

**IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY**

IN THE MATTER OF THE  
PETITION OF THE MARYLAND  
OFFICE OF PEOPLE’S COUNSEL

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**Civil Case No. 15-CV-22-001977**

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**MEMORANDUM OF PETITIONER  
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## INTRODUCTION

As Maryland sets more aggressive goals to reduce greenhouse gas emissions, the Public Service Commission has frustrated the State's effort by sitting idle while Washington Gas distributes deceptive marketing materials promoting natural gas in its customer bills. The utility's marketing broadly pronounces alleged environmental and cost benefits of natural gas consumption:

Natural Gas is a [*sic*] clean, efficient, and reliable energy. Converting an all-electric home to natural gas is the equivalent of planting 2.75 acres of trees or driving 26,520 fewer miles each year. In addition, natural gas cost [*sic*] 1/3 less than electric, which makes it a smart decision for the environment and your wallet.

In the era of climate change and natural gas price volatility, attempts—like Washington Gas's message above—to broadly and unqualifiedly brand fossil fuels as “clean energy” and “smart for the environment and your wallet” are an insidious form of “greenwashing,” or the misleading of customers regarding a product's environmental benefits. Greenwashing is detrimental to the public interest.

Washington Gas operates as a state-granted monopoly; its customers are captive and cannot choose a different utility to distribute their gas. They provide a captive audience for Washington Gas's greenwashing efforts and must trust that regulators will protect them from misleading messages entering their homes through their utility bills. Washington Gas's deceptive messages are specifically intended to induce its customers

into making long-term, economically significant decisions—decisions that are likely detrimental to their own interests and run counter to the State’s decarbonization efforts.<sup>1</sup>

The Maryland Public Service Commission’s mandate is to supervise and regulate public service companies to ensure those companies operate in the public interest.<sup>2</sup> This obligation includes regulating utility marketing and protecting captive customers from exploitive utility practices.

On November 23, 2021, OPC filed a complaint with the Commission alleging Washington Gas and its affiliate WGL Energy Services were violating the Public Utilities Article by distributing the marketing message quoted above, containing deceptive and misleading statements about the environmental and cost attributes of natural gas. The Commission summarily dismissed OPC’s complaint. The Commission’s orders completely ignored Washington Gas’s marketing message and the readily apparent factual dispute about the scope of the marketing effort and who was responsible for it. The Commission conducted no investigation and made no independent factual findings. The Commission refused to address OPC’s claim that the marketing violated the Public Utilities Article. These illegal and arbitrary actions flaunt the precepts of Maryland administrative law.

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<sup>1</sup> See Md. Code Ann., Envr. § 2-1204.1.

<sup>2</sup> Md. Code Ann., Pub. Util. § 2-112. Washington Gas is a public service company as defined under Md. Code Ann., Pub. Util. § 1-101(z)(1).

As will be discussed below, the Commission's orders violate the Public Utilities Article and are arbitrary and capricious. This Court should reverse Order Nos. 90057 and 90175 and remand the case back to the Commission.

### **STATEMENT OF THE CASE**

This petition for judicial review concerns Commission Order Nos. 90057 and 90175, issued on February 7, 2022, and April 20, 2022, respectively. The Commission issued these orders in Case No. 9673, a proceeding opened on November 23, 2021, in response to OPC's complaint against Washington Gas and WGL Energy Services regarding an environmental marketing statement included in bills issued to certain customers. Washington Gas filed a motion to dismiss on January 7, 2022, to which OPC responded on January 24, 2022. The Commission issued Order No. 90057 on February 7, 2022, dismissing OPC's complaint. OPC filed a request for rehearing, which the Commission denied on April 20, 2022, in Order No. 90175. On May 20, 2022, OPC timely filed its petition for judicial review. OPC submits this memorandum pursuant to Maryland Rule 7-207.

### **QUESTIONS PRESENTED**

1. Were Order Nos. 90057 and 90175 arbitrary and capricious or did they err as a matter of law because they failed to address OPC's claims under the Public Utilities Article?
2. Were Order Nos. 90057 and 90175 arbitrary and capricious because they dismissed material factual disputes, including those raised in OPC's sworn affidavit, when it dismissed OPC's complaint?
3. Were Order Nos. 90057 and 90175 arbitrary and capricious or did they err as a matter of law because they failed entirely to address the substance of Washington



Gas's marketing claims and accepted Washington Gas's self-certification of its marketing statements?

## STATEMENT OF FACTS

### A. The Public Service Commission's Unique Regulatory Role

Public utilities are among the most heavily regulated industries in the nation.

Through the state's award of an exclusive franchise, they are bestowed with a monopoly and insulated from competition.<sup>3</sup> The condition of that award is comprehensive regulation of their terms and conditions of service, customer rates, and the scope of their economic activities.<sup>4</sup> Public utilities provide essential services and have special access to customers within their government-granted service territories. Through the bills for their services, utilities have a captive audience for presenting marketing messages. The law recognizes that without comprehensive regulation, utilities can misuse their monopolies and take advantage of their captive customers.<sup>5</sup>

Through the Public Utilities Article, Maryland law recognizes the importance of regulating public utilities and assigns that responsibility to the Public Service Commission. The Commission's primary responsibility is to "supervise and regulate the public service companies . . . to ensure their operation in the interest of the public and promote adequate, economical, and efficient delivery of utility services in the State

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<sup>3</sup> See generally, *In the matter of the Establishment of Service Areas of Electric Utilities within the State of Maryland*, Order No. 56203, Case No. 6017 (April 27, 1966).

<sup>4</sup> Md. Code Ann. Pub. Util. § 5-201(a).

<sup>5</sup> *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595–96 (1976) ("Public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation.").

without unjust discrimination.”<sup>6</sup> This obligation extends beyond rate regulation and performance; it encompasses virtually every aspect of utility services, utility marketing efforts as well.<sup>7</sup> For example, the Commission has approved regulations governing the disclosure of the emissions intensity of the fuel mixes of electricity to consumers.<sup>8</sup>

Section 3-102 of the Public Utilities Article entitles anyone to file a complaint with the Commission alleging a violation of its provisions. This complaint provision expressly recognizes OPC’s responsibility to raise complaints on behalf of residential utility customers.<sup>9</sup> For its part, OPC is the statutory representative of residential customers responsible for “conduct[ing] investigations and request[ing] the Commission to initiate proceedings to protect the interests of residential” utility customers.<sup>10</sup>

Finally, the term “public interest,” undefined by statute, that the Commission is required to advance is informed by other state policies that the General Assembly has enacted into law. For example, sections 2-1201 and 2-1204.1 of the Environment Article establish aggressive carbon reduction goals.”<sup>11</sup> Another primary source of law for giving meaning to the Public Utilities Article’s “public interest” standard—particularly in the

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<sup>6</sup> Md. Code Ann., Pub. Util. §§ 2-113(a)(1)(i); 5-101.

<sup>7</sup> *E.g.*, *In the Matter of the Potomac Edison Company D/B/A/ Allegheny Power’s Energy Efficiency and Demand Response Programs Pursuant to the Empower Maryland Energy Efficiency Act of 2008*, Order No. 82673, Case No. 9153 (May 12, 2009) (requiring electric utilities to provide marketing messages promoting energy efficiency to the Commission for review prior to mass distribution or circulation “to assure there is a consistency of message and that the materials are focused on educating the customer rather than serving as promotion material for the utility itself.”)

<sup>8</sup> *See In the Matter of the Commission’s Inquiry Into the Provision and Regulation of Electric Service*, Order No. 77412, Case No. 8738 (December 11, 2001).

<sup>9</sup> Md. Code Ann., Pub. Util. § 3-102(d)(2).

<sup>10</sup> Md. Code Ann., Pub. Util. § 2-204.

<sup>11</sup> These provisions of the Environmental Article that were in effect when the Commission issued Orders 90057 and 90175 and were modified and made more aggressive in the recently enacted Climate Solutions Now Act, S.B. 528, Section 10(a)(2), 444th Gen. Assemb., (Md. 2022).

context of deceptive marketing—is Maryland’s Consumer Protection Act (“CPA”), discussed next.

## **B. The Law of Deceptive Utility Marketing**

Maryland’s Consumer Protection Act protects consumers from unfair and deceptive marketing practices. The CPA defers to the Commission for primary responsibility for regulating public utility marketing under its public interest standard. Section 13-104 expressly recognizes the Commission’s broad role in regulating public utilities by expressly exempting public service companies “to the extent their activities are regulated by the Commission.”<sup>12</sup>

Under the CPA, marketing statements do not have to be deceptive in every application to be unlawful. Further, under the CPA, an “unfair, abusive, or deceptive trade practice” includes the omission of a material fact “if the failure has the tendency to deceive.”<sup>13</sup> Thus, an unqualified statement that could sometimes be true is still unlawful if it omits a material fact.

The law on deceptive advertising is also informed by federal law. Federal regulators recognize growing customer consciousness over the environmental impact of the products they consume.<sup>14</sup> However, some companies engage in “greenwashing”—the act of misleading customers regarding the environmental benefits of a product or service—to promote the appearance of being environmentally friendly.<sup>15</sup> Given the

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<sup>12</sup> Md. Code Ann., Com. L. § 13-104.

<sup>13</sup> Md. Code Ann., Com. L. § 13-301(1), (3).

<sup>14</sup> Sierra Club Comments at 2.

<sup>15</sup> *Id.*

insidiousness of greenwashing—especially in the context of climate change—the Federal Trade Commission promulgated regulations and guidelines for environmental marketing claims.<sup>16</sup> Maryland’s CPA requires that these standards be “given due consideration and weight.”<sup>17</sup> FTC’s Green Guides advise marketers against making unqualified general environmental benefits claims—such as describing an energy source as “clean”—because it is highly unlikely that all reasonable interpretations of those claims can be substantiated.<sup>18</sup>

Since public service companies are exempt from the CPA “to the extent that the company’s services and operations are regulated by the [Commission],”<sup>19</sup> the Commission is the primary regulatory body with the authority to issue regulations or orders governing utility marketing claims and to evaluate allegations of utility greenwashing.<sup>20</sup>

### **C. OPC’s Complaint and Washington Gas’s Response**

In November 2021, a Washington Gas residential customer that purchases retail gas supply from WGL Energy Services—a retail gas supplier and affiliate of Washington Gas—provided OPC a copy of a gas bill containing an environmental marketing

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<sup>16</sup> FEDERAL TRADE COMM’N, GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS (“FTC Green Guides”), 77 Fed. Reg. 62122 (Oct. 11, 2012), *codified at* 16 C.F.R. § 260 et al.

