

**PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA**  
**1325 G STREET, N.W., SUITE 800**  
**WASHINGTON, D.C. 20005**

**ORDER**

January 28, 2025

**FORMAL CASE NO. 1176, IN THE MATTER OF THE APPLICATION OF THE POTOMAC ELECTRIC POWER COMPANY FOR AUTHORITY TO IMPLEMENT A MULTIYEAR RATE PLAN FOR ELECTRIC DISTRIBUTION SERVICE IN THE DISTRICT OF COLUMBIA, Order No. 22358**

**I. INTRODUCTION**

1. By this Order, the Public Service Commission of the District of Columbia (“Commission”) addresses two separate requests for reconsideration of Order No. 22328.<sup>1</sup> The Commission denies the Apartment and Office Building Association of Metropolitan Washington’s (“AOBA”) Application for Reconsideration. The Commission denies the Office of the People’s Counsel for the District of Columbia’s (“OPC” or “Office”) Application for Reconsideration and Request for Clarification.

**II. BACKGROUND**

2. On April 13, 2023, the Potomac Electric Power Company (“Pepco” or “Company”) filed an application, which it calls “Climate Ready Pathway,” for approval to increase rates by implementing a second Multi-year Rate Plan (“MRP”) for its electric distribution service in the District of Columbia (“District”) from Calendar Years (“CY”) 2024 through 2026.<sup>2</sup> Pepco indicated that the \$190.7 million revenue requirement requested in its MRP Application is driven by a \$116 million revenue deficiency, which includes a requested return on equity of 10.5%.<sup>3</sup> Pepco subsequently updated its MRP revenue requirement, reducing the total to \$186.5 million.<sup>4</sup>

3. By Order No. 21886, the Commission directed Pepco to file supplemental testimony with accompanying exhibits that explain in quantitative and qualitative terms the benefit of, problems identified, and lessons learned from the *Formal Case No. 1156 Modified EMRP Pilot*

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<sup>1</sup> *Formal Case No. 1176, In the Matter of the Application of Potomac Electric Power Company for Authority to Implement a Multiyear Rate Plan for Electric Distribution Service in the District of Columbia (“Formal Case No. 1176”)*, Order No. 22328, rel. November 26, 2024 (“Order No. 22328”).

<sup>2</sup> *Formal Case No. 1176, Application of Potomac Electric Power Company for Authority to Implement a Multiyear Rate Plan for Electric Distribution Service in the District of Columbia*, filed April 13, 2023 (“MRP Application”).

<sup>3</sup> Pepco (B) (Leming Direct) at 6-7.

<sup>4</sup> Pepco (3B) (Leming Rebuttal) at ii and 2.

approved in Order No. 20775.<sup>5</sup> The Commission further directed Pepco to file supplemental testimony and exhibits along with supporting schedules to support a traditional one-year rate case for the test period CY 2023 and directed the intervenors to file direct testimony responding to Pepco's supplementary testimony and adopted a procedural schedule.<sup>6</sup>

4. OPC, with the support of AOBA and the District of Columbia Government ("DCG"), filed a Request for Reconsideration of Order No. 21886, arguing that Order No. 21886 (1) failed to establish a process limited to review of a traditional one-year rate case; (2) erred by inexplicably departing from precedent and establishing a truncated procedural schedule for review of alternative forms of ratemaking; (3) violated parties' due process rights and erred in finding that the Parties can simultaneously assess a traditional one-year rate case and the Modified EMRP Pilot and Pepco's request to approve a second MRP filing; and (4) erred in finding that the assessment of the Modified EMRP Pilot will be conducted in the first instance by the Company in supplemental testimony.<sup>7</sup> On January 16, 2024, the District of Columbia Court of Appeals ordered that OPC's Petition for Review be dismissed.<sup>8</sup> By Order No. 21955, the Commission denied OPC's Motion for Limited Stay.<sup>9</sup>

5. Pepco filed a traditional historic test year cost of service rate application ("TTY"), as directed by the Commission in Order No. 21886.<sup>10</sup> According to Pepco, it expects to earn a rate of return ("ROR") of 5.07% on its fully adjusted rate base for the 12 months ended December 31, 2023, and an adjusted return on equity ("ROE") of 5.37%, resulting in a revenue requirement deficiency of \$108.2 million based on Pepco's proposed ROR of 7.66% and an ROE of 10.5%.<sup>11</sup> The TTY comprises actual data from January 1 to June 30, 2023, and forecasted data from July 1 to December 31, 2023.<sup>12</sup> Pepco filed voluntary Responses to the Company's October 16, 2023, Traditional Test Year Compliance Filing.<sup>13</sup>

6. OPC, AOBA, DCG, the District of Columbia Water and Sewer Authority ("DC

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<sup>5</sup> *Formal Case No. 1176*, Order No. 21886, rel. July 28, 2023 ("Order No. 21886").

<sup>6</sup> *Formal Case No. 1176*, Order No. 21886, ¶ 1.

<sup>7</sup> *Formal Case No. 1176*, Office of the People's Counsel for the District of Columbia Request for Reconsideration of Order No. 21886, filed August 28, 2023.

<sup>8</sup> D.C. Court of Appeals Dismissal Order, *Office of the People's Counsel v. Public Service Comm'n*, No. 23-AA-0959 (January 16, 2024).

