

**IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND**

KENNETH D. SCHISLER, INDIVIDUALLY, \*  
AS CHAIRMAN OF THE PUBLIC \*  
SERVICE COMMISSION, AND ON \*  
BEHALF OF THOSE MEMBERS OF \*  
THE PUBLIC SERVICE COMMISSION \*  
SIMILARLY SITUATED \*  
Cooper Point Road \*  
Bozman, Maryland 21612 \*

and \*

PUBLIC SERVICE COMMISSION OF \*  
MARYLAND \*  
6 St. Paul Street, 16<sup>th</sup> Floor \*  
Baltimore, Maryland 21202 \*

Plaintiffs \*

v. \*

STATE OF MARYLAND \*  
Serve on: \*  
J. Joseph Curran, Jr., Attorney General \*  
200 St. Paul Place \*  
Baltimore, Maryland 21201 \*

Defendant \*

\* \* \* \* \*

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs, Kenneth D. Schisler, individually, as the Chairman of the Public Service Commission of Maryland, and on behalf of those members of the Public Service Commission similarly situated, and the Public Service Commission of Maryland, by their attorneys, Andrew Radding, Gregory M. Kline, H. Scott Jones and the law firm of Adelberg, Rudow, Dorf & Hendler, LLC, David R. Thompson, Brynja M. Booth and the law firm of Cowdrey, Thompson

& Karsten, P.C. file this Memorandum in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction, stating the following in support thereof.

## I. OVERVIEW

Plaintiffs have filed a Motion for Temporary Restraining Order and a Preliminary Injunction pursuant to Maryland Rule 15-501, *et seq.*, to prevent Sections 12 and 22 of Senate Bill 1 attached hereto as *Exhibit 1* from taking effect. More specifically, Plaintiffs request that the Court expressly order that the current incumbent Commissioners shall remain in office during the pendency of this proceeding, subject to the further order of this Court. Furthermore, Plaintiffs request that the Court enter an order prohibiting the appointment of new Commissioners as contemplated by Sections 12 and 22 of Senate Bill 1, pending the further order of this Court after a hearing on the merits.

Senate Bill 1, a so-called “emergency bill” is nothing more than a politically motivated attempt by the General Assembly to circumvent the express provisions of the Maryland Constitution, which only permits the removal of the incumbent Commissioners for cause by the Governor. The Bill would end the term the current sitting Commissioners and replace them with newly designated Commissioners on or after July 1, 2006 in violation of the incumbent Commissioners’ vested rights to their respective appointments. Sections 12 and 22 of Senate Bill 1 will have the effect of unconstitutionally removing the current Commissioners from office without due process, in violation of the Maryland Declaration of Rights and Article II, Section 15 of the Maryland Constitution.

Earlier this year, the General Assembly made a virtually identical attempt to unconstitutionally and unlawfully terminate the terms of the sitting Commissioners in Senate Bill 1102 attached hereto as *Exhibit 2*. Pursuant to Section 2 of Senate Bill 1102, the terms of the

sitting Commissioners would have terminated April 9, 2006. On April 6, 2006, the Commissioners and Public Service Commission of Maryland sought injunctive and declaratory relief in pleadings very similar to those filed before this Court.<sup>1</sup> On April 7, 2006, the Circuit Court for Talbot County granted temporary injunctive relief, ordering that “the implementation of Senate Bill 1102 is stayed until further ordered of this Court.” The State immediately noted an appeal and sought to stay the lower court’s temporary restraining order. On April 10, 2006, argument was heard before a three judge panel of the Court of Special Appeals which upheld the lower court’s issuance of the restraining order. *Exhibit 3*, April 13, 2006 Court of Special Appeals Order. In upholding the temporary restraining order, Chief Judge Murphy, writing for the Court, determined that the temporary restraining order should remain in effect until “**a full and complete showing that, if called into special session, the current General Assembly does not have the authority to reconsider and override the Governor’s veto of Senate Bill 1102.**” *Exhibit 4*, April 12, 2006 Court of Special Appeals Order [emphasis added]. Later that evening, the General Assembly adjourned without acting on Senate Bill 1102 and the issue became moot.<sup>2</sup>

On June 14, 2006, Maryland’s General Assembly convened in Special Session to consider and pass Senate Bill 1. Following the Governor’s veto of Senate Bill 1, the General Assembly voted to override the veto on June 23, 2006. The unconscionable actions of the General Assembly are an unprecedented abuse of power, violate separation of power principles,

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<sup>1</sup> SB 1102 was challenged prior to the legislation being vetoed by the Governor. The matter was ripe for review because the legislation was declared emergency legislation and the commissioner removal provisions were retroactive. SB 1 is also an emergency bill, and was enacted upon a veto override on June 23, 2006. Under SB 1, the commissioner terms end on June 30, 2006.

