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March 5, 2017

FILED VIA DELAFILE
Donna Nickerson, Secretary
Delaware Public Service Commission
Cannon Building, Suite 100
861 Silver Lake Boulevard
Dover, DE 19904

Re: Docket No. 16-0649 – Answer of Delmarva Power & Light Company to Staff's Petition for an Interlocutory Appeal to the Commission

Dear Secretary Nickerson:

Enclosed for filing is Delmarva Power & Light Company's ("Delmarva") Answer to Staff's Petition for an Interlocutory Appeal to the Commission along with a compendium of the authorities cited in the Answer.

Should you have any questions or require any additional information, please do not hesitate to contact me.

Very truly yours,

Pamela J. Scott

Enclosures
cc: Senior Hearing Examiner Mark Lawrence (w/enclosures)
James McC. Geddes, Esquire (w/enclosures)
Regina A. Iorii, Esquire (w/enclosures)
Michael J. Quinan, Esquire (w/enclosures)
Service List Docket 16-0649

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY FOR AN INCREASE IN ELECTRIC BASE RATES AND MISCELLANEOUS TARIFF CHANGES (Filed May 17, 2016)	* * * * * *	PSC Docket No. 16-0649

ANSWER TO STAFF'S PETITION FOR
AN INTERLOCUTORY APPEAL TO THE COMMISSION

Delmarva Power and Light Company ("Delmarva") hereby files an Answer to the Petition of the Staff of the Public Service Commission ("Staff") for an Interlocutory Appeal to the Commission[1] filed on March 3, 2017 (the "Petition"):

1. Interlocutory appeals from the ruling of a Hearing Examiner are allowed only where "extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest."[2] Staff seeks to appeal Senior Hearing Examiner Lawrence's February 28, 2017, Order No. 9033 (the "Order"), which sets a hearing to develop a factual record on whether a proposed settlement agreement (the "Proposed Agreement") between Delmarva, the Division of the Public Advocate ("DPA") and the Delaware Energy Users' Group ("DEUG" and together with Delmarva and DPA, the "Settling Parties") is in the "public interest," followed by the opportunity for Staff to present its full direct case in opposition to Delmarva's Application For An Increase In Electric Base Rates (filed May 17, 2016).

2. As a threshold matter, the hearings for this matter were set to commence on March 7 as a result of a scheduling order issued on July 28, 2016. The parties have been diligently

1 26 *Del. Admin. C.* § 1001-2.16.3 ("Within three (3) days of service of the Petition for interlocutory review, any party may file an answer limited to five (5) pages in length.").
2 *In re Chesapeake Util. Corp.*, 2016 WL 3086186, at ¶ 12 (Del. P.S.C. May 17, 2016); 12 *Del Admin. C.* § 1001-2.16.1.

processing the case, including by engaging in multiple rounds of filed testimony and engaging in significant discovery to prepare for hearings on March 7. The Order did not accelerate the start of the hearings. Consistent with the Order which affirmed that hearings would proceed on March 7, Delmarva, DEUG and DPA have expended substantial resources to schedule the appearance of counsel (internal and outside) and corporate and expert witnesses (including travel) for the hearing starting on March 7. Witnesses and counsel have spent considerable time preparing. If the Commission cancels the hearing set for March 7, 8 and 9, many of those resources will be wasted and scheduling new dates could produce a substantial delay in the resolution of Delmarva's rates and result in the incurrence of even more costs on behalf of the parties.

3. Although Staff argues that the Order created two separate hearings, there is, in actuality, one hearing relating to the Proposed Agreement and whether it is in the "public interest," with Staff having the opportunity to develop all its possible objections to the settlement by presenting its entire case. The Order is not "extraordinary." It schedules a settlement hearing on a proposed settlement agreement.[3] Equally routine is the modification of the procedural schedule to accommodate a settlement hearing before a full adversarial hearing, whether or not all of the parties approve of the settlement.[4]

4. Staff incorrectly argues that the Order shifts the burden of proof to Staff. In the settlement context, the burden of proof is always on the parties submitting the settlement agreement to

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3 *See, e.g.*, *In re Chesapeake Util. Corp.,* P.S.C. Docket No. 15-1734, Order No. 8982, at ¶ 25 (Del. P.S.C. Dec. 20, 2016) (recognizing that "with the submission of the Proposed Settlement by the Settling parties, the *focus of the case* moved to whether the agreement should be accepted by the Commission as a final resolution of the matter…") (emphasis added).

4 *See, e.g.*, *In re Delmarva Power & Light Co.,* 2005 WL 3617552 (Del. P.S.C. Oct. 11, 2005) (modifying schedule where not all the parties had signed on to the settlement); *In re Tidewater Util., Inc.*, 2013 WL 9600776, at ¶ 96 (Del. P.S.C. Nov. 25, 2013) ("immediately prior to the Evidentiary Hearing" the Hearing Examiner was presented with a proposed settlement agreement, and the scheduled hearing switched focus to whether the agreement was in the "public interest").

prove that it is in the public interest, and the utility retains the burden of proof to show that the rates in the settlement are just and reasonable.[5] Nothing in the Order states, or implies, otherwise.

5. Staff will have the opportunity to present its full case, avoiding any alleged due process issues. Staff suggests that it has been constitutionally disadvantaged because it cannot submit written testimony on the terms of the settlement agreement. Staff has been a full and active participant in this case since it was filed on May 17, 2016, and is fully aware of all of the issues in the case. As a result, Staff and the other parties have had ample time to develop their positions and the Order ensures that Staff will have the full ability to present that position. Staff received a copy of the term sheet on February 21, 2017, and has had the full settlement agreement for several days.[6] All pre-filed testimony of all Settling Parties and exhibits have been available for months. Staff has a fully-formed position concerning Delmarva's rates which it may introduce into evidence.

6. Staff will have a full opportunity to present a case that the settlement does not result in just and reasonable rates. Staff can challenge Delmarva's case and the terms of the settlement during the first phase of the hearing including by cross-examining the witnesses of Delmarva and the other Settling Parties. Pursuant to the Order, Staff also has the opportunity to present its entire case against Delmarva's proposed rates – and the rates in the proposed settlement – during the second phase. Nothing more could reasonably be required. Staff tellingly fails to identify any arguments or evidence that it will be denied the ability to present against the settlement.

7. While it is unclear as to what due process standard Staff is arguing, it must be rejected.[7] Staff asserts that it is faced with "a procedural bar hinder[ing] essential due process for

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5 *In re Tidewater*, 2013 WL 9600776 at ¶¶ 118-19; 26 *Del. C.* § 307.

6 The only substantive issue contained in the settlement agreement and omitted from the term sheet was a simple rate design adjustment.

7 We note that Staff's Petition alleged that "Delmarva ratepayers have been deprived of meaningful *substantive* due process in this proceeding" and that the Order "hinders *essential* due process . . . ." Petition at ¶ 6. However, substantive due process relates to unconstitutional deprivations of fundamental rights. *See, e.g.*, *Dale v. Town of Elsmere*, 702 A.2d 1219, 1224 (Del. 1997) (noting that not all property interests worthy of procedural due process protection are protected by the

Delmarva ratepayers who rely on Staff to provide a fair and complete review of proposed new electric rates."[8] The Delaware Supreme Court has recognized that due process merely requires that a party to a proceeding be given the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends.[9] Due process simply consists of "the opportunity to be heard at a meaningful time and in a meaningful manner."[10] It should be noted, however, that "due process is flexible and calls for such procedural protections as the particular situation demands."[11] Only "some kind of notice and hearing" is required.[12] Under the Order, Staff has ample opportunity to be heard, present testimony and cross-examine witnesses as to whether the settlement is within the "public interest" under 26 *Del. C.* § 512. In fact, Staff has two opportunities to do so – first during the initial "public interest" phase through cross-examination, and second at the subsequent adversarial phase through direct examination of its witnesses. Staff's claim that it is being forced to litigate "in an incomplete arena with incomplete evidence"[13] is wrong and appears designed to obfuscate and confuse. The Order is well within the flexible requirements of due process.

8. Similarly unpersuasive is Staff's assertion that "substantial injustice or detriment to the public interest" will result, unless the Commission grants its interlocutory appeal. That assertion

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concept of substantive due process, rather only fundamental property interests are worthy of such protection); *In re New Maurice J. Moyer Acad., Inc.*, 108 A.3d 294, 321 (Del. Ch. 2015) (finding plaintiff's property interest in a government charter did not rise to level of a fundamental right). We assume the Petition meant to refer to procedural due process, given the argument focused on alleged procedural deficiencies, rather than the nature of the property interest itself.

8 Petition at ¶ 6.

9 *Orville v. Div. of Family Servs.*, 759 A.2d 595, 598 (Del. 2000).

10 *Cohen v. State ex rel. Stewart*, 89 A.3d 65, 87 (Del. 2014) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *see also Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011) (noting that the Delaware Supreme Court submits to United States Supreme Court precedent on due process inquiries).

11 *Slawik v. State*, 480 A.2d 636, 645 (Del. 1984) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

12 *Id.*

13 Petition ¶ 3.

is illogical because the purpose of a settlement hearing is to determine what is in the "public interest."[14] Additionally, Staff seemingly argues that its Petition should be granted because Staff is in the unique position of representing all stakeholders and claims to have a monopoly on the "public interest." This is a misstatement of each party's role in a rate proceeding and ignores Delaware law. DPA is statutorily required to "advocate the lowest reasonable rates for consumers . . . consistent with an equitable distribution of rates among all classes of consumers," including both "residential and small commercial consumers" as well as, in its discretion, any class of "commercial or industrial consumers."[15] In this case, large industrial, commercial, GST and GSP consumers are represented by DEUG.[16] Staff's defined role, by contrast, is limited to "render[ing] advice to the Commission,"[17] and to "balanc[ing] the *utility's* and ratepayers' interests."[18] Because the interests of the utility and the ratepayers are fully represented by Delmarva, DPA and DEUG and are aligned, there is no need or grounds for Staff under these circumstances to delay review for the proposed settlement. Staff stands alone in continuing to delay the prompt consideration of whether this case may be resolved by settlement, going against the directive of Delaware statute that settlements are to be encouraged,[19] and forcing the parties to incur costs that will be ultimately borne by Delaware ratepayers.[20]

WHEREFORE, Delmarva respectfully requests that the Commission deny Staff's Petition for Interlocutory Appeal to the Commission.

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14 26 *Del. C.* § 512(c) (providing that, "upon a hearing" the Commission may approve a proposed settlement if it finds such resolution to be "in the public interest") (emphasis added).

15 29 *Del. C.* § 8716(e)(2).

16 *See* Petition to Intervene of the Delaware Energy Users' Group, at ¶ 1.

17 26 *Del. Admin. C.* § 1001-1.2.

18 *In re Chesapeake Util. Corp.*, 2014 WL 5037158, at ¶ 29 (Del. P.S.C. Sept. 30, 2014).

19 26 *Del. C.* § 512(a).

20 *In re Delmarva Power & Light Co.*, 2014 WL 5241515, at ¶ 1, n.2 (Del. P.S.C. Apr. 15, 2014); 26 *Del. C.* § 114(b)(1).

Respectfully submitted,

By: *<u>/s/ Michael Houghton</u>*

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March 6, 2017

10869969

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY FOR AN INCREASE IN ELECTRIC BASE RATES AND MISCELLANEOUS TARIFF CHANGES (Filed May 17, 2016)	* * * * *	PSC Docket No. 16-0649

COMPENDIUM OF AUTHORITIES CITED TO IN
DELMARVA POWER & LIGHT COMPANY'S ANSWER TO
STAFF'S PETITION FOR AN INTERLOCUTORY APPEAL TO THE COMMISSION

Dated: March 6, 2017

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TABLE OF AUTHORITIES

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Cases:

In re Chesapeake Util. Corp.,
2016 WL 3086186 (Del. P.S.C. May 17, 2016) **1**

In re Chesapeake Util. Corp.,
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In re Delmarva Power & Light Co.,
2005 WL 3617552 (Del. P.S.C. Oct. 11, 2005) **3**

In re Tidewater Util., Inc.,
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Dale v. Town of Elsmere,
702 A.2d 1219 (Del. 1997) **5**

In re New Maurice J. Moyer Acad., Inc.,
108 A.3d 294 (Del. Ch. 2015) **6**

Orville v. Div. of Family Servs.,
759 A.2d 595 (Del. 2000) **7**

Cohen v. State ex rel. Stewart,
89 A.3d 65 (Del. 2014) **8**

Mathews v. Eldridge,
424 U.S. 319 (1976) **9**

Sheehan v. Oblates of St. Francis de Sales,
15 A.3d 1247 (Del. 2011) **10**

Slawik v. State,
480 A.2d 636 (Del. 1984) **11**

Morrissey v. Brewer,
408 U.S. 471, 481 (1972) **12**

In re Chesapeake Util. Corp.,
2014 WL 5037158 (Del. P.S.C. Sept. 30, 2014) **13**

In re Delmarva Power & Light Co.,
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TAB 1

2016 WL 3086186 (Del.P.S.C.)
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IN THE MATTER OF THE APPLICATION OF CHESAPEAKE UTILITIES CORPORATION FOR A GENERAL INCREASE IN ITS NATURAL GAS RATES AND FOR APPROVAL OF CERTAIN OTHER CHANGES TO ITS NATURAL GAS TARIFF (FILED DECEMBER 21, 2015)

PSC Docket No. 15-1734

Delaware Public Service Commission

May 17, 2016
ORDER NO. 8878

BY THE COMMISSION:<<Signature>>, Chair<<Signature>>, Commissioner<<Signature>>, Commissioner<<Signature>>, Commissioner<<Signature>>, Commissioner

I. PROCEDURAL BACKGROUND

*1 1. December 21, 2015, Chesapeake Utilities Corporation ("CUC") filed an Application with the Commission for a general increase in its natural gas rates and for approval of certain changes to its tariff regarding natural gas.

2. On January 19, 2016, the Commission adopted Order No. 8848, which opened this docket, appointed a Hearing Examiner, directed the publication of notice of the filing, and set a deadline of February 26, 2016 for the filing of any petitions for leave to intervene.

3. On February 25, 2016, the Delaware Association of Alternative Energy Providers, Inc. ("DAAEP") filed a Petition for Leave to Intervene.

4. On March 4, 2016, CUC filed a brief opposing DAAEP's Petition.

5. On March 9, 2016, DAAEP filed a Reply in support of its Petition.

6. On March 11, 2016, the Hearing Examiner assigned to this docket issued Order No. 8860, which granted DAAEP's Petition for Leave to Intervene.

7. On March 16, 2016, CUC filed with the Commission a Petition for Interlocutory Appeal of Order No. 8860.

8. On March 21, 2016, DAAEP filed an Answer to CUC's Petition for Interlocutory Appeal.

9. On April 5, 2016, the Commission met at its regularlyscheduled meeting to consider the CUC's Petition for Interlocutory Appeal and DAAEP's Answer and to hear oral argument from the parties. After deliberations, the Commission denied CUC's Petition, thus allowing Order No. 8860 to stand. This Order explains the Commission's findings and decision.

II. APPLICABLE LAW

10. Any person seeking to intervene in a proceeding, other than an original party to a proceeding or a party entitled to participate as a matter of right, must file a petition to intervene stating "why the petitioner's interest will not be adequately represented by the parties to the proceeding or why participation in the proceeding would be in the public interest." 26 *Del. Admin. C.* § 1001-2.9.1.

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11. The Commission may delegate to the designated Hearing Examiner the authority to grant or deny a party's petition for leave to intervene, subject to an interlocutory appeal pursuant to 2 6 *Del. Admin. C.* § 1001-2.16. 26 *Del. Admin. C.* § 1001-2.9.3.

12. Interlocutory appeals from rulings of a 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. The Commission shall determine if the Petition and any answers thereto justify interlocutory review, and if no Commission action occurs within thirty days of the Petition filing, then it shall be deemed denied by operation of law. 26 *Del. Admin. C.* § 1001-2.16.5.

III. CUC's PETITION FOR INTERLOCUTORY APPEAL & ARGUMENT

13. CUC argued in its Petition and at oral argument before the Commission that intervenor status should not be granted to DAAEP for the following reasons:

***2** a. Despite the fact that DAAEP has been allowed to intervene in similar prior dockets and that the Commission has historically exercised a liberal intervention policy, DAAEP has failed to meet the requirements to intervene (Hearing Tr. 21:1-23).

b. Other state utility commissions in Maryland, New Jersey, Pennsylvania, and other states have denied similar intervention requests by unregulated propane and oil dealers seeking to protect their competitive interests, on grounds that those commissions lack the statutory authority to protect such interests (Hearing Tr. 14:14-15:5), except where state law specifically authorizes such intervention (Hearing Tr. 22:20-24:4).

c. Staff and the Delaware Division of the Public Advocate ("DPA") will better represent the interests of CUC's customers with respect to any proposed rate increased or tariff changes (Hearing Tr. 16:15-18).

d. DAAEP seeks to represent the competitive interests of its member companies by limiting natural gas expansion, which is contrary to the "public interest" and therefore contrary to 26 *Del. Admin. C.* § 1001-2.9.1 (Hearing Tr. 14:14-15:5); the Commission is not authorized to consider or protect the competitive interests of DAAEP in setting the rates of a regulated utility (Hearing Tr. 16:23-17:17).

e. DAAEP's status as an intervenor and a signatory to settlement agreements in prior CUC rate case dockets is irrelevant (CUC Petition for Interlocutory Appeal ¶¶ 8-9).

IV. DAAEP's ANSWER & ARGUMENT

14. DAAEP responded in its Answer and at oral argument before the Commission that it should be granted status as an intervenor for the following reasons:

a. Developing a robust evidentiary record in this proceeding that includes the unique industry perspective of DAAEP is in the public interest (Hearing Tr. 31:14-20).

b. The Commission has historically employed a liberal policy for considering intervention petitions, including granting similar requests by DAAEP in prior CUC rate cases (Hearing Tr. 34:5-19).

c. Because DAAEP is a signatory to settlement agreements in prior proceedings that may be modified in the instant case, it should be allowed to intervene to protect its interests (Hearing Tr. 38:14-39:9).

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d. DAAEP has access to relevant information regarding market conditions that Staff and the DPA will not be able to access easily unless DAAEP is allowed to intervene (Hearing Tr. 39:18-40:12).

V. POSITIONS OF OTHER PARTIES

15. Staff represented at oral argument that it was not taking a position on CUCs Petition (Hearing Tr. 41:1-2).

16. The Delaware Division of the Public Advocate ("DPA") noted at oral argument that the presence of intervenors in a docket can increase the costs billed to consumers, but it also prefers to have broad public participation (Hearing Tr. 41:11-24). The question the Commission must answer in deciding whether or not to grant CUC's Petition is whether Staff and the DPA are capable of representing the interests of DAAEP (Hearing Tr. 42:3-11).

***3** 17. Delmarva Power & Light Company, which was granted status as an Intervenor on March 1, 2016 by Order No. 8857, did not participate in oral argument. The Federal Executive Agencies, which was granted status as an Intervenor on April 20, 2016 by Order No. 8882, did not participate.

VI. DELIBERATION AND DECISION

18. As acknowledged by both CUC and DAAEP, the Commission has historically employed a liberal policy for granting intervention petitions (Hearing Tr. 58:19-22; 60:1-4), and we are not persuaded to depart from that policy here. DAAEP, as it has in prior similar proceedings, has represented that it will bring its unique industry perspective and additional information to this docket in a way that will not be adequately represented by the other parties (Hearing Tr. 60:11-17).

19. Any potential increased cost to CUC customers caused by an intervenor should not be a factor in the Commission's decision (Hearing Tr. 60:18-22), but to the extent there are increased costs, the efficiency and value of building a more robust evidentiary record outweighs that cost (Hearing Tr. 51:6-52:16).

20. Furthermore, it does not appear that protecting the confidentiality of information exchanged during discovery would be a concern if DAAEP is allowed to intervene, as DAAEP stated that this has not been an issue in prior proceedings (Hearing Tr. 40:13-17).

VI. ORDER

AND NOW, this 17th day of May, 2016, it is hereby ordered that:

21. For the reasons stated herein, CUCs Petition for Interlocutory Appeal of Order No. 8860 is DENIED, and as such, Order No. 8860, in which the Hearing Examiner assigned to this docket granted DAAEP's Petition for Leave to Intervene, stands (by a 4-1 vote of the Commission, with Chairman Winslow and Commissioners Karia, Conaway, and Gray voting in favor and Commissioner Drexler voting against).

22. The Commission reserves jurisdiction and authority to enter such further orders as may be deemed necessary or proper.

ATTEST:

<<Signature>>

Secretary

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TAB 2

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF CHESAPEAKE UTILITIES CORPORATION FOR A GENERAL INCREASE IN ITS NATURAL GAS RATES AND FOR APPROVAL OF CERTAIN OTHER CHANGES TO ITS NATURAL GAS TARIFF (FILED DECEMBER 21, 2015)	)	PSC DOCKET NO. 15-1734

ORDER NO. 8982

AND NOW, this 20th day of December, 2016.

WHEREAS, the Commission having received and considered the Report and Recommendations of the Hearing Examiner ("Report") issued in the above-captioned docket, which was submitted after a duly-noticed public evidentiary hearing; and

WHEREAS, the Hearing Examiner recommends that the proposed Settlement Agreement, which is endorsed by the Company, Commission Staff, the Division of the Public Advocate, the Delaware Association of Alternative Energy Providers and the Federal Executive Agencies ("FEA"), and which is not opposed by Delmarva Power & Light Company, and which is attached to the Hearing Examiner's Report as "Exhibit 1", be adopted by the Commission; and

WHEREAS, the Commission finds, for the reasons identified by the Hearing Examiner in his Report, that the Proposed Settlement results in just and reasonable rates and is in the public interest as required by 26 *Del. C.* § 512(c);

NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. That, the Report and Recommendations of the Hearing

Examiner, appended to the original hereof as "Attachment A," are hereby adopted.

2. That the Proposed Settlement Agreement, attached to the Hearing Examiner's Report as Exhibit "1", is accepted as a resolution of this matter which is in the public interest as required by 26 *Del. C.* § 512(c).

3. That, consistent with the Proposed Settlement, the revised Tariffs and Rate Design attached as composite Exhibit "A" to the Proposed Settlement, and the revised rates and rate structure set forth therein, are approved and shall govern the gas services offered by Chesapeake Utilities Corporation as described below.

4. That, consistent with the Settlement, the rates contained in the Settlement adopted herein shall be implemented as follows:

(a) The rates shall become effective for services rendered by the utility on and after January 1, 2017;

(b) Until December 31, 2016, the interim rates previously approved shall continue to apply for services to customers, but such continued interim rates shall be subject to the refund obligation for interim rates set forth in Ordering Paragraph 5 below and 26 *Del. C.* § 306(b)&(c).

5. That Chesapeake Utilities Corporation, the Division of the Public Advocate, Commission Staff, and the FEA shall confer to determine the amount of any refund amounts that might be due and how

such refunds (or refund credits) are to be made. The Company will refund amounts collected through Interim Rates in excess of the $2,250,000 revenue requirement agreed to in the Settlement Agreement. Refunds will be made based on each class's proportionate share of revenues collected through the Interim Rate increase. The Company shall submit a Refund Plan within thirty (30) days of the date of this Order.

6. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

_____
Chair

_____
Commissioner

_____
Commissioner

_____
Commissioner

_____
Commissioner

ATTEST:

_____

Secretary

A T T A C H M E N T "A"

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF CHESAPEAKE UTILITIES CORPORATION FOR A GENERAL INCREASE IN ITS NATURAL GAS RATES AND FOR APPROVAL OF CERTAIN OTHER CHANGES TO ITS NATURAL GAS TARIFF (FILED DECEMBER 21, 2015)	)	PSC DOCKET NO. 15-1734

FINDINGS AND RECOMMENDATION OF THE HEARING EXAMINER

DATED: December 5, 2016

MARK LAWRENCE
SENIOR HEARING EXAMINER

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BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF CHESAPEAKE UTILITIES CORPORATION FOR A GENERAL INCREASE IN ITS NATURAL GAS RATES AND FOR APPROVAL OF CERTAIN OTHER CHANGES TO ITS NATURAL GAS TARIFF (Filed December 21, 2015)	)	PSC DOCKET NO. 15-1734

FINDINGS OF FACT AND RECOMMENDATION OF THE HEARING EXAMINER

Mark Lawrence, having been appointed to act as the Hearing Examiner in this matter by PSC Order No. 8848 (January 19, 2016), submits the following Report to the Delaware Public Service Commission (the "Commission").

I. SUMMARY

Chesapeake Utilities Corporation ("Chesapeake"), Commission Staff ("Staff"), the Division of the Public Advocate ("DPA"), and Intervenors, the Delaware Association of Alternative Energy Providers ("DAAEP") and the Federal Executive Agencies ("FEA"), (together, "the Settling Parties") request the Commission to adopt a Settlement Agreement agreed to by those parties, and not opposed by Intervenor Delmarva Power & Light Company ("Delmarva"). According to the Settling Parties, the Settlement Agreement would allow the natural gas utility a reasonable increase in its base rates, permit it to restructure its residential customer charge, permit deferred accounting treatment of certain expenses relating to a new Customer Information System subject to certain conditions, and resolve other issues surrounding the

Company's services and operations. I recommend that the Commission adopt the Proposed Settlement, including its proposed rates and terms, as a resolution of this case since it is "in the public interest."

II. APPEARANCES

On behalf of Chesapeake Utilities Corporation:

Brian M. Quinn, Esq., Venable LLP

William O'Brien, Esq., Associate General Counsel

On behalf of the Commission Staff:

Brenda R. Mayrack, Esq., Deputy Attorney General, Department of Justice

On behalf of the Division of the Public Advocate:

Regina A. Iorii, Esq., Deputy Attorney General, Department of Justice

On behalf of the Intervenor, Delaware Association of Alternative Energy Providers:

Richards, Layton & Finger
Todd A. Coomes, Esq.

On behalf of the Intervenor, Delmarva Power & Light Company:

Pamela J. Scott, Esq., Assistant General Counsel

On behalf of the Intervenor, Federal Executive Agencies:

Captain Natalie A. Cepak, Esq. (argued)

Thomas A. Jernigan, Esq., Counsel for FEA

III. PROCEDURAL HISTORY

1. On December 21, 2015, Chesapeake filed an Application seeking Commission approval to increase its base natural gas rates and to make other proposed changes to its Tariff.

(Exh. 1)[1] The rates proposed by the Company were designed to produce an increase in its annual revenues of approximately $4,741,823, or a 9.96% increase over the Company's existing revenues based upon a Test Year ending June 30, 2015 and a Test Period ending March 31, 2016. (Id. at ¶4.)

2. If Chesapeake's Application was granted, an average Chesapeake residential heating customer would see an increase during the winter of $13.36 per month, or a 10.68% increase based upon an average use of 120 Ccfs[2] per winter month. An average non-heating customer residential heating customer would experience an increase of $5.41 per month, or a 15.17% increase based upon an average use of 18 Ccfs per month. (*Id.* at ¶4.) Chesapeake has approximately 47,000 natural gas customers in Delaware. (*Id.* at ¶1.)

3. In addition to the proposed rate changes, the Company's Application also proposed a number of new Service Offerings including:

   a) Multi-Family Housing Program - Chesapeake would provide a per-unit financial contribution to offset the costs associated with new gas piping and venting to builders that select natural gas for "multi-family

[1] Exhibits admitted into evidence at the Evidentiary Hearing will be referred to as "Exh.," with page numbers where necessary, i.e., Exh. 1, p.2. The Settlement Agreement is attached as "Exhibit "1"" with the word Exhibit not being abbreviated. Testimony from the transcript of the Evidentiary Hearing will be referred to, for example, "Tr.-26," meaning the testimony appears at page 26.

[2] "Ccf" equals the volume of 100 cubic feet of natural gas.

housing," meaning four (4) individually metered apartments and condominium units per building.

b) Natural Gas Compression Service - Pursuant to a negotiated contract, Chesapeake would construct, own and maintain compression facilities (for example industrial natural gas fueling stations, compressors, gas dryers or storage vessels) for commercial customers that require enhanced pressure for their operations.

c) Municipal Natural Gas Infrastructure Expansion Program - Chesapeake would offer municipalities or incorporated towns an advance to fund the construction of natural gas infrastructure, which must be paid back within six (6) years of installation. After six (6) years, the municipality or town would be responsible for the difference if the amount advanced by the Company exceeds six (6) times the expected delivery service revenues from the project. The Company also sought to establish a regulatory asset for the carrying costs related to the advance.

d) Temporary Gas Storage Tank Program - This program would allow the Company to provide a customer with propane or temporary Compressed Natural Gas ("CNG") service until the customer can be connected to a new natural gas main under construction. Utilizing the economic test contained in the Company's Line

Extension Tariff, the Company would be permitted to proceed with a project if the anticipated revenues exceed the equipment cost, for example the cost of storage tanks and equipment conversion.

e) CNG Service - Chesapeake would make available natural gas service to owners or operators of CNG facilities or to CNG transportation providers that compress and/or transport CNG to third parties.

f) Poultry House Transportation Program - This offering would allow poultry companies to aggregate usage from their poultry houses for purposes of meeting the minimum consumption eligibility requirement of 30,000 Ccf for the Transportation Service Rate.

g) Revenue Normalization Adjustment ("RNA") - Chesapeake also proposes a RNA for residential and smaller commercial customers. Chesapeake sought that "each quarter, the Company [would] implement an adjustment to rates of the customer classes subject to the RNA's [true-up] to collect or return differences between the actual margin per customer collected and the per-customer margin approved in this proceeding." (Application, Exh. 1, ¶7; Mierzwa, Exh. 25, pp.33, 40-43; Breakie, Exh. 12, pp. 1-19.)

4. Chesapeake also proposed a tariff amendment changing its curtailment policy as to the rate Chesapeake pays a customer if Chesapeake diverts customer-owned gas for higher priority

customers.[3] (Exh. 1, Sheet 3, Red-lined Tariff) The Company's Application also seeks to extend the customer bill payment due date for all rate classes from ten (10) days to twenty (20) days. (Exh. 6, Third Rev. Sheet 24, §13.4, Red-lined Tariff) Chesapeake also seeks to revise its tariff to replace the interest rate on customer deposits held more than ninety (90) days from 6% per annum to a Treasury-yield calculation. (Exh. 6, Third Rev. Sheet No. 23, §13.2(b), Red-lined Tariff)

5. Finally, the Company also sought Commission approval of deferred accounting treatment for expenses relating to the implementation of new technologies, including a new billing system since the current system is over twenty (20) years old, as well as expenses associated with the Company's pension, deferred compensation, and other post-retirement benefits. (Exh. 1, ¶ 7, 8; Dewey, Exh. 14, p.7.)

6. As will be explained later in Article IV, Section G herein which addresses the testimony at the evidentiary hearing, the parties agreed upon some variations of the Company's proposed Service Offerings, and the Company subsequently withdrew some of its proposed Service Offerings.

7. Chesapeake's Application asserted that a significant portion of its proposed rate increase is due to replacing

[3]Sheet No. 2 of Chesapeake's Tariff defines the Company's curtailment rules and regulations. In the event that the Company determines that there is insufficient gas supply to meet the demands of customers on its distribution system, the Company has the discretion to curtail service to customers based upon an established priority system beginning with residences, hotels, hospitals, the police and "other institutions essential to the public welfare."

unprotected bare steel pipe and cast iron pipe totaling approximately $11.3 million with pipe which increases reliability by less corrosion and leaks. (Exh. 1, ¶3,; Redd, Exh. 21, pp. 4-5.) According to the Company, it has also experienced a decline in consumption on a per-customer basis over the past eight (8) years, which has led to decreased volumes upon which fixed costs can be allocated.[4] (Exh. 1, ¶3).

8. By PSC Order No. 8848 (January 19, 2016), the Commission suspended the proposed effective date of the Company's proposed new rates and numerous tariff revisions pending further investigation, public comment, an evidentiary hearing, and a final decision by the Commission. Thereafter, pursuant to 26 *Del. C.* §306(c), Chesapeake requested that the Commission implement the Company's proposed interim rate increase of $2,500,000 in additional revenues based on the Company's current rate schedules, with such adjustments subject to refund. (Exh. 1, Application ¶¶ 5, 10) The Commission ordered that those interim rates would become effective on February 19, 2016. (PSC Order No. 8848, §3)

9. The Commission also granted Chesapeake's request for a waiver of the requirements of 6 *Del. C.* §306(b), which requires a public utility to file a bond with a surety in an amount approved by the Commission. Instead, the Commission required that the Company abide by any Commission refund order. (*Id.* at §4.)

[4] Notice of the Company's Application was published in the News Journal and Delaware State News on February 1, 2016. (Exh. 8)

10. Pursuant to its statutory right, the DPA intervened in this Docket. Delmarva intervened without objection from any party. (PSC Order No. 8857, March 1, 2016) Finally, the FEA, representing the interests of Dover Air Force Base, also intervened without objection from any party. (PSC Order No. 8882 (April 20, 2016))

11. The DAAEP, which represents a number of propane companies, sought and was granted intervention by the Commission. DAAEP's intervention was primarily to address the Company's new service proposals relating to the Company's main extension policies, including the parameters of its expansion of services into Kent and Sussex Counties. (PSC Order No. 8878 (May 17, 2016) (approving Hearing Examiner's Recommendation by 4-1 vote to allow DAAEP to intervene without conditions)) In the proposed Settlement, the Company has reserved its right to appeal the Commission's decision allowing DAAEP to intervene in this case.[5] (Exhibit 1, Settle. Agree., ¶39.)

12. I held three (3) public comment sessions on the Company's Application in the Commission's office in Dover on May 17, 2016, at the Middletown High School on May 18, and at the Millsboro Am Vets-2 facility on May 19. No member of the public appeared at the Dover or Middletown evening sessions. One (1)

[5] Due to the substantial increase in the number of objections as to approved or not approved interventions in various dockets by utilities, Staff, the DPA and Interveners, I recommend that the Commission open a Regulatory Docket to review its intervention requirements adopted in 1999. (*See* 26 *Del. Admin. C.* § 1001, Rule 2.9.) *E.g.*, PSC Order 8658 (Oct. 14, 2015)(in Exelon/Delmarva Power Merger Docket, Intervenor's written discovery halted due to vexatious and overly burdensome discovery requests); PSC Docket 13-250 (in DPL Billing Transparency Docket, DPA's intervention objections filed Aug. 5, 2013).

customer spoke in Millsboro. That customer later submitted a written comment primarily arguing that: a) his Customer Charge is excessive when compared to his minimal natural gas use; b) it is unfair that, because he resides in the "Expansion Area," his Customer Charge is higher than other areas served by the Company;[6] and c) in light of ample natural gas supply nation-wide, the customer believes that the Company's price for natural gas is simply too expensive.[7]

13. On July 13, 2016, the Company filed a petition seeking to implement an additional interim rate increase in the amount of $2,241,823, as permitted by 26 *Del. C.* §306(b). On July 26, 2016, the Commission issued Order No. 8921 granting the Company's request to place its entire requested revenue increase into effect, on an interim basis and subject to refund, effective August 1, 2016. On August 1, 2016, the Company placed into effect the total approved interim increase of $4,741,823, which included the interim rates amount of $2,500,000 previously placed into effect on February 19, 2016. (PSC Order 8921, July 26, 2016)

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[6] By PSC Order No. 8479 (November 5, 2013), the Commission permitted the Company to establish an "Expansion Area" whose customers would be charged a higher Customer Charge than customers in other areas:

> "10. [I]n the Expansion Area, the Company will charge an Infrastructure Expansion Service ("IES") Rate to all new Residential, General Service, and Medium Volume Service customers. Revenues collected through the IES Rates will be utilized by Chesapeake to enable Chesapeake to extend its natural gas distribution system in the Expansion Area. Unless provided by further order of the Commission, the IES Rates will remain in place for a period of time to ensure an appropriate level of rate and cost recovery related to the distribution system infrastructure established in the Expansion Area." (Attach. A, ¶ 10)

[7] The Notice of Public Comment Sessions was published in the *Delaware State News*, *Cape Gazette*, and *News Journal* on April 23, 22 and 21, 2016, respectively. (Exh. 9)

14. The Company, Staff, the DPA, DAAEP and the FEA filed pre-filed written direct testimonies. On December 21, 2015, the Company submitted the following thirteen (13) pre-filed Direct Testimonies: (a) Direct Testimony of Ronald J. Amen (Exh. 11); b) Direct Testimony of Shane Breakie (Exh. 12); c) Direct Testimony of Autumn Chalabala (Exh. 13); d) Direct Testimony of Matthew Dewey (Exh. 14); e) Direct Testimony of Lisa Elder (Exh. 15); f) Direct Testimony of Matthew Everngam (Exh. 16); g) Direct Testimony of Sarah Hardy (Exh. 17); h) Direct Testimony of Kathryn G. McVay (Exh. 18); (i) Direct Testimony of James Moore (Exh. 19;(j) Direct Testimony of Paul R. Moul (Exh. 20); k) Direct Testimony of Christopher Redd (Exh. 21); l) Direct Testimony of John Taylor (Exh. 22); and m) Direct Testimony of Jeffrey Weiss. (Exh. 23)

15. On June 1, 2016, the Company filed updated financial information for the twelve (12) month period ending March 31, 2016, the end of the Company's Test Period. (Exh. 42)

16. On August 2, 3 and 4, 2016, Staff conducted an audit at the Company's headquarters, including a tour of certain distribution facilities. (Exhibit 1, Settle. Agree., ¶10.)

17. On August 24, 2016, Staff filed the following five (5) pre-filed testimonies: a) Direct Testimony of Lisa B. Driggins; (Exh. 24); b) Direct Testimony of Jerome D. Mierzwa (Exh. 25); c) Direct Testimony of Lafayette K. Morgan, Jr. (Exh. 26); d) Direct Testimony of David C. Parcell (Exh. 27); and e) Direct Testimony of Jason R. Smith (Exh. 28).

18. On August 24, 2016, the DPA filed the following two (2) pre-filed Direct Testimonies: a) Direct Testimony of Michael Gorman; (Exh. 30); and b) Direct Testimony of Glenn A. Watkins. (Exh. 29)

19. On August 24, 2016, Intervenor DAAEP filed the pre-filed Direct Testimony of James F. Wilson. Intervenor FEA filed the pre-filed Direct Testimony of Amanda M. Alderson.(Exhs. 32, 31, *respectively*)

20. On September 30, 2016, the Company filed the following eight (8) pre-filed Rebuttal Testimonies: (a) Rebuttal Testimony of Ronald J. Amen (Exh. 33); (b) Rebuttal Testimony of Shane Breakie (Exh. 34); c) Rebuttal Testimony of Matthew Dewey (Exh. 35); d) Rebuttal Testimony of Matthew Everngam (Exh. 36); e) Rebuttal Testimony of Kathryn G. McVay (Exh. 38); f) Rebuttal Testimony of Paul R. Moul (Exh. 37); g) Rebuttal Testimony of John Taylor (Exh. 39); and h) Rebuttal Testimony of Jeffrey Weiss. (Exh. 40)

21. During this docket, the parties conducted substantial written and informal discovery. (Exhibit 1, Settle. Agree., ¶13)

22. On October 5, 2016, the parties attended a settlement conference. (Tr.-148)

23. I held a pre-hearing conference call with the parties on November 2, 2016. During that call, the Settling Parties notified me that they had reached an agreement as to most major

issues and they were actively attempting to resolve the remaining issues.

24. On November 15, 2016, Chesapeake submitted the "Proposed Settlement" (Exhibit 1) agreed to by the Company, the DPA, DAEEP, FEA, and the Staff. While Delmarva Power is not a signatory to this settlement, according to the agreement, it did not oppose the Commission approving the Proposed Settlement. (Exhibit 1, Settle. Agree., Intro. ¶) The Proposed Settlement comprehensively resolves this matter, while addressing many of the multi-faceted requests made in the original Application. The terms of the Proposed Settlement document are outlined later herein.

25. With the submission of the Proposed Settlement by the Settling Parties, the focus of the case moved to whether the agreement should be accepted by the Commission as a final resolution of this matter pursuant to the settlement authority granted to it in 26 *Del. C.* §512.

26. The duly-noticed evidentiary hearing was held on November 16, 2016 at the Commission's office in Dover.[8] The evidentiary record consists of forty-six (46) hearing exhibits, and a sixty (60) page hearing transcript.

27. At the public hearing on November 16, 2016, the Company, the DPA, Staff, DAAEP, and FEA each presented a witness to support the Commission accepting the Proposed Settlement as a

[8] The Notice of Evidentiary Hearings was published in the *Cape Gazette*, *Delaware State News* and *News Journal* on October 25, 26 and November 1, 2016, respectively. (Exh. 10)

reasonable resolution which is in the public interest. Given that no party opposed the agreement, I did not require post-hearing briefing.

IV. SUMMARY OF THE EVIDENCE

A. COMPANY'S TESTIMONY

28. For the Test Period ending March 31, 2016,[9] the Company calculated a revenue deficiency of $4,741,823 (later reduced to $4,111,163), derived from a rate base of $70,938,749 (later reduced to $69,380,120), a proposed overall rate of return of 9.68%,[10] including and a return on equity of 11.0%,[11] and pro-forma net income of $3,506,163. (Exhs. 1; Exh. 2; Briefing Sheet; Amen, Exh. 11, p.12; Exh. 43)

29. As stated previously, Chesapeake's Application asserts that a significant portion of its proposed rate increase is due to replacing unprotected bare steel pipe and cast iron pipe totaling approximately $11.3 million with pipe which increases reliability by less corrosion and leaks. (Exh. 1, ¶ 3,; Redd, Exh. 21, pp. 4-5) According to the Company, it has also

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[9] The Company used a "Test Year" comprised of the twelve (12) months ending June 30, 2015 and a "Test Period" comprised of the twelve (12) months ending March 31, 2016. Neither Staff nor the DPA disagreed with the Company's selected Test Year or Test Period. (Parcell, Exh.27, pp. 3-4, Watkins, Exh. 29, p.3.) However, as discussed later herein, Staff and the DPA did not agree with some of the Company's adjustments to the Test Year and Test Period, Rate Base calculation, some Operating Expenses, the embedded cost of debt, and the Company's proposed capital structure. These differences were eventually settled by the parties by virtue of their Settlement Agreement, except as otherwise expressed therein.

[10] The rate of return is defined as the Company's net operating income divided by its rate base. *E.g.*, FPC v. Hope Nat. Gas Co., 320 U.S. 591, 596-97 (1944).

[11] The return on equity (or "ROE") is defined as the annual rate of return which an investor expects to earn when investing in shares of a company. (Financial Accounting Institute, *Definitions Section*.)

experienced a decline in consumption on a per-customer basis over the past eight (8) years, which has led to decreased volumes upon which fixed costs can be allocated. (Exh. 1, ¶ 3).

B. STAFF'S TESTIMONY

30. For the Test Period ending March 31, 2016, Staff determined that, based on the Company's revised revenue requirement of $4,111,163 and Staff's rate base of $68,322,378, a revenue increase of $1,017,019 was warranted, an overall rate of return of 7.06%, and a return on equity of 9.30%. (Morgan, Exh. 26, pp. 4-5 & Sch. LKM-1,2; Exh. 27, Parcell, pp.4, 42)

31. Areas of dispute between Staff and the Company involved, among other issues:

a) Return on equity (9.30% advocated by Staff versus 11.0% sought by the Company);
b) Staff's proposed capital structure of 50% long-term debt and 50% common equity as opposed to the Company's proposed capital structure of 39.61% long-term debt and 60.39% common equity.[12] (Exh. 27, Parcell, pp. 25-26; Moul, Exh. 20, Attachment PRM-5);
c) Staff recommended that revenue distribution based upon its Cost of Service "Peak & Average" approach allocating revenue by distribution main investment be adopted as opposed to the Company's proposed Customer/Demand method which Staff argued allocates distribution mains to each customer partially based upon the number of customers and partially based on design day demands. (Exh. 25, Mierzwa, p.4); and
d) Staff maintained that, based on its analysis, the proposed increase to the residential monthly customer charge was not justified.(*Id.*)

32. Staff generally did not object to the Company's proposed Service Offerings as originally proposed, provided that current

[12] Staff Consultant Parcell's testimony describes the effect of capital structure upon a utility's rate of return. (Exh. 27, p.4.)

customers did not subsidize the programs. (Exh. 25, Mierzwa, pp. 39-44.)

C. PUBLIC ADVOCATE'S TESTIMONY

33. For the Test Period ending March 31, 2016, the Public Advocate ("DPA") recommended an overall base rate revenue increase of $282,335, based on the DPA's rate base of $68,446,579, an overall rate of return of 6.69%, and a return on equity of 9.15%. (Watkins, Exh. 29, pp. 2, 8; Exh. 30, Gorman, pp. 2,4)

34. Areas of dispute between the Public Advocate and the Company involved, among other issues:

a) Return on equity (9.15% advocated by DPA versus 11.0% sought by the Company);
b) Like Staff, the DPA's proposed capital structure of 50% long-term debt and 50% common equity, as opposed to the Company's proposed capital structure of 39.61% long-term debt and 60.39% common equity. (Gorman, Exh. 30, pp. 2, 12; Moul, Exh. 20, Attachment PRM-5);
c) Like Staff, the DPA recommended that revenue distribution be based upon its Cost of Service "Peak & Average" study allocating revenue by distribution main investment, as opposed to the Company's proposed Customer/Demand method which the DPA argued allocates distribution mains to each customer partially based upon the number of customers and partially based on design day demands. (Exh. 20, Moul, p.42.); and
d) the DPA argued that, based on its analysis, only a minimal increase of the residential monthly customer charge for rate class RS-1 was warranted, and a decrease of the monthly customer charge for rate class RS-2 was warranted. (*Id.* at pp. 61, 71.)

35. The DPA objected to all of the Company's proposed Service Offerings as proposed, arguing that, in their current form, current customers would subsidize them; however, the DPA agreed

to the Temporary Gas Storage Program if it was limited to six (6) months. (Exh. 29, Watkins, pp. 78-84, 82)

D. DAAEP'S TESTIMONY

36. On August 24, 2016, DAAEP filed the pre-filed Direct Testimony of James F. Wilson (Exh. 32) Mr. Wilson opined as to the Company's proposed Service Offerings as follows:

> "1. With regard to Offering #3 [Municipal Natural Gas Infrastructure Expansion Program], Chesapeake acknowledges that the proposed treatment of the carrying costs constitutes a subsidy. The subsidy would appear to be contrary to Commission policy and [it is] not justified that it be paid by … Chesapeake's natural gas customers. In addition, it is unclear how a town would pay back any financial contribution that remains unrecovered after six years. As a result, and in light of uncertainty about new customer connections and usage levels, the program appears risky.
>
> 2. With regard to Offering #4 [Gas Storage Tanks], Chesapeake acknowledges that gas storage tanks are available, on a temporary or permanent basis, from multiple unregulated providers in Delaware at market rates. There does not appear to be any sound reason why Chesapeake, as a regulated utility, should be involved in providing storage tanks and to recover the case of the storage tanks through base rates could lead to a subsidy…
>
> 3. With regard to Offering #5 [Transportation for Poultry Houses], this would be a rather ad hoc revision of Delaware's retail access policies for a single industry (the poultry industry). It would seem to be a very questionable regulatory policy…
>
> 4. Offering #1 [Multi-Family Housing Program] and Offering #4 [Temporary Gas Storage Tank Program] allow Chesapeake to use the "headroom" under its economic tests to provide a contribution to a project. This increases the risk that the project may turn out to be uneconomic…
>
> 5. The 2013 Settlement contained a provision (P.9) under which, at the next base rate proceeding, the Company would bear 50% of the shortfall if the aggregated IRRM of all expansion projects fell short of the target. Such a provision provides incentives for the Company to

> select wisely, control costs and build revenues, and it provides ratepayers some protection from the potential cost of uneconomic expansions …."
>
> (*Id.* at pp. 4-5.)

E. FEA'S TESTIMONY

37. On August 24, 2016 the FEA filed the pre-filed testimony of Consultant Amanda M. Alderson (Exh. 31) According to Ms. Alderson, the FEA agreed and disagreed with the Company's Application in certain respects:

> "1. Chesapeake's allocated cost of service study ("ACOSS") generally follows appropriate cost of service principles in determining the allocated cost to serve Chesapeake's customer classes. I support the Company's proposed production plant cost allocation on a peak design day method. I support the Company's proposed dual classification of distribution main costs on both a customer basis and a peak design day basis. I have no adjustments or corrections to the Company's ACOSS at this time.
>
> 2. I recommend a revenue spread across rate classes that is more consistent with the Company's ACOSS results. I agree with the Company's proposed cap of 1.5x and 2.0x the system average increase, but disagree with the proposal for a 0% increase for classes deserving of a rate decrease. I propose that these classes receive a 0.5x system average decrease. I also recommend the Residential Service-2 ("RS-2") class receive a 1.5x system average increase in line with the Company's gradualism cap instead of the 1.3x increase proposed by the Company, since the Company's ACOSS supports a 1.7x increase for this class. I make no further changes to the Company's proposed revenue increase for the remaining customer classes. The results of this revenue spread are more reflective of the Company's ACOSS results, and bring rate classes closer to cost of service than does the Company's proposed revenue spread.
>
> 3. I have no objection to the Company's general rate design for any class. I recommend the rate charges for all classes be set at levels that will recover the appropriate proposed revenue by rate class that I recommend in my testimony. To that end, I have provided

> proposed tariff rate charges for the LVS and HLFS classes in my testimony.
>
> 5. I oppose the Company's proposed Revenue Normalization Adjustment for the General Service ("GS") class. The Company's own data shows that the revenue margin per customer in the GS class has not frequently fallen below the authorized level.…
> 6. I propose the Company allow for consolidated billing for customers that meet the requirements. Where a customer has multiple service accounts all served by one distribution main, the customer should not be over-billed for the cost of that main. The costs to serve these customers should be properly reflected in the tariff rates billed to them. The Company's billing rates as they stand now collect excess revenue from these customers through the First Block usage charges. A consolidated billing customer should continue to pay appropriate Customer Charges for each meter to recover the full cost of the meters and individual service laterals. …"

F. COMPANY'S REBUTTAL TESTIMONY

38. On September 30, 2016, the Company submitted the Rebuttal Testimony of Mr. Amen, Mr. Breakie, Mr. Dewey, Mr. Everngam, Ms. McVay, Mr. Moul, Mr. Taylor and Mr. Weiss. (Exhs. 33-40, respectively).

39. Although the Company accepted several of Staff's, the DPA's, and the Intervenors' proposed expense adjustments, their respective positions continued to differ regarding, among other things:

a) The Company's proposed capital structure, as opposed to Staff's/DPA's proposed capital structure;

b) the Company's proposed return on equity;

c) the Company's proposed Service Offerings;

d) Construction Work in Progress ("CWIP"); and

e) Cost of Service Allocations.

G. TESTIMONY AT EVIDENTIARY HEARING REGARDING THE PROPOSED SETTLEMENT AGREEMENT

40. Five (5) witnesses testified at the evidentiary hearing in favor of this unanimous Settlement Agreement, each testifying that the Agreement is in the public interest and should be adopted by the Commission: a) C. James Moore, the Company's Vice President; b) Jason R. Smith, Staff Public Utility Analyst; c) Andrea Maucher, DPA Public Utility Analyst; d) Andrew Lampert, DAAEP's President; and e) Amanda M. Alderson, FEA's Consultant.

41. New Rates, Rate Design, Cost of Service & Future Rate Studies: The Settling Parties have proposed that the Commission approve the proposed Settlement Agreement attached hereto as Exhibit "1." The Agreement is a "black box settlement," meaning that the Settling Parties have agreed to some terms in the Agreement, (for example, an increased revenue requirement of $2.25 million, a return on equity of 9.75%, and the Company's actual cost of debt of 4.82% as filed), but have not stated other terms in the Agreement (for example, an agreed upon capital structure). (*Id.* at ¶16.) The Settling Parties have also agreed that, for the Company's regulatory accounting purposes and its Internal Rate of Return Model, the Company will utilize an overall rate of return of 7.53%. (*Id.*)

42. If approved, the Settlement would increase the customer charge to $13.50 per month for both of the Company's

residential classes, RS-1[13] and RS-2.[14] (Exhibit 1, Settle. Agree. ¶17.) Currently, the customer charge is $10.50 per month for the RS-1 Class and $13.00 per month for the RS-2 Class. (Exh. 4) The monthly fixed charges for commercial customers would be as proposed in the Application. (Exhibit 1, Settle. Agree. (¶17.) The volumetric rates for all classes have been agreed upon "based on a compromise revenue allocation," another aspect of this black box settlement. (*Id.*; Exh. 1, Settle. Agreement, Exh. "A.") The new rates would be approved for service effective January 1, 2017. (*Id.*)

43. The Settling Parties have agreed that Chesapeake will conduct studies as to: a) whether having two (2) residential rate classes is necessary and appropriate; and b) whether phasing out declining block rates (in which the more natural gas a customer uses, the lower the average price) is necessary and appropriate. The results of both studies will be presented in the Company's next rate case. (Exhibit 1, Settle. Agree. ¶26)

44. Rate Refund: The parties agreed that the Company will refund amounts collected through Interim Rates in excess of the

[13] Rate Schedule RS-1: Residential Service, provides that: "This Rate Schedule is available to any individually metered Customer using gas in a residential dwelling or unit for space heating, cooking, water heating, or other domestic purpose with an annual consumption of two hundred and forty (240) Ccf or less." (Tenth Rev. Tariff Sheet No. 29, effective Feb. 19, 2016) (PSC Order No. 8848 (Jan. 19, 2016))

[14] Rate Schedule RS-2: Residential Service, provides that: "This Rate Schedule is available to any individually metered Customer using gas in a residential dwelling or unit for space heating, cooking, water heating, or other domestic purpose with an annual consumption of greater than two hundred and forty (240) Ccf." (First Rev. Tariff Sheet No. 29.2, effective Feb. 19, 2016) (PSC Order No. 8848 (Jan. 19, 2016))

$2.25 Million revenue requirement agreed to in the Settlement Agreement. Refunds will be made based on each class' proportionate share of revenues collected through the Interim Rate increase. In addition, the Company will submit a refund plan to the Commission for its approval within thirty (30) days of the Commission approving this settlement. (Exhibit 1, Settle. Agree., ¶30)

45. As to the proposed new rates, the Settling Parties each testified that the Settlement resulted from a compromise of each party's original positions. (Tr.-138,149, 156-57; 170,176.) Chesapeake's Moore testified that the Company reduced its original revenue request from over $4.7 million to $2.25 million, and its original return on equity ("ROE") request from 11% to 9.75%. (Id.) Staff and the DPA compromised by increasing their respective offers regarding revenue and ROE from their initial positions. (*Id.*)

46. Staff's Smith testified that the agreed upon ROE was consistent with recent Commission decisions involving other public utilities. (Tr.-149.) For example, the most recently litigated utility rate case resulted in the Commission awarding a 9.75% ROE to Artesian Water Company. (PSC Order No. 8816, Jan. 19, 2016, ¶119.) The DPA's Maucher testified that the DPA agreed to the Settlement because the DPA believed that, if the case was litigated, it was unlikely that the Commission would reach a significantly different decision. (Tr. 156-57.)

47. As to the new monthly residential customer charge, the amounts were eventually agreed upon despite initial disagreement as to the proper amount. The DPA's Maucher testified that the DPA was seeking an even lower customer charge because "the Public Advocate believes it is inappropriate for a regulatory utility to attempt to recover … [for] mains and corporate overhead, which are not directly related to connecting and maintaining a customer's account." (Tr.-158) The Company's Moore, on the other hand, testified that the parties' customer charge compromise, "at least gets us closer to our fixed customer related costs.…" (Tr.-137)

48. The Settling Parties reached agreement on two of the Company's proposed Service Offerings: a) Multi-family Housing Program; and b) Temporary Gas Storage Tank Program. With respect to the Multi-Family Housing Program, the Settling Parties agreed that:

> 19. The Company may implement the Multi-family Housing Program for multi-family housing projects with four (4) or more units with the following modifications and clarifications relating to cost recovery. For cost recovery purposes, the Company agrees to limit its contribution toward the builder's gas infrastructure costs to 50% of the net present value of savings on a project-by-project basis, with an annual aggregate cap on contributions of $250,000. The net present value of savings from a project is the maximum amount of investment that could be added to the cost of the project without rendering the project uneconomic under the Company's approved economic test for expansion projects. The Company will record its contribution toward the builder's gas infrastructure costs as a deferred cost and will amortize it as expense over thirty (30) years, with its rate of return applied to the unamortized portion.

49. As to the Temporary Gas Storage Tank Program, the Settling Parties agreed as follows:

> 22. The Company may implement the Temporary Gas Storage Tank Program with the following modifications to cost recovery. When the temporary service provided is propane service, the Company will not recover in rates the costs associated with the program incurred after twelve (12) months from the placement of the tanks. The Company may, however, petition the Commission for an extension of the twelve (12) month cost recovery period when the delay that causes construction to extend past twelve months occurs for reasons beyond the control of the Company. No such extension of time, however, will exceed six (6) months. Recoverable costs under the program include behind-the-meter[15] conversion costs provided such costs are incurred within the time limits described herein. The Company will record its costs under this program as a deferred cost and will amortize it as expense over thirty (30) years, with its rate of return applied to the unamortized portion.

50. The Company's Moore testified that the Commission should approve these two (2) programs to increase the availability of lower-cost, lower-emission natural gas to new customers while protecting existing customers from subsidizing expansion. (Tr. 18-39.) DPA witness Maucher testified that she recommended approval of the revised Multi-Family Housing Program because it would help encourage customer growth without undue subsidization from existing customers. (Tr. 161-62). She also testified that she recommended approval of the Temporary Gas Storage Tank program as revised because the additional provisions protected existing customers and made the program truly a "temporary" one. (*Id.* 163). Although representing

[15] "Behind the meter" means "customer-owned equipment and appliances." (NRC Internal Safety Culture Task Force, p. 3, Dec. 4, 2008)

propane suppliers, DAAEP's Lambert also testified that these two (2) offerings were in the public interest. (Tr. 169-70.)

51. Company's Withdrawal of Certain Service Offerings Proposed In Application: The Company agreed to withdraw the following four (4) Service Offerings it proposed in this Application at this time: a) the Municipal Natural Gas Infrastructure Expansion Program, although the parties agreed to meet to discuss this Program in the future: b) the Poultry House Transportation Program; c) the Natural Gas Compression Service; and d) the Revenue Normalization proposal. (Exhibit 1, Settle. Agree., ¶¶ 21, 23, 20, 18, respectively.)

52. Deferred Accounting-CIS System. The Settling Parties also agreed upon Deferred Accounting for costs related to the set-up and implementation of new technologies, such as a new Customer Information System ("CIS"). Specifically, the parties agreed that "[t]he costs will be recorded in a regulatory asset account separate from any other new technology systems. The Company will amortize such costs over the same time period as the related asset or expected life of the technology beginning with the implementation of new rates in the Company's next base rate case. The Company will not earn a return on the unamortized deferred costs prior to the next rate case. Cost recovery for the deferred costs will only be allowed in a future rate case and is subject to reasonable review by the Commission Staff and the DPA during that proceeding." (Exhibit 1, Settle. Agree. ¶24)

53. Post-Retirement Benefits; Rate Case Expenses: According to the Settlement Agreement, "[t]he Company agrees to withdraw its request for deferral accounting treatment for Chesapeake's pension, deferred compensation and other post-retirement benefits but may file separately for an accounting order at a later date." (*Id.* at ¶25.) Finally, according to the Settlement Agreement, "[t]he Company may also separately request, as part of this docket or otherwise, an order regarding its accounting treatment of its rate case expenses." (*Id.*)

54. Agreed Upon Tariff Amendments-Curtailment: The parties have also agreed to Chesapeake's proposed tariff amendment changing its curtailment policy as to the rate Chesapeake pays a customer if Chesapeake diverts customer-owned gas for higher priority customers. (Exh. 1, Sheet 3, Red-lined Tariff) The parties have agreed upon the following language:

> "In the event that Customer-owned gas is diverted for use by higher priority Customers, the Company will reimburse the Customer by paying the cost of the Customers alternative fuel or, if the Customer has no alternative fuel, reimbursement will be at a rate equal to the higher of the Company's weighted average cost of gas (the total cost of natural gas delivered to the Company for system supply divided by the volume delivered) or the Customer's total acquisition cost of gas (including pipeline transportation charges). In the event of a supply shortage which causes the Company to purchase the Customer's gas, the Customer shall make available a copy of its contract for natural gas supply upon request; or in lieu thereof, the Customer shall supply a sworn affidavit specifying Customer's total acquisition cost of gas." (Exh. 46, Third Rev. Tariff Sheet No. 3, §2.4; Red-lined Final Tariff)

55. Bill Due Date Tariff: The parties have agreed that the Company will extend the customer bill payment due date for all

rate classes from ten (10) days to twenty (20) days as the Company requested in its Application. (Exh. 46, Third Rev. Tariff Sheet No. 24, §13.4 & Rate Class Schedules; Red-lined Final Tariff)

56. Customer Deposit Tariff: Finally, the parties have also agreed that Chesapeake shall revise its tariff to replace the interest rate on customer deposits held more than ninety (90) days from 6% per annum to a Treasury-yield calculation. (Exh. 46, Third Rev. Tariff Sheet No. 23, §13.2, Red-lined Final Tariff)[16]

57. Finally, relating to FEA, the Settling Parties agreed in the Settlement Agreement as follows:

> "29. The Company will consolidate the volumes and charge one customer charge for the three (3) meters serving FEA located east of Route 1, pursuant to Section 3.5(b) of the Rules and Regulations contained in the Company's tariff."

58. FEA's Consultant Amanda M. Alderson testified at the evidentiary hearing that the rates proposed in the Agreement were in the public interest:

> "FEA proposed a decrease for larger customers in order to offset the ongoing subsidy that large customers have been providing to residential and smaller customers. Staff and DPA disagreed with certain cost of service methods used by the Company and produced their own cost of service study showing that large use customers were further below cost of service than residential and smaller use customers." (Tr.-175.)

[16] Two (2) additional, notable Tariffs which the parties have agreed to include a Tariff incorporating the Company's Main Extension Economic Evaluation Requirements for New Residential Developments previously adopted by the Commission, and a Tariff increasing the number of customers who may utilize the Company's Budget Billing Plan. (Exh. 46, Fifth Rev. Sheet No. 12, §6.2 & Third Rev. Sheet No. 25 §13.5, respectively.)

59. According to Ms. Alderson, "Staff's cost of service indicated that all the major rate classes were not providing sufficient revenue to cover the full cost of service, and, therefore, no full subsidization was occurring. Based on its cost of service, Staff then proposed a 30 percent rate increase for large use customers on average and a 20 percent rate increase for residential and small use customers." (Tr. 175-76.)

60. Ms. Alderson further testified that "[t]he settlement spread of the required revenue increase is a compromise position and an acceptable middle ground between the parties' positions in this case. The residential classes combined will receive an approximate ten percent rate increase using the reduced revenue requirement proposed in the settlement, which is the middle ground between the Company's original proposed 13 percent increase and Staff's original proposed eight percent rate increase at the settlement revenue requirement." (Tr.-176)

61. Finally, Ms. Alderson testified that "[i]n addition, medium and large use customers will receive [a] nine percent revenue increase under the settlement on average, which represents a middle ground position between the Company's original proposed one percent increase, FEA's proposed four percent decrease and Staff's proposed 15 percent increase." (Tr. 176-77.)

V. Discussion

62. I incorporate Sections III, IV and V of this Report as my Findings of Fact.

63. Delaware law promotes settlements in utility rate cases. Section 512 of Delaware's Public Utilities Act directs the Commission to "encourage the resolution of matters brought before it through the use of stipulations and settlements." (26 *Del. C.* §512(a).) The Commission may, upon hearing, approve the resolution of matters by stipulations or settlements when the Commission finds such resolutions to be in the public interest. (*Id.* at §512(c).)

64. According to the United States Supreme Court, a public utility seeking a general rate increase is entitled to an opportunity to earn a fair rate of return on the value of its property dedicated to public service. *Bluefield Water Works and Improvement Co. v. Public Service Comm. of West Virginia*, 262 U.S. 679 (1923); *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

65. After considering the evidentiary record, I recommend that the Commission accept the Proposed Settlement in its entirety to resolve this Docket. I recommend that, from the record developed, the Commission should find, as required by 26 *Del. C.* §512(c), that the terms in the Proposed Settlement represent resolutions of the various issues which are "in the public interest."

66. The Commission should consider that the Settlement Agreement resulted after extensive pre-hearing investigation and the filing of voluminous pre-filed direct and rebuttal testimonies. The Settlement Agreement and the testimony is

"evidence" that its terms represent a reasonable resolution of each issue.

67. Moreover, the Commission can look to, and rely upon, the mutual conclusions of its Staff, the DPA, FEA, DAAEP and the Company – parties with disparate constituencies and positions - that the Settlement results in just and reasonable rates and is in the public interest.

VI. RECOMMENDATIONS & PROPOSED COMMISSION ORDER APPROVING SETTLEMENT AGREEMENT

68. In summary, and for the reasons discussed above, I recommend that the Commission hold that the proposed Settlement Agreement is in the public interest because it results in just and reasonable rates, consistent with the Commission's traditional rate-making analysis and is in the public interest.

69. I also recommend that, as requested in the Settlement, the new rates shall take effect on January 1, 2017. A proposed Order for the Commission's consideration is attached hereto as Exhibit "2."

Respectfully Submitted,

DATED: December 5, 2016

_____

Mark Lawrence
Senior Hearing Examiner

E X H I B I T "1"

TAB 3

2005 WL 3617552 (Del.P.S.C.), 245 P.U.R.4th 466

Re Delmarva Power and Light Company

PSC Docket No. 04-391
Findings, Opinion, and Order No. 6746

Delaware Public Service Commission

October 11, 2005

APPEARANCES: On behalf of Delmarva Power & Light Company: RANDALL V. GRIFFIN, ESQUIRE. On behalf of the Division of the Public Advocate: G. ARTHUR PADMORE, ESQUIRE. On behalf of the Delaware Public Service Commission Staff: JAMES MCC. GEDDES, ESQUIRE, ASHBY & GEDDES, Rate Counsel and BRUCE H. BURCAT, Executive Director, CONNIE S. MCDOWELL, Chief of Technical Services, KAREN L. NICKERSON, Secretary, JANIS L. DILLARD, Regulatory Policy Administrator, Delaware Public Service Commission Staff. On behalf of Conectiv Energy Supply, Inc.: I. DAVID ROSENSTEIN, ESQUIRE. On behalf of the Delaware Energy Users Group: BRIAN R. GREENE, ESQUIRE, CHRISTIAN BARTON LLP. On behalf of the Retail Energy Supply Association, Select Energy, Inc. and Strategic Energy LLC: DANIEL CLEARFIELD, ESQUIRE, WOLF, BLOCK, SCHORR & SOLIS-COHEN LLP. On behalf of Premcor Refining Group: KENNETH G. HURWITZ, ESQUIRE, HAYNES & BOONE.

Before McRae, chair, and Lester, Conaway, and Winslow, commissioners.

BY THE COMMISSION:

BACKGROUND

1. The Electric Utility Restructuring Act of 1999 (the 'Act') required Delmarva Power & Light Company ('Delmarva' or 'the Company') to file a restructuring plan under which it would provide standard offer service ('SOS') for an initial transition period ending on September 30, 2002 for non-residential customers and on September 30, 2003 for residential customers. The restructuring plan and related matters relevant to customer choice and restructuring were approved in a series of Orders issued in Docket No. 99-163. Among other things, the approved restructuring plan reduced rates for residential customers and froze those reduced residential rates and the applicable rates for non-residential customers until the end of the respective transition periods.

2. Prior to the end of the initial transition periods, a merger involving Delmarva and Potomac Electric Power Company was proposed. In the resolution of that docket, the Delaware Public Service Commission (the 'Commission') approved a settlement that authorized the proposed merger on the condition that Delmarva's obligation to provide SOS would continue until May 1, 2006 at rates that were reset to reflect market prices at that time. (Docket No. 01-194).

3. On October 19, 2004, noting that SOS rates had increased significantly in other jurisdictions once the freeze on supply rates had been lifted, the Commission initiated this docket to 'explore issues related to the selection of an SOS supplier for [Delmarva's] service territory and the appropriate prices to be charged for SOS after that date.' (Order No. 6490, Oct. 19, 2004 at £ 3). In Order No. 6490, the Commission discussed certain statutory requirements and prior cases involving the provision of SOS to Delmarva customers pursuant to the Act. The Order established a process pursuant to which major policy issues would be resolved in an initial phase of the docket, while other technical and policy issues would be reserved for resolution in one or more subsequent phases of the docket. The Commission established February 28, 2005 as the deadline for the conclusion of the first stage and appointed Senior Hearing Examiner William F. O'Brien as a monitor to oversee the proceedings.

4. Pursuant to the Commission's instructions in Order No. 6490, Staff conducted two workshops, during which it solicited both written and oral comments from the participants. On January 5, 2005, Staff submitted a position paper addressing several issues that the parties agreed were fundamental SOS issues.

5. On March 22, 2005, in Order No. 6598, the Commission reviewed the report and recommendations prepared by Staff that had been the subject of written comments and oral argument presented by parties that had participated in the docket. In Order No. 6598, the Commission adopted all of Staff's recommendations notwithstanding opposition from certain parties. First, the Commission determined that SOS in Delaware would be provided pursuant to a 'wholesale' model, whereby the Commission would select the incumbent distribution utility (Delmarva) as the SOS provider. Delmarva would secure the power to serve SOS customers from the wholesale power market but would continue to interface directly with the customer. This model was selected over various forms of the 'retail' model, whereby the Commission would select one or more SOS providers through some form of competitive bidding process and those providers would assume some or all of the duties of interfacing with the retail SOS customer.

6. Second, the Commission deferred the remaining Phase 1 issues to Phase 2, including the method by which the wholesale power would be procured, the composition of the 'retail adder' or margin that Delmarva would include in its SOS rates, and the use of SOS to promote various societal benefits (such as renewable resource and demand side management programs). The Commission again appointed Hearing Examiner O'Brien to monitor the Phase 2 proceedings and to handle any disputes regarding the provision of information.

7. In Phase 2, the parties established a two-track procedural schedule consisting of a litigation track for the determination of the composition of the retail adder and a non-litigation track for the remaining, primarily policy-driven, issues. These latter issues included Commission oversight of the process, splitting of rate classes, and rate translation of bids into tariffs.

8. After Staff had conducted four workshops and had solicited oral and written comments on the issues, Staff, the Division of the Public Advocate (the 'DPA '), the Delaware Energy Users Group ('DEUG'), Delmarva, and Conectiv Energy Supply, Inc. ('CESI') reached a proposed settlement of all of the issues, including the litigation-track retail adder. These parties submitted the proposed settlement to the Hearing Examiner on July 14, 2005. On July 14, 2005, the Hearing Examiner modified the procedural schedule to provide that the signatories to the proposed settlement would submit pre-filed testimony in support of the settlement on July 18, 2005, and that opponents would submit pre-filed testimony in opposition to the settlement on July 26, 2005. A hearing was scheduled for August 1-2, 2005, with post-hearing briefs due on August 16, 2005.

9. Staff witness Janis L. Dillard, Delmarva witness Peter E. Schaub, DPA witness Andrea C. Crane, Conectiv witness Champe Fisher and DEUG witness Dr. Alan Rosenberg all filed testimony supporting the proposed settlement on July 18, 2005. Subsequently, the parties requested additional time to try to reach a unanimous settlement. The testimony filing date was extended from July 26 to July 29, and the evidentiary hearing originally scheduled for August 1 and 2 was postponed to August 4.

10. The parties were unable to reach a unanimous settlement, and, therefore, on July 29, 2005, Select Energy, Inc. ('Select') submitted the pre-filed testimony of witnesses Leonard Navitsky and Marc Hanks in opposition to the proposed settlement. The Premcor Refining Group ('Premcor') submitted a letter from Michael Polluf, Refinery Manager, opposing the proposed settlement.

11. On August 1, 2005, Senior Hearing Examiner O'Brien conducted the public comment portion of the hearing. Only one non-party attended the public comment session, and, although this person asked several questions, she offered no public comment.

12. On August 4, 2005, the Hearing Examiner presided over a duly-noticed evidentiary hearing at which the Settling Parties presented the proposed settlement agreement and offered testimony in support of the settlement. The Hearing Examiner also heard oral surrebuttal testimony by the settlement proponents. Select's

witnesses presented their pre-filed testimony. Moreover, although the Retail Energy Supply Association ('RESA') had not submitted any testimony in opposition to the proposed settlement, its counsel appeared at the evidentiary hearing and cross-examined the settlement proponents' witnesses. At the conclusion of the hearing, the record, consisting of 10 exhibits and a 676-page transcript of the hearing, was closed.

13. On August 16, 2005, the parties submitted their post-hearing briefs in favor of or in opposition to the proposed settlement.

14. On September 1, 2005, Senior Hearing Examiner O'Brien issued his findings and recommendations, in which he found the proposed settlement to be in the public interest and recommended that the Commission approve it.

15. On September 13, 2005, RESA, Select, and Strategic submitted a combined set of exceptions to the Hearing Examiner's findings and recommendations. Also, on September 13, 2005, Premcor submitted a letter to the Commission stating its opposition to the Hearing Examiner's findings and recommendations. DEUG filed in support of the Hearing Examiner's findings and recommendations. Commission Staff, DPA, and Delmarva submitted letters stating that they took no exceptions.

16. On September 20, 2005, the Commission met at its regularly-scheduled public meeting to consider and deliberate on the Hearing Examiner's proposed Findings and Recommendations. At that meeting, we adopted the Findings and Recommendations of the Hearing Examiner and approved the Settlement Agreement into which the Settling Parties had entered.

17. On October 5, 2005, the parties executing the Settlement Agreement and Premcor filed an amendment to the Settlement Agreement, which amendment provides an alternative mechanism for assigning certain billing system costs to Premcor and other customers. The amendment was unopposed and, at the Commission's October 11, 2005 meeting, was discussed and approved.

18. We set forth herein the reasoning behind our adoption of the Hearing Examiner's Findings and Recommendations and our approval of the Settlement Agreement, as amended.

THE SETTLEMENT

***1** 19. The proposed settlement provides that Delmarva will provide SOS to all customer classes, with no specified termination date. There will be two categories of SOS: (1) a fixed price SOS available to all but the largest customers (the GS-T customers); and (2) an Hourly Priced Service ('HPS') that is mandatory for GS-T customers and will be offered as an option for GS-P customers. In order to take HPS, a GS-P customer must make an affirmative election prior to the Request for Proposal ('RFP') process, and must have an interval meter or be willing to pay for installation of such a meter prior to beginning HPS. GS-P customers will have the opportunity to elect HPS or fixed price SOS every year. [1]

20. A competitive RFP process will be used to procure the full requirements of customers eligible for a fixed price SOS. Bidders will be asked to bid seasonally, but the retail rates will be developed using the bids and converting them into the existing rate design structures. In consultation with the other parties in this docket, Delmarva is in the process of developing a Full Requirements Service Agreement ('FSA') and an RFP (collectively, a 'Bid Plan'). The proposed settlement calls for a consultant selected by the Commission to monitor and participate in the bidding process. The Company will pay for the consultant, with the expenses being recovered in charges that are part of the fixed price SOS. That consultant, as well as the DPA and its consultant, will be permitted unfettered access to the bid process, subject to confidentiality concerns.

21. To provide rate stability for residential and small commercial customers, Delmarva will initially procure 1/3 of the load with a three-year contract (which will actually be 37 months for the first three-year contract), 1/3 with a two-year contract (which will actually be 25 months for the first two-year contract),

and 1/3 with a one-year contract (which will actually be 13 months for the first one-year contract).[2] By the end of the second year, there will be a portfolio of three-year contracts to serve this load, and each year thereafter, a new three-year contract for 1/3 of that load will be entered into to replace the expiring one. One-year contracts will be used for all other customer classes eligible for the fixed price SOS.

22. There are two major components of the SOS retail supply rates. First is the Full Requirements Costs ('FRC'), which, with the exception of the Volumetric Risk Mechanism ('VRM'),[3] is comprised of the costs that Delmarva pays to the winning bidders. Absent a Commission finding of exceptional circumstances, the FRC component will be reset and fixed for 12 months. The FRC will be trued up annually, and this will result in the retail rate for SOS being reset on an annual basis.

23. The reasonable allowance for retail margin ('RARM') mandated by the Act is comprised of several elements: (1) incremental expenses incurred (a) to provide fixed price SOS and HPS; (b) to administer the VRM applicable with respect to fixed price SOS customer load; and (c) carrying costs on Cash Working Capital for fixed price SOS and HPS; (2) $2.75 million per 12-month period, which for the Year 1 and Year 2 rates, is deemed to include any carrying costs on incremental capitalized costs associated with providing fixed price SOS and the VRM, but does not include the separately-calculated carrying costs for capitalized billing system software costs needed to bill and track HPS costs and revenues and also does not include any return on investment that is removed from distribution rates as supply-related; and (3) for GS-T customers and those in the GS-P class that have elected HPS, the allocable share of the above categories plus an amortized amount, including carrying costs on the unamortized balance of the capitalized billing system software costs and interface costs needed to bill and track HPS costs and expenses.[4] In the event that investment is removed from distribution rates in a future distribution base rate proceeding as supply-related, the RARM shall include an additional component comprised of the rate necessary to recover the same revenue requirement components as would have been applied if such investment were to have remained in distribution rates *e.g.*, depreciation expense, return on investment grossed-up for taxes, etc.). Such an adjustment to the RARM shall be made without regard to any other cost component.

24. Delmarva will establish the incremental costs of providing SOS by conducting a lead-lag study to determine its cash working capital requirements. The calculation of these requirements will use Delmarva's total weighted cost of capital grossed up for income taxes. Delmarva will apply its grossed-up cost of capital to the results of the lead-lag study to determine its cash working capital requirements in mills per kWh for each customer class. It will estimate its other incremental capital costs and expenses and provide the Staff and DPA with the supporting workpapers, documents, cost centers and internal work order numbers that Delmarva uses to collect and track costs. These estimates will be reconciled in a proceeding that will be held after actual cost data are known. After this one-time reconciliation, the RARM will remain fixed unless changed by the Commission.

25. The combination of the costs paid for the capacity and energy plus the RARM is designed to comply with the Act's mandate that the SOS price after the end of the transition periods be 'based upon and/or representative of regional wholesale electric market prices, plus a reasonable allowance for retail margin to be determined by the Commission.' 26 Del. C. § 1006(a)(2) c.

26. The proposed settlement also permits Delmarva to implement a pass-through mechanism pursuant to which its retail transmission rates will be developed and billed on the same basis that PJM and FERC use to develop rates and bill Delmarva for transmission. Currently, Delmarva's Delaware transmission rates are designed so that in the aggregate, they collect what PJM charges Delmarva. However, PJM bills based on peak load capacity and Delmarva's retail rates currently bill based on monthly billing demand for larger customers and on a kWh basis for residential and smaller commercial and industrial customers. The settlement proposal reduces the potential for mismatches between FERC costs and retail rate recovery and provides an incentive for customers to participate in demand response programs.

27. As of May 1, 2006, all residential customers and all commercial, industrial, governmental, and other customers other than GS-T customers and electing GS-P customers will be eligible for fixed price SOS.[5] SOS rates will vary

by customer type because the prices will be based on the winning bids received from wholesale suppliers under an RFP bidding process. The supply requirements for residential and the smallest non-residential customers will be bid out as one group. MGS-S customers will form another group, and their load will be bid for separately. LGS-S customers will form a third group, and non-electing GS-P customers will comprise the fourth group. (Exhs. 2, 3).

***2** *THE HEARING EXAMINER'S PROPOSED FINDINGS AND RECOMMENDATIONS*

1. The Proposed Settlement Complies With the Act.

28. The Hearing Examiner began by observing that the Act provides that if Delmarva is the SOS supplier, the SOS price shall be revised from time to time for each customer rate class to be representative of the regional wholesale electric market price plus a reasonable allowance for retail margin, and that the Commission may review the SOS price to determine whether it continues to reflect the regional wholesale electric market price plus a reasonable allowance for retail margin. 26 Del. C. § 1010(a)(2)(C). (Hearing Examiner's Report and Recommendations at ¶ 39) (hereafter ('HER at ___'). He found that the proposed settlement satisfied each of those requirements.

29. First, the power to provide SOS would be acquired at a price 'representative of the regional wholesale electric market price' because Delmarva would obtain that power either through PJM's competitive markets (in the case of hourly-priced SOS) or through a competitive bidding process. Moreover, the integrity of the bidding process would be assured by the presence of an outside consultant who would monitor the process and report to the Commission. (HER at ¶ 40).

30. The Hearing Examiner also found that the proposed settlement contained a 'reasonable allowance for retail margin' as required by the Act. The RARM proposed in the settlement includes Delmarva's incremental cost of providing SOS and a component for return (profit). The RARM further contains a true-up provision to capture costs to the extent they were not identified or recovered in the first year's rates and also has a 'catch-all' provision to capture any other cost category that may have been overlooked. (HER at ¶ 41).

2. The Proposed Settlement Is In The Public Interest.

31. The Hearing Examiner next concluded that the proposed settlement was in the public interest. First, he found that the proposed settlement was supported by a variety of divergent interests: Staff, which represented the interests of ratepayers and regulated utilities; the DPA, which represented all ratepayers with a primary focus on residential and small commercial customers; DEUG, which represented certain large customers, including members of the GS-T class, which would be the only customers subject to the mandatory HPS form of SOS; CESI, which represented a prospective bidder in the RFP process to supply Delmarva with power; and Delmarva, the SOS provider and local distribution company. (HER at ¶ 43). He agreed that the public interest argument would be stronger if the retail marketers had joined the agreement, but observed that the retail marketers, who would be competing with Delmarva, had 'a direct interest in making the SOS service as unattractive as possible in order to increase their chances of gaining market share.' (HER at ¶ 44).

32. The Hearing Examiner further found that the retail marketers' interests had been considered in the negotiation of the proposed settlement. He identified several terms in the proposed settlement that benefit retail marketers: (1) the annual resetting of rates to better reflect current market prices; (2) the elimination of returning customer rules; (3) the addition of the RARM, which includes a profit margin, on top of wholesale prices (to provide 'headroom' under which competitors can price their services); and (4) restructuring how Delmarva charges for transmission and ancillary rates to correspond more closely with how PJM charges retail marketers for such services (to enhance a marketer's ability to match its price components with the SOS pricing). (HER at ¶ 45).

33. The Hearing Examiner rejected the retail marketers' arguments that the proposed settlement should be modified: (1) to require all large commercial and industrial customers to take HPS SOS; and (2) to increase the RARM

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to be more representative of 'actual' costs (which they claimed was better reflected in Delmarva's original pre-settlement position). First, the Hearing Examiner found that imposing mandatory HPS on all large commercial and industrial customers would reduce the choice available to those customers because, if they would be unable to take fixed-price SOS from Delmarva; their only option would be to take a fixed-price service from a retail marketer, which they might not want to do. The Hearing Examiner quoted the DPA to explain why that was inappropriate:

*3 Although Select argues that HPS provides better price signals to customers, Select admitted that it has no Delaware customers taking HPS. It is ironic that Select is promoting implementing HPS in Delaware, even though none of its customers in Delaware take HPS. Clearly, Select does not need [Delmarva] to offer an HPS so that it can be put on a level playing field with [Delmarva] because Select itself has no customers on HPS. Select's proposal to increase mandatory HPS appears to be simply a ploy to drive customers away from SOS. DPA witness Crane explained in her testimony that it would be Select, not Delaware ratepayers, who would benefit under Select's proposal.

(HER at £ 47).

Furthermore, the Hearing Examiner found that even if further restricting the availability of fixed price SOS somehow advanced competition, that was outweighed by the interests of affected customers that may wish to remain on SOS but who seek the stability of a fixed price service. He was persuaded by the testimony of DEUG witness Rosenberg, who observed that some large customers might not find HPS attractive because of the volatility, which would create budgeting chaos and uncertainty. (HER at £ 47).

