

**CONSTELLATION ENERGY  
GROUP, INC., et al.**

**Petitioners**

v.

**MARYLAND PUBLIC SERVICE  
COMMISSION, et al.**

**Respondents**

**IN THE**

**CIRCUIT COURT**

**FOR**

**BALTIMORE CITY**

**Case No.: 24-C-09-003720**

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**MEMORANDUM OPINION**

**I. INTRODUCTION**

On June 11, 2009, Petitioners Constellation Energy Group, Inc. (“CEG”) and Baltimore Gas and Electric Company (“BGE”) filed a Petition for Judicial Review<sup>1</sup> in this Court. Similarly, on June 17, 2009, Petitioner E.D.F. International S.A. (“EDF”) joined in the present action by filing its own Petition for Judicial Review. The Petitioners are seeking judicial review of the June 11, 2009 decision, Order No. 82719, issued by the Maryland Public Service Commission (the “Commission”) in connection with PSC Case No. 9173. In response to the Petitions for Judicial Review, the State of Maryland (the “State”) filed a Motion to Dismiss on June 17, 2009. Additionally, the Commission filed a Motion in support of the State’s Motion to Dismiss on June 18, 2009. Similarly, the Maryland Office of People’s Counsel (“OPC”) filed a Motion to Dismiss on June 18, 2009, in which it adopted the arguments advanced by the State.

**II. PROCEDURAL HISTORY**

On October 17, 2008, CEG, BGE, and MidAmerican Energy Holdings Company (“MidAmerican”) filed a joint application for approval of their proposed transaction pursuant to

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<sup>1</sup> Contemporaneously, CEG and BGE filed a Motion to Shorten Time with regard to the filing of any responsive pleadings to their Petition for Judicial Review. However, inasmuch as no party opposed this Court handling the present matter on an accelerated timetable and the parties having agreed upon all critical deadlines, the Motion to Shorten Time was rendered moot.

section 6-105 of the Public Utility Companies Article of the Maryland Code Annotated.<sup>2</sup> Once presented with EDF's proposal—which is the matter underlying the instant proceeding—CEG abandoned its proposed transaction with MidAmerican in December 2008. Accordingly, on December 19, 2008, following a status conference, the Commission terminated its public interest review of the MidAmerican proposed transaction. Furthermore, the Commission initiated new proceedings in order to obtain a clear understanding of the financial condition of BGE, the potential impact of EDF's proposed transaction on BGE, and to determine whether EDF's proposed transaction would result in EDF's acquisition of substantial influence over the policies and actions of BGE. *See In the Matter of the Current and Future Financial Condition of BGE*, Commission Order No. 82407 at 9, January 16, 2009.

In accordance with the Commission's revised schedule,<sup>3</sup> the parties submitted expert testimony in March and April 2009 on the issue of the potential existence of "substantial influence" over BGE. Additionally, the Commission conducted a six-day evidentiary hearing beginning on April 27, 2009, during which it took testimony from twelve witnesses. Thereafter, the parties filed post-hearing briefs, and on June 11, 2009, the Commission issued its decision—Order No. 82719. The Commission determined that EDF's proposed transaction falls within the purview of section 6-105(e); therefore, CEG and EDF must obtain the Commission's authorization, pursuant to section 6-105(g), before the closing of the Transaction.

In its Order, the Commission ruled that the pending \$4.5 billion transaction (the "Transaction"), in which a wholly owned subsidiary of EDF would acquire a minority interest in Constellation Energy Nuclear Group, LLC ("CENG"), is subject to Commission pre-approval

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<sup>2</sup> All references to "section" made in this Memorandum Opinion are to the Public Utility Companies Article of the Maryland Code Annotated.

<sup>3</sup> The schedule originally established by the Commission was modified and extended at the request of CEG and BGE.

pursuant to section 6-105. Specifically, the Commission found that the proposed Transaction would result in EDF acquiring, “directly or indirectly, the power to exercise any substantial influence over the policies and actions of” BGE. *In the Matter of the Current and Future Financial Condition of BGE*, Commission Order No. 82719 at 34, June 11, 2009; *see also* Md. Code Ann., Pub. Util. Cos. § 6-105(e)(1). Furthermore, although the Commission acknowledged the “safe harbor” provision of section 6-105(e)(2), it ultimately determined that it is inapplicable to the Transaction. *See* Commission Order No. 82719 at 20. Consequently, the Commission concluded that the statute requires CEG and EDF to obtain Commission authorization, following a public interest review as set forth in section 6-105(g), before finalizing the Transaction.