<sup>17</sup> Md. Code Ann., Com. L. § 13-105; OPC Response to Motions to Dismiss at 18.

<sup>18</sup> 16 C.F.R. § 260.4(b); *see also* FTC Staff Comments on Nat’l. Ass’n. of Att’ys. Gen. Discussion Draft Guidelines to Environmental Marketing Claims for Electricity 4 (1998), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-national-association-attorneys-general-concerning-green-guides-electricity/v980020.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-national-association-attorneys-general-concerning-green-guides-electricity/v980020.pdf) (*emphasis added*).

<sup>19</sup> Md. Code Ann., Com. L. § 13-104(2).

<sup>20</sup> OPC Response to Motions to Dismiss at 16–17.

statement. The marketing statement, reproduced in its entirety here, broadly pronounces the alleged environmental attributes of natural gas:

Natural Gas is a [*sic*] clean, efficient, and reliable energy. Converting an all-electric home to natural gas is the equivalent of planting 2.75 acres of trees or driving 26,520 fewer miles each year. In addition, natural gas cost [*sic*] 1/3 less than electric, which makes it a smart decision for the environment and your wallet.

Though it has fewer emissions than other fossil fuels,<sup>21</sup> natural gas is still a significant source of greenhouse gas emissions. Natural gas production and consumption emit more than 1,500 million metric tons (“MMT”) of carbon—about one third of the United States’ total annual carbon emissions.<sup>22</sup> Residential end-use consumption alone accounts for almost 5% of annual U.S. greenhouse gas emissions.<sup>23</sup> In addition to greenhouse gas emissions, recent studies have found that in-home combustion of natural gas emits pollutants that are hazardous to human health.<sup>24</sup>

The billing message raised two concerns. First, with growing awareness of the impacts of their energy usage,<sup>25</sup> consumers seeking to minimize their environmental impact may be misled by the broad and unqualified statements regarding the alleged environmental attributes of natural gas.<sup>26</sup> Second, customers could be misled into making economically significant decisions detrimental to their long-term interests. A blanket

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<sup>21</sup> OPC Complaint at 5, ¶ 12 and OPC Response to Motions to Dismiss at 23 (each citing sources).

<sup>22</sup> OPC Complaint at 5, ¶ 12; Sierra Club Comments at 13.

<sup>23</sup> *Id.*

<sup>24</sup> Sierra Club Comments at 13–14.

<sup>25</sup> OPC Response to Motions to Dismiss at 21.

<sup>26</sup> OPC Complaint at 9, ¶ 25; OPC Response to Motions to Dismiss at 32; Sierra Club Comments at 11; Dissenting Statement of Commissioner Michael T. Richard, Order No. 90057 at 1.

claim that natural gas costs less than electric is not factually correct under all circumstances.<sup>27</sup> Customers making decisions to replace furnaces, stoves, or water heaters—appliances with long service lives—based on this claim may wind up spending significantly more money in the long run than they otherwise would.<sup>28</sup> OPC contacted Washington Gas to inquire about the marketing statement.<sup>29</sup> In response, Washington Gas disclaimed any responsibility for the marketing message, stating that WGL Energy Services was responsible for billing its Maryland customers and that the affiliate “includes content on its bill of its own choosing.”<sup>30</sup> Washington Gas’s lawyer informed OPC in writing that the utility itself “has no control over or connection to this content.”<sup>31</sup>

Commission regulations explicitly prohibit public service companies from “giving any preference to a core service affiliate” and “engaging in promotions, marketing, or advertising with a core or non-core service affiliate.”<sup>32</sup> WGL Energy Services is a “core service affiliate” of Washington Gas.<sup>33</sup> Because OPC’s investigation was only able to identify the marketing message on Washington Gas bills for which WGL Energy Services served as the gas supplier, the factual question was raised of whether Washington Gas was violating Commission rules by giving WGL Energy Services preferential access to market on its customer bills.<sup>34</sup>

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<sup>27</sup> OPC Response at 28; Sierra Club Response at 15.

<sup>28</sup> OPC Complaint at 25; OPC Response to Motions to Dismiss, at 23–25; Sierra Club Comments, at 16.

<sup>29</sup> OPC Response to Motions to Dismiss at 7; Washington Gas Opposition and Motion to Dismiss at 2–3.

<sup>30</sup> Washington Gas Opposition and Motion to Dismiss at 2; OPC Response to Motions to Dismiss at 9–10, Exhibit 2.

<sup>31</sup> *Id.*

<sup>32</sup> COMAR 20.40.02.01B(2), (5).

<sup>33</sup> COMAR 20.40.01.03B(4).

<sup>34</sup> OPC Complaint at 3, ¶ 2.

OPC filed a complaint with the Commission on November 23, 2022. The complaint alleged the marketing message was deceptive on its face as a matter of law, in violation of Public Utilities Article § 2-113, and further alleged that the marketing failed to account for environment quality, in violation of PUA § 5-303.<sup>35</sup> For relief, the complaint asked the Commission to order the message’s removal from all customer bills and to issue civil penalties. OPC further requested the Commission to open an investigation into Washington Gas’s possible preferential treatment of its retail supply affiliate, WGL Energy Services.<sup>36</sup>

Both Washington Gas and WGL Energy Services opposed OPC’s complaint and filed motions to dismiss on January 7, 2022.<sup>37</sup> Washington Gas’s motion disavowed its earlier representation to OPC that WGL Energy Services was solely responsible for the marketing message. Washington Gas now took full responsibility, repeatedly stating that the marketing statement appeared on “every utility consolidated billing service to approximately 30 [retail suppliers] in Maryland.”<sup>38</sup> The utility argued that the broad and unqualified marketing statements were not deceptive, as defined by the CPA and the FTC’s Green Guides, and purported to substantiate each of its claims.<sup>39</sup> It argued that the marketing statements were not deceptive under the CPA and the FTC Green Guides.<sup>40</sup>

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<sup>35</sup> OPC Complaint at 9, ¶ 27.

<sup>36</sup> *Id.* at 12–14.

<sup>37</sup> WGL Energy Services moved to dismiss on grounds that it was not responsible for the environmental claims. *See* WGL Energy Services Motion to Dismiss at 2.

<sup>38</sup> *See, e.g.*, Washington Gas Motion to Dismiss at 2, 26.

<sup>39</sup> *Id.* at 6–17.

<sup>40</sup> *Id.* at 19–22.

Lastly, Washington Gas argued that the Commission should accept its self-certification of environmental marketing claims.<sup>41</sup>

OPC responded to the companies' motions to dismiss on January 24, 2022. OPC explained how each assertion in the marketing statements omitted important contextual information and could not be substantiated under every circumstance.<sup>42</sup> OPC further refuted Washington Gas's claim that the marketing statement is included on all the bills of all customers served by retail suppliers.<sup>43</sup> Contrary to Washington Gas's assertions, OPC provided a sworn affidavit with an exhibit showing retail supply customer bills without the marketing statement.<sup>44</sup> OPC's response further reiterated that its claims fell under the public interest standard of the Public Utilities Article and not the CPA.<sup>45</sup>

**D. The Commission's Dismissal through Order Nos. 90057 and 90175.**

On February 7, 2022, the Commission issued Order No. 90057, dismissing OPC's complaint. The only mention of OPC's response to Washington Gas's motion to dismiss was in a single footnote incorrectly stating that the motion "repeat[s] the allegations in the complaint" and that the Commission's chose not to address it.<sup>46</sup> Despite the conflicting facts concerning the scope of the marketing campaign and OPC's sworn affidavit, the Commission accepted Washington Gas's assertion that it was solely responsible for the bills and that the message was on all bills of every customer signed up

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<sup>41</sup> *Id.* at 22–23.

<sup>42</sup> OPC Response to Motions to Dismiss at 21–33.

<sup>43</sup> *Id.* at 11–13.

<sup>44</sup> *Id.*, Exhibit A.

<sup>45</sup> *Id.* at 17–20.

<sup>46</sup> Order No. 90057 at 5 n.11.



with retail a supplier; it thus dismissed OPC’s complaint against WGL Energy Services as moot.<sup>47</sup> The Commission further concluded that OPC’s complaint “fail[ed] to adequately demonstrate a violation of state law or regulation.”<sup>48</sup> Its only explanation was a footnote stating that “public service companies regulated by the PSC are exempt from the Consumer Protection Act.”<sup>49</sup>

Order No. 90057 did not address the substantiation—or lack thereof—of the marketing statement on Washington Gas’s bills. Framing OPC’s complaint as raising “broad allegations regarding the environmental attributes of natural gas,” the order stated that OPC’s complaint “is not the proper forum in which to address such broad issues.”<sup>50</sup> The order further accepts Washington Gas’s argument regarding “self-certification”—allowing utilities to make marketing claims internally “certified” as accurate—stating that “Maryland has allowed self-certification of marketing claims.”<sup>51</sup> Then, disregarding OPC’s communications with Washington Gas prior to the filing its complaint, the order speculates that “if OPC had revealed its concerns with the language included on gas bills to Washington Gas at the outset and requested an explanation, modification or removal of the bill message, the utility would have likely done so—or, at a minimum, a conversation would have occurred.”<sup>52</sup>

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<sup>47</sup> *Id.* at 5–6.

<sup>48</sup> *Id.* at 6.

<sup>49</sup> *Id.* at 6, n.13.