<sup>9</sup> *Formal Case No. 1176*, Order No. 21955, rel. February 9, 2024.

<sup>10</sup> *Formal Case No. 1176*, Pepco's Testimonies and Exhibits for the Traditional Test Year Compliance Filing, filed October 16, 2023.

<sup>11</sup> *Formal Case No. 1176*, Pepco (2B) (Leming Additional Supplemental Direct) at 5:8-13 and (2B)-1 at 1.

<sup>12</sup> *Formal Case No. 1176*, Pepco (3A) (O'Donnell Supplemental Direct) at 2:4-10.

<sup>13</sup> *Formal Case No. 1176*, Pepco's Voluntary Responses to October 16, 2023, Traditional Test Year Compliance Filing, filed October 19, 2023.

Water”), and the U.S. General Services Administration (“GSA”) filed direct testimony and exhibits.<sup>14</sup> Pepco and GSA filed rebuttal testimony and exhibits.<sup>15</sup> OPC and DCG filed surrebuttal testimony.<sup>16</sup> The Commission convened three community hearings on March 27, 2024, April 2, 2024, and April 3, 2024.<sup>17</sup>

7. OPC, the DCG, and AOBA filed a Motion to Dismiss or, In the Alternative, Motion for Summary Disposition dismissing Pepco’s MRP.<sup>18</sup> Pepco filed a response opposing the OPC/DCG/AOBA Joint Motion.<sup>19</sup> OPC filed a Motion for Leave to Reply and Reply to Pepco’s Response in Opposition to the Motion to Dismiss or, in the Alternative, Motion for Summary Disposition.<sup>20</sup> OPC and AOBA filed a Motion to Dismiss or, In the Alternative, Motion for Summary Disposition.<sup>21</sup> Pepco filed a response opposing OPC/AOBA Joint Motion dismissing both Pepco’s MRP and traditional historical test year rate application.<sup>22</sup>

8. On March 12, 2024, OPC motioned for an enlargement of time in the procedural schedule, seeking additional time for discovery and testimony. OPC’s proposed schedule included

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<sup>14</sup> *Formal Case No. 1176*, OPC’s Direct Testimony of Witnesses and Supporting Exhibits, filed January 12, 2024; *Formal Case No. 1176*, AOBA’s Direct Testimony of Bruce Oliver and Timothy Oliver, filed January 12, 2024; and *Formal Case No. 1176*, DCG’s Direct Testimony of Courtney Lane and Supporting Exhibits, filed January 12, 2024.

<sup>15</sup> *Formal Case No. 1176*, GSA’s Rebuttal Testimony of Dr. Dennis Goins, filed February 27, 2024; *Formal Case No. 1176*, Pepco’s Rebuttal Testimony, filed February 27, 2024.

<sup>16</sup> *Formal Case No. 1176*, OPC’s Surrebuttal Testimony, filed April 22, 2024, and *Formal Case No. 1176*, DCG’s Surrebuttal Testimony, filed April 22, 2024.

<sup>17</sup> *Formal Case No. 1176*, Transcript of March 27, 2024, Community Hearing, filed April 1, 2024. *Formal Case No. 1176*, Transcript of April 1, 2024, Community Hearing, filed April 5, 2024. *Formal Case No. 1176*, Transcript of April 3, 2024, Community Hearing, filed April 10, 2024.

<sup>18</sup> *Formal Case No. 1176*, Motion to Dismiss or, In the Alternative, Motion for Summary Disposition of the Office of the People’s Counsel for the District of Columbia, District of Columbia Government, and the Apartment and Office Building Association of Metropolitan Washington, filed March 12, 2024 (“OPC, DCG, and AOBA Joint Motion”). OPC filed an Errata to the Joint Movants’ Motion to Dismiss, or in the Alternative, Motion for Summary Disposition on April 15, 2024. This order references the OPC Errata to the OPC, DCG, and AOBA Joint Motion.

<sup>19</sup> *Formal Case No. 1176*, Response of Potomac Electric Power Company in Opposition to the Motion to Dismiss or, In the Alternative, Motion for Summary Disposition, filed March 22, 2024 (“Pepco Response to OPC, DCG, and AOBA Joint Motion”).

<sup>20</sup> *Formal Case No. 1176*, Office of the People’s Counsel for the District of Columbia’s Motion for Leave to Reply and Reply to the Potomac Electric Power Company’s Response in Opposition to the Motion to Dismiss or, in the Alternative, Motion for Summary Disposition, filed April 1, 2024.

<sup>21</sup> *Formal Case No. 1176*, Motion to Dismiss or, In the Alternative, Motion for Summary Disposition of the Office of the People’s Counsel for the District of Columbia and the Apartment and Office Building Association of Metropolitan Washington, filed June 10, 2024 (“OPC and AOBA Joint Motion”).

