

ORDER NO. 87534

IN THE MATTER OF THE APPLICATION
OF BALTIMORE GAS AND ELECTRIC
COMPANY FOR ADJUSTMENTS TO ITS
ELECTRIC AND GAS BASE RATES

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9406

Issue Date: May 4, 2016

To: All Parties of Record

On April 21, 2016, Baltimore Gas and Electric Company (“BGE” or “the Company”) filed with the Commission an Objection to Admissibility of Staff Response to Bench Data Request in the rate case proceeding captioned above. For the reasons discussed below, BGE’s Objection is denied.

BGE’s Objection stems from a colloquy that took place on April 7, 2016, during the evidentiary hearings of the BGE rate case, when Commissioner Hoskins asked Staff witness Patricia Stinnette about the appropriate treatment of bonus depreciation, given the passage of the Protecting Americans from Tax Hikes Act of 2015 (“PATH Act”), which extended 50% bonus depreciation on Accumulated Deferred Income Taxes through the year 2017. The treatment of bonus depreciation was an issue that party witnesses had already addressed in pre-filed and live testimony. However, Commissioner Hoskins asked Ms. Stinnette during live testimony whether any precedent existed that addressed how bonus depreciation should be treated given the explicit retroactive language

contained in the PATH Act.¹ BGE did not object at the time to Ms. Stinnette's testimony that she was unaware of specific precedent but would look into the matter in response to the bench data request.

On April 19, 2016, Staff filed a four-paragraph response to the Commission's inquiry. BGE filed its Objection two days later, focusing on the second through fourth paragraphs of Staff's response, which address, respectively, a proceeding pending before the Michigan Public Service Commission, the expectations of other state commissions that utilities will take a retroactive tax implementation and reflect it in rate base deferred tax accounts, and Staff's conversation with personnel in the Virginia State Corporation Commission. Staff filed its opposition to BGE's Objection on April 28, 2016.

BGE's primary objection is that Staff's answer is nonresponsive to the Commission's question. BGE characterizes Staff's response as "not directly on point" because it does not provide any state commission *decisions* that address the retroactive application of tax statutes to utilities.² We find that BGE read the bench data request too narrowly. Commissioner Hoskins asked broadly whether another commission "has had to deal with the issue of a change in the tax law that was retroactive during the tax year."³ The request was not so narrow as to preclude Staff from responding with anything other than a published commission decision. Additionally, as Staff points out in its April 28 filing, Staff has a statutory burden to complete the record in a proceeding before the Commission. MD. CODE ANN., Public Utilities Article § 3-104(e)(4).⁴ Staff's April 19 filing merely responds to the Commission's bench data request to the best of its ability,

¹ The PATH Act is retroactive to January 1, 2015, including 11 months in the test year.

² BGE April 21, 2016 Objection at 1.

³ Case No. 9406 Tr. at 1632.

⁴ Staff April 28, 2016 response at 2.

given the apparent dearth of information available due to the recent passage of the PATH Act.

Next, BGE objects that Staff referenced out-of-hearing statements made by members of the staff of the Virginia State Corporation Commission and active members of the NARUC Subcommittee for Accounting and Finance. BGE argues that these statements constitute inadmissible hearsay under Maryland Rule 5-802 and the Company notes that it did not have the opportunity to cross-examine either Staff Witness Stinnette or the staff members that she talked with at other state commissions. Finally, BGE laments that it cannot introduce new evidence at this stage of the proceeding or issue its own data request to the Commission Staff regarding its communication with out-of-state personnel.

BGE's characterization of Staff's response as inadmissible hearsay is misplaced given that as an administrative agency, the Commission is not required to exclude hearsay evidence.⁵ *See, Motor Vehicle Administration v. McDorman*, 364 Md. 253, 263 (2001) (It is "hornbook law that hearsay evidence, if reliable, is admissible at administrative proceedings"); and *Eger v. Stone*, 253 Md. 533, 542 (1969) ("not only is hearsay evidence admissible in administrative hearings in contested cases but ... such evidence, if credible and of sufficient probative force, may indeed be the sole basis for the decision of the administrative body.") Indeed, the Commission just recently reiterated these principles in MPSC Case No. 9324, *In The Matter Of The Investigation*

⁵ The Maryland Administrative Procedure Act ("APA") specifically forbids an agency from excluding evidence "solely on the basis that it is hearsay." Md. Code Ann., St. Gov't Art. § 10-213(c). Although the APA does not apply specifically to the Maryland Commission (St. Gov't Art. § 10-203(a)(3)(v)), the evidentiary principle that an agency is not required to exclude hearsay evidence pre-dates the passage of the APA and in any event is consistent with it.

Into The Marketing Practices Of Starion Energy Pa, Inc., Order 86211, 105 MD PSC 91, 100 (2014). (It “is well-established in Maryland administrative law that ‘hearsay if credible and of sufficient probative force may be the sole basis of [an administrative] decision.’”) We agree with Staff that the Commission often receives from witnesses out-of-hearing statements offered for the truth of the matter asserted and that the Commission is well-positioned to “consider the statements with whatever weight it deems appropriate” under the circumstances.⁶

Finally, we do not find persuasive BGE’s due process arguments. The Commission asked witnesses testifying on behalf of several parties, including BGE, for additional information related to their pre-filed and live testimony. The Commission’s data request of Staff witness Stinnette is not unusual in this or any other proceeding. Indeed, the direct questioning by the Commission of party witnesses is an invaluable tool in our evidentiary proceedings, and the related issuance of bench data requests when the witnesses do not have an answer but believe information is available is a long-standing tradition at the Commission that likewise provides helpful information. We agree with Staff that, given its timing, a bench data request will often preclude cross examination because it will require collection and filing of information after the end of the evidentiary hearing. But BGE was aware of the data request in this case during the evidentiary hearings and could have objected at the time or asked for permission to submit its own response given the Commission’s explicit, on-the-record interest in the subject. In any event, BGE has made its position on this issue abundantly clear through its April 21

⁶ BGE’s inability to cross examine Ms. Stinnette regarding her communication with out-of-state personnel in other state commissions is one of the variables that will inform the Commission’s decision of how much weight to afford Staff’s April 19 filing.

response that no state commission has issued a decision directly addressing the appropriate treatment of bonus depreciation after a change in the tax law. To the extent the Company has anything additional to submit on the issue, it retained the option to further respond through its initial brief and may also address the issue in its reply brief.⁷

For all of the above reasons, BGE's Objection is denied.

IT IS THEREFORE, this 4th day of May, in the year Two Thousand Sixteen, by the Public Service Commission of Maryland,

ORDERED That BGE's Objection to Admissibility of Staff Response to Bench Data Request is hereby denied.

By Direction of the Commission,

/s/ David J. Collins

David J. Collins
Executive Secretary

⁷ The filing dates for those briefs are April 29, 2016 and May 13, 2016, respectively.