

Department of Legislative Services
Maryland General Assembly
2003 Session

FISCAL AND POLICY NOTE

House Bill 199

(Chairman, Economic Matters Committee)

(By Request – Departmental – Public Service Commission)

Economic Matters

Public Service Commission - Orders

This departmental bill provides that a Public Service Commission (PSC) order issued in a generic or quasi-legislative proceeding is valid and enforceable if the order meets the requirements of the Public Utilities Article regardless of whether it meets the definition of a regulation, unless the article specifically requires PSC to act by regulation.

The bill is retroactive to any order issued by PSC on or after January 1, 1988. It may not be interpreted to affect any court case filed or that has become final on or before June 1, 2003. The bill is effective June 1, 2003.

Fiscal Summary

State Effect: The bill's changes could be handled with existing budgeted resources.

Local Effect: None.

Small Business Effect: The Public Service Commission has determined that this bill has minimal or no impact on small business (attached). Legislative Services concurs with this assessment.

Analysis

Current Law: Under the Administrative Procedures Act (APA), "regulation" is defined as a statement or an amendment or repeal of a statement that:

- has general application;
- has future effect;
- is adopted by a governmental unit to:

- detail or carry out a law that the unit administers;
 - govern organization of the unit;
 - govern the procedure of the unit; or
 - govern practice before the unit; and
- is in a form, including:
 - a guideline;
 - a rule;
 - a standard;
 - a statement of interpretation; or
 - a statement of policy.

Regulation does not include a statement that concerns only internal management of the unit and does not affect directly the rights of the public or the procedures available to the public.

A governmental unit that seeks to adopt a regulation must follow the procedures set forth in the APA, which include submission of the proposed regulation to the General Assembly's Joint Committee on Administrative, Executive, and Legislative Review; publication of the proposal in the *Maryland Register*; and receipt and consideration of public comments.

Background: In 1999, PSC issued Order No. 76292 which placed certain requirements on the electric and gas utilities that remained subject to regulation by PSC after the Electric Customer Choice and Competition Act of 1999 and imposed certain limitations on the relationship that those utilities had with their nonregulated affiliates. The utilities filed suit to challenge that order in the Circuit Court for Wicomico County on a number of procedural and substantive grounds. One of the utilities, Delmarva Power & Light Company, sought a declaratory judgment that parts of the order were invalid because PSC had failed to comply with the regulation-making provisions of the APA.

The court rejected Delmarva's argument, holding that when an order emanates from a generic proceeding it is not necessary for PSC to comply with the regulation-making requirements of the APA. Appeal was taken and the Court of Appeals granted *certiorari* prior to review by the Court of Special Appeals due to the public importance of the issues raised. On April 8, 2002, the Court of Appeals filed an opinion (*Delmarva Power & Light Co. v. Public Service Commission*, 370 Md. 1 (April 8, 2002) which concluded that Order No. 76292 constituted a regulation, as defined by the APA, that PSC was subject to the requirements of the regulation-making provisions of the APA, that it had failed to comply with those requirements, that, as a result, the order was ineffective.

In particular, the court held that (1) in 1978, the General Assembly specifically included PSC under the regulation-making provisions of the APA; (2) those provisions required,

among other things, that proposed regulations be published in the *Maryland Register* for public comment and that they be submitted to the General Assembly's Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee) for its review; and (3) the statute made clear that no regulation may take effect unless and until there has been compliance with those requirements.

April 8, 2002 was also the last day of the 2002 regular session of the General Assembly. On that day, HB 135 and SB 620, which sought to change the funding mechanism for PSC and the Office of People's Counsel (OPC), were amended by a conference committee to add § 2 with respect to decisions and orders of PSC: "Notwithstanding the Administrative Procedure Act, unless a provision of this Article specifically requires the Commission to act through regulation, the Commission may implement any provision of this Article by either order or regulation as the Commission deems necessary and proper." Section 3 was also added, which provided that § 2 would be construed to apply retroactively to any order issued by PSC on or after June 1, 2000. Both houses adopted the conference committee report and passed the bill, as amended, on April 8. On May 16, 2002, the Governor signed the bill as Chapter 494 of 2002.

Following enactment of Chapter 494, motions for reconsideration were filed by the utilities (*Delmarva Power & Light Co. v. Public Service Commission*, 371 Md. 356 (October 11, 2002)). The Court of Appeals ruled that Chapter 494 violated the "single subject" requirement of Article III, § 29 of the Maryland Constitution and that §§ 2 and 3 were therefore invalid, although the other parts of the bill relating to the funding of PSC and OPC remained effective.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Public Service Commission, Office of People's Counsel, Department of Legislative Services

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ncs/jr

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