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PUBLIC SERVICE COMMISSION

March 1, 2022

Chair Delores G. Kelley
Finance Committee
Miller Senate Office Building, 3 East
Annapolis, MD 21401

RE: INFORMATION – SB 902 – Dams With Hydroelectric Power Plants – Annual Compensation Fee

Dear Chair Kelley and Committee Members:

Senate Bill 902 makes changes to the Renewable Portfolio Standard specific to hydroelectric power plants with over 30 megawatts in generating capacity that are connected to the electric distribution grid of Maryland. The Maryland Public Service Commission oversees compliance with the RPS, and I offer the following observations for the Committee's consideration.

First, the compensation fees described in SB 902 would apply only to Conowingo Dam; it is the only facility that satisfies the requirements in the bill. Second, SB 902 requires the Commission, on or before January 31, 2023, and each year thereafter, to determine the average price of a Tier 2 renewable energy credit for the previous RPS compliance year. However, since the RPS filings are not made until April 1 of each year, the Commission would not have the information needed to meet this timeline until later in the year. The Commission therefore proposes changing the deadlines in the bill from January 31, 2023 and on or before each January 31 thereafter to May 1, 2023 and on or before May 1 thereafter.

Third, proposed Section 7-207(d), which would prohibit the owner of a dam subject to the compliance fee from petitioning the Commission to increase its rates, implies that the Commission has the authority or jurisdiction to regulate electricity rates of hydroelectric plants, which it does not. Section 7-509(a)(1) of the *Public Utilities Article*, enacted by the Electric Customer Choice and Competition Act of 1999, clearly prohibits the regulation of the price of electricity from generating plants with certain exceptions not applicable to this plant. As the electricity produced by the hydroelectric plant is sold on the wholesale electricity market that is exclusively regulated by the Federal Energy Regulatory Commission, any attempt by this Commission to regulate such rates would be subject to preemption under the Supremacy Clause

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of the United States Constitution. As such, the Commission could not prevent the owner of the dam from adjusting its electricity rates offered in the wholesale market to compensate for the compensation fee of the proposed legislation, if the owner attempted to do so.

Finally, Section 7-217(c)(2) and (c)(3) would require the compensation fee for 2023 to also include a fee for the use of State land and waterways during the 2020 and 2021 calendar years. Under Maryland law, statutes are presumed to be intended to operate prospectively and the presumption is found to have been rebutted only if there are clear expressions in the statute to the contrary.¹ Retroactive application of statutes, even where permissible, is not favored. Retroactive statutes imposing taxes or other governmental charges or fees that reach voluntary transactions completed significantly before the enactment of the statutes have been found to unconstitutionally deprive persons of property or contract rights² in violation of the Maryland Constitution.³ The creation, ownership, and proceeds from the sale of Tier 2 Renewable Energy Credits in prior years may consist of property or contract rights within these cases. As such, SB 902 could result in legal challenges for the retroactive application of the compensation fee.

The Commission appreciates the opportunity to provide testimony on SB 902. Please contact Lisa Smith, Director of Legislative Affairs, at (410) 336-6288 if you have any questions.

Sincerely,



Jason M. Stanek
Chairman

¹ See *State of Md., D.N.R. v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1070 (1972).

² *Washington Nat'l Arena Ltd. Partnership v. Treasurer, Prince George's County*, 287 Md. 38, 43 n.3, 410 A.2d 1060, 1064 n.3 (1980).

³ *Muskin v. S.D.A.T.*, 422 Md. 544, 555-558 (2010) (cases have held that Article 24 of the Declaration of Rights and Article III, Section 40, of the Maryland Constitution prohibit the retrospective reach of statutes that would have the effect of abrogating vested property rights). See also *Dua v. Comcast Cable of Md. Inc.*, 370 Md. 604, 630 n.9, 805 A.2d 1061, 1076 n.9 (2002).