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COMMENT

GETTING THE LIGHTS BACK ON: AN ANALYSIS OF THE MARYLAND ENERGY SERVICE QUALITY AND RELIABILITY ACT'S IMPACT ON UTILITY LIABILITY AND CONSUMER RIGHTS

By: Elizabeth Payne*

INTRODUCTION

In the midst of one of the most ferocious winter storms in Mid-Atlantic history, thousands of Washington D.C. area residents sat helplessly as their homes suddenly went dark.¹ Power lines became victims of the storm, unable to survive the barrage of rapidly falling wet snow. As households huddled together in the dark, watching the snow and wind create white-out conditions, many assumed the power would be back by morning.

In reality, at least four days came and went before power was finally restored to many neighborhoods.² Some families viewed the long blackout as a minor inconvenience, utilizing fireplaces and generators, or self-evacuating to places that had electricity. For the less fortunate, the outage resulted in long days of near-freezing temperatures in darkened apartments, cut off from the world. These unlucky ones, often lower-income families, had no fireplaces or generators, and could not leave until the city's public transportation system reopened.³

The situation worsened as a second blizzard slammed into the area just three days after the first storm, and before power returned to many D.C.

* Elizabeth Payne received her juris doctorate from the University of Baltimore School of Law in May of 2013. Elizabeth would like to personally thank her Faculty Advisor, Professor William Hubbard of the University of Baltimore Law School, for his advice, feedback, and patience with her comment and relentless stream of questions.

¹ See Joe Stephens, *Pepco Struggles to End Power Outages*, WASH. POST, Jan. 31, 2011, available at http://www.washingtonpost.com/local/pepco-struggles-to-end-power-outages/2011/01/30/AB3RDME_story.html.

² See *id.*

³ The blizzards resulted in shutting down all local bus routes, along with 40 above-ground Metro stations, and remained closed for days. See Carlos Hamann, *Powerful Blizzard Shuts Down U.S. Capital*, GOOGLE NEWS (Feb. 5, 2010), <http://www.google.com/hostednews/afp/article/ALeqM5j3HVBhfkkHN4c9TIIAxNkxjbR0A>. Some of the above-ground stations serve some of D.C.'s poorest neighborhoods, including Branch Avenue, Suitland, Capitol Heights, and New Carrollton. See WMATA, http://wmata.com/getting_around/SnowMap.pdf (last revised May 23, 2007) (showing which stations close after eight inches of snow accumulates).

neighborhoods. Many residents learned electricity would not be restored for a week, and the *Washington Post's* online comment boards filled with complaints by furious area residents.⁴ The majority of the comments came from D.C. and Maryland residents, who constituted the Potomac Electric Power Company's ("PEPCO") customer base.⁵ Where is PEPCO, they asked, and why is it taking so long? How could Virginia's power companies seemingly restore power faster, despite having more outages?⁶ How were people expected to survive in dark, cold homes, especially through another blizzard?

While this scenario might seem extreme, anyone who weathered the 2010 "Snowmageddon" storms in southern Maryland lived through such an ordeal.⁷ Thousands in Maryland faced days without power after the February 2010 blizzards that delivered a one-two punch and dumped over two feet of snow on the D.C. area in less than a week.⁸ Then, after a series of violent thunderstorms tore through the region in August 2010, PEPCO customers in Montgomery and Prince George's counties lost power for days.⁹ The company claimed the storms took it by surprise, but angry residents demanded accountability.¹⁰

⁴ See Christopher Dean Hopkins, *How Have Elected Leaders Handled the Snow Storm? Readers Respond*, WASH. POST MD. POLI. BLOG (Feb. 8, 2010, 4:23 PM), http://voices.washingtonpost.com/annapolis/2010/02/how_have_elected_leaders_handled.html.

⁵ *Id.*; see Stephens, *supra* note 1; see Mary Pat Flaherty, *In Storm, Pepco Last to Seek Aid*, WASH. POST, Jan. 28, 2011, available at http://www.washingtonpost.com/national/in-storm-pepco-last-to-seek-aid/2011/01/27/ABTi4LE_story.html.

⁶ See *Preliminary Snow Totals Ending Feb. 6, 2010*, NAT'L WEATHER SERV., <http://www.erh.noaa.gov/lwx/events/?event=20100206> (last visited Apr. 2, 2013). The NWS reported the following snowfall totals: 27.5 inches at American University in D.C., 27 inches in Bethesda, Md., 25 inches in College Park, Md.; 28 inches in the Ballston neighborhood of Arlington, Va.; and 32.4 inches at Dulles International Airport in Loudoun County, Va. *Id.*

⁷ See Jason Samenow, *Amazing Mid-Atlantic Snow Statistics*, WASH. POST CAPITAL WEATHER BLOG (Feb. 12, 2010, 12:30 PM), http://voices.washingtonpost.com/capitalweathergang/2010/02/amazing_mid-atlantic_snow_stat.html. The *Capital Weather Blog*, a popular weather forecasting site, created the Snowpocolypse (December 2009 blizzard), Snomaggedon (February 5-6 2010 blizzard) and Snoverkill (February 9-10, 2010 blizzard) nicknames, which were then picked up by national news organizations.

⁸ See Flaherty, *supra* note 5. Over 205,000 PEPCO customers lost power by the end of the 2010 blizzards. Virginia's Dominion Power reported 140,000 outages by the end of the second storm, and BG&E reported 135,000. *Id.*

⁹ See Joe Stephens & Aaron C. Davis, *Pepco Defends Post-Storm Efforts at Hearing*, WASH. POST, Aug. 18, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/17/AR2010081705868.html>; see Dan Morse, Editorial, *Pepco Acknowledges Response Problems*, WASH. POST, July 28, 2010, available at

This scenario is not unique to the Maryland suburbs surrounding Washington. Baltimore Gas and Electric (“BG&E”) also received heavy criticism for its storm responses, which included a week-long restoration after 2011’s Hurricane Irene.¹¹ Nor is this problem unique to Maryland, as Connecticut suffered from similar problems after the surprise 2011 “Snowtober” nor’easter.¹² Many customers, tired of throwing out spoiled food, living in cold homes, or forced to move to hotels, offices, or anyplace warm, undoubtedly wondered how such a slow response could be legal. Does the law afford them any rights as customers? Are these companies being held to any standard of responsibility by legislators or regulators?

After facing a massive backlash from both local media and constituents, Maryland legislators took action.¹³ In early 2011, the General Assembly passed the Maryland Electricity Service Quality and Reliability Act (“ESQR”).¹⁴ The statute, which went into effect on July 1, 2012, required the Maryland Public Service Commission (“PSC”) create and hold Maryland utility companies to new reliability standards.¹⁵ Special requirements and reports for weather-related outages may also be enacted.¹⁶ But what will this law actually do? Why are power companies in Maryland taking days to get

<http://voices.washingtonpost.com/local-breaking-news/maryland/pepco-outages-continue-to-decl.html>.

¹⁰ See Stephens & Davis, *supra* note 9. The D.C. Metro area typically has severe and damaging thunderstorms in the late summer months. See *id.*

¹¹ See Editorial, *Our Say: PSC needs to look into BGE efforts following Irene*, THE CAPITAL (Annapolis, Md.), Sept. 7, 2011, available at http://capitalgazette.com/news/our-say-psc-needs-to-look-into-bge-efforts-following/article_d0b4b270-fee3-56a5-b7de-3acf445259bb.html?mode=print.

¹² See Dave Collins & Stephen Singer, *October Snowstorm Outages Remain, Thousands In Connecticut Enter Second Week Without Power*, HUFFINGTON POST (Nov. 7, 2011, 9:26 PM), http://www.huffingtonpost.com/2011/11/07/connecticut-outages-enter-second-week_n_1079489.html. A surprise October Nor’Easter dropped almost a foot of snow on New England, leaving approximately 830,000 Connecticut homes without power. After restoration efforts took almost two weeks, many residents demanded government action, much like Maryland residents did after the 2009-2010 blizzards. See *id.*; see Morse, *supra* note 9.

¹³ See generally MD. GEN. ASSEMB., DEP’T. OF LEGIS. SERV., *Fiscal and Policy Note*, H.B. 391, 2011 Leg., 428th Sess. (Md. 2011) (hereinafter “Fiscal Policy Note”).

¹⁴ MD. ELEC. SERV. QUALITY AND RELIABILITY ACT, H.B. 391, 2011 Leg., Reg. Sess. (Md. 2011) (codified as MD. CODE ANN., PUB. UTIL. § 7-213 (West 2011)); see *Bill to Penalize Utilities if They Fall Below Standards*, WBAL-TV, Feb. 4, 2011, <http://www.wbal.com/news/26751498/detail.html> (on file with author); Fiscal Policy Note, *supra* note 13.

¹⁵ See Fiscal Policy Note, *supra* note 13. ESQR requires that the PSC base the new reliability and service quality standards on national ranking systems, and creates a state goal that each electric company provide the highest levels of service quality and reliability in a cost-effective manner. Fiscal Policy Note, *supra* note 13, at 1-2.

¹⁶ See Fiscal Policy Note, *supra* note 13, at 2, 4.

the lights back on? Why does it seem that Maryland's utilities move slower than those in Virginia? Most importantly, what legal rights do citizens have, and can they be compensated for their damages?

This comment addresses these questions and analyzes the new requirements set forth by ESQR. Section II examines the previous statutory and regulatory requirements Maryland imposed on electric utilities, and explores whether the current policy of emphasizing low electricity rates is the best way to ensure customer satisfaction and reliable service. Section III then looks at case law to see how the courts have dealt with claims relating to utilities. This section then examines ESQR as part of the legal framework and addresses how the statute will correct previously identified problems. Part IV compares Maryland's laws and regulations to Virginia's, to see if statutory and legal differences explain the differing utility response times after the storms. Finally, the comment concludes with considering whether ESQR is the best method of fixing slow utility response times.

II. BACKGROUND AND HISTORICAL DEVELOPMENT

A. *The Regulatory Scheme*

Understanding electric utility company liability issues requires a basic knowledge of how utility regulation works. Power companies were originally privately owned corporations regulated by the free market.¹⁷ These companies began forming "natural monopolies" due to the costs of providing electric power to customers.¹⁸ A natural monopoly exists when only one company could supply all of the demand for the area it serves.¹⁹ Public utility companies, including electric, telephone, and water services, are common natural monopolies.²⁰

As these natural monopolies formed, self-regulation through the free market faltered.²¹ The reliability and quality of electric service dropped, causing customer dissatisfaction.²² The government soon intervened, seeing electric company monopolies as necessary, but also needing outside regulation.²³ The State protected citizens by keeping costs low and requiring utilities to advance certain legislative goals for the public's benefit.²⁴ In return, states protected the utilities' profits through the creation of favorable

¹⁷ See John L. Rudy, *Limitation of Liability Clauses in Public Utility Tariffs: Is the Rationale for State-Sponsored Indemnity Still Valid?*, 52 BUFF. L. REV. 1379, 1390 (2004).

¹⁸ See *id.*

¹⁹ Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STANFORD L. REV. 548 (1969).

