IN THE COURT OF APPEALS
OF MARYLAND

September Term, 2005

No. 140

KENNETH D. SCHISLER, *et al.,*

Appellants,

v.

STATE OF MARYLAND,

Appellee.

On Appeal from the Circuit Court for Baltimore City
(Albert J. Matricciani, Jr., Judge)

BRIEF OF APPELLEE, THE STATE OF MARYLAND

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STATEMENT OF THE CASE

This case presents a challenge to the authority of the General Assembly to statutorily reconstitute an agency that was itself created by statute. The case was brought by the Chair of the Public Service Commission of Maryland, Kenneth D. Schisler, "individually, as Chairman of the Public Service Commission, and on behalf of those members of the Public Service Commission similarly situated." The Public Service Commission of Maryland ("PSC") was also separately denominated as a plaintiff. In this suit for injunctive and declaratory relief against the State of Maryland, the appellants challenge portions of Senate

Bill 1, entitled "Public Service Commission – Electric Industry Restructuring" (the "PUC Act").

On Monday, June 26, 2006, Commissioner Schisler and the PSC filed a verified complaint, motion for temporary restraining order ("TRO"), supporting affidavit, proposed orders, and a memorandum of law. The State filed a response and opposition on the following day. The circuit court heard argument on Wednesday, June 28. Commissioner Schisler offered additional factual support at the hearing. The circuit court then denied the motion for a TRO, in a written opinion that was issued later that afternoon. On June 29, Commissioner Schisler and the PSC noted this appeal from the denial of their motion for a temporary restraining order.

QUESTION PRESENTED

Did the circuit court properly exercise its discretion in denying a temporary restraining order, where the General Assembly exercised its plenary power to address a crisis, and a State official and State agency subsequently sued, seeking to enjoin the resulting emergency statute, but failed to show irreparable harm and likelihood of success on the merits, because there is no constitutional limitation on the General Assembly's near-absolute ability to modify the powers and duties of a statutory entity?

STATEMENT OF FACTS[1]

A. The Circuit Court's Denial Of The TRO.

Kenneth Schisler, the Chair of the PSC, brought suit in the circuit court for injunctive and declaratory relief, challenging the constitutionality of sections 12 and 22 of the PUC Act. In the motion for a TRO, Commissioner Schisler asked that the "implementation of Sections 12 and 22 of [the PUC Act be] stayed until further order of this Court." (R. 11 - 90.)[2] The State opposed the TRO. (R. 91 - 120.)

Applying the standard for granting a TRO set out in Rule 15-504(a), the circuit court concluded that the plaintiffs were not entitled to a TRO because they failed to show either a likelihood of success on the merits of the underlying claim or that the official entities – the PSC and the office of Chairman of the PSC – would suffer irreparable harm if the commission members were replaced by operation of sections 12 and 22 of the PSC Act. (R. 138 - 51.)

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[1] Because of the expedited briefing schedule, counsel were unable to confer and prepare a Rule 8-501 extract. While the circuit court did not provide a copy of the record, it provided a copy of the docket entries with page numbers to the Record. The record cites herein are cites to page numbers indicated on the docket entries; cites to specific pages within those documents may be approximate. Cites to "T." are citations to the transcript of the hearing before the circuit court. Additional materials will be included in the appendix. Rule 8-501(e).

[2] The plaintiffs' complaint also seeks a permanent injunction similarly "restraining and enjoining the [State] from terminating the terms of the present commissioners and appointing new commissioners as provided for in Sections 12 and 22 of [the PUC Act]." (R.1 - 10.) Commissioner Schisler and the PSC contend that those sections of the Act violate Article II, § 15 of the Maryland Constitution, deprive them of due process protections provided by Article 24 of the Maryland Declaration of Rights, and constitute an unlawful bill of attainder in violation of Article I, § 10 of the United States Constitution. (R.1 - 10.).

B. The Identity Of The Litigants.

The circuit court noted that, before it could determine whether the plaintiffs suffered irreparable harm, it first had to determine who the plaintiffs were. (R.121 - 24, 138 - 51; T.2 - 5.) The caption listed the plaintiffs as Kenneth D. Schisler, "individually, as Chairman of the Public Service Commission, and on behalf of those members of the Public Service Commission similarly situated." The PSC was also separately named as a plaintiff.

1. The PSC As Plaintiff.[3]

The complaint did not allege any facts demonstrating that the PSC authorized a lawsuit against the State. Instead, after the State raised this issue in its opposition to the TRO,[4] Commissioner Schisler attempted during oral argument to submit an undated affidavit stating: "In my position as chairman, I polled the Commissioners who, by majority vote, approved the institution and prosecution of the instant litigation." (R.154l, T.5.) The affidavit did not disclose the date the poll was taken. In its written opinion, the circuit court observed that the PSC's purported authorization to bring suit against the State "rests upon a polling of the Commissioners" as evidenced by an affidavit that was "apparently an afterthought." (R. 121 - 124; 138 - 51.)[5]

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[3] It is undisputed that the PSC is a statutory agency. (R.154; T.7); *see also,* Md. Code Ann., Pub. Util. Comp. § 2-101 *et seq.*

[4] The State noted that the complaint contains no allegation that the PSC, acting as a whole, met or voted to authorize suit. *Cf. Public Serv. Comm'n v. Wilson,* 389 Md. 27, 52 (2005) (PSC chairman lacked authority, required to be exercised by majority of sitting commissioners, to terminate employee).

[5] There is no indication that any attempt was made by Commissioner Schisler to comply with the Open Meetings Act. One remedy for an open meetings violation is to void the improper decision of the agency. Thus, if, in polling the Commissioners for the purpose (continued...)

The circuit court was aware of the undisputed fact that Commissioner Harold D. Williams did not join the lawsuit. (Tr.4.) In fact, Commissioner Williams submitted a copy of a June 27, 2006, letter that Commissioner Williams had sent to Commissioner Schisler's counsel. Commissioner Williams wrote:

> I will not to [sic] be a party to the lawsuit. . . . I was unaware of the contents of the lawsuit and as such did not give my consent to be a party to the aforementioned lawsuit. It has come to my attention that your firm has been selected to represent the commission, another decision for which I was not consulted and a decision that was made once again unilaterally outside of the deliberative process. . . . I am extremely troubled that pertinent information has not been shared with me prior to decisions being made that affect the entire Commission. Moreover, Chairman Schisler has implicated all five commissioners throughout that lawsuit without utilizing the deliberation process.

(R. 132 - 33.)

2. Commissioner Schisler, "Individually, As Chairman," As Plaintiff.

At the hearing on the motion for the TRO, in response to questioning by the court regarding the status in which Commissioner Schisler brought suit, Commissioner Schisler's only explanation, offered in rebuttal, was that the placement of a comma in the descriptor clearly demonstrated that this lawsuit had been filed in both an individual and an official capacity. (R.154; T.58.) The circuit court noted in its written opinion that, "[i]t is not at all clear to the Court, even after hearing counsel's arguments, who are the real parties in interest

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[5] (...continued)
of bringing this lawsuit, there was an Open Meetings Act violation, the alleged majority decision may be void. *See* Md. Code Ann., State Gov't § 10-510(b)(1)(iii).

in this case." (R.138 - 51.) Ultimately, the circuit court analyzed the claims as if brought in both capacities, and determined that the TRO should not issue. (R.138 - 51.)

3. Similarly Situated Commissioners As Plaintiffs.

Although the complaint alleged that Commissioner Schisler filed suit "on behalf of those [unnamed] members of the Public Service Commission similarly situated," (R.1 - 10), the circuit court observed that, "[t]his case is not a class action. The other four commissioners have not joined as party plaintiffs." (R.138 - 51.) Commissioner Williams has affirmatively stated that his authorization was neither sought nor given. Another Commissioner, Karen A. Smith, has resigned, publicly stating that she was not part of this lawsuit.[6] Thus, of the five Commissioners, one is named (Commissioner Schisler), one was not consulted (Commissioner Williams), and one resigned and stated that she was not part of this lawsuit (Commissioner Smith). The two remaining Commissioners, who Commissioner Schisler claimed had full knowledge of the lawsuit, nevertheless did not join as plaintiffs. (R. 154; T.33.) At no point in the pleadings or argument did Commissioner Schisler identify the Commissioners who he contends are "similarly situated."

C. The Statute That Is Being Challenged.

On June 14, 2006, by a three-fifths majority of each House, the General Assembly, enacted emergency legislation amending the Public Utility Companies Article by enacting

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[6] Commissioner Smith appears to have resigned after the TRO hearing. Her resignation is not in the record. Judicial notice may be taken at any stage of a proceeding. Md. Rule 5-201. The State requests that this Court judicially notice the resignation of Commissioner Smith.

the PUC Act. The emergency legislation became effective upon its enactment on June 23, 2006. *See* Md. Const. art. II, § 17(d); *see also* PUC Act § 25.

The PUC Act was passed in a special session of the General Assembly to address the anticipated 72% hike in energy prices facing a large number of Maryland citizens. In his June 5, 2006, letter to the Speaker of the House of Delegates and the President of the Maryland Senate, Governor Robert L. Ehrlich, Jr., described the effects of the anticipated rate increase as creating "undue financial hardship for many Marylanders." (R.118 - 19.) Governor Ehrlich stated that he believed a special session of the General Assembly was necessary to address the coming crisis. (R.118 - 19.)

Subsequently, sufficient members of the Senate and House of Delegates petitioned for a special session. *See* Md. Const. art. III, §14. Before the petition reached him, the Governor called the special session under Article II, §16. The fruit of that special session, the PUC Act, is a comprehensive legislative package that, in addition to reconstituting the PSC, provides current rate relief and processes to study increased rates. (R.11 - 90.) Moreover, the General Assembly expressly enacted the PUC Act as "an emergency measure . . . *necessary for the immediate preservation of the public health or safety*. . . ." PUC Act § 25 (emphasis added). After Governor Ehrlich vetoed the legislation, the veto was overridden by a three-fifths majority of both the House of Delegates and the Senate.

Section 12(1) of the PUC Act reconstitutes the PSC by providing that the term of the current members of the PSC "shall terminate at the end of June 30, 2006." Section 12(2) - (5) establishes a process for appointing five new members and designating the chair. Section 12(6) specifies the expiration dates of the terms of the newly appointed members

(staggered to occur on June 30 of each year between 2007 and 2011). Section 1of the PUC Act in turn amends Md. Code Ann., Pub. Util. Cos. ("PUC") § 2-102(d)(2) to provide that the staggered five-year terms of commissioners set forth in that section follow the terms created for the newly appointed members, with each term beginning on July 1 of the pertinent year.

By operation of the provisions of the PUC Act described above, the current terms of the PSC chair and commissioners ended on June 30, 2006, *see* § 12(1); successors will be appointed, and a new chair will be designated to fill terms that began on July 1. *See* § 12(2) & (3). The manner of appointment prescribed by § 12 requires the Speaker of the House of Delegates and the President of the Senate to jointly submit to the Governor a list of candidates for chair and a list of candidates for the four other new commissioners. *See* § 12(2). The Governor is then to appoint five commissioners and designate the chair from these lists. *See id.*

The Act further provides that, if the Governor fails to appoint the new commissioners by July 15, 2006, the Speaker of the House of Delegates and the President of the Senate will make appointments and designate the chair "promptly." § 12(3)(I). The PUC Act also authorizes the Executive Secretary of the PSC to act on its behalf in "carrying out ministerial functions" if the Governor has not acted by July 15, 2006. § 12(3)(ii).

Recognizing the possibility that successors of the current PSC members may not be appointed by July 15 or some time promptly thereafter, the General Assembly continued the holdover provisions set out in PUC §§ 2-102(d)(3) and 2-103(b)(2), which state that, "[a]t the end of a term" a commissioner and the chair, respectively, "continue[] to serve until a

successor qualifies." Section 12 expressly states that PUC §§ 2-102(d)(3) and 2-103(b)(2) are unaffected by the appointment process necessitated by the reconstitution of the PSC.[7] Thus, for any period between the expiration of the current terms and the appointment of new commissioners, the current members of the PSC will remain in office beyond the expiration of their terms on June 30.

The PUC Act provides for a separate appointment mechanism in the event that judicial intervention would result in invalidation of the appointment procedures set forth in § 12(2) & (3). In such a case, the appointment of new PSC members would be effected by the Attorney General.[8] *See* § 22(c).

D. Factual Evidence In Support Of The Motion For TRO.

The factual record initially submitted by Commissioner Schisler consisted only of the following: 1) a verified complaint alleging that sections 12 and 22 of the PUC Act constituted an ultra vires exercise of legislative authority; 2) the plaintiffs' motion for a TRO, incorporated into the complaint, in which the plaintiffs contended, without alleging supporting facts, that market disruption harmful to the public interest would result if sections 12 and 22 were to take effect; 3) a copy of the PUC Act; 4) Commissioner Schisler's affidavit averring to the truth of the allegations contained in the complaint; and 5) copies of

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[7] Specifically, the prefatory language in § 12 states that its terms apply "notwithstanding the provisions of § 2-102 of the [PUC] Article, as enacted by this Act, *except for subsection (d)(3)*, and notwithstanding the provisions of § 2-103 of the [PUC] Article, as enacted by this Act, *except for subsection (b)(2)*." (emphasis added).

[8] A similar safeguard is created in § 22(b), which would have the current commissioners serve at the pleasure of the Attorney General, in the event that the termination of their terms in office under § 12(1) were invalidated by court action.

orders in a moot, dismissed case that originated in the Circuit Court for Talbot County. (R.11 - 90.)

