

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION OF)
DELMARVA POWER & LIGHT COMPANY) PSC DOCKET NO. 13-115
FOR AN INCREASE IN ELECTRIC BASE)
RATES (FILED MARCH 22, 2013))

ORDER NO. 8537

AND NOW, this 15th day of April, 2014, the Delaware Public Service Commission ("Commission") determines and orders the following:

WHEREAS, on March 22, 2013, Delmarva Power & Light Company ("Delmarva") filed with the Commission an application (the "Application") seeking approval of: (a) an increase in its electric base rates; and (b) miscellaneous tariff changes; and

WHEREAS, pursuant to Order No. 8837 (April 9, 2013), the Commission suspended the proposed rate increase and appointed a hearing examiner to conduct evidentiary hearings on the justness and reasonableness of the Application; and

WHEREAS, evidentiary hearings were held on November 13, 14, and 18, 2013; and

WHEREAS, on the first day of the evidentiary hearings, Delmarva marked and attempted to move into evidence a cover letter and Schedules (JCZ-R)-6 and (JCZ-R)-7 (collectively, "Exhibit 25"). Delmarva alleged that errors in Schedules (JCZ-R)-6 and (JCZ-R)-7 had to be corrected because Delmarva had no taxes that could be deferred at the time and therefore the accumulated deferred income taxes ("ADIT") could not properly be used to offset net plant; and

WHEREAS, both counsel to the Commission Staff ("Staff") and counsel to the Public Advocate ("DPA") objected to the admission of Exhibit 25. Hence, Exhibit 25 was only marked as an exhibit but not introduced into evidence; and

WHEREAS, on December 16, 2013, the Hearing Examiner afforded Staff and the DPA the opportunity to file any procedural objections to the admission of Exhibit 25; and

WHEREAS, on January 6, 2014, both Staff and the DPA filed objections to the admission of Exhibit 25 and on January 13, 2014, Delmarva filed a response to the objections; and

WHEREAS, on January 14, 2014, the Hearing Examiner denied Staff's and the DPA's objections based on his complete agreement with Delmarva's arguments; and

WHEREAS, on January 17, 2014, Staff and the DPA filed a joint Petition for Interlocutory Appeal ("Petition") to this Commission; and

WHEREAS, on April 15, 2014, after reviewing Staff's and DPA's objections, Delmarva's response, the Hearing Examiner's decision, the Petition, Delmarva's response to the Petition, and the oral arguments of the parties made before us on February 6, 2014, and deliberating in public session, the Commission makes the following determinations:

**NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTE OF
NOT FEWER THAN THREE COMMISSIONERS:**

1. The Commission determines that Staff and DPA have satisfied the requirements for an interlocutory appeal. Under 26 *Del. Admin. C.*

§1001- 2.16.1,¹ a party may take an interlocutory appeal from a ruling of a Hearing Examiner to the full Commission during the course of a proceeding "only where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest." Here, the Commission finds extraordinary circumstances exist that necessitate a prompt decision by the Commission. The Hearing Examiner has mistakenly decided that the objections to the admission of Exhibit 25 raised by Staff and the DPA should be denied and has simultaneously ordered that the parties participate in additional hearings regarding Exhibit 25. The Commission cannot allow such a decision to stand because of the magnitude of the proposed modifications to test period data and the additional time and expense the parties would need to expend if such decision were not reversed by this Commission.²

2. Although we accept for purposes of this discussion Delmarva's assertion that the proposed change represents the correction of a mistake, we conclude that the attempted modifications of Schedules (JCZ-R)-6 and (JCZ-R)-7 constitute changes in test period data for purposes of the Commission's Minimum Filing Requirements

¹ 26 *Del. Admin. C.* §1001- 2.16.1 provides, in pertinent part, that "[i]nterlocutory appeals from rulings of the Presiding Officer or Hearing Examiner during the course of a proceeding may be taken to the full Commission by any party only where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest."

² In addition, the Commission notes that the expenses for this rate case are ultimately paid for by Delmarva's customers. See 26 *Del. C.* §114(b)(1).

