

IN THE MATTER OF THE :
APPLICATION OF THE POTOMAC :
EDISON COMPANY D/B/A :
ALLEGHENY POWER FOR A :
CERTIFICATE OF PUBLIC :
CONVENIENCE AND NECESSITY :
TO CONSTRUCT THE :
MARYLAND SEGMENTS OF A 765 KV :
ELECTRIC TRANSMISSION LINE AND :
A SUBSTATION IN FREDERICK :
COUNTY, MARYLAND :

BEFORE THE PUBLIC SERVICE
COMMISSION OF MARYLAND

Case No. 9223

**SUGARLOAF CONSERVANCY, INC.'s REPLY
TO APPLICANT'S OPPOSITION
REGARDING SUGARLOAF'S RESPONSE TO APPLICANT'S
NOTICE OF WITHDRAWAL**

Sugarloaf Conservancy, Inc. ("Sugarloaf"), by its counsel, Amy C. H. Grasso, and Miller, Miller & Canby, Chtd., files this reply to the Applicant's recent opposition (Docket No. 217) to its previously-filed Response to Notice of Withdrawal (Docket No. 214) and in support states:

A. Elements this Commission Should Consider in Placing Conditions on the Voluntary Abandonment of the Applicant's Application

Although the applicant contends that it is entitled to abandon its application after a three-year-long battle without any condition imposed or recompense to the other parties to this proceeding, there are sound policy reasons for placing conditions on the abandonment of the Applicant's application.

The first policy reason for placing conditions on the abandonment of this application is one that underlies Maryland Rule 2-506.¹ There, for example, a plaintiff may only voluntarily dismiss a civil claim it has filed (a) if there has been no answer yet filed (and therefore the defendant has not exerted any effort or incurred fees in its defense of the matter) or (b) with the

¹ Although the Maryland Rules of Procedure are not binding on the PSC, they give excellent guidance as to the policy and judicial considerations that are important to consider in permitting a party to a judicial or adjudicatory proceeding to withdraw his petition or application after the issues have been joined and the proceeding begun.

consent of the opposing party. Otherwise—*i.e.*, if the defendant has invested in the litigation and may suffer prejudice without any reparation for the time wasted—the Court may dismiss the claim “only by order of court and upon such terms and conditions as the court deems proper.” Md. Rule 2-506. The policy underlying this rule supports Sugarloaf’s request here. The Applicant cannot file repeated applications, causing other parties, interested persons, and this Commission to spend time and energy on it, only to withdraw the application at its whim without any recompense to all of the affected individuals.

The rule “allows the court to *prevent prejudice to the defendant* in such cases by attaching conditions to the dismissal.” *See Skevofilax v. Aventis Pasteur, Inc.* 167 Md. App. 1, 14 n.9 (2006), *rev’d on other grounds*, 396 Md. 405 (emphasis added). In the context of this proceeding, similarly, the PSC can prevent prejudice to Sugarloaf and other parties by attaching conditions to the withdrawal. In deciding whether to permit voluntary abandonment of its application, without imposing any conditions, this Commission should consider the following elements, which Courts also consider in the context of determining whether to impose conditions on voluntarily dismissal:

- (1) the other parties’ and intervenors’ effort and the expense involved in preparing for proceedings on the CPCN;
- (2) excessive delay and lack of diligence on the part of the Applicant in prosecuting the action;
- (3) insufficient explanation of the need to withdraw its application;
- (4) whether there are pending motions for summary judgment.

See, e.g., Aventis Pasteur, Inc. v. Skevofilax, 396 Md. 405, 426-429 (2007). With respect to the first consideration, it cannot be disputed that the other parties to this proceeding, including Sugarloaf, as well as the intervenors, have incurred substantial costs, and spent unlimited time,

energy, and resources in battling the Applicant's CPCN. Upon information and belief, some parties have already retained expert witnesses. A brief review of the docket in this matter demonstrates the energy that has been poured into this proceeding. Similarly, with respect to the second consideration, it cannot be disputed that there has been excessive delay and lack of diligence in the Applicant's prosecution of this matter, evidenced by the original improperly-filed application, as well as the subsequent application, which required repeated supplementation.

