December 13, 2010

Ms. Terry J. Romine
Executive Secretary
Public Service Commission of Maryland
6 St. Paul St., 16th Floor
Baltimore, Maryland 21202-6806

Re: Reply Brief – Pole Replacement Project for Crest Substation Project

Dear Ms. Romine:

Enclosed please find the Reply Brief filed on behalf of the Staff of the Public Service Commission.

Sincerely,

Michael A. Dean
Assistant Staff Counsel

cc: Delmarva Power & Light Co.
Office of People’s Counsel
REPLY BRIEF

In accordance with the Commission’s grant of a motion by Delmarva Power & Light Company (DPL) at the administrative meeting of November 23, 2010, the Staff of the Public Service Commission files this Reply Brief regarding whether a certificate of public convenience and necessity (CPCN) is required for its modification to an overhead transmission line for the interconnection of the proposed Crest Substation. Under Pub. Utils. § 7-207, a CPCN will be required for the modification to the transmission lines for the Crest Substation project.

1. Procedural History.

On October 26, 2010, DPL filed a letter, Mail Log No. 126203, regarding a proposed Crest Substation to be located near Farm Crest, Maryland, off of a 230 kV transmission line between the existing Cecil¹ and Colora substations. In the letter, DPL asserted that the planned substation was within the scope of a certificate of public convenience and necessity for the

¹ The Cecil Substation is located in Elkton, Maryland.
transmission line issued by Order No. 69246\(^2\) in Case No. 8282, and would not constitute a modification of the transmission line under COMAR 20.79.01.02. The letter stated DPL’s intent to commence building the Crest Substation project unless the Commission issues a letter by January 18, 2011, indicating that it disagrees with DPL’s position.

Staff filed comments on November 15, 2010, noting that the substation is not within the scope of the CPCN issued in Order No. 69246, and that under Pub. Utils. § 7-207(a) a CPCN would be required for the Crest Substation project.

On November 22, 2010, DPL filed a letter indicating that Staff may have misinterpreted the October 26, 2010 letter, and indicated that it was planning only to replace one transmission pole with two shorter poles. This letter stated that, under COMAR 20.79.01.02B(14), the Commission previously did not require a CPCN for similar work on a transmission line, and that not every physical change to a transmission line requires Commission approval. The letter noted the Commission’s obligations under Pub. Utils. § 2-113 to “promote adequate, economical, and efficient delivery of utility services in the State,” and that requiring electric companies to undergo the time and expense of preparing and prosecuting CPCN applications

for any transmission line modification would be contrary to this requirement. The letter also included, due to the “significant ramifications of requiring a CPCN for this type of project,” a request that the Commission permit full briefing on this issue before issuing a final decision.

The Commission considered the item at its November 23, 2010 administrative meeting, and granted DPL’s request for a full briefing on the issue of whether a CPCN would be required for the transmission line modification associated with the Crest Substation project. DPL filed its brief on December 3, 2010, Mail Log No. 127146.

2. **Issues.**

   Is a CPCN required for the modification to the overhead transmission line to interconnect the planned Crest Substation.

3. **Argument.**

   (a) **Under Pub. Utils. § 7-207(a),** a certificate of public convenience and necessity is required prior to a physical change to an overhead transmission line which involves an activity that constitutes construction.

   Pub. Utils. § 7-207(b)(3) provides that “an electric company may not begin construction of an overhead transmission line that is designed to carry a voltage in excess of 69,000 volts” unless it first obtains a CPCN. § 7-207(a), as amended in 2005, states:
(a) "Construction" defined. –

(1) In this section and § 7-208 of this subtitle, "construction" means:

   (i) any physical change at a site, including fabrication, erection, installation, or demolition; or

   (ii) the entry into a binding agreement or contractual obligation to purchase equipment exclusively for use in construction in the State or to undertake a program of actual construction in the State which cannot be canceled or modified without substantial loss to the owner or operator of the proposed generating station.

(2) "Construction" does not include a change that is needed for the temporary use of a site or route for nonutility purposes or for use in securing geological data, including any boring that is necessary to ascertain foundation conditions.