34. The Hearing Examiner next addressed the retail marketers' argument that there was not substantial evidence on the record to support the RARM. First, he noted that the settlement proponents' witnesses had testified that the RARM components would cover Delmarva's incremental costs and that the proposed return would satisfy the statutory requirement of a 'reasonable' retail margin, and that the expert testimony constituted record evidence. (HER at £ 49). Second, the fact that Delmarva originally supported larger retail margins than those espoused in the proposed settlement did not mean that the profit margins in the proposed settlement were inadequate or otherwise failed to encourage competition. Third, he observed that under Delaware law, the parties contesting a settlement do not have a right to a full trial on their issues; rather, the adjudicator of a contested settlement need only know enough about its merits and the identity of the parties to the settlement to be able to evaluate the settlement. (HER at £ 49, *citing In re Amsted Industries, Inc. Litigation*, 521 A.2d 1104 (Del. Ch. 1986); *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964)).

35. Next, the Hearing Examiner noted that even if the parties had fully litigated the RARM component of the proposed settlement, their positions would still have been substantially divergent and 'determination of the 'correct' numbers would remain elusive' because the parties' positions would largely depend on their views of cost allocation and risk valuation — a subject on which experts frequently disagree. (HER at £ 50). Avoiding the costs associated with fully litigating this issue alone supported a conclusion that the proposed settlement was in the public interest. (HER at £ 50).

36. Finally, the Hearing Examiner rejected Premcor's objection to the proposed settlement that it should not have to bear any of the cost of a system that it was not using. He noted that Premcor's witness at the evidentiary hearing testified that if Premcor's load serving entity was no longer qualified as such by PJM, it 'would probably have to fall back to Delmarva.' (HER at £ 51, quoting Tr. at 567). As the SOS supplier, Delmarva would be obligated to provide supply to Premcor under HPS service at any time if Premcor requested Delmarva to do so. The costs for which Premcor (and others) would be responsible are the costs of establishing the hourly billing system, and the Hearing Examiner found that those costs would exist whether or not Premcor takes HPS initially or not. (HER at £ 51).

OPINION

*4 37. *Twenty-six Del. C.* § 512 encourages the resolution of matters brought before the Commission through stipulations and settlements. Indeed, Section 512(a) of the Public Utilities Act specifically exhorts us to encourage the parties before it to resolve matters by stipulation or settlement. We may approve such stipulations or settlements, even if all parties do not agree, if we find the resolution contemplated by the stipulation or settlement to be in the public interest. 26 Del. C. § 512(c); *Constellation New Energy, Inc. v. Public Service Commission*, 825 A.2d 872, 882 (Del. Super. 2002) (...the legislature has determined that settlements are to be encouraged and that the Commission may approve any settlement it finds to be in the public interest, regardless of whether that settlement has been agreed to by all the parties.').

38. We have reviewed the record and the Findings and Recommendations of the Hearing Examiner, and we agree with the Hearing Examiner that this settlement is in the public interest. For the reasons set forth by the Hearing Examiner, we find that the settlement complies with the requirements of 26 Del. C. § 1006(a)(2)(c), which provides that if Delmarva is the SOS provider (which it is), then the SOS price must be representative of the wholesale electric market price, plus a 'reasonable allowance for retail margin.' We reject the retail marketers' assertion that expert opinion testimony is not substantial evidence and that this settlement is not supported by substantial evidence; indeed, we believe that the Superior Court rejected a similar argument that Constellation New Energy made in its appeal of our decision in Docket No. 01-194. In Constellation New Energy, Constellation argued that the settlement proponents and the Commission bore the burden of establishing that each aspect of the settlement must be supported by specific numeric analysis. The Superior Court, however, disagreed, stating:

This case involves judicial review for the first time of a statute authorizing settlements of disputes before the Commission. That statute authorizes the Commission to approve settlements, even ones contested by non-settling parties, where the Commission finds such resolution to be in the public interest.

***Constellation New Energy*, 825 A.2d at 874.**

39. Later in the opinion, the Court described Constellation's argument with respect to the settlement's provision for the establishment of the regional wholesale electric market price as follows:

Constellation criticizes the Commission because it did not rely on any quantitative analysis as to market prices. Essentially, it maintains that the Commission did not identify any numerical evidence of the 'regional wholesale market price,' or reasonable allowance for retail margin.' Constellation concludes that since the Court cannot identify — and therefore cannot review — the components of the price determination formula set up under section 1006, the Court cannot find that the Commission's decision was based on substantial evidence.

*5 *Id.* at 884. The Superior Court, however, disagreed:

> However, several parties to the settlement and appellees point out that there is no single 'wholesale price' that can be said to be 'representative.' This is because any such wholesale price is necessarily a composite of the prices of capacity, energy and ancillary service, each of which will vary depending on whether one looks at today's prices, future price curves generated by models, or bid and ask prices in future markets. Additionally, all of these factors are necessarily evaluated by each market participant through the lens of its perceptions of the risks assumed for variations in weather, customer usage, risks of lost or added customers, and other forces. Therefore, they conclude, any determination as to whether a particular standard offer service price is representative of regional wholesale market price plus a reasonable allowance for retail margin necessarily entails judgments not easily reducible to a mathematical formula. That is why, the argument continues, it was necessary for the Commission to take the 'end results' approach, relying on the experts' opinions that the settlement's rates were reasonable approximations.

Id. at 884-85. After reviewing other corollary arguments of Constellation and setting forth the expert testimony upon which the Commission relied, the Court concluded: 'The foregoing constitutes substantial evidence from which the Commission could conclude that approval of the settlement with the proposed rates were in the public interest.'*Id.* at 887.

40. We further observe that in Section 1002 of the Act, the Legislature declared that one of the standards governing the Commission's oversight of the transition process is that 'customers shall have the right to choose among electric suppliers.' 26 Del. C. § 1002 (a)(2).[6] We believe that the retail marketers' proposal to require HPS SOS for all large commercial and industrial customers (defined as all GS-T, GS-P and LGS customers having a PLC of greater than 600 kW) would reduce the right of these customers to choose their electric supplier, as DPA witness Crane testified. *See* Tr. at 497. We do not believe that promotion of retail competition, to the exclusion of all other considerations, is the be-all and end-all of the Act. We must take other considerations into account, and we do not interpret the Act as precluding us from doing so.

41. The Settlement Agreement also results in reduced regulatory expense, which is a benefit to Delmarva customers because it reduces the legal and other rate case expense costs that Delmarva will seek to recover in its next case (which has been filed). In a time of rising costs for nearly every commodity, this cost limitation is certainly in the public interest.

42. We rejected Premcor's objections to the original Settlement Agreement for the reasons set forth by the Hearing Examiner. In particular, we note that Premcor, like other customers, has the right to use a competitive retail supplier or to take a Delmarva-provided SOS. Delmarva has incurred costs, in this instance, billing system costs, to be ready to provide an hourly form of SOS (HPS SOS) to Premcor and other customers within the GS-T customer class and those GS-P customers that elect this form of SOS. Thus, it is reasonable that all such customers pay a share of those 'make ready' costs even if, at any particular moment in time, some or all of those customers may not be using the service. The Settlement Agreement provided one reasonable approach, based on peak load, for assigning these costs among customers that will have the right to take the HPS form of SOS. The amendment to the Settlement Agreement provides a different, but also reasonable, mechanism using a per customer charge, except that peak load is used for 'smaller' customers within this group of generally large customers.

43. For these reasons, as well as those set forth in the Hearing Examiner's Findings and Recommendations, we hereby adopt the Findings and Recommendations of the Hearing Examiner in their entirety. (4-0).

MISCELLANEOUS

***6** 44. On September 15, 2005, Delmarva filed two documents developed as part of the process for the solicitation of electric supply to meet its SOS obligations on and after May 1, 2006. The first of these documents consists of a single page identifying the Service Types of the customer groups for which supply will be separately solicited, the approximate loads of each of those groups (the Peak Load Contribution or 'PLC') and the contract duration. The second document is a draft request for proposal ('RFP') that will be sent to prospective bidders. The attachments to the RFP included various forms that bidders would need to complete in order to participate in the process or, upon winning a bid, to complete the contemplated transaction. A draft Full Requirements Supply Agreement ('FSA'), that the winning bidders would be required to sign, is also attached as an appendix to the RFP.

45. Delmarva's September 15, 2005 filing was served on all parties to the proceeding. At the Commission meeting on September 20, 2005, Delmarva requested that the Commission take appropriate steps to solicit any comments that other parties may have on the draft documents and, if possible, to consider approving these documents for use in Delmarva's SOS solicitation at the Commission's meeting on October 11, 2005. The Commission directed Hearing Examiner O'Brien to solicit such comments and Staff has reported back that no such comments have been received. Staff has also indicated that it has reviewed the documents and does not propose any changes to them.

46. Delmarva has requested that the Commission approve the form of these documents, including the FSA with a recognition that minor changes to the documents may be made as the result of continuing discussions with Staff and other parties, or from feedback received in pre-bid meetings with prospective bidders. [7]

ORDER

AND NOW, this 11th day of October, 2005, *IT IS HEREBY ORDERED*:

1. That the Findings and Recommendations of the Hearing Examiner dated September 1, 2005 (attached to the original hereof as Exhibit 'A') recommending that the parties' Settlement Agreement be approved are hereby approved and adopted in their entirety. The September 28th amendment to the Settlement Agreement is also approved (attached to the original hereof as Exhibit 'B').

2. The Commission hereby approves the form of the documents filed on September 15, 2005, and explicitly recognizes that some changes to these documents may be necessary or appropriate as the RFP process proceeds. The Commission will not require that each such change be brought back to the Commission for a further approval, but does direct the Company to ensure that Staff and the Public Advocate are made aware of any such changes. To the extent that Staff or the Public Advocate believe that the changes are significant enough to warrant further Commission consideration, the Commission will review any such request.

3. That the Commission retains the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

EXHIBIT 'A'

REPORT OF THE HEARING EXAMINER

DATED: September 1, 2005

*7 William F. O'Brien, duly appointed Hearing Examiner in Stage 1 and Stage 2 of this docket, pursuant to Commission Orders Nos. 6490 (Oct. 19, 2004) and 6598 (Mar. 22, 2005), reports to the Delaware Public Service Commission ('Commission') as follows:

I. APPEARANCES

On behalf of the Delaware Public Service Commission Staff: JAMES McC. GEDDES, ESQUIRE, ASHBY & GEDDES, Rate Counsel. On behalf of the Division of the Public Advocate: G. ARTHUR PADMORE, ESQUIRE. On behalf of Delmarva Power & Light Company: RANDALL V. GRIFFIN, ESQUIRE. On behalf of Intervenor Conectiv Energy Supply, Inc. I. DAVID ROSENSTEIN, ESQUIRE. On behalf of Intervenor Delaware Energy Users' Group: BRIAN R. GREENE, ESQUIRE, CHRISTIAN & BARTON, LLP. On behalf of Intervenor Retail Energy Supply Association: DANIEL CLEARFIELD, ESQUIRE, WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP. On behalf of Intervenor Select Energy, Inc.: FREDERICK LEE KLEIN, ESQUIRE. On behalf of Intervenor Premcor Refining Group: MR. JAMES T. FUESS.

II. BACKGROUND

1. Delaware's Electric Utility Restructuring Act of 1999 ('Restructuring Act ') established a framework under which Delmarva Power & Light Company ('Delmarva' or 'DP&L') and Delaware Electric Cooperative, Inc. would surrender their exclusive franchises to serve retail electric utility customers, thereby providing competitive retail electric marketers

the opportunity to compete for customers within those utilities' service territories. Under the Restructuring Act, those customers who do not choose an electric supplier will take 'standard offer service' ('SOS') from the 'standard offer service supplier' after the applicable 'transition period.'[8] In this docket, the Commission selects the SOS supplier for Delmarva's service territory and establishes the process under which SOS supply will be procured and priced.

2. The statutory transition period for all customer classes in Delmarva's service territory ended in September 2003. In the early part of 2002, however, as part of the resolution of its merger with PEPCO Holdings, Inc., Delmarva agreed to serve as the SOS supplier for its service territory until May 1, 2006, and to freeze its SOS rates (with certain exceptions) until May 1, 2006.[9] The SOS prices would then be reviewed in connection with a process intended to result in the selection of an SOS supplier for the period beginning May 1, 2006.

3. On October 19, 2004, noting that SOS rates had increased significantly in other jurisdictions once the freeze on supply rates had been lifted in those jurisdictions, the Commission opened this docket to 'explore issues related to the selection of an SOS supplier for DP&L's service territory and the appropriate prices to be charged for SOS after that date.'[10] In that Order, the Commission adopted Staff's proposal to conduct this proceeding in three stages: (1) resolving the larger, fundamental issues underlying the selection of a supplier and the setting of SOS rates; (2) crafting the necessary rules or procedures for implementing the choice of an SOS supplier(s) and establishing SOS rates; and (3) implementing the selection and pricing mechanisms from the second stage to determine the post-May 2006 SOS supplier and SOS rates. In addition, the Commission established a deadline of February 28, 2005 for the conclusion of the first stage and appointed a Hearing Examiner as a monitor to oversee the proceedings.

4. Pursuant to the Commission's directives in Order No. 6490, Staff conducted two workshops, through which it solicited written and oral comments from the participants, and then, on January 5, 2005, submitted a position paper addressing several issues that the parties agreed were fundamental SOS issues. On March 22, 2005, the Commission adopted all of Staff's recommendations, as follows, despite opposition from certain parties. (PSC Order No. 6598.)

5. First, the Commission determined that SOS in Delaware would be provided pursuant to a 'wholesale' model, whereby the Commission would select the incumbent distribution utility (DP&L) as the SOS provider, who would secure the power to serve SOS customers from the wholesale power market but would continue to interface directly with the customer. The 'wholesale' model was chosen over various forms of the 'retail' model, whereby the Commission would select one or more SOS providers through some form of competitive process and those providers would assume some or all of the duties of interfacing with the retail SOS customer. (*Id.*)

6. Second, the Commission decided to defer the remaining Stage 1 issues to Stage 2, including the method by which the wholesale power will be procured, the composition of the 'retail adder' or margin that Delmarva would include in its SOS rates, and the use of SOS to promote various societal benefits (*e.g.*, renewable resources and demand response programs). In addition, the Commission again appointed a Hearing Examiner 'to superintend and monitor the Stage 2 process and to deal with any disputes regarding the adequate provision of relevant information.' (*Id.*)

7. In Stage 2, the parties established a two-track procedural schedule consisting of (1) a litigation track for the determination of the composition of the 'retail adder' and (2) a non-litigation track for the remaining issues, which were considered primarily policy-driven and which could be resolved without evidentiary hearings. Track 2 issues included Commission oversight of the process, splitting of rate classes, and rate translation of bids into tariffs, as well as certain issues that the Commission deferred from Stage 1 to Stage 2.

8. After conducting four workshops and soliciting written and oral comments on the issues, however, certain parties agreed on a 'Proposed Settlement,' dated July 14, 2005, regarding all issues from both tracks. As a result, the Hearing Examiner consolidated the two tracks and, rather than conduct a hearing solely on the 'retail adder,' conducted a hearing on whether the Commission should adopt the terms of the Proposed Settlement. The parties

who joined the Proposed Settlement are Staff, the Division of the Public Advocate ('DPA'), DP&L, Conectiv Energy Supply, Inc. ('CESI'), and Delaware Energy Users' Group ('DEUG ') (collectively, 'Settling Parties').

9. On August 1, 2004, I conducted the public comment portion of the hearing, as noticed by newspaper publication, press release, and direct contact with Delmarva's Project Concern participants. [11] Leslie Lee, who administers the low-income home energy assistance program for the Division of State Service Centers of the Department of Health and Social Services, was the only non-party to appear. She asked several procedural questions but offered no public comment.

10. On August 4, 2005, after postponing the evidentiary portion of the hearing in order to allow the parties more time to negotiate changes to the Proposed Settlement in an effort to secure full consensus among the parties, I conducted the remainder of the hearing. At the hearing, the Settling Parties each appeared in support of the Proposed Settlement while Retail Energy Marketers' Association ('RESA'), Select Energy, Inc. ('Select'), Strategic Energy, LLC ('Strategic'), and Premcor Refining Group ('Premcor') opposed the Proposed Settlement. [12] The record, as developed at the hearing, consists of a 680-page verbatim transcript and ten exhibits.

11. On August 16, 2005, in accordance with the approved post-hearing schedule, certain parties filed post-hearing briefs. Staff, DPA, Delmarva, and CESI each filed briefs supporting the Proposed Settlement. Three of the retail marketers that participated in this proceeding, RESA, Select, and Strategic (collectively 'Retail Marketers') jointly filed one brief opposing the Proposed Settlement. [13] I have considered all of the record evidence as well as the post-hearing briefs and, based thereon, I submit for the Commission's consideration this Report of the Hearing Examiner.

III. THE PROPOSED SETTLEMENT

12. A summary of the terms of the Proposed Settlement (Ex. 2), taken largely from Staff's in its brief, is as follows.

13. The Proposed Settlement provides that Delmarva will provide SOS to all customer classes, with no specified termination date. There will be two categories of SOS: (1) a fixed price service ('FPS') available to all but the largest customers (*i.e.*, the eleven GS-T customers, who all take at a transmission level voltage); and (2) an hourly priced service ('HPS') that is mandatory for GS-T customers and will be offered as an option for GS-P customers (generally, the large commercial customers). In order to take HPS, a GS-P customer must make an affirmative election prior to the Request for Proposal ('RFP') process for selecting wholesale SOS providers, and must have an interval meter or be willing to pay for installation of such a meter prior to beginning HPS. GS-P customers will have the opportunity to elect HPS or FPS every year. [14] All other SOS customers must take the FPS.

14. Under the Proposed Settlement, a competitive RFP process will be used to procure the full requirements of customers eligible for a fixed price SOS. Bidders will be asked to bid seasonally, but the retail rates will be developed using the bids and converting them into the existing rate design structures. In consultation with the other parties in this docket, Delmarva is in the process of developing a Full Requirements Service Agreement ('FSA') and an RFP (collectively, a 'Bid Plan'). The proposed settlement calls for a consultant selected by the Commission to monitor and participate in the bidding process. The Company will pay for the consultant, with the expenses being recovered in charges that are part of the fixed price SOS. That consultant, as well as the DPA and its consultant, will be permitted unfettered access to the bid process, subject to confidentiality concerns.

15. To provide rate stability for residential and small commercial customers, Delmarva will initially procure 1/3 of the load with a three-year contract (which will actually be 37 months for the first three-year contract), 1/3 with a two-year contract (which will actually be 25 months for the first two-year contract), and 1/3 with a one-year contract (which will actually be 13 months for the first one-year contract). [15] By the end of the second year, there will be a portfolio of three-year contracts to serve this load, and each

year thereafter, a new three-year contract for 1/3 of that load will be entered into to replace the expiring one. One-year contracts will be used for all other customer classes eligible for the fixed price SOS.

16. Under the Proposed Settlement, there are two major components of the SOS retail supply rates. First is the Full Requirements Costs ('FRC'), which, with the exception of the Volumetric Risk Mechanism ('VRM'),[16] is comprised of the costs that Delmarva pays to the winning bidders. Absent a Commission finding of exceptional circumstances, the FRC component will be reset and fixed for 12 months. The FRC will be trued up annually, and this will result in the retail rate for SOS being reset on an annual basis.

17. Under the Proposed Settlement, the 'reasonable allowance for retail margin' ('RARM') mandated by the Restructuring Act is comprised of the following components:

***8** (1) Incremental expenses incurred:

(a) to provide fixed price SOS and HPS;

(b) to administer the VRM applicable with respect to fixed price SOS customer load; and

(c) carrying costs on Cash Working Capital for fixed price SOS and HPS;

(2) $2.75 million per 12-month period, which for the Year 1 and Year 2 rates, is deemed to include any carrying costs on incremental capitalized costs associated with providing fixed price SOS and the VRM, but does not include the separately-calculated carrying costs for capitalized billing system software costs needed to bill and track HPS costs and revenues and also does not include any return on investment that is removed from distribution rates as supply-related; and

(3) For GS-T customers and those in the GS-P class that have elected HPS, the allocable share of the above categories plus an amortized amount, including carrying costs on the unamortized balance of the capitalized billing system software costs and interface costs needed to bill and track HPS costs and expenses.

18. In the event that investment is removed from distribution rates in a future distribution base rate proceeding as supply-related, the RARM shall include a fourth component comprised of the rate necessary to recover the same revenue requirement components as would have been applied if such investment were to have remained in distribution rates (*e.g.*, depreciation expense and return on investment grossed-up for taxes). Such an adjustment to the RARM shall be made without regard to any other cost component.

19. Delmarva will establish the incremental costs of providing SOS by conducting a lead-lag study to determine its cash working capital requirements. The calculation of these requirements will use Delmarva's total weighted cost of capital grossed up for income taxes. Delmarva will apply its grossed-up cost of capital to the results of the lead-lag study to determine its cash working capital requirements in mills per kWh for each customer class. It will estimate its other incremental capital costs and expenses and provide the Staff and DPA with the supporting workpapers, documents, cost centers and internal work order numbers that Delmarva uses to collect and track costs. These estimates will be reconciled in a proceeding that will be held after actual cost data are known. After this one-time reconciliation, the RARM will remain fixed unless changed by the Commission.

20. The Proposed Settlement also permits Delmarva to implement a pass-through mechanism pursuant to which its retail transmission rates will be developed and billed on the same basis that PJM and FERC use to develop rates and bill Delmarva for transmission. Currently, Delmarva's Delaware transmission rates are designed so that in the aggregate, they collect what PJM charges Delmarva. PJM, however, uses peak load capacity as a billing

determinant while Delmarva uses monthly demand for larger retail customers and kWh usage for residential and smaller commercial and industrial customers. The settlement proposal reduces the potential for mismatches between FERC costs and retail rate recovery and provides an incentive for customers to participate in demand response programs.

21. As of May 1, 2006, all residential customers and all commercial, industrial, governmental and other customers other than GS-T customers and electing GS-P customers will be eligible for fixed price SOS. [17] **SOS rates will vary by customer type because the prices will be based on the winning bids received from wholesale suppliers under an RFP bidding process. The supply requirements for residential and the smallest non-residential customers will be bid out as one group. MGS-S customers will form another group, and their load will be bid separately. LGS-S customers will form a third group, and non-electing GS-P customers will comprise the fourth group. (Exs. 2, 3.)**

IV. SUMMARY OF EVIDENCE

22. Testimony in support of the Proposed Settlement (Ex. 2) was pre-filed (and adopted as sworn testimony) by DP&L witness Schaub (Ex. 3), DEUG witness Alan Rosenberg (Ex. 4), CESI witness Champe Fisher (Ex. 5), DPA witness Andrea C. Crane (Ex. 6), Staff witness Janis L. Dillard (Ex. 8), and Premcor witness Jay Fuess (Ex. 9). The following is a summary this pre-filed testimony as well as the live testimony from the hearing (as provided, in large part, by Delmarva in its brief).

23. Mr. Schaub summarized the Proposed Settlement and concluded that adoption thereof would be in the public interest. (Ex. 3 at 2, 6-9; Tr. 393-96.) He identified several specific elements of the Proposed Settlement that were beneficial to customers, including that:

***9** a) Delmarva will provide SOS under PSC regulation;

b) Wholesale procurement of SOS is a proven method to obtain fair market prices;

c) The structure of the procurement is modeled after successful programs in other states, and a similar process has received affirmation from FERC;

d) Customers may shop at any time if that is to their advantage and can therefore have the benefits of retail choice;

e) Customers most inclined to shop will have SOS prices reset annually to reflect market conditions thereby allowing more contemporary pricing offers from third party suppliers;

f) The largest customers may take advantage of volatile hourly pricing if they are able to manage the volatility to their benefit;

g) Residential and small commercial customers are provided less volatile pricing through longer term procurement because price stability is most important to them;

h) Delmarva's experience with performing similar procurements means low incremental expenses associated with procurement and related functions; and

i) The wholesale market has proven quite competitive when similar procurements have been conducted.

(Ex. 3 at 2-3.)

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24. Mr. Schaub further identified elements of the Proposed Settlement that were beneficial to wholesale suppliers of power, retail marketers, and DP&L. (Ex. 3 at 3-4.) He noted that the Proposed Settlement reflected compromise by each of the Settling Parties and asserted that the Settling Parties aggressively represented customer interests. (Ex. 3 at 5.)

25. In oral surrebuttal, Mr. Schaub responded to comments filed by Premcor regarding whether Premcor should have to pay for services that it does not intend to use. Mr. Schaub explained that Delmarva was legally obligated to provide SOS to Premcor. (Tr. 398.) Because there are fixed costs that are incurred to stand ready to serve hourly priced service (HPS) customers, Mr. Schaub concluded that Premcor should pay a share of those fixed costs irrespective of whether or not Premcor availed itself of that service. (Tr. 398-99.)

26. Mr. Schaub also responded to Select's alternative proposal for how the SOS procurement process should be implemented and rates set and identified several reasons for rejecting that proposal. He noted that Select's proposal was unacceptable to the Company because it would cause existing rate classes to be split into different groups based on size, causing additional administrative expenses for the Company. (Tr. 400.) Additional administrative burdens were proposed in the form of quarterly procurement cycles, which Mr. Schaub opposed because there 'doesn't seem to be any benefit accruing to customers that justifies that incremental cost.' (Tr. 401.) Mr. Schaub also opposed Select's proposal to deny fixed price SOS to larger customers in the GS-P and LGS-S classes, noting that 'we're certainly not hearing any interest in that from the representatives of those customers.' (Tr. 400-01.) He also testified that for residential and small non-residential customers, the use of rolling three-year contracts as set forth in the Proposed Settlement rather than the one-year contracts proposed by Select, 'satisfies the needs of those customers for some rate stability over time while still providing a market base[d] price.'' (Tr. 401-02.)

27. DEUG witness Rosenberg testified that DEUG was comprised of industrial customers taking service primarily under the GS-T and GS-P service classifications and that the Proposed Settlement met the objectives of the DEUG members to establish an appropriately priced hourly priced service for the customers who were sophisticated enough to want such a service while not mandating such a service for the GS-P customers; many of whom may be less sophisticated. (Ex. 4 at 3.) Dr. Rosenberg noted the benefits to industrial customers from having no minimum stay or other requirements limited customers' ability to move between a Delmarva provided supply service and a supply service from a competitive retail marketer. (*Id.* at 4.) He testified that the provisions that change the way transmission and ancillary rates are charged for retail purposes to use the same billing mechanisms that PJM uses to charge Delmarva will promote demand side management. (*Id.* at 5-7.) He supported the pricing mechanisms established for the HPS, including how the HPS billing system costs would be recovered from HPS customers. (*Id.* at 9-12.) He concluded that the Proposed Settlement was in the public interest and should be approved. (*Id.* at 14.)

28. CESI witness Fisher testified that the sections of the Proposed Settlement that deal with the way in which Delmarva will acquire the supply required to meet its SOS supply obligations are in the public interest. (Ex. 5 at 3.) In particular, Mr. Fisher supported the RFP process set forth in the Proposed Settlement and the use of a Volumetric Risk Mitigation ('VRM') mechanism that should operate to encourage active participation in the RFP process by wholesale sellers of electricity. (Ex. 5 at 3-5.) On the stand, Mr. Fisher testified that a wholesale bid from CESI would be higher to a retailer under an agreement that did not contain a VRM than it would be to a retailer under an agreement with a VRM. (Tr. 480-81.) He also noted that standard contract provisions between CESI and retailers contain alternative mechanisms for limiting CESI's risk. (Tr. 484-85.)

29. DPA witness Crane testified that the Proposed Settlement was in the public interest and should be approved. (Ex. 6 at 5.) She further testified that:

***10** On balance, I believe that the Settlement provides a fair and reasonable resolution of the issues in this case. The Settlement provides a competitive process for procuring electric generation supply. Moreover, it allows Delmarva to recover its actual procurement costs as well as the incremental administrative costs of providing SOS. In this regard,

the Settlement is consistent with the statute, since it ensures that the SOS price will be 'representative of the regional wholesale electric market price, plus a reasonable allowance for retail margin ....'

The Settlement also provides some rate stability to customers, particularly residential and small commercial customers who will receive SOS procured through three-year contracts. Additional stability will be provided after Year 2, when the RARM is reset, since the settlement does not provide for annual changes to the RARM after the Year 1 true-up. The Settlement also avoids the 'residual charge' proposed as part of Delmarva's Administrative Charge, which in my opinion would have inflated SOS rate without providing any attendant benefit to customers. Finally, the Settlement will avoid the need for protracted and expensive litigation. Avoiding such litigation is especially important given the fact that the SOS process must be in place by May 1, 2006.

(*Id.* at 12.)

30. Ms. Crane, in oral surrebuttal, testified against Select's recommendations. In particular, she opposed Select's proposal to 'restrict choice by requiring an hourly price service for all customers over six hundred kW by year two.' (Tr. 490.) She also noted that Select's proposal would increase costs by requiring four rounds of bids each year and by splitting rate classes by size. (Tr. 490-91.) She noted that while some costs involved in the RFP process may be one-time set up costs, other costs, such as the $75,000 in estimated costs for an outside consultant reporting to the Commission to oversee the RFP process, would be incurred multiple times per year under the Select proposal. (Tr. 514-16.) She also testified against a so-called 'retail adder" that was included in the Company's originally filed proposal and in Select's proposal, but is not incorporated in the Proposed Settlement. (Tr. 491.)

31. Staff witness Dillard testified that the Proposed Settlement was in the public interest and should be approved by the Commission. (Ex. 8 at 3.) Ms. Dillard identified in her pre-filed testimony and on the stand several specific aspects of the Proposed Settlement that benefited customers, wholesale marketers, and retail marketers. She noted that the RFP process in the Proposed Settlement was a 'fairly low-cost way for a small state like Delaware to conduct the procurement process' and that a lot of time was spent 'dealing with cost recovery because we wanted to make sure the company was able to recover all of its real costs of providing the SOS service, but wasn't going to be able to double recover any cost.' (Tr. 521-22.) Ms. Dillard pointed out several specific provisions that benefited retail marketers including that there would be no minimum stay requirements that would restrict customers moving back-and-forth between shopping competitively and returning to SOS; that making hourly priced service mandatory for GS-T customers and optional for GS-P customers provides an opportunity for retail marketers to offer a fixed price alternative; that by ensuring that all incremental costs are going to be in the shopping credit, retail suppliers will have some 'head room to compete;' and that the power procured for the SOS provided to medium-sized non-residential customers would be done under one-year, rather than two-year, contracts. (Tr. 522-23.)

32. On the stand, Ms. Dillard explained at some length the process by which the Proposed Settlement was reached. She described the workshop process and Staff's efforts to develop a comprehensive settlement package, which would address the concerns raised by all parties, including the retail marketers. (Tr. 525.) She explained the efforts that Staff made to identify areas of common interest that could form the basis of a settlement and how those discussions started with DPA, then expanded to include the Company and then DEUG. (Tr. 523-24.) After noting various instances where she had had discussions with retail marketers, she concluded that retailers had a fair opportunity to participate in the process, testifying that:

***11** [W]e talked to them through the workshops. We talked to them on May 31st. I talked to them in June. We had a lot of discussions in the week after the settlement was filed. So, I think they had an adequate opportunity to air their views. I think it was more just a disagreement on policy, the way that we thought Delaware should go on these issues.

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(Tr. 531.)

33. Premcor submitted a letter (Ex. 9), adopted on the stand by witness Jay Fuess, in opposition to the Proposed Settlement. The letter stated that while Premcor participated in the workshop process, nothing discussed therein appeared to affect Premcor and that Premcor was surprised by the draft of a settlement sent to it on July 7, 2005, which had the result of assigning a sizable portion of the costs of Delmarva's hourly billing system costs to Premcor. In Premcor's view, this was inappropriate because Premcor does not take its supply service from Delmarva and would never benefit from the use of the hourly billing system. (Ex. 9 at 2.) On the stand, Mr. Fuess also made an assertion that he thought that Premcor's bills were so complex that he thought it likely that even if Premcor were to take service from Delmarva, the bills would need to be done manually, and not through the hourly billing software. (Tr. 559.) Premcor also raised concerns regarding the process by which the July 7, 2005 draft settlement was developed, without input from Premcor. (Ex. 9 at 1-2.)

34. Select presented two witnesses as a panel, Messrs. Marc Hanks and Leonard Navitsky, who testified in opposition to the Proposed Settlement. Their pre-filed testimony stated that Select had not been consulted with during the settlement process, which they characterized as 'private negotiations,' and that 'Select first became aware of the 'Proposed Settlement' when we were provided a copy on July 7 and were given a mere two days to provide comments.' (Ex. 10 at 4.) Select's witnesses testified that the Proposed Settlement will hamper the development of a competitive market because it continues 'to mask the true cost of electricity from consumers.' (*Id.* at 5.) Select's witnesses then presented an alternative proposal. The alternative proposal would increase the number of customers for whom only the HPS form of SOS would be available, ultimately resulting in all customers with peak loads in excess of 600 kW being eligible for only the HPS form of SOS. (Ex. 10 at 6-7 and 9.)

35. Select also proposed that Delmarva procure power every quarter through an RFP process to serve customers with peak loads above 100 kW and that annual RFP's be used with contracts not to exceed a term of one year for residential and smaller non-residential customers. (*Id.* at 8.) In the third year of the program, Select would require a new proceeding be initiated to propose changes for implementation in the fourth year. (*Id.* at 9.) Select also proposed that the retail prices charged by Delmarva to its SOS customers include additional retail margins. (*Id.* at 10-12.) The bases for this proposal were that there are retail adders on some or all customer classes in surrounding states and that Delmarva's initial pre-filed testimony in this proceeding (*i.e.*, prior to the Proposed Settlement agreement was reached) proposed retail margins. (*Id.*)

36. On cross-examination, Mr. Navitsky agreed that Select did not review the underlying Delmarva records or documents that formed the basis for the pre-filed testimony, that the panel was unaware of the risks identified in that testimony with respect to the operations of Delmarva's New Jersey utility affiliate, and that they had not independently verified the data presented. (Tr. 610-11.)

V. DISCUSSION

37. In Stage 1 of this docket, the Commission selected Delmarva as the SOS provider for its service territory and decided that Delmarva would provide SOS service under the 'wholesale' model. (Order No. 6598 (Mar. 22, 2005).) In this stage, the Commission will develop a procedure under which Delmarva will procure, provide, and price the SOS supply. In Stage 3, the Commission will select the wholesale providers and determine the post-May 2006 SOS prices, in accordance with the procedures and pricing mechanisms developed in this stage.

38. After numerous workshops, written and oral comments, off-line discussions, and protracted negotiations, Staff, DPA, DP&L, CESI, and DEUG reached an agreement as to all Stage 2 issues, as outlined above. RESA, Select, and Strategic (collectively 'Retail Marketers') and Premcor oppose the Proposed Settlement, despite Staff's attempts, both before and after the hearing, at reaching a full consensus. As outlined below, however, I recommend that the Commission approve the Proposed Settlement in this case because it complies with the Restructuring Act and its adoption would be in the public interest.

39. The Restructuring Act provides that the Commission shall determine who will provide SOS and that the Commission is permitted, but not required, to designate Delmarva as the SOS provider.[18] As noted above, the Commission has already selected Delmarva to continue as the SOS provider for its service territory. (Order No. 6598.) The Restructuring Act further provides[19] that:

***12** If DP&L is a standard offer service supplier, the standard offer service price shall be revised by DP&L from time to time for each customer rate class to be representative of the regional wholesale electric market price, plus a reasonable allowance for retail margin to be determined by the Commission for providing such electric supply service. The standard offer service price may be reviewed from time to time by the Commission to determine whether it represents the regional wholesale electric market price, plus a reasonable allowance for retail margin.

The Restructuring Act, therefore, directs the Commission to determine an SOS price that is 'representative of the regional wholesale electric market price, plus a reasonable allowance for retail margin.'

40. The Proposed Settlement meets each of these requirements. The power for SOS will be acquired at a price 'representative of the regional wholesale electric market price' because Delmarva will obtain the power either through PJM's competitive markets (in the case of the HPS SOS) or through a process where wholesale bidders, acting in their own self interest, will bid competitively. Furthermore, the integrity of the procurement process is assured by the oversight of an outside consultant who will monitor the process and report to the Commission. (Delmarva Br. at 20-22.)

41. The Proposed Settlement also explicitly contains a 'reasonable allowance for retail margin' ('RARM'), which includes Delmarva's incremental cost of providing SOS (to be determined in Delmarva's upcoming distribution rate case), plus a component for return, or profit. The RARM also contains a true-up provision to capture costs to the extent not identified or recovered in the first year's rates and further contains a 'catch-all' provision to capture any category of cost that may have been overlooked.

42. In addition, the record amply supports a finding that adoption of the Proposed Settlement would be in the public interest. Pursuant to Section 512 of the Public Utilities Act, the Commission may approve a settlement where the Commission finds the settlement to be in the public interest, whether or not all parties have joined the settlement. More specifically:

Insofar as practicable, the Commission shall encourage the resolution of matters brought before it through the use of stipulations and settlements.

The Commission's staff may be an active participant in the resolution of such matters.

The Commission may upon hearing approve the resolution of matters brought before it by stipulations or settlements whether or not such stipulations or settlements are agreed to or approved by all parties where the Commission finds such resolution to be in the public interest.

***26 Del. C.* §512 (a)-(c).**

43. First, it is significant that the Settling Parties, all of whom maintain that the Proposed Settlement is in the public interest, represent a wide variety of interests. Staff represents the interests of ratepayers and regulated utilities. DPA represents all ratepayers, but focuses primarily on residential and small commercial customers. DEUG represents certain large industrial customers (including members of the GS-T class, which is the only class subject to the mandatory HPS form of SOS). CESI's interest in this proceeding is as a potential

wholesale provider of service, *i.e.*, a prospective bidder in the RFP process to supply Delmarva with power for the SOS. And, of course, Delmarva is the SOS provider and local distribution company for its territory.

44. The public interest argument in support of the Proposed Settlement would, of course, be stronger if the Retail Marketers joined the agreement. After all, one goal of the Restructuring Act is to encourage retail competition, and whether retail competition takes hold in Delaware will depend on the business decisions and future success of retail marketers in Delaware. On the other hand, the Commission should also consider that retail marketers will be competing directly with the SOS provider and, therefore, have a direct interest in making the SOS service as unattractive as possible in order to increase their chances of gaining market share. Not surprisingly, their positions in this case, as discussed below, support changes to the Proposed Settlement that would raise the price of SOS and limit the options available to SOS customers.

45. In addition, the Retail Marketers' opposition to the Proposed Settlement should not be interpreted to mean that their interests were not considered. In fact, the Settling Parties included in the Proposed Settlement several terms that benefit retail marketers. (Ex. 8 (Dillard) at 14-15; Ex. 3 (Schaub) at 4, Tr. 522-23 (Dillard.)) Such terms include the annual resetting of rates (to better reflect current market prices), the elimination of returning customer rules (so that customers may leave SOS without fear of not being able to return to SOS), the addition of the RARM, which includes a profit margin, on top of wholesale prices (to provide 'headroom' under which competitors can price their services), and restructuring how Delmarva charges for transmission and ancillary rates to correspond more closely with how PJM charges retail marketers for such services (to enhance a marketer's ability to match its price components with the SOS pricing).

46. The Retail Marketers argue, however, that the Proposed Settlement should not be adopted unless modified (1) to require HPS for all large commercial and industrial customers (rather than just the eleven GS-T customers) and (2) to increase the RARM to be more reflective of 'actual' cost, which, according to the Retail Marketers, is better reflected by Delmarva's initial, pre-settlement position.[20] (RM Br. at 6-20.) According to the Retail Marketers, adoption of the Proposed Settlement without these modifications would run contrary to the public interest and to the Restructuring Act because the resulting SOS product and pricing would discourage shopping and would, therefore, prevent the development of retail competition in Delaware.[21]

47. Regarding the Retail Marketers' first point, the Proposed Settlement requires the eleven GS-T (transmission-level) industrial customers to take HPS, allows the larger GS-P customers (with interval meters) to choose HPS (or default to FPS), and requires all other SOS customers to take FPS. The Retail Marketers argue that more customers should be restricted to HPS because HPS is more responsive to market conditions than FPS and because such a restriction would benefit competition by forcing those customers who wanted a fixed price service to switch to a competitive supplier. (RM Br. at 7-8.) In response, the DPA makes the following pertinent observation:

***13** Although Select argues that HPS provides better price signals to customers, Select admitted that it has no Delaware customers taking HPS. It is ironic that Select is promoting implementing HPS in Delaware, even though none of its customers in Delaware take HPS. (Tr. 592.) Clearly, Select does not need DP&L to offer an HPS so that it can be put on a level playing field with DP&L because Select itself has no customers on HPS. Select's proposal to increase mandatory HPS appears to be simply a ploy to drive customers away from SOS. DPA witness Crane explained in her testimony that it would be Select, and not Delaware ratepayers, who would benefit under Select's proposal.

In addition, even if further restricting SOS FPS somehow benefited competition, any such benefit is outweighed by the interests of the affected customers who wish to remain on SOS but who seek the price stability of a fixed price service. After all, even the DEUG witness, who supports HPS for large sophisticated customers, noted that some large customers may not find HPS attractive 'because of its volatility, which can create budgeting chaos and uncertainty ....' (Ex. 4 (Rosenberg) at 14; Delmarva Br. at 26.)

48. Regarding the Retail Marketers' second point, the RARM consists of Delmarva's incremental cost of providing SOS, which will be determined in Delmarva's upcoming distribution rate case (and which will be subject to a true-up), plus a $2.75 million return component. The Retail Marketers argue that without placing a number figure on the incremental costs in this proceeding, and without evidence to show that the $2.75 million actually covers Delmarva's cost of capital associated with incremental SOS investment, adoption of these terms would not be legally sustainable, because they are not based on substantial evidence. (Retail Marketers Br. at 13-20.)

49. First, the Settling Parties' witnesses testified that the proposed RARM cost components will cover Delmarva's incremental costs and that the proposed return will satisfy the statutory requirement for a 'reasonable' retail margin. (Ex. 3 (Schaub) at 4; Ex. 8 (Dillard) at 9; Ex. 6 (Crane) at 12; Tr. at 489 (Crane); Ex. 4 (Rosenberg) at 2-3.) This expert testimony certainly constitutes record evidence in support of these terms. Second, while it can shown that Delmarva's litigation position (now espoused by the Retail Marketers) included somewhat larger profit margins, that is not the same as establishing that the profit margins reflected in the Proposed Settlement are not adequate or somehow fail a statutory requirement by not encouraging competition. Moreover, as argued by Delmarva, the parties contesting a settlement in Delaware do not have the right to a full trial on their issues.[22] Instead, the adjudicator of a contested settlement need only know enough about the merits of the settled issues and the identity of the parties to the settlement to be able to evaluate the settlement.[23] (Delmarva Br. at 29-30.)

50. Furthermore, even if the Commission fully litigated Delmarva's incremental cost of providing SOS and its associated cost of capital, complete with cost studies and cost of capital expert testimony, the parties' positions would still diverge substantially (consistent with their self-interests) and determination of the 'correct' numbers would remain elusive. After all, the parties' litigated positions would depend largely on their views of cost allocation and risk valuation, over which experts often (and inevitably) disagree. As such, avoiding the considerable cost of a fully litigated proceeding, which would carry uncertain benefit, further supports a conclusion that adoption of the Proposed Settlement is in the public interest.

51. Premcor's objection is based primarily on the fact that it believes that Premcor should not pay for the cost of a system that it is not currently using. (Staff Br. at 23-24.) But as Mr. Fuess conceded at the evidentiary hearing, if in the future Premcor's load serving entity ('LSE') was no longer qualified as an LSE by PJM, it 'would probably have to fall back to Delmarva.' (Tr. at 567.) As explained by Delmarva witness Schaub, Delmarva is obligated to provide supply to Premcor under HPS at any time should Premcor request Delmarva to do so. (Tr. at 399.) The costs that Premcor will be responsible for are the costs of setting up the hourly billing system, which will exist whether or not Premcor takes the service initially or not. (Tr. at 399-400.) For these reasons, Premcor is responsible for such costs and the Commission should not reject the Proposed Settlement on the basis of Premcor's objection.

VI. RECOMMENDATIONS

52. In summary, and for the reasons discussed above, I propose and recommend to the Commission the following:

***14** A. That the Commission find the attached Proposed Settlement ('Attachment A ') to be in the public interest and in compliance with state law and, therefore, adopt it as a resolution of the Stage 2 issues in this docket; and

B. That the Commission initiate Stage 3 of this docket for the purpose of selecting the wholesale providers for SOS and determining the post-May 2006 SOS prices, in accordance with the procedures and pricing mechanisms set forth in the Proposed Settlement.

Respectfully submitted,

William F. O'Brien William F. O'Brien Hearing Examiner

Dated: September 1, 2005

ATTACHMENT 'A'

PROPOSED SETTLEMENT

On this day, July 14, 2005, the undersigned, all of whom together are the 'Parties' or 'Settling Parties,' hereby propose a complete settlement of all issues that were raised in this proceeding, except as specifically reserved for a subsequent proceeding or phase of this proceeding.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On October 19, 2004, this proceeding was initiated by Delaware Public Service Commission ('DPSC' or the 'Commission') Order No. 6490. The Order discusses certain statutory requirements and prior cases involving the provision of standard offer service to customers of Delmarva Power & Light Company ('Delmarva'). The Order also established a process under which various major policy issues would be resolved in an initial phase of the proceeding, while other policy and technical issues would be resolved in one or more subsequent phases of the proceeding. On March 22, 2005, in Order No. 6598, the Commission reviewed a report and recommendation presented by the Staff of the Commission ('Staff'), which report and recommendation was the subject of written comments and oral argument presented by interested parties to the proceeding. As described more thoroughly therein, Order No. 6598 resolved certain major policy issues. Order No. 6598 also outlines the history of this proceeding through March 22, 2005.

Subsequent to March 22, 2005, the parties to the proceeding have met on several occasions in informal workshops, open to the public, to discuss remaining issues in the proceeding. Various parties have also met privately to attempt to reach a settlement of some or all of those remaining issues.

A procedural schedule was approved by the Hearing Examiner, modified to provide more time for settlement discussions.

The Division of the Public Advocate ('DPA') made a timely notice to participate in the proceeding. In addition to the Company, Staff, and DPA, other parties to the proceeding as of July 7, 2005 are: the Delaware Energy Users Group ('DEUG'), PROPOSED SETTLEMENT Energy Resources & Trade LLC, Select Energy, Inc., Strategic Energy, LLC, Constellation Energy Commodity Group, Inc. and Constellation New Energy, Inc., Washington Gas Energy Services, Inc., PEPCO Energy Services, Inc., Conectiv Energy Supply, Inc., the Delaware Electric Cooperative, and PJM Interconnection, LLC.

II. SETTLEMENT PROVISIONS

A. Definitions.

***15** 'Actual incremental costs' are defined as additional costs incurred by Delmarva for reasons other than waste, bad faith, or an abuse of discretion, as a result of providing FP-SOS and HPS (including any 'Inc' amounts) that are not included in distribution rates. For example, such actual incremental costs include: uncollectibles that are not being recovered in Delmarva's distribution rates; consultants; procurement processes; incremental system costs; bill inserts for education; and transactions costs; and the cash working capital revenue requirement.

'Customer' shall have the same meaning as in the Delmarva Delaware retail tariff.

'Customer group' or 'customer grouping' is used herein to identify and group customer classes that will be treated similarly. For purposes of this settlement, customers within the R, R-TOU, R-TOU-SOP, SGS-ND, OL, ORL, X classes

and that portion of the load of customers with separately metered space heating and separately metered water heating comprise one customer group. Customers within the MGS-S class are a separate customer group. Customers within the LGS-S class are a separate customer group. Customers within the GS-P class are a separate customer group. Customers within the GS-T class are a separate customer group.

FP-SOS means fixed price standard offer service.

Full Requirements and Full Requirements Service shall have the meanings set forth in the form of Full-Requirements Service Agreement ('FSA').

Full Requirements Costs shall mean the total of all amounts paid to the supplying counterparties of FSAs.

HPS means hourly priced service, a form of standard offer service.

Inc, Inc load, Inc service and similar terms refer to the incremental service and loads to be supplied by Delmarva pursuant to a volumetric risk mitigation mechanism that operates with respect to customers in the LGS-S and GS-P class when there has been a defined threshold increase in load associated with customers from these classes beyond the obligations assumed by counterparties to FSAs.

R & Small C&I FP-SOS means the fixed price SOS that is available to customers served under service classifications R, R-TOU, R-TOU-SOP, SGS-ND, OL, ORL, or X, and separately metered space heating or water heating load.

SOS or Standard Offer Service is as defined in 26 Delmarva. C. § 1001 (15).

Year 1 means the thirteen month period of May 1, 2006 — May 31, 2007.

Year 2 means June 1, 2007 — May 31, 2008; subsequent Years are measured from June 1 of a given year through May 31 of the following year.

B. Standard Offer Service Availability.

1. Delmarva shall provide SOS to all classes of retail customers. As of May 1, 2006, an FP-SOS offering will be available for all customers other than customers served under the GS-T class. As of May 1, 2006, the form of SOS available to GS-T customers will be HPS.

2. In addition, GS-P customers will be eligible for HPS if: i) the GS-P customer makes an affirmative election to take HPS rather than FP-SOS; ii) such election is made by the GS-P customer no later than 45 calendar days prior to the date on which the first bid round occurs to provide Delmarva with supply for its GS-P customers taking FP-SOS; iii) the GS-P customer has an interval meter or will pay to have such a meter installed prior to the beginning of its HPS. No later than 30 calendar days prior to the deadline for making such an election, Delmarva shall send a letter to each GS-P customer informing such customers of the option to elect HPS and instructions as to how to make such an election. Such election shall be made annually and shall be effective for the entire year when made. The election shall be operative during any part of a Year during which the GS-P customer is receiving SOS, including a GS-P customer returning to SOS after previously receiving a supply service from a competitive retail supplier. An election or failure to make an election shall not affect the right of a GS-P customer to obtain its supply service from a competitive retail supplier. The failure to make an election in any given year will mean that a GS-P customer currently opting for HPS will be deemed to have elected HPS for the coming year, and a GS-P customer currently opting for FP-SOS will be deemed to have elected FP-SOS for the coming year.

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C. Obtaining SOS Supply at Wholesale.

1. Request For Proposals Process.

***16** Delmarva shall obtain the Full Requirements necessary to provide FP-SOS through a competitively bid, Request for Proposals ('RFP') process. The contemplated RFP process will be described more fully in a Bid Plan that will be developed by Delmarva and submitted separately for review by the parties to this proceeding and for Commission approval. The elements of the Bid Plan are described more fully in Appendix A, which is incorporated herein by reference and made a part of this Settlement. As set forth therein, the RFP process will include oversight by a consultant selected by the Commission and accountable to the Commission, but paid by the Company, who will be permitted physical access during all portions of the process including the days that bids are received and evaluated. The DPA and its consultant will also be permitted such access. The Staff and DPA consultants will be required to execute a confidentiality agreement that is substantially similar to the form set forth in Appendix B. Such confidentiality agreement will not bar the consultant(s) from providing a report on a confidential basis to the Commission regarding the RFP process and evaluation of bids that includes the consultant's conclusions or recommendations to the Commission ...The Settling Parties recognize that there may be minor modifications that occur with respect to dates or procedures described in Appendix A or the Bid Plan. The Company will inform the Staff and DPA consultants of such minor modifications prior to the date that the consultant(s) report(s) would be made to the Commission.

2. Length of Contracts.

In Year 1, contracts with wholesale suppliers to serve the R & Small C&I FP-SOS load shall be executed such that one-third (1/3) of the projected load for Year 1 will be served under a thirteen month contract, one-third of the projected load for Year 1 will be served under a twenty-five month contract, and one-third of the projected load for Year 1 will be served under a thirty-seven month contract. In Year 2, only three-year contracts will be bid to serve one-third of the projected Year 2 load. The other two-thirds of the Year 2 projected load (which includes 2/3rds of the load growth relative to Year 1), shall continue to be served pursuant to the second year of the Year 1 two-year contracts and the second year of the Year 1 three year contracts. In Year 3 and thereafter, only three-year contracts will be bid out.

In Year 1, thirteen-month contracts with wholesale suppliers to serve the FP-SOS load of customers within the MGS-S, LGS-S and GS-P classes shall be executed to serve 100% of the projected load for Year 1. In Year 2 and thereafter, one-year contracts shall be executed. Separate contracts shall apply with respect to each of the customer groups MGS-S, LGS-S and GS-P.

The supply for HPS and for the 'Inc' service described below shall be obtained by Delmarva through PJM with energy procured at the Delmarva zonal real-time LMP as determined by PJM, capacity obtained through PJM's short-term capacity markets, short-term bilateral contracts, or at the capacity deficiency rate, or through any substitute capacity construct implemented by PJM, and ancillary charges as billed by PJM. The foregoing recognizes a degree of discretion on the Company's part with respect to how capacity is procured and the Company will exercise that discretion reasonably in an attempt to keep capacity costs in line with PJM prices for capacity available at the time a decision to procure capacity is made. Appendix C contains additional provisions relating to the HPS.

3. Pricing of Supply Contracts.

***17** The Bid Plan shall include instruction that bidders are required to bid for FP-SOS with a flat per kwh bid, which may vary by season, but would not change over the length of the contract, including those contracts that are for terms greater than one year.

D. Computation of Retail Supply Rates Generally.

1. The rate components for retail supply rates shall be as follows: a) the Full Requirements Costs incurred pursuant to the Full Requirements contracts entered into to serve the FP-SOS load for the particular customer class or grouping or, alternatively, the costs of acquiring energy, capacity and ancillary services for those customers receiving HPS; and b) a reasonable allowance for retail margin ('RARM'). As detailed below, retail rates for customers receiving FP-SOS or HPS will also include retail charges designed to recover, on an aggregate basis, FERC-approved transmission and ancillary charges and any other PJM charges and costs incurred by Delmarva associated with the SOS obligation. In addition, retail rates for customers receiving FP-SOS or HPS will be charged applicable taxes and any other cost element directly related to either the FP-SOS or the HPS that may be identified in a subsequent proceeding and approved by the Commission for recovery.

2. The Full Requirements Costs component of the Retail Supply rates for each customer grouping receiving FP-SOS shall be established to recover fully, but not overcollect, the costs of the Full Requirements contracts entered into to serve the FP-SOS load for such customers. The Full Requirements Costs component of the Retail Supply rates for FP-SOS load shall remain fixed during each Year, absent a Commission order finding that exceptional circumstances exist to warrant a rate change during a particular Year. Retail Supply rates for GS-T customers and those GS-P customers that have elected HPS, shall be charged monthly based on the changes in costs incurred hour-by-hour to serve such customers. These monthly charges are to recover fully, but not overcollect, the costs incurred to obtain capacity, energy, and ancillary services for HPS customers.

3. Algorithms for each customer grouping shall be developed by Delmarva and will be made available to prospective bidders. These algorithms will show how a per kwh bid price for FP-SOS will be translated into retail rates for each customer class or type of customer. Staff, DPA and the Commission will have an opportunity to review and comment on the algorithms prior to their being finalized. This rate translation process shall be performed to retain to the maximum extent feasible the currently-authorized rate design differences applied to a particular customer class or type of customer to reflect seasonality, time-of-use, or demand/commodity components. Nothing herein precludes a Settling Party from proposing in some future proceeding rate design changes that would be implemented prospectively only. The Settling Parties agree, however, that even prospective rate design changes may need to be phased in so as not to significantly change the bases upon which a wholesale supplier may have bid for a three-year contract.

4. The RARM is comprised of the following components: a) incremental expenses incurred: i) to provide FP-SOS and HPS; ii) to administer the Volumetric Risk Mitigation (VRM) mechanism described below and applicable with respect to FP-SOS customer load; and iii) carrying costs on Cash Working Capital (CWC) for FP-SOS and HPS; b) $2.75 million per 12 month period, which, for the Year 1 and 2 rates, is deemed to include any carrying costs on incremental capitalized costs associated with providing FP-SOS and the VRM mechanism, but does not include the separately calculated carrying costs for capitalized billing system software costs needed to bill and track HPS costs and revenues and also does not include any return on investment that is removed from distribution rates as supply related; and c) for GS-T customers and those in the GS-P class that have made an election for HPS, the allocable share of the above categories plus an amortized amount, including carrying costs on the unamortized balance of the capitalized billing system software costs and interface systems needed to bill and track HPS costs and revenues. For illustrative purposes only, Appendix D shows how an illustrative amount of such costs would be recovered through amortization with carrying costs at an illustrative level.

5. In the event that investment is removed from distribution rates in a future distribution base rate proceeding as supply related, the RARM shall include a fourth component comprised of the rate necessary to recover the same revenue requirement components as would have been applied if such investment were to have remained in distribution rates (*e.g.*, depreciation expense, return on investment grossed-up for taxes, etc.) Such an RARM adjustment shall be made without regard to any other cost component and no Settling Party shall take a position that this fourth cost component should be reduced or offset in any way by the $2.75 million figure or some other RARM cost component. Nothing herein precludes

a Settling Party from asserting that the supply-related costs as removed from distribution rates should not be recoverable in the supply component of rates because such costs were incurred in violation of the statutory standard for recovery.

E. Setting Year 1 Retail Rates.

1. The incremental costs of providing SOS shall be initially established as follows.

***18** a) A lead lag study shall be performed by Delmarva and reviewed by the parties to determine the CWC requirements. The lead/lag study shall be performed in the following manner:

(1) Revenue lag will be calculated using the following components:

(i) mid-point of the service period to meter reading date;

(ii) meter-reading date to bill-rendered date; and

(iii) bill-rendered date to collection date.

(2) Lag in payment for electric supplier bills will be based upon the payment terms set forth in the FSA contained in the Bid Plan as approved by the Commission.

(3) Lag in payment of incremental costs will be determined separately for each category of cost.

(4) Lag in payment of all applicable taxes will be determined.

b) The calculation of cash working capital revenue requirement shall use the Delmarva's total weighted cost of capital grossed up for income taxes. The carrying costs on CWC shall be set to equal the overall rate of return that is established in Delmarva's upcoming distribution base rate case.

c) Delmarva will apply its grossed-up cost of capital to the results of its lead/lag study to determine cash working capital revenue requirements, in mills per kWh, for each customer group.

2. Delmarva shall estimate its other incremental capital costs and its other incremental expenses (including the reasonable costs incurred to administer the Volumetric Risk Mitigation (VRM) mechanism) and will provide to the Settling Parties the workpapers and other documentation underlying such estimates, including listing cost centers or Internal Order numbers that are or will be used to collect and track costs. Depreciation expense for the incremental capital costs will be based on a five year life unless a longer life is warranted for the particular type of equipment or asset involved. To the extent not deemed to be included pursuant to paragraph D.4 above, a return on incremental capital costs shall be set to equal the overall rate of return grossed up for income taxes that is established in Delmarva's upcoming distribution base rate case. Notwithstanding any other provision herein and irrespective of whether or not included in Delmarva's estimate of incremental capital costs or other incremental expenses, the incremental costs of providing SOS shall include any costs that are removed from Delmarva's distribution rates case in a Delmarva base rate proceeding if the basis for such removal is that such costs are supply-related.

3. Except with respect to GS-T customers and those GS-P customers who make a timely election for HPS, a 0.6 mill per kwh charge for each customer class or type of customer will be established initially to collect the net of the $2.75 million per 12 month period figure referenced in section D.4.b) minus the collections from GS-T customers and electing GS-P customers as set forth in the next sentence. GS-T customers will be charged instead a per-month charge of $400, which shall apply irrespective of whether the GS-T customer takes HPS or receives supply from a competitive retail

supplier. GS-P customers who make a timely election for HPS will be charged instead a per-month charge of $150, which shall apply irrespective of whether the electing GS-P takes HPS or receives supply from a competitive retail supplier.

4. A fixed annual amount of $175,000 shall be established as the costs referenced in section D.4.c). For GS-T customers and for GS-P customers who opt into HPS service prior to the beginning of Year 1, a fixed rate per month based on kW of PJM Peak Load Capacity will apply irrespective of whether or not the customer takes HPS.

***19** *F. Retail Rates for Transmission, Ancillary Services, HPS Capacity and HPS Energy.*

1. Effective June 1, 2006, and for each Year thereafter commencing on June 1, 2006, retail transmission rates shall be established such that, on an aggregated basis, such rates recover the same revenue as is charged by PJM to Delmarva for such transmission services. The Company shall endeavor to develop systems that will permit it to file and put into effect as early as June 1, 2006 and no later than June 1, 2007, retail transmission rates that are designed using the same formula rate structure, billing determinants, and other rate mechanisms as those reflected in the PJM transmission rates charged to Delmarva. The Parties recognize that a number of billing system and interface system modifications are already scheduled to accommodate regulatory requirements in other jurisdictions and to implement provisions in this Settlement. In the event that such system modifications are made, tested, and available for use prior to June 1, 2007, Delmarva shall notify the Commission and the Settling Parties and propose a prospective rate design change with an effective date prior to June 1, 2007.

2. Effective June 1, 2006, and for each Year thereafter commencing on June 1, 2006, retail ancillary rates shall be established such that, on an aggregated basis, such rates recover the difference, if any, between charges by PJM to Delmarva for ancillary services and the amounts paid by the wholesale suppliers on Delmarva's behalf or directly to PJM for ancillary services pursuant to the FSA.

3. Special Transition Rule for GS-T Customers. Effective June 1, 2006, GS-T transmission and ancillary service rates shall be redesigned as set forth above in sections F.1 and F.2. In the event that Delmarva has not at that time made the computerized system modifications necessary to implement such a rate design change, Delmarva shall implement procedures to bill GS-T customers manually.

4. To the extent not already recovered through PJM Network Integration Transmission Service charges and to the extent in effect when retail rates are reset pursuant to this Settlement, any existing PJM surcharges and any future surcharges assessed to network transmission customers for PJM-required transmission enhancements pursuant to the PJM Regional Transmission Expansion Plan, or for transition costs related to elimination of through-and-out transmission charges and other FERC-mandated changes in transmission rate design, will be included in the retail charges pursuant to this Settlement. Pursuant to the contemplated FSA, the wholesale suppliers shall bear the risk of any other changes in PJM products and pricing during the term of their FSAs, including changes in ancillary service charges or new ancillary service charges. In no event will Delmarva bear the risk of any changes in regulation or PJM rules related to such costs or charges.

5. In the event that there are any other new FERC-approved PJM transmission charges, or other new PJM charges and costs charged to network transmission customers, that Delmarva or any wholesale supplier believes should be recovered through retail rates because they are directly related to Delmarva's SOS obligations, then:

***20** a) Delmarva will file with the Commission, and provide notice to all Parties, a request for approval to recover such new charges through its retail rates. The wholesale supplier that brings the issue to Delmarva's attention will be required to intervene before the Commission. The Commission will resolve Delmarva's request on an expedited basis.

b) The wholesale supplier will bear the cost of all new PJM charges and costs that the Commission determines may not be recovered in rates by Delmarva. In no event will Delmarva bear the risk of any changes in regulation or PJM rules

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related to such costs or charges. Also, in no event shall any PJM charges to other than network transmission customers be recovered through the Utility's retail transmission rates for service under the Settlement, except to the extent (if any) provided therein.

6. Retail charges for capacity for HPS customers shall be charged based on each customer's annual capacity obligation in accordance with (i) PJM's method of calculation, and (ii) PJM's monthly capacity auction closing prices for the applicable month, unless it is impracticable to obtain the full amount of capacity needed through the monthly capacity auction, in which case, the costs of obtaining capacity or capacity deficiency amounts would be reflected in the retail price. As an illustrative example, it is recognized that in the event of an unexpected competitive retail supplier default, a customer may be returned to Delmarva for HPS at a time when it would be too late to obtain capacity in the monthly capacity auction. Additionally, while the parties contemplate the use of the monthly capacity auction as the source of capacity for HPS customers, the parties recognize that if PJM eliminates the monthly capacity auction or significantly modifies the method by which capacity obligations are determined or met, this provision will be deemed to be modified as necessary to reflect those new PJM methods.

7. With the exception described in the next two sentences below, retail charges for energy for HPS customers and any 'Inc.' load shall be charged based on the PJM real time LMP for the Delmarva Zone. Customers taking HPS may elect, in accordance with PJM rules, to pay the nodal price for hourly energy; provided, however, that either PJM must charge Delmarva for such an electing customer's load at the nodal price for hour energy or that Delmarva will be permitted to recover any difference between the nodal price and the price charged to Delmarva via the annual true-up proceeding. The nodal price is determined by multiplying the customer's hourly load, adjusted for the applicable loss adjustment factor for the customer's service voltage level, with the hourly integrated LMP, or its successor, as determined and reported by PJM, at the specific bus or busses serving the customer's load.

G. Resetting of Retail Rates and True-Up Mechanisms For Year 2 and Thereafter.

1. As of the start of Year 2 and each Year thereafter, retail rates shall be reset to reflect:

***21** a) changes in projected Full Requirements Costs based on the Full Requirements Service Agreements that will be effective for such Year.

b) an adjustment to the Full Requirements Costs component to collect or return over the subsequent Year any differences between amounts billed to customers for FP-SOS and HPS (including any 'Inc.' amounts) and amounts paid to wholesale suppliers and PJM to provide the Full Requirements of FP-SOS and HPS (including any 'Inc.' supply) plus interest on the differences at a rate equal to the overall return established in Delmarva's next distribution rate case. Such differences shall be tracked on a monthly basis by customer grouping and would be subject to audit. The collection or return of differences plus interest shall be by customer grouping and thus, it is recognized that there may be circumstances in which one customer group is receiving a prospective downward adjustment while another group of customers is receiving a prospective upward adjustment. In each Year, the differences taken into account shall be based on the most recently available actual data. In the event that the estimated year-end balances become significant during a Year, Delmarva retains the right to request that the Commission approve an interim true-up to be effective prior to the end of the Year. It is the Settling Parties intent that HPS customers shall not be required to pay for costs that are related solely to the provision of FP-SOS.

c) Transmission and ancillary costs associated with providing SOS.

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2. The Year 2 rates shall also include changes to the RARM amounts to remove non-recurring RARM costs reflected in the Year 1 rates, an annualized amount of RARM based on the then-known actual RARM costs incurred during Year 1, and known and measurable changes to RARM costs that will be incurred during Year 2.

3. Approximately four months after the start of Year 2, Delmarva shall submit documentation in this docket with copies to the Settling Parties, proposing revised rates to reflect a true-up of actual RARM costs incurred during the period between the start of this proceeding and the end of Year 1 and amounts billed to FP-SOS and HPS customers, *i.e.*, a true-up of costs and volumes. The differences plus interest (at a rate equal to the overall return established in Delmarva's next distribution base rate case), shall be collected from or returned to FP-SOS and HPS customers through a prospective rate adjustment over a time period to be established in that proceeding. Additionally, the millage rate charged to FP-SOS customers to collect the $2.75 million portion of the RARM, shall be reset in that proceeding based on actual annualized Year 1 (and known and measurable changes) of quantities of FP-SOS to be supplied annually. It is contemplated by the Settling Parties that the reset millage rate will be a single rate applied per kwh to all customers receiving FP-SOS in Year 2 and thereafter until changed. The fixed charge(s) for HPS customers designed to recover part of the $2.75 million portion of the RARM shall not be reset in that proceeding.

4. In the Year 2 proceeding described in section G.3., all Parties reserve the right to propose alternative methods for resetting rates if the procedures outlined in this subsection G would otherwise result in an extraordinary burden or unduly discriminatory result on customers. The following examples are intended to be illustrative but not exclusive examples of such events. For example, if rates would otherwise be reset such that virtually all the $2.75 million figure referenced above in section D. 4. b) were to be charged to residential customers because virtually all non-residential customers had chosen a competitive retail supplier in Year 1, parties could propose an alternative mechanism for Delmarva to recover the $2.75 million. As another example, if significant annual expenses were incurred associated with software licensing or administering the HPS, but only one or no customers were taking HPS, parties could propose an alternative mechanism for Delmarva to recover those expenses.

5. After the conclusion of the proceeding described above, there would be no additional changes to rates to reflect true-ups of RARM costs and FP-SOS and HPS volumes in any prior period, or to reset the millage rate to collect the $2.75 million portion of the RARM. Prospective changes in rates to reflect changes in RARM amounts and FP-SOS and HPS volumes, however, may be proposed at any time by any party. The proposed change in the RARM component of retail rates shall be considered by the Commission in a docketed proceeding that will be limited to a review of RARM components and collections of such components. The proposed charge shall go into effect within 60 days of filing or thereafter if a later date is proposed by the Company. Any change in such component of retail rates that goes into effect prior to a final order of the Commission shall be effective subject to refund including interest. In such a proceeding, no Settling Party will raise and all Settling Parties participating in the proceeding will not support any positions taken that such a rate change is inappropriate due to changes in non-RARM costs, revenues, or other factors (including cost of capital), or any costs or revenues associated with transmission, ancillary, or distribution services.

6. Notwithstanding anything that could be read to the contrary in sections G. 4 or 5 above, to the extent that the FP-SOS volume for the R & Small C&I customer group drops by more than 40% relative to the period June 1, 2006-May 31, 2007, any party may petition for prospective changes with respect to the recovery of a share from that group of the $2.75 million portion of the RARM. The form of such petition and the relief sought shall be in the discretion of the petitioning party and could, but is not required to, include proposals to reallocate to other customer groups the share of the $2.75 million charged to the R & Small C&I customer group, to modify how that share as allocated to the R & Small C&I customer group is recovered from that group, or to reduce the overall $2.75 million figure by some amount. Other parties may take any position with respect to such a petition in their sole discretion.

H. Volumetric Risk Mitigation Mechanism.

1. Subject to Delmarva's customer enrollment rules and tariffs and except as provided herein, effective May 1, 2006, there shall be no 'minimum stay' requirements for customers in any customer class that precludes a customer from obtaining service from a competitive retail supplier and returning to FP-SOS service and then subsequently obtaining service again from the same or another competitive retail supplier. If a GS-P customer elects to take HPS in a given Year and then takes service from a competitive retail supplier, any return to Delmarva's service shall be to the HPS during that Year. No volumetric risk mitigation mechanism is established herein with respect to customers other than those receiving FP-SOS that are within the MGS-S, LGS-S and GS-P customer classes.

***22** *2. Load Following Obligations and Exceptions.*

a) As will be more specifically set forth in a Full Requirements Service Agreement ('FSA') that is currently under development, each winning bidder ('Seller') will be required to execute the FSA (a 'Transaction') to supply FP-SOS and will be awarded a 'Bid Block' based on the Capacity Peak Load Contribution ('Capacity PLC'). Delmarva shall determine the Capacity PLC, stated in megawatts, associated with each Bid Block in each Transaction ('Base PLC Per Bid Block') as of the date of execution of each FSA. Subsequent to the determination of the Base PLC Per Bid Block, and on each Business Day (as defined in the FSA) thereafter, Delmarva shall determine the Capacity PLC, stated in megawatts, associated with each Bid Block in each Transaction ('PLC Per Bid Block'). The obligations of each Seller will include providing the Full Requirements of that Bid Block, including load following obligations, except as provided below and more specifically in the FSA.

b) Each Seller shall be obligated to provide full requirements service that follows load up to five (5) megawatts above the Base PLC Per Bid Block. If, on any day, the Capacity PLC of a Bid Block is greater than the Base PLC plus 5 MW an Inc Load of Capacity PLC less Base PLC Per Bid Block shall be triggered. When an Inc Load is triggered, the Seller will supply the full requirements service that follows load up to the Base PLC Per Bid Block plus 5 MW and Delmarva will supply the full requirements service that follows the Inc Load above that level. If, on any subsequent day, the Capacity PLC is less than or equal to the Base PLC plus 5 MW, the Inc Load will be turned off, and the Seller will again be obligated to provide the full requirements service that follows load up to five (5) megawatts above the Base PLC Per Bid Block.

c) Each Seller's Base PLC Per Bid Block for FP-SOS supply to MGS-S, LGS-S and GS-P customers shall be reduced during the term of the FSA under the following circumstances: If on any Business Day when the PLC Per Bid Block is equal to or less than the Base PLC Per Bid Block minus three (3) megawatts, a new Base PLC Per Bid Block shall be established which shall be equal to the Base PLC Per Bid Block in effect on the day prior to such event, minus three (3) megawatts for each whole multiple of three (3) megawatts that the PLC Per Bid Block is below the prior day Base PLC Per Bid Block. Such new Base PLC Per Bid Block shall replace the prior Base PLC Per Bid Block from the date of such adjustment forward. The intent of this provision is as follows: To the extent that 3 or more MW of PLC Per Bid Block within any of the MGS-S, LGS-S or GS-P classes switch to a competitive retail supplier, the Seller's present and future obligation to provide supply to Delmarva for its FP-SOS to such customer class is correspondingly reduced and, thus, the Seller can, but is not required to, unwind any hedges or commitments that it may deem to be in excess of its present and future obligations.

***23** d) Any Inc. load for MGS-S, LGS-S and GS-P customers shall be supplied by Delmarva and obtained through PJM. The energy shall be procured at Delmarva's zonal average LMP. Capacity shall be obtained through PJM's short-term capacity markets, short-term bilateral contracts, or at the PJM capacity deficiency rate, or through any substitute capacity construct implemented by PJM. Ancillary services costs will be as charged by PJM. A millage amount per kwh equal to that applied to the same type of customer taking FP-SOS will also be charged. The differences in costs relative to the Full Requirements Cost component of rates will be recorded and tracked in a deferral account that will be returned or recovered through the annual adjustment to the Full Requirements cost component mechanism described in section G. 1. b) above; provided, however, if the accumulated differences exceed 5% of the monthly Full Requirements Costs, then the Company may make an early filing to adjust rates prior to the beginning of the next Year.

e) The reasonable costs of administering this volumetric risk mitigation mechanism shall be recoverable in the rates charged to MGS-S, LGS-S and GS-P customers taking FP-SOS as part of the RARM component.

f) As more specifically described in the form of FSA, if a winning bidder subsequently defaults on its obligations, non-defaulting signatories to an FSA will be offered the opportunity to assume such obligations. If such obligations are assumed, the obligations of the assuming signatory will be adjusted accordingly.

I. Reports and Information Regarding Bidding and Bid Results

In addition to any restrictions that may be set forth in a confidentiality agreement, information concerning the outcome of the supply procurement may be released by the Company, DPA, Staff, and the Commission subject to the following restrictions and in the following manner:

1. All customers eligible for FP-SOS will be informed of the retail prices and the price to compare for the service for Year 1 at least two (2) months prior to the beginning of that Year. If it is not practicable to provide such notice, Delmarva shall file with the Commission and serve upon the Settling Parties notice of that fact, the reasons for the delay, and the expected date for the provision of such information. For each Year thereafter, the customers will be notified of the retail prices and price to compare as they are notified of any other rate change, *i.e.* in bill inserts within 60 days of the rate going into effect.

2. Any report concerning each year's supply procurement is not to be released until at least one month after the completion of bidding for the last tranche of that year's procurement cycle for Delmarva. Such report may list all the wholesale suppliers who were awarded supply contracts, but would not list individual bid prices or quantities. This list of winning wholesale suppliers will then be public information for all purposes.

3. If the Delaware Governor or a committee of the General Assembly requests that the Commission, Staff, the Company, or DPA release the names of the individual wholesale bidders that will be providing FP-SOS, that information shall be provided with notice that the information is confidential pursuant to this Settlement, provided however that no winning individual wholesale bidder's name will be released until at least one month after the final tranche is awarded and the Commission has approved the awards for that tranche.

4. Annually, a report may be issued by either Staff or Delmarva that shows, separate from all supplier-identifying information, the winning bid prices (expressed in dollars per MWh for the contract year) for each customer grouping. This list of winning bid prices will then be public information for all purposes.

5. If the Commission so orders, after notice and a hearing at which parties opposing release will be allowed to state the reasons for their opposition, a list which matches winning wholesale suppliers' names with their winning bid prices may be made public.

6. Any information about the supply procurement results that does not identify individual wholesale bidders, provide supplier-specific information, or disclose any individual bid prices may be made public, after all tranches of bidding for that year of FP-SOS service are completed, by the Staff, the Commission, or DPA at their discretion. Examples of such information that can be released include, but are not limited to, the total number of bids submitted, or the range in price between the lowest and the highest bids submitted.

7. In the event that a FSA with a wholesale supplier is terminated, the Company, Staff, DPA, and/or the Commission may opt to disclose any confidential information previously provided by that supplier with respect to the terminated FSA. Any information so disclosed will no longer be treated as confidential pursuant to this Settlement.

8. To the extent any information regarding the names of winning bidders, quantities purchased, or prices paid is required by law or regulation to be provided on a non-confidential basis to a federal or state regulatory agency, including but not limited to FERC Form 1 reports or SEC reports, then such disclosure shall not be deemed to violate this Settlement.

III. MISCELLANEOUS

A. Delmarva shall provide Staff and the DPA monthly data by customer class showing number of customers and quantities (by peak load obligation) served by competitive retail suppliers in the aggregate. Staff shall, within a reasonable amount of time, post the data on the Commission's web page.

B. The Commission, or if Staff requests, the Company, will procure independent consultants, paid by the Company, who will be responsible for monitoring all aspects of the procurement of the FP-SOS services described in this Settlement.

***24** 1. These consultants will be selected by, will take their direction from, and will provide their consultation and work products to, the Commission or its Staff.

2. These consultant costs will be included in the incremental costs that Delmarva will recover through the RARM described in the Settlement.

3. The consultants will provide the Commission with a final report as to each supply procurement and award. Copies of each report with appropriate redactions will be forwarded to each Party who executes a confidentiality agreement approved by the Commission.

C. Provisions in this settlement that tie a return, a carrying cost, or interest to the overall return authorized in Delmarva's next distribution base rate case, shall be read to be modified to reflect any changes in overall return authorized in any subsequent distribution base rate proceeding that becomes effective while this Settlement is still in effect.

D. The FSA shall assign to the wholesale suppliers the responsibility to obtain and assume the risk and expenses of compliance of federal and state statutory or regulatory requirements that may be imposed with respect to renewable portfolio standards, green power initiatives, distributed generation, or new load control programs.

E. If at any time while FP-SOS, HPS, or 'Inc' supply is being provided by Delmarva, any additional price or cost elements beyond those specifically addressed in this Settlement that are directly related to that service and would be incurred by Delmarva, then Delmarva may file a request with the Commission (with notice to all the Parties) for approval of recovery of those costs and, to the extent the costs are found to arise from provision of the service and are approved by the Commission, the costs will thereafter be included in the service price.

F. Notwithstanding any other provision of this Settlement, Delmarva may at any time request Commission approval to make changes in the non-price terms and conditions of its tariffs.

IV. RESERVATIONS

A. This Settlement represents a compromise for the purposes of settlement and shall not be regarded as a precedent with respect to any ratemaking or any other principle in any future case. No Settling Party necessarily agrees or disagrees with the treatment of any particular item, any procedure followed, or the resolution of any particular issue in agreeing to this Settlement other than as specified herein, except that the Settling Parties agree that the resolution of the issues herein, taken as a whole, results in just and reasonable rates, that the disposition of all other matters set forth in the Settlement are in the public convenience, necessity and interest and that, with the disposition of all such matters as set forth herein, this proceeding should be terminated with an order approving the Settlement.

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B. The various provisions of the Settlement are not severable. None of the provisions shall become operative unless and until the Commission issues an order approving the Settlement as to all of the terms and conditions set forth herein without modifications or conditions. The Settlement shall be subject to waiver only by the unanimous written agreement of the Settling Parties. If any portion of this Settlement is modified, conditioned, or rejected by the Commission, the Settlement shall be considered null and void and each Settling Party individually reserves the right to proceed with the filing of testimony, briefs and evidentiary hearings as contemplated in the Commission's Orders in this proceeding. If the Settlement is rendered null and void by operation of this section III.B., the Settling Parties agree to enter into good faith negotiations to reach a new settlement. Once the Settlement has become operative under the terms of this section III.B., its terms may be revised or waived only by the unanimous written agreement of the Settling Parties or a subsequent valid order of the Commission.

C. Nothing in the Settlement shall be used to abrogate any existing or future contract for competitive retail electricity supply.

D. The headings, titles and captions of the Settlement and its various sections shall have no legal import or precedential value.

E. This Settlement may be executed in any number of identical counterparts, each of which when executed and delivered shall be an original, but all such counterparts shall constitute but one and the same instrument. Delivery by any party or its respective representatives of telecopied (counterpart) signature pages shall be as binding an execution and delivery of this Settlement by such party as if the other parties had received the actual physical copy of the entire Settlement with an ink signature from such party.

V. CONCLUSION

***25** IN WITNESS WHEREOF, intending to bind themselves and their successors and assigns, the undersigned parties have caused this Settlement to be signed by their duly-authorized representatives and the undersigned parties further recommend and urge the Commission to issue an order expeditiously approving this Settlement and making the requested findings and approvals set forth herein.

Randall V. Griffin Delmarva Power & Light Company Bruce H. Burcat Delaware Public Service Commission Staff G. Arthur Padmore Division of the Public Advocate Brian R. Greene Delaware Energy Users Group I. David Rosenstein Conectiv Energy Supply, Inc.

Footnotes

1 Delmarva's witness testified that the HPS is similar to MPSS, a currently-existing service classification in which Delmarva acquires the capacity and energy necessary to supply the load through short-term PJM markets rather than through the longer-term RFP process. The HPS energy price, like the MPSS energy price, is based on PJM's real time locational marginal pricing ('LMP ') delivered into the Delmarva Zone.

2 The purpose of the extra month in the initial contracts is to move from the May 1, 2006 start date for SOS in this proceeding to a PJM year, which commences June 1 of every year.

3 A VRM will be implemented for the large customer classes that receive the fixed price SOS (MGS-S, LGS-S and GS-P). This is in lieu of imposing a minimum stay requirement or a returning customer rule. It is designed to recognize that there are cost risks associated with customers departing from and then returning to fixed price SOS. To the extent that the fixed price SOS load per 50 MW block shrinks by 3 MW or more, the wholesale bidders' supply obligations will also be reduced. To the extent that the fixed price SOS load per 50 MW block increases by more than 5 MW, that incremental load will become Delmarva's responsibility to supply.

4 It is the method by which this 'allocable share' is determined that was the subject of the amendment to the Settlement Agreement. Both the original Settlement Agreement and the amendment assign the Delaware-retail share of the costs of the

billing system associated with the hourly priced service to GS-T customers and electing GS-P customers. The amendment uses a different mechanism than did the original Settlement Agreement for calculating each customer's share of those costs.

5 Although the term used to describe this SOS is 'fixed price,' the proposed settlement maintains existing seasonal and time of use rate differentials reflected in the current Commission-approved rates. Furthermore, because bids will be taken annually, the fixed rates will change every year.

6 *See also* 26 Del. C. § 1003(a): 'Customers of electric distribution companies in this state shall have the opportunity, but not the obligation, to purchase electricity from their choice of electric suppliers ....' (emphasis added).

7 As an example, Delmarva has noted that Exhibit D of the FSA contains a list of items on the monthly PJM bill items and specifies whether buyer (Delmarva) or seller is initially responsible for such charges. A new line item has recently been added by PJM and Exhibit D will therefore be modified to include this new line item.

8 *See* 26 Del. C. §§ 1001; 1006(a)(2)a.-c.; 1006(b)(2)a.-c.

9 *See* PSC Order No. 5941 (Apr. 16, 2002), Hearing Examiner's Report, App. A (Settlement) at ££ B, C, D.1, *aff'd sub nom. Constellation New Energy, Inc. v. Public Service Commission*, 825 A.2d 872 (Del. Super. 2003); *see also* 26 Del. C. § 1010(a)(2).

10 *See* PSC Order No. 6490 (Oct. 19, 2004) at £ 3.

11 The affidavits of publication of notice from the *Delaware State News* and *The News Journal* are included in the record as Exhibit 1. Exhibits will be cited as 'Ex.__' and references to the hearing transcript will be cited as 'Tr.__.'