At oral argument on the TRO motion, Commissioner Schisler submitted an additional affidavit stating that a majority of the Commissioners polled had approved institution of the lawsuit. (R.154; T.3.) In addition, Commissioner Schisler submitted, over objection, news clippings that he contended showed illegitimate motives of the legislature in enacting the challenged portions of the statute. (R.154; T.6, 36 - 38.) The circuit court did not admit the clippings into evidence. (R.121 - 24; 138 - 51.)

E. Post-Hearing Developments.

In argument, Commissioner Schisler contended that the candidates whose names would be submitted to the Governor by the General Assembly might not be properly qualified. (R.154; T.17 - 18, 29.) The list has now been submitted and is subject to judicial notice. Md. Rule 5-201. The list includes persons with significant experience and qualifications, such as Members of the Bench, a current PSC Commissioner, a former PSC Commissioner, former People's Counsel and Assistant People's Counsel, and a federal utilities regulator.[9]

SUMMARY OF ARGUMENT

A single commissioner of a State entity, purporting to act "individually, as the Chairman of the Public Service Commission," for himself and unnamed others, seeks to challenge the status quo, pitting his pecuniary interests against the public interest. The emergency legislation attacked in this lawsuit was enacted upon the express finding that the

[9] As noted, Commissioner Smith apparently resigned after the TRO hearing.

statute was "necessary for the immediate preservation of the public health and safety." PUC Act § 25.

Plaintiffs seek to enjoin two sections of a comprehensive statute that addressed: a) current rate relief; b) processes to study the proposed merger and other matters related to increased rates; and c) the structure of the entity charged with applying the law in a manner that serves the public interest. Commissioner Schisler has singled out the term and appointment provisions, in an effort to save his job. He seeks to block legislative action that the General Assembly determined was necessary to the "immediate preservation of public health and safety."

Commissioner Schisler has no standing in his official capacity. There is no allegation that the PSC took the requisite actions to proceed in its official capacity. The individual occupants of public office are *not* the same as the public entity. Thus, the PSC and its official capacity chairman cannot assert injury in fact, an element of standing.

The General Assembly has plenary power. The only limits on that power are those contained in the Constitution. Absent a constitutional limitation, the legislature can and may act and, regardless of whether its actions are deemed wise or unwise, they are not subject to judicial review.

In their attempt to persuade this Court to find constitutional limitations on the exercise of legislative power to restructure the PSC, the PSC and Commissioner Schisler posit fatally flawed premises. Plaintiffs incorrectly assert, contrary to the plain language of the Constitution, and the decisions of this Court, that the Governor's discretionary authority to remove an official for cause impaired the legislature's recognized power to control the

entities that it created. The Due Process Clause of Article 24 does not preclude legislative restructuring of an agency. There is no vested right to a government office and legislative amendment of an existing statutory system is all the process that is due. Commissioner Schisler attempts to buttress his claims by alleging harm flowing from a change of PSC officeholders. These, however, are policy arguments and additionally are rebutted by the well-established *de facto* officer and holdover doctrines, which assure that there will be no vacancy in office and the official acts of the occupants in office remain valid acts.

Nothing contained in the present statute constitutes a bill of attainder. The statute does not disqualify any of the current commissioners from serving in the future. It does not assign "guilt" or impose a sanction or penalty.

The General Assembly created the PSC and can abolish it. It therefore has the lesser included power of altering the structure of the PSC. The State of Maryland is the sole entity before this Court that speaks for the people of Maryland. The decision below, denying the TRO, was entered pursuant to the lower court's broad equitable discretion, and should be affirmed.

ARGUMENT

STANDARD OF REVIEW

This is an appeal from a denial of a motion for a temporary restraining order. This Court "review[s] the exercise of the trial court's discretion to grant or deny a request for injunctive relief under an 'abuse of discretion' standard." *El Bey v. Moorish Science Temple of Am., Inc.,* 362 Md. 339, 354 (2001); s*ee also, e.g., State Comm'n on Human Relations v. Talbot County*, 370 Md. 115, 127 (2002) ("Generally, appellate courts review a trial court's

determination to grant or deny injunctive relief for an abuse of discretion."); *State Dep't of Health & Mental Hygiene v. Baltimore County,* 281 Md. 548, 554 (1977) (there is "[n]o principle . . . better established, than that the granting or refusing of a writ of injunction, is a matter resting in the sound discretion of the court."); *but see, J.L. Matthews, Inc. v. Maryland-National Capital Park & Planning Comm'n,* 368 Md. 71, 93-94 (2002) (de novo). Where a plaintiff seeks to enjoin the State, circuit courts, exercising their traditional equity powers, have broader latitude than when only private interests are at stake. *DMF Leasing, Inc. v. Budget Rent-A-Car of Maryland, Inc.*, 161 Md. App. 640, 648 n. 3 (citing *State Dep't of Health & Mental Hygiene v. Baltimore County*, 281 Md. 548, 555-57 (1977)). Pure legal determinations are reviewed *de novo*. [10]

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[10] Neither Commissioner Schisler nor the PSC sought *certiorari*. This matter is before the Court on appeal pursuant to section 19(3) of the PUC Act. This Court has indicated that, even with respect to some direct appeals to this Court authorized by statute, a petition for a writ of *certiorari* is the preferred method of obtaining review. *See Bienkowski v. Brooks,* 386 Md. 516, 548-52 (2005); *cf.* Rule 8-301(a)(1), (3). In light of the express legislative directive authorizing a direct appeal here, if this is an appeal from a final judgment, the State accepts the appellants' lodging of their appeal as adequate to invoke the Court's jurisdiction.

The State has not filed an answer and does not concede that an order denying a TRO is reviewable. The appellants' motion for a preliminary injunction was neither briefed by the State nor ruled on by the circuit court. The question of whether the denial of a TRO is an appealable order under Md. Code Ann., Cts. & Jud. Proc. § 12-303(3) appears never to have been addressed by this Court. The Court of Special Appeals has held that such an order is appealable. *See Bond v. Slavin,* 157 Md. App. 340, 353 (2004); *contra OPM v. AFGE,* 473 U.S. 1302, 1303-04 (1985).

Generally, denial of a TRO is not appealable. There are exceptions to that rule. "The easiest way to show that a temporary restraint ruling creates the same risks as a preliminary injunction ruling occurs when a denial of temporary restraint effectively denies a preliminary injunction. Appeals have been allowed on this theory in circumstances in which the district court has manifestly rejected the only theories that would support a preliminary injunction, serious harm must occur that could not be redressed by a preliminary injunction, or the district court is not moving effectively toward a preliminary injunction decision." Wright,

(continued...)

In the circuit court, this case was assigned to the Business and Technology Track. (R.125 - 27.) The circuit court judge in this case had acquired a significant degree of familiarity with issues surrounding utility regulation and the functions of the PSC by presiding over recent cases seeking judicial review of PSC orders, *e.g.,* Case No.24-C-06-003976, and the prolonged litigation over electric utility deregulation that began in 2000, Case No. 24-C-00-000666, which led to an appeal adjudicated in this Court and a second appeal adjudicated in the Court of Special Appeals. This Court may – and should – judicially notice that those lawsuits are also assigned to the same Member of the Bench in the Circuit Court for Baltimore City, *see* Md. Rule 5-201, and consider the circuit court judge's unique familiarity with these matters in determining whether the Circuit Judge acted within his discretion in denying the TRO.

I. WHEN THE STATE IS SUED, THE FACTORS GOVERNING EQUITABLE RELIEF ARE NOT THE SAME AS THOSE GOVERNING PRIVATE DISPUTES.

Rule 15-504(a) imposes a stringent standard for issuance of a TRO – this extraordinary form of relief should be granted "only if it *clearly* appears . . . that *immediate, substantial, and irreparable harm* will result to the person seeking the order before a full adversary hearing can be held. . . ." (emphasis added). Because the purpose of a TRO is "to prevent irreparable injury 'so as to preserve the court's ability to render a meaningful decision on the merits,'" no TRO is warranted if the plaintiffs fail to show that it is necessary "for the prevention of interim injury which would undermine the final disposition of [the] case on the merits." *State Dep't of Health & Mental Hygiene v. Baltimore County*, 281 Md.

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[10] (...continued)
Miller & Cooper, 16 Fed. Prac. & Proc. § 3922.1.

at 558, 559 (internal citations omitted). Moreover, a TRO is generally designed to maintain the status quo. *Id.* ("it is quite clear from our cases that a preliminary injunction will lie when it is necessary to preserve the status quo"; whether the status quo is to be preserved, "should have weighed very heavily in the trial court's evaluation of the request for interim injunctive relief.").

Here, because it was emergency legislation, the PUC Act became law before this lawsuit was commenced. It *is* the status quo, which is defined as the last peaceable state of affairs that existed prior to the lawsuit. *See id. at* 556 n.9; *see also, Lee v. Maloof*, 136 Md. App. 682, 693 (2001). Because appellants sought to change the status quo, they were faced with a heavy burden – one that the circuit court correctly determined they failed to meet.

Despite naming the State of Maryland as the sole defendant in this suit,[11] Commissioner Schisler relied below on the TRO standard used for resolution of disputes between private litigants. Under that standard, if the party requesting the TRO meets the threshold showing of irreparable harm, the Court should examine the following four factors to determine whether the TRO should issue: 1) the likelihood that the plaintiff will succeed on the merits; 2) the balance of convenience determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; 3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and 4) the public interest. *Dep't of Transp. v. Armacost*, 299 Md. 392, 404-05 (1984) (citing *Dep't of Health & Mental Hygiene v. Baltimore County*, 281 Md. at 554-57).

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[11] Sovereign immunity prevents a lawsuit against the State, absent consent, which is nowhere alleged. Only a State officer can be sued, not the State itself, even in a declaratory judgment action. *Davis v. State*, 183 Md. 385 (1944).

In contrast, however, “when government interests are at stake, fewer than all four of the factors will apply, and trial courts, exercising their traditional equity powers, have broader latitude than when only private interests are at stake." *DMF Leasing,* 161 Md. App. at 648 n. 3 (citing *Dep't of Health & Mental Hygiene v. Baltimore County*, 281 Md. at 555-57). The balance of convenience factor “normally will not be considered in a dispute between two governmental parties” because “consideration of the comparative hardship to each side is not relevant; the only interest to be considered is the public interest.” *Armacost*, 299 Md. at 404 n.6.

Moreover, an injunction should not be granted unless the party seeking the injunction can show a "*probability* of prevailing on the merits, not merely a remote *possibility* of doing so." *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 456 (1995) (emphasis in original). Thus, a TRO should not be granted unless plaintiffs make a showing that is “full and sufficiently definite and clear, in support of the right asserted, and that such right has been violated.” *Armacost*, 299 Md. at 405 (citations omitted). Where the party seeking an injunction is unable to show a real likelihood of success on the merits, the Court does not have to consider the other factors. *Fogle*, 337 Md. at 456.

II. THE CIRCUIT COURT CORRECTLY HELD THAT COMMISSIONER SCHISLER IS UNLIKELY TO SUCCEED ON THE MERITS.

The circuit court determined that the plaintiffs failed to demonstrate a likelihood of success on the merits because “the General Assembly’s authority to alter the terms of office of the Public Service Commissioners and to reconstitute the Commission with new appointees, chosen by the Governor from lists submitted by legislative leaders, is not beyond

its constitutional authority and does not run afoul of the federal constitution's dictates on separation of powers and bills of attainder." (R.138 - 51) (footnote and citations omitted). That holding was correct, both factually and legally.

A. The General Assembly Has Plenary Power To Act In All Areas Not Prohibited By The Constitution, And The Power To Create And Abolish Agencies Contains, As A Lesser Included Power, The Power To Modify Them.

The General Assembly has plenary power to act in all areas, unless prohibited by the Constitution. *Maryland Committee for Fair Elections v. Tawes,* 228 Md. 412, 439 (1962); *Wyatt v. Beall,* 175 Md. 258 (1938) (the constitution is the only limit on legislative powers, and whatever the people have not, by their constitution, restrained for themselves, through their representatives in the legislature they may do); *Brawner v. Curran,* 141 Md. 586 (1922) (legislature's plenary powers are limited only by State and federal Constitutions, legislative powers are of most vital interest to the people); *McMullen v. Shepherd,* 133 Md. 157 (1918); *Trustees Catholic Cathedral Church v. Manning,* 72 Md. 116 (1890) (recognizing plenary power of legislature, legislative power is practically absolute).

In reviewing a legislative enactment, a court should not ask whether power to pass the bill was granted; the court should do no more than determine whether the Constitution prohibits the action taken. *Mayor & City Council of Balt. v. State,* 15 Md. 376, 472, (1860) (LeGrand, C.J, concurring) ("the people have the power to do as they may please," while "their delegates have the same scope of authority, save in so far as there be *express* or necessarily *implied* limitations on it) (emphasis in original); *Rochow v. Maryland National Capital Park and Planning Commission,* 151 Md. App 558, 582 (2003) (the legislature has plenary power when acting for the public health, comfort, order, safety, convention, morals,

or general welfare). "The powers of the Maryland Legislature are plenary except as restrained or confined by the Federal or State Constitutions." *First Continental Sav. & Loan Ass'n v. Director, State Dep't of Assessments & Taxation,* 229 Md. 293, 302 (1962).[12]

As the circuit court noted, even a case cited by Commissioner Schisler, *Little v. Schul,* 118 Md. 454, 563-64 (1912), supports the proposition that the creating authority has the power to abolish the agency, and that power necessarily subsumes the lesser included power of modifying the agency. (R.154; T.20 - 21.) *Schul* does not stand alone – this Court's decision in *Town of Glenarden v. Bromery,* 257 Md. 19 (1970), provides ample precedent on that point.