The Petitioners are seeking judicial review of Order No. 82719 on the grounds that (1) the Transaction falls outside the scope of section 6-105(c); (2) the safe harbor provision of section 6-105(e)(2) is applicable and exempts the Transactions from Commission pre-approval; (3) the Commission’s finding that EDF would acquire the power to exercise substantial influence over BGE is erroneous; and (4) the Commission erred in applying section 6-105 because EDF will not become an “affiliate” of BGE following the Transaction as the statute requires.

After the filing of the Petitions for Judicial Review, this case was designated for this Court’s Business and Technology Case Management Program. On June 18, 2009, the Court conducted a telephone status conference, and after consultation between the parties, the Court issued a Case Management Order on June 19, 2009. The Case Management Order provided for, *inter alia*, a hearing on all motions to dismiss on July 1, 2009. To that end, the Court entertained oral argument on the three motions to dismiss that were filed in connection with the instant action. More specifically, the Court heard argument on the following motions to dismiss: (1) the State’s Motion to Dismiss Interlocutory Petition for Judicial Review; (2) the PSC’s Motion to

Dismiss Petition for Judicial Review; and (3) the OPC's Motion to Dismiss Interlocutory Petitions for Judicial Review.<sup>4</sup>

### III. DISCUSSION

The Respondents filed the instant Motions to Dismiss pursuant to Maryland Rule 7-204(b), which provides for the filing of a preliminary motion in an administrative appeal. In their Motions, the Respondents challenge this Court's jurisdiction to entertain the extant Petitions for Judicial Review.

#### A. The Commission's June 11, 2009 Decision, Order No. 82719, Fails to Satisfy the Firmly Established Requirement of Finality

It is well established that section 3-202 of the Public Utility Companies Article, entitled "Right to judicial review of orders and decisions," controls this Court's authority to entertain the present action for judicial review of an order of the Public Service Commission. Section 3-202 provides, in relevant part, "Except for the staff of the Commission, a party or person in interest, including the People's Counsel, that is dissatisfied by a final decision or order of the Commission may seek judicial review of the decision or order as provided in this subtitle." Although the statute does not define what constitutes a "final decision or order," venerable Maryland case law has developed a rigid framework for determining whether a decision or order of an administrative agency is final. *See Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co.*, 296 Md. 46, 56–57 (1983).<sup>5</sup> The Court of Appeals has stated that:

[O]rdinarily the action of an administrative agency, like the order of a court, is final if it determines or concludes the rights of the parties, or if it denied the parties means of further prosecuting or defending their rights and interests in the

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<sup>4</sup> Although three separate Motions to Dismiss were filed in the instant action, the PSC and OPC's Motions were filed in support of the State's Motion. Therefore, this Memorandum Opinion will address all three Motions simultaneously, rather than in three separate opinions.

<sup>5</sup> All parties agree that *Maryland Commission on Human Relations v. Baltimore Gas & Elec. Co.*, 296 Md. 46, 56–57 (1983), sets forth the test of finality with respect to administrative agency decisions.

subject matter in proceedings before the agency, thus leaving nothing further for the agency to do. . . . [A]n administrative agency's action is final if it determines the rights of the parties and leaves nothing further for the agency to do.

*Id.* (citations omitted). The Court of Appeals has described the rationale underlying the strict requirement of finality as follows:

“The salutary purpose of the finality requirement is to avoid piecemeal actions in the circuit court seeking fragmented advisory opinions with respect to partial or intermediate agency decisions. Not only would a contrary rule create the real prospect of unnecessary litigation, as a party choosing to seek review of an unfavorable interlocutory order might well, if the party waited to the end, be satisfied with the final administrative decision, but the wholesale exercise of judicial authority over intermediate and partial decisions could raise serious separation of powers concerns.”

*Tamara A. v. Montgomery County Dep't of Health & Human Servs.*, 407 Md. 180, 189 (2009) (quoting *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 407 (1988)).