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

Commissioner Michael T. Richard dissented. He found that the marketing statements were “worth investigating” and agreed with OPC and Sierra Club that Washington Gas “should cease using the gas-advertising message in question.”<sup>53</sup> He further noted how Washington Gas’s explanations to “legitimate and clear OPC questions have been contradictory and inaccurate,” and that the majority's decision failed to “adequately address the Company’s culpability for undermining its own credibility or for failing to address the alleged false environmental benefits-claims asserted by OPC.”<sup>54</sup>

OPC petitioned for rehearing on March 9, 2022. In its response, Washington Gas for the third time changed its explanation about the scope of the marketing campaign, now stating that the marketing was only included on bills sent to “autopay” customers.<sup>55</sup>

On April 20, 2022, in Order No. 90175 the Commission denied OPC’s rehearing request on grounds that OPC “did not present any new facts or evidence in its request for rehearing.”<sup>56</sup> In a shift from the Commission’s initial order, the Commission recognized the narrow scope of OPC’s complaint—“the inclusion of a message printed on certain customer bills of a single natural gas utility company operating in Maryland.”<sup>57</sup> Yet, the Commission determined that any finding on the merits of OPC’s complaint would require “an analysis of broader issues involving greenhouse gases and environmental policy” and that such analysis was “far outside the scope of [OPC’s] narrow complaint.”<sup>58</sup> While

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<sup>53</sup> Order No. 90057, Dissenting Statement of Commissioner Michael T. Richard at 1.

<sup>54</sup> *Id.* at 2–3.

<sup>55</sup> Washington Gas Opposition to OPC Request for Rehearing at 2.

<sup>56</sup> Order No. 90175 at 3.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Commissioner Odogwu Obi Linton concurred in the Commission’s judgment, he concluded that the marketing statement was “misleading because of its lack of context or specificity.”<sup>59</sup>

### STANDARD OF REVIEW

Public Utilities Article § 3-203 provides that final orders of the Commission are “prima facie correct and shall be affirmed” unless unconstitutional, outside of the Commission’s statutory authority or jurisdiction, made on unlawful procedure, arbitrary or capricious, or affected by other error of law. Though the “arbitrary and capricious” standard is deferential to the Commission, that deference is not without limit.<sup>60</sup> A agency’s decision may be found to be “arbitrary and capricious” and reversed if a party challenging the decision shows “that the agency exercised its discretion unreasonably or without a rational basis.”<sup>61</sup> Commission decisions must be affirmed if “a reasoning mind could have come to the same conclusion.”<sup>62</sup> As the Court of Appeals explained, a reviewing court “may consider such things as the agency’s expertise, policy goals stated in pertinent statutes or regulations, consistency with the agency’s past decisions, and whether it is possible to follow the path of the agency’s reasoning.”<sup>63</sup>

A court may not uphold an agency’s order unless it is sustainable on the agency’s findings and for the reasons stated by the agency.<sup>64</sup> Further, the Public Utilities Article

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<sup>59</sup> Order No. 90175, Concurring Statement of Commissioner Odogwu Obi Linton at 5.

<sup>60</sup> *Maryland Office of People’s Counsel v. Maryland Pub. Serv. Comm’n.*, 461 Md. 380, 396 (2018).

<sup>61</sup> *Id.* at 399.

<sup>62</sup> *Communications Workers of America v. Pub. Serv. Comm’n of Maryland*, 424 Md. 418, 433 (2012).

<sup>63</sup> *Id.* at 400, 405.

<sup>64</sup> *United Steelworkers v. Beth. Steel*, 298 Md. 665, 679 (1984).

requires that all Commission decisions and orders “in a contested proceeding” must (1) be based on consideration of the record, (2) be in writing, and (3) state the grounds for its conclusions.<sup>65</sup> At minimum, the Commission “is required to articulate the standards through which it applied the applicable law to the relevant facts in reaching its decision in a contested proceeding.”<sup>66</sup> This requirement is “essential for judicial review, because a court generally may not uphold an agency’s decision ‘unless it is sustainable on the agency’s findings and for the reasons stated by the agency.’”<sup>67</sup> In other words, to be properly upheld by a reviewing court, orders “must at least be sufficiently detailed to apprise the parties as to the basis for the agency’s decision.”<sup>68</sup>

## **ARGUMENT**

### **I. Order Nos. 90057 and 90175’s failure to address OPC’s claim under the Public Utilities Article constitutes legal error or, alternatively, is arbitrary and capricious.**

The Commission’s dismissal of OPC’s complaint is based on its conclusion that OPC’s complaint “failed to adequately demonstrate a violation of state law or regulation.”<sup>69</sup> The sole support for this conclusion is a single footnote stating that public service companies “regulated by the PSC are exempt from the Consumer Protection

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<sup>65</sup> Md. Code Ann., Pub Util., § 3-113(a).

<sup>66</sup> *Baltimore Gas and Elec. Co. v. Pub. Service Comm’n of Maryland*, 305 Md. 145, 167 (1986).

<sup>67</sup> *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Public Service Comm’n*, 227 Md. App. 265, 285 (2016) (quoting *Baltimore Gas & Elec. Co. v. Pub. Serv.. Comm’n of Maryland*, 75 Md. App. 87, 99 (1988)).

<sup>68</sup> *Id.*

<sup>69</sup> Order No. 90057 at 6.

Act.”<sup>70</sup> Either the orders erred by failing to apply the Public Utilities Article, or the orders erroneously concluded that OPC’s complaint fell under the CPA. Either warrant reversal.

The applicable law—and the law under which OPC filed its complaint—is the Public Utilities Article. Under this law, the Commission’s primary task is to regulate and supervise public service companies to make sure they operate “in the interest of the public.”<sup>71</sup> This requirement forms the basis of the Commission’s supervisory and enforcement powers. Further, section 2-112 of the Public Utilities Article provides that the Commission has the “implied and incidental powers needed or proper to carry out its functions” and that such powers “shall be construed liberally.”<sup>72</sup>

Section 13-104 of the CPA defers to the Commission the primary responsibility for regulating utility marketing. There is good reason to do so. As state-granted monopolies that provide essential public services, public service company actions are imbued with the public interest.<sup>73</sup> Utility customers have no choice in who provides their energy. Customers in other sectors of the economy can choose who provides their products and services, but utility customers are captive to their utility.

This distinction between competitive companies and public utilities is reflected by the interaction between the CPA and the Public Utilities Article. The Public Utilities Article establishes a specialized agency—the Commission—to regulate and supervise

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<sup>70</sup> *Id.* n.13.

<sup>71</sup> Md. Code Ann., Pub. Util. § 2-113(a)(1)(i).

<sup>72</sup> *Id.* § 2-112 (b)(2), (3).

<sup>73</sup> *See Munn v. Illinois*, 94 U.S. 113, 125 (1877) (When someone “devotes his property to a use in which the public has an interest, he, in effect, grants to the public interest in that use, and must submit to be controlled by the public for the common good, to the extent of that interest he has thus created.”).

public utilities to ensure they operate in the public interest.<sup>74</sup> By exempting public service companies “to the extent [their] services and operations are regulated by the [Commission],” the CPA recognizes the potential for conflicting regulatory obligations.<sup>75</sup> As such, primary regulatory authority over utility marketing is given to the Commission under the authority vested to it by the Public Utilities Article.

The Commission’s expansive authority to ensure utilities operate in the public interest means that complaints concerning utility marketing can be brought under the Public Utilities Article, not the Consumer Protection Act, as recognized in Public Utilities Article §3-102(a)(1). That is precisely what OPC did in this case— although one would not know that from the Commission’s orders.

OPC based its complaint on the requirement that Washington Gas operate “in the interest of the public,” and because “deceptive advertising practices that mislead customers are not in the public interest.”<sup>76</sup> Its complaint states that the Consumer Protection Act “is *instructive* on the Commission’s assessment of deceptive marketing and consumer. The Commission’s complete failure to address the basis of OPC’s complaint under the PUA, and articulate how Washington Gas’s marketing meets its requirements, fails to “apprise the parties as to the basis of its conclusion,”<sup>77</sup> nor does it provide a “path” for a reviewing court to follow. These failures constitute legal error as well as render the orders arbitrary and capricious. protection violations.”<sup>78</sup> OPC

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<sup>74</sup> Md. Code Ann., Pub. Util. § 2-112.

<sup>75</sup> Md. Code Ann., Com. L. § 13-104(2).

<sup>76</sup> OPC Complaint at 6, ¶¶ 14, 15.

<sup>77</sup> *Accokeek*, 227 Md. App. at 285.

<sup>78</sup> OPC Complaint at 6, ¶ 18 (emphasis added).

reiterated this point in its response to Washington Gas’s motion to dismiss: “Marketing in competitive markets that violates the Maryland Consumer Protection Act (“CPA”) is surely unlawful for a regulated monopoly under the much broader public interest standard.”<sup>79</sup>

Aside from OPC’s pleadings, intervenor commentators understood that OPC’s cause of action arises under the Public Utilities Article. Public Service Commission Technical Staff described the “core” of OPC’s complaint as “the question of whether the [marketing statement] is deceptive and misleading, and violates the Maryland Public Utilities Article [] and the Maryland [CPA.]”<sup>80</sup> Sierra Club’s comments explain that “the General Assembly has determined that authorizing the Commission to protect consumers from unfair or deceptive marketing practices is in the public interest” and argue that the Commission should look to the Consumer Protection Act and FTC guidance to aid in its review of whether the billing statement at issue is unfair and deceptive.<sup>81</sup> Even Washington Gas’s motion to dismiss acknowledges the Commission’s authority to supervise utility marketing practices.<sup>82</sup>

Yet the Commission’s orders inexplicably and erroneously point to the Consumer Protection Act’s public service company exemption language as the reason that OPC’s complaint is legally insufficient. The Commission’s orders contain no reference to the Public Utilities Article, let alone any discussion of how the Public Utilities Article applies

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<sup>79</sup> OPC Response to Motions to Dismiss at 17.

<sup>80</sup> Comments of Commission Staff at 3.

<sup>81</sup> Comments of Sierra Club at 6.

<sup>82</sup> Washington Gas Motion to Dismiss at 23.

to allegations of utility deceptive marketing. Rather, the orders refer to the “Consumer Protection Act.”<sup>83</sup>

For the Commission’s orders to be upheld, a reasoning mind must be able to arrive at the same conclusion and “follow the path” of the agency’s reasoning.<sup>84</sup> Here, the Commission’s failure to address the basis of OPC’s complaint makes it impossible to “follow the path” of the Commission’s decision.