<sup>22</sup> *Formal Case No. 1176*, Response of Potomac Electric Power Company in Opposition to the Motion to Dismiss or, In the Alternative, Motion for Summary Disposition, filed June 17, 2024 (“Pepco Response to OPC and AOBA Joint Motion”).

three dates for an evidentiary hearing (if necessary).<sup>23</sup> On April 1, 2024, in Order No. 21976, the Commission granted OPC's Motion for Enlargement of Time and adopted a new procedural schedule.<sup>24</sup> The new procedural schedule noted that a "hearing (if necessary)" is "to be determined." On June 13, 2025, the Commission issued a notice announcing that it will convene a legislative-style hearing on July 30, 2024, to allow the Parties to present oral arguments regarding the issues they believe are fundamental to the Commission's decisions in this proceeding.<sup>25</sup> OPC filed a Motion to Suspend the Procedural Schedule and a Request for Clarification on the Commission's hearing notice, in part due to new and amended ROR filings by Pepco.<sup>26</sup> AOBA filed a letter supporting OPC's Motion to Suspend, arguing in part that Pepco's filings lack important documentation and explanation.<sup>27</sup> Pepco filed a response in opposition to OPC's Motion to Suspend.<sup>28</sup>

9. By Order No. 22013, the Commission granted OPC's Motion for Leave to Reply, denied the OPC, DCG, and AOBA Joint Motion to Dismiss or, In the Alternative, Motion for Summary Disposition, and denied in part, and granted in part the OPC and AOBA Joint Motion to Dismiss or, In the Alternative, Motion for Summary Disposition of the OPC and AOBA.<sup>29</sup> The Commission denied both motions stating that any dispositive motion necessarily raises issues of first impression that is more appropriately decided after the Commission has a more complete record. We indicated that the Commission had not decided on any issue of policy or law that undergird the motions, so the Parties were free to argue their case as they would have if no dispositive motion had been filed.<sup>30</sup> The Commission denied OPC's Motion to Suspend the Procedural Schedule and directed the Parties to appear at a hearing on July 30, 2024.<sup>31</sup> The Commission further advised the Parties to file pre-hearing briefs; conformed testimony and exhibits; admission of stipulated testimony, exhibits, data requests, and data responses; and post-hearing briefs to complete the record.<sup>32</sup>

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<sup>23</sup> *Formal Case No. 1176*, OPC March 12, 2024 Motion for Enlargement of Time, Attachment A (Proposed Schedule).

<sup>24</sup> *Formal Case No. 1176*, Order No. 21976 at Attachment A.

<sup>25</sup> *Formal Case No. 1176*, Notice of Legislative-Style Hearing, rel. June 13, 2024.

<sup>26</sup> *Formal Case No. 1176*, The Office of the People's Counsel for the District of Columbia's Motion to Suspend the Procedural Schedule and Request Clarification, filed June 24, 2024.

<sup>27</sup> *Formal Case No. 1176*, The Office of the People's Counsel for the District of Columbia's Motion to Suspend the Procedural Schedule and Request Clarification, filed June 24, 2024.

<sup>28</sup> *Formal Case No. 1176*, Response of Potomac Electric Power Company in Opposition to Motion to Suspend the Procedural Schedule and Request Clarification, filed June 26, 2024.

<sup>29</sup> *Formal Case No. 1176*, Order No. 22013, ¶ 28, rel. June 28, 2024 ("Order No. 22013").

<sup>30</sup> *Formal Case No. 1176*, Order No. 22013, ¶ 28.

<sup>31</sup> *Formal Case No. 1176*, Order No. 22013, ¶ 30.

<sup>32</sup> *See Formal Case No. 1176*, Order No. 22013, Attachment A.

10. OPC, Pepco, AOBA, and DCG filed pre-hearing briefs while GSA filed a letter.<sup>33</sup> The Commission held the hearing on July 30, 2024.<sup>34</sup> GSA, Pepco, OPC, AOBA, and DCG filed their post-hearing briefs.<sup>35</sup> OPC filed a Motion to Exclude the Atrium Economics Audit Report.<sup>36</sup> Pepco filed a Response in Opposition to OPC's Motion.<sup>37</sup>

11. All Parties submitted conformed pre-filed testimony and exhibits, as directed.<sup>38</sup> Pepco moved for the admission of the testimonies and exhibits the Company filed in this proceeding into evidence when it filed the conformed pre-filed testimony.<sup>39</sup> AOBA requested that its Conformed Direct Testimony, Conformed Surrebuttal Testimony, and Attachment A to AOBA's Limited Brief be admitted into the record<sup>40</sup> AOBA indicated that it could not stipulate to the admission of any of Pepco's filed testimony, exhibits, data requests, and responses in the absence

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<sup>33</sup> *Formal Case No. 1176*, Office of the People's Counsel for the District of Columbia's Pre-Hearing Brief, filed July 24, 2024; *Formal Case No. 1176*, Potomac Electric Power Company's Limited Brief on Fundamental Issues, filed July 24, 2024; *Formal Case No. 1176*, Apartment and Office Building Association's Limited Brief, filed July 24, 2024; *Formal Case No. 1176*, District of Columbia Government's Limited Pre-Hearing Brief, filed July 24, 2024; *Formal Case No. 1176*, United States General Services Administration Letter, filed July 24, 2024.

<sup>34</sup> *Formal Case No. 1176*, Transcript of Legislative Style Hearing, filed August 5, 2024.

<sup>35</sup> *Formal Case No. 1176*, Office of the People's Counsel for the District of Columbia's Post-Legislative-Style Hearing Brief, filed August 30, 2024; *Formal Case No. 1176*, Potomac Electric Power Company's Post-Legislative-Style Hearing Brief, filed August 30, 2024; *Formal Case No. 1176*, Apartment and Office Building Association's Post-Legislative-Style Hearing Brief, filed August 30, 2024; *Formal Case No. 1176*, District of Columbia Government's Post-Legislative-Style Hearing Brief, filed September 3, 2024; *Formal Case No. 1176*, United States General Services Administration's Post-Legislative-Style Hearing Brief, filed August 30, 2024.

