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October 27, 2022

VIA ELECTRONIC FILING
Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission
of the District of Columbia
1325 G Street, N.W., Suite 800
Washington, D.C. 20005

Re: Formal Case No. 1167, *In the Matter of the Implementation of Electric and Natural Gas Climate Change Proposals*

Dear Ms. Westbrook-Sedgwick:

Enclosed for filing in the above-referenced proceeding, please find the *Office of the People's Counsel for the District of Columbia's Reply Brief in Response to the Public Service Commission's Request for Briefs.*

If there are any questions regarding this matter, please contact me at (202) 727-3071.

Sincerely,

/s/ Sarah Kogel-Smucker

Sarah Kogel-Smucker
Assistant People's Counsel

Enclosure

cc: Parties of record

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

In the Matter of	§	
	§	
The Implementation of	§	
Electric and Natural Gas Climate	§	
Change Proposals	§	**Formal Case No. 1167**
	§	

REPLY BRIEF OF THE OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA IN RESPONSE TO THE PUBLIC SERVICE COMMISSION'S REQUEST FOR BRIEFS

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October 27, 2022

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OTHER AUTHORITIES

The Office of the People's Counsel for the District of Columbia ("Office" or "OPC"), the statutory representative of District of Columbia ratepayers with respect to utility matters,[1] submits this reply brief in response to the Public Service Commission's ("PSC" or "Commission") July 12, 2022, "Request for Briefs"[2] and the Commission's July 29, 2022, "Order Extending the Time for Providing Briefs."[3] In accordance with the Commission's directive, this brief addresses arguments made by other parties to Formal Case No. 1167 regarding the scope of the Commission's legal authority to order electrification.

I. INTRODUCTION

This proceeding does not exist in a vacuum. As part of the Commission's consideration (in Formal Case No. 1156) of Potomac Electric Power Company's ("Pepco") proposed multiyear rate plan, Commissioner Beverly in October 2020 issued a "Statement" in which he observed that the "District has set ambitious goals to improve our climate, and it is going to take bold steps to get there."[4] His Statement expressed concern that the PSC not "surrender" its "normal oversight over public utilities at a time when our involvement is increasingly important to ensuring that the District can meet its climate and energy goals." *Id*. Finally, Commissioner Beverly pointed out that the Commission is

> obligated to follow the directives of the CleanEnergy DC Omnibus Amendment Act of 2018 in this proceeding. Specifically we are to consider the effects on global climate change and the District's public climate commitments, along with the public safety, the economy of the District, the conservation of natural resources, and

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1 D.C. Code § 34-804.

2 *Formal Case No. 1167, In the Matter of the Implementation of Electric and Natural Gas Climate Change Proposals,* Request for Briefs, rel. July 12, 2022 ("Request for Briefs").

3 *Formal Case No. 1167*, Order No. 21411, rel. July 29, 2022.

4 *Formal Case No. 1156, In the Matter of the Application of the Potomac Electric Power Company Authority to Implement a Multiyear Rate Plan for Electric Distribution Service in the District of Columbia*, Statement of Commissioner Beverly, rel. Oct. 21, 2020 at 3 ("Statement").

> the preservation of environmental quality, in our supervision and regulation of utility or energy companies.

Id. at 3-4 n.6.

Some of the necessary "bold steps" have already been taken. As the Commissioner noted, in the Clean Energy Act of 2018, the Council—over Washington Gas Light Company's ("Washington Gas" or "WGL") objection[5]—required the Commission to regulate in ways consistent with the District's climate goals. In more recently enacted legislation, the Council codified those specific goals into law, and, separately, banned natural gas connections in almost all new (or substantially improved existing) buildings. Given all that has happened, OPC submits that the Commission is well within its authority to order electrification.

OPC's Initial Brief states and supports its position that the Commission has an essential role to play in facilitating decarbonization in the District. This is because the Commission has the authority to regulate, in ways "consistent with achievement of the electrification needed to meet the goals set forth in the Climate Commitment Act," both the provision of services by the District electric and gas utilities and the facilities used to provide those services.[6] As explained there, the Commission "possesses broad authority over District utilities"[7] and, in exercising that authority, "must consider 'effects on global climate change and the District's public climate commitments.'" OPC Br. at 2 (*citing* D.C. Code § 34-808.02 ("CleanEnergy Act")). With the exception of WGL,

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[5] The Company fought—unsuccessfully—the enactment of the provision in the Clean Energy Act of 2018 requiring the Commission to regulate in accord with the District's climate goals. *See* Comm. Rep. No. B22-904, Clean Energy DC Omnibus Amendment Act of 2018, at 18 (D.C. Nov. 20, 2018).

