IN THE CIRCUIT COURT FOR BALTIMORE CITY

STEPHEN H. TOPPING ET AL. 349 Warren Avenue Baltimore, MD 21230 Plaintiffs, on behalf of themselves and a class of those similarly situated,	:	**Case No. 24-C-23-002872**
v.	:	
BALTIMORE GAS & ELECTRIC CO. 2 Center Plaza 110 West Fayette Street Baltimore, Maryland 21201 Defendant	:	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO STAY LITIGATION

Plaintiffs Stephen H. Topping et al., on behalf of themselves and a class of all those similarly situated, by and through their undersigned counsel, Thiru Vignarajah, hereby submit this Response to Defendant Baltimore Gas & Electric Company's (BGE) Motion to Stay Litigation. For the reasons set forth below, this Court should deny BGE's request. Because of the character of the issues raised by BGE's motion, Plaintiffs would request a hearing to address the Court on this matter.

INTRODUCTION

BGE's motion to stay this litigation until after the Public Service Commission (PSC) has started its proceedings amounts to a poorly disguised maneuver to shift this case from a court of law where BGE has suffered an early setback and faces imminent adversarial proceedings to a forum it believes, rightly or wrongly, will be more favorable. What BGE frames as a straightforward motion about the efficient sequence of litigation is a tactic to avoid cross examination and public scrutiny of its unsupported assertions, to delay discovery indefinitely, and to break the momentum Plaintiffs have

generated around this issue. But this is no routine procedural motion. It implicates the imperfect overlap of federal and state regulations and regulatory bodies; it depends on whether the PSC has primary or concurrent jurisdiction over this matter; and it requires BGE to make a threshold *prima facie* showing that external installations of pressure regulators are safer than internal installations — or at a minimum to establish that there is a colorable debate on the issue.

So, where a *federal* agency (not the PSC) has set forth safety regulations for placement of pressure regulators, where the PSC has concurrent (not primary) jurisdiction on the subject, and where BGE cannot establish to this court that external regulators are safer because federal data shows precisely the opposite, BGE should not be allowed to take a complaint seeking injunctive and declaratory relief on the grounds that BGE exceeds its authority under a statewide contract and thereby violates the property rights of homeowners and subordinate the Plaintiffs' lawsuit and this Court's prerogatives to the timeline and judgment of a commission whose "core charge" is to ensure that utility rates are "just and reasonable." *See generally State Public Service Commissions and Their Evolving Power Over Our Energy Sources*, 135 HARV. L. REV. 1614 (2022).

ARGUMENT

BGE's motion is more complicated and consequential than the utility giant admits because this case is fundamentally a contract and property rights dispute dressed up by BGE as a public policy debate over safety. The Maryland General Assembly conducted and resolved that debate in 2021 when it passed the Flower Branch Act with BGE's vigorous input, deciding that external installations would be required for multifamily dwellings with six or more units. What remains unsettled is a utility's limited contract rights pitted against a homeowner's property rights in contexts where installations are not required to be outside or inside. That is a classic question settled by courts of law.

To move the epicenter of this controversy over to a forum that has historically been more favorable to utility companies, BGE seeks to shoehorn claims of safety into this basic contract and

property rights dispute. But to give rise to this affirmative defense of sorts, BGE must be required to do more than incant the word 'safety.' All Plaintiffs seek is a preliminary hearing where BGE is expected to present any studies or support it has that external regulators are safer. Unless and until BGE presents some (really, any) colorable evidence of a valid safety concern, this Court should not allow BGE to use its naked claims of safety as an excuse to punt the matter to the PSC. That is especially true when all available data — *see infra* Part I — indicates that external installations are in fact deadlier and more dangerous than internal installations.

Furthermore, BGE's motion cleverly trades on the intuition that a state regulatory agency would naturally have primary jurisdiction over customer complaints and technical matters involving safety. That turns out to be untrue. Only certain customer complaints fall within the PSC's primary jurisdiction, and BGE itself has indicated to the PSC that the complaints that have been filed to date are not "billing disputes" of the individual and routine variety over which PSC would have primary jurisdiction, but "safety disputes" that are beyond the traditional practice and purview of the Consumer Affairs Division of the PSC.