In *Glenarden*, the voters replaced the town's incumbent officials, shortening the terms of office of the incumbents by use of a charter amendment. The incumbents sued to protect their terms in office. This Court squarely stated that the voters had the power to amend the charter and shorten the terms of office, observing that, "the legislative power of a State, except insofar as restrained by its own constitution, is at all times absolute with respect to all

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[12] The late Chief Justice LeGrand also expressly noted that the expediency and wisdom of legislation is a matter for the legislature, not the courts. In *Mayor & City Council of Baltimore v. State,* 15 Md. 376 (1860), he wrote that "if the Legislature had power to make the appointment, we cannot say that it ought not to have been exercised, any more than we could, with propriety, pass upon the correctness of its judgment in selecting these officers. It is a mere question of legislative power, and as such, alone, can we treat it." In short, courts are without authority to interfere with any exercise of legislative prerogative that is within constitutional limits. *Harvey v. Marshall,* 389 Md. 243 (2005); *Beasley v. Ridout,* 94 Md. 641 (1902) (valid exercise of legislative power is a question of power alone, as determined by constitution; expediency or utility is the exclusive decision of the legislature and cannot be regarded by judiciary in testing power to pass laws; noting presumption that every act of legislature is within its power; it is for court to declare acts of legislature unconstitutional, the unconstitutionality must be manifest); *State Board of Education v. Montgomery County,* 346 Md. 633 (1997) (courts are without authority to interfere with valid exercise of legislative prerogative, within constitutional limits).

offices within its reach, so that it may at pleasure create or abolish them, or modify their duties, *and may also shorten or lengthen the term of service." Id.* at 64-65 (citing *Higginbotham v. Baton Rouge*, 306 U.S. 535 (1939) (emphasis added).[13]

Moreover, "appointment to and tenure of an office created for the public use do not come within the import of the term 'contracts' as used in the Constitution or, in other words, *within the vested, private, personal rights intended by the Constitution to be protected." Glenarden,* at 257 Md. at 65 (citing *Crenshaw v. U.S.,* 134 U.S. 99 (1890) (emphasis added). Because public officials are appointed for public purposes, they serve at the convenience of the public. "It follows then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws, and to create and *change* or *discontinue* the agents designed for the execution of those laws." *Glenarden,* 257 Md. at 65 (internal citations omitted) (emphasis added). In short, officials hold their offices subject to the possibility that they may be ousted by a change in the statute creating their office. *Id.*; *accord, Brown v. Brooke*, 95 Md. 738 (1902) (affirming issuance of writ of mandamus requiring commissioners to vacate their offices after statute was amended to provide for termination of terms).

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[13] In *Higginbotham v. Baton Rouge,* 306 U.S. at 535, the city legislature went into emergency session and enacted a bill that terminated Higginbotham from his position as Superintendent of Parks. The Superintendent sued, asserting that he had been employed for a term that had not yet expired and that his contractual right had been impaired. The Supreme Court affirmed dismissal of that claim. It noted that "the legislative power of a State, except insofar as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service." *Id.* at 538 (quotations omitted). The Court wrote that the plaintiff municipal official's "position . . . both with respect to duties and tenure may properly be regarded as subject to the control of the legislature and of the Commission Council acting under its authority." *Id.* at 539.

Recently, in *Clark v. O'Malley,* ___ Md. App. ___, 2006 WL1789064 at *13-14 (2006), the Court of Special Appeals held that, in the absence of a provision of the Constitution to the contrary, removal or suspension of a public officer, whether elected or appointed, is in the control of the legislature. It held that contractual rights did not supersede statutory limits on power.

Glenarden demonstrates that the power of the General Assembly is plenary and, unless limited by the Constitution, must be upheld.[14] Statutory public officials do not have a vested right to their office.[15] The General Assembly, having created an agency, is free to abolish that agency. It has the lesser included power of being able to restructure the agency. Plaintiffs conceded as much in oral argument when they admitted that the General Assembly had the absolute authority to abolish the PSC completely.[16] (T.154.)

Commissioner Schisler's argument, then, becomes one of form over substance. He admits that the legislature could have abolished the PSC, thereby terminating the

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[14] Cases cited by Commissioner Schisler, like *Miles v. County Comm'rs of Somerset County,* 80 Md. 358 (1894), are not on point. In that case, unlike the present one, the governing statute provided for a fixed term with removal *only* for incompetency, willful neglect of duty, or misdemeanor in office. The supervisors removed the official because another person could provide cheaper services. The Court held that the removal of a supervisor by the commissioners "for cause," without specifying the cause, and without any formal accusation against or notice to such supervisor, was illegal and void. *Miles* provides no support to Commissioner Schisler. Here, due to a "crisis" and an "emergency" that threatened public health and safety, the General Assembly restructured the PSC. The PSC statute does not provide only for removal "for cause."

[15] The State should not be understood to assert that a statutory change could modify a Constitutionally-prescribed term of office.

[16] At oral argument, appellants stated: "MR. RADDING: . . . . If they abolished the agency and recreated a new agency, if there were some benign changes to the agency, all of those would be possibly, depending on the way they were done, acceptable." (T.23.)

commissioners, without notice and a hearing, and that it could have created a replacement agency with new commissioners; however, he asserts that it cannot keep the PSC and replace its commissioners. Setting aside the substantial restructuring of the PSC contained in the PUC Act, which effectively accomplishes what the Commissioner concedes could have been done, Commissioner Schisler's argument should be rejected as a technicality.

The circuit court correctly sustained the State's objection to admission or consideration of newspaper clippings containing partial statements made by members of the General Assembly, in an apparent attempt to show improper motive in enacting the PUC Act. (R.154; T.36 - 38.) Such an attempt is futile because it is well settled that a reviewing court is limited only to determining if a legislative enactment is constitutional, and not whether the legislature acted with a proper purpose. *Workers Compensation Commission v. Driver,* 336 Md. 105, 118-19 (1994), *cert. denied*, 513 U.S. 1113 (1995) (judiciary is not ordinarily concerned with what motivated legislative body; motives of legislature cannot be regulated by judiciary when testing power to pass statutes and motives of legislature are ordinarily not pertinent); *see also, Mayor & City Council of Balt.*, 15 Md. 376 ("the motives of the legislature can have no effect upon the efficiency of the laws, neither can they be regarded by the judiciary when testing their powers to pass them").

B. The Constitutional Provisions Relied On By Commissioner Schisler Do Not Restrict The Plenary Power Exercised In The PUC Act.

None of the four constitutional provisions relied on by Commissioner Schisler in his effort to limit the plenary power of the General Assembly invalidate the PUC Act.

Accordingly, the circuit court correctly determined that the PUC Act was fully within the legislative authority of the General Assembly.

1. The Governor's Constitutional Power To Remove Officials For Misconduct Supplements, But Does Not Supplant, The Legislature's Plenary Power To Create, Modify, Or Abolish The PSC And Change The Terms Of Office.

Art. II, § 15 provides: "The Governor *may* . . . remove for incompetency, or misconduct, all civil officers who received appointment from the Executive for a term of years." (emphasis added). Commissioner Schisler contends that this provision means that *only* the Governor may remove civil officers whom he appoints for a term of years. That argument is, of course, not supported by the plain language of the Constitution.

What the Commissioner fails to recognize is that Art. II, § 15 simply provides an alternative removal mechanism to complement the legislature's inherent power to abolish or modify what it has created by statute. This conclusion is not only a practical interpretation, it is one supported by the language and history of the clause itself.

The General Assembly is in session for only 90 days a year. Practically speaking, if the need to remove a public official for misconduct arose when the General Assembly was not in session, absent Art. II, §15, the only way to remove the official would be to reconvene the General Assembly, a process that, at the time the 1851 Maryland Constitution was ratified, could have taken weeks. Instead, the Constitution created this alternative mechanism to complement – not replace – the General Assembly's removal power.

The history of the debate leading up to this provision also supports this construction. The modern provision essentially dates from 1851. The 1851 Constitution was designed to

limit, not enhance, the Governor's powers. *Cull v. Wheltle,* 114 Md. 58, 70 (1910). The State's construction of the provision is borne out by the history surrounding the constitutional debates that resulted in what is now Art. II, § 15. The original draft would have provided:

> The Governor may suspend or arrest any military officer of the State, for disobedience of orders, or other military offence, and may remove him in pursuance of the sentence of a court martial; and may suspend or remove any civil officer whose tenure of office is not placed beyond his control by some other provision of this Constitution.

Before this section was taken up, the Convention considered what is now Art. II, § 10, and, on motion of Mr. Grason, amended it to add "[u]nless a different mode shall be prescribed by the law creating the office." Proceedings and Debates of the 1850 Constitutional Convention, Debates Volume 1 at 468. Mr. Grason offered a similar amendment to § 15, adding "or the law creating the office," Proceedings and Debates of the 1850 Constitutional Convention, Debates Volume 1 at 471, and that amendment was adopted. However, in the discussion of the section, delegates raised issues about the ability of the Governor to remove officers without cause, with the general feeling being that he should not have that power. As a result, Mr. Grason suggested a second amendment that put the section in its final form:

> The Governor may suspend or arrest any military officer of the State, for disobedience of orders or other military offense, and may remove him in pursuance of the sentence of a court-martial; and may remove for incompetency or misconduct, all civil officers who receive appointments from the executive for a term not exceeding two years.

The pattern of events here, and the fact that the same person proposed both amendments , supports the conclusion that the deletion of the express reference to contrary constitutional or statutory provisions was not intended to limit the power of the legislature. The Framers of the 1851 Constitution were concerned about abuses of the Governor's

removal power that might have the effect of undoing a legislatively created body; accordingly that power was limited. The power of the legislature to determine the composition and organization of governmental bodies created by statute was unaffected.[17]

Both the logical interpretation and the legislative history of Art. II, §15 lead to the inescapable conclusion that it was not intended to supplant the General Assembly's plenary power to create, modify, or abolish public bodies created by statute. Instead, § 15 merely provides for an alternative process by which the Governor could remove public officials for specified reasons. Accordingly, it does not present a constitutional impediment to the PUC Act.

2. The Due Process Clause Neither Limits The General Assembly's Power To Create, Modify, Or Abolish A Public Body Created By Statute Nor Protects A Vested Property Right In A Government Appointment To That Public Body.

Commissioner Schisler contends that the § 12 of the PUC Act operates to deprive him of a property interest without notice and an opportunity to be heard in violation of Article 24 of the Declaration of Rights. His argument fails because: a) there is no vested right in a statutory term of appointment; b) he received all of the process that he is due; and, c) he is obtaining judicial review.

Where an employee is removed by the executive for misconduct or incompetence, the employee may have certain enumerated due process rights. *See* Decl. of Rights, Art. II, §15;

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[17] Further evidence of this general sentiment can be found in the debates on the Board of Public Works provision, which reflects the view that leaving the Board to be established by legislation would "leave the Legislature to enlarge or diminish the duties of the office, according to the public exigencies, or to abolish it altogether, if the public interest should so require." Proceedings and Debates of the 1850 Constitutional Convention, Debates Volume II at 445.

Md Code Ann., State Gov't. §3-307; PUC § 2-102(f). In contrast, because the removal of PSC commissioners contemplated by the PUC Act is made pursuant to the legislature's inherent authority, no due process protections are triggered and § 12 does not run afoul of Article 24. Instead, the General Assembly exercised its authority to restructure the PSC, based on its determination that reconstitution of that body is in the public interest. The Constitution does not require that notice or a hearing be provided to persons affected by legislation. *See Richard's Furniture v. Board,* 233 Md. 249, 258-60 (1964). The General Assembly's ability to amend previously enacted legislation is implicit in the enactment of the original bill. *Farmers & Merchants Nat'l Bank of Hagerstown v. Schlossberg*, 306 Md. 48, 61 (1986) (where newer statute conflicts with older, newer prevails).

Commissioner Schisler's due process and vested rights arguments are further undermined by two binding principles. First, a public official does not have a vested right in office. *See Glenarden,* 257 Md. at 65 (citing *Crenshaw v. U.S.,* 134 U.S. 99 (1890)) ("appointment to and tenure of an office created for the public use do not come within the import of the term 'contracts' as used in the Constitution or, in other words, *within the vested, private, personal rights intended by the Constitution to be protected."*) (emphasis added). Second, one General Assembly cannot insulate legislation from repeal, amendment, or modification in future legislative sessions.

As to the first principle, an appointment to a public office for a definite term is not a contract conferring constitutional protections. *See Butler v. Commonwealth of Pennsylvania*, 51 U.S. 402 (1850) ("The selection of [public] officers . . . is matter of public convenience or necessity and can[not] constitute any obligation to continue such agents, or to re-appoint

them."). Nor does a public officer have "a vested right to perform any particular service." *Bradford v. Jones*, 1 Md. 351 (1851) (distinguishing between the right to perform a particular service and the right to receive compensation for services rendered).

