

ORDER NO. 82892

IN THE MATTER OF THE APPLICATION OF THE
POTOMAC EDISON COMPANY ON BEHALF OF
PATH ALLEGHENY TRANSMISSION
COMPANY, LLC FOR A CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY TO
CONSTRUCT THE MARYLAND SEGMENTS OF
A 765 kV ELECTRIC TRANSMISSION LINE AND
A SUBSTATION IN FREDERICK COUNTY,
MARYLAND

*
*
*
*
*
*
*

BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9198

In this Order, the Public Service Commission (“Commission”)¹ finds that the Potomac Edison Company d/b/a Allegheny Power (“Potomac Edison” or the “Company”) may not seek authorization to construct a transmission line on behalf of its non-electric-company affiliate, PATH Allegheny Transmission Company, LLC (“PATH”).² As set forth below, we find *first* that § 7-207(b)(3) of the Public Utility Companies (“PUC”) Article authorizes us to issue a Certificate of Public Convenience and Necessity (“CPCN”) only to an “electric company,”³ a status PATH undeniably lacks, and that the law does not allow us to ignore or circumvent this requirement by granting a CPCN to Potomac Edison “on behalf of” PATH when Potomac Edison will neither construct nor operate the proposed line. *Second*, as a result of this holding, we find that no application to construct the proposed transmission line has properly been filed with the Commission, and thus that any time periods pertaining to possible federal siting authority have not yet begun to run and will not begin to run until a proper electric company has filed a complete application

¹ Commissioner Brenner dissents from Section II of this Order and writes separately on the issues covered there. He joins the remainder of this Order.

² There are a number of different entities that use one variant or another of the “PATH” name. Unless otherwise noted, the abbreviation “PATH” refers to all or any one of them, as appropriate.

³ See PUC § 1-101(h).

with the Commission. *Third*, because the issue would have been presented had this application been properly filed, we hold that our authority under § 7-207(b)(3) of the PUC Article encompasses all components of a project integral to the proposed transmission line, including, where appropriate, substations. We make no decisions here about whether the substation proposed in this application would or would not qualify as integral to the proposed transmission line for these purposes.

Based on these holdings, we need not and do not structure or schedule any further proceedings to consider this application. We ask the Company to inform the Commission within 30 days of its intention to submit a new, conforming application and, if possible, the anticipated timeframe of any such filing.

I. Background

On May 19, 2009, Potomac Edison filed a *Motion for Expedited Decision that the Company may file for a Certificate of Public Convenience and Necessity (“CPCN”) on behalf of PATH Allegheny Transmission Company, LLC and an Application for a CPCN to construct the Maryland segments of a 765-kV transmission line and a substation in Frederick County, Maryland (“Motion”)* at the same time it submitted an Application of The Potomac Edison Company on Behalf of Path Allegheny Transmission Company, LLC for a Certificate of Public Convenience and Necessity to Construct the Maryland Segments of a 765 KV Electric Transmission Line and a Substation In Frederick County, Maryland (“Application”). The Commission considered the Motion, and specifically whether the Application could be filed in the form PATH lodged it, at the Commission’s Administrative Meeting on June 3, 2009.

After hearing from the Commission’s Technical Staff (“Staff”), the Company, the Office of People’s Counsel (“OPC”), the Board of County Commissioners of Frederick County, Maryland (“County”), the Sierra Club, the Sugarloaf Conservancy, Inc., as well as from a number of citizens from Frederick County who opposed the proposed substation, the Commission found that several preliminary matters must be briefed, argued and resolved before the Commission could set the Application for hearing:

- 1) Does § 7-207(b)(3) of the Public Utility Companies Article, *Annotated Code of Maryland* (“PUC”) authorize the Commission to issue a CPCN for a transmission line designed to carry a voltage in excess of 69,000 volts to any entity other than an electric company? Does the Company, a Maryland electric company, have standing to seek a CPCN for a line that would be constructed and owned by its affiliate, PATH Allegheny Transmission Company, LLC, which is not a Maryland electric company? If the Commission were to issue the requested CPCN to the Company, under what authority could the Company assign or otherwise delegate the construction or ownership of any approved transmission line to an affiliate?
- 2) Must the Company obtain the County’s approval regarding the siting of the substation, or has the PUC pre-empted the County’s zoning authority? If the County is not pre-empted, may the Application be considered by the Commission concurrently with the County zoning process?
- 3) What, if any, sources of federal siting authority might apply to any aspect of the proposed project? For each source of federal siting authority identified: (a) is there a time period that must elapse before that authority could be invoked; (b) if so, has that time period begun to run; and (c) if so, when did the time period begin to run?⁴
- 4) Should the Commission set an intervention deadline immediately and allow discovery to start prior to