("MFRs").³ These attempted modifications did not meet the timing requirements of the MFRs (i.e., the modifications had to be filed by no later than the date that Delmarva filed rebuttal testimony). Because the timing requirements of the MFRs were not met here, Exhibit 25 is inadmissible as evidence in this proceeding.

3. In addition, the Commission finds that the language at the end of 26 *Del. Admin. C.* §1002-1.3.1, Part A, does not provide an exception to the timing requirements of the MFRs in this situation.⁴ That language only provides the Commission, presiding officer or Hearing Examiner with the ability to permit such modifications "simultaneously" with the filing of rebuttal evidence. There is no dispute that Delmarva did not offer the proposed modifications "simultaneously" with the filing of its rebuttal evidence in this case.

4. Furthermore, even if such language allowed an untimely filing of modified test period data, the interests of justice do not

³ 26 *Del. Admin. C.* §1002-1.3.1, Part A, provides, in pertinent part, as follows: "Prepared direct testimony and supporting exhibits must be filed coincident with the filing of the applications for rate relief.... Modifications in test period data occasioned by reasonably known and measurable changes in current or future rate base items, expenses (i.e., labor costs, tax expenses, insurance, etc.) or revenues may be offered in evidence by the utility at any time prior to its filing of rebuttal evidence.... Notwithstanding anything to the contrary in 1.3, the Commission, Presiding Officer or Hearing Examiner may permit the utility to offer in evidence the modifications contemplated hereunder simultaneously with the filing of rebuttal evidence, where extraordinary circumstances and the interests of justice so warrant."

⁴ Such language in 26 *Del. Admin. C.* §1002-1.3.1, Part A, is as follows: "Notwithstanding anything to the contrary in 1.3, the Commission, Presiding Officer or Hearing Examiner may permit the utility to offer in evidence the modifications contemplated hereunder simultaneously with the filing of rebuttal evidence, where extraordinary circumstances and the interests of justice so warrant."

warrant any exception to the timing requirements of the MFRs under these facts.

5. Finally, the Commission also finds that its decision regarding this matter is required to prevent substantial injustice. Notwithstanding the Hearing Examiner's scheduling of an additional day to take evidence on the ADIT issue raised by the proposed modifications, the Commission believes that both Staff and the DPA would suffer unfair prejudice given the large magnitude of the proposed modifications, their inability at this late date to raise other adjustments that may have arisen from the modifications, and the absence of any reason why Delmarva did not discover its error earlier in the proceeding when Staff and the DPA could have addressed it.

6. Based on the reasons set forth above, the Commission reverses the Hearing Examiner's decision regarding Exhibit 25 and determines that such exhibit is excluded from the evidentiary record of this proceeding. Hence, no further evidentiary hearings regarding Exhibit 25 shall be held.

7. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chair

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary

At oral argument on February 6, the parties disagreed as to whether the above-quoted language from the Hearing Examiner's ruling constituted a ruling with regard to the admissibility of Exhibit 25. The Commission's February 6 deliberations, however, make clear that the Commission did not determine that an admissibility ruling had been made by the Hearing Examiner. Commissioner Clark explained that the objection of Staff and DPA to Exhibit 25 was a "procedural objection." Commissioner Clark further explained that although the Hearing Examiner stated in his ruling that he would have a future hearing as to the admissibility of Exhibit 25, the real issue on the Interlocutory Appeal was whether Delmarva's attempt to make a correction at this time (through Exhibit 25) violates the Commission's Minimum Filing Requirements. Commissioner Clark explained that the timing of proposed Exhibit 25 did not meet the timing requirements of the Minimum Filing Requirements and as such, the proposed hearing on Exhibit 25 would pose unfair prejudice to Staff and DPA. Commissioner Clark, therefore, moved that the Commission grant the Interlocutory Appeal on the Minimum Filing Requirements basis. Commissioners Lester and Conaway agreed. Commissioner Clark described his reasoning as follows:

[I]n reviewing the Hearing Examiner's decision in this case, I know he says that he's going to have a hearing as to the admissibility of the exhibit, but really what we're arguing over here is the Minimum Filing Requirements, whether or not they are met. That's a procedural objection. And he denied the procedural objection of the Staff and the Public Advocate....² [Exhibit 25] constitutes a modification in data that falls within the Minimum Filing Requirements of the Commission. It's clear that...the proffered evidence by Delmarva... did not meet the timing requirements of the Minimum Filing Requirements in our rules.³ So, for those reasons, Madam Chair, . . . I would move that the Commission reverse the decision of the Hearing Examiner in this case on an interlocutory basis and remand the matter for the rest of the proceeding.⁴ (Transcript excerpts attached as Attachment 4 hereto).