Thus, what remains are safety issues (assuming BGE has established even that), and this Court should consider whether safety related to regulator installations is within the primary or *concurrent* jurisdiction of the PSC. There is a regulatory agency that has primary jurisdiction over questions of safety, but it is not the Maryland Public Service Commission — it is a federal agency, the Pipeline and Hazardous Materials Safety Administration (PHMSA), and that agency has already promulgated its safety regulations concerning interior and outdoor installations of pressure regulators. *See* 49 C.F.R. § 192.353 (Customer meters and regulators: Location.).

That does not mean the PSC lacks jurisdiction over the issue altogether. It is welcome to consider the matter in the context of its concurrent jurisdiction, but the PSC cannot do so as an exercise of either primary or exclusive jurisdiction. A court could give a pronouncement from the PSC

whatever weight it believed it deserved, just as the Commission could give a ruling by this Court whatever deference it believed a judicial decision deserved. Neither is required or expected to await or defer to the other, and where the litigants diverge on their preferred forum, it is appropriate for both to proceed apace in parallel.

Finally, BGE's recent litigation history shows it does not believe its own claim that litigation involving questions of safety belong before the Public Service Commission. Exactly two weeks before Plaintiffs filed its complaint against BGE, the utility company sued two contractors on the grounds that their installation of bollards — protective safeguards that shield meters and regulators from vehicular collisions — were deficient from a safety perspective and hence constituted a breach of contract. *See* Exhibit 1 (Complaint in *BGE v. Precision Pipeline Solutions et al.*, filed June 9, 2023).

In a case where BGE has declined to put forward any evidence to support its bald assertion that safety considerations dwarf the contract and property dispute, where the PSC is entitled to act but lacks primary or exclusive jurisdiction over the matter, and where BGE itself has acknowledged that a Baltimore City court can handle issues of safety, BGE's strategic request for a stay of the litigation should be denied. This Court is perfectly capable of interpreting contract provisions, evaluating property rights, navigating the tension between them, and, if necessary, deciding whether there is sufficient evidence of safety concerns that might trump the otherwise ordinary adjudication of the contract and property rights at issue. Plaintiffs have already agreed to extend the deadline for a response given opposing counsel's other commitments, but Plaintiffs do not believe the law or circumstances support further subordinating this proceeding to the actions of the PSC.

I

BGE's motion to stay litigation and not be required to even file a response for now is predicated on the assumption that the PSC should take a first crack at this because technical issues of safety are paramount and are better addressed by the state regulatory agency. This Court should not

accept BGE's naked assertion without requiring some threshold showing that external regulators are safer than internal ones.

Plaintiffs respectfully submit that BGE cannot do this because federal data indicates the exact opposite. "According to 13 years of PHMSA data from 2010-2023, when comparing external with internal placement of gas regulators, an incredible 87% of incidents and 78% of injuries and fatalities were associated with externally located regulators." *See* Testimony of Paula Fernandes, Baltimore City Council's Health, Environment, and Technology Committee (July 12, 2023). This is also what BGE's allies told the legislature in 2020, citing at that time PHMSA data from 2005 to 2018: "PHMSA data shows that between 2005 and 2018[,] 18% of gas line releases that resulted in a fatality or hospitalization were caused by vehicular damage to meter and regulators located outside of a building." This is also consistent with recent reporting by The Baltimore Banner: "Residents are particularly worried about cars and scooters crashing into the regulators — a primary cause of serious gas accidents, according to data from the Pipeline and Hazardous Materials Safety Administration under the U.S. Department of Transportation." Clara Longo de Freitas, *Residents plan to take legal action against BGE over gas regulators* (BALT. BANNER, June 14, 2023).

Based upon the company's statements at the recent City Council hearing on this issue, it is not evident that BGE even disputes anymore the robust federal data that more injuries and deaths are connected to the exterior placement of pressure regulators. Rather, the company simply blames the resulting explosions, fires, and fatalities on the motorists that crash into the regulators the company seeks to relocate from inside to outside:

> BGE sent four people to the hearing who provided testimony and offered rebuttals to points raised by residents, including the contention that outdoor regulators are responsible for numerous fatalities as a result of crashes.
>
> "That's a traffic safety problem" and not the fault of the utility, said Kevin Nelson senior manager of gas projects for BGE.