<sup>36</sup> *Formal Case No. 1176*, Office of People's Counsel for the District of Columbia's Motion to Exclude the Atrium Economics Audit Report, filed September 17, 2024.

<sup>37</sup> *Formal Case No. 1176*, Response of Potomac Electric Power Company in Opposition to OPC's Motion to Exclude the Atrium Economics Audit Report, filed September 27, 2024.

<sup>38</sup> *Formal Case No. 1176*, Apartment and Office Building Association of Metropolitan Washington's Fully Conformed Direct Testimony of Bruce Oliver and Timothy Oliver, filed August 12, 2024; *Formal Case No. 1176*, Apartment and Office Building Association of Metropolitan Washington's Fully Conformed Surrebuttal Testimony of Bruce Oliver and Timothy Oliver, filed August 12, 2024; *Formal Case No. 1176*, United States General Services Administration's Conformed Rebuttal Testimony of Dr. Dennis Goins, filed August 12, 2024; *Formal Case No. 1176*, Potomac Electric Power Company's Direct Testimony, filed August 12, 2024; *Formal Case No. 1176*, Potomac Electric Power Company's Supplemental Direct Testimony, filed August 12, 2024; *Formal Case No. 1176*, Potomac Electric Power Company's Rebuttal Testimony, filed August 12, 2024; *Formal Case No. 1176*, Office of the People's Counsel for the District of Columbia's Conformed Direct Testimony, filed August 12, 2024; *Formal Case No. 1176*, Office of the People's Counsel for the District of Columbia's Conformed Surrebuttal Testimony, filed August 12, 2024; *Formal Case No. 1176*, District of Columbia Government Fully Conformed Direct Testimony of Courtney Lane, filed August 12, 2024; *Formal Case No. 1176*, District of Columbia Government Fully Conformed Surrebuttal Testimony of Courtney Lane, filed August 12, 2024.

<sup>39</sup> *Formal Case No. 1176*, Letter from Dennis P. Jamouneau to Brinda Westbrook-Sedgwick, filed August 20, 2024.

<sup>40</sup> *Formal Case No. 1176*, The Apartment and Office Building Association of Metropolitan Washington Testimony, Exhibits, Data Requests, and Data Responses at 2-3, filed August 21, 2024.

of opportunity to cross-examine Pepco witnesses.<sup>41</sup> GSA requested the admission of its Conformed Rebuttal Testimony into the record in this proceeding.<sup>42</sup> Without specifying which Pepco filings OPC was referring to, OPC indicated that it could not stipulate to the testimony and corresponding exhibits of Pepco's witnesses and noted that these filings contain unexplained and contradictory data that is stale and conflicts with subsequent filings submitted by the Company.<sup>43</sup> The District Government requested the Commission admit its Direct and Surrebuttal Testimonies and Exhibits into evidence.<sup>44</sup> GSA, Pepco, OPC, AOBA, and the District Government filed post-hearing briefs.<sup>45</sup> The Commission has previously explained that the record closes when the post-hearing briefs are filed.<sup>46</sup> The Commission accepted the Parties' pre-filed testimony and exhibits and admitted the Parties' responses to data requests into evidence.<sup>47</sup>

12. In Order No. 22328, the Commission approved a *Formal Case No. 1176* Modified MRP Extended Pilot, which authorized Pepco to increase its electric distribution rates during a two-year term with a revenue requirement of \$99.7 million in 2025 and \$23.7 million in 2026 for a cumulative revenue requirement increase of \$123.4 million over two years.<sup>48</sup> The Commission's decision reduced Pepco's proposed ROE and ROR. The Commission's decision included a \$211 million downward adjustment of Pepco's proposed 2025 and 2026 capital expenditures, downward adjustments of Pepco's proposed Net Rate Base for 2025 and 2026, and downward adjustments to the Company's proposed 2025 and 2026 operations and maintenance ("O&M") expenses.<sup>49</sup> The Commission also (1) established an automatic rate credit to be issued to ratepayers for any over-earning above the authorized ROE of 9.5% by the Company at the end of the 2-year MRP period;

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<sup>41</sup> *Formal Case No. 1176*, The Apartment and Office Building Association of Metropolitan Washington Testimony, Exhibits, Data Requests, and Data Responses at 3. AOBA indicated AOBA cannot stipulate to the admission of any document that has been provided only in electronic format, and it cannot stipulate to the admission of any data request response that has been provided without a named sponsor who can be cross-examined regarding the content of the response.

<sup>42</sup> *Formal Case No. 1176*, The United States General Services Administration's Request for Admission of Testimony and Exhibits, filed August 21, 2024.

<sup>43</sup> *Formal Case No. 1176*, Letter from Ankush Nayar to Brinda Westbrook-Sedgwick, filed August 21, 2024.

<sup>44</sup> *Formal Case No. 1176*, District of Columbia Government's Motion to Admit Testimonies and Exhibits, filed August 21, 2024.