² Transcript page 1089, lines 15-23.

³ *Id.* at page 1090, lines 17-24.

⁴ *Id.* at page 1091, lines 16-21.

Delmarva respectfully asserts that it is critical that Commission orders accurately reflect the decisions made by the Commission as set forth in the record of its proceedings. It would be incorrect for Order No. 8537 to state that the Hearing Examiner "decided that Exhibit 25 is admissible" because no such finding was made by the Commission on February 6.

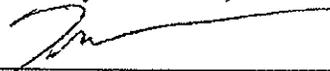
Commissioner Clark's clearly articulated motion on February 6 makes that clear.

Accordingly, Delmarva respectfully requests that, for Order No. 8537 to accurately reflect the record and the Commission's February 6, 2014 ruling, the relevant sentence in paragraph 1 be modified, as follows (*recommended deleted text is shown in strike through and added text is shown underlined*):

"The Hearing Examiner has mistakenly decided that ~~Exhibit 25 is admissible~~ the procedural objections to Exhibit 25 raised by Staff and DPA should be denied and has simultaneously ordered that the parties participate in additional hearings regarding Exhibit 25."

A clean copy of Proposed Order 8537, with the requested changes to paragraph 1 included, is attached hereto as Attachment 5.

Respectfully submitted,



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Dated: February 20, 2014



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Todd L. Goodman
Associate General Counsel

VIA EMAIL

February 19, 2014

Re: Draft Order No. 8537 - DPL Electric Base Rate Case - Docket No. 13-115

Jo and Gina:

I reviewed draft Order No. 8537, which grants the Interlocutory Appeal of Staff and DPA and reverses the Hearing Examiner's procedural ruling. I have found an error in that draft. In paragraph 1, the draft Order states:

"The Hearing Examiner has mistakenly decided that Exhibit 25 is admissible and has simultaneously ordered that the parties participate in additional hearings regarding Exhibit 25." (*emphasis added*)

The Hearing Examiner did not rule on the admissibility of Exhibit 25. The Hearing Examiner's ruling, at paragraph 1, states as follows:

"Staff's and the Public Advocate's procedural objections to DPL's proffered Exhibit 25 [are] denied." and "...that an evidentiary hearing be held as to the admissibility of DPL's proffered Exhibit 25." (*emphasis added*)

Accordingly, it would be incorrect for Order 8537 to state that the Hearing Examiner "decided that Exhibit 25 is admissible...."

Delmarva recommends that in order for Order 8537 to accurately reflect the record, the relevant sentence in paragraph 1 be modified, as follows, to reflect the Hearing Examiner's ruling (*deleted text is shown in strike through and added text is shown underlined*):

"The Hearing Examiner has mistakenly decided that the procedural objections to Exhibit 25 raised by Staff and DPA should be denied ~~Exhibit 25 is admissible~~ and has simultaneously ordered that the parties participate in additional hearings regarding the admissibility of Exhibit 25."

Please let me know as soon as possible whether Staff and DPA will agree to modify Proposed Order No. 8537 to correctly reflect the Hearing Examiner's recommended ruling.

Thanks - Todd

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF)
DELMARVA POWER & LIGHT COMPANY) PSC DOCKET NO. 13-115
FOR AN INCREASE IN ELECTRIC BASE)
RATES (FILED MARCH 22, 2013))

ORDER NO. 8537

AND NOW, this 20th day of February, 2014, the Delaware Public Service Commission ("Commission") determines and orders the following:

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WHEREAS, pursuant to Order No. 8837 (April 9, 2013), the Commission suspended the proposed rate increase and appointed a hearing examiner to conduct evidentiary hearings on the justness and reasonableness of the Application; and