⁴ Although the Commission directed the parties to address this issue, ultimately, individual parties will decide what federal avenues they will attempt to pursue and it would be up to federal authorities to determine what, if any, jurisdiction they have in this matter.

deciding the preliminary matters? What core discovery could be started prior to a ruling on these preliminary matters?

The Commission set a briefing schedule and scheduled oral arguments for July 31, 2009. Pursuant to that schedule, Staff, OPC, the Company, several organizations and numerous citizens submitted both Initial Briefs and Reply Briefs. The County submitted Initial Comments on Issues 2 and 3 and declined to comment on Issues 1 and 4. In submitting its comments, the County asserted that it was not submitting to the jurisdiction of the Commission to determine the issues. After reviewing and considering the briefs of all parties and the testimony and comments received at the July 31st hearing, the Commission finds that the Application cannot be accepted as filed.

II. § 7-207(b)(3) of the PUC Article Does Not Authorize The Commission To Grant A CPCN To Potomac Edison “On Behalf Of” PATH

The first, and threshold, question before us is whether the PUC Article authorizes us to issue a CPCN for the proposed transmission line to Potomac Edison “on behalf of” PATH. Potomac Edison concedes, to its credit, that the proposed line would be built, owned and operated not by Potomac Edison itself, but by a family of entities created for those purposes.⁵ Potomac Edison acknowledges as well that the PATH companies do not qualify as an “electric company” under the PUC Article⁶ and that the Maryland entity, PATH Allegheny, “couldn’t come here on its own to seek a CPCN to build a transmission line.”⁷ In light of these undisputed facts, Potomac Edison submitted the Application “on

⁵ See Initial Brief of Potomac Edison at 4-5.

⁶ See Transcript of Hearing, July 31, 2009 (“Transcript”), at 12 (“CHAIRMAN NAZARIAN: But [PATH Allegheny] is not an electric company, right? MS. HERMAN: PATH Allegheny is not an electric company.”). An electric company is defined as “a person who physically transmits or distributes electricity in the State to a retail electric customer.” PUC § 1-101(h).

⁷ See Transcript at 12 (“CHAIRMAN NAZARIAN: PATH Allegheny couldn’t come here on its own to seek a CPCN to build a transmission line, correct? MS. HERMAN: Correct.”).

behalf of” the PATH entities and asks us to issue (after the appropriate review) a CPCN in that fashion. Potomac Edison argues that we can grant this Application because neither § 7-207(b)(3) of the PUC Article nor the Commission’s regulations expressly forbids it. When pressed, Potomac Edison also falls back on § 2-113 of the PUC Article, the section defining the Commission’s general supervisory and regulatory authority over public service companies, and argues that the operational and financial benefits from the PATH entity structure justify a “liberal” construction of our statutory authority.

In this context, however, the law does not permit us the sort of flexibility Potomac Edison seeks. Indeed, § 7-207(b)(3) of the PUC Article leaves no interstitial void for § 2-113 of the PUC Article to fill: it *limits* the Commission’s authority to issue CPCNs for transmission lines designed to carry a voltage in excess of 69,000 volts to “electric company[ies]”:

Unless a certificate of public convenience and necessity for the construction is first obtained from the Commission, an **electric company** may not begin construction of an overhead transmission line that is designed to carry a voltage in excess of 69,000 volts or exercise a right of condemnation with the construction.⁸

The term “electric company” is defined in the PUC Article and, unlike the Panda case on which Potomac Edison relies,⁹ there is no factual dispute here about whether PATH could satisfy that definition. To the contrary, we know here that the family of entities created to construct, own and operate the proposed line *cannot* qualify as an electric company. The only way to read this sentence to allow a non-electric company such as PATH to construct a 69kV or greater transmission line is to ignore the term or to give it a meaning different than the meaning the General Assembly gave it. Moreover, the General Assembly knew

⁸ PUC 7-207(b)(3) (emphasis added).

