholesale competitive procurement and pricing system for the electricity supply was determined in a settlement approved by the PSC in Order No. 78400, issued April 29, 2003, and a subsequent phase II settlement approved on September 30, 2003. The OPC has been involved in this procedure throughout and the process has been approved more than once by the Federal Energy Regulatory Commission (“FERC”). The process was established in PSC Case No. 8908, from which no appeals were taken. The City did not participate. On February 24, 2006 BGE signed contracts for wholesale electricity supply to serve residential customers in accordance with this procedure and the result is the 72% bill impact. In response to a request from the Governor, the PSC initiated the present case No. 9052 to consider a “rate stabilization plan.” An evidentiary hearing was conducted before the Commission on March 2, 2006, without the City’s participation, and on March 6, 2006, the PSC entered Order No. 80638, adopting an opt-out mitigation plan with a nine month deferral period and the ability of BGE to charge interest on the deferred payments. No appeal was taken from that Order.

Following the announcement on March 7, 2006 of the 72% rate increase for residential customers, the City filed a motion to intervene in Case No. 9052 on March 21, 2006. Thereafter, on April 20, 2006, BGE filed a motion to amend Order No. 80638 to make adjustments that had been negotiated between BGE and the Governor following the close of the

legislative session. The next day, the Commission issued a notice of further hearing and status conference in Case No. 9052. The PSC conducted a “legislative-style” hearing on April 27, 2006, and issued Order No. 80764 on April 28, establishing a phase-in rate mitigation plan. The City then requested judicial review of that Order. The opposing parties have adamantly insisted that the Court’s review here is limited to determining whether the Commission’s adoption of an opt-in versus opt-out rate mitigation plan is supported by the evidence and not arbitrary or capricious.

It would be an understatement to say that the City takes exception to the conduct of the PSC throughout these proceedings. The City asserts that it was denied due process of law when the PSC refused to conduct an adjudicatory hearing on April 28, 2006. The City contends that Order No. 80764 was issued by the Commission without considering all the relevant facts and circumstances necessary to its determination. The City argues that the PSC should not have exercised its discretion to deny a consolidation of Case No. 9052 with Case No. 9054, the Commission’s investigation into the proposed merger of Constellation Energy and Florida Power and Light Company (“FPL”), because both cases contain common questions of law and fact. The City believes that Order No. 80764 should be vacated and the case remanded to the PSC to explore all relevant facts and circumstances surrounding the impact of the 72% rate increase to take effect on July 1, 2006. In sum, the City argues that the Commission failed to meet its statutory obligations to act in the public interest in the present case by failing to undertake an adequate evaluation of BGE’s procurement costs and rate of return.

The pertinent provisions of the statute governing the PSC in this case are contained at Md. Code Ann., Public Utility Companies Art., § 7-501, et. seq. § 7-510(c)(3)

provides that, following the rate cap periods, “if the Commission finds that the electricity supply market is not competitive or that no acceptable competitive proposal has been received to supply electricity to those customers described under paragraph (2) of this subsection, the Commission shall extend the obligation to provide standard offer service to residential and small commercial customers at a market price that permits recovery of the verifiable, prudently incurred costs to procure or produce the electricity plus a reasonable return.” The opposing parties contend that those findings and that process were made and approved in a settlement in 2003 in PSC Case No. 8908. They contend that Order No. 78400 is final and that those issues cannot be reached by the Court or the Commission in the present case. The City, on the other hand, contends that the heart of the present case is the announcement on March 7, 2006 of the 72% rate increase for residential customers and that the Commission’s obligation in any effort to mitigate the impact of that rate increase is to do so in the context of its statutory evaluation of prudently incurred costs and reasonable return.

The Court has no dispute with the notion that the unappealed and final orders of the Commission must be respected or with the concept that the PSC has discretion to set its own docket and to decline to consolidate cases, such as the BGE/FPL proposed merger case and the present case involving a rate stabilization or mitigation plan for residential customers. This Court is bound by the authorities of the Maryland appellate courts which have upheld the Commission’s discretion to control its own docket and impose finality on its decisions, with appropriate access to appellate review, and the Court has no interest in disturbing those well settled principles or in substituting its judgment for that of the agency statutorily charged with regulation of public utility companies. None of those principles, however, are in the least bit

disturbed by the practical circumstance that occasionally evidentiary issues overlap cases. Thus, the fact that a state and federally sanctioned process for evaluating prudently incurred procurement costs and reasonable return was determined long ago in a prior case, does not render irrelevant evidence relating to those costs and that return in a subsequent proceeding to address the impact of a dramatic 72% increase in residential rate payments.<sup>2</sup> Similarly, the fact that all the issues relevant to the merger of BGE and FPL may be addressed later this summer in a separate proceeding before the PSC, does not render irrelevant to the present case evidence of issues logically connected to the enormous rate increase for which a stabilization or mitigation plan is contemplated in the present proceeding. In fact, it is difficult for the Court to conceive of the Commission conducting an adequate review of the relevant facts and circumstances concerning such a plan without inquiring into a number of the issues raised by the City here, for example, the cost of power acquired by BGE from Constellation Energy, the savings associated with the proposed merger and the allocation of those savings to residential rate payers, the allocation of costs between BGE and Constellation Energy, the rate of return for BGE and Constellation Energy and other facts reasonably related to the rate increase and the payment deferral plan.<sup>3</sup>

The residents of Baltimore City, represented in this action by the Mayor and City

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<sup>2</sup> The absurdity of the Commission's position that this evidentiary door is forever closed is reflected in its principal counsel's response to the Court's question of whether the Commission was powerless to address even a 172% rate increase. Her reply was that the Commission had no ability, at this point, to do anything about the actual rate increase.