[6] *Formal Case No. 1167,* Initial Brief of the Office of the People's Counsel for the District of Columbia Addressing Legal Authority to Order Electrification at 10, filed Sept. 30, 2022 ("OPC Br.").

[7] *Id*. at 1. *See generally,* D.C. Code §§ 34-301(1), 403, & 911.

each of the parties to this proceeding that briefed the issue agrees with the position asserted by the Office.[8]

WGL accepts that District law "requires the Commission to 'consider' climate goals in its ongoing supervision and regulation of utilities,"[9] and asserts that the Commission "plays a critical role in overseeing adoption of and monitoring of continued compliance with programs and standards critical to the District's climate goals." *Id.* at 21. But the Company views that "critical role" as narrow, and indeed, almost toothless. WGL argues that the Commission's authority to *regulate* the Company's rates and services does not include taking measures that would *restrict* the availability of gas service to customers. *Id.* at 1, 5.

The position is contrary to the statutes referenced *supra* (and in OPC's Brief) and to WGL's own prior, sworn representations to the Commission. As will be discussed *infra,* AltaGas testified in PSC proceedings concerning its proposed acquisition of WGL that AltaGas understood and accepted the District's climate goals, and acknowledged that meeting them would require the Company to "evolve" and "transform" its "business model." That testimony included the revelation by David Harris, then-Chief Executive Officer of AltaGas, that the Company's plan for dealing with the inevitable revenue drop associated with the District's gradual phase out of gas

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[8] *See Formal Case No. 1167*, Brief of Sierra Club at 1, filed Sept. 27, 2022 (the Commission's [statutory] mandate . . . requires that it respect and effectuate the clear preference for electrification embodied in District policy and legislation pursuant to its statutory mandate."); *Formal Case No. 1167*, Brief of D.C. Gov't at 1, filed Sept. 27, 2022 (if "the [Benefits Cost Analysis] shows, in the context of a rate case or otherwise, that the continued investment in natural gas infrastructure is not cost-effective, or electrification is cost-effective, the Commission would be well within its statutory rights and duties to phase out natural gas use in favor of electrification."); *Formal Case No. 1167*, Brief of Grid 2.0 Working Group at 2, filed Sept. 16, 2022 ("to achieve the District's climate change commitments and obligations under law, Grid2.0 advises that requiring electrification would be an authorized course of action."); *Formal Case No. 1167*, Brief of Apartment & Office Bldg. Ass'n ("AOBA") at 13, filed Sept. 27, 2022 ("the Commission possesses the requisite authority to order electrification."). AOBA contends that despite this broad authority the Commission cannot phase out natural gas service because of Washington Gas's purported federal charter obligations. *Id.* at 11-13. As discussed, *infra*, WGL ceased to be a federally chartered utility in the 1950s when it transformed its corporate structure.

[9] *Formal Case No. 1167*, Brief of Washington Gas Light Company at 2, filed Sept. 27, 2022 ("WGL Br.").

service was to get into the business of building new renewable generation. He urged only that the natural gas phase out be accomplished in an "orderly" fashion.

OPC agrees that the implementation of service changes undertaken to meet the District's climate goals must be done in a careful, deliberate, and "orderly" manner. There should be no question, however, that the Commission plays a key role in managing those changes. It is also clear that the Commission must begin immediately to make regulatory choices that consider how its decisions align with the long-term direction of the Government's policy mandates, and the Government's plans to achieve them, which includes sector-based electrification. While WGL is focused on whether the Commission can "ban" gas service, there are many other important—and more immediate—questions that fall within the Commission's bailiwick and bear directly on meeting the District's climate goals. For example, Pepco's and WGL's 5 Year plans in this proceeding are contradictory—the Commission must resolve those contradictions in considering what to approve, which very well could result in approving electrification spending and rejecting advancing certain "clean fuel" projects.

The Commission should reject WGL's position, because it is irreconcilable with District law and the climate objectives embodied therein. The Commission's mandate is clear—it must exercise its substantial regulatory powers over the District's electric and gas utilities based upon and consistent with "consider[ation]" of the District's climate commitments. As explained in the CleanEnergy DC Plan and the Climate Commitment Act of 2022 committee report findings, those climate commitments necessitate "significant reduction (and, in some instances, complete phase-out) of natural gas use in the building sector" within the District. OPC Br. at 7.[10] In order to comply

[10] *See also id.* 5-9 (discussing CleanEnergy DC Plan and committee report).

with the directives of District law, the Commission can take steps consistent with meaningful electrification.

II. ARGUMENT

WGL's arguments for limiting the Commission's jurisdiction are unconvincing. The District has adopted climate commitments, and a plan to meet them that includes sector-based electrification and has directed the Commission by statute to implement the District's climate commitments. This directive includes, if necessary, full or partial electrification. WGL's arguments to the contrary are inconsistent with the Commission's statutory duty, as well its prior, sworn statements to this Commission.