## **II. Order Nos. 90057 and 90175’s dismissal is arbitrary and capricious and procedurally unlawful because genuine issues of material fact are unresolved.**

The pleadings show clear disputes over material facts concerning the scope of Washington Gas’s environmental marketing campaign. The undisputed record shows that Washington Gas provided three different stories regarding the groups of customers that receive its marketing message:

- *First*, before OPC filed its complaint, Washington Gas informed OPC that the statement appeared on a “subscriber consolidated bill” issued by WGL Energy Services, that WGL Energy Services is responsible for its own bills to its Maryland customers and their content, and that Washington Gas “has no control over or connection to” the marketing statement.<sup>85</sup>
- *Second*, in its motion to dismiss, Washington Gas took full responsibility for the marketing statements, repeatedly and unequivocally asserting that the marketing statements appear on “*every* utility consolidated bill” sent to its customers.<sup>86</sup>
- *Third*, after OPC showed that its second representation could not be correct through its submission of a sworn affidavit with exhibits, Washington Gas

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<sup>83</sup> Order No. 90057 at 1.

<sup>84</sup> *Communications Workers of America*, 424 Md. at 433; *Office of People’s Counsel*, 461 Md. at 406.

<sup>85</sup> Washington Gas Motion to Dismiss at 2, Exhibit 2. A “subscriber consolidated bill” is a bill sent by a supplier that consolidates the utility’s charges with the supplier’s charges.

<sup>86</sup> *See* Washington Gas Motion to Dismiss at 25, 26 (emphasis added). A “utility consolidated bill” is a bill sent by a utility that consolidates a retail supplier’s charges with the utility’s charges.



stated that only a subset of its customers receiving consolidated bills received the marketing statements.<sup>87</sup>

The Commission may dismiss a complaint “if it fails to state a claim upon which relief can be granted.”<sup>88</sup> The Commission applies a standard similar to the Maryland Rules for dismissing a complaint.<sup>89</sup> Under Maryland’s liberal pleading standard, pleadings need only contain “such statements of fact as may be necessary to show the pleader’s entitlement to relief or ground of defense.”<sup>90</sup> In considering a motion to dismiss for failure to state a claim, a court “assumes the truth of all well pleaded facts and reasonable inferences that can be drawn from them.”<sup>91</sup> Dismissal of a complaint is proper only if the allegations and permissible inferences, if true, would not afford relief to the non-moving party.<sup>92</sup>

Here, the Commission erred by accepting Washington Gas’s statements on the scope of its marketing campaign as true, despite the record evidence of multiple conflicting stories. As detailed above, Washington Gas told OPC that WGL Energy Services was responsible for the billing statement. Then, after OPC filed its complaint, the utility took full responsibility for the billing statement, stating that the marketing

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<sup>87</sup> OPC Response to Motion to Dismiss at 12, Exhibit A; Washington Gas Opposition to Rehearing at 2.

<sup>88</sup> COMAR 20.07.03.03A(3).

<sup>89</sup> For example, in Order No. 89192, the Commission rejected a retail electricity supplier’s request that a complaint against it be dismissed because the Commission found “that there are genuine disputes of material fact and that further proceedings are warranted to determine whether the Company has engaged in a pattern or practice of systemic violations of the consumer protections contained in the Public Utilities Article and the Commission’s regulations.” *In the Matter of the Complaint of the Staff of the Public Service Commission Against Direct Energy Services, LLC*, Order No. 89192, Case No. 9614 at 1 (July 12, 2019).

<sup>90</sup> Maryland Rule 2-303; see *Johns Hopkins Hospital v. Pepper*, 346 Md. 679, 697 (1997).

<sup>91</sup> *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995).

<sup>92</sup> *Pittway Corp. v. Collins*, 409 Md. 218, 239 (2009).

statements are included on “every” utility consolidated bill regardless of the customer’s retail supplier. Faced with OPC’s sworn affidavit showing bills that lacked the billing message, Washington Gas introduced a *third* explanation—that the statements were only included on bills set to “autopay” customers. Without any investigation or discovery, the Commission accepted Washington Gas’s representation.

The utility’s shifting story, along with OPC’s affidavit with exhibits, creates a genuine factual dispute. Understanding the scope and source of the marketing campaign is integral for evaluating any impermissible affiliate interactions and for determining the extent of the alleged harm and appropriate civil penalty if the Commission finds the marketing statements deceptive.

Yet, rather than accepting as true the “allegations and permissible inferences” of the non-moving party,<sup>93</sup> Order Nos. 90057 and 90175 do the opposite. They accept Washington Gas’ misstatements without addressing the facts to the contrary provided by both OPC *and* Washington Gas. Such an action is an arbitrary and capricious, procedurally unlawful action necessitating reversal by this Court.

**III. The Commission erred by failing to address Washington Gas’s marketing claims and, apparently, relying on the utility’s “self-certification.”**

OPC’s complaint alleged that, as a matter of law, Washington Gas’s environmental marketing is deceptive and contrary to the public interest. To properly decide on OPC’s complaint, the Commission must articulate how the applicable law

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<sup>93</sup> *Parks v. Alpharma, Inc*, 421 Md. 59, 72 (2011).

applies “to the relevant facts in reaching its decision in a contested proceeding.”<sup>94</sup> Yet the Commission never addressed whether Washington Gas’s marketing message is deceptive. Rather, the Commission erroneously misconstrued OPC’s complaint to claim that reviewing the marketing materials would be improper, and it relied on Washington Gas’s self-certification of the marketing claims. The Commission’s failure to address the marketing claims is legal error. This error is compounded by the Commission’s failure to consider its obligations to take climate change into account when exercising its regulatory duties. Alternatively, the Commission’s failure to address the marketing claims was arbitrary and capricious action, requiring reversal.

**A. Order Nos. 90057 and 90175 never addressed whether Washington Gas’s marketing is deceptive.**

OPC’s complaint alleged facts showing how each clause of the marketing statement is deceptive.<sup>95</sup> The complaint further alleged that the marketing statements “confuse customers about the environmental impact of natural gas and inhibit customers from making an informed decision on how they wish to heat and power their homes in light of individual customer concerns about their contributions to climate change.”<sup>96</sup> OPC also responded to Washington Gas’s motion to dismiss, rebutting each of Washington Gas’s claims made in opposition to OPC’s complaint.<sup>97</sup>

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<sup>94</sup> *Balt. Gas and Elec. Co.*, 305 Md. at 167.

<sup>95</sup> OPC Complaint at 8–9, ¶ 24.

<sup>96</sup> OPC Complaint at 9, ¶ 25.

<sup>97</sup> OPC Response to Motions to Dismiss at 20–33. Sierra Club’s comments also discusses at length how each of Washington Gas’s claims is deceptive and misleading. *See* Sierra Club Comments at 11–18.

Because the marketing is not true under all circumstances—indeed, the statements are untrue in most circumstances—OPC asked the Commission to declare them unlawful without an evidentiary hearing. No such hearing is necessary because Washington Gas cannot, and does not, show that the statements are true under all circumstances. Stated otherwise, even giving Washington Gas the benefit of its own representations, it is simply untrue that in every circumstance “converting an all-electric home” to natural gas improves the environment or saves customers money (or equals “planting 2.75 acres of trees or driving 26,520 fewer miles”).<sup>98</sup> Thus, the marketing is misleading for at least some customers, and it is therefore contrary to the public interest and the utility’s obligation to furnish services that are “just, reasonable, economical, and efficient, considering the conservation of natural resources and the quality of the environment.”<sup>99</sup>

The Commission, however, never addressed Washington Gas’s marketing message. Order No. 90175 states that the Commission “does not find that this complaint regarding a bill message is the proper forum to address broad environmental economic issues related to the use of natural gas.”<sup>100</sup> The order then confusedly claims that it would be improper to investigate them, finding them simultaneously too narrow *and* too broad. Apparently accepting Washington Gas’s effort to recast OPC’s complaint as a referendum on natural gas generally, the Commission states that resolving OPC’s complaint would require a “*broader*” environmental analysis that “is far outside the scope

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<sup>98</sup> OPC Response to Motions to Dismiss at 31–32.

<sup>99</sup> Md. Code Ann., Pub. Util. § 5-303.

<sup>100</sup> Order No. 90175 at 2.

of this *narrow* complaint, i.e., the inclusion of a message printed on certain customer bills of a single natural gas utility company operating in Maryland.”<sup>101</sup> Stated otherwise, the Commission concludes that OPC’s complaint is narrow in scope but too broad to act on.

This incoherence in the Commission’s reasons for not addressing, at all, Washington Gas’s marketing claims exemplifies the lack of rational basis and the unreasonableness of the Commission’s dismissal of OPC’s complaint. The Commission’s decision is not premised on the sufficiency OPC’s pleadings. Rather, it is based on an erroneous, conflicting, and arbitrary mischaracterization of OPC’s complaint.

Moreover, rather than address the marketing claims themselves, the Commission speculates that, had OPC revealed its concerns with the billing statement and requested an explanation, modification, or removal of the bill message, “the utility would have likely done so—or, at a minimum, a conversation would have occurred.”<sup>102</sup> This statement is false, as the record shows. As described above, Washington Gas’s own brief attaches the exchange in which Washington Gas’s attorney informs OPC that Washington Gas has “no control over or connection” to the marketing message—information the utility later disclaimed.<sup>103</sup> Commissioner Richard’s dissent emphasized this point, noting that “due to [Washington Gas’s] verbal and written responses to OPC’s inquiries, legitimate questions about the veracity of WGLs responses left OPC with few options” other than to file its complaint.<sup>104</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> Order No. 90057 at 6, ¶ 17.

<sup>103</sup> Washington Gas Motion to Dismiss, Exhibit 2.

<sup>104</sup> Dissenting Statement of Commissioner Michael T. Richard, Order No. 90057 at 1.

The Commission’s order summarily dismissed OPC’s complaint without any due consideration of the merits. It failed to fulfill its statutory obligations to evaluate the marketing, and for that reason constitutes an error of law. Such an unreasonable exercise of discretion epitomizes “arbitrary and capricious” agency behavior.

**B. Order No. 90057 gives Washington Gas irrebuttable authority to self-certify its marketing claims.**

By relying on the utility’s self-certification claims, Order Nos. 90057 and 90175 abdicate the Commission’s statutory responsibilities. While initial utility self-certification of marketing claims may be legally permissible (albeit a questionable policy), the Commission cannot—consistent with its statutory obligations for supervising utilities to promote the public interest—make self-certification irrebuttable. Here, relying on self-certification to deny OPC’s complaint leaves OPC, and other potential complainants, without any effective remedy for deceptive or otherwise unlawful marketing practices.