The Commission recently reviewed the application of this statute to the interconnection of substations to overhead transmission lines in a filing by the Baltimore Gas and Electric Company (BGE). On October 15, 2009, BGE filed a request, Mail Log No. 119215, regarding planned work at its Bagley Substation. This work involved the removal of two transmission towers and the addition of two H-frame structures and ten steel poles. The Commission in a September 9, 2010, Letter Order denied a request that it waive the regulatory definition of "modification" and stated:

Section 7-207 of the Public Utility Companies Article, Annotated Code of Maryland (“PUC”) provides that “unless a certificate of public
convenience and necessity for the construction is first obtained from the Commission, an electric company [such as BGE] may not begin construction of an overhead transmission line that is designed to carry a voltage in excess of 69,000 volts.” PUC § 7-207(a)(1) defines “construction” broadly, to include “any physical change at a site, including fabrication, erection, installation, or demolition . . . .” There is no dispute that BGE proposes “physical change[s]” at the site, including “demolition” of the old towers and “erection [or] installation” of the new higher towers and poles, that amount to “construction” within the meaning of PUC § 7-207(a)(1)(i). Under the plain language of PUC § 7-207(b)(3), BGE must obtain a CPCN from the Commission before beginning the proposed transmission line construction adjacent to the Bagley Master Substation site. The Commission disagrees with BGE that the term “construction” in PUC § 7-207 applies only to new transmission line construction. And because this requirement is grounded in statute, the Commission is not authorized to waive it.

Ltr. Order p. 2 (footnotes deleted). The Commission then noted that while it was “mindful of the effort that its Staff and the electric companies expended upon the CPCN process, the Commission cannot allow such ‘practical implications,’ as BGE phrased it, to override our statutory mandates.” Id. As a result, the Commission concluded that a CPCN would be required to construct the Bagley project. Id. p. 3.3

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3 BGE, on September 28, 2010, filed an application for a rehearing of the September 9, 2010 Letter Order in Mail Log No. 125694, which was denied by the Commission on November 5, 2010. BGE also filed an application for a CPCN for the Bagley substation project on September 20, 2010, which was docketed by the Commission as Case No. 9243.
It is clear that, under the statute, a modification to an overhead transmission line that involves activities classified as construction require a CPCN before that construction may commence. However, the definition of “construction” indicates that it is dealing with a “physical change” of the overhead transmission line, which is a comparison of the resulting change from that previously licensed transmission line. Thus, the modifications that would require a CPCN are those that involve the erection of new poles and the demolition or removal of existing poles such that the final configuration represents a physical change to the facility.

(b) Legislative history cannot be used to prove that the definition of “construction” in Pub. Utils. § 7-207(a) only applies to electric generating stations and not to overhead transmission lines.

Based upon legislative history, DPL’s Brief argues that the 2005 amendment to the definition of construction in Pub. Utils. § 7-207(a) was intended only to apply to generating stations and not intended to change the law regarding overhead transmission lines. However, under Maryland law, legislative history cannot be used to determine a statute’s meaning if it will contradict the plain meaning of a statute. As stated in one recent case:

We have acknowledged that in determining a statute’s meaning, courts may consider the context in which a statute appears, including
related statutes and, even when a statute is clear, its legislative history. See Morris v. Prince George's County, 319 Md. 597, 604, 573 A.2d 1346, 1349 (1990); see also Kaczorowski v. Mayor and City Council of Baltimore, 309 Md. 505, 515, 525 A.2d 628, 633 (1987). We have cautioned, however, that this inquiry is "in the interest of completeness," Harris [v. State], 331 Md. [137,] 146, 626 A.2d [946,] 950, [(2008)] "to look at the purpose of the statute and compare the result obtained by use of its plain language with that which results when the purpose of the statute is taken into account." Id. That inquiry, in other words, we emphasized in Chase, "is a confirmatory process; it is not undertaken to contradict the plain meaning of the statute." Chase, supra, 360 Md. at 131, 756 A.2d at 993; see also Coleman v. State, 281 Md. 538, 546, 380 A.2d 49, 54 (1977) ("a court may not as a general rule surmise a legislative intention contrary to the plain language of a statute or insert exceptions not made by the legislature.").


Pub. Utils. § 7-207(b) states that a CPCN must be obtained prior to constructing an overhead transmission line, and § 7-207(a) states that the definition of "construction" applies to "this section and § 7-208," meaning that the definition applies to § 7-207. DPL's Brief uses legislative history to argue that the 2005 amendment to § 7-207 only applies to generating stations and was never intended to apply to transmission lines. However, that violates the rule of In re Gloria H., which holds that legislative history can only be used to confirm the meaning of a statute, not to contradict its plain
meaning. As such, the legislative history cannot be used to contradict the plain language in § 7-207.

