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PUBLIC SERVICE COMMISSION

Chair Brian Feldman
Education, Energy, and the Environment Committee
2 West Miller Senate Office Building
Annapolis, MD 21401

RE: SB 799- Information – Water Companies and Sewage Disposal Companies - Eminent Domain Proceedings and Service Rates

Dear Chair Feldman and Committee Members:

The Public Service Commission (the “Commission”) appreciates the opportunity to provide this informational testimony for SB 799. The bill requires the Commission to deny a rate increase request for a water or sewage company if a local government has commenced or indicated an intent to commence a condemnation proceeding. The purpose of this testimony is to identify potential conflicts that may arise from implementing this bill.

The US Supreme Court has established the legal standard that public utilities are entitled to recover their prudently incurred expenses and have an opportunity to recover a reasonable return on investment.¹ If a regulatory body sets rates so low that they do not cover operating expenses and a reasonable return on investment, it can be considered confiscatory, which constitutes a “taking” in violation of the Fifth and Fourteenth Amendments.² Pursuant to these legal standards, if a water or sewage company properly puts a request for a just and reasonable rate increase before the Commission, failure to approve that request could be considered an unconstitutional taking.

The Commission notes that the language in this bill is not consistent with a typical “stay-out” provision, which is a regulatory tool sometimes used to prevent a utility from filing a request for a rate increase for a specific time period. “Stay-out” provisions are typically agreed to by a utility in exchange for approval of other regulatory requests—e.g., a utility agrees to a “stay-out” term if it is granted a multi-year rate plan. The ability to apply SB 799 as a “stay-out” provision may

¹ *Bluefield Water Works v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944).

² *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (“The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory”). The Takings Clause of the Fifth Amendment to the US Constitution reads as follows: “Nor shall private property be taken for public use, without just compensation.” The Takings Clause is applicable to state governments through the Due Process Clause of the Fourteenth Amendment.

depend on an analysis of the administrative sufficiency associated with the alternate regulatory or statutory processes made available to the utilities.³

Additionally, it is not possible to ascertain the time period of the prohibition; it applies *before* a condemnation proceeding has been commenced if a local government has “indicated an intent” to begin one, and the bill does not specify for what period of time a utility would be prohibited from filing a rate case *after* a local government has commenced a condemnation proceeding. This could result in a utility being required to “stay-out” for an unreasonable or unquantifiable period of time, during which it may accrue detrimental effects from being denied a just and reasonable rate increase. In any case, the Commission would anticipate that any action it takes pursuant to this legislation would be subject to the risk of legal challenge that would need to be adjudicated by the courts.

Please contact Niki Wiggins, Director of Legislative Affairs, at irene.wiggins3@maryland.gov if you have any questions related to this informational testimony.

Sincerely,



Kumar P. Barve
Chair, Maryland Public Service Commission

³ For example, the bill’s proposed § 12–105.2.(b) of the Real Property Article requires that when a fact finder is assessing the value of the potentially condemned property in a proceeding involving a water company, they must consider the cost of reasonable system upgrades necessary for the company to provide safe and reliable service. This may be interpreted to provide an alternate opportunity for the utility to be justly compensated, but there is no guarantee that the valuation would encompass all expenses that could otherwise be properly recovered in a rate case. The portion that is unrecoverable in a condemnation proceeding may still be considered an unconstitutional taking if the company sought to recover those costs in a rate proceeding before the Commission and was unduly denied the opportunity.