<sup>3</sup> The Court does not see a reasonable connection between the executive compensation and bonus issues to be reviewed in the merger proceeding and the issues in this rate mitigation/stabilization plan case to include these issues in its remand order.

Council, had no knowledge that their electricity rate would increase by 72% on July 1, 2006 until the announcement by PSC staff on March 7 of this year.<sup>4</sup> The only proceeding conducted by the Commission thereafter was that initiated by BGE on its motion to amend Order No. 80638 which, by its very terms, asks the Commission to consider newly discovered facts and important changes in circumstances and to conduct what would have amounted to an adjudicatory hearing, allowing participation of all parties properly admitted before the Commission in this case. In the judgment of this Court, the time limitations were not of sufficient importance here to deny the participants their right to due process or to permit the Commission itself to make findings of adjudicatory facts in a proceeding lacking the appropriate formalities. The PSC knew that this matter would most likely receive judicial review. It recognized certainly the importance of providing a record to support its factual findings and legal conclusions and it could not help but appreciate the tremendous public interest in its adoption of Order No. 80764, coming as it did on the heels of the announcement of the 72% rate hike. Under these circumstances, the Court believes that *Hyson v. Montgomery County Council*, 242 Md. 55 (1966) and its progeny compelled the PSC to conduct an adjudicatory hearing and that the City was denied its right to due process of law when its request for an adjudicatory hearing was denied prior to the start of the April 27, 2006 hearing in this case. Moreover, the Commissions's failure to conduct a proper adjudicatory hearing resulted in its issuance of a defective order, which contained neither findings of fact nor conclusions of law supported by substantial evidence on the record. BGE's efforts to avoid having this Court or an appellate court uphold the City's right to an adjudicatory

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<sup>4</sup> The Commission's March 6, 2006 Order did contain a reference to the testimony of a staff economist, Philip E. VanderHayden, whose analysis indicated increases of approximately 40-81%. This was uncontested until the issue was raised by the City.

hearing by requesting a limited remand for cross examination of its only witness on April 27 is simply not an adequate remedy given the other limitations imposed on the hearing by the PSC.

The Public Service Commission is a creature of statute. As the City contends in this case, the PSC has a statutory obligation to supervise and regulate public service companies in the public interest (PUC, § 2-113), to oversee the regulation of the restructured electric industry in a manner that is fair to customers (PUC, § 7-505) and to extend the obligation to provide standard offer service to residential and small commercial customers at a market price that permits recovery of the verifiable, prudently incurred costs to procure or produce the electricity plus a reasonable return. (PUC, § 7-510)(c)(3)(ii). The Court does not believe that the Commission acted in the public interest or with fairness to customers in the face of a recently announced 72% residential rate increase, when it abruptly terminated an adjudicatory proceeding following the City's intervention on behalf of its BGE customer residents and denied the City the fundamental fairness of a due process hearing on all relevant facts and circumstances relating to a Commission approved plan to mitigate the dramatic residential rate increase.

For these reasons, it is this 30<sup>th</sup> day of May, 2006, by the Circuit Court for Baltimore City, Part 20,

**ORDERED** as follows:

1. The City's motion to supplement the record for purposes of judicial review is **GRANTED**, with the exception of Tab No. 42 containing the public comments of Chairman Schisler.
2. BGE's motion for limited remand is **DENIED**, as moot.
3. Order No. 80764 issued by the PSC on April 28, 2006 is **VACATED** and

this case (No. 9052) is remanded to the Commission to conduct an adjudicatory hearing on an appropriate rate mitigation or stabilization plan, at which the City and all other parties before the Commission shall have the opportunity to present evidence and cross-examine witnesses on all relevant facts and circumstances, including, but not limited to, the cost of power acquired by BGE from Constellation Energy, the savings associated with the proposed merger between BGE and FPL and the allocation of those savings to residential rate payers, the allocation of costs between BGE and Constellation Energy, the rate of return for BGE and Constellation Energy, as well as the issues presented by BGE's motion to amend Order No. 80638 and its request for a rehearing in connection with that Order.

4. This Court's Order dated May 10, 2006, staying implementation of PSC Order No. 80764 is dissolved, as that Order is hereby **VACATED**. Any further requests for stay must be directed to the PSC.
5. On remand, the Commission shall determine in accordance with its custom and practice the specific procedures to be applied in the adjudicatory hearing, including apportioning the burdens of proof and production to the appropriate parties on the issues presented.
6. Due to the fast approaching July 1, 2006 deadline for lifting the cap on residential rates, the PSC will have the option either of further briefly deferring the cessation of rate caps or of proceeding with the July 1, 2006

deadline, the rate stabilization plan adopted on March 6, 2006 and  
formulating a mechanism to later make whole its customers through  
appropriate adjustments and/or credits.

/s/ Albert J. Matricciani, Jr.  
ALBERT J. MATRICCIANI, JR.  
Judge

cc: All Counsel of Record (via e-mail)