WHEREAS, evidentiary hearings were held on November 13, 14, and 18, 2013; and

WHEREAS, on the first day of the evidentiary hearings, Delmarva ~~marked and attempted to move into evidence a cover letter and~~ Schedules (JCZ-R)-6 and (JCZ-R)-7 (collectively, "Exhibit 25"). Delmarva alleged that errors in Schedules (JCZ-R)-6 and (JCZ-R)-7 had to be corrected because Delmarva had no taxes that could be deferred at the time and therefore the accumulated deferred income taxes ("ADIT") could not properly be used to offset net plant; and

WHEREAS, both counsel to the Commission Staff ("Staff") and counsel to the Public Advocate ("DPA") objected to the admission of Exhibit 25. Hence, Exhibit 25 was only marked as an exhibit but not introduced into evidence; and

WHEREAS, on December 16, 2013, the Hearing Examiner afforded Staff and the DPA the opportunity to file any procedural objections to the admission of Exhibit 25; and

WHEREAS, on January 6, 2014, both Staff and the DPA filed objections to the admission of Exhibit 25 and on January 13, 2014, Delmarva filed a response to the objections; and

WHEREAS, on January 14, 2014, the Hearing Examiner denied Staff's and the DPA's objections based on his complete agreement with Delmarva's arguments; and

WHEREAS, on January 17, 2014, Staff and the DPA filed a joint Petition for Interlocutory Appeal ("Petition") to this Commission; and

WHEREAS, on February 6, 2014, after reviewing Staff's and DPA's objections, Delmarva's response, the Hearing Examiner's decision, the Petition, Delmarva's response to the Petition, and the oral arguments of the parties, and deliberating in public session, the Commission makes the following determinations:

NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTE OF

NOT FEWER THAN THREE COMMISSIONERS:

1. The Commission determines that Staff and DPA have satisfied the requirements for an interlocutory appeal. Under 26 *Del. Admin. C.*

\$1001-2.16.1,¹ a party may take an interlocutory appeal from a ruling of a Hearing Examiner to the full Commission during the course of a proceeding "only where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest." Here, the Commission finds extraordinary circumstances exist that necessitate a prompt decision by the Commission. The Hearing Examiner has mistakenly decided that Exhibit 25 is admissible and has simultaneously ordered that the parties participate in additional hearings regarding Exhibit 25. The Commission cannot allow such a decision to stand because of the magnitude of the proposed modifications to test period data and the additional time and expense the parties would need to expend if such decision were not reversed by this Commission.²

2. Although we accept for purposes of this discussion Delmarva's assertion that the proposed change represents the correction of a mistake, we conclude that the attempted modifications of Schedules (JCZ-R)-6 and (JCZ-R)-7 constitute changes in test period data for purposes of the Commission's Minimum Filing Requirements

¹ 26 Del. Admin. C. §1001-2.16.1 provides, in pertinent part, that "[i]nterlocutory appeals from rulings of the Presiding Officer or Hearing Examiner during the course of a proceeding may be taken to the full Commission by any party only where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest."

² In addition, the Commission notes that the expenses for this rate case are ultimately paid for by Delmarva's customers. See 26 Del. C. §114(b)(1).

("MFRs").³ These attempted modifications did not meet the timing requirements of the MFRs (i.e., the modifications had to be filed by no later than the date that Delmarva filed rebuttal testimony).

3. In addition, the Commission finds that the language at the end of 26 *Del. Admin. C. §1002-1.3.1, Part A*, does not provide an exception to the timing requirements of the MFRs in this situation.⁴ That language only provides the Commission, presiding officer or Hearing Examiner with the ability to permit such modifications "simultaneously" with the filing of rebuttal evidence. There is no dispute that Delmarva did not offer the proposed modifications "simultaneously" with the filing of its rebuttal evidence in this case.

4. Furthermore, even if such language allowed an untimely filing of modified test period data, the interests of justice do not warrant any exception to the timing requirements of the MFRs under these facts.

