

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:

/s/ Dallas Winslow
Chair

/s/ Jaymes B. Lester
Commissioner

/s/ Joann T. Conaway
Commissioner

/s/ Jeffrey J. Clark
Commissioner

Commissioner

ATTEST:

/s/ Alisa Carrow Bentley
Secretary