A. The Commission has a statutory duty to consider the District's public climate commitments—and the District's plans include a meaningful degree of electrification.

WGL argues that PSC's authority is limited to what its enabling statute allows, and urges that "no statute has authorized the Commission to mandate electrification or prohibit gas service." WGL Br. 5. OPC agrees that "the Public Service Commission [] 'is an administrative body possessing only such powers as are granted by statute.'"[11] But this argument trivializes the Council's directive that, in exercising its broad regulatory powers, the PSC must consider the District's climate change objectives and take actions that are consistent with achievement of the District's objectives. The language of D.C. Code § 34-808.02 is mandatory: "In supervising and regulating utility or energy companies, the Commission *shall* consider the public safety, the economy of the District, the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change and the District's public climate commitments" (emphasis added). This obligation means acting to assist in the achievement of

[11] *Wash. Gas Light Co. v. Pub. Serv. Comm'n*, 982 A.2d 691, 718 (D.C. Oct. 2009) (*citing Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934).

carbon neutrality by 2045, which, according to the Mayor-approved CleanEnergy DC Plan and the Climate Commitment Act of 2022, includes sector-based electrification.[12]

WGL's brief pays virtually no attention to the statutory directive of D.C. Code § 34-808.02, specifically addressing it only once. Contrary to the statutory language, WGL suggests that the Section 34-808.02 does nothing more than afford "the Commission . . . a critical role in overseeing adoption of and monitoring of continued compliance with programs and standards critical to the District's climate goals." WGL Br. at 21. WGL impermissibly reads other provisions of the Clean Energy DC Act, such as §§ 34-1432 and 1434 as narrowing the scope of § 34-808.02. *Id*. (arguing that the PSC is limited to implementing a renewable portfolio standard and promoting "transportation electrification" through a "limited mechanism").

The mandatory obligation contained in D.C. Code § 34-808.02 to regulate and supervise encompasses more than ensuring compliance with a particular program or standard. Indeed, this proceeding is predicated upon the Commission's exercise of its authority under § 34-808.02 to determine whether the District utilities are "meeting and advancing the District's energy and climate goals." Request for Briefs ¶ 1. OPC has argued that WGL's proposed plans for meeting the District's climate goals fall short of providing a "viable pathway" to net greenhouse gas ("GHG") emissions in the District.[13] Other parties to this proceeding, consistent with the CleanEnergy DC Plan and the Climate Commitment Act of 2022 Committee Report findings, have argued and provided evidence that the only feasible pathway to meet the District's climate objectives is the phase out of natural gas usage. To the extent the Commission agrees, it is obligated

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[12] *See e.g.,* 69 D.C. Reg. 011946 (Oct. 7, 2022) ("Climate Commitment Act") and the CleanEnergy DC Plan at ix.

[13] *Formal Case No. 1167*, Office of the People's Counsel for the District of Columbia's Reply Comments on Washington Gas Light Company's and AltaGas' Combined Filings at 3 (Oct. 3, 2022).

by law to change the direction suggested by WGL to ensure that both utilities undertake measures that align with achieving carbon neutrality by 2045.[14]

WGL further asserts that the PSC is "empowered to support" GHG reductions through "fuel-neutral measures." WGL Br. at 5. But the Company's mention of fuel neutrality is a distraction spun from whole cloth. WGL neither does—nor, we submit, can—provide any statutory support for its contention that Commission decisions must be fuel neutral. The Commission's sole obligation is to adhere to the statutory authority granted to it by the District Council. "Fuel neutrality" is not an enumerated statutory obligation. And the imposition of the obligation to be "neutral" is inconsistent with the Council's adoption of GHG reduction goals and the steps that must be taken to meet them. Those steps are described in the CleanEnergy DC Plan, which is plainly not fuel neutral. To the contrary, the Plan finds that "phasing fossil fuels out of the District's energy supply will be essential to achieving the city's climate commitments." Clean Energy DC Plan at v.

B. WGL does not have a right to provide natural gas service indefinitely.

WGL asserts that it enjoys the right under District and federal law to provide natural gas service indefinitely (WGL Br. at 1), and that the Commission's responsibility is to "ensure[] the continued availability of . . . gas service in the District." *Id.* at 4. This claim does not withstand scrutiny. WGL's claimed statutory authority does not exist: there is no statute or federal charter that grants the Company a perpetual right to serve, let alone one that supersedes the Commission's regulatory responsibilities—including the obligation to consider the District's climate change commitments when overseeing WGL's rates, services, facilities, plans and proposed capital investments. As OPC and the other parties have shown, the Commission is charged with regulating

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[14] *See* OPC Br. at 7.