In any event, it is well-established that a personal interest in continued government employment is subject to "the legislative power of a State, except so far as restrained by its own constitution, [which] is at all times absolute with respect to all offices within its reach, so that it may at pleasure create or abolish them, or modify their duties, and *may also shorten or lengthen the term of service." Glenarden,* 257 Md. at 26-27 (emphasis added). Furthermore, the due process rights that protect interests in some forms of employment have "been held inapplicable" where, as here, the loss of employment would be the result of "legislatively mandated reorganizations or reductions in force not based on individual fault or 'cause.'" *Maryland Classified Employees Ass'n v. State,* 346 Md. 1, 23 (1997).

The Supreme Court recognized early on that statutes relating to the selection of State officers and employees and the periods of their appointment are adopted "for the benefit of all, and from the necessity of the case, and according to universal understanding, to be *varied* or *discontinued* as the public good shall require." *Butler v. Pennsylvania*, 10 How. 402, 416 (1851)(emphasis added). Further, the "appointment to and the tenure of an office created for the public use" are "functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon to foster and promote the general good. . . ." *Id.* at 417; *see also Glenarden*, 257 Md. at 27 ("The selection of officers, who are nothing more than agents for effectuating such public purposes, is a matter of public convenience or necessity, and so, too, are the periods of the appointment of such agents."). These decisions

establish that, because a public official has no vested right to continue in office, a legislative restructuring does not implicate due process rights of notice and an opportunity to be heard. In fact, as Commissioner Schisler conceded at oral argument, the legislature could abolish the entire agency – and all terms of employment in that agency – without providing notice and a hearing. An incumbent in a public office is entrusted with part of the State's sovereign powers. Clearly, the State must be able to determine who will exercise those powers. It would be anomalous to hold that Commissioner Schisler was permitted to exercise the State's sovereignty while, at the same time, determining that the sovereign State that gave permission lacks the power to remove him from office.

Second, no General Assembly can bind the hands of a future General Assembly to enact or repeal statutes – statutes are always subject to change. Thus, where, as here, an official holds office through a statutorily-created mandate, the official is charged with knowing that future legislatures may repeal or modify the statute. *Cf. F&M Nat'l Bank*, 306 Md. at 27 (where a recent statute conflicts with an older one, the newer one prevails). The current General Assembly determined that the public interest required a statutory change and it had the power to make that change.

The General Assembly's restructuring of the PSC is not unique. The General Assembly has regularly exercised its power to abolish or reorganize statutorily created offices and agencies. In 1994, for example, the General Assembly enacted legislation ending the terms of the members of State Board of Dental Examiners and directing the Governor to appoint all new members. *See* 1994 Laws, ch. 449. More recently, legislation abolished positions on the State Retirement System Board. *See* 2003 Laws, ch. 436; *see also, e.g.,*

1997 Laws, ch. 105 (Baltimore City School Board); 2003 Laws, ch. 252 (Board of Physician Quality Assurance abolished and replaced by State Board of Physicians); Ch. 220, SB 381, 1990 (Baltimore City Community College Board); Ch. 289, HB 949, 2002 (Prince George's County School Board; Ch. 613, HB 1589, 2005 (Board of Examining Engineers replaced by State Board of Stationary Engineers); Ch. 422, HB 376, 2003 (Board of Electrologists abolished and Electrology Practice Committee of the State Board of Nursing created); Ch. 538, HB 607, 1993 (State Insurance Dept. of Maryland replaced by Maryland Insurance Administration); Ch. 534, 1924 (Office of General Counsel to PSC abolished; position of People's Counsel created). The due process clause offers Commissioner Schisler no protection in these circumstances.

3. Because The Power To Appoint Officials Is Not Extrinsically Executive, The "List Procedure" And Other Appointment Mechanisms Established In The PUC Act Do Not Violate The Separation Of Powers Doctrine.

Commissioner Schisler contends that § 12 of the PUC Act, because it involves legislative actors in the appointment process, encroaches on the prerogatives of the executive branch and violates constitutional separation of powers principles. This contention is misplaced on a number of grounds. First, it is well-settled that the declaration of distinct branches of government in Article 8 of the Declaration of Rights, relied upon by Commissioner Schisler, (R.11 - 90), "is not to be interpreted as enjoining a complete separation between these several departments." *Benson v. State*, 389 Md. 615, 643 (2005) (quoting *Mayor & City Council of Baltimore v. State*, 15 Md. 376, 457 (1860)).

Second, the power of appointment is not the exclusive province of the Governor, but has frequently been exercised by the legislature:

> The power of appointment to office is not, under our system of checks and balances in the distribution of powers, where the people are the source and fountain of government, a function intrinsically executive, in the sense that it is inherent in, and necessarily belongs to, the executive department.

Mayor & City Council of Baltimore v. State, 15 Md. at 376; *see also, id.* (citing historical examples of legislative appointments of executive branch officials, such as the fact that, the Treasurer was appointed by the legislature); *see also, e.g.,* Md. Code Ann., Educ. § 5-302 (Intragency Committee on School Construction "appointed by the President of the Senate and the Speaker of the House); Md. Code Ann., Ins. § 14-115 (Board of Directors of Non-Profit Health Service Plans; same manner of appointment); Md. Ann. Code, Art. 83A, § 4-604 (State Arts Council; same manner of appointment); Md. Code Ann., Fin. Inst. § 13-1104 (Heritage Areas Authority "appointed from names recommended by the President of the Senate and the Speaker of the House"); Md. Code Ann., Educ. § 6-703 (Professional Standards Board; same manner of appointment); Md. Ann. Code, Art. 83A, §4-203 (Tourism Development Board); Md. Ann. Code, Art. 83A, §5-1710.1 (Military Installation Council); Md. Ann. Code, Art. 49C, § 2 (Commission for Women).

Thus, the provision of § 12 of the PUC Act, calling for appointment of Commissioners from a list proposed by the General Assembly is unremarkable in historical context. It no more impinges on executive function than the other cited examples.

Third, changes to the manner of appointment to a legislatively created agency, even when they result in the removal of an officer, are well within the legislature's power. As the Court has held, "the legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach, so that it may at pleasure create or abolish them, or modify their duties, *and may also shorten or lengthen the term of service."* *Glenarden*, 257 Md. at 27 (emphasis added). This Court has also written that: "When the office is of legislative creation, the legislature can modify, control, or abolish it, *and within this power is embraced the right to change the mode of appointment*." *Ash v. McVey,* 85 Md. 119, 128 (1897) (quoting *Anderson v. Baker,* 23 Md. 627 (1865)); *see also Davis v. State,* 7 Md. 151, 161 (1854) ("When the legislature creates an office by act of Assembly, it can designate by whom and in what manner the person who is to fill the office shall be appointed.").

In view of these well-established principles and the General Assembly's regular demonstration of their application, Commissioner Schisler's claim that the PUC Act violates the separation of powers principle generally, or as allegedly set forth in Art. II, § 15, cannot be seriously entertained. By its terms, Art. II, § 15 does not give the Governor an *exclusive power* of removal that would limit the General Assembly's power to reconstitute the PSC or any other agency whose officers were appointed for a term of years. To be sure, if the Governor sought to remove a PSC commissioner based on "incompetency or misconduct," he would have authority to do so, and that authority would have to be exercised in

accordance with § 3-307 of the State Government Article and PUC § 2-102(f). The Governor has not, however, sought to exercise this authority, and the enactment of the PUC Act would not impede his ability to do so.

There is no merit to Commissioner Schisler's claim that he is the victim of an improper legislative intrusion on executive prerogatives; indeed – and ironically – it is Commissioner Schisler's challenge to a perfectly valid legislative act that actually represents an attack on separation of powers principles. This lawsuit, putatively brought by a statutory agency of the State, against the State, its creator, attempts to undo the General Assembly's valid exercise of legislative authority in an area where its powers are nearly absolute – the reconstitution of a statutorily created instrumentality of the State. *See Glenarden*, 257 Md. at 27.

4. The PUC Act Is Not A Bill Of Attainder.

Sections 12 and 22 of the PUC Act are not an unconstitutional bill of attainder because they were not intended to punish members of the PSC who held appointments at the time the legislation was enacted. Instead, those sections of the PUC Act are part of a complex and comprehensive statutory scheme enacted to address an anticipated 72% rate hike of energy prices which, as the Governor recognized, posed a potential risk of financial hardship to a substantial number of Maryland's electricity consumers.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946) (quoting *Cummings v. State of Missouri*, 4 Wall. 277, 323). To qualify as a bill of attainder, the person or persons intended

to be punished by operation of the legislation must be singled out or readily ascertainable. *Id*. at 315. Nevertheless, specificity alone does not render a statute an unconstitutional bill of attainder – a law may be so specific that it creates a "legitimate class of one" and still be constitutional. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977). Rather, the touchstone in determining whether a legislative enactment is an unconstitutional bill of attainder is whether it imposes punishment on the person or class targeted.

The "one who complains of being attained must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct." *Id.* at 476 n.40 (citing *United States v. Brown*, 381 U.S. 437, 460 (1965). Punishment for purposes of a bill of attainder includes types of "punishment traditionally prohibited by the Bill of Attainder Clause" as well as "new burdens and deprivations that are inconsistent with the bill of attainder guarantee." *Nixon*, 433 U.S. at 476. In determining the latter, courts apply a functional test to "analyze whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Id.* (internal citations omitted).

Thus, under the functional test, a legislative enactment will be deemed a bill of attainder only if there is no legitimate legislative purpose in burdening the person or class targeted by the legislation. *Id.* Nevertheless, the mere fact "that burdens are placed on citizens" by certain legislation "does not make those burdens punishment." *Selective Serv. Syst. v. Minnesota Public Int. Research Grp.*, 468 U.S. 841, 851 (1984). To the contrary, as the Supreme Court has recognized, "[f]iguratively speaking, all discomforting action may be deemed punishment because it deprives of what otherwise might have been enjoyed." *Id.* n.8.

There is no evidence here that the General Assembly intended the PUC Act to be punitive. Instead, the PUC Act was passed as "an emergency measure . . . necessary for the immediate preservation of the public health or safety. . . ." PUC Act § 25. While the aim of sections 12 and 22 of the PUC Act was to reconstitute the PSC, there is no indication in the legislative record that the goal was to punish the incumbent members – at most, sections 12 and 22 can be interpreted only to suggest a policy dispute with the incumbent PSC members. Reconstitution of the PSC, a creation of statute, was thus fully within the authority of the General Assembly's inherent appointment authority. The PUC Act was not intended to punish the incumbent commissioners but was, instead, "an act of nonpunitive legislative policymaking." *See Nixon*, 433 U.S. at 425.

The effect of sections 12 and 22 of the PUC Act is simply distinguishable from punishments and burdens imposed by legislative enactments found to be unconstitutional bills of attainder. For instance, in *Cummings* and *In re Garland*, 4 Wall. 333 (1866), the Supreme Court overturned two separate statutes that required members of certain professions to take loyalty oaths to the United States in the wake of the Civil War. In both cases, failure to take the oath would have been an absolute bar to practicing one's chosen profession. Similarly, in *Lovett*, the Supreme Court overturned legislation as an unconstitutional bill of attainder that barred three individuals from government employment because they were believed to have "'subversive' beliefs and 'subversive' associations" that were "destructive or inimical to the Government of the United States. . . ." *Lovett*, 328 U.S. at 308, 310 - 11. Not only did the legislation essentially charge the three named individuals with what would be criminal conduct, it also "sentenced them to perpetual exclusion from any government employment." *Id.* at 316.

In contrast, that type of punishment was neither intended nor effected by operation of sections 12 and 22 of the PUC Act. While the General Assembly exercised its prerogative to terminate the statutory terms of the incumbent PSC members, they were not, as was the case in *Cummings, Garland, or Lovett*, perpetually barred them from State employment, either at some point in the future or with some other State agency. To the contrary, the PUC Act did not even preclude their reappointment to the reconstituted PSC – in fact, the name of one of the PSC members whose term was shortened by operation of sections 12 and 22 was included on the list recently provided to the Governor. Nor does the legislative record demonstrate that the incumbent PSC members were accused of any type of wrongdoing, much less of some type of criminal conduct. Even assuming that comments reported in the press should have been properly considered – and they should not – the Supreme Court has made clear that "isolated statements [of lawmakers] expressing understandable indignation . . . do not constitute 'the unmistakable evidence of punitive intent which . . . is required" to render a legislative act an unconstitutional bill of attainder. *Selective Serv. Syst.*, 468 U.S. at 856 (quoting *Flemming v. Nestor*, 363 U.S. 603, 619 (1960)).

Finally, Commissioner Schisler's reliance on *Consolidated Edison of New York, Inc. v. Pataki*, 292 F.3d 338 (2d Cir. 2002), is misplaced. Even assuming the Second Circuit's opinion had precedential value for this Court, the case is inapposite. In contrast to *ConEd*, here there was neither a legislative determination by the General Assembly that the incumbent PSC commissioners engaged in any wrongdoing, nor legislative action that was so disproportionate to the problem sought to be ameliorated that it constituted punishment. Instead, the PUC Act represents a valid exercise of the legislative prerogative to modify a

public body created by statute. Commissioner Schisler has simply failed to demonstrate that it metes out the punishment necessary to find it an unconstitutional bill of attainder.

5. Neither Commissioner Schisler In His Capacity As A State Official Nor The PSC As A State Agency Created By The General Assembly May Properly Sue The State.