> Nelson said closer examination of the PHMSA data would show that the culprit is vehicles "traveling at an excessive rate of speed."

Fern Shen, *"Residents call on city leaders to prohibit BGE external gas regulators* (BALT. BREW, July 13, 2023).

Graphically corroborating the raw data, there are countless stories and videos online of home explosions and fatal fires due to cars colliding with external gas regulators. (This is the kind of evidence Plaintiffs would present, along with data and experts, to show that exterior installations are not less dangerous but in fact *more* dangerous than interior regulators.) So long as bad drivers and narrow streets exist in Baltimore, it is no answer to say that the unfavorable safety data is explained by bad drivers and narrow streets. BGE's position may justify shifting legal liability from itself to auto and home insurance companies once the regulators are moved outside, but it does not establish that exterior regulators are actually safer for residents or communities. And if BGE lacks even basic evidence and data to support its safety assertion, it has no business insisting that the PSC should take precedence because of its supposed expertise in evaluating technical evidence and safety data.

II

Plaintiffs also respectfully submit that law and custom make clear that while the PSC has primary jurisdiction over certain customer complaints, a proposition established by *Bell Atlantic of Md., Inc. v. Intercom Sys. Corp.*, 366 Md. 1 (2001), it only has *concurrent* jurisdiction over issues of safety.

To be clear, as BGE itself apparently argued to the PSC in the days just before this Court granted Plaintiffs a temporary restraining order (TRO), not all customer complaints fall within the primary jurisdiction of the PSC. A qualifying dispute, under Section 20.32.01.02 of the Code of Maryland Regulations, is defined as a "disagreement between a utility and a customer regarding provision of utility service, disputed bills, billing practices, or terminations of service." These are the customer complaints over which the Consumer Affairs Division of the PSC has power to intervene. As PSC explained in its press release the day before this Court granted a TRO, while "BGE is required to halt terminations of service when there is a pending complaint to CAD [Consumer Affairs Division]

related to a billing dispute[,] BGE asserts that the terminations at homes where exterior regulators are to be installed are due to safety disputes and not billing disputes. . . ." *See* Exhibit 2 (*Maryland PSC Clarifies its Customer Complaint Process re: Service Terminations*, June 27, 2023). On that basis, PSC declined to halt terminations of service even when customers had filed complaints, and consequently a TRO from this Court was needed to block BGE's unjustified actions.

Thus, by BGE's own averments to the PSC, the dispute at issue is not the kind of customer complaint contemplated by the Maryland Supreme Court's decision in *Bell Atlantic* over which the PSC or its Consumer Affairs Division would have primary jurisdiction. In fairness to BGE, the utility company appears to be right insofar as Plaintiffs have been unable to identify a single instance where the PSC has ever addressed a significant unsettled safety issue in the context of a consumer complaint. Customer complaints addressed by the PSC overwhelmingly involve billing disputes, missed appointments by technicians, shoddy work by contractors, late payments, and confusing language in utility bills. Those are the kinds of individual issues the PSC routinely handles and resolves in its everyday exercise of its primary jurisdiction, and they are a far cry from the matter that is now before this Court and that the PSC has also agreed to take up — that is, the prudence, necessity, or safety justification of installing a gas pressure regulator on the outside of every residence in Baltimore City.

The question then is, fully separate from the agency's primary jurisdiction over individual customer complaints, whether the PSC has primary jurisdiction over a substantial safety dispute that affects an entire region. (This assumes, again, that the Court is satisfied that BGE has pled or presented pled enough to establish that there is a bona fide safety question in the first place.)

The agency that naturally has primary jurisdiction over issues of pipeline safety is PHMSA, which is responsible for establishing uniform safety standards for the nation's "nearly 3.4 million miles of oil, gas, and other hazardous material pipelines facilities." Local public service commissions across the United States must ensure that state rules comport with federal standards set forth by PHMSA.

Just as Maryland's legislature did when it enacted the Flower Branch Act, individual States are permitted to enact heightened requirements but local commissions, with or without authorization from their legislatures, cannot adopt regulations that are "incompatible" with federal standards. That very deference makes clear that the federal agency, not a state commission, has primary jurisdiction over matters of safety.