(c) The proposed modification of the 230 kV transmission line for the interconnection of the proposed Crest Substation would constitute construction that requires a certificate of public convenience and necessity.

DPL argued in its filing that under the Commission’s regulations, the Crest Substation project would not require a CPCN. For the Crest Substation project, DPL will erect two new poles to interconnect the substation with its 230 kV transmission line. The erection of two new 230 kV transmission line poles would fall within the statutory definition of “construction” as defined in § 7-207(a) and would thus require DPL to obtain a CPCN for the Crest Substation project.

The DPL Brief suggests that under the Commission’s definition of “modification” applicable to overhead transmission lines in COMAR 20.79.01.02B(14)(b), a CPCN would not be required for the addition of the two poles for the Crest Substation project, and that under this regulation the Commission has not required a CPCN previously for similar physical changes to overhead transmission lines. However, this regulatory definition precedes the 2005 amendment to Pub. Utils. § 7-207, which amended the definition of “construction.” It is clear that using the definition of “modification” in the regulation would allow certain types of changes to transmission lines
without first obtaining a CPCN for which the statutory definition of “construction” would require a CPCN. Since the regulatory definition is inconsistent with the statute, the regulation cannot be used for determining when a CPCN would be required for work that results in changes to overhead transmission lines. “Where the language of a statute differs from relevant language in a departmental regulation, the statutory language must control.” Cecil County Dept. of Soc. Serv. v. Russell, 159 Md. App. 594, 611, 861 A.2d 92 (2004). As such, since the Crest Substation project would require the erection of two new 230 kV transmission line poles, a CPCN would be required for this project.

The conclusion that a CPCN would be required for the Crest Substation project is consistent with recent Commission decisions involving BGE. On September 9, 2009, BGE filed a request regarding planned work at its Bagley Substation. This work involved the removal of two transmission towers and the addition of two H-frame structures and ten steel poles. As noted above, the Commission in its September 9, 2010, Letter Order denied a request that it waive the regulatory definition of “modification” and concluded that, under the statutory definition of “construction” in Pub. Utils. § 7-207(a), a CPCN would be required to construct the Bagley project. Id. p. 3.
BGE filed a request on September 28, 2010, Mail Log No. 125693, for a determination that its Joppatowne Supply Project, which involved the installation of a new tap line with a single pole off of a 115 kV transmission line, would not require a CPCN. BGE, using an argument similar to that in DPL’s current filing, stated that because the new pole was lower in height than the existing transmission line structures, the project under Pub. Utils. § 7-207 and the Commission’s regulations should not require a CPCN. Because of the timing needs for the Joppatowne Supply Project, BGE also filed an application for a CPCN for the project on October 13, 2010, Mail Log No. 125938 in parallel to its request for a determination that the project did not require a CPCN. The Commission rejected BGE’s request in a letter order on November 5, 2010 (Commissioner Brenner dissenting), and set the CPCN application for hearing as Case No. 9244.

The DPL Crest Substation interconnection is very similar to the two BGE projects in that it involves a modification to a transmission line that will involve the erection of two new transmission poles. Similar to the decisions in the two BGE filings, it is clear that under the definition of construction in Pub. Utils. § 7-207(a), a CPCN will be required for the overhead transmission line modification associated with the Crest Substation project.
(d) Absent a requirement from Pub. Utils. § 7-207(a) for a proceeding to approve a CPCN for the modification of an overhead transmission line to interconnect a substation, an additional proceeding would not be necessary under administrative law principles.

As indicated in DPL’s Brief, prior to the 2005 amendment to Pub. Utils. § 7-207, the Commission did not require an electric company to obtain a CPCN prior to interconnecting a substation to an overhead transmission line, which typically requires the addition of at least one new transmission pole.\textsuperscript{4}

The prior practice typically involved a notice or request by the electric company to the Commission and proceedings before the local county or municipal planning or zoning board. By requiring a CPCN for the modification to the transmission line to interconnect a substation, § 7-207 and Commission regulations at COMAR 20.79 require the filing of an application with supporting environmental studies, a hearing for public comment, evidentiary hearings, and an order that considers certain statutory criteria. In comparing the prior Commission process and a requirement to have a CPCN proceeding for the transmission

\textsuperscript{4} The Commission has permitted some modifications to overhead transmission lines since the 1995 amendment to the definition of “construction” in Pub. Utils. § 7-207(a). For example, a letter order dated January 31, 2008 concluded a CPCN was not required for the reconductoring of the 230 kV Doubs-Aqueduct-Dickerson transmission line. This Allegheny Power project required that eight transmission structures be raised slightly, a change that the Letter Order described as being \textit{de minimus}. A letter order dated February 3, 2006 stated that a CPCN would not be required for the installation of a tap line with two 67 foot towers to connect a new substation to be built in Washington County.
line modifications to interconnect a substation, under administrative law the additional proceeding would not be required.