Specifically, Order No. 90057 states that “Maryland has allowed self-certification of marketing claims.”<sup>105</sup> At the same time, Order No. 90057 dismisses OPC’s complaint pursuant to section 3-102 of the Public Utilities Article.<sup>106</sup> The effect of the Commission’s action is to authorize Washington Gas to regulate its own marketing. It leaves OPC and any other parties no path by which to challenge the utility’s marketing message, and no consideration of the public interest at stake. Indeed, the Commission’s

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<sup>105</sup> Order No. 90057, at 6, ¶ 17.

<sup>106</sup> Md. Code Ann., Pub. Util. § 3-102(f) (“Unless a complaint is voluntarily satisfied, the Commission shall take final action on each complaint by issuing an order that: (1) dismisses the complaint; (2) directs full or partial satisfaction of the complaint; or (3) directs any action that the Commission considers to be warranted.”).

orders identify no minimum standards for self-certification of gas utility environmental claims and establish no process for reviewing self-certified claims.<sup>107</sup> In short, Order Nos. 90057 and 90175 effectively established an irrebuttable presumption that any marketing statement “self-certified” by Washington Gas may be included on a customer’s bill.

The effect of the Commission’s orders is unlawful. The orders render superfluous the Commission’s regulatory responsibilities under Public Utilities Article §§ 2-112 and 2-113 as well as OPC’s own statutory responsibility to “conduct investigations and request the Commission to initiate proceedings to protect the interests of residential” utility customers by filing complaints under Public Utilities Article § 3-102.<sup>108</sup> Accordingly, Order Nos. 90057 and 90175 are unlawful and arbitrary and warrant reversal.

**C. Order No. 90057’s failure to address the environmental marketing claims conflicts with General Assembly’s statutory directives.**

Order No. 90057 acknowledges the Commission’s statutory obligation to take climate change into account when regulating public service companies.<sup>109</sup> Consumer deception about addressing climate change is a central issue in OPC’s complaint. It is

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<sup>107</sup> The Commission’s assertion that “Maryland”—by which presumably the “Commission” means itself—allows self-certification is itself misleading. The Commission has approved a form of self-certification for electricity providers, but it has not previously authorized self-certification for gas utilities. In Case No. 8738, the Commission required electricity providers (both utilities and retail suppliers) to use a third party (PJM) tracking system and permitted self-certification *only if* use of the third-party tracking system would be “unduly burdensome.” Order No. 77412 at 7. The Commission requires electric providers to show that the PJM tracking system would be burdensome, and it required providers to document that its disclosures would at minimum meet the same standards of adequacy and accuracy. *Id.* Further, provider self-certification standards are subject to Commission audits “when necessary.” *Id.* These standards were developed through a robust regulatory process, involving a number of stakeholders and consideration of the public’s interest in such standards. *Id.*

<sup>108</sup> Md. Code Ann., Pub. Util. § 2-204; 3-102(f).

<sup>109</sup> Order No. 90057 at 6–7.

uncontested that natural gas consumption results in greenhouse gas emissions. Customer awareness of this fact poses a threat to gas utilities, who have begun to market natural gas as environmentally beneficial. Without some qualification, the wholesale marketing of natural gas as “clean energy” is likely to confuse many customers—concerned about climate change—that seek to reduce their greenhouse gas footprint.

The marketing statements’ clear nexus with climate-change implicates the Commission’s statutory duty to take climate change into account when regulating public service companies. Regardless of the Commission’s decision on the merits, the Commission is obligated to evaluate whether such broad and unqualified marketing statements may be deceptive and thereby harmful to customers. The Commission unreasonably exercised its discretion by failing to address the substance of OPC’s complaint despite its clear statutory obligation to do so.

## **CONCLUSION**

Deceptive marketing is harmful to the public interest. The Commission has primary authority to address and mitigate the harm to customers posed by deceptive marketing by a utility to its captive audience. Dismissing OPC’s complaint without addressing the substance of its claims or resolving the factual issues concerning the scope of Washington Gas’s marketing was arbitrary and capricious and fails to protect captive customers from deceptive and misleading advertising. With its dismissal, the Commission abdicates its obligations under the Public Utilities Article to supervise and regulate public utilities to ensure they operate in the public interest.



For the reasons stated herein, OPC requests this Honorable Court to vacate the Order Nos. 90057 and 90175 and remand the matter to the Commission for further proceedings not inconsistent with its decision.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on the 1<sup>st</sup> day of September 2022, the foregoing Memorandum of the Maryland Office of People’s Counsel was e-mailed to all parties listed below, all of whom have consented to electric service:

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/s/ Michael F. Sammartino

## **Appendix A**

received by the Commission and protestants were represented by Counsel at the hearing.

In an appeal heard by the Maryland Court of Appeals in *Hessey v. Capital Transit Co.* 193 Md. 265 involving an application by Capital Transit Company to abandon its line between Branchville and Beltsville, Maryland, the Court said at Page 272:

"It is a recognized principle that a railroad company, organized and conducted for private corporate profit, but devoting its property to the use of the public, does not do so irrevocably or absolutely, but upon condition that the public will supply sufficient traffic on a reasonable rate basis to yield a fair return. If at any time it appears that further operation will result in loss, the company may discontinue operation and salvage whatever it can out of the property by dismantling the road. To compel a railroad to continue at a loss would amount to the taking of property without just compensation in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States."

Considering the history of this service conducted by Port Welcome Cruises, Inc., and the losses suffered during the past three years of operation, the Commission finds that it is not possible, economically, to continue the operation in public transportation between Baltimore, Maryland, and Betterton, Maryland, and all intermediate points, and that the public convenience permits the discontinuance by the Company of its operations.

IT IS, THEREFORE, this 20th day of April, in the year Nineteen Hundred and Sixty-six, by the Public Service Commission of Maryland,

**Ordered:** That the permission and approval of the Commission be, and the same are hereby, given to the discontinuance by Port Welcome Cruises, Inc., of its operations in public transportation between Baltimore, Maryland, and Betterton, Maryland, and all intermediate points.

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ORDER NO. 56203

BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND

CASE NO. 6017

In the Matter of the Establishment of Service Areas of ELECTRIC UTILITIES within the State of Maryland.

By letter dated June 2, 1964, Harrison M. Robertson, Jr., People's Counsel before the Public Service Commission, requested the Commission to institute an investigation of the areas in which the municipal, private and cooperative electric utilities provide electric service, in order to bring about stabilization of service areas and to protect the public interest. In his communication the People's Counsel suggested that each of the utilities prepare maps for the Commission which would show the area which the particular utility considered to be its service area and to submit a written statement to support its claim to the territory in the State of Maryland within which the utility considered that it could construct extensions of its facilities, including generation, transmission and distribution facilities, without any further specific authorization from the Commission or any political subdivision of the State.

Thereafter on June 16, 1964, the Commission wrote to each of the electric companies and requested that each utility furnish the data suggested by the People's Counsel by August 31, 1964, and to state specifically the basis for its conclusions. After the requested material had been filed with the Commission the maps were reviewed by the Commission's Engineering Division in order to determine the number and extent of areas of disagreement among the electric utilities. As a result of its review the Engineering Division requested that each utility submit the plan of its service area on maps of a uniform standard scale. In reconciling the disagreements revealed by the filed maps numerous conferences were held by representatives of the Commission's Engineering Division with representatives of the electric utilities. As a result of these conferences, a number of revisions and corrections were made to the maps originally filed in response to the Commission's letter of June 16, 1964.

On December 18, 1965 the Commission's Chief Engineer, Hugh H. Hunter,

filed a proposed exhibit which included a list of the service area maps presented to the Commission, together with associated notes, recommendations and proposed rules. By Order No. 56083, entered in this proceeding on December 28, 1965, the Commission assigned the matter for hearing on February 2, 1966, and transmitted a copy of the proposed exhibit of the Chief Engineer to each of the electric companies together with a copy of the order. At the hearing held on February 2, 1966, People's Counsel introduced into evidence as People's Counsel Exhibit No. 1 the exhibit prepared by Mr. Hunter, and as People's Counsel Exhibit No. 2a through No. 2g seven volumes of maps which show the proposed service areas for the electric utilities in the State of Maryland. A copy of the exhibit prepared by Mr. Hunter is attached to this order as "Appendix A."

Mr. Hunter testified that, except for three areas in the State, the filed maps incorporated the results of the conferences between the Engineering Division and the various electric utilities. Therefore, he recommended that, with the exception of the three areas still in dispute, the service areas shown on the filed maps be adopted by the Commission. With the respect to the disagreements concerning the three areas, Mr. Hunter's recommended action was stated in Schedule C of People's Counsel Exhibit No. 1 on two of the areas and he recorded in Note E of Schedule B of People's Counsel Exhibit No. 1 his opinion that a prior order of the Commission governed the third situation. This matter was deferred until the interested parties could state their views.

The matter was then assigned for further hearing on April 6, 1966, and on February 28, 1966, the Commission wrote the following letter to each of the 24 political subdivisions of the State:

"This is to give notice that the Public Service Commission of Maryland held an initial hearing on February 2, 1966 on a plan to allocate operating territories to the various electric utilities operating in the State of Maryland, generally in conformity with the areas they are presently serving.

"In this proceeding Harrison M. Robertson, Jr., People's Counsel, proposed that each electric utility be allotted the area which it is now serving, and that it be given a fair share of the adjacent unserved territory.

"This matter has now been set for further hearing at the offices of the Commission, 301 West Preston Street, Baltimore, Maryland, 21201, on Wednesday, April 6, 1966 at 10:30 o'clock, A.M. At that time opportunity to be heard will be given to any of the political subdivisions of the state having an interest in the matter.

"Attached for your information is a copy of an exhibit prepared by the Commission's Chief Engineer which was introduced at the initial hearing."

In addition to this, in advance of the April 6, 1966 hearing, the Commission caused the following public notice to be published in a newspaper published in each of the 23 counties, Baltimore City and Washington, D.C.

"This is to give notice that the Public Service Commission of Maryland held an initial hearing on February 2, 1966 on a plan to allocate operating territories to the various electric utilities operating in the State of Maryland, generally in conformity with the areas they are presently serving.