And on the issue of where regulators should be installed and how they should be inspected and maintained, PHMSA has hardly been silent:

> The Federal Pipeline Safety Regulations at 49 C.F.R. 192.353 require that each meter and service regulator, whether inside or outside a building, must be installed in a readily accessible location and be protected from corrosion and other damage, including vehicular damage. For regulators located inside a building, each service regulator must be located as near as practical to the point of service line entrance. Each meter must be located in a ventilated place and not less than 3 feet from any source of ignition or any source of heat that might damage the meter. . . .
>
> Federal Pipeline Safety Regulations include requirements that operators conduct leakage surveys of their systems, including meter and service regulators located inside buildings (§ 192.723). In scheduling such surveys, operators must consider the nature of their operations and the local conditions. At a minimum, operators must conduct surveys: (1) In business districts at intervals not exceeding 15 months, but at least once each calendar year; and (2) outside business districts as frequently as necessary, but at least once every five calendar years at intervals not exceeding 63 months. The regulations also require that operators inspect each pipeline or portion of pipeline that is exposed to the atmosphere for evidence of atmospheric corrosion in accordance with § 192.481. Further, if atmospheric corrosion is found during an inspection, the operator must provide protection against the corrosion as required by § 192.479.
>
> PHMSA is reminding operators of these existing requirements for inside meters and regulators. This advisory bulletin notes that, if access is an issue to check and maintain inside regulators properly, operators should endeavor to have the customer provide access for the operator to check the regulator and conduct the leakage and atmospheric corrosion surveys.

See Pipeline Safety: Inside Meters and Regulators (Notice by PHMSA, Sept. 29, 2020).[1]

[1] Available at https://www.federalregister.gov/documents/2020/09/29/2020-21507/pipeline-safety-inside-meters-and-regulators#citation-1-p61102.

These federal minimum standards not only explain why, on top of avoiding liability once an injury or fatality occurs, BGE may wish to duck the unrecoverable costs and added liability of mandatory periodic inspections of indoor regulators — they also make clear that PHMSA, not the PSC, has primary (but not exclusive) jurisdiction over safety issues related to the internal and external installation of gas pressure regulators.

Still, BGE argues that the issues raised by Plaintiffs are "highly technical" and thus require the expertise of the PSC. Maryland's courts have made clear that "primary jurisdiction is relevant only if the claim . . . raises issues or relates to subject matter falling within the special expertise of an administrative agency." *Maryland-National Capital Park & Planning Commission v. Washington National Arena*, 282 Md. 588, 602 (Md. 1978). It is telling in this context that PHMSA has promulgated safety guidelines on internal versus external installation of regulators, but Plaintiffs have found no example of a state commission anywhere that has issued substantial guidance or regulations on this issue. Plaintiffs would welcome the Maryland Public Service Commission becoming the first, but that does not mean the PSC has primary jurisdiction or established expertise on this issue that would necessitate this Court suspending litigation until PSC has its say.

Indeed, it is unclear what technical or specialized knowledge BGE believes PSC possesses that a court of law would lack. It is understood that BGE's decision to replace rather than repair low pressure gas lines with higher pressure gas lines requires the installation of pressure regulators, either inside or outside a home, that can bring the gas pressure back down to a level that home appliances can use. It is not hard to comprehend BGE's claim that if there is a malfunction with an indoor regulator notwithstanding its vent to the outside, that gas could accumulate in a confined space and create a catastrophic scenario. It is also not hard to comprehend the federal data covering 1384 incidents nationwide from 2010 through the present that makes clear that the fear BGE peddles is vanishingly rare, and that far more common are serious incidents, injuries, hospitalizations, and

fatalities connected to external regulators that are damaged due to tampering, vandalism, corrosion, and above all vehicular collisions. Neither that data nor the technical features of pressure regulators are so mystifying and impenetrable that the PSC's expertise is critical.