There is no question that the PSC is an arm of the State – PUC § 2-101(c) expressly provides that "[t]he Commission shall carry out the functions assigned to it." This action was brought against the State by the PSC, an instrumentality of the State, and by an individual, purportedly in his official capacity as chair of the State agency. The State is a unitary entity, and the interests of its instrumentalities and officers are by definition identical to the State's, which are expressed through the democratic process of legislation.

The PSC, as a creature of statute, may properly be the subject of legislation amending those statutes and does not suffer harm from such legislation. For this reason, the State is not susceptible to suit by an agency of the State, which exists only as a creation of the State. *See Bd. of Educ. of Prince George's County v. Secretary of Personnel,* 317 Md. 34, 44-45 (1989) (quoting *Baltimore County v. Churchill, Ltd.,* 271 Md. 1, 6 (1974)) ("State agencies and political subdivisions, as creatures of the State, have no right to question the constitutionality of the acts of [their] superior and creator.'"); *see also Churchill,* 271 Md. at 6 (recognizing "the prevailing rule, that a subdivision or other arm of a state does not, in general, have standing to contest the constitutionality, under either the federal or state constitution, of any act of the state").

The plaintiffs here, as a public official and a public entity, cannot claim injury sufficient to support standing in an official capacity. Commissioner Schisler claims injury

only to his personal interest, which is not identical to his interest. as a public official. A public official has taken an oath of office to uphold the laws of the State, including those with which he may disagree personally. Thus his or her official interest is identical to that of the State's.

It is well established that State officials cannot sue the State, absent narrow exceptions, rarely applied and not present here. *See State ex rel. Atty. Gen. v. Burning Tree Club, Inc.,* 301 Md. 9 (1984) (quoting *State's Attorney v. City of Baltimore,* 274 Md. 597, 602 (1975)) (standing of State official to sue State exists only where the "public official [charged with administering a statute], faced with a dilemma 'either in refusing to act under a statute he believes to be unconstitutional, or in carrying it out and subsequently finding it to be unconstitutional' has standing to bring a declaratory judgment action challenging the validity of the statute."); s*ee also, Churchill*, 271 Md. at 138; *Pressman v. State Tax Comm'n*, 204 Md. 78, 85 (1954). This narrow exception does not apply here for two reasons. First, the crux of Commissioner Schisler's complaint, that he will be ousted from office, is not a dilemma of the type contemplated by this Court in *Burning Tree*. Second, Commissioner Schisler is clearly not charged with administering the two challenged portions of the PUC Act. *See Burning Tree*, 301 Md. at 19 (only official charged with administering statute has standing to sue under dilemma doctrine).

III. THE CIRCUIT COURT CORRECTLY HELD THAT COMMISSIONER SCHISLER AND THE PSC HAD NOT MET THE THRESHOLD SHOWING OF IRREPARABLE INJURY, A NECESSARY PREREQUISITE FOR ISSUANCE OF A TRO.

Even assuming Commissioner Schisler was authorized to bring suit on behalf of the PSC and other PSC members – and the record suggests he was not – none of the plaintiffs

can show irreparable harm. The PSC remains the PSC regardless of who might be appointed as Commissioners of the PSC, and Commissioner Schisler has alleged no facts demonstrating that the PSC itself would be harmed simply because he and the current commissioners no longer hold office.[18]

The *only* conceivable way in which Plaintiff Schisler or any of the PSC members could show allegedly cognizable harm would be in their individual capacities, as the result of the termination of their State employment. That would be of no avail here, however – the unnamed, individual Commissioners, if they have sued at all, have not sued in their individual capacities and, in any event, it is well settled that mere economic harm, which could be compensated through the payment of damages, is insufficient to meet the showing of irreparable harm necessary for the extraordinary remedy of a TRO. *See, e.g., Wisconsin Gas Co. v. Federal Energy Regulatory Commission*, 758 F.2d 669, 675 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) ("'mere economic loss' . . . will not support a finding of irreparable injury.").

If Commissioner Schisler's individual claim is a contract action, absent a written contract, it is barred by sovereign immunity. Md. Code Ann., State Gov't. §12-202. If his claimed injury is for damages for alleged wrongful discharge or a constitutional tort, he must comply with the requirements of the Maryland Tort Claims Act. *See* Md. Code Ann., State Gov't. § 12-104 ; Md. Code Ann., Cts. & Jud. Proc. § 5-511 ; *Lee v. Cline,* 384 Md. 245 (2004) (State constitutional torts are covered by MTCA).

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[18] Plaintiffs have attempted to substitute their judgment as to the wisdom of the General Assembly's decision. That, as noted elsewhere, is a matter well within the province of the legislature and not a matter for judicial review.

A showing of irreparable harm is a necessary threshold to issuance of a TRO. The circuit court correctly determined that Commissioner Schisler, and, if proper parties to this suit, any similarly situated Commissioners and the PSC, failed to make the requisite showing. Accordingly, this Court should affirm the circuit court's denial of the TRO.[19]

IV. AN ORDER RESTRAINING PORTIONS OF A STATUTE, ENACTED AFTER THE GOVERNOR NOTED THE EXISTENCE OF A CRISIS AND THE GENERAL ASSEMBLY EXERCISED ITS CONSTITUTIONAL POWER TO DECLARE AN EMERGENCY, IS NOT IN THE PUBLIC INTEREST, IN LIGHT OF THE LEGISLATIVE FINDING THAT THE STATUTE WAS NECESSARY "FOR THE IMMEDIATE PRESERVATION OF THE PUBLIC HEALTH OR SAFETY."

In the lower court, Commissioner Schisler repeatedly attempted to substitute his judgment for that of the General Assembly – and asked the court to do the same – by arguing that the replacement of Commissioners did not, in his opinion, present an emergency. (R.154; T.13, 27.) Nevertheless, the Constitution provides that the General Assembly may declare an emergency and enact emergency legislation to address that emergency. *See* Md. Const. art. XVI, § 2. Nowhere does the Constitution provide that anyone may question that decision. *First Continental Sav. & Loan Ass'n v. Director, State Dep't of Assessments & Taxation*, 229 Md. 293, 302 (1962) ("If legislation comes within the purview of Art. XVI, it is for the Legislature and not for the courts to determine whether an emergency exists.").

This Court should recognize three uncontrovertible facts: a) the Constitution provides that the General Assembly may declare an emergency and enact bills to address the

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[19] The holdover doctrine provides for sitting officers to remain past the expiration of their term of appointment until a successor is appointed, and the *de facto* officer doctrine gives effect to the actions of the occupant of the office – whether a holdover or a new appointment – even if the appointment is later deemed invalid. *See Reed v. President & Comm'rs,* 226 Md. 229 (1961); *Kimble v. Bender,* 173 Md. 608 (1938).

emergency; b) the General Assembly, in PUC Act §25, declared that an emergency exists, and it did so after the Governor noted that there is a crisis; and, c) the General Assembly declared that the statute was "*necessary for the immediate preservation of the public health or safety*. . . ." PUC Act § 25.

Commissioner Schisler cannot challenge the General Assembly's determination that an emergency exists. "[W]e have consistently held that a legislative determination of emergency is conclusive and not reviewable." *Biggs v. Maryland-Nat'l Capital Park & Planning Comm'n ,* 269 Md. 352, 355 (1973); *First Continental Sav. & Loan Ass'n,* 229 Md. at 302. If Commissioner Schisler pursues in this Court his argument that the legislature incorrectly declared an emergency, the argument should be rejected.

It is the province of the General Assembly, not Commissioner Schisler, to determine what the public interest requires. In an analogous context, assessing "factors that might relate to the public interest," the Supreme Court noted that "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation." *United States v. Oakland Cannabis Buyers' Co-operative,* 532 U.S. 483, 497 (2001) (quoting *Virginian Ry. Co. v. System Federation No. 40,* 300 U.S. 515, 551 (1937)).

By asking for a TRO, the plaintiffs ask this Court to override the legislative determination that the PUC Act is in the public interest. Again, Commissioner Schisler's argument is precluded. This Court has directed judicial restraint where litigants seek to challenge legislative facts in an individual adjudication. *See Maryland Aggregates Ass'n v. State of Maryland*, 337 Md. 658, 670 (1995) ("factual determinations made by a legislature are not ordinarily subject to review in the courts"); *Governor v. Exxon Corp.*, 279 Md. 410. 428-29 (1977), *aff'd*, 437 U.S. 117 (1978) ("courts do not substitute their social and

economic beliefs for the judgment of legislative bodies, who are elected to pass laws"); *Bowie Inn v. City of Bowie*, 274 Md. 230, 238 (1975) ("[e]ven where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government"); *Sugarloaf Citizens Assoc. v. Gudis,* 319 Md. 558, 572 (1990) (on the unconstitutionality of legislation authorizing a court to determine what is in the public interest).

Commissioner Schisler sought to convince the lower court that a TRO was in the public interest in several ways, all of which were of no avail. First, he repeatedly criticized the General Assembly and attempted to impugn its motives through oral argument and news articles. (R.154; T.6, 38 - 38.). As the State asserted, however, the General Assembly consists of public-spirited citizens performing difficult work under trying conditions. (R.154; T.47.) The Commissioner's attacks were factually misplaced and legally irrelevant.

Second, in oral argument, Commissioner Schisler suggested that the PUC Act was purely a partisan measure directed at a Governor of a different party. (T.6.) Even if that were, solely for argument's sake, correct, Commissioner Schisler has not cited, and cannot cite, any authority in support of the notion that such a motive renders a statute unconstitutional.[20]

The argument, however, is incorrect. Commissioner Schisler's showing, even if it were admissible, is factually insufficient to demonstrate that a TRO would be in the public interest. The newspaper's partial quotations of alleged comments of a few members of the

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[20] If, for argument's sake, Commissioner Schisler correctly asserts that this is a partisan issue, it is well-settled that courts of equity decline jurisdiction over political issues. *See Jackson v. Cosby*, 179 Md. 671, 673 (1941). Courts of equity do not try title to office. *Id.* at 674.

legislature do no more than show the existence of a *policy* dispute between some legislators and some Commissioners.[21] And, the partial quotes do not necessarily represent all of those in the General Assembly. In any event, even if the comments were authentic and complete, they are not admissible because the motivation of the legislature is irrelevant. *See, e.g., Driver,* 336 Md. at 118-19; *Mayor & City Council of Baltimore,* 15 Md. 376. Either the legislature had plenary power to enact the legislation or it did not. This Court should reject the Commissioner's invitation to invalidate the PUC Act based on alleged comments contained in news clippings.

The lower court's choice was clear – either it could have decided that the elected policy-makers represent the public interest, or, on the other hand, it could have decided that an appointed official who has filed a questionable affidavit, purported to bring suit on behalf of other officials who were not willing to join the litigation, and who has asserted nothing more than a pecuniary interest, is a proper judge of the public interest. The circuit court's rejection of the latter proposition was not an abuse of discretion.

The General Assembly and the PUC Act embody the public interest in being able to restructure government to meet changing needs. Here, contrary to Commissioner Schisler's argument that this was a "firing" (R.154; T.7, 9, 11, 22, 38, 57, 59), the General Assembly enacted a lengthy and comprehensive bill that did much more than conclude the terms of the current Commissioners. In addition to the challenged portions, the PUC Act provides for

[21] Commissioner Schisler's arguments could be viewed as presenting nonjusticiable political questions. *See Jackson v. Cosby*, 179 Md. at 673-74.

study of problems, possible additional relief, and regulated utility rates.[22] The legislature could easily have concluded that, based on policy differences, the current Commissioners should not perform the mandated study and other actions. The entire statute should be considered when analyzing the public interest issue – Commissioner Schisler's effort to carve out a central portion of that comprehensive legislation should be rejected as contrary to the public interest.

The Commissioner argues vigorously that the enactment of the statute will disrupt the markets and the functioning of the Commission. (R.154; T.16, 19 - 20, 25 - 27, 59.) The evidence, if any, in support of that assertion is thin, at best. The argument, however, is of no moment. The Commissioner admits that the General Assembly could abolish the PSC in its entirety. (R.154; T.8.) Presumably, that would have a greater impact on the markets; nonetheless, Commissioner Schisler concedes – as he must – that it is within the General Assembly's power. Impact on the markets or the PSC staff is a matter committed to the legislature's plenary power, not to the Commissioner or the courts. Furthermore, no entity that trades in the market has sought to intervene in this lawsuit and it is less than clear that Commissioner Schisler can assert their interests, if any, in the membership of the Commission. The public interest, as enunciated by the people's elected representatives, should prevail.

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[22] The Fiscal and Policy Note on the Bill explains the many changes enacted in the Bill. It is judicially noticeable, Md. Rule 5-201, and available on the General Assembly's web site. Because this expedited Brief is being electronically filed, the Note is not included in the Appendix.

V. ALTHOUGH THE COURT SHOULD NOT REVIEW THE BALANCE OF HARDSHIPS IN THIS SUIT AGAINST THE STATE, IF IT DOES, THE BALANCE TIPS MARKEDLY IN FAVOR OF THE STATE AND AGAINST COMMISSIONER SCHISLER.

As noted above, the balance of hardships is irrelevant in cases such as this. *See Armacost,* 299 Md. at 404 (in litigation involving the government, the "balance of convenience factor will normally not be considered. . . ."). If the Court were to consider the balance, it would tip against issuance of a TRO and in favor of affirming the decision below.