²⁰ See *id.*

²¹ See Rudy, *supra* note 17, at 1391.

²² *Id.* at 1390.

²³ *Id.* at 1391.

²⁴ See *id.* at 1392.

legislation.²⁵ State legislatures crafted regulatory systems, governed by an oversight commission, to maintain the fragile balancing of regulatory benefits.²⁶

Service agreements called “tariffs” lay at the heart of the relationship between public utility companies and state regulatory committees.²⁷ These tariffs are essentially standard contracts, stating how much a power company may charge, along with other service terms.²⁸ Power companies create these tariffs, and commonly use them as a sheltering mechanism through the inclusion of protective terms and conditions.²⁹

One key tariff protection is the liability indemnity clause (“LIC”), which most power companies write into its tariffs.³⁰ LICs block lawsuits by stipulating when a company can be found liable for its negligence.³¹ Railroad companies originally created LICs to allocate risks between the company and its customers.³² In 1884, the Supreme Court upheld a railroad company LIC, and opened the door for other utilities to adopt their use.³³ LICs are now a commonly used contractual safeguard for utility companies.³⁴

B. *A Valuation of Goals*

Regulatory systems do not simply change the state-utility relationship, but allow states to set a utility’s rates in exchange for government protection.³⁵ Most of the company’s practices also fall under the state’s power, where they are usually regulated by an administrative agency.³⁶ Regulatory commission oversight ensures utility companies operate in compliance with the state’s legislative goals.³⁷ Such goals supposedly protect states and consumers while guaranteeing regulated utilities do not engage in harmful or irresponsible practices.³⁸

Legislatures tend to focus on three goals for energy utilities: environmental conservation, service reliability or quality, and electricity

²⁵ *Id.* at 1391.

²⁶ *See* Rudy, *supra* note 17, at 1391.

²⁷ *Id.* at 1380 n.8.

²⁸ *Id.* at 1380 n.8.

²⁹ *Id.* at 1385.

³⁰ *Id.* at 1381 n.10; *see infra* at Part C for further analysis on LICs.

³¹ *Id.* at 1383-84.

³² *Id.* at 1382 (citing *Hart v. Pa. R.R. Co.*, 112 U.S. 331, 343 (1884)).

³³ Rudy, *supra* note 17 at 1383-84 (citing *Hart*, 112 U.S. at 343).

³⁴ *See* Rudy, *supra* note 17, at 1382.

³⁵ *See* Rudy, *supra* note 17, at 1392.

³⁶ *Id.* at 1391-92.

³⁷ *Id.* at 1392 n.70.

³⁸ *Id.* at 1391.

affordability.³⁹ Theoretically, a state could equally emphasize each of these goals. In practice, most states pick one as the top priority and rank the other goals accordingly.⁴⁰ This necessary valuation results from the conflict each of these goals creates with another.⁴¹

For example, more environmentally friendly energy resources tend to cost more, as they require updating older, less “green” infrastructure, with newer, more expensive technology.⁴² In addition, few environmentally friendly power sources can produce the same amount of voltage as a traditional fossil-fuel power plant.⁴³ Nuclear power, long considered cleaner and as productive as traditional electricity sources, remains highly controversial due to concerns over high construction costs.⁴⁴ These economic issues make nuclear power simply too expensive for some states in light of concerns over nuclear fuel storage and accidents.⁴⁵

The conflict between service reliability-quality (“SRQ”) and affordability goals seems obvious at first, but these clear-cut lines vanish after examining the real costs and benefits.⁴⁶ Many programs that raise SRQ levels require spending money, such as tree-trimming programs and upgrading infrastructure well before storms hit.⁴⁷ Pre-storm preparation entails hiring sub-contractors, putting more workers on duty, and paying overtime and

³⁹ *Id.* at 1407-08.

⁴⁰ *Id.* at 1410.

⁴¹ See Rudy, *supra* note 17, at 1408.

⁴² See Douglas L. Heinold, *Retail Wheeling: Is Competition Among Energy Utilities an Environmental Disaster, or Can it be Reconciled With Integrated Resource Planning?*, 22 RUTGERS COMPUTER & TECH. L.J. 301, 313 (1996).

⁴³ *Id.* at 313-14.

⁴⁴ *Id.* at 329-30. This controversy is unlikely to end soon with the recent tragedy at Japan’s Fukushima Daiichi nuclear plant. See Brian Wingfield, *NRC Staff to Lay Out Next Steps on Plant Safety, Official Says*, BLOOMBERG BUSINESSWEEK (Jan. 12, 2012), <http://www.businessweek.com/news/2012-01-12/nrc-staff-to-lay-out-next-steps-on-plant-safety-official-says.html>. The Japanese tsunami and resulting nuclear meltdown caused the Nuclear Regulatory Commission to review all Fukushima-style reactors used in U.S. nuclear power plants. *Id.* Additionally, the recent Virginia earthquake took Virginia Power’s Lake Anna Nuclear Power Plant offline after concerns over damage arose. Press Release, Dominion Virginia Power Begins Restart of North Anna Power Station, DOMINION POWER, Nov. 11, 2011, <http://dom.mediaroom.com/index.php?s=43&item=1053>. In light of these recent events, many Americans were reminded of the dangers of nuclear power. See Christopher Joyce, *After Fukushima: A Changing Climate for Nuclear*, NPR (Dec. 24, 2011, 5:10 AM), <http://www.npr.org/2011/12/24/144194064/after-fukushima-a-changing-climate-for-nuclear>.

⁴⁵ See Heinold, *supra* note 42, at 308-09.

⁴⁶ See Rudy, *supra* note 17, at 1415; see Steven Ferrey, *Reliability and Blackouts*, 1 L. INDEP. POWER § 10:3.1, 10-30.2-3 (2011).

⁴⁷ See Rudy, *supra* note 17, at 1415; see Ferrey, *supra* note 46, at 10-34.

other costs so that ample response teams are available to repair damaged or downed wires.⁴⁸

On the other hand, power companies that do not practice regular tree-trimming and upgrading have higher chances of suffering from outages.⁴⁹ Storms regularly knock overhanging limbs onto wires or inflict water damage on unprotected or worn equipment.⁵⁰ This reality highlights a logical flaw in electric companies' favorite argument against higher SRQ goals.⁵¹ Massive service restoration projects after storms sometimes cost consumers as much, if not more, than SRQ optimization programs.⁵²

Despite SRQ programs potentially lowering utility expenses in the long run, many states prioritize affordability above SRQ goals.⁵³ Electricity is a basic need.⁵⁴ State governments thus set goals to maximize affordability.⁵⁵ Keeping costs low validates regulatory programs and agreements, along with any protections for utilities therein.⁵⁶ Utility companies argue that making affordability the primary goal protects the most vulnerable consumers while allowing for greater economic growth overall.⁵⁷ Proponents claim lower rates attract new business owners, industry, and may even bring in new residents.⁵⁸

However, high SRQ levels also lure new businesses and homeowners.⁵⁹ For example, some businesses may choose their location based on a need to minimize power outages that damage sensitive equipment.⁶⁰ Many technological industries require constant electric service, and outages take entire servers hosting cloud technology for international clients offline.⁶¹ Widespread power outages cost millions, even when they affect a small

⁴⁸ See Ferrey, *supra* note 46, at 10-30.5-6.

⁴⁹ See Rudy, *supra* note 17, at 1411.

⁵⁰ See Fiscal Policy Note, *supra* note 13, at 5.

⁵¹ See Rudy, *supra* note 17, at 1415.

⁵² *Id.*

⁵³ See generally Ferrey, *supra* note 46; see also Rudy, *supra* note 17, at 1398; see also Heinold, *supra* note 42, at 303; see also Liability of Elec. Power Companies for Injury or Damages Resulting from Problems in the Delivery of Electric Power, 82 Md. P.S.C. 92, 101 (1991) (hereinafter "*In re Singer*").

⁵⁴ See Ferrey, *supra* note 46, at 10-30.3.

⁵⁵ See generally Ferrey, *supra* note 46.

⁵⁶ See Rudy, *supra* note 17, at 1398.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See generally *Singer Co., Link Simulation Sys. Div. v. Balt. Gas & Elec. Co.*, 79 Md. App. 461, 468, 558 A.2d 419, 422 (1989); see generally Ferrey, *supra* note 46.

⁶⁰ See generally *Singer*, 79 Md. App. at 468, 558 A.2d at 422.

⁶¹ See *id.* For an example of the widespread effects of a cloud server outage, see Sharon Gaudin, *Amazon Cloud Outage Staggers Into Day 2*, COMPUTERWORLD (Apr. 22, 2011, 12:01 PM), http://www.computerworld.com/s/article/9216083/Amazon_cloud_outage_staggers_into_Day_2_ (discussing the Amazon Cloud Services outage in 2011).

area.⁶² California's scheduled rolling blackouts cost the Silicon Valley area \$75 million a day.⁶³ The August 2003 blackout resulted in \$1 billion in losses for New York City's businesses.⁶⁴ In today's globalized, technologically-dependent world, power outages are serious business.⁶⁵

C. Liability Indemnity Clauses and Service Quality Issues

Electric company LICs focus on service interruptions resulting in a loss of power, especially due to "acts of God," because the nature of electric power puts the delivery method of exposed wires at the whim of the weather.⁶⁶ Power lines hang, dangerously exposed to winds, tree branches, and snow.⁶⁷ Even underground wiring is vulnerable to flooding.⁶⁸ Power companies, unable to control the weather, rightly fear being held liable for outages outside of their control.⁶⁹

There are reasonable actions power companies can take to prepare for major storms, and most power companies prepare well in advance.⁷⁰ Many power companies routinely trim tree branches away from wires.⁷¹ Most power companies prepare for expected weather events through extensive planning, including calling in extra help ahead of the storm.⁷² But regulated companies find themselves stuck between the proverbial rock and hard place.⁷³ Storm-preparation programs cost money, but state-set electricity rates block utility companies from raising their rates to pay for such programs.⁷⁴ Hence, electric companies insert strict LICs into their tariffs, with the state's approval so long as affordability is maximized.⁷⁵

⁶² See Ferrey, *supra* note 46, at 10-30.3.

⁶³ See Ferrey, *supra* note 46, at 10-30.6.

⁶⁴ See Ferrey, *supra* note 46, at 10-30.5.

⁶⁵ See Ferrey, *supra* note 46, at 10-30.5, 10-30.6, 10-33.

⁶⁶ See Rudy, *supra* note 17, at 1385. LICs often mirror *force majeure* clauses in traditional contracts. *Id.* For an analysis of *force majeure* clauses in utility contracts, see Jennifer Sniffen, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 NOVA L. REV. 551, 573 (2007).

⁶⁷ See generally Fiscal Policy Note, *supra* note 13; see Stephens, *supra* note 1.

⁶⁸ See generally *Overhead and Underground Electrical Service FAQs*, FLA. POWER & LIGHT, <http://www.fpl.com/faqs/underground.shtml>, (last visited Feb. 28, 2013).

⁶⁹ See Ferrey, *supra* note 46; see Rudy, *supra* note 17, at 1393-94.