<sup>45</sup> *Formal Case No. 1176*, Post-Legislative-Style Hearing Brief of the United States General Services Administration, filed August 30, 2024; *Formal Case No. 1176*, Post-Legislative-Style Hearing Brief of Potomac Electric Power Company, filed August 30, 2024; *Formal Case No. 1176*, Post-Legislative-Style Hearing Brief of the Office of the People's Counsel for the District of Columbia, filed August 30, 2024; *Formal Case No. 1176*, Post-Legislative-Style Hearing Brief of the Apartment and Office Building Association of Metropolitan Washington, filed August 30, 2024; *Formal Case No. 1176*, District of Columbia Government's Post-Legislative-Style Hearing, filed September 3, 2024.

<sup>46</sup> See *Formal Case No. 1169*, Order No. 21939, ¶ 19, rel. December 22, 2023. If the parties were unclear as to the formal closure of the record in this case, they could have requested clarity from the Commission.

<sup>47</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 26.

<sup>48</sup> *Formal Case No. 1176*, Order No. 22328, rel. November 26, 2024.

<sup>49</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 7.

(2) established a separate bill line item for the Bill Stabilization Adjustment (“BSA”) surcharge, an annual BSA reconciliation filing, and established BSA class revenue targets; (3) established a BSA Working Group to discuss future decoupling mechanism improvements; (4) required Pepco to write off and reduce the existing BSA GT-LV deferral balance by \$15.3 million due to Pepco’s prior BSA demand billing determinant error; (5) ordered the removal and placement of \$39.7 million from the existing GT-LV BSA deferral balance due to COVID-19-related lost energy sales into a regulatory asset; (6) required that Pepco continue making the quarterly ROR compliance filings; (7) required that Pepco make a compliance filing providing an updated filing on capital additions and O&M expenses projections for 2023 and 2024; (8) established a formal MRP Lessons Learned proceeding and a Lessons Learned Working Group to evaluate the overall performance and effectiveness of the *Formal Case No. 1176* Modified MRP Extended Pilot; (9) required Pepco to undergo a two-phase independent management audit; and (10) preclude Pepco from filing another MRP application until the Lessons Learned proceeding concludes.<sup>50</sup>

13. AOBA filed an Application for Reconsideration of Order No. 22328.<sup>51</sup> OPC filed an Application for Reconsideration and Request for Clarification.<sup>52</sup> Pepco notified the Commission, pursuant to D.C. Code § 34-604(b), that it consented to Order No. 22328 not being stayed.<sup>53</sup> Pepco filed a response addressing AOBA’s Application for Reconsideration and OPC’s Application for Reconsideration and Request for Clarification.<sup>54</sup>

### III. DISCUSSION

#### A. **Standard of Review**

14. D.C. Code § 34-604(b) states in pertinent part:

Any public utility or any other person or corporation affected by any final order or decision of the Commission may, within 30 days after the publication thereof, file with the Commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration.<sup>55</sup>

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<sup>50</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 8.

<sup>51</sup> *Formal Case No. 1176*, Apartment and Office Building Association of Metropolitan Washington’s Application for Reconsideration of Order No. 22328, filed December 26, 2024 (“AOBA Application”).

<sup>52</sup> *Formal Case No. 1176*, Office of the People’s Counsel for the District of Columbia’s Application for Reconsideration and Request for Clarification, filed December 26, 2024 (“OPC Application”).

<sup>53</sup> *Formal Case No. 1176*, Potomac Electric Power Company Notification of Consent Not to Stay Order No. 22328, filed December 27, 2024.

<sup>54</sup> *Formal Case No. 1176*, Response of Potomac Electric Power Company to the Applications for Reconsideration and Request for Clarification of the Office of the People’s Counsel and the Apartment and Office Building Association of Metropolitan Washington, filed January 3, 2025 (“Pepco Response”).

<sup>55</sup> D.C. Code § 34-604(b) (2001).

15. The standards governing applications for reconsideration of Commission orders are well-settled. The sole purpose of a petition for reconsideration is to identify errors of law or fact in the Commission's initial order so that they can be corrected. It is not a vehicle for losing parties to rehash arguments that were earlier considered and rejected.<sup>56</sup> Nor is it an occasion to raise new issues for the first time that, with due diligence, could have been raised and addressed earlier in the case.<sup>57</sup> If there is substantial evidence to support the Commission's initial decision, that decision is not erroneous simply because there is substantial evidence that could have supported a contrary conclusion.<sup>58</sup> The party seeking reconsideration must state "specifically the errors claimed as grounds for such reconsideration."<sup>59</sup> The party seeking reconsideration bears the burden of showing that the challenged portions of the Order were "unreasonable, arbitrary, or capricious by demonstrating clearly and convincingly a fatal flaw in the action taken."<sup>60</sup> The Commission enjoys wide discretion on the issues that come before it. On a petition for reconsideration, the Commission may use this discretion to reconsider or clarify the findings and conclusions that appear in its initial decision.<sup>61</sup>

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<sup>56</sup> *Formal Case No. 1137, In the Matter of the Application of Washington Gas Light Company for Authority to Increase Existing Rates and Charges for Gas Service*, Order No. 18768, ¶ 5, rel. May 12, 2017 (footnotes omitted). *See also, Formal Case No. 1093, In the Matter of the Investigation into the Reasonableness of Washington Gas Light Company's Existing Rates and Charges for Gas Service*, Order No. 16894, ¶ 3, rel. September 7, 2012.

<sup>57</sup> *Formal Case No. 1139, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 19130, ¶ 4, rel. October 6, 2017.