12 The parties who did not actively participate in the hearing and did not otherwise support or oppose the Proposed Settlement include Delaware Electric Cooperative, Inc., PSEG Energy Resources & Trade LLC, PEPCO Energy Services, Inc., Washington Gas Energy Services, Inc., Constellation Energy Commodity Group, Inc., Constellation New Energy, Inc., and PJM Interconnection, LLC.

13 The briefs submitted by the Settling Parties will be cited as '[party name] Br. at ___.' The Retail Marketers' brief will be cited as 'RM at __.'

14 According to Delmarva, the HPS is similar to MPSS, a currently existing optional service classification in which Delmarva acquires the capacity and energy necessary to supply the load through short-term PJM markets rather than through the longer-term RFP process. The HPS energy price, like the MPSS energy price, is based on PJM's real time locational marginal pricing ('LMP ') delivered into PJM's 'Delmarva Zone.'

15 The purpose of the extra month in the initial contracts is to move from the May 1, 2006 start date for SOS in this proceeding to a PJM year, which commences June 1 of every year.

16 A VRM will be implemented for the large customer classes that receive the fixed price SOS (*i.e.*, MGS-S, LGS-S and GS-P). This is in lieu of imposing a minimum stay requirement or a 'returning customer' rule. It is designed to recognize that there are cost risks associated with customers departing from and then returning to fixed price SOS. To the extent that the fixed price SOS load per 50 MW block shrinks by 3 MW or more, the wholesale bidders' supply obligations will also be reduced. To the extent that the fixed price SOS load per 50 MW block increases by more than 5 MW, that incremental load will become Delmarva's responsibility to supply.

17 Although the term used to describe this SOS is 'fixed price,' the proposed settlement maintains existing seasonal and time of use rate differentials reflected in the current Commission-approved rates. Furthermore, because bids will be taken annually, the fixed rates will change every year.

18 *See* 26 Del. C. § 1010(a)(2).

19 *See* 26 Del. C. § 1006(a)(2)(C).

20 In testimony (but not on brief), RESA also sought quarterly RFPs (rather than annual), which would raise the cost (and thus the price) of SOS, and which could discourage participation by wholesalers. (Tr. 401 (Schaub); Tr. 478 (Fisher).)

21 On brief, the Retail Marketers' also recommended that the Commission undertake a comprehensive review of the SOS process after one year to evaluate the competitive marketplace. (RM Br. at 20.) The other parties have not addressed this recommendation but I will note that such a quick review may discourage participation from retailers who decide to wait a year to see what changes are made at the end of the review period before entering the market.

22 *Rome v. Archer*, Del. Supr., 197 A.2d 49, 53 (1964) (holding that '[i]n determining the fairness of a settlement ... there is no requirement that opportunity be given the parties to hold a trial as to the issues. To do so would defeat the basic purpose of the settlement of litigation.'

23 *In Re Amsted Industries, Inc. Litigation*, 521 A.2d 1104 (Del. Ch. 1986).

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TAB 4

2013 WL 9600776 (Del.P.S.C.)
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IN THE MATTER OF THE APPLICATION OF TIDEWATER UTILITIES, INC. FOR A GENERAL RATE INCREASE IN WATER BASE RATES AND TARIFF REVISIONS

Docket No. 13-466

Delaware Public Service Commission

November 25, 2013
ORDER NO. 8611

BY THE COMMISSION:Dallas Winslow, ChairJoann T. Conaway, CommissionerJaymes B. Lester, CommissionerJeffrey J. Clark, CommissionerHarold B. Gray, Commissioner

*1 **AND NOW,** this 19th day of August, 2014:

WHEREAS, the Commission has received and considered the Findings and Recommendations of the Hearing Examiner, which is attached hereto as ""**Attachment A,"** issued in the above-captioned docket, which was submitted after a duly-noticed public evidentiary hearing held on July 31, 2014; and

WHEREAS, the Hearing Examiner recommends that the Commission approve the proposed Settlement Agreement, which is endorsed by all the parties, and which is attached hereto as **"Attachment B," and;**

WHEREAS, the Commission finds that the proposed rates and tariff modifications contained in the proposed Settlement Agreement are just and reasonable, and that adoption of the proposed Settlement Agreement is in the public interest; **NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:**

1. That by and in accordance with the affirmative vote of a majority of the Commissioners, the Commission hereby adopts the August 10, 2014 Findings and Recommendations of the Hearing Examiner, attached hereto as **"Attachment A."**

2. That the Commission approves the proposed Settlement Agreement (attached hereto as **"Attachment B"**) and the tariff modifications and proposed rates therein, which reflects an additional revenue requirement for Tidewater Utilities, Inc. ("Tidewater") of $800,000, or approximately a 2.89% increase over current base rates. This revenue requirement amount is based upon an overall cost of capital of 7.92% and an authorized rate of return on equity of 9.75%.

3. That the final rates contained in the proposed Settlement Agreement are approved for implementation effective for service provided on and after August 19, 2014. These rates shall remain in effect until further Order of the Commission.

4. That, because the final rates contained in the proposed Settlement Agreement are lower that the interim rates placed into effect in February 2014, as ordered by the Commission, Tidewater's ratepayers are entitled to a refund of $424,169.33, representing the difference between the amount collected through the interim rates and the amount that would have been collected over this same time period had the $800,000 revenue increase agreed upon in the proposed Settlement Agreement been in effect.

5. That the aforementioned refund shall be made via a one-time bill credit to Tidewater's customers, to be reflected on the first bill received by a customer after the effective date of this Order.

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6. That the proposed tariff revisions discussed in the Settlement Agreement are hereby approved and deemed filed as of the date of this Order.

7. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

ATTEST:

Alisa Carrow Bentley

Secretary

ATTACHMENT "A"

IN THE MATTER OF THE APPLICATION OF TIDEWATER UTILITIES, INC. FOR A GENERAL RATE INCREASE IN WATER BASE RATES AND TARIFF REVISIONS (FILED NOVEMBER 25, 2013)

***2** PSC DOCKET No. 13-466

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

R. Campbell Hay, duly appointed Hearing Examiner in this docket pursuant to *26 Del. C. §502* and *Del. C. Ch. 101*, by Commission Order No. 8522, dated February 6, 2014, reports to the Commission as follows:

I. APPEARANCES

On behalf of the Applicant, Tidewater Utilities, Inc.:
MID-ATLANTIC ASSOCIATES

By: GLENN C. KENTON, ESQUIRE

RICHARDS, LAYTON & FINGER, P. A.

By: TODD A. COOMES, ESQUIRE

MIDDLESEX WATER COMPANY

By: JAY L. KOOPER, ESQUIRE

On behalf of the Delaware Public Service Commission:
ASHBY & GEDDES

By: JAMES McC. GEDDES, ESQUIRE

On behalf of the Division of the Public Advocate:

REGINA A. IORII, ESQUIRE, Deputy Attorney General Delaware Department of Justice

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On behalf of the Division of the Public Advocate:
REGINA A. IORII, ESQUIRE, Deputy Attorney General

Delaware Department of Justice

II. BACKGROUND

*3 1. On November 25, 2013, Tidewater Utilities, Inc. ("Tidewater" or ""Company") filed an application with the Delaware Public Service Commission (the "Commission") to increase its rates for water service. In its application, Tidewater sought an overall increase in annual operating revenues of $3,903,338, or 14.42% over current water revenues. [1] (Application, Exh. 2, Briefing Sheet)

2. After reviewing the Application, the Commission initiated this docket pursuant to 26 *Del. C.* §306 (a) (1) and by Order No. 8522 dated February 6, 2 014, suspended the proposed rate increase pending a full and complete evidentiary hearing to establish whether the proposed rates are just and reasonable. The Commission designated me, R. Campbell Hay, as the Hearing Examiner to conduct the Evidentiary Hearing and to report to the Commission my findings and recommendations.

3. In Order No. 8522, pursuant to 26 *Del. C.* §306(c) and on Tidewater's Application, the Commission allowed Tidewater to place interim rates into effect. Effective February 6, 2014, Tidewater placed into effect, under bond, an interim rate increase of approximately $1,730,958, or a net increase of approximately 6.5% over existing rates.

4. On January 31, 2014, the Division of the Public Advocate ("Public Advocate" or "DPA") exercised its statutory right of intervention in this docket, pursuant to 29 *Del. C.* §8716(d)(1).

5. On March 18, 2014, all parties participated in a conference call with the Hearing Examiner to review and agree on a Procedural Schedule outlining specific deadlines for this docket. The Procedural Schedule was amended on April 9, 2014 to include a deadline for written public comments of May 13, 2014.

6. Three Public Comment Sessions were held, one in each of Delaware's three counties, as follows:
• Tuesday, April 15, 2014 in the Hearing Room at the Office of the Delaware Public Service Commission in Dover;

• Thursday, April 17, 2014 in the Theater of Cape Henlopen High School in Lewes;

• Tuesday, April 22, 2014 at VFW Post 3792 in Townsend.

All of the comment sessions were held at 7 p.m. Two members of the public attended the Lewes public comment sessions. [2] No members of the public attended the Dover or Townsend public comment sessions.

*4 7. With its application, Tidewater included pre-filed testimony of Gerard L. Esposito (President), Jeremy M. Kalmbacher (Director of Engineering), Bruce E. Patrick (Vice President and General Manager), A. Bruce O'Connor (Tidewater Treasurer and Middlesex CFO), Michele L. Tilley (Middlesex), and three consultants from AUS Consultants (Pauline M. Ahern,

Dylan W. D'Ascendis, and Gary D. Shambaugh).

8. On February 24, 2014 Delaware Public Service Commission Staff ("Staff") entered into an agreement with Excel Consulting to provide certain services in the areas of Cost of Service and Rate Design and Snavely, King, Majoros & Associates, Inc. to provide certain services in the areas of Cost of Capital and Cost of Equity.

9. On April 9, several Staff members (Kevin Neilson, Amy Woodward, Malika Davis, Connie McDowell, Jason Smith, Lisa Driggins, and Ron Teixeira), DPA Analyst (Andrea Maucher), PSC Rate Counsel (Jim Geddes) and I were guided on a tour of several Tidewater facilities by Tidewater's President (Jerry Esposito), Tidewater's General Manager (Bruce Patrick) and Tidewater's Director of Engineering (Jeremy Kalmbacher).

10. We visited several projects that are in various stages of completion, all of which are included in the capital improvements section of Tidewaters rate case (PSC Docket No. 13-466). Those projects were General's Greene, Camden Hydraulic Upgrades, Season's-Warrington Creek Interconnection, Angola Elevated Tank, and Meadows Upgrades. (Tr., pp. 7-10)

11. General's Greene - Although under construction, this plant was active. Improvements included a new building and piping, a new generator, new control system and chemical addition. (*Id.*)

12. Camden Hydraulic Upgrades - It was explained to us that this was a necessary upgrade to reroute the water main due to DelDOT construction. (*Id.*)

13. Season's-Warrington Creek Interconnection - Here we toured the plant at Season's, witnessed a fire hydrant test (for use and usability), and saw where the interconnection was laid underneath the golf course from Season's to Warrington Creek. The interconnection was made underground using drilling equipment so as not to disturb the existing neighborhoods or the golf course. (*Id.*)

14. Angola Elevated Tank - Tank construction was completed on the 400,000 gallon water tower in Angola. (*Id.*)

15. Meadows Upgrade - This was a water plant acquired by Tidewater. The site was under construction and improvements allowed for removal and discontinuation of use of a grain silo, which was turned on its side and used for water storage. The improvements included new piping, control system and chemical addition within the existing structure. (*Id.*)

III. PARTIES' PREFILED TESTIMONY

A. Tidewater

*5 16. **Gerard L. Esposito**, President of Tidewater Utilities, Inc., testified that Tidewater serves 34,000 customers through fifty (50) water systems located in all three (3) Delaware counties, of which seventeen (17) are interconnected with at least two community water systems. The fifty (50) water systems are served by 83 treatment plants and 158 wells. Mr. Esposito also explained cost mitigation steps the Company had taken. These included a 12.4% workforce reduction and amendments to its retirement health plan qualification, resulting in greater retiree contributions to the plan. (Exh. 3, pp. 1-2)

17. **Jeremy M. Kalmbacher**, Director of Engineering for Tidewater, offered testimony regarding the Company's capital program. Mr. Kalmbacher listed 27 capital projects which fell within the Test Period. (Exh. 4, pp. 4-7)

18. Mr. Kalmbacher also testified that, with the exception of Bayside Distribution Phase 2 (#16 on the list), all of the projects discussed in his direct testimony were for the purpose of infrastructure upgrades, improvements, or to meet regulatory requirements. The Bayside improvements were for customer growth. Mr. Kalmbacher further testified that the total cost of all capital projects was approximately $8.5 million. (*Id.* at 2)

19. Next, Mr. Kalmbacher described Tidewater's capital budgeting process. He noted that the process was developed as part of a five year capital program. Each fall every project is reviewed individually, in detail, to determine operational and financial status. Those projects that are not completed by the end of the calendar year are continued into the next year. The following year's budget and related project timetable is based on currently available information as Tidewater analyzes system needs, customer needs, and growth. (*Id.* at 2-3)

20. Mr. Kalmbacher explained that the contracts for capital projects are awarded by inviting a group of pre-qualified contractors to submit bid proposals. The project is awarded to the lowest qualified bid. (*Id.* at 3)

21. **Bruce E. Patrick, P.E.**, Vice President and General Manager for Tidewater, testified in support of certain operating expenses. These included labor, power, chemicals, treatment and laboratory services, and tank painting. (Exh. 5, p.2)

22. Mr. Patrick also testified that pumpage had declined over the past several years despite a growing customer base because many individual homeowners are installing irrigation wells. He testified that records received from the Department of Natural Resources and Environmental Control (DNREC) via a Freedom of Information Act (FOIA) request supported his belief. According to Mr. Patrick, these records showed that DNREC issued approximately 2,600 irrigation well permits over the five (5) year period from 2007 to 2012. Further analysis by Mr. Patrick showed a significant decrease in pumpage since 2010 during the summer irrigation season. (*Id.* at 3)

23. **A. Bruce O'Connor**, Treasurer of Tidewater, testified that Tidewater has complied with Commission Order No. 8164 for a monthly meter reading and billing study submission to the Commission and the filing of a Lead-Lag study. Mr. O'Connor testified that these were submitted to the Commission on or about March 12, 2013. He also testified that the results of the Lead-Lag study were used to prepare the financial information used to determine its projected rate increase requested in the present case. (Exh. 6, p.D

***6** 24. Mr. O'Connor testified that the Test Year for this case was the twelve (12) month period ending September 13, 2013 and the Test Period was the twelve (12) month period ending June 30, 2014. (*Id.* at 2) He stated that all known and measurable changes, annualized, and expected to occur on or before the end of the Test Period, were reflected in the Test Period. (*Id.*)

25. **Michele L. Tilley** of Middlesex Water Company testified regardingcomponents of the rate base not covered by Mr. O'Connor's testimony. Ms. Tilley outlined details of the costs related to utility plant, accumulated depreciation, materials and supplies, cash working capital (CWC), deferred income taxes, customer advances for construction and Contributions In Aid of Construction (CIAC). Ms. Tilley noted that Tidewater changed its cash working capital model as a result of the Settlement Agreement in PSC Docket No. 11-397, Order No. 8164 to file the aforementioned Lead-Lag study. The Lead-Lag study helped Tidewater determine the appropriate Cash Working Capital needed in the future. (Exh. 7, pp. 1-3)

26. **Pauline M. Ahem, CRRA,** Principal at AUS Consultants, testified on behalf of Tidewater that the appropriate common equity cost rate that Tidewater should be afforded the opportunity to earn on its rate base was 10.95%. This was based on comparisons to water utilities of similar, but not identical, risk. [3] (Exh. 8, pp. 2-3)

27. Ms. Ahern applied the Discounted Cash Flow (DCF) approach, the Risk Premium Model (RPM), and the Capital Asset Pricing Model (CAPM) to the market data of the comparison companies to reach her conclusions. In reaching her conclusions, she gave each of these approaches relatively equal weight, stating that "no single model is so inherently

precise that it can solely be relied upon." Ms. Ahern noted that all of the models used were market based using nine (9) water utilities which met specific criteria in comparison to Tidewater. (*Id.* at 3-4)

28. **Dylan W. D'Ascendis, CRRA,** Principal at AUS Consultants, testified on behalf of Tidewater regarding the appropriate capital structure, including the long-term debt cost rate, used in calculating the overall rate of return. (Exh. 9, p.l)

29. Mr. D'Ascendis testified that, as of June 30, 2014, Tidewater's long-term debt ratio was 49.04% and the common equity ratio was 50.96%. He stated that Tidewater's ratios were similar to the ratios of the comparison companies Ms. Ahern used in her analysis. His conclusion was that Tidewater's ratios are appropriate for ratemaking purposes. (*Id.* at 2-4)

*7 30. **Gary D. Shambaugh,** Principal and Director at AUS Consultants, testified on behalf of Tidewater concerning cost of service allocations and rate design. Mr. Shambaugh found that, in order for Tidewater to meet its cost of service, general water service would require a 15.95% increase, public fire would require an 18.26% increase, and private fire would require a 22.59% decrease. (Exh. 10, pp. 13-15)

B. Division of the Public Advocate

31. **Glenn A. Watkins**, Vice President and Senior Economist of Technical Associates, Inc., was retained by the DPA and testified on the DPA' s behalf that a fair overall rate of return for Tidewater was 7.79%, based on a cost of equity of 9.1%, a capital structure of 49% long-term debt and 51% equity, and a cost of long-term debt of 6.01%. While the overall rate of return recommended by Mr. Watkins differed from the recommendations of Tidewater and Staff, the underlying capital structure to which his recommended debt and equity costs would be applied was the same capital structure that Tidewater proposed. (Exh. 11, pp. 2-3)

32. Mr. Watkins recommended a different distribution of revenue to the customer classes and service categories than Tidewater and recommended no change in fixed monthly/quarterly customer charges. (*Id.* at 8)

33. In his equity cost analysis, Mr. Watkins used the same nine (9) water utilities in his proxy group that Ms. Ahern used in her analysis. He used three different calculation methods to arrive at his conclusions: DCF, CAPM, and Comparable Earnings (CE). Mr. Watkins gave each method relatively equal weight and used the mid-point from each equity cost model to reach 9.1%. (*Id.*)

34. The primary drivers of the difference between Mr. Watkins' recommended cost of equity and Ms. Ahern's recommended cost of equity was (2) Ms. Ahern's reliance on forecasted future interest rates for Moody's AAA-rated corporate bonds and 3 0-year Treasury bonds in her RP and CAPM studies (*id.* at 23-25); (2) her use of a "Predictive Risk Premium Model" (PRPM) risk premium study to which she gave a 50% weighting (*Id.* at 25-26); and (3) her upward adjustments to the results of her equity cost studies to account for flotation costs, Tidewater's allegedly greater credit risk, and Tidewater's smaller size. (*Id.* at 26-28)

35. Howard J. Woods, Jr., P.E., an independent consultant retained by the DPA, testified that Tidewater had underestimated present rate revenues and overestimated certain of its Test Period operating expenses. He further opined that certain of Tidewater's capital construction projects would not be completed and in service by the end of the Test Period and should be excluded from rate base. (Exh. 12, pp. 3-4, 14-15)

36. Mr. Woods also testified that Tidewater's requested allowance for CWC incorrectly included depreciation and invested capital. He stated that these should not be included in the CWC calculation because they are noncash items. (*Id.* at 15)

*8 37. Mr. Woods adjusted present rate revenues to reflect what, in his analysis, were actual sales for the Test Period. (*Id.* at 5-7). He also made adjustments to Tidewater's proposed Test Period operating expense levels for vacant positions; purchased power, chemicals and treatment; tank painting; uncollectible accounts; outside services; insurance; employee pension and benefits expense (which included removing the costs associated with Tidewater's Supplemental Executive retirement Plan (SERP) and nonexecutive employee compensation plan); regulatory commission expense; and Enterprise Resource Planning (ERP) system expense. (*Id.* at 8-14).

38. Mr. Woods supported Tidewater's proposed tariff changes regarding cross-connection control and fire hydrants. (*Id.* at 4-5)

39. After applying Mr. Watkins' recommended overall rate of return to his proposed rate base, Mr. Woods concluded that Tidewater's rates should actually be reduced annually by $1,387,713. (*Id.* at 4, 16)

C. PSC Staff

40. **Connie S. McDowell,** Senior Regulatory Policy Administrator with the PSC, testified regarding certain rate base items and revenue requirement items. (Exh. 13, p. 2)

41. Ms. McDowell's analysis found a revenue requirement deficiency of $1,055,788 ($2,847,550 less than that in Tidewater's analysis); a Test Period rate base of $93,992,059; Test Period operating income of $6,518,526; and an appropriate return on equity of 9.15% based on an overall cost of capital of 7.61%. (*Id.* at 3)

42. Ms. McDowell adjusted CWC by removing a lag day from a specific, unpaid account from Tidewater's Lead-Lag Study calculations and removing non-cash items, such as accumulated depreciation, from the calculation. (*Id.* at 5)

43. **Malika Davis,** Public Utility Analyst II for the PSC, testified regarding purchased water expense, regulatory commission expense, and ERP. (Exh. 14, p. 3)

44. Ms. Davis recommended no change to purchased water expense. (*Id.*)

45. Ms. Davis noted that Tidewater estimated regulatory commission expenses for the present case to be 56.76% higher than the last rate case. Her conclusion was that this amount was excessive and should be reduced by $50,000 due to known consultant expense restrictions by PSC Staff.[4] (*Id.* at 5)

46. Ms. Davis recommended a $65,059 reduction in ERP costs based on Staff's lower recommended rate of return and cost of equity. (*Id.* at 6)

47. **Lisa B. Driggins,** Public Utility Analyst for Staff, testified regarding chemicals, treatment and lab, tank painting, and outside services expenses. (Exh. 15, p. 2)

48. Ms. Driggins concluded that since amortization for tank painting expenses would be completed by the time final rates are placed into effect, the expense should not be included in the current rate case. (*Id.* at 3)

*9 49. Brian Kalcic, Principal at Excel Consulting, was retained by Staff to review Tidewater's cost-of-service study and proposed rate design. Generally, Mr. Kalcic recommended adopting Tidewater's cost-of-service study; reflecting Tidewater's proposed class revenue allocation; adopting Staff's recommended revenue allocation; and implementing Staff's recommended rate design. (Exh. 16, p. 1)

50. Mr. Kalcic disagreed with Tidewater's rate decrease proposed for Private Fire Service as, in his estimation, it would require remaining customer classes to bear a combined increase in excess of Tidewater's overall revenue adjustment. Mr. Kalcic proposed no change to the Private Fire class. (*Id.* at 4)

51. Mr. Kalcic did not support a change in Public Fire Protection rates since that class was contributing revenues in excess of its cost of service. (*Id.*)

52. In addition, Mr. Kalcic recommended that, because Tidewater's Gws customer-related costs were $2,727 million less than current GWS facility charge revenues, any increase to Tidewater's present GWS facilities charges should be limited to one-half of the overall GWS class increase in this case. (*Id.*)

53. Mr. Kalcic recommended an increase to the GWS class rates of 4.51% in order to implement Staff's recommended revenue requirement; therefore, the GWS facilities charge, according to Mr. Kalcic, should be 2.2 6%. (*Id.* at 5)

54. **Charles W. King,** President Emeritus of Snavely, King, Majoros, & Associates, Inc., was retained by Staff to recommend the rate of return that should be allowed on Tidewater's rate base. (Exh. 17, p. 2)

55. Mr. King found that the appropriate after-tax rate of return was 7.61%, inclusive of a 9.15% return on equity. (*Id.*)

56. Mr. King used eight (8) water utilities in his analysis proxy group. This proxy group included all companies used by Ms. Ahern and Mr. Watkins, except Artesian Resources Corp. (*Id.* at Sch. 1, p. 2)

57. In estimating return on equity, Mr. King referred to the *Hope Natural Gas* case (also cited by Ms. Ahern) [5] in finding that there were three standards for determining an appropriate return on equity. First, earnings must be "commensurate with the return on investments in other enterprises having corresponding risk." Second, earnings must be sufficient to "assure confidence in the financial integrity of the enterprise." Third, the earnings must allow the utility to attract capital. (*Id.* at 4)

58. Mr. King used the DCF procedure as his primary basis for determining return on equity. This procedure, he stated is used by a number of regulatory commissions, including the FCC and FERC. (*Id.* at 6-7)

***10** 59. Mr. King opined that the CAPM analysis is useful in checking results, but is not as reliable as DCF because of the assumptions and judgments needed for CAPM inputs. (*Id.* at 15-16)

60. Mr. King testified that one of the reasons Ms. Ahern arrived at, what in his belief was such a high return at 10.95% was the 11.59% return derived from application of the PRPM. Mr. King argued that PRPM is unreliable as applied by Ms. Ahern because the assumption that realized earnings equate to required return is unfounded. He stated that if that were the case, years in which an investment earned a negative return would result in a negative required return. (*Id.* at 23-24)

61. Kevin S. Neilson, Regulatory Policy Administrator for Staff, testified with respect to Plant in Service and proposed tariff changes with respect to testing and maintenance of certain fire hydrants. (Exh. 18, p. 1)

62. Mr. Neilson corrected a portion of Tidewater's formula for projected additions. This correction reduced the Plant in Service figure for the Test Period by $8,511, which also resulted in a corresponding reduction in accumulated depreciation and depreciation expense. (*Id.* at 6)

63. Mr. Neilson testified that Tidewater identified three (3) projects that would not be completed and placed in service by the end of the Test Period. Removing these projects resulted in a decrease in the projected Plant in Service at the

end of the Test Period of $796,630, resulting in a corresponding reduction in accumulated depreciation and depreciation expense. (*Id.*)

64. Mr. Neilson also removed non-blanket projects that were not 100% complete as of April 30, 2014. Six (6) were completed by this date. (*Id.* at 7)

65. Mr. Neilson recommended disallowing Tidewater's requested addition to projects for which no funds had been closed to plant. This amounted to an additional reduction of $149,198. (*Id.* at 9)

66. **Jason R. Smith,** Public Utility Analyst for Staff, provided recommendations regarding revenue projections and projects. He proposed a net adjustment of $155,611 to Test Period revenues, based on calculations in which the budgeted monthly test period revenues provided in the original application and subsequent data responses were updated to include actual figures. (Exh. 19, pp. 2-3)

67. Mr. Smith recommended that rental income from communications companies in the amount of $48,942 for a communications antenna on top of an elevated storage tank be included in Test Period revenue. He reached this conclusion because the income was generated by a regulated asset of Tidewater that is being supported by ratepayers. Mr. Smith argued that ratepayers should benefit from the additional income. (*Id.* at 4)

68. **Ron Teixeira,** Public Utilities Analyst for Staff, testified on aspects of accumulated depreciation and depreciation expenses. (Exh. 20, p. 2)

69. According to Mr. Teixeira, based on reductions in Utility Plant In Service (UPIS) , as suggested by Mr. Neilson, accumulated depreciation should be reduced $228,582. (*Id.* at 3)

***11** 70. Mr. Teixeira recommended a reduction of $3 04,774 in depreciation expense by applying depreciation rates developed in PSC Docket No. 99-466 which was adopted by the Commission in Order No. 5592. He also recommended that Tidewater include a new depreciation rate study in its next rate case, as the last such study was conducted in December, 1999. (*Id.* at 6-7)

71. **Amy Woodward,** Public Utility Analyst II for Staff, addressed issues regarding labor, employee pensions and benefits, and executive compensation. (Exh. 21, p. 2)

72. Ms. Woodward testified that Tidewater should not include SERP expenses in the Test Period. She based her conclusion on the fact that the Commission recently decided in an electric rate case that these are extraordinary expenses, not necessary for the operation of basic utility services. This resulted in an expense reduction of $234,079. (*Id.* at 3)

73. Ms. Woodward also noted that Non-Executive Incentive Compensation expenses should not be included because such expenses were disallowed in the last several utility cases. This resulted in an expense reduction of $101,005. (*Id.*)

74. Ms. Woodward recommended that $58,191 in expenses for Executive Compensation be excluded from the revenue requirements, as well. (*Id.*)

D. TIDEWATER REBUTTAL TESTIMONY

75. **Pauline M. Ahern, CRRA,** in her rebuttal testimony discounted the weight Staff's Mr. King gave the DCF analysis in determining his recommended cost of equity rate of 9.15%. Instead, she testified that a more prudent analysis would give more equal weight to CAPM and other analyses, resulting in a higher cost of equity. She cited many financial treatises to support her position. (Exh. 22, pp. 2-3)

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76. Ms. Ahern criticized Public Advocate Witness Watkins' use of prospective growth rates in his DCF analysis, stating that security analysts' forecasts are more reliable because they incorporate historical and prospective growth rates in their calculations. Rather, she stated, Mr. Watkins should have used a more consistent approach to his analysis by using an average of the Value Line EPS growth rate and FirstCall EPS growth rate to adjust dividend yields. (*Id.* at 17-18)

77. **Jeremy M. Kalmbacher,** in his rebuttal testimony, took issue with the timetable Mr. Neilson used to analyze Tidewater's recent capital program. Mr. Kalmbacher noted that from 20 02-2008 the housing market was rapidly expanding, putting upward pressure on Tidewater's capital planning. Because many new housing developments were planned, Tidewater based its capital planning during that period on the projected growth and housing development schedules. (Exh. 23, p. 3)

78. Mr. Kalmbacher suggested that a more accurate timetable would be a four-year average from 2010-2013, which more accurately reflects current capital needs. (*Id.*)

***12** 79. **A. Bruce O'Connor** provided testimony to rebut DPA and Staff testimony regarding certain expenses, revenues, and to provide an update to changes to the Minimum Filing Requirements (MFR) schedules for adjustments and for actual financial results through May 31, 2014. (Exh. 24, p. 2)

80. Mr. O'Connor noted that winter 2014 did not accurately compare to recent winters because of the severe sub-freezing temperatures that created extraordinary and unusual consumption. Higher consumption was due to undiscovered broken pipes and measures taken to mitigate pipe damage, such as leaving faucets dripping to avoid freezing. As a result, Mr. O'Connor noted that revenues from water consumption were not as reliable during winter 2014 as compared to other years. (*Id.* at 2-3)

81. Mr. O'Connor disagreed with the inclusion in revenue of rental income from the communications antenna. He suggested that such rental income serves to mitigate the cost of the asset being used for the antenna and serves to reduce rates for the customer. Mr. O'Connor also noted that the lease in question ended so it is no longer an issue. (*Id.* at 5)

82. Mr. O'Connor also disagreed with the reduction in tank painting costs recommended by Staff Witness Driggins. He testified that since the amortization recovery period for the tank painting continued beyond the Test Period, Tidewater would not have fully recovered the cost expended. (*Id.* at 6)

83. Mr. O'Connor testified regarding Mr. Woods' recommendations as to labor costs. Mr. O'Connor stated that open positions are meant to be filled. He opined that Mr. Woods erred in using historical data to show the cycle of open positions for which Tidewater has not had to pay. Mr. O'Connor testified that the history of open positions does not account for the fact that there would not be vacant positions but for the fact that attracting and retaining qualified human resources is a continuous management challenge. He added that Tidewater must be prepared to fill vacant positions as qualified talent becomes available. (*Id.* at 6-9)

84. For similar reasons as stated above, Mr. O'Connor opined that pension benefits and incentive compensation should be included expenses. He stated that a company's total employment package must be competitive in order to attract and retain qualified personnel. (*Id.* at 8-10)

85. **Gary D. Shambaugh** testified to rebut the testimony of Messrs. Kalcic and. Watkins regarding cost of service and customer tariff rate design. (Exh. 25, p.l)

86. Mr. Shambaugh testified that limiting Private Fire Protection rates, as suggested by Messrs. Kalcic and Watkins, would arbitrarily limit the impact of the current and future rate increases to the general water service class customers.

Since Private Fire Protection customers have been augmenting the revenues required to provide service to other customer classes, the proposals of Messrs. Kalcic and Watkins would ensure that the Private Fire Protection rates would not meet its costs of service indication well into the future. (*Id.* at 2)

***13** 87. Making a similar argument, Mr. Shambaugh also stated that *any* changes to the Public Fire Protection rates would significantly impact the general water service rates. (*Id.* at 2-3)

88. Mr. Shambaugh countered testimony of Messrs. Kalcic and Watkins regarding facilities charges. He referred to a trend in the water industry and with state regulatory agencies not to limit facilities charges to just direct customer charges. (*Id.* at 3-5)

89. Mr. Shambaugh supported his position that conservation block water use rates proposed by Tidewater should be implemented by stating that the rates reduce discretionary water use. He stated that a significant price signal could provide a significant benefit to all customers by avoiding future capital and operational costs. (*Id.* at 5)

90. Mr. Shambaugh disagreed with Mr. Watkins that residential and non-residential customers should have separate general metered service cost assignments. Mr. Shambaugh testified that he did not see any benefit in such a separation and noted that, in his opinion, the level of service to an individual customer is more important that the class in which that customer resides. (*Id.* at 6)

91. **Michele L. Tilley** testified that she did not agree with DPA and Staff testimony recommending exclusion of depreciation and invested capital from Tidewater's CWC requirement. (Exh. 26, p. 2)

92. Citing *Accounting for Public Utilities*, Ms. Tilley stated, that depreciation should be included in CWC because the assumption that there was no cash outlay associated with depreciation is flawed. She stated that there was a cash outlay when the properties at issue were built. (*Id.* at 3)

93. Similar to depreciation expense, Ms. Tilley testified that invested capital should be included in CWC. She reasoned that including invested capital compensates investors for the recovery lag between cash returns on their investment and revenues collected from customers. (*Id.* at 4-5)

94. In rebuttal of Mr. Teixeira's testimony regarding depreciation in prior Commission Order No. 5592, Ms. Tilley stated that there were three (3) accounts in that Order in which the Commission accepted Tidewater's position on depreciation. [6] (*Id.* at 5-6)

95. Ms. Tilley testified that Ms. Woodward's adjustment to employee benefit costs should be ($221,646) rather than ($234,079), stating that the capitalized adjustment should only be applied to the direct portion of the adjustment, consistent with how Tidewater filed its employee benefits cost. (*Id.* at 6-7)

IV. PROPOSED SETTLEMENT AGREEMENT

96. On July 31, immediately prior to the Evidentiary Hearing, I was presented with a signed and executed Proposed Settlement Agreement (Agreement). The Agreement notes that the parties did differ as to the proper resolution of many of the underlying issues in this case and they agreed that, except as set forth in the Agreement, those issues may be raised in future proceedings. (Exh. 27, pp. 2-3)

***14** 97. Under the Agreement the total additional revenue awarded to Tidewater is $800,000, or an overall increase of 2.8% over current base rates. This is based on an overall cost of capital of 7.92% and an authorized rate of return on common equity of 9.75%. (*Id.* at 3)

98. Rates will increase only on Facilities Charges, Water Consumption Charges, and Service Connection Charges. There will be no change to Private Fire Service or Public Fire Hydrant Charges. (*Id.*)

99. Because the rates agreed to in the Agreement are lower that the interim rates granted by the Commission, Tidewater customers are entitled to a refund totaling $424,169.33. A one-time credit will be reflected on the first bill received by the customer after the effective date of the Order approving the Agreement. (*Id.* at 3-4)

100. Upon approval of this Agreement by the Commission, Tidewater will file its amended tariff with the Commission reflecting the agreed upon changes. (. at 4)

V. EVIDENTIARY HEARING

101. On July 31, 2014, I conducted a duly-noticed evidentiary hearing (Hearing) in Dover, at which time the parties stipulated to the admission of 27 exhibits into the record and I heard evidence on the proposed settlement. [7] (Tr. pp. 4-5)

102. At the Hearing, Tidewater called two witnesses: Mr. Bruce Patrick, Vice President of Tidewater, and Mr. Bruce O'Connor, Treasurer of Tidewater. (*Id.* at 5)

103. Mr. Patrick testified that all but three of the capital projects listed on Schedule 2A of Tidewater's application were complete and had been placed into service. He noted that those three unfinished projects were not included in the utility plant in service calculation used during settlement discussions. (*Id.* at 9-10)

104. Mr. O'Connor testified that Tidewater updated MFR schedules to contain eleven (11) months of actual data and one (1) month of projected data. Mr. O'Connor stated that this update resulted in a reduction of the revenue requirement increase from $3.9 million to $2.5 million. (*Id.* at 11-12)

105. Mr. O'Connor stated that the primary reason for the reduction in revenue requirement contained in Tidewater's rebuttal testimony was centered on the cost of Tidewater's employee benefit plans. (*Id.* at 12)

106. Mr. O'Connor also noted that while Tidewater did not agree with each of the proposed adjustments by Staff or the DPA, in order to avoid lengthy litigation Tidewater agreed to modify certain projections and positions. He testified that Tidewater also agreed to a final revenue requirement of $800,000. (*Id.* at 12-13)

107. Mr. O'Connor said that because the agreed-upon revenue requirement is less than that collected under the interim rates, Tidewater would issue a one-time credit to customers. (*Id.* at 14)

***15** 108. Finally, Mr. O'Connor testified that he believed the proposed settlement agreement is "within the bounds of the statutory requirements of just and reasonable rates and is in the public interest." (*Id.*)

109. On cross examination by Mr. Geddes, Mr. O'Connor stated that Tidewater would not be opposed to meeting with Staff and the DPA with regard to deal with concerns regarding CWC. (*Id.* at 16-17)

110. The DPA proffered Mr. Watkins as its witness. He adopted his pre-filed testimony (Exh. 11) and Mr. Woods' pre-filed testimony (Exh. 12) as his own for purposes of the Hearing. (*Id.* at 18-19)

111. Mr. Watkins testified that the settlement was the product of negotiation among the parties and that in his opinion it resulted in just and reasonable rates and was in the public interest. (*Id.* at _68-69_) While the agreed-upon return on equity of 9.75% was higher than he had recommended, he stated that it was within the "range of reasonableness." (*Id.*

at 68-69) He further testified that the Company had agreed with the majority of the DPA's revenue requirements and that those higher billing units that created the additional revenues were reflected in the settlement rate design. (*Id.* at 68) He concluded that the settlement's proposed revenue increase would provide Tidewater with an opportunity to recover its operating expenses and earn a fair rate of return. (*Id.* at 69) Staff called Ms. Lisa Driggins, who testified that Staff submitted nine (9) direct testimonies (Exhs. 13-21) which she adopted as her own for the Hearing. (*Id.* at 25-26)

112. Ms. Driggins testified that she believes that the proposed settlement agreement is in the public interest and results in just and reasonable rates. (*Id.* at 28)

113. At the close of the Hearing, I officially entered all 27 exhibits into the record and declared the record closed. (*Id.* at 30-31)

VI. FINDINGS AND RECOMMENDATIONS

114. The Commission has jurisdiction over this case. 26 *Del. C.* §201 (a). This statute provides, in pertinent part, that "[t]he Commission shall have exclusive original supervision and regulation of all public utilities and also their rates, property rights, equipment, facilities ... so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of rates...."

115. 26 *Del. C.* §512 directs the Commission to "encourage the resolution of matters brought before it through the use of stipulations and settlements," and provides that the Commission may, upon hearing, approve the resolution of matters through stipulations and settlements "where the Commission finds such resolutions to be in the public interest." (See 26 *Del. C.* §§512(a), (c).)

***16** 116. I incorporate the prior sections of this Report as my Findings of Fact. Based upon those Findings of Fact and my analysis in this Section, I find that Tidewater has met its Burden of Proof in this case.

117. Tidewater has the Burden of Proof in this case pursuant to 26 *Del. C.* §307(a), which provides as follows:

§307. Burden of Proof

In any proceeding upon the motion of the Commission, or upon complaint, or upon application of a public utility, involving any proposed or existing rate of any public utility, or any proposed change in rates, the burden of proof to show that the rate involved is just and reasonable is upon the public utility.
(Emphasis added)

118. I find that the Parties have demonstrated that the Proposed Settlement Agreement results in just and reasonable rates and should be approved by the Commission. For the reasons discussed below, I recommend to the Commission its approval and adoption.

119. The Settlement Agreement is the product of extensive negotiation among the parties, and reflects a mutual balancing of various issues and positions.[8] As described, the Parties have concluded that settlement on the agreed-upon terms and conditions will serve the interest of the public and Tidewater, while meeting the statutory requirements that rates must be just and reasonable.

120. Based on my review of the entire record, I find that the approval of the Proposed Settlement Agreement is in the public interest because it balances the interests of ratepayers and the Company. It is clear from the record that the Settlement was a product of extensive negotiations between the parties, conducted after the completion of thorough

investigations by Staff and the DPA, including an evidentiary hearing addressing why the proposed settlement is in the public interest.

121. The Proposed Settlement Agreement reflects a mutual balancing of various issues and positions. In addition, it is significant that the Parties, all of whom maintain that the proposed settlement is in the public interest, represent a wide variety of interests. Finally, I note that settlements are encouraged under *26 Del. C.* §512, particularly when supported by all parties.

***17** 122. In summary, and for the reasons stated above, I find that the Proposed Settlement Agreement is just and reasonable, and is overall a fair resolution of the issues raised in this case. A proposed Order implementing the foregoing recommendations is attached hereto as Exhibit "B" for the Commission's consideration.

123. Accordingly, I recommend that the Commission adopt this Report and approve the Proposed Settlement Agreement, confirming that the settlement rates and tariff revisions can be placed into effect as of August 19, 2014.

124. The approved rates and tariff revisions shall remain effective until further changed by Commission Order.

Respectfully submitted,

R. Campbell Hay

Hearing Examiner

Dated: August 14, 2014

ATTACHMENT "B"

IN THE MATTER OF THE APPLICATION OF TIDEWATER UTILITIES, INC. FOR A GENERAL RATE INCREASE (FILED NOVEMBER 25, 2013)

PSC DOCKET NO. 13-466

PROPOSED SETTLEMENT AGREEMENT

This proposed Settlement Agreement (the "Settlement") is entered into by and among Tidewater Utilities, Inc. ("Tidewater" or "the Company"), the Staff of the Public Service Commission ("Staff"), and the Division of Public Advocate ("Public Advocate") (individually each a "Party" and collectively "the Parties").

I. BACKGROUND

1. On November 25, 2013, Tidewater filed an application with the Public Service Commission of the State of Delaware ("the Commission") pursuant to 26 *Del. C.* §§201, 209, 304, and 306, requesting approval of an increase in water service rates designed to produce an additional $3,903,338 in annual revenues applied to a rate base of $99,594,854 (a 14.42% increase over existing rates) and approval of proposed changes to its tariff language (the ""Application").

2. On February 6, 2014, by Order No. 8522 and pursuant to 26 *Del C.* §306(a)(l), the Commission suspended Tidewater's proposed rate increase pending the conduct of evidentiary hearings to determine whether the proposed rate increase results in just and reasonable rates; assigned the matter to Hearing Examiner R. Campbell Hay (the "Hearing Examiner")

to conduct such evidentiary hearings; permitted Tidewater to place into effect pursuant to 26 *Del. C.* §306(c) interim rates intended to produce an annual increase in operating revenue of $1,730,958, effective February 6, 2014 (approximately 6.5% over existing rates); and approved the form of rate refunding bond attached to the interim rate application to secure the interim rates.

***18** 3. In April 2014, public comment sessions were held in Dover, Lewes and Townsend, Delaware. At each public comment session, representatives of the Company or the Hearing Examiner sumarized the Application and members of the public were afforded an opportunity to comment on the Application. One member of the public commented on the Application at the Lewes session. No members of the public attended the Dover or Townsend sessions.

4. On May 20, 2014, Staff filed testimony recommending a $1,055,788 increase in the revenue requirement rather than the $3,903,338 in additional revenues the Company requested in its Application.

5. Pursuant to 29 *Del. C.* §8716, the Public Advocate intervened in this proceeding. On May 20, 2014, the Public Advocate filed testimony recommending a decrease of $1,387,713 in Tidewater's annual revenue requirement.

6. On June 26, 2014, and July 3, 2014, the Company updated its Test Period information and testimony with actual data, including actual operating results for 1 1 months of the Test Period. The revised Test Period updates reduced Tidewater's overall revenue request by $1,393,115 to $2,510,223 on a rate base of $98,872,402.

7. The Parties have engaged in substantial written discovery. In a desire to avoid the additional cost of evidentiary hearings, they have conferred in an effort to resolve the issues in this proceeding. The Parties acknowledge that they differ as to the proper resolution of many of the underlying issues in this rate proceeding and that, except as specifically addressed in this Settlement, they preserve their rights to raise those issues in future proceedings; but for purposes of this proceeding, they believe that settlement on the terms and conditions contained herein will serve the interests of the public and the Company, and meet the statutory requirement that the resulting rates will be both just and reasonable.

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by Tidewater, Staff, and the Public Advocate that the Parties will submit to the Commission for its approval the following terms and conditions for resolution of the pending proceeding:

II. SETTLEMENT PROVISIONS

8. The total additional revenue requirement awarded to the Company will be $800,000, or approximately an overall increase of 2.89% over current base rates. The Parties agree to this revenue requirement award as a compromise of their positions and believe that it is within the bounds of the statutory requirement of a fair rate of return for the utility. Tidewater shall file the appropriate modifications to its tariff so as to incorporate the stipulated revenue requirement increase.

9. The Settlement revenue requirement amount of $800,000 is stipulated to by the Parties based on an overall cost of capital of 7.92%, and an authorized rate of return on common equity of 9.75%.

10. The Parties have resolved the rate design issues raised in this proceeding by implementing increases only to the Facilities Charges, Water Consumption Charges and Service Connection Charges tariff rates. There are no changes in Private Fire Service or Public Fire Hydrant Charges tariff rates. (See Schedule A attached hereto).

***19** 11. The rates agreed to under this Settlement are lower than the interim rates placed into effect in February 2014. Accordingly, Tidewater's ratepayers are entitled to a refund of the difference between the amount collected on an interim basis and the amount agreed to in this Settlement, plus interest on the overcollected amount. Rather than having

ratepayers incurring the costs necessary to provide the refund, the Company has proposed, and the Parties have agreed to, a one-time bill credit to its customers totaling $424,169.33. The credit will be reflected on the first bill received by a customer after the effective date of the Order approving this Settlement.

12. The Company's proposed method of returning these funds to its ratepayers will reduce the overall costs associated with the implementation of this Settlement. Under Commission rules, ratepayers are entitled to interest on any overcollection. Staff has reviewed the Company's estimate of the interest due to ratepayers on the over-collection. Although Staff disagrees with the Company's calculation of the actual interest that is owed to ratepayers, it believes the savings associated with the bill credit, as compared to the normal refund process, exceeds any potential difference on the amount of interest owed to Tidewater ratepayers on the overcollection.

13. The Parties have agreed to the following modifications to Tidewater's tariff, as proposed in the Application:
a. Section 3.6 - Cross Connection Control; and

b. Section 6.2 - Public Fire Service, Maintenance of Fire Hydrants.

Upon approval of this Settlement by the Commission, Tidewater shall file its amended tariff with the Commission reflecting these modifications.

III. ADDITIONAL PROVISIONS

14. This Settlement is the product of extensive negotiation and reflects a mutual balancing of various issues and positions. It is therefore a condition of the Settlement that the Commission approve it in its entirety without modification or condition. If this Settlement is not approved in its entirety, this Settlement shall become null and void.

15. This Settlement shall not set a precedent and no Party shall be prohibited from arguing a different policy or position before the Commission in any future proceeding. The purpose of this Settlement is to provide just and reasonable rates for the customers of Tidewater, and the Parties believe that this Settlement accomplishes this goal. In addition, the Parties believe that the Settlement is in the public interest because, among other things, it avoids the additional cost of litigation.

16. The terms of this Settlement will remain in effect until changed by an order of the Commission. The Commission retains jurisdiction over this Settlement and all statutory procedures and remedies otherwise available to the Parties to ensure that rates are just and reasonable, while providing a fair rate of return.

17. This Settlement may be executed in counterparts by any of the signatories hereto and transmission of an original signature by facsimile or email shall constitute valid execution of this Settlement, provided that the original signature of each Party is delivered to the Commission's offices before its consideration of this Settlement. Copies of this Settlement executed in counterpart shall constitute one agreement. Each signatory executing this Settlement warrants and represents that he or she has been duly authorized and empowered to execute this Settlement on behalf of the respective Party.

***20** DELAWARE PUBLIC SERVICE COMMISSION STAFF

By: Connie S. McDowell

TIDEWATER UTILITIES, INC.

By: <<Signature>>

THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE

By: David L. Bonar by ABM

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July 31, 2014

Exhibit A

TIDEWATER UTILITIES, INC.

P.S.C. DEL. NO. 6

FIRST REVISED PAGE NO. 5

CANCELING

ORIGINAL PAGE NO. 5

EFFECTIVE DATE: NOVEMBER 25, 2013

3.5 PROPERTY SUPPLIED BY SINGLE SERVICE LINE:

A customer service line from the meter to a property shall not supply more than one property, except under special circumstances approved in writing by the Company. Any such property upon written request of the owner may be supplied by two or more meters, each of which shall be considered for billing purposes as being one customer account, and provided that each supply to each such meter has an individual control at or near the curb. Installation or continuance of any such multiple meter applications shall be in the discretion of the Company, and the Company shall have the right to reduce, modify or discontinue any service as it sees fit.

3.6 CROSS CONNECTION CONTROL

a) A cross connection is any pipe, valve or other physical connection or other arrangement or device connecting the pipelines of the Company, or facilities directly or indirectly connected therewith, to and with pipes or fixtures by which any contamination might be admitted or drawn from lines other than the Company's into the distribution system of the Company, or into lines connected therewith.
b) No direct connection of pumping equipment for any purpose or cross-connection with any other piping system will be allowed unless approved in writing by the Company.

c) The Company reserves the right to require any customer, owner or tenant to install, at their expense, and as part of a service connection such equipment or material which it deems necessary and as may be acceptable or required from time to time by any regulatory agency or good engineering practices, to prevent backflow into the water supply and minimize or eliminate contamination of its water supply system.

d) Backflow preventors shall be required in all domestic, commercial, industrial, public and municipal services where water is used in any process which, in the opinion of the Company, could constitute a cross-connection and/or health hazard. Customer shall install backflow preventers on their service lines when they connect any irrigation system

or equipment on their property. All back flow prevention equipment must be approved by the Company prior to installation.

e) Upon issuance of a non-potable water well permit and installation of such non-potable well on customer's property, and in accordance with Title 7 Chapter 60 §6075 (d), the Company may inspect the well at any reasonable time to insure that there are not interconnections with any portion of any building's plumbing and/or the Company's water service connection. Additionally, the Company may conduct an inspection for interconnections with a non-potable well upon valid reasons including suspicious water usage

4. DISCONTINUANCE OF SERVICE

4.1 AT THE REQUEST OF THE CUSTOMER:

***21** All agreements regarding water service shall continue in full force and effect until and unless reasonable oral or written notice is given of a desire to terminate the contract by reason of a customer moving off the Company's system in the event of a change in ownership or occupancy. Water may be turned off from the premises temporarily upon the oral or written request of the customer and upon payment to the Company of the approved Turn-off Charge without in any way affecting the existing agreement for service or the customer's duty to pay the approved Facilities Charges. In the event a Seasonal Turn Off is requested, the customer shall pay the approved seasonal Turn-off Charge at the time of the turn off. In each case service will be restored upon payment of any required Turn-on Charge and other amounts due before service is restored.

6. PUBLIC FIRE SERVICE

6.1 ALLOWABLE USE:

No person except an authorized agent of the Company or other person authorized by the Company shall take water from any public fire hydrant or hose plug, except for fire puiposes or the use of the fire department in case of fire, and no public fire hydrant shall be used for sprinkling streets, flushing sewers or gutters, or for any other purposes except with the approval and consent of the Company.

6.2 MAINTENANCE:

All Company-owned fire hydrants shall be maintained by the Company. The Company assumes no maintenance, repair or ownership responsibility for any fire hydrant installed by a developer, builder or customer unless and until such fire hydrant has been accepted by the Company as part of its public fire service system.

6.3 CHANGE OF LOCATION:

Upon written request for a change in the location of any fire hydrant, the Company, if an approved location can be found, will make such change at the expense of the person making the request. Charges shall be based on time and material to make such changes.

6.4 INSPECTION:

Upon request of the Fire Marshall or duly authorized officials of any municipality or governing body, the Company will make inspections at convenient times and at reasonable intervals to determine the condition of the fire hydrants, such

inspections to be made by a representative of the Company and a duly authorized representative of the Fire Marshall or municipality.

TARIFF SCHEDULE OF RATES

1. GENERAL WATER SERVICE CHARGES:

General Water Service customers are charged a Facilities Charge plus a Water Consumption Charge and a Public Fire Hydrant Charge, where applicable:

(a) FACILITIES CHARGES:

A Facilities Charge payable in advance is based on the customer's meter size, as follows:

Meter Size	Monthly Facilities Charge	Quarterly Facilities Charge
5/8# - 3/4#	$ 18.20	$ 54.60
1#	$ 30.33	$ 90.99
1-1/2#	$ 54.61	$ 168.83
2#	$ 84.95	$ 254.85
3#	$ 163.83	$ 491.49
4#	$ 254.85	$ 764.55
6#	$ 497.55	$ 1,492.65
8#	$ 776.67	$2,330.01
10#	$ 1,032.77	$3,098.31

b) WATER CONSUMPTION CHARGES:

Quarterly Residential Customers	Rate per Thousand Gallons
0 - 5,000 gallons	$8.2074
5,001 - 20,000 gallons	$8.3131
Over 20,000 gallons	$8.4189

***22** All other general water service customers are charged for consumption at $8.4191 per thousand gallons registered on the meter.

(c) PUBLIC FIRE HYDRANT CHARGES:

Where fire hydrants are installed, such districts will be termed Fire Hydrant Districts. A service charge of $15.09 per quarter, or $5.03 per month, will be added to the regular Facilities Charge on all services in these districts. Apartment

houses, hotels, motels and other multiple unit buildings will be charged one such hydrant service charge of $15.09 per quarter, or $5.03 per month, for every four units.

3. TURN-OFF AND TURN-ON CHARGES:

When temporary shut-off is made at the request of a customer, or for the failure of the customer to pay past-due bills or for another reason set forth in this tariff, a service charge of $38.63 will be made. An additional charge of $38.63 will be made for turning the service back on.
There shall be no discount on these charges. These charges will apply during regular working hours, and should it be necessary to perform such work after normal hours, the charge will be $57.94.

4. SEASONAL TURN-OFF CHARGES:

Customers may request a Seasonal Turn Off by giving notice to the Company and paying the Seasonal Turn Off Charge. During the period of the Seasonal Turn Off, the customer will not be required to make payment of the Facilities Charge. The amount of the Seasonal Turn-off Charge will depend upon meter size as follows:

5/8# - 3/4#	$ 175.58
1#	263.37
1-1/2#	526.73
2#	877.91
3#	1,580.24
4#	2,633.73
6#	5,267.43
8#	8,427.89

5. SERVICE CONNECTION CHARGES:

a) Service Connection Charges will be as follows:

5/8# - 3/4# service	$ 987.80
1# service	$ 1,395.27
1-1/2# service	$ 2,457.18
2# service	$ 2,778.18
3# service	$ 8,890.23
4# service	$10,458.36
6# service	$15,199.26

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8# service $23,067.03

b) The charge for installing 3/4# metered service to existing customers having formerly paid a Service Connection Charge shall be the difference between the Service Connection Charge in effect at the time metering commences and the Service Connection Charge previously paid. No charge will be assessed to customers having paid a tapping fee which included metered service.
c) In addition to the Service Connection Charge above, customers within the franchise territory yet outside a particular service area will be charged an extension fee of $987.80 per service.

***23** d) In addition to the Service Connection Charge above, customers within the Development of Indian River Acres will be charged a subdivision specific tariff of $2,807.71 for each service.

6. OTHER MISCELLANEOUS CHARGES:

Service call to read a meter due to change of ownership or occupancy of a dwelling unit:
Transfer charge will be $43.90.

Service call for frozen service lines or leaks that are the customer's responsibility:

The service charge will be $38.63.

After hours charge will be $57.94.

Unauthorized entry of meter pit:

The charge will be $87.79 plus cost of repair or damage for each occurrence.

Unauthorized water withdrawal from fire hydrants:

The charge will be $263.36 for each occurrence.

The Company shall charge each customer $20.00 for any returned check it receives as payment for any service, charge or deposit.

7. DISTRIBUTION SYSTEM IMPROVEMENT CHARGE:

In addition to the net charges provided for in items 1. and 2. of this Tariff Schedule of Rates, a charge of 0.0% will apply to all charges for bills rendered on or after January 25, 2014.
The above charge will be recomputed semi-annually, using the elements prescribed by Section 314 of Title 26 of the Delaware Code.

8. BULK WATER CONTRACT SALES

a) Ocean View - Under contract, the Town of Ocean View is charged $4.8024 per thousand gallons of consumption registered through the meter(s) at the interconnection with the Town of Ocean View water distribution system.

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b) Dover Air Force Base - Off Base Housing - Under contract, Dover Air Force Base Housing - Eagle Meadows/Heights is charged $12.2609 per thousand gallons of consumption registered through the meter(s) at the interconnection with the Eagles Heights and Eagle Meadows Housing subdivision water distribution systems.

c) Southern Shores - Under contract, Southern Shores Water Company is charged $5.6116 per thousand gallons of consumption registered through the meter(s) at the interconnection with Southern Shores water distribution systems.

9. PSC REGULATION DOCKET 15 - CATEGORY 2 COSTS

Pursuant to PSC Order No. 6873, Category 2 Costs refer to transmission, supply, treatment and/or other utility plant costs that are not directly assignable to a specific project or where the Category 1 (1A and IB) costs have not included sufficient direct costs for transmission, supply, treatment, and/or other utility plant costs to supply water to the project. These costs will be contributed by the contractor, builder, developer, municipality, homeowner, or other project sponsor, as CIAC with no refunds. This tariff section applies to new customer service connections associated with water service agreements entered into after April 11, 2006.
Category 2 Charges will be as follows:

Service Size	
5/8# - 3/4#	$1,500.00
1#	$1,560.00
1-1/2#	$1,620.00
2#	$1,785.00
3#	$3,000.00
4#	$3,450.00
6#	$4,500.00
8#	$5,700.00

10. DOVER AIR FORCE BASE (FEDERAL ENCLAVE)

***24** PUBLIC FIRE HYDRANT CHARGES:
Each fire hydrant within the perimeter of the Dover Air Force Base (Federal Enclave) is subject to a service charge of $30.00 per quarter, or $10.00 per month.

Footnotes

1 The Evidentiary Hearing Exhibits will be cited herein as ""(Exh. __)." References to the pages of the Evidentiary Hearing transcript will be cited as "Tr.-__." Schedules from the Company's Application or pre-filed testimony will be referred to as "Sch.__."

2 Public notices of the Public Comment Sessions were posted in the Delaware Wave on April 8, 2014; the Delaware State News on April 4, 2014; the Cape Gazette on April 4, 2014; and The News Journal on April 2, 2014.

3 Ms. Ahern noted that since Tidewater is a wholly-owned subsidiary of Middlesex Water Company, the stock is not publicly traded; therefore a market-based common equity cost could not be directly observed. She noted that this method of comparison is consistent with the principles of fair return established in the *Hope* and *Bluefield* cases, found at 320 U.S. 591 (1944) and 262 U.S. 679 (1922), respectively.

4 According to Ms. Davis, Staff's consultant expense was capped at $25,523.(Exh. 14, p. 6)

5 See footnote 3

6 Ms. Tilley referred to accounts 316, 343, and 390, in which the Hearing Examiner recommended Tidewater's position and was ultimately accepted by the Commission in Order No. 5592.

7 Notice of the Evidentiary Hearing was published in *The News Journal* and the Delaware State *News* on July 11, 2014. (Exh. 1)

8 According to Paragraph 7 of the Settlement Agreement, "The parties have engaged in substantial written discovery. ... The Parties acknowledge that they differ as to the proper resolution of many of the underlying issues in this rate proceeding and that, except as specifically addressed in this Settlement, they preserve their rights to raise those issues in future proceedings; but for purposes of this proceeding, they believe that settlement on the terms and conditions contained herein will serve the interests of the public and the Company, and meet the statutory requirement that the resulting rates will be both just and reasonable."

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TAB 5

Original Image of 702 A.2d 1219 (PDF)

702 A.2d 1219
Supreme Court of Delaware.

Joseph B. DALE and Mary J. Dale, husband and wife, Plaintiffs Below, Appellants,
v.
TOWN OF ELSMERE, Charles M. Cavanaugh, John Jaremchuck, Jr., Hugh D. Hamill, Edward Dickerson, Phyllis B. Wingate, Lawerence Sontowski and Thomas S. Novak, Defendants Below, Appellees.

No. 115, 1997.
|
Submitted: Oct. 15, 1997.
|
Decided: Nov. 21, 1997.

Landowners brought action against town and its mayor, alleging town created a nuisance and violated their substantive due process rights when it created loading zone for adjacent commercial property. The Superior Court, New Castle County, entered summary judgment in favor of defendants, and landowners appealed. The Supreme Court, Walsh, J., held that: (1) addressing an issue of first impression, landowners' adjacent property ownership was insufficient to establish property interest worthy of substantive due process protection; (2) creation of loading zone on residential street was discretionary act under Municipal Tort Claims Act, for which neither town nor mayor could be held liable; and (3) mayor's agreement to reinstate no loading zone in front of landowners' property was not enforceable.

Affirmed.

West Headnotes (9)

[1] **Municipal Corporations**
Discretionary powers and duties

Creation of loading zone on residential street was discretionary act under Municipal Tort Claims Act, for which neither town nor mayor could be held liable. 10 Del.C. § 4011(a), (b)(3).

2 Cases that cite this headnote

[2] **Municipal Corporations**
Destruction of Property

Property damage exception to governmental immunity provisions of Municipal Tort Claims Act did not apply to landowners' tort claim against mayor, based on creation of loading zone on street adjoining their property, where landowners sought monetary compensation only for lost enjoyment and value. 10 Del.C. § 4011(c).

9 Cases that cite this headnote

[3] **Zoning and Planning**
Proceedings to Modify or Amend

Creation of loading and unloading zone on residential street was not zoning change that required approval of town's board of adjustment, although parking regulation was covered by town's zoning code, where town's home rule charter empowered town council to regulate streets and adopt traffic regulations, and property that used loading zone was prior nonconforming use exempted from zoning ordinance for loading zones.

1 Cases that cite this headnote

[4] **Municipal Corporations**
Mayor or other chief executive

Mayor's agreement to reinstate no loading zone in front of landowners' property was not enforceable, where agreement was not reached in contractual setting, and there was no showing that mayor possessed authority to enter into such agreement.

Cases that cite this headnote

[5] **Constitutional Law**
Particular issues and applications

Landowners' adjacent property ownership was insufficient to establish property interest worthy of substantive due process protection, as required to support their federal civil rights

claim based on establishment of loading zone on street adjoining neighboring property, in alleged violation of their substantive due process rights in use and enjoyment of their property. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[6] **Civil Rights**
Municipalities and counties and their officers

Municipal Tort Claims Act did not shield the town officials from liability for claims brought under federal civil rights statute. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[7] **Constitutional Law**
Property Rights and Interests

As predicate to substantive due process claim, plaintiff must first establish possession of property interest worthy of due process protection. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**
Property Rights and Interests

Not all property interests worthy of procedural due process protection are protected by the concept of substantive due process; only fundamental property interests are worthy of such protection. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[9] **Constitutional Law**
Other particular persons and entities

Land-owning plaintiff entitled to substantive due process protection from government interference is limited to one who is actual property owner. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

***1220** Appeal from Superior Court. **AFFIRMED.**
Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 94C-10-99.

Attorneys and Law Firms

Francis J. Trzuskowski and Francis J. Schanne (argued), Trzuskowski, Kipp, Kelleher & Pearce, P.A., Wilmington, for Appellants.

Edward M. McNally (argued) and Richard D. Kirk, Morris, James, Hitchens & Williams, Wilmington, for Appellees.

Before WALSH, HARTNETT and BERGER, JJ.

Opinion

WALSH, Justice:

In this appeal, appellants plaintiffs-below, residents of the Town of Elsmere (the "Town"), seek reversal of the Superior Court's grant of summary judgment in favor of the Town Council, the Mayor, and the Town (collectively, the "Town Defendants") on claims of creation of a nuisance and violation of substantive due process rights under 42 U.S.C. § 1983. On appeal, the appellants claim: (i) the Municipal Tort Claims Act does not govern the nuisance issue; (ii) the creation of an unloading zone violated the applicable zoning regulations; (iii) breach of contract by the Town and the Mayor; and (iv) that they have a constitutionally protected property interest at stake in this litigation. We conclude that the award of summary judgment was appropriate. Accordingly, we affirm.

I

For the purpose of this appeal, the following facts are undisputed. Joseph B. Dale and Mary J. Dale, his wife, (the "Dales") own two properties on Chestnut Avenue in Elsmere. One property, located on the corner of Kirkwood Highway and Chestnut Avenue, faces Kirkwood Highway, and the other, their residence, is adjacent to the corner property, facing Chestnut Avenue. A delicatessen ("Walt's Deli"), which is the focus of this litigation, is across Chestnut Avenue from the corner property, facing Kirkwood Highway. The Elsmere Fire

House is located on Kirkwood Highway to the east of Walt's Deli.

In 1973, the Town adopted the "Town of Elsmere Zoning Ordinance" (the "Zoning Code"). In 1985, the Town adopted Resolution 85-08, which provides:

> WHEREAS, the current vehicular restrictions on Chestnut Avenue where it intersects the Kirkwood Highway are inadequate for protecting the residential character of the neighborhood; and
>
> WHEREAS, the suppliers of Walt's Delicatessen are able to find an alternative place to load and unload their trucks;
>
> NOW THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE TOWN OF ELSMERE, that "NO TRUCKS LOADING OR UNLOADING" signs be placed alongside the "FIFTEEN MINUTE PARKING" signs in accordance with the attached diagram....

Walt's Deli changed owners in 1985. Prior to the change in ownership, delivery trucks did not use Chestnut Avenue, and unloading occurred on Kirkwood Highway or on the Fire House side of Walt's Deli.

In 1992, construction began on the Fire House. Shortly after construction began, the Mayor approached the Dales and requested that they agree, on a temporary basis, to unloading for Walt's Deli on Chestnut Avenue. In exchange, it was promised that the unloading restriction would be strictly enforced thereafter, including the reinstatement of Resolution 85-08. The Dales agreed. [1] On July 14, 1992, Resolution 92-12, ***1221** titled "Temporary Suspension of Resolution 85-08 Prohibiting Parking and Unloading on Chestnut Avenue," was adopted without opposition from the Dales. It provides:

> WHEREAS, the Mayor and Council of the Town of Elsmere has [sic] determined that Resolution 85-08 by prohibiting parking and unloading on Chestnut Avenue creates a safety hazard; and
>
> WHEREAS, due to the construction of the new fire house there is limited parking on Kirkwood Highway in front of Walt's Delicatessen;
>
> NOW, THEREFORE BE IT HEREBY RESOLVED, by the Mayor and Council of the Town of Elsmere, that Resolution 85-08 be suspended, hereby allowing parking and truck loading and unloading on the East side of Chestnut Avenue during the hours of 8:00 a.m. to 4:00 p.m. until April 1, 1993, or until construction is completed by the Elsmere Fire Company....

On October 14, 1993, the Town adopted another resolution, over the Dales' objection, which created a permanent loading and unloading zone for Walt's Deli on Chestnut Avenue. This resolution, No. 93-5, permitted loading and unloading in a forty foot zone "on the east side of Chestnut Avenue ... with parking limited to thirty (30) minutes, during the hours of 8:00 a.m. to 3:00 p.m., Monday through Friday...." The Dales complain that neither the time parameters nor the forty foot restriction have been enforced. As a result, trucks park in front of the Dales' lawn and driveway at various hours and with considerable noise.

The Dales brought suit against Walt's Deli, the truck operators who deliver on Chestnut Avenue, and the Town Defendants. The allegations of their complaint pertinent to this appeal are: (i) the Town and the Mayor created and maintained a private and a public nuisance, and the Mayor, as agent for the Town, made negligent or intentional misrepresentations ("Count I"); (ii) the Town and the Mayor violated the Zoning Code ("Count III"); (iii) the Town and the Mayor, both personally and as agent for the Town, breached a contract with the Dales concerning the reinstatement of a no loading zone ("Count IV"); and (iv) the Town Defendants violated the Dales' substantive due process rights under the 14th Amendment and 42 U.S.C. § 1983 ("Count V").

The Town Defendants moved for, and were granted, summary judgment on all of the above listed Counts. [2] As to the Count I claims, the Superior Court found that the Town Defendants were protected from liability by the Municipal Tort Claims Act, 10 *Del.C.* Ch. 40, (the "Act"). On the Count III claims, the Superior Court found that the Town has full authority to make decisions about parking zones and that review by the Board of Adjustment was unnecessary because of Walt's Deli's prior non-conforming use. The Superior Court ruled that the agreement alleged in Count IV was not legally enforceable for lack of consideration and that, in any event, the Mayor lacked the authority to enter into it. Finally, with respect

to the substantive due process violation alleged in Count V, the Superior Court held that the Dales did not have a constitutionally protected right to be free from proximity to a loading zone.

II

This Court reviews the grant of summary judgment, *de novo,* to determine whether, viewing the facts in the light most favorable to the Dales, the Town Defendants have demonstrated that there are no material issues of fact in dispute and that they are entitled to judgment as a matter of law. *See Burkhart v. Davies,* Del.Supr., 602 A.2d 56, 59 (1991), *cert. denied,* 504 U.S. 912, 112 S.Ct. 1946, 118 L.Ed.2d 551 (1992).

A.

The Dales argue that the Superior Court committed reversible error by granting summary judgment to the Town and the Mayor ***1222** on the Count I claims of nuisance and misrepresentation.[3] They assert that the Superior Court misapplied the Act in reaching the conclusion that the Town and the Mayor were immune from liability on the nuisance claim. Specifically, the Dales argue that the Superior Court incorrectly determined that the loading zone is neither prohibited by statute nor poses a threat to public health or welfare and that they could be made whole by injunctive relief, rather than by damages. Further, they argue that material issues of fact concerning the existence of a nuisance have been established.

Alternatively, the Dales argue that, even if the Act bars their nuisance action, the Superior Court erred by granting summary judgment in favor of the Mayor on the misrepresentation claim because their claims against the Mayor fall under the "property damage exception" of the Act. 10 *Del.C.* § 4011(c).[4] They assert that the Superior Court improperly interpreted this exception to require that they allege *physical* property damage, rather than intangible property damage.

The Town and the Mayor respond that, because the Dales' Count I claims sound in tort and seek recovery of damages, they are immune under § 4011(a) of the Act.[5] The question of their liability, it is argued, turns on whether their actions are discretionary in nature. They assert that this issue must be decided in their favor because the change in parking along Chestnut Avenue is "the allocation of scarce resources among competing policy objectives [which] is, under ordinary circumstances, precisely the sort of 'discretionary' act which the legislature intended to immunize, as evidenced by the language of Sec. 4011(b)(3)." (Ans. Br. of Appellees at 8 (quoting *In re Consolidated Flood Cases,* Del.Super., C.A. No. 91C-09-235, 1993 WL 393044, at *8, Goldstein, J. (Sept. 7, 1993) ("*Consolidated Flood Cases* ")).) Finally, they argue that the Mayor's actions do fall within the exception of § 4011(c) because such section requires *physical* property damage and, thus, the Dales' claims for lost enjoyment and lost value are insufficient to survive summary judgment.

[1] In our view, the Superior Court correctly granted summary judgment in favor of the Town and the Mayor on Count I. The Superior Court correctly distinguished this case from *Consolidated Flood Cases.* The Dales' claims of misrepresentation and nuisance are "tort claims seeking recovery of damages" and, as such, are governed by the Act. 10 *Del.C.* § 4011(a). The Dales' interpretation of *Consolidated Flood Cases,* as creating liability for any governmental action that impacts the public as arguably a public nuisance, is inconsistent with the plain language of § 4011(b)(3).[6] The creation of the loading zone was a discretionary act for which neither the Town nor the Mayor may be held liable. 10 *Del.C.* § 4011(b)(3).

[2] As to § 4011(c) and the Mayor's personal liability, exceptions to broad grants of immunity are to be construed narrowly. *Heaney v. New Castle Co.,* Del.Supr., 672 A.2d 11, 14 (1995). The Dales have not cited any authority that supports their asserted position. Their reliance upon *Dilucehio v. Shaw,* Del.Super., 115 A. 771 (1922), is misplaced. In *Dilucehio,* the Superior Court ***1223** simply held that, because negligence is not an element of a private nuisance claim, a plaintiff, to survive a demurrer, did not have to allege the defendant's duty or manner of wrongful use of vibration causing machinery. *Id.* at 771. We adopt the holding of *Carr v. Town of Dewey Beach,* that economic harm alone does not constitute "property damage" as that term is used in the Act. D.Del., 730 F.Supp. 591, 602 (1990). Because the Dales seek monetary compensation only for lost enjoyment and value, they have failed to allege any "property

damage" sufficient to implicate the exception of § 4011(c). Accordingly, the Superior Court's ruling is affirmed.

B.

[3] The Dales view the creation of the loading and unloading zone on Chestnut Avenue as a zoning change that required the approval of the Board of Adjustment because parking regulation is covered by the Zoning Code. In support of this argument, the Dales cite Zoning Code § 304E.1., which provides that "[t]ruck loading and unloading facilities shall be provided on the property in other than the front yard area in sufficient amount to permit the transfer of goods in other than a public street."

The Town responds that it has full authority to make decisions about parking zones and that the approval of the Board of Adjustment is not necessary. *Leon N. Weiner & Assocs. v. Carroll,* Del.Ch., 270 A.2d 539, 541 (1970), *rev'd on other grounds,* Del.Supr., 276 A.2d 732 (1971). Alternatively, it argues that approval of the Board of Adjustment was unnecessary because a prior nonconforming use obviated the need for a variance. Such use arose, they maintain, when Walt's Deli unloaded trucks on Kirkwood Highway, a public street, prior to the enactment of the Zoning Code.

The Superior Court did not err by granting summary judgment in favor of the Town Defendants on this Count. Section 401 of the Elsmere Home Rule Charter specifically empowers the Town Council "to regulate the streets, lanes and alleys of the Town and to have and exercise control of the same; ... to adopt municipal zoning regulations; to adopt traffic regulations...." Nowhere in either that charter or in the Zoning Code is the right to make traffic regulations vested solely in the Board of Adjustment. If such were the case, Resolution 85-03, which the Dales argue the Mayor promised would be reinstated, would be invalid. As a prior nonconforming use, Walt's Deli is exempted from § 304E.1. of the Zoning Code by § 203N.2., which provides that "[n]one of the off-street parking facilities required in this Ordinance shall be required for any existing building or use...."

Nor is the Dales' spot zoning claim viable. *Shevock v. Orchard Homeowners Ass'n, Inc.,* Del.Supr., 621 A.2d 346 (1993), upon which the Dales rely, addresses claims arising only where the procedural aspects of zoning have not been followed. As demonstrated above, the Town Council did not violate any zoning procedure in adopting Resolution 93-5. Therefore, the Superior Court's grant of summary judgment is affirmed.

C.

[4] The Dales claim that the Town and the Mayor, personally and as agent for the Town, breached an agreement calling for reinstatement of the no loading zone. The Dales argue that this agreement is legally enforceable because they gave valid consideration in the form of a promise not to bring legal action on "colorable claims." This claim is quickly addressed.

The agreement was not reached in a contractual setting. If every promise an elected official made to his constituency was enforceable through an action at law, our courts would be inundated with claims of breach of contract. Moreover, there has been no showing that the Mayor possessed the authority to enter into such an agreement. *Cf. Hartman v. Buckson,* Del.Ch., 467 A.2d 694 (1983). Accordingly, the award of summary judgment in favor of the Town and the Mayor on Count IV is affirmed.

D.

[5] The Dales' final claim against the Town requires that we address an issue of first impression: whether the creation of a "private nuisance" by a governmental entity ***1224** may give rise to a substantive due process claim under 42 U.S.C. § 1983.[7] The Dales claim that the establishment of the loading zone created a nuisance that violates their substantive due process rights in the use and enjoyment of their property. They argue that the Superior Court erred by distinguishing the case *sub judice* from *DeBlasio v. Zoning Board of Adjustment,* 3d Cir., 53 F.3d 592, *cert. denied,* 516 U.S. 937, 116 S.Ct. 352, 133 L.Ed.2d 247 (1995), and by interpreting their allegations to assert an interest in parking or traffic regulations, rather than an interest in the enjoyment of their home. They further argue that they must establish only arbitrary denial of their request for a no loading zone and not a distinct entitlement to a no loading zone under the Zoning Code.[8] *See id.* at 601 n. 11. Alternatively, they argue that, even if they are required to show a distinct entitlement, they

did so because this case involves a variance, and they were denied the right to have that variance reviewed by the Board of Adjustment.[9]

The Town Defendants respond that the Dales have failed to establish an interest worthy of substantive due process protection. They argue that *DeBlasio* is distinguishable because the plaintiff in *DeBlasio,* unlike the Dales, owned the property that was the subject of the allegedly violative government action. The Town Defendants argue that this case is analogous to *MacNamara v. County Council of Sussex County,* in which the District Court for the District of Delaware held that plaintiffs who owned property near land that was granted a conditional use, but who did not actually own that land, failed to establish a protectable property interest. D.Del., 738 F.Supp. 134, 141, *aff'd,* 3d Cir., 922 F.2d 832 (1990).

[6] **[7]** **[8]** The Superior Court did not err by granting summary judgment in favor of the Town on the § 1983 claim. Initially, we note that the Municipal Tort Claims Act does not shield the Town Defendants from liability for claims brought under § 1983. *Martinez v. California,* 444 U.S. 277, 284 & n. 8, 100 S.Ct. 553, 558 & n. 8, 62 L.Ed.2d 481 (1980). As a predicate to a substantive due process claim, a plaintiff must first establish possession of property interest "worthy of due process protection." *DeBlasio,* 53 F.3d at 598. "[N]ot all property interests worthy of procedural due process protection are protected by the concept of substantive due process": only fundamental property interests are worthy of such protection. *Id.* at 598-99. Ownership of property has been held to be such an interest. *Id.* at 600 (citing *Bello v. Walker,* 3d Cir., 840 F.2d 1124 (1988)). Thus,

> in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due-process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.

Id. at 601 (footnotes omitted).

[9] If it be assumed, for summary judgment purposes, that the decision implementing the loading zone was arbitrarily or irrationally reached, the question arises whether the Dales are the type of "land-owning plaintiff" protected from governmental interference by the *DeBlasio* holding. We conclude that they are not. We read *DeBlasio,* consistent with *MacNamara,* to hold that a "land-owning plaintiff" is limited to one who is an ***1225** actual property owner. Indeed, this appears to have been the interpretation of *DeBlasio* intended by the Third Circuit.[10] Therefore, we find that the Dales' adjacent property ownership is insufficient to establish a property interest worthy of substantive due process protection upon which such a claim must be predicated. The Town Defendants were entitled to judgment as a matter of law of the Dales' § 1983 claim, and the award of summary judgment is affirmed.

III

There are no material issues of fact in dispute, and the Town Defendants have demonstrated that they are entitled to judgment as a matter of law on each of the Counts. Therefore, the Superior Court's award of summary judgment in favor of the Town Defendants is **AFFIRMED.**

All Citations

702 A.2d 1219

Footnotes

1 The Town Defendants disagree that the Mayor requested that the Dales permit a temporary loading and unloading zone, but argue they are entitled to summary judgment despite this issue of fact. For the purpose of this analysis, it is assumed that this agreement does in fact exist.

2 Two additional motions for summary judgment are not at issue in this appeal: (i) the grant of summary judgment in favor of the truck operators because they could not be considered to have created the nuisance; and (ii) the denial Walt's Deli's motion for summary judgment.

3 The Dales do not argue that § 4011(a) of the Act is inapplicable to their tort claim of misrepresentation against the Town. Therefore, summary judgment for the Town on the misrepresentation claim is not challenged.

4 10 *Del.C.* § 4011(c) states:

> An employee may be personally liable for acts or omissions causing property damage, ... in instances in which the governmental entity is immune under this section, but only for those acts which were not within the scope of employment or which were performed with wanton negligence or willful and malicious intent.

5 10 *Del.C.* § 4011(a) states: "Except as otherwise expressly governed by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages...."

6 10 *Del C.* § 4011(b) states:

> Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from: ...
>
> (3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid....

7 Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

8 The record does not reflect that the Dales ever requested a no loading zone, although they objected to Resolution 93-5, which made the loading zone permanent.

9 The Board of Adjustment is empowered to review variances. Zoning Code § 702.A.1.

10 *See id.* at 601 n. 10 ("Having implied in *Neiderhiser [v. Borough of Berwick,* 3d Cir., 840 F.2d 213 (1988)] that a lessor possesses a property interest worthy of substantive due process protection against arbitrary and irrational governmental deprivation, *an actual property owner, a fortiori,* possesses such an interest." (emphasis supplied)).

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TAB 6

Original Image of 108 A.3d 294 (PDF)

108 A.3d 294
Court of Chancery of Delaware.

In re the New Maurice J. Moyer Academy, Inc.

CONSOLIDATED C.A. No. 10398–CB

Date Submitted: January 2, 2015

Date Decided: January 9, 2015

Synopsis

Background: Charter school operator and school students, through parents, brought action against state Department of Education and state Board of Education, seeking to enjoin department and board from implementing decision to revoke school's charter. Operator and students moved for preliminary injunction.

Holdings: The Chancery Court, Bouchard, Chancellor, held that:

[1] operator had no due process-protected property interest in charter;

[2] students did not have due process-protected property interest in charter;

[3] even if operator or students had property interest in charter, they did not show reasonable probability of success on claim that their procedural due process rights were violated in revocation of charter.

Motion denied.

West Headnotes (21)

[1] Injunction
Grounds in general; multiple factors

Injunction
Balancing or weighing factors; sliding scale

To obtain a preliminary injunction, a plaintiff must establish three elements: (1) a reasonable probability of success on the merits; (2) irreparable harm absent interim relief; and (3) that the balance of the equities favors the relief requests; although a strong showing on one element may overcome a weak showing on another element, plaintiff must still demonstrate all three elements.

1 Cases that cite this headnote

[2] Injunction
Extraordinary or unusual nature of remedy

Injunction
Presumptions and burden of proof

The burden to establish propriety of a preliminary injunction is not a light one, and the extraordinary remedy of a preliminary injunction will never be granted unless earned.

Cases that cite this headnote

[3] Constitutional Law
Benefits, rights and interests in

A property interest entitled to procedural due process under the due process clause is created and defined not by the constitution, but rather by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. U.S. Const.Amend. 14.

1 Cases that cite this headnote

[4] Constitutional Law
Benefits, rights and interests in

To have a property interest in a benefit, as could require procedural due process protection for interest, a person clearly must have more than an abstract need or desire for it; he must have more than a unilateral expectation of it and must, instead, have a legitimate claim of entitlement to it. U.S. Const.Amend. 14.

Cases that cite this headnote

[5] **Constitutional Law**
Benefits, rights and interests in

As a general matter, when the decision to grant or withhold a benefit is entrusted to the discretion of a government actor, one has no due process property interest in obtaining that relief. U.S. Const.Amend. 14.

Cases that cite this headnote

[6] **Constitutional Law**
Benefits, rights and interests in

There is no due-process protected property interest where the decision to remove a benefit is left to the unfettered discretion of the government actor. U.S. Const.Amend. 14.

Cases that cite this headnote

[7] **Constitutional Law**
Benefits, rights and interests in

The State may create a due process-protected interest by placing a substantive limitation on official discretion to grant, deny, or remove a benefit. U.S. Const.Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**
Accreditation and licensure

Education
Termination of charter

State Department of Education retained, pursuant to Charter School Act, the discretionary ability to revoke charter school's charter, and thus school operator had no due process-protected property interest in charter, where ultimate decision to revoke a charter was permissive, with no substantive limits on the department's decision-making process. U.S. Const.Amend. 14; 14 Del. Code § 515(f).

