IN THE MATTER OF THE CURRENT AND	*	BEFORE THE
FUTURE FINANCIAL CONDITION OF	*	PUBLIC SERVICE COMMISSION
BALTIMORE GAS AND ELECTRIC COMPANY	*	OF MARYLAND
	*	CASE NO. 9173
	*	
	*	PHASE II

BRIEF OF THE NUCLEAR INFORMATION AND RESOURCE SERVICE, BEYOND NUCLEAR, PUBLIC CITIZEN, THE MARYLAND PUBLIC INTEREST RESEARCH GROUP, AND MARYLAND ACORN

COME NOW the Joint Intervenors, Nuclear Information and Resource Service ("NIRS"), Beyond Nuclear, Public Citizen, Maryland Public Interest Research Group ("Maryland PIRG"), and Maryland Association of Communities Organizing for Reform Now ("Maryland ACORN"), by undersigned counsel, and submit the following brief setting forth why the Public Service Commission ("Commission" or "PSC") should reject the proposed transaction between Electricité de France International, SA ("EDF") and Constellation Energy Group, Inc. ("Constellation" or "CEG").

I. The Applicable Legal Standard under Maryland Code Ann., Public Utility Companies ("PUC") § 6-105(g)(3)(i)

Under the standard set forth in PUC § 6-105(g)(3)(i), the Commission must affirmatively find that the proposed deal between EDF and CEG is "consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers." When construing this language, the Commission "…must … look to the plain and ordinary meaning of the words and apply their everyday meaning to the facts before [it]." Order No. 82719, In the Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Company, at 23 (citing In Re Arnold M, 298

Md. 515,520, 471 A.2d 313, 315 (1984)). Thus, "…EDF and CEG must show that BGE customers receive 'benefits' in their capacity as customers." Alan Schwartz Phase II Written Testimony at 10; see also Daniel Lawton Phase II Written Testimony at 18, lines 8-9.

II. Legal Analysis

A. The Commission should reject the proposed transaction, with or without the conditions proposed by the Parties, because of the likelihood of harms to Baltimore Gas and Electric Company ("BGE") ratepayers, without attendant benefits

EDF and Constellation have failed to show that the deal would benefit BGE ratepayers, and they have failed to show that the deal would not harm BGE ratepayers, even with the modifications proposed by the Companies and other Intervenors. Quite the opposite, the deal, whether with or *sans* conditions, holds every possibility of causing substantial harm to BGE ratepayers while providing them with no benefit whatsoever. Therefore, the Commission should reject the deal in its entirety.

Constellation and BGE have touted several benefits stemming from this transaction. Joint Intervenors here address the two major economic benefits claimed for BGE ratepayers—reduced electricity prices for BGE customers and financial stability for BGE—as well as the benefits attributed to tax payments resulting from the sale, a $36 million contribution to the Constellation Energy Foundation, construction of a $20 million visitor center at Calvert Cliffs, and construction of a third nuclear reactor at Calvert Cliffs ("Calvert Cliffs-3" or "CC3"). Upon examination, these features of the transaction do not benefit BGE customers. At the same time, the transaction would

weaken BGE in the long term and prove to be a detriment to developing a safe, secure, and affordable energy future for BGE ratepayers and Marylanders in general.

1. The proposed construction of Calvert Cliffs-3 will not financially benefit, and will likely harm, BGE customers

Putting aside questions about whether Calvert Cliffs-3 will be constructed should this transaction be approved—if the reactor is completed, it would likely apply strong upward pressures on electricity prices for BGE customers, while threatening BGE's financial stability.

PSC Staff witness Julia Frayer claimed that construction of a new nuclear reactor at Calvert Cliffs would result in reduction of wholesale prices in PJM Region B, which would be passed on to BGE customers. See Julia Frayer Phase II Written Testimony at 30-51. Remarkably for a witness who engaged in intricate modeling and extensive cost-benefit analyses, Ms. Frayer made no accounting for the enormous costs of building Calvert Cliffs-3. Instead, she flatly asserted in her oral testimony that the plant will be a "price taker" in the wholesale market, no matter what the cost is to construct it. Further, Ms. Frayer acknowledged her analysis did not factor in the costs of decommissioning a new reactor, disposing of its wastes, or addressing a potential "incident" at the plant. See id. at 51, lines 17-24.