To understand that expertise, it should be noted that, unlike PHMSA — which was created in 2004 specifically to address, at a national level, issues involving safety with respect to the country's pipelines — public service commissions nationwide have historically been focused on setting rates, monitoring utility profits, and accounting for the economics of a monopoly industry:

> PSCs have varying rules and names . . . yet they share many similarities. For one, PSCs use a comparable calculation when setting customers' rates. They link profits to capital investments, typically allowing between a nine to ten percent return on equity. And, importantly, state PSCs generally share the same mandate: ensure customers' utility rates are 'just and reasonable.' This language is the core charge of PSCs and has guided their decisionmaking for nearly a century. This 'just and reasonable' standard reflects why PSCs exist — to hold in check the monopolistic market power of utility companies and serve as a proxy for real-world competition.

State Public Service Commissions, 135 HARV. L. REV. at 1618-19.

To be sure, Maryland's PSC is entitled to take up issues of safety. But its jurisdiction on such matters was never thought to be primary. As the Maryland Manual explains, "[I]n addition to setting rates, the Commission collects and maintains records and reports of public service companies; reviews plans for service; inspects equipment; audits financial records; and addresses consumer complaints." For BGE to insist that PSC is the proper forum for this dispute when BGE never brought this matter to the agency on its own, resisted the PSC's involvement when individual customer complaints were filed, and still has not presented a single paragraph of data or analysis to justify its asserted need for expertise is disingenuous and transparently strategic.

III

That becomes even more apparent in light of the utility company's complaint in *BGE v. Precision Pipeline Solutions et al.*, which it filed last month in the Circuit Court in Baltimore City. That complaint makes it clear that BGE knows courts are perfectly equipped to handle legal controversies

with significant safety dimensions and that those matters do not first need to be considered or adjudicated by the Maryland Public Service Commission. Exactly two weeks before Plaintiffs filed their complaint for a preliminary injunction based on a theory that BGE had exceeded its authority under its contract with customers, BGE filed its own lawsuit against a contractor for allegedly failing to install safety barriers called bollards to shield thousands of gas meters and regulators across its service region. The lawsuit contains dozens of allegations premised on technical aspects of these installations that made the bollards unsafe. BGE asserted that of "the 5,680 residential bollards inspected by BGE as of April 2023, 4,919 failed inspection due to non-compliance with one or more requirements identified by the Residential Bollard Standards." That constituted a "failure rate of nearly 85 percent." *See* Exhibit 1 at ¶ 51. BGE claimed that some 3,300 bollards were "found to be unstable" while "another 1,952 bollards failed the above grade height requirement." *See id.* at ¶ 52-53.

The precise contours of the allegations are not as important as the fact that BGE thought it perfectly appropriate to bring technical matters related to safety before the Circuit Court for Baltimore City in its complaint against two contractors. In fact, the safety issues in BGE's are even more paramount since they are at the core of BGE's original complaint, whereas in the putative class action filed by Plaintiffs against BGE, arguments about safety have only arisen because BGE has asserted a safety rationale in responding to what on its face is a dispute about the contract provisions of the Gas Service Tariff and the property rights of Baltimore homeowners.

This is not meant to be a "gotcha" argument. Plaintiffs bring this to the Court's attention because BGE's pleadings make clear that courts routinely are asked to wrestle with technical issues connected to safety. They have to receive expert testimony and make factbound judgments about whether work performed by contractors or the installation of regulators outdoors meets certain safety standards. This, too, betrays the hypocrisy of BGE's position. The company never brought its safety-related concerns before the PSC before commencing litigation in the Circuit Court for Baltimore City.

And BGE cannot answer that this is because its quarrel was between two commercial parties because *Bell Atlantic*, the case BGE relies most heavily upon, also involved a dispute between commercial entities, not a single ratepayer and a utility company.

As BGE's complaint last month makes clear, BGE did not believe PSC had primary jurisdiction over the dispute because of unavoidable questions related to safety. It rather availed itself of its preferred forum (in that matter, the Circuit Court for Baltimore City) because a state court, at a minimum, has concurrent jurisdiction with the PSC in a dispute over a contract. And what is good for the goose must be good for the gander. Both BGE's lawsuit against its contractors and Plaintiffs' lawsuit against BGE depend on interpretations of contract provisions. Both impact thousands and potentially tens of thousands of customers. Both arguably raise questions of safety where technical and expert testimony will need to be considered. Those were no more reasons to shift BGE's lawsuit over to the Public Service Commission than to shift the instant lawsuit to a regulatory agency that historically has made judgments about rate-setting and appropriate profit margins and that lacks primary jurisdiction over customer complaints of this kind or over safety issues that are already entrusted to the primary jurisdiction of a federal agency that literally has 'safety' in its name.