<sup>2</sup> SB 1102 could not be considered for a veto override in the recent special session of the General Assembly as the bill was passed prior to the eighty-third day of the regular session (known as Presentment Day), the legislature could only override a veto prior to adjournment of the regular session. *See*, Art. II § 17 of the Maryland Constitution. The Talbot County case has now been dismissed as moot.

and are a blatant attempt to deny the opportunity for fair and timely judicial review of an unconstitutional legislative enactment. The General Assembly has engineered the process to give itself the opportunity to empanel a new Commission before the incumbent Commissioners could have a chance to seek judicial review of this unconstitutional law without the need to pursue extraordinary remedies. This Court should not tolerate the General Assembly's *ultra vires*, illegal attempt to deny a thorough and considered review of its legislative enactments.

As discussed more fully below, Sections 12 and 22 of Senate Bill 1 violate Art. II, §15 of the Maryland Constitution and Article 24 of the Maryland Declaration of Rights. The Commission respectfully requests that the Court enjoin the implementation of Sections 12 and 22 of Senate Bill 1 until the Commission's declaratory judgment action can be fully considered by the Court.

## II. STATEMENT OF FACTS

The Public Service Commission ("Commission") is an independent unit in the Executive Branch of the State government with statutorily conferred duties and powers. MD. CODE ANN., PUBLIC UTILITY COMPANIES ARTICLE ("PUC Article") §§2-101 and 2-112. In addition to establishing the jurisdiction of the Commission, the PUC Article sets forth the basic structure of the Commission. Currently, the five Commissioners are appointed by the Governor with the advice and consent of the Senate and serve staggered five-year terms. PUC Article §§2-102 and 2-103.

All five incumbent Commissioners were duly appointed by the Governor and confirmed by the Senate and are current civil officers of the State serving a term of years. The Constitution of Maryland expressly provides that "The Governor...may remove for incompetence, or misconduct, all civil officers who received appointment from the Executive for a term of years."

MD. CODE ANN., CONSTITUTIONS, Constitution of Maryland, Art. II, §15. PUC Article §2-102(f) further provides that a Commissioner may only be removed from his or her position by the Governor for misconduct or incompetence in accordance with the due process provisions afforded under MD. CODE ANN., STATE GOVERNMENT §3-307.

Senate Bill 1 entitled “Public Service Commission - Electric Industry Restructuring” is denominated as an “emergency bill,” and was passed during a special session of the General Assembly on June 14, 2006. On June 22, 2006, the Governor vetoed Senate Bill 1. On June 23, 2006, the General Assembly reconvened and overrode the Governor’s veto to enact Senate Bill 1.

Since Senate Bill 1 is labeled as an “emergency bill”, it purports to become effective when enacted. MD. CODE ANN., CONSTITUTIONS, Constitution of Maryland, Art. II, §17. By its express terms, Sections 12 and 22 of Senate Bill 1 remove the incumbent Commissioners as of June 30, 2006, and provides for their replacement on July 1, 2006. *Exhibit 1*, Section 12.

As discussed in detail below, Sections 12 and 22 of Senate Bill 1 violate the Maryland Constitution, Art. II, § 15. Only the Governor can remove duly appointed and confirmed Commissioners. Furthermore, a Commissioner can only be removed for misconduct or incompetence. Sections 12 and 22 of Senate Bill 1 also violate Article 24 of the Maryland Declaration of Rights which prevents the removal of Commissioners without due process of law, and contravenes the due process procedures for removing Commissioners set forth in MD. CODE ANN., STATE GOVERNMENT §3-307. Finally, as enacted, Sections 12 and 22 of Senate Bill 1 are an unconstitutional Bill of Attainder prohibited under Article I, §10 of the Constitution of the United States. MD. CODE ANN., CONSTITUTIONS, Constitution of the United States, Art. I, §10.