While recognizing that it was not clear in what capacity Commissioner Schisler brought suit, the lower court correctly determined that he and the other putative plaintiffs would not be irreparably harmed, regardless of whether the suit was brought in their individual or official capacities. The circuit court recognized that, if the suit was brought by the PSC and Commissioner Schisler as the Chair of the PSC, "[b]oth entities will continue to exist and perform their statutory functions after June 30, 2006." (R.121 - 24, 138 - 51.) That conclusion is the correct one – a public agency is more than the temporary occupant of its offices. Even if Commissioner Schisler sued in his individual capacity, the only "harm" he could possibly suffer is one that could be redressed by way of a claim for damages.

In contrast, if this Court reverses the decision below, and a TRO is entered, the State will suffer real and immediate harm. The Governor described the situation as a crisis and the General Assembly found it to be an emergency. The statute is needed to protect public health and welfare. PUC Act §25. Because it is emergency legislation, the statute is currently in effect. A TRO would roll back the status quo. It would create a precedent where dissatisfied

public officials could sue to preserve their jobs after a governmental restructuring and the power to address new emergencies would be hampered.

For example, assume that hypothetical agency XYZ was created in 1990, to regulate topics ABC, and that it has ten commissioners with 30 year terms. Assume that agency XYZ had a superb professional staff; however, between 1990 and 2006: public policy had changed; topic B had become obsolete due to technological improvements; topic D had emerged as significant; and, the commissioners were no longer responsive to public needs, but neither engaged in misconduct nor were incompetent. That situation could be deemed to require change. If the General Assembly chose to take restructuring actions similar to those in the PUC Act, that would be a salutory course of conduct, but it would be prohibited under Commissioner Schisler's analysis. For example, under his analysis, only the Governor could remove the commissioners, and then, only for misconduct or incompetence, which had not occurred. Change would be prevented for approximately fourteen years, until the end of the commissioners' 30-year terms. Good government should not be paralyzed by arguments such as those presented by the Commissioner and the PSC.[23]

VI. NO OTHER BASES ADVANCED BY THE PLAINTIFFS BELOW SUPPORT THEIR CLAIM FOR RELIEF.

In light of the order for simultaneous briefing, the State does not know what issues appellant Schisler intends to present to this Court. Out of an abundance of caution, two red herrings will be addressed below.

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[23] If Commissioner Schisler concedes that the legislature could accomplish the same goal by abolishing agency XYZ and creating a new agency, which would hire the same professional staff but have new commissioners, then Commissioner Schisler is admitting that his entire lawsuit elevates form over substance.

A. The PUC Does Not Create The Potential For A Conflict Of Interest For The Attorney General.

Plaintiffs contended below that § 22 of the PUC Act creates a conflict of interest because, if it is invoked, the Attorney General appoints and removes Commissioners, and litigates before the PSC. That argument should be rejected.

The argument is not ripe. Section 22 becomes operable only if: a) the Governor does not act by July 15, 2006; and b) the leaders of the General Assembly do not act promptly thereafter. Any decision regarding § 22 would be merely advisory. Moreover, in making this argument, Commissioner Schisler ignores the fact that the Governor both appoints and can remove PSC Commissioners, and the Governor also appoints officials such as the Secretary of the Maryland Department of the Environment, which litigates and appears before the PSC.

The Attorney General is the legal officer for the entire State. Md. Const., Art. V; Md. Code Ann., State Gov't § 6-106. The conflict test is whether legal interests, not political interests, differ. Here, no legal conflict arises. Because of the Attorney General's Constitutional role, the Model Rules of Professional Conduct expressly state that government lawyers may represent clients in situations where private attorneys could not. Rules of Professional Conduct, Preamble, Scope, 18.

B. The Prior Suit Challenging The General Assembly's Modification Of The Terms Of The PSC Members Brought In Talbot County, Has No Precedential Value And Did Not Preclude The Circuit Court's Denial Of The TRO In This Case.

Equally unavailing is plaintiffs' argument that a prior bill, SB 1102, would have shortened the terms of the Commissioners, if the veto of that bill had been over-ridden. The

veto was never over-ridden. While the bill was vetoed, Commissioner Schisler and the PSC sued the State in the Circuit Court for Talbot County, to enjoin it. That bill – which was not in effect at the time of the TRO proceedings – was never enacted. The circuit court granted a TRO and the State appealed. The legislature adjourned without over-riding the veto and the case was subsequently dismissed, pursuant to a joint stipulation, as moot. Nevertheless, in open court, below, Commissioner Schisler argued that the Talbot case collaterally estopped the State in this lawsuit. That position should be rejected for the following reasons.

The circuit court in this case correctly noted that it had not been provided with the record of the Talbot County case. (R.154; T.55.) At no point did plaintiffs even request judicial notice. *See* Md. Rule 5-201 (judicial notice at any stage). Nor did they proffer any excluded evidence. Md. Rule 5-103(a)(2). They have waived any issue related to the Talbot case. There is simply no record upon which to evaluate their claims.

In any event, as the circuit court in this case correctly noted, the mooted case is of no precedential value. (R.54; T.55.) That case went forward under a different bill. The former bill, for example, did not have a holdover provision; the new statute does. The former bill was not comprehensive; the new statute is. The former bill was not emergency legislation; the new statute is not only an emergency bill, but it also contains legislative findings that it is necessary for the public health and safety. The Talbot matter was never briefed in the circuit court. It was dismissed as moot and is, therefore, of no precedential value. And, plaintiffs, in their submission to the circuit court, quoted only a portion of the order of the Court of Special Appeals, curiously ignoring the disjunctive portion of the order.[24]

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[24] The State sought an appellate stay of the circuit court's order because of its (continued...)

The General Assembly enacted the PUC Act as an emergency bill to address a crisis in public health and welfare. Commissioner Schisler seeks to invalidate key provisions of that bill. The statute was well within the plenary power of the General Assembly. None of the Constitutional provisions cited by Commissioner Schisler and the PSC operate to limit that power in this context. Because the public interest is being effectuated by elected representatives, and it is not represented by the Commissioner's personal pecuniary concerns, the order denying the TRO was proper.

CONCLUSION

For the reasons stated above, the June 28, 2006, order of the Circuit Court for Baltimore City denying the petitioners' motion for a temporary restraining order should be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MICHAEL D. BERMAN
Deputy Chief of Civil Litigation
WILLIAM F. BROCKMAN
CYNTHIA G. PELTZMAN
Assistant Attorneys General
CARL N. ZACARIAS

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[24] (...continued)
interference with the then-ongoing *legislative* process. (Ct. of Spec. App., Sept. Term 2006, No. 110). The Commissioner misleadingly described the CSA's subsequent actions as "upholding" the TRO. (R.11 - 90.) In fact, the court merely denied the motion for an appellate stay; it did not *affirm* the TRO; indeed, the plaintiffs filed a stipulation of dismissal in the Circuit Court before the CSA even issued its order denying the stay. The Court of Special Appeals subsequently granted the parties' joint motion to dismiss the appeal as moot. The inconclusive proceedings in that matter shed no light on the issues in this appeal, notwithstanding the assertion by counsel for the appellants that "collateral estoppel" should result. (T.37.)

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July 5, 2006

Pursuant to Md. Rule 8-504(a)(8), this brief has been printed with proportionally spaced type: Times New Roman - 13 point.

THOMAS V. MIKE MILLER, JR.
PRESIDENT OF THE SENATE

MICHAEL E. BUSCH
SPEAKER OF THE HOUSE

MARYLAND GENERAL ASSEMBLY
STATE HOUSE
ANNAPOLIS, MARYLAND 21401-1991

June 30, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: Public Service Commission

Dear Governor Ehrlich:

Pursuant to the provisions of Senate Bill 1, Chapter 5 of the 2006 Special Session, we hereby submit the following names for your consideration for the Maryland Public Service Commission. Consistent with the provisions of the law, these appointments are representative of the geographic and demographic diversity of the State and include individuals with diverse training and experience. We believe that these individuals possess substantive expertise, leadership skills and a willingness to serve.

Section 12 of Chapter 5 provides that the President of the Senate and the Speaker of the House present a list containing at least three names from which the Governor shall select a Chair of the Public Service Commission. The following individuals are submitted for your consideration as Chair:

Ms. Susanne Brogan, Esq.

The Honorable Joseph H. H. Kaplan

The Honorable Thomas J. S. Waxter, Jr.

Section 12 further provides that the remaining four commissioners of the Public Service Commission be selected by the Governor from a list of at least ten names submitted

by the President of the Senate and the Speaker of the House. The following individuals are submitted for your consideration as commissioners:

The Honorable Raymond E. Beck, Sr.

The Honorable J. Ernest Bell II

The Honorable F. Vernon Boozer

The Honorable Lawrence Brenner

Ms. Susanne Brogan, Esq.

Ms. Paula M. Carmody, Esq.

The Honorable Joseph H. H. Kaplan

Mr. Michael J. Travieso, Esq.

The Honorable Thomas J. S. Waxter, Jr.

Mr. Harold D. Williams

We have attached resumes and biographical material for each submission. If we receive updated information, we will forward it to you.

Sincerely,

Thomas V. Mike Miller, Jr.
President of the Senate

Michael E. Busch
Speaker of the House

cc: Members, Senate of Maryland
Members, Maryland House of Delegates
Secretary Lawrence J. Hogan, Jr.

Archives of Maryland
(Biographical Series)

Raymond E. Beck, Sr.
MSA SC 3520-11726

Biography:

Born in Baltimore, Maryland, March 5, 1939. Attended Baltimore City and Baltimore County public schools; University of Baltimore, A.A., 1964;
University of Baltimore School of Law, LL.B., 1967. Admitted to the Maryland Bar, 1967. Honorary Doctor of Law, Western Maryland College, 1988.

General Assembly:
House of Delegates, Carroll County, 1972-82. Minority Whip, 1974-78. Minority Leader, 1978-83. Member, Ways and Means Committee.
Senate, District 5, 1983-89. Budget & Taxation Committee, 1983-89; Joint Budget & Audit Committee; Spending Affordability Committee; Special
Joint Committee on Pensions; Joint Committee on State Government Revision; Special Joint Oversight Committee on Juvenile Services Initiative.

Private Career and Other Public Service:
Served in U.S. Marine Corps, 1956-59. Colonel, Maryland Army National Guard. Judge Advocate Generals School, basic & advanced courses, 1986, 1988.
U.S. Army Command and General Staff College, 1988. Retired MDARNG as brigadier general (MD), March 5, 1999. Member, Joint Legislative and Executive Committee on Pensions, 1983; Task Force on the Administration of Human Services, 1985; Task Force to Examine the School Construction Program, 1985; Task Force to Study Alternative College Financing Methods, 1987. Associate judge, Carroll County Circuit Court, 5th Judicial Circuit, 1989-91; county administrative judge, 1991-2005. Member, Civil Law and Procedure Committee, and Legislative Subcommittee, Maryland Judicial Conference. Member, American, Maryland State and Carroll County Bar Associations.

Return to Raymond E. Beck's Introductory Page

Archives of Maryland
(Biographical Series)

J. Ernest Bell, II
MSA SC 3520-13217

Biography:

Born in Leonardtown, Maryland, April 26, 1941. Attended Ryken High School; Mount St. Mary's College, B.S., 1963; Catholic University of America School of Law, J.D., 1966. Admitted to Maryland Bar, 1970. Married; four children.

General Assembly:
House of Delegates, St. Mary's County, 1983-94. House Chair, Joint Oversight Committee on Juvenile Services Initiatives, 1993. House Chair, Tort and Insurance Reform Oversight Committee, 1993. Deputy Majority Leader. Member, Judiciary Committee; Joint Committee on Federal Relations; Joint Committee on Legislative Ethics; Special House Committee on Drug and Alcohol Abuse. Chair, St. Mary's County Delegation.

Private Career and Other Public Service:
Served in U.S. Marine Corps; captain, 1966-70; Navy Achievement Medal. Attorney. Member, Tri-County Council for Southern Maryland. Member, St. Mary's County Property Review Board, 1971-82. Attorney, Commissioners of Leonardtown, 1971-78; St. Mary's County Board of Election Supervisors, 1972-82; St. Mary's County Board of County Commissioners, 1975-82. Member, State Prosecutor Selection and Disabilities Commission 1977-82. Member, Southern Maryland Legislative Delegation, Tri-County Council for Southern Maryland. Court Auditor, St. Mary's County Circuit Court.

Return to J. Ernest Bell's Introductory Page

F. VERNON BOOZER:

Republican, District 9, Baltimore County. House of Delegates, 1971-79. Member, Senate, 1981-98; Budget and Tax Committee, 1995-98; Rules Committee, 1995-98; Legislative Policy Committee, 1990-98; Joint Committee on the Management of Public Funds, 1995-98. Minority Whip, 1990-97. Finance Committee, 1981-84, 1991-92; Judicial Proceedings Committee, 1985-90, 1993-94; Executive Nominations Committee, 1984-94; Joint Budget and Audit Committee, 1984-94; Joint Committee on Administrative, Executive and Legislative Review, 1994; Minority Leader, 1997-98. *Born in Norfolk, Virginia, January 30, 1936. Duke University, A.B., 1958; University of Maryland School of Law, J.D., 1964. Attorney, Task Force on Economic Expansion of Service Industries, 1983; Humane Practices Commission, 1984-85; Medical Transplant Study Commission, 1984-85; State Advisory Council for Handicapped Individuals, 1984-86; Liability Insurance Task Force, 1985; Task Force on Real Property Closing Costs, 1985-86; Task Force on Eating Disorders, 1986-89; Task Force to Study the White Cane Law, 1987; State Advisory Council on Administrative Hearings, 1990-; Governor's Task Force on Family Law, 1991; Correctional Options Advisory Board, 1993-; Trial Magistrate, Baltimore County, 1967-68; Administrator of Loan Laws, 1968-69. Currently on the Board of the Maryland Stadium Authority, a Member of the Gunpowder River Legacy Committee, Advisory Committee of the University of Baltimore since 1996, the Board of the Maryland League of Conservation Voters, Court of Appeals Rules Committee, Baltimore County Council Ethics Committee Chairman .* Married; four children. Office: 614 Bosley Avenue, Towson, MD 21204-4066.