Some delay in civil litigation is inevitable and sometimes valuable. But this Court should not countenance BGE's strategic forum shopping on the basis of disingenuous arguments about safety and expertise and primary jurisdiction that are belied by its own lawsuits and its own attestations to the PSC in the last month and that, still to this day, are unaccompanied by any evidence that its preferred installation is safer than what customers want. Plaintiffs are anxious for their day in court in their selected forum, and while a hearing on the preliminary injunction has already been pushed out 60 days, further delay in seeing an answer from BGE is legally and practically unwarranted.

CONCLUSION

For the reasons set forth in this Response, this Court should deny BGE's motion for a stay of litigation. Again, because of the character and complexity of the issues raised by BGE's motion and by Plaintiffs' response, Plaintiffs respectfully request a hearing so that both sides can present additional argument on this matter.

Respectfully submitted,

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THIRUVENDRAN VIGNARAJAH

Client Protection Fund No. 0812180249
1211 Light Street, #216, Baltimore, MD 21230
Thiru@JusticeForBaltimore.com
(410) 456-7552

Counsel for Plaintiffs

Dated: July 19, 2023

CERTIFICATE OF SERVICE

I HEREBY certify that on this 19th day of July 2023, a copy of the foregoing Response was filed with the Clerk of the Circuit Court for Baltimore City, and a copy sent by email to:

Jonathan Singer
Partner
Saul Ewing
jon.singer@saul.com

David Ralph
General Counsel
Baltimore Gas & Electric
David.Ralph@bge.com

____
THIRUVENDRAN VIGNARAJAH

STEPHEN H. TOPPING, *et al.*,	IN THE
Plaintiffs,	CIRCUIT COURT
v.	FOR
BALTIMORE GAS & ELECTRIC CO.,	BALTIMORE CITY
Defendant.	Case No. 24-C-23-002872

MEMORANDUM ORDER

Plaintiffs Stephen H. Topping, Douglas Clemens, Curtis Decker, Michael Donnenberg, Paula Fernandes, Donna Katrinic, Antoine Kline, Suzan Rode, Nancy Rohrer, Christina Sabin-Scharff, Sandra Seward, Donna Sylvester, Claudia Towles, and Raquel Zuniga, on behalf of themselves and a class of all those similarly situated (collectively "Plaintiffs") filed suit against Defendant Baltimore Gas & Electric Co. ("BGE") related to the placement of external gas regulators on residences in Baltimore City. The issue before the Court is whether the litigation should be stayed pending an administrative hearing scheduled before the Maryland Public Service Commission ("PSC"). For the reasons set forth below, the Court finds that BGE has not shown at this early stage of the litigation that this case should be stayed.

Background

On June 23, 2023, Plaintiffs filed their Complaint in this Court alleging that BGE acted beyond its authority in threatening to terminate and in terminating the gas service of residents who refused to consent to the installation of external gas regulators not required by law. (Docket Entry No. 1.) Plaintiffs further alleged that BGE's placement of external gas regulators on Baltimore City residences implicated

important safety concerns, specifically with respect to external forces such as vehicular damage. (Pl.'s Compl. ¶¶ 36-39.) Plaintiffs' Complaint contained two counts seeking declaratory and injunctive relief. (Pl.'s Compl. ¶¶ 51-57.)

Plaintiffs also sought an emergency Temporary Restraining Order ("TRO") prohibiting BGE from proceeding with the installation of the external gas regulators and from shutting off gas service to residents who declined to consent to the placement of an external gas regulator. (Docket Entry No. 2.) The Court conducted a hearing on Plaintiffs' emergency request for a TRO on June 28, 2023. By Order entered that same day, the Court granted Plaintiffs' request for TRO prohibiting BGE from installing external gas regulators without consent and further prohibiting BGE from threatening to cut off or cutting off the gas service of Plaintiffs who refused to consent. (Docket Entry No. 2/1.) The TRO also required BGE to restore gas service to Plaintiffs who had previously refused to provide consent. *Id.* It was effective for ten days, until July 10, 2023, at 2:00 p.m., at which time the Court scheduled an evidentiary hearing on the propriety of the issuance of a preliminary injunction. *Id.*