### III. THE STANDARD FOR GRANTING AN INJUNCTION

The granting of a temporary restraining order is governed by Maryland Rule 15-504. The standard for granting a temporary restraining order is the same as the standard for granting a preliminary injunction, with the following additional requirement:

A temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.

*Id.*, at 15-504(a). The four factors to be considered in reviewing an application for a temporary restraining order are: (1) likelihood of success on the merits; (2) the "balance of convenience;" (3) irreparable injury; and (4) where appropriate, the public interest. *State Dept. of Health & Mental Hygiene v. Baltimore County*, 281 Md. 548, 554 (1977). If those factors are present, under Maryland Rule 15-505, the Court may, following a hearing, convert a temporary restraining order into a preliminary injunction. As the facts of this case demonstrate, consideration of each of the factors militates strongly in favor of granting the Plaintiffs both a temporary restraining order and a preliminary injunction.

### IV. ARGUMENT

#### A. The Plaintiffs Are Likely To Succeed On The Merits

At the very heart of this action lie the "checks and balances" protections afforded every citizen through the separation of powers provisions of the Maryland Constitution. These cornerstone protections are encapsulated in Article 8 of Maryland's Declaration of Rights which states "[t]hat the Legislative, Executive and Judicial powers of the Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." (emphasis added). MD.

CODE ANN., CONSTITUTIONS, Declaration of Rights, Art. 8. No division of Maryland's government can be allowed to usurp the province of the other.

**1. Sections 12 and 22 of Senate Bill 1 Violate The Maryland Constitution Art. II, § 15 That Solely Empowers The Governor With The Right To Remove The Commissioners For Good Cause**

The Maryland Constitution expressly provides that:

The Governor may suspend or arrest any military officer of the State for disobedience of orders, or other military offense; and may remove him in pursuance of the sentence of a Court-Martial; and *may remove for incompetency, or misconduct, all civil officers who receive appointments from the Executive for a term of years.* (emphasis added).

MD. CODE ANN., CONSTITUTIONS, Constitution of Maryland, Art. II, §15. Clearly, only the Governor can remove a civil officer who was appointed to a term of years. Furthermore, even the Governor is constitutionally constrained to only removing a civil officer for misconduct or incompetency. The General Assembly is granted no power to remove a civil officer prior to the completion of that officer's term. Once appointed by the Governor with the advice and consent of the Senate, each Commissioner has a vested legal right to their respective appointment, and can only be removed by the Governor for cause.

In this case, the incumbent Commissioners were lawfully appointed to terms of five years with the advice and consent of the Senate and, under the Maryland Constitution, can **only** be removed by the **Governor** – not the General Assembly – for “incompetency or misconduct.” Maryland Constitution, Article II, 15. Sections 12 and 22 of Senate Bill 1 are a specious attempt to usurp the Governor's constitutional authority by directly removing the present Commissioners without any regard whatsoever for the Constitutional requirements of Article II, § 15. Sections 12 and 22 of Senate Bill 1 violate the separation of powers by usurping the Governor's exclusive ability to remove the Commissioners for cause. In essence Sections 12 and 22 of Senate Bill 1

have the effect of “voiding” the appointments of the incumbent Commissioners. Under the Maryland Constitution, the General Assembly has no authority to void the lawful appointments of the incumbents. To permit Sections 12 and 22 of Senate Bill 1 to stand would be to nullify their Constitutional rights to the appointment unless the Governor removes them for cause. Sections 12 and 22 of Senate Bill 1 are invalid, unlawful sections of the new law which fly in the face of Article II, § 15.

## **2. Sections 12 and 22 of Senate Bill 1 Violate Each Commissioner’s Vested Rights In Their Appointment**

The designation, in Art. II, § 15, of the two causes which would authorize the use of the power to remove, is a denial of the right to remove for any other or different causes. *See eg. Miles v. County Commissioners of Somerset County*, 80 Md. 358, 364 (1894). The incumbent Commissioners, having been duly appointed, have the right not to be deprived of the office prior to the legal expiration of their term. *Id.* As noted by the Court in *Miles*, “[I]t is the utmost stretch of arbitrary power and a despotic denial of justice to strip an incumbent of his public office and deprive him of its emoluments and income, before its prescribed term has elapsed, except for legal cause alleged and proved upon an impartial investigation after due notice.” *Miles*, 80 Md. at 366 (emphasis added). The incumbent Commissioners have a vested legal right in their respective appointments, and under the Constitution of Maryland, they can only be removed by the Governor for incompetency or misconduct.