Although some may consider additional proceedings to be beneficial, they are not without costs. The Supreme Court has weighed in as to when additional administrative proceedings are needed. To determine whether additional administrative proceedings are necessary, the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), stated that “due process is flexible and calls for such procedural protections as the particular situation demands.” The analysis for determining when additional proceedings are necessary involves a cost-benefit test balancing three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous determination through the process accorded and the probable value of added procedural safeguards; and (3) the public interest and administrative burdens, including costs, that the additional or substitute procedures would entail. The Maryland courts have adopted the rule of Mathews. See Md. Racing Comm’n v. Castenze, 335 Md. 284, 643 A.2d 412 (1994). See also Arnold Rochvarg, Md. Admin. Law 18-19 (MICPEL 2d ed. 2007). Using these factors and comparing the prior Commission practice for the modification of a transmission line to interconnect a substation without using a CPCN proceeding,
additional administrative proceedings would not be necessary unless required by statute.

As the electric company would own or have rights to the property on which the transmission line and substation occupy, other private property rights are not directly affected. However, under a CPCN proceeding, local property owners would have the opportunity to present evidence regarding the effect of the project upon issues such as aesthetics and land use. However, they could also do this at local zoning or planning board proceedings, where they have similar due process rights to be heard and to contest any issue. See, e.g., Friends of the Ridge v. Baltimore Gas & Elec. Co., 120 Md. App. 444, 707 A.2d 866 (1998) (describing administrative and legal proceedings involving a modification to a substation on property owned by an electric company). Environmental regulations, which are listed in a CPCN, still would be applicable to the transmission line modification and substation project under the Commission’s former practice. As such, it is not clear that having a CPCN proceeding adds additional protections that would not be available to stakeholders under the former Commission practice.

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5 For example, Pub. Utils. § 7-207(f) requires that a decision regarding CPCN for a transmission line be made only after due consideration of the need to meet existing or future demand and economics. This requirement is also met in zoning proceedings. See Friends of the Ridge at 488-89 (stating that the electric company met the “need” requirement under the zoning law regarding the provision of electric service and that the board’s review considered the effect on ratepayers).
It is not clear that having a CPCN proceeding reduces the risk of an incorrect decision regarding allowing a transmission line modification for the interconnection of a substation under the Mathews criteria when compared with the prior Commission practice. This may be because the risk of the construction of unnecessary facilities is largely reduced by the ratemaking process, which places the possibility of not recovering the capitalized cost associated with a substation and transmission line modification upon the electric company, which is proposing the project, if they fail to meet the “used and useful” criteria of Pub. Utils. §§ 4-101 and 4-201. In addition, the process before zoning boards considers criteria similar to the approval criteria of § 7-207(e). See Howard County v. Potomac Elec. Power Co., 319 Md. 511, 527-28, 573 A.2d 821 (1990) (comparing the criteria that would be used by county zoning boards and the Commission in reviewing and approving an overhead transmission line).

Regarding the public interest and administrative burdens and costs under Mathews, the CPCN proceeding involves additional state agency and electric company costs. A CPCN proceeding would require expert testimony, the production of environmental review documents, an evidentiary hearing and public hearings in each affected county, and proposed and final orders. Incremental costs associated with a CPCN proceeding for
minor transmission line activities for the Public Service Commission might include stenographer costs, travel costs, and possibly expert witness testimony costs (if outsourced under contract). State agencies such as the Department of Natural Resources (DNR) would have greater incremental costs as they normally rely more on the use of contractual expert witness testimony than does Staff. The Power Plant Research Program (PPRP) of DNR has informally estimated that the incremental cost associated with a CPCN evaluation of minor transmission line activities such as the BGE Joppatowne Supply Project, assuming that nothing unusual is found during their review, would be on the order of $15,000 to $20,000. This state agency cost is over 10% of the $160,000 estimated cost of construction listed in the Joppatowne Supply Project CPCN Application. Expenses of the Public Service Commission and of the PPRP are recovered in utility rates. Pub. Utils. §§ 2-110 & 2-110.1; Nat. Res. § 3-302. In addition, the electric company’s increased cost of preparing the application and environmental review and of the hearings would be capitalized as part of the cost of the transmission and substation and later recovered in electric rates. See also Pub. Utils. § 2-113 (“The Commission shall supervise and regulate the public service companies subject to the jurisdiction of the Commission to . . . promote adequate, economical, and efficient delivery of utility services”).
On balance, the Mathews criteria do not indicate that the additional proceedings add value to the administrative decision process for the modification of an overhead transmission line to interconnect a substation. As such, absent a statutory construction of § 7-207 that requires a CPCN proceeding, the additional costs associated with having a CPCN proceeding when compared with the prior Commission practice indicate that the additional proceeding is not necessary.