The third consideration also weighs in favor of Sugarloaf here, as the Applicant has not sufficiently explained the need to withdraw its application. "Whether or not [the explanation is] sufficient ... really is dependent on the facts of this case." *Aventis*, 396 Md. at 427. It is unclear how much the alternatives to PATH, and the information uncovered through the Virginia modeling runs have impacted the withdrawal of the Applicant's application here.

Finally, with respect to the fourth consideration, although there are no pending motions for summary judgment, there is a pending order that modeling runs be produced by the applicant in the Virginia proceeding. The purpose of this element is to avoid the plaintiff in a proceeding from dismissing the proceeding when it is on the verge of suffering an unfavorable decision. Specifically, "[t]his factor is premised, at least in part, on the principle that a plaintiff confronting the potential for an adverse disposition of his, her, or its case may not dismiss unilaterally the case in order to file again in the future at a time when the conditions may be more favorable." *Aventis*, 396 Md. at 428.

For the very same reasons set forth in Maryland Rule 2-506 and the aforementioned cases, it is clear that the Commission—when considering the above factors—is within its power to place conditions upon the applicant's voluntary withdrawal of this matter. Sugarloaf notes

that the Applicant has repeatedly asserted that the Commission has great authority in a CPCN proceeding—to the extent that it trumps the authority of the local jurisdiction in siting a substation. Thus, to now assert that in the circumstances of this case the Commission does not have the authority to place conditions upon the voluntary abandonment of its application is insincere.

Sugarloaf's request for conditions to be placed on the Applicant's voluntary abandonment of its application for CPCN is further supported, by analogy, by the Maryland Real Property Statute relating to eminent domain. That statute provides that, when a condemning authority abandons a condemnation proceeding, "the defendant is entitled to recover from the plaintiff the reasonable legal, appraisal, and engineering fees actually incurred by the defendant because of the condemnation proceeding." Md. Code Ann., Real Prop. § 12-109. This provision is relevant and helpful here for a few reasons.

First, the Applicant's application for a CPCN in this case—and the application for CPCNs in general—have severe implications on a property-owner's rights and the value of his or her property. In that regard, it's not very different from an eminent domain proceeding. In order for a property owner to protect the value of his or her property, he or she has to actively participate in the proceedings. This is evidenced by the number of intervenors, as well as involvement of groups such as the Sugarloaf Conservancy and CAKES. Thus, the legislature—through the Real Property article—recognizes that the initiation of a proceeding that will take away valuable property rights, and the subsequent abandonment of it, results in damages unique to other forms of litigation. Accordingly, a property owner that has fought for recognition of its property rights—and incurred fees and expenses relating thereto—is entitled to be compensated when the condemning authority simply abandons its proposed condemnation.

Further, this matter is really only once-removed from an eminent domain proceeding, as the CPCN empowers the Applicant with the ability to condemn. See Md. Code Ann., Public Utilities § 7-207 (b)(2)-(3).

Here, Sugarloaf is not seeking reimbursement of legal fees and costs associated with this proceeding.² It is simply asking that—for the same reasons that the abandonment of a condemnation proceeding entitles the property owner to those fees and costs—it should be entitled to the assurance that this entire 3-year battle has not been in vain. Accordingly, it asks that the reasonable conditions listed in its Response to Applicant’s Notice of Withdrawal be granted as a requirement of the Applicant’s voluntary abandonment of this proceeding.

B. The Conditions to the Applicant’s Voluntary Abandonment of its CPCN Application are Reasonable and Necessary to the Other Parties Avoiding Further, Future Prejudice

The information requested by Sugarloaf as a condition to the Applicant’s voluntary withdrawal of its application is relevant to any future application. This is because, as discussed above, Sugarloaf is entitled to know in detail why the application is now meritless, and to know that, in the future, any such application will not suffer the same deficiencies. Further, parties to this proceeding are entitled to understand the “benchmarks” created by the Applicant’s application, and recent abandonment thereof, so that they can properly consider whether to oppose any future application. The prejudice suffered by three years’ worth of litigating the present application—only to have it abandoned when the Applicant realizes it is a losing application—has earned Sugarloaf and other parties to this proceeding the right to this additional information.

