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Maillog No. 242905

February 1, 2023

Mr. Brian J. Petruska, Esq.
LiUNA Mid-Atlantic Regional Organizing Coalition
One Freedom Square
11951 Freedom Drive
3rd Floor, Suite 310
Reston, VA 20190

Dear Mr. Petruska:

Re: Baltimore-Washington Construction and Public Employees Laborers' District Council's Request for Rulemaking Requiring Utilities to Undertake Certain Compliance Measures with Respect to Maryland Code, Public Utilities § 5-305

1. On October 28, 2022, Baltimore-Washington Construction and Public Employees Laborers' District Council ("BWLDC") filed with the Maryland Public Service Commission ("Commission") a request for a rulemaking requiring utilities to take certain compliance measures with respect to Public Utilities Article ("PUA"), *Annotated Code of Maryland*, § 5-305, which went into on January 5, 2022.¹ In its filing, BWLDC noted that the PUA § 5-305 requires that Maryland public service companies ensure that utility contractors and subcontractors pay their employees no less than the prevailing wage when performing construction work on utility underground service lines.² BWLDC states that the new law "imposes a novel obligation on public service companies and therefore poses a novel compliance question for the Commission."³

2. BWLDC requests that the Commission—as the state agency charged with ensuring Maryland utilities' compliance with applicable laws—issue a rule, or order, requiring all utilities covered by PUA § 5-305 to collect regular payroll records from their contractors and

¹ Letter dated October 28, 2022, from LiUNA Mid-Atlantic Regional Organizing Coalition ("BWLDC Request").

² BWLDC at 1.

³ *Id.*

subcontractors and to file an annual report with the Commission summarizing compliance levels among contractors and subcontractors.⁴

I. BACKGROUND

3. BWLDC points out that the Maryland General Assembly, through Senate Bill 95 and House Bill 174, amended PUA § 5-305 as follows: “An investor-owned gas company, electric company, or combination gas and electric company, shall require a contractor or subcontractor on a project described in subsection (a) of this section to pay its employees not less than the prevailing wage rate determined by the Commissioner of Labor and Industry under title 17, subtitle 2 of 13 the State Finance and Procurement Article.”⁵

4. BWLDC highlights certain provisions of PUA § 5-305 including Subsection (a) which specifies that the prevailing wages apply to “construction, reconstruction, installation, demolition, restoration, or alteration of any underground gas or electric infrastructure of the company and any related traffic control activities” for investor-owned gas or electric (or combined) utilities.⁶

5. Finally, BWLDC points out that PUA § 5-305(b) includes cross references to other Maryland laws defining “prevailing wages” as those specifically set by the Maryland Commissioner of Labor and Industry.⁷ BWLDC also notes that every year the Maryland Commissioner of Labor and Industry publishes wage sheets, called “Wage Determinations”, specifying the prevailing wages for each construction craft classification in each Maryland county.⁸

II. BWLDC’s PROPOSAL

6. BLWDC proposes that the Commission promulgate a rule or issue an order to all investor-owned electric companies, gas companies, or combined electric and gas companies to take the following steps related to monitoring their compliance with PUA § 5-305:⁹

- 1) That, Utilities covered by § 5-305 immediately require all construction contractors and subcontractors of any tier performing construction work on their underground infrastructure to regularly

⁴ *Id.* at 5.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 3.

⁹ *Id.*

submit, to the Utilities, copies of payroll records detailing the wages and benefits provided to all employees performing construction on the utilities' underground infrastructure covered by § 5-305; and

2) That, on an annual basis no later than thirty days following the end of the calendar year, the Utilities prepare and file with the Commission, based upon the wage data submitted by contractors and subcontractors throughout the year, a report listing each contractor or subcontractor of any tier performing work covered under § 5-305 and for each provide the following:

- i) the prevailing wage classification, wages, and fringe benefit rates utilized by the contractor or subcontractor on work covered § 5-305;
- ii) the number of hours worked by the employees covered by §5-305 that were paid consistently with the applicable prevailing wage;
- iii) the number of hours worked by employees covered by § 5-305 that were paid inconsistently with the applicable prevailing wage;
- iv) the total amount that employees were underpaid during the year, if any
- v) a description of all action taken, if any, by the Utility to address any underdevelopment of wages by each contractor or subcontractor and the outcome achieved.”¹⁰

7. BWLDC argues that traditionally under prevailing wage laws, contractors and subcontractors covered by the requirement to pay prevailing wages must submit verified copies of payroll records for review to the public agency that hired them.¹¹ BWLDC notes that the purpose of this requirement is to make the prevailing wage requirement more transparent. BWLDC acknowledges that while PUA § 5-305 imposes an obligation on Maryland utilities to pay the prevailing wages, it does so without addressing, or requiring, certified payrolls.

