ML 218852

ORDER NO. 88558

IN THE MATTER OF THE INVESTIGATION OF THE CURRENT PRACTICE OF BALTIMORE GAS AND ELECTRIC COMPANY AND BGE HOME PRODUCTS & SERVICES, INC.	* * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 9235

Issue Date: February 5, 2018

On February 12, 2014, the Maryland Public Service Commission ("Commission") issued Order No. 86184 in the above-captioned case pertaining to Baltimore Gas and Electric Company ("BGE") and BGE Home Products & Services, Inc. ("BGE Home"), accepting the November 26, 2013 Report of the PULJ finding "no fact supporting a conclusion that BGE and BGE Home, Inc. had violated Commission regulations by the exchange of unlawful subsidies, intentional exclusion of competitors from BGE's billing system, or any other practice."[1] In its Order, the Commission also declined to discuss the issue of whether to prohibit BGE from authorizing BGE Home to use its tradename, citing the Commission's determination when it delegated Case No. 9235[2] that the issue of whether affiliates should be allowed to use utility tradenames demanded a broader proceeding involving other affected utilities and not just resource sharing between BGE and BGE Home.[3]

[1] Order No. 86184 at 3.
[2] Order No. 83467 (Jul. 13, 2010), slip op. pp.3-4.
[3] *Id*. at 2 n 1.

On March 12, 2014, the Maryland Alliance for Fair Competition ("the Alliance") filed a Request for Rehearing and Reconsideration ("Request") of Order No. 86184, arguing that the Commission could have and should have found that BGE violated §§ 7-211(h)(5)(iii), 7-211(h)(6), and/or 7-211(i)(4) of the Public Utilities Article[4] by allowing BGE Home to use its name and logo without compensation (without addressing other utilities and uses of their name and logo by their affiliates).[5] In comments filed in the matter on April 11, 2014, the Commission's Staff ("Staff") recommended that the Commission deny the Alliance's Request, maintaining that the Commission's decision should based on the statutory text of the PUA, which in relevant part is conditioned upon the existence of a contract or obligation to provide heating, ventilation, air conditioning, or refrigeration services through the EmPOWER program, a condition that the Alliance never asserted to have been satisfied.[6]

On April 22, 2014, the Alliance filed a Reply to Response to Request for Rehearing and Reconsideration ("Reply"), arguing that the correspondence between Senator Klausmeier and Commission Chairman Douglas Nazarian demonstrated the Commission's intent when it opened Case No. 9235, and maintaining that the Alliance

---

[4] Md. Code Ann. Public Utilities Article (hereinafter "PUA").

[5] Request at 2. As support for its argument that the Commission erred in not deciding whether BGE Home's use of BGE's logo violated SB 955 (the legislation that created §§ 7-211(h)(5)(iii), 7-211(h)(6), and 7-211(i)(4)) the Alliance cited an exchange of letters between Senator Katherine Klausmeier and Chairman Douglas R. M. Nazarian, in which Sen. Klausmeier wrote that the free use of BGE's trade name and logo by BGE Home was an illegal subsidy, and is what SB 955 was designed to prohibit. *Id*. at 2 On May 9, 2012, Chairman Nazarian responded, noting *inter alia*, that both Case No. 9154 and No. 9235 were pending before the Commission, and that the Commission expected that "the issue of BGE's compliance with Senate Bill 955" would "be addressed within Case No. 9235". *Id*. at 2-3. Whether former Chairman Nazarian intended to imply that compliance with SB 955 bore implications for the use of a trade name or logo by an affiliate is a question that is beyond this Commission's ability to answer.

[6] ML #154289 at 2-6. Staff also maintained that if the Commission granted the Alliance's Request, it should limit the proceeding to the issues of whether a contract or obligation between BGE and BGE Home have been met, and, if so, whether any statutes or regulations were violated as a result of BGE Home's improper use of the BGE trademark or logo. *Id*. at 7-8.

already asserted that BGE Home, and all HVAC Contractors participating in EmPOWER Maryland have legal contracts or obligations with BGE.[7]

On May 9, 2014, Staff filed a Motion to Strike Improper Filing, arguing that: the Alliance's Reply is not authorized by statute or regulation or accompanied by a proper motion; that it should be stricken as an improper attempt to supplement or recharacterize its Request for Rehearing and Reconsideration; and that the Commission should base its decision on whether to grant the Alliance's Request solely on the Alliance's original Request and Staff's Response.[8] On May 16, 2014, the Alliance filed an Opposition to Staff's Motion to Strike, arguing that past Commission practice allows replies to responses to requests to rehearing, but requested that should the Commission disagree, the Commission grant it leave to file its Reply, retroactive to that filing.[9] On June 9, 2017, the Alliance filed a request that the Commission issue a ruling on its outstanding Request for Reconsideration and Rehearing.[10]