³ 26 *Del. Admin. C. §1002-1.3.1, Part A*, provides, in pertinent part, as follows: "Prepared direct testimony and supporting exhibits must be filed coincident with the filing of the applications for rate relief.... Modifications in test period data occasioned by reasonably known and measurable changes in current or future rate base items, expenses (i.e., labor costs, tax expenses, insurance, etc.) or revenues may be offered in evidence by the utility at any time prior to its filing of rebuttal evidence.... Notwithstanding anything to the contrary in 1.3, the Commission, Presiding Officer or Hearing Examiner may permit the utility to offer in evidence the modifications contemplated hereunder simultaneously with the filing of rebuttal evidence, where extraordinary circumstances and the interests of justice so warrant."

⁴ Such language in 26 *Del. Admin. C. §1002-1.3.1, Part A*, is as follows: "Notwithstanding anything to the contrary in 1.3, the Commission, Presiding Officer or Hearing Examiner may permit the utility to offer in evidence the modifications contemplated hereunder simultaneously with the filing of rebuttal evidence, where extraordinary circumstances and the interests of justice so warrant."

5. Finally, the Commission also finds that its decision regarding this matter is required to prevent substantial injustice. Notwithstanding the Hearing Examiner's scheduling of an additional day to take evidence on the ADIT issue raised by the proposed modifications, the Commission believes that both Staff and the DPA would suffer unfair prejudice given the large magnitude of the proposed modifications, their inability at this late date to raise other adjustments that may have arisen from the modifications, and the absence of any reason why Delmarva did not discover its error earlier in the proceeding when Staff and the DPA could have addressed it.

6. Based on the reasons set forth above, the Commission reverses the Hearing Examiner's decision regarding Exhibit 25 and determines that such exhibit is excluded from the evidentiary record of this proceeding.⁵ Hence, no further evidentiary hearings regarding Exhibit 25 shall be held.

7. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chair

Commissioner

⁵ Although the Hearing Examiner's decision was unclear in that he issued a case decision under 29 Del. C. §§ 10102(3) and 10126, ruled that the objections were denied, and recommended that evidentiary hearings be held as to the admissibility of Exhibit 25, his final decision in effect admitted Exhibit 25 into the record.

PSC Docket No. 13-115, Order No. 8537 Con't

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF)
DELMARVA POWER & LIGHT COMPANY)
FOR AN INCREASE IN ELECTRIC BASE)
RATES) PSC DOCKET NO. 13-115
(FILED MARCH 22, 2013))

RECOMMENDATION DENYING PROCEDURAL OBJECTIONS AND ORDERING EVIDENTIARY
HEARING AS TO THE ADMISSIBILITY OF EXHIBIT 25 PROFFERED BY DELMARVA
POWER & LIGHT COMPANY

AND NOW, this 14TH day of January, 2014, pursuant to the authority granted to me in PSC Order No. 8337 dated April 9, 2013, this Hearing Examiner having considered the "Objection of the Staff of the Public Service Commission To the Admission of Delmarva Power & Light Company's ("DPL's") Proposed Exhibit 25" dated Jan. 6, 2014 ("Staff's Procedural Objection"), and the "Objection of the Division of the Public Advocate to the Admission of Exhibit 25 Regarding The Correction of Adjustment 25" dated Jan. 6, 2014 ("Public Advocate's Procedural Objection"), recommends as follows;

NOW, THEREFORE,

Now, therefore, IT IS RECOMMENDED:

1. I recommend that Staff's and the Public Advocate's Procedural Objections to DPL's proffered Exhibit 25 be denied. I also recommend that an evidentiary hearing be held as to the admissibility of DPL's proffered Exhibit 25. My recommendation is based upon my complete agreement with the arguments raised in DPL's Response dated

Jan. 13, 2014, rather than Staff's and the Public Advocate's Procedural Objections.

2. If this recommendation is not appealed to the Commission, the evidentiary hearing shall be held as soon as possible. If this recommendation is appealed and the Commission denies the appeal, the evidentiary hearing shall occur during the week of Feb. 10-14, 2014.

3. Regardless of whether this recommendation is appealed to the Commission, due to the time constraints of this docket, on or before Wednesday, January 22, 2014 at 4:30 p.m., the parties shall provide me with their written agreement setting one (1) entire business day for the evidentiary hearing. The hearing shall begin at 10 a.m., shall continue until completed, and if possible, will be held at the Carvel State Office Building in Wilmington, Delaware. The parties are responsible for securing their own witnesses for the hearing.