"In this proceeding Harrison M. Robertson, Jr., People's Counsel, proposed that each electric utility be allotted the area which it is now serving, and that it be given a fair share of the adjacent unserved territory.

"This matter has now been set for further hearing at the office of the Commission, 301 West Preston Street, Baltimore, Maryland, 21201, on Wednesday, April 6, 1966, at 10:30 o'clock, A.M. At that time opportunity to be heard will be given to any member of the public having an interest in the matter."

As a result of these notices the only communication received was one from the Lanham Citizen's Association concerning the existing boundary between Potomac Electric Power Company and Baltimore Gas and Electric Company. The position of the Association was duly noted and considered by the Commission.

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No other response was received nor did any protestants to the proposed service areas designated appear on the date of the hearing April 6, 1966.

The Commission finds that designation of service areas for electric utilities are in the public interest because such designation would eliminate future wasteful construction of duplicate distribution facilities, it would permit electric utilities to develop unserved portions of their service areas in the most economical manner, and it would reduce to a minimum disagreements between companies as to service areas.

The Commission has carefully considered the evidence in this matter, particularly the recommendations of its Chief Engineer, and is of the opinion and so finds that the establishment of service areas within the State for electric utilities is in the public interest.

It will accordingly adopt as the present service area for each of the electric companies the area delineated on the various maps filed in this proceeding and recommended by its Chief Engineer, with three exceptions.

These three exceptions are: (1) the disagreement between Somerset Rural Electric Cooperative, Inc. and The Potomac Edison Company concerning the territorial boundary in the vicinity of Friendsville, Garrett County, referred to in Note I and Note II of Schedule C, People's Counsel Exhibit No. 1; (2) the disagreement between Stockton Light and Power Company and Choptank Electric Cooperative, Inc. concerning the territorial boundary between the two utilities in Worcester County, referred to in Note III, Schedule C, People's Counsel Exhibit No. 1; and (3) the service area of Hagerstown Municipal Electric Light Plant, which was the subject of Commission Order No. 56028 in Case No. 5996.

People's Counsel Exhibit No. 1 in Schedule D proposed several rules which are designed to assist in resolving problems which may arise in connection with the administration of the Commission's order in this case. Rule No. 1 designates the treatment to be accorded electric distribution lines which cross a boundary to serve customers in the territory of an adjacent electric utility. It is the purpose of this rule to provide an orderly method of handling minor exceptions to the service area adopted by the Commission.

Rule No. 2 establishes guidelines for use in determining which utility should serve a customer who is located on a territorial boundary line. The use of this rule should resolve most of the problems arising from such situations.

Rule No. 3 sets out the guidelines to be followed in using roads and railroads as a base for measurement in establishing a territorial boundary line.

The Commission has carefully considered the content and purpose of the proposed rules and is of the opinion and so finds that they will be of substantial value in resolving problems which may arise in the future administration of the Commission's order in this proceeding. It will accordingly adopt the rules set forth in Schedule D of People's Counsel Exhibit No. 1.

In view of the fact that changing circumstances over the years may require some adjustments in the areas adopted by the Commission in these proceedings, the Commission will in the public interest retain jurisdiction in this matter and may order from time to time changes in the areas herein to be assigned. It is the purpose of this order to assign the service area within which each utility is to render retail electric service, however, each utility shall make application to the Commission before making any substantial extension of its facilities within its service area. All presently effective orders that may conflict with this decision will be modified so as to clearly make this order the controlling guideline for the service areas of electric utilities in the State of Maryland.

This is a historic step in the regulation of electric utilities in Maryland. We believe that the public will be benefited in the improvement of service implicit in the responsibility assumed by each utility for the service area designated to it, and in the avoidance of wasteful duplication. This should assure the orderly and most economical development of electric service for the citizens of Maryland.

IT IS, THEREFORE, this 27th day of April, in the year Nineteen Hundred and Sixty-six, by the Public Service Commission of Maryland,

**Ordered:** (1) That the service area for each of the electric companies in the State of Maryland shall be the area delineated on the various maps filed in

this proceeding as People's Counsel Exhibits 2a through 2g and recommended by its Chief Engineer with the exception of the disagreement between Somerset Rural Electric Cooperative, Inc. and The Potomac Edison Company concerning the territorial boundary in the vicinity of Friendsville, Garrett County, referred to in Note I and Note II of Schedule C, People's Counsel Exhibit No. 1; the disagreement between Stockton Light and Power Company and Choptank Electric Cooperative, Inc., concerning the territorial boundary between the two utilities in Worcester County, referred to in Note III, Schedule C, People's Counsel Exhibit No. 1; and the service area of Hagerstown Municipal Electric Light Plant, which was the subject of Commission Order No. 56028 in Case No. 5996.

(2) That the rules contained in Schedule D of People's Counsel Exhibit No. 1 be, and the same are hereby, adopted as the basis for resolving problems which may arise in the future administration of this order.

(3) That all outstanding orders of the Commission in conflict with this order be, and the same are hereby, modified to the extent necessary to clearly make this decision the controlling guideline for the service areas of electric utilities in the State of Maryland.

(4) That this matter shall remain open for such further and future action and consideration as may from time to time be necessary and proper in attaining the purpose of this order.

(5) That this order shall take effect June 1, 1966 and remain in effect until the further order of the Commission in the premises.

#### ORDER NO. 56204

##### BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND

CASE No. 6012

In the Matter of the Rates of CHARLES UTILITIES, INC. for Water and Sewer Services.

On August 30, 1965 Charles Utilities, Inc. filed with the Commission revised rates for the rendition of water service identified as First Revised Sheet 2 to Water Service Tariff P.S.C., Md. No. 1, and new rates for the rendition of sewer service identified as Original Sheets No. 1 and No. 2 of Sewer Service Tariff P.S.C. Md. No. 1. The Schedules were filed to become effective on December 1, 1965 and were designed to produce additional annual revenues of \$9,000. The proposed tariffs provided for a reduction for water service from \$5.00 a month to \$4.00 a month and the establishment of a charge of \$4.00 a month for sewer service.

Many letters of protests were received by the Commission and by Order No. 56050 entered in this proceeding on November 17, 1965 the Commission suspended the rates proposed by Charles Utilities, Inc. for a period of not more than 120 days from December 1, 1965 in order to provide an opportunity for the Commission to determine the justice and reasonableness thereof.

A hearing was held on March 16, 1966 and because the proceedings could not be completed within the period of the initial suspension, the Commission extended the suspension of rates for an additional thirty day period from March 31, 1966 as provided in Section 70 of the Public Service Commission Law. A further hearing was held on April 27, 1966.

At the hearing which was held on March 16, 1966 the testimony disclosed that the Company has been operating since 1956 without an increase in its original rate for water service of \$5.00 per month, unmetered, and since the summer of 1961 the Company furnished sewage disposal service without charge. Charles Utilities, Inc. has operated under a constant deficit since its inception as its Annual Reports have indicated.

Under date of December 28, 1965, the Commission's Chief Auditor submitted a report which included schedules showing

*Schedule No. 1*—Balance Sheet of Charles Utilities, Inc. as of December 31, 1964 and July 31, 1965.

*Schedule No. 2*—Income Statement for the year 1964, the seven months ended July 31, 1965, and Pro-Forma Income Statement.

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## **Appendix B**



**ORDER NO. 77412**

IN THE MATTER OF:	*	BEFORE THE
		PUBLIC SERVICE COMMISSION
THE COMMISSION'S INQUIRY INTO THE PROVISION AND REGULATION OF ELECTRIC SERVICE.	*	OF MARYLAND
	*	
	*	_____
(Emissions and Fuel Mix Disclosure)		CASE NO. 8738
_____		_____

Before the Public Service Commission (“Commission”) is the Second Report of the Emissions Disclosure Working Group (“EDWG”) filed October 3, 2000.<sup>1</sup> This Report follows the issuance of Commission Order No. 76241, dated June 15, 2000, adopting rules for the disclosure of emissions and fuel mix data by electric companies and electricity suppliers to retail consumers.

In its Report, the EDWG indicates that, following the issuance of Order No. 76241, it reconvened working group participants as directed to address: disclosure label development; emissions and fuel mix disclosure verification; PJM’s conceptual design for a regional tracking system; cooperation with other states within the region; and timetables for emissions and fuel mix disclosures.<sup>2</sup> A third report of the EDWG is expected in December 2001. At that time the Commission will address further development of the emissions and disclosure labels approved by the Commission in

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<sup>1</sup> Participants in Emissions Disclosure Working Group discussions included Allegheny Energy, Baltimore Gas and Electric Company, Delmarva Power & Light Company, d/b/a Conectiv, Constellation Energy, Enron, First Energy, Inc., the Maryland Department of Natural Resources (Power Plant Research Program), the Maryland Department of the Environment, the Maryland Energy Administration, the Maryland Public Interest Research Group, Mid-Atlantic Power Supply Association, the Montgomery County Department of Environmental Protection, the Maryland Office of People’s Counsel, Old Dominion Electric Cooperative, Potomac Electric Power Company, Pepco Energy Services, Inc., the PJM Interconnection LLC, and Southern Maryland Electric Cooperative.

<sup>2</sup> EDWG Second Report at 1-2.

calendar year 2000. At this juncture, the Commission will address the EDWG's recommendations and comments of the parties with regard to verification and tracking of emissions disclosures.

The tracking approaches presented for consideration in the EDWG Report provide for self-certification by electric companies and electricity suppliers or third-party verification, i.e., verification using a certified accounting procedure, green-e certification using a voluntary certification and verification program for "green" electricity products developed by a San Francisco-based nonprofit organization, or PJM region emissions and fuel mix tracking in which PJM would match settlement data for transactions with environmental data currently available. Another approach suggests the use of tagging by which blocks of electricity would be tagged at the source of generation to identify its particular fuel mix and emissions data. The respective tags would follow the transfer of electricity through multiple transactions, so as to allow the purchase, sale and trading of emissions and fuel mix tags.