<sup>58</sup> *Formal Case No. 945*, Order No. 15883, ¶ 8, rel. July 16, 2010, citing *Formal Case No. 1053*, Order No. 14832, rel. June 13, 2008 (citing *State of New York v. United States*, 880 F. Supp. 37 (D.D.C. 1995) and *Washington Gas Light Company v. District of Columbia Public Service Commission*, 856 A.2d 1098, 1104 (D.C. 2004)).

<sup>59</sup> D.C. Code Ann. § 34-604(b) (2001).

<sup>60</sup> *Formal Case No. 1144, In the Matter of the Potomac Electric Power Company's Notice to Construct Two 230kV Underground Circuits from the Takoma Substation to the Rebuilt Harvard Substation, and from the Rebuilt Harvard Substation to the Rebuilt Champlain Substation*, Order No. 20235, ¶ 9, rel. October 11, 2019. *See also*, D.C. Code § 34-606 (2001). *Bell Atl. Washington, D.C., Inc. v. Pub. Serv. Comm'n*, 655 A.2d 1231, 1233 (D.C. 1995).

<sup>61</sup> *See, e.g.*, D.C. Code § 34-604(b) (2001); *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction*, Order No. 18243, ¶¶ 20-21, rel. June 17, 2016; *Formal Case No. 1103, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 17539, ¶ 4, rel. July 10, 2014.



**B. AOBA and OPC's Application for Reconsideration-Hearing Requirement**

16. **AOBA.** AOBA argues that the procedural mechanisms the Commission utilized, including the absence of opportunity to cross-examine evidence provided by opposing witnesses, violate due process as established by D.C. Code § 2-509(b) and failed to provide for the development of an evidentiary record to serve as the basis for the Commission's determinations.<sup>62</sup> According to AOBA, the parties must be permitted to offer sworn initial and rebuttal testimony subject to cross-examination at a formal evidentiary hearing.<sup>63</sup>

17. **OPC.** OPC argues that the Commission is required by statute to hold an evidentiary hearing, although acknowledging that a hearing is not required where there are no issues of material facts in dispute if the necessary inferences and legal conclusions can be drawn from facts already established or the only issues are policy concerns.<sup>64</sup> OPC asserts that this legal standard requires the Commission to consider the facts and circumstances of each case in determining whether it is appropriate to apply this legal standard and not avoid evidentiary hearings.<sup>65</sup> The Office acknowledges the applicability of *Watergate E. v. D.C. Pub. Serv. Comm'n*, cited by the Commission in Order No. 22328 to support its decision not to hold an evidentiary hearing, but the Office contends that the issue is how that legal standard should be applied based on the facts and circumstances of this case.<sup>66</sup>

18. OPC states that the Commission cites numerous factual issues, disagreements, and differences involving testimony by competing experts from different stakeholders on various issues in the case and asserts that differing opinions between experts are insufficient to establish a dispute over an issue of material fact.<sup>67</sup> OPC argues that the Commission does not analyze the issues and failed to explain why it did not have an evidentiary hearing even as Order No. 22328 provides factual disputes that warrant a hearing.<sup>68</sup> OPC argues that Order No. 22328 does not indicate the facts established nor the specific inferences and legal conclusions the Commission drew that justified depriving parties of their right to an evidentiary hearing.<sup>69</sup>

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<sup>62</sup> *Formal Case No. 1176*, AOBA Application at 9-10.

<sup>63</sup> *Formal Case No. 1176*, AOBA Application at 10-12.

<sup>64</sup> *Formal Case No. 1176*, OPC Application at 16-17, 19, 21-22 (citations omitted).

<sup>65</sup> *Formal Case No. 1176*, OPC Application at 17.

<sup>66</sup> *Formal Case No. 1176*, OPC Application at 18-19, 23 (citing *Watergate E. v. D.C. Pub. Serv. Comm'n*, 662 A.2d 881, 886 (D.C. 1995)). OPC argues that the *Watergate* decision is factually distinct from this case because it focused on interpreting an order issued in a rate case and whether the new rate for service to the Watergate Hotel was triggered by Washington Gas Light Company filing a tariff amendment approved by a Commission order.

<sup>67</sup> *Formal Case No. 1176*, OPC Application at 17 and 19 (citations omitted).

<sup>68</sup> *Formal Case No. 1176*, OPC Application at 15-16.

<sup>69</sup> *Formal Case No. 1176*, OPC Application at 19.

19. OPC argues that the Commission erred by determining the merits in this contested case without convening an evidentiary hearing.<sup>70</sup> OPC argues that the Commission's failure to hold an evidentiary hearing deprived the parties of the opportunity to challenge the facts and conclusions that formed the basis of Order No. 22328, thereby infringing on procedural due process rights.<sup>71</sup> The Office contends that due to the failure to hold an evidentiary hearing, there is no exclusive record supporting the findings and conclusions in Order No. 22328 with substantial evidence.<sup>72</sup> OPC further contends that the failure to allow the parties to present and challenge evidence at an evidentiary hearing violates constitutional due process.<sup>73</sup>