⁷⁰ See Rudy, *supra* note 17, at 1415. Regulatory commissions require utility companies make reasonable preparations when weather forecasts show incoming storms that may cause outages. For examples of local power company storm preparation, see Kate Ryan, *Area Power Companies Prep for Irene*, WTOP (Aug. 27, 2011, 9:03 AM), <http://www.wtop.com/?nid=41&sid=2513520>.

⁷¹ See Rudy, *supra* note 17, at 1414-16.

⁷² See Fiscal Policy Note, *supra* note 13, at 2-3.

⁷³ See Rudy, *supra* note 17, at 1410.

⁷⁴ *Id.* at 1413.

⁷⁵ *Id.*

D. LICs and Affordability Goals in Maryland

In Maryland, the Public Service Commission (PSC) oversees state regulation of all utilities.⁷⁶ Many Maryland power companies, including PEPCO and BG&E, fall under the PSC's oversight.⁷⁷ Maryland is not, however, a purely regulatory scheme.⁷⁸ Maryland recently adopted a competitive cooperative market system ("co-op"), meaning some utilities still fall under state regulation, but other utilities offer electricity service at competitive market rates.⁷⁹ These unregulated co-op merchants often offer environmentally-friendly power sources, for a price.⁸⁰ While the consumer buys the power directly from the co-op company, the regulated utility company still provides the equipment actually transferring electric power (i.e., the power lines and transformers).⁸¹ The co-op company pays a usage fee to the regulated company, taken out of the customer's payment.⁸² This creates two kinds of markets at work in Maryland, one subject to regulation, another impacted by it.⁸³

III. THE JUDICIAL AND REGULATORY POWER STRUGGLE OVER UTILITY NEGLIGENCE LIABILITY

A. Gross Negligence and Utility Liability in Maryland

In Maryland, utility providers' tariff LICs may contract away all liability, with the exception of "gross negligence."⁸⁴ Gross negligence is an oft-used legal term, but subject to a variety of interpretations.⁸⁵ The standard's gravity allows it to sometimes overcome contributory negligence, which bars

⁷⁶ MD. CODE ANN., PUB. UTIL. COS. § 2-112, 113 (West 2011); 9 M.L.E. Elec. Co. § 3, *Electric Companies*.

⁷⁷ See 9 M.L.E. Elec. Co. § 3, *Electric Companies*.

⁷⁸ See 9 M.L.E. Elec. Co. § 3, *supra* note 78.

⁷⁹ See MD. CODE ANN., PUB. UTIL. COS. § 7-504 (West 2011); see Rudy, *supra* note 17, at 1381, 1408.

⁸⁰ See MD. CODE ANN., PUB. UTIL. COS. § 7-504; see Rep. Jim Cooper, Policy Essay, *Electric Co-Operatives: From New Deal to Bad Deal?*, 45 HARV. J. ON LEGIS. 335, 337 (2008).

⁸¹ See Cooper, *supra* note 81, at 336.

⁸² See *Choosing Your Residential Electricity Supplier*, MD. ATT'Y. GENERAL, <http://www.oag.state.md.us/energy/> (last visited on Jan. 13, 2012).

⁸³ See 9 M.L.E. Elec. Co. § 3, *supra* note 78.

⁸⁴ See Singer, 79 Md. App. at 479, 558 A.2d at 427; see Randolph Stuart Sergent, *Gross, Reckless, Wanton, and Indifferent: Gross Negligence in Maryland Civil Law*, 30 U. BALT. L. REV. 1, 42 (2000).

⁸⁵ See Sergent, *supra* note 85, at 2.

liability claims in Maryland.⁸⁶ However, the standard also makes a successful lawsuit against an electric company highly unlikely, and previous PSC actions ensured LICs will protect utilities from all but the most egregious claims.⁸⁷

Gross negligence, under Maryland law, requires severe recklessness and actual knowledge of the potential risks by the acting party.⁸⁸ Maryland courts require showing substantial risk of foreseeable and almost certain harm to another's person or property.⁸⁹ The actor must also have a "manifest duty" to the endangered party.⁹⁰ In the electric utility context, this duty springs from the contractual relationship between companies and their customers.⁹¹

The analysis does not stop after determining reasonable foreseeability and potential harm.⁹² Maryland courts also look at underlying social policies in determining gross negligence.⁹³ Here, power companies protect themselves through the PSC and their tariffs.⁹⁴ Maryland's regulatory scheme strives to achieve affordable electricity access for as many people as possible.⁹⁵ The PSC places far less emphasis on quality and reliability standards because efforts to achieve these goals can limit access and raise costs.⁹⁶ Similarly, liability for outage damages will raise electricity costs, especially after major storms.⁹⁷ Maryland electric companies commonly argue this point when faced with a suit, and win.⁹⁸ The PSC's social policies effectively shield

⁸⁶ See *Minor v. State*, 326 Md. 436, 441, 605 A.2d 138, 140 (1992); see *Singer*, 79 Md. App. at 480, 558 A.2d at 428. The electric utility standard is indistinguishable from the "willful and wanton" standard for trespassers under Maryland law, a common area of electric utility liability claims. *Sergent*, *supra* note 85, at 2. The contributory negligence doctrine creates an affirmative defense to a negligence claim by showing the plaintiff's aggrieved or partially caused their injury. See *Sergent*, *supra* note 85, at 2.

⁸⁷ See *Minor*, 326 Md. at 441, 605 A.2d at 140; see also *Singer*, 79 Md. App. at 480, 558 A.2d at 428; see also *In re Singer*, *supra* note 53, at 92.

⁸⁸ See *Minor*, 326 Md. at 441, 605 A.2d at 140; see also *Sergent*, *supra* note 85, at 56-58.

⁸⁹ See *Minor*, 326 Md. at 441, 605 A.2d at 140; see *Sergent*, *supra* note 85, at 58-59.

⁹⁰ See *Sergent*, *supra* note 85, at 42.

⁹¹ *Id.* at 41-42 (citing *Marriott Corp. v. Chesapeake & Potomac Tel. Co.*, 124 Md. App. 463, 467-68, 723 A.2d 454, 457 (1998)).

⁹² See *Sergent*, *supra* note 85, at 58-59.

⁹³ *Id.* at 64-65.

⁹⁴ *Id.* at 41-42.

⁹⁵ *Singer*, 79 Md. App. at 479, 558 A.2d at 427.

⁹⁶ *Id.*

⁹⁷ See *Rudy*, *supra* note 17, at 1393-94.

⁹⁸ See, e.g., *Premier Parks, Inc. v. Balt. Gas & Elec. Co.*, 37 F. Supp. 2d 732, 735 (D. Md. 1999); *Singer*, 79 Md. App. at 477-78, 558 A.2d at 427.

utility companies from liability.⁹⁹ This creates little incentive for utility companies to pursue adequate storm response programs or SRQ initiatives.

B. Singer and the PSC: Who has the Final Say?

Only one Maryland case shows the state courts attempting to carve out a limited area of legal sanctuary for customers hurt by a utility's negligence. In *Singer v. BG&E*, the Court of Special Appeals of Maryland limited the amount of liability an LIC could block.¹⁰⁰ The case centered on frequent power outages caused by lightning-damaged electrical equipment owned by BG&E.¹⁰¹ The outages affected Singer's industrial machinery that needed a constant electric supply, and so Singer informed BG&E of the outages.¹⁰² BG&E knew a damaged power station caused the outages, but failed to take any action to repair it.¹⁰³ Singer sued, alleging breach of contract and negligence.¹⁰⁴

Singer brought multiple issues to the court's attention, the first being whether the Maryland UCC's implied warranty for goods applied to electricity.¹⁰⁵ The Court, following other jurisdictions, ruled electricity only becomes a good under the UCC when it reaches the meters on a house because it is not converted for household use until that point.¹⁰⁶ While this limited any breach of contract claims, the *Singer* court nevertheless held that BG&E may be liable for the outages.¹⁰⁷ BG&E's tariff LIC limited BG&E's liability to "willful default or neglect on its part," and excluded liability for weather-caused interruptions or anything "beyond its control."¹⁰⁸ BG&E argued for a narrow interpretation, stating that it should only be found liable when plaintiffs could prove that BG&E acted with actual malice.¹⁰⁹

⁹⁹ See, e.g., *Premier Parks*, 37 F. Supp. 2d at 735; *Singer*, 79 Md. App. at 480, 558 A.2d at 428.

¹⁰⁰ See *Singer*, 79 Md. App. at 480, 558 A.2d at 428.

¹⁰¹ *Id.* at 468-69, 558 A.2d at 422-23.

¹⁰² *Id.*

¹⁰³ *Id.* at 469, 558 A.2d at 423.

¹⁰⁴ *Id.* at 465, 558 A.2d at 421.

¹⁰⁵ *Id.* The UCC implied warranty rule applies guaranteed warranties of fitness and merchantability to all goods, which some states interpret to include electricity. See generally, Gary D. Spivey, Annotation, *Electricity, Gas or Water Furnished by Public Utility as "Goods" Within Provisions of Uniform Commercial Code, Article 2 On Sales*, 48 A.L.R. 3d 1060. For the Maryland UCC's implied warranty provisions, see MD. CODE ANN., COM. LAW § 2-314, 2-315 (West 2011).

¹⁰⁶ See *Singer*, 79 Md. App. at 471-72, 558 A.2d at 424.

¹⁰⁷ *Id.* at 480, 558 A.2d at 428. *Singer* appealed from a summary judgment decision in the circuit court, which the Court of Special Appeals returned the case for a final decision. *Id.*

¹⁰⁸ See *id.* at 477, 558 A.2d at 427.

¹⁰⁹ See *id.* at 477, 558 A.2d at 426.

However, the court interpreted the LIC clause as requiring “willful default” or “willful neglect” by consciously failing to fulfill a duty to a customer.¹¹⁰ *Singer’s* holding thus broadened the legal responsibilities of Maryland power companies.¹¹¹

BG&E based its argument of allowing utility liability only for malicious conduct on the policy goals of the Maryland PSC.¹¹² The company claimed any broader liability would result in electricity rates rising, undermining the State’s goal of maximum affordability.¹¹³ Furthermore, BG&E admitted that outages and interruptions were part of the electricity business and unavoidable.¹¹⁴ BG&E could not stop weather from damaging electricity delivery systems, it argued, and their tariffs, approved by the PSC, accounted for storm related damages by barring this area of liability.¹¹⁵

The Court of Special Appeals disagreed.¹¹⁶ *Singer* suggested that weather-related damages to power systems might fall under a company’s control if the company failed to fix the problems.¹¹⁷ At that point, a utility engaged in willful neglect of its duty to customers and thus became liable.¹¹⁸

Had *Singer* remained controlling law, the Maryland General Assembly may not have needed to later create the ESQR.¹¹⁹ Perhaps because *Singer* left utility companies like BG&E and PEPSCO unhappy, the PSC reviewed the case and the limitations on LICs in general.¹²⁰ The subsequent PSC opinion slammed the door shut on any broader interpretation of utility liability.¹²¹

The PSC invoked its regulatory authority to address whether there should be a uniform standard of liability, and whether utilities should be able to

¹¹⁰ *Id.* at 480, 558 A.2d at 428.