In its Comments on the Second EDWG Report, Staff recommended that the Commission adopt the third-party PJM tracking system for tracking and verifying emissions and fuel mix disclosure for both electric companies and electricity suppliers who provide retail electricity to Maryland consumers.<sup>3</sup> According to Staff, adoption of the PJM tracking system would minimize the use of regional averages and would provide a workable system through which the Commission can audit emissions information, when necessary.<sup>4</sup> At the time of its Comments, however, Staff acknowledged that the PJM

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<sup>3</sup> Staff Comments, January 5, 2001 at 4.

<sup>4</sup> *Id.*

tracking system was still developmental and not yet fully operational. Staff recommended that until the PJM system becomes fully operational, the Commission should continue to allow self-certification by electricity providers.

Staff also suggested that, should the Commission adopt this approach, once the PJM system became operational, electricity providers should be allowed to opt-out and continue self-certification if the provider could demonstrate that using the PJM system would be unduly burdensome.<sup>5</sup> A provider seeking to opt-out would be required to document that it had sufficient controls in place to assure that its disclosures meet or exceed the adequacy and accuracy standards met by the PJM system.<sup>6</sup> The EDWG initially estimated the development cost for the PJM tracking system would amount to approximately \$500,000 and that annual operation and maintenance cost would be in the range of \$100, 000 per year.<sup>7</sup>

The Joint Utilities support self-certification by electric companies and electricity suppliers and are opposed to third-party verification.<sup>8</sup> According to the Joint Utilities, "[c]omprehensive reporting requirements [inclusive of] prescriptive quality assurance provisions are already in place to ensure that the data supplied are accurate and complete."<sup>9</sup> They also suggest that significant federal enforcement exists to ensure that proper monitoring and reporting practices are followed.<sup>10</sup>

In its Comments, MAPSA recommended that the Commission require any supplier making environmental claims about its electricity product to provide third-party

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> EDWG Second Report at 7. PJM later indicated that the development costs will be underwritten by its members, significantly reducing electricity suppliers exposure to costs associated with use of the PJM tracking system.

<sup>8</sup> Joint Utilities Comments at 1.

<sup>9</sup> *Id.*

verification.<sup>11</sup> MAPSA noted that with regard to self-certifying suppliers, the Commission would reserve the right to audit source information and end-products to ensure adequacy and accuracy.<sup>12</sup> MAPSA also supports self-verification and certification for suppliers who do not make environmental claims. According to MAPSA, self-verification and certification allows suppliers to compete on a least-cost basis without unduly burdensome and costly certification.<sup>13</sup>

Enron, an independently competitive electricity supplier, urged that the Commission adopt the certificate approach as a means of tracking fuel mix and emissions information.<sup>14</sup> Under the certificate model, all fuel types would be issued certificates. The certificates would later be used to verify the fuel mix and emissions data on each products label. Part of the certificate approach is the purchase, sale and trading component. According to Enron, "[s]uppliers would have the option to purchase certificates and claim the fuel type and emissions characteristics on their label on a product-by-product basis."<sup>15</sup> Alternatively, like MAPSA, Enron also supports self-verification and certification by all electricity suppliers not making environmental claims.<sup>16</sup> According to Enron, many of the environmental disclosures required under the Public Utilities Companies Article are also required by other State and federal governmental agencies. Enron submits that since self-verification is the accepted method for providing information to other State and federal agencies, it should also be acceptable

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<sup>10</sup> *Id.*

<sup>11</sup> MAPSA Comments at 2-3.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 8.

<sup>14</sup> Enron Comments at 2.

<sup>15</sup> *Id.* Certificates would only be issued at the time of generation yet could be based on historical or prospective generation. *Id.*

<sup>16</sup> *Id.* at 4.

to the Commission.<sup>17</sup> Enron also suggests that, if self-certified information provided to the Commission is later found to be inaccurate, civil and criminal penalties could be imposed.<sup>18</sup>

The Office of People's Counsel in its Comments stated that the PJM tracking system would be the preferred method of fuel mix and emission verification.<sup>19</sup> According to OPC, "[c]alculation and verification of emissions and fuel mix data could best be performed by a PJM-wide tracking system that uses the transactions data recorded by the PJM control area operator."<sup>20</sup> OPC observed that, as compared with individualized self-verification, "a PJM-wide tracking system better serves the ultimate goal of providing a uniform, consistent, and accurate set of emissions and fuel mix data to [consumers]."<sup>21</sup> OPC also observed that the PJM control area operator already obtains data on fuel mix and emissions for the PJM region as a whole. It would be a short step from PJM's current process to tracking fuel mix and emissions data from generation source to market for Maryland electricity suppliers.

OPC viewed the self-verification and certification procedures suggested by MAPSA and Enron as purely "stop-gap" measures that fail to provide uniform data and require duplicate auditing and verification by Commission Staff.<sup>22</sup> MDE also urged the Commission to adopt uniform verification procedures that apply to all electricity suppliers regardless of the energy sources used. According to MDE, uniform procedures

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> OPC Comments at 2.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 5.

will make review of the information simpler and require similar reporting burdens for all providers.<sup>23</sup>

The Commission heard additional comments from the parties during a hearing on January 16, 2001. During the hearing the parties further elaborated on their written comments, yet echoed the same diverse sentiments. However, in supplemental comments filed by Enron on February 16, 2001, MAPSA asserted that the PJM contract tracking system would not necessarily provide environmental information to the level of accuracy desired.<sup>24</sup> Enron also noted that, at the time, no written description pertaining to the proposed operation of the PJM tracking system had been presented either to the Commission or to the parties.<sup>25</sup> Attached to Enron's supplemental comments was a "Proposal for a Generation Information System Database."

According to Enron, the document described a proposal for use by the New England Independent System Operator (ISO-NE) for creating generator-specific certificates. Again, Enron urged the Commission to adopt the certificate approach that allows for the purchase, sale and trading of generation certificates for providers other than those making environmental claims. OPC moved to exclude Enron's supplemental filing as untimely and an improper effort to confuse the record on a critical issue.<sup>26</sup> The Commission, however, finds that Enron's supplemental filing has some merit, particularly its notation that the PJM tracking system proposal had not been reduced to writing for consideration by the Commission and the parties.

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<sup>23</sup> MDE Comments at 1.

<sup>24</sup> MAPSA's Supplemental Comments at 1.

<sup>25</sup> *See id.* at 2.

<sup>26</sup> OPC's Motion to Exclude MAPSA's February 16, 2001 Filing at 1.

Subsequently, at the Commission's request, PJM provided in writing its "Generator Attribute Tracking System - Conceptual Design."<sup>27</sup> PJM has also produced a "white paper" describing its proposal to meet the tracking needs for a competitive generation market.<sup>28</sup> Having reviewed these materials, the Commission believes that use of the PJM contract tracking system would satisfy the obligation of electric companies and electricity suppliers to ensure the provision of adequate and accurate fuel mix and emissions information to Maryland consumers and to the Commission. Furthermore, the Commission finds that removal of the development costs from consideration reduces a significant burden for providers who may be required to utilize the system.

Upon consideration of the EDWG Second Report and the comments received by the Commission, the Commission believes that adoption of the third-party PJM emissions and fuel mix tracking system best serves the public interests. Electricity providers may be allowed to opt-out and continue self-certification if the provider is able to demonstrate that using the PJM system would be unduly burdensome. A provider seeking to opt-out shall be required to document that it has sufficient controls in place to assure that its disclosures meet or exceed the adequacy and accuracy standards set by the PJM tracking system and their standards are subject to audit by the Commission when necessary.

Based upon its assessment of the PJM tracking system, the Commission is poised to require the use of the PJM system as the primary verification and certification system for use by electric companies and electricity suppliers that provide electricity to consumers in Maryland. Since, however, as Enron correctly noted: the PJM proposal had not been reduced to writing and shared with the parties, the Commission will defer

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<sup>27</sup> Appendix A.

<sup>28</sup> Appendix B.

implementation of the system for 60 days. Within that time, any party wishing to do so may obtain the appropriate documents and comment on both the conceptual and operational design of the PJM system may do so.

With regard to electric companies and electricity providers making environmental claims, the Commission shall permit self-certification and verification. The Commission shall reserve the right to audit providers' reports to ensure adequacy and accuracy of reporting. Further, the Commission may impose civil penalties for any willful or negligent error made by any provider in reporting fuel mix and emissions data.

WHEREFORE, for the foregoing reasons, the Commission hereby adopts the PJM emissions and fuel mix tracking system for use by electric companies and electricity suppliers providing retail electricity to customers in Maryland. The Commission shall suspend this order for 60 days in order to permit parties to comment on the PJM conceptual and operational design.

IT IS, THEREFORE, this 11<sup>th</sup> day of December, in the year Two Thousand One, by the Public Service Commission of Maryland,

ORDERED: (1) That the Commission hereby adopts the PJM emissions and fuel mix tracking system for use by electric companies and electricity suppliers providing retail electricity to customers in Maryland;



(2) That this Order shall be and hereby is suspended for 60 days in order to permit parties to comment on the PJM conceptual and operational design.

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Commissioners

## **Appendix C**

**ORDER NO. 89192**

IN THE MATTER OF THE COMPLAINT \*  
OF THE STAFF OF THE PUBLIC SERVICE \*  
COMMISSION AGAINST DIRECT \*  
ENERGY SERVICES, LLC \*  
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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND  
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CASE NO. 9614  
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**Issue Date: July 12, 2019**

**DELEGATION TO THE PUBLIC UTILITY LAW JUDGE DIVISION**

On May 15, 2019, the Technical Staff (“Staff”) of the Maryland Public Service Commission filed a Complaint against Direct Energy Services, LLC (the “Company”) alleging that the Company had violated Maryland law governing retail suppliers’ activities. On May 17, 2019, the Commission ordered the Company to file an Answer to Staff’s Complaint and to file evidence to show just cause as to why the Company’s license to provide electricity or electricity supply services and its license to provide natural gas and natural gas supply services should not be suspended or revoked, or in the alternative, why the Company should not be precluded from soliciting additional customers and/or why the Company should not be subject to a civil penalty under Public Utilities Article, *Ann. Code of Maryland*, §§ 7-507(1) and 13-201 for (a) committing fraud, (b) engaging in deceptive practices, (c) slamming, and (d) failing to comply with the Commission’s consumer protection regulations as contained in COMAR 20.53.07 and 20.59.07. The May 17 order also directed the Company to appear at the Commission’s July 17, 2019 Administrative

Meeting for a hearing on the Complaint. On June 18, 2019, the Company filed its Answer and Response.<sup>1</sup>

Upon a review of the record, the Commission finds that the submissions provided by the parties are insufficient to resolve the issues set forth in Staff's Complaint and the Company's Answer and Response. Specifically, the Commission finds that there are genuine disputes of material fact and that further proceedings are warranted to determine whether the Company has engaged in a pattern or practice of systemic violations of the consumer protections contained in the Public Utilities Article and the Commission's regulations.