The constitutional principles implicated by the General Assembly’s actions have been upheld by the United States Supreme Court since *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803). While *Marbury v. Madison* is generally familiar to most college students, the facts of this historic case are worth mentioning. In *Marbury*, on the eve of leaving office, the outgoing



President of the United States, John Adams, nominated Mr. Marbury and other applicants as justices of the peace for the District of Columbia. By statute, justices of the peace were appointed for five year terms. Once appointed by the President, with advice and consent of the Senate, they were not removable at will by the President. In this case, after the Senate gave its advice and consent to the appointments, President Adams signed the commissions appointing Mr. Marbury and the other applicants to five year terms as justices of the peace. The commissions were delivered to James Madison, the Secretary of State, who was required by statute to deliver the commissions to Mr. Marbury and the other appointees. At the direction of the new President, Thomas Jefferson, Secretary Madison refused to deliver the commissions after John Adams' term as President expired. Mr. Marbury and the other applicants filed a mandamus action, requesting that the Supreme Court order Secretary Madison to carry out his duty and deliver the commissions.

The Supreme Court issued the mandamus, and ordered Secretary Madison to deliver the commissions. The Supreme Court noted that once the commission was issued by the outgoing President, the appointment was made, and the commission was complete. The Court held that:

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. ***But when the officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled. It has conferred legal rights which cannot be resumed.***

*Marbury*, 5 U.S. at 162 (emphasis added). The Court held that the outgoing President Adams had the absolute power to make the appointments, and once appointed, the law gave Mr. Marbury “a right to hold, for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country. ***To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a***

*vested legal right.*” *Id.* (emphasis added); *see also Little v. Schul*, 118 Md. 454 (1912) (holding that where an appointment to public office is made in pursuance of the provisions of the Constitution which fix the term of office, the appointment cannot be revoked or annulled, or the term of office abridged or extended by the legislature, unless so authorized by the Constitution. “If the appointing power was lawfully exercised...in the manner prescribed by law, the appointment vested in the appellee legal rights which could not be disturbed by the legislature”).

The clear purpose behind giving the Commissioners a term of years, subject only to removal by the Governor for cause, is to immunize the Commission from political considerations in exercising its quasi-judicial responsibilities. If Sections 12 and 22 of Senate Bill 1 are upheld, no civil officer will be safe from the political whims of the General Assembly. Agencies such as the Parole Commission, Worker’s Compensation Commission, State Board of Contract Appeals and others, all of whom make quasi-judicial decisions, will lose the independence which allows them to function in a fair, unbiased manner.

The Constitution reflects the strong public policy that civil officers should be insulated from political retaliation by the General Assembly and the Governor alike so that these individuals can responsibly make appropriate decisions in accordance with their statutory mandates without concerns about political retribution. Legislative enactments such as Sections 12 and 22 of Senate Bill 1, if allowed to stand, will make all civil officers subject to the political whims of the General Assembly and deny these officers the ability to make independent decisions when interpreting state law.

**3. Sections 12 and 22 of Senate Bill 1 Violate Article 24 Of The Maryland Declaration Of Rights And Unconstitutionally Removes The Vested Legal Rights Of Each Commissioner In His Or Her Appointment**

In language which was based on the Magna Carta, Article 24 of the Maryland Declaration of Rights provides “that no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner, destroyed or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land.”

The due process requirements of Article 24 function to “protect interests in life, liberty and property from deprivation or infringement by government without appropriate procedural safeguards.” *Coleman v. Anne Arundel Police*, 369 Md. 108, 141-42 (2002). In *Motor Vehicle Administration v. Lytle*, 374 Md. 37 (2003), the Court of Appeals held:

to establish a violation of due process, the aggrieved party must show that state action resulted in a deprivation of a property interest protected by . . . Article 24 of the Maryland Declaration of Rights. If a property interest is established then the court must determine what procedures are required constitutionally before an individual may be so deprived.