¹¹¹ *See generally id.* at 480, 558 A.2d at 427; *see In re Singer, supra* note 53, at 93.

¹¹² *See Singer*, 79 Md. App. at 478-79, 558 A.2d at 427.

¹¹³ *See id.* at 479, 558 A.2d at 427.

¹¹⁴ *See id.* The Maryland Court of Special Appeals agreed that weather-related outages and interruptions could not be totally avoided and initially fell outside a power company’s control. *Id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.* at 428, 558 A.2d at 428.

¹¹⁷ *See Singer*, 79 Md. App. at 480, 558 A.2d at 428. The Maryland Court of Special Appeals remanded the case, declining to make such a decision themselves. *Id.*

¹¹⁸ *See id.* As previously mentioned, *Singer* dealt with the after-effects of weather-related damages, and not an actual case involving a weather-caused outage. *Id.* However, *Singer* certainly suggested that at some point, a utility company’s duty to mitigate outages arises, even when weather is the cause. *Id.*

¹¹⁹ *See generally In re Singer, supra* note 53; *see Fiscal Policy Note, supra* note 13.

¹²⁰ *See In re Singer, supra* note 53, at 101. The PSC never stated this was their real reason, but one could imagine the PSC found themselves under considerable pressure from utility companies to assert their jurisdiction and limit *Singer’s* applicability.

¹²¹ *Id.* at 101.

limit potential liability.¹²² All of the Maryland utilities submitted comments to the PSC on these issues, with BG&E and PEPSCO vehemently fighting against any LIC limitations.¹²³ PEPSCO even submitted a proposed change to their LIC tariff, allowing liability only for “intentional misconduct,” a higher level than the *Singer* court’s interpretation of gross negligence.¹²⁴

The utilities’ efforts paid off, and the PSC ruled any LICs were valid as long as they were “reasonable,” declining to create any uniform standard.¹²⁵ The PSC decision deferred limiting the scope of reasonableness to the utilities themselves.¹²⁶ Instead, the PSC found each company’s unique operations required each LIC to be tailored to the company’s needs.¹²⁷ The decision found that utility companies were best suited to interpret what their LICs meant, making *Singer*’s judicial interpretations irrelevant due to the PSC’s authority.¹²⁸

While the PSC did not directly overturn *Singer*, its ruling demonstrates that the PSC believes Maryland’s affordability goal substantially outweighs any SRQ initiatives.¹²⁹ *Singer* would give utility companies a reason, albeit small, to upgrade systems and implement procedures to maximize SRQ ratings in order to escape any liability.¹³⁰ However, the PSC’s decision indicates that even the most protective LICs would be upheld, and SRQ standards would not be a major concern as long power companies minimized their rates.¹³¹ Even more concerning was that the PSC essentially gave power companies full power to interpret what constitutes a “reasonable” LIC, and where this boundary falls.¹³² The PSC asserted that “gross negligence” would not be covered by an LIC, but strongly suggested that the *Singer* decision did not find such level of negligence.¹³³ Thus, gross negligence for

¹²² *Id.* at 93. The PSC’s regulatory authority allows the Commission to review utility actions and issue regulatory orders. *See id.*; *see generally* MD. CODE REGS. 20.50.07.05 (2011).

¹²³ *In re Singer*, *supra* note 53, at 93-94.

¹²⁴ *Id.* at 104. Under the ruling, PEPSCO would be allowed to adopt such language in its LIC, as long as it was reasonable. *Id.* at 105. However, PEPSCO withdrew the request before the PSC made its decision. *Id.*

¹²⁵ *See id.* at 105.

¹²⁶ *See id.* at 101.

¹²⁷ *See id.* Such factors requiring this approach included the different jurisdictions and needs of each company; the range in service areas and demands; and the fact that some companies served multiple jurisdictions that fell outside the state. *Id.* PEPSCO is a Maryland utility that also serves Washington, D.C.

¹²⁸ *See id.* at 101-02.

¹²⁹ *See In re Singer*, *supra* note 53, at 104, 105.

¹³⁰ *See Singer*, 79 Md. App. at 469, 478, 558 A.2d at 423, 428.

¹³¹ *See In re Singer*, *supra* note 53, at 101.

¹³² *See id.* at 105.

¹³³ *See id.* at 104; *see Singer*, 79 Md. App. at 480, 558 A.2d at 428.

utilities is a higher standard than the term's traditional meaning, and has been interpreted to mean "intentionally."¹³⁴

The decision also allowed PEPSCO to create an incredibly protective LIC, one that allowed damages only for "intentional misconduct."¹³⁵ This PEPSCO standard obscures the line between what is and is not reasonable.¹³⁶ Giving the utilities full interpretative power severely limited Maryland courts' role in any utility negligence claims, offering little legal recourse for damaged Maryland consumers.

C. *Gross Liability After In re Singer*

Two recent cases highlight how the PSC's order limits the judiciary's role in current utility damage claims.¹³⁷ The first case, *Maryland Jockey Club of Baltimore City v. BG&E* ("*Jockey Club*"), found that the PSC essentially declared *Singer* no longer good law.¹³⁸ *Jockey Club* ruled that the PSC required finding the electric company acted with "intentional" negligence, and that the PSC's ruling bound the court.¹³⁹ *Jockey Club* applied this interpretation to the same BG&E tariff interpreted in *Singer*, highlighting the judiciary's deference to the PSC.¹⁴⁰ *Jockey Club* found that under the tariff and the PSC's public policy considerations, the "gross negligence" turned on whether the utility actually intended to cause harm by failing to act correctly.¹⁴¹ Even though *Jockey Club* is unreported, it highlights how hesitant courts are to find gross negligence after the PSC's ruling, all but closing the door to any realistic legal relief for injured Maryland consumers.¹⁴²

A 1999 decision, *Premier Parks, Inc. v. BG&E* ("*Premier Parks*"), comes from Maryland's federal district court, and deals with the same BG&E tariff

¹³⁴ See *Md. Jockey Club of Balt. City, Inc. v. Balt. Gas & Elec. Co.*, 2002 WL 32123994, at *3-5 (Md. Ct. Spec. App. 2002) (unreported case); see *Premier Parks, Inc.*, 37 F. Supp. 2d 732 at 735-37.

¹³⁵ See *In re Singer*, *supra* note 53, at 104-05.

¹³⁶ See *id.*

¹³⁷ See *Jockey Club*, 2002 WL 32123994 at *3-5; see *Premier Parks*, 37 F. Supp. 2d at 735. The fact that these two cases and *Singer* make up the Maryland case law handling power company liability for outages shows how few cases even make it to court.

¹³⁸ See *Jockey Club*, 2002 WL 32123994 at *5. *Jockey Club* is an unreported 2002 case from the Maryland Court of Special Appeals. While the case is merely persuasive authority, it best shows the high standard set for utility negligence cases after the PSC invalidated *Singer*.

¹³⁹ See *id.*

¹⁴⁰ See *id.* at *3.

¹⁴¹ See *id.* at *10.

¹⁴² See *id.* at *10; see *In re Singer*, *supra* note 53, at 92.

LIC addressed in *Singer*.¹⁴³ The plaintiff alleged the LIC's language should be treated as ambiguous and given to a fact-finder.¹⁴⁴ However, *Premier Parks* relies on both *Singer* and the PSC's ruling to find that *Singer* settled the meaning of the LIC.¹⁴⁵ The Court did not find the PSC overruled or invalidated *Singer*, showing that conflicting judicial interpretations over *Singer's* applicability remained.¹⁴⁶ Nevertheless, *Premier Parks* failed to clearly define when a utility acts with "gross negligence."¹⁴⁷

IV. THE ESTABLISHMENT OF ESQR: STRICT NEW POLICY OR FATALLY FLAWED LEGISLATION?

A. Pre-ESQR Maryland Statutes Regarding Utility Service Interruption

The previously addressed Maryland court cases did not involve weather-related outages, and therefore did not explain what actions a utility would be required to take under those circumstances.¹⁴⁸ There is a simple explanation for this: some utilities' LICs explicitly bar any actions for weather-related outages.¹⁴⁹ Coupled with this is the fact that weather events are unlikely to involve "gross negligence," because power companies cannot control the weather.¹⁵⁰ However, Maryland statutes and regulations do require certain procedures and standards for responding to weather-related outages.¹⁵¹ The question is whether these regulations are enough to combat unnecessarily long outages, or if they could possibly provide a baseline for gross negligence cases?

The Code of Maryland Regulations ("COMAR") requires electric utilities suffering from storm-caused outages to restore power as quickly as the

¹⁴³ See *Premier Parks*, 37 F. Supp. 2d at 734-35; see *Jockey Club*, 2002 WL 32123994 at *3; cf. *Singer*, 79 Md. App. at 477, 558 A.2d at 427.

¹⁴⁴ See *Premier Parks*, 37 F. Supp. 2d at 735.

¹⁴⁵ See *id.* at 735-36 (citing *Singer*, 79 Md. App. at 477, 480, 558 A.2d at 427).

¹⁴⁶ See *Premier Parks*, 37 F. Supp. 2d at 736. It should also be noted that neither of these two cases dealt with weather-related outages.

¹⁴⁷ See *id.* at 737. The court spent little time addressing what gross negligence would actually be, or what facts would be required, and instead states that only ordinary negligence took place.

¹⁴⁸ See *Jockey Club*, 2002 WL 32123994, at *9; see *Premier Parks*, 37 F. Supp. 2d at 737; see *Singer*, 79 Md. App. at 480, 558 A.2d at 428.

¹⁴⁹ See *Singer*, 79 Md. App. at 477, 558 A.2d at 427 (quoting § 2.5 of BG&E's Electrical Service Tariff).

¹⁵⁰ See Rudy, *supra* note 17, at 1395; see *In re Singer*, *supra* note 53, at 102; see *Jockey Club*, 2002 WL 32123994, at *5.

¹⁵¹ See MD. CODE ANN., PUB. UTIL. COS. § 5-303 (West 2011); see MD. CODE REGS. 20.50.12.13 (2012); see MD. CODE REGS. 20.50.07.07 (2011); see MD. CODE REGS. 20.50.12.06 (2012); see MD. CODE REGS. 20.50.01.03B (2011).

circumstances reasonably allow.¹⁵² Companies also must file a report with the PSC at the start of a “major outage event,” detailing the number of affected customers and an estimated restoration time.¹⁵³ All utilities must file a post-major storm report within three weeks of a storm’s end, documenting how many outages occurred and what preparations were taken.¹⁵⁴ After such an event, the PSC may review the utilities’ responses and make recommendations, either on their own accord or in response to consumer complaints.¹⁵⁵

The problem with these regulations springs from their lack of clear definitions and varying levels of utility compliance.¹⁵⁶ For example, COMAR defines what constitutes a “major storm” as a weather-related event resulting in service interruptions to either ten percent or one hundred thousand of a utility’s customers for more than twenty-four hours.¹⁵⁷ Power companies should be able to determine when this threshold has been met on their own; but PEPCO and BG&E failed to file such reports before or after the 2010 blizzards that left 236,000 BG&E customers and over 300,000 PEPCO customers without power for multiple days.¹⁵⁸

Additionally, the reporting requirement for companies to submit response plans “at the onset of a storm,” lacks clarity and efficiency.¹⁵⁹ COMAR does

¹⁵² MD. CODE REGS. 20.50.07.05A (2011).