(e) The Commission should not preempt local government authority in the siting of substations that are not integral to overhead transmission lines, and limit its review of the Crest Substation project to the modification of the transmission line.

DPL’s Brief notes that the Commission, in its consideration of the proposed PATH transmission line, determined that a CPCN was only required for substations that are integral to the overhead transmission line. Re Potomac Edison Co. on behalf of PATH Allegheny Trans. Co., LLC, 100 Md. PSC 276 (2009). In that case, the proposed overhead transmission line required a new substation to interconnect with the 500 kV transmission grid, and the Commission determined that approval of the transmission line included the approval of the siting of the substation. In other cases, the Commission’s CPCN approving the construction of transmission lines did not extend to the approval of the siting of any substation. See, e.g., Re Potomac

Staff agrees that the Commission should not exercise authority over the siting of new substations in its authority to issue CPCNs for the construction of transmission lines unless the substation is integral to the transmission line. Approval of the siting of substations to serve electric distribution systems, such as the Crest Substation, is under the land-use regulatory authority of local governments in Maryland. See § 3.08, Art. 68B, Md. Code. Ann.

(f) The definition of modification in COMAR 20.79.01.02B(12)(b) predates the amendment of Pub. Utils. § 7-207 and should be revised to reflect the Commission’s current policies.

DPL in its Brief noted that COMAR 20.79.01.02B(12)(b) has not been repealed pursuant to the Maryland Administrative Procedures Act (APA), State Gov. § 10-110 et seq. DPL also

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6 However, an October 28, 2010, filing by the Office of People’s Counsel, Mail Log No. 126282, regarding a request by BGE on whether the Joppatowne Supply Project requires a CPCN, appears to argue that Commission had jurisdiction over transmission line modifications for the interconnection of a substation due to concerns over the zoning of the substation site, and that the scope of the CPCN under Pub. Utils. § 7-207 included “any portion” of the construction. OPC Ltr. pp. 2-3. The Commission letter order of November 5, 2010, on the BGE request did not directly address the OPC argument.
notes that courts have required that rulemaking under the APA is required in order to amend or rescind a final rule. See also Delmarva Power & Light Co. v. Pub. Serv. Comm’n, 370 Md. 1, 803 A.2d 460 (2002) (changes to agency policies that have general application to all electric and gas utilities must be promulgated pursuant to the APA). As the Commission in recent decisions has, essentially, considered the definition of modification in COMAR 20.79.01.02B(12)(b) to be inconsistent with the 2005 amendment to the definition of “construction” Pub. Utils. § 7-207(a), the Commission may wish to consider revising the regulation to be consistent with the statute, or to adopt regulations that delineate which physical changes to an overhead transmission line would not require a CPCN. 7 Such regulations could, for example, could for interconnection of substations to transmission lines require the filing of a notice with certain information describing the modification.

4. Conclusion.

For the above stated reasons, Staff recommends that the Commission notify DPL that a CPCN will be required for the

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7 The Commission has published proposed regulations at 36 Md. Reg. 1478-79 (Sep. 11, 2009) delineating which modifications of generating stations would not require prior Commission approval using a CPCN. In addition, although Pub. Utils. § 7-207.1 allows certain small generating units to be approved in a streamlined process without requiring a CPCN under § 7-207, the regulatory definition at COMAR 20.79.01.02B(9)(b) defines an electric generating unit that is less than 373 kW as not being a generating station, effectively allowing all such units to be constructed without a CPCN.
modification to the transmission lines for the Crest Substation project.

Michael A. Dean
Assistant Staff Counsel

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the above document was mailed by first-class, U.S. Mail, postage prepaid this 13th day of December, 2010, to:

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