20. OPC further contends that the Commission erred in stating that the two dispositive motions filed in this case asserted that there were no issues of material fact in dispute.<sup>74</sup> OPC asserts that the parties advancing those dispositive motions ("Movants") argued that no disputed facts would preclude the Commission from dismissing or rejecting the MRP proposal on summary judgment, given Pepco's burden of proof and the inadequacy of the Company's MRP proposal.<sup>75</sup> According to the Office, the Movants indicated that an evidentiary hearing would be needed if neither dispositive motion were granted because the pre-filed submissions did not satisfy Pepco's burden of proof or support approval of its proposal.<sup>76</sup> OPC states that while the Commission could deny the MRP application based on the pre-filed submissions, Commission approval of the application would require additional process because the pre-filed submissions did not resolve disputed facts as to the specific amount of the rate increase, the rate plan structure, or the supposed benefits from the MRP proposal, among other issues.<sup>77</sup> The Office further contends that while OPC and AOBA were the only signatories to the two dispositive motions and the District Government was a signatory on the first dispositive motion, these parties do not represent all the other stakeholders in this case. OPC argues that because Pepco opposed both dispositive motions, it is not accurate to conclude that all parties agreed or stipulated that there were no issues of material fact in dispute.<sup>78</sup>

21. OPC further states that the Commission could not admit pre-filed written testimonies and exhibits, as well as data requests and responses filed by the parties, into the exclusive record without a formal hearing because the written testimonies and exhibits cited in

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<sup>70</sup> *Formal Case No. 1176*, OPC Application at 4, 10, 15-20.

<sup>71</sup> *Formal Case No. 1176*, OPC Application at 15.

<sup>72</sup> *Formal Case No. 1176*, OPC Application at 22-24.

<sup>73</sup> *Formal Case No. 1176*, OPC Application at 20-22.

<sup>74</sup> *Formal Case No. 1176*, OPC Application at 19.

<sup>75</sup> *Formal Case No. 1176*, OPC Application at 19.

<sup>76</sup> *Formal Case No. 1176*, OPC Application at 19-20.

<sup>77</sup> *Formal Case No. 1176*, OPC Application at 19-20.

<sup>78</sup> *Formal Case No. 1176*, OPC Application at 20.

Order No. 22328 do not constitute evidence in an exclusive record that the Commission can rely on in support of Order No. 22328 on judicial review.<sup>79</sup>

22. OPC contends that the Commission reached a merits determination in Pepco's favor without holding the evidentiary hearing required by statute to address material disputes. The Office states there was no applicable exception for this requirement or any meaningful articulation as to why the evidentiary hearing was not held. Therefore, Order No. 22328 is arbitrary, capricious, and not in accordance with the law.<sup>80</sup>

23. **Pepco Response.** Pepco opposes AOBA and OPC's requests for reconsideration and clarification asserting that their applications fail to meet the applicable standard of review and should be denied.<sup>81</sup> Generally, Pepco asserts that AOBA and OPC improperly re-argue matters previously raised and addressed by the Commission and fail to identify errors of law, resulting in a fatal flaw in the Commission's decision.<sup>82</sup>

24. Pepco asserts, contrary to AOBA and OPC's assertion, the Commission did not err by not holding an evidentiary hearing. Pepco explains that the Commission already considered and rejected this procedural argument in Order No. 22013, wherein the Commission denied OPC's Motion to Suspend the Procedural Schedule and "indicated that it would convene a [ ] hearing on July 30, 2024, at which the parties could present oral argument on relevant legal and policy issues that the Parties believe are fundamental to the Commission's decision in this proceeding."<sup>83</sup> Additionally, as Pepco asserts, the Commission allowed the Parties to submit pre- and post-hearing briefs and notified them that it would hold an evidentiary hearing if it determined one was needed after the July 30<sup>th</sup> hearing.<sup>84</sup>

25. Pepco notes that OPC references process provided in *Formal Case No. 1169* as a basis for requiring a hearing in this proceeding, even though the Commission did not hold an evidentiary hearing in *Formal Case No. 1169*.<sup>85</sup> Furthermore, Pepco asserts that "[b]ecause the decision to hold or not hold an evidentiary hearing is procedural in nature, it is not an appropriate

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<sup>79</sup> *Formal Case No. 1176*, OPC Application at 23.

<sup>80</sup> *Formal Case No. 1176*, OPC Application at 20.

<sup>81</sup> *Formal Case No. 1176*, Response of Potomac Electric Power Company to the Applications for Reconsideration and Clarification of the Office of the People's Counsel and the Apartment and Office Building Association of Metropolitan Washington ("Pepco Response") at 2, filed January 3, 2025. Pursuant to D.C. Code Section 34-604(b) (2001), on December 27, 2024, Pepco consented to Order No. 22328 not being stayed. Pepco Response at 41-42.

<sup>82</sup> *Formal Case No. 1176*, Pepco Response at 2.

<sup>83</sup> *Formal Case No. 1176*, Pepco Response at 7-8. (internal quotations omitted).

<sup>84</sup> *Formal Case No. 1176*, Pepco Response at 8.