As the Alliance states in its Request, there is enough evidence in the record of Case No. 9235 for the Commission to reach a decision on whether BGE violated PUA §§ 7-211(h)(5)(iii), 7-211(h)(6), and/or 7-211(i)(4) by allowing BGE Home to use its name and logo without compensation.[11] The Commission concurs with the expert opinion of its Staff that the Alliance has not established an adequate basis for a finding that PUA §

[7] ML# 154451.Since this matter was filed in 2009, BGE has changed some of its EmPOWER contracting practices, rendering some of the original issues now moot.
[8] ML# 154921. Although the Commission considered Staff's Motion to Strike Improper filing, it is denied as moot.
[9] ML# 155139
[10] ML# 215602.
[11] *See* Request for Rehearing and Reconsideration at 4.

7-211 or any other statute has been violated as a result of "nonmonetary subsidization through use of a trade name" or logo.[12]

SB 955 contains various safeguards and prohibitions against subsidies from an electric company to an affiliate, but makes no mention of the use of trade names or logos. Since SB 955 of 2009's enactment, the Maryland General Assembly has had the opportunity to clarify that an electric company's affiliate may not, in fact, use the electric company's trade name or logo without compensation. In 2011,[13] 2012[14] and 2016,[15] the General Assembly considered but did not pass measures that would have required the payment of compensation for the use of certain utility company trade names, logos, and other services. Given this history, the Commission has been and remains reluctant to attach an interpretation to a statute that would result in a policy outcome that has not received the clear endorsement of the legislature.

The Commission has also demonstrated its willingness to object when companies it regulates propose to use names that are similar to other well-recognized companies in a misleading manner, especially when the Commission views the name as giving them a clear advantage over other companies. In a recent series of administrative rulings and cases, for example, the Commission rejected the application of a company named Baltimore Power Company to provide electricity and natural gas services to residential, commercial, and industrial customers in the BGE service territory. The Commission felt that customers could confuse Baltimore Power Company with Baltimore Gas Electric

[12] *See* Staff Reply Brief at 3-4.
[13] Senate Bill 697.
[14] Senate Bill 373.
[15] Senate Bill 684 and House Bill 1569. In 2010, 2014, and 2015, the General Assembly also considered, but did not pass, various measures related to the provision of HVAC services under EmPOWER. *See* SB 1095 of 2010; SB 1013 of 2014; and SB 826 of 2015.

Company, but was twice told by the Circuit Court of Baltimore City that it did not have a reasonable basis for reaching that conclusion.[16] Considering that experience, and absent further clarity from the legislature, the Commission is even more hesitant to attach the Alliance's preferred interpretation to PUA § 7-211.

To be clear, this Commission has not taken a position on this issue in the legislature, and will continue to defer to the wishes of the General Assembly. Unless and until another measure is passed, however, the Commission will continue to rely on its general affiliate code of conduct regulations, and to maintain its efforts to "promote competitive markets and ensure that an electric or gas utility does not subsidize its affiliates."[17]

Accordingly, based on the facts before it in this case, the Commission finds that BGE did not violate the plain language of PUA §§ 7-211(h)(5)(iii), 7-211(h)(6), and/or 7-211(i)(4) by allowing BGE Home to use its name and logo without compensation.

IT IS THEREFORE, this 5th day of February, in the year Two Thousand and Eighteen, by the Public Service Commission of Maryland,

ORDERED: (1) that the Alliance's Request for Rehearing and Reconsideration of Order No. 86184 is hereby DENIED; and

[16] *Baltimore Power Company, LLC v. Maryland Public Service Commission, et al.*, No. 24-C-16-006056 (Balt. City Cir. Ct. Nov. 15, 2017). In the first appeal of the Commission's license denial, Judge W. Michel Pierson observed that he failed to "see any indication that the [C]ommission exercised any expertise that puts it in a better position than [him] to decide whether or not [the name Baltimore Power Company] is misleading or deceptive." *Id*. at 2 (quoting Paper 3000, Sept. 13, 2016 Order, Trial Hr'g Tr. 30:21-24, Sept. 20, 2016). After the Commission provided further reasons for its license denial on remand, and Baltimore power again appealed, a second judge again rejected the Commission's decision, and specifically reaffirmed Judge Pierson's observation above. *Id*. at 4.

[17] Code of Maryland Regulations ("COMAR") 20.40.01.02.

(2) that the docket is hereby closed.

By Direction of the Commission

/s/ David. J. Collins

David J Collins
Executive Secretary