BEFORE THE
MARYLAND PUBLIC SERVICE COMMISSION

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IN THE MATTER OF THE BALTIMORE GAS AND ELECTRIC COMPANY'S APPLICATION FOR AN ELECTRIC AND GAS MULTI-YEAR PLAN	*	CASE NO. 9692
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MOTION FOR LEAVE TO FILE REPLY TO BALTIMORE GAS AND ELECTRIC COMPANY'S RESPONSE TO ORDER NO. 90915 AND REPLY

The Office of People's Counsel moves for leave to file a reply to Baltimore Gas and Electric Company's response ("Response") to Commission Order No. 90915, which was filed on November 30, 2023[1] in the form of a letter accompanying the BGE's public disclosure of company Exhibit DMV-11. In Order No. 90915, the Commission directed BGE to remove the confidentiality designation for Exhibit DMV-11—a memorandum detailing, among other things, BGE's rationale for capitalizing expenditures it makes to improve Baltimore City's conduit system under a February, 2023 agreement with Baltimore City. BGE's compliance filing improperly makes substantive arguments that supplement BGE's brief, mischaracterizes the contents of the memorandum and insinuates that OPC acted improperly. OPC seeks leave to file a reply, set forth below, which is limited to these points.

[1] ML# 306397.

REPLY TO BALTIMORE GAS AND ELECTRIC COMPANY'S RESPONSE TO ORDER NO. 90915

BGE claims in its Response that the "amended conduit agreement . . . will save BGE customers $57 million over the next three years, while allowing BGE to increase investments to improve the conduit system."[2] This claim, which has nothing to do with compliance with Order No. 90015, mischaracterizes the contents of the memorandum contained in Exhibit DMV-11.

First, BGE describes the memorandum as "evidence" supporting its misleading claim that the conduit agreement will save BGE's customers money over agreement's three-year term.[3] The memorandum contains no financial computations that support the proposition that customers are better off if conduit costs are capitalized. In fact, if BGE spends all of the $212 million that the agreement authorizes it to spend on conduit improvements (assuming the agreement is extended through 2029) and is permitted to capitalize those investments over their 50-year lifespan, *customers would ultimately pay more than $800 million* for those improvements. Moreover, once the agreement term expires, at the end of 2026 or 2029, BGE will need a new lease arrangement with Baltimore City that will add new customer costs to the capitalized costs being depreciated over 50 years. There are no circumstances where capitalization will save customers money over the longer term. In the rate case, BGE did not dispute OPC's expert's

[2] Response Letter at 1.
[3] *Id.*

calculation of the full costs of capitalizing over its lifetime of the investments,[4] nor did it provide any analysis of its own on the costs to customers beyond three years, even after OPC asked for that information in discovery. BGE's improper defense of the conduit deal in its Response fails to provide this additional context.

Second, BGE's statement that general accounting principles support capitalization of the conduit costs "[b]ecause of BGE's perpetual access rights"[5] is both unsubstantiated and incomplete. The memo actually confusedly concludes that capitalization is appropriate for two reasons: (1) BGE's purported "perpetual access rights"[6] and (2) the company's *"ability to include these expenditures in rate base*."[7] The second reason is a tautology. Stated otherwise, BGE asserts that it can capitalize an investment it does not own because it can capitalize that investment. This analysis assumes its conclusion—presuming the very issue before the Commission—and undermines its purported application of GAAP.

Third, BGE's claim regarding future "benefits" to it and its customers from capitalizing the investments is illusory, both because (1) on a net basis, the future "benefits" customers will purportedly receive depend on the associated costs—the full scope of which are unknown—and (2) unlike making depreciation payments on an asset the utility owns, the customers who pay for BGE's proposed 50 years of depreciated

[4] BGE disputed the net present value calculation of OPC's expert and disputed that that calculation could be compared to a scenario in which the company paid $212 million to the City in lease payments but not did not capitalize those investments. Tr. 896:7-898:17.
[5] Response at 2.
[6] No document in the record established in this case supports BGE's argument that it enjoys "perpetual access rights" to the conduit system.
[7] Exhibit DMV-11 at 6 (emphasis added).

payments for conduit improvements will *not* obtain any cognizable legal interest[8] in the conduit because BGE does not own it.