Contrary to Ms. Frayer's assertions, the costs of building the plant would matter to BGE ratepayers. While the two confidential, all-in cost estimates presented at this proceeding for CC3 differ, see Testimony of Michael Wallace, *Confidential Transcript* at 530-31, 537, for purposes of this brief, Joint Intervenors are using the publicly available

cost estimate of Pennsylvania Power and Light ("PPL"). PPL is considering building a reactor identical to CC3 and also has UniStar Nuclear involvement in the project. See Testimony of Michael Wallace, *Public Transcript* at 500, line 19. PPL projects actual costs of a new Areva Evolutionary Power Reactor ("EPR")—the reactor chosen for CC3—at $13-$15 billion.

Neither Ms. Frayer, nor indeed any other witness, has provided a compelling explanation of how any electricity generation project—nuclear or not—could provide electricity causing a reduction of wholesale market prices at a construction cost of some $15 billion for 1600MW of power, or about $9,000/kW. Joint Intervenors submit that such an extraordinary cost, especially for a project which is mostly debt-financed, see id. at p. 523, lines 4-9, could not possibly result in reduced electricity rates given the enormous debt burden that must be repaid.

$9,000/kW is far above the cost of any competing source of electricity generation. Wind power typically costs on the order of $2-4,000/kW, natural gas is on the same plane and perhaps even cheaper. Coal is currently cheaper, but may not be if Congress enacts a tax on carbon; and in any case, Joint Intervenors are opposed to any new coal-fired power plants. Right now, solar power is cheaper as well in many regions of the United States. Thus, EDF/Constellation is proposing a source of electricity that is not the most cost-effective source, but rather the most expensive source.

If this deal were to be approved, and CC3 were to be built at current construction cost estimates, there are three likely scenarios. First, Constellation Energy Nuclear

Group ("CENG") could not generate electricity at a price low enough to compete with other electricity providers in the PJM region. While in the short-term CENG might be able to sell its power at a loss but sufficient to repay loans without tapping other assets, that is not a viable economic strategy for the long-term. Constellation eventually would go bankrupt, and potentially take BGE down with it.

Second, CENG could sell some of its electricity on the open market at a loss—hoping prices rise later—but then sell the bulk of its electricity to its wholly-owned subsidiary Baltimore Gas and Electric. BGE would go to the Public Service Commission for a hefty rate increase to cover those costs. Since BGE is a wholly-owned subsidiary of Constellation and the largest purchaser of Constellation-generated electricity, this is a highly plausible scenario. This becomes even more likely because EDF and Constellation could point to issuance of the CPCN and approval of this deal as at least tacit Commission approval of building CC3 regardless of cost.

Third, the competitive market could fail. Instead of providing substantially cheaper electricity, other generators could raise their prices to be just under those of Calvert Cliffs-3. *Thus, instead of leading to lower prices, Calvert Cliffs-3 would cause prices to rise for everyone, regardless of where their electricity comes from.* For example, assume that 1600 MW of electricity from Calvert Cliffs in 2018 costs 30 cents/kWh. A competitor using wind energy can provide it at 8 cents/kWh, while coal and natural gas plants are providing it at about 12 cents/kWh. All are selling to the same interconnected PJM grid which services Maryland and the mid-Atlantic states. Why should the wind, coal and

gas generators compete with each other when the biggest kid on the block—Calvert Cliffs-3—is so much more expensive? All three could sell their electricity for 25 cents/kWh and still undercut the nuclear plant while reaping huge profits at ratepayers' expense.

This is not idle speculation. A California Energy Commission ("CEC") Draft Staff Report issued after the beginning of this proceeding, in August 2009, estimates electricity from a merchant nuclear power plant coming online in 2018 at 34.24 cents/kWh.[1] Significantly, the CEC study is based on construction costs of only $3950/kW, or less than half the acknowledged construction costs of CC3.