Cases that cite this headnote

[9] **Constitutional Law**
Accreditation and licensure

Education
Termination of charter

Charter school students did not have protected property interest in school's charter which could require procedural due process protection in revocation of charter, regardless of statute providing that a pupil accepted for enrollment in a choice school "shall be entitled to remain enrolled therein until graduation" from school; protections of such statute were available only if the school had a charter to operate, and students did not have a state-created right to graduate from a particular school. U.S. Const.Amend. 14; 14 Del. Code § 407(a)(1).

1 Cases that cite this headnote

[10] **Constitutional Law**
Procedural due process in general

Only after finding the deprivation of a protected interest does the court look to see if the state's procedures comport with due process. U.S. Const.Amend. 14.

Cases that cite this headnote

[11] **Civil Rights**
Education

Constitutional Law
Accreditation and licensure

Education
Termination of charter

Even assuming charter school operator or school students had protected property interest in school's charter, operator and students did not show reasonable probability of success on claim that their procedural due process rights were violated by Department of Education and Board of Education's decision to revoke charter, as could support grant of preliminary injunction to prevent department and board from implementing revocation decision, where process afforded prior to decision followed requirements of

Charter School Act and included notice of formal review, appointment of committee to conduct a review, public hearings, and provision to operator of opportunity to review and comment on committee report. U.S. Const.Amend. 14; 14 Del. Code § 515(b)-(d).

Cases that cite this headnote

[12] **Constitutional Law**
Notice and Hearing

The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it. U.S. Const.Amend. 14.

Cases that cite this headnote

[13] **Constitutional Law**
Notice and Hearing

The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. U.S. Const.Amend. 14.

Cases that cite this headnote

[14] **Constitutional Law**
Accreditation and licensure

Education
Termination of charter

Even assuming charter school operator or school students had protected property interest in school's charter, due process did not require that operator or students be given opportunity to examine witnesses or to make argument at a trial-like proceeding, prior to revocation of school's charter; procedural protections were already in place under Charter School Act, and any arguable benefit from additional procedures was outweighed by significant fiscal, administrative, and logistical burdens of imposing such procedures. U.S. Const.Amend. 14; 14 Del. Code § 515(b)-(d).

Cases that cite this headnote

[15] **Injunction**
Establishment and closing of schools

Charter school operator and students did not show reasonable likelihood of success on claim that Department of Education failed to comply with Charter School Act by not revoking school's charter effective immediately, as opposed to making revocation effective at end of school year, and that such failure to comply with Act amounted to due process violation, as could support preliminary injunction preventing department from implementing revocation decision; although Charter School Act implied that department could revoke a charter immediately, nothing in statute expressly addressed when a revocation decision was required to become effective. U.S. Const.Amend. 14; 14 Del. Code § 515(f).

Cases that cite this headnote

[16] **Injunction**
Establishment and closing of schools

Charter school operator and students did not show reasonable likelihood of success on claim that Department of Education failed to comply with Charter School Act by sending letter formally revoking school's charter one day after 60-day deadline and that such violation of Act was a violation of due process, as could support preliminary injunction preventing department from implementing revocation decision; even assuming deadline was mandatory, a one-day violation was hyper-technical, and operator did not show any prejudice from delay. U.S. Const.Amend. 14; 14 Del. Code § 515(c).

Cases that cite this headnote

[17] **Constitutional Law**
Accreditation and licensure

Education
Termination of charter

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Any protected interest of charter school operator or students in school's charter did not rise to level of a fundamental right that could be basis for substantive due process claim challenging revocation of charter; no federal or state authority held that students had a fundamental right under constitution to attend a particular school or that a charter school had a fundamental right under constitution to remain open. U.S. Const.Amend. 14.

Cases that cite this headnote

[18] **Constitutional Law**
Substantive Due Process in General

The protections of substantive due process attach only where a plaintiff has demonstrated deprivation of an interest that is considered a fundamental right under the federal constitution. U.S. Const.Amend. 14.

Cases that cite this headnote

[19] **Education**
Judicial review

Provision of Charter School Act enumerating the two reasons for which a charter may be revoked and stating that charter "shall be subject to revocation or probation, after the exercise of due diligence and good faith" necessarily implies that a charter school may seek judicial review to challenge whether the approving authority complied with the "due diligence and good faith" standard in determining that one of the reasons for revocation has been satisfied. 14 Del. Code § 516.

Cases that cite this headnote

[20] **Statutes**
Superfluousness

Words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning.

Cases that cite this headnote

[21] **Education**
Termination of charter

Injunction
Establishment and closing of schools

Charter school operator did not show reasonable likelihood of success on claim that Department of Education did not exercise due diligence and good faith when it determined that operator failed to comply with its charter and with criteria for operation of school set forth in Charter School Act, as could support grant of preliminary injunction to prevent department from implementing its decision to revoke school's charter; record showed that department actively sought to avail itself of all material information reasonably available to it, including through public meetings and hearings that permitted operator to submit written responses. 14 Del. Code § 512.

Cases that cite this headnote

Attorneys and Law Firms

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OPINION

BOUCHARD, C.

I. INTRODUCTION

In 1995, the General Assembly adopted the Delaware Charter School Act.[1] The purpose of the Act was "to create an alternative to traditional public schools operated by school districts and improve public education overall by establishing a system of independent 'charter' schools throughout the State."[2] To that end, the Act "offers members of the community a charter to organize and run independent public schools, free of most state and school district rules and regulations governing public education," and with the use of public funds, "as long as they meet the requirements of [the Act], and particularly the obligation to meet measurable standards of student performance."[3]

Today, over 30 charter schools operate in the State of Delaware. This action concerns one of them. Maurice J. Moyer Academic Institute ("New Moyer") is a charter school located in Wilmington, Delaware serving grades 6–12. In 2011, it was granted a four-year charter that started with the 2012–2013 school year, and ***298** expires at the end of the 2015–2016 school year.

In this action, the operator of New Moyer, parents representing several of its students, and the City of Wilmington seek a preliminary injunction to enjoin the Delaware Department of Education, the Secretary of Education for the State of Delaware, and the Delaware State Board of Education from implementing their October 2014 decision to revoke New Moyer's charter and to close the school at the end of the current school year, in June 2015, one year before the charter expires. As discussed below, following an extensive process set forth in the Charter School Act, this decision was made because, among other reasons, New Moyer is the lowest performing charter school in the State based on the State's testing standards.

New Moyer serves some of the most economically disadvantaged students in the State of Delaware. They face significant academic challenges. It is natural to be sympathetic to Plaintiffs' desire to keep New Moyer's doors open for an additional school year so that the families who chose New Moyer can continue to send their children to what they view as their only practical option to attend a school in their neighborhood. It is the responsibility of State officials, however, to make the tough decisions concerning whether a charter school is meeting its obligations under the Charter School Act.

The primary issue before the Court is whether Plaintiffs have demonstrated a reasonable probability that they have been denied due process under the Fourteenth Amendment of the United States Constitution with respect to the decision to revoke New Moyer's charter. For the reasons discussed below, I conclude they have not. More specifically, I conclude that New Moyer does not have a constitutionally protected property interest in its charter and that its students do not have a constitutionally protected interest in graduating from New Moyer and that, even if they did, Plaintiffs have failed to demonstrate that it is reasonably probable they were not afforded due process.

I also conclude that, although the Charter School Act expressly prohibits judicial review of the merits of a decision to revoke a school's charter, it impliedly affords the school the right to challenge whether one of the statutorily required grounds upon which a charter may be revoked was made after the exercise of due diligence and good faith. The evidence Plaintiffs have presented, however, is insufficient to demonstrate that it is reasonably probable this standard was not met here.

For these and the other reasons explained below, Plaintiffs' motion for a preliminary injunction is denied.

II. BACKGROUND[4]

A. The Parties

Plaintiff The New Maurice J. Moyer Academy, Inc., a non-stock, non-profit Delaware ***299** corporation, operates Maurice J. Moyer Academic Institute, a charter school serving grades 6–12 in the City of Wilmington, Delaware. Although these two entities are technically distinct, I refer to them interchangeably as "New Moyer."

Plaintiffs Shauniece Anderson, Shatana Turner, Alvin Alexander, Judi Kennedy, Jemuel Anderson, Jacqueline Bailey, Shalonda Davis, and Darcel Earl are Delaware

citizens who filed suit on behalf of their minor children who currently attend New Moyer. I refer to these citizens and their minor children together as the "Individual Plaintiffs."

Plaintiff The City of Wilmington, a Delaware municipal corporation, filed suit as *parens patriae* for the benefit of minor citizens who attend or wish to attend New Moyer.

Defendant Delaware Department of Education (the "Department") is the State agency that oversees public education in Delaware.

Defendant Mark T. Murphy is, and was as of the date of the revocation decision, the Secretary of Education for the State of Delaware (the "Secretary"). Murphy is sued solely in his official capacity as the Secretary.

Defendant Delaware State Board of Education (the "State Board"), an entity within the Department, is the governing body of the Delaware school system. The State Board administers and supervises the charter schools of Delaware.

Defendants Teri Quinn Gray, Jorge L. Melendez, Gregory G. Coverdale, Jr., G. Patrick Heffernan, Randall L. Hughes, II, Barbara B. Rutt, and Jerry M. Whittaker are, and were as of the date of the revocation decision, the seven members of the State Board. They are sued solely in their official capacities as members of the State Board.

B. The Predecessors to New Moyer

In 2006, the Department granted a charter for a school named The Maurice J. Moyer Academy, Inc. ("Old Moyer"), which would be located in the City of Wilmington. In February 2010, the Secretary of the Department recommended, and the State Board agreed, not to renew Old Moyer's charter. [5]

In 2010, the General Assembly directed the Department to manage a school at the location of Old Moyer from July 1, 2010, until June 30, 2012. [6] Pursuant to the General Assembly's directive, in July 2010, the Department contracted with K–12 Classroom DE, LLC ("K12") to provide educational services for the 2010–2011 academic year. [7] In July 2011, after issuing a request for proposals for a third party to provide educational services for the 2011–2012 academic year, [8] the Department awarded that contract to K12. [9]

C. New Moyer is Formed and Receives a Charter from the Department

On January 3, 2011, a group of individuals (the "Moyer Board") submitted an application to the Department to operate a ***300** charter school at the former location of Old Moyer. [10] The application, which reflected the "consensus" of the Moyer Board members on the new school's "mission, goals and organization," was signed by all members of the Moyer Board, including the current Chairman, Christopher Curry ("Curry"), and the current Vice Chairman. [11] The application set forth forty-seven separate "assurances" of the Moyer Board should it receive a charter. Those assurances included, for example, that the school would "[b]e in full compliance with 14 Delaware Code, Chapter 5" (the Charter School Act); that the Moyer Board would "not implement any modifications to the charter school program or operation without the express written consent of the Department"; and that the Moyer Board and the school would "[c]omply with the provisions for a Performance Agreement, as required by the Secretary." [12]

The Moyer Board contemplated that the new school, New Moyer, would serve 365 students in grades 6–12 in its first year and would expand to serve 600 students in grades 6–12 in its fourth year. [13] Anticipating that New Moyer's demographics would be similar to those of its predecessors, the Moyer Board projected that the student body would be predominantly economically disadvantaged (with over 90% qualifying for free or reduced lunch) and minority (with over 99% being African American), and that approximately 25% of its students would need special education services. [14]

According to its application, the Moyer Board "intend[ed] to contract with [K12] for educational and management services in the operation of the school if the Moyer Board [were] granted a charter." [15] The Moyer Board further stated that it found K12, which offered an online instruction method, to be "the premier provider of curriculum, systems, and services" in digital education. [16] The application also included a draft services agreement between New Moyer and K12 pursuant to which K12

would provide educational services to New Moyer's students through the 2020–2021 academic year, unless terminated earlier. [17]

On April 1, 2011, the Charter School Accountability Committee (the "Committee") issued a final report on New Moyer's charter application. [18] The Committee found that New Moyer satisfied thirteen of the fourteen criteria required for approval under the Charter School Act. [19] The only criterion not satisfied was New Moyer's educational programming. [20] Regarding New Moyer's proposed curriculum, the Committee approved Science and Health Education; conditionally approved Math and Social Studies; but did not approve ***301** Physical Education, World Languages, Visual Arts, or Performing Arts based on the information submitted. [21]

In its report, the Committee recommended that the State Board approve New Moyer's charter application, subject to twenty-three conditions. Those conditions included requiring the Moyer Board to submit to the Department a proposed Performance Agreement "specifying measurable objectives with annual targets that is acceptable to the Secretary" by February 15, 2012. [22] The Committee also required New Moyer to submit its curricula for Math, Social Studies, Physical Education, World Languages, Visual Arts, and Performing Arts for review and approval by the Department by August 1, 2012. [23]

On April 21, 2011, the Secretary recommended, and the State Board approved, by a 6–0 vote, the issuance of a charter to New Moyer, subject to the conditions in the Committee's final report. [24] The charter would permit New Moyer to begin operations starting with the 2012–2013 academic year [25] and to remain open through the 2015–2016 academic year. [26]

On February 7, 2012, nearly ten months after New Moyer received a charter, a Department employee inquired about the status of New Moyer's services agreement with K12. The employee forwarded to Curry a copy of the draft services agreement that the Moyer Board had submitted in its charter application and encouraged Curry to consult an attorney regarding a final agreement. [27]

On July 1, 2012, New Moyer officially took over operations at the former location of Old Moyer. As of August 23, 2012, New Moyer still had not submitted an executed services agreement to the Department. When a Department employee inquired about the status of that agreement on August 23, Curry stated that New Moyer's counsel was in "the process of drafting the K12 Agreement." [28]

By December 3, 2012, New Moyer and K12 executed an Education Products and Services Agreement (the "Services Agreement"), which was dated to be effective retroactively as of July 1, 2012. [29] Under the Services Agreement, K12 would provide educational services to New Moyer's students, and New Moyer became "responsible for monitoring K12's performance under, and compliance with, the terms of this Agreement in accordance with Applicable Law." [30] The Services Agreement continues through the 2015–2016 academic year, unless terminated earlier. [31]

D. New Moyer's Performance in its First Year (2012–2013)

New Moyer failed to meet the August 1, 2012, deadline the Committee had set in its April 2011 report to submit and receive approval of its curriculum. Thus, when New Moyer opened in fall 2012, it lacked a ***302** curriculum approved by the Department. [32] On November 19, 2012, the Department instructed New Moyer to submit the outstanding curricula for approval no later than December 31, 2012. [33] This deadline was extended further to May 31, 2013, by which time New Moyer submitted a proposed curriculum for approval. [34] On June 11, 2013, content specialists at the Department prepared an internal report noting certain deficiencies in New Moyer's proposed curriculum. [35]

The Department rated the overall academic performance of New Moyer for the 2012–2013 academic school year to be "below standard." [36] Of the fifteen categories in which academic performance was rated, New Moyer received two ratings of "exceeds standard," two ratings of "meets standard," six ratings of "below standard," and five ratings of "far below standard." [37] For the 2012–2013 academic year, the percentage of students scoring "proficient" according to Delaware state standards was

49.6% in English Language Arts and 40.3% in Math, both of which were slightly below the 20th percentile for all schools in the State.[38]

E. New Moyer Requests to Modify its Curriculum

During its first year of operation, New Moyer deviated from the online instruction method set forth in its charter application without obtaining the Department's written approval.[39] On November 19, 2012, the Department instructed New Moyer to submit a proposed charter modification regarding this change in instruction method no later than December 31, 2012.[40]

On December 17, 2012, New Moyer applied to the Department to modify its charter by changing its curriculum and by decreasing its authorized enrollment.[41] Regarding the curriculum, New Moyer sought to change its instructional method for core academic courses from online instruction to traditional, classroom instruction.[42]

On May 30, 2013, the Committee met with New Moyer representatives to discuss the charter modification proposal.[43] On June 27, 2013, the Committee recommended that the Department deny New Moyer's request because of deficiencies in its proposal, including the curricula for English Language Arts, Math, and Social Studies.[44]

On July 18, 2013, the State Board was informed that the Secretary had denied New Moyer's charter modification request. Because this charter modification required approval by both the Secretary and the ***303** State Board, the State Board took no further action on New Moyer's request.[45]

On July 25, 2013, the Department met with representatives of New Moyer to discuss its curriculum. Moyer Board's Chairman understood the importance of this meeting. Beforehand, in a July 18 email, Curry stated that the meeting "should not be taken lightly. We will be given hard deadlines and if we do not produce, Moyer's future is no more!"[46]

After the July 25 meeting, the Department sent New Moyer a "Curriculum Refinement Review," which provided detailed feedback on New Moyer's curriculum.[47] Similarly, on July 26, 2013, the Department provided New Moyer with a "Corrective Action Plan," which set forth "the expectations of the Department, the deadlines that must be met, and the areas in which the Department will engage in ongoing monitoring of [New] Moyer's progress."[48] The Department further informed New Moyer that, as part of the Corrective Action Plan, it would conduct site visits during September and October 2013.[49]

During the Corrective Action Plan period, the Department provided feedback on New Moyer's curriculum in reports dated October 3, 2013, October 27, 2013, and January 9, 2014.[50] On November 8, 2013, the Department also provided New Moyer with a report explaining certain observations in its monitoring of the Corrective Action Plan, noting that New Moyer's curriculum "continue[d] to lack coherence, appropriate progressions and alignment with assessments, and [did] not align to Common Core State Standards."[51] The report further noted that the Department had "found little improvement over the submissions that resulted in the denial of [New Moyer's] modification application in July, 2013."[52]

F. New Moyer's Performance in its Second Year (2013–2014)

On September 24, 2013, after New Moyer had operated for one academic year, New Moyer and the Department entered into the Performance Agreement,[53] which had been a condition of New Moyer's charter.[54] The Performance Agreement set forth certain performance expectations for New Moyer, including:

> By 2015, [New Moyer's] expectation is to achieve the overall rating of "Meets" or "Exceeds" standard as measured by the Academic Performance Framework. Each year, [New Moyer] will show growth within [its] overall rating putting [it] on track to achieve [its] academic performance expectations. This progress will be monitored

> through [its] annual performance review.[55]

***304** The Performance Agreement would "continue in full force and effect during the term of the school's charter and any subsequent renewal term thereof."[56] Although the Performance Agreement is styled as a contract, it does not include any representations or warranties, covenants, or other obligations on behalf of the Department. Indeed, the Performance Agreement provides that "in the sole discretion of the [Department], with the assent of the [State Board], this agreement may be amended at such time as the school's charter may be renewed under the provisions of 14 *Del. C.* § 515(b) or subjected to review under 14 *Del. C.* § 515(c)."[57]

In January 2014, the Department conducted an on-site monitoring visit of New Moyer's special education services. The Department found 67 of 68 student records to be noncompliant with regulations under the federal Individuals with Disabilities Education Act, including the requirement of Individualized Education Plans ("IEPs").[58] In February 2014, the Department notified New Moyer in writing of the on-site monitoring results.[59]

On February 27, 2014, the Department met with representatives of New Moyer to discuss its observations, to conduct a "Root Cause Analysis," and to develop a "Corrective Action Plan" to ensure New Moyer's compliance with federal and State special education regulations.[60] On March 7, 2014, the Department provided certain professional development services to New Moyer representatives.[61] The Department set a deadline of April 1, 2014, for New Moyer to correct noncompliance in the 67 IEPs previously identified as noncompliant ("Prong 1"), and another deadline of May 1, 2014, for New Moyer to correct any systemic noncompliance in its special education procedures ("Prong 2").[62] These deadlines were extended twice, ultimately to May 16, 2014 (for Prong 1) and May 31, 2014 (for Prong 2).[63]

In May and June 2014, the Department reviewed New Moyer's updated files for Prong 1 and concluded that 29 student records were still noncompliant.[64] On June 23, 2014, the Department sent a letter to New Moyer outlining its monitoring of New Moyer's compliance with special education regulations.[65] Because of the outstanding noncompliance, the Department required New Moyer to enter into the Compliance Agreement,[66] which it did in July 2014.[67]

The Compliance Agreement required New Moyer to correct the 29 noncompliant student records by September 19, 2014. On September 19, the Department reviewed New Moyer's updated files and orally informed New Moyer that it was in ***305** compliance with Prong 1.[68] The Department then further extended the deadline for New Moyer to satisfy Prong 2, to correct any systemic noncompliance in New Moyer's special education procedures, until November 3, 2014.[69]

The Department rated the overall academic performance of New Moyer for the 2013–2014 academic school year to be "far below standard."[70] Of the seventeen categories in which academic performance was rated (the fifteen categories from the prior year plus two new categories), New Moyer received zero ratings of "exceeds standard," one rating of "meets standard," three ratings of "below standard," and thirteen ratings of "far below standard."[71] The test scores of New Moyer students on the Delaware Comprehensive Assessment System were the lowest of any charter school in the State.[72] For the 2013–2014 academic year, the percentage of students scoring "proficient" according to Delaware state standards was 23.1% in English Language Arts, a decrease from 49.6% for the prior year; 10.2% in Math, a decrease from 40.3% in the prior year; 6.2% in Science, a decrease from 12.1% in the prior year; and 0% in Social Studies, a decrease from 39.3% in the prior year.[73]

The Department also measured the growth of New Moyer students during the academic year.[74] The percentage of New Moyer students meeting their academic growth targets fell from 70% in English Language Arts and 55.2% in Math for the 2012–2013 year to 28.1% in English Language Arts and 39.5% in Math for the 2013–2014 year.[75] Although 61% of New Moyer's student body for the 2013–2014 year had attended a different school in the prior year, there was only a "nominal difference" between the growth rate performances in these subjects for students who attended New Moyer for both 2012–2013 and 2013–

2014 compared to those who attended for only 2013–2014.[76]

G. New Moyer Again Requests to Modify its Curriculum

On May 13, 2014, New Moyer applied for a major modification of its charter to adopt a curriculum provided by SpringBoard in English Language Arts and Math.[77] The Department had earlier suggested the SpringBoard curriculum to New Moyer in March and April 2014.[78] SpringBoard, which several Delaware schools use, would allow New Moyer to ***306** "use Delaware certified teachers to deliver instruction in [its] core courses," while continuing to use online instruction in its elective courses.[79]

On June 12, 2014, the Committee met with New Moyer representatives to discuss its modification request. On June 17, 2014, the Committee issued an initial report on New Moyer's request in which it expressed concern about implementing a new curriculum, and requested additional information regarding New Moyer's professional development and teacher instruction plans.[80]

On July 9, 2014, the Committee again met with representatives of New Moyer.[81] The Committee agreed to recommend New Moyer's request for charter modification pending submission of satisfactory documents by July 14, 2014, to address six areas of concern, which included providing a plan to fill student knowledge gaps in the proposed transition from K12 to SpringBoard and professional development for teachers.[82]

On July 21, 2014, the Committee issued its final report recommending non-approval of New Moyer's charter modification request.[83] New Moyer had adequately addressed only two of the Committee's six areas of concern by July 14.[84] The four unsatisfactory areas of concern included student knowledge gaps. According to the Committee, New Moyer failed to provide "a detailed plan for placing students in courses, [and] an indication of the specific data that will be used to place students or determine deficits in prerequisite skills and knowledge."[85]

On August 5, 2014, the Committee held a public hearing in Dover, Delaware on its final report.[86] According to the transcript, no representative of New Moyer addressed the Committee at this hearing. On August 21, 2014, at a State Board meeting, the Secretary announced his decision to accept the Committee's recommendation and deny New Moyer's charter modification request.[87] In light of the Secretary's decision, the State Board took no further action on New Moyer's request.[88]

H. The Department Places New Moyer under "Formal Review"

On July 17, 2014, with the assent of the State Board, the Secretary sent a letter to the Moyer Board informing its members that New Moyer was being placed on Formal Review.[89] The Secretary set forth ***307** seven areas in which New Moyer was noncompliant with State law and/or its charter: (i) academic performance; (ii) special education services; (iii) educational programming; (iv) discipline and attendance;[90] (v) student assessment; (vi) staff credentialing; and (vii) financial and administrative operations.[91] Attached to the Secretary's letter was a timeline for the Formal Review process.[92] The Secretary's Formal Review notice was also posted on the Department's website.[93]

I. The Committee Recommends Revocation of New Moyer's Charter

As required by Section 515(c) of the Charter School Act, the Department appointed the Committee to conduct an initial review of New Moyer to determine whether New Moyer was in compliance with its charter and all applicable laws and regulations, and, if not, to determine whether remedial measures were appropriate.[94] On August 5, eleven representatives of New Moyer, including four members of the Moyer Board, met with the Committee ***308** to discuss the seven areas identified in the Secretary's Formal Review notice.[95] Two members of the public also attended this meeting.[96]

Also on August 5, 2014, immediately following the Committee's public hearing on New Moyer's charter modification request to use SpringBoard, the Committee held a public hearing in Dover on the Formal Review

process. The transcript of this Committee meeting reflects that: (i) New Moyer was notified of the hearing in the Secretary's Formal Review notice; (ii) on July 18, 2014, a notice of the meeting was placed on the Department's website and on the State's online public meeting calendar; and (iii) also on July 18, a notice of the hearing was published in *The News Journal* and *Delaware State News*.[97] Keenan Dorsey, the principal of New Moyer, made comments on the record.[98]

On August 7, 2014, the Committee issued its Initial Report recommending that New Moyer be found noncompliant with its charter and relevant Delaware regulations based on the same seven areas of noncompliance identified in the Secretary's Formal Review notice.[99] New Moyer was given the opportunity to respond in writing to the Initial Report by August 22, 2014.

On August 19, 2014, New Moyer submitted a written response.[100] In its response, New Moyer asserted that its population was "severely underprivileged, underserved and underprepared" in that 75% of the current student body was new to the school; 32% of the student body was identified as special needs students; and the students who attend the school had reading proficiencies that, on average, were three grade levels below their target grade level.[101] New Moyer further explained that, despite turnover in its special education department, it hired a Special Education Director in February 2014, who in turn hired three special education teachers and four paraprofessionals for the 2014–2015 academic year.[102] As to the suspension rate, New Moyer noted that its "zero tolerance approach" to disciplinary infractions was perhaps an "overcorrect[ion]," and that it had submitted to have an on-campus School Resource Officer.[103]

On August 29, 2014, the Committee held a public meeting in Dover, Delaware. Seven representatives of New Moyer, including two members of the Moyer Board, attended, as well as two representatives from the public.[104] At this meeting, the ***309** Committee unanimously agreed that New Moyer was noncompliant with four of the seven areas identified in the Secretary's Formal Review notice: (i) academic performance; (ii) special education services;[105] (iii) educational programming; and (iv) school discipline.[106] Before the Committee voted on its recommendation to the Department regarding the appropriate remedial measures, one Committee member noted how he did not consider probation appropriate for New Moyer:

> [The Committee member] also stated that, if areas of noncompliance in student achievement were not as significant as they are and the previous two years had not been as difficult as they were, it would be easier to recommend probation and place faith in [New] Moyer. He explained that there was too much history over the last two years and the issues concerning services to Special Education students make it difficult to set aside.[107]

A majority of the Committee then voted (by a 3–0 vote, with one member abstaining) to recommend that New Moyer's charter be revoked, effective June 30, 2015.[108]

On September 5, 2014, the Committee issued its Final Report, which recommended, for the four reasons listed at its August 29 meeting, revocation of New Moyer's charter, effective June 30, 2015.[109] New Moyer was given the opportunity to respond in writing to the Final Report by September 15, 2014, but New Moyer declined to do so.[110]

J. The Secretary and the State Board Revoke New Moyer's Charter

On September 10, 2014, the Department and the State Board held a joint public hearing in Wilmington, Delaware to discuss the Committee's Final Report.[111] The transcript of this joint hearing reflects that: (i) on July 19, 2014, New Moyer was notified of the hearing; (ii) on August 18, 2014, a notice of the hearing was placed on the Department's website and on the State's online public meeting calendar; and (iii) also on August 18, a notice of the hearing was published in *The News Journal* and *Delaware State News*.[112] Six representatives of New Moyer, including three Moyer Board members and its principal, made comments on the record.[113]

On October 9, 2014, at a public meeting of the State Board, the Secretary announced his decision to accept

the recommendations of the Committee's Final Report to revoke New Moyer's charter, ***310** effective June 30, 2015.[114] The Secretary explained that the Final Report "highlight[s] significant problems with the school's academic performance and its program," specifically noting:

- New Moyer "is at the bottom of the traditional district schools and charter schools in regards to student achievement";
- The percentage of students at New Moyer who tested proficient for the 2013–2014 academic year was 10% in Math, 23% in English Language Arts, 6% in Science, and 0% in Social Studies;
- The proficiency scores of New Moyer's students for the 2013–2014 academic year were lower than the proficiency scores for the 2012–2013 academic year, "which also fell far below state averages"; and
- Significant challenges the school faced with respect to special education needs, including the requirements for IEPs and adequate staffing.[115]

The State Board then unanimously agreed (by a 7–0 vote) with the Secretary to revoke New Moyer's charter.[116]

On October 13, 2014, sixty-one working days (excluding the Labor Day holiday) after the Secretary's Formal Review notice, the Secretary notified New Moyer by letter of his and the State Board's decision to revoke New Moyer's charter, effective June 30, 2015.[117] The letter outlined the four areas of noncompliance that formed the basis for the revocation decision: (i) academic performance (pursuant to New Moyer's Performance Agreement); (ii) special education services (pursuant to Section 512(7) of the Charter School Act); (iii) educational programming (pursuant to Section 512(6) of the Charter School Act); and (iv) discipline and attendance (pursuant to Section 512(11) of the Charter School Act).[118]

K. Procedural History

On November 25, 2014, three Individual Plaintiffs and the City of Wilmington filed an action (C.A. No. 10398) against the ***311** Department, the Secretary, the State Board, and each of its members. On November 26, 2014, five other Individual Plaintiffs and New Moyer filed another action (C.A. No. 10402) against the Department, the Secretary, and the State Board. On December 2, 2014, I entered an order consolidating these two actions.

On December 3, 2014, I granted the parties' stipulated order for expedited proceedings. On December 5, 2014, Plaintiffs filed a Consolidated Complaint.[119]

On December 19, 2014, Plaintiffs moved for a preliminary injunction "enjoining Defendants from implementing the decision revoking New Moyer's charter and closing the New Moyer School at the close of the current school year (June 2015)." Plaintiffs request a ruling before January 14, 2015, the deadline for students to apply to the school of their choice under the Delaware School District Enrollment Choice Program (the "Choice Program").

Also on December 19, 2014, Defendants moved to dismiss the Consolidated Complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim. On January 2, 2015, I heard oral argument on Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss.

Given the exigencies of Plaintiffs' preliminary injunction application, this opinion addresses the issues necessary to resolve Plaintiffs' motion, but I also have considered the parties' briefing on Defendants' motion to dismiss.

III. LEGAL ANALYSIS

A. The Legal Standard

[1] **[2]** "[A] motion for preliminary injunctive relief requires [the Court] to take a step that, procedurally speaking, is extraordinary: to make a 'preliminary' determination of the merits of a cause before there can be a final adjudication of [Plaintiffs'] claims."[120] To obtain a preliminary injunction, Plaintiffs must establish three elements: (i) a reasonable probability of success on the merits; (ii) irreparable harm absent interim relief; and (iii) that the balance of the equities favors the relief requested.[121] "This burden is not a light one, and an 'extraordinary remedy' like a preliminary injunction 'will never be granted unless earned.' "[122] Although "[a] strong showing on one element may overcome a weak showing on another element," Plaintiffs must still demonstrate all three elements.[123]

B. Reasonable Probability of Success on the Merits

In support of their preliminary injunction application, Plaintiffs advance claims that "collectively comprise a due process claim or set of claims under the Fourteenth Amendment" of the United States ***312** Constitution.[124] The precise demarcation of Plaintiffs' constitutional claims is unclear. Plaintiffs asserted both procedural and substantive due process challenges in their briefs concerning the decision to revoke New Moyer's charter, although they acknowledged at oral argument that their due process claims are primarily procedural and not substantive.[125] Because the City of Wilmington concedes that its claims as *parens patriae* are identical to those of the Individual Plaintiffs' claims,[126] I address only the claims of the Individual Plaintiffs and New Moyer in this opinion.

1. Procedural Due Process Claim

The Due Process Clause of the Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." When a plaintiff asserts a violation of the Due Process Clause, the threshold question "is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' "[127]

[3] **[4]** A property interest entitled to procedural due process under the Due Process Clause is created and defined not by the Constitution, but rather by "existing rules or understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[128] "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[129]

[5] **[6]** **[7]** As a general matter, "[w]hen the decision to grant or withhold a benefit is entrusted to the discretion of a government actor, one has no constitutional property interest in obtaining that relief."[130] "If the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' the State has not created a constitutionally protected ... interest."[131] In other words, there is no protected property interest where the decision to remove a benefit is left to the "unfettered discretion" of the government actor.[132] Conversely, the State may create a constitutionally protected ***313** interest by placing a "substantive limitation on official discretion" to grant, deny, or remove a benefit.[133]

a. New Moyer Has No Protected Property Interest[134]

[8] New Moyer contends that the charter it received from the Department to operate a school is "a government license, not a contract," and thus constitutes a protected property interest.[135] In opposition, Defendants argue that, because "the decision to withhold, grant, or revoke a public school charter is a discretionary one," the charter New Moyer received from the Department was a "privilege" and thus not a protected interest.[136]

In my opinion, New Moyer does not have a constitutionally protected property interest in its charter because, under Delaware law, the Department's decision to revoke its charter was discretionary. In adopting the Charter School Act, the General Assembly created a statutory scheme governing the Department's oversight of Delaware charter schools. A charter may be issued by an approving authority (*i.e.*, a public school district or the Department) with the approval of the State Board.[137] The Charter School Act prescribes certain actions an approving authority must take, and others are left to the approving authority's discretion. I conclude, for the reasons that follow, that the Department's decision to revoke New Moyer's charter falls within the latter category.

The Department's decision to revoke New Moyer's charter implicates Sections 515(f) and 516(2) of the Charter School Act. Under Section 516(2), an approved charter "shall be subject to revocation or probation, after the exercise of due diligence and good faith," if the approving authority (here, the Department) determines that "[t]he school fails to comply with its charter or to satisfy, in its operation of the school, the criteria set forth in [Section] 512."[138] Thus, the Department's determination under Section 516(2) about ***314** whether New Moyer's charter was *subject* to possible revocation or probation

uses the mandatory "shall" and is qualified by reference to the sixteen criteria specified in Section 512, which are the conditions required for the issuance of a charter. Critically, however, under Section 515(f), the ultimate decision *to revoke* a charter is permissive as the statute uses the term "may" and is not qualified by reference to any criteria:

> If the approving authority determines that the criteria for remedial action set forth in § 516 of this title have been satisfied, it ***may revoke*** the charter and manage the school directly until alternative arrangements can be made for students at the school or place the school on a probationary status subject to terms determined by the approving authority which are directly relevant to the violation or violations. [139]

In my view, the ability of the Department to revoke a charter is discretionary because there are no substantive limits on the Department's decision-making process. Although the Department does not have the discretion to revoke a charter unless that charter is subject to revocation under Section 516, once a charter is subject to revocation, Section 515(f) affords the Department the discretion to revoke or not to revoke it. No provision of the Charter School Act sets forth any criteria that mandates or prohibits revocation under Section 515(f). Because the Department's decision to revoke a charter ultimately is discretionary and not subject to any substantive limits, I conclude that New Moyer has no legitimate claim of entitlement to the four-year charter it received. [140]

My conclusion is supported by Chief Judge Stark's recent decision in *Reach Academy for Boys and Girls, Inc. v. Delaware Department of Education,* [141] in which he addressed whether students had a protected property interest in a charter where the Department decided not to renew the charter after its initial term. Under Section 514A(b) of the Charter School Act, the Department has the authority to decide, at the end of a charter's term, whether to renew the charter: a charter "***may*** be renewed for successive 5–year terms." [142] There is no mandatory "shall" or objective criteria that prescribes, one way or the other, whether to renew a charter. Focusing on the use of the word "may" in Section 514A(b), Chief Judge Stark concluded that the plaintiffs—individual students who attended the charter school—had no constitutionally protected property interest in the school's charter because the Charter School Act vested the Department "with the discretion to renew or not renew charters." [143]

***315** The use of the "may" in Section 515(f)–without any specific criteria to guide the Department's determination of whether a charter subject to revocation should actually be revoked–is analytically similar to the use of the "may" in Section 514A. Although Section 515(f) operates differently than Section 514A(b) in that only Section 515(f) references the criteria incorporated into Section 516, this is a distinction without a difference in my view. There is no statutory analogue for when a charter "shall be subject" to renewal because there is no need for one. By its terms, a charter exists for a specified term and then expires.

The ultimate decision under Section 515(f) whether to revoke a charter subject to revocation, much like the decision under Section 514A(b) whether to renew a charter whose term is about to expire, is within the discretion of the Department. Thus, just as in *Reach Academy,* where Chief Judge Stark concluded that the plaintiffs did not have a constitutionally protected interest in a charter because the Department had discretion under Section 514A(b) to decide whether or not to renew a charter, [144] I conclude that New Moyer does not have a constitutionally protected property interest in its charter because the Department has the discretion under Section 515(f) to decide whether or not to revoke the charter.

This conclusion also is consistent with the substantial authority cited by Defendants finding there to be no constitutionally protected interest in a charter school, both in the context of addressing revocation of a charter [145] and non-renewal of a charter. [146] New Moyer, by contrast, relies solely on *Northside Urban Pathways Charter School v. State Charter School Appeal Board.* [147] That case is inapposite.

The key issue before the *Northside Urban* court was whether a Pennsylvania state agency had subject matter jurisdiction to hear an appeal of a school district's decision to deny a charter school's charter modification request. [148] Although the ***316** court noted that a

"charter school has a protected property interest in its charter" [149] under the Pennsylvania Charter School Law, the court did not address the significance of statutory provisions like those in the Delaware Charter School Act, discussed above, which expressly afford the approving authority the discretion to decide whether or not to renew or revoke a charter.

b. The Individual Plaintiffs Have No Protected Property Interest

[9] The Individual Plaintiffs contend they have a protected property interest in New Moyer's charter under the Due Process Clause because Delaware law "grants an express entitlement to the students of choice schools to graduate from their school of choice." [150] In support, the Individual Plaintiffs rely exclusively on their interpretation of Section 407(a)(1) of the Choice Program, which provides that "a pupil accepted for enrollment" in a choice school "shall be entitled to remain enrolled therein until graduation from the school." [151] Based solely on this statute, the Individual Plaintiffs contend that the State must provide (and has failed to provide) appropriate procedural due process before depriving them of their property interest in graduating from New Moyer. [152]

Defendants, in opposition, contend that the Individual Plaintiffs do not have a legally protected property interest in New Moyer's charter because Delaware students do not have a State-created right to graduate from a particular school. Specifically, Defendants argue that the Individual Plaintiffs' proffered interpretation of Section 407(a)(1) of the Choice Program directly conflicts with the plain language of Section 516(2) of the Charter School Act, which permits the Department to revoke New Moyer's charter, and thereby close the school, if it fails to comply with its obligations under its charter. [153] Read together, according to Defendants, Section 407(a)(1) "generally allows a student to remain enrolled until graduation at a school that remains open and operational," while Section 516(2) "applies to the determination of whether a charter school remains in compliance with statutory requirements and its charter." [154] I agree.

In my opinion, Section 407(a)(1) of the Choice Program does not provide Delaware students a legitimate claim of entitlement to graduate from a school at which they are enrolled. [155] The Choice Program, particularly Section 407, is a student-centered statute. Section 407(a)(1) provides, in relevant part:

> (a)(1) A pupil accepted for enrollment in a school or program pursuant to this ***317** chapter shall be entitled to remain enrolled therein until graduation from the school or completion of the program provided that the pupil continues to meet the requirements for such school or program[.]

The plain language of Section 407(a)(1) means that, once a choice school accepts a student for enrollment, that school may terminate the student's enrollment for only certain specified reasons. Similarly, Section 407(a)(2), which is not at issue here, limits the ability of a student accepted for enrollment at a choice school to change his or her choice school during a two-year period to only certain specified reasons.

Although Section 407(a)(1) is to be construed broadly, [156] a necessary and fundamental implication of Section 407(a) is that a school must be *open* for these Choice Program protections to attach. As Plaintiffs recognized at oral argument, the protections of Section 407 are available only if, for example, the school is adequately funded. [157] In the case of New Moyer, this means that the protections of Section 407(a) are available only *if the school has a charter to operate.*

Plaintiffs' interpretation of Section 407 is plainly incorrect in my view because it would allow the student-centered provision of Section 407 to eviscerate the school-centered provisions of the Charter School Act and the General Assembly's express directive for the Department to oversee public education in the State, which includes the authority to revoke and to not renew a charter. Nothing in Section 407 indicates that the General Assembly intended the statute to have this effect.

In light of the distinct subject matters addressed by the Choice Program and the Charter School Act, both of which were adopted by the General Assembly on July 10, 1995, I conclude that Section 407(a)(1) was not intended to create a legitimate claim of entitlement that would prevent the Department from exercising its statutory discretion

under Section 515(f) to revoke New Moyer's charter unless it satisfied the Individual Plaintiffs' rights under the Due Process Clause.[158] In short, neither Section 407(a) nor any other provision of the Delaware Constitution, Delaware statutory law, or Delaware common law that has been identified endows Delaware students with the right to graduate from a particular school.[159] Thus, I conclude that the Individual Plaintiffs do not have a protected property interest in graduating from New Moyer.

c. Even if New Moyer and the Individual Plaintiffs Had Protected Property Interests, They Received Due Process

[10] **[11]** "Only after finding the deprivation of a protected interest [does the ***318** Court] look to see if the State's procedures comport with due process."[160] Assuming, for the sake of argument, that New Moyer had a protected interest in its charter and that the Individual Plaintiffs had a protected interest in graduating from New Moyer, Plaintiffs have still failed to show a reasonable probability of success on their procedural due process claims.

Plaintiffs' procedural due process challenges are straightforward. They contend that Defendants gave inadequate notice on the Department's website about the Formal Review notice. They also contend that Defendants "failed to provide Plaintiffs with ample opportunity to be heard" by (i) not permitting a reasonable opportunity to introduce evidence, to examine witnesses, or to make argument; and (ii) holding the Committee's public hearing in Dover.[161] In response, Defendants have submitted evidence disputing Plaintiffs' contention concerning the website and further assert that the requirements of the Due Process Clause are flexible such that a trial-like proceeding was not "required or warranted" to revoke New Moyer's charter.[162] Thus, Defendants argue that the statutorily prescribed process they undertook provided "more than ample notice and an opportunity to be heard" than the Due Process Clause requires.[163]

[12] **[13]** "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.' "[164] "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."[165] In *Mathews v. Eldridge,* the United States Supreme Court set forth several factors that a court must balance in determining the procedural process due in a given situation:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[166]

The *Mathews* test, as the Supreme Court has repeatedly recognized, is one of "flexibility."[167]

***319** In my opinion, Plaintiffs received adequate due process of the Department's decision to revoke New Moyer's charter. It is undisputed that New Moyer received the Formal Review notice and Defendants have submitted an affidavit, which I credit, attesting that the notice was available on the Department's website from July 18, 2014 (the day after the Formal Notice was issued) until November 7, 2014, by which time the revocation decision had been made and announced publicly.[168] No evidence has been submitted that anyone who wished to attend the Committee's hearing on August 5, its meeting on August 29, or the State Board and Department's joint hearing on September 10 was unaware of the opportunity to do so, or that the statutorily required notice of those hearings was not provided.[169]

The record further reflects that Defendants followed the process required by the Charter School Act[170] before revoking New Moyer's charter, including:

- On July 17, 2014, providing the Formal Review notice to New Moyer;
- Appointing the Committee to conduct a review;

- On August 5, 2014, holding a meeting between the Committee and New Moyer to discuss the areas of concern identified in the Formal Review notice;
- On August 5, 2014, holding a public hearing in Dover before the Committee issued its Initial Report;
- Providing New Moyer the opportunity to review and comment on the Committee's Initial Report by August 22, 2014;
- On August 29, 2014, holding a public meeting in Dover to discuss the Committee's Initial Report and New Moyer's response;
- Providing New Moyer the opportunity to review and comment on the Committee's Final Report by September 15, 2014; and
- On September 10, 2014, holding a joint public hearing of the Department and the State Board in Wilmington to discuss the Committee's Final Report.

In sum, throughout this process, New Moyer was given adequate notice and a meaningful opportunity to be heard before the Department revoked its charter. In fact, numerous New Moyer representatives attended Committee meetings and the public hearings, and New Moyer submitted a written response to the Committee's Initial Report. New Moyer's decision not to respond in writing to the Committee's Final Report does not change the fact that New Moyer had a meaningful opportunity to do so.

[14] Given the respective interests of Plaintiffs and Defendants under the *Mathews* test, the Due Process Clause did not require, in my view, that Plaintiffs have the opportunity to formally introduce evidence,[171] to examine witnesses, or to make argument at a trial-like proceeding. In ***320** my opinion, those additional procedures are not warranted given the procedures already in place under the Charter School Act, and any arguable benefit derived from them would be outweighed by the significant fiscal, administrative, and logistical burdens of imposing such requirements on the approving authority whenever it is necessary to determine whether any of the over 30 charter schools in Delaware[172] is violating the terms of its charter and whether remedial measures should be ordered—a process that is to be completed within 60 working days.[173]

Finally, I am not persuaded that Defendants acted unconstitutionally by holding the Committee's public meetings and a public hearing in Dover, where the main office of the Department is located, as opposed to Wilmington. Plaintiffs do not suggest the Committee was legally required to meet in Wilmington, and they have not offered any evidence that Defendants' decision to hold those hearings in the State capital was out of the ordinary for that type of proceeding. The final public hearing held by the Department and the State Board on September 10, moreover, was held in Wilmington.

For the reasons explained above, even assuming *arguendo* that New Moyer had a protected interest in its charter and/or that the Individual Plaintiffs had a protected interest in graduating from New Moyer, Plaintiffs have failed to demonstrate a reasonable probability of success on the merits of their procedural due process claims.

d. Plaintiffs Have Failed to Show a Reasonable Probability of Demonstrating that Defendants Violated the Charter School Act Procedures

Plaintiffs argue that the Department failed to comply with the Charter School Act in two respects when it revoked New Moyer's charter: (i) by not revoking New Moyer's charter effective immediately as opposed to making the revocation effective at the end of the 2014–15 school year; and (ii) by sending the Secretary's letter formally revoking New Moyer's charter 61 days after the Formal Review notice, which is one day after the 60–working–day deadline in Section 515(b).[174] Plaintiffs contend that these alleged violations deprived Plaintiffs of a protected interest in violation of the Due Process Clause.[175] Assuming, without deciding, that Plaintiffs' legal theory is viable, Plaintiffs are unlikely to succeed on the merits of either claim in my view.

[15] As to the first claim, Section 515(f) provides that the Department "may revoke the charter and manage the school directly until alternative arrangements can be made for students at the school or place the school on a probationary status."[176] Although this language implies that the Department may revoke a charter

immediately, nothing in the statute expressly addresses when a revocation decision must become effective. Nor does the statute expressly prohibit the Department from making a revocation effective at a future date. In another context, the General Assembly's use of the word "may" has been interpreted to mean "a permissive ***321** approach that authorizes [action] by the means specified, but not ruling out [action] by other means." [177] In my opinion, interpreting Section 515(f) in this manner is consistent with the apparent intent of the statute to facilitate an orderly transition for the students when the Department decides to revoke a charter. [178] Thus, I conclude that, under Section 515(f), the Department has the discretion, which it exercised with respect to New Moyer's charter, to revoke a charter effective at a future date. [179]

[16] As to the second claim, assuming that Plaintiffs' interpretation of the 60–working day requirement is correct, [180] which I need not decide, a one-day violation of the 60–working day deadline in Section 515(c) is hyper-technical and does not amount to a constitutional violation of due process. Plaintiffs have not shown any prejudice from the one-day delay, let alone prejudice that, without more, would constitute a violation of the Due Process Clause.

2. Substantive Due Process Claim

[17] As Plaintiffs acknowledged at oral argument, the thrust of their application for a preliminary injunction is predicated on their procedural due process claims addressed above. Insofar as Plaintiffs raised substantive due process claims in their briefs, they can be addressed in short order.

[18] Under the Third Circuit's decision in *Nicholas v. Pennsylvania State University,* [181] which cites extensive supporting authority and which I find to be persuasive here, the protections of substantive due process attach only where a plaintiff has demonstrated deprivation of an interest that is considered a "fundamental" right under the United States Constitution. [182] ***322** Defendants contend that any protected interest of Plaintiffs, if it exists, "does not rise to the level of a 'fundamental' right." [183] I agree.

Plaintiffs have cited no federal or state authority in which a court has held that students have a fundamental right under the Constitution to attend a particular school or that a charter school has a fundamental right under the Constitution to remain open. In the absence of any such authority, and in light of the United States Supreme Court's directive that a court should "exercise the utmost care" when asked to "break new ground" in the jurisprudence of substantive due process, [184] I decline to find that any supposed protected interest Plaintiffs have advanced constitutes a "fundamental" right. [185]

This conclusion logically follows from my prior conclusion, for the reasons explained above, that neither the Individual Plaintiffs nor New Moyer have established the existence of a protected property interest regarding New Moyer's charter under the Due Process Clause for purpose of invoking the protections of procedural due process. Thus, I decline Plaintiffs' request to second-guess the substantive merits of the Department's decision to revoke New Moyer's charter through the prism of a substantive due process analysis. [186]

3. The Lack of Judicial Review Claim

Plaintiffs assert that the Charter School Act violates their rights to due process under the Constitution insofar as it "purports to preclude judicial review of the decision" of the Department to revoke ***323** New Moyer's charter. [187] Defendants respond that the Charter School Act properly precludes a direct appeal, but that a limited right of appeal is available in the form of certiorari review in the Superior Court (but not in the Court of Chancery), which Plaintiffs failed to pursue. [188] For the reasons discussed below, I find (1) that the Charter School Act implies that a charter school may challenge whether the Department's decision to revoke a charter was made "after the exercise of due diligence and good faith" but may not challenge the merits of a decision to revoke a charter, and (2) that evidence Plaintiffs have presented fails to demonstrate that it is reasonably probable the Department did not exercise due diligence or act in good faith in this case.

The Charter School Act provides that the availability of appellate review of the approving authority's decision to

revoke a charter depends on the identity of the approving authority. Under Section 515(g), if a local school district decides to revoke a charter it granted, the charter school may pursue in arbitration a claim to demonstrate why that decision was in error:

> [i]f a local school district which is an approving authority decides to revoke the school's charter or place the school on probationary status, the applicant may file for arbitration in writing with the American Arbitration Association in Philadelphia within 20 days of the local board's decision stating the reasons why it believes the local board decision was in error.... The arbitrator shall convene a hearing and determine whether the local board's decision was in error.... The arbitrator's decision shall be final and binding upon the parties.

By contrast, under Section 515(h), "[i]f the approving authority is the Department and it decides to revoke the school's charter or place the school on probationary status, its decision shall be final and not subject to arbitration or judicial review." [189] This provision plainly evidences the General Assembly's intention that the merits of a decision to revoke a charter (*i.e.*, whether that "decision was in error") shall not be subject to judicial review when that decision is made by the Department.

[19] **[20]** On the other hand, Section 516 of the Charter School Act, which enumerates the two reasons for which a charter may be revoked, expressly provides that the charter "shall be subject to revocation or probation, after the exercise of *due diligence and good faith* [.]" [190] By necessary implication, this provision contemplates that a charter school may seek judicial review to challenge whether the approving authority complied with the ***324** "due diligence and good faith" standard in determining that one of the reasons for revocation has been satisfied. [191] If this were not the case, the inclusion of the "due diligence and good faith" language in Section 516 would be rendered meaningless because no check would exist to ensure the standard was satisfied. [192]

In briefing the present motion, the parties provided no authorities concerning the meaning of "due diligence and good faith." The Court's research shows that this specific standard appears in only two provisions of the entire Delaware Code: Sections 512 and 516 of the Charter School Act, neither of which defines either "due diligence" or "good faith."

Absent a definition in the Charter School Act, I must look elsewhere to determine the plain meaning of "due diligence and good faith." "Because dictionaries are routine reference sources that reasonable persons use to determine the ordinary meaning of words, [Delaware courts] often rely on them for assistance in determining the plain meaning of undefined terms." [193] *Black's Law Dictionary* defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation," and it further defines "diligence" as "[a] continual effort to accomplish something" and "[c]are; caution; the attention and care required from a person in a given situation." [194] These definitions are generally consistent with how the term "due diligence" is construed in the Delaware Uniform Commercial Code, [195] and they also are captured well in the familiar concept of the duty of care in Delaware corporate law. [196] *Black's Law Dictionary* also defines "good faith" as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." [197] This definition is a functional analogue of the Delaware corporate law ***325** concept of good faith. [198]

[21] Applying these concepts here, I conclude that the evidence of record is insufficient to demonstrate that it is reasonably probable New Moyer could prove successfully at trial that the Department did not exercise due diligence and good faith when it determined that New Moyer failed to comply with its charter and to satisfy, in its operation of the school, criteria set forth in Section 512 of the Charter School Act. [199] In my opinion, the record demonstrates that the Department properly exercised due diligence in finding that New Moyer's charter was subject to revocation for many of the same reasons, discussed above, that demonstrate that the Plaintiffs were

afforded appropriate due process. In particular, the record shows that the Department actively sought to avail itself of all material information reasonably available to it, including through the statutory process that required public meetings and hearings and that permitted New Moyer to submit written responses.

Regarding the Department's good faith, there is no persuasive evidence in the record to suggest that the Department acted with an improper motive,[200] with an intention to violate Delaware law, or in conscious disregard of the Charter School Act. Indeed, of the seven areas of potential violations identified in the Secretary's Formal Review notice, only four areas formed the basis of the Department's decision to revoke New Moyer's charter. This reflects a good faith effort by Defendants to determine whether New Moyer was in violation of its charter and/or applicable law, and, if so, whether remedial measures were appropriate.

* * * * *

Because Plaintiffs have failed to demonstrate a reasonable probability of success on the merits of any of the claims they have advanced on this motion, Plaintiffs have not satisfied the standard to earn a preliminary injunction. I thus need not ***326** address the elements of irreparable injury or the balance of the equities.[201]

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction is DENIED.

IT IS SO ORDERED.

All Citations

108 A.3d 294, 314 Ed. Law Rep. 940

Footnotes

1 14 *Del. C.* ch. 5.

2 14 *Del. C.* § 501.

3 *Id.*

4 These are the preliminary facts as I find them based on the documentary evidence and affidavits from the following individuals submitted by the parties in conjunction with Plaintiffs' preliminary injunction motion: (i) Rev. Christopher T. Curry, Ph.D., Chairman of the Board of Directors of New Moyer ("Curry Aff."); (ii) John H. Carwell, Jr., an Education Associate at the Department ("Carwell Aff."); (iii) Donna R. Johnson, the Executive Director of the State Board and a non-voting member of the Committee ("Johnson Aff."); (iv) Barbara Mazza, an Education Associate at the Department and a voting member of the Committee ("Mazza Aff."); (v) Mary Kate McLaughlin, the Chief of Staff for the Department ("McLaughlin Aff."); (vi) Jennifer Nagourney, the Executive Director of the Department's Charter School Office ("Nagourney Aff."); and (vii) Shelley Rouser, the Director of K–12 Initiatives and Educator Engagement for the Department ("Rouser Aff.") No depositions were taken in connection with Plaintiffs' preliminary injunction motion.

5 Defs.' Ex. 1 at DOE–MOYER001418–21.

6 77 Del. Law Ch. 327; 145th General Assembly, SB 310 § 384.

7 Defs.' Ex. 2.

8 Defs.' Ex. 3.

9 Defs.' Ex. 4; Carwell Aff. ¶ 12.

10 Pls.' Ex. 9.

11 *Id.* at CW000416, 495, 498. Although the composition of the Moyer Board has changed since New Moyer received its charter, the identity of its members is immaterial to this opinion.

12 *Id.* at CW000491–94.

13 *Id.* at CW000414.

14 *Id.* at CW000415.

15 *Id.* at CW000417–18. The signed application states that the Moyer Board "has worked closely with K12 in the development of [the] application." *Id.* This representation is at odds with the affidavit of Moyer Board's Chairman, which implies that the Moyer Board was not involved in the preparation of the application. *See* Curry Aff. ¶ 6.

16 Pls.' Ex. 9 at CW000434.

17 Defs.' Ex. 6 at DOE–MOYER000208.
18 Pls.' Ex. 12.
19 *See* 14 *Del. C.* § 512.
20 Pls.' Ex. 12 at CW001002.
21 *Id.*
22 *Id.* at CW001006 (condition # 16).
23 *Id.* (condition # 10).
24 Defs.' Ex. 5 at DOE–MOYER001498.
25 *Id.*
26 Curry Aff. ¶ 5.
27 Carwell Aff. ¶ 14; Curry Aff. Ex. C. The preliminary record does not reflect that anyone at the Department had authored any part of that draft agreement or that the Department mandated that the Moyer Board agree to the particular provisions of that draft.
28 Defs.' Ex. 7.
29 Pls.' Ex. 11 at CW000967, 990.
30 *Id.* at CW000972 (§ 3.1). The Services Agreement provides that Delaware law is the applicable law. *Id.* at CW000968 (§ 1.2).
31 *Id.* at CW000973 (§ 5.1).
32 Carwell Aff. ¶ 2.
33 Defs.' Ex. 8.
34 Carwell Aff. ¶ 3.
35 Pls.' Ex. 28.
36 Pls.' Ex. 26 at CW001085. The ratings system the Department used contains four ratings, in descending order: (1) exceeds standard, (2) meets standard, (3) does not meet (or below) standard, and (4) far below standard. *Id.* at CW001077.
37 *Id.* at CW001085.
38 Pls.' Ex. 39 at CW000744; Pls.' Ex. 13 at CW001009.
39 Carwell Aff. ¶ 4.
40 Defs.' Ex. 8.
41 Pls.' Ex. 15.
42 *Id.* at CW001056–57; Carwell Aff. ¶ 5.
43 Defs.' Ex. 9 at MOYER–COVERDALE000164.
44 *Id.* at MOYER–COVERDALE000154–63.
45 Defs.' Ex. 10 at DOE–MOYER001628.
46 Defs.' Ex. 11.
47 Carwell Aff. ¶ 9, Ex. E.
48 McLaughlin Aff. ¶ 2.
49 *Id.* Ex. B at DOE–MOYER001758.
50 Rouser Aff. ¶ 4, Exs. A–C. A Department employee noted in an affidavit that "[s]everal overarching areas of misalignment of New Moyer's curriculum with the State Standards for math, English language arts (ELA), science and social studies were identified in each of these reports." *Id.* ¶ 5.
51 McLaughlin Aff. ¶ 5, Ex. E.
52 Id.
53 Pls.' Ex. 18.
54 Pls.' Ex. 12 at CW001006 (condition # 16); Pls.' Ex. 9 at CW000492 (assurance # 13).
55 Pls.' Ex. 18 at CW000561.
56 *Id.* at CW000559.
57 *Id.* at CW000559 (§ 2) The Performance Agreement additionally provides that, "[i]f the [Department] finds that the school is not making satisfactory progress toward its performance targets the [Department], with the assent of the [State Board], may place the school's charter on formal review pursuant to 14 *Del. C.* § 515(c)." *Id.* (§ 3(b)).

58 Mazza Aff. ¶ 4.
59 *Id.* ¶ 5.
60 *Id.* Ex. A.
61 *Id.* ¶ 7, Ex. B.
62 *Id.* ¶ 6.
63 *Id.* ¶ 7.
64 *Id.* ¶ 8.
65 *Id.* ¶ 9.
66 *Id.* Ex. C.
67 *Id.* Ex. D.
68 *Id.* ¶ 12; Curry Aff. ¶¶ 27–28, Ex. M.
69 Mazza Aff. ¶ 12. On November 3, 2014, the Department reviewed 26 individual student records and concluded that ten were noncompliant with special education regulations. *Id.* ¶ 13. Plaintiffs note, logically, that these additional examples of noncompliance cannot support the decision to revoke Moyer's charter since they were found after that decision had been made in October 2014.
70 Pls.' Ex. 26 at CW001085.
71 *Id.*
72 Pls.' Ex. 31 at CW000666.
73 Pls.' Ex. 39 at CW000744–45; *see also* Pls.' Ex. 26 at CW001078.
74 Johnson Aff. ¶ 6.
75 Pls.' Ex. 26 at CW001077.
76 Defs.' Ex. 16 ("Students who attended Moyer in both 12–13 and 13–14 met 40% of their Math targets, compared to 34% of students attending Moyer in only 13–14. Similarly for ELA, 27% of students who attended for both 12–13 and 13–14 met their targets, compared to 25% of students who attended for only 13–14.").
77 Pls.' Ex. 27.
78 Curry Aff. ¶¶ 13–14.
79 Pls.' Ex. 27 at CW000597, 600.
80 Pls.' Ex. 29 at CW001093–94.
81 Pls.' Ex. 30 at CW000676.
82 *Id.* at CW000682.
83 *Id.* at CW000683.
84 *Id.*
85 *Id.* The other unsatisfactory areas were: (i) Common Core standards for mathematical practice; (ii) assessments; and (iii) pacing instruction. *Id.*
86 Defs.' Ex. 14.
87 Defs.' Ex. 15 at DOE–MOYER001752.
88 *Id.* Plaintiffs note that, on August 19, 2014, Curry requested to meet with the Department's curriculum professionals to discuss New Moyer's charter modification request. Pls.' Reply Br. Ex. B. The evidence reflects that there was no such meeting before or after the August 21, 2014, State Board meeting. Curry Aff. Ex. H.
89 Pls.' Ex. 31. The Formal Review notice came one month after the University of Delaware, the Delaware Academy for School Leadership, and the Department released a Comprehensive School Review of New Moyer on June 17, 2014. Defs.' Ex. 17. The report noted, among other findings, that New Moyer "lacks a clear mission and vision that focus instruction and to provide a unifying purpose," and that "[t]here is an organizational structure disconnect among board, school leadership, staff, and K12 management." *Id.* at DOE–MOYER001141. The report also noted that "[s]tudents report that they do not feel safe in school" in part because "the front door is routinely unlocked so anyone can get into the halls and classrooms." *Id.* at DOE–MOYER001181.
90 Under the category of disciple and attendance, the letter identified six items of concern. The first item reported that the out of school suspension rate for New Moyer students for the 2013–2014 academic year was 61% as opposed to the State average of 9%. Pls.' Ex. 31 at CW000667. Plaintiffs make much of the fact that, on October 8, 2014, New Moyer informed the Department that its suspension data were incorrect because one student was listed as suspended for 400 days after he no longer attended the school. Curry Aff. ¶¶ 30–32, Ex. P. The Department reviewed the issue and concluded that

their records and statistics were not affected by this error because their analysis did not rely on the data field in which the error was made. Nagourney Aff. ¶ 4, Ex. A. Plaintiffs have not identified any discrepancies regarding the five other items the Department had identified concerning discipline and attendance, three of which the Secretary identified in his letter of October 13, 2014 (in addition to the 61% suspension rate), as part of the grounds for his revocation decision concerning the issue of discipline and attendance. *See* Pls.' Ex. 43 at CW000825.

91 Pls.' Ex. 31 at CW000666–67.

92 The attachment outlining the Formal Review timeline is not in the record but is publicly available. *See Formal Review Process Timeline,* Delaware Department of Education (Sept. 2, 2014), *available at* http://www.doe.k12.de.us/cms/lib09/DE01922744 /Cntricity/Domain/151 /FormalR#eviewP#rocess/2014–15F#ormalR#eview/UpdatedMJMFormalReviewTimeline.pdf. I take judicial notice of this information because it is not subject to reasonable dispute. D.R.E. 201(b); *In re Lear Corp. S'holder Litig.,* 967 A.2d 640, 656 (Del. Ch.2008) (taking judicial notice on plaintiffs' preliminary injunction motion).

93 The original link to the Secretary's Formal Review notice inadvertently directed to a notice for a different charter school. On July 18, 2014, the day after the Formal Review notice was posted online, this issue was brought to the attention of the Charter School Office, and the website link was corrected that day. Nagourney Aff. ¶ 8; Defs.' Ex. 19. When this action was filed on November 25, 2014, however, the link to the New Moyer Formal Review notice again had been directed to the wrong document. Defendants assert that this error likely was caused by an update to the Department's website on November 7, 2014–nearly a month after the Secretary and the State Board would vote to revoke New Moyer's charter. Nagourney Aff. ¶ 8; Pls.' Ex. 32. There is no evidence reflecting that the link was, in fact, incorrect between July 18 and November 7. I credit the Nagourney affidavit and conclude for purposes of this opinion that the correct Formal Review notice was available on the Department's website from July 7 to November 7.

94 Pls.' Ex. 39 at CW000744; Pls.' Ex. 31 at CW000666.

95 Defs.' Ex. 18 at DOE–MOYER001278–87.

96 *Id.* at DOE–MOYER001279.

97 Pls.' Ex. 33 at CW000700.

98 *Id.* at CW000704–07; Nagourney Aff. ¶ 7.

99 Defs.' Ex. 18 at DOE–MOYER 001287–88.

100 Pls.' Ex. 20.

101 *Id.* at CW000730 ("6th grade is reading on average at a 5th grade level; 7th grade is reading on average at a 4th grade level; 8th grade is reading on average at a 4th grade level; 9th grade is reading on average at a 6th grade level; [and] 10th grade is reading on average at a 7th grade level.").

102 *Id.* at CW000732.

103 *Id.*,at CW000734. New Moyer also represented that it would not seek a charter renewal if it did not make significant improvements:

> "The State has our further commitment, and we will make it binding in whatever fashion the State desires, that should we not make significant improvements in special education documentation and reporting during this school year and show measurable growth in student achievement during that same time, the [Moyer] Board will not seek renewal at the end of its charter term."

Id. at CW000730.

104 Pls.' Ex. 39 at CW000747; *see also* Pls.' Ex. 34.

105 The Committee's report for the August 29 meeting references that, of the 67 out of 68 IEPs that had been found noncompliant, 29 remained noncompliant and that the Department would be returning to New Moyer in September to determine whether these 29 IEPs have been brought into compliance. Pls.' Ex. 39 at CW000748–49.

106 *Id.* at CW000751.

107 *Id.*

108 *Id.*

109 Pls.' Ex. 39. Plaintiffs contend that the Final Report did not specifically address New Moyer's request to modify its charter to change its English Language Arts and Math instruction from K12 to SpringBoard, but the SpringBoard curriculum was one of the subjects discussed at this meeting. A Committee member "clarified for the record that [New] Moyer is still implementing SpringBoard notwithstanding the fact that the recent charter modification application was denied." *Id.* at CW000749.

110 Nagourney Aff. ¶ 10.

111 Pls.' Ex. 40.

112 *Id.* at CW000756; Nagourney Aff. ¶ 7.

113 Pls.' Ex. 40 at CW000758, 763, 768, 771, 774, 779.

114 Pls.' Ex. 41 at CW001154.

115 *Id.* In summation, the Secretary stated:

> While the public record makes clear the school's dedication to improvement, my decision must be based upon evidence and not intentions. The accountability committee has determined that the school has failed to comply with its charter and satisfy in its operation of the school the criteria set forth in the charter law. To note specifically two areas, the school has failed to meet the academic standards and special education services criteria.

Id. After the revocation decision had been made, the Secretary spoke at a meeting of the Wilmington City Council and discussed the reasons why the Department was recommending a new assessment test for the State. Plaintiffs contend that the Secretary stated that Delaware's current testing standards, the performance on which was a basis for the decision to revoke New Moyer's charter, were unreliable. Pls.' Op. Br. 25. Based on my review of the relevant parts of the recording identified by Defendants, Defs.' Ans. Br. 32–33 n.21, the Secretary noted how the Department wanted to improve on what was already "one of the most sophisticated assessments in the country."

116 Pls.' Ex. 41 at CW001155. Plaintiffs note that neither the Secretary nor the State Board acknowledged at the October 9 meeting that New Moyer had, as of the September 19 deadline, satisfied Prong 1 of its Compliance Agreement for special education services. Although Plaintiffs are correct, it bears mention that the public comment period for the revocation decision closed on September 15 (before the September 19 deadline). *See Formal Review Process Timeline,* referenced *supra.* at n. 92.

117 Pls.' Ex. 43.

118 *Id.* at CW000824–25.

119 The Consolidated Complaint asserts seven causes of action: failure to comply with the Delaware Choice Program (Count I); further violation of the Charter School Act (Count II); due process (Count III); breach of charter contract (Count IV); breach of implied covenant (Count V); *parens patriae* claims (Count VI); and arbitrary and capricious decision-making (Count VII).

120 *Frazer v. Worldwide Energy Corp.,* 1987 WL 8739 (Del. Ch. Feb. 19, 1987), reprinted at 13 Del. J. Corp. L. 294, 303, 1987 WL 8739 (1987).

121 *See Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.,* 506 A.2d 173, 179 (Del.1986).

122 *Wayne Cty. Empls.' Ret. Sys. v. Corti,* 954 A.2d 319, 329 (Del. Ch.2008) (quoting *Lenahan v. Nat'l Computer Analysts Corp.,* 310 A.2d 661, 664 (Del. Ch.1973)).

123 *See Cantor Fitzgerald, L.P. v. Cantor,* 724 A.2d 571, 579 (Del. Ch.1998).

124 Pls.' Op. Br. 43.

125 Tr. of Oral Arg. 10 ("I don't think we are arguing that this is primarily a substantive due process case."), 40 ("The parties have focused on procedural due process in the briefing.").

126 Pls.' Reply Br. 26 n.12 ("[T]he claims of the Individual Plaintiffs and the City are identical[.]"); *see also Harden v. Christina School Dist.,* 924 A.2d 247, 267 n. 120 (Del.Ch.2007).

127 *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 59, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (citations omitted).

128 *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

129 *Id.*

130 *Suryanto v. Att'y Gen. of U.S.,* 398 Fed.Appx. 830, 834 (3d Cir.2010) (citing *Conn. Bd. of Pardons v. Dumschat,* 452 U.S. 458, 464, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981)).

131 *Olim v. Wakinekona,* 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) (finding no legitimate claim of entitlement where there were "no standards governing the administrator's exercise of his discretion" to transfer an inmate) (citation omitted).

132 *See Roth,* 408 U.S. at 566–67, 92 S.Ct. 2701 (concluding a nontenured university professor had no property interest in his position because "State law ... clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.").

133 *See Mullen v. Thompson,* 155 F.Supp.2d 448, 452 (W.D.Pa.2001) (citing *Olim,* 461 U.S. at 249–50, 103 S.Ct. 1741) ("[S]tate law that establishes purely procedural rules does not create federal due process rights. Rather, only those state laws that place a substantive limitation on official discretion in the decision to grant or deny the benefit itself—not in the process leading to that decision—create a property interest that is entitled to constitutional protection under the

Due Process clause.") ("*Mullen I* "), *aff'd,* 31 Fed.Appx. 77 (3d Cir.2002); *see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex,* 442 U.S. 1, 11–12, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979) ("accept [ing] respondents' view that the expectancy of release provided in [a] statute is entitled to some measure of constitutional protection" where the state statute provided that the board of parole "shall order" the release of a committed offender who is eligible for release on parole unless the board determines that the release should be deferred for one of four enumerated reasons); *Griffeth v. Detrich,* 603 F.2d 118, 121 (9th Cir.1979) (finding a legitimate claim of entitlement for "persons who claim to meet the eligibility requirements" where the state's welfare application regulations were "comprehensive and definite" and "greatly restrict[ed] the discretion of the intake eligibility worker").

134 Defendants challenge New Moyer's standing to assert any claims in this action. For purposes of Plaintiffs' preliminary injunction motion only, I assume that New Moyer has standing.

135 Pls.' Op. Br. 48.

136 Defs.' Ans. Br. 36.

137 14 *Del. C.* § 503.

138 14 *Del. C.* § 516(2). A charter shall also be subject to revocation or probation if, after the exercise of due diligence and good faith, the approving authority determines that "[t]he school, or its representatives, has committed a material fraud on the approving authority or misappropriated federal, state or local funds." 14 *Del. C.* § 516(1).

139 14 *Del. C.* § 515(f) (emphasis added).

140 New Moyer also asserts that the Performance Agreement is a basis for its constitutionally protected property interest. I disagree. The language of the Performance Agreement, providing that it would "continue in full force and effect during the term of the school's charter," does not supersede or otherwise restrict the Department's discretion under Section 515(f) to revoke New Moyer's charter before its expiration. The Department perhaps could have entered into such an arrangement with New Moyer, but such an agreement would have vastly different provisions than the one-sided terms of the Performance Agreement, which impose no obligations on the Department and expressly recognize the Department's right to place a charter on formal review. *See supra* note 57. Thus, New Moyer has no legitimate claim of entitlement as a Constitutional matter to its charter under the Performance Agreement.

141 46 F.Supp.3d 455, 2014 WL 2445804 (D.Del.2014), *modifying* 8 F.Supp.3d 574 (D.Del.2014).

142 14 *Del. C.* § 514A(b) (emphasis added).

143 *Reach Academy,* 46 F.Supp.3d at 467, 2014 WL 2445804, at *7. *Reach Academy,* like this case, involved a preliminary injunction motion and a motion to dismiss for failure to state a claim.

144 *See id.*

145 *See, e.g., Project Reflect, Inc. v. Met. Nashville Bd. of Pub. Educ.,* 947 F.Supp.2d 868, 878 (M.D.Tenn.2013) (concluding that a charter school did not have a constitutionally protected interest in its charter under Tennessee law because the statutory provision governing charter revocation "uses the language of discretion, not entitlement, and only minimally conditions that exercise of discretion"); *see also Project Sch. v. City of Indianapolis,* 2012 WL 3114573, at *3 (S.D.Ind. July 31, 2012) (concluding that there was no protected property interest in a charter under Indiana law because "the charter school statute frames the decision to revoke a charter as a discretionary matter").

146 *Pinnacle Charter Sch. v. Bd. of Regents of the Univ. of N.Y.,* 108 A.D.3d 1024, 969 N.Y.S.2d 318, 320–21 (2013) ("[T]he New York Charter Schools Act ... creates no constitutionally protected property interest in the renewal of a charter[.]"); *State v. Williamson,* 141 S.W.3d 418, 427–28 (Mo.Ct.App.2004) ("[J]ust as a prospective charter school has no protected property interest at stake regarding an initial charter application, the school also has no protected property interest under the [Missouri] Charter Schools Act with regard to renewal of its charter.").

147 56 A.3d 80 (Pa.Commw.2012).

148 *Id.* at 84 (citing *Foreman v. Chester–Upland School Dist.,* 941 A.2d 108, 115 (Pa.Commw.2008) (concluding, in determining whether a state agency had authority to modify a charter as a contract, that "the relationship between a school district and a charter school is not contractual, but regulatory")).

149 *Id.*

150 Pls.' Op. Br. 47.

151 14 *Del. C.* § 407(a)(1).

152 Pls.' Reply Br. 15–17; Pls.' Op. Br. 47–48.

153 Defs.' MTD Op. Br. 26–27.

154 *Id.*

155 My analysis of the meaning of Section 407 is guided by familiar principles of statutory interpretation:

In interpreting a statute, Delaware courts must ascertain and give effect to the intent of the legislature. If the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls.... [A] statute is ambiguous only if it is reasonably susceptible of different interpretations, or if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.... Courts also should ascribe a purpose to the General Assembly's use of statutory language, and avoid construing it as surplusage, if reasonably possible.

In re Krafft–Murphy Co., Inc., 82 A.3d 696, 702 (Del.2013).

156 14 *Del C.* § 401(b) ("It is therefore the intent of the General Assembly that this chapter be construed broadly to maximize parental choice in obtaining access to educational opportunities for their children.").

157 Tr. of Oral Arg. 11–12.

158 The fact that, as discussed above, the Department has broad discretion in determining whether to renew a charter is further legal support for my conclusion that Delaware students do not have a constitutionally protected interest in attending New Moyer. *See Reach Academy,* 46 F.Supp.3d at 467, 2014 WL 2445804, at *7 ("The interest Plaintiffs assert, the renewal of Reach's charter, is not an interest protected by the Fourteenth Amendment's Due Process Clause.").

159 *Accord Mullen v. Thompson,* 31 Fed.Appx. 77, 79 (3d Cir.2002) ("[Pennsylvania students] have no constitutionally cognizable property or liberty interest in attending the individual school of their choice."); *Pocono Mountain Charter School v. Pocono Mountain School Dist.,* 442 Fed.Appx. 681, 685 n. 5 (3d Cir.2011) ("[S]tudents do not have a cognizable liberty or property interest in going to a school of their choice.").

160 *Sullivan,* 526 U.S. at 59, 119 S.Ct. 977.

161 Pls.' Op. Br. 52.

162 Defs.' Ans. Br. 50.

163 *Id.*

164 *Mathews v. Eldridge,* 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (citation omitted).

165 *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

166 *Mathews,* 424 U.S. at 335, 96 S.Ct. 893.

167 *Heller v. Doe,* 509 U.S. 312, 332, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex,* 442 U.S. 1, 13, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)).

Plaintiffs contend that "procedural due process can also be offended when governmental action violates protected rights in an arbitrary and capricious manner." Pls.' Reply Br. 27. They cite two cases for support: (i) *Ridings v. Unemployment Insurance Appeal Board,* 407 A.2d 238 (Del.Super.1979), in which the plaintiff alleged a lack of procedural due process because he could not testify in support of his claim before the state unemployment benefits board; and (ii) *Chung v. Park,* 514 F.2d 382, 387 (3d Cir.1975), in which a terminated college professor challenged, on due process grounds, the procedures imposed at a pre-termination hearing before an arbitration panel. In my opinion, when the quotations cited by Plaintiffs from *Ridings* and *Chung* are analyzed in context, they are not persuasive support for Plaintiffs' argument. In any event, Plaintiffs' contention is inconsistent with the United States Supreme Court's more recent precedents cited above, including *Mathews* and its progeny, which focus the procedural due process inquiry on the provision of notice and an opportunity to be heard.

168 *See supra* note 93.

169 *See* 29 *Del. C.* § 10004(e).

170 14 *Del. C.* §§ 515(b)-(d).

171 As discussed above, Plaintiffs were afforded the opportunity to submit written comments to the Committee and did so on at least one occasion.

172 I take judicial notice of the number of charter schools currently operating in Delaware because this fact is not subject to reasonable dispute. *See About Us,* Delaware Charter Schools Network, *available at* http://decharternetwork.org/About-Us. D.R.E. 201(b).

173 14 *Del. C.* § 515(c).

174 Pls.' Reply Br. 20; Pls.' Op. Br. 50–51.

175 Pls.' Reply Br. 17–18 n.10.

176 14 *Del. C.* § 515(f).

177 *See, e.g., Biolase, Inc. v. Oracle P'rs, L.P.,* 97 A.3d 1029, 1033–34 (Del.2014) (concluding that it was "sensible and reasonable" to interpret 8 *Del. C.* § 141(b), which provides that a director "may resign ... upon notice given in writing," to not preclude a director from resigning orally).

178 *See also* 14 *Del. C.* § 515(i) ("In the event of a charter school closure for any reason, the approving authority shall oversee and work with the closing school to ensure a smooth and orderly closure and transition for students, parents and employees, as guided by the closure protocol.").

179 Plaintiffs' Section 515(f) challenge is curious. Given that Plaintiffs are seeking to preserve the ability of the current Board to oversee the management of New Moyer until the end of the 2015–16 school year, it is surprising that they would object to the current management structure not being displaced immediately.

180 None of the parties submitted any legal authority interpreting the 60–working day requirement in Section 515(c). Defendants contend that, although the Secretary did not send his letter notifying New Moyer of the decision to revoke its charter until 61 working days after the Formal Review notice was issued, the decision had been publicly announced, and thus was "issued" within the meaning of Section 505(c), at the public hearing held on October 9, 2014, which was within the required 60–working day period. Defs.' Ans. Br. 53. There is also a legitimate argument that the 60–working–day requirement is merely directory rather than truly mandatory. *See, e.g., Bartley v. Davis,* 519 A.2d 662, 667 (Del.1986) ("There is no universal standard or test for determining whether a statute is directory or mandatory.... The question is, what did the legislature intend that the consequences of noncompliance with the statutory command be?").

181 227 F.3d 133 (3d Cir.2000).

182 *Id.* at 140 (citing, *inter alia, Nilson v. Layton City,* 45 F.3d 369, 372 (10th Cir.1995); *McKinney v. Pate,* 20 F.3d 1550, 1556 (11th Cir.1994) (en banc); *Sutton v. Cleveland Bd. of Educ.,* 958 F.2d 1339, 1351 (6th Cir.1992); *Huang v. Bd. of Governors of Univ. of N.C.,* 902 F.2d 1134, 1142 n. 10 (4th Cir.1990)) ("[W]e believe that a careful review of the case law does reveal one guiding principle: whether a certain property interest embodies this 'particular quality' is not determined by reference to state law, but rather depends on whether that interest is 'fundamental' under the United States Constitution.").

183 Defs.' MTD Op. Br. 51.

184 *Collins v. City of Harker Heights, Tex.,* 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

185 "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Reno v. Flores,* 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (citations omitted).

186 Plaintiffs made essentially three contentions in support of their substantive due process claim: (i) the Committee purportedly did not consider material facts in its Final Report, such as the role of K12 in New Moyer's academic performance; (ii) the Department purportedly treated New Moyer differently than other charter schools with similar academic performance issues; and (iii) the Department purportedly failed to consider New Moyer's request to implement the SpringBoard curriculum before revoking its charter. Pls.' Op. Br. 54–58. Were one to engage in a substantive due process analysis, the standard of review that would apply to the Department's revocation of New Moyer's charter, as non-legislative action, is "shocks the conscience," which encompasses "only the most egregious conduct." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA,* 316 F.3d 392, 399–400 (3d Cir.2003) ("[E]xecutive action violates substantive due process only when it shocks the conscience but that the meaning of this standard varies depending on the factual context."). Without engaging in a point-by-point review of the merits, the Department's ultimate decision to revoke New Moyer's charter instead of placing New Moyer on probation does not shock the conscience, in my view, given that New Moyer indisputably was the lowest performing charter school in the State during the 2013–14 academic year based on the State's testing standards, and given that its academic performance had declined markedly from the prior year.

187 Pls.' Op. Br. 58.

188 Defs.' Ans. Br. 56. On December 30, 2014, the same day their reply brief on the present motion was due, Plaintiffs moved to amend the Consolidated Complaint to add a cause of action for review by writ of certiorari. Defendants filed an opposition to that motion on December 31, 2014, which raises significant issues concerning whether the Court of Chancery has subject matter jurisdiction over such a claim. *See Maddrey v. Justice of Peace Court 13,* 956 A.2d 1204, 1207 (Del.2008) ("[T]he Superior Court has original and exclusive jurisdiction among trial courts under the Delaware Constitution to issue common law writs of certiorari to inferior tribunals[.]"). Because Plaintiffs did not fairly present a claim for certiorari review in connection with their application for a preliminary injunction, I do not consider this issue in resolving the present motion.

189 I note that Section 515(h) does not preclude Plaintiffs from asserting their Due Process Clause claims by operation of the Supremacy Clause of the United States Constitution.

190 14 *Del. C.* § 516 (emphasis added).

191 The procedures governing the oversight and revocation process outlined in Section 515 of the Charter School Act afford the "applicant" or the "school" certain rights to receive notice and the opportunity to review and comment on the Committee's initial report as well as to respond to the Committee's final report. *See* 14 *Del. C.* §§ 515(b)-(d). The statute also affords the "applicant" the right to arbitrate a revocation decision by a local school district. *Id.* § 515(g). Based on these provisions, I find that the right of review implied in Section 516 extends to New Moyer but does not extend to the Individual Plaintiffs. For the avoidance of doubt, as I noted at the outset of my legal analysis, I have not addressed in this opinion whether New Moyer has standing.

192 "[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning [.]" *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 900 (Del.1994).