¹⁵³ See *id.* at 20.50.07.05B(1)(A).

¹⁵⁴ See MD. CODE REGS. 20.50.12.13 (2012).

¹⁵⁵ The 2010 snowstorm response shows a PSC review due to customer complaints. See *In the Matter of an Investigation Into the Reliability and Quality of the Elec. Dist. Serv. of Potomac Elec. Power Co., Md. P.S.C. Order 83552*, at 443 (Aug. 26, 2010) (hereinafter “PEPCO Snow Response Order”). For an example of a post-storm PSC Review that is not in response to complaints, see *generally* *In re Elec. Serv. Interruptions Due to Hurricane/Tropical Storm Isabel and the Thunderstorms of Aug. 26-28, 2003*, 95 Md. P.S.C. 62 (2004) (hereinafter *In re Isabel*).

¹⁵⁶ See PEPCO Snow Response Order, *supra* note 156 (highlighting PEPCO’s delayed compliance in responding to previous PSC orders).

¹⁵⁷ MD. CODE REGS. 20.50.01.03B (2011); see *In the Matter of an Investigation Into the Performance of Utils. During the Snow Storms Between the Period Feb. 5 Through Feb. 12, 2010*, Md. P.S.C. Order 83173 (Feb. 25, 2010) (hereinafter “Snow Storm Report Order”).

¹⁵⁸ See *Snow Storm Report Order*, *supra* note 158, at 1; see Joe Stephens and Aaron M. Davis, *Pepco Defends Post-Storm Efforts at Hearings*, WASH. POST, Aug. 18, 2010, at 2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/17/AR2010081705868.html>; see Joe Stephens, *Pepco Struggles to End Power Outages*, WASH. POST, Jan. 31, 2011, at 1, available at http://www.washingtonpost.com/local/pepco-struggles-to-end-power-outages/2011/01/30/AB3RDME_story.html. COMAR requires electric companies to maintain service interruption records that include the amount and duration of the outages, which should allow utilities to easily determine when the definition of a “major storm” is met. See MD. CODE REGS. 20.50.07.05D (2011).

¹⁵⁹ See MD. CODE REGS. 20.50.07.05B(a)(1)(2012). None of the PSC orders or reviews mentions if any Maryland utilities filed “onset” reports, or when such a

not require these “onset” reports to detail what preparations the utility made, or if the filing mandate arises only when pre-existing outages are present.¹⁶⁰ The regulations do not require specific preparations for storms.¹⁶¹ Companies may be fined and ordered to make changes by the PSC, but these rare sanctions come long after the outages take place.¹⁶² It doesn’t appear that COMAR offers any potential legal or regulatory relief for beleaguered customers.¹⁶³ The regulations also fail to provide strong deterrents for slow restoration and ill-prepared companies, even though the state protects these utilities from traditional disincentives.¹⁶⁴ The question remains: how is the current regulatory system benefitting Maryland residents from utility abuses?

B. Setting the Stage for Consumer Outrage

One key reason for a lack of Maryland legislative action regarding electric service reliability could be that there was insignificant consumer demand for such changes before 2009.¹⁶⁵ The PSC noted utilities responded well to the outages caused by 2003’s Hurricane Isabel, improving upon past

report would be mandated. *See In re Isabel, supra* note 156, at 62; *see* Snow Storm Report Order, *supra* note 158 at 1-2; *see* PEPCO Snow Response Order, *supra* note 156, at 1.

¹⁶⁰ *See* MD. CODE REGS. 20.50.07.05B (2012).

¹⁶¹ *See* MD. CODE REGS. 20.50.07.05 (2012).

¹⁶² *See* Joe Stephens, *Maryland Public Service Commission fines Pepco \$1 million*, WASH. POST, Dec. 21, 2011, available at

http://www.washingtonpost.com/local/maryland-public-service-commission-fines-pepco-1-million/2011/12/21/gIQAwriz9O_story.html; *see, e.g., In re Isabel, supra* note 156, at 62. The Isabel review came almost one year after Hurricane Isabel struck Maryland. *See id.* The P.S.C. did not make a final decision or levy fines on PEPCO for the outages during the February, 2010 Blizzards until December, 2011. *See In re Isabel, supra* note 156, at 62. Additionally, PSC decisions rarely levy such fines and tend to focus on recommendations instead of mandatory actions that will improve response time. *See In re Isabel, supra* note 156, at 62, 66.

¹⁶³ MD. CODE REGS. 20.50.07.05 (2011); MD. CODE REGS. 20.50.12.13 (2012); MD. CODE REGS. 20.50.12.06 (2012); MD. CODE REGS. 20.50.01.03B (2011).

¹⁶⁴ *See* MD. CODE REGS. 20.50.07.05 (2011); *see* MD. CODE REGS. 20.50.12.06 (2012); *see* MD. CODE REGS. 20.50.12.13 (2012); *see* MD. CODE REGS. 20.50.01.03B (2011). Such protections are thought to be the basic reasoning behind allowing such natural monopolies to take place. *See* Rudy, *supra* note 17, at 1390-91. More traditional protections from utility negligence would be legal action and market choice for consumers. *See* Rudy, *supra* note 17, at 1391, 1393. Cooperatives do not truly offer “market choice,” as part of the customers’ rates goes to paying the “host” utility. *See* Rudy, *supra* note 17, at 1408.

¹⁶⁵ None of the reports found demonstrated any such demands from Maryland residents, or indicated a large number of complaints to the PSC or State Legislators. *See In re Isabel, supra* note 156, at 66.

performances.¹⁶⁶ 2003-2009 brought a relatively calm period of weather.¹⁶⁷ However, the 2009-2010 winter forced Maryland consumers to re-evaluate their viewpoints on whether the current system really worked.¹⁶⁸

The first blizzard, nicknamed the “Snowpocolypse,” dumped a record fifteen inches of snow on the Washington, D.C. metropolitan area days before the Christmas holiday.¹⁶⁹ The fast-falling, thick, wet snow came with plenty of warning: local meteorologists warned of a major winter weather event seventy-two hours prior to the storm’s onset.¹⁷⁰ The wet snow caused power outages across the region, mostly from trees falling onto electric wires, and paralyzed the region days before the Christmas holiday.¹⁷¹ While the outages did not reach significant levels, many transportation offices and Virginia’s Dominion Power Company took the storm as an opportunity to review their internal blizzard response plans.¹⁷²

Unfortunately, the December 2009 storm was winter’s warm-up act for a Mid-Atlantic assault.¹⁷³ In early February, meteorologists began forecasting

¹⁶⁶ See *In re Isabel*, *supra* note 156, at 3 (noting improved responses in comparison to utility restoration stemming 1997’s Hurricane Floyd).

¹⁶⁷ Jason Samenow, *Amazing Mid-Atlantic Snow Statistics*, WASH. POST: CAPITAL WEATHER GANG BLOG (Feb. 12, 2010, 12:30 PM), voices.washingtonpost.com/capitalweathergang/2010/02/amazing_mid-atlantic_snow_stat.html (showing no major winter storms between 2003-2009).

¹⁶⁸ See Fiscal Policy Note, *supra* note 13, at 4.

¹⁶⁹ Va. Div. of Energy Reg. Spec. Rep., Preparation for and Response to the December 2009 Snowstorm, VA. STATE CORP. COMM’N, at 3-4 (Aug. 2010). The blizzard was actually a Nor’easter, a common weather phenomenon in the Mid-Atlantic with forty mph winds during the storm, and caused the D.C. Metro subway system to close all aboveground stations. The blizzard also shut down the Federal Government. Ashley Halsey III, Sandya Somashekar, Josh White, *Washington’s Big Dig*, WASH. POST (Dec. 21, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/20/AR2009122001153.html>. The Snowpocolypse caused Maryland, Virginia, and D.C. to declare states of emergency. Va. Div. of Energy Reg. Spec. Rep., at 4.

¹⁷⁰ See Tim Ballisty, *Snow Totals Adding Up from Blizzard 2009*, The Weather Channel.com (Dec. 2012), available at http://www.weather.com/outlook/weather-news/news/articles/winter-storm-aiming-for-mid-atlantic_2009-12-17.

¹⁷¹ See Va. Div. of Energy Reg. Spec. Rep., *supra* note 170, at 1.

¹⁷² See generally Va. Div. of Energy Reg. Spec. Rep., *supra* note 170 (providing overall analysis of Virginia power company’s response to storm). The storm caused approximately 1.5 million power outages on the East Coast. Va. Div. of Energy Reg. Spec. Reg., *supra* note 170, at 4-5. Virginia’s Dominion Power had over 1,500 outages in Northern Virginia. *CBS News: Major Storm Bears Down on Mid-Atlantic*, CBS NEWS (Dec. 20, 2009, 7:50 AM), <http://www.cbsnews.com/stories/2009/12/18/national/main5996542.shtml>. Maryland companies did not submit a major outage event report for this storm, and no figures were available.

¹⁷³ See Jason Samenow, *Forecast: Major Snowstorm poised to strike*, WASH. POST (Feb. 4, 2010 10:40 AM),

for another major blizzard (“the 2010 Snowmageddon Blizzard”).¹⁷⁴ Two days before this second blizzard hit, weather reports alarmingly predicted that a third blizzard would come just days after the second one, resulting in approximately three feet of snow falling on the D.C. area.¹⁷⁵ Residents flocked to the stores to stock up, the Federal government shut down, and the region readied itself for this historic snow event.¹⁷⁶

Most area utilities also prepared for the storm, knowing widespread outages would occur.¹⁷⁷ Virginia’s Dominion Power moved internal crews up to Northern Virginia the day before the storm, and called in an additional 200 outside subcontractors.¹⁷⁸ BG&E requested 400 extra crewmembers the day of the storm.¹⁷⁹ PEPSCO did not make any requests until a second BG&E call went out after the storm began.¹⁸⁰ As a result, PEPSCO mounted a severely crippled response, especially in comparison to Dominion and BG&E.¹⁸¹ Dominion and BG&E’s service areas are not only larger than PEPSCO’s, but also include more rural and isolated areas.¹⁸² Some angry PEPSCO customers found themselves waiting in the cold for over a week.¹⁸³

http://voices.washingtonpost.com/capitalweathergang/2010/02/forecast_another_maj_or_weekend.html.

¹⁷⁴ Deborah Tedford, *East Coast Digs Out From Record Snow*, NPR, (Feb. 10, 2010 5:05 PM), <http://www.npr.org/templates/story/story.php?storyId=123558638>.

¹⁷⁵ See Jason Samenow, *Remembering 2010’s Snoverkill*, WASH. POST CAPITAL WEATHER GANG BLOG, (Feb. 9, 2011, 11:45 AM), http://voices.washingtonpost.com/capitalweathergang/2011/02/remembering_snoverkill.html. The third and final blizzard, nicknamed “Snoverkill”, resulted in whiteout conditions and an additional twenty inches of snow falling in twelve hours. *Id.*

¹⁷⁶ See Carol Morello & Ashley Halsey, III, *Historic Snowstorm in D.C. Leaves a Mess to be Reckoned with*, WASH. POST, (Feb. 7, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/06/AR2010020600683.html>.