Ms. Frayer's testimony further errs by adopting Constellation's claim that CC3 could come online in 2016. This is, to put it mildly, highly unlikely. Mr. Wallace himself acknowledged that "2016 to 2017" is now Constellation's anticipated completion date for CC3. Testimony of Michael Wallace, *Public Transcript* at 739, line 19. But his projection likewise is not realistic. The Nuclear Regulatory Commission schedule for licensing of CC3 anticipates granting a license in late 2011 or early 2012. However, even those dates are in doubt, since some of the Joint Intervenors in this PSC case are also Intervenors in the NRC proceeding. We believe that our concerns may delay this project further, or even cause its cancellation entirely.

Even in the best-case scenario for EDF and Constellation, a construction-operating license would not be granted until around the beginning of 2012. To be online

[1] Klein, Joel. 2009. *Comparative Costs of California Central Station Electricity Generation Technologies*. Table 5. Available at http://www.energy.ca.gov/2009publications/CEC-200-2009-017/CEC-200-2009-017-SD.PDF

in 2016 or 2017 would require a four- to five-year construction period. Since at least 1980, only one U.S. reactor project has been completed in as little as six years. That was the River Bend reactor, owned by Gulf States Utilities. To be able to complete that reactor in six years required a cost overrun of about 400%. The average construction time for U.S. reactors since 1980 is more than eight years.

A construction timeframe of eight years or more is borne out by current experience in Europe with the new EPR design proposed for Calvert Cliffs-3. Construction began on the Olikuoto-3 EPR reactor currently being built in Finland by Areva, which is intended to be the flagship reactor for the design proposed for CC3, in early 2005. A four-year construction schedule was contemplated and the reactor was supposed to begin operation at the beginning of June 2009. It did not make that date, and no longer has an estimated completion date, although Areva acknowledges there is about three and a half years more work to do—making this a 7 ½ year project at best. Moreover, like every other reactor project built in the Western world for the past 35 years, this reactor is drastically overbudget. As of September 2009, it is 75% over its budgeted cost of 3 billion Euros. Disturbingly, neither Mr. Morris nor Mr. Wallace indicated specific knowledge about concerns raised in a United Kingdom governmental review of an EPR design, though Mr. Wallace acknowledged "some issues." Testimony of Michael Wallace, *Public Transcript* at 456, line 1.

In unrebutted testimony in the CC3 Certificate of Public Convenience and Necessity case, No. 9127, Joint Intervenors' expert David Schlissel cited a 1986 study by

the U.S. Department of Energy that found that the average cost overrun for the first 75 U.S. nuclear reactor projects was 207%. Reactors built after 1986 typically suffered from even larger cost overruns. The brief history of the Areva EPR indicates substantial cost overruns will continue.

If one does not, as Ms. Frayer did not, account for actual construction costs in attempting to determine benefits, then it is quite easy to assign benefits. But there are always costs involved. When the projected costs of CC3 are thoroughly examined, it is much more likely that the reactor would entail financial strain, as opposed to financial relief, for BGE ratepayers.

2. *In the long-term, the transaction would jeopardize further the bond ratings of BGE and Constellation*

In the short-term, two of the three major credit rating agencies—Fitch and Moody's—have stated that the closing of the transaction has no bearing on Constellation's credit rating. See Testimony of Michael Wallace, *Public Transcript* at 491, lines 4-12. While Standard & Poor's ("S&P") had indicated in December, 2008 and May, 2009 that it would downgrade CEG's credit rating if the EDF deal were not completed, it made a vaguer statement in June that in the absence of the transaction there would be "…additional stress on Constellation's credit profile…." PSC Staff witness Julia Frayer opined that if S&P were to downgrade CEG's credit rating, it would be by one notch to "BBB-," which is still considered investment grade and which is in line with the ratings of Fitch and Moody's. See Julia Frayer Phase II Written Testimony at 14.

As an initial matter, rejection of this transaction would have, at most, a minimal impact on Constellation's and BGE's credit ratings in the short term. Fitch and Moody's have stated that their ratings for CEG will not be impacted, while S&P has backtracked from earlier statements linking its rating to the completion of the deal. Further, a one notch downgrade by S&P would not drop Constellation's debt to junk bond status, while its impact on BGE customers is *de minimis*. Maryland Tax Education Foundation witness Jeff Hooke explained that a temporary drop to junk bond status in CEG's credit rating would be "mildly damaging" to BGE. Jeffrey Hooke Phase II Written Testimony at 4. A junk bond rating for CEG is far worse than the no-deal outcome here, with a stable, investment grade rating by two of the major credit rating agencies, and a speculative, one-notch downgrade by the other to a level that is still above junk bond status.