WGL in ways that are consistent with the public interest and the preservation of public health and safety.[15] Informing those regulatory obligations, District law now provides that decarbonization is necessary for the preservation of the health and safety of District residents. And, as demonstrated below, WGL ceded its federal charter more than 65 years ago, refuting any argument that whatever rights were granted by that charter have vitality today.

1. The Commission has the requisite statutory authority, and concomitant obligation, to take necessary actions towards electrification.

WGL contends (WGL Br. at 1) that provisions of the District Charter, as set forth in D.C. Code § 1-204.93, affords the Company a perpetual right to provide natural gas service to any customer upon demand because the Commission's "function shall be to insure [sic] that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate in all respects just and reasonable."

WGL's reliance upon this provision begs the question of whether gas service today and going forward is safe, adequate, and just and reasonable. In exercising its regulatory authority to achieve that end, the PSC must evaluate whether, in light of the District's climate goals and its endorsement of sector-based electrification to achieve them, maintenance of the status quo with respect to natural gas service continues to be safe, adequate and just and reasonable—and, if not, what should be done to make it so. WGL makes no argument that the Commission's statutory authority to "furnish service" supersedes the Commission's duty to consider the District's climate commitments. If the Commission determines that, in light of the District's adopted plans, the

[15] D.C. Code § 34-301(2) (PSC has the "power to order such with respect to manufacturing, distributing, or supplying such gas as . . . will reasonably promote the public interest, preserve the public health . . . .); D.C. Code § 1-204.93 ("There shall be a Public Service Commission whose function shall be to insure that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable."). The Council has found that the failure to curb greenhouse gas emissions poses a health and safety concern for District residents. The Commission is duty-bound to insure that WGL's continued service offerings are consistent with safety concerns.

continued supply of natural gas service at current levels is inconsistent with the achievement of those goals, then some degree of electrification is required.[16]

2. The power to regulate encompasses the power to ban.

WGL supports its proposed cabining of the Commission's authority by arguing that the power to regulate is not the power to "ban," and contending that this position accords with the "plain meaning" of the Commission's authorizing legislation. WGL Br. at 5-6. Not so. The Commission is a "regulatory . . . body." D.C. Code § 34-201. As a matter of plain meaning, the ability to "regulate" is the power "[t]o control or direct according to rule, principle, or law."[17] Thus, in the context of construing Congress' power to "regulate" interstate commerce,[18] the Supreme Court has explained that "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Gonzales v. Raich*, 545 U.S. 1, 26 (2005). To like effect, the Commission enjoys general supervisory authority over all gas and electric utilities within the District.[19] The power to supervise is "[t]o have the charge and direction of."[20] Applying that plain meaning of these provisions, the Commission's "regulatory" and "supervisory" authority is more than broad enough to encompass "direct[ing]" WGL's provision of gas service "according to" District law, and through all means necessary and proper to achieve the goals set forth in that law. The Commission's statutory duty to regulate District utilities in ways that are consistent with the public interest and safety, including

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16 The CleanEnergy DC Plan confronts this inconsistency by finding that natural gas service must be phased out of the building sector. *See* CleanEnergy DC Plan at x (describing the District's plan to meet its climate targets by "shift[ing] buildings away from reliance on fossil-fuels (e.g., natural gas, coal, oil)."

17 *Regulate,* American Heritage Dictionary (4th ed. 2006).

18 U.S. Const. art 1, § 8, cl. 3.

19 D.C. Code § 34-301(1).

20 *Supervise,* American Heritage Dictionary, (4th ed. 2006).

the District's climate goals, compels a determination that the Commission's power to regulate necessarily includes the power to prohibit.[21]

The case law that WGL cites is inapposite. The Supreme Court's observation in *In re Permian Basin Area Rate Cases* that the "power to regulate is not a power to destroy," 390 U.S. 747, 769 (1968), has no bearing on the scope of the specific authority delegated by the Council to the Commission. A broad observation about utility rate regulation does not trump an express statutory directive. The Council here directed the Commission to exercise its regulatory authority to advance the District's climate commitments, which include electrification and, absent any other feasible alternative, will require the eventual phase-out of the use of natural gas in the building sector.[22] The Commission has the statutory power to severely constrain—and even ban—natural gas service by taking steps toward meaningful electrification as directed by the District's climate goals.

3. WGL has no federal charter rights because WGL abandoned those rights.

The Commission should reject the contention of WGL (WGL Br. at 2) that it operates under a federal charter that guarantees it the right to provide natural gas in the District indefinitely.[23] Washington Gas has admitted that it abandoned its federal charter rights in 1956. According to a history of the company published by WGL Holdings, Inc., "Washington Gas retained its federal

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[21] *See* D.C. Code § 34-301(2), which affords the PSC the "power to order such with respect to manufacturing, distributing, or supplying such gas as . . . will reasonably promote the public interest, preserve the public health, and protect those using such gas or electricity and those employed in the manufacture and distribution of gas . . . ."