The Petitioners maintain that the Commission's Order is final under *Steuart Investment Company v. Board of Commissioners, St. Mary's County*, 38 Md. App. 381 (1978). This Court disagrees. In *Steuart*, the Board of County Commissioners ordered that Steuart Investment Company had to obtain an environmental impact analysis, or EIA, as a prerequisite to the issuance of a building permit. *See id.* at 384–87. The Court of Special Appeals concluded:

[A]lthough the contents of the EIA had not been agreed upon, the Board had determined that it would not act upon Steuart's site plan without an EIA of some as yet undetermined content. Thus the Board's action, as expressed in its letters, was to require an EIA as a prerequisite to site plan approval despite Steuart's protest. The Board's action imposed an obligation on Steuart to participate in the provision of the EIA and settled the disputed issue of whether an EIA was prerequisite to approval. The legal consequence of the Board's action was that, unless and until the Board obtained an EIA, Steuart's permit was, in effect, denied. Under all the these circumstances, the Board's letter of 6 May 1976 was a final order and Steuart had thus exhausted its administrative remedies with respect to the requirement of an EIA even though the contents of the EIA had not yet been determined.

*Id.* at 392. The *Steuart* court was presented with an administrative order that required a party to take some affirmative action outside of the administrative proceeding itself, i.e., obtain an EIA. In contrast, this Court is faced with an administrative order that requires the parties to engage in further administrative proceedings. In that context, *Steuart* is distinguishable from the facts of the case at bar and thus not controlling of the issue of finality.

The Commission, in Order No. 82719, determined that section 6-105(e)(2) does not exempt the Transaction from further administrative proceedings. The Commission further held that the Transaction is violative of section 6-105(e)(1),<sup>6</sup> thereby triggering the need for a public interest review pursuant to section 6-105(g). Specifically, the Commission's Order No. 82719 concluded, in relevant part:

For the foregoing reasons, we hold that EDF would, after closing of the proposed transaction, acquire directly or indirectly the power to exercise substantial influence over the policies and actions of BGE. As such, the statute requires CEG and EDF to obtain the Commission's authorization prior to closing, after the public interest review set forth in PUC § 6-105(g).

After having reviewed all of the written filings and section 6-105 itself and having entertained lengthy oral argument, this Court concludes that the Commission's June 11, 2009 Order does not constitute a final order. Conversely, Order No. 82719 is in the form of an interlocutory order, which requires further administrative proceedings. In other words, Order No. 82719 mandates that the Transaction must obtain Commission authorization after being subjected to a section 6-105(g) public interest inquiry.

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<sup>6</sup> Section 6-105(e)(1) prescribes:

(1) Without prior authorization from the Commission, a person may not acquire, directly or indirectly, the power to exercise any substantial influence over the policies and actions of an electric company, gas and electric company, or gas company, if the person would become an affiliate of the electric company, gas and electric company, or gas company as a result of the acquisition.

As the United States Court of Appeals for the District of Columbia Circuit held in *Aluminum Company of America v. United States*, “It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding.” 790 F.2d 938, 941 (D.C. Cir. 1986) (citations omitted). That is precisely the situation present in the case *sub judice*; the Commission has exercised its authority under section 6-105(e) to require authorization of the Transaction through further administrative proceedings under section 6-105(f) and (g). Accordingly, it cannot be argued that the Commission’s June 11, 2009 Order “leaves nothing further for the agency to do.” *Baltimore Gas & Elec. Co.*, 296 Md. at 57. Consequently, the Petitioners have failed to satisfy the second prong of the finality test that is firmly established by *Baltimore Gas & Electric* and its progeny. *Id.*

**B. The Commission's June 11, 2009, Decision, Order No. 82719, Does Not Fall Within the Very Limited Exception of *Holiday Spas v. Montgomery County***

Alternatively, the Petitioners maintain that they are permitted an immediate right to appeal because the Commission’s June 11, 2009 Order is exempt from finality. Namely, Petitioners contend that Order No. 82719 enjoins CEG and BGE from closing EDF’s acquisition of a majority interest in CEG’s nuclear power plants. The Petitioners further maintain that should this Court not address this interlocutory appeal, it would have a chilling effect on CEG’s unregulated business.

In support of this argument, the Petitioners rely heavily on a judicially created exception to the prerequisite of finality. *See Holiday Spas v. Montgomery County*, 315 Md. 390 (1989). In *Holiday Spas*, the Court of Appeals determined that the Montgomery County Commission on Human Relations had not resolved the underlying issue of damages, and therefore, the traditional requirement of finality as a predicate to appellate review of administrative agency decisions was

not satisfied. However, in *Holiday Spas*, the Court held that an exception to finality exists where the agency order in question inflicts “sufficient irreparable injury to be deemed final.” *Id.* at 399.