In the longer term, the development of Calvert Cliffs-3, which the Companies have made a centerpiece of their future strategy should the transaction proceed, will harm Constellation's creditworthiness. The reasons for this are set forth in a May, 2008 report from Moody's on "New Nuclear Generating Capacity," attached to the Phase II Written Testimony of Daniel Lawton. OPC Exhibit 2-5A, Attachment DJL-6. Among other factors, this report noted that in the past, most nuclear-building utilities suffered ratings downgrades—and sometimes several—while constructing facilities. See id. at 1. The report further stated, "The sheer size, cost and complexity of nuclear construction

projects can increase the business and operating risk profile of a utility, potentially exposing it to downward rating pressure." Id. at 3.

3. The tax payments, visitors center, charitable donation, and potential economic impacts of CC3 which would result from the transaction do not benefit BGE ratepayers

As State/MEA witness Alan Schwartz and OPC witness Jeffrey Lawton have emphasized, PUC § 6-105(g)(3)(i) makes approval of the transaction contingent on the establishment of benefits for BGE customers in their capacity as customers. See Alan Schwartz Phase II Written Testimony at 10; Daniel Lawton Phase II Written Testimony at 18, lines 8-9. Any tax payments to the State which would result from this transaction, the visitors center, the contribution to the Constellation Energy Foundation, and the jobs attributed to CC3 would not benefit BGE customers as customers.

Even when considered from a broader societal basis, these benefits prove to be greatly exaggerate. They pale in comparison to the harms posed by the transaction, and benefit the Companies to a great degree. For example, as OPC witness William D'Onofrio effectively showed, the Companies have overstated the tax benefits accruing to the State of Maryland from the proposed transaction.

The proposed new visitors center at Calvert Cliffs is laden with self-interest for the Companies. It would serve as a vehicle to promote nuclear power to Maryland citizens, as well as political actors in the state and the nation's capital. Moreover, the center would pose a threat of radioactive contamination to those who visited it.

The charitable contribution is also a self-interested proposition, in accordance with the strictures of modern corporate law. See, e.g., A.P. Smith Mfg. Co v. Barlow, 13 N.J. 145, 150, 98 A.2d 581, 584 (1953). Turning the $56 million presently allocated for the visitors center and charitable donation over to BGE customers in the form of rate relief—amounting to about $50 per customer—would be an insufficient measure to counteract the much larger harms posed by this transaction.

According to testimony in this proceeding and the CPCN proceeding, there would be about 4,000 construction jobs directly created by CC3, around half of which would be short-term construction jobs that would last one year or less. In addition, there would be around 400 permanent jobs. Assuming all in costs for the plant of $13-$15 billion based on the PPL estimate, the cost per job would be roughly $3 million. It would be difficult to deliberately design a less-effective jobs program. Indeed, just about anything Constellation could do other than build a new nuclear reactor would create far more jobs than its current course. If the PSC reads the statute broadly and considers job creation a potential benefit from this deal, then it must also consider the prospect of far more jobs created by investment in any other energy source.

B. In order to ensure benefits and no harms for BGE customers in the context of this transaction, BGE should be prohibited from paying dividends to CEG until Calvert Cliffs-3 is completed.

Should the Commission consider adding conditions to the transaction under PUC § 6-105(g)(3)(ii), it should take strong measures to insulate BGE from the substantial risks posed by Constellation Energy Nuclear Group's aggressive pursuit of

nuclear development, including the proposed construction of Calvert Cliffs-3. One simple condition that would effectuate this end would be a prohibition on dividend payments from BGE to Constellation until CC3 is built, operating, and paid for. This would protect BGE ratepayers from having their payments to BGE used for purposes other than improving BGE operations and infrastructure, and would prevent ratepayers from paying for an expensive nuclear reactor that might not be completed, coupled with default.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _26th_ day of October, 2009, a copy of the foregoing brief was served on all parties of record by electronic mail.

___/s/_____
Curtis Cooper, Esq.