Fourth, the accounting memorandum confirms that the agreement with Baltimore City "meets the definition of a lease."[9] Because it is a lease, the improvements are "leasehold improvements" that GAAP and FERC Uniform System of Accounting rules require to be amortized over the shorter of (i) the life of the assets or (ii) the term of the lease (which the accounting memo correctly states is the end of 2026). As noted, the memo's results-oriented subsequent conclusion that they are not leasehold improvements rests on its circular assumption that the Commission has already approved its proposal to capitalize those improvements.

Next, the Response insinuates that OPC somehow acted improperly by requesting the Commission to require public disclosure of the memo.[10] BGE argues that it voluntarily provided the memo to OPC and the Commission "with their understanding and . . . agreement that the memo would only be used for the MRP proceeding and would remain confidential."[11] Contrary to BGE's implication, OPC has complied with its obligations under the protective agreement. OPC did not publicly disclose the document and has not used it in any other proceeding. Apparently, BGE believes that the protective agreement forecloses OPC's ability to challenge the confidentiality designation of a

[8] This principle is inherent in the adjustments made to depreciation for net salvage as well as other century-old ratemaking principles, as explained in OPC's briefing.
[9] In its statement sent to the press prior to the filing of its compliance filing, BGE acknowledges the memo concludes that the agreement constitutes a lease, but maintains, without explanation, that "it is not legally a lease."
[10] Response at 2.
[11] *Id.*

document. That is not true. Section 3 of the protective agreement expressly creates a mechanism for a party to challenge a document's confidential designation and provides that such disputes "shall be treated as a discovery dispute and resolved by the PSC."[12] Indeed, OPC first asked BGE to remove the confidentiality designation, then brought the issue to the Commission only after BGE declined. This is fully consistent with the protective agreement.[13]

Finally, BGE's Response contains a veiled threat to withhold future documents relevant to Commission proceedings on the grounds that those documents may be subject to public disclosure. BGE falsely presumes that it has a right to withhold information relevant to its performance or the Commission's evaluation of requested rate increases—matters of great public importance. In fact, as a public service company, BGE must file reports and information as required by the Commission.[14] Further, the Commission will decide whether a document is discoverable in a future proceeding, not BGE.

BGE further ignores that any document filed with the Commission is, as Order No. 90915 concludes, a public record potentially subject to disclosure under the Public Information Act.[15] The Commission's reliance on confidential materials in a rate case does not immunize those materials from disclosure pursuant to the PIA. Even after a rate case has concluded, any person could request—and the Commission could authorize—

[12] *See* Attachment A at 3.
[13] BGE also grossly mischaracterizes OPC's interactions and motives with respect to the media. OPC does not address those mischaracterizations here.
[14] *See* Md. Code Ann., Pub. Util. Art. ("PUA") §§ 5-302(a)(1), 6-205(d)(1).
[15] Md. Code Ann., Gen. Provis. § 4-101(1)(i)(defining "public record" as "the original or any copy of any documentary material that is . . . received by the unit or instrumentality of the State in connection with the transaction of public business").

release of confidential materials submitted as part of a rate case proceeding. Finally, BGE's veiled threat to withhold documents for fear of public disclosure is concerning and completely at odds with its claim that the company "strongly favors transparent exchanges of information between parties and the Commission."[16]

CONCLUSION

The Commission should accept this reply and disregard the assertions the improper response letter that BGE included with the public version of Exhibit DMV-11 in its filing to comply with Order No. 90915. As the Commission has repeatedly recognized, transparency in regulatory proceedings is paramount. A utility's belief that a document is confidential does not override the Commission's authority to determine that disclosure of confidential materials is warranted to ensure the public is accorded wide-ranging access to information concerning the operation of their government.

Respectfully submitted,

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[16] Response at 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of December 2023, a copy of OPC's Motion for Leave to File Reply to Baltimore Gas and Electric Company's Response to Order No. 90915 and Reply were e-mailed to all parties of record in this proceeding.

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