¹⁷⁷ Mary Pat Flaherty, *In Storm, Pepco Last to Seek Aid*, WASH. POST, (Jan. 28, 2011), available at http://www.washingtonpost.com/national/in-storm-pepco-last-to-seek-aid/2011/01/27/ABTi4LE_story.html.

¹⁷⁸ See Flaherty, *supra* note 178.

¹⁷⁹ See Flaherty, *supra* note 178.

¹⁸⁰ See Flaherty, *supra* note 178.

¹⁸¹ See Flaherty, *supra* note 178.

¹⁸² See PEPSCO.COM, *New Construction: Service Map*, PEPSCO.COM, <http://www.pepco.com/business/services/new/map/> (last accessed Jan. 15, 2012) (showing that PEPSCO serves D.C. and Maryland’s Montgomery and Prince George’s Counties); see *Virginia Energy Patterns and Trends*, VIRGINIA TECH, <http://www.energy.vt.edu/vept/electric/serviceareas.asp> (last accessed Jan. 14, 2011) (showing that Dominion Power, a.k.a. Virginia Power, serves Arlington, Fairfax, Prince William, Stafford, and Fauquier Counties, and the Cities of Alexandria, Falls Church, Fairfax, and Fredericksburg).

¹⁸³ See Andrew Gully, *Blizzards Shut Down Washington, Boston and New York on the United States Eastern Seaboard*, THE HERALD SUN (Feb. 11, 2010 8:23 AM), <http://www.heraldsun.com.au/news/victoria/blizzards-shut-down-washington->

Families found themselves forced to evacuate their homes due to freezing temperatures.¹⁸⁴ A *Washington Post* investigation reported PEPCO's failure to prepare for the storms, resulting in an outpouring of criticism from furious PEPCO customers.¹⁸⁵ PEPCO not being held responsible for its lackluster preparation was a common theme of consumer outrage.¹⁸⁶ The *Post*'s investigation also revealed that the PSC previously failed to act on PEPCO's already poor ranking for service reliability.¹⁸⁷ Maryland residents found themselves unable to trust the PSC, and demanded legislative action.¹⁸⁸

These snowstorms did more than highlight PEPCO's ill-preparedness and the PSC's lack of preventative action.¹⁸⁹ For decades, Maryland's primary utility goal focused on affordability.¹⁹⁰ The General Assembly sought to protect lower-income and vulnerable populations from heightened financial hardship by keeping electricity rates as low as possible.¹⁹¹ However, the week-plus power outages harmed these populations the most.¹⁹² Lower-income families may lack the financial resources to restock a refrigerator after its contents spoil.¹⁹³ They also may be less likely to have medical insurance to cover illnesses caused by spoiled food.¹⁹⁴ Low-income and federally-assisted persons are less likely to have the resources to relocate,

boston-and-new-york-on-the-united-states-eastern-seaboard/story-e6frf71f-1225829029847.

¹⁸⁴ See Flaherty, *supra* note 178.

¹⁸⁵ See Flaherty, *supra* note 178.

¹⁸⁶ See Flaherty, *supra* note 178; see also Hamil R. Harris, *Editorial, Prince George's Officials Grill Pepco*, WASH. POST, (Aug. 20, 2011, 12:08 PM), <http://voices.washingtonpost.com/local-breaking-news/crime-and-public-safety/pepco-president-thomas-graham.html>.

¹⁸⁷ See Flaherty, *supra* note 178 (reporting that before the storms, the PSC knew PEPCO ranked as one of the worst electric providers in the United States). The PSC had acted after the 2009 snowstorm by opening an investigation. See Flaherty, *supra* note 178. These events spurred the original creation of the ESQR, prior to the 2010 snowstorms. See Flaherty, *supra* note 178.

¹⁸⁸ See Flaherty, *supra* note 178; see Fiscal Policy Note, *supra* note 13, discussing the 2010 snowstorms as the catalyst for passing ESQR.

¹⁸⁹ See Flaherty, *supra* note 178.

¹⁹⁰ See *infra*, Part II(d) for discussion on Maryland's affordability goal.

¹⁹¹ See *In re Singer*, *supra* note 53, at 101.

¹⁹² See Stephens, *supra* note 1 (detailing families keeping warm with blankets); see Flaherty, *supra* note 178 (reporting medically disabled people explaining their evacuation from powerless homes); *Editorial, Why Pepco Cannot Keep the Lights On*, WASH. POST, Dec. 5, 2010, available at <http://www.justicefirst.org/national/in-the-media/why-pepco-cant-keep-lights-on.html>.

¹⁹³ See CDC.GOV: EMERGENCY PREPAREDNESS AND RESPONSE, <http://www.bt.cdc.gov/disasters/poweroutage/needtoknow.asp>. Even though it was winter, some homes were warmer than the recommended refrigeration and storage temperature for perishable foods. See *id.* Local health authorities urged residents to throw away all perishables. *Id.*

¹⁹⁴ See *id.*

especially when local public transportation is suspended.¹⁹⁵ Elderly and disabled persons, that relied on electricity for medical needs, found themselves stranded.¹⁹⁶ Furthermore, the additional costs from the storm outages, including lost wages due to closed businesses, quickly added up.¹⁹⁷ PEPCO announced it would need to raise rates to pay for repairs.¹⁹⁸ Thus, the storms revealed the current policy's biggest flaw: more service interruptions result in higher overall costs for consumers, and hurt the very populations the policy works to protect.¹⁹⁹

C. An In-Depth Look at the ESQR

The Maryland General Assembly passed the Maryland Electricity Service Quality and Reliability Act on May 10, 2011, a little over a year after PEPCO's disastrous performance created a consumer and voter backlash.²⁰⁰ While ESQR's formal introduction came before the January blizzards, the storms certainly helped provide momentum for the bill's passage.²⁰¹ Legislators directly cited complaints against PEPCO as a motivating factor that influenced their vote.²⁰² Both lawmakers and Governor O'Malley touted ESQR as a solution that would raise reliability rates and allow the PSC to punish utilities falling below the acceptable threshold.²⁰³

ESQR's language targets both utilities and the PSC.²⁰⁴ The statute requires the PSC to establish an individual standard of SRQ for each utility company.²⁰⁵ Interestingly, the law continues the established policy against implementing blanket rules and standards on electric companies.²⁰⁶ Despite ESQR's lack of uniform standards, the statute requires the creation of

¹⁹⁵ See Morello & Halsey, *supra* note 177.

¹⁹⁶ See Flaherty, *supra* note 178.

¹⁹⁷ See Morello & Halsey, *supra* note 177. The Federal Government and many area businesses remained closed, partially due to lack of electricity. *Id.*

¹⁹⁸ See Flaherty, *supra* note 178.

¹⁹⁹ See generally Flaherty, *supra* note 178.

²⁰⁰ See MD. ELEC. SERV. QUALITY AND RELIABILITY ACT, *supra* note 14; see *Bill to Penalize Utilities if They Fall Below Standards*, WBAL-TV, Feb. 4, 2011, *supra* note 14.

²⁰¹ See MD. ELEC. SERV. QUALITY AND RELIABILITY ACT, *supra* note 14; see *Bill to Penalize Utilities if They Fall Below Standards*, WBAL-TV, Feb. 4, 2011, *supra* note 14.

²⁰² See MD. ELEC. SERV. QUALITY AND RELIABILITY ACT, *supra* note 14; see WBAL-TV, *supra* note 14.

²⁰³ See *Bill to Penalize Utilities if They Fall Below Standards*, WBAL-TV, Feb. 4, 2011, *supra* note 14.

²⁰⁴ See Fiscal Policy Note, *supra* note 13, at 1.

²⁰⁵ See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(b),(d) (West 2011).

²⁰⁶ See Fiscal Policy Note, *supra* note 13, at 2; see, e.g., *In re Singer*, *supra* note 53, at 101 (ruling against blanket standards for all electric companies).

specific qualifications for each utility's SQR.²⁰⁷ The PSC must base their systems on one of three nationally recognized SQR indexes.²⁰⁸ The PSC also must set specific standards regarding a company's vegetation management, downed wire repair, and service interruption response.²⁰⁹ Individual systems should be tailored to fit the utility's current infrastructure, customer bank, and the utility's service area.²¹⁰ All of these systems must be in place by July 1, 2012.²¹¹

ESQR mandates annual SQR reporting for all utilities.²¹² COMAR only required utilities to submit reports to the PSC during or after a "major storm" event.²¹³ These regulations gave utilities substantial discretion under COMAR, which resulted in companies failing to report outages after catastrophic storms.²¹⁴ This lack of reporting delayed any PSC opinion regarding a utility's response, as the PSC would have to order companies to submit the required reports with all the necessary information.²¹⁵ Under ESQR, the annual reporting requirement ensures that utilities will not be able to conceal outage information indefinitely.²¹⁶ All in all, the review mandates provide a much-needed level of transparency to utility operations and SQR levels.

Perhaps most significantly, ESQR calls for the PSC to automatically review each utility's SQR performance, and a utility's failure to comply with the ESQR may be punished via monetary penalties and sanctions.²¹⁷ Furthermore, utilities may not attempt to recoup the costs of any such corrective action from any of their customers, a protective measure installed

²⁰⁷ See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(e) (West 2011).

²⁰⁸ See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(d) (West 2011).

²⁰⁹ See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(e)(1)(i) (West 2011).

²¹⁰ See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(e)(2) (West 2011).

²¹¹ See MD. CODE ANN., PUB. UTIL. COS. § 7-213(d) (West 2011).

²¹² See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(g) (West 2011).

²¹³ See *infra* at Part I(d) for discussion on the COMAR definition of a "major storm"; see MD. CODE REGS. 20.50.07.05B (2012); see MD. CODE REGS. 20.50.01.03B (2011).

²¹⁴ See MD. CODE REGS. 20.50.01.03B (2011). For examples of non-compliance, see PEPCO Snow Response Order, *supra* note 156; Snowstorm Report Order, *supra* note 158.

²¹⁵ See generally Stephens, *supra* note 163 (detailing the PSC rulings regarding PEPCO's storm response, almost two years after the storms).

²¹⁶ See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(g) (West 2011).

²¹⁷ See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(f)(2)(ii) (West 2011). See *supra* at Part ? for discussion relating to PSC's lack of punitive authority under current regulations.

to keep affordability maximized and avoid any incentives for non-compliance.²¹⁸ Previously, the regulations pushed the PSC into an advisory role.²¹⁹ After major storm events, the PSC made only suggestions and recommendations, appearing to lack the power to force change.²²⁰ By giving the PSC stronger punitive tools, the General Assembly sent a message to Maryland citizens that the PSC would look out for consumers, not just utilities.

