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July 12, 2018

VIA E-MAIL AND DELAFILE

The Honorable Mark Lawrence
Senior Hearing Examiner
Delaware Public Service Commission
861 Silver Lake Blvd., Suite 100
Dover, Delaware 19904

Re: Docket No. 17-1094

Dear Senior Hearing Examiner Lawrence:

By letter dated July 11, 2018, Ms. Iorii, Deputy Attorney General on behalf of the Division of the Public Advocate ("DPA"), argued the title of your July 11th Findings and Recommendations memorializing your July 3, 2018 oral ruling in this matter took your ruling outside the scope of Rule 2.16 of the Commission's Rules of Practice and Procedure regarding interlocutory appeals and instead required it be treated as a proposed decision on the merits under *29 Del. C.* § 10126(a) of the Administrative Procedures Act (the "APA"). On behalf of Delmarva Power and Light Company ("Delmarva Power"), the undersigned counsel was preparing to respond to DPA's submission when I received your Amendment to Findings and Recommendations of the Hearing Examiner, dated July 12, 2018, granting DPA's request for 20 days to file a response to your ruling. This letter is in response to DPA's July 11th letter and Your Honor's Amendment to Findings and Recommendations of the Hearing Examiner.

Delmarva Power does not object to allowing DPA 20 days to file an interlocutory appeal in this matter, as ordered Your Honor. However, Your Honor was correct in your original Findings and Recommendations that any appeal of your decision must be taken in accordance with Rule 2.16 of the Commission's Rules of Practice and Procedure. That rule governs interlocutory appeals, and the standard of review it specifies must be applied. The rule provides in pertinent part:

> 2.16.1 *Interlocutory appeals from rulings* of the . . . 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.*

26 Del. Admin. C. § 1001-2.16.1 (emphasis added). Here, the issue in dispute involved the procedural schedule, and Your Honor ruled on this issue during a July 3, 3018 teleconference. Yet, DPA seems to contest whether this was a "ruling". The written affirmation of that decision specifically provides:

> *I ruled* that Delmarva could file the Report, the evidentiary hearing schedule for July 11 and 12 were cancelled, and a new Procedural Schedule would be implemented allowing necessary new discovery to take place. Since the Public Advocate has advised me that it intended to appeal *my ruling*, I drafted these Findings and Recommendations.

Findings and Recommendations of the Hearing Examiner at 7 (July 11, 2018) (emphasis added).

A "ruling," by definition, is "[t]he outcome of a court's decision either on some point of law or on the case as a whole." BLACK'S LAW DICTIONARY (10th ed. 2014). There is little question Your Honor made a ruling on the July 3rd teleconference. An appeal of a ruling of this nature is interlocutory. "Interlocutory" is defined as: "Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." BLACK'S LAW DICTIONARY (10th ed. 2014). The disposition of an issue around the procedural schedule prior to a formal hearing on the merits squarely meets this definition.

The APA is not in conflict. Nothing in § 10126(a) or the APA generally provides that an oral ruling on a discovery dispute triggers its provisions. The label put on the ruling is of little relevance; it is the substance of the ruling that matters.[1] There being no conflict with the APA, Commission Rule 2.16 governs.[2]

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[1]This issue can also be guided by the widely-accepted notion, as it relates to statutory construction, that "the character of an act is to be determined by its provisions, and not by its title[,]" and that "the title should not be allowed to override the plainly expressed provisions of the act, and to read into the act something that was not intended by those enacting it." 37 A.L.R. 927 (Originally published in 1925).

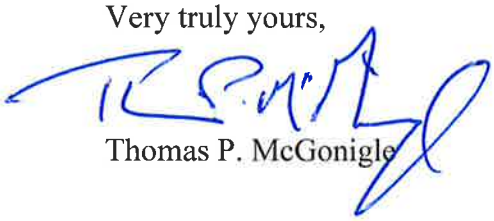
[2]From a practical perspective, DPA's argument also runs counter to well-settled policy and precedent around interlocutory appeals in Delaware, which are to be exceptional and expedited:

> (ii) *Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources.* Therefore, parties should only ask for the right to seek interlocutory review if they believe in good faith that there are substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal.

Del. Sup. Ct. R. 42(b)(ii) (emphasis added).

In closing, your Honor's July 11, 2018 opinion fits squarely in the category of a "ruling" pursuant to Rule 2.16 of the Commission's Rules of Practice and Procedure and its appeal is interlocutory. While Delmarva Power concedes the additional time requested by DPA, an appeal of this decision should be held to the confines of Rule 2.16, which require that in order to "justify interlocutory review," the Commission must find it necessary to "prevent substantial injustice or detriment to the public interest."

Very truly yours,



Thomas P. McGonigle

TPM

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