² Sugarloaf, however, does not waive its right to seek such fees and costs in any future matter or any review of this proceeding.

The basis for the “benchmarks” is as follows: the Applicant filed an application in 2009, alleging that there was sufficient need to support its application. Now, in 2011, it has determined that there is no longer sufficient need to support its application. The before and after—the data supporting the 2009 application and the data supporting the 2011 abandonment—set points of reference, or benchmarks, for any future proceeding. If, in the future, the Applicant files an application claiming that it is supported by sufficient need, any other interested person can “check” the data supporting the new application against these points of reference from 2009 (what is sufficient to support an application) and 2011 (what is not sufficient to support an application) applications. And, the projection of peak power demands, and an independent analysis of PJM’s energy forecast (both requested by Sugarloaf), are relevant to this consideration and will allow for groups such as Sugarloaf to assess whether a third round of battling the PATH project is warranted. In other words, it may save time, energy, and money for the Applicant, the Commission, and adverse parties, to know how the demands and forecasts play out, in comparison to the Applicant’s previous applications.

Similarly, to the extent that any alternatives played a role in the present abandonment of the Applicant’s application, other parties are entitled to know that. It is telling that the Applicant has withdrawn all of its applications shortly before modeling runs were required to be produced in the Virginia matter. And, for any future application—in light of the proceedings in this particular case—it is reasonable that an analysis of the alternatives take place so that a last-minute abandonment can be avoided. It will also allow potential adversaries to consider whether to invest time, energy, and money to oppose a new application.

Likewise, the requests for proof of having obtained the necessary approvals by the local jurisdiction in order to site the substation is a reasonable request. Sugarloaf maintains its

position that the Commission does not trump the local jurisdiction in the ability to site the substation.³ This will allow for a streamlined process, and potentially avoid unnecessary litigation before the Commission in a future proceeding.

Finally, the Virginia-ordered modeling runs should be produced. Sugarloaf and others have requested, and are entitled to, these. The Applicant, nonetheless, responds:

First, as the application in the Virginia case has also been withdrawn, the need to prepare and file the modeling runs is moot. Second, it is unclear why the Commission would need to compare 2011 data with data compiled to support the need case in a future application.

It is wrong on both points. On the Applicant's second point—that this information is not relevant to a future application—it *is* relevant for the reasons discussed on page 5-6, above. Further, on the Applicant's first point, the need to prepare and file the modeling runs should not be considered "moot," and there is nothing outlandish in the request for this information. If the production of the modeling runs does not follow the Applicant, in spite of withdrawal, the unfortunate message to the Applicant is that it can avoid its obligations—*i.e., the production of evidence it doesn't like*—by simply withdrawing its application, and refiling the application after some time.

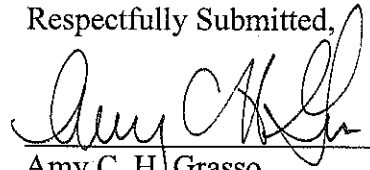
The Applicant has now spent three years' of many citizens' time in pursuing a case—and requiring them to spend the time, energy, and money of opposing it—only to withdraw the application at the last minute, after being ordered to produce these modeling runs in the Virginia case. This information is clearly relevant to the reason for withdrawing the present case, and should be produced as a condition to the Applicant's withdrawal so that the other parties—as is discussed in section I, above—have a sufficient explanation of the need to withdraw the application.

³ See Sugarloaf Motion to Dismiss at 3-10 (Docket Item No. 168).

CONCLUSION

Wherefore, for the foregoing reasons, Sugarloaf Conservancy, Inc., asks this Court to impose the conditions requested in its Response to Applicant's Notice of Withdrawal (Docket No. 214).

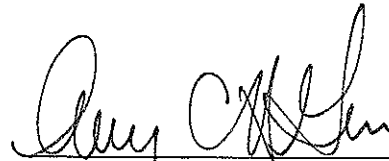
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2011, I served this all known parties of record to this proceeding by electronic mail to the e-mail addresses of record.



Amy C. H. Grasso