FVB-BIO

LAWRENCE BRENNER

12512 Deoudes Road, Boyds, Maryland 20841
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EXPERIENCE

1994-present **Administrative Law Judge,** Federal Energy Regulatory Commission. Decides highly contested cases involving wholesale cost-of-service and market-based rates, market power anti-competitive behavior, contract disputes, and power pool issues for electric, natural gas and oil pipeline services. Frequently serves as the choice of all sides to mediate disputes, many with complex combinations of issues and parties (about 100 in some cases). Some of the mediations involve state public service commissions, including negotiations with commissioners.

1986-94 **Administrative Law Judge,** U. S. Department of Labor. Decided a variety of litigated cases, involving coal mine and longshore workers' compensation, financial audits, disputed grant awards, tax credits, whistleblower retaliation and alien labor certification.

1981-86 **Administrative Judge,** Atomic Safety and Licensing Board, U S. Nuclear Regulatory Commission. Presided over highly contested cases involving nuclear power plants. The hearings involved a full range of administrative-regulatory practice issues, as well as the litigation of complex technical and legal issues arising primarily under the National Environmental Policy Act, the Clean Water Act and the Atomic Energy Act. The technical subjects litigated included: nuclear and radiation health physics; meteorology; geology, seismology and hydrology; transport models and effects of chemical, radioactive and thermal discharges to water, land and air; electric power system planning (including demand forecasting); and financial analyses of electric utilities.

1979-81 **Consulting Legal Counsel to Atomic Safety and Licensing Board,** U. S. Nuclear Regulatory Commission (part-time to Dec. 1980). Provided legal advice, including the drafting of decisions, to judges conducting nuclear power plant hearings. Most of the work focused on the unprecedented Three Mile Island case.

1979 -80 **General Practice of Law,** Rockville, Maryland.

1973-79 **Deputy Assistant Chief Hearing Counsel,** U. S. Nuclear Regulatory Commission (Originally selected under the Commission's Honor Law Graduate Program, with progressively greater responsibilities and promotions from trial counsel levels to position noted.) Supervised the work of attorneys engaged in litigation and regulatory counseling, and served as the lead trial counsel for the NRC in nuclear power plant and nuclear waste disposal cases, and in administrative appeals of such cases. The litigation preparation included counseling on the need for and content of Environmental Impact Statements and nuclear safety evaluations.

1968-70 **U.S. Army.** Drafted as Private, honorable separation as Specialist 5 after 19 months active duty. (Five months early discharge upon return from Vietnam.)

1967-68 **Teacher,** 3rd grade, New York City.

HONORS, APPOINTMENTS and COMMUNITY SERVICE

2003-05	President, Forum of U.S. Administrative Law Judges, a professional association.
2002-03	President, Federal Administrative Law Judges Conference, a professional association.
2000-03	Board Member and Vice Chair, BlackRock Center for the Arts, Germantown, Maryland.
1989-90	Leadership Montgomery, selected for inaugural class.
1985-86	Congressional Fellowship. (Nominated by Federal Government and selected by American Political Science Association.) On sabbatical leave as a judge while working in Congress, primarily on energy and environmental issues.
1985	Certified for Federal Administrative Law Judge selection list. (Precise ranking is not given. My rating of 99.88 put me near the top of the register.)
1985-89	Montgomery County, Maryland, Up-County Citizens Advisory Board. (Appointed by County Executive and confirmed by County Council when Board was first formed.)
1986 & 88	Lecturer, U. S. Department of Justice, Legal Education Institute. Presented the administrative hearing part of Federal Regulatory Process course.
1983	Executive of the Year, Professional Secretaries International Montgomery County, Maryland Chapter
1979	U. S. Nuclear Regulatory Commission Special Achievement Award
1975-86	Prepared and taught various courses before scientists and engineers on the nuclear regulatory hearing and licensing process, and expert witness training.

EDUCATION

Law School: **State University of New York at Buffalo, School of Law**; 1970-1973; Juris Doctor
Activities: Moot Court Board (competitive selection); Legal Aid Clinic.
Awards: Best Brief Award, Moot Court Competition; New York State War Service Scholarship (competitive exam).

College: **Brooklyn College**; Brooklyn, New York, 1963-1967; BA Economics
Awards: New York State Regents Scholarship (competitive exam).

BAR ADMISSIONS

1979	Maryland
1975	District of Columbia
1974	New York

References can be supplied upon request.

SUSANNE BROGAN
125 Archwood Avenue
Annapolis, Maryland 21401
410-263-0469
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EDUCATION

University of Maryland, School of Law, Baltimore, MD 1979 - 1982
- J.D., with honors
- Order of the Coif
- American Jurisprudence Award in Administrative Law
- American Jurisprudence Award in Contracts

Washington College, Chestertown, MD 1976 - 1979
- Bachelor of Arts Degree in Political Science, with honors

PROFESSIONAL EXPERIENCE

Director of Development, Radcliffe Creek School 2001 – present
- Member of the Administrative staff of Radcliffe Creek School, an independent K-8 school for children with learning disabilities that is located in Chestertown, MD
- Primary responsibilities include:
  - Fundraising for the school's Annual Fund and scholarship fund
  - Board of Trustees relations
  - Landlord – tenant matters, as the school owns the building in which it is located and in which outside tenants are located
  - Overseeing corporate matters of Radcliffe Creek School, Incorporated

Commissioner, Maryland Public Service Commission October, 1992 – June, 2001
- Regulated electric and gas utilities, telephone companies, taxicabs and other business entities subject to regulation under the relevant provisions of the Annotated Code of Maryland
- Undertook the implementation of competition in:
  - local telephone service, pursuant to federal law;
  - gas, pursuant to PSC initiative; and
  - electricity, pursuant to Maryland law
- Reviewed and conditionally approved the proposed merger between Baltimore Gas & Electric (BGE) and Potomac Electric Power Company (PEPCO)
- Active participant in the National Association of Regulatory Utility Commissioners (NARUC) and the Mid-Atlantic Association of Regulatory Utility Commissioners (MACRUC)
  - Secretary/Treasurer, MACRUC
  - Member, Gas Advisory Council

Legislative Assistant, MD House of Delegates, Office of the Speaker 1986 – 1992

- Facilitated relationships between the Speaker of the House and the other 140 delegates
- Facilitated interactions between and among committee chairs
- Assigned bills to committees
- Participated in the development of legislation relating to:
  - Non-tidal wetlands
  - Higher education reorganization
  - Election law reform
  - Tort reform
  - Redistricting and reapportionment following the 1990 census
- Coordinated House/Senate actions with the President's Legislative Assistant
- Coordinated the Speaker's legislative package, wrote testimony and testified in support of the Speaker's bills

Legislative Analyst, Department of Legislative Services 1984 – 1986

- Staffed the Appropriations Committee
- Drafted legislation in the areas of taxes, bonds, pensions and other fiscal matters
- Staffed the Amendment Room on a periodic basis

OTHER PUBLIC SERVICE

Chair, Economic Development Article Review Committee 2003 - present

Member, General Assembly Compensation Commission 2005

Member, Governor's Salary Commission 2001

ASSOCIATIONS

Member, Maryland State Bar Association 1982 – present

Member, Advisory Council, Women & Girls Fund, Mid-Shore Community Association

PAULA M. CARMODY
2502 Ailsa Avenue
Baltimore, Maryland 21214
410-444-1605 (H); 410-960-0348 (C)

PROFESSIONAL EXPERIENCE

CONSUMER PROTECTION DIVISION, OFFICE OF ATTORNEY GENERAL (2004 -)

- Assistant Attorney General

Litigation: Investigations and enforcement actions regarding Maryland's Consumer Protection Act and related consumer protection laws

Regulations: Responsible for the Regulatory Review and Evaluation Process for Division Regulations in 2004-5, and amendment of Division regulations

Legislation: Provided testimony before House and Senate Committees, General Assembly

OFFICE OF PEOPLE'S COUNSEL, Baltimore, MD (1988-2003)

- Assistant People's Counsel II, III and IV
- Senior attorney at independent state agency
- Represented the interests of residential consumers of gas and electricity in state and federal regulatory agency proceedings
- Regular appearances before the Maryland Public Service Commission and the Federal Energy Regulatory Commission
- Appellate court experience

Litigation: Represented the People's Counsel in gas and electric utility rate cases, complex utility mergers and bankruptcy proceedings, electric and gas industry restructuring proceedings; administrative agency rulemakings, administrative proceedings and consumer complaints.

Legislation: Wrote testimony, testified before House and Senate Committees, drafted legislation, negotiated legislative amendments, and worked with Committee Staff and Legislative Services.

Community Outreach and Training: Appeared as a speaker, panelist and trainer at a variety of conferences, forums and community meetings. Developed consumer education materials for consumers and service providers.

UAW-GM LEGAL SERVICES PLAN, Dundalk, MD 21224 (1984-1988)

- Managing Attorney of the Baltimore, Maryland office of the Plan
- Litigation experience
- Represented auto workers, family members and retirees in a variety of civil matters

- Estate planning (wills, deeds, trusts)
- Family law (separation agreements; custody; guardianships)
- Home purchases (contracts; settlement attorney)
- Bankruptcies
- Social Security Appeals
- Consumer complaints (breach of contracts; defective products; deceptive practices)
- Tax litigation

- Appearances in various state and federal courts

LEGAL AID BUREAU, INC., Bel Air, MD (1980-1984)

- Staff Attorney
- Litigation experience
- Represented clients in a variety of civil matters
  - Family law (divorces; custody; guardianships; adoptions)
  - Administrative law (Social Security, SSI, SSD, unemployment and benefits)
  - Housing (evictions; rent escrow; security deposits)
  - Consumer (deceptive practices; retail sales agreements; repossessions)
  - Child in Need of Assistance (represented parents and children)
- Court appearances in district, circuit and juvenile courts in Harford and Cecil Counties

EDUCATION

J. D.
Antioch School of Law, Washington, D.C.

B.A., Political Science
McGill University, Montreal, Quebec, Canada

NARUC Annual Regulatory Studies Program Certificate
Michigan State University, Graduate School of Business Administration

COMMUNITY ACTIVITIES

- Adult Literacy Tutor, Greater Homewood Development Corporation, Baltimore, Maryland (2004-Present)
- Parent Representative, School Improvement Team, Baltimore City College High School (2001-2005; Chair, 2003-2005)
- Member, MSBA, Section Council on Delivery of Legal Services (1984-1996) (including position as Chair)
- Board Member, Pro Bono Resource Center (formerly People's Pro Bono Action Center) (1994-1996)
- Board Member, Consumer Credit Counseling Service (1984-1996)

Maryland

BALTIMORE CITY CIRCUIT COURT

JOSEPH H. H. KAPLAN, *Chief Judge,* 8th Judicial Circuit, Baltimore City Circuit Court. Circuit Administrative Judge, 8th Judicial Circuit, Baltimore City Circuit Court, September 20, 1984 to September 20, 1999 (Associate Judge, January 19, 1977 to September 19, 1984, and since 1999-). Member, Court of Appeals Standing Committee on Rules of Practice and Procedure, 1982-2000 (emeritus status, 2000-). Executive Committee, Maryland Judicial Conference, 1983-87. Member, Conference of Circuit Judges, 1984-. Chair, State-Federal Judicial Council, 1989-. Chair, Sentencing Guidelines Advisory Board, Maryland Judicial Conference, 1990-99 (member, 1981-99). Member, Family and Domestic Relations Law Committee, Maryland Judicial Conference, 1997-2000; Ad Hoc Committee on the Implementation of Family Divisions, 1997-2002.