[22] CleanEnergy DC Plan at x; OPC Br. at 7 ("the District has adopted a plan of sector-based electrification, which will include significant reduction (and, in some instances, complete phase-out) of natural gas use in the building sector.").

[23] AOBA supports this position, asserting that the PSC, "by electrification or any other order, cannot void or otherwise phase out Washington Gas' federal mandated obligation to provide natural gas services." AOBA Br. 11-13.

charter until 1956, when the company incorporated under the District of Columbia Code."[24] Nor has WGL argued in PSC proceedings where the charter would seemingly be relevant that it has any role to play in Commission deliberations. WGL did not, for example, list congressional approval as necessary for its merger with AltaGas.[25] WGL instead sought PSC approval for the merger, showing WGL's belief that it operates under Commission regulation, not a federal charter.

WGL likewise contends that a 1936 federal law authorizing the Company to, *inter alia*, "manufacture, transmit, distribute, and sell gas in all parts of the District of Columbia and adjoining territory, for any purposes for which gas is now or may hereafter be used" (WGL Br. at 2 n.3, 15) affords WGL the right to sell gas in perpetuity. WGL was subject to PSC regulation in 1936 (the Commission commenced operation in 1913), and nothing in that statute changed that fact.[26] Thus, it was and is for the Commission to say for what—if any—purposes gas may be used in the District. Indeed, there is a considerable question whether the 1936 provision continued to have any vitality following WGL's abandonment of its federal charter, which was the legal predicate and object of the statute.

4. WGL wrongly asserts an unalienable customer right to gas service on demand.

WGL also argues that *customers* have the perpetual right to gas service. This argument is apparently grounded in the other federal and District laws addressed above. This argument fares no better because it is fundamentally inconsistent with the Commission's statutory duty to regulate in ways that consider the District's climate goals and ensure the public interest. If the continuation

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[24] Washington Gas, *Growing with Washington, Part II* at 19 (May 11, 2012), https://www.washingtongas.com/-/media/b32177e8b4684d29b285f3e3eaf26b24.pdf.

[25] *Formal Case No. 1142, In the Matter of the Merger of AltaGas Ltd. and WGL Holdings, Inc.*; Applicants' Application, Direct Testimony, Supporting Exhibits and Work Papers, Transmittal Letter at 38.

[26] "[N]othing [in the 1936 statute] shall be taken or construed as altering, repealing or changing any provision of existing charter or franchise or rights of the Washington Gas Light Company, or any statute, law, ordinance, or regulation pertaining thereto." 49 Stat. 337, Pub. Law No. 577, 1268-1269 Sec. 3 (May 11, 1936).

of natural gas service is inconsistent with the District's climate goals, then no customer has the right to override those goals simply because the customer would rather use natural gas.[27] The Council's recent legislation banning natural gas hookups in new buildings and buildings that are significantly retrofitted shows that District customers do not have a perpetual right to natural gas service, because residents of newly-constructed buildings will have no such service rights.[28]

C. WGL's contention that the PSC cannot order full or partial electrification should be rejected as inconsistent with the Company's sworn statements to the Commission.

WGL supports (WGL Br. at 1) its claim that the Commission lacks authority to order electrification "in whole or in part" by asserting that efforts to implement electrification would amount to a "regulatory taking," (*id.* at 10 n.19), breach the "regulatory compact between the District of Columbia and utility companies," (*id.* at 16), and result in potential confiscatory ratemaking.[29] This parade of horribles (including other kindred arguments)[30] cannot be reconciled

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[27] 69 D.C. Reg. 011947 (Oct. 7, 2022) ("Clean Energy DC Building Code Act").

[28] WGL says that it has contracts to supply natural gas to federal facilities located within the District. *See* WGL Br. at 10, n. 19. But the federal government has matched the District's climate goals—it also aims to achieve carbon neutrality by 2045—so the federal government must consider electrification to achieve these goals. Exec. Order No. 14,057, 3 C.F.R. 694, § 205, at 696 (2022).

[29] WGL acknowledges that this supposed "compact" does "not guarantee that a utility will achieve its projected revenues, it must provide the utility with a reasonable opportunity to earn a rate of return sufficient to maintain the company's financial integrity, to attract necessary capital at a reasonable cost," Br. at 17 (emphasis removed).