The Petitioners in this proceeding argue that, absent review by this Court at this time, the transaction between EDF and CEG would be placed in grave jeopardy. In that context, the Petitioners contend that Order No. 82719 subjects the Petitioners to irreparable injury so as to require this Court’s immediate review of the interlocutory order.

First, it is noteworthy that the Court of Appeals recently held that the exception explicated in *Holiday Spas* is very narrow. *See Tamara A.*, 407 Md. at 189 (holding that “[i]n *Holiday Spas v. Montgomery County*, 315 Md. 390 (1989), this Court recognized a *very limited exception* to the finality requirement with respect to judicial review of an administrative agency order”) (emphasis added). In *Holiday Spas*, the administrative agency required the party to take several affirmative steps to assure compliance outside the context of the administrative proceeding itself. *Holiday Spas*, 315 Md. at 394. In contrast, the Commission’s Order in this case requires further administrative proceedings consistent with the agreed upon scheduling order associated with the case. Clearly, every order of a court or administrative agency has ancillary and potentially adverse effects. Admittedly, the Commission’s Order affects adversely the rights of the Petitioners. That, *vel non*, does not entitle the Petitioners the right to an immediate appeal. If an immediate appeal were permitted on interlocutory administrative orders that negatively affect a party, the “very limited” exception of *Holiday Spas* would swallow the rule governing finality.

Secondly, the pending transaction between CEG and EDF is nevertheless subject to receipt of NRC approval, which to date, has not been granted.<sup>7</sup> Third, EDF and CEG are no

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<sup>7</sup> At oral argument, the Petitioners’ counsel represented that NRC approval is forthcoming. However, at this time, the NRC has not formally approved the Transaction.

more “enjoined” from proceeding with their transaction after the June 11, 2009 Order than they were after Order 82407, which was issued on January 16, 2009. The June 11, 2009 Order—similar to Order No. 82407—did not include a determination of the ultimate issue under section 6-105, i.e., whether the Transaction is consistent with the public interest, and may therefore proceed. Indeed, in its June 11, 2009 Order, the Public Service Commission noted expressly that:

We reiterate here what we said at the outset of this Order: we have found only that EDF would acquire the power to exercise substantial influence if the deal proceeds. Nothing in this opinion should be construed to reflect this Commission’s value as to the merits of this transaction or the likelihood that the deal will or will not ultimately be approved. Issues bearing on the public interest will be addressed in the next phase of the case.

*In the Matter of the Current and Future Financial Condition of BGE*, Commission Order No. 82407 at 34–35, June 11, 2009. Accordingly, the Commission’s June 11, 2009 Order does not fall within the very limited exception governing finality.

### **C. CEG and BGE’s Participation Before the Commission is Continuing**

Tangentially, CEG and BGE argue that neither CEG nor BGE is acquiring anything, and therefore, neither is an “applicant” pursuant to section 6-105(f). Accordingly, the Petitioners maintain that they have no further remedies before the Commission, and therefore, are entitled to immediate judicial review at this stage of the proceeding. The Court disagrees.

The Petitioners are entirely correct that EDF is the only party that *must* submit an application pursuant to section 6-105. However, EDF has submitted an application to the Public Service Commission on or about June 16, 2009. Further, CEG and BGE attended the status conference before the Commission on June 17, 2009 and were ordered “to file their testimony in support of EDF’s application on or before June 24, 2009.” Moreover, the procedural schedule established by the Commission on June 18, 2009 invites reply testimony, rebuttal testimony, and

discussing requests from all interested parties, including EDF, BGE and CEG. In sum, this Court rejects the Petitioners' contention that there is nothing left for the Commission to do with respect to BGE and CEG.

#### **IV. CONCLUSION**

For the reasons set forth fully in this Memorandum Opinion, this Court concludes that the Commission's June 11, 2009 decision, Order No. 82719, issued in connection with PSC Case No. 9173, is not a final order as defined under Maryland case law. Furthermore, this Court concludes that Order No. 82719 does not fall within the limited exception enumerated in the *Holiday Spas* decision. Finally, this Court concludes that CEG and BGE remain active participants in the administrative proceedings. Consequently, this Court lacks jurisdiction under section 3-202 of the Public Utility Companies Article to entertain the Petitions for Judicial Review at this time.

July 2, 2009  
Date

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Stuart R. Berger  
Judge, Circuit Court for Baltimore City