8. BWLDC further contends that it is within the Commission's authority to require Maryland utilities covered by PUA § 5-305 to collect payroll records from their contractors and subcontractors to verify they are in compliance with the new law. BWLDC argues that a proposed rule, or order, from the Commission falls within the Commission's supervisory and

¹⁰ *Id.*

¹¹ *Id.* BWLDC notes that the requirement to submit certified payroll records exists under federal law through the Davis-Bacon Act and its related statutes, and the Maryland Prevailing Wage law. See 40 U.S.C. § 3145; Md. Code, State Fin. & Proc. § 17-220(b) & (c).

regulatory authority in PUA § 2-113.¹² BWLDC also points out that the Commission’s adoption of such a rule or standing order “would be a standard measure consistent with the prevailing wage regimes to ensure compliance with a requirement to pay prevailing wages.”¹³

9. BWLDC further argues that the proposed rule is “highly likely to be effective for compelling compliance with the prevailing wage law” as contractors and subcontractors are “economically dependent upon utilities”.¹⁴ Additionally, BWLDC contends that the proposed rule “would minimize the administrative burden on the Commission with respect to overseeing the covered utilities’ compliance with PUA § 5-305, as it would reduce the burden on the Commission by providing a single report from each covered utility per year.

10. Finally, BWLDC argues that the proposed rule is superior to other regulatory alternatives such as random audits,¹⁵ or declining to implement any form of monitoring, but opting to rely on the complaint process to drive compliance.¹⁶

III. EXELON UTILITIES RESPONSE

11. On November 28, 2022, Potomac Electric Power Company, Delmarva Power & Light Company, and Baltimore Gas and Electric Company (collectively, “the Exelon Utilities”) filed a response to BWLDC’s Request with the Commission.¹⁷ The Exelon Utilities oppose the request and argue that it is “unnecessary and would burden Commission resources by inappropriately shifting enforcement of labor matters and private contractual matters to the Commission.”¹⁸

12. The Exelon Utilities argue that PUA § 5-305 “requires utilities to require their contractors or subcontractors to pay their employees the prevailing wage determined by the Commissioner of Labor and Industry for projects involving construction, reconstruction, installation, demolition, restoration, or alteration on any underground gas or electric infrastructure of the

¹² PUA § 2-113 provides “(a) (1) The Commission shall: (i) supervise and regulate the public service companies subject to the jurisdiction of the Commission to: 1. Ensure their operation in the interest of the public; and 2. Promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination; and (ii) enforce compliance with the requirements of law by public service companies, including requirements with respect to financial condition, capitalization, franchises, plant, manner of operation, rates, and service. (2) In supervising and regulating public service companies, the Commission shall consider the public safety, the economy of the State, the conservation of natural resources, and the preservation of environmental quality.”

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 5.

¹⁷ Letter dated November 28, 2022, from Potomac Electric Power Company, Delmarva Power & Light Company, and Baltimore Gas and Electric Company (collectively, the Exelon Utilities) re Response of the Exelon Utilities (“Exelon Utilities Response”).

¹⁸ Exelon Utilities at 1.

utility, and any related traffic control activities (“covered projects”).”¹⁹ To comply with this requirement, the Exelon Utilities state that they have already sent notices of the specific requirement to their contractors, and have incorporated the language in their standard contractual terms and conditions that their contractors and subcontractors are required to pay employees in accordance with applicable law, including the prevailing wage, for their employees working on covered projects.²⁰

13. The Exelon Utilities contend that it is through the contracting mechanism where they set requirements for contractor compliance “with not only the prevailing wage law, but all laws (e.g., environmental, health and safety such as OSHA, labor and employment such as anti-discrimination, privacy) applicable to covered projects.”²¹

14. The Exelon Utilities further argue that adopting BWLDC’s proposed rule or order to monitor utility compliance with the prevailing wage law “would essentially shift to the Commission enforcement responsibility of private contractual terms and conditions between utilities and their contractors, as well as labor laws, which are already subject to enforcement by the Division of Labor and Industry.”²² Additionally, the Exelon Utilities contend that shifting such enforcement responsibility to the Commission is concerning given the resource demands and constraints acknowledged in the Commission’s Public Conference 57 – Modernizing Commission Staffing and Resources.²³

IV. COMMISSION DECISION

15. PUA § 5-305 provides that utilities require their contractors and subcontractors to comply with the prevailing wage law. As explained by the Exelon Utilities, actions have been taken to comply with PUA § 5-305 by notifying contractors and subcontractors of the new law, and by incorporating the compliance requirement into their standard contractual terms and conditions signed by the contractors and subcontractors.

16. The Commission declines to act on BWLDC’s request to require that utilities covered by PUA § 5-305 be subject to a reporting requirement involving the submission of wage data by its contractors and subcontractors. The Commission finds that addressing the prevailing wage requirements of PUA § 5-305 through contractual terms between the utilities and their contractors and subcontractors is an appropriate mechanism, and thus, declines to grant the requested action. To the extent that a contractor or subcontractor fails to pay a prevailing wage to its employees, the contractor or subcontractor would be in breach of its contract with the

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1-2.

²³ *Id.* at 2.

utility, be in violation of the law, and be liable to the affected employee(s). Ultimately, this matter is addressed when utilities enter into contracts with the companies that provide services involving the construction of underground infrastructure covered by PUA § 5-305. To ensure that all Maryland electric and gas utilities are affirmatively aware of its obligations under PUA § 5-305 with respect to the requirements that its contractors and subcontractors pay a prevailing wage, each utility is ordered to file an affidavit acknowledging this obligation and explain how it will comply with this law. The Commission directs each Maryland utility to submit such an affidavit by March 1, 2023, for compliance review.²⁴

By Direction of the Commission,

/s/ Andrew S. Johnston

Andrew S. Johnston
Executive Secretary

²⁴ Commissioner Bubar did not participate in this decision.