In fact, the ESQR explicitly states in section (b): “It is the goal of this state that each electric company provide its customers with high levels of service quality and reliability...”²²¹ The importance of this dramatic policy change cannot be missed.²²² Previously, the state’s primary goal centered on affordability over SQR, and the utilities successfully avoided by threatening rate-hikes when unfavorable SQR measures arose.²²³ While ESQR specifically notes that cost-effective SQR programs are best, it makes it clear that the one-sided argument that SQR would harm consumers is no longer acceptable.²²⁴ Some balancing is required, and an electric company with sub-standard SQR ratings can be held accountable.²²⁵

V. ANALYSIS OF THE ESQR’S REAL-WORLD IMPACT ON UTILITY STORM RESPONSES

The ESQR’s design focuses on preventing Maryland consumers from undergoing long and unnecessary power outages due to poor maintenance and storm planning.²²⁶ It is thus important to ask whether the ESQR would prevent another post-Snowmagedden scenario. Many consumers focused on the response times between Virginia and Maryland electric companies.²²⁷

²¹⁸ See Fiscal Policy Note, *supra* note 13, at 2; see MD. CODE ANN., PUB. UTIL. COS. § 7-213(f)(2)(iii) (West 2011). Maryland’s primary goal of affordability is addressed in *In re Singer*, *supra* note 53, at 101.

²¹⁹ See MD. CODE REGS. 20.50.07.05B (2012); see Snow Storm Report Order, *supra* note 158.

²²⁰ See PEPCO Snow Response Order, *supra* note 157; see *In re Isabel*, 95 Md. P.S.C. at 3.

²²¹ See MD. CODE ANN., PUB. UTIL. COS. § 7-213(b) (West 2011).

²²² See *id.*

²²³ See *supra* Part II (c) for discussion on Maryland’s policy.

²²⁴ See Fiscal Policy Note, *supra* note 13, at 2.

²²⁵ See Fiscal Policy Note, *supra* note 13, at 2. The language also indirectly instructs the PSC to evaluate its mission, in order to comply with the new policy. Fiscal Policy Note, *supra* note 13, at 2.

²²⁶ See MD. CODE ANN., PUB. UTIL. COS. § 7-213(b) (West 2011).

²²⁷ See Tucker Echols, *Confidence in Pepco Slumps, Dominion Gains*, WASH. BUSINESS J., (Apr. 20, 2011, 1:49 PM), <http://www.bizjournals.com/washington/news/2011/04/19/confidence-in-pepco-slumps-dominion.html>.

This comparison calls for a brief analysis of Virginia's regulations, and looking at how key differences required Virginia utilities' fast response time.

A. Virginia's Pro-Reliability Policy and Regulations

The 2009-10 snowstorms highlighted how Virginia's power companies responded far better to major storm events and outages.²²⁸ Both Dominion Power and PEPCO suffered widespread outages, but Dominion Power had all lights restored within two days of the second storm's end.²²⁹ PEPCO took over a week to restore services.²³⁰ Local media and consumers asked why such a difference existed.²³¹ A comparison of each state's legal standards reveals different policy goals play a role in answering this question.

Virginia's State Corporation Commission ("SCC") oversees the Commonwealth's regulated energy utilities.²³² Unlike Maryland's PSC, Virginia grants the SCC a large amount of regulatory and judiciary power, including a large amount of oversight over outage response plans.²³³ The SCC's power includes requiring utilities to submit their emergency response procedures so that the SCC may ensure proper plans exist before such an emergency arises.²³⁴ During an emergency, the SCC may require a utility take certain actions.²³⁵ The Virginia Governor also can force utilities to provide electricity to other areas during certain emergencies.²³⁶ All of these provisions keep a large amount of control reserved for the state, and allow the government to step in and force action if power companies fail to respond adequately.²³⁷

Furthermore, Virginia's policies differ from that of Maryland in that Virginia electric companies have a statutory duty to provide reasonably reliable service at affordable rates.²³⁸ Until the ESQR's passage, Maryland lacked a similar policy.²³⁹ The SCC also has the power to determine that a utility failed to fulfill this duty through consumer complaints alone, and the

²²⁸ See Echols, *supra* note 228.

²²⁹ See Flaherty, *supra* note 178; see Stephens, *supra* note 1.

²³⁰ See Flaherty, *supra* note 178; see Stephens, *supra* note 1.

²³¹ See Flaherty, *supra* note 178; see Stephens, *supra* note 1.

²³² See VA. CODE ANN. § 56-35 (West 2012).

²³³ See *id.*; see VA. CODE ANN. § 56-250 (West 2012); see VA. CODE ANN. § 56-249 (West 2012).

²³⁴ VA. CODE ANN. § 56-586.1 (West 2012).

²³⁵ E-mail from Kenneth J. Schrad, Dir. of Information Resources, Va. SCC, Response to Author's Questionnaire (Jan. 18, 2012) (on file with author); VA. CODE ANN. § 56-250 (West 2012).

²³⁶ See VA. CODE ANN. § 56-586.1 (West 2012).

²³⁷ See *id.*; VA. CODE ANN. § 56-250 (West 2012).

²³⁸ See generally *supra* at Part II, (c), for Maryland's policies favoring affordability; see VA. CODE ANN. § 56-234.4 (West 2011); see VA. CODE ANN. § 56-234 (West 2011).

²³⁹ See MD. CODE ANN., PUB. UTIL. COS. § 7-213(b)-(d) (West 2011).

SCC can use this finding to compel operational or other changes.²⁴⁰ Not only does this statute give the SCC the teeth to enforce the duty, but also allows consumer complaints to show a utility has not met their duty.²⁴¹ Virginia utilities thus have a strong incentive for high customer satisfaction rates.

In fact, Virginia's SCC has authority to review a power company's SRQ ratings even before a customer complaint is filed.²⁴² The Virginia legislature grants the SCC general oversight powers over utilities' service performance.²⁴³ The SCC may, at any time, request a utility to submit an SRQ report to them, and investigates every consumer complaint made to the Commission.²⁴⁴ Additionally, the SCC reviews all utility responses to major storms that cause outages for longer than twenty four hours.²⁴⁵ The Virginia legislature thus ensured the SCC's oversight and control over utility SRQ levels would not be compromised by lack of authority or administrative power.²⁴⁶

Virginia and Maryland also differ in their remedies for utility liability.²⁴⁷ Like Maryland, Virginia gives the SCC jurisdiction over power companies, and grants them extensive remedial powers.²⁴⁸ Virginia and Maryland both allow their respective regulatory committees to act on consumer complaints.²⁴⁹ But Virginia specifically states that the SCC's judicial powers do not end an aggrieved consumer's common law rights.²⁵⁰ Nor may a utility's tariff purport to do so, although they can limit liability.²⁵¹ This means a Virginia power customer is specifically not foreclosed from seeking judicial relief, and can pursue damage claims through this avenue.²⁵²

Virginia's regulatory system certainly provides strong incentives for utilities to minimize outages, through its remedy statutes and arming the SCC with expansive powers.²⁵³ These incentives, though rarely used, may

²⁴⁰ See Schrad, *supra* note 236; VA. CODE ANN. §§ 56-6, 234.

²⁴¹ See Schrad, *supra* note 236; VA. CODE ANN. §§ 56-6, 234.

²⁴² VA. CODE ANN. § 56-249 (West 2011).

²⁴³ See Schrad, *supra* note 236; VA. CODE ANN. §56-234.4 (West 2012).

²⁴⁴ See Schrad, *supra* note 236; VA. CODE ANN. §56-234.4 (West 2012).

²⁴⁵ See Schrad, *supra* note 236.

²⁴⁶ See VA. CODE ANN. § 56-234.4 (West 2012).

²⁴⁷ See *In re Singer*, *supra* note 53, at 105; see VA. CODE ANN. §§ 56-6, 253 (West 2011).

²⁴⁸ See MD. CODE ANN., PUB. UTIL. COS., §§ 2-112, 113 (West 2011); see VA. CODE ANN. § 56-6 (West 2012).

²⁴⁹ See MD. CODE ANN., PUB. UTIL. COS., § 3-102 (West 2011); see VA. CODE ANN. § 56-6 (West 2012).

²⁵⁰ VA. CODE ANN. § 56-7 (West 2011).

²⁵¹ Schrad, *supra* note 236; VA. CODE ANN. § 56-253 (West 2012).

²⁵² Schrad, *supra* note 236. While no Virginia case law showed such an action, perhaps these statutory provisions are Virginia's electric companies seem far more concerned with maintaining high SRQ rates.

²⁵³ See Schrad, *supra* note 236; VA. CODE ANN., § 56-234.4 (West 2012); VA. CODE ANN., § 56-6, 234 (West 2012).

explain why Virginia's power companies quickly restored power after the 2011 blizzards.²⁵⁴ Virginia's approach highlights how strong SRQ policy initiatives ensure utilities undertake the necessary programs to prevent outages in the first place.²⁵⁵

B. Comparing ESQR to Virginia's Regulations

ESQR revolutionizes Maryland energy policy by promoting high SRQ satisfaction rates, much like Virginia's long-standing policies.²⁵⁶ Virginia's strong policy initiatives likely play a major role in incentivizing utility action.²⁵⁷ Maryland adopted similarly forceful policy language in ESQR, focusing the entire statute on creating SRQ goals for Maryland electric utilities.²⁵⁸ This historical change uses mechanisms comparable to Virginia in determining SRQ standards, including the delineation of explicit enforcement powers to the PSC.²⁵⁹

However, ESQR does not state whether the PSC can request major storm outage reports before initiating a hearing, as the SCC does.²⁶⁰ Historically, most utilities would not submit such reports until the PSC requested one during a Commission investigation.²⁶¹ ESQR should have strengthened the reporting requirements allowing the PSC to adopt the SCC's method of automatic review.²⁶²

ESQR also lacks statutory guarantees of legal action for Maryland consumers.²⁶³ Virginia customers have multiple routes for taking legal

²⁵⁴ See Schrad, *supra* note 236. Mr. Schrad noted the SCC never used the emergency powers granted by VA. CODE ANN., § 56-250 (West 2012).

²⁵⁵ See generally Rudy, *supra* note 17, at 1415.

²⁵⁶ See Fiscal Policy Note, *supra* note 13, at 1; see VA. CODE ANN., § 56-6, 234 (West 2012).

²⁵⁷ See text accompanying note 250, *supra*.

²⁵⁸ See Fiscal Policy Note, *supra* note 13, at 3-4; compare MD. CODE ANN., PUB. UTIL. COS. § 7-213 (West 2011), and VA. CODE ANN., § 56-234.4 (West 2011).

²⁵⁹ See Fiscal Policy Note, *supra* note 13, at 2 (requiring use of national ranking systems and models, including SAIDI and SAIFI, for setting ESQR's standards); see also Schrad, *supra* note 236 (stating the SCC uses SAIDI and SAIFI scores for determining SRQ goals).

²⁶⁰ See Fiscal Policy Note, *supra* note 13; compare MD. CODE ANN., PUB. UTIL. COS. § 7-213 (West 2011), with VA. CODE ANN., § 56-249 (West 2012).