⁹ See *Re Potomac Elec. Power Co.*, 83 Md. P.S.C. 191 (1992).

precisely how to modify our authority to allow non-electric companies to build things – in 1999, as part of legislation restructuring Maryland’s electricity markets, the General Assembly amended the companion provision defining our authority to issue CPCNs for generating stations to allow a “person,” rather than just an electric company, to construct one.¹⁰ So although we agree with Commissioner Brenner that we should interpret and apply the PUC Article flexibly and with the best interests of the ratepayers in mind, that principle does not permit us to expand the scope of our authority if we disagree with the lines the legislature has drawn. It may be that the structure of PATH entities would allow them to construct and operate the line more efficiently and cost-effectively, but that possibility does not permit us to ignore or waive the statutory limitations on our authority.

For these reasons, we find that § 7-207(b)(3) of the PUC Article does not authorize the Commission to issue a CPCN to “Potomac Edison on behalf of PATH,” and that the Application Potomac Edison submitted on May 19, 2009 is neither complete nor properly filed. And as such, any time periods that must expire before PATH might seek authority to construct the proposed project under federal law have not yet begun to run.¹¹ Potomac Edison could, of course, file an application for a CPCN on its own behalf, and that filing would trigger the Commission’s CPCN review process, and we ask the Company to advise the Commission within thirty days of its intention to do so and, if so, an estimate of when it plans to file a proper application. We note as well that our decision that PATH is not eligible to construct a transmission line in Maryland should not be read to foreshadow any

¹⁰ See Chapters 3 and 4, Acts 1999, amending PUC § 7-207(b)(1)(i).

¹¹ See, e.g., Section 216 of the Energy Policy Act of 2005, codified at 16 U.S.C. §824p which grants the Federal Energy Regulatory Agency (“FERC”) the authority to issue a construction permit for an applicant’s transmission line if the Commission “withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law” 16 U.S.C. §824p(b)(1)(C) (i)

views on the merits of the proposed transmission line project.

III. The Commission’s CPCN Authority Encompasses Electric Substations That Are Integral To Transmission Lines Designed To Carry a Voltage In Excess of 69,000 Volts

Notwithstanding our holding above, we will address the relative scope of our CPCN authority vis-à-vis Frederick County’s zoning authority for two reasons. *First*, the question of whether our CPCN authority encompasses the siting, specifications and conditions of the proposed Kemptown¹² substation is fully briefed and argued. Had we decided that Potomac Edison could seek a CPCN on behalf of PATH, as Commissioner Brenner would, we would need to decide the question and would do so on the very same record. *Second*, because Potomac Edison and the PATH entities are seeking approval to construct portions of the proposed transmission line in other states simultaneously, we expect that Potomac Edison will seek authorization to build the proposed transmission line project in the near future, at which point the identical issue would surface again. As a general rule, the Commission does not and will not issue advisory opinions, and this Order should not be read as setting a precedent that the Commission will decide on an advisory basis issues not presented in a live case or controversy. But because these precise issues are likely to come before us in the context of this same project,¹³ we offer the following guidance for the parties for the near-future life of this proposed project.

Although it is dramatically more complicated in engineering terms, the Maryland portion of the proposed project consists of two primary components: a 765-kV

¹² We recognize that the proposed substation, which has been labeled “Kemptown” in the regional transmission planning process, is physically located in Mount Airy, Maryland, not the town of Kemptown itself. For the sake of consistency between the application and this decision, we will refer to the substation by its planning name. As the Company proceeds, however, it should be mindful of the potential for public confusion that this nomenclature apparently has created and should tailor its public outreach accordingly.

¹³ *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (exception to mootness doctrine applies where claims are capable of repetition yet evading review).

transmission line and, at the terminus of the line, a new substation. Nobody disputes the Commission's authority (assuming a proper application) to consider and issue a CPCN for the transmission line portion of the project. With regard to the substation portion of the project, however, Frederick County argues that the Maryland General Assembly has directly delegated authority to site or locate electricity substations to local governments, and thus that the proposed Kemptown substation cannot be sited or constructed as proposed without the County's approval. The Company and Staff argued, to the contrary, that the proposed substation is integral to the transmission lines and, therefore, the transmission line CPCN process supersedes the County's independent siting authority.