Assistant U.S. Attorney for the District of Maryland, 1963-65. Past executive secretary, Mayor's Advisory Commission on Crime, Baltimore City. Member, Maryland Commission on Human Relations, 1969-71. Member, Expenditure Control Committee, Baltimore City, 1972-77; Board of Ethics, Baltimore City, 1972-77. President, Civil Service Commission of Baltimore City, 1972-77. Chair, Executive Pay Plan Committee, Baltimore City, 1975-77. Member, Correctional Options Advisory Board, 1993-. Co-Chair, Task Force on Sentencing and Intermediate Sanctions of Cabinet Council on Criminal and Juvenile Justice, 1995-96. Member, Commission on the Future of Maryland Courts, 1995-97; Maryland Commission on Criminal Sentencing Policy, 1996-99. *Born in Brooklyn, New York, January 2, 1937. The Johns Hopkins University, A.B., 1957; University of Chicago Law School, J.D., 1960. Admitted to Maryland Bar, 1961. Served in U.S. Army, U.S. Army National Guard, U.S. Air Force Reserve, and U.S. Naval Reserve. Member, American and Baltimore City Bar Associations; Maryland State Bar Association (co-chair, alternative dispute resolution committee, 1985-88). President, Library Company of the Baltimore Bar, 1979-83 (board member, 1977). Chair, Alcoholism Services Advisory Committee of Alcohol and Drug Abuse Program, University of Maryland School of Medicine, 1979-85. Trustee, Woodbourne Center, 1967-82. President, Quarter Way House, Inc., 1977-79. President, J. Dudley Digges Inn, American Inns of Court, 1990-91 (member, 1991-). Board of Trustees, Baltimore City Historical Society, 2002-. Honorary board member, Maryland Chapter, Asthma and Allergy Foundation of America. Past officer, Big Brothers and Big Sisters of Central Maryland, Inc.; Dismas House. Former member, Serjeants' Inn Law Club. Inactive member, Barristers' Law Club. Current and past member, Lawyers Round Table Law Club.*

Maryland Judiciary
Maryland Government
Maryland Constitutional Offices & Agencies
Maryland Departments
Maryland Independent Agencies
Maryland Executive Commissions, Committees, Task Forces, & Advisory Boards
Maryland Universities & Colleges
Maryland Counties
Maryland Municipalities
Maryland at a Glance

Maryland Manual On-Line

Search the Manual
e-mail: mdmanual@mdarchives.state.md.us

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Governor **General Assembly** **Judiciary** **Maryland.Gov**

MICHAEL J. TRAVIESO
220 Stony Run Lane BG
Baltimore, Maryland 21210
410-366-2264 (Home)
(410) 323-6860

Education:

Washington College, Chestertown, Maryland. A.B., cum laude, in English Literature. Omicron Delta Kappa; Who's Who in American Colleges and Universities.

Tulane University, New Orleans, Louisiana. Graduate studies in English Literature. (Ph.D. program).

University of Maryland School of Law. J.D. with Honors; Order of the Coif; Chestnut Medal for scholarship; Bernstein Prize for legal writing. Editorial staff of The Maryland Law Forum.

Legal Experience:

Assistant Attorney General, Director of the Medicaid Fraud Control Unit, Office of the Attorney General of the State of Maryland, 200 St. Paul Place, Baltimore, Md. 21202. October, 2003 to present. Director of a 23 person Unit that investigates and prosecutes Medicaid fraud and the abuse and neglect of vulnerable adults. The Unit is a self contained prosecutorial section of the Attorney General's Office that investigates and prosecutes cases on a statewide basis.

Maryland People's Counsel, 6 St. Paul Street, Suite 2102, Baltimore, Maryland 21202. August, 1994 to August, 2003. Appointed by the Governor of Maryland to represent residential consumers before the Maryland Public Service Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission, the State legislature, the United States Congress and the courts in all matters that may affect residential consumers in the energy and telecommunications industries. Head of an office of eighteen full time employees, including nine lawyers, a public relations specialist and investigator and a support staff, with an animal budget of 2.5 million dollars.

Assistant Attorney General, Office of the Attorney General of the State of Maryland, 200 St. Paul Place, Baltimore, Maryland 21202. November, 1993 to August, 1994. Advice counsel to the regulatory agencies within the Maryland Department of Licensing and Regulation.

Partner, Gallagher, Evelius & Jones, LLP, 218 North Charles Street, Park Charles Building, Suite 400, Baltimore, Maryland 21201. November, 1982 to October, 1993. Trial and appellate litigation, health law, education law and regulatory law.

Assistant United States Attorney, United States Attorney's Office, 101 West Lombard Street, Baltimore, Maryland 21201. May, 1978 to November, 1982. Federal prosecutor. Numerous jury trials, grand jury investigations and appellate arguments in the U.S. Court of Appeals for the Fourth Circuit.

Associate, Frank, Bernstein, Conaway & Goldman, (former address - firm no longer exists) 1300 Mercantile Bank & Trust Building, Two Hopkins Plaza, Baltimore, Maryland 21201. September, 1976 to May, 1978. Associate in litigation department.

Judicial Law Clerk to The Honorable James R. Miller, Jr. of United States District Court for the District of Maryland. August, 1975 to August, 1976.

Bar Memberships:

The Court of Appeals of Maryland;
The Supreme Court of the United States;
The United States Courts of Appeal for the Fourth, Fifth and District of Columbia Circuits;
United States District Court for the District of Maryland.

Bar Associations and other Professional Memberships:

Maryland, Baltimore City, Federal and American Bar Associations.
National Association of State Utility Consumer Advocates: Vice President, 2002, Secretary 2000, Chair of the Telecommunications Committee, 1999-2002.

Recent Presentations and Speaking Engagements:

Testimony before United States Congress, House Representatives, Committee on Judiciary (anti-trust aspects of electricity deregulation) and Committee On Energy and Commerce (Electric Transmission Policy and Electricity Markets, Lessons Learned from California).

Testimony in FCC proceedings on universal service, truth in billing, broadband policy and consumer education.

Testimony before the Maryland General Assembly on electric deregulation; natural gas consumer choice; energy conservation; renewable energy; net metering; retail electric aggregation; telephone competition; cell phone regulation; alternative regulation of incumbent local exchange carriers.

Preparation of filed comments at the FCC and the FERC on numerous proposed rulemakings relating to cost and price issues, economic, accounting; market design,

quality of service, market power, standard market design, RTO, transmission cost recovery and other issues.

Participation on panels on energy and telecommunications topics sponsored by the National Association of State Regulatory Utility Commissioners; the United States Telephone Association; the Society of Utility and Regulatory Financial Analysts; the Consumer Federation of America; the American Association of Retired Persons; the League of Women Voters; the New Mexico State University Center for Public Utilities the Maryland Energy Institute and the Consumer Energy Council of America Research Foundation.

Appearances on Maryland and DC public radio talk shows; Maryland Public Television; and numerous cable television shows on energy and telecommunications issues.

Specialized Training:

Completed the Annual NARUC Regulatory Studies Program at the Institute of Public Utilities of the Eli Broad Graduate School of Management at Michigan State University.

Completed the course in Antitrust in Energy Markets sponsored by the University of Wisconsin Law School and the Wisconsin Public Utility Institute, School of Business, University of Wisconsin - Madison.

THOMAS WAXTER, JR.
5514 Woodlawn Road
Baltimore, Maryland 21210
410-435-9429

Circuit Court Judge, Baltimore City (Semi-retired) 111 North Calvert Street Baltimore, Maryland 21202 410-396-8057	2005 - present
Circuit Court Judge Baltimore, Maryland	1996 - 2005
Partner, Semmes Bowen & Semmes 250 West Pratt Street Baltimore, Maryland 21201	1970 - 1996
Associate, Semmes Bowen & Semmes 250 West Pratt Street Baltimore, Maryland 21201	1962 - 1970
University of Maryland Law School, L.L.B.	1962
University of Pennsylvania, M.S.W.	1960
Princeton University, B.A.	1956
Gilman School	1952
Baltimore City Council	1975 - 1987
Maryland Legislature, House of Delegates	1966 - 1970
Director, Provident Bank of Maryland	1972 - 1996
Director, Park West Health Center	1975 - 2000
Director, Better Business Bureau	1990 - 1996
Director, Hearing and Speech Agency	1986 - 2006

Married, Nancy W. Waxter
Sons, Thomas Waxter, III; Dixon G. Waxter

Harold D. Williams
3 Falls Glen Court
Parkton, MD. 21120
(410) 329-6046

SUMMARY

Harold D. Williams' career spans over twenty five years of extensive experience in management, organizational development, planning and administration, contract negotiation and broad-based communications. He has worked in corporate America, private industry, for the city of Baltimore,(MD), and for the State of Maryland. Throughout his endeavors, he has consistently served his constituents with eagerness, competency, and integrity. His background also includes extensive leadership experience in managerial and training skills, as well as excellent community relation's development skills.

PROFILE:

As a Maryland resident, he has consistently been actively involved in improving the plight of the citizens of Maryland. Throughout his career he has been an advocate for its citizens and whenever possible, setting a tone of equity between the corporations that provide services to Maryland and the consumers. He has been consistently dedicated and committed to doing the best job possible in every work environment, and his work ethics have been noted both locally and nationally. In his present position he has continued to demonstrate leadership and attempts to improve the economic growth of corporations and yet be accountable to the consumers which he serves. He is an active member of the National Association of Regulatory Utility Commissioners (NARUC). Under his leadership as Chairman, the Energy Marketing Access Partnership (EMAP) was expanded to UMAP (Utility Marketing Access Partnership) and includes Electricity, Gas, Water and the Telecom industries promoting the expansion of Women Minority Business Enterprises for nationwide use in all product and service areas.

He is a nationally recognized authority in Minority Business Enterprise, and as such has sought to increase market efficiency, reliability of supply and demonstrated economic value to an entire industry including electricity, gas, telecommunications, and water. He has consistently demonstrated the significance of sharing information between regulators, alleviating impediments and enhancing opportunities for all industry participants.
National impact includes service and participation on the following boards and committees.

- Committee on Internal Relations (NARUC)
- Federal Communications Commissions Advisory Committee on Diversity
- Mid –Atlantic Conference of regulatory Utility Commissioners (MACRUC)
- Energy Resources and Environmental Committee (NARUC)

PROFESSIONAL EXPERIENCE:

Maryland Public Service Commission **Baltimore, MD** **(October 2002-present)**

Commissioner - Appointed to the Maryland Public Service Commission as a Commissioner, October 2002. Responsibilities include regulating the activities of the utility industry for the State of Maryland and acting in the best interest of all Maryland residents. Demonstrated ability to safeguard the standards of practice set for public service companies by utilizing industry knowledge (20 years) to maintain an equitable balance of service between the utility industry and their customers. Other duties include:

- Hearing cases associated with utilities and Maryland residents
- Resolving energy related conflicts that impact Maryland residents
- Monitoring all industry related activities for Maryland citizens

Baltimore Gas and Electric Company **Baltimore, MD.** **(1982 - present)**

Director, Corporate Procurement Services **(1999-Present)**
Directed BGE's Procurement reengineering process to establish new techniques, new business practices, and new product development by embracing principles of self-reliance, and propensity for change.

- Developed and supervised the operation of the Corporate Card program
- Reengineered, with team, staffing services and travel
- Managed over $34 million in goods and services for retail services division
- Coordinated redistribution of work load for optimum utilization of employees, equipment and materials
- Developed good business relationships and selection processes with suppliers resulting in the best combination of quality service and price

Director, Procurement Opportunity Program (Minority Business Program) – **(1989 – 1999)**
Ranked as one of the nation's leading authorities on, and champions of, equal access opportunities for minority and women-owned business enterprises (MWBE's)

- Helped shape and develop BGE's Procurement Opportunity Program to achieve national recognition, competitive supremacy and superior customer service.
- Developed new markets and untapped resources
- Increased market share and competitive position through procurement opportunities and expenditures valued at $81.9 million

Procurement Administrator **(1987 – 1989)**
Coordinated and directed project contract administration for a $400 million Brandon Shores Power Plant project, including procurement expediting and factory inspection services for the company; evaluated the effectiveness of material, equipment and service suppliers in meeting projected requirements and reported findings.

Buyer (1982-1987)
Successfully negotiated bids for various services, e.g. guards, temporary services, construction of new buildings, pre-fab shelters and refurbishing existing offices. Maintained contact with various departments, ensuring the development and maintenance of up to date concise bidders lists.

Amtrak Washington, D.C. (1976 – 1982)

Buyer (1980 – 1982)
Solicited and evaluated bids as well as negotiated and administered purchase agreements for all office equipment and supplies, heavy duty construction equipment, marketing and superliner equipment, including annual contracts in the amount of $8 million for Amtrak's system-wide requirements.

MILITARY: United States Air Force Washington, D.C. (1965-1967)

EDUCATION

The Johns Hopkins University, Baltimore, MD
Master of Administrative Sciences - Human Resource and Organizational Development

Coppin State College, Baltimore, MD
BS Management Science – Magna cum Laude

State University of New Jersey-Rutgers Center for Management Development
Certificate – Rutgers Effective Management Program

ASSOCIATIONS/ HONORS:
Alliance, Inc.- Board of Directors
American Assoc. of Blacks in Energy
Associated Black Charities – Board of Directors
Baltimore County African American Cultural Festival – President, Board Directors
Edison Electric Institute – Chairman, Minority Business Development Committee
First United Church – Deacon board/ Men's Dept.
National Association of Purchasing Managers (NAPM)
National Minority Supplier Development Council – Board of Directors
Walters Art Gallery – African American Steering Commitee

AWARDS:
National Association of Regulatory Commissioners/Utility Marketing Access Partnership Award 2005
Coordinator of the Year – MD/DC Minority Supplier Development Council
Distinguished Alumni Award – NAFEO (National Assoc. for Equal Opportunity in Higher Education)
Minority Business Development Award – Edison Electric Institute
Recognition - U.S. Senator Paul Sarbanes - Commitment to the Baltimore Community

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of July 2006, a copy of the foregoing Brief of Respondent was sent by electronic transmission contemporaneously with its filing with the Court by that means on counsel listed below; the Brief is also being sent by facsimile and served by first-class mail, postage prepaid, on the following counsel:

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Gregory M. Kline, Esq.
Adelberg, Rudow, Dorf & Hendler, LLC
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Baltimore, Maryland 21202
Facsimile: (410) 539-5834

-- and --

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Brynja M. Booth, Esq.
Cowdrey, Thompson, & Kartsen, P.C.
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Easton, Maryland, 21601
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Counsel for Appellants.

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Michael D. Berman