4. Any appeal of this Recommendation shall be governed by Rule 26 of the Rules of Practice and Procedure of the Delaware Public Service Commission.



Mark Lawrence
Hearing Examiner

In The Matter Of:
PSC Hearing

Hearing
February 6, 2014

Wilcox & Fetzer, Ltd.
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Wilmington, DE 19801
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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

VOLUME 13

IN RE: IN THE MATTER OF :
THE APPLICATION OF DELMARVA :
POWER & LIGHT COMPANY FOR AN: PSC DOCKET
INCREASE IN ELECTRIC BASE : NO. 13-115
RATES AND MISCELLANEOUS :
TARIFF CHANGES (FILED MARCH :
22, 2013) :

Public Service Commission Hearing taken pursuant to notice before Gloria M. D'Amore, Registered Professional Reporter, in the offices of the Public Service Commission, 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware, on Thursday, February 6, 2014 beginning at approximately 2:15 p.m., there being present:

APPEARANCES:

On behalf of the Public Service Commission:
JAY LESTER, COMMISSIONER
JOANN CONAWAY, COMMISSIONER
JEFFREY CLARK, COMMISSIONER

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1 we going to hearing on it?

2 Thank you.

3 COMMISSIONER CONAWAY: Any
4 questions?

5 COMMISSIONER CLARK: I don't have
6 any further questions.

7 COMMISSIONER LESTER: No. I'm
8 done.

9 COMMISSIONER CONAWAY: What is
10 your pleasure?

11 COMMISSIONER CLARK: Well, I'll
12 do a motion, Madam Chair, and just maybe go
13 ahead and lay out some, at least some thoughts
14 I have, at least for the basis of the motion.

15 But in reviewing The Hearing
16 Examiner's decision in this case, I know he
17 says that he's going to have a hearing as to
18 the admissibility of the exhibit, but really
19 what we're arguing over here is the Minimum
20 Filing Requirements, whether or not they are
21 met. That's a procedural objection. And he
22 denied the procedural objection of the Staff
23 and The Public Advocate and went onto say that
24 he was in complete agreement with Delmarva's



1 response in the case.

2 And after carefully weighing the
3 submissions in this case, the record and the
4 arguments of the parties, I do, at least I do
5 find, and it will be the basis for my motion,
6 that in this case there are extraordinary
7 circumstances that necessitate a prompt
8 decision by the Commission to prevent
9 substantial injustice or detriment to the
10 public interest.

11 In reviewing the nature of what
12 we're examining here, I don't have any doubt
13 that this was a mistake on the part of
14 Delmarva.

15 But I also don't have any doubt,
16 and I am firmly convinced that to a substantive
17 extent it constitutes a modification in data
18 that falls within the Minimum Filing
19 Requirements of the Commission.

20 It's clear that this application,
21 or the proffered evidence by Delmarva, the
22 proper change and proper modification did not
23 meet the timing requirements of the Minimum
24 Filing Requirements in our rules.



1 I'm not convinced that based on
2 the timing of what they've done that really the
3 port of the savings clause at the end of 1.3 is
4 even available in this circumstances based on
5 the timing.

6 But if it were based on, really,
7 what I view as would be unfair prejudice to the
8 other parties as you weigh the interest when
9 you are dealing with a modification of this
10 magnitude, at this point in the proceeding, I
11 am convinced that this isn't a circumstance,
12 based on unfair prejudice where extraordinary
13 circumstances or interest of justice would
14 warrant excusing the delay in filing under the
15 Minimum Filing Requirements.

16 So, for those reasons, Madam
17 Chair, I would recommend that the Commission,
18 or I would move that the Commission reverse the
19 decision of The Hearing Examiner in this case
20 on an interlocutory basis and remand the matter
21 for the rest of the proceeding.

22 COMMISSIONER LESTER: I got to
23 think about that. Yes. I agree with that.
24 That's a second.



1 COMMISSIONER CONAWAY: Is that a
2 second?

3 COMMISSIONER LESTER: Yes.

4 COMMISSIONER CONAWAY: Any
5 questions on the motion?

6 MS. IORII: Point of
7 clarification, Commissioners.

8 If I understand the motion
9 correctly, then, what you are saying is that
10 the motion is that Staff and DPA's procedural
11 objection to the admissibility be upheld?