The Supreme Court of the United States has determined that whether a public employee has a property interest in his continued employment is a function of whether the employee has a legitimate claim of entitlement to that employment derived from a statutory or contractual provision.<sup>3</sup> *Cleveland v. Loudermill*, 470 US 532, 538 (1985). Where dismissal may only be for cause, a property interest in that employment is created. *Board of Regents v. Roth*, 408 US 564 (1972).

As noted previously, several provisions address how the sitting Commissioners can be removed from office. First, the Maryland Constitution, Art. II, § 15 provides that the “Governor . . . may remove for incompetency or misconduct, all civil officers who receive appointments

from the Executive for a term of years.” The Constitution does not provide that right to the Legislature. The term of a Commissioner is five years. *See* PUC Article § 2-102(d). Section 2-102(f) specifically provides that the Governor may remove a Commissioner for incompetence or misconduct in accordance with MD. CODE ANN., STATE GOVERNMENT §3-307. This Section of the State Government Article carefully prescribes the method by which the Governor is required to exercise this delicate and important power. The Governor is required to provide notice to the party complained against, an opportunity for defense, the examination of witnesses and a full hearing of the case. None of these due process guarantees are afforded the Commissioners under Sections 12 and 22 of Senate Bill 1.

This legislation violates the individual rights of the sitting Commissioners in three distinct ways. First, only the Governor can remove a sitting Commissioner. Both the Maryland Constitution, Art. II, § 15, and the PUC Article § 2-102(f) clearly establish that *only* the Governor can remove an incumbent Commissioner. Through Sections 12 and 22 of Senate Bill 1, the General Assembly has unconstitutionally attempted to usurp this authority.

Second, a sitting Commissioner can only be removed for incompetency or misconduct, not because of partisan political expediency. Under Maryland Constitution, Art. II, § 15, the incumbent Commissioners clearly are not at-will employees. They have a constitutionally protected vested right in their appointment, and can only be removed by the Governor for “incompetency or misconduct”. Article II, § 15. *Harmon v. Harwood*, 58 Md. 1, 15 (1881). Sections 12 and 22 of Senate Bill 1 expressly provide for the removal of the sitting Commissioners without any regard to the constitutional protections and rights of the

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<sup>3</sup> Supreme Court decisions interpreting the Due Process Clause of the Fourteenth Amendment “are practically direct authority for the meaning of [Article 24].” *Garnett v. State*, 332 Md. 571, 613 n. 20 (1993).

Commissioners. The effect of Sections 12 and 22 of Senate Bill 1 is to nullify the “for cause” requirement embodied in the Constitution.

Additionally, a sitting Commissioner cannot be removed without notice and an evidentiary hearing. The sitting Commissioners have significant pre-termination rights which are violated by Sections 12 and 22 of Senate Bill 1. As noted previously, the Commissioners are entitled to notice, the opportunity for defense, the examination of witnesses and a full hearing regarding the allegations pursuant to MD. CODE ANN., STATE GOVERNMENT §3-307.

In these instances where the officer’s term is prescribed by statute and a statute or constitutional provision provides that the individual can only be removed for misconduct or incompetency, the designation of these two causes is a denial of the right to remove for any other reason or different cause. *See Miles*, 80 Md. at 364. Furthermore, an incumbent civil officer is entitled to an opportunity to be heard and to make a defense before he can be legally removed. The act of removing a civil officer without these safeguards is a nullity. *Id.*

Sections 12 and 22 of Senate Bill 1 attempt to circumvent all the legal requirements established by the Maryland Declaration of Rights, the Maryland Constitution, the PUC Article and MD. CODE ANN., STATE GOVERNMENT §3-307. Through Sections 12 and 22 of Senate Bill 1, the General Assembly usurps the constitutional authority of the Governor, removes civil officers without cause and denies those officers their due process rights. Accordingly, Plaintiffs request that the Court determine that the actions by the General Assembly are unconstitutional and declare Sections 12 and 22 of Senate Bill 1 invalid.