BGE filed a motion to cancel and/or postpone the July 10, 2023, preliminary injunction hearing. (Docket Entry No. 7.) It argued that the requested relief was moot as it has stopped the placement of external gas regulators without consent in Baltimore City. *Id.* In the alternative, it represented that it would agree to a sixty-day extension of the TRO pending a status conference the week of September 5, 2023. *Id.* Plaintiffs opposed BGE's motion to cancel and/or postpone and sought to move forward with the scheduled preliminary injunction hearing. (Docket Entry No. 7/1.)

The Court declined to cancel the preliminary injunction hearing on mootness grounds. Instead, the Court extended the TRO for sixty-days pursuant to BGE's consent until a status conference scheduled for September 5, 2023. (Docket Entry No. 10.) BGE now moves to stay the litigation until the September 5, 2023, status conference. (Docket Entry No. 11.) Plaintiffs have opposed the stay. (Docket Entry No. 11/1.) The parties stipulated to extend the time to July 31, 2023, for BGE to submit additional briefing in furtherance of its responsive pleading to Plaintiffs' Complaint pending the Court's decision on the stay. (Docket Entry No. 13.)

Discussion

BGE argues that a stay is in the interest of judicial economy and efficiency due to a hearing to be held before the PSC on August 15, 2023, regarding the relocation of residential natural gas service regulators in BGE's service territory. (PSC Case No. 9711.) BGE's position is that the PSC has primary jurisdiction over the issues raised in Plaintiffs' Complaint and this Court should defer to the expertise of the PSC by staying the instant litigation until at least September 5, 2023. It argues that given the intervening PSC administrative proceeding, it would be a waste of time and resources to proceed with additional briefing on its motion to dismiss, a motion to dismiss hearing, and commencement of discovery.

The Supreme Court of Maryland recently summarized the law governing the exhaustion of administrative remedies. *Comptroller of Maryland v. Comcast of California*, No. 32, Sept. Term, 2022, (Md. July 12, 2023). In *Comcast of California*, the Supreme Court of Maryland explained that when the General Assembly provides

both an administrative and judicial review remedy, "the relationship between that administrative remedy and a possible alternative judicial remedy will ordinarily fall into one of three categories." *Id.* at * 3. (quoting *Zappone v.Liberty Life Ins. Co.,* 349 Md. 45, 60 (1998)). First, if the administrative remedy is exclusive, the "only manner of obtaining judicial involvement is by pursuing judicial review of the final administrative agency decision." *Id.*

Second, and as argued by BGE here, the administrative remedy may be "primary but not exclusive." *Id.* When a claim is within the primary jurisdiction of an administrative agency, the Supreme Court explained that "the claimant maintains the right to pursue an alternative judicial remedy, but generally not until first exhausting the administrative remedy." *Id.* The appropriate course of action is for the circuit court to stay judicial proceedings pending a final agency determination that is within the primary jurisdiction of an administrative agency. *Monarch Acad. Balt. Campus, Inc. v. Balt. City Bd. of Sch. Comm'rs*, 457 Md. 1, 13 (2017).

Third, the administrative and judicial remedies may be fully concurrent. *Comcast of California*, 2023 WL 4482556, at *3. If the remedies are concurrent, there is no need for a claimant to exhaust administrative remedies. *Id.* Finally, the Supreme Court instructed that determining which of the three categories applies is "ordinarily a question of legislative intent." *Id.*

Applying the principles laid out in *Comcast of California* at the early stages of litigation here, the Court is unable to conclude that the General Assembly intended for the PSC to have primary jurisdiction over the safety issues raised by Plaintiffs in

their Complaint for declaratory and injunctive relief. The General Assembly established the PSC as an independent unit in the Executive Branch of State Government. Md. Code Ann., Public Utilities Article ("PUA") § 2-101(b). It has jurisdiction over every public service company engaging in or operating a utility business in Maryland. PUA § 2-112. It is charged with supervising and regulating public service companies to "ensure their operation in the interest of the public" and "promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination." PUA § 2-113(a). In its role in supervising and regulating public service companies, among other considerations, it is required to take into account public safety. PUA § 2-113(a)(2)(i).