We hold that the Commission's overarching authority to site transmission lines includes the location, specifications and conditions of substations that are integral to a proposed transmission line project that requires a CPCN. A substation is integral if, and to the extent, we find that the construction of a proposed transmission line designed to a voltage in excess of 69,000 volts cannot be constructed without it. We offer no opinion on whether the proposed Kemptown substation is integral to the proposed transmission line – that determination must be made from a factual record that had not yet been developed in the life of this case, and will be for the Hearing Examiner or the Commission to make if Potomac Edison submits a new and proper application. In the course of considering whether to issue a CPCN that encompasses this proposed line and substation, or any other project, we would have the authority – as we do with respect to the lines themselves – to determine the appropriate location, specifications and conditions of the project. And although our CPCN authority would, in this regard, supersede what normally would be a

local land use decision, we will weigh heavily the expertise and recommendations of local authorities such as Frederick County in our review and analysis.

This is not entirely an issue of first impression. In *Howard County Co. v. Potomac Electric Power Co.*, 319 Md. 511 (1990), the Maryland Court of Appeals held that the Commission's authority to site transmission lines preempted county zoning ordinances. Although the Court did not address the specific issue of local zoning authority over a substation, the principles underlying that decision counsel in favor of construing the Commission's substantive authority over transmission line projects to encompass all integral elements of those projects, including substations that are, as a factual matter, functionally necessary for the construction and operation of the line at issue.

In *Howard County*, two counties attempted to apply their zoning ordinances to one of the last links in the 500 kV transmission loop around Washington, DC and Baltimore. One county issued a special exemption that would expire in three years for its 3.7 mile section of the line, but the second county denied a request for a special exemption to allow construction of its 6.8 mile section.

The Court began its analysis from the fact that the Commission, as the state-wide regulator of electricity, has "final authority" over the siting of transmission lines:

In this case it is clear that, in the field of public utility service, the General Assembly intended to grant broad powers to the PSC to execute its principal duty of assuring adequate electrical service statewide. While §§ [1-101] and [2-113] of [the Public Utility Companies Article] outline the general scope of authority vested in the PSC, § [7-207] states with particularity that the PSC shall have final authority over the granting of construction permits for overhead transmission lines in excess of 69,000 volts.¹⁴

¹⁴ *Id.* at 524.

Against that broader regulatory backdrop, the Court analyzed the tension, and possible conflict, between the Commission's broader regulatory mission and local zoning decisions, and concluded that the Commission's CPCN authority preempts county zoning authority for transmission lines:

As in *County Council v. Montgomery Ass'n*, [274 Md. 52, 333 A.2d 596 (1975)], the imposition of conflicting conditions associated with the construction of high-voltage overhead transmission lines could generate like complications if counties were permitted to require utilities to obtain special exception status under local ordinances. Not only could counties impose special conditions upon utilities seeking to construct transmission lines, but an individual county could effectively thwart the line's construction even after the utility had been granted a certificate by the PSC. And as this case demonstrates, the county regulations require consideration of some of the same factors which are implicated during the PSC proceedings for a certificate. For example, both counties in the present cases require a showing of a "public necessity" or "need" for the construction, as does § [7-207]; both counties require that the local authorities consider potential impacts on esthetic qualities, either architectural or historic, as does § [7-207]; both require minimization of impacts on the environment or character of the surrounding areas, as do §§ [7-207] and [2-113]; and Montgomery County requires a consideration of aviation hazards, as does § [7-207]. Both counties require assessment of other more specific considerations toward granting a special exception. County regulations may legitimately serve to protect strictly local interests. However, a local governing body that has the power to altogether exclude from its jurisdiction a transmission line which provides electrical service statewide is essentially regulating the public utility in a manner that may be antithetical to the interests of the rest of the state. The legislature could not possibly have intended this result. The purpose of [the Public Utility Companies Article], and § [7-207] in particular, is to control the transmission of electric power. That the legislature delegated this authority to a state agency with statewide powers, perspective, and expertise is indicative of the intent that electric utility companies respond to a centralized authority in the transmission of high-voltage electricity. The legislature, however, did not intend that

local interests be ignored by the PSC, as evidenced by the right of counties to actively participate in the certification proceedings. Under §§ [7-207] and [7-208] the counties may present recommendations during the PSC public hearings, thus eliminating the potential for dual application procedures which may result in irreconcilably conflicting results, such as those presented in this case.