#### **4. Sections 12 and 22 of Senate Bill 1 Are An Unconstitutional Bill of Attainder Under The Constitution of the United States, Article I, Section 10**

The Constitution of the United States prohibits both Congress (in Article I, Section 9) and the States (in Article I, Section 10) from enacting Bills of Attainder. Sections 12 and 22 of Senate Bill 1 constitute a Bill of Attainder and are unconstitutional.

A Bill of Attainder is a legislative form of punishment, requiring three elements. One, the legislative act must determine “guilt” and “inflict punishment.” Two, it must be directed “upon an identifiable individual.” Three, it must occur “without the provision of the protections of a judicial trial.” *Consolidated Edison Co. of New York v. Pataki*, 292 F.3d 338, 346 (2<sup>nd</sup> Cir.) *cert. denied*, 537 U.S. 1045 (2002) (The New York Legislature was found to have enacted a Bill of Attainder because it sought to punish an electric utility by depriving it of power replacement costs for a plant shutdown).

Clearly, as to the first element, there can be no dispute that the removal from office before the expiration of their terms constitutes in effect a finding of guilt and a form of punishment of the current Commissioners for their past actions or inaction. Secondly, the legislation at issue is clearly directed at the current Commissioners. Finally, Sections 12 and 22 of Senate Bill 1 would remove the Commissioners from office without any provision of the protections of a judicial trial. Accordingly, Sections 12 and 22 of Senate Bill 1 are an unlawful Bill of Attainder and violate Article I, Section 10 of the United States Constitution.

#### **5. Section 22 Of Senate Bill 1 That Eliminates The Term Of The Commissioners And Authorizes The Attorney General To Appoint Successors Is Unconstitutional**

In what appears to be foreshadowing a judicial determination of the unconstitutionality of Section 12 of Senate Bill 1, the General Assembly included Section 22 to provide for the termination of the sitting Commissioners and appointment of new Commissioners if Section 12

was determined to be invalid. However, for the very same reasons that Maryland's legislature cannot terminate the terms of the Commissioners in Section 12, it cannot create a "fall back" provision that terminates the terms of the Commissioners if the earlier provision to terminate the terms of the Commissioners is found to be invalid. As set forth above, the General Assembly cannot constitutionally draft legislation that removes the sitting Commissioners regardless of whether it is in Section 12 or Section 22.

Section 22 provides that if Section 12 is held invalid, then the terms of the current commissioners are terminated and commissioners become at will employees of the Attorney General. *Exhibit 1*. It cannot be overstated how Section 22, if allowed to stand, would frustrate the utility regulatory process and would operate as a *per se* denial of due process to virtually all parties with important business before the Commission. It is common for the Attorney General to participate as a party in proceedings before the Public Service Commission. Indeed, pursuant to Senate Bill 1, the Attorney General is directed to intervene and participate in a proceeding to consider a proposed merger between Constellation Energy and FPL Group that is pending. *Id.* at Section 15. Section 22 of Senate Bill 1 purports to end the terms of current Commissioners and provides that they "serve at the pleasure of the Attorney General, who is authorized to terminate their service and appoint their successors." *Id.* at Section 22(b). Members of the Public Service Commission could not possibly maintain the necessary objectivity and independence to exercise the Commission's quasi-judicial functions if they were at will employees of a party in its proceedings. In addition, Section 13 of Senate Bill 1 provides that the People's Counsel serves at the pleasure of the Attorney General." *Exhibit 1*, Section 13. This legislation creates an untenable conflict of interest and destroys any impartiality between the Commissioners, People's Counsel and the Attorney General. Again, these provisions underscore the General Assembly's

unprecedented abuse of power, violation of separation of power principles, and complete disregard for an independent Public Service Commission. Sections 12 and 22 of Senate Bill 1 are blatantly unconstitutional and must be enjoined by this Court.

**B. Plaintiffs Will Suffer Irreparable Harm In The Absence Of An Injunction**

The Court of Appeals has found that the most significant of the four factors necessary for a preliminary injunction is irreparable harm, and that irreparable harm can be demonstrated by the necessity to maintain the *status quo*. *Lerner v. Lerner*, 306 Md. 771, 776 (1986).