The statutory scheme governing the PSC provides "[a]ny person may file a complaint with the Commission." PUA § 3-102(a)(1). The PSC is required to investigate complaints involving "the quality or reliability of gas supply or electric power supply" or "the price of gas or electricity." PUA § 3-102(d). The PSC also may bring a complaint against a person on its own motion. PUA § 3-102(e). Any person who is the subject of a complaint has the right to a contested case hearing. PUA § 3-102(c). A party has a right to seek judicial review of a final decision of the PSC. PUA § 3-202(a).

While the PSC has broad administrative authority over customer complaints, the crux of Plaintiffs' lawsuit involves concern over the safety of the placement of external gas regulators by BGE and its alleged actions in forcing Plaintiffs' compliance with the placement of the regulators. At the TRO hearing, Plaintiffs

produced evidence indicating that the PSC had declined to intervene on behalf of customers because the gas service terminations involved a safety dispute and not a billing dispute. (Pl's Response, Ex. 2.) The PSC now appears ready to address many of the issues raised in this litigation at the August 15, 2023, hearing. The PSC's initial delay and unwillingness to address the customers' complaints, however, does not support that it has primary jurisdiction over these issues. It also is important to note that the PSC will hold a "legislative-style" hearing and has not yet decided "what additional proceedings, if any, are needed." (Def.'s Motion, Ex B.)

The General Assembly's only word with respect to the safety of the placement of external gas regulators by gas companies was the adoption of the Flower Branch Act. PUA § 7-313. The Act requires gas service regulators installed on the interior of multifamily residential structures to be relocated to the outside when the gas service line or regulator is replaced. PUA § 7-313(b)(2). It is silent with respect to single family residential structures with existing gas service. A gas company is required to submit a plan to relocate gas service regulators on a multifamily residential structure to the PSC for approval. PUA § 7-313(b)(3). The General Assembly, however, did not provide an administrative remedy for customers aggrieved by a decision of a gas company regarding the placement of external regulators in the Act. Nor is there any reference in the Act to a person's right to seek administrative review under PUA § 3-102.

BGE's reliance on *Bell Atlantic of Md., Inc., v. Intercom Sys. Corp.,* 366 Md. 1 (2001) does not appear to be determinative of the question of jurisdiction over the

safety issues raised in this case. In *Bell Atlantic*, the Supreme Court of Maryland held that the PSC has primary jurisdiction over consumer complaints raised against public utility companies. It concluded that consumer complaints regarding the provision, adequacy, and pricing of public utility services require consumers to exhaust administrative remedies prior to seeking judicial relief. *Bell Atlantic,* 366 Md. at 25. The Plaintiffs' claims here do not appear to be the typical consumer complaint considered by the Supreme Court of Maryland in *Bell Atlantic.*

As pointed out by Plaintiffs, BGE itself recently bypassed the PSC in filing suit in this Court against gas regulator contractors involving the same subject matter. (Pl.'s Response, Ex. 1.) Specifically, the Court notes that the allegations in that matter raise safety concerns regarding external gas regulators. Plaintiffs have raised similar safety concerns here.

With regard to the judicial economy arguments raised by BGE, these arguments are premature. In its motion to dismiss, BGE makes jurisdictional arguments that are appropriately raised in a responsive pleading and deserve to be fully briefed. *See* Md. Rule 2-322(b). Moreover, a hearing on BGE's motion to dismiss would not be scheduled until after September 5, 2023. With respect to the commencement of discovery, BGE may move for a stay of discovery pending resolution of its motion to dismiss on jurisdictional grounds, which is commonly granted by this Court.

While the Court is mindful of deference to the expertise of the PSC, there is no basis to stay the litigation at this stage. Accordingly, it is this 26th day of July 2023, hereby

ORDERED that BGE's Motion to Stay Litigation is **DENIED.**

JUDGE JOHN S. NUGENT

THE JUDGE'S SIGNATURE APPEARS ON THE ORIGINAL DOCUMENT

TRUE COPY
TEST

Xavier A. Conaway, Clerk of the Circuit Court

7/26/23