[30] *See id*. 10, n.19. In order to establish a claim under the Contract Clause (*id.* 10, n.19), WGL must show that "state law has operated as a substantial impairment of a contractual relationship," and that state law is not "drawn in an 'appropriate' and 'reasonable' way to advance a 'significant and legitimate public purpose.'" *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). No such showing has, or, we submit, can be made. Nor can it be that the District's regulation of natural gas distribution service within the District, a right reserved to it under the Natural Gas Act, 15 U.S.C. § 717(b), violates the dormant Commerce Clause. *Compare* WGL Br. 10, n.19 *with Nw. Cent. Pipeline Co. v. State Corp. Comm'n of Kan.*, 489 U.S. 493 (1989). WGL's reliance upon *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) is inapposite because that case concerns the "tying the prices of . . . in-state products to out-of-state prices." *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003). And as regards the interests of the federal government (WGL Br. 10, n.19), its current executive policy is to decarbonize its energy needs by 2035. Executive Order No. 14057, Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, § 101 (Dec. 19, 2021). And, to date, WGL's preemption argument under the Energy and Policy Conversation Act has been rejected. *Cal. Rest. Assoc. v. City of Berkeley*, 547 F. Supp. 3d 878 (N.D. Cal. 2021), *appeal pending* Case No. 21-16278 (9th Cir. filed Aug. 5, 2021).

with the regulatory record and WGL's merger commitments in Formal Case No. 1142. AltaGas, the corporate parent of Washington Gas, acknowledged to this Commission during that proceeding that it was acquiring WGL knowing that there would be a phase-out of its natural gas distribution business in accordance with the District's climate objectives, and both AltaGas and WGL agreed to settlement commitments consistent with that understanding.

The sworn testimony of AltaGas/WGL in Formal Case No. 1142 included acknowledgments by senior executives and expert advisors that the District was moving toward carbon-neutrality, and accepted that doing so would require Washington Gas to change fundamentally its role in the provision of utility services to District consumers. Far from asserting that a diminution in gas service would be a "taking" or breach of a "compact," AltaGas testified that it recognized and embraced the District's climate goals, understood that the "transformation" of the gas company was inevitable, and asserted that AltaGas was best positioned to make the City's climate goals a reality. When asked to explain why AltaGas was seeking under these circumstances to buy WGL, the Company's CEO responded that WGL would replace lost gas business revenues by engaging in the development of needed renewable projects. Following the hearing, AltaGas memorialized its understandings in a set of settlement terms that made clear its acceptance of the need for WGL to "evolve its business model" in response to the District's climate goals.

The parties to Formal Case No. 1142 relied on these commitments in deciding to settle that proceeding, and, OPC submits, the Commission relied on them in approving the settlement, and, by extension, the merger.[31] The record is clear that at the time AltaGas pursued the acquisition, it

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[31] *Formal Case No. 1142,* Order No. 19396 at 29, rel. June 29, 2018 ("The Proposed Merger, as set forth in the Settlement Agreement, subject to the conditions outlined in this Order, when taken as a whole, is in the public interest under D.C. Code §§ 34-504 and 34-1001.").

knew exactly what the future held for the District's gas company, and understood that meeting the District's climate objectives would likely require a substantial phase-out of natural gas usage. The only constraint that AltaGas voiced on the measures taken to meet the District's climate goals was that they be "orderly." OPC has no objection to an orderly transition. The management of an "orderly" transformation of gas service in the District, however, is in large part the job of the Commission, which has plenary regulatory authority over WGL's rates, services, and facilities. OPC Br. at 7-8. The Commission should reject AltaGas's arguments to the contrary—which the Company posed here without so much as a mention of Formal Case No. 1142.

1. Testimony in Formal Case No. 1142 shows that AltaGas understood the District's climate goals and that WGL would need to "transform" in order to comply with them.

The Formal Case No. 1142 testimony of then-AltaGas CEO David Harris demonstrates that AltaGas knew that WGL would need to be "transform[ed]" to comply with District law and policy, and that an integral part of the "transformation" would be a reduction (if not a total phase-out) of natural gas service. This testimony refutes any claim that an electrification directive would violate a "compact" between the Company and the Commission.

WGL's brief refers to "existing, unambiguous legislative directives" requiring the Commission to ensure WGL continues to provide gas service.[32] Mr. Harris knew better, testifying that the "[M]ayor has an initiative by 2015 [sic: 2050] to be a hundred percent, you know, carbon-free."[33] He acknowledged that WGL would consequently be "forced to transform over time,"[34] observing that "you're not going to have the same utility five years from now, you're not

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[32] WGL Br. at 4-5.

[33] *Formal Case No. 1142,* Complete Hearing Transcript, 269:9-10, rel. Dec. 6, 2017. The Mayor's initiative was codified into law in the Climate Commitment Act.