12 COMMISSIONER CLARK: That is
13 correct.

14 My motion is to reverse the
15 recommendation of The Hearing Examiner with
16 regard to his decision involving the procedural
17 objection. So, it is inadmissible under the
18 Minimum Filing Requirements.

19 MR. GOODMAN: So, there will be
20 no hearing. It's resolved. It doesn't come
21 in. No preparation for this hearing on the
22 issue?

23 COMMISSIONER CLARK: That's
24 correct. That's my motion.



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2. Although we accept for purposes of this discussion Delmarva's assertion that the proposed change represents the correction of a mistake, we conclude that the attempted modifications of Schedules (JCZ-R)-6 and (JCZ-R)-7 constitute changes in test period data for purposes of the Commission's Minimum Filing Requirements

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² In addition, the Commission notes that the expenses for this rate case are

PSC Docket No. 13-115, Order No. 8537 Con't
ultimately paid for by Delmarva's customers. See 26 Del. C. §114(b)(1).

("MFRs").³ These attempted modifications did not meet the timing requirements of the MFRs (i.e., the modifications had to be filed by no later than the date that Delmarva filed rebuttal testimony).

3. In addition, the Commission finds that the language at the end of 26 *Del. Admin. C.* §1002-1.3.1, Part A, does not provide an exception to the timing requirements of the MFRs in this situation.⁴ That language only provides the Commission, presiding officer or Hearing Examiner with the ability to permit such modifications "simultaneously" with the filing of rebuttal evidence. There is no dispute that Delmarva did not offer the proposed modifications "simultaneously" with the filing of its rebuttal evidence in this case.

4. Furthermore, even if such language allowed an untimely filing of modified test period data, the interests of justice do not warrant any exception to the timing requirements of the MFRs under these facts.

³ 26 *Del. Admin. C.* §1002-1.3.1, Part A, provides, in pertinent part, as follows: "Prepared direct testimony and supporting exhibits must be filed coincident with the filing of the applications for rate relief.... Modifications in test period data occasioned by reasonably known and measurable changes in current or future rate base items, expenses (i.e., labor costs, tax expenses, insurance, etc.) or revenues may be offered in evidence by the utility at any time prior to its filing of rebuttal evidence.... Notwithstanding anything to the contrary in 1.3, the Commission, Presiding Officer or Hearing Examiner may permit the utility to offer in evidence the modifications contemplated hereunder simultaneously with the filing of rebuttal evidence, where extraordinary circumstances and the interests of justice so warrant."

⁴ Such language in 26 *Del. Admin. C.* §1002-1.3.1, Part A, is as follows: "Notwithstanding anything to the contrary in 1.3, the Commission, Presiding Officer or Hearing Examiner may permit the utility to offer in evidence the modifications contemplated hereunder simultaneously with the filing of rebuttal evidence, where extraordinary circumstances and the interests of justice so warrant."

5. Finally, the Commission also finds that its decision regarding this matter is required to prevent substantial injustice. Notwithstanding the Hearing Examiner's scheduling of an additional day to take evidence on the ADIT issue raised by the proposed modifications, the Commission believes that both Staff and the DPA would suffer unfair prejudice given the large magnitude of the proposed modifications, their inability at this late date to raise other adjustments that may have arisen from the modifications, and the absence of any reason why Delmarva did not discover its error earlier in the proceeding when Staff and the DPA could have addressed it.

6. Based on the reasons set forth above, the Commission reverses the Hearing Examiner's decision regarding Exhibit 25 and determines that such exhibit is excluded from the evidentiary record of this proceeding.⁵ Hence, no further evidentiary hearings regarding Exhibit 25 shall be held.

7. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chair

Commissioner

⁵ Although the Hearing Examiner's decision was unclear in that he issued a case decision under 29 Del. C. §§ 10102(3) and 10126, ruled that the objections were denied, and recommended that evidentiary hearings be held as to the admissibility of Exhibit 25, his final decision in effect admitted Exhibit 25 into the record.

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Commissioner

Commissioner

Commissioner

ATTEST:

Secretary