**IT IS THEREFORE**, this 12<sup>th</sup> day of July, in the year Two Thousand Nineteen, by the Public Service Commission of Maryland,

**ORDERED** (1) That this matter is delegated to the Public Utility Law Judge Division for a finding of whether a pattern or practice exists as described above and, if so, for a recommendation as to appropriate relief;

(2) That the Company is excused from appearing at the Commission's July 17, 2019 Administrative Meeting; and

(3) That a new docket, Case No. 9614, is hereby initiated for all subsequent

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<sup>1</sup> ML# 225792

proceedings deriving from the Staff Complaint against Direct Energy Services, LLC and the Company's Answer and Response.

By Direction of the Commission,

*/s/ David J. Collins*

David J. Collins  
Deputy Executive Secretary

## **Appendix D**

**ORDER NO. 82673**

IN THE MATTER OF THE POTOMAC EDISON  
COMPANY D/B/A ALLEGHENY POWER'S  
ENERGY EFFICIENCY, CONSERVATION AND  
DEMAND RESPONSE PROGRAMS PURSUANT  
TO THE EMPOWER MARYLAND ENERGY  
EFFICIENCY ACT OF 2008

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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND

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CASE NO. 9153

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IN THE MATTER OF BALTIMORE GAS AND  
ELECTRIC COMPANY'S ENERGY EFFICIENCY,  
CONSERVATION AND DEMAND RESPONSE  
PROGRAMS PURSUANT TO THE EMPOWER  
MARYLAND ENERGY EFFICIENCY ACT OF  
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CASE NO. 9154

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IN THE MATTER OF POTOMAC ELECTRIC  
POWER COMPANY'S ENERGY EFFICIENCY,  
CONSERVATION AND DEMAND RESPONSE  
PROGRAMS PURSUANT TO THE EMPOWER  
MARYLAND ENERGY EFFICIENCY ACT OF  
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CASE NO. 9155

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IN THE MATTER OF DELMARVA POWER &  
LIGHT COMPANY'S ENERGY EFFICIENCY,  
CONSERVATION AND DEMAND RESPONSE  
PROGRAMS PURSUANT TO THE EMPOWER  
MARYLAND ENERGY EFFICIENCY ACT OF  
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CASE NO. 9156

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IN THE MATTER OF SOUTHERN MARYLAND  
ELECTRIC COOPERATIVE'S ENERGY  
EFFICIENCY, CONSERVATION AND DEMAND  
RESPONSE PROGRAMS PURSUANT TO THE  
EMPOWER MARYLAND ENERGY EFFICIENCY  
ACT OF 2008

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CASE NO. 9157

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To: Parties and Interested Persons in Case Nos. 9153, 9154, 9155, 9156 and 9157

WILLIAM DONALD SCHAEFER TOWER • 6 ST. PAUL STREET • BALTIMORE, MARYLAND 21202-6806

410-767-8000 • Toll Free: 1-800-492-0474 • FAX: 410-333-6495

MDRS: 1-800-735-2258 (TTY/Voice) • Website: [www.psc.state.md.us/psc/](http://www.psc.state.md.us/psc/)

On April 21, 2009, the Public Service Commission (“Commission”) conducted a hearing to consider the *General Awareness Campaign Working Group Report* (“Report”) submitted by the Commission’s Technical Staff (“Staff”) on March 31, 2009 on behalf of the General Awareness Workgroup (“Work Group”) in these proceedings.

The Report was not a consensus report because two stakeholders, the Maryland Energy Administration (“MEA”) and the Office of People’s Counsel (“OPC”), disagreed with a number of the Report’s proposals and, at the hearing, provided their alternative proposals to the concepts to which they objected to in the Report. The fundamental disagreement by MEA and OPC with the Report was the Work Group’s proposed approach to the development and dissemination of the State-wide uniform message. The Work Group envisioned the development of the general awareness campaign would result in creation of State-wide messages focused on common themes that educate consumers about the benefits of energy efficiency and conservation. There would not be a single State-wide campaign, but rather a State-wide awareness effort by the EmPower Maryland utilities, MEA, and others, using common themes developed. MEA and OPC opposed this concept because they believe that the general awareness campaign must be a single, State-wide campaign with uniform messages that are delivered in all service territories rather than commonly themed messaging. To accomplish this single State-wide general awareness campaign, MEA and OPC recommended that the Commission direct the utilities’ approved general awareness budgets to be devoted to this State-wide, comprehensive general awareness campaign. MEA submitted that it would take the lead in developing the State-wide campaign, including the type of marketing material to be used and the specific text for each message (with input from the utilities and other



stakeholders), and would contribute \$650,000 in Fiscal Year 2009 to the development of the campaign. MEA and OPC argued that this State-wide campaign would complement the individual programmatic marketing campaigns that each utility would do within its individual service territory.

Staff and the utilities were provided the opportunity to respond to MEA's and OPC's alternative proposal, but none agreed with the proposed approach. These parties encouraged the Commission to adopt the approach proposed in the Report.

The Commission agrees with the Work Group's proposed approach to the State-wide general awareness campaign. The Commission finds that the more practical means to implement the general awareness campaign is to develop State-wide messages with a consistent, common theme and have the utilities use these common themes to market their specific programs in their service territories. Because of the State's diverse demographics, the Commission concludes that the utility will need to have some flexibility on determining how to blend the general awareness education with that of each specific program that the utility wishes to promote. This is not to say that the utilities, MEA, OPC, Staff and other interested parties should not continue to coordinate in the Work Group to develop best practice general awareness messages and share with others messaging that is working.

MEA, of course, is welcomed to create a State-wide campaign consistent with the developed common-themed messages as well as to adopt any of the utilities' developed messages. In addition to the expertise MEA can provide in developing common-themed messages, the Commission encourages MEA to take the lead in developing a website that has links to the various utilities' websites to have a central point for Marylanders to find

information on the availability of EmPower Maryland programs as well as other energy efficiency, conservation, demand side response program, including federal, State, and local grant programs. The utilities could then add this “one-stop shopping” website link to its messaging in addition to the utility’s website information.

Additionally, the Commission finds that the Report provides a good outline of the development of the campaign and its implementation, but is devoid of any substantive text of the messages/marketing ad copy. Although the Commission will not micromanage the campaign (or, for that matter, the utilities’ program-specific campaigns), the Commission does expect – in light of the “EmPower Md. Charge” that is or will be appearing on customer bills – that the General Awareness *and* utility-program-specific campaigns will draw a specific connection between the programs and the EmPower Maryland Act. Other branding is fine, but the campaigns must draw a discernible connection between the programs and the EmPower Maryland Act so that customers understand that the programs are funded by their monthly surcharge.

With that general direction, the parties should proceed to develop the proposed text of the messaging or ad copy, and ensure that the materials disseminated by the utilities are not inconsistent and provide the necessary educational information to the consumers. To that end, the Commission believes that as the marketing campaign and specific messaging is developed by a utility, the proposed material(s) should be circulated to the other stakeholders in the Work Group, as well as to the Commission, for review prior to mass distribution or circulation to assure that there is a consistency of message and that the materials are focused on educating the customer rather than serving as promotional material for the utility itself. Moreover, the Commission expects that this

sharing may reduce the expense of each utility having to individually create the messaging/ad copy to be delivered to its customers. The Commission encourages the utilities not to “re-invent the wheel” and to adopt other utilities’ messages/ad copy if it appears to be a “best practice” message.

The Commission recognizes that the review process must be expeditious and not delay a utility in “going to market” with its marketing campaign to promote awareness of the general goals of EmPower Maryland as well as the specific programs within the applicable service territory. Therefore, the Commission adopts this review process:

- Each stakeholder, including the Commission, shall identify the contact(s) to which concept copy of the proposed messaging/ad copy should be directed;<sup>1</sup>
- Each stakeholder has sixteen (16) business hours, from the receipt of the material, to review the materials and provide any suggestions or concerns to the utility within that time frame. Any concerns should be shared with all the stakeholders in addition to the proposing utility. If the utility receives suggestions, then it should consider revising the material or respond to the stakeholders as to the basis for rejection of the comments. Any revisions should be circulated to the other stakeholders and the Commission, but there is no requirement to await further comments from stakeholders .

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<sup>1</sup> Utilities should provide a copy of the materials to be considered by the Commission via email to: Terry Romine; LaWanda Edwards; Karen Gatzke; and Obi Linton. The Commission’s Technical Staff shall identify its POC separately from the Commission’s.

- The Commission has five (5) business days, from receipt of the material, to provide any concerns to the utility. In the event that the Commission needs additional time for review, it will notify the utility. Otherwise, if at the end of the 5<sup>th</sup> business day, the Commission has not notified the utility that the Commission has concerns with the materials or has notified the utility that the Commission requires additional time to review, then silence is deemed acceptance.

Finally, the Commission directs the Work Group to continue to meet on a regular basis to develop the General Awareness Campaign messaging and to share and coordinate messaging ideas. The Commission leaves the timing of the Work Group meetings to the discretion of Staff and the stakeholders, but encourages the group to meet more frequently than quarterly until such time as the State-wide general awareness campaign is sufficiently developed and implemented by the utilities.

**IT IS THEREFORE**, this 12th day of May in the year of Two Thousand Nine by the Public Service Commission of Maryland,

**ORDERED:** (1) That the General Awareness Campaign proposal submitted by the Work Group is approved as set forth in this Order;

(2) That the Work Group is directed to continue to meet on a frequent basis to develop the general messaging themes that will be used by the utilities to promote the General Awareness Campaign as envisioned in the Report; and

(3) That the Work Group shall report on a quarterly basis on the general status of its efforts and any issues that it believes need to be addressed by the Commission.

By Direction of the Commission,

*/s/ Terry J. Romine*

Terry J. Romine  
Executive Secretary