193 *Freeman v. X–Ray Assocs., P.A.,* 3 A.3d 224, 227–28 (Del.2010); *see also Ingram v. Thorpe,* 747 A.2d 545, 548 (Del.2000) ("Dictionary definitions of undefined terms can be useful in construing statutes[.]").

194 *Black's Law Dictionary* at 488 (8th ed.2004).

195 *See* 6 *Del. C.* § 1–202 ("An organization exercises due diligence if it maintains reasonable routines for communicating significant information ... and there is reasonable compliance with the routines.").

196 *See, e.g., Aronson v. Lewis,* 473 A.2d 805, 812 (Del.1984) ("[D]irectors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them.").

197 *Black's Law Dictionary* at 713 (8th ed.2004).

198 *See, e.g., In re Walt Disney Co. Deriv. Litig.,* 906 A.2d 27, 67 (Del.2006) ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.").

199 Plaintiffs referenced the due diligence and good faith standard in their papers for the purpose of arguing that Defendants' conduct was arbitrary and capricious, *see* Pls.' Op. Br. 52, but they did not argue specifically that this standard was not met. Nonetheless, in the interest of completeness, I consider whether the evidence of record is sufficient to demonstrate a reasonable probability of success on such a claim.

200 In my opinion, the overwhelming weight of the evidence in the preliminary record disproves Plaintiffs' speculation that Defendants wanted to shut down New Moyer for any reason other than those first listed in the Secretary's Formal Review letter, all of which are grounds for revocation under Section 512 of the Charter School Act. Rather, the evidence shows that Defendants repeatedly sought in good faith to help New Moyer comply with the Charter School Act. For example, when the Department first discovered that New Moyer was in violation of its charter during its first year by using a different instruction method than that specified in its charter, the Department worked with New Moyer to modify its charter, rather than take other remedial action. Similarly, it was the Department that first suggested the SpringBoard curriculum to New Moyer, which undermines Plaintiffs' contention that Defendants were wedded to the use of K12 at New Moyer. The inability of New Moyer to obtain Department approval to modify its charter or to use the SpringBoard curriculum was not the product of any ulterior or improper motives of Defendants.

201 *See Cantor Fitzgerald,* 724 A.2d at 579.

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TAB 7

Original Image of 759 A.2d 595 (PDF)

759 A.2d 595
Supreme Court of Delaware.

Jacqueline A. ORVILLE,
Respondent Below, Appellant,
v.
DIVISION OF FAMILY SERVICES,
Petitioner Below, Appellee.

No. 447, 1999.
|
Submitted: Feb. 29, 2000.
|
Decided: March 30, 2000.

Department of Services for Children, Youth and Their Families filed petition to terminate parental rights of incarcerated parent. The Family Court, New Castle County, terminated parental rights. Parent appealed. The Supreme Court, Holland, J., held that parent, by not participating in a meaningful manner in the termination hearing, was denied due process.

Remanded for additional proceedings.

West Headnotes (9)

[1] Constitutional Law
Duration and timing of deprivation;pre- or post-deprivation remedies

A party is entitled to due process prior to the termination of a right protected by the Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[2] Constitutional Law
Procedural due process in general

The due process clause of the Fourteenth Amendment imposes on the states the standards necessary to ensure that judicial proceedings are fundamentally fair. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[3] Constitutional Law
Removal or termination of parental rights

Both procedural and substantive due process must be afforded to the parties in a termination of parental rights proceeding. U.S.C.A. Const.Amend. 14; 13 Del.C. § 1103.

4 Cases that cite this headnote

[4] Constitutional Law
Notice and Hearing

Procedural due process consists of notice to the person whose right is affected by a proceeding, a reasonable opportunity to refute or defend against a charge or accusation, a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation, representation by counsel, and a hearing before an impartial decisionmaker. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[5] Constitutional Law
Removal or termination of parental rights

In a termination of parental rights proceeding, the Supreme Court analyzes due process standards in accordance with: (1) the private interest that will be affected by the official action; (2) the risk that there will be an erroneous deprivation of the interest through the procedures used and the probable value of any additional or substitute procedural safeguards; and (3) the government interest involved, including the added and fiscal and administrative burdens that additional or substitute procedures would require. U.S.C.A. Const.Amend. 14; 13 Del.C. § 1103.

1 Cases that cite this headnote

[6] Constitutional Law

Removal or termination of parental rights

Due process requires an incarcerated parent to have an opportunity for meaningful participation in the process of termination of parental rights. U.S.C.A. Const.Amend. 14; 13 Del.C. § 1103.

4 Cases that cite this headnote

[7] **Constitutional Law**
Removal or termination of parental rights

Due process requires that an incarcerated parent have an opportunity to have actual knowledge of the evidence presented in support of the petition to terminate parental rights before he is called upon to present a defense. U.S.C.A. Const.Amend. 14; 13 Del.C. § 1103.

2 Cases that cite this headnote

[8] **Constitutional Law**
Removal or termination of parental rights

Infants
Presence of parties and counsel

Prisons
Presence or appearance

Incarcerated parent, by not participating in a meaningful manner in termination of parental rights proceeding, either by telephone through the entire hearing, or by being allowed to review a reproduction of the case against her before presenting her own case, was denied due process, where parent merely participated by telephone at the conclusion of state's case, so that she could present testimony, and hear closing arguments and the court's decision. U.S.C.A. Const.Amend. 14; 13 Del.C. § 1103.

1 Cases that cite this headnote

[9] **Infants**
Continuance

If it becomes necessary to adjourn and reconvene a termination hearing, under circumstances involving an incarcerated parent who did not have an opportunity to participate in the hearing in a meaningful manner, the Family Court should make every effort to complete the hearing within thirty days of the original adjournment. 13 Del.C. § 1103.

1 Cases that cite this headnote

***596** Court Below—Family Court of the State of Delaware, in and for New Castle County, C.A. No. 99–02–02 TN.
Upon appeal from the Family Court. **REMANDED.**

Attorneys and Law Firms

Kimberly A. Harrison, of Doroshow, Pasquale, Krawitz, Siegel & Bhaya, Millsboro, Delaware, for appellant.

Peter S. Feliceangeli, of the Department of Justice, Wilmington, Delaware, for appellee.

Before VEASEY, Chief Justice, HOLLAND and BERGER, Justices.

Opinion

HOLLAND, Justice:

This is an appeal from the Family Court. The Division of Family Services of the Department of Services for Children, Youth and Their Families ("DFS") filed a petition to terminate the parental rights of the respondent-appellant, Jacqueline A. Orville. Following a hearing on September 10, 1999, the Family Court entered a final judgment terminating Orville's parental rights.

Orville was incarcerated in New Jersey on the date of the hearing. The Family Court apparently contemplated that Orville would participate in the entire proceeding by telephone. Orville's court-appointed attorney was advised, however, that the New Jersey prison officials would permit her to participate by telephone for only a portion of the hearing.

Therefore, prior to the beginning of the termination of parental rights hearing, Orville's attorney moved for a continuance. DFS opposed that motion. The Family Court denied Orville's motion, stating that even though:

> she's in New Jersey, in prison, and that they will not permit her to be here or to be on the telephone the entire time does not, in my opinion, supersede the interest of the—the best interest of the child in this case, so I'm not going to grant the continuance.

***597** In this appeal, Orville argues that the Family Court violated her due process rights by not granting her motion for a continuance until such time as she could be physically present for trial, or by providing her with a transcript of DFS's case, for the purpose of deciding whether to recall certain witnesses for cross-examination and otherwise preparing her own presentation of evidence, prior to the entry of a final judgment.

The record reflects that the Family Court properly exercised its discretion in denying a continuance until Orville could be present *physically* at a hearing in Delaware. The record also reflects, however, that the hearing was conducted in a manner that violated Orville's federal constitutional right to procedural due process. Accordingly, this matter will be remanded for further expedited proceedings in accordance with Orville's due process rights.

Facts

A Petition for Termination and Transfer of Parental Rights was filed by DFS. The petition seeks termination of the parental rights of Orville in her child, Diane B. Orville,[1] born June 24, 1996. The petition alleges that termination of the parental rights of Orville is sought on the ground that she is not able or has failed to plan adequately for the child's needs or her mental and emotional health and development pursuant to 13 *Del. C.* § 1103(5). Alternatively, termination is sought on the ground of abandonment pursuant to 13 *Del. C.* § 1103(2). Orville opposed the termination of her parental rights.

On July 23, 1999, the Family Court appointed an attorney to represent Orville in responding to DFS's petition to terminate her parental rights. A hearing was set for September 10, 1999. Prior to the hearing, Orville and her attorney received copies of all documents which DFS intended to introduce into evidence.

Orville was incarcerated in New Jersey at the time of trial. Prior to the beginning of the hearing, the Family Court learned that the prison officials in New Jersey would not permit Orville to participate by telephone for the entire hearing. Based on that information, Orville's attorney moved for a continuance. The Family Court denied that request.

DFS then proceeded with its case. Orville was represented by counsel throughout the hearing. When DFS presented its case, however, Orville was not connected telephonically to the proceedings. The Court–Appointed Special Advocate ("CASA")[2] also presented, in Orville's absence, its testimony on the child's best interests. Orville's attorney had an opportunity to cross-examine the CASA and each of DFS's four witnesses but without consulting Orville.

At the conclusion of the DFS case, Orville was connected to the courtroom by telephone. A recess was called to permit Orville to confer with her attorney. The attorney summarized the testimony of the CASA and DFS's four witnesses for Orville.

Orville and her attorney indicated they were ready to resume trial. Orville testified on her own behalf. Orville did not call any additional witnesses. She also did not recall either the CASA or any of DFS's witnesses.

After she testified, Orville remained connected to the courtroom by telephone. She heard the attorney's closing arguments. Orville also heard the Family Court's decision.

Termination Requires Due Process

[1] [2] [3] [4] A party is entitled to due process prior to the termination of a right protected by the Fourteenth Amendment to the ***598** United States Constitution.[3] The due process clause in the United States Constitution "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair."[4] The

United States Supreme Court and this Court have recognized, as a fundamental liberty interest,[5] a parent's interest in maintaining a relationship with his or her child. Accordingly, both procedural and substantive, due process must be afforded to the parties in a termination of parental rights proceeding.[6] Procedural due process consists of

> notice to the person whose right is affected by a proceeding ...; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel ...; and a hearing before an impartial decisionmaker.[7]

Similarly, this Court has stated that due process entails

> providing the parties to the proceeding with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends.[8]

[5] In a "termination of parental rights proceeding, [this Court] analyzes ... due process standards in accordance with the factors established by the United States Supreme Court in *Mathews v. Eldridge.*"[9] Those factors are:

> (1) the private interest that will be affected by the official action; (2) the risk that there will be an erroneous deprivation of the interest through the procedures used and the probable value of any additional or substitute procedural safeguards; and (3) the government interest involved, including the added and fiscal and administrative burdens that additional or substitute procedures would require.[10]

DFS acknowledges that the termination of Orville's parental rights adversely affects Orville's private interests under the first factor of the *Mathews* test. "The parental right is a sacred one."[11] DFS admits that Orville's fundamental liberty interest in retaining her parental rights is substantial.[12]

Meaningful Participation

[6] This is not the first time we have been called upon to balance the second and ***599** third *Mathews* factors in a proceeding to terminate the parental rights of an incarcerated person. In a prior opinion, this Court has held that an incarcerated individual has no constitutional due process right to be physically present at a hearing to terminate his or her parental rights.[13] Nevertheless, due process requires "an incarcerated parent [to] have an opportunity for meaningful participation in the termination process."[14]

This Court has concluded that due process was satisfied when the Family Court conducted a proceeding to terminate an incarcerated mother's parental rights by affording that individual the opportunity to participate in the *entire* hearing by telephone from prison.[15] In that appeal, the issue was an alleged equipment problem with the telephone connection during the hearing. This Court determined that the trial judge made sufficient efforts to assure that the incarcerated mother could hear all of the testimony and that all of the documentary evidence was read to her.[16] This Court also stated:

> In future similar proceedings, however, the Family Court should, before such proceedings commence, make certain that the communication system is working properly and that all parties can effectively hear (and where applicable, see) the proffered testimony.[17]

The basis for this Court's holding in *Heller* was our conclusion that an incarcerated parent's right to due process included an opportunity to have actual knowledge of the testimonial and documentary evidence being presented in support of the petition to terminate his or her parental rights. DFS argues, however, that Orville was afforded due process because she was represented by counsel, notwithstanding her exclusion from participation in the hearing by telephone when DFS presented its evidence against her. A majority of courts from other jurisdictions that have considered similar arguments have rejected DFS' position.[18]

Other Jurisdictions

The Supreme Court of New Hampshire recently reviewed the due process procedures implemented by other jurisdictions in termination procedures when a parent is incarcerated.[19] In *In re Baby K.*, the father of the minor child was incarcerated in another state at the time scheduled for the hearing to terminate his parental rights.[20] The trial court in New Hampshire originally intended for the father to participate during the entire hearing by telephone.[21] There were problems with the telephone transmission, however, that prevented the father from hearing the proceedings. Nevertheless, the New Hampshire trial court did not recess or adjourn the proceeding to rectify the father's known inability to hear the telephonic transmission.[22] On appeal, the Supreme Court of New Hampshire reviewed the three *Mathews* factors and held that, even though he was represented by an attorney, a termination proceeding that the incarcerated father ***600** could not hear denied that father "a fair opportunity to participate."[23]

The facts of *In re Baby K.* are similar to those in Orville's case. The Family Court's written decision states it expected that Orville would "be available throughout the hearing to listen to the evidence and to testify but the security concerns of the correctional facility where [Orville was] incarcerated would not enable her to remain on the line for the entire length of the hearing." Thus, the record reflects that the Family Court originally intended to conduct a hearing in complete accordance with this Court's holding in *Heller*.

Orville Denied Due Process

[7] The entire focus of a proceeding to terminate the parental rights of an incarcerated person is on that individual's alleged failure to discharge his or her parental responsibilities. Consequently, the incarcerated parent may have either exclusive or unique knowledge of any evidence that can be marshalled in response to the termination petition. Therefore, due process requires that an incarcerated parent have an opportunity to have actual knowledge of the evidence presented in support of the petition to terminate before he or she is called upon to present a defense.

[8] The Family Court should have continued the proceeding for a brief time until Orville would have been able to participate by telephone during the entire hearing. In the alternative, following the presentation of DFS's case, the hearing should have been continued for a short time until another day, and a reproduction[24] of the testimony forwarded to Orville and her attorney for review. The hearing should have reconvened expeditiously, with Orville participating by telephone at a later date. Such a procedure would permit: (a) Orville's attorney to recall the CASA or any of DFS's witnesses who were necessary for additional cross-examination; (b) Orville to testify; and (c) Orville to present other testimonial or documentary evidence in opposition to DFS's petition for termination. These reasonable safeguards would have effectively balanced the second and third *Mathews* factors by eliminating the risk of an erroneous decision, while simultaneously accommodating the government's good faith efforts on behalf of a dependent or neglected child.

The Family Court failed to provide Orville an opportunity to participate in a meaningful manner, either by telephone during the entire hearing or by permitting her to review a reproduction of the case against her before presenting her own case. Accordingly, we hold the Family Court did not afford Orville her federal constitutional right to due process in the proceeding to terminate her parental rights.[25] That can be remedied, however, by a remand to the Family Court for additional expedited proceedings in accordance with this opinion.

Permanent Placement Priority

The federal Family Preservation and Support Act provides multi-year grants to state Supreme Courts to improve how courts within each state handle cases involving children in foster care, termination of parental rights, and adoption proceedings. These grants are administered through the U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. The Delaware Supreme Court and the Family Court have participated in this program for several years.[26]

[9] *601 The Court Improvement Project of the Delaware Supreme Court issued its first report in 1997 "An Assessment of Delaware's Court Performance in Child Welfare Cases with Recommendations for Improvement." That report concluded that a paramount "goal in child welfare cases is to establish a safe permanent home for the child in a timely fashion." [27] This can be accomplished by successfully reuniting a child in foster care with the natural parents or, if that good faith effort fails, by terminating those parental rights and arranging for an adoption. The Delaware studies have determined that the judiciary plays a vital role in the timely establishment of permanency for children in individual cases. [28] Therefore, if it becomes necessary to adjourn and reconvene a termination hearing in the future, under circumstances similar to Orville's, the Family Court should make every effort to complete the hearing within thirty days of the original adjournment.

The Delaware Family Court recently published a monograph entitled "*Family Court Performance Standards and Measures.*" [29] Standard 2.3 relates to "Prompt Implementation of Law and Procedure." It requires the Family Court to integrate into its operations changes mandated by statute, case law, or court rules as soon as those changes become effective. [30] In an effort to support the Family Court's commendable efforts to identify and promptly implement the "best practices," the Clerk of this Court is directed to send a copy of this Opinion to all Family Court Judges.

Conclusion

This matter is remanded to the Family Court for additional expedited proceedings in accordance with this opinion. Jurisdiction is retained by this Court. [31]

All Citations

759 A.2d 595

Footnotes

1 The biological father consented to the termination of his parental rights.

2 *See* Fam.Ct.Civ.R. 205.

3 *U.S. Const.* amend XIV, § 1.

4 *Allen v. Division of Child Support Enforcement,* Del.Supr., 575 A.2d 1176, 1178 (1990) (quoting *Lassiter v. Department of Soc. Services,* 452 U.S. 18, 33, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)).

5 *See Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *see also In re Stevens,* Del.Supr., 652 A.2d 18, 24 (1995).

6 *Santosky v. Kramer,* 455 U.S. at 753, 102 S.Ct. 1388 (citing *Lassiter v. Department of Soc. Services,* 452 U.S. 18, 37, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (first dissenting opinion)).

7 *In re L.V.,* 240 Neb. 404, 482 N.W.2d 250, 257 (1992) (citing *Fuentes v. Shevin,* 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)).

8 *Bell Atlantic Delaware, Inc. v. Public Serv. Comm'n,* Del.Supr., 705 A.2d 601, 605 (1997) (quoting *Carousel Studio v. Unemployment Ins. Appeal Bd.,* Del.Super., C.A. No. 89A–AU–7, Babiarz, J., 1990 WL 91108 (June 26, 1990)).

9 *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *In re Heller,* Del.Supr., 669 A.2d 25, 30 (1995) (citing *In re Burns,* Del.Supr., 519 A.2d 638, 645 (1986) (citing *Lassiter v. Dept. of Soc. Services of Durham County,* 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981))).

10 *In re Heller,* 669 A.2d at 31.

11 *In re Burns,* Del.Supr., 519 A.2d 638, 645 (1986).

12 *Id.* at 646.

13 *In re Heller,* Del.Supr., 669 A.2d 25, 32 (1995).

14 *In re Baby K.,* 143 N.H. 201, 722 A.2d 470, 474 (1998).

15 *In re Heller,* 669 A.2d at 32.

16 *Id.*

17 *Id.*

18 *In re Baby K.,* 143 N.H. 201, 722 A.2d 470 (1998) (collecting cases); *In re Juvenile Appeal,* 187 Conn. 431, 446 A.2d 808 (1982); *In re Randy Scott B.,* Me.Supr., 511 A.2d 450 (1986); *In the Interest of Darrow,* 32 Wash.App. 803, 649 P.2d 858 (1982); *State v. Mott,* 166 Vt. 188, 692 A.2d 360 (1997).

19 *In re Baby K.,* 143 N.H. 201, 722 A.2d 470 (1998).

20 *Id.* at 471.

21 *Id.* Arrangements were also made for the father's attorney to wear a headset so that the father could speak with him privately during the hearing.

22 *Id.* at 472.

23 *Id.*

24 That reproduction can be a transcript or a tape-recording.

25 *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

26 Marsha L. Miller, et al., Supreme Court of the State of Delaware, *Court Improvement Project of the Delaware Supreme Court: An Assessment of Delaware's Court Performance in Child Welfare Cases with Recommendations for Improvement* (1997).

27 *Id.* at 75.

28 *Id.* at 77.

29 Family Court of the State of Delaware, Family Court Performance Standards and Measures (December 1999).

30 *Id.* at 20–21.

31 Supr.Ct.R. 19(c).

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TAB 8

Original Image of 89 A.3d 65 (PDF)

89 A.3d 65
Supreme Court of Delaware.

Jeffrey B. COHEN, and IDG Companies, LLC., Non–Parties Below, Appellants,
v.
STATE of Delaware, ex. rel. The Honorable Karen Weldin STEWART, CIR–ML, Insurance Commissioner of the State of Delaware, Petitioner–Below, Appellee,
and
Indemnity Insurance Corporation, RRG, Respondent Below, Appellee.
In the Matter of the Rehabilitation of Indemnity Insurance Corporation, RRG.

Nos. 545, 2013, 621, 2013.
|
Submitted: March 5, 2014.
|
Decided: April 9, 2014.

Synopsis

Background: After Insurance Commissioner was granted seizure order against liability insurance company, insurance company filed motion to amend seizure order and for sanctions against company's former chief executive officer (CEO) for interfering with Commissioner's lawful efforts to operate insurance company. The Court of Chancery granted motions. CEO appealed. After Commissioner filed petition for entry of rehabilitation, corporate entity allegedly owned by CEO requested to intervene based on alleged status as insurance company's controlling stockholder. The Court of Chancery denied entity's intervention request. CEO appealed, and appeals were consolidated.

Holdings: The Supreme Court, Strine, C.J., held that:

[1] amended seizure order did not constitute violation of CEO's due process rights;

[2] sanctions did not violate CEO's due process rights;

[3] trial court did not abuse its discretion in denying CEO's and entity's motion for modification or relief from sanctions; and

[4] decision to deny entity opportunity to brief motion to intervene did not violate due process.

Affirmed.

West Headnotes (14)

[1] **Insurance**
Insolvency or bankruptcy
States
Insurance

Insurer insolvency is regulated by state law rather than federal Bankruptcy Code.

1 Cases that cite this headnote

[2] **Insurance**
Financial Impairment

One of the main purposes of Insurers Liquidation Act is to centralize claims in one place to avoid dissipating a distressed insurer's assets by allowing it to be sued, and requiring it to defend, litigations scattered in many jurisdictions throughout the country. 18 West's Del.C. § 5904(b).

1 Cases that cite this headnote

[3] **Insurance**
Review

Order to rehabilitate liability insurer did not render appeal of amended seizure order moot filed by insurer's former CEO, even though grant of rehabilitation order vacated seizure order as a matter of law; substance of dispute did not disappear and justiciable controversy still existed. 18 West's Del.C. §§ 5905, 5910(a).

1 Cases that cite this headnote

[4] **Constitutional Law**

Relationship to other constitutions

State constitutional due process is coextensive with federal constitutional due process. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

2 Cases that cite this headnote

[5] **Appeal and Error**

Cases Triable in Appellate Court

Supreme Court reviews claims of violations of constitutional rights de novo.

Cases that cite this headnote

[6] **Constitutional Law**

Notice and Hearing

Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

1 Cases that cite this headnote

[7] **Constitutional Law**

Factors considered;flexibility and balancing

Due process is flexible and calls for such procedural protections as particular situation demands. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

Cases that cite this headnote

[8] **Constitutional Law**

Evidence in general;disclosure

Due process does not require evidentiary hearing approximating a judicial trial before every deprivation of rights; indeed, such extensive process is only required in certain limited circumstances. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

1 Cases that cite this headnote

[9] **Constitutional Law**

Factors considered;flexibility and balancing

To determine whether a challenged procedure satisfies due process, courts are instructed to balance: (1) private interest that will be affected by official action; (2) risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedures would entail. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

Cases that cite this headnote

[10] **Constitutional Law**

Insurance

Constitutional Law

Search, Seizure, and Confiscation

Insurance

Orders

Entry of amended seizure order following ex-parte hearing on liability insurance company's motion to amend order based on interference by company's former chief executive officer (CEO) with Insurance Commissioner's attempts to operate company did not constitute violation of CEO's due process rights, even though Commissioner failed to provide CEO with hearing transcript; property interest identified by CEO did not deserve substantial weight, CEO received sufficient notice of substance of allegations against him, any additional procedures would not have appreciably reduced risk of erroneous deprivation, and Insurance Department had strong countervailing interest against such procedures. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9; 18 West's Del.C. §§ 5904(a, b), 5943.

Cases that cite this headnote

[11] **Constitutional Law**
Penalties, fines, and sanctions in general

Insurance
Orders

Sanctions issued for violation of seizure order against liability insurance company's former chief executive officer (CEO), which required CEO to cease his control over insurance company's managing general agent, did not violate CEO's due process rights, despite contention that CEO was not provided adequate opportunity to present evidence regarding corporate separateness of insurance company and agent before sanctions was granted; agent did not have interests that were harmed by sanctions, trial court procedures adequately protected against erroneous deprivation of interest, and Insurance Department had substantial interest in ensuring that seizure order was not circumvented through use of intermediaries or corporate form. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9; 18 West's Del.C. §§ 1802(3), 5943.

Cases that cite this headnote

[12] **Appeal and Error**
New Trial or Rehearing

Standard of review on motion for reargument is abuse of discretion.

Cases that cite this headnote

[13] **Insurance**
Orders

Trial court did not abuse its discretion in denying liability insurance company's former chief executive officer's (CEO) and its related entity's motion for modification or relief from sanctions order following CEO's interference with Insurance Commissioner's lawful efforts to operate company pursuant to seizure order, since CEO had used entity to interfere with Commissioner and it was important to preserve sanctions order to prevent CEO from using entity to interfere again. 18 West's Del.C. § 5904(b); Chancery Court Rule 59(e).

Cases that cite this headnote

[14] **Constitutional Law**
Insurance

Insurance
Rehabilitation

Trial court's decision not to delay entry of rehabilitation order for liability insurance company, which was proposed by Insurance Commissioner and approved by insurance company, to allow shareholder in insurance company opportunity to brief motion to intervene did not violate shareholder's due process rights; rehabilitation order provided shareholder protection from erroneous deprivation of its interest in delaying proceedings, strong public policy reasons justifying refusal to delay entry of order existed, and Commissioner had important interest in moving quickly to protect interests of policy holders and creditors. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9; 18 West's Del.C. §§ 5905, 5910(a), 5943; Chancery Court Rule 24.

Cases that cite this headnote

***67** Court Below: Court of Chancery of the State of Delaware, C.A. No. 8601–VCL.
***68** Upon appeal from the Court of Chancery. **AFFIRMED.**

Attorneys and Law Firms

Theodore A. Kittila, Esquire (argued), Greenhill Law Group, LLC, Wilmington, Delaware, for Appellants Jeffrey B. Cohen, IDG Companies, LLC, and RB Entertainment Ventures, LLC.

W. Harding Drane, Jr., Esquire (argued), and Jessica M. Willey, Esquire, of the Department of Justice, Wilmington, Delaware, for Appellee State of Delaware.

Michael W. Teichman, Esquire, Michael W. Arrington, Esquire, James D. Nutter, Esquire, Elio Battista,

Jr., Esquire, Parkowski, Guerke & Swayze, P.A., Wilmington, Delaware, for Appellee Indemnity Insurance Corporation, RRG.

Before STRINE, Chief Justice, HOLLAND, BERGER, JACOBS, and RIDGELY, Justices, constituting the Court en banc.

STRINE, Chief Justice:

I. INTRODUCTION

Central to this appeal, which challenges multiple orders issued by the Court of Chancery, is one issue: whether the delinquency proceedings for Indemnity Insurance Corporation, RRG ("Indemnity") violated the constitutional due process rights of Appellant Jeffrey B. Cohen ("Cohen") or Co–Appellant RB Entertainment Ventures ("RB Entertainment"). We conclude that no violation of those parties' due process rights occurred.

RB Entertainment is one of a complicated web of at least seventeen different companies that Cohen allegedly owns and controls (the "Cohen-affiliated entities"). Co–Appellant IDG Companies, LLC ("IDG"), Indemnity's managing general agent,[1] is also one of the Cohen-affiliated entities. After uncovering evidence that Cohen had committed fraud in his capacity as Indemnity's CEO and that Indemnity might be insolvent, the Delaware Insurance Commissioner (the "Commissioner") petitioned the Court of Chancery for a seizure order. The Delaware Uniform Insurers Liquidation Act (the "Insurers Liquidation Act") authorizes the Commissioner to obtain a seizure order to protect the interests of policyholders and creditors and to prevent further depletion of the insurer's assets.[2] Based on the detailed allegations and supporting evidence presented by the Commissioner, the Court of Chancery granted that seizure order, which, among other things, prohibited anyone with notice of the proceedings from transacting the business of Indemnity, selling or destroying Indemnity's assets, or asserting claims against Indemnity in other venues without permission from the Commissioner. The seizure order also prohibited anyone with notice of the proceedings from interfering with the Commissioner in the discharge of her duties.

Cohen, who founded Indemnity and had served as its President, Chairman, and CEO, resigned from Indemnity's board during the ensuing investigation and the board removed him from his managerial positions. After his resignation, Cohen interfered with the Commissioner's lawful efforts to operate Indemnity in various ways. As Cohen's misbehavior escalated, Indemnity and the Commissioner returned ***69** to the Court of Chancery several times, first seeking an amendment to the seizure order to address Cohen's behavior and then seeking sanctions against him. The Court of Chancery entered a series of orders that, as Cohen's ongoing disruptive actions justified, increased the restrictions on Cohen's behavior and imposed stiffer sanctions upon him.

Cohen argues that he was denied due process at several junctures during the Court of Chancery proceedings. Because Cohen's claims allege violations of his right to due process, the focus of this opinion is on whether Cohen was given notice of the allegations against him and a fair opportunity to present his side of the dispute. Having carefully examined the record in this case, we conclude that he was.

At oral argument, Cohen's counsel emphasized what he considered to be his client's strongest claim: that Cohen was not provided with a copy of the transcript from a brief hearing that, as authorized by § 5904 of the Insurers Liquidation Act, occurred ex parte on September 10, 2013. The Court of Chancery directed that the transcript be provided to Cohen by counsel for the Commissioner, but it was not. Cohen argues that the transcript contained a critical reference to criminal contempt that would have altered his approach to the case and changed his decision not to attend the hearing to show cause on September 24, 2013. Cohen claims that his absence from the September 24, 2013 hearing put him at a permanent disadvantage that tainted all subsequent sanctions proceedings.

But, Cohen was on abundant notice of the allegations against him and the transcript contained no new information that had not already been provided to Cohen by (i) Indemnity's September 9, 2013 motion, supporting exhibits, and proposed order; and (ii) the Court of Chancery's September 10, 2013 Amended Seizure Order. The Court of Chancery made it clear that a hearing would be held to give Cohen a chance to show cause why he should not be held in civil or criminal contempt. Cohen

was represented by counsel at the hearing on September 24, 2013 and had a full and fair opportunity to respond to the allegations against him. Thus, after weighing the factors set out by the U.S. Supreme Court in *Mathews v. Eldridge,* [3] we conclude that although the failure to provide the transcript was unfortunate and regrettable, it did not constitute a due process violation.

Likewise, we conclude that Cohen's due process rights were respected throughout the remainder of the Court of Chancery proceedings, and that the Court of Chancery did not abuse its discretion when it denied Cohen's motion for reargument of one of its orders. We also find that the Court of Chancery's decision not to delay the entry of a rehabilitation order that the Commissioner proposed and Indemnity's board consented to in order to protect the remaining value of the company and avoid liquidation—in response to a letter from RB Entertainment asking for time to brief a renewed motion to intervene—did not deny RB Entertainment its due process rights. The letter from RB Entertainment did not deny that serious fraud had occurred, did not proffer any evidence that Indemnity was not in the precarious financial situation that the Commissioner and Indemnity's board indicated, and made no offer to provide back-stop financing to Indemnity to ensure that no harm from the delay would befall it and its policyholders and creditors. Given the important public policy interests served by the Commissioner's proposed order and the opportunity ***70** afforded by the Court of Chancery for objections to the rehabilitation plan, RB Entertainment suffered no denial of its due process rights. Thus, we affirm the decisions of the Court of Chancery.

II. FACTUAL AND PROCEDURAL BACKGROUND

Indemnity is a Delaware-domiciled risk retention group that sells liability policies to restaurants and nightclubs, as well as insurance for special events. Indemnity insures approximately 4,100 policyholders and processes approximately 4,500 claims per year. [4] Indemnity wrote over $35 million in hospitality premiums during the 2012 calendar year. [5] Indemnity is subject to the regulatory authority of the Delaware Department of Insurance (the "Insurance Department"), which is charged with protecting insurance consumers, making sure that insurance companies are able to pay claims, and prosecuting insurance fraud. [6]

Indemnity shares its offices with at least seventeen Cohen-affiliated entities, which are intertwined, have complicated financial relationships with each other, and share employees and equipment. Before the spring of 2012, one of the Cohen-affiliated entities, IDG, performed "essentially all" of the day-to-day operations for Indemnity, including providing employees, paying for utilities, and other services. [7] Then, around April 2012, Cohen changed this arrangement and transferred these operational functions, including the employees, to Indemnity, but the companies remained interrelated. [8] For example, although by 2013 Indemnity was paying for at least some of the utilities itself, some accounts remained in IDG's name. [9]

In July 2012, the Insurance Department began a routine regulatory examination of Indemnity. From the beginning, Cohen allegedly refused to cooperate with the Insurance Department's requests for information. [10] During the examination, concerns emerged about Indemnity's solvency when the Insurance Department discovered (i) a receivable to Indemnity from Cohen-controlled affiliate IDG for approximately $20 million that was likely uncollectible, (ii) an unsubstantiated representation that Indemnity was entitled to recover $983,000 of incurred insurance losses from a reinsurer, and (iii) indications that Indemnity's booked reserves ***71** were understated by between $1 million and $3 million. [11] The $20 million receivable was of particular concern, because—for an insurer like Indemnity that had written $35 million in premiums in 2012—that was a material amount. The receivable existed because, over a three-year period, IDG had been collecting premiums on Indemnity's behalf but had not remitted those premiums to Indemnity. [12] After reviewing IDG's financial statements, which Cohen had submitted, the Commissioner concluded that IDG was insolvent because its total assets were only $3 million while its total liabilities exceeded $24 million, and that it was unlikely that Indemnity would ever receive the money IDG owed to it. [13]

In both the Petition for Entry of a Confidential Seizure and Injunction Order (the "Seizure Petition") and the

Petition for Entry of a Liquidation and Injunction Order (the "Liquidation Petition"), the Commissioner alleged that in spring 2013, as part of the ongoing inquiry by the Insurance Department, Cohen represented that Indemnity had $5,100,000 in unencumbered cash in an account at Susquehanna Bank.[14] When the Insurance Department sought to verify that amount, Cohen submitted a form that appeared to have been faxed from Susquehanna Bank confirming the account balance.[15] The Insurance Department suspected that this form was fraudulent and followed up by attempting to contact the Susquehanna Bank representative who purportedly had signed the form.[16] Cohen thwarted the Insurance Department's inquiries by providing a false post office box, telephone number, fax number, and email address for that representative.[17] When the Insurance Department finally succeeded in contacting the Susquehanna Bank representative, she confirmed its suspicions that the signature on the form Cohen submitted was not hers.[18] The Insurance Department's investigation later revealed that the actual account balance did not match the amount disclosed in Indemnity's financial statements, and—contrary to Cohen's assertions—the cash in the account represented the proceeds of a loan that another Cohen-controlled affiliate, RBE Entertainment, had taken out and that cash was fully encumbered by the loan.[19]

The Insurance Department's evidence suggested that the fraudulent activity at Indemnity was not limited to the account at Susquehanna Bank. The Insurance Department's investigation uncovered a similar scheme involving an account allegedly held at Royal Bank of Canada—Barbados, ***72** [20] as well as additional misrepresentations in Indemnity's financial statements that hid its true financial condition, including insufficient reserves, overstated account balances, and reinsurance claims that could not be corroborated.[21] The discovery of these potential frauds fueled the Insurance Department's concerns about Indemnity's financial viability.

[1] Insurer insolvency is regulated by state law rather than the federal Bankruptcy Code.[22] Many states, including Delaware, have adopted a form of the Uniform Insurers Liquidation Act "to avoid the confusion inherent in the forced liquidation of a multistate insurance corporation, especially with regard to assets in foreign jurisdictions."[23] The General Assembly enacted the Delaware Uniform Insurers Liquidation Act (the "Insurers Liquidation Act") in 1953.[24] Section 5943 of the Insurers Liquidation Act provides that, "[u]pon the filing by the Commissioner in the Chancery Court of a petition" meeting the statutory requirements, the Court of Chancery may:

> issue forthwith, *ex parte and without a hearing,* the requested order which shall direct the Commissioner to take possession and control of all or a part of the property, books, accounts, documents and other records of an insurer and of the premises occupied by it for the transaction of its business, and until further order of the Court enjoin the insurer and its officers, managers, agents and employees from disposition of its property and from transaction of its business except with the written consent of the Commissioner.[25]

The Insurance Department filed the Seizure Petition because of its concerns about Indemnity's financial viability and its suspicion that Cohen had engaged in fraud. The Court of Chancery reviewed the Seizure Petition, found it to be supported by sufficient evidence, and granted the Confidential Seizure and Injunction Order (the "Seizure Order") on May 30, 2013. The Seizure Order, tracing the language of the Insurers Liquidation Act, instructed the Commissioner to take immediate control of Indemnity and vested the Commissioner with "all right, title and interest in, of or to, all of the property of [Indemnity]."[26]

The Commissioner later determined that Indemnity was "impaired, or insolvent or ***73** in unsound condition" and that its "further transaction of insurance [was] presently or prospectively hazardous to its policyholders."[27] The Commissioner filed the Liquidation Petition on July 26, 2013, based on the allegations of fraud described above, all of which were supported by extensive evidence.

Cohen resigned from Indemnity's board of directors on August 5, 2013, and the board removed him from all of his officer positions that same day. Cohen has not denied or substantively contested the fraud allegations in the Court of Chancery proceedings.[28] Indemnity did not deny the fraud allegations either.[29] But Indemnity did file an opposition to the Liquidation Petition on August 21,

2013, arguing that Indemnity was not insolvent. Thus, at that time, Indemnity's board still believed that Indemnity was a "profitable business" that was "both solvent and in possession of substantial liquid assets that are sufficient to service [Indemnity]'s operations and pay claims." [30]

A. RB Entertainment's First Request to Intervene

On August 14, 2013, Cohen-controlled affiliate RB Entertainment moved to intervene under Court of Chancery Rule 24, seeking to oppose the Liquidation Petition. [31] RB Entertainment is one of the seventeen Cohen-affiliated entities. Cohen claims to own 100 percent of RB Entertainment, and RB Entertainment in turn claims to own 99 percent of Indemnity's equity. [32] RB Entertainment sought to intervene ***74** based on its alleged status as Indemnity's controlling stockholder. As discussed above, the Commissioner alleged that Cohen used RB Entertainment as an instrumentality to perpetrate at least one of the frauds, by causing RB Entertainment to take out a loan to provide the funds that were later deposited into the Indemnity account at Susquehanna Bank and were falsely represented as unencumbered.

RB Entertainment's motion to intervene argued that Indemnity was solvent but did not contest the fraud allegations. Both Indemnity and the Commissioner opposed RB Entertainment's motion. The Court of Chancery held an office conference on RB Entertainment's motion on August 22, 2013 and denied it without prejudice. But the Court of Chancery, citing the Insurers Liquidation Act and other authority, [33] held that as a general matter, stockholders do not have any official role as parties in a delinquency proceeding, because the insurer's interests are protected and represented by the insurer's board of directors. [34] The Court of Chancery also emphasized that it had not yet adjudicated any of the fraud claims, stating that "before we determine that Mr. Cohen is a bad guy, he actually ought to be able to dispute the fact that he's a bad guy." [35] The Court of Chancery stated that:

> If it turns out that the State wants some remedy that would deprive [RB Entertainment] of its voting rights or other[wise] affect its unique rights as a stockholder, I would reconsider and I would give Mr. Cohen, or really [RB Entertainment], the ability to intervene for the purpose of litigating its own particular rights. Likewise, I think that if the issue of fraud is to be adjudicated ... and if that adjudication would then, in turn, be binding upon [RB Entertainment], then I would allow [RB Entertainment] to intervene solely for the purpose of defending against an adjudication that would be dispositive of its rights. [36]

But the Court of Chancery added that:

> Even if I allowed [RB Entertainment] to intervene, it would only be for that limited purpose. So it's not going to be for the purpose of arguing about valuation. It's not going to be for the purpose of arguing about solvency. It's not going to be for the purpose of arguing about business viability. Those are all issues that are now within the control of the board of [Indemnity]. The board gets to decide what arguments it wants to make, not Mr. Cohen. [37]

The Court of Chancery asked RB Entertainment's counsel whether it wanted "the ***75** opportunity to seek to intervene to oppose the fraud issue" and RB Entertainment's counsel responded, "I think that's something to be discussed." [38] RB Entertainment did not seek reconsideration of the denial of intervention by demonstrating any specific interest that had been impaired or by contesting the fraud allegations. RB Entertainment has not appealed the Court of Chancery's August 22, 2013 decision to deny intervention, and thus the resolution of that motion is not before us. And, to reiterate, at no time has Cohen personally sought to intervene in the delinquency proceedings to contest the fraud allegations.

B. The Amended Seizure Order of September 10, 2013

The Seizure Order entered by the Court on May 30, 2013 prohibited anyone with notice of the proceedings "from transacting any business of, or on behalf of, [Indemnity] or selling, transferring, destroying, wasting, encumbering or disposing of any of the Assets, without the prior

written permission of the Commissioner." [39] Persons with notice of the proceedings were also prohibited "from interfering with the Commissioner and her authorized agents either in their possession and control of the Assets or in the discharge of their duties hereunder." [40] Despite those prohibitions, the record below reveals that Cohen interfered with the Commissioner's investigation and ability to run Indemnity in a variety of ways.

In response, Indemnity filed an expedited motion to amend the Seizure Order on September 9, 2013. [41] The motion set out detailed allegations that Cohen had (i) accessed Indemnity's computer servers and monitored company email, (ii) sent emails disparaging Indemnity's new management to company employees and insurance brokers, (iii) sent threatening text messages to members of management, and (iv) disclosed confidential documents to the ratings agency A.M. Best, which resulted in a ratings downgrade of Indemnity. The motion also provided affidavits and documentary evidence to support those serious allegations. Attached to the motion was a proposed order which would have, among other things, enjoined Cohen from accessing Indemnity's information technology systems or discussing Indemnity's business matters with employees or business contacts, and would have imposed criminal contempt sanctions on Cohen for any violation of the order. Indemnity's motion, proposed order, and supporting exhibits were served on Cohen's counsel that same day.

Because of the expedited nature of the motion and to protect the interests of the policyholders and creditors of Indemnity, the Court of Chancery held an ex parte office conference on the motion the next day, on September 10, 2013, as authorized by the Insurers Liquidation Act. [42] The office conference began at 12:39 PM and ***76** lasted for approximately 20 minutes. The Court of Chancery did not grant Indemnity's proposed order in the form submitted, but instead made several modifications to make it more protective of Cohen's interests. First, the Court of Chancery narrowed the scope of the restraint out of concern that the proposed order was "overbroad" and might infringe on Cohen's individual rights. [43] Second, the Court of Chancery modified the order so that *either* civil or criminal sanctions could be imposed for violations of the order, instead of *only* criminal sanctions as Indemnity's proposed order suggested. [44] Third, the Court of Chancery added language that provided Cohen an opportunity to respond and show cause why he was not in contempt of the Seizure Order, [45] stating that "*we have to hold out the possibility that there's some good explanation for all this.*" [46]

Then, after finding that "[t]here is certainly sufficient evidence attached to the motion in the form of affidavits as well as supporting documents to raise more than a colorable claim that types of improper access and interference have occurred," [47] the Court of Chancery entered an order amending the Seizure Order (the "Amended Seizure Order") at 4:11 PM. The Amended Seizure Order enjoined Cohen from "discussing, disclosing or communicating with or to [Indemnity]'s employees or any persons or entities that Cohen knows have business relationships with [Indemnity] regarding (i) any matter or fact relating to the Seizure Order or other matters contained in filings under this docket or (ii) any matter relating to [Indemnity]'s business." [48] The Amended Seizure Order was served on Cohen's counsel on September 10, 2013.

At the conclusion of the office conference, the Court of Chancery told the Commissioner to provide Cohen with a copy of the transcript, "so that [Cohen is] clear what his obligations are." [49] The full transcript is only 20 pages long. Unfortunately, counsel for the Commissioner did not comply with the Court of Chancery's instructions, and Cohen did not receive a copy of the transcript until January 15, 2014. Nonetheless, the Amended Seizure Order—when read in context with Indemnity's motion, the proposed order, and the supporting exhibits—provided Cohen with substantive knowledge of all the serious charges against him. Specifically, the Amended Seizure Order stated that:

> 4. Persons found in violation of this amendment to the Seizure Order may be held in *civil or criminal contempt* and, subject to the limits of applicable law, such persons may be sanctioned as the ***77** Court, in its discretion, may determine is warranted under the circumstances.
>
> 5. Cohen should show cause on or before September 24, 2013, why by accessing [Indemnity]'s information and technology systems he is not in contempt of paragraphs 7 and 9 of the Seizure Order. [50]

C. The Sanctions Order of September 25, 2013

The same day that the Amended Seizure Order was issued, management at Indemnity held a meeting with all employees. An unidentified Indemnity employee secretly recorded the meeting and delivered the recording to Cohen, who then sent a text message to a member of Indemnity's board stating that he had the recording and threatening litigation. As a result of this conduct, Indemnity filed a motion for sanctions on September 12, 2013, arguing that Cohen was in violation of paragraph 9 of the Seizure Order and paragraph 2 of the Amended Seizure Order, and requesting at least $30,000 in sanctions. [51] The Court of Chancery ordered briefing on both the Amended Seizure Order and the new motion for sanctions, and scheduled a hearing for September 24, 2013 where Cohen could present evidence on both issues. [52]

Indemnity alleged in its reply brief that, while the motion was being briefed, Cohen continued to interfere with Indemnity in other ways. On September 13, 2013, three Indemnity employees became aware of unauthorized activity in their deferred-compensation accounts. Cohen was the only person with access to the accounts, which were held in IDG's name. IDG is the Cohen-affiliated entity that owes Indemnity $20 million. The stock in the accounts had been sold and converted to cash, and the employees were concerned that Cohen was preparing to withdraw the funds. The employees contacted the Insurance Department, and the Commissioner froze the three accounts before they could be emptied. [53] Cohen sent the Commissioner a letter on September 19, 2013 demanding that the accounts be released, noting that IDG is not regulated by the Insurance Department. Cohen admitted that he attempted to cash out the employees' accounts, but claimed that he was seeking to offset a large payable that Indemnity owed IDG and that the plan's documents permitted him to do so. [54]

Then, on September 19, 2013, the telephone service in Indemnity's office went dead. When Indemnity contacted Verizon about the problem, Verizon informed it ***78** that Cohen had requested to disconnect the telephone service. The telephone service was not in Indemnity's name. Rather, it was in the name of one of Cohen's affiliated entities, and Indemnity needed Cohen's permission to transfer it or would have to open a new account, which would leave Indemnity without telephone service for ten days. Indemnity had similar problems with its electricity and the internet service, which Cohen had also requested be turned off. As a result of this behavior, Indemnity increased its request for sanctions to at least $100,000 in its reply brief filed on September 20, 2013. [55] The serious nature of the allegations against Cohen would have been evident to anyone who read the papers served on Cohen. In fact, Cohen's own attorney acknowledged that in a letter to the Court on September 16, 2013, stating: "We are in receipt of [Indemnity]'s Expedited Motion to Amend Confidential Seizure and Injunction Order *and note the serious allegations it contains.*" [56]

But Cohen chose not to attend the September 24, 2013 hearing. Instead, Cohen simply submitted an affidavit addressing the allegations, providing the Insurance Department with no opportunity to cross-examine him. Cohen's affidavit claimed that Indemnity's offices are leased by IDG, that IDG owned the servers that Indemnity was using, and that the servers "contain all of the data and information for 17 companies that are separate and apart from [Indemnity]." [57] The affidavit also stated that all the Cohen-affiliated entities maintain their financial records on the same software application, which had been purchased by IDG. In other words, Cohen attempted to justify his accessing Indemnity's servers and entering Indemnity's offices by arguing that he had caused Indemnity's core operations—as a regulated insurer—to be intermingled with and dependent on various Cohen-affiliated entities that he claimed to own and control and that he caused to be operated out of the same building as Indemnity.

At the hearing, evidence was presented that demonstrated that Cohen had interfered with the Commissioner by accessing Indemnity's servers. Cohen's counsel had the opportunity to present contrary evidence or deny that Cohen had accessed Indemnity's servers, but did not do so. Instead, relying on Cohen's affidavit, Cohen's counsel argued that Cohen should still be allowed to access the information on the Indemnity servers because the servers were owned by IDG and contained data belonging to the other Cohen-affiliated entities. [58] Cohen's attorneys also argued that Cohen should be allowed into Indemnity's offices to operate IDG and the other Cohen-affiliated entities, and claimed that his inability to do so under the

Seizure Order was negatively affecting IDG and the other Cohen-affiliated entities. [59]

***79** In response to this argument by Cohen's counsel, the Court of Chancery asked questions about IDG and the other Cohen-affiliated entities at the September 24, 2013 hearing. [60] Cohen's attorneys were not surprised by these questions, responding, "Thank you, Your Honor. That's something I was itching—have been itching to tell you." [61] Cohen's attorneys acknowledged that "the structure of the companies is important and provides context for these motions." [62] But Cohen's attorneys did not know the specific information necessary to answer many of the Court of Chancery's questions, and Cohen, the one person in the best position to know the details, did not attend the hearing. Cohen's attorneys said that:

> There's a benefit to aggregating all of these employees in the same place so that they can perform overlapping functions for each of these entities because the overhead costs would be substantially greater for each of these entities if they didn't sublease office space from IDG, use their servers, et cetera.... You get the picture. [63]

The Court of Chancery responded that "what it also evidences is that these are really one economic unit ... from what you're telling me there is a high degree of integration, to the point of nigh complete integration, between these businesses at the operational and functional level." The Court of Chancery continued, "there is a legal separation in terms of the intervening holdco ownership; but the intervening holdco ownership is, at most, a blocker entity, because when we get up to it, the ultimate ownership is all Mr. Cohen. Have I gotten that right?" Cohen's counsel answered, "I think that is essentially correct." [64]

In other words, the Court of Chancery focused on the reality that if the facts were as Cohen's counsel represented, then Cohen had intermingled the operations of an insurance company—which had over four thousand policyholders and was subject to regulation by the Insurance Department—with a dog's breakfast of shell entities, one of which appeared to be insolvent and happened to owe Indemnity $20 million. In essence, Cohen was arguing that he should continue to be able to be involved in Indemnity's business, by accessing its computer systems and offices, because he had made Indemnity dependent on dozens of non-transparent entities that he controlled and that he claimed were not subject to regulation by the Insurance Department. Given the important public policy interest of protecting policyholders served by the Insurers Liquidation Act, [65] the Court of Chancery understandably ***80** rejected Cohen's argument that he should be allowed to benefit from entangling a regulated insurer with his myriad corporations by continuing to disrupt the Commissioner's control of Indemnity. At the hearing, the Court of Chancery stated that it was "not about to allow the legal fig leaf of IDG to prevent the State from exercising its police powers and supervisory and regulatory authority over a Delaware entity." [66]

The next day, September 25, 2013, the Court of Chancery issued an order imposing sanctions (the "Sanctions Order"). [67] The Sanctions Order required Cohen to (i) stop interfering with the Commissioner, her agents, or current management at Indemnity; (ii) transfer control of the Indemnity telephone lines and other utilities to the Commissioner; (iii) cease to control IDG; and (iv) conduct all further communication with Indemnity or its employees through counsel. The Sanctions Order also enjoined and restrained IDG from interfering with the Commissioner in the discharge of her duties. [68] Although the Sanctions Order did not require Cohen to pay any damages at that time, to encourage compliance with the order, the Court of Chancery required Cohen to place $100,000 in escrow, which Cohen would forfeit if he continued to violate the Seizure Order. To enable a fuller exploration of the issues Cohen's own argument had injected into the proceedings, the Sanctions Order also directed discovery into Cohen's net worth and into the corporate separateness of the seventeen Cohen-affiliated entities that were transacting business out of the same premises as Indemnity.

D. The Denial Of The Rehearing Motion On October 7, 2013

On October 7, 2013, Cohen filed an Expedited Motion to Modify or Alternatively For Relief From the Order Imposing Sanctions (the "Rehearing Motion"). Cohen argued that the Sanctions Order should be modified under Court of Chancery Rule 59(e) to allow Cohen to reassert control over IDG to "avoid irreparable harm to the [Cohen-affiliated] non-party entities and to prevent

manifest injustice." [69] In the alternative, Cohen claimed that the September 25, 2013 Sanctions Order should be set aside under Court of Chancery Rule 60(b), because of newly discovered evidence. Without providing any specific details, Cohen alleged that IDG's computer servers were being destroyed or discarded, that Indemnity's attorneys had withdrawn from representing IDG in certain other matters due to alleged conflicts of interest, and that Indemnity was not depositing checks remitted to IDG and was forwarding them to Cohen instead. The only new evidence that Cohen attached was an electric bill to one of the Cohen-affiliated entities dated September 16, 2013, and three letters dated September 17, September 19, and September ***81** 25, 2013, where Indemnity attorneys had withdrawn as counsel to IDG in separate litigation due to conflicts of interest in representing both entities.

The Court of Chancery denied Cohen's Rehearing Motion without prejudice, noting that "there are no specifics to back [these allegations] up" as well as "no indication that, as to matters such as the [attorney] withdrawals or the depositing of IDG checks, Cohen has made any effort to contact Indemnity and solve the problem before attempting to create an issue for the Court to resolve." [70] The Court of Chancery also noted that the evidence could have been presented at the September 24, 2013 hearing, stating that "[t]he main reason why the Court's questions could not be answered on September 24 was because Cohen chose not to show up for a hearing about whether he was in contempt of an order from this court." [71] Nonetheless, the Court of Chancery gave Cohen leave to renew the motion if "he (i) grounds it on specific [ ] facts and (ii) demonstrates that he has met and conferred with [Indemnity] before seeking relief." [72] Cohen did not refile the motion. Instead, he filed the appeal in Case Number 545, 2013 three days later on October 10, 2013, challenging (i) the Amended Seizure Order of September 10, 2013, (ii) the Sanctions Order of September 25, 2013, and (iii) the denial of the Rehearing Motion on October 7, 2013.

E. The Additional Sanctions Order of November 1, 2013

[2] Cohen's contumacious behavior continued. Cohen filed three lawsuits against Indemnity in the state courts of Maryland (the "Maryland Lawsuits"), two pro se in his individual capacity on October 8, 2013 and the other through IDG and other Cohen-affiliated entities on October 11, 2013. The filing of the Maryland Lawsuits violated paragraph 10 of the Seizure Order, which, under the authority of § 5904(b) of the Insurers Liquidation Act, [73] enjoined and restrained anyone with ***82** notice of the proceedings "from asserting any claim against the Commissioner, her authorized agents, or [Indemnity] ... except insofar as such claims are brought in [ ] these seizure proceedings." [74] Further, the Maryland Lawsuits were not filed under seal and they attached pages of sealed transcripts from the Delaware proceedings, and as a result, Indemnity's identity—and thus, the fear that its financial condition was fundamentally compromised —became public. That violated § 5944(b) of the Insurers Liquidation Act and paragraph 15 of the Seizure Order, which required that Indemnity's identity be kept confidential. [75]

Cohen also violated paragraph 8 of the Seizure Order, which required persons holding Indemnity's assets to "turn those Assets over to the Commissioner" within ten days. Cohen refused to return a 2011 Aston Martin, a 2012 Range Rover, and a 2013 Ford Mustang Shelby GT that Indemnity purchased and held title to, stating that he would not return the vehicles until Indemnity put $30 million in escrow to cover alleged violations of his Employment Agreement related to his termination.

Cohen also continued communicating with Indemnity employees without going through counsel, in violation of paragraph 6 of the Sanctions Order and paragraph 2 of the Amended Seizure Order. On October 15, 2013, Cohen and another former Indemnity employee went to the Indemnity offices—in a Bentley owned by IDG—to serve certain members of management with the Maryland Lawsuits after service by mail had been declined. That caused a commotion at Indemnity's offices and the police were called to supervise the service of process because some employees felt intimidated. On October 17, 2013, Cohen sent a cease and desist letter to the acting president of Indemnity alleging defamation and sent an email to a benefits administrator threatening litigation, both without going through counsel.

In response, Indemnity filed an Expedited Motion for Additional Contempt Sanctions on October 21, 2013. The Court of Chancery held a hearing on the motion on November 1, 2013. The hearing lasted over three hours, and Cohen attended part of the hearing and testified.

Cohen admitted that he had filed the Maryland Lawsuits despite knowing of the restrictions in the Seizure Order;[76] had not returned the vehicles, even though Indemnity held title ***83** to them;[77] and had continued to contact Indemnity employees without going through counsel, even though he knew that he was prohibited from doing so by the Sanctions Order and the Amended Seizure Order.[78] Despite being represented by counsel at the time in other matters, Cohen testified that he believed he was permitted to contact the employees because he had filed the Maryland Lawsuits pro se and was therefore acting as his own attorney. The Court of Chancery rejected that testimony as "pretextual,"[79] a conclusion well within its discretion. Cohen also testified that he relied on advice from his attorney in Maryland that he was not required to return the vehicles. Cohen left during the lunch break and chose not to attend the remainder of the hearing, which included the Court's ruling on the motion for sanctions.

After the hearing on November 1, 2013, the Court of Chancery issued an order for additional sanctions (the "Additional Sanctions Order"), which included the forfeiture of the $100,000 that Cohen had put in escrow with the Register in Chancery; the return of the three vehicles to Indemnity by an agent before November 4, 2013; and the dismissal of the Maryland Lawsuits before November 8, 2013.[80] The Court of Chancery made it clear that if Cohen had any claims that needed to be brought exclusively in Maryland, he could make an application in Chancery for leave to do so.[81] Cohen did not file any such application. Based on evidence of Cohen's net worth—including documentation showing that Cohen had received over $1 million in compensation from Indemnity for each of the past four years[82]—and the fact that a potential $100,000 sanction had not been effective in convincing Cohen to comply with its orders, the Court of Chancery also ordered Cohen to deposit an additional $500,000 in escrow before November 8, 2013.[83]

Cohen failed to comply with the Additional Sanctions Order. On November 3, 2013, Cohen returned the Aston Martin by parking it across the entrance to Indemnity's parking lot, and he returned the Mustang by parking it on the sidewalk blocking the front entrance to the building. One of the Aston Martin's tires appeared to have been deflated intentionally, but Cohen denied deflating it. Regardless, because Cohen had not returned the keys to either vehicle, both had to be towed away. The Range Rover was not returned until November 14, 2013. The Maryland Lawsuits were not timely dismissed, although they were later dismissed.

In response to this conduct, Indemnity filed another motion for sanctions on November 7, and a hearing was held on December 5, 2013, at which Cohen testified. ***84** On January 2, 2014, the Court of Chancery imposed additional sanctions of $33,331, plus towing costs for these violations.[84] In an illustration of its restraint in the face of inexcusable behavior, the Court of Chancery refused to impose any additional sanctions for the flat tire because it could not be certain that Cohen was responsible.

F. The Rehabilitation Order and RB Entertainment's Second Request to Intervene

On November 6, 2013, the Commissioner filed a Petition for Entry of Rehabilitation and Injunction Order by Consent (the "Rehabilitation Petition"). The Rehabilitation Petition alleged two independent statutory grounds for entry of a rehabilitation order. First, based on the substantial evidence that the Commissioner collected during the investigation, the Rehabilitation Petition alleged that Indemnity was "impaired, insolvent, in unsound condition, and in or using such condition as to render its further transaction of insurance presently and prospectively hazardous to its policyholders."[85] In such circumstances, the Court of Chancery is authorized to enter a rehabilitation order by § 5905(1) of the Insurers Liquidation Act.[86] Second, Indemnity's board —which had previously opposed the Liquidation Petition —now consented to the Rehabilitation Petition.[87] In its unanimous written consent to the entry of a rehabilitation order, Indemnity's board stated that "[a]t the time the Opposition Statement was filed, the Company's Board of Directors did not fully grasp the true depth and extent of the frauds that Cohen appears to have perpetrated, *or the true financial position* of [Indemnity]."[88] The consent of Indemnity's board thus provided the Court of Chancery with independent statutory grounds to enter a rehabilitation order under § 5905(9) of the Insurers Liquidation Act.

Indemnity's board and the Commissioner emphasized the need for the Court of Chancery to grant the Rehabilitation Petition swiftly. Indemnity had negotiated a potential transaction with AmTrust North America, Inc., a large insurance holding company, that might allow it to avoid liquidation, and it feared the transaction would fall apart if the Court of Chancery did not move with alacrity.[89] In addition, on October 29, 2013, Bloomberg Newsweek published an article about the Commissioner's seizure of Indemnity, based on information obtained from the Maryland Lawsuits that Cohen had filed in violation of paragraph 10 of the Seizure Order.[90] The article ***85** "exacerbated the financial and operational difficulties of [Indemnity] and ... increased policyholder concern."[91] The Commissioner and Indemnity's board both said that they were concerned about an imminent "run on the bank" caused by canceled policies and demands for premium refunds, which would have a substantial adverse effect on the interests of policyholders if Indemnity was not placed into receivership as soon as possible.[92]

Later that same day, RB Entertainment sent a letter to the Court of Chancery stating that although it was "well aware of the need for expedited treatment," it was requesting the opportunity to brief a formal motion to intervene before the Court of Chancery entered any rehabilitation order.[93] RB Entertainment's letter quoted the Court of Chancery from the August 22, 2013 hearing transcript:

> If it turns out that the State wants some remedy that would deprive [RB Entertainment] of its voting rights or other[wise] affect its unique rights as a stockholder, I would reconsider and I would give Mr. Cohen, or really [RB Entertainment], the ability to intervene for the purpose of litigating its own particular rights.

RB Entertainment did not indicate which particular right as a stockholder it had been deprived of, did not provide any evidence or assurance of Indemnity's solvency, did not attach a formal motion to intervene that stated the grounds for intervention, and did not include a pleading setting forth the claim or defense for which intervention was being sought, as Court of Chancery Rule 24 required.[94] RB Entertainment said that it would be prepared to submit a formal motion by the following week. Notably, RB Entertainment had not been joined by IDG in its request for intervention, nor did RB Entertainment indicate that RB Entertainment, Cohen, and IDG were willing to assure Indemnity's solvency, by, for example, causing IDG to repay the $20 million it owed to Indemnity. The Commissioner replied by letter that day, urging the Court of Chancery to deny RB Entertainment's request to brief the intervention issue, arguing that it would "slow down the proceedings at the very time when it is critical to determine ... whether [Indemnity] can be rehabilitated, or whether it must be liquidated."[95]

[3] The Court of Chancery entered the Rehabilitation and Injunction Order (the "Rehabilitation Order") on November 7, 2013.[96] The Rehabilitation Order appointed ***86** the Commissioner as the receiver of Indemnity and otherwise granted the Commissioner broad powers that were similar to those contained in the Seizure Order. Although the Rehabilitation Order denied RB Entertainment's request for leave to brief a motion to intervene, the Rehabilitation Order did state that "[t]o the extent [RB Entertainment] has a claim against the [Indemnity] estate, [RB Entertainment] may give notice of its claim and file an objection to any proposed report and recommendation in the manner contemplated by this Rehabilitation and Injunction Order."[97] The Rehabilitation Order gave any person objecting to the final rehabilitation plan submitted by the Commissioner the right to file a written objection within sixty days and indicated that the Court of Chancery would hold a hearing on any objections.[98]

Cohen filed the appeal in Case Number 621, 2013 the next day, on November 8, 2013, challenging (i) the November 1, 2013 Additional Sanctions Order and (ii) the entry of the Rehabilitation Order without permitting intervention by RB Entertainment. The two appeals were briefed separately, but consolidated before the parties' argument.

III. ANALYSIS

A. Cohen Was Afforded Due Process At All Times

[4] **[5]** In his two appeals, Cohen raises a multitude of due process claims.[99] Delaware constitutional due process is coextensive with federal constitutional due process.[100] This Court reviews claims of violations of constitutional rights *de novo.*[101]

[6] [7] [8] Under both the U.S. and Delaware Constitutions, a person may not be deprived of life, liberty, or property without due process of law. "The fundamental requirement of due process is the opportunity *87 to be heard 'at a meaningful time and in a meaningful manner.' "[102] But "due process is flexible and calls for such procedural protections as the particular situation demands."[103] As a result, due process does not require an evidentiary hearing approximating a judicial trial before every deprivation of rights; indeed, such extensive process is only required in certain limited circumstances.[104] This Court has explained that "where only property rights are involved, 'mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of the liability is adequate.' "[105] Thus, "the necessity of prompt action by the State or the impracticality of providing a meaningful pre-deprivation hearing, coupled with the availability of post-deprivation process to assess the legality of the official action, may satisfy the requirements of procedural due process."[106]

[9] To determine whether a challenged procedure satisfies due process, Delaware Courts have employed the analysis set out by the United States Supreme Court in *Mathews v. Eldridge.*[107] The "*Eldridge* factors" instruct a Court to balance:

> the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail.[108]

1. The September 10, 2013 Hearing

[10] The only interest that Cohen has identified that was allegedly infringed by the September 10, 2013 hearing and the entry of the Amended Seizure Order is a *88 general property interest arising from the interconnected nature of his many business entities. Paragraph 2 of the Amended Seizure Order enjoined Cohen from communicating with Indemnity's employees or business relationships about Indemnity's business. Cohen claims that this provision "had the effect of shuttering several of [Cohen's] and IDG's businesses: [because] Indemnity has business/contractual relationships with several of [Cohen]'s and [IDG]'s various other business entities."[109] But Cohen himself never articulated his property interest with any degree of specificity. Cohen did not identify any aspect of what the Cohen-affiliated entities did that was separate from Indemnity, describe any specific way that the Cohen-affiliated entities would be harmed if they were denied from communicating with Indemnity, or otherwise explain why the Amended Seizure Order would have a materially negative effect on the Cohen-affiliated entities. This vague and amorphous interest, therefore, did not constitute a property interest that deserved substantial weight.

Cohen's complaints about the office conference held on September 10, 2013 have evolved over the course of the briefing. In his Opening Brief, Cohen argued that he was entitled to an opportunity to present an opposition before the Court of Chancery granted the Amended Seizure Order. In his reply brief and at oral arguments before this Court, however, Cohen focused on the Commissioner's failure to provide him a copy of the transcript from the September 10, 2013 office conference as directed by the Court of Chancery. Cohen claims that if he had read the transcript's reference to potential criminal sanctions, then he would have attended the September 24, 2013 hearing and been available to answer questions. Cohen also alleges that the Commissioner's failure to provide the transcript tainted the September 24, 2013 hearing and every subsequent order for sanctions against him, because although an opportunity to respond had been presented, his decision not to take full advantage of it was based on incomplete knowledge. Essentially, Cohen argues that the failure to provide the transcript deprived him of a meaningful opportunity to respond to the allegations against him and resulted in a deprivation of his property rights without due process.

Despite repeated references to the September 10, 2013 hearing throughout the record,[110] which make it clear that no one intended to keep Cohen unaware that a *89 hearing had been held, Cohen's counsel apparently remained unaware of the fact that the office conference had taken place until January 15, 2013. But Cohen's counsel is correct to note that that it was not his burden to determine whether a hearing—which was unnoticed on

the docket—had taken place. In certain circumstances, that sort of omission could possibly rise to a violation of a defendant's due process rights, but those circumstances are not presented here. Although the Commissioner's failure to order and provide the transcript as directed by the Court of Chancery was infelicitous and regrettable, it was not prejudicial to Cohen in any constitutionally meaningful way.

The procedures used by the Court of Chancery in this case created little risk of erroneous deprivation. Cohen received sufficient notice of the substance of the allegations against him. Cohen's counsel was served with Indemnity's motion, proposed order, and supporting exhibits on September 9, 2013, which set out the allegations in detail. Cohen's counsel responded to the motion on September 10, 2013, acknowledging the serious nature of the allegations the motion contained. Cohen's counsel was then served with the Amended Seizure Order on September 10, 2013, which provided Cohen an opportunity to brief the issue and show cause why he was not in contempt, and scheduled a full hearing on the issue for September 24, 2013. Cohen filed his Response to the Amended Seizure Order on September 19, 2013. In its introduction, the Response explained that the Court of Chancery granted the Amended Seizure Order but then "*afforded Cohen an opportunity to respond* to the many false and misleading statements and assumptions contained [in the motion]." [111] Cohen's Response contested each of the allegations against him, specifically addressing the allegations that Cohen had monitored Indemnity's email, accessed Indemnity's servers, communicated with Indemnity's employees and insurance brokers, and disclosed the Seizure Order to ratings agency A.M. Best.

Cohen has not identified anything in the short transcript from the September 10, 2013 office conference that he had not otherwise been given notice of. Cohen had full notice of the allegations against him and was afforded a meaningful opportunity to respond within a reasonable amount of time after the Amended Seizure Order was granted.

Moreover, Cohen's argument that the Court of Chancery's mention of criminal sanctions in the transcript would have motivated him to attend the September 24, 2013 hearing is belied by the fact that the proposed order attached to Indemnity's expedited motion on September 9, 2013—which Cohen did receive—suggested *only* criminal sanctions, [112] and that the Amended Seizure Order—which Cohen also received—warned that persons found in violation of the order could be held in *either* civil or criminal contempt. [113] When the Court of Chancery's comments during the September 10, 2013 office conference are placed in proper context, it becomes clear ***90** that the Court of Chancery was not raising the specter of criminal sanctions spontaneously. Rather, it was explaining changes it had made to the proposed order that were actually to Cohen's benefit. The Court of Chancery was trying to protect Cohen's rights while also protecting Indemnity's policyholders and creditors as required by the Insurers Liquidation Act. [114] Therefore, we conclude that Cohen's due process right was not violated in connection with the September 10, 2013 office conference. For the same reasons, we find that the November 1, 2013 Sanctions Order was not tainted by the Commissioner's failure to provide the transcript. [115]

Before the transcript issue emerged as a cri de coeur in Cohen's reply brief, Cohen had argued that he should have been given the opportunity to hold a full trial-type hearing where he could present argument against the Amended Seizure Order before it was entered. That argument is also without merit. The grant of the Amended Seizure Order by the Court of Chancery following an ex parte hearing was authorized by § 5904(a) of the Insurers Liquidation Act, which provides that "the court may *without notice* issue an injunction restraining the insurer, its officers, directors, *stockholders,* ... and all other persons from the transaction of its business or the waste or disposition of its property." It was also authorized by § 5904(b) of the Insurers Liquidation Act, which provides that the Court of Chancery may "*at any time* during a proceeding under this chapter issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding or waste of the assets of the insurer."

Cohen's property interest was protected because the Court of Chancery scheduled an evidentiary hearing shortly after granting the Amended Seizure Order, which gave Cohen a meaningful opportunity to ***91** respond to the Amended Seizure Order and show cause why he was not in civil or criminal contempt of the Seizure Order. That hearing was held on September 24, 2013. Although his attorneys attended on his behalf, Cohen deliberately

chose not to personally attend—even though he was facing possible criminal and civil contempt findings and thousands of dollars in potential sanctions that Indemnity had requested in its September 12, 2013 motion, which also was being heard that day. His counsel filed separate oppositions to each motion, and acknowledged that the purpose of the September 24, 2013 hearing was to address both motions.[116] Cohen's counsel had an opportunity to present testimony and documents, as well as cross-examine witnesses.

The additional procedures that Cohen requests would not have appreciably reduced the risk of erroneous deprivation, but they would have impaired the Commissioner's ability to act in the expedited fashion contemplated by the Insurers Liquidation Act, which is necessary to accomplish the policy goals of preventing further damage to a potentially insolvent insurer and protecting remaining assets to pay the claims of its policyholders and creditors.[117] The Insurance Department has a strong countervailing interest in consumer protection and preventing fraud at Indemnity, an interest recognized by the General Assembly when it passed the Insurers Liquidation Act.[118] Thus, after balancing the *Eldridge* factors, we conclude that the Court of Chancery's grant of the September 10, 2013 Amended Seizure Order did not constitute a due process violation in any respect.

2. The September 25, 2013 Sanctions Order Extends The Seizure Order To Include IDG

[11] Cohen also claimed that his due process rights were violated because he was not provided an adequate opportunity to present evidence regarding the corporate separateness of Indemnity and IDG before the September 25, 2013 Sanctions Order was granted. But Cohen did have that opportunity, because it was Cohen who raised that issue in the first place.

Cohen surfaced the issue of corporate separateness in his September 19, 2013 Response to the Amended Seizure Order, when Cohen argued that he should still have access to Indemnity's servers so he could run the seventeen Cohen-affiliated entities. Cohen could have presented evidence about corporate separateness at the September 24, 2013 hearing, but did not. After the hearing, the Court of Chancery concluded that "there's sufficient evidence of a close relationship between Cohen and IDG that at this point I believe it's necessary to preserve the status quo to extend the seizure order and to enjoin Cohen ***92** from taking any action to interfere with the company through IDG."[119]

[12] **[13]** A balancing of the *Eldridge* factors again compels the conclusion that the Court of Chancery did not violate Cohen's right to due process. First, Cohen has never identified any particular interests of IDG's that were harmed by the Sanctions Order.[120] Even later, when he filed a motion for rehearing,[121] the only additional evidence that Cohen was able to present regarding his property interest was that Indemnity's attorneys had withdrawn from representing IDG in certain other matters due to alleged conflicts of interest, and that Indemnity was not depositing checks remitted to IDG and was forwarding them to Cohen instead.[122] Thus, no evidence of record supports a conclusion that Cohen's interests in these entities were seriously impaired by preventing IDG from interfering with the Commissioner's efforts to manage Indemnity. Requiring IDG to hire its own attorneys and to deposit its own checks is not an infringement of IDG's rights; it is simply a requirement that IDG run its own affairs. In this regard, Cohen's own choice to entangle these seventeen entities with a regulated insurer was the major cause of any impairment of his ability to operate them.

Second, even if we assume that Cohen had some, albeit slight and vague, property interest in these entities that was impaired by the Sanctions Order, we find that the procedures used by the Court of Chancery already adequately protect against erroneous deprivation. Cohen had an opportunity to present evidence on corporate separateness at the September 24, 2013 hearing, yet he failed to do so. Despite having injected this issue into the proceedings, Cohen's counsel was not able to provide the Court with any reliable information about what the seventeen Cohen-affiliated entities did, the state of their finances, whether they faced any genuine exigencies, and why. No final determination about veil piercing was made in the September 25, 2013 Sanctions Order, and Cohen still has the opportunity to demonstrate corporate separateness. The Sanctions Order provided for discovery into IDG and the Cohen-affiliated entities, including ***93** "the nature of their business,

the identities of their employees, their revenue and its sources, how their corporate structure came to be, and their interrelationship with [Cohen]." [123] Cohen was given an opportunity to challenge the Commissioner's claims and demonstrate corporate separateness, but there is no record evidence that Cohen made any attempt to provide reliable information about what these various entities do, let alone how their ability to function was compromised by having to operate independently of Indemnity. [124]

Thus, additional process would have had no benefit, because Cohen has not even taken advantage of the process that was available to him. Cohen could have prepared a targeted request of the particular documents and information he needed so he could run the various Cohen-affiliated entities independently of Indemnity, if these entities were in fact bona fide, separate business entities. If, however, none of the Cohen-affiliated entities were genuinely distinct businesses that could be disentangled from Indemnity and Cohen simply wished to continue to have full access to Indemnity's affairs, then that reality supports the reasonableness of the Court of Chancery's orders and demonstrates that those orders were necessary to ensure that the Commissioner had sole control over Indemnity. In either event, any intrusion on Cohen's property rights was the self-inflicted result of his having intermingled these other entities' affairs with a regulated entity.

Third, the Insurance Department has a substantial interest in ensuring that the Seizure Order is not circumvented through the use of intermediaries and the abuse of the corporate form. Under the Insurers Liquidation Act, the Commissioner is charged with preventing further damage to an insurer and protecting the remaining assets to pay the potential claims of policyholders and creditors. [125] Cohen was already enjoined from personally interfering with Indemnity, and allowing Cohen to continue to interfere by indulging his continued intermingling of the affairs of non-regulated entities with those of a regulated entity would defeat the purposes of the Insurers Liquidation Act. Any impairment to Cohen's property interests is decisively outweighed by the important public interest in ensuring that the Commissioner could exercise control over Indemnity and protect the interests that were the subject of the Insurers Liquidation Act. Therefore, Cohen's due process rights were not violated by the September 25, 2013 Sanctions Order.

B. The Court of Chancery's Decision Not To Delay Entry Of The Rehabilitation Order To Allow RB Entertainment Time To Press A Renewed Motion to Intervene Was Appropriate

[14] RB Entertainment also claims that its due process rights were violated because the Court of Chancery did not ***94** permit it to brief the issue of intervention before it entered the Rehabilitation Order. In responding to RB Entertainment's claim, the Commissioner raised the interesting question of whether the Insurers Liquidation Act gives a stockholder, like RB Entertainment, standing to intervene and oppose a Rehabilitation Order. Delaware has not yet determined the standing of a stockholder to oppose a delinquency petition, but cases from other jurisdictions provide persuasive guidance about how to interpret the Insurers Liquidation Act. [126] Jurisdictions that have considered the issue have typically held that stockholders do not have standing to intervene in a delinquency proceeding. [127] RB Entertainment has not cited any case where standing to intervene was granted to a stockholder under the Insurers Liquidation Act in Delaware or in a comparable proceeding in any other jurisdiction. Furthermore, the Commissioner argues that denying stockholders standing to intervene supports the goals of the Insurers Liquidation Act, which center on the orderly, expeditious, and equitable resolution of all claims against the insolvent insurer. [128] Permitting general intervention would complicate and slow that process. [129] We need not address or answer this question here, however, because it is not essential to the resolution of this appeal. RB Entertainment does not appeal from a definitive ruling denying it standing to intervene. Instead, it challenges the Court of Chancery's decision to deny RB Entertainment's request, submitted by letter after the Rehabilitation Petition had been submitted, for leave to brief a motion to intervene before entry of the Rehabilitation Order.

RB Entertainment argues that this denial violated its right to due process. To determine whether RB Entertainment's due process rights were violated, we again balance the *Eldridge* factors, and conclude that the Court of Chancery did not violate RB Entertainment's right to due process. RB Entertainment argues that it should have been allowed to brief a motion to ***95** intervene before

the entry of the Rehabilitation Order to protect an ill-defined and cursorily-pled property interest. Whatever property interest RB Entertainment may have had, it stemmed from its disputed claim to be a stockholder of Indemnity. But even if RB Entertainment is a stockholder, that does not give it a claim over any specific asset of Indemnity.[130] And, if Indemnity is insolvent, RB Entertainment may have no right to a liquidation payment at all given the priority of claims set out in the Insurers Liquidation Act.[131] Moreover, Indemnity's board—which was representing the interests of equityholders and debtholders—had unanimously consented to the entry of the Rehabilitation Order, because it believed that rehabilitation would maximize the value of the company and might allow it to avoid liquidation.[132] In such cases, hearings are unnecessary.[133]

With brazenness, RB Entertainment also argues that intervention is "particularly appropriate ... where the principal of the equity holder is accused of fraud but not permitted an opportunity to challenge those allegations."[134] If RB Entertainment or Cohen had truly never been given an opportunity to challenge the fraud allegations, then that argument might have been advanced without a lack of grace. But, as the record reflects, the Court of Chancery asked whether RB Entertainment wanted to contest the fraud issue at the hearing on August 22, 2013 on RB Entertainment's original motion to intervene.[135] At no time in the months that followed did RB Entertainment do so. RB ***96** Entertainment's proposed pleading, filed on August 21, 2013 in opposition to the Liquidation Petition, failed to respond to the allegations of fraud in the Commissioner's petition, stating that it should be addressed "separately."[136] For his part, Cohen has not denied the fraud either.[137] As a result, the record before the Court of Chancery consisted solely of strong evidence of fraud material to Indemnity's solvency—evidence that those in the strongest position to refute chose not to dispute.

Nonetheless, in its letter on November 6, 2013, RB Entertainment asked the Court of Chancery to delay entering the Rehabilitation Order, despite a record of (i) uncontested evidence of substantial financial fraud by Cohen that was material to Indemnity's solvency, (ii) a balance sheet that included as a major asset a $20 million receivable from IDG, an entity owned by Cohen that was apparently insolvent itself and whose nature Cohen never clarified, even though he had been given multiple chances to do so, (iii) public disclosure of Indemnity's financial problems and the fraud allegations because of Cohen's own actions, and (iv) the unanimous view of Indemnity's board, which had earlier argued that Indemnity was solvent, that Indemnity's financial problems were worse than it realized and that the expeditious entry of the Rehabilitation Order was necessary in order to make a last attempt to secure a transaction that would enable Indemnity to avoid liquidation.

In the face of this compelling interest, RB Entertainment, through its letter, sought leave to have briefed and decided yet another motion to intervene before entry of a rehabilitation order. RB Entertainment's letter did not indicate that it would contest the evidence of fraud, that it had any evidence that Indemnity was not in the precarious financial situation that the Commissioner's and Indemnity's board's submissions and evidence indicated, or that it or any of the other Cohen-affiliated entities would offer to provide financial assurance to Indemnity to soothe the concerns about its perilous circumstances. And notably, RB Entertainment did not indicate that its fellow Cohen-controlled affiliate IDG was prepared to deliver the $20 million it owed to Indemnity.

The Court of Chancery denied RB Entertainment's eleventh-hour request and entered the Rehabilitation Order on November 7, 2013. In addition to the many opportunities to protect its interests that the Court of Chancery gave RB Entertainment before entering the Rehabilitation Order, the plain terms of the Rehabilitation Order and the Insurers Liquidation ***97** Act provided further protection to RB Entertainment and other interested parties from erroneous deprivation. RB Entertainment was given the opportunity to be heard later on any specific issues that implicate its property rights, by submitting an objection to specific provisions of the Commissioner's proposed Rehabilitation Plan.[138] These procedures adequately protected any risk to RB Entertainment's purported property rights.

Most importantly, there were strong public policy reasons justifying the Court of Chancery's refusal to delay the entry of the Rehabilitation Order while intervention was briefed. Cohen's own actions and violations of the Court of Chancery's orders had created a situation of urgency. Indemnity's identity had become public knowledge

because of Cohen's filing of the Maryland Lawsuits, and as policyholder concern over the undisputed allegations of fraud grew, Indemnity's board feared a "run on the bank" that would further deplete Indemnity's assets. The record evidence was overwhelming that Indemnity's financial condition was precarious, and its own board had come to the belated realization that Indemnity was insolvent. There was also legitimate concern that delay would cause the potentially life-saving transaction with AmTrust to fall apart, forcing Indemnity into liquidation instead of rehabilitation. The Commissioner had an important interest in moving quickly to protect the interests of policyholders and creditors.[139] We find that on balance, the Commissioner's interest in speed far outweighed RB Entertainment's interest in further delaying the proceedings, and the Court of Chancery did not violate any due process right by denying RB Entertainment an opportunity to brief the intervention issue before entering the Rehabilitation Order.

IV. CONCLUSION

For all of the reasons above, the judgments of the Court of Chancery are AFFIRMED.

All Citations

89 A.3d 65

Footnotes

1 18 *Del. C.* § 1802(3) defines "managing general agent" as "any person, firm, association or corporation who negotiates and binds ceding reinsurance contracts on behalf of an insurer or manages all or part of the insurance business of an insurer (including the management of a separate division, department or underwriting office) and acts as an agent for such insurer...."

2 18 *Del. C.* § 5943.

3 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

4 Indemnity's Opposition Statement (Aug. 21, 2013), docket 66, at *4.

5 RB Entertainment's Opposition Statement (Aug. 21, 2013), docket 65, at *5.

6 *Mission,* DEL. DEP'T OF INS., http://www.delawareinsurance. gov/mission.shtml (last updated May 15, 2012).

7 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 12:18–22.

8 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 13:2–22.

9 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 51:10–22; 58:7–9.