²⁶¹ See Fiscal Policy Note, *supra* note 13, at 4-5; see PEPCO Snow Response Order, *supra* note 156 (where the PSC orders such a report after opening an investigation). PEPCO's outages certainly reached the level needed to trigger the major storm reporting requirement in MD. CODE REGS. 20.50.01.03B (2011), but PSC records show this regulation is not followed by utilities.

²⁶² Compare MD. CODE ANN., PUB. UTIL. COS. § 7-213 (West 2011), with VA. CODE ANN., § 56-249 (West 2012).

²⁶³ Compare MD. CODE ANN., PUB. UTIL. COS. § 7-213 (West 2011), with VA. CODE ANN., § 56-253 (West 2012) (forbidding Virginia utilities from attempting to limit consumer common law actions).

action, although it is unclear whether Virginians utilize the judicial course.²⁶⁴ While Virginia's remedy laws may not be practicable, they have some deterrent effect by creating another incentive for utilities to keep customers happy.²⁶⁵

Finally, Virginia grants the SCC extensive emergency powers, while ESQR did not extend such authority to the PSC.²⁶⁶ Much like Virginia's remedy laws, these emergency powers may be more pretense than practice.²⁶⁷ But, giving such expansive authority could encourage the PSC to adopt a more aggressive approach in utility regulation.²⁶⁸ ESQR's policy provisions underline the General Assembly's intended shift in focus to protecting consumers, and hold the PSC to this view.²⁶⁹ Given the PSC's history, a clear delegation of emergency powers may encourage such changes in regulatory behavior.²⁷⁰

C. Storm Response and Utility Preparation Requirements Under ESQR

ESQR will likely help raise SRQ ratings for Maryland utilities, and represents a clear shift in longstanding energy policy.²⁷¹ This change, while long overdue, should help create greater customer satisfaction and relations with utilities.²⁷²

However, ESQR fails to resolve known problems. COMAR's vague storm outage reporting requirements still stand, seemingly unchanged by ESQR.²⁷³ Moreover, ESQR does not establish automatic punishments for utilities that fail to adequately respond to storm-related outages.²⁷⁴ While automatic punishments do not allow for case-by-case determinations, they

²⁶⁴ See VA. CODE ANN., § 56-6 (West 2012); see also Schrad, *supra* note 236.

²⁶⁵ See Schrad, *supra* note 236. Mr. Schrad noted that many of Virginia's pro-SRQ enforcement provisions had not been utilized. *Id.*

²⁶⁶ See VA. CODE ANN., §§ 56-250, 586.1 (West 2012); see MD. CODE ANN., PUB. UTIL. COS. § 7-213 (West 2011).

²⁶⁷ Schrad, *supra* note 236. The SCC noted these emergency powers, established in response to the 1970's energy crisis, have never been used. *Id.*

²⁶⁸ See, e.g., Rudy, *supra* note 17, at 1413-15.

²⁶⁹ See MD. CODE ANN., PUB. UTIL. COS. § 7-213 (West 2011); see also Fiscal Policy Note, *supra* note 13, at 1-2.

²⁷⁰ See, e.g., *infra* Part V(c) (reflecting the previous PSC policy favoring utility interests).

²⁷¹ See Fiscal Policy Note, *supra* note 13.

²⁷² See Fiscal Policy Note, *supra* note 13.

²⁷³ See MD. CODE REGS. 20.50.01.03B (2011). See *supra* Part III (c) for a discussion on the COMAR reporting requirement.

²⁷⁴ See MD. CODE ANN., PUB. UTIL. COS. § 7-213 (West 2011); see also Fiscal Policy Note, *supra* note 13.

create strong incentives for proper pre-storm preparations.²⁷⁵ ESQR also fails to address the problem of slow and prolonged PSC reviews after major storms caused outages.²⁷⁶ These tools would greatly hasten utility response, raise SRQ levels, and restore consumer faith in the PSC.

The biggest variable in ESQR's future effectiveness does not stem from the Maryland General Assembly, but from the PSC. ESQR leaves a large amount of discretion to the PSC, which may undermine ESQR's effect on changing utility practices if the PSC continues its highly protective stance towards utilities.²⁷⁷ Historically, the PSC failed to stringently enforce storm preparation regulations, choosing instead to protect utilities from outside scrutiny.²⁷⁸ If ESQR is meant to prevent a repeat of the February 2010 blackouts, the PSC must change their approach and become proactive in their enforcement of ESQR.²⁷⁹ This includes a possible reconsideration by the PSC of their 1991 *Singer* ruling.²⁸⁰

This concern may be unwarranted, as the PSC has already begun an administrative review of its rules and procedures relating to utility outages.²⁸¹ In December of 2011, the Commission issued an unprecedented \$1,000,000 fine against PEPCO for its failures in 2010, and continued to publicly criticize PEPCO's reliability ratings in 2012.²⁸² These actions hint that the PSC itself is evolving.²⁸³ Regardless, the PSC must ensure that untimely delays in reviewing storm reports and responding to consumer complaints are minimized.²⁸⁴ This includes clarifying regulations by adding strict enforcement mechanisms, and building certain mandatory reliability programs into the forthcoming individualized utility standards.²⁸⁵ While the \$1,000,000 fine against PEPCO reflects the PSC's recognition of consumer outrage, the fine still came approximately two years after the blizzards.²⁸⁶ If utility companies know complaints will be swiftly reviewed by the PSC, they

²⁷⁵ For an example of the rate-hike argument, see *In re Singer*, *supra* note 53.

²⁷⁶ See PEPCO Snow Response Order, *supra* note 156; Snow Storm Report Order, *supra* note 158.

²⁷⁷ See MD. CODE ANN., PUB. UTIL. COS. § 7-213 (West 2011); see *supra* Part III(b) discussing previous PSC opinions and policies.

²⁷⁸ See *In re Singer*, *supra* note 53, at 101.

²⁷⁹ See generally *id.* at 101-05.

²⁸⁰ Compare Fiscal Policy Note, *supra* note 13, with *In re Singer*, *supra* note 53.

²⁸¹ See Fiscal Policy Note, *supra* note 13, at 6.

²⁸² Stephens, *supra* note 159; see Victor Zapana and Aaron C. Davis, *Pepeco Receives Small Rate Hike in Maryland*, WASH. POST, July 20, 2012, http://articles.washingtonpost.com/2012-07-20/local/35486123_1_pepco-derecho-storm-small-rate-hike.

²⁸³ See Stephens, *supra* note 159; but cf. *In re Singer*, *supra* note 53, at 105.

²⁸⁴ See MD. CODE REGS. 20.50.01.03B (2011); see *supra* Part III (c) for a discussion on the COMAR reporting requirement.

²⁸⁵ For example, requiring tree-trimming programs and targeted upgrades as part of a utility's ESQR goals would help ensure the legislative and policy goals behind ESQR are quickly met.

²⁸⁶ See Zapana and Davis, *supra* note 284.

are more likely to be adequately prepared for storms and outages.²⁸⁷ Therefore, the PSC should adopt a rigid review process, including fines for failing to appropriately respond to a PSC investigation.

VI. CONCLUSION

Two blizzards and days of freezing homes, tired families and consumer outrage lay the ground for ESQR's passage.²⁸⁸ The Act will help prevent another prolonged outage like the one PEPCO customers experienced in 2010.²⁸⁹ Maryland utilities are now required to institute programs that will help prevent many future outages.²⁹⁰ More importantly, ESQR shows the General Assembly will act to hold utilities liable for massive post-storm outages.²⁹¹

²⁸⁷ See *supra* Part II(c).

²⁸⁸ See *supra* Part IV(c) for discussion of ESQR's passage.

²⁸⁹ See *supra* Part IV(b) for discussion of the 2010 blizzards.

²⁹⁰ PEPCO and BG&E instituted reliability improvement programs before ESQR's effective date of January 1, 2013. PEPCO, Press Release, *Maryland State Legislators Progress Report* (Dec. 2012) available at http://www.pepco.com/_res/documents/PEPCO%20MD%20REP%20PROGRESS%20RPT%20DEC2012.pdf; BGE, Tree & Vegetation Management, <http://www.bge.com/customerservice/servicerequests/treetrimming/pages/default.aspx> (last visited Feb. 8, 2013). In October 2012, PEPCO's preparations and performance were lauded as a significant improvement after Hurricane Sandy dealt the D.C. area a glancing blow. J. Freedom du Lac, Annys Shin and Steve Hendrix, *Inside Pepco: How the Utility Kept the Lights on During Hurricane Sandy*, WASH. POST, Oct. 30, 2012, http://articles.washingtonpost.com/2012-10-30/local/35499547_1_pepco-holdings-hurricane-sandy-utility. PEPCO suffered approximately 42,000 outages, compared to Dominion Power's 81,000. *Id.* BG&E also reported a drop in service interruptions after Hurricane Sandy. Andrea K. Walker and Jamie Smith Hopkins, *BGE Works to Restore Power to Thousands of Residents*, BALT. SUN, Oct. 31, 2012, http://articles.baltimoresun.com/2012-10-31/business/bs-bz-sandy-power-outages-20121030_1_bge-works-power-lines-power-for-eight-days (BGE reported approximately 338,000 outages, a drop from over 750,000 outages during Hurricane Irene).

²⁹¹ PEPCO faced its first real challenge under the new ESQR requirements after a line of severe storms (known as a "derecho") hit the Washington D.C. metropolitan area on June 29, 2012. See Aaron C. Davis and Mary Pat Flaherty, *Pepco Defends Its Response to Derecho Storm, Saying it 'Mobilized Quickly'*, WASH. POST, July 30, 2012, http://articles.washingtonpost.com/2012-07-30/local/35487619_1_pepco-derecho-storm-outages. The derecho caused more than 440,000 PEPCO customers to lose electricity, with more than 229,403 customers experiencing an outage for more than seventy two hours. Huffington Post D.C., *Pepco Power Restoration Efforts Under Fire from Customers, Politicians (Updated)*, THE HUFFINGTON POST (last updated July 2, 2012, 11:26 PM), http://www.huffingtonpost.com/2012/07/02/dc-power-outages_n_1643652.html. It took a full week for PEPCO to restore power to all of its customers, and many

There are many differences between ESQR and Virginia's utility regulations. Maryland may not need to match Virginia's level of consumer protection, but ESQR allows Maryland to adopt similar provisions if necessary. ESQR makes one point clear: both Maryland and Virginia recognize that states and utilities must work together in order to keep the lights on.

elected officials publicly criticized the slow response time. *See id.*; *see* Davis and Flaherty, *Pepco Defends Its Response to Derecho Storm, Saying it 'Mobilized Quickly,'* WASH. POST, July 30, 2012, http://articles.washingtonpost.com/2012-07-30/local/35487619_1_pepco-derecho-storm-outages. BG&E also received heavy criticism for its derecho response, and the PSC held a hearing on BG&E's reliability improvement plan in September of 2012. *See* BALT. SUN, Editorial, *Our View: the Light Goes On at BGE*, Sept. 17, 2012, http://articles.baltimoresun.com/2012-09-17/news/bs-ed-bge-20120917_1_derecho-storm-power-lines-underground-outages. BG&E reported over 750,000 outages after the derecho. Walker and Hopkins, *supra* note 292.