Even so, the PSC is entitled to recognize the broader public interest of providing safe and reliable electrical service to larger areas. The counties' argument that the zoning regulations govern disparate aspects of the utility is not well founded because the regulations specify some of the same considerations included in § [7-207]; more significantly, the local laws grant to county government the power to negate prior PSC decisions as shown in this case. When such an exercise of local authority obstructs the fundamental purpose of [the Public Utility Companies Article], we must conclude that these local powers were not intended to exist concurrently with those of the PSC.¹⁵

Unlike our decision in Section II, the precise contours of our authority over a particular project are not defined in the statute. Put another way, there is a fair question about where, in the context of a proposed transmission line project, the "transmission line" begins and ends. The answer to that question is a factual one and could vary from project to project, depending on the size and scope of the proposed line, the way in which it interconnects with the broader electricity grid, and other issues of construction and engineering that will differ with each proposal.

As a matter of principle, however, we are persuaded that the General Assembly has directed us to decide whether and how to site a transmission line. To the extent a local authority could, in effect, veto the Commission's CPCN decision by denying approval of a necessary substation (or other component), we hold that our broader regulatory authority

¹⁵ *Id.* at 527-28.

over the transmission line supersedes the local land use authority. Our CPCN authority wins out only with regard to the components of a proposed project that are integral to the transmission line itself. We need not and do not answer the specific factual question about whether this proposed substation (or any other component of the proposed PATH line) is integral to the proposed PATH transmission line – if and when an electric company submits a new application, we will address that question on an appropriate record. We expressly do not hold that our CPCN authority supersedes local siting authority for all electric substations, but only as to substations or other elements integral to proposed transmission line projects that are subject to our CPCN authority.

As we reconcile these conflicting sources of regulatory authority, we recognize as well the critical role of local authorities and citizens in the review and analysis of transmission line projects. Should Potomac Edison file a new application, we encourage Frederick County to participate in our evening public hearings¹⁶ and as a party in the evidentiary proceedings themselves.¹⁷ And beyond the statutory requirement that we consider the County’s recommendation in deciding the CPCN,¹⁸ we recognize that land use decisions fall within the core expertise and competency of local authorities such as Frederick County, not this Commission. As such, we will give appropriate – which is to say, significant – weight to the views and recommendations of local authorities in the course of deciding whether, where, and on what terms to site the various components of a

¹⁶ PUC § 7-207(d)(2).

¹⁷ PUC § 7-207(e).

¹⁸ PUC § 7-207(e)(1).

transmission line falling within our authority.

IV. Discovery/Intervention Deadline

The Company, Staff and OPC all have indicated that they support setting an intervention deadline immediately. The parties further agreed that the Commission should allow discovery to start prior to deciding the preliminary issue set forth above. Given the very early stage of the proceedings, they suggested that none of the intervening parties would have been harmed if the Commission allowed discovery to begin. Having found that no application is properly on file, however, the Commission will defer any decisions on discovery and/or intervention deadlines until the Company has an opportunity to determine and exercise its next course of action. The Commission asks the Company to file a letter within 30 days from the date of this Order, informing the Commission whether it plans to file on its own behalf, and if so, when.

IT IS THEREFORE, this day of 9th September, in the year Two Thousand and Nine, by the Public Service Commission of Maryland,

ORDERED: (1) That the Motion for Expedited Decision that the Company may file a Certificate of Public Convenience and Necessity on behalf of PATH Allegheny Transmission, LLC is denied;

(2) That, for the reasons set forth above, the Application for a CPCN to construct the Maryland segments of a 765-kV transmission line and a substation in Frederick County, Maryland has not properly been filed, and thus cannot be considered; and; and

(3) That the Potomac Edison Company shall notify the Commission

within 30 days whether it intends to re-file an appropriate application and, if so, when it intends to submit the application.

/s/ Douglas R. M. Nazarian

/s/ Harold D. Williams

/s/ Susanne Brogran

/s/ Lawrence Brenner

Commissioners