

CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

IN THE MATTER OF MARYLAND \*

OFFICE OF PEOPLE'S COUNSEL, et al.\* Case No: 17-C-15-019974

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MEMORANDUM AND ORDER DENYING MOTION(S)

BACKGROUND

In these now consolidated actions, the petitioners, the Maryland Office of People's Counsel, Sierra Club and Chesapeake Climate Action Network, and Public Citizen, Inc. seek for judicial review of a decision of the Maryland Public Services Commission ("PSC").<sup>1</sup> That decision, issued on May 5, 2015, essentially approved the proposed merger between Exelon Corporation and Pepco Holdings, Inc., subject to certain conditions. The Maryland Office of People's Counsel filed a "motion to stay and to set a schedule for discovery and presentation of new evidence" ("motion") on July 21, 2015.<sup>2</sup> On July 31, 2015, Sierra Club and Chesapeake Climate Control Network filed a motion to stay. Public Citizen, Inc. supported the motion of Office of People's Counsel.<sup>3</sup> Oppositions to the motions were filed by Exelon Corporation, Pepco Holdings, Inc., et al., hereinafter referred to as "Exelon", and by the Maryland Public Service Commission. A hearing on the motion was held on August 7, 2015.

DISCUSSION

In a judicial review, after a motion is filed and a hearing held, a "...court may grant a stay...upon conditions as to bond or otherwise as the court considers

<sup>1</sup> Case Nos. 19974, 19976, and 19998 respectively.

<sup>2</sup> On July 31, 2015, the Office of People's Counsel sought expedited consideration and requested a hearing.

<sup>3</sup> The Court has reviewed all pleadings and notes that AOBA supported the motion and Montgomery Counties opposed it.

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proper.” Md. Rule 7-206. While no set test governs the granting of a stay in the instant situation, the preliminary injunction factors are instructive and were discussed by the parties. The factors are: (1) likelihood of success on the merits; (2) the “balance of convenience” determined by whether greater injury would be done to the defendant by granting the injunction that would result from its refusal; (3) whether irreparable injury would be occasioned without an injunction; and (4) the public interest. *Citations omitted.*

Turning to the case at hand, the Court applies the above factors in turn, no one of which is in itself determinative.

#### Likelihood of Success on the Merits

Petitioners seek a stay and further discovery based upon the alleged appearance of impropriety in the actions of a voting member of the Public Service Commission. As such, the Court’s view of the alleged impropriety is central to the discovery issue. Citing *Regan v. State Bd. of Chiropractic Examiners*, 355 Md. 397 (1999), petitioners urge the Court to adopt an “appearance of impropriety” standard in reviewing the conduct in question. In *Regan*, the Court of Appeals reaffirmed the view that “the test to be applied is an objective one which assumes that a reasonable person knows and understands all relevant facts...” *Regan*, 355 Md. at 411; quoting *Boyd v. State*, 321 Md. 69 (1991)(emphasis theirs).

Based upon the facts outlined by the parties, which, for purposes of the motion were stipulated, the Court finds no appearance of impropriety. The complained about conduct of Commissioner Speakes-Backman, namely employment seeking activities was, in the Court’s view, permissible. The Commissioner in question cut short the job seeking process upon learning of a connection<sup>4</sup> between a possible future employer and the pending application. *MD CODE ANN.*, Public Utilities Article, §§2-301, *et seq.* (2010, 2014 Supp.), governing ethics of commissioners, *inter alia*, was also not offended by Commissioner Speakes-Backman on the “stipulated” facts. Having found no appearance of impropriety on the part of Commissioner Speakes-Backman, there is no reasonable basis for granting a stay. Furthermore, conducting discovery on this issue on appeal would consequently be inappropriate and without justification.

#### “Balance of Convenience”

The Court finds that Exelon will suffer the greater injury should the stay be granted, particularly since the movants have sought extraordinary relief without any willingness to post a bond.

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<sup>4</sup> The Court notes the exceedingly tenuous nature of the connection between Exelon and the prospective employer.

Harm to Petitioners

The petitioners' challenge to the actions of the Public Service Commission remain for consideration as part of this judicial review process, now scheduled with a hearing on December 8, 2015 at 1:30 p.m.

Public Interest

The Court finds nothing in this factor to favor either party. Among both respondents and petitioners are agencies serving the public interest in affordable energy.

In sum, the balance of factors weighs in favor of Exelon and the Public Service Commission and against granting a stay. Even if petitioners had shown the possibility of irreparable harm, the showing is outweighed by the actual harm which would be incurred to Exelon in the event of a stay. Petitioners have not shown a likelihood of success on the merits to justify such an imposition. Accordingly, the motion of the Maryland Office of People's Counsel will be denied. The arguments in the motion for stay filed by Sierra Club and Chesapeake Climate Control Network are perhaps appropriate for proceedings on the merits but do not support a stay at this juncture; consequently, their motion will be denied.

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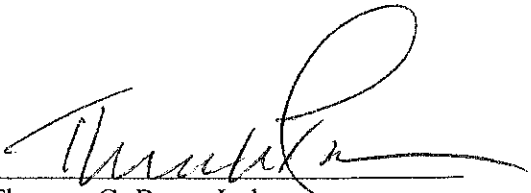
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**ORDER DENYING MOTION(S)**

For the reasons set out in the foregoing memorandum, and a review of all pleadings in these consolidated matters, and based upon the arguments of counsel at the hearing held on August 7, 2015, it is this 12 day of August 2015, by the Circuit Court for Queen Anne's County,

**ORDERED**, that the motion of the Maryland Office of People's Counsel be, and it is hereby, **DENIED**; and it is

**ORDERED**, that the motion for stay filed by Sierra Club and Chesapeake Climate Action Network is **DENIED**.

  
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Thomas G. Ross, Judge

**ENTERED**

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Clerk, Circuit Court  
for Queen Anne's County