10 Seizure Petition (May 30, 2013), docket 1, ¶ 10 (alleging that "the Department's examiners uncovered several areas of high concern regarding [Indemnity]'s financial condition that they were prevented from confirming and quantifying due to the failure of [Indemnity]'s Cohen to cooperate with the examiners' request for information and Cohen's direction to [Indemnity]'s vendors not to cooperate with the Department"); *see also id.* ¶ 63 (alleging "Cohen's use of these actions and practices to obstruct and mislead the [Insurance] Department in its effort to confirm assets of [Indemnity] as part of examining its financial condition" and "the persistent efforts of [Indemnity] and its president and director, Cohen, to resist and thwart the Department's ongoing attempt to examine [Indemnity] since the summer of 2012").

11 Seizure Petition (May 30, 2013), docket 1, ¶ 11.

12 Seizure Petition (May 30, 2013), docket 1, ¶ 11.

13 Seizure Petition (May 30, 2013), docket 1, ¶¶ 14–15; Liquidation Petition (July 26, 2013), docket 20, ¶¶ 29–32.

14 Seizure Petition (May 30, 2013), docket 1, ¶ 16; Liquidation Petition (July 26, 2013), docket 20, ¶¶ 38–39.

15 Seizure Petition (May 30, 2013), docket 1, ¶¶ 18, 22–32; Liquidation Petition (July 26, 2013), docket 20, ¶¶ 41, 45–61.

16 Seizure Petition (May 30, 2013), docket 1, ¶ 33; Liquidation Petition (July 26, 2013), docket 20, ¶ 62.

17 Seizure Petition (May 30, 2013), docket 1, ¶¶ 34–36, 38–42, 48; Liquidation Petition (July 26, 2013), docket 20, ¶¶ 63–65, 68–71, 79.

18 Seizure Petition (May 30, 2013), docket 1, ¶¶ 37, 43; Liquidation Petition (July 26, 2013), docket 20, ¶¶ 66, 72.

19 Seizure Petition (May 30, 2013), docket 1, ¶¶ 49; Liquidation Petition (July 26, 2013), docket 20, ¶¶ 97–102.

20 Liquidation Petition (July 26, 2013), docket 20, ¶¶ 84–96.

21 Liquidation Petition (July 26, 2013), docket 20, ¶¶ 118–136.

22 *Checker Motors Corp. v. Exec. Life Ins. Co.,* 1992 WL 29806, at *2 (Del.Ch. Feb. 13, 1992) ("Because distressed insurance companies are prohibited from seeking the protection of the Federal Bankruptcy Code, the rehabilitation or liquidation of such insurers is left to regulation by the states.").

23 Jay M. Zitter, *Validity, construction, and application of Uniform Insurers Liquidation Act,* 44 A.L.R.5th 683 (1996); *see also Checker Motors Corp. v. Exec. Life Ins. Co.,* 1992 WL 29806, at *2 (Del.Ch. Feb. 13, 1992) (noting that "[b]ecause most large insurance companies have assets and operations in more than one state, many states, including California and Delaware, have adopted the [Uniform Insurers Liquidation Act] to establish a uniform method for processing claims against, and distributing assets of, distressed insurance companies."); STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, COUCH ON INSURANCE § 6:14 (3d ed. 2013) (explaining that the Uniform Insurers Liquidation Act was "designed to provide consolidated, orderly, and equitable liquidations of multistate insurers and to secure equal treatment for all creditors wherever situated.").

24 18 *Del. C.* §§ 5901–5933; 5941–5944.

25 18 *Del. C.* § 5943 (emphasis added).

26 Seizure Order (May 30, 2013), docket 4, ¶ 2.

27 18 *Del. C.* § 5905(1).

28 Indemnity has brought an action against Cohen in the Delaware District Court alleging breach of fiduciary duty and fraud, and in an Answer filed on November 12, 2013, Cohen's response to the specific allegations of fraud was: "Cohen asserts a privilege not to respond to the allegations contained in this paragraph." *See* Appellee's Appendix B531–33, 535, 539, 541, ¶¶ 17–19, 21, 23, 29–30, 41, 52–53.

29 Indemnity's Opposition Statement (Aug. 21, 2013), docket 66, at *1 ("[Indemnity] cannot offer, and is unaware of, any evidence to refuse allegations made by [the Insurance Department] in its petition that Cohen provided false information...."); *id.* at *5 (stating that "[Indemnity] has identified no evidence suggesting that Mr. Cohen was not responsible for the false Susquehanna bank confirmation or the representations to the [the Insurance Department] concerning an account at Royal Bank of Canada—Barbados" and noting "the lack of any exculpatory evidence").

30 Indemnity's Opposition Statement (Aug. 21, 2013), docket 66, at *2.

31 RB Entertainment acknowledged that its motion was not accompanied by the pleading required by Rule 24(c), but requested that it be excused from compliance because the required pleading would be duplicative of the one that was due on August 21, 2013. The Commissioner argued that this did not comply with Rule 24(c) in its Opposition to Intervention filed on August 19, 2013. After RB Entertainment filed its reply, it filed the required pleading on August 21, 2013. The hearing regarding intervention was held the next day, on August 22, 2012, and the Court of Chancery made no determination as to whether the belatedly-filed pleading satisfied Rule 24(c).

32 Cohen claims that he owns 99 percent of Indemnity's equity through RB Entertainment, as a result of having been issued a zero-dollar insurance policy by Indemnity. *See* Memorandum Opinion (Jan. 16, 2014), docket 339, at *3. The Commissioner disputes this characterization and argues that RB Entertainment does not qualify as a statutory owner of Indemnity under the Delaware Risk Retention Act, 18 *Del. C.* §§ 8001–8014. Indemnity's board also disputes the claim and says that there is no record that Indemnity ever issued stock to RB Entertainment or anyone else in exchange for genuine economic consideration. *See* Rehabilitation Petition (Nov. 6, 2013), docket 228, at 15 n. 10; Unanimous Written Consent of the Directors of Indemnity, Exhibit A to Exhibit 2 to Commissioner's Rehabilitation Petition (Nov. 6, 2013), docket 228, ¶ 10. This issue has not been adjudicated by the Court of Chancery.

33 18 *Del. C.* § 5903 ("The Commissioner shall commence any such proceedings by application to the court for an order directing *the insurer* to show cause why the Commissioner should not have the relief prayed for.") (emphasis added); *see also Metcalf v. Investors Equity Life Ins. Co.,* 80 Hawai'i 339, 910 P.2d 110 (1996) (stockholder did not have standing to oppose liquidation petition); *Hartnett v. Southern American Fire Ins. Co.,* 495 So.2d 902, 903 (Fla.App.1986) (stockholders of insolvent insurance corporation sought to challenge receiver's actions, but were denied due to lack of standing); *cf. In re Westerleigh Dev. Corp.,* 141 B.R. 38 (Bankr.S.D.N.Y.1992) (no right for stockholders to contest an involuntary petition filed against their corporation in analogous bankruptcy proceeding).

34 Transcript from Office Conference (Aug. 22, 2013), docket 73, at 34:5–39:24.

35 Transcript from Office Conference (Aug. 22, 2013), docket 73, at 24:10–21.

36 Transcript from Office Conference (Aug. 22, 2013), docket 73, at 38:7–18.

37 Transcript from Office Conference (Aug. 22, 2013), docket 73, at 38:9–39:5.

38 Transcript from Office Conference (Aug. 22, 2013), docket 73, at 33:10–14.

39 Seizure Order (May 30, 2013), docket 4, ¶ 7.

40 Seizure Order (May 30, 2013), docket 4, ¶ 9.

41 Expedited Motion to Amend Seizure Order (Sept. 9, 2013), docket 82.

42 18 *Del. C.* § 5904(a) states that "the court may *without notice* issue an injunction restraining the insurer, its officers, directors, stockholders, ... and all other persons from the transaction of its business or the waste or disposition of its property...." and § 5904(b) states that "[t]he court may *at any time* during a proceeding under this chapter issue such other injunctions as may be deemed necessary to prevent interference with the Commissioner...." (emphasis added).

43 Transcript from Office Conference (Sept. 10, 2013), docket 381, at 9:13–10:11 ("I understand you want the most protection you can from the company. But I have to balance that against the idea that Mr. Cohen does continue to have individual rights as well.").

44 Transcript from Office Conference (Sept. 10, 2013), docket 381, at 16:5–17 ("I'm also going to modify paragraph 3 to make it clear that contempt can be civil or criminal ... [and] that contempt does not follow as a matter of course.... [I]t's not appropriate for me to put in here that anybody who violates this shall be held in criminal contempt. That's just too strong.").

45 Transcript from Office Conference (Sept. 10, 2013), docket 381, at 16:18–22.

46 Transcript from Office Conference (Sept. 10, 2013), docket 381, at 18:1–2 (emphasis added).

47 Transcript from Office Conference (Sept. 10, 2013), docket 381, at 12:17–21.

48 Amended Seizure Order (Sept. 10, 2013), docket 85, ¶ 2.

49 Transcript from Office Conference (Sept. 10, 2013), docket 381, at 17:2–5.

50 Amended Seizure Order (Sept. 10, 2013), docket 85, ¶¶ 3–4 (emphasis added).

51 Indemnity's Expedited Motion for Sanctions (Sept. 12, 2013), docket 99, ¶¶ 6–8.

52 Order Setting Hearing on Motion for Sanctions and Order to Show Cause (Sept. 13, 2013), docket 117.

53 Suspicious activity was also observed in a fourth account, belonging to former Indemnity IT employee Jorge Cuadra ("Cuadra"). Cuadra did not cosign the letter requesting that the Commissioner freeze the accounts. The account was emptied before the Commissioner could freeze it, but Cuadra did not complain that the money was missing. Cuadra allegedly passed information to Cohen and helped Cohen to access Indemnity's servers before he quit in August 2013. Cuadra also signed an affidavit on Cohen's behalf on October 14, 2013, after the account had been emptied, alleging that Indemnity had violated labor laws by withholding wages that were due to him and that management at Indemnity had created a hostile work environment. *See* Exhibit H to Verified Petition (Oct. 18, 2013), docket 181. It is not known whether Cuadra now works at one of the other Cohen-affiliated entities or where the money went.

54 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 30:20–33:8.

55 Indemnity's Reply to: 1) Response to Expedited Motion to Amend Confidential Seizure and Injunction Order and to Show Cause; and 2) Opposition to Motion for Sanctions (Sept. 20, 2013), docket 159, ¶ 18.

56 Letter from Cohen's Counsel to the Court of Chancery (Sept. 10, 2013), docket 84 (emphasis added).

57 Cohen's Affidavit, Exhibit D to Cohen's Response to Amended Seizure Order (Sept. 19, 2013), docket 145, ¶¶ 3–4.

58 Cohen's Response to Amended Seizure Order (Sept. 19, 2013), docket 145, at *12–14 (emphasis added); Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 9:3–5 ("IDG is the actual tenant for that office space. IDG owns all the servers that all the entities utilize.").

59 Cohen's Response to Amended Seizure Order (Sept. 19, 2013), docket 145, at *9 (emphasis added).

60 *See, e.g.,* Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 4:11–12 ("Tell me about these 17 companies. What do you know about them?"); *id.* at 7:5–9 ("[Cohen's counsel] has just started to tell me about the 17 companies that used the IDG servers and which aren't part of [Indemnity] but yet are implicated by what we may do today."); *id.* at 8:15–23 ("So IDG is the ultimate parent. And the other 16 entities are subsidiaries of IDG? ... Tell me what you can about these 16 other entities."); *id.* at 9:21–22 ("Do any of these entities have other lines of business that aren't insurance related?"); *id.* at 10:7–20 ("How many employees does IDG and its subsidiaries have? ... How many of [Indemnity]' s employees does IDG utilize on a regular basis?").

61 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 4:13–15.

62 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 27:12–14.

63 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 22:15–23.

64 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 23:1–16.

65 *Matter of Transit Cas. Co.,* 79 N.Y.2d 13, 580 N.Y.S.2d 140, 588 N.E.2d 38, 42 (1992) ("The over-all purpose of the Uniform Act, like liquidation proceedings generally, is not only to preserve available assets for the benefit of creditors, but to protect the interest of persons who purchased insurance policies from a company which has become insolvent.").

66 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 26:9–12 ("[W]hat your client is doing is clutching the corporate separateness of IDG as a basis for, put bluntly, interfering with the regulatory efforts of the State.").

67 Sanctions Order (Sept. 25, 2013), docket 161.

68 Sanctions Order (Sept. 25, 2013), docket 161, ¶ 7.

69 Cohen's Rehearing Motion (Oct. 7, 2013), docket 169, at *2.

70 Order Denying Rehearing Motion (Oct. 7, 2013), docket 170. Cohen nonetheless claims on appeal that he was unable to hire new attorneys and cash the checks for IDG because the provisions in the September 25, 2013 Sanctions Order enjoined him from exercising control over IDG. *See* Cohen's Opening Brief (Nov. 25, 2013), No. 545, at *34. But the Court of Chancery made clear to Cohen that specific issues of this kind could be easily resolved. All Cohen had to do was confer through counsel with Indemnity and work them out. If no resolution was reached, then the Court of Chancery would hear his concerns. There is no rational basis, therefore, to believe that Cohen would not have been permitted to deposit checks into IDG's account or hire attorneys for IDG with IDG's own resources or with his own. But the record reflects no attempt by Cohen to address these kinds of specific issues in the constructive manner that the Court of Chancery suggested.

71 Order Denying Rehearing Motion (Oct. 7, 2013), docket 170 ("Having chosen to send his lawyers and not appear personally, Cohen cannot complain about their inability to answer questions.").

72 Order Denying Rehearing Motion (Oct. 7, 2013), docket 170.

73 18 *Del. C.* § 5904(b) ("The court may at any time ... issue such other injunctions or orders as may be deemed necessary to prevent ... the commencement or prosecution of any actions ... against the insurer or against its assets or any part thereof." As Delaware Courts have recognized, one of the main purposes of the Insurers Liquidation Act is to centralize claims in one place "to avoid dissipating a distressed insurer's assets by allowing it to be sued, and requiring it to defend, litigations scattered in many jurisdictions throughout the country.") *Checker Motors Corp. v. Exec. Life Ins. Co.,* 1992 WL 29806, at *2 (Del.Ch. Feb. 13, 1992). This public policy interest has also been recognized as important by other courts. *See, e.g., Munich American Reinsurance Co. v. Crawford,* 141 F.3d 585, 593 (5th Cir.1998) (consolidation in one court "eliminates the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policyholders as well as other creditors."); *G.C. Murphy Co. v. Reserve Ins. Co.,* 54 N.Y.2d 69, 444 N.Y.S.2d 592, 429 N.E.2d 111, 117 (1981) (recognizing "the paramount interest of the various States in seeing that insurance companies domiciled within their respective boundaries are liquidated in a uniform, orderly and equitable manner without interference from external tribunals.").

74 Seizure Order (May 30, 2013), docket 4, ¶ 10.

75 18 *Del. C.* § 5944(b) ("In all summary proceedings and judicial reviews thereof, all records of the insurer, other documents and all Insurance Department files and court records and papers ... shall be and remain confidential ... unless and until the Chancery Court ... shall order otherwise...."); Seizure Order (May 30, 2013), docket 4, ¶ 15 ("This Seizure and Injunction Order shall remain confidential except as determined necessary by the Commissioner to protect the Assets and business of [Indemnity], their policyholders, creditors, and stockholders."). Cohen's counsel blamed this disclosure on a "snafu" with the court clerk's office. *See* Cohen's Opening Brief (Dec. 23, 2013), No. 621, at *33 n. 21.

76 Transcript from Oral Arguments (Nov. 1, 2013), docket 419, at 89:7–13, 117:14–118:2.

77 Transcript from Oral Arguments (Nov. 1, 2013), docket 419, at 92:13–22; 121:15–22.

78 Transcript from Oral Arguments (Nov. 1, 2013), docket 419, at 82:14:19.

79 Transcript from Oral Arguments (Nov. 1, 2013), docket 419, at 118:13–119:3; 160:15–161:23.

80 Additional Sanctions Order (Nov. 1, 2013), docket 217.

81 Transcript from Oral Arguments (Nov. 1, 2013), docket 419, at 162:11–162:17.

82 *See* Transcript from Oral Arguments (Nov. 1, 2013), docket 419, at 44:16–45:20, 135:1–15; Exhibit D to Cohen's Response to Expedited Motion for Additional Contempt Sanctions (Oct. 29, 2013), docket 199, ¶ 28 (claiming that Cohen's Employment Agreement entitles him to a salary of $1,300,000 per year, plus bonus, benefits, and significant perquisites).

83 Cohen has not posted the $500,000 security, because he claims that he cannot afford to do so.

84 Memorandum Opinion on Contempt (Jan. 2, 2014), docket 305, at *22.

85 Rehabilitation Petition (Nov. 6, 2013), docket 228, at *25.

86 *See* 18 *Del. C.* § 5905 (setting forth the statutory grounds for rehabilitation); *see also* 18 *Del. C.* § 5910(a) ("An order to rehabilitate a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.").

87 Letter from Counsel for Indemnity to the Court of Chancery (Nov. 6, 2013), docket 232.

88 Unanimous Written Consent of the Directors of Indemnity, Exhibit A to Exhibit 2 to Commissioner's Rehabilitation Petition (Nov. 6, 2013), docket 228, ¶ 2 (emphasis added).

89 Motion for Expedited Consideration of the Commissioner's Rehabilitation Petition (Nov. 6, 2013), docket 228, ¶ 6; Unanimous Written Consent of the Directors of Indemnity, Exhibit A to Exhibit 2 to Commissioner's Rehabilitation Petition (Nov. 6, 2013), docket 228, at *3.

90 Phil Milford, *Nightclub Insurer Founder Fights Delaware Regulator Over Seizure,* BLOOMBERG (Oct. 29, 2013 at 3:58 PM), http://www. bloomberg. com/news/2013–10–29/nightclub-insurer-founder-fights-delaware-regulator-over-seizure.html (identifying Indemnity from Cohen's filings in Maryland lawsuits, which were not filed under seal).

91 Motion for Expedited Consideration of the Commissioner's Rehabilitation Petition (Nov. 6, 2013), docket 228, ¶ 9.

92 Motion for Expedited Consideration of the Commissioner's Rehabilitation Petition (Nov. 6, 2013), docket 228, ¶ 10; Unanimous Written Consent of the Directors of Indemnity, Exhibit A to Exhibit 2 to Commissioner's Rehabilitation Petition (Nov. 6, 2013), docket 228, at *3.

93 Letter from Cohen's Counsel to the Court of Chancery (Nov. 6, 2013), docket 235.

94 Court of Chancery Rule 24(c) states that "[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene."

95 Letter from the Commissioner to the Court of Chancery (Nov. 6, 2013), docket 236.

96 The Commissioner argued that the grant of the Rehabilitation Order vacated the Seizure Order as a matter of law, and therefore rendered moot Cohen's appeal of the Amended Seizure Order, the Sanctions Order, and the Rehearing Denial. We disagree. The substance of the dispute has not disappeared and a justiciable controversy still exists, because the same limitations contained in the Seizure Order and Amended Seizure Order were replicated in the Rehabilitation Order almost word for word, and they are still binding upon Cohen.

97 Rehabilitation Order (Nov. 7, 2012), docket 237, ¶ 28.

98 Rehabilitation Order (Nov. 7, 2012), docket 237, ¶¶ 23–25.

99 U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law...."); DEL. CONST. art. I, § 9 ("All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have a remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense.").

100 *Sheehan v. Oblates of St. Francis de Sales,* 15 A.3d 1247, 1259 (Del.2011) (citing *Blinder, Robinson & Co., Inc. v. Bruton,* 552 A.2d 466, 472 (Del.1989)); *see also Helman v. State,* 784 A.2d 1058, 1070 (Del.2001) (quoting *Opinion of the Justices,* 246 A.2d 90, 92 (Del.1968) (noting that the due process clause of the Delaware Constitution has "substantially the same meaning" as the due process clause in its federal counterpart.)); *but see Hammond v. State,* 569 A.2d 81, 85–87 (Del.1990) (citing *Deberry v. State,* 457 A.2d 744 (Del.1983) (holding that, in cases involving the State's obligation to preserve evidence, the due process requirements of the Delaware Constitution require courts to follow the test set forth in *Deberry,* which balances the nature of the State's conduct and the degree of prejudice to the accused, rather than the test adopted by the United States Supreme Court, which only considers whether the State acted in good faith)).

101 *Cooke v. State,* 977 A.2d 803, 840 (Del.2009).

102 *Mathews v. Eldridge,* 424 U.S. at 333, 96 S.Ct. 893 (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)); *Nottingham Partners v. Dana,* 564 A.2d 1089, 1100 (Del.1989).

103 *Slawik v. State,* 480 A.2d 636, 646 (Del.1984) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Mirzakhalili v. Chagnon,* 2000 WL 1724326 (Del.Ch. Nov. 9, 2000) ("Federal procedural Due Process jurisprudence is not outlined in bright neon lines.")).

104 *Mathews v. Eldridge,* 424 U.S. 319, 333–34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ("[T]his Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg v. Kelly,* ... has the Court held that a hearing closely approximating a judicial trial is necessary."); *Slawik v. State,* 480 A.2d 636, 645 n. 11 (Del.1984) ("To the extent due process requires some form of pre-termination hearing as a matter of constitutional right, the Supreme Court has held, on only one occasion, that a hearing approximating a judicial trial is necessary."). *Goldberg v. Kelly* dealt with the termination of welfare benefits. 397 U.S. 254, 266–71, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

105 *Slawik v. State,* 480 A.2d 636, 646 (Del.1984) (quoting *Phillips v. Comm'r,* 283 U.S. 589, 596–97, 51 S.Ct. 608, 75 L.Ed. 1289 (1931)).

106 *Slawik v. State,* 480 A.2d 636, 646 (Del.1984) (citing *Parratt v. Taylor,* 451 U.S. 527, 541, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)).

107 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *see also Watson v. Div. of Family Servs.,* 813 A.2d 1101, 1107 (Del.2002) ("[T]his Court's construction of the Delaware Constitution's mandate for due process 'in accordance with the right of the cause' has been consistent with the flexible standards of due process enunciated by the United States Supreme Court in *Mathews v. Eldridge.*").

108 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

109 Cohen's Opening Brief (Nov. 25, 2013), No. 545, at *23.

110 *See, e.g.,* Transcript from Oral Arguments (Nov. 1, 2013), docket 419, at 151:4–6 ("On September 10th, 2013, *after a hearing,* I granted the motion and I entered an order amending the seizure order.") (emphasis added); *id.* at A1756 ("I regarded it as indisputably clear that Mr. Cohen was to interact through appropriate legal channels, such as his counsel, and not to continue the types of interference that were the subject of the September 10th hearing."); Additional Sanctions Order (Nov. 1, 2013), docket 217 ("WHEREAS on September 10, 2013, *following a hearing,* this Court granted the Insurer's motion and entered an order amending the Seizure Order ... which imposed additional restrictions on Cohen.") (emphasis added); Memorandum Opinion on Contempt (Jan. 2, 2014), docket 305 ("On September 9, 2013, Indemnity sought an expedited modification of the Seizure Order on the grounds that Cohen was interfering actively with Indemnity and the efforts of the Commissioner. Due to the summary nature of an insurance liquidation and the exigent nature of the motion, *the court heard the motion the following day. Counsel for both Indemnity and the Commissioner participated in the hearing,* and they provided documentary evidence and presented testimony by affidavit. The affiants were present and available to testify, but the court dispensed with live testimony in the interest of time.") (emphasis added).

111 Cohen's Response to Amended Seizure Order (Sept. 19, 2013), docket 145 (emphasis added).

112 Expedited Motion to Amend Seizure Order (Sept. 9, 2013), docket 82, ¶ 3 ("Persons found in violation of this amendment to the Seizure Order shall be held [in] criminal contempt and ... shall be sanctioned as the Court, in its discretion, shall determine is warranted....").

113 Amended Seizure Order (Sept. 10, 2013), docket 85, ¶¶ 4–5 (requiring Cohen to "show cause on or before September 24, 2013, why by accessing Respondent's information and technology systems he is not in contempt of paragraphs 7 and 9 of the Seizure Order").

114 Transcript from Office Conference (Sept. 10, 2013), docket 381, at 10:8–11 ("I understand you want the most protection you can [for] the company. But I have to balance that against the idea that Mr. Cohen does continue to have individual rights as well.").

115 To the extent that Cohen's due process claim related to the November 1, 2013 Sanctions Order is another way of arguing that the Court of Chancery erred in entering the Sanctions Order against him, we reject that argument. This Court has explained that "[t]o the extent a decision to impose sanctions is factually based, we accept the trial court's factual findings so long as they are sufficiently supported by the record, are the product of an orderly and logical reasoning process, and are not clearly erroneous." *Genger v. TR Investors, Inc.,* 26 A.3d 180, 190 (Del.2011) (citing *Stegemeier v. Magness,* 728 A.2d 557, 561 (Del.1999)). In order to merit sanctions, "[t]he violation must be a failure to obey the court in a meaningful way." *M.B. v. E.B.,* 28 A.3d 495, 500 (Del.Fam.Ct.2011). There was ample evidence in the record of Cohen's repeated violations of the orders, and the Court of Chancery's orders addressed those violations in a restrained manner. Cohen attended the November 1, 2013 hearing, testified that he knew of and understood the orders, and admitted the facts surrounding his deliberate actions in violation of those orders. Cohen may not now defend against his contempt of those court orders by asserting that they were invalid. *Mayer v. Mayer,* 132 A.2d 617, 621 (Del.1957) (quoted in *Rambo v. Fraczkowski,* 350 A.2d 774, 774 (Del.Super.1975)) ("In a contempt proceeding based upon the violation of an injunction, the only legitimate inquiry to be made by the court is whether or not it had jurisdiction of the parties and of the subject matter. Subject to this limitation the court will not listen to an excuse for the contemptuous action based upon an argument that the order in question was imperfect or erroneous."); *EDIX Media Grp., Inc. v. Mahani,* 2006 WL 3742595 (Del.Ch. Dec. 12, 2006) ("Even an imperfect or erroneous order of this Court must still be followed, and a court may punish disobedience with penalties for contempt so long as the order was not issued in excess of the Court's jurisdiction.").

116 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 3:6–8 ("[W]e stand here prepared to respond substantively to the motions"); *id.* at 27:10–12 ("We are here. We were prepared to come here today to address the two motions that are before the Court."); *id.* at 28:20–21 ("[W]e're here on these two motions.").

117 *Matter of Transit Cas. Co.,* 79 N.Y.2d 13, 580 N.Y.S.2d 140, 588 N.E.2d 38, 41 (1992) ("Statutes providing for the liquidation of insolvent insurance companies are designed to protect creditors, policyholders and the general public by

providing a comprehensive and efficient means for collecting the insolvent's assets and equitably paying the claims of creditors.").

118 *Remco Ins. Co. v. State Ins. Dept.,* 519 A.2d 633, 635 (Del.1986) (noting that the statute grants the Insurance Department "broad regulatory authority to protect policyholders and others who may be harmed by business practices of insurers").

119 Transcript from Oral Argument (Sept. 24, 2013), docket 373, at 26:2–6 ("[W]e've got a regulatory proceeding at a stage where, at least so far, no one is showing me any real separation between these businesses.").

120 The entirety of Cohen's discussion of the first *Eldridge* factor in his Opening Brief is a conclusory statement that reads as follows: "[IDG] is a company that is owned by [Cohen], not [Indemnity]. Therefore, with respect to the first *Eldridge* factor, the [Court of Chancery]'s decision—which took control out of [IDG]'s hands and placed it in the control of the Commissioner—had a significant impact." Cohen's Opening Brief (Nov. 25, 2013), No. 545, at *29.

121 Cohen's Rehearing Motion (Oct. 7, 2013), docket 169.

122 Cohen and IDG also argued that the Court of Chancery should not have denied their motion for modification or relief from the Sanctions Order without holding a hearing to consider what they claimed was "new evidence." The standard of review on a motion for re-argument is abuse of discretion. *Poe v. Poe,* 872 A.2d 960 (Del.2005); *Lilly v. State,* 649 A.2d 1055, 1059 (Del.1994). There was uncontradicted evidence in the record that Cohen had interfered with the Commissioner, and that Cohen had used IDG to do so. It was logical for the Court of Chancery to conclude that it was important to preserve the Sanctions Order to prevent Cohen from using IDG to interfere again. Also, the "new" evidence that Cohen asked the Court of Chancery to consider was available to Cohen before the September 24, 2013 hearing and could have been presented there. Thus, we conclude that the Court of Chancery did not abuse its discretion.

123 Sanctions Order (Sept. 25, 2013), docket 161, ¶ 2.

124 Cohen claims that certain IDG bills have not been paid and that it is having an effect on IDG's credit worthiness. *See* Cohen's Opening Brief (Nov. 25, 2013), No. 545, at *31. Cohen claims that he has been unable to provide the evidence necessary to support his claims of corporate separateness because all the documents are located inside Indemnity's offices and he has been unable to get discovery from Indemnity. *See* Cohen's Opening Brief (Nov. 25, 2013), No. 545, at *30 n. 17 and accompanying text.

125 *Kentucky Cent. Life Ins. Co. v. Stephens,* 897 S.W.2d 583 (Ky.1995) (noting that the purpose of the Uniform Insurers Liquidation Act is "the protection of the interest of the insured, creditors, and the public generally").

126 18 *Del. C.* § 5920 ("The [Insurers Liquidation Act] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.").

127 *See supra* note 33 (citing cases where stockholders did not have standing to intervene in delinquency proceedings); *State ex rel. Holland v. Heritage Nat. Ins. Co.,* 184 P.3d 1093, 1097 (Okla.Civ.App.2008) ("Shareholders do not have standing to intervene in a receivership proceeding"); *State ex rel. Crawford v. Am. Standard Life & Acc. Ins. Co.,* 37 P.3d 971, 974 (Okla.Civ.App.2001) (holding that stockholders do not have standing to intervene); *see also Ainsworth v. Old Sec. Life Ins. Co.,* 685 S.W.2d 583, 586 (Mo.App.1985) (holding that sole shareholder was not permitted to intervene in a delinquency proceeding because allowing it "would too much encumber the receivership proceeding"); STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, COUCH ON INSURANCE § 5:36 (3d ed. 2013) ("Stockholders of insurer placed in receivership pursuant to the Uniform Insurers Liquidation Act do not have standing to intervene in a receivership proceeding.").

128 STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, COUCH ON INSURANCE § 5:36 (3d ed. 2013) ("One of the purposes of the [Insurers Liquidation Act] is to provide for a uniform, orderly and equitable method of making and processing claims against financially troubled insurers and to provide for fair procedures for distributing their assets.").

129 Transcript from Office Conference (Aug. 22, 2013), at A284 (Counsel for Indemnity arguing that "I think ... you create a precedent where you let one shareholder intervene in a delinquency proceeding like this, you really do open the floodgates in future delinquency proceedings for multiple shareholders, policyholders, creditors, all claims with an interest in the litigation" and noting that "bringing in another party is obviously going slow ... the train down even more.").

130 *Norte & Co. v. Manor Healthcare Corp.,* 1985 WL 44684 (Del.Ch. Nov. 21, 1985) (citing *Bird v. Wilmington Soc. of Fine Arts,* 43 A.2d 476, 483 (Del.1945) ("[T]he corporation is the legal owner of its property and the stockholders do not have any specific interest in the assets of the corporation.")); *see also* 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 31, *Distinctness of corporate entity* (2013) ("The property of the corporation is its property and not that of the shareholders as owners, even if there is only one Shareholder,...").

131 18 *Del. C.* § 5918(e)(9) (placing "[t]he claims of shareholders or other owners arising out of such capacity" as last in priority); *see also Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772 (Del.Ch.2004); *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 1991 WL 277613 (Del.Ch. Dec. 30, 1991).

132 Cohen's Reply Brief raises for the first time the idea that he may have wished to remove Indemnity's board by exercising a written consent. *See* Cohen's Reply Brief (Feb. 14, 2014), No. 621, at 17. This belated argument is unfairly raised and has no grounding in the record below. Cohen voluntarily resigned from Indemnity's board on August 5, 2013, and left its governance to the remaining directors. Although it may have violated the orders of the Court of Chancery for Cohen to unilaterally remove and replace the board of Indemnity after that time, nothing prevented Cohen from making an application for relief to the Court of Chancery in order to do so. Of course, to have done so would require a judicial determination that Cohen's claim he indirectly owns 99 percent of Indemnity's equity through RB Entertainment was factually accurate. Indemnity's board claims that there is no record that Indemnity ever issued stock to RB Entertainment or anyone else in exchange for genuine economic consideration. *See supra* note 32. For present purposes, what is clear is that the right to manage the affairs of Indemnity was vested in its board of directors at all times, to the extent that Indemnity was not otherwise under the control of the Commissioner.

133 *See, e.g., In re Rehab. Of Nat'l Heritage Life Ins. Co.*, 656 A.2d 252, 254 (Del.Ch.1994) (entering a rehabilitation order on the day after the petition was filed with the consent of the board and without notification of any third party).

134 Cohen's Opening Brief (Dec. 23, 2013), No. 621, at *27.

135 Transcript from Office Conference (Aug. 22, 2013), docket 73, at 33:10–14.

136 RB Entertainment's Opposition to Petition to Liquidate (Aug. 21, 2013), docket 65, at *3 ("Indemnity's former President, Mr. Cohen, has resigned as an officer and director of indemnity, as has Indemnity's former Controller, Mrs. Piotrowski. The alleged wrongdoing of these two former employees should be addressed separately, because neither is in a position to cause any further harm.").

137 Cohen's Affidavit, Exhibit A to RB Entertainment's Opposition to Petition to Liquidate (Aug. 21, 2013), docket 65 (arguing that Indemnity was solvent and noting that he had resigned from Indemnity's board, but not denying the fraud allegations against him); Cohen's Affidavit, Exhibit D to Cohen's Response to Amended Seizure Order (Sept. 19, 2013), docket 145 (claiming that the servers were owned by IDG and contesting allegations that he had interfered with the Commissioner, but not denying the fraud allegations); Exhibit G to Verified Petition (Oct. 18, 2013), docket 181 (denying that he had interfered with the Commissioner, but not denying the fraud allegations); Cohen's Affidavit, Exhibit A to Letter to Court of Chancery (Nov. 15, 2013), docket 258 (apologizing for his behavior when returning the vehicles and explaining that he was upset about watching Indemnity's business unravel, but not denying the fraud allegations).

138 18 *Del. C.* § 5917; *see also* Rehabilitation Order (Nov. 7, 2012), docket 237, ¶¶ 23–25. Courts have shown that they will entertain those types of specific objections and challenges to a proposed Rehabilitation Plan. *See, e.g., In re Rehab. of Manhattan Re–Ins. Co.*, 2011 WL 4553582 (Del.Ch. Oct. 4, 2011); *see also In re Ambac Assur. Corp.*, 351 Wis.2d 539, 841 N.W.2d. 482 (Wis.App.2013) (denying motion to intervene and holding that opportunity to object to specific aspects of the rehabilitation plan satisfied due process).

139 *Remco Ins. Co. v. State Ins. Dept.*, 519 A.2d 633, 636 (Del.1986) (noting that "[a]s the title of the Act indicates, the purpose of the summary remedies is to permit the Commissioner to act quickly when need be to prevent harm to policyholders.").

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TAB 9

Original Image of 96 S.Ct. 893 (PDF)

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds M.E.K. v. R.L.K., Fla.App. 5 Dist., February 24, 2006

96 S.Ct. 893
Supreme Court of the United States

F. David MATHEWS, Secretary of Health, Education, and Welfare, Petitioner,
v.
George H. ELDRIDGE.

No. 74-204.
|
Argued Oct. 6, 1975.
|
Decided Feb. 24, 1976.

A person whose social security disability benefits had been terminated brought an action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education and Welfare for assessing whether there exists a continuing disability. The United States District Court for the Western District of Virginia, 361 F.Supp. 520, determined that the administrative procedures in question were unconstitutional, and the Court of Appeals, 493 F.2d 1230, affirmed. On grant of certiorari, the Supreme Court, Mr. Justice Powell, held that an evidentiary hearing is not required prior to termination of disability benefits, and that the present administrative procedures for such termination fully comport with due process.

Reversed.

Mr. Justice Brennan dissented and filed opinion in which Mr. Justice Marshall concurred.

West Headnotes (11)

[1] Social Security
Exhaustion of other remedies

Despite disability benefit claimant's failure to exhaust administrative remedies under Social Security Act after termination of disability benefits, district court had jurisdiction to entertain his claim that evidentiary hearing was required prior to termination of such benefits where claimant's answers to questionnaire and letter to state agencies specifically presented claim that his benefits should not be terminated because he was still disabled and where claimant's interest in having particular issue promptly resolved was so great that deference to decision of Secretary of Health, Education and Welfare whether to waive exhaustion requirements was inappropriate. Social Security Act, § 205(a, g, h) as amended 42 U.S.C.A. § 405(a, g, h); Fed.Rules Civ.Proc. rules 8(c), 12(h)(1), 28 U.S.C.A.; Social Security Administration Regulations, §§ 404.910, 404.916, 404.940, 42 U.S.C.A. App.; 28 U.S.C.A. §§ 1257, 1291.

1310 Cases that cite this headnote

[2] Social Security
Exhaustion of other remedies

Secretary of Health, Education and Welfare may waive requirement that administrative remedies be exhausted before court review of agency determination is sought if Secretary satisfies himself, at any stage of administrative process, that no further review is warranted either because internal needs of agency are fulfilled or because relief that is sought is beyond his power to confer. Social Security Act, § 205(g) as amended 42 U.S.C.A. § 405(g).

604 Cases that cite this headnote

[3] Constitutional Law
Social Security

Interest by individual in continued receipt of social security benefits is statutorily-created property interest protected by due process clause of Fifth Amendment. Social Security Act, § 201 et seq. as amended 42 U.S.C.A. § 401 et seq.; U.S.C.A.Const. Amend. 5.

644 Cases that cite this headnote

[4] Constitutional Law
Notice and Hearing

Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. U.S.C.A.Const. Amends. 5, 14.

2666 Cases that cite this headnote

[5] **Constitutional Law**
Factors considered;flexibility and balancing

Due process is not technical conception with fixed content unrelated to time, place and circumstances; rather, it is flexible and calls for such procedural protections as particular situation demands. U.S.C.A.Const. Amends. 5, 14.

1315 Cases that cite this headnote

[6] **Constitutional Law**
Factors considered;flexibility and balancing

Identification of specific dictates of due process generally requires consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. U.S.C.A.Const. Amends. 5, 14.

5820 Cases that cite this headnote

[7] **Constitutional Law**
Disability benefits

Evidentiary hearing is not required prior to termination of social security disability benefits; present administrative procedures for such terminations fully comport with due process. U.S.C.A.Const. Amends. 5, 14; Social Security Act, §§ 201(b), 202(b–d), 204, 204(b), 205(a, g, h), 215, 216(i)(2)(D), 221, 221(b, c), 223, 223(a)(1, 2), (d)(1), (d)(1)(A), (d)(2)(A), (d)(3), 224, 1614(a)(3), 1631(c) as amended 42 U.S.C.A. §§ 401 et seq., 401(b), 402(b–d), 404, 404(b) 405(a, g, h), 415, 416(i)(2)(D), 421, 421(b, c), 423, 423(a)(1, 2), (d)(1), (d)(1)(A), (d)(2)(A), (d)(3), 424a, 1382c(a)(3), 1383(c); Social Security Administration Regulations, §§ 404.408, 404.501–404.515, 404.503, 404.504, 404.907, 404.909, 404.910, 404.916, 404.917, 404.927, 404.934, 404.940, 404.945, 404.951, 42 U.S.C.A. App.; 28 U.S.C.A. §§ 1257, 1291, 1361.

325 Cases that cite this headnote

[8] **Constitutional Law**
Administrative Agencies and Proceedings in General

Degree of potential deprivation that may be created by particular decision is factor to be considered in assessing validity of administrative decision-making process from due process standpoint. U.S.C.A.Const. Amends. 5, 14.

45 Cases that cite this headnote

[9] **Constitutional Law**
Factors considered;flexibility and balancing

Procedural due process rules are shaped by risk of error inherent in truth-finding process as applied to generality of cases, not rare exceptions. U.S.C.A.Const. Amends. 5, 14.

358 Cases that cite this headnote

[10] **Constitutional Law**
Administrative Agencies and Proceedings in General

Financial cost alone is not controlling weight in determining whether due process requires particular procedural safeguard prior to some administrative decision; but government's interest, and hence that of public, in conserving scarce fiscal and administrative resources, is factor which must be weighed. U.S.C.A.Const. Amends. 5, 14.

943 Cases that cite this headnote

[11] Constitutional Law
Notice and Hearing

Essence of due process is requirement that person in jeopardy of serious loss be given notice of case against him and opportunity to meet it; all that is necessary is that procedure be tailored, in light of decision to be made, to capacities and circumstances of those who are to be heard, to insure that they are given meaningful opportunity to present their case. U.S.C.A.Const. Amends. 5, 14.

2702 Cases that cite this headnote

****895 *319** *Syllabus* *

In order to establish initial and continued entitlement to disability benefits under the Social Security Act (Act), a worker must demonstrate that, inter alia, he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." The worker bears the continuing burden of showing, by means of "medically acceptable . . . techniques" that his impairment is of such severity that he cannot perform his previous work or any other kind of gainful work. A state agency makes the continuing assessment of the worker's eligibility for benefits, obtaining information from the worker and his sources of medical treatment. The agency may arrange for an independent medical examination to resolve conflicting information. If the agency's tentative assessment of the beneficiary's condition differs from his own, the beneficiary is informed that his benefits may be terminated, is provided a summary of the evidence, and afforded an opportunity to review the agency's evidence. The state agency then makes a final determination, which is reviewed by the Social Security Administration (SSA). If the SSA accepts the agency determination it gives written notification to the beneficiary of the reasons for the decision and of his right to de novo state agency reconsideration. Upon acceptance by the SSA, benefits are terminated effective two months after the month in which recovery is found to have occurred. If, after reconsideration by the state agency and SSA review, the decision remains adverse to the recipient, he is notified of his right to an evidentiary hearing before an SSA administrative law judge. If an adverse decision results, the recipient may request discretionary review by the SSA Appeals Council, and finally may obtain judicial review. If it is determined after benefits are terminated that the claimant's disability extended beyond the date of cessation initially established, he is entitled to retroactive payments. Retroactive adjustments are also made for overpayments. A few years after respondent was first awarded disability benefits he received and completed a questionnaire ***320** from the monitoring state agency. After considering the information contained therein and obtaining reports from his doctor and an independent medical consultant, the agency wrote respondent that it had tentatively determined that his disability had ceased in May 1972 and advised him that he might request a reasonable time to furnish additional information. In a reply letter respondent disputed one characterization of his medical condition and indicated that the agency had enough evidence to establish his disability. The agency then made its final determination reaffirming its tentative decision. This determination was accepted by the SSA, which notified respondent in July that his benefits would end after that month and that he had a right to state agency reconsideration within six months. Instead of requesting such reconsideration respondent brought this action challenging the constitutionality of the procedures for terminating disability benefits and seeking reinstatement of benefits pending a hearing. The District Court, relying in part on Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, held that the termination procedures violated procedural due process and concluded that prior to termination of benefits respondent was entitled to an evidentiary hearing of the type provided welfare beneficiaries under Title IV of the Act. The Court of Appeals affirmed. Petitioner contends, inter alia, that the District Court is barred from considering respondent's action by Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522, which held that district courts are precluded from exercising jurisdiction over an action seeking a review of a decision of the Secretary of Health, Education, and Welfare regarding benefits under the Act except ****896** as provided in 42 U.S.C. s 405(g), which grants jurisdiction only to review a "final" decision of the Secretary made after a hearing to which he was a party. Held :

1. The District Court had jurisdiction over respondent's constitutional claim, since the denial of his request for benefits was a final decision with respect to that claim for purposes of s 405(g) jurisdiction. Pp. 898-902.

(a) The s 405(g) finality requirement consists of the waivable requirement that the administrative remedies prescribed by the Secretary be exhausted and the nonwaivable requirement that a claim for benefits shall have been presented to the Secretary. Respondent's answers to the questionnaire and his letter to the state agency specifically presented the claim that his benefits should not be terminated because he was still disabled, and thus satisfied the nonwaivable requirement. Pp. 899-901.

***321** (b) Although respondent concededly did not exhaust the Secretary's internal-review procedures and ordinarily only the Secretary has the power to waive exhaustion, this is a case where the claimant's interest in having a particular issue promptly resolved is so great that deference to the Secretary's judgment is inappropriate. The facts that respondent's constitutional challenge was collateral to his substantive claim of entitlement and that (contrary to the situation in Salfi) he colorably claimed that an erroneous termination would damage him in a way not compensable through retroactive payments warrant the conclusion that the denial of his claim to continued benefits was a sufficiently "final decision" with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Pp. 900-902.

2. An evidentiary hearing is not required prior to the termination of Social Security disability payments and the administrative procedures prescribed under the Act fully comport with due process. Pp. 901-910.

(a) "(D)ue process is flexible and calls for such procedural protections as the particular situation demands," Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484. Resolution of the issue here involving the constitutional sufficiency of administrative procedures prior to the initial termination of benefits and pending review, requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Pp. 901-903.

(b) The private interest that will be adversely affected by an erroneous termination of benefits is likely to be less in the case of a disabled worker than in the case of a welfare recipient, like the claimants in Goldberg, supra. Eligibility for disability payments is not based on financial need, and although hardship may be imposed upon the erroneously terminated disability recipient, his need is likely less than the welfare recipient. In view of other forms of government assistance available to the terminated disability recipient, there is less reason than in Goldberg to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action. Pp. 905-907.

(c) The medical assessment of the worker's condition implicates ***322** a more sharply focused and easily documented decision than the typical determination of welfare entitlement. The decision whether to discontinue disability benefits will normally turn upon "routine, standard, and unbiased medical reports by physician specialists," Richardson v. Perales, 402 U.S. 389, 404, 91 S.Ct. 1420, 1428-1429, 28 L.Ed.2d 842. In a disability situation the potential value of an evidentiary hearing is thus substantially less than in the welfare context. Pp. 907-908.

(d) Written submissions provide the disability recipient with an effective means of communicating his case to the decision-maker. The detailed questionnaire identifies ****897** with particularity the information relevant to the entitlement decision. Information critical to the decision is derived directly from medical sources. Finally, prior to termination of benefits, the disability recipient or his representative is afforded full access to the information relied on by the state agency, is provided the reasons underlying its tentative assessment, and is given an opportunity to submit additional arguments and evidence. Pp. 907, 908.

(e) Requiring an evidentiary hearing upon demand in all cases prior to the termination of disability benefits would entail fiscal and administrative burdens out of proportion to any countervailing benefits. The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances, and here where the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action but also assure a right to an evidentiary hearing as well as subsequent judicial review before the denial of his claim becomes final,

there is no deprivation of procedural due process. Pp. 909-910.

493 F.2d 1230, reversed.

Attorneys and Law Firms

***323** Donald E. Earls, Norton, Va., for respondent.

Opinion

Mr. Justice POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, 42 U.S.C. s 423.[1] Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed ***324** the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability.[2] The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration ****898** (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity ***325** of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability.[3] 361 F.Supp. 520 (W.D.Va.1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits.[4] The Secretary contended that Goldberg was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural ***326** due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in Goldberg. It further noted that decisions subsequent to Goldberg demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. See Fuentes v. Shevin, 407 U.S. 67, 88-89, 92 S.Ct. 1983, 1998-1999, 32 L.Ed.2d 556 (1972); Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. 361 F.Supp., at 528.[5]

Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring termination of Eldridge's benefits prior to an evidentiary hearing. 493 F.2d 1230 (1974).[6] We reverse.

****899 II**

[1] At the outset we are confronted by a question as to whether the District Court had jurisdiction over this suit. The Secretary contends that our decision last Term in Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), bars the District Court from considering Eldridge's action. Salfi was an action challenging the Social Security Act's ***327** duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners. We there held that 42 U.S.C. s 405(h)[7] precludes federal-question jurisdiction in an action challenging denial of claimed benefits. The only avenue for judicial review is 42 U.S.C. s 405(g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite.

Section 405(g) in part provides:
"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."[8]

***328** On its face s 405(g) thus bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Secretary after a "hearing." It is uncontested that Eldridge could have obtained full administrative review of the termination of his benefits, yet failed even to seek reconsideration of the initial determination. Since the Secretary has not "waived" the finality requirement as he had in Salfi, supra, at 767, 95 S.Ct., at 2467-2468, he concludes that Eldridge cannot properly invoke s 405(g) as a basis for jurisdiction. We disagree.

Salfi identified several conditions which must be satisfied in order to obtain judicial review under s 405(g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite grant of subject-matter jurisdiction . . .." 422 U.S., at 764, 95 S.Ct., at 2466.[9] Implicit in Salfi however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

***329 **900** That this second requirement is an essential and distinct precondition for s 405(g) jurisdiction is evident from the different conclusions that we reached in Salfi with respect to the named appellees and the unnamed members of the class. As to the latter the complaint was found to be jurisdictionally deficient since it "contain(ed) no allegations that they have even filed an application with the Secretary . . . ." 422 U.S., at 764, 95 S.Ct., at 2466. With respect to the named appellees, however, we concluded that the complaint was sufficient since it alleged that they had "fully presented their claims for benefits 'to their district Social Security Office and, upon denial, to the Regional Office for reconsideration.' " Id., at 764-765, 95 S.Ct., at 2466. Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the SSA.

The fact that Eldridge failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling.[10] As construed in Salfi, s 405(g) requires only that there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in Salfi did not present their constitutional claim to the Secretary. Weinberger v. Salfi, O.T.1974, No. 74-214, App. 11, 17-21. The situation here is not identical to Salfi, for, while the ***330** Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. 42 V.S.C. s 405(a). We do

not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.

[2] As the nonwaivable jurisdictional element was satisfied, we next consider the waivable element. The question is whether the denial of Eldridge's claim to continued benefits was a sufficiently "final" decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Eldridge concedes that he did not exhaust the full set of internal-review procedures provided by the Secretary. See 20 CFR ss 404.910, 404.916, 404.940 (1975). As Salfi recognized, the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer. Salfi suggested that under s 405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is his. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.

Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there ***331** is a crucial distinction between the nature of the constitutional claim asserted here and that raised in Salfi. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. ****901** See Regional Rail Reorganization Act Cases, 419 U.S. 102, 156, 95 S.Ct. 335, 365, 42 L.Ed.2d 320 (1974). In light of the Court's prior decisions, see, e. g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.[11] Thus, unlike the situation in Salfi, denying Eldridge's substantive ***332** claim "for other reasons" or upholding it "under other provisions" at the post-termination stage, 422 U.S., at 762, 95 S.Ct., at 2465, would not answer his constitutional challenge.

We conclude that the denial of Eldridge's request for benefits constitutes a final decision for purposes of s 405(g) jurisdiction over his constitutional claim. We now proceed to the merits of that claim.[12]

III

A

[3] Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, e. g., Richardson v. Belcher, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-257, 30 L.Ed.2d 231 (1971); Richardson v. Perales, 402 U.S. 389, 401-402, 91 S.Ct. 1420, 1427-1428, 28 L.Ed.2d 842 (1971); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372-1373, 4 L.Ed.2d 1435 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. Arnett v. Kennedy, 416 U.S. 134, 166, 94 S.Ct. 1633, 1650, 40 L.Ed.2d 15 (Powell, J., concurring in part) (1974); Board of Regents v. Roth, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 2708-2710, 33 L.Ed.2d 548 (1972); Bell v. Burson, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, 397 U.S., at 261-262, 90 S.Ct., at 1016-1017. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process ***333** that is constitutionally due before a recipient can be deprived of that interest.

****902** **[4]** This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, e. g. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). See also Dent v. West Virginia, 129 U.S. 114, 124-125, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a

principle basic to our society." Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). See Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, Goldberg v. Kelly, 397 U.S., at 266-271, 90 S.Ct., at 1019-1022, 25 L.Ed.2d 287, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. ***334** SniaDachv. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), involving garnishment of wages, was entirely silent on the matter. In Fuentes v. Shevin, 407 U.S., at 96-97, 92 S.Ct., at 2002-2003, 32 L.Ed.2d 556, the Court said only that in a replevin suit between two private parties the initial determination required something more than an ex parte proceeding before a court clerk. Similarly, Bell v. Burson, supra, at 540, 91 S.Ct., at 1590, 29 L.Ed.2d 90, held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). More recently, in Arnett v. Kennedy, supra, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U.S., at 142-146, 94 S.Ct., at 1638-1640.

[5] **[6]** These decisions underscore the truism that " '(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, supra, 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part); Goldberg v. Kelly, supra, 397 U.S., at 263-266, 90 S.Ct., at 1018-1020; ****903** Cafeteria Workers v. McElroy, supra, 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions ***335** indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., Goldberg v. Kelly, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

We turn first to a description of the procedures for the termination of Social Security disability benefits and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. 42 U.S.C. s 421(a).[13] The standards applied and the procedures followed are prescribed by the Secretary, see s 421(b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed.Reg. 4473 (1975).

***336** In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable
"to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U.S.C. s 423(d)(1)(A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," s 423(d)(3), that he has a physical or mental impairment of such severity that
"he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." s 423(d)(2)(A). [14]

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases. [15]

***337** ****904** The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail in which case he is sent a detailed questionnaire or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM s 6705.1; Disability Insurance State Manual (DISM) s 353.3 (TL No. 137, Mar. 5, 1975). [16]

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM s 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician. [17] Ibid. Whenever the agency's tentative assessment of the beneficiary's condition differs from his ***338** own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. [18] He also may respond in writing and submit additional evidence. Id., s 353.6.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U.S.C. s 421(c); CM ss 6701(b), (c). [19] If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. 20 CFR ss 404.907, 404.909 (1975). [20] Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. 42 U.S.C. (Supp. III) s 423(a) (1970 ed., Supp. III).

***339** If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR ss 404.917, 404.927 (1975). The hearing is nonadversary, ****905** and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. s 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, s 404.945, and finally may obtain judicial review. 42 U.S.C. s 405(g); 20 CFR s 404.951 (1975). [21]

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U.S.C. s 404. Cf. s 423(b); 20 CFR ss 404.501, 404.503, 404.504 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U.S.C. s 404. [22]

C

[7] Despite the elaborate character of the administrative procedures provided by the Secretary, the courts *340 below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in Goldberg, see 397 U.S., at 263-264, 90 S.Ct., at 1018-1019, the nonprobationary federal employee in Arnett, see 416 U.S., at 146, 94 S.Ct., at 1640, 1641, and the wage earner in Sniadach. See 395 U.S., at 341-342, 89 S.Ct., at 1822-1823. [23]

Only in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:
"The crucial factor in this context a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 397 U.S., at 264, 90 S.Ct., at 1018 (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need. [24] Indeed, it is wholly unrelated to *341 the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, [25] tort claims awards, savings, private **906 insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . ." Richardson v. Belcher, 404 U.S., at 85-87, 92 S.Ct., at 259 (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9-10, 419-429 (1974) (hereinafter Staff Report).

[8] As Goldberg illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The potential deprivation here is generally likely to be less than in Goldberg, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." 42 U.S.C. s 423; 361 F.Supp., at 523. Thus, in contrast to the discharged federal employee in Arnett, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

As we recognized last Term in Fusari v. Steinberg, 419 U.S. 379, 389, 95 S.Ct. 533, 540, 42 L.Ed.2d 521 (1975), "the possible length of wrongful deprivation of . . . benefits (also) is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between *342 a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. id., at 383-384, 386, 95 S.Ct., at 536-537, 538, and the typically modest resources of the family unit of the physically disabled worker, [26] the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level. [27] See *343 Arnett v. Kennedy, supra, 416 U.S., at 169, **907 94 S.Ct., at 1651-1652 (Powell, J., concurring in part); id., at 201-202, 94 S.Ct., at 1667-1668 (White, J., concurring in part and dissenting in part). In view of these potential

sources of temporary income, there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See Mitchell v. W. T. Grant Co., 416 U.S. 600, 617, 94 S.Ct. 1895, 1905, 40 L.Ed.2d 406 (1974); Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques," 42 U.S.C. s 423(d)(3), that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." s 423(d)(1)(A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and ***344** veracity often are critical to the decisionmaking process. Goldberg noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U.S., at 269, 90 S.Ct., at 1021.

[9] By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," Richardson v. Perales, 402 U.S., at 404, 91 S.Ct., at 1428, concerning a subject whom they have personally examined.[28] In Richardson the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." Id., at 405, 407, 91 S.Ct., at 1428, 1430. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, ***345** is substantially less in this context than in Goldberg.

The decision in Goldberg also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to ****908** write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U.S., at 269, 90 S.Ct., at 1021. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law Cases and Comments 860-863 (6th ed. 1974).

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access ***346** to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again

as contrasted with those before the Court in Goldberg, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% For appealed reconsideration decisions to an overall reversal rate of only 3.3%.[29] Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since ***347** the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% To 40% Of the appealed cases, in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

****909** E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

[10] ***348** Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly, supra, 123 U.Pa.L.Rev., at 1276, 1303.

[11] But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143, 60 S.Ct. 437, 441, 84 L.Ed. 656 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." ***349** Joint Anti-Fascist Comm. v. McGrath, 341 U.S., at 171-172, 71 S.Ct., at 649. (Frankfurter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," Goldberg v. Kelly, 397 U.S., at 268-269, 90 S.Ct., at 1021 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided

assure fair consideration of the entitlement claims of individuals. See Arnett v. Kennedy, 416 U.S., at 202, 94 S.Ct., at 1667-1668 (White, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for **910 asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971).

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL concurs, dissenting.

For the reasons stated in my dissenting opinion in Richardson v. Wright, 405 U.S. 208, 212, 92 S.Ct. 788, 791, 31 L.Ed.2d 151 (1972), I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded *350 an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U.S.C. s 601 et seq. See Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

George P. McLAUGHLIN, petitioner, v. Douglas VINZANT, Superintendent, Massachusetts Correctional Institution. No. 75-5671.

Former decision, 423 U.S. 1037, 423 U.S. 1037, 96 S.Ct. 573.

Facts and opinion, 1 Cir., 522 F.2d 448.

Jan. 26, 1976. Petition for rehearing denied.

Mr. Justice STEVENS took no part in the consideration or decision of this petition.

All Citations

424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The program is financed by revenues derived from employee and employer payroll taxes. 26 U.S.C. ss 3101(a), 3111(a); 42 U.S.C. s 401(b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. 42 U.S.C. ss 423(c)(1)(A) and (B). Benefits also are provided to the worker's dependents under specified circumstances. ss 402(b)-(d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. ss 416(i)(2)(D), 423(a)(1). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, The Year in Review 21 (1974).

2 Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated

that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12-13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.

3 The District Court ordered reinstatement of Eldridge's benefits pending its final disposition on the merits.

4 In Goldberg the Court held that the pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity (for the recipient) to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U.S., at 266-271, 90 S.Ct., at 1019-1022. In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in Goldberg.

5 The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the Goldberg requirements. See 45 CFR s 205.10(a) (1975); n. 4, supra.

6 The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in Williams v. Weinberger, 494 F.2d 1191 (1974), cert. pending, No. 74-205.

7 Title 42 U.S.C. s 405(h) provides in full:

"(h) Finality of Secretary's decision.

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

8 Section 405(g) further provides:

Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ."

9 The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision, or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the parties. Salfi, 422 U.S., at 763-764, 95 S.Ct., at 2465-2466. As in Salfi no question as to whether Eldridge satisfied these requirements was timely raised below, see Fed.Rules Civ.Proc. 8(c), 12(h)(1), and they need not be considered here.

10 If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court. Cf. Flemming v. Nestor, 363 U.S. 603, 607, 80 S.Ct. 1367, 1370-1371, 4 L.Ed.2d 1435 (1960).

11 Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted, Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949), when applying the finality requirements of 28 U.S.C. s 1291, which grants jurisdiction to courts of appeals to review all "final decisions" of the district courts, and 28 U.S.C. s 1257, which empowers this Court to review only "final judgments" of state courts. See, e. g., Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971); Construction Laborers v. Curry, 371 U.S. 542, 549-550, 83 S.Ct. 531, 536, 537, 9 L.Ed.2d 514 (1963); Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 557-558, 83 S.Ct. 520, 521-522 (1963); Cohen v. Beneficial Ind. Loan Corp., supra, 337 U.S., at 545-546, 69 S.Ct., at 1225-1226. To be sure, certain of the policy considerations implicated in ss 1257 and 1291 cases are different from those that are relevant here. Compare Construction Laborers, supra, 371 U.S., at 550, 83 S.Ct., at 536-537; Mercantile Nat. Bank, supra, 371 U.S., at 558, 83 S.Ct., at 522, with McKart v. United States, 395 U.S. 185, 193-195, 89 S.Ct. 1657, 1662-1663, 23 L.Ed.2d 194 (1969); L. Jaffe, Judicial Control of Administrative Action 424-426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

12 Given our conclusion that jurisdiction in the District Court was proper under s 405(g), we find it unnecessary to consider Eldridge's contention that notwithstanding s 405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. s 1361, or the Administrative Procedure Act, 5 U.S.C. s 701 et seq.

13 In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act of 1920, 41 Stat. 735, as amended, 29 U.S.C. s 701 et seq. (1970 ed., Supp. III), acts as the "state agency" for purposes of the disability insurance program. Staff of the House Comm. on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 148 (1974). This assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession. H.R.Rep.No.1698, 83d Cong., 2d Sess., 23-24 (1954).

14 Work which "exists in the national economy" is in turn defined as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." s 423(d)(2)(A).

15 Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) s 6705.2(c).

16 Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.

17 All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM s 353.4C.

18 The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM s 7314. See also 20 CFR s 401.3(a)(2) (1975). The Secretary informs us that this curious limitation is currently under review.

19 The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.

20 The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32 (1973). Both the recipient and the agency may adduce new evidence.

21 Unlike all prior levels of review, which are de novo, the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U.S.C. s 405(g).

22 The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." 42 U.S.C. s 404(b). See generally 20 CFR ss 404.501-404.515 (1975).

23 This, of course, assumes that an employee whose wages are garnisheed erroneously is subsequently able to recover his back wages.

24 The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in 42 U.S.C. s 415 (1970 ed., Supp. III). See s 423(a)(2).

25 Workmen's compensation benefits are deducted in part in accordance with a statutory formula. 42 U.S.C. s 424a (1970 ed., Supp. III); 20 CFR s 404.408 (1975); see Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

26 Amici cite statistics compiled by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was $3,803, while the median income for the unit was $2,836. The mean liquid assets i. e., cash, stocks, bonds of these family units was $4,862; the median was $940. These statistics do not take into account the family unit's nonliquid assets i. e., automobile, real estate, and the like. Brief for AFL-CIO et al. as Amici Curiae App. 4a. See n.29, infra.

27 Amici emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the companion welfare system for the disabled, Supplemental Security Income (SSI), compare 42 U.S.C. s 423(d)(1) with s 1382c(a)(3) (1970 ed., Supp. III), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See 7 U.S.C. ss 2013(c),

2014(b); 7 CFR s 271 (1975). Finally, in 1974, 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since financial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated. And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. 42 U.S.C. s 1383(c) (1970 ed., Supp. III); 20 CFR s 416.1336(c) (1975); 40 Fed.Reg. 1512 (1975); see Staff Report 346.

28 The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work which exists in the national economy . . . ." 42 U.S.C. s 423(d)(2)(A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. K. Davis, Administrative Law Treatise s 7.06, at 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.

29 By focusing solely on the reversal rate for appealed reconsideration determinations amici overstate the relevant reversal rate. As we indicated last Term in Fusari v. Steinberg, 419 U.S. 379, 383 n. 6, 95 S.Ct. 533, 536-537, 42 L.Ed.2d 521 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% Of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for AFL-CIO et al. as Amici Curiae App. 4a, the deprivation is significantly less than that concomitant to the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for Petitioner 14.

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TAB 10

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15 A.3d 1247
Supreme Court of Delaware.

James E. SHEEHAN, Plaintiff Below, Appellant,
v.
OBLATES OF ST. FRANCIS DE SALES; Oblates of St. Francis de Sales, Incorporated, a Delaware corporation; and Salesianum School, Inc., a Delaware corporation, Defendant Below, Appellees.

No. 730, 2009.
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Submitted: Dec. 15, 2010.
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Decided: Feb. 22, 2011.
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Reargument Denied April 19, 2011.

Synopsis
Background: Former student at Catholic high school brought action against school and religious order that managed priest who was teacher at school, alleging that, in 1962, defendants had negligently allowed priest to be in contact with student, and that as a result priest had sexually abused student. After a jury trial, the Superior Court, New Castle County, entered judgment on verdict in favor of defendants. Student appealed and order cross-appealed.

Holdings: The Supreme Court, Steele, C.J., held that:

[1] testimony of student's general causation expert was admissible;

[2] Child Victim's Act (CVA) revived intentional tort claims;

[3] 1962 criminal code was required to be used in determining whether teacher had committed a sexual crime against student; and

[4] CVA did not violate due process.

Reversed and remanded.

West Headnotes (30)

[1] **Appeal and Error**
Competency of witness
Supreme Court reviews a trial judge's decision to exclude expert testimony for an abuse of discretion.

3 Cases that cite this headnote

[2] **Appeal and Error**
Competency of witness
On appeal of a trial judge's decision to exclude expert testimony, if the Supreme Court finds that the trial judge abused his discretion, the Court then considers whether the abuse constituted significant unfair prejudice and denied the appellant a fair trial.

3 Cases that cite this headnote

[3] **New Trial**
Reception of evidence
New Trial
Reception of evidence
When improperly excluded evidence goes to the very heart of a plaintiff's case and might well have affected the outcome of the trial, the exclusion of the evidence warrants a new trial.

Cases that cite this headnote

[4] **Evidence**
Matters involving scientific or other special knowledge in general
Evidence
Necessity of qualification
Evidence
Necessity and sufficiency
Under the five-step test to determine whether expert testimony is admissible, the trial judge

must determine whether: (1) the witness is qualified as an expert by knowledge, skill experience, training or education; (2) the evidence is relevant and reliable; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury. Rules of Evid., Rule 702.

Cases that cite this headnote

[5] **Evidence**
Relevancy in general

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

1 Cases that cite this headnote

[6] **Evidence**
Relevancy in general

To determine relevance of proffered evidence, a court must examine the purpose for which the evidence is offered, and the evidence must be of consequence to the action and advance the likelihood of the fact asserted.

1 Cases that cite this headnote

[7] **Evidence**
Relevancy in general

A litigant has the right to introduce all relevant evidence which goes to the very heart of the case and could affect the outcome of the trial.

Cases that cite this headnote

[8] **Evidence**
Tendency to mislead or confuse

Probative value outweighed possibility of prejudice resulting from admission of "general causation" expert's opinion as to the types of emotional, mental, spiritual and physical injuries that survivors of childhood sexual abuse suffer, and thus evidence was admissible, in former student's action against Catholic high school and religious order that managed teacher at school, on issue of whether teacher's sexual abuse of student was the proximate cause of student's injuries; testimony tended to prove that childhood sexual abuse can in fact cause the types of injuries suffered by student, and served to lay foundation for testimony of "specific causation" expert on whether the abuse did in fact cause student's injuries. Rules of Evid., Rules 403, 702.

1 Cases that cite this headnote

[9] **Appeal and Error**
Particular types of evidence

Trial court's erroneous exclusion of expert testimony on general types of injuries suffered by victims of childhood sexual abuse, at trial in former student's action against Catholic high school and religious order that managed teacher at school, constituted significant unfair prejudice to student and denied student a fair trial, warranting a new trial; as a result of the exclusion of general causation testimony, student was unable to lay foundation for testimony of expert who attempted to testify that teacher's abuse of student was the actual cause of student's injuries. Rules of Evid., Rule 702.

1 Cases that cite this headnote

[10] **Appeal and Error**
Nature of error or defect

Appeal and Error
Submission of Issues or Questions to Jury

Special verdict form used at trial in former student's action against Catholic high school arising from teacher's alleged sexual abuse, requiring jury to determining whether the abuse was "the," rather than "a," proximate cause of student's injuries, was harmless error,

and not plain error, even though the form impliedly instructed the jury to apply an incorrect legal standard, since instructions as a whole contained an accurate statement of the law on proximate cause; jury was specifically instructed that there can be more than one proximate cause of an injury.

Cases that cite this headnote

[11] **Appeal and Error**
Necessity of objections in general

Absent plain error, the Supreme Court does not review claims that were not fairly presented to the trial judge.

1 Cases that cite this headnote

[12] **Appeal and Error**
Exceptions to instructions

A party may not assign error to the giving of a jury instruction without excepting to the charge before the jury retires to consider its verdict.

Cases that cite this headnote

[13] **Appeal and Error**
Necessity of objections in general

"Plain error review," under which an unpreserved error may be reviewed on appeal, means the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.

1 Cases that cite this headnote

[14] **Appeal and Error**
Necessity of objection in general

Trial
Errors in general

In determining whether an alleged erroneous jury instruction is plain error, the instructions must be viewed as a whole; an inaccuracy in the jury instructions is not plain error unless the deficiency undermines the ability of the jury to intelligently perform its duty in returning a verdict.

Cases that cite this headnote

[15] **Limitation of Actions**
Revival of causes of action by amendment or repeal of statute

Child Victim's Act (CVA), abolishing civil statute of limitations for claims of childhood sexual abuse and creating a two-year window to allow victims of childhood sexual abuse to bring civil suits that statute of limitations had previously barred, revived former student's intentional tort claims against Catholic high school and religious order that managed teacher at school, arising from teacher's alleged sexual abuse; Va's specification of "gross negligence" as a prerequisite for revival of all unspecified causes of action was a floor, not a ceiling, for invoking CVA. 10 West's Del.C. § 8145.

4 Cases that cite this headnote

[16] **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews questions of statutory interpretation de novo because they involve questions of law.

2 Cases that cite this headnote

[17] **Statutes**
Liberal or strict construction

Remedial statutes should be liberally construed to effectuate their purpose.

1 Cases that cite this headnote

[18] **Constitutional Law**
Infants, children, and minors, offenses specific to

Education
Duty to Protect Against Intentional Injuries

In former student's action, pursuant to Child Victim's Act (CVA), against Catholic high school and religious order that managed teacher, arising from teacher's alleged sexual abuse of student in 1962, the criminal code in existence in 1962, not the current code, was required to be used in determining whether teacher had committed a sexual crime against student, since to hold school and order liable for failing to protect student from conduct that was not criminal at the time of the conduct would violate due process. U.S.C.A. Const.Amend. 14; 10 West's Del.C. § 8145.

Cases that cite this headnote

[19] **Appeal and Error**
Cases Triable in Appellate Court

Constitutional claims are subject to plenary or de novo review on appeal to determine whether the trial court committed an error of law.

3 Cases that cite this headnote

[20] **Constitutional Law**
Presumptions and Construction as to Constitutionality

There is a strong presumption that a legislative enactment is constitutional.

6 Cases that cite this headnote

[21] **Constitutional Law**
Doubt

In reviewing a constitutional challenge to a statute, a court resolves all doubts in favor of the challenged legislative act.

4 Cases that cite this headnote

[22] **Courts**
Construction of state Constitutions and statutes

When considering a case of due process under the state constitution, a court should ordinarily submit its judgment to that of the United States Supreme Court, if the point at issue has been decided by that Court. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

5 Cases that cite this headnote

[23] **Constitutional Law**
Time for proceedings;limitation or suspension of remedy

Limitation of Actions
Constitutionality of statute

Child Victim's Act (CVA), abolishing civil statute of limitations for claims of childhood sexual abuse and creating a two-year window to allow victims of childhood sexual abuse to bring civil suits that statute of limitations had previously barred, did not violate due process, since no fundamental vested right existed in the expiration of the statute of limitations on claims arising from sexual abuse. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9; 10 West's Del.C. § 8145.

4 Cases that cite this headnote

[24] **Constitutional Law**
Relationship to other constitutions

Delaware constitutional due process is coextensive with federal due process. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

5 Cases that cite this headnote

[25] **Constitutional Law**
Time for proceedings;limitation or suspension of remedy

Limitation of Actions
Constitutionality of statute

As a matter of constitutional law, statutes of limitation go to matters of remedy, not destruction of fundamental rights; accordingly, the General Assembly has the power to determine a statute of limitations and such a determination does not violate due process if it is reasonable. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

1 Cases that cite this headnote

[26] **Constitutional Law**
Making, Interpretation, and Application of Statutes

In determining a constitutional challenge to a statute, the Supreme Court does not sit as an uberlegislature to eviscerate proper legislative enactments.

2 Cases that cite this headnote

[27] **Constitutional Law**
Policy

Constitutional Law
Wisdom

It is beyond the province of courts to question the policy or wisdom of an otherwise valid law; rather, courts must take and apply the law as they find it, leaving any desirable changes to the General Assembly.

6 Cases that cite this headnote

[28] **Constitutional Law**
Time for proceedings;limitation or suspension of remedy

Limitation of Actions
Constitutionality of statute

Child Victim's Act (CVA), abolishing civil statute of limitations for claims of childhood sexual abuse and creating a two-year window to allow victims of childhood sexual abuse to bring civil suits that statute of limitations had previously barred, did not violate due process as applied to religious order that managed teacher, in action by former student arising from Catholic high school teacher's alleged sexual abuse of student in 1962, even though teacher who had allegedly committed the abuse had died and was not available as a witness; order's own records demonstrated that it had prior knowledge of teacher's sexual abuse of children and many other problems, and several of teacher's coworkers were still alive and available to testify. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9; 10 West's Del.C. § 8145.

1 Cases that cite this headnote

[29] **Constitutional Law**
Retrospective laws and decisions;change in law

To prevail on an as applied due process challenge arising from retroactive application of a statute, a defendant must show not only the loss of a witness or evidence but also that that loss prejudiced him. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

Cases that cite this headnote

[30] **Constitutional Law**
Witnesses;confrontation and cross-examination

To prevail on an as applied due process challenge arising from retroactive application of a statute, a defendant must specifically identify witnesses or documents lost during delay properly attributable to the plaintiff, and the proof must be definite and not speculative; an assertion that a missing witness might have been useful does not show the actual prejudice required. U.S.C.A. Const.Amend. 14; West's Del.C.Ann. Const. Art. 1, § 9.

Cases that cite this headnote

***1251** Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 07C–11–234.
Upon appeal from the Superior Court. **REVERSED** and **REMANDED.**

Attorneys and Law Firms

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Before STEELE, Chief Justice, BERGER, JACOBS, RIDGELY, Justices and NOBLE, Vice Chancellor * constituting the Court en banc.

Opinion

STEELE, Chief Justice:

James E. Sheehan filed a personal injury action under 10 *Del. C.* § 8145, the Child Victim's Act, against several institutional defendants, including the Oblates of St. Francis de Sales and Salesianum School, for the alleged sexual abuse he suffered in 1962 by Father Francis Norris, a teacher at Salesianum. The Child Victim's Act (CVA), enacted in 2007, abolished the civil statute of limitations for claims of childhood sexual abuse and created a two year window to allow victims of childhood sexual abuse to bring civil suits that the statute of limitations previously barred. After a jury trial, the jury found the Oblates, but not Salesianum, negligent under Section 8145. However, the jury did not find that the Oblates' negligence had proximately caused Sheehan's injuries.

Sheehan asserts that the trial judge committed numerous reversible errors. We reverse and remand for a new trial for two reasons: (1) because the trial judge failed to properly balance, on the record, the probative value of admitting the general causation expert against the unfair prejudice to Sheehan of excluding the testimony; and (2) because the trial judge erred by holding that Section 8145 does not revive intentional torts.

I. FACTS AND PROCEDURAL HISTORY

James E. Sheehan attended Salesianum School during 1961–1964. While Sheehan was a student at Salesianum, Father Francis Norris, a priest of the Oblates of St. Francis de Sales, was assigned to a teaching position at Salesianum. Sheehan alleges that one night in April 1962, during the spring of his sophomore year, Norris offered him a ride home after a basketball game and Norris forced him to engage in sexual masturbation in the car. Sheehan never reported the incident to the Oblates or to Salesianum. However, Sheehan testified that decades before he had any motive to lie, he told his family members about the sexual abuse.

***1252** Eyewitness testimony, as well as the Oblates' own business records, demonstrated that the Oblates had prior notice that Norris was an alcoholic and had attempted suicide, and that the Oblates' own doctors urged his immediate psychiatric hospitalization. Sheehan's expert witness testified that in the 1960's priest records used code words to refer to sexual abuse of a child. These code words included "health problems," "depression," "nervous breakdown," and "alcoholism." The expert also testified that alcoholism was not considered a scandal at the time because it was so prevalent in the religious communities of priests. Norris' personnel file was filled with the words "health problems," "depression," and "alcoholism." Shortly before his transfer to Salesianum, his file noted that it was preferable to remove him from his then current locality (New York) and out of direct contact with his present community.

Norris died on March 24, 1985, and the Oblates remained unaware of Sheehan's allegations until Section 8145 became law in July 2007.

In 2007, after a Boston Globe investigation revealed a pattern of sexual abuse against minors by Catholic priests, the Delaware Legislature enacted Section 8145, to repeal the statute of limitations in civil suits relating to child sex abuse. [1] The CVA provided a two year window, during which time prior victims of abuse would be permitted to file civil actions previously barred by the then applicable statute of limitations. The statute also revived claims against institutional defendants who employed or controlled alleged abusers, for claims arising from "gross negligence."

Sheehan filed his complaint against Oblates of St. Francis de Sales, Oblates of St. Francis de Sales, Inc., and Salesianum School, Inc., on November 30, 2007. A seven day jury trial began on November 16, 2009. Sheehan contended at trial that the Oblates were aware of the "red flags" yet failed to keep Norris away from children as

required by the educational standard of care in Delaware schools in the 1950s and 1960s.

Before trial, but after completion of discovery, the Oblates had moved for summary judgment on numerous grounds. On October 27, 2009, the Superior Court issued an opinion holding, *inter alia,* that Section 8145 did not revive intentional torts and dismissed Sheehan's fraud count. [2] The court denied the Oblates' remaining motions for summary judgment, including motions challenging the constitutionality of Section 8145. [3] The Oblates also filed a pretrial motion *in limine* to strike the testimony of Sheehan's general causation expert, Diane Mandt Langberg, Ph.D. On November 9, 2009, the trial judge issued an order granting the motion and precluding Langberg from testifying for lack of relevance. [4] The Oblates also moved *in limine* to exclude the testimony of Sheehan's corroborative witnesses who Norris also allegedly abused. The trial judge denied the motion and permitted the witnesses to testify where the alleged abuse of a corroborative witness occurred during the same time Sheehan was abused.

At the prayer conference on November 20, 2009, each party submitted a proposed special verdict form for the trial judge's consideration. The trial judge rejected ***1253** Sheehan's version, which contained the standard of "a proximate cause," in favor of a special verdict form with the language of "the proximate cause." Sheehan did not object to the language of the special verdict form at trial. The trial judge further ruled that the 1962 Delaware Criminal Code governed the types of sexual acts which Sheehan needed to prove under the CVA rather than the current version of the criminal code. [5]

Following a seven day trial, the jury returned a verdict form that found the Oblates negligent, but not Salesianum. The form further indicated that the jury found that Sheehan had failed to prove that the Oblates' negligence proximately caused his injuries. Consequently, a verdict was entered for the defendant.

On appeal, Sheehan alleges the trial judge erred and abused his discretion by (i) excluding his general causation expert, (ii) using a special verdict form that referred to "*the* " proximate cause rather than "*a* " proximate cause, (iii) that the CVA did not revive intentional torts and (iv) incorrectly applying the 1962 criminal code rather than the current Delaware criminal code. The Oblates have cross appealed, contending that the CVA is unconstitutional either facially or if not facially, as applied. They also contend on cross appeal that the trial judge erred by admitting the testimony of Norris' other alleged victims, because that testimony was unfairly prejudicial and constituted improper character evidence.

II. ANALYSIS

A. *The Trial Judge Abused His Discretion by Excluding Sheehan's General Causation Expert.*

[1] **[2]** **[3]** We review a trial judge's decision to exclude expert testimony for an abuse of discretion. [6] If we find that the trial judge abused his discretion, we then consider whether the abuse constituted significant unfair prejudice and denied the appellant a fair trial. [7] When improperly excluded evidence "goes to the very heart of [a] plaintiff['s] case and might well have affected the outcome of the trial, the exclusion of the evidence warrants a new trial." [8]

[4] The Delaware Uniform Rule of Evidence 702 governs. [9] In applying that Rule, this Court employs a five-step test to determine whether expert testimony is admissible. [10] The trial judge must determine whether: (1) the witness is qualified as an expert by knowledge, skill experience, training or education; (2) the evidence is relevant and reliable; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand ***1254** the evidence or to determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury. [11] In determining whether to admit expert evidence under step (5), D.R.E. 403 [12] requires the trial judge to weigh whether the probative value of the testimony substantially outweighs the danger of unfair prejudice or jury confusion. [13]

In considering the Oblates' motion *in limine* to exclude Langberg's testimony the trial judge concluded that she:

> "may be qualified as an expert to testify about general injuries child sex abuse victims suffer, but these generalized conclusions will not be helpful to determine the damages suffered by the Plaintiff in the current

case. Without personally examining Plaintiff and basing her opinion on that exam, her testimony is not helpful to assist the trier of fact in determining the damages Plaintiff suffered from the alleged abuse." [14]

The trial judge erred by failing to properly balance, on the record, [15] the probative value of admitting Langberg's testimony against the unfair prejudice to Sheehan of excluding the testimony. [16]

[5] [6] [7] "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [17] To determine relevance, we must "examine the purpose for which the evidence is offered" and it "must be of consequence to the action and advance the likelihood of the fact asserted." [18] A litigant has the right to introduce all relevant evidence which goes to the very heart of the case and could affect the outcome of the trial. [19]

[8] [9] Sheehan offered two experts at trial, Carol A. Tavani, M.D., a "specific causation" expert, and Langberg, a "general causation" expert. Langberg's testimony was directly and vitally relevant to the most critical issue in the case—proximate cause. Thus, by excluding Langberg's testimony, the trial judge prevented Sheehan from laying the foundation upon which he could build his case for proximate cause. Langberg's testimony was necessary to establish the psychological baseline for the general types of emotional, mental, spiritual and physical injuries that survivors of childhood sexual abuse suffer. That testimony would tend to prove that childhood sexual abuse can in fact cause the types of injuries suffered by Sheehan. Sheehan also offered Langberg's expert testimony on the basis that the injuries typically suffered by child sex abuse victims are unusual and sometimes ***1255** counterintuitive to a layperson and beyond the common experience of any jury. Most importantly, Langberg's testimony would have laid the foundation for and corroborated Tavani's testimony about the actual cause of Sheehan's injuries.

At trial, the Oblates repeatedly objected to Tavani's testimony whenever she attempted to explain Sheehan's injuries in relation to the general effects of sexual abuse on childhood development. [20] Indeed, Tavani's testimony expressly shows how the trial judge's ruling limited her ability to explain Sheehan's injuries. Tavani testified, "I don't know if you want me to talk about—it's a little hard without saying what happens in general and how he exemplified that." [21] Given the complex damages picture this case presented and the centrality of proximate cause to addressing the issue of damages, Langberg's evidence was both relevant and vital to Sheehan's case.

The trial judge reversibly erred by not correctly weighing the probative value of Langberg's general causation evidence against the possibility of unfair prejudice as D.R.E. 403 requires. The excluded evidence goes to the very heart of the proximate cause issue at trial. Given the important nature of expert testimony on the most critical issue in this case, it is clear that this error constituted significant prejudice [22] and that excluding the general causation evidence denied Sheehan a fair trial.