[34] Tr. 278:4-10.

going to have the same utility ten years from now. 20 years from now."[35] Mr. Harris also made clear the basis for his opinion, stating that in meeting the 2050 goal, "you're certainly not going to be delivering gas to customers if you're going to have a hundred percent carbon-free environment."[36]

Mr. Harris went on state that the looming transformation was the result of policy changes with respect to power supply. He observed that "renewables are going to become more of a disruptive influence on the East Coast[,]" noting that they would be "more disruptive" here because they were making "inroads . . . on the East Coast." Tr. 279:5-13. He then clarified that by "disruptive" he meant "more prevalent," stating:

> Well, that's right. Just take a look at the D.C. government. I mean, it's got an initiative that says by 2050 they want to be hundred percent off carbon.

Tr. 279:14-20.[37] Mr. Harris confirmed that the "disruption" posed by renewables would be to Washington Gas's then existing business model. Tr. 279:21-280:2.

Mr. Harris was asked at hearing how AltaGas had concluded that its "strategies and goals" were aligned with those of the District of Columbia when the Company had not included in its presentation any analyses, reports, or similar documents supporting this assertion. He responded that there was no need to do so:

> It's actually quite easy. You know, we operate in a number of different jurisdictions, so the energy policy with respect to D.C. is very similar to what we've seen in other districts or other jurisdictions in which we operate. So we felt there really wasn't a need.
>
> A good example would be we [how we] function in California. They've got very strong and aggressive goals as it relates to

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35 Tr. 274:3-7.

36 Tr. 269:11-15.

37 The District is now committed to achieving carbon neutrality by 2045. Climate Commitment Act.

> renewable standards and what they're trying to do and reduction in greenhouse gas. We're familiar and read the D.C. policy, and it's consistent with what we've been doing as a company and where we actually think the energy sectors are going. So we really didn't feel any need.

Tr. 314:16 – 315:8.

Separately, Mr. Harris was asked about AltaGas's views on a proposal by the Mayor of Vancouver (Canada) to phase out natural gas service by 2050. Mr. Harris voiced his disagreement with the suggestion that AltaGas was opposed to the phase-out, and responded to an internal company document that suggested hostility to the city policy by asserting, "this document is not intended by any stretch of the imagination to oppose that type of regulation. As a matter of fact, we're very much for it. We just, again, want to make sure it's done in a timely, healthy, transformative manner."[38] He reiterated the concern that the ongoing "transformation" be done in the proper manner, stating:[39]

> We just usually like to look to make sure that both policy-making industry and the customers are working in unison with each other. And the reason for that is you want to be able to pace and meet and achieve those goals in a structured, orderly fashion, so customers are not harmed or a region is not harmed. And I'm not talking just for emission; I'm talking everything. So it's -- from that perspective, I would expect that the mayor's office have done their homework. We're certainly supportive of the initiatives and we want to make sure it's done in the appropriate, structured, orderly manner.

The same sentiments were expressed by Paul Hibbard, an AltaGas expert witness who submitted rebuttal testimony in Formal Case No. 1142 responding to concerns "with respect to the Applicants' approach and commitment to reducing emissions of greenhouse gases ("GHG") and addressing environmental remediation obligations consistent with the directives and goals of the

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38 Tr. 325:5-9.

39 Tr. 318:15-319:6

Commission."[40] Witness Hibbard asserted that these concerns were misplaced, stating that AltaGas has "fully complied with the environmental laws, regulations and policies of the jurisdictions in which it operates, and has demonstrated a commitment to transitioning to lower GHG-intensive energy production and use over time."[41] He reiterated these views on cross examination, asserting that AltaGas is "far ahead of utilities with respect to the progress towards a transition in the industry that will lower greenhouse gas emissions over time."[42] Indeed, witness Hibbard went so far as to inform former Chair Kane that if the merger is approved, the District will "end up with a corporate partner that's more able to help the District to achieve objectives over time" than the "current company."[43]

Faced with the long term outlook for gas service in the District, Chair Kane questioned Mr. Harris about AltaGas's motivations for pursuing the transaction. She noted, and Mr. Harris confirmed, that distribution service revenues earned by WGL are "largely volumetric," and that "sales revenue is a hundred percent, basically, volumetric."[44] The Chair then noted the testimony of a District Government witness indicating that in order to meet the District's 2050 GHG goals, fossil gas sales would need to fall 48 percent from 2015 levels, or smaller reductions with the use of renewable natural gas.[45] Based on these data, Chair Kane asked Mr. Harris:

> how are you going to operate a company with 48 percent less revenue? And why are you investing in a company that's going to have 48 percent less revenue?

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40 Exhibit JA (Q) at 3:10-13.

41 *Id*. 5:11-14.