The unwarranted disruption to the daily functioning of the Commission caused by the uncertainty regarding the constitutionality of Sections 12 and 22 of Senate Bill 1 cannot be overstated. Essentially, any order issued by the “new” Commissioners will be void if their appointment is subsequently found to be unconstitutional. The Commission cannot be subjected to this form of “legal paralysis” during the pendency of this proceeding.

Furthermore, a complete change in Commissioners will disrupt the entire staff of the Commission and its work. Once Sections 12 and 22 of Senate Bill 1 are found to be unconstitutional, the return of the incumbent Commissioners will put staff through a second complete change of leadership. The effect on morale, productivity and the work of the Commission will be devastating.

Much of the irreparable harm to the Plaintiffs also constitutes harm to the citizens of Maryland as well. This harm is set forth below in the discussion addressing why granting the injunction is in the public interest.

**C. Granting The Injunction Is In The Public Interest**

This case is one of extreme importance to the citizens of Maryland. The Commission has significant on-going cases in progress. These cases affect the lives and livelihood of thousands



of citizens. The Commission's significant on-going cases require decision in a relatively short period of time. If the injunction is not granted, new Commissioners with no familiarity with the record or the issues in these cases will essentially be forced to start these proceedings over. The delays associated with new review of pending cases will harm not only the litigants awaiting Commission decisions but, more importantly, will harm the public in general who ultimately bear the costs of any delay.

Furthermore, if a new Commission is seated while the constitutionality of Sections 12 and 22 of Senate Bill 1 are challenged, the result will be chaotic for the financial markets which support utility infrastructure investments in Maryland and depend upon regulatory stability in order to provide relatively low cost capital. Customers pay the costs of utility capital investments (both debt and equity costs) through utility rates. Destabilizing the Public Service Commission while this litigation is ongoing will unnecessarily increase investment risks and costs that customers will have to pay for utility service. As noted previously, the lawfulness of any orders issued by the "new" Commission while the litigation proceeds will certainly be, at a minimum, subject to serious doubt. The fact that Commission orders will not be valid on their face will inject an unprecedented degree of doubt regarding utility rates, utility finances and the rights and responsibilities of all parties to Commission proceedings. This chaos clearly is not in the public interest.

The citizens of Maryland are entitled to have their State agencies operated in an efficient and effective manner. The premature implementation of Sections 12 and 22 of Senate Bill 1 clearly will have a highly disruptive effect on the Commission and by extension on the utilities which the Commission regulates and the public who depends upon those utilities for essential services.

**D. The Balance of Convenience Favors Granting The Injunction**

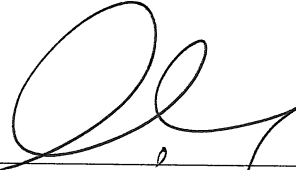
The “balance of convenience” favors the grant of the Commission’s Motion because great injury will be done to the Commission by denying the injunction and no injury will be done to the Defendant by granting it. *Teferi v. Dupont Plaza Assoc.*, 77 Md. App. 566, 578, 579, n. 5 (1989).

As discussed above, the Commission has made a strong showing that it will suffer irreparable harm unless the request for injunction is granted. Granting the injunction will not cause any injury to the Defendant.

**E. The Controversy Is Ripe for Judicial Review And The Plaintiffs Have Standing To Challenge Sections 12 and 22 of Senate Bill 1**

In conjunction with this request for an injunction, the Plaintiffs have filed a complaint seeking declaratory relief. The primary purpose of the Uniform Declaratory Judgment Act is to relieve litigants of the rule of common law that no declaration of rights may be judicially adjudged unless a right has been violated and to render practical help in ending controversies which have not reached the stage where other legal relief is immediately available. *Davis v. Maryland*, 183 Md. 385, 388-389 (1944). The Court of Appeals has held that a person directly

affected by a statute should be permitted to obtain a judicial declaration that the statute is unconstitutional. *Id.* at 389.



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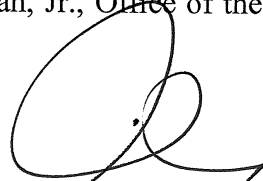
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT on this 26<sup>th</sup> day of June, 2006, a copy of the foregoing Memorandum was hand-delivered to J. Joseph Curran, Jr., Office of the Attorney General, 200 St. Paul Place, Baltimore, Maryland 21201.



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Andrew Radding