B. *The Trial Judge Did Not Commit Plain Error By Providing a Special Verdict Form That Referred to "The" Proximate Cause, Rather Than "A" Proximate Cause.*

[10] [11] [12] As an initial matter, absent plain error, we do not review claims that were not fairly presented to the trial judge. [23] At trial, Sheehan did not object to the use of the phrase "*the* proximate cause" rather than "*a* proximate cause" on the verdict form. [24] Furthermore, a party may not assign error to the giving of a jury instruction without excepting to the charge before the jury retires to consider its verdict. [25]

[13] [14] Sheehan argues that the trial judge committed plain error by providing the jury with a special verdict form that asked the jury to decide whether "either or both of the defendants' liability was *the* proximate cause of the harm to the plaintiff." [26] Plain error review means "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." [27] In performing this evaluation, jury instructions must be viewed as a whole. [28] An inaccuracy in the jury instructions is not plain error unless the deficiency undermines the ability of the jury to intelligently perform its duty in returning a verdict. [29]

The special verdict form impliedly instructed the jury to apply an incorrect legal standard which required the Oblates' negligence to be "the" sole proximate ***1256** cause rather than "a" proximate cause of Sheehan's injuries. We find, however, that the language in the special verdict form does not constitute plain error when read in context with the entirety of the jury instructions. In their entirety, the instructions contained an accurate statement of the law on proximate cause.[30] The trial judge specifically instructed the jury that there can be more than one proximate cause of an injury.[31] As a general principle, a jury should not have to reconcile two contrary statements of the law.[32] Nonetheless, given Sheehan's failure to object to the verdict form's language before or after the trial judge gave it to the jury to follow in rendering their verdict and given the correct statement of the law in the trial judge's instruction, the incorrect verdict form constituted harmless, not plain, error.

C. *The Trial Court Incorrectly Held That Section 8145 Does Not Revive Intentional Tort Claims.*

[15] **[16]** **[17]** We review questions of statutory interpretation *de novo* because they involve questions of law.[33] Under Delaware law, remedial statutes should be liberally construed to effectuate their purpose.[34]

Sheehan claims the trial judge erroneously concluded that the CVA did not revive intentional tort claims because it specified the mental state of "gross negligence" as a prerequisite for revival. The problem is that a *mens rea* finding of intent necessarily includes a lesser included subsidiary finding of gross negligence. The relevant portion of the CVA provides:

> (b) For a period of 2 years following July 9, 2007, victims of child sexual abuse that occurred in this State who have been barred from filing suit against their abuser by virtue of the expiration of the former civil statute of limitations, shall be permitted to file those claims in the Superior Court of this State. If the person committing the act of sexual abuse against a minor was employed by ... [a] legal entity that owned a duty of care to the victim, or the accused and the minor were engaged in some activity over which the legal entity had some degree of responsibility or control, damages against the legal entity shall be awarded under this subsection *only if there is a finding of gross negligence on the part of the legal entity.*[35]

We agree with Sheehan that reading the CVA to authorize one form of *mens rea* misses the self-evident intent of the remedial legislation. The relevant language addresses *mens rea,* not a particular cause of action. The trial judge's holding that intentionally breaching a duty does not subsume grossly negligently breaching a duty is manifestly incorrect. Under Delaware law, the hierarchy of mental states (in order of lesser to higher) are negligence, gross negligence, recklessness, intent, and malice.[36] Therefore, by definition a finding ***1257** of an intentional breach of a duty subsumes a grossly negligent breach of that duty. The General Assembly, in Section 8145, made a policy decision to set gross negligence as the floor—not the ceiling—for invoking the statute's applicability. The plain language of the statute sets the specific mental state of gross negligence as the prerequisite for revival of all unspecified causes of action. After all:

> "To the extent that a tort is alleged, that has as its basis, intentional conduct—actual knowledge—those are higher states of mind or worse states of mind than gross negligence ... The Legislature having said that gross negligence is revived, does not have to say that intentional conduct is revived."[37]

We find the trial judge's holding that intentionally breaching a duty does not trigger the statute to be error, because it prevented Sheehan from making additional legal arguments supporting liability against Salesianum. Because the ruling prevented Sheehan from arguing to the jury that Salesianum owed Sheehan a duty of care and intentionally breached that duty of care, we must reverse and remand for a new trial.

D. *The Trial Judge Correctly Ruled that the Criminal Code to be Applied to Claims Under Section 8145 is the Criminal Code in Existence When the Abuse Occurred.*

We review questions of statutory interpretation *de novo* because they include questions of law.[38] Under Delaware

law, remedial statutes should be liberally construed to effectuate their purpose.[39]

[18] 10 *Del. C.* § 8145(a) states that "[a] civil cause of action for sexual abuse of a minor shall be based upon sexual acts that would constitute a criminal offense under the Delaware Code." The trial judge found that the plain language of the CVA did not address which version of the Delaware Code to apply. The trial judge "determined applying anything other than the code in existence at the time of the alleged abuse would be a violation of due process."[40] The judge so concluded because the CVA requires that a claim must be premised upon the commission of a sexual crime.[41] A sexual crime is a predicate element to a civil claim against an institutional defendant for grossly negligently failing to protect a plaintiff from sexual criminal acts of its employee or agent.[42] Moreover, fundamental due process dictates that the scope of liability imposed by a retroactive law cannot substantially change the scope of liability existing at the time of the alleged abuse.[43]

***1258** If the current Delaware criminal code were found applicable, the sexual acts alleged in this case could fall within the definition of a criminal offense that did not exist at the time of the alleged abuse. The result would be to create a cause of action where none existed in 1962. The current Code criminalizes multiple sexual acts that were not criminalized in 1962.[44] Under the 1962 Code, the only crime that related to the facts in the record here was lewdly playing with a child under 16 years.[45]

We agree that the CVA's reference to the Criminal Code does not transform this civil statute into a criminal one to which *ex post facto* analysis applies. The Act is and continues to be a civil statute of limitations affecting matters of procedure and remedy.[46] However, an essential predicate to civil claims prosecuted under the CVA is a sexual act that would constitute a criminal offense. If an act was not a crime in 1962, we cannot hold the defendants to reasonably have been on notice of a duty to prevent the now criminalized act from occurring. To hold an institutional defendant liable today for failing to protect a plaintiff from conduct that was not criminal at the time of the conduct violates all notions of fairness by failing to put the defendant on notice that a failure to act could incur civil or criminal liability.

For the above reasons, we hold that the trial judge correctly held that the Criminal Code to be applied to claims under the CVA is the Code that was in existence when the alleged abuse occurred.

E. *The CVA Violates Neither Federal Nor State Due Process.*

[19] **[20]** **[21]** Constitutional claims are subject to plenary or *de novo* review to determine whether the Superior Court committed an error of law.[47] When our "review is of a constitutional nature, there is a strong presumption that a legislative enactment is constitutional."[48] We resolve all doubts in favor of the challenged legislative act.[49]

a. The General Assembly Has the Power to Determine the Statute of Limitations and Such A Determination Does Not Violate Article I, Section 9 of the Delaware Constitution.

[22] Historically, the due process clause of the Delaware constitution[50] has ***1259** substantially the same meaning as the due process clause contained in its federal counterpart.[51] The expression "due process of law, as it appears in the Constitution of the United States, and the expression 'law of the land' as used in the Delaware Constitution, have generally been held to have the same meaning."[52] When considering "a case of due process under our Constitution we should ordinarily submit our judgment to that of the highest court of the land, if the point at issue has been decided by that Court."[53]

[23] **[24]** **[25]** **[26]** **[27]** The Oblates argue that the expiration of a statute of limitations for a civil action is a fundamental vested right, and once the time has lapsed, a defendant has a vested right in knowing that no person or entity can bring a claim against him. We do not agree. Delaware constitutional due process is coextensive with federal due process.[54] Federal precedent has long held that unless the expiration of a statute of limitation creates a prescriptive property right, such as title in adverse possession, the legislature can revive a cause of action after the statute of limitation has expired.[55] In 1945, the United States Supreme Court concluded that revival of a personal cause of action, that did not involve the creation of title,

does not offend the Federal Constitution.[56] Explicitly rejecting the fundamental right argument, the Court held that:

> Statutes of limitation find their justification in necessity and convenience rather than in logic ... They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay ... Their shelter has never been regarded as ... a 'fundamental right' ... the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.[57]

As a matter of constitutional law, statutes of limitation go to matters of remedy, not destruction of fundamental rights.[58] Under Delaware law, the CVA can be applied retroactively because it affects matters of procedure and remedies, not substantive or vested rights.[59] Accordingly, the General Assembly "has the power to determine a statute of limitations and such a determination does not violate [Article 1, Section 9] if it is reasonable."[60] Furthermore, we do not sit as an überlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly.[61]

***1260 b. The CVA, As Applied to the Oblates, Does Not Violate Due Process.**

[28] [29] [30] To prevail on an as applied due process challenge, a defendant must show not only the loss of the witness and/or evidence but also that that loss prejudiced him.[62] The complaining party must specifically identify witnesses or documents lost during delay properly attributable to the plaintiff.[63] Furthermore, the proof must be definite and not speculative. An assertion that a missing witness might have been useful does not show the actual prejudice required.[64]

The Oblates claim that the CVA violates due process as applied to them, because there is no direct evidence that the defendants had notice or knowledge of the risk of abuse that Norris posed. According to the Oblates, this lack of "notice" violates due process, and therefore, it is unjust for them to defend against a claim for gross negligence based on actions that occurred over 40 years ago.

Here, the Oblates fail to demonstrate special hardships, oppressive effects or actual prejudice because there is abundant evidence—including the Oblates' own records demonstrating prior knowledge of Norris' sexual abuse of children and his many other problems—that the Oblates may have violated the educational standard of care for Delaware schools. Additionally, the Oblates were not unduly prejudiced by Norris' death and his inability to testify, because the question to be decided was whether the Oblates and Salesianum had knowledge of Norris' history as an abuser and failed to act in response. A review of the record evidence shows that there was sufficient circumstantial evidence to support the jury verdict.[65] Indeed, the evidence is taken directly from the defendants' own still existing internal records. Furthermore, several of Norris' coworkers are still alive and testified at trial. Therefore, we find the CVA does not violate due process as applied to the Oblates.

CONCLUSION

The judgment of the Superior Court is REVERSED and the action is REMANDED for proceedings consistent with this Opinion.

All Citations

15 A.3d 1247, 265 Ed. Law Rep. 1133

Footnotes

* Sitting by designation pursuant to Del. Const. Art. IV § 12.

1 76 Del. Laws Ch. 102, § 1 (2007).

2 *Sheehan v. Oblates of St. Francis de Sales., et al.*, C.A. No. 07C–11–234 CLS, at 8 (Del.Super. Oct. 27, 2009).

3 *Id.* at 8–11; *Sheehan v. Oblates of St. Francis de Sales., et al.*, C.A. No. 07C–11–234 CLS, at 5 (Del.Super. Nov. 10, 2009).

4 *Sheehan v. Oblates of St. Francis de Sales., et al.,* C.A. No. 07C–11–234 CLS, at 2 (Del.Super. Nov. 9, 2009).
5 *Sheehan v. Oblates of St. Francis de Sales., et al.,* C.A. No. 07C–11–234 CLS, at 4 (Del.Super. Nov. 30, 2009).
6 *Sturgis v. Bayside Health Ass'n Chartered,* 942 A.2d 579, 583 (Del.2007).
7 *Powell v. Dept. of Servs. for Children, Youth & Their Families,* 963 A.2d 724, 736 (Del.2008).
8 *Barrow v. Abramowicz,* 931 A.2d 424, 429 (Del.2007).
9 D.R.E. 702 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

10 *Bowen v. E.I. DuPont de Nemours & Co.,* 906 A.2d 787, 795 (Del.2006).
11 *Id.*
12 D.R.E. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

13 *Tolson v. State,* 900 A.2d 639, 645 (Del.2006).
14 *Sheehan v. Oblates of St. Francis de Sales., et al.,* C.A. No. 07C–11–234 CLS, at 2 (Del.Super. Nov. 9, 2009).
15 *See, e.g., Floudiotis v. State,* 726 A.2d 1196, 1208 (Del.1999).
16 *Timblin v. Kent Gen. Hosp., Inc.,* 640 A.2d 1021, 1023 (Del.1994).
17 *State Farm Mut. Auto. Ins. Co. v. Enrique,* 3 A.3d 1099, 2010 WL 3448534, at *2 (Del.2010) (TABLE).
18 *Green,* 791 A.2d at 739.
19 *Barrow,* 931 A.2d at 430.
20 Tavani Tr. A851–53; 877–78; 854
21 *Id.* at 854.
22 *Powell,* 963A.2d at 736.
23 Supr. Ct. R. 8; *Rodriguez v. State,* 820 A.2d 372, 2003 WL 1857547, at *1 (Del.2003) (TABLE).
24 App. to Ans. Br. at B00080.
25 Super. Ct. R. 51.
26 App. to Ans. Br. at B00262.
27 *Culver v. Bennett,* 588 A.2d 1094, 1096 (Del.1991).
28 *Probst v. State,* 547 A.2d 114, 119 (Del.1988).
29 *Id.*
30 *See* Proximate Cause Jury Instructions App. to Ans. Br. at B00234.
31 *Id.*
32 *Duphily v. Del. Elec. Co–op., Inc.,* 662 A.2d 821, 834 (Del.1995).
33 *Rapposelli v. State Farm Mut. Auto. Ins. Co.,* 988 A.2d 425, 427 (Del.2010).
34 *State v. Cephas,* 637 A.2d 20, 25 (Del.1994).
35 10 *Del. C.* § 8145(b) (emphasis added).
36 11 *Del. C.* § 253 (Whenever a statute provides that negligence suffices to establish an element of an offense, the element is also established if a person acts intentionally, knowingly, recklessly, or with criminal negligence); *see, e.g., Jardel Co., v. Hughes* 523 A.2d 518, 530 (Del.1987) (holding "[c]riminal negligence as defined in 11 *Del. C.* § 231(d) is the functional equivalent of gross negligence as that term is applied as a basis for the recovery of damages for civil wrongs. Gross negligence, though criticized as a nebulous concept, signifies more than ordinary inadvertence or inattention. It is nevertheless a degree of negligence, while recklessness connotes a different type of conduct akin to the intentional infliction of harm.").
37 *Hecksher v. Fairwinds Baptist Church, Inc.,* Super.Ct. Docket No. 09C–06–236–FSS (Del.Super. Oct. 13, 2009).
38 *Rapposelli,* 988 A.2d at 427.

39 *Cephas,* 637 A.2d at 25; *see, e.g., Layfield v. Hastings,* 1995 WL 419966, at *3 (Del.Ch. July 10, 1995) ("[I]t is a traditional principle of statutory construction that remedial statutes are to be construed liberally in order for the goal of the statute to be attained.").

40 *Sheehan v. Oblates of St. Francis de Sales, et al.,* C.A. No. 07C–11–234 CLS, at 2 (Del.Super. Nov. 30, 2009).

41 *See* 10 *Del. C.* § 8145(a).

42 *Id.* at § 8145(b).

43 *See Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (explaining the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place—has timeless and universal appeal); *Doe I v. Boy Scouts of America,* 148 Idaho 427, 224 P.3d 494, 498 (2009) (holding a statute governing tort actions in child abuse cases could not be retroactively applied to expand liability for perpetration of acts where liability did not previously exist).

44 For example: sexual harassment, incest, unlawful sexual contact, sexual extortion, continuous sexual abuse of a child, sexual exploitation of a child, and sexual solicitation of a child. *See e.g.,* 11 Del. C. Part I, Chapter 5, Subchapter II, Subpart D: Sexual Offenses.

45 *See* 11 *Del. C.* § 822 (1953): Lewdly playing with a child under 16 years.

> Whoever lewdly and lasciviously plays or toys with a child under the age of 16 years may be fined not more than $500 or imprisoned not more than 3 years, or both.

46 *See, e.g., Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.,* 489 A.2d 413, 421 (Del.1984) (explaining that "the running of a statute of limitations will nullify a party's remedy" and that a "statute of limitations is ... a procedural mechanism.").

47 *Abrams v. State,* 689 A.2d 1185, 1187 (Del.1997).

48 *Wien v. State,* 882 A.2d 183, 186 (Del.2005).

49 *State v. Baker,* 720 A.2d 1139, 1144 (Del.1998).

50 DEL. CONST. art. I, § 9 ("All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have a remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. Suits may be brought against the State, according to such regulations as shall be made by law.").

51 *Helman v. State,* 784 A.2d 1058, 1070 (Del.2001).

52 *Opinion of the Justices,* 246 A.2d 90, 92 (Del.1968); *see also* Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 59 (2002).

53 *Gen. Elec. Co. v. Klein,* 106 A.2d 206, 210 (Del.1954).

54 *Blinder, Robinson & Co., Inc. v. Bruton,* 552 A.2d 466, 472 (Del.1989).

55 *Cambpell v. Holt,* 115 U.S. 620, 627–28, 6 S.Ct. 209, 29 L.Ed. 483 (1885).

56 *Chase Sec. Corp. v. Donaldson,* 325 U.S. 304, 316, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945).

57 *Id.* at 314, 65 S.Ct. 1137.

58 *Id.*

59 *Hubbard v. Hibbard Brown & Co.,* 633 A.2d 345, 354 (Del.1993).

60 Holland, *supra* note 54, at 60.

61 *In re Adoption of Swanson,* 623 A.2d 1095, 1099 (Del.1993).

62 *U.S. v. Mays,* 549 F.2d 670, 677 (9th Cir.1977).

63 *U.S. v. Bartlett,* 794 F.2d 1285, 1289 (8th Cir.1986).

64 *Mays,* 549 F.2d at 677.

65 *See Seward v. State,* 723 A.2d 365, 369 (Del.1999) (holding there is no distinction between direct and circumstantial evidence).

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TAB 11

Original Image of 480 A.2d 636 (PDF)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Mirzakhalili v. Chagnon, Del.Ch., November 9, 2000

480 A.2d 636
Supreme Court of Delaware.

Melvin A. SLAWIK, Plaintiff-Appellant, Cross-Appellee,
v.
STATE of Delaware and Pierre S. Dupont, IV, in his official capacity as Governor of the State of Delaware, Defendants-Appellees, Cross-Appellants.

Submitted: Jan. 30, 1984.
|
Decided: July 18, 1984.

After reversal of conviction which led to his removal from office, former county executive filed suit for damages against the State, the former governor and others alleging that he had been deprived of a "property" interest by not being permitted to complete his full term of office. The Superior Court, 389 A.2d 775, entered summary judgment for defendants, and the Supreme Court, 410 A.2d 512, reversed. On remand, the Superior Court awarded plaintiff's counsel a fee under § 1988, and both parties appealed. The Supreme Court, Horsey, J., held that: (1) a state officer's interest in his elected post is not "property" in the constitutional sense, and (2) fact that governor removed county executive from office for misconduct without first having obtained an advisory opinion from Supreme Court as to legality of removal did not deprive executive official of procedural due process, as possibility of premature removal and consequent deprivation of interest in continuation in public office was eclipsed by need for immediate action by state and official's right to recover damages in suit at law after the incident.

Reversed.

West Headnotes (15)

[1] Costs
Prevailing party

Under the "American Rule," remedy of fee shifting is ordinarily not available to a prevailing litigant absent statutory authority to award costs, including counsel fees.

5 Cases that cite this headnote

[2] Costs
Bad faith or meritless litigation

Courts have inherent power to allow attorney fees in particular situations, for example, the willful disobedience of a court order as part of fine to be levied on defendant, or when losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

21 Cases that cite this headnote

[3] Constitutional Law
Rights, Interests, Benefits, or Privileges Involved in General

Any loss, however grievous, visited upon a person by the state is not, without more, sufficient to invoke procedural protections of the due process clause; determining factor is nature of interest involved, not its weight. U.S.C.A. Const.Amends. 5, 14.

Cases that cite this headnote

[4] Civil Rights
Substantive or procedural rights

Substantive rights are not created by § 1983; rather, statute provides method for vindicating federal rights elsewhere conferred either by the United States Constitution or federal statutes. 42 U.S.C.A. § 1983.

5 Cases that cite this headnote

[5] Civil Rights
Rights Protected

Misapplication of state law does not, per se, give rise to a § 1983 action and a subsequent claim for attorney fees under § 1988; rather, a petitioner must show a violation of a specific constitutional guarantee. 42 U.S.C.A. §§ 1983, 1988.

1 Cases that cite this headnote

[6] **Civil Rights**
Results of litigation;prevailing parties

For purposes of an award of attorney fees under statute providing for such an award to a prevailing party in a § 1983 suit, if a party "prevails" solely on an issue of state law, question becomes whether disposition of case on state law enabled court to avoid decision on "substantial" constitutional questions. 42 U.S.C.A. §§ 1983, 1988.

8 Cases that cite this headnote

[7] **Federal Courts**
Jurisdiction of Entire Controversy; Pendent and Supplemental Jurisdiction

Pendent jurisdiction exists whenever there is a claim arising under the Constitution, laws of the United States and treaties made, or which shall be made, under their authority, and whenever that claim, coupled with the pendent state claim, comprises but one constitutional case that derives from a common nucleus of operative fact.

2 Cases that cite this headnote

[8] **Federal Courts**
Nature of dispute;concreteness

District courts are without power to adjudicate claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit, wholly insubstantial, or obviously frivolous.

Cases that cite this headnote

[9] **Constitutional Law**
Source of right or interest

Constitutional Law
Benefits, rights and interests in

Property interests do not emanate from the Constitution but are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law that is, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

1 Cases that cite this headnote

[10] **Constitutional Law**
Elected officials

A state officer's interest in his elected post is not "property" in the constitutional sense. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[11] **Constitutional Law**
Duration and timing of deprivation;pre- or post-deprivation remedies

A rudiment of procedural due process is right to receive notice and to be heard at a meaningful time and in a meaningful manner prior to deprivation of a protected interest. U.S.C.A. Const.Amend. 14.

8 Cases that cite this headnote

[12] **Constitutional Law**
Duration and timing of deprivation;pre- or post-deprivation remedies

Length and resultant severity of a deprivation of protected interest is but one factor to be weighed in determining proper form of hearing under due process clause and is not decisive of basic right to be heard. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[13] **Constitutional Law**
Notice and Hearing

Due process clause does not require a trial-type hearing in every conceivable instance of governmental impairment of private rights. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[14] **Constitutional Law**
Duration and timing of deprivation;pre- or post-deprivation remedies

At a minimum, due process requires some kind of notice and hearing as a preface to curtailment of constitutionally secured property interests. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[15] **Constitutional Law**
Termination or discharge

That governor removed county executive from office for misconduct without first having obtained an advisory opinion from Supreme Court as to legality of removal did not deprive executive official of procedural due process, as possibility of premature removal and consequent deprivation of interest in continuation in public office was eclipsed by need for immediate action by state and official's right to recover damages in suit at law after the incident. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

***638** Upon appeal from Superior Court. Reversed.

Attorneys and Law Firms

Jack B. Jacobs of Young, Conaway, Stargatt & Taylor, Wilmington, for plaintiff-appellant, cross-appellee.

John A. Parkins, Jr., Chief of Appeals Division, Dept. of Justice, Wilmington, for defendants-appellees, cross-appellants.

Before McNEILLY, HORSEY and MOORE, Justices.

Opinion

HORSEY, Justice:

This appeal concerns an attorney's fee award under the Civil Rights Attorney's Fees Awards Act of 1976 (the "Act"), 42 U.S.C. § 1988. Appellant challenges the adequacy of the fee award and appellee-State cross appeals contesting the grant of any award under § 1988.

Melvin A. Slawik, plaintiff-appellant, while holding the elected office of County Executive for New Castle County, was convicted in March, 1976 in the United States District Court of Delaware of making false declarations before a Federal Grand Jury in violation of 18 U.S.C. § 1623. Two days later and prior to plaintiff's sentencing, the Governor of Delaware, acting under the provisions of Article XV, § 6 of the Delaware Constitution, [1] removed Slawik from his office as County Executive, effective immediately. Six weeks after his removal from office, Slawik was sentenced in Federal Court; but following appeal, the United States Court of Appeals for the Third Circuit reversed Slawik's convictions. *United States v. Slawik, et al.,* 3d Cir., 548 F.2d 75 (1977). Slawik then filed suit for damages in Superior Court against the State of Delaware, the former Governor of Delaware, and others. Plaintiff contended that he had been deprived of a "property" interest by not being permitted to complete his full term of office as County Executive. The Superior Court granted summary judgment for the defendants, holding that Slawik was "convicted" at time of his removal from office and hence was not wrongfully removed. *Slawik v. Folsom, et al.,* Del.Super., 389 A.2d 775 (1978). On appeal, this Court reversed, ruling that Slawik's removal from office "on March 11, 1976, was invalid when effectuated, but became valid *nunc pro tunc* with the imposition of sentence on April 21, 1976." *Slawik v. Folsom,* Del.Supr., 410 A.2d 512, 514 (1979). [2]

***639** On remand, the Superior Court awarded Slawik's counsel a fee under 42 U.S.C. § 1988. Section 1988 provides that in any action to enforce § 1983, the Court may allow the prevailing party a reasonable attorney's fee as part of the costs. Finding that plaintiff Slawik had "prevailed" on the limited issue of premature removal from office, Superior Court (by unreported decision) granted Slawik's counsel a percentage of the monies recovered plus costs. [3]

Plaintiff appeals from Superior Court's denial of his attorney's claim for a fee award equaling twice the "lodestar" or market value of time expended plus

the value of the time required to prosecute the fee application.[4] The State, by cross appeal, argues that Superior Court was not authorized by § 1988 to award any fees against the State defendants in the absence of either: (1) a judicial determination that appellant's federal constitutional rights had been violated; or (2) a finding that plaintiff had presented a § 1983 claim which was sufficiently substantial to support federal jurisdiction under the reasoning of *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

The question presented is whether plaintiff's allegation of a deprivation of a Fourteenth Amendment "property" right in continuing in public office satisfies the substantiality test of *Hagans v. Lavine.* We find plaintiff to have not presented a constitutionally cognizable claim. Therefore, we reverse Superior Court's award of counsel fees to plaintiff; deny the appeal; grant the cross appeal; and hold that the Civil Rights Attorney's Fee Awards Act of 1976 does not authorize any award of fees in this case.

I

[1] **[2]** Under the so-called "American Rule," the remedy of fee shifting is ordinarily not available to a prevailing litigant absent statutory authority to award costs, including counsel fees. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).[5] Appellant seeks to invoke the congressional sanction of the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
> 42 U.S.C. § 1988.

Presumably to bring § 1988 into play, appellant has alleged that his removal from office by the Governor of Delaware denied him a Fourteenth Amendment "property" interest in completing his four-year term as ***640** County Executive.[6] The complaint claims that this deprivation violates both 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Since suit is brought to enforce § 1983 rights, continues appellant, § 1988 authorizes recovery of fees for appellant's attorney.

[3] **[4]** **[5]** **[6]** We find appellant's argument to be flawed in two fundamental respects. *First,* any loss, however grievous, visited upon a person by the State is not, without more, sufficient to invoke the procedural protections of the Due Process Clause. *Meachum v. Fano,* 427 U.S. 215, 225, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976). The determining factor is the *nature* of the interest involved, not its weight. *Board of Regents v. Roth,* 408 U.S. 564, 570–71, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

Second, § 1983 imposes civil liability only upon one

> who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the *Constitution and laws....*

(emphasis added). Section 1983 does not itself *create* substantive rights. Rather, the statute provides the method for vindicating federal rights elsewhere conferred either by the United States Constitution or the federal statutes therein described. *See Maine v. Thiboutot,* 448 U.S. 1, 9–10, 100 S.Ct. 2502, 2506–07, 65 L.Ed.2d 555 (1980); *Maher v. Gagne,* 448 U.S. 122, 129 n. 11, 100 S.Ct. 2570, 2574 n. 11, 65 L.Ed.2d 653 (1980); *Baker v. McCollan,* 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979). If, however, a party "prevails" solely on an issue of State law, the question becomes whether disposition of the case on State law enabled the Court to avoid decision on "substantial" constitutional questions.[7] *See Maher v. Gagne, supra,* 448 U.S. at 128, 100 S.Ct. at 2574.

We address these points in reverse order.

II

A

The legislative history to § 1988 makes clear that fees may be awarded in cases where a pendent constitutional claim is raised, even if the claim on which the party prevailed is wholly statutory and is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460 states:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines,* 486 F.2d 880 (7th Cir.1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine, supra; United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the ***641** court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers v. Gibbs, supra,* at 725, 86 S.Ct. at 1138.

H.R.Rep. No. 94–1558, p. 4, n. 7 (1976).

[7] The substantiality doctrine of *Hagans v. Lavine* requires that petitioner establish a constitutional claim of sufficient substance to support jurisdiction in a federal court. To that end, pendent jurisdiction is said to exist whenever: (1) there is a claim "arising under [the] Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority ...," U.S.Const., Art. III, § 2; *and* (b) that claim, coupled with the pendent State claim, comprises but one constitutional "case" that derives from a common nucleus of operative fact. *United Mine Workers of America v. Gibbs,* 383 U.S. at 725, 86 S.Ct. at 1138.

[8] It is well settled, however, that District Courts are without power to adjudicate claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 579, 24 S.Ct. 553, 557, 48 L.Ed. 795 (1904); "wholly insubstantial," *Bailey v. Patterson,* 369 U.S. 31, 33, 82 S.Ct. 549, 551, 7 L.Ed.2d 512 (1962); or "obviously frivolous," *Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910). Here, appellant's allegation of a constitutional deprivation must not be too insubstantial to confer subject matter jurisdiction on a federal court. *See Maher v. Gagne,* 448 U.S. 122, 127, 100 S.Ct. 2570, 2573, 65 L.Ed.2d 653 (1980), *citing Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Luria Bros. & Co., Inc. v. Allen,* 3rd Cir., 672 F.2d 347, 357 (1982). *See also Anderson v. Redman,* D.Del., 474 F.Supp. 511 (1979).

B

This brings us to the Fourteenth Amendment and appellant's assertion of a "property" right in his position as County Executive. The text of the Fourteenth Amendment provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis supplied).

It is clear that appellant satisfies two of the three traditionally recognized prerequisites of a valid due process argument: The Governor acted under color of State law; and appellant's removal amounted to a deprivation. However, the question remains whether there has been a denial of a federally protected "property" right.

(1)

[9] The parties acknowledge that property interests do not emanate from the Constitution but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709. An individual's interest in or entitlement to "property" thus encompasses a broad range of benefits which may assume a host of forms. The general attributes of such interests have been summarized in the following manner:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id.

Hence, the Supreme Court has held that welfare recipients have a constitutionally ***642** secured interest in continued receipt of welfare benefits—an interest safeguarded by procedural due process. *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). *Compare Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (holding that an evidentiary hearing is not required prior to the termination of Social Security disability benefits). In the area of public employment, the Court has held that college professors teaching under tenure provisions, *Slochower v. Board of Higher Education of New York City,* 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956), professors and staff members employed pursuant to contracts, *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), and police officers, *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), have interests in continued employment that are insured by due process. *See also Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). However, a state junior college professor's subjective expectancy of reemployment, not buttressed by "existing rules or understandings," *Roth, supra,* 408 U.S. at 577, 92 S.Ct. at 2709, is not a "property interest" subject to procedural due process protection. *Perry v. Sinderman,* 408 U.S. 593, 92 S.Ct. 2694 (1972).

(2)

In contrast, in cases involving the contested suspension or removal of public officials in state government, the courts —federal and state—have consistently refused to find a federally protected property right to office. In *Wilson v. North Carolina,* 169 U.S. 586, 18 S.Ct. 435, 42 L.Ed. 865 (1898), the United States Supreme Court first addressed the issue of suspension of a public official. In that case, plaintiff was elected railroad commissioner by the General Assembly of North Carolina of 1893 for a term ending April 1, 1899. In August of 1897, the Governor notified plaintiff that he had been charged with violating the Act establishing the State Railroad Commission. Plaintiff was directed to show cause why, on a named day and at the office of the Governor, he should not be suspended from office. Plaintiff was also directed to be present in person or by counsel on the appointed day to give answer to the charges raised.

On the return date, plaintiff appeared and denied, in a written statement, the various allegations communicated by the Governor. At the meeting, plaintiff demanded that the Governor produce the evidence against him and that he be accorded the opportunity to confront his accusers and cross-examine the witnesses. The Governor refused the demand. Thereafter, the plaintiff was suspended from office pursuant to the statute creating his position.

In a subsequent *quo warranto* proceeding, the North Carolina Supreme Court upheld suspension. The Court held that plaintiff, in taking office, became subject to the applicable act, including those provisions providing for the appointment, suspension, and removal of commission officials. In addressing the purpose of the suspension provision, the State Supreme Court commented:

> The duty of suspension was imposed upon the Governor from the highest

> motives of public policy to prevent the danger to the public interests which might arise from leaving such great powers and responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next biennial session of the legislature, or pending litigation which might be continued for years, would destroy the very object of the law. As the Governor was, therefore, by the very letter and spirit of the law, required to act and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law.

169 U.S. at 592, 18 S.Ct. at 437.

Plaintiff then sought a writ of error from the United States Supreme Court to review the judgment. In considering defendants' motion to dismiss plaintiff's writ for lack of jurisdiction, the Court characterized the ***643** controversy as one relating "exclusively to the title to a state office, created by a statute of the State, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the constitution of the State, excepting in so far [sic] as they may be protected by any provision of the Federal Constitution." *Id.* Since plaintiff had raised a Fourteenth Amendment argument, the Court considered whether the State, through the conduct of its Governor, had deprived plaintiff of a property interest without the process due under the Constitution.

In rejecting the Fourteenth Amendment claim, the Court found plaintiff not to have been deprived, by reason of the Governor's actions, of any right guaranteed to him by the Federal Constitution. Mr. Justice Peckham, speaking for the Court, said: "No ... fundamental rights were involved in the proceedings before the Governor. In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office." *Id.* at 594, 18 S.Ct. at 438. The writ was then dismissed for want of a federal question sufficient to support jurisdiction in the Court:

> [T]he Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.

Id. at 595, 18 S.Ct. at 439.

Two years later, in *Taylor v. Beckham,* 178 U.S. 548, 20 S.Ct. 890, 44 L.Ed. 1187 (1900), the Supreme Court decided a contest over the offices of governor and lieutenant governor of the State of Kentucky. In a *quo warranto* proceeding brought under the statutes of Kentucky, the incumbent officeholders, who were the losers in an election conducted in the State's General Assembly, averred that they had been denied a right to a public office protected by the Fourteenth Amendment. The Supreme Court rejected this contention, stating:

> The view that public office is not property has been generally entertained in this country.
>
> ---
>
> The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. (citations omitted) (underlining added).

178 U.S. at 576–77, 20 S.Ct. at 900. The holding of *Taylor* was subsequently reaffirmed in *Cave v. Missouri ex rel. Newell,* 246 U.S. 650, 38 S.Ct. 334, 62 L.Ed. 921 (1918)

(per curiam) and also in *Snowden v. Hughes,* 321 U.S. 1, 7, 64 S.Ct. 397, 400, 88 L.Ed. 497 (1944). [8]

***644** In *State ex rel. Maxwell v. Crumbaugh,* Tex.Civ.App., 26 Tex. 521, 63 S.W. 925, 927 (1901), the Texas Court of Civil Appeals summarized what may now be deemed the "majority" rule concerning the nature of public office:

> A public office is not "property," within the meaning of the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law." It is a mere public agency, revocable according to the will and appointment of the people, as exercised in the constitution and the laws enacted in conformity therewith. *Moore v. Strickling* (W.Va.) [46 W.Va. 515], 33 S.E. 274, 50 L.R.A. 279. In the case cited the court in its opinion makes ... the following quotation: "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public, benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it."

Similarly, in *Smith v. Thompson,* Iowa Supr., 219 Iowa 888, 258 N.W. 190, 193 (1934), the Court said:

> [I]t must be conceded, as a general rule, that the relation between a public office and the people is not in the nature of a contract, and that such office has in it no element of property. It is a public trust, created for the benefit of the state, and not for the benefit of the individual citizens thereof, and the prospective emoluments of a public office are not property in any sense. [9]

The contrary view, of course, assumes that a public officeholder has a property right in his office which may not be unlawfully taken away or illegally infringed. *See Fair v. Kirk,* N.D.Fla., 317 F.Supp. 12, 14 (1970), *citing Piver v. Stallman,* Fla.App., 198 So.2d 859, 862 (1967).

(3)

[10] Whether in Delaware a public officer has a constitutionally cognizable "property" interest in his elected post is a question of first impression for this Court. Having considered the various federal and state decisions, we today hold that a public officer in this State takes his position under the aegis and for the benefit of the public, subject to suspension or removal by any constitutionally permissible means. The office is in the nature of a public trust created to serve the public interest and not the private advantage of the individual officer. [10] As such, the officer remains in public ***645** service at the sufferance of the people. Removal is delimited, as a general rule, by the Constitution and laws of the State creating and defining his office. However, there is no legitimate claim of "property" within the sense of the Fourteenth Amendment. Looking to the nature of public office, then, we find no infringement of a property right within the intendment of the Due Process Clause. *Roth,* 408 U.S. at 570–71, 92 S.Ct. at 2705.

III

Although we here decide that an officer's interest in his elected post is not "property" in the constitutional sense, we acknowledge the Supreme Court's pronouncement in *Roth* that procedural due process extends to anything to which a person may assert a legitimate claim of entitlement. *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709. Relying thereon, appellant argues that procedural due process required that he not be "summarily removed from office without being afforded an opportunity to present his position in a reasoned way to the Governor, with the assistance of counsel, after being afforded a reasonable opportunity to prepare." Under the present circumstances, however, we are convinced that the procedures urged by appellant were not constitutionally prescribed.

[11] **[12]** **[13]** **[14]** A rudiment of procedural due process is the right to receive notice and to be heard "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965), prior to the deprivation of a protected interest. The length and resultant severity of a deprivation is but one factor to be weighed in determining

the proper form of hearing and "is not decisive of the basic right" to be heard. *Fuentes v. Shevin,* 407 U.S. 67, 86, 92 S.Ct. 1983, 1997, 32 L.Ed.2d 556 (1972). Also, it is established that the Due Process Clause does not require a trial-type hearing in every conceivable instance of governmental impairment of private rights. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). At a minimum, though, due process requires *some* kind of notice and hearing as a preface to curtailment of constitutionally secured property interests. [11]

Recognizing a *de minimis* level of infringement for which the Constitution does not provide redress, "[t]he question remains what procedure is due." *Morrissey v. Brewer, supra* at 481, 92 S.Ct. at 2600. *See Goss v. Lopez,* 419 U.S. 565, 577, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). To begin, the availability of common law remedies for abuse often obviates the need for advance procedural safeguards. *Ingraham v. Wright,* 430 U.S. 651, 675, 97 S.Ct. 1401, 1414, 51 L.Ed.2d 711 (1977). Whether in this case the traditional remedy for premature removal constitutes due process of law hinges on a consideration of three distinct factors: *first,* the private interest that will be affected; *second,* the risk of an erroneous deprivation of such interest and the probable value, if any, of additional or substitute procedural safeguards; and *finally,* the State interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. ***646** *Mathews v. Eldridge, supra,* 424 U.S. at 335–36, 96 S.Ct. at 903.

Appellant's interest here is the continuation in public office pending an evidentiary hearing establishing official misconduct. The purpose of requiring a hearing prior to removal is to avoid "unfair or mistaken" findings of wrongdoing by the individual charged. *Goss v. Lopez,* 419 U.S. at 579, 95 S.Ct. at 738. The "fairness" concern of procedural due process, though, speaks to the risk of error inherent in the *truthfinding* process only. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 170, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951).

[15] It is not contended by appellant that his removal was improper due to "unfairness" in the trial proceeding before the District Court. Appellant instead complains that the Governor deprived him of procedural due process by removing him from office without first having obtained an advisory opinion from this Court as to the legality of the removal. [12] As a result, appellant argues that the absence of procedural due process increased the possibility of wrongful removal and thereby deprived him of his Fourteenth Amendment "property" interest.

The law is to the contrary. *First,* the usual rule has been that where only property rights are involved, "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of the liability is adequate." *Phillips v. Commissioner,* 283 U.S. 589, 596–97, 51 S.Ct. 608, 611, 75 L.Ed. 1289 (1931). *Second,* appellant premises his argument on an issue of law; yet, "due process does not require an evidentiary hearing as a prerequisite to a valid determination of a question of law." *N.L.R.B. v. Sun Drug Co.,* 3rd Cir., 359 F.2d 408, 415 (1966). *Finally,* it has been recognized that either the necessity of prompt action by the State or the impracticality of providing a meaningful pre-deprivation hearing, coupled with the availability of post-deprivation process to assess the legality of the official action, may satisfy the requirements of procedural due process. *See Parratt v. Taylor,* 451 U.S. 527, 541, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981).

Balancing the parties' respective interests against these precedents, we find the State's interest in speedy removal to plainly outweigh any need by appellant for additional procedural safeguards. *See Mathews v. Eldridge, supra.* Appellant had his full "day in court" and was removed under the authority of a valid legislative enactment. Furthermore, sound public policy demands that a State's Chief Executive act expeditiously when commanded to do so by law. "[A] public official found guilty of a prohibited act should not be permitted to continue in office too long thereafter ... because of the vital need for the public trust and confidence in public officers...." *Slawik v. Folsom,* Del.Supr., 410 A.2d at 518.

In our opinion, the possibility of a premature removal and consequent deprivation was eclipsed by the need for immediate action by the State and appellant's right to recover damages in a suit at law after the incident. Any incremental benefit which would flow from the imposition

of a pre-removal hearing could not reasonably justify the additional cost and expenditure of time which the procedures urged by appellant would entail. *Mathews v. Eldridge, supra.* Moreover, appellant did not assert his "property" claim until after his term of office had expired. Hence, any risk of abuse by the State was minimal and was adequately protected by appellant's common-lawwwwwww ***647** w right to an injunction and his right to post-termination judicial review.

For the foregoing reasons, we find appellant's allegation of a denial of his right to procedural due process insufficient to meet the substantiality test of *Hagans v. Lavine.* Having so found, we do not reach appellant's substantive due process claim. *See New Castle-Gunning Bedford Education Ass'n v. Board of Education,* D.Del., 421 F.Supp. 960 (1976). [13]

In the absence of a "substantial" constitutional basis for his § 1983 claim, appellant may not recover counsel fees under § 1988. The § 1988 fee award Order of Superior Court is therefore reversed and set aside.

All Citations

480 A.2d 636

Footnotes

1 *Del.Const.,* Art. XV, § 6 provides:

> "All public officers shall hold their offices on condition that they behave themselves well. The Governor shall remove from office any public officer convicted of misbehavior in office or of any infamous crime."

2 This Court added, "On [imposition of sentence], the plaintiff lost all rights to any salary and benefits of his public office that he may have previously possessed....

> In view of the limited scope of this appeal ... we make no judgment as to the merits of the plaintiff's claim for the period prior to April 21, 1976. We hold, however, that on and after April 21, 1976, the plaintiff was not entitled to any salary and benefits accruing from the office of New Castle County Executive...." 410 A.2d at 514, 518.

3 The Court awarded Slawik's counsel a fee of $2,407.20, plus expenses, representing 40 percent of a settlement of six weeks salary plus benefits, with interest, reached between Slawik and New Castle County officials. The New Castle County defendants were then dismissed from the suit. (After the filing of appellant's petition for fees, His Excellency Pierre S. du Pont, present Governor of Delaware, was substituted for The Honorable Sherman W. Tribbitt, Delaware's Governor at the time appellant brought suit.)

4 Plaintiff seeks recovery of $31,430 for services rendered exclusive of this appeal computed as follows: 227 hours x hourly rate = $12,330 "lodestar" x 2 + $6,770 [hourly rate x time prosecuting fee application before Superior Court].

5 We recognize the inherent power in the courts to allow attorneys' fees in particular situations, *e.g.,* the willful disobedience of a court order "... as part of the fine to be levied on the defendant," *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967); or when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons...." *F.D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc.,* 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974). However, since none of the exceptions are apposite here, we limit our inquiry to the applicability of a fee statute.

6 Slawik's term of office expired two months before filing suit.

7 Correlative to the substantiality doctrine is the rule that the misapplication of State law does not, *per se,* give rise to a § 1983 action and a subsequent claim for attorneys' fees under § 1988. *See Screws v. United States,* 325 U.S. 91, 108, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945); *Derheim v. Hennepin County Welfare Board,* 8th Cir., 688 F.2d 66, 69 (1982). Petitioner must show a violation of a specific constitutional guarantee. Mere incantation of § 1983 is not sufficient to support an award of counsel fees. *See Smith v. Cumberland School Committee,* 1st Cir., 703 F.2d 4 (1983).

8 We cannot agree with appellant that *Wilson* and *Taylor* are no longer viable in light of subsequent developments in due process analysis. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) and their progeny introduced a two-step analysis of due process. In the first step, a court must determine whether a party has a legitimate "property" or "liberty" interest. An analysis of the individual's rights under State law provides the answer to this inquiry. It is the second step—what process is due, assuming a deprivation of an entitlement—that the Court emphasized in the above-mentioned cases. The source

of this inquiry is unquestionably federal law. Thus, contrary to appellant's contention, the rationale underpinning the early decisions is fully consistent with and unaffected by the Court's subsequent due process cases.

9 This rule has been followed most recently in *Tarrant County v. Ashmore,* Tex.Supr., 635 S.W.2d 417 (1982). It also represents the majority position in other jurisdictions. *See, e.g., Burks v. Perk,* 6th Cir., 470 F.2d 163 (1972); *Cosby v. Moore,* Ala.Supr., 65 So.2d 178, 181 (1953); *Katz v. Brandon,* Conn.Supr., 156 Conn. 521, 245 A.2d 579 (1968); *Kirkpatrick v. King,* Ind.Supr., 228 Ind. 236, 91 N.E.2d 785, 788–89 (1950); *State ex rel. Hall v. Vaughn,* Mo.Supr., 483 S.W.2d 396, 397 (1972) (en banc); *Isola v. Borough of Belmar,* N.J.Super., App.Div., 34 N.J.Super. 544, 112 A.2d 738 (1955); *Lanza v. Wagner,* N.Y.Ct.App., 11 N.Y.2d 317, 229 N.Y.S.2d 380, 384, 183 N.E.2d 670, 673 (1962); *Simmons v. Elizabeth City,* N.C.Supr., 197 N.C. 404, 149 S.E. 375, 376 (1929); *Wright v. City of Florence,* S.C.Supr., 197 N.C. 404, 93 S.E.2d 215, 220 (1956). *See also* Annot., 172 A.L.R. 1366 (1948); 99 A.L.R. 336 (1935); 63A Am.Jur.2d *Public Officers and Employees,* § 8 (1984).

10 Today's holding does not suggest that a duly elected officer has no financial or "property" right to be protected against interference by parties not acting under color of statutory or constitutional authority. These rights, however, more properly give rise to claims under State tort law rather than actions under the United States Constitution. *See, e.g., Walton v. Davis,* Ga.Supr., 188 Ga. 56, 2 S.E.2d 603, 604 (1939); *State ex rel. Ryan v. Norby,* Mont.Supr., 118 Mont. 283, 165 P.2d 302, 304 (1946); *Carver v. Wheeler County,* Tex.Civ.App., 200 S.W. 537, 538 (1918).

11 To the extent due process requires some form of pre-termination hearing as a matter of constitutional right, the Supreme Court has held, on only one occasion, that a hearing approximating a judicial trial is necessary. *Goldberg v. Kelly,* 397 U.S. 254, 266–71, 90 S.Ct. 1011, 1019–22, 25 L.Ed.2d 287 (1970) (termination of welfare benefits).

12 Appellant claims a further violation of due process in the Governor's denial of appellant's request for a three-day "grace period" within which to consult his attorney.

13 The Court in *Gunning-Bedford* wrote:

> Because "the constitutional right to 'substantive' due process is no greater than the right to procedural due process," [citations omitted] it follows from the Court's rejection of plaintiffs' procedural due process claim that plaintiffs' substantive due process rights have not been violated. *Id.* at 965.

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TAB 12

Original Image of 92 S.Ct. 2593 (PDF)

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Ex parte Doan, Tex.Crim.App., June 20, 2012

92 S.Ct. 2593
Supreme Court of the United States

John J. MORRISSEY and G. Donald Booher, Petitioners,
v.
Lou B. BREWER, Warden, et al.

No. 71-5103.
|
Argued April 11, 1972.
|
Decided June 29, 1972.

Two cases, in each of which the United States District Court for the Southern District of Iowa denied a petition for writ of habeas corpus for the release of a prisoner following revocation of parole. The Court of Appeals affirmed, 443 F.2d 942. On certiorari, the Supreme Court, Mr. Chief Justice Burger, held that minimal due process requirements for parole revocation include a preliminary inquiry in the nature of a preliminary hearing to determine probable cause, to be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest, and a revocation hearing with respect to which certain specified minimal due process requirements must be observed.

Reversed and remanded.

Mr. Justice Brennan filed a concurring opinion in which Mr. Justice Marshall joined.

Mr. Justice Douglas dissented in part and filed opinion.

West Headnotes (18)

[1] **Federal Courts**
Presentation of Questions Below or on Review;Record;Waiver

Federal Courts
Scope and Extent of Review

United States Supreme Court on certiorari was required to treat case in posture and on record on which state elected to rely in district court and Court of Appeals, but if facts were otherwise, state could so show in district court on remand.

12 Cases that cite this headnote

[2] **Pardon and Parole**
Procedure for Revocation

Revocation of parole is not part of criminal prosecution, and thus full panoply of rights due defendant in such proceeding does not apply to parole revocations. U.S.C.A.Const. Amend. 14.

759 Cases that cite this headnote

[3] **Constitutional Law**
Liberties and liberty interests

Constitutional Law
Benefits, rights and interests in

Whether any procedural protections are due depends not on whether governmental benefit is characterized as "right" or as "privilege" but whether individual will be condemned to suffer grievous loss, and question is not merely weight of individual's interest but whether nature of interest is one within contemplation of "liberty or property" language of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

953 Cases that cite this headnote

[4] **Constitutional Law**
Factors considered;flexibility and balancing

Once it is determined that due process applies, there is flexibility in determining what procedural protections are demanded by particular situation. U.S.C.A.Const. Amend. 14.

1937 Cases that cite this headnote

[5] **Pardon and Parole**
Parole Conditions;Validity

State properly subjects parolee to many restrictions not applicable to other citizens. U.S.C.A.Const. Amend. 14.

136 Cases that cite this headnote

[6] **Constitutional Law**
Parole

What is required by due process for parole revocation is informal hearing structured to assure that finding of parole violation will be based on verified facts and that exercise of discretion will be informed by accurate knowledge of parolee's behavior. U.S.C.A.Const. Amend. 14.

518 Cases that cite this headnote

[7] **Constitutional Law**
Parole

On arrest for parole violation due process requires inquiry in nature of preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that parolee committed acts which would constitute violation of parole conditions; such inquiry should be conducted at or reasonably near place of alleged parole violation or arrest and as promptly as convenient after arrest, by someone, not necessarily judicial officer, not directly involved in the case. U.S.C.A.Const. Amend. 14.

401 Cases that cite this headnote

[8] **Pardon and Parole**
Hearing in general;notice

Parolee should be given written notice of preliminary hearing to determine whether there is probable cause to believe that parolee committed parole violation, and notice should state what parole violations have been alleged. U.S.C.A.Const. Amend. 14.

219 Cases that cite this headnote

[9] **Pardon and Parole**
Preliminary hearing

At preliminary hearing to determine whether there is probable cause to believe that parolee committed parole violation, parolee may appear and speak in his own behalf and may bring letters, documents or individuals who can give relevant information to hearing officer; on request of parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence, but if hearing officer determines that informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination. U.S.C.A.Const. Amend. 14.

1049 Cases that cite this headnote

[10] **Pardon and Parole**
Requisites of hearing

Hearing officer determining whether there is probable cause to believe that parolee committed parole violation has duty of making summary or digest of what occurs at hearing in terms of responses of parolee and substance of documents or evidence given in support of parole revocation and of parolee's position, and officer's determination should be based on information before him, but formalism is not required. U.S.C.A.Const. Amend. 14.

333 Cases that cite this headnote

[11] **Pardon and Parole**
Determination and record;effect

Determination, after preliminary hearing conducted in accordance with due process requirements for parole revocation, that there is probable cause or reasonable grounds to believe that parolee committed acts constituting violation of parole conditions is sufficient to warrant parolee's

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continued detention and return to state correctional institution pending final decision. U.S.C.A.Const. Amend. 14.

1154 Cases that cite this headnote

[12] **Constitutional Law**
Parole

Due process requires that parolee held pending final decision of parole board be given opportunity for hearing within reasonable time after he is taken into custody; minimal requirements include (a) written notice of claimed parole violations; (b) disclosure of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) right to confront and cross-examine adverse witnesses, unless hearing officer specifically finds good cause for not allowing confrontation; (e) "neutral and detached" hearing body such as traditional parole board; (f) written statement by factfinders as to evidence relied on and reasons for revocation. U.S.C.A.Const. Amend. 14.

4010 Cases that cite this headnote

[13] **Pardon and Parole**
Parole Boards or Officers

Members of hearing body making final decision on parole revocation, such as traditional parole board, need not be judicial officers or lawyers. U.S.C.A.Const. Amend. 14.

186 Cases that cite this headnote

[14] **Pardon and Parole**
Time for hearing;speedy trial

Parole revocation hearing must be tendered within reasonable time after parolee is taken into custody. U.S.C.A.Const. Amend. 14.

211 Cases that cite this headnote

[15] **Pardon and Parole**
Evidence and fact questions

Final parole revocation hearing should be flexible enough for consideration of evidence including letters, affidavits, and other material which would not be admissible in adversary criminal trial. U.S.C.A.Const. Amend. 14.

308 Cases that cite this headnote

[16] **Courts**
In general;retroactive or prospective operation

United States Supreme Court decision setting forth minimal due process requirements for parole revocation proceedings is applicable to future revocations of parole. U.S.C.A.Const. Amend. 14.

1030 Cases that cite this headnote

[17] **Pardon and Parole**
Procedure for Revocation

Control over parole revocation proceedings by hearing officers can assure that delaying tactics and other abuses sometimes present in traditional adversary trial situation do not occur. U.S.C.A.Const. Amend. 14.

25 Cases that cite this headnote

[18] **Pardon and Parole**
Hearing in general;notice

Parolee in parole revocation proceeding cannot relitigate issues determined against him in other forums, as in situation presented when revocation is based on conviction of another crime. U.S.C.A.Const. Amend. 14.

103 Cases that cite this headnote

****2595** Syllabus *

***471** Petitioners in these habeas corpus proceedings claimed that their paroles were revoked without a hearing and that they were thereby deprived of due process. The Court of Appeals, in affirming the District Court's denial of relief, reasoned that under controlling authorities

parole is only 'a correctional device authorizing service of sentence outside a penitentiary,' and concluded that a parolee, who is still 'in custody,' is not entitled to a full adversary hearing such as would be mandated in a criminal proceeding. Held:

1. Though parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding, a parolee's liberty involves significant values within the protection of the Due Process Clause of the Fourteenth Amendment, and termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation. Pp. 2599—2601.

2. Due process requires a reasonably prompt informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation or arrest to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. The parolee should receive prior notice of the inquiry, its purpose, and the alleged violations. The parolee may present relevant information and (absent security considerations) question adverse informants. The hearing officer shall digest the evidence on probable cause and state the reasons for holding the parolee for the parole board's decision. Pp. 2601—2603.

3. At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good ****2596** cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement ***472** by the factfinders as to the evidence relied on and reasons for revoking parole. Pp. 2603—2605.

443 F.2d 942, reversed and remanded.

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Opinion

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole.

Petitioner Morrissey was convicted of false drawing or uttering of checks in 1967 pursuant to his guilty plea, and was sentenced to not more than seven years' confinement. He was paroled from the Iowa State Penitentiary in June 1968. Seven months later, at the direction of his parole officer, he was arrested in his home town as a parole violator and incarcerated in the county jail. One week later, after review of the parole officer's written report, the Iowa Board of Parole revoked Morrissey's ***473** parole, and he was returned to the penitentiary located about 100 miles from his home. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report on which the Board of Parole acted shows that petitioner's parole was revoked on the basis of information that he had violated the conditions of parole by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insurance company after a minor accident, obtaining credit under an assumed name, and failing to report his place of residence to his parole officer. The report states that the officer interviewed Morrissey, and that he could not explain why he did not contact his parole officer despite his effort to excuse this on the ground that he had been sick. Further, the report asserts that Morrissey admitted buying the car and obtaining credit under an assumed name, and also admitted being involved in the accident. The parole officer recommended that his parole be revoked because of 'his continual violating of his parole rules.'

The situation as to petitioner Booher is much the name. Pursuant to his guilty plea, Booher was convicted of forgery in 1966 and sentenced to a maximum term of 10 years. He was paroled November 14, 1968. In August 1969, at his parole officer's direction, he was arrested in his home town for a violation of his parole and confined

in the county jail several miles away. On September 13, 1969, on the basis of a written report by his parole officer, the Iowa Board of Parole revoked Booher's parole and Booher was recommitted to the state penitentiary, located about 250 miles from his home, to complete service of his sentence. Petitioner asserts he received no hearing prior to revocation of his parole.

***474** The parole officer's report with respect to Booher recommended that his parole be revoked because he had violated the territorial restrictions of his parole without consent, had obtained a driver's license under an assumed name, operated a motor vehicle without permission, and had violated the employment condition of his parole by failing to keep himself in gailful employment. The report stated that the officer had interviewed Booher and that he had acknowledged to the parole officer that he had left the specified territorial limits and had operated the car and had obtained a license under an assumed name 'knowing that it was wrong.' The report ****2597** further noted that Booher had stated that he had not found employment because he could not find work that would pay him what he wanted—he stated he would not work for $2.25 to $2.75 per hour—and that he had left the area to get work in another city.

After exhausting state remedies, both petitioners filed habeas corpus petitions in the United States District Court for the Southern District of Iowa alleging that they had been denied due process because their paroles had been revoked without a hearing. The State responded by arguing that no hearing was required. The District Court held on the basis of controlling authority that the State's failure to accord a hearing prior to parole revocation did not violate due process. On appeal, the two cases were consolidated.

The Court of Appeals, dividing 4 to 3, held that due process does not require a hearing. The majority recognized that the traditional view of parole as a privilege rather than a vested right is no longer dispositive as to whether due process is applicable; however, on a balancing of the competing interests involved, it concluded that no hearing is required. The court reasoned that parole is only 'a correctional device authorizing service of sentence outside the penitentiary', ***475** 443 F.2d 942, 947; the parolee is still 'in custody.' Accordingly, the Court of Appeals was of the view that prison officials must have large discretion in making revocation determinations, and that courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities. The majority expressed the view that 'non-legal, non-adversary considerations' were often the determinative factors in making a parole revocation decision. It expressed concern that if adversary hearings were required for parole revocation, 'with the full panoply of rights accorded in criminal proceedings,' the function of the parole board as 'an administrative body acting in the role of parens patriae would be aborted', id., at 949, and the board would be more reluctant to grant parole in the first instance—an apprehension that would not be without some basis if the choice were between a full-scale adversary proceeding or no hearing at all. Additionally, the majority reasoned that the parolee has no statutory right to remain on parole. Iowa law provides that a parolee may be returned to the institution at any time. Our holding in Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), was distinguished on the ground that it involved deferred sentencing upon probation revocation, and thus involved a stage of the criminal proceeding, whereas parole revocation was not a stage in the criminal proceeding. The Court of Appeals' decision was consistent with many other decisions on parole revocations.

In their brief in this Court, respondents assert for the first time that petitioners were in fact granted hearings after they were returned to the penitentiary. More generally, respondents say that within two months after the Board revokes an individual's parole and orders him returned to the penitentiary, on the basis of the parole officer's written report it grants the individual a hearing before the Board. At that time, the Board goes over 'each of ***476** the alleged parole violations with the returnee, and he is given an opportunity to orally present his side of the story to the Board.' If the returnee denies the report, it is the practice of the Board to conduct a further investigation before making a final determination either affirming the initial revocation, modifying it, or reversing it.[1] Respondents assert that Morrissey, ****2598** whose parole was revoked on January 31, 1969, was granted a hearing before the Board on February 12, 1969. Booher's parole was revoked on September 13, 1969, and he was granted a hearing on October 14, 1969. At these hearings, respondents tell us —in the briefs—both Morrissey and Booher admitted the violations alleged in the parole violation reports.

Nothing in the record supplied to this Court indicates that respondent claimed, either in the District Court or the Court of Appeals, that petitioners had received hearings

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promptly after their paroles were revoked, or that in such hearing they admitted the violations; that information comes to us only in the respondents' brief here. Further, even the assertions that respondents make here are not based on any public record but on interviews with two of the members of the parole board. In the interview relied on to show that petitioners admitted their violations, the board member did not assert he could remember that both Morrissey and Booher admitted the parole violations with which they were charged. He stated only that, according to his memory, in the previous several years all but three returnees had admitted commission of the parole infractions agreed ***477** and that neither of the petitioners was among the three who denied them.

[1] We must therefore treat this case in the posture and on the record respondents elected to rely on in the District Court and the Court of Appeals. If the facts are otherwise, respondents may make a showing in the District Court that petitioners in fact have admitted the violations charged before a neutral officer.

I

Before reaching the issue of whether due process applies to the parole system, it is important to recall the function of parole in the correctional process.

During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo.L.J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. [2] The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Under some systems, parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner ***478** and makes a prediction whether he is ready to reintegrate into society.

To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they ****2599** are assigned and sometimes they must make periodic written reports of their activities. Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime & Delin. 267, 272—273 (1969).

The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parole and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development. [3]

The enforcement leverage that supports the parole conditions derives from the authority to return the parolee ***479** to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity. [4] The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid 'undesirable' associations or correspondence. Cf. Arciniega v. Freeman, 404 U.S. 4, 92 S.Ct. 22, 30 L.Ed.2d 126 (1971). Yet revocation of

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parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35%—45% of all parolees are subjected to revocation and return to prison. [5] Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State. [6]

Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that ***480** the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not ****2600** purely factual but also predictive and discretionary.

If a parolee is returned to prison, he usually receives no credit for the time 'served' on parole. [7] Thus, the returnee may face a potential of substantial imprisonment.

II

[2] We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

***481** **[3]** **[4]** We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As Mr. Justice Blackmun has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'' Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971). Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. '(C)onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

[5] We turn to an examination of the nature of the interest ***482** of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he

can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. **2601 Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.[8] He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation.[9] The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.

We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

*483 Turning to the question what process is due, we find that the State's interests are several. The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Yet, the State has no interest in revoking parole without some informal procedural guarantees. Although the parolee is often formally described as being 'in custody,' the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody. Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will not result in fewer grants of parole.[10]

This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached *484 the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See **2602 People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 379, and n. 2, 318 N.Y.S.2d 449, 450, and n. 2, 267 N.E.2d 238, 239, and n. 2 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.[11]

[6] Given these factors, most States have recognized that there is no interest on the part of the State in revoking parole without any procedural guarantees at all.[12] What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.

III

We now turn to the nature of the process that is due, bearing in mind that the interest of both State and *485 parolee will be furthered by an effective but informal hearing. In analyzing what is due, we see two important stages in the typical process of parole revocation.

[7] (a) Arrest of Parolee and Preliminary Hearing. The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some

minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. Hyser v. Reed, 115 U.S.App.D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. Cf. Goldberg v. Kelly, 397 U.S., at 267—271, 90 S.Ct. at 1020—1022, 25 L.Ed.2d 287.

In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a ***486** failure for his supervising officer.[13] However, we need make no assumptions one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have ****2603** complete objectivity in evaluating them.[14] Goldberg v. Kelly found it unnecessary to impugn the motives of the case-worker to find a need for an independent decisionmaker to examine the initial decision.

This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In Goldberg, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person other than one initially dealing with the case. It will be sufficient, therefore, in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation. A State could certainly choose some other independent decisionmaker to perform this preliminary function.

[8] **[9]** With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing ***487** will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

[10] **[11]** The hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. As in Goldberg, 'the decision maker should state the reasons for his determination and indicate the evidence he relied on . . .' but it should be remembered that this is not a final determination calling for 'formal findings of fact and conclusions of law.' 397 U.S., at 271, 90 S.Ct., at 1022. No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error.

[12] **[13]** **[14]** **[15]** (b) The Revocation Hearing. There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole ***488** authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation

suggest that the violation does not warrant revocation. The revocation ****2604** hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable.

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds.[15] Our task is limited to deciding the ***489** minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

We do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent.[16]

***490** **[16]** **[17]** **[18]** We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system. Control over the required proceedings by the hearing officers can assure that delaying ****2605** tactics and other abuses sometimes present in the traditional adversary trial situation do not occur. Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.

In the peculiar posture of this case, given the absence of an adequate record, we conclude the ends of justice will be best served by remanding the case to the Court of Appeals for its return of the two consolidated cases to the District Court with directions to make findings on the procedures actually followed by the Parole Board in these two revocations. If it is determined that petitioners admitted parole violations to the Parole Board, as respondents contend, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter. If the procedures followed by the Parole Board are found to meet the standards laid down in this opinion that, too, would dispose of the due process claims for these cases.

We reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice BRENNAN, concurring in the result.

I agree that a parole may not be revoked, consistently with the Due Process Clause, unless the parolee is afforded, first, a preliminary hearing at the time of arrest to determine whether there is probable cause to believe ***491** that he has violated his parole conditions and, second, a final hearing within a reasonable time to determine whether he has, in fact, violated those conditions and whether his parole should be revoked. For each hearing the parolee is entitled to notice of the violations alleged and the evidence against him, opportunity to be heard in person and to present witnesses and documentary evidence, and the right to confront and cross-examine adverse witnesses, unless it is specifically found that a witness would thereby be exposed to a significant risk of harm. Moreover, in each case the decisionmaker must be impartial, there must be some record of the proceedings, and the decisionmaker's conclusions must be set forth in written form indicating both the evidence and the reasons relied upon. Because the Due Process Clause requires these procedures, I agree that the case must be remanded as the Court orders.

The Court, however, states that it does not now decide whether the parolee is also entitled at each hearing to the assistance of retained counsel or of appointed counsel if he is indigent. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), nonetheless plainly dictates that he at least 'must be allowed to retain an attorney if he so desires.' Id., at 270, 90 S.Ct., at 1022. As the Court said there, 'Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-

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examination, and generally safeguard the interests of his client. Id., at 270—271, 90 S.Ct., at 1021—1022. The only question open under our precedents is whether counsel must be furnished the parolee if he is indigent.

Mr. Justice DOUGLAS, dissenting in part.

Each petitioner was sentenced for a term in an Iowa penitentiary for forgery. Somewhat over a year later each was released on parole. About six months later, each was arrested for a parole violation and confined in a local jail. In about a week, the Iowa Board of Parole revoked their ***492** paroles and each was returned to the penitentiary. At no time during any of the proceedings which led to the parole revocations were they granted a hearing or the opportunity to know, question, or challenge any of the facts which formed the basis of their alleged parole violations. Nor were they given an opportunity to present evidence on their own behalf or to confront and cross-examine those on whose testimony their paroles were revoked.

****2606** Each challenged the revocation in the state courts and, obtaining no relief, filed the present petitions in the Federal District Court, which denied relief. Their appeals were consolidated in the Court of Appeals which, sitting en banc, in each case affirmed the District Court by a four-to-three vote, 443 F.2d 942. The cases are here on a petition for a writ of certiorari, 404 U.S. 999, 92 S.Ct. 568, 30 L.Ed.2d 552, which we granted because there is a conflict between the decision below and Hahn v. Burke, 430 F.2d 100, decided by the Court of Appeals for the Seventh Circuit.

Iowa has a board of parole[1] which determines who shall be paroled. Once paroled, a person is under the supervision of the director of the division of corrections of the Department of Social Services, who, in turn, supervises parole agents. Parole agents do not revoke the parole of any person but only recommend that the board of parole revoke it. The Iowa Act provides that each parolee 'shall be subject, at any time, to be taken into custody and returned to the institution' from which he ***493** was paroled.[2] Thus, Iowa requires no notice or hearing to put a parolee back in prison, Curtis v. Bennett, 256 Iowa 1164, 131 N.W.2d 1; and it is urged that since parole, like probation, is only a privilege it may be summarily revoked.[3] See Escoe v. Zerbst, 295 U.S. 490, 492—493, 55 S.Ct. 818, 819, 79 L.Ed. 1566; Ughbanks v. Armstrong, 208 U.S. 481, 28 S.Ct. 372, 52 L.Ed. 582. But we have long discarded the right-privilege distinction. See, e.g., Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534; Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90; Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811; cf. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968).

The Court said in United States v. Wilson, 32 U.S. 150, 7 Pet. 150, 161, that a 'pardon is a deed.' The same can be said of a parole, which when conferred gives the parolee a degree of liberty which is often associated with property interests.

***494** We held in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, that the termination by a State of public assistance payments to a recipient without a prior evidentiary hearing denies him ****2607** procedural due process in violation of the Fourteenth Amendment. Speaking of the termination of welfare benefits we said: 'Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a 'privilege' and not a 'right.'" Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1327, (22 L.Ed.2d 600) (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); or to denial of a tax exemption, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); or to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748—1749, 6 L.Ed.2d 1230 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private

interest that has been affected by governmental action.' See also Hannah v. Larche, 363 U.S. 420, 440, 442, 80 S.Ct. 1502, 1513, 1514, 4 L.Ed.2d 1307 (1960).' 397 U.S., at 262—263, 90 S.Ct., at 1017—1018.

***495** Under modern concepts of penology, paroling prisoners is part of the rehabilitative aim of the correctional philosophy. The objective is to return a prisoner to a full family and community life. See generally Note, Parole Revocation in the Federal System, 56 Geo.L.J. 705 (1968); Note, Parole: A Critique of Its Penal Foundations and Conditions, 38 N.Y.U.L.Rev. 702 (1963); Comment, 72 Yale L.J. 368 (1962); and see Baine v. Beckstead, 10 Utah 2d 4, 347 P.2d 554 (1959). The status he enjoys as a parolee is as important a right as those we reviewed in Goldberg v. Kelly. That status is conditioned upon not engaging in certain activities and perhaps in not leaving a certain area or locality. Violations of conditions of parole may be technical, they may be done unknowingly, they may be fleeting and of no consequence.[4] See, e.g., Arciniega v. Freeman, 404 U.S. 4, 92 S.Ct. 22, 30 L.Ed.2d 126; Cohen, Due Process, Equal Protection and State Parole Revocation Proceedings, 42 U.Colo.L.Rev. 197, 229 (1970). The parolee should, in the concept of fairness implicit in due process, have a chance to explain. Rather, under Iowa's rule revocation proceeds on the ipse dixit of the parole agent; and on his word alone each of these petitioners has already served three additional years in prison.[5] The charges may or may not be true. Words of explanation may be adequate to transform into trivia what looms large in the mind of the parole officer.

****2608** '(T)here is no place in our system of law for reaching ***496** a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.' Kent v. United States, 383 U.S. 541, 554, 86 S.Ct. 1045, 1053, 16 L.Ed.2d 84 (1966).

Parole,[6] while originally conceived as a judicial function, has become largely an administrative matter. The parole boards have broad discretion in formulating and imposing parole conditions. 'Often vague and moralistic, parole conditions may seem oppressive and unfair to the parolee.' R. Dawson, Sentencing 306 (1969). They are drawn 'to cover any contingency that might occur,' id., at 307, and are designed to maximize 'control over the parolee by his parole officer.' Ibid.

Parole is commonly revoked on mere suspicion that the parolee may have committed a crime. Id., at 366—367. Such great control over the parolee vests in a parole officer a broad discretion in revoking parole and also in counseling the parolee—referring him for psychiatric treatment or obtaining the use of specialized therapy for narcotic addicts or alcoholics. Id., at 321. Treatment of the parolee, rather than revocation of his parole, is a common course. Id., at 322—323. Counseling may include extending help to a parolee in finding a job. Id., at 324 et seq.

A parolee, like a prisoner, is a person entitled to constitutional protection, including procedural due process.[7] At the federal level, the construction of regulations of the Federal Parole Board presents federal questions of ***497** which we have taken cognizance. See Arciniega v. Freeman, 404 U.S. 4, 92 S.Ct. 22, 30 L.Ed.2d 126. At the state level, the construction of parole statutes and regulations is for the States alone, save as they implicate the Federal Constitution in which event the Supremacy Clause controls.

It is only procedural due process, required by the Fourteenth Amendment, that concerns us in the present cases. Procedural due process requires the following.

If a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or to a local jail.[8] Rather, notice of the alleged violation should be given to the parolee and a time set for a hearing.[9] The ***498** hearing should not be before the parole officer, as he is the one ****2609** who is making the charge and 'there is inherent danger in combining the functions of judge and advocate.' Jones v. Rivers, 338 F.2d 862, 877 (CA4 1964) (Sobeloff, J., concurring). Moreover, the parolee should be entitled to counsel.[10] See Hewett v. North Carolina, 415 F.2d 1316, 1322—1325 (CA4 1969); People ex rel. Combs v. LaVallee, 29 App.Div.2d 128, 286 N.Y.S.2d 600 (1968); Perry v. Williard, 247 Or. 145, 427 P.2d 1020 (1967). As the Supreme Court of Oregon said in Perry v. Williard, 'A hearing in which counsel is absent or is present only on behalf of one side is inherently unsatisfactory if not unfair. Counsel can see that relevant facts are brought out, vague and insubstantial allegations

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discounted, and irrelevancies eliminated.' ***499** Id., at 148, 427 P.2d, at 1022. Cf. Mempa v. Rhay, 389 U.S. 128, 135, 88 S.Ct. 254, 257, 19 L.Ed.2d 336.

The hearing required is not a grant of the full panoply of rights applicable to a criminal trial. But confrontation with the informer may, as Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, illustrates, be necessary for a fair hearing and the ascertainment of the truth. The hearing is to determine the fact of parole violation. The results of the hearing would go to the parole board—or other authorized state agency—for final action, as would cases which involved voluntary admission of violations.

The rule of law is important in the stability of society. Arbitrary actions in the revocation of paroles can only impede and impair the rehabilitative aspects of modern penology. 'Notice and opportunity for hearing appropriate to the nature of the case,' Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, are the rudiments of due process which restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men. [11]

****2610** I would not prescribe the precise formula for the management of the parole problems. We do not sit as an ombudsman, telling the States the precise procedures they must follow. I would hold that so far as the due process requirements of parole revocation are concerned: [12]

(1) the parole officer—whatever may be his duties under various state statutes—in Iowa appears to be an agent having some of the functions of a prosecutor and ***500** of the police; the parole officer is therefore not qualified as a hearing officer;

(2) the parolee is entitled to a due process notice and a due process hearing of the alleged parole violations including, for example, the opportunity to be confronted by his accusers and to present evidence and argument on his own behalf; and

(3) the parolee is entitled to the freedom granted a parolee until the results of the hearing are known and the parole board—or other authorized state agency—acts. [13]

I would reverse the judgments and remand for further consideration in light of this opinion.

All Citations

408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The hearing required by due process, as defined herein, must be accorded before the effective decision. See Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). Petitioners assert here that only one of the 540 revocations ordered most recently by the Iowa Parole Board was reversed after hearing, Petitioners' Reply Brief 7, suggesting that the hearing may not objectively evaluate the revocation decision.

2 See Warren, Probation in the Federal System of Criminal Justice, 19 Fed.Prob. 3 (Sept. 1955); Annual Report, Ohio Adult Parole Authority 1964/65, pp. 13—14; Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N.Y.U.L.Rev. 702, 705—707 (1963).

3 Note, Observations on the Administration of Parole, 79 Yale L.J. 698, 699—700 (1970).

4 Ibid.

5 President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 62 (1967). The substantial revocation rate indicates that parole administrators often deliberately err on the side of granting parole in borderline cases.

6 See Morrissey v. Brewer, 443 F.2d 942, at 956—954, n. 5 (CA8 1971) (Lay, J., dissenting); Rose v. Haskins, 388 F.2d 91, 104 (CA6 1968) (Celebrezze, J., dissenting).

7 Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime and Delinquency 267, 271 (1969); Note, Parole Revocation in the Federal System, 56 Geo.L.J. 705, 733 (1968).

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8 'It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.' United States ex rel. Bey v. Connecticut Board of Parole, 443 F.2d 1079, 1086 (CA2 1971).

9 See, e.g., Murray v. Page, 429 F.2d 1359 (CA10 1970) (parole revoked after eight years; 15 years remaining on original term).

10 Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J.Crim.L.C. & P.S. 175, 194 (1964) (no decrease in Michigan, which grants extensive rights); Rose v. Haskins, 388 F.2d 91, 102 n. 16 (CA6 1968) (Celebrezze, J., dissenting) (cost of imprisonment so much greater than parole system that procedural requirements will not change economic motivation).

11 See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83, 88 (1967).

12 See n. 15, infra. As one state court has written, 'Before such a determination or finding can be made it appears that the principles of fundamental justice and fairness would afford the parolee a reasonable opportunity to explain away the accusation of a parole violation. (The parolee) . . . is entitled to a conditional liberty and possessed of a right which can be forfeited only by reason of a breach of the conditions of the grant.' Chase v. Page, 456 P.2d 590, 594 (Okl.Crim.App.1969).

13 Note, Observations on the Administration of Parole, 79 Yale L.J. 698, 704—706 (1970) (parole officers in Connecticut adopt role model of social worker rather than an adjunct of police, and exhibit a lack of punitive orientation).

14 This is not an issue limited to bad motivation. 'Parole agents are human, and it is possible that friction between the agent and parolee may have influenced the agent's judgment.' 4 Attorney General's Survey on Release Procedures: Parole 246 (1939).

15 Very few States provide no hearing at all in parole revocations. Thirty States provide in their statutes that a parolee shall receive some type of hearing. See Ala.Code, Tit. 42, s 12 (1959); Alaska Stat. s 33.15.220 (1962); Ariz.Rev.Stat.Ann. s 31—417 (1956); Ark.Stat.Ann. s 43—2810 (Supp.1971); Del.Code Ann., Tit. 11, s 4352 (Supp.1970); Fla.Stat.Ann. s 947.23(1) (Supp.1972); Ga.Code Ann. s 77—519 (Supp.1971); Haw.Rev.Stat. s 353—66 (1968); Idaho Code ss 20—229, 20—229A (Supp.1971); Ill.Ann.Stat., c. 108, ss 204(e), 207 (Supp.1972); Ind.Ann.Stat. s 13—1611 (Supp.1972), IC 1971, 11—1—1—11; Kan.Stat.Ann. s 22—3721 (1971); Ky.Rev.Stat.Ann s 439.330(1)(e) (1962); La.Rev.Stat.Ann. s 15:574.9 (Supp.1972); Me.Rev.Stat.Ann., Tit. 34, s 1675 (Supp.1970—1971); Md.Ann.Code, Art. 41, s 117 (1971); Mich.Comp.Laws s 791.240a, Mich.Stat.Ann. s 28.2310(1) (Supp.1972); Miss.Code Ann. s 4004—13 (1956); Mo.Ann.Stat. s 549.265 (Supp.1971); Mont.Rev.Codes Ann. ss 94—9838, 94—9835 (1969); N.H.Rev.Stat.Ann. s 607:46 (1955); N.M.Stat.Ann. s 41—17—28 (1972); N.Y.Correction Law, McKinney's Consol.Laws, c. 43, s 212, subd. 7 (Supp.1971); N.D.Cent.Code s 12—59—15 (Supp.1971); Pa.Stat.Ann., Tit. 61, s 331.21a(b) (1964); Tenn.Code Ann. s 40—3619 (1955); Vernon's Ann.Tex.Code Crim.Proc., Art. 42.12, s 22 (1966); Vt.Stat.Ann., Tit. 28, s 1081(b) (1970); Wash.Rev.Code ss 9.95.120 through 9.95.126 (Supp.1971); W.Va.Code Ann. s 62—12—19 (1966.) Decisions of state and federal courts have required a number of other States to provide hearings. See Hutchison v. Patterson, 267 F.Supp. 433 (Colo.1967) (approving parole board regulations); United States ex rel. Bey v. Connecticut State Board of Parole, 443 F.2d 1079 (CA2 1971) (requiring counsel to be appointed for revocation hearings); State v. Holmes, 109 N.J.Super. 180, 262 A.2d 725 (1970); Chase v. Page, 456 P.2d 590 (Okl.Crim.App.1969); Bearden v. South Carolina, 443 F.2d 1090 (CA4 1971); Baine v. Beckstead, 10 Utah 2d 4, 347 P.2d 554 (1959); Goolsby v. Gagnon, 322 F.Supp. 460 (ED Wis. 1971). A number of States are affected by no legal requirement to grant any kind of hearing.

16 The Model Penal Code s 305.15(1) (Proposed Official Draft 1962) provides that '(t)he institutional parole staff shall render reasonable aid to the parolee in preparation for the hearing and he shall be permitted to advise with his own legal counsel.'

1 Iowa Code s 247.5 (1971) provides in part:

'The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be a sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole.'

2 Id., s 247.9 provides in part:

'All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled.'

3 'A fundamental problem with (the right-privilege) theory is that probation is now the most frequent penal disposition just as release on parole is the most frequent form of release from an institution. They bear little resemblance to episodic

acts of mercy by a forgiving sovereign. A more accurate view of supervised release is that it is now an integral part of the criminal justice process and shows every sign of increasing popularity. Seen in this light, the question becomes whether legal safeguards should be provided for hundreds of thousands of individuals who daily are processed and regulated by governmental agencies. The system has come to depend on probation and parole as much as do those who are enmeshed in the system. Thus, in dealing with claims raised by offenders, we should make decisions based not on an outworn cliche but on the basis of present-day realities.' F. Cohen, The Legal Challenge to Corrections: Implications for Manpower and Training 32 (Joint Commission on Correctional Manpower and Training 1969).

4 The violations alleged in these cases on which revocation was based are listed by the Court of Appeals, 443 F.2d 942, 943—944, nn. 1 and 2.

For a discussion of the British system that dispenses with precise conditions usually employed here see 120 U.Pa.L.Rev. 282, 311—312 (1971). As to conditions limiting constitutional rights see id., at 313—324, 326—339.

5 As to summary deprivations of individual liberty in Communist nations, see, e.g., Shao-chuan Leng, Justice In Communist China 34 (1967); 1 P. Tang, Communist China Today 271 (2d ed. 1961); J. Hazard, Communists and Their Law 121—126 (1969).

6 'Parole is used after a sentence has been imposed while probation is usually granted in lieu of a prison term.' R. Clegg, Probation and Parole 22 (1964). See Baine v. Beckstead, 10 Utah 2d 4, 9, 347 P.2d 554, 558; People ex rel. Combs v. LaVallee, 29 App.Div.2d 128, 131, 286 N.Y.S.2d 600, 603.

7 See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83, 84 (1967); 120 U.Pa.L.Rev. 282, 348—358 (1971).

8 As Judge Skelly Wright said in Hyser v. Reed, 115 U.S.App.D.C. 254, 291, 318 F.2d 225, 262 (1963) (concurring in part and dissenting in part):

'Where serious violations of parole have been committed, the parolee will have been arrested by local or federal authorities on charges stemming from those violations. Where the violation of parole is not serious, no reason appears why he should be incarcerated before hearing. If, of course, the parolee willfully fails to appear for his hearing, this in itself would justify issuance of the warrant.' Accord, In re Tucker, 5 Cal.3d 171, 199—200, 95 Cal.Rptr. 761, 780, 486 P.2d 657, 676 (1971) (Tobriner, J., concurring and dissenting).

9 As we said in another connection in Greene v. McElroy, 360 U.S. 474, 496—497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377:

'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative and regulatory actions were under scrutiny.' (Citations omitted.)

10 American Bar Association Project on Standards for Criminal Justice, Providing Defense Services 43 (Approved Draft 1968); Model Penal Code s 301.4, s 305.15(1) (Proposed Official Draft 1962); R. Dawson, Sentencing (1969). For the experience of Michigan in giving hearings to parolees see id., at 355. In Michigan, it is estimated that only one out of six parole violators retains counsel. One who cannot afford counsel is said to be protected by the hearing members of the board. Id., at 354. The number who ask for public hearings are typically five or six a year, the largest in a single year being 10. Michigan has had this law since 1937. Id., at 355. But the Michigan experience may not be typical, for a parole violator is picked up and returned at once to the institution from which he was paroled. Id., at 352—353.