42 Tr. 1972:14-17.

43 Tr. 1987:1-6.

44 Tr. 442:3-11.

45 Tr. 441-3-8.

Tr. 442:22-443:3. Mr. Harris did not respond by suggesting that WGL had a legal right to continue selling gas at current levels indefinitely, or that a reduction in sales would violate the "compact" between WGL and its regulator, or constitute a "taking" of WGL property without compensation. He instead called it "a great question," and said that AltaGas already had plans for what WGL would doing as gas service was being phased out:[46]

> From the standpoint is -- that's kind of where our general theme has been -- right? -- is that's where the energy sector is going, so all's we're saying is there may be 48 percent less revenue that comes from the regulated gas side, but there's a corresponding increase of 48 percent more revenue if you're competing and turning around and putting renewable projects in -- right? -- because the energy has to come from somewhere -- right? -- at the end of the day.

Similarly, Mr. Harris went on to assert that "this merger makes a tremendous amount of sense" because of the "work force development" benefits that would be achieved "as we come in and take part in putting in renewable projects[.]"[47]

In short, the leadership of AltaGas understood at the time it bought WGL that a transformation away from natural gas was the future, and was prepared to accommodate a phase out of natural gas service in the District and maintain otherwise diminishing revenues by moving into different lines of business.

2. The Settlement Agreement reached in Formal Case No. 1142 demonstrates AltaGas's understanding and acceptance of the need for WGL to "evolve" in response to the District's electrification goals.

Formal Case No. 1142 was resolved through the execution of a Settlement Agreement.[48] Consistent with the testimony of its leadership and expert consultant, the Settlement Agreement

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[46] Tr. 443:5-15. Mr. Hibbard likewise noted AltaGas's involvement in the construction of renewables, stating: "when you look at the level of renewable development by AltaGas in their investment and storage, they actually stand out compared to most others in the industry. And I think that's critically important." Tr. 1970:1-5.

[47] Tr. 444:21-22.

[48] *Formal Case No. 1142*, Order No. 19396, App. A, rel. June 29, 2018. ("Settlement Agreement").

contains several provisions that express support for the achievement of the District's climate goals, as well as recognition that meeting those goals would require WGL to "evolve." The relevant Settlement Agreement terms are:

- Settlement Term No. 76 ("Climate change presents risks to AltaGas and its operations, but also provides it with an opportunity to be part of the solution. These factors underlie AltaGas's commitment to continued change and improvement in its operations, and provide an evolving portfolio of clean and renewable products and services to communities AltaGas serves");

- Settlement Term No. 77 (acknowledging the authority of the DC and federal governments to adopt "measures to address climate change and other public interest issues such as air quality, and including the District's Sustainable DC Plan and Clean Energy Plan"); and

- Settlement Term No. 79 (requiring submission of a "long-term business plan" on "how [WGL] can evolve its business model to support and serve the District's 2050 climate goals (e.g., providing innovative and new services and products instead of relying only on selling natural gas").

AltaGas expert witness John J. Reed, the Chairman and CEO of consulting firm Concentric Energy Advisors, Inc., testified in support of the settlement. His presentation highlighted these provisions, stating that, "Commitments 76, 77 and 79 demonstrate the Applicants' support for the District's Clean Energy Policy."[49] Mr. Reed went on to explain:[50]

> Commitment 76 sets out AltaGas's commitment to "continued change and improvement in its operations, and provide an evolving portfolio of clean and renewable products and services in communities AltaGas serves." Commitment 77 states that the Applicants recognize that District and the U.S. Government retain the right to enact laws and regulations in relation to natural gas and other carbon-based energy sources in measures to address climate change and other public interests, including the District's Sustainable DC Plan and Clean Energy Plan. Commitment 79 commits AltaGas to filing a long-term business plan (with bi-annual meetings) with the Commission that supports the District's 2050 climate goals.

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49 Exhibit JA (4L) at 4:21-22.

50 Exhibit JA (4L) at 4:22-5:9.

These statements and commitments stand in sharp contrast to WGL's initial brief assertions that the Commission has no authority to order full or partial electrification. Neither AltaGas nor Washington Gas claimed at any time during the merger proceeding that they were opposed to the District's climate objectives, or that WGL had a perpetual right to supply gas to customers in the District. WGL Br. at 17. Nor was there ever a hint that WGL's position was that the Commission's authority was limited to "considering and promoting" (*id.* at 1) the District's climate objectives. WGL should be estopped from arguing now for the very rights it and its corporate parent disavowed in Formal Case No. 1142.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, and the reasons set forth in OPC's Initial Brief, the Office asks that the Commission make findings and issue rulings consistent with the positions taken herein.

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CERTIFICATE OF SERVICE

Formal Case No. 1167, In the Matter of the The Implementation of Electric and Natural Gas Climate Change Proposals

I certify that on October 27, 2022, a copy of the *Office of the People's Counsel for the District of Columbia's Reply Brief in Response to the Public Service Commission's Request for Briefs* was served on the following parties of record by hand delivery, first class mail, postage prepaid or electronic mail:

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