By way of contrast, parole revocation hearings in California are secretive affairs conducted behind closed doors and with no written record of the proceedings and in which the parolee is denied the assistance of counsel and the opportunity to present witnesses on his behalf. Van Dyke, Parole Revocation Hearings in California: The Right to Counsel, 59 Calif.L.Rev. 1215 (1971). See also Note, 56 Geo.L.J. 705 (1968) (federal parole revocation procedures).

11 The Brief of the American Civil Liberties Union, amicus curiae contains in Appendix A the States that by statute or decision require some form of hearing before parole is revoked and those that do not. All but nine States now hold hearings on revocation of probation and parole, some with trial-type rights including representation by counsel.

12 We except of course the commission of another offense which from the initial step to the end is governed by the normal rules of criminal procedure.

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13 The American Correctional Association states in its Manual of Correctional Standards 279 (3d ed. 1966) that:
'To an even greater extent than in the case of imprisonment, probation and parole practice is determined by an administrative discretion that is largely uncontrolled by legal standards, protections, or remedies. Until statutory and case law are more fully developed, it is vitally important within all of the correctional fields that there should be established and maintained reasonable norms and remedies against the sorts of abuses that are likely to develop where men have great power over their fellows and where relationships may become both mechanical and arbitrary.'
And it provides for parole revocation hearings:
'As soon as practicable after causing an alleged violator (to be) taken into custody on the basis of a parole board warrant, the prisoner should be given an opportunity to appear before the board or its representative. The prisoner should be made fully aware of the reasons for the warrant, and given ample opportunity to refute the charges placed against him or to comment as to extenuating circumstances. The hearing should be the basis for consideration of possible reinstatement to parole supervision on the basis of the findings of fact or of reparole where it appears that further incarceration would serve no useful purpose.' Id., at 130.
The American Bar Association states at p. 10 of its brief amicus in the present cases that it is 'in full agreement with the American Correctional Association in this instance. The position that a hearing is to be afforded on parole revocation is consistent with several sets of criminal justice standards formally approved by the Association through its House of Delegates.'

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TAB 13

2014 WL 5037158 (Del.P.S.C.)
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IN THE MATTER OF THE APPLICATION OF CHESAPEAKE UTILITIES CORPORATION FOR APPROVAL OF A CHANGE IN ITS GAS SALES SERVICE RATES ("GSR") TO BE EFFECTIVE NOVEMBER 1, 2013 (FILED SEPTEMBER 3, 2013; AMENDED FEBRUARY 19, 2014)

PSC Docket No. 13-351F

Delaware Public Service Commission

September 30, 2014
ORDER NO. 8641

BY THE COMMISSION:Dallas Winslow, ChairJoann T. Conaway, CommissionerHarold B. Gray, CommissionerJeffrey J. Clark, CommissionerJaymes B. Lester, Commissioner

*1 **AND NOW,** this 30th day of September, 2014;

WHEREAS, the Commission has received and considered the Findings and Recommendations of the Hearing Examiner issued in the above-captioned docket, submitted after a duly-noticed public evidentiary hearing, the original of which is attached hereto as **Attachment "A";**

AND WHEREAS, the Hearing Examiner recommends that the Gas Sales Service Rates ("GSR") proposed by Chesapeake Utilities Corporation in its September 3, 2013 Application and February 19, 2014 Amended Application be approved as just and reasonable for services rendered on and after November 1, 2013, and April 1, 2014 respectively;

AND WHEREAS, the Hearing Examiner recommends that the Proposed Settlement Agreement dated June 11, 2014, which is endorsed by all the parties, the Public Version of which is attached to the original hereof as **Attachment "B",** be approved as reasonable and in the public interest;

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NO FEWER THAN THREE COMMISSIONERS:

1. The Commission hereby adopts the Findings and Recommendations of the Hearing Examiner, appended to the original hereof as **Attachment "A".**

2. The Commission approves the Proposed Settlement, appended to the original hereof as **Attachment "B",** and Chesapeake Utilities Corporation's ("Chesapeake") proposed rates as set forth in the Application and the Amended Application.

3. Chesapeake's proposed rates per Ccf are approved as just and reasonable rates, effective as set forth below:
Rates Effective for Service Rendered on and after November 1, 2013, through and including March 31, 2014

Service:	Rates:
RS, GS, MVS, LVS	$1.008 per Ccf
GLR, GLO	$0.536 per Ccf

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HLFS	$0.819 per Ccf
Firm Balancing Rate	$0.072 per Ccf for LVS
Firm Balancing Rate	$0.015 per Ccf for HLFS
ITS Balancing Rate	$0.001 per Ccf

Approved Rates for usage on or after April 1, 2014, and until changed by further order of the Commission:

Service:	Rates:
RS, GS, MVS, LVS	$1.132 per Ccf
GLR, GLO	$0.656 per Ccf
HLFS	$0.941 per Ccf
Firm Balancing Rate	$0.072 per Ccf for LVS
Firm Balance Rate	$0.015 per Ccf for HLFS
ITS Balancing Rate	$0.001 per Ccf

*2 4. All Tariff revisions filed by Chesapeake with this Commission on September 3, 2013, and February 19, 2014, respectively, and the revised rates and charges therein are approved and shall be effective for gas service rendered on or after November 1, 2013, at the rates and during the periods set forth above until further Order of the Commission. No later than two business days from the date of this Order, Chesapeake shall file revised Tariffs which comply with this Order.

5. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

ATTEST:

Alisa Carrow Bentley

Secretary

ATTACHMENT "A"

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED: August 28, 2014

R. Campbell Hay

HEARING EXAMINER

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R. Campbell Hay, duly appointed Hearing Examiner in this Docket pursuant to 26 Del. C. §502 and 29 Del. C. ch. 101 and by Commission Order No. 8492 dated December 5, 2013, reports to the Commission as follows:

I. APPEARANCES

On behalf of the Applicant, Chesapeake Utilities Corporation ("Chesapeake" or ""the Company"):

By: WILLIAM A. DENMAN, ESQ., PARKOWSKI, GUERKE AND SWAYZE, P.A.

On behalf of the Public Service Commission Staff ("Staff"):

By: JULIE M. DONOGHUE, ESQ., DEPUTY ATTORNEY GENERAL

On behalf of the Division of the Public Advocate ("DPA"):

By: REGINA A. IORII, ESQ., DEPUTY ATTORNEY GENERAL

II. BACKGROUND

1. On September 3, 2013, Chesapeake filed with the Delaware Public Service Commission ("the Commission") an application ("Application") seeking approval to change its GSR Rates effective on November 1, 2013 as follows: (1) increase the Company's current GSR rate from $0.997 per Ccf to $1.008 per Ccf for customers served under rate schedules RS-1, RS-2, GS, MVS and LVS; (2) increase the Company's current GSR rate from $0.519 per Ccf to $0.536 per Ccf for customers served under rate schedules GLR and GLO; (3) increase the Company's current GSR rate from $0.817 per Ccf to $0.819 per Ccf for customers served under rate schedule HLFS; (4) increase the Company's firm balancing rate for transportation customers served under rate schedule LVS from $0.063 per Ccf to $0.072 per Ccf; and (5) decrease the Company's firm balancing rate for transportation customers served under rate schedule HLFS from $0.022 per Ccf to $0.015 per Ccf; and (6) maintain the Company's interruptible balancing rate for transportation customers served under rate schedule ITS at $0.001 per Ccf.

***3** 2. Comparing the proposed rates in the Application to the rates approved in the last GSR filing, an average RS-2 customer using 700 Ccf per year will experience an annual increase of approximately 0.7% or $.64 per month. During the winter heating season, a typical RS-2 customer on Chesapeake's system using 120 Ccf per month will experience an increase of approximately 0.8% or $1.32 per winter month.

3. With its Application, Chesapeake also submitted prefiled testimony from two witnesses, both employed by Chesapeake: (1) Sarah E. Hardy, Regulatory Analyst II (Exh. 3) and (2) Marie E. Kozel, Gas Supply Analyst II (Exh. 4). [1]

4. In Order No. 8458 dated September 26, 2013, the Commission authorized the proposed GSR rates, firm balancing rates and interruptible balancing rate and other revisions to the Company's tariff to become effective for usage on or after November 1, 2013, subject to refund and pending further review and final decision by the Commission, and designated Mark Lawrence as Hearing Examiner. By Order No. 8492 dated December 5, 2013, the Commission reassigned this case to me as the Hearing Examiner.

5. On September 18, 2013, the DPA exercised its statutory right of intervention.

6. Notice of the filing of the Application and public comment session was published in the News Journal and the Delaware State News on October 7, 2013 and October 8, 2013 respectively. (Exh. 1).

7. A duly noticed public comment session (Exh. 1) was held at 7:00 p.m. on November 19, 2013 in the Delaware Public Service Commission Hearing Room located at 861 Silver Lake Boulevard, Cannon Building, Dover, Delaware. No members of the public attended. In addition, the Commission received no written comments.

8. On February 19, 2014, Chesapeake filed an amended or "out-of-cycle" application (the "Amended Application") seeking to make further changes to its GSR rates to be effective for service rendered on and after April 1, 2014. The stated reason for this filing was an increase in the projected "under-collection" of gas costs which exceeded the 6% tariff threshold. Notice of the filing of the Amended Application was published in the News Journal and the Delaware State News on March 7, 2014. (Exh. 1) In the Amended Application, Chesapeake proposed to (1) increase the Company's GSR rate from $1.008 per Ccf to $1.132 per Ccf for customers served under rate schedules RS-1, RS-2, GS, MVS and LVS; (2) increase the Company's GSR rate from $0.536 per Ccf to $0.656 per Ccf for customers served under rate schedules GLR and GLO; and (3) increase the Company's GSR rate from $0.819 per Ccf to $0.941 per Ccf for customers served under rate schedule HLFS. The Company's Amended Application did not request any change in the balancing rates that were proposed in its initial Application.

*4 9. By Order No. 8520 dated March 4, 2014, the Commission authorized the Company to place the amended rates into effect for service rendered on and after April 1, 2014, subject to refund.

10. With its Amended Application (Exh. 5), the Company filed the supplemental testimony of Sarah E. Hardy (Exh. 6).

11. Ms. Hardy sponsored the Company's schedules filed in both applications. (Exh. 3 at 4; Exh. 6 at 2). Ms. Hardy testified to the mechanics of the three separate GSR rates, the development of the firm and interruptible sales volumes and total system requirements, and the development of the lost and unaccounted for gas ("LAUF") volumes. She also provided support for the overall calculation of the proposed three separate GSR rates to be effective with service rendered on and after November 1, 2013 and April 1, 2014, as well as the mechanics of the proposed balancing rates for transportation service under the Large Volume Service ("LVS"), High Load Factor Service ("HLFS") and Interruptible Service rates. She explained the impact of the proposed GSR rates on an average residential customer's bill and ensured compliance with the gas cost provisions required by previous Commission orders. (Exh. 3 at 5-16; Exh. 6 at 3-12).

12. Ms. Hardy explained that the three separate GSR rates were developed in accordance with the approved gas cost recovery mechanism as contained in the Company's natural gas tariff on Sheet Nos. 42 through 42.3. (Exh. 3 at 4; Exh. 6 at 6).

13. Ms. Hardy described how she calculated the proposed GSR rate levels based on the estimated purchased gas costs and estimated sales volumes for the twelve months ending October 31, 2014. (Exh. 3 at 5; Exh. 6 at 4).

14. Ms. Hardy stated the reason the GSR rates are changing from last year's GSR filing is because the variable or commodity gas costs are anticipated to increase by $4,234,044. (Exh. 6 at 4) These costs are increasing primarily due to

the projected cost of flowing commodity gas for the upcoming year. (Id. at 5). The fixed costs are anticipated to increase by $755,282, primarily due to the capacity entitlements associated with the Texas Eastern Transmission TEAM 2012 project. (Id. at 6)

15. Ms. Kozel testified on the support documentation for the gas costs used in the calculation of the Delaware Division's GSR rates in this Application and discussed the Company's gas supply and procurement activities as required by PSC Order No. 4767 in PSC Docket No. 97-294F. (Exh. 4 at 1-9).

16. Jason R. Smith, Case Manager for Staff, filed testimony addressing the justness and reasonableness of the proposed GSR rates and the Company's compliance with the Settlement Agreement approved in PSC Order No. 8430 in PSC Docket No. 12-450F. (Exh. 7A (confidential version) and Exh. 7B (public version)).

*5 17. Mr. Smith testified that he reviewed and verified the mathematical accuracy of the Company's schedules and calculations provided in both applications, and he determined that they conformed to the Company's GSR tariff. Therefore, he recommended that the Commission approve the GSR and firm balancing rates as submitted by the Company in the Amended Application because the rates were just and reasonable and in the public interest. (Exh. 7B at 7).

18. Mr. Smith summarized the provisions of the Settlement Agreements approved in prior Orders and provided his opinion that the Company was in compliance with those provisions. (Exh. 7B at 7-12). Mr. Smith also reviewed the Company's proposed modifications to its hedging plan and supported the proposed changes. (Exh. 7A at 12-13).

19. Jerome D. Mierzwa filed testimony on behalf of Staff and the Public Advocate addressing the reasonableness of the Company's gas procurement practices and policies and other issues raised by the Application. Mr. Mierzwa reviewed his concerns regarding how the costs of upstream pipeline capacity are allocated. While noting that this issue is being addressed in PSC Docket No. 13-383, he stated that if the issue is not resolved in that docket, the Company should release any upstream capacity not required to serve firm sales customers on a "non-recallable long-term basis." (Exh. 8 at 7-8).

III. PROPOSED SETTLEMENT AGREEMENT

20. On June 19, 2014, Chesapeake, Staff and the DPA presented me with a fully-executed Settlement Agreement (Exh. 9A-Confidential Version and Exh. 9B-Public Version) resolving the issues in this docket. The signatories agreed to the following:

• The proposed GSR rates are just and reasonable and should be approved; (Exh. 9A at 3)

• Chesapeake shall be allowed to continue to recover the TETCO capacity costs and Eastern Shore capacity costs associated with the TETCO inter-connect. With respect to any capacity release revenues received outside of an Asset Management Agreement ("AMA") associated with this capacity, one hundred percent (100%) of any capacity release revenues associated with the release of this capacity will be credited to the GSR; (Id. at 4)

• The Company agrees to continue to utilize its annual Supply Plan as a mechanism by which to notify the Settling Parties of the need for all new capacity additions. When the Company needs to acquire capacity in any given year that was not previously identified in its most recent Supply Plan as being required in that year, the Company agrees to continue to provide the information agreed to in the Settlement Agreements in PSC Docket Nos. 08-296F and 09-398F regarding Eastern Shore capacity acquisitions and agrees to provide this information for potential upstream capacity additions as well. The Company will provide this information for both Eastern Shore and upstream capacity on a confidential basis only. The Company will continue to review its design day forecasting methodology each year at the time the Supply Plan is developed to ensure its validity. The Company will also review and comment on any alternative design day forecasting

methodology proposals submitted by either the Staff or the DPA during the course of the Company's Supply Plan; (Id. at 3-4)

*6 • The Company's AMA that expired on March 31, 2013 has been replaced with a new AMA with a different Asset Manager. Under the new AMA the Company will receive certain fixed margins on a monthly basis. The Settling Parties agree that with respect to said fixed margins, the Company shall continue to be allowed to retain seven and one half percent (7.5%) of the fixed margins, with the remaining ninety-two and one half percent (92.5%) being credited to ratepayers in the Company's GSR rates; (Id. at 4)

• Chesapeake agrees to provide the Staff and DPA with periodic updates regarding any intervention by the Company in FERC proceedings and the actions taken by the Company on behalf of the Company's ratepayers, including, but not limited to, an enumeration of each issue and the position that the Company is actively pursuing. The Company will provide such periodic updates to the Staff and DPA subject to the Company's ability to provide this information on a confidential basis when appropriate; (Id. at 5)and

• As agreed in prior dockets, the Company will continue with the following practices: (a) the Company will notify the parties of any supplier refunds that may impact the GSR charges; (b) the Company will continue to include in future GSR applications an update on steps taken to mitigate the effects of changes in gas costs; (c) the Company will provide information on the total sales volumes, costs, and margins by month for Interruptible Gas Transportation sales as part of its GSR applications; and (d) the Company will calculate the impact on its proposed GSR rates had a thirty-year average degree day been used and provide such information to the Staff and DPA as part of the discovery process, when and if requested. (Id.)

• The Company will continue to monitor the level of its under-collection balance to determine whether a change in the methodology used to calculate the GSR rate is necessary. (Id. at 3)

• The Company will be allowed to implement the proposed changes to the Company's Hedging Plan, as described on Exhibit A attached to the confidential version of the Settlement Agreement. (Id. at 10)

(Exh. 9A and 9B)

21. At the evidentiary hearing, Sarah Hardy presented the testimony of the Company. After reviewing the terms and conditions of the Proposed Settlement (Tr. 37-40), Ms. Hardy stated that she believed the terms and conditions of the Proposed Settlement were just and reasonable. (Tr. 40).

22. The DPA presented the testimony of Andrea B. Maucher, a Public Utilities Analyst. (Tr. 41). Ms. Maucher adopted Mr. Mierzwa's prefiled testimony as her own. She further testified that she believed the settlement would result in just and reasonable rates for residential and small commercial consumers. (Tr. 43). She testified that the proposed rates had been calculated correctly and in accordance with the Company's tariff. (Tr. 44). After describing briefly the other terms and conditions of the Proposed Settlement (Tr. 46-48), Ms. Maucher concluded that the Proposed Settlement successfully resolved the concerns raised by the parties. (Tr. 48). Accordingly, she concluded that the Proposed Settlement resulted in just and reasonable rates and was in the public interest, and recommended its approval. (Tr. 49).

*7 23. Staff proffered Mr. Smith as its witness. Mr. Smith concluded that the proposed rates were calculated correctly in accordance with the Company's tariff, and therefore Staff did not take issue with the Company's proposed rate changes. (Tr. 51, 53). Mr. Smith discussed briefly the Staff's concern regarding how the Company allocates its upstream capacity costs, but noted that this issue is being addressed in PSC Docket 13-383. (Tr. 52). Mr. Smith also expressed concern over the Company's growing undercollection balance, and noted that this concern was addressed in paragraph 11 of the Proposed Settlement, which would require the Company to monitor this balance to determine if a change in

the methodology used to calculate the GSR would be appropriate. (Tr. 52). Mr. Smith concluded that the Proposed Settlement resulted in just and reasonable rates and was in the public interest because it would avoid unnecessary additional administrative costs and was entered into despite differing viewpoints among the parties. (Tr. 53-54)

IV. DISCUSSION AND RECOMMENDATIONS

24. The evidentiary hearing was held on Thursday, July 10, 2014, beginning at 10:00 a.m. The record, as developed at the evidentiary hearing, consists of a verbatim transcript of fifty eight (58) pages and eleven (11) hearing exhibits. The parties stipulated to the admissibility of all hearing exhibits. (Tr.31).

25. Pursuant to the Commission's instructions, I hereby submit for consideration these proposed Findings and Recommendations.

26. The Commission has jurisdiction in this matter pursuant to 26 *Del. C.* §303(b), §304 and §306.

27. After having reviewed the entire record, I conclude that the Settlement Agreement is in the public interest, results in just and reasonable rates, and should be approved.

28. First, 26 *Del. C.* §512(a) provides that "insofar as practicable, the Commission shall encourage the resolution of matters brought before it through stipulations and settlements." This reflects a legislative intent that the Commission welcomes settlements of part or all of a case.

29. Second, I note that each of the Settlement's signatories represents a different constituency and comes to the case with different interests. Chesapeake's interest is in recovering all of its actual gas costs (as 26 *Del. C.* §303(b) permits). Staff is required to balance the utility's and ratepayers' interests. And 29 *Del. C.* §8716(e)(2) charges the DPA with advocating the lowest reasonable rates for consumers consistent with maintaining adequate utility service and an equitable distribution of rates among all the utility's customer classes. Despite these disparate interests and responsibilities, the parties have reached agreement. This is a significant factor weighing in favor of approving the Settlement.

***8** 30. Third, the witnesses for both Staff and the DPA testified that they reviewed Chesapeake's forecasts, methodologies and calculations of the proposed GSR rates and found them to be in compliance with previous Commission Orders as well as reasonable and accurate. Therefore, the proposed GSR rates were not challenged.

31. Fourth, the Settlement is in the public interest because it avoids the cost of a litigated evidentiary hearing.

32. For the foregoing reasons, I conclude that the Settlement Agreement, the Public Version of which is attached hereto as **Exhibit "1"**, results in just and reasonable rates and is in the public interest, and recommend that the Commission approve it. I attach a form of Order implementing my recommendations hereto as **Exhibit "2"**.

Respectfully Submitted,

<<Signature>>

Hearing Examiner

Date: August 28, 2014

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ATTACHMENT "B"

PROPOSED SETTLEMENT

On this 11th day of June, 2014, Chesapeake Utilities Corporation, a Delaware corporation (hereinafter "Chesapeake" or the "Company"), the Delaware Public Service Commission Staff ("Staff"), and the Division of the Public Advocate (the "DPA") (all of whom together are the "Settling Parties") hereby propose a settlement that, in the Settling Parties' view, appropriately resolves all issues raised in this proceeding.

I. INTRODUCTION

1. On September 3, 2013, pursuant to 26 *Del. C.* §§ 303(b), 304, and 306, Chesapeake filed with the Delaware Public Service Commission (the ""Commission") an application (the "Application") for a change in its Gas Sales Service ("GSR") rates to be effective for service rendered on and after November 1, 2013. By Commission Order No. 8458 dated September 26, 2013, the Commission allowed Chesapeake's proposed rates to go into effect on November 1, 2013, on a temporary basis, and subject to refund, pending a full evidentiary hearing and a final decision of the Commission.

2. On February 19, 2014, Chesapeake filed an amended, or "out-of-cycle," application (the "Amended Application") seeking to make further changes to its GSR rates to be effective for service rendered on and after April 1, 2014. The stated reason for the "out-of-cycle" filing was an increase in the projected ""under-collection" of gas costs which exceeded the 6% tariff threshold. This under-collection arose because natural gas commodity prices significantly increased since the Company filed its GSR application on September 3, 2013. When the Company filed the Amended Application, its under-collection balance was estimated to be $5,667,285, or 13.35% of the projected cost of gas.

3. The DPA intervened in this docket on September 18, 2013. On May 1, 2014, the Staff filed both separate testimony, and, along with the DPA, joint testimony.

***9** 4. In their pre-filed testimony, neither Staff nor the DPA took issue with any of the Company's proposed rate changes as reflected in the Company's original Application and Amended Application. Accordingly, Chesapeake did not file any rebuttal testimony in this proceeding.

5. During the course of this proceeding, the Settling Parties have conducted substantial written discovery in the form of data requests.

6. Notice of the filing of the Application was published in *The News Journal* and the *Delaware State News* on October 7, 2013, and October 8, 2013, respectively. Notice of the Filing of the Amended Application was published in *The News Journal* and the *Delaware State News* on March 7, 2014.

7. As required under the settlement agreement in PSC Docket No. 06-287F, on September 19, 2013 Chesapeake submitted its confidential annual report of all hedging activities and transactions. In this report, the Company proposed certain changes to its Hedging Plan. The details of the revised Hedging Plan are outlined on the attached **Exhibit A**.

8. The Settling Parties have conferred in an effort to resolve all cost recovery and reporting issues raised in this proceeding. The Settling Parties acknowledge that the parties may differ as to the proper resolution of many of these issues. Notwithstanding these differences, the Settling Parties have agreed to enter into this Proposed Settlement on the terms and conditions contained herein because they believe that this Proposed Settlement will serve the interest of the public and the Company, while meeting the statutory requirement that rates be both just and reasonable. The Settling Parties agree that subject to the approval of the Hearing Examiner, the terms and conditions of this Proposed Settlement will be presented to the Commission for the Commission's approval.

II. SETTLEMENT PROVISIONS

9. The Settling Parties agree that the Company's proposed rates as set forth in the Company's Application and Amended Application are just and reasonable. Accordingly, the Settling Parties recommend to the Hearing Examiner and the Commission that the rates set forth on the attached **Exhibit B** be approved as just and reasonable for the periods set forth on **Exhibit B**.

10. The Settling Parties agree that the proposed changes to the Company's Hedging Plan, as described on the attached **Exhibit A,** are acceptable.

11. The Company agrees to monitor the level of its under--collection balance to determine whether a change in the methodology used to calculate its GSR rate is necessary.

12. The Company agrees to continue to utilize its annual Long-Term Supply and Demand Strategic Plan ("Supply Plan") as a mechanism by which to notify the Settling Parties of the need for all new capacity additions. When the Company needs to acquire capacity that was not previously identified in its most recent Supply Plan, the Company agrees to continue to provide the information agreed to in the Settlement Agreements to PSC Docket Nos. 08-296F and 09-398F regarding Eastern Shore Natural Gas Company ("ESNG") capacity acquisitions and agrees to begin providing this information for potential upstream capacity additions as well. The Company will provide this information for both ESNG and upstream capacity on a confidential basis only. The Company will also continue to review its design day forecasting methodology each year at the time the Supply Plan is developed to ensure its validity. The Company will also review and comment on any alternative design day forecasting methodology proposals submitted by either Staff or the DPA during the course of any review of the Company's Supply Plan.

***10** 13. The Company's Asset Management Agreement that expired on March 31, 2013 has been replaced with a new Asset Management Agreement with a different Asset Manager. Under the new Asset Management Agreement ("AMA"), the Company will receive certain fixed margins on a monthly basis. The Settling Parties agree that with respect to said fixed margins, the Company shall be allowed to continue to retain seven and one half percent (7.5%) of the fixed margins, with the remaining ninety-two and one half percent (92.5%) being credited to ratepayers in the Company's GSR rates.

14. Chesapeake shall be allowed to continue to recover the Texas Eastern capacity costs and the ESNG capacity costs associated with the Texas Eastern inter-connect. With respect to any capacity release revenues received outside of an Asset Management Agreement associated with this capacity, one hundred percent (100%) of any capacity release revenues associated with the release of this capacity will be credited to the GSR.

15. Chesapeake agrees to continue to provide Staff and DPA with periodic updates regarding any intervention by the Company in Federal Energy Regulatory Commission ("FERC") proceedings and the actions taken by the Company on behalf of the Company's ratepayers, including, but not limited to, an enumeration of each issue and the position that the Company is actively pursuing. The Company will provide such periodic updates to Staff and DPA subject to the Company's ability to provide this information on a confidential basis when appropriate.

16. As agreed in prior dockets, the Company will continue with the following practices: (a) the Company will notify Staff and the DPA of any supplier refunds that may impact the GSR charges; (b) the Company will continue to include in future GSR applications an update on steps taken to mitigate the effects of changes in gas costs; (c) the Company will provide information on the total sales volumes, costs, and margins by month for Interruptible Gas Transportation sales as part of its GSR applications; and (d) the Company will calculate the impact on its proposed GSR rates had a thirty-year average degree days been used and provide such information as part of the discovery process, when and if requested.

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17. In Chesapeake's 2013 GSR filing (PSC Docket No. 12-450F), Staff had argued that it was unreasonable to require firm sales customers to pay for upstream capacity in excess of their requirements. As part of the Settlement Agreement in that docket,[2] the Parties agreed that Chesapeake would file an alternative proposal to the allocation of the cost of upstream pipeline capacity. Chesapeake timely filed its proposal, which was docketed as PSC Docket No. 13-383. Because that docket is addressing the issue of upstream capacity costs, this Settlement Agreement does not resolve any such related issues.

III. STANDARD PROVISIONS AND RESERVATIONS

***11** 18. The provisions of this Proposed Settlement are not severable except by written agreement of the Settling Parties.

19. This Proposed Settlement represents a compromise for the purposes of settlement and shall not be regarded as a precedent with respect to any rate making or any other principle in any future case or in any existing proceeding, except that, consistent with and subject to the provisos expressly set forth below, this Proposed Settlement shall preclude any Settling Party from taking a contrary position with respect to issues specifically addressed and resolved herein in proceedings involving the review of this Proposed Settlement and any appeals related to this Proposed Settlement. No party to this Proposed Settlement necessarily agrees or disagrees with the treatment of any particular item, any procedure followed, or the resolution of any particular issue addressed in this Proposed Settlement other than as specified herein, except that each Settling Party agrees that the Proposed Settlement may be submitted to the Commission for a determination that it is in the public interest and that no Settling Party will oppose such a determination. Except as expressly set forth below, none of the Settling Parties waives any rights it may have to take any position in future proceedings regarding the issues in this proceeding, including positions contrary to positions taken herein or previously taken.

20. If this Proposed Settlement does not become final, either because it is not approved by the Commission or because it is the subject of a successful appeal and remand, each of the Settling Parties reserves its respective rights to submit additional testimony, file briefs, or otherwise take positions as it deems appropriate in its sole discretion to litigate the issues in this proceeding.

21. This Proposed Settlement will become effective upon the Commission's issuance of a final order approving this Proposed Settlement and all the settlement terms and conditions without modification. After the issuance of such final order, the terms of this Proposed Settlement shall be implemented and enforceable notwithstanding the pendency of a legal challenge to the Commission's approval of this Proposed Settlement or to actions taken by another regulatory agency or Court, unless such implementation and enforcement is stayed or enjoined by the Commission, another regulatory agency, or a Court having jurisdiction over the matter.

22. The obligations under this Proposed Settlement if any, that apply for a specific term set forth herein shall expire automatically in accordance with the term specified and shall require no further action for their expiration.

23. The Settling Parties may enforce this Proposed Settlement through any appropriate action before the Commission or through any other available remedy. The Settling Parties shall consider any final Commission order related to the enforcement or interpretation of this Proposed Settlement as an appealable order to the Superior Court of the State of Delaware. This shall be in addition to any other available remedy at law or in equity.

***12** 24. If a Court grants a legal challenge to the Commission's approval of this Proposed Settlement and issues a final non-appealable order which prevents or precludes implementation of any material term of this Proposed Settlement, or if some other legal bar has the same effect, then this Proposed Settlement is voidable upon written notice by any of the Settling Parties.

25. This Proposed Settlement resolves all of the issues specifically addressed herein; provided, however, that this Proposed Settlement is made without admission against or prejudice to any factual or legal positions which any of the Settling Parties may assert (a) if the Commission does not issue a final order approving this Proposed Settlement without modifications; or (b) in other proceedings before the Commission or other governmental body. This Proposed Settlement is determinative and conclusive of all of the issues addressed herein and, upon approval by the Commission, shall constitute a final adjudication as to the Settling Parties of all of the issues in this proceeding.

26. This Proposed Settlement is expressly conditioned upon the Commission's approval of all of the specific terms and conditions contained herein without modification. If the Commission fails to grant such approval, or modifies any of the terms and conditions herein, this Proposed Settlement will terminate and be of no force and effect, unless the Settling Parties agree in writing to waive the application of this provision. The Settling Parties will make their best efforts to support this Proposed Settlement and to secure its approval by the Commission.

27. It is expressly understood and agreed that this Proposed Settlement constitutes a negotiated resolution of the issues in this proceeding and any related court appeals.

IV. CONCLUSION

Intending to legally bind themselves and their successors and assigns, the undersigned parties have caused this Proposed Settlement to be signed by their duly authorized representatives.

Chesapeake Utilities Corporation

Dated: 06/11/14

By: /s/ Stephen C. Thompson

Delaware Public Service Commission

Dated: 06/10/14

By: /s/ Connie S. McDowell

Division of the Public Advocate

Dated: 06/09/14

By: /s/ David Bonar

EXHIBIT A CONFIDENTIAL SETTLEMENT

EXHIBIT B

CHANGES TO THE GSR RATES

Approved Rates for the Period November 1, 2013, up through and including March 31, 2014:
a. RS, GS, MVS, LVS $1.008 per Ccf

b. GLR, GLO $0.536 per Ccf

c. HLFS $0.819 per Ccf

d. Firm Balancing Rate $0.072 per Ccf for LVS

e. Firm Balancing Rate $0.015 per Ccf for HLFS

f. ITS Balancing Rate $0.001 per Ccf

Approved Rate for usage on or after April 1, 2014, and until changed by further order of the Commission:
a. RS, GS, MVS, LVS From $1.008 per Ccf to $1.132 per Ccf

b. GLR, GLO From $0.536 per Ccf to $0.656 per Ccf

c. HLFS From $0.819 per Ccf to $0.941 per Ccf

***13** d. Firm Balancing Rate $0.072 per Ccf for LVS

e. Firm Balance Rate $0.015 per Ccf for HLFS

d. ITS Balancing Rate $0.001 per Ccf

Footnotes

1 The Evidentiary Hearing Exhibits will be cited herein as ""(Exh.__)." References to the pages of the Evidentiary Hearing transcript will be cited as "Tr.-__." Schedules from the Company's Application or pre-filed testimony will be referred to as "Sch.__."

2 The Commission approved the Parties' Settlement Agreement in PSC Docket No. 12-450F via Order No. 8430 (August 13, 2013).

End of Document

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TAB 14

2014 WL 5241515 (Del.P.S.C.)
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IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY FOR AN INCREASE IN ELECTRIC BASE RATES (FILED MARCH 22, 2013)

PSC Docket No. 13-115
Order No. 8537

Delaware Public Service Commission

April 15, 2014

BY ORDER OF THE COMMISSION: Dallas Winslow, ChairJaymes B. Lester, CommissionerJoann T. Conaway, CommissionerJeffrey J. Clark, Commissioner

***1 AND NOW,** this 15th day of April, 2014, the Delaware Public Service Commission ("Commission") determines and orders the following:

WHEREAS, on March 22, 2013, Delmarva Power & Light Company ("Delmarva") filed with the Commission an application (the "Application") seeking approval of: (a) an increase in its electric base rates; and (b) miscellaneous tariff changes; and

WHEREAS, pursuant to Order No. 8837 (April 9, 2013), the Commission suspended the proposed rate increase and appointed a hearing examiner to conduct evidentiary hearings on the justness and reasonableness of the Application; and

WHEREAS, evidentiary hearings were held on November 13, 14, and 18, 2013; and

WHEREAS, on the first day of the evidentiary hearings, Delmarva marked and attempted to move into evidence a cover letter and Schedules (JCZ-R)-6 and (JCZ-R)-7 (collectively, "Exhibit 25"). Delmarva alleged that errors in Schedules (JCZ-R)-6 and (JCZ-R)-7 had to be corrected because Delmarva had no taxes that could be deferred at the time and therefore the accumulated deferred income taxes ("ADIT") could not properly be used to offset net plant; and

WHEREAS, both counsel to the Commission Staff ("Staff") and counsel to the Public Advocate ("DPA") objected to the admission of Exhibit 25. Hence, Exhibit 25 was only marked as an exhibit but not introduced into evidence; and

WHEREAS, on December 16, 2013, the Hearing Examiner afforded Staff and the DPA the opportunity to file any procedural objections to the admission of Exhibit 25; and

WHEREAS, on January 6, 2014, both Staff and the DPA filed objections to the admission of Exhibit 25 and on January 13, 2014, Delmarva filed a response to the objections; and

WHEREAS, on January 14, 2014, the Hearing Examiner denied Staff's and the DPA's objections based on his complete agreement with Delmarva's arguments; and

WHEREAS, on January 17, 2014, Staff and the DPA filed a joint Petition for Interlocutory Appeal ("Petition") to this Commission; and

WHEREAS, on April 15, 2014, after reviewing Staff's and DPA's objections, Delmarva's response, the Hearing Examiner's decision, the Petition, Delmarva's response to the Petition, and the oral arguments of the parties made before us on February 6, 2014, and deliberating in public session, the Commission makes the following determinations:

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NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. The Commission determines that Staff and DPA have satisfied the requirements for an interlocutory appeal. Under 26 *Del. Admin. C.* §1001-2.16.1,[1] a party may take an interlocutory appeal from a ruling of a Hearing Examiner to the full Commission during the course of a proceeding "only where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest." Here, the Commission finds extraordinary circumstances exist that necessitate a prompt decision by the Commission. The Hearing Examiner has mistakenly decided that the objections to the admission of Exhibit 25 raised by Staff and the DPA should be denied and has simultaneously ordered that the parties participate in additional hearings regarding Exhibit 25. The Commission cannot allow such a decision to stand because of the magnitude of the proposed modifications to test period data and the additional time and expense the parties would need to expend if such decision were not reversed by this Commission.[2]

***2** 2. Although we accept for purposes of this discussion Delmarva's assertion that the proposed change represents the correction of a mistake, we conclude that the attempted modifications of Schedules (JCZ-R)-6 and (JCZ-R)-7 constitute changes in test period data for purposes of the Commission's Minimum Filing Requirements ("MFRs").[3] These attempted modifications did not meet the timing requirements of the MFRs (i.e., the modifications had to be filed by no later than the date that Delmarva filed rebuttal testimony). Because the timing requirements of the MFRs were not met here, Exhibit 25 is inadmissible as evidence in this proceeding.

3. In addition, the Commission finds that the language at the end of 26 *Del. Admin. C.* §1002-1.3.1, Part A, does not provide an exception to the timing requirements of the MFRs in this situation.[4] That language only provides the Commission, presiding officer or Hearing Examiner with the ability to permit such modifications "simultaneously" with the filing of rebuttal evidence. There is no dispute that Delmarva did not offer the proposed modifications "simultaneously" with the filing of its rebuttal evidence in this case.

4. Furthermore, even if such language allowed an untimely filing of modified test period data, the interests of justice do not warrant any exception to the timing requirements of the MFRs under these facts.

5. Finally, the Commission also finds that its decision regarding this matter is required to prevent substantial injustice. Notwithstanding the Hearing Examiner's scheduling of an additional day to take evidence on the ADIT issue raised by the proposed modifications, the Commission believes that both Staff and the DPA would suffer unfair prejudice given the large magnitude of the proposed modifications, their inability at this late date to raise other adjustments that may have arisen from the modifications, and the absence of any reason why Delmarva did not discover its error earlier in the proceeding when Staff and the DPA could have addressed it.

***3** 6. Based on the reasons set forth above, the Commission reverses the Hearing Examiner's decision regarding Exhibit 25 and determines that such exhibit is excluded from the evidentiary record of this proceeding. Hence, no further evidentiary hearings regarding Exhibit 25 shall be held.

7. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Dallas Winslow

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Chair

/s/ Jaymes B. Lester

Commissioner

/s/ Joann T. Conaway

Commissioner

/s/ Jeffrey J. Clark

Commissioner

Commissioner

ATTEST:

/s/ Alisa Carrow Bentley

Secretary

Footnotes

1 26 *Del. Admin.* C. §1001- 2.16.1 provides, in pertinent part, that "[i] nterlocutory appeals from rulings of the Presiding Officer or 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."

2 In addition, the Commission notes that the expenses for this rate case are ultimately paid for by Delmarva's customers. See 26 *Del. C.* §114(b)(1).

3 26 *Del. Admin. C.* §1002-1.3.1, Part A, provides, in pertinent part, as follows: "Prepared direct testimony and supporting exhibits must be filed coincident with the filing of the applications for rate relief.... Modifications in test period data occasioned by reasonably known and measurable changes in current or future rate base items, expenses (i.e., labor costs, tax expenses, insurance, etc.) or revenues may be offered in evidence by the utility at any time prior to its filing of rebuttal evidence.... Notwithstanding anything to the contrary in 1.3, the Commission, Presiding Officer or Hearing Examiner may permit the utility to offer in evidence the modifications contemplated hereunder simultaneously with the filing of rebuttal evidence, where extraordinary circumstances and the interests of justice so warrant."

4 Such language in 26 Del. Admin. C. §1002-1.3.1, Part A, is as follows: """"Notwithstanding anything to the contrary in 1.3, the Commission, Presiding Officer or Hearing Examiner may permit the utility to offer in evidence the modifications contemplated hereunder simultaneously with the filing of rebuttal evidence, where extraordinary circumstances and the interests of justice so warrant."

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TAB 15

West's Delaware Administrative Code
Title 26. Public Utilities
Division 1000. General Regulations
Chapter 1001. Rules of Practice and Procedure of the Delaware Public Service Commission

26 Del. Admin. Code 1001-2.0
Alternatively cited as DE ADC 26 1000 1001

1001-2.0. Hearings

Currentness

2.1 Appearances

2.1.1 A person may appear before the Commission by filing: i) an entry of appearance; ii) a complaint; iii) an answer; iv) a petition to intervene; v) an application; or vi) comments. An attorney, officer, or other qualified authorized agent may appear on behalf of a corporation or association, whether incorporated or not, subject to the Rules of the Supreme Court of Delaware. The Commission, Executive Director, or designated Hearing Examiner may limit the number of representatives that a party may designate to be on the service list.

2.1.2 Attorneys who are not members of the Delaware Bar may be permitted to appear *pro hac vice* before the Commission in accordance with Rule 72 of the Rules of the Supreme Court of Delaware. A motion for such admission shall be made by a member of Delaware Bar in a form complying with Official Form O of the Rules of the Delaware Supreme Court and shall be accompanied with the required fees. A separate motion for such admission must be made in each matter before the Commission. The member of the Delaware Bar moving such admission shall remain responsible for compliance with any rule or order of the Commission.

2.1.3 An attorney appearing before the Commission shall conform to the standards required of members of the Delaware Bar. The Commission may deny, temporarily or permanently, the privilege of appearing before it if it determines that an attorney or other qualified officer or agent has engaged in illegal, unethical, or improper behavior.

2.1.4 The Public Advocate may appear in any proceeding before the Commission as a party as a matter of right.

2.2 Informal Complaints and Mediation

2.2.1 An informal complaint may be made by letter, other writing, or via telephone to Commission Staff, which shall investigate the allegations and, having duly notified the person that is the subject of the informal complaint, request a response from such person. The Commission Staff shall attempt to resolve the informal complaint to the satisfaction of the parties. The Commission Staff shall prepare a report at the conclusion of the investigation and mediation process to summarize the dispute and the proposed resolution by the Commission Staff. The parties will have twenty (20) days to indicate in writing acceptance or rejection of the proposed resolution by Commission Staff.

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2.2.2 If resolution of the informal complaint by Commission Staff is not deemed satisfactory by the complainant or respondent, then the complainant may institute a formal complaint at any time, within two (2) years of the alleged violation, unless good cause is shown.

2.3 Formal Complaints

2.3.1 A formal complaint shall be in numbered paragraphs and include the following:

2.3.1.1 name, mail and e-mail addresses, daytime telephone and fax numbers of the complainant;

2.3.1.2 name of the person that is subject of the complaint;

2.3.1.3 description of conduct, including all known facts, alleged to have violated a law, rule or order; and

2.3.1.4 description of the relief requested.

2.3.2 Formal complaints alleging violations of any matter within the Commission's jurisdiction shall be served by the Secretary either through DelaFile or by certified mail on the person that is the subject of the complaint and direct such person to file a response within twenty (20) days of the service, unless emergency relief is requested and appropriate.

2.3.3 Except for investigations under Rule 2.2.1, any Commission Staff investigation of an alleged violation shall be deemed a formal complaint, and the notice of investigation shall, unless otherwise ordered, be served in a like manner as a formal complaint. Notice of this investigation to the public may be given in order to elicit public input.

2.4 Answer to Formal Complaint

2.4.1 Within twenty (20) days after service of a formal complaint, or such other time as the Commission may order, the respondent shall file an answer with the Commission and a certificate of service indicating service on the complainant and any other party who may have intervened. The answer shall specifically admit or deny the factual allegations in the complaint or that the party is without knowledge or information sufficient to answer the allegation. The answer should state clearly and concisely the facts and law relied upon, and set forth fully the nature of any defense.

2.4.2 Except where the Commission shall have waived the service and filing of an answer, a respondent who fails to file a timely answer shall be deemed in default and the Commission may thereafter enter an order granting the relief requested or take such other action as it deems appropriate.

2.5 Resolution of Formal Complaints

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2.5.1 If a respondent and complainant reach an agreement on a formal complaint, then the complainant and the respondent shall execute and file with the Secretary a statement that the complaint has been resolved and the proceeding can be closed.

2.5.2 If a formal complaint is not resolved by agreement, the complaint shall be assigned to a Hearing Examiner to conduct a hearing and prepare a Recommended Decision for the Commission's consideration.

2.6 Discovery Procedures

2.6.1 Discovery may be conducted through written interrogatories, written data requests, requests for admissions, and or depositions. Discovery may be available to any party in proceedings before the Commission or to the Staff and Public Advocate in the investigation of any filing. No discovery is to be filed with the Commission or Hearing Examiner unless it is requested or submitted as part of a discovery dispute.

2.6.2 Parties should begin any discovery as soon as possible after the commencement of the proceeding and discovery should be completed prior to the hearings. Leave to conduct discovery after the commencement of hearings may be granted for good cause shown.

2.6.3 All interrogatories or written data requests shall be numbered in sequence by the party requesting the information.

2.6.4 The Commission, designated Presiding Officer or Hearing Examiner may vary discovery provisions, in the interest of justice, and may direct the parties to employ electronic medium for the service of discovery.

2.6.5 The parties are encouraged to pursue discovery through informal written or oral data requests or conferences.

2.6.6 In rate or other expedited cases, responses to discovery must be served no later than fifteen (15) days, excluding holidays and weekends, after service of the discovery, unless otherwise directed by the Commission, the designated Presiding Officer or Hearing Examiner. In all other cases the information requested shall be provided within thirty (30) days of service, unless otherwise directed by the Commission, Presiding Officer, or designated Hearing Examiner.

2.6.7 If a party objects to any discovery, then that party must notify the party seeking the information within ten (10) days after service of the discovery of the objection and its grounds. Should the parties be unable to resolve any discovery dispute, then the party seeking the information shall file a motion to compel and attach the other party's objection. The Presiding Officer or Hearing Examiner may schedule oral argument on the motion.

2.7 Motions

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2.7.1 A party in any proceeding may file and serve a motion at any time, unless otherwise prohibited. A written motion shall set forth in numbered paragraphs a concise statement of the facts and law which support the motion and a specific request for relief.

2.7.2 The Commission, Presiding Officer or Hearing Examiner may permit oral motions to be made on the record during a hearing or conference that is transcribed.

2.8 Notice

2.8.1 Except in emergencies, notice of a formal hearing shall include the date, time and place of the hearing or hearings, a brief description of the subject matter and the manner in which the public may present its views. The Commission shall establish the appropriate public notice consistent with 26 Del.C. § 102A.

2.8.2 After commencement of the initial hearing, any adjournments and continuances of the hearing may be scheduled and conducted on such dates as designated by the Commission, Hearing Examiner or Presiding Officer, either on the record or in writing to the parties.

2.9 Petitions for Leave to Intervene

2.9.1 Any person, other than an original party to a proceeding or a party entitled to participate as a matter of right, must file a petition to intervene. Such petition shall set forth in numbered paragraphs the following:

2.9.1.1 the name, identity, mail and e-mail addresses, telephone and fax numbers of the person seeking to intervene;

2.9.1.2 a description of the petitioner's interest in the outcome of the proceeding;

2.9.1.3 a concise statement of why the petitioner's interest will not be adequately represented by the parties to the proceeding or why participation in the proceeding would be in the public interest; and

2.9.1.4 a description of the relief requested.

2.9.2 A petition to intervene shall be filed with the Commission no later than the date specified for the filing of such petitions in the public notice, or the initial hearing if no public notice is given. Late intervention may be sought and granted for good cause shown.

2.9.3 The Commission may delegate to the designated Presiding Officer or Hearing Examiner the authority to grant or deny a party's intervention, subject to an interlocutory appeal pursuant to Rule 2.16.

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2.9.4 Intervention shall be subject to such reasonable terms and conditions as the Commission or designated Presiding Officer or Hearing Examiner may prescribe.

2.10 Pre-hearing Conferences

2.10.1 The Commission, Hearing Examiner or Presiding Officer, with or without motion, and upon written notice to all parties of record, may convene a pre-hearing conference. Each of the parties may be required to prepare a pre-hearing memorandum that addresses the following matters:

2.10.1.1 Proposed resolution of the proceeding or issues;

2.10.1.2 Identification of issues the party expects to pursue;

2.10.1.3 Identification of witnesses the party expects to present;

2.10.1.4 Status of the party's discovery; and

2.10.1.5 Position on complete or partial settlement of the proceeding.

2.10.2 Pre-hearing conferences may be conducted formally or informally. Proceedings at formal conferences shall be recorded by a Reporter. Agreements or stipulations by the parties and other matters resolved at informal conferences shall be reduced to writing by the Presiding Officer or Hearing Examiner, who will issue a pre-hearing memorandum. The memorandum will bind all parties, including those who, after having been duly notified, could have attended the conference but did not.

2.10.3 The Hearing Examiner or Presiding Officer at such conference may, by either written or oral ruling, dispose of such procedural matters as may be necessary or appropriate to determine at that stage of the proceedings. All such rulings shall be binding upon all parties to the proceeding, subject to interlocutory appeal to the Commission and to subsequent modification for good cause shown.

2.11 Hearings

2.11.1 Formal hearings and informal proceedings will be held before the Commission, a Commissioner appointed as Presiding Officer, or a Hearing Examiner appointed by the Commission.

2.11.2 The Commission shall give notice of a hearing in a manner consistent with 26 Del.C. § 102A.

2.11.3 Hearings shall be transcribed and the transcripts shall become part of the record.

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2.11.4 All witnesses shall present testimony that is sworn or affirmed and shall be subject to reasonable cross-examination.

2.12 Order of Proceeding and Burden of Proof

2.12.1 The moving party shall open and close the presentation of evidence, except in those instances when the Commission, the designated Presiding Officer or Hearing Examiner determines a different presentation, such as when the evidence is peculiarly within the knowledge or control of another party.

2.12.2 If a party fails to appear at a scheduled hearing, then the designated Presiding Officer or Hearing Examiner may recommend to the Commission that it enter an order ruling against the party who failed to appear.

2.12.3 The burden of proof shall be on the moving party, except where placed on another party by law or Commission order.

2.12.4 All parties to hearings, their counsel and spectators shall conduct themselves in a proper manner. Disruptive demonstrations of any kind at hearings shall not be permitted. Any disregard by parties, attorneys or other persons of the rulings of the Commission, Presiding Officer or Hearing Examiner on matters of order or procedure may be noted on the record. The Presiding Officer or Hearing Examiner may, in his or her discretion, recess or continue any hearing when the deportment of witnesses, spectators, news media or other persons unduly disrupts or interferes with the proper conduct of such hearing.

2.13 Evidence

2.13.1 The Commission may consider the Delaware Uniform Rules of Evidence as a guide but, in accordance with 26 Del.C. § 503 and 29 Del.C. § 10125, shall not be bound by the technical rules of evidence.

2.13.2 The parties are encouraged to agree upon any facts at issue, or upon the authenticity of any relevant documents. The agreement may be in writing or by oral statement made upon the hearing record. The Commission, Presiding Officer or Hearing Examiner upon reasonable notice to the parties, may require proof by record evidence of stipulated facts.

2.13.3 Unless otherwise ordered, parties shall file prepared statements of testimony and exhibits in rate proceedings or other proceedings where directed by the Commission or the designated Presiding Officer or Hearing Examiner. All prepared statements of testimony shall be double-spaced on pages with numbered lines and have a cover page identifying the witness, the nature of the testimony (direct, rebuttal, etc.), the sponsoring party, and the caption of the proceeding.

2.13.4 Exhibits shall be marked sequentially.

2.14 Subpoenas and Witnesses

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2.14.1 Upon application of any party or upon the initiative of the Commission, the designated Presiding Officer or Hearing Examiner will issue subpoenas to be served as provided in 26 Del.C. § 504.

2.14.2 The Commission, Presiding Officer or Hearing Examiner, upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, may quash, modify, or condition the subpoena if it is demonstrated to be unreasonable or oppressive.

2.14.3 The Commission, designated Presiding Officer or Hearing Examiner may limit the number of witnesses or restrict evidence or its examination in the interest of justice and economy.

2.15 Transcripts of Hearings

2.15.1 An official court reporter designated by the Commission shall make an official transcript (in both public and confidential versions when necessary) of the formal hearings and such other matters as directed by the Commission, Executive Director or designated Presiding Officer or Hearing Examiner.

2.15.2 Parties desiring copies of the official transcript shall arrange to secure and pay for such copies from the official court reporter.

2.15.3 A party's motion to correct the transcript of the record must be filed within ten (10) days after the transcript is filed in the proceeding. Any party objecting to such motion shall file an answer within five (5) days from the filing of the motion. The Commission, Presiding Officer or Hearing Examiner shall rule on the motion with or without hearing.

2.16 Interlocutory Appeals to the Commission

2.16.1 Interlocutory appeals from rulings of the Presiding Officer or 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.

2.16.2 Within three (3) days of the entry of the ruling from which the appeal is sought, a party shall file with the Commission and serve via DelaFile or by hand delivery or overnight delivery upon all the other parties to the proceeding a Petition for interlocutory review. The Petition shall set forth in numbered paragraphs, not to exceed five (5) pages in length, the following:

2.16.2.1 a short statement of the case;

2.16.2.2 a summary of the party's position; and

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2.16.2.3 the grounds supporting interlocutory appeal, including citations to the record.

2.16.3 Within three (3) days of service of the Petition for interlocutory review, any party may file an answer limited to five (5) pages in length.

2.16.4 The proceeding shall continue pending Commission review of the Petition for interlocutory review unless the Presiding Officer or Hearing Examiner stays the proceeding pending Commission review.

2.16.5 The Commission shall determine if the Petition and any answers thereto justify interlocutory review. If interlocutory review is granted, then it will be scheduled for oral argument before the Commission at its earliest convenience or a decision will be issued based on the written submissions. If no Commission action occurs within thirty days of the Petition filing, then it shall be deemed denied by operation of law.

2.17 Post-Hearing Briefs

2.17.1 The Commission, Presiding Officer or Hearing Examiner may direct the filing of post-hearing briefs or memoranda. A post-hearing brief shall contain a cover page with the caption of the proceeding, the name of the party, and the nature of the brief. The Commission or designated Presiding Officer or Hearing Examiner may, either in addition or as an alternative, direct the filing of proposed findings of fact and conclusions of law.

2.17.2 The Commission, or designated Presiding Officer or Hearing Examiner may specify the length of the briefs or other post-hearing submissions, and any other format guidelines, including electronic medium.

2.17.3 The Commission, Presiding Officer or Hearing Examiner may reject briefs or memoranda which do not conform to these rules or the rulings of the Presiding Officer or Hearing Examiner.

2.18 Post Hearing Procedures for Hearings Conducted by Presiding Officer or Hearing Examiner

2.18.1 In accordance with 29 Del.C. Chapter 101, upon the completion of a proceeding, the Hearing Examiner or Presiding Officer shall prepare and submit to the Commission a report and recommendations which shall include a summary of the evidence, recommended findings of fact, recommended conclusions and the reasons therefor.

2.18.2 The Executive Director or Secretary shall serve a copy of the report and recommendations on all parties and by cover letter indicate when exceptions should be filed and when the matter will be scheduled for the Commission's consideration.

2.19 Exceptions

2.19.1 Any party may file with the Commission written exceptions to the findings and recommendation of the designated Presiding Officer or Hearing Examiner in numbered paragraphs that:

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2.19.1.1 identify each part of the Presiding Officer's or Hearing Examiner's findings and recommendations that is the subject of the exceptions.

2.19.1.2 refer to the portions of the record relied upon in support of each exception;

2.19.1.3 cite any authorities relied upon;

2.19.1.4 state all the grounds and reasons for exceptions, comments and arguments respecting the recommended decision or report and refer to the portions of any post-hearing brief or memorandum where the issue was more fully addressed; and

2.19.1.5 set forth any request for oral argument.

2.19.2 Any argument opposing a portion of the designated Presiding Officer's or Hearing Examiner's findings and recommendation that is not raised by an exception shall be considered waived.

2.19.3 Exceptions shall be filed within twenty (20) days of the date the findings and recommendations was served on the parties, unless the parties have agreed to a reduced time period or the Executive Director or Secretary has granted a longer time period to accommodate the Commission's meeting schedule.

2.20 Oral Argument before the Commission

2.20.1 The Commission may exercise its discretion to hear argument on exceptions. Oral arguments shall be limited to a discussion of the legal or regulatory issues and a restatement of the facts in the record. No new evidence shall be presented at oral argument except by direction of the Commission, upon a motion to reopen the record.

2.21 Entry of Orders

2.21.1 The Commission, acting through a majority of the members of Commission, shall execute an Order on matters properly before it for decision, unless the law allows otherwise. The Secretary shall serve the Order on all parties to the proceeding along with a cover letter that shall establish the entry date of issuance of the Order for the purpose of determining the time period for any challenge to the Order.

2.22 Post-Hearing Petitions for Relief

2.22.1 Petition to Re-open Record. At any time after the close of the record any party desiring further hearing upon supplemental evidence may file a petition setting forth the grounds to re-open the record, a description of additional evidence to be introduced, and a statement of the reasons why such was not introduced prior to the close

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of the record. The petition and any answer thereto shall be referred to the designated Presiding Officer or Hearing Examiner for disposition.

2.22.2 Petition for Rehearing and Reconsideration. Within thirty (30) days from the entry of an Order or decision of the Commission, any party may petition for rehearing and reconsideration, which shall set forth in numbered paragraphs the grounds for rehearing and reconsideration that are different from the arguments previously made to the Commission. Other parties shall have seven (7) days to file an answer. The Commission, in its discretion, may grant or deny the petition without a hearing, or set a hearing thereon. The filing of a timely petition for rehearing shall suspend the finality of the order that is the subject of the petition.

2.22.3 If the Commission takes no action on a petition within sixty (60) days of the entry date of the Order, then the petition for rehearing and reconsideration shall be deemed denied by operation of law, and the Secretary shall notify in writing all parties of such denial by operation of law.

2.23 Compliance Filings

2.23.1 Any party directed by a final Commission Order to undertake a compliance filing shall make the filing with the Secretary and serve all parties within fifteen days (15) from the service of the final Order, or such other time as the Commission may permit.

2.23.2 The Commission shall retain jurisdiction to review all compliance filings to determine that they are in compliance with the Commission Order.

Credits
2 DE Reg. 2162 May 1, 1999. Amended Nov. 11, 2013; June 11, 2015.

Current with amendments included in the Delaware Register of Regulations, Volume 20, Issue 8, dated February 1, 2017.

26 Del. Admin. Code 1001-2.0, 26 DE ADC 1001-2.0

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TAB 16

West's Delaware Code Annotated
Title 26. Public Utilities
Chapter 1. Public Service Commission
Subchapter V. Hearings and Appeals

26 Del.C. § 512

§ 512. Settlements are to be encouraged

Currentness

(a) Insofar as practicable, the Commission shall encourage the resolution of matters brought before it through the use of stipulations and settlements.

(b) The Commission's staff may be an active participant in the resolution of such matters.

(c) The Commission may upon hearing approve the resolution of matters brought before it by stipulations or settlements whether or not such stipulations or settlements are agreed to or approved by all parties where the Commission finds such resolutions to be in the public interest.

Credits
70 Laws 1995, ch. 48, § 8, eff. June 12, 1995.

26 Del.C. § 512, DE ST TI 26 § 512
Current through 80 Laws 2016, ch. 430. Revisions to 2016 Acts by the Delaware Code Revisors were unavailable at the time of publication.

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TAB 17

West's Delaware Code Annotated
Title 29. State Government
Part VIII. Departments of Government
Chapter 87. Department of State
Subchapter I. General Provisions

29 Del.C. § 8716

§ 8716. Division of the Public Advocate

Effective: July 24, 2013
Currentness

(a) There is established within the Department of State the Division of the Public Advocate. The Public Advocate shall be a person qualified by training and/or experience to perform the duties of the office. Beginning in the 149th General Assembly, the Public Advocate shall be appointed by the Governor with the advice and consent of the majority of the Senate to serve a term of 4 years at the pleasure of the Governor. The Public Advocate shall be a full-time employee of the State.

(b) No person shall be eligible for appointment to be Public Advocate who owns or controls, in that person's own name or as a fiduciary, or whose spouse or minor child residing in that person's household owns or controls any stock, note or debenture in any public utility, or who holds any office or position with any public utility or whose employment or vocation depends directly upon or is under the control of a public utility.

(c) In the event of death, resignation, temporary incapacity or removal of the Public Advocate and prior to the appointment of a successor, the Governor may appoint an Acting Public Advocate. The Acting Public Advocate shall have all the powers and shall perform all the duties and functions of the Public Advocate during such absence or incapacity or until a successor is duly qualified and appointed.

(d) The Public Advocate shall comply with and be held strictly accountable for compliance with the highest standards of Chapter 58 of this title and § 22, Article II of the Delaware Constitution. The Division of the Public Advocate is an agency subject to Chapters 64 and 100 of this title.

(e) The Public Advocate shall have the following powers and duties:

(1) To appear before the Public Service Commission on behalf of the interest of consumers in any matter or proceeding over which the Commission has jurisdiction and in which the Public Advocate deems the interest of consumers requires such participation.

(2) To advocate the lowest reasonable rates for consumers consistent with the maintenance of adequate utility service and consistent with an equitable distribution of rates among all classes of consumers; provided, however that the Public Advocate shall principally advocate on behalf of residential and small commercial consumers and shall not be required to advocate for any class of commercial or industrial consumers that the Public Advocate determines in his or her sole discretion on a case by case basis has the ability to advocate on its own behalf before the Public Service Commission.

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(3) To appear on behalf of the interest of consumers in the courts of this State, the federal courts and federal administrative and regulatory agencies and commissions in matters involving rates, service and practices of public utilities.

(4) To hire, from time to time, as needed, in connection with proceedings before the Commission, experts in the utility regulation field, including, but not limited to, economists, cost of capital experts, rate design experts, accountants, engineers and other specialists. A budget for compensation and/or expenses of these experts shall be provided annually through the Delaware Public Utility Regulatory Revolving Fund. Nothing in this section shall be construed to preclude the Public Advocate from applying to the General Assembly for additional funds in specific instances, including emergencies, and from receiving such additional amounts as the General Assembly shall determine.

(5) To have the same access to and the same right to inspect any and all books, accounts, records, memoranda, property, plant facilities and equipment of the public utilities as is afforded by law or by rule of the Public Service Commission to any other party in interest.

(6) To have full access to the records of the Public Service Commission.

(7) To call upon the assistance of the staff and experts of the Public Service Commission in the performance of duties.

(8) To appoint, fix the compensations and terms of service and prescribe the duties and powers of such staff as may be necessary for the proper conduct of the work of the Division of the Public Advocate, within the conditions and limitations imposed by the merit system of personnel administration.

(9) Upon request of the Governor, the Secretary of the Department, or the General Assembly, the Public Advocate shall provide guidance on matters relating to energy policy and utility consumers, and shall consider such other matters as may be referred to the Public Advocate or the Division by the Governor, the Secretary of the Department, or the General Assembly. The Public Advocate may study, research, plan and make advisory recommendations to the Governor, the Secretary of the Department, or the General Assembly on matters it deems appropriate to advocate on behalf of public utility consumers.

(f) The Public Service Commission shall notify the Public Advocate of all hearings and meetings of the Commission and shall forward to the Public Advocate copies of all applications submitted by public utilities and all formal complaints and petitions filed with the Commission. No formal action taken by the Commission without proof of the receipt of notice by the Public Advocate shall have any legal effect.

(g) The Public Advocate shall be entitled to be present and be heard at any public meeting of the Public Service Commission.

(h) When the Public Advocate shall determine to intervene in a matter before the Public Service Commission, the Public Advocate shall file a statement to that effect with the Public Service Commission. Thereupon, the Public Advocate shall

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be deemed a party in interest and shall have full power to present evidence, subpoena and cross-examine witnesses, submit proof, file briefs, appeal and do any other act appropriate for a party to the Commission.

(i) The Public Advocate shall make an annual report to the Governor and the General Assembly of the Division's activities, and shall render such other reports as the Governor or General Assembly may from time to time request or as may be required by law.

Credits

71 Laws 1997, ch. 138, § 17; 70 Laws 1995, ch. 186, § 1, eff. July 10, 1995. Redesignated from 29 Del.C. § 8808 and amended by 75 Laws 2005, ch. 88, §§ 7, 17(3), eff. July 1, 2005. Amended by 79 Laws 2013, ch. 139, § 1, eff. July 24, 2013.

Codifications: 29 Del.C. 1974, § 8808

29 Del.C. § 8716, DE ST TI 29 § 8716
Current through 80 Laws 2016, ch. 430. Revisions to 2016 Acts by the Delaware Code Revisors were unavailable at the time of publication.

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TAB 18

West's Delaware Administrative Code
Title 26. Public Utilities
Division 1000. General Regulations
Chapter 1001. Rules of Practice and Procedure of the Delaware Public Service Commission

26 Del. Admin. Code 1001-1.0
Alternatively cited as DE ADC 26 1000 1001

1001-1.0. General Provisions

Currentness

1.1 Applicability and Construction of Rules, Specific Orders, and Waiver

1.1.1 These rules govern practice and procedure in all matters before the Commission and shall be liberally construed to secure a just, fair, convenient, economical and expeditious determination in accord with the Commission's statutory and public responsibilities.

1.1.2 Nothing in these rules shall preclude the Commission, in the exercise of its statutory duties and where circumstances reasonably require, from prescribing different procedures to apply to specific proceedings.

1.2 Definitions

"**Application**" - means a document in which a person seeks a certification, permit, license, or other approval, ruling or authorization from the Commission.

"**Complaint**" - means a formal or informal document or communication in which a person alleges that a person subject to the jurisdiction of the Commission has violated a statute, rule, regulation, or order within the Commission's authority to enforce.

"**Commission**" - means the Public Service Commission of Delaware.

"**E-Filing**" means, on and after November 4, 2013, all filings made by a person with the Commission utilizing the "DelaFile" document management system available through the Commission website at http://depsc.delaware.gov.

"**Filing**" - means any document submitted to the Commission as part of the Commission's official records in any proceeding.

"**Hearing Examiner**" - means a person assigned by the Commission to preside over a Commission proceeding and, thereafter, to prepare a report with recommendations for the Commission's consideration.

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"**Intervenor**" - means a person who is admitted as a party pursuant to Rule 2.9 of these rules.

"**Party**" - means a person who, as a matter of right or by Commission authorization, appears in and has a direct interest in a proceeding before the Commission.

"**Person**" - includes a natural person; a corporation, partnership, association, public trust, joint stock company, joint venture, or other group of persons, whether incorporated or not; a trustee or receiver of the foregoing; a municipality or other political subdivision of the State of Delaware; and any other governmental agency or any officer, agent or employee of such agency.

"**Petition**" - means a request for relief which is not an application or complaint.

"**Presiding Officer**" - means a Commissioner designated by the Commission to preside over a proceeding and to prepare a report, with recommendations, for the Commission's consideration.

"**Proceeding**" - means any matter assigned a docket number by the Secretary.

"**Proof of Public Notice**" - means a certificate or affidavit reciting the date and manner notice was given to the public as may be required by statute, rule, or order.

"**Proof of Service**" - means a certificate or affidavit reciting the date and manner of service upon the parties to a proceeding.

"**Respondent**" - means a public utility or other person named as the subject of an investigation or complaint proceeding.

"**Secretary**" - means the Secretary of the Commission, or any employee of the Commission designated by the Secretary and authorized by the Executive Director.

"**Staff**" - means full-time professional employees of, and outside counsel and consultants retained by, the Public Service Commission who render advice to the Commission. The Staff may participate in any Commission proceeding and may advocate particular positions concerning the issues raised in such proceeding and file supporting material and testimony for the Commission's consideration.

1.3 Address of Commission and Office Hours

1.3.1 The mailing address of the Commission is: "The Public Service Commission of Delaware, 861 Silver Lake Boulevard, Cannon Building, Suite 100, Dover, Delaware 19904." All communications to the Commission shall be so addressed unless otherwise specifically directed.

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1.3.2 Unless otherwise provided by statute or Executive Order, the office of the Commission shall be open from 8:00 A.M. until 4:30 P.M. of each week day, except Saturdays, Sundays, and legal holidays observed by the State in Kent County, Delaware.

1.4 Commission Meetings

1.4.1 The Commission shall meet for the transaction of its business at its office in Dover or at such other places within this State as the Commission may designate.

1.4.2 Notice of all meetings of the Commission shall be given at least seven (7) days in advance by a conspicuous posting of written notice at the Commission's office in Dover and such other methods as the Commission may deem appropriate. An agenda shall be posted contemporaneously with the notice, subject to revisions made up until six (6) hours in advance of the meeting. The Secretary may make the notice and agenda available through the Commission's web page.

1.4.3 A majority of the members appointed to the Commission shall constitute a quorum and shall be sufficient for any final order of the Commission; provided, however, that a single Commissioner may sit as a Presiding Officer for the purpose of hearing testimony in any proceeding subject to Commission review. Any final decision concerning any matter before the Commission must be approved by the affirmative vote of the majority of all members appointed to the Commission.

1.5 Office of the Secretary

1.5.1 The Secretary shall have custody of the seal and official records of the Commission and shall be responsible for the maintenance and custody of its docket files, opinions, orders, rules, regulations, forms, and any schedules and tariffs filed with the Commission.

1.5.2 All orders and other actions of the Commission shall be attested to by the Secretary.

1.5.3 The Secretary shall mark the time and date of receipt or filing on each communication addressed to the Commission and on each pleading, report, exhibit, deposition, transcript, and order received or filed. When deemed appropriate, the Secretary shall also assign a docket number to a filing that has been received.

1.5.4 The Secretary shall maintain the schedule of fees and charges as approved by the Commission, for filings and the provision of copying and other similar services.

1.6 Filing of Documents

1.6.1 All papers submitted for filing with the Commission shall include on the first page the caption and docket number of the proceeding if available; the name, mail and e-mail addresses, telephone and fax numbers of the person

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filing the document; and the name, mail and e-mail addresses, telephone fax numbers of the person representing the person filing the document.

1.6.2 The Secretary may reject any filing that does not conform to these rules or is not accompanied by the appropriate filing fee or other approved payment by returning the filing with an explanation of the defect to be remedied, if allowed, within the time period specified by the Secretary.

1.6.3 If E-Filing is not an available option, an original and ten (10) copies of all documents submitted for paper filing shall be provided to the Secretary, unless otherwise directed by the Commission, designated Presiding Officer or Hearing Examiner. The Secretary may request additional copies when necessary.

1.6.4 All filings shall be made via E-Filing unless a person obtains prior written permission from the Commission, designated Presiding Officer, or Hearing Examiner to be excused from using such method. If E-Filing is unavailable for use, paper filings must be made in accordance with these Rules.

1.6.5 The Commission shall forward to the Public Advocate a copy of all applications submitted by public utilities and all formal complaints and petitions filed with the Commission, along with proof of a notice to be executed and returned with an acknowledged receipt pursuant to 29 Del.C. § 8808 (e). One copy of all initial filings and comments shall be served on the Division of the Public Advocate at its official address and a certificate of service indicating such service must accompany the filing with the Secretary.

1.6.6 Each person filing a document with the Commission shall serve a copy of the document on each party named on the service list for the proceeding as maintained by the Secretary, if established, and any other person required to be served by rule, order, or law. Proof of such service shall be attached to the document to be filed or its cover letter.

1.6.7 Unless otherwise specified by the Presiding Officer or Hearing Examiner or served via DelaFile, service should be made by:

1.6.7.1 United States mail, first-class;

1.6.7.2 Commercial courier service; or

1.6.7.3 personal delivery.

1.7 Types of Filings and General Requirements

1.7.1 Filings shall include the following:

1.7.1.1 applications;

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1.7.1.2 petitions;

1.7.1.3 complaints;

1.7.1.4 answers;

1.7.1.5 motions;

1.7.1.6 briefs;

1.7.1.7 memoranda;

1.7.1.8 exceptions; and

1.7.1.9 comments.

1.7.2 All petitions and other filings that allege facts not otherwise in the record must be accompanied by a signed, sworn verification. Where the filer is a corporation or an association, the verification shall be signed by a bona fide officer thereof.

1.7.3 All filings must be accompanied by a signed certificate of service pursuant to Rules 1.6.5 and 1.6.6.

1.7.4 Except as directed by the Commission, designated Presiding Officer or Hearing Examiner, all paper filings shall be on 8 1/2 inch by 11 inch sized paper with margins of at least one inch using type size no smaller than 12 pitch font.

1.8 Applications

1.8.1 Applications shall be in numbered paragraphs and include the following:

1.8.1.1 the name, mail and e-mail addresses, telephone and fax numbers of the applicant;

1.8.1.2 a description of the authorization, right, or approval sought;

1.8.1.3 a description of any previous authorization or approval which will be affected;

1.8.1.4 a concise recitation of the material facts to be relied upon;

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1.8.1.5 a citation to the statute, rule, or order which authorizes the application;

1.8.1.6 copies of all pertinent contracts, agreements, certificates, permits, tariffs, proposed tariffs, charters, by-laws, ordinances, resolutions or other writings referred to in the application, which shall be attached as exhibits. Copies of written material or orders which are of record with the Commission need not be attached to the application if reference is made to the appropriate docket and order numbers; and

1.8.1.7 any information required by rule or order for a specific type of application.

1.8.2 Applications shall be initially reviewed by the Commission and upon such review, may be i) published for public comment, ii) approved with or without conditions, iii) denied, iv) set for evidentiary hearing, or v) granted in part and denied in part.

1.8.3 Applications may become the subject of an evidentiary hearing if the Commission determines that the comments or the application require a hearing.

1.9 Computing Time

1.9.1 In computing any time period under these rules, the first day of the designated period of time shall commence the next day after the event requiring the computation of the time period. The last day of the time period shall be included, unless it falls on a Saturday, Sunday, or a legal holiday by the laws of this State or the United States, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

1.9.2 Upon good cause shown, the Commission, or a designated Presiding Officer or Hearing Examiner, may extend the period of time prescribed by these rules.

1.10 Public Access to Commission Records

1.10.1 The Secretary shall make available for public inspection upon reasonable request during the regular business hours of the Commission all of the "public records" of the Commission, as defined in 29 Del.C. § 10002 (d), subject to any privilege or proprietary treatment of the records.

1.10.2 The Secretary may charge a fee to recover reasonable costs of copying.

1.11 Submission of Confidential, Proprietary, and Privileged Material

1.11.1 A person may request that the Commission accord confidential treatment to some or all of the information contained in a document. In support of such a request, such person shall attest that the information is not subject to inspection by either the public or by other parties unless an appropriate proprietary agreement is executed. There

shall be a rebuttable presumption that information claimed to be confidential is confidential until ruled otherwise by the Commission. (For a listing of materials that are exempt from public disclosure, *see* 29 Del.C. § 10002(d)).

1.11.2 If the claim of confidentiality is challenged by any person, then the person claiming confidential treatment for information must demonstrate in a petition to the Commission that the designated information is confidential as recognized by state law.

1.11.3 The party seeking proprietary treatment shall submit for filing one copy of the document without the confidential information, with an indication that claimed confidential information has been deleted.

1.11.4 Upon any dispute over the confidential treatment of information, the matter shall be resolved by the Commission, designated Presiding Officer or Hearing Examiner.

1.11.5 The Commission, Commission Staff, and the Division of Public Advocate shall have access to all documents for which confidential treatment has been claimed. Access to non-public information shall be made available to all other parties, including consultants retained by the Commission, Commission Staff, and the Division of Public Advocate, upon the execution of an appropriate agreement by the parties or entry of a protective order by the Commission or designated Presiding Officer or Hearing Examiner.

1.11.6 Non-public information shall not be disclosed by the Commission, its Staff, the Division of the Public Advocate, and their consultants and any party to a proprietary agreement and its consultants except as authorized by law.

1.12 Ex Parte Communications

1.12.1 No Commissioner or Commission Staff assigned to participate in any way in the rendering of a case decision shall discuss or communicate, directly or indirectly, respecting any issue of fact or law with any party or person except upon notice to, and opportunity for, all parties to participate. This rule shall not apply to communications required for the disposition of ex parte matters as authorized by law, or to communications, not prohibited by law, by and among Commission members and Commission Staff.

Credits
Amended Nov. 11, 2013; Aug. 11, 2014; June 11, 2015.

Current with amendments included in the Delaware Register of Regulations, Volume 20, Issue 8, dated February 1, 2017.

26 Del. Admin. Code 1001-1.0, 26 DE ADC 1001-1.0

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TAB 19

West's Delaware Code Annotated
Title 26. Public Utilities
Chapter 1. Public Service Commission
Subchapter I. General Provisions

26 Del.C. § 114

§ 114. Charges and fees; costs and expenses of proceedings

Effective: July 10, 2009
Currentness

(a) The Commission may impose charges and fees for filing and for other

services rendered by it in accordance with the following schedule of fees:

SCHEDULE OF FEES

1. For filing the annual financial statement of any public utility..... $25

2. Certificates of public convenience and necessity:

(a) For filing each original application for a certificate of public convenience and necessity (except for telecommunications local exchange service or application for approval of a transfer of such certificate)..... 750

(b) For filing each extension to a certificate of public convenience and necessity (except for telecommunications local exchange service)..... 300

(c) For filing each application for a certificate of public convenience and necessity (for original or for extension) to provide telecommunications local exchange service or application for approval of a transfer of such certificate..... 3000

3. For filing each application for approval or authority to discontinue or abandon all or any part of any public utility operation or service..... 150

4. (a) For each filing of rate or tariff schedules, or any amendment thereto or notice of changes therein..... 50

(b) For each filing of petition or application to increase rates

5. For filing each petition or application under § 215(a)(1) of this title..... 100

6. For filing each petition or application under § 215(a)(2) of this title in accordance with the following schedule based upon the aggregate amount of the stocks (by par value or by stated value if no par), notes, bonds, or other evidence of indebtedness. The fee so established is to be used to evaluate such petition or application in lieu of any other assessment

AGGREGATE AMOUNT

Under $1,000,001..... 150

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	$1,000,001 - $10,000,000	250
	$10,000,001 and above	350
7.	For preparing and certifying to the Superior Court any record in appeal	400
8.	For certifying a copy of each paper, order, record, transcript or any other official document other than to the Superior Court	10
9.	Upon request therefor by either a consumer or a utility for testing each water meter having an outlet not exceeding 1 inch	10
10.	Upon request therefor by either a consumer or a utility for testing each water meter having an outlet of more than 1 inch but not exceeding 2 inches	15
11.	Upon request therefor by either a consumer or a utility for testing each electric meter	10

12. The charge or fee for any services rendered by the Commission in filing papers, documents, records or other items not expressly provided for in this subsection shall be a reasonable charge or fee in relation to the service rendered, not to exceed the highest fee or charge permitted on this schedule of fees fixed by the Commission from time to time.

(b)(1) Whenever the Commission, in a proceeding upon its own initiative or upon complaint or upon written application to it, shall deem it necessary in order to carry out its statutory duties, to investigate the operations, services, practices, accounting records and/or procedures, rates, charges, rules and regulations, of any public utility, and/or to make valuations or revaluations of the property of any public utility, and/or to enter into and hold a hearing or hearings in connection therewith, such public utility shall be charged with and pay such portion of the expenses of the Commission, and the compensation and expenses of its agents, representatives, consultants and employees, including, but not limited to those temporarily employed or retained, as is reasonably attributable to such investigation, valuation and revaluation, hearing or hearings. In addition, if the Division of the Public Advocate elects to intervene or participate in a natural gas, electric, water or wastewater rate proceeding under subchapter III of this chapter including fuel adjustments pursuant to § 303(b) of this title and water utility distribution system improvement charges pursuant to § 314 of this title. The public utility involved shall also be charged with and pay such portion of the expenses of the Division of the Public Advocate, and the compensation and expenses of its agents, representatives, consultants and employees, including but not limited to those temporarily employed or retained, as is reasonably attributable to such proceeding. At the time the Commission or the Division of the Public Advocate determines that such charges will be required, the Commission or Division shall provide notice to the public utility, or its counsel of record at such time, of its intent to impose and collect any charges. No charges shall be made for the compensation of Commissioners or the Public Advocate.

a. If the Commission or an appellate court determines by order that the Commission or the Public Advocate brought or defended all or a portion of a proceeding 1. For an improper purpose; 2. Without any basis in existing law; 3. Without a justifiable basis for seeking the extension, modification or reversal of existing law; or 4. Without evidentiary support after reasonable opportunity for investigation and discovery,

then to such extent the public utility shall not be charged with or required to pay such expenses.

b. If the Commission or an appellate court determines by order that a utility brought or defended all or a portion of a proceeding 1. For an improper purpose; 2. Without any basis in existing law; 3. Without a justifiable basis for seeking the extension, modification or reversal of existing law; or 4. Without evidentiary support after reasonable opportunity for investigation and discovery,

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then to such extent the utility shall not be permitted to include the costs associated with that proceeding in its rates.

(2) From time to time as the investigation, valuation, revaluation, hearing or hearings progress, or upon completion thereof, the Commission and the Division of the Public Advocate shall ascertain each agency's costs incurred in connection therewith, including, but not limited to the expenses of the Commission and the Division of the Public Advocate and the compensation and expenses of each agency's respective agents, representatives, consultants and employees, including those temporarily employed or retained, and shall determine the amount thereof to be paid by the public utility and shall render separate bills therefor to the public utility. The Commission and the Division of the Public Advocate shall furnish the public utility such itemization of each said bill as may be requested by said public utility. The public utility shall have the right to audit said bill within a reasonable period after its rendition by the Commission or the Division of Public Advocate and shall have the opportunity to be heard before the Commission as to any or all of the items included in the bill. The amount of such bill as finally determined by the Commission following such hearing and any appeal therefrom shall be paid into the Delaware Public Utility Regulatory Revolving Fund within 30 days from the date of its determination. If any amount so assessed against a public utility is not paid within 30 days after the date of rendition of the bill with respect thereto, the utility shall pay a penalty of 1% of the amount due for each month or fraction thereof that such amount is unpaid. The charges imposed for the costs of the Division of the Public Advocate shall be paid to the Commission and shall be deposited to the credit of the Delaware Public Utility Regulatory Revolving Fund.

(3) The expenses of the Commission and the Division of the Public Advocate and the compensation and expenses of each agency's respective agents, representatives, consultants and employees, including but not limited to those temporarily employed or retained, reasonably attributable to any appellate court proceedings in either or both the Superior or Supreme Court of the State growing out of any order, opinion, decision or findings of the Commission shall also be ascertained, charged, billed to and paid for by the public utility in accordance with the foregoing conditions and procedures.

(4) Whenever the investigation, valuation, revaluation, hearing, hearings or appellate court proceedings involve the affairs and operations of 2 or more public utilities jointly, the charges made under this section for such investigation, valuation, revaluation, hearing, hearings, or appellate court proceedings shall be prorated among such public utilities upon the basis of their gross intrastate operating revenues for the last preceding calendar year.

(5) The total aggregate amount to be charged by both the Commission and the Division of the Public Advocate to any public utility under authority of this subsection (b) in any calendar year shall not exceed 1 percent of such public utility's gross operating revenues derived from intrastate utility operations in the last preceding calendar year.

(c) In connection with any Commission proceedings under §§ 203A and 203B of this title the Commission and the Division of the Public Advocate shall charge the public utilities involved therein, including any electric utility that is municipally owned or a municipal electric company formed pursuant to Chapter 13 of Title 22, the expenses of the Commission and the Division of the Public Advocate related to such proceedings as is reasonably attributable thereto prorated among such public utilities upon the basis of their gross intrastate electric revenues for the last preceding calendar year.

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50 Laws 1955, ch. 552, § 1; 52 Laws 1959, ch. 155; 53 Laws 1962, ch. 389; 57 Laws 1970, ch. 667, §§ 1, 2; 59 Laws 1974, ch. 397, § 1; 68 Laws 1992, ch. 299, § 2; 71 Laws 1997, ch. 22, § 1, eff. April 29, 1997; 71 Laws 1998, ch. 405, § 1, eff. July 13, 1998; 77 Laws 2009, ch. 151, §§ 2-7, eff. July 10, 2009.

Codifications: 26 Del.C. 1953, § 113

26 Del.C. § 114, DE ST TI 26 § 114

Current through 80 Laws 2016, ch. 430. Revisions to 2016 Acts by the Delaware Code Revisors were unavailable at the time of publication.

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