<sup>85</sup> *Formal Case No. 1176*, Pepco Response at 9.

subject for reconsideration.”<sup>86</sup>

26. Pepco also challenges AOBA and OPC’s assertion that a formal evidentiary hearing was required in this proceeding. AOBA asserts that the decision in *Mail Order Ass’n of America v. U.S. Postal Service* requires a formal hearing in every rate case proceeding; however, Pepco counters that the Commission rejected this argument in *Formal Case No. 1156*, wherein the Commission stated that a formal hearing “would clearly be warranted if there are disputed issues of material fact;” otherwise, the process due is determined by what is “required for a full and true disclosure of the facts.”<sup>87</sup> Pepco asserts that “[a]fter looking at the record before it in this proceeding, the Commission found that there was no need for a formal evidentiary hearing in this instance.”<sup>88</sup> Pepco similarly asserts that OPC’s reliance on *Watergate East* is misplaced because the Court clearly held that even when an agency is required to hold a formal evidentiary hearing by statute or by the Constitution, “it need do so only if there exists a dispute concerning a material fact” and that it “is never required if the only disputes involve issues of law or policy.”<sup>89</sup> Pepco notes that following multiple rounds of testimony and discovery, “OPC and AOBA filed two joint motions seeking summary disposition of the Company’s Application [asserting] that there were *no issues of material fact in dispute*.”<sup>90</sup>

27. Pepco also deems baseless OPC’s assertion that due to the lack of a formal evidentiary hearing, the Commission erred in approving various ratemaking adjustments (“RMAs”) as uncontested, adjustments that “OPC claims the parties would have contested [ ] at a hearing or on briefs.”<sup>91</sup> Pepco asserts that the “items the Commission found to be uncontested involved issues or adjustments for which the other parties had presented no evidence challenging Pepco’s position.”<sup>92</sup> Pepco emphasizes that precedent dictates that “utilities seeking a rate increase are not required to demonstrate in their case-in-chief that all expenditures were prudent. . . . However, where some other participant in the proceeding creates serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the

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<sup>86</sup> *Formal Case No. 1176*, Pepco Response at 10 (citing *Formal Case No. 1162, In the Matter of the Application of Washington Gas Light Company for Authority to Increase Existing Rates and Charges for Gas Service*, Order No. 20369, ¶ 19, rel. June 17, 2020).

<sup>87</sup> *Formal Case No. 1176*, Pepco Response at 10 (citing *Formal Case No. 1156, In the Matter of the Application of Potomac Electric Power Company for Authority to Implement a Multiyear Rate Plan for Electric Distribution Service in the District of Columbia* (“*Formal Case No. 1156*”), Order No. 21042 at ¶ 135, rel. October 26, 2021).

<sup>88</sup> *Formal Case No. 1176, Formal Case No. 1176*, Pepco Response at 11.

<sup>89</sup> *Formal Case No. 1176*, Pepco Response at 11-12 (citing *Watergate East* at 890 (quoting 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994))).

<sup>90</sup> *Formal Case No. 1176*, Pepco Response at 17 (emphasis in the original).

<sup>91</sup> *Formal Case No. 1176*, Pepco Response at 25.

<sup>92</sup> *Formal Case No. 1176*, Pepco Response at 25.

questioned expenditure to have been prudent.”<sup>93</sup> Pepco concludes that the parties did not submit testimony on these items nor dispute them on brief; therefore, they failed to “create a serious doubt” as to the prudence of the adjustments.<sup>94</sup>

### **Decision on Hearing Requirement**

28. D.C. Code § 34-908 provides that in contested cases, “no order affecting [ ] rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the Commission without a formal hearing.”<sup>95</sup> The D.C. Administrative Procedures Act (“DCAPA”) provides that in contested cases, “[e]very party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination *as may be required for a full and true disclosure of the facts.*”<sup>96</sup>

29. However, the D.C. Court of Appeals has ruled that a formal hearing (and thus the opportunity to cross-examine witnesses) is not required “where no material facts are in dispute or where the disposition of claims turns not on the determination of facts, but inferences and legal conclusions to be derived from facts already established or inferences to be drawn or issues of policy or law and not a determination of facts.”<sup>97</sup> The Commission has recognized that “a factual issue is ‘genuine’ if it is not capable of being conclusively foreclosed by reference to undisputed facts [and] a fact is ‘material’ when its existence facilitates the resolution of an issue” material to the outcome of the case.”<sup>98</sup> If a dispute about whether a matter is true or false and it is material to the Commission’s decision, it may rise to a genuine issue of material fact in dispute, and an evidentiary hearing may be required.<sup>99</sup> However, there is little need for a formal hearing so each party can cross-examine a witness on their opinion or to allow the parties to determine whether a material fact exists.<sup>100</sup> The Commission can decide which witness opinion to credit based on the written testimony and exhibits.<sup>101</sup>

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<sup>93</sup> *Formal Case No. 1176*, Pepco Response at 26, citing *Anaheim, Riverside, Banning, Colton & Azusa, Cal. v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981).

<sup>94</sup> *Formal Case No. 1176*, Pepco Response at 26-27.

<sup>95</sup> D.C. Code § 34-908 (2001).

<sup>96</sup> D.C. Code Ann. § 2-509(b) (2001) (emphasis added).

<sup>97</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 21 (citing *Watergate East Inc. v. District of Columbia Public Service Commission*, 662 A.2d 881, 890 (D.C. 1995) (citing *Potomac Elec. Power Co. v. Public Serv. Comm’n*, 457 A.2d 776, 789 (D.C.1983)).

<sup>98</sup> *Formal Case No. 1169, In the Matter of the Application of Washington Gas Light Company for Authority to Increase Existing Rates and Charges for Gas Service* (“*Formal Case No. 1169*”), Order No. 21582, ¶ 8, rel. March 14, 2023 (“Order No. 21582”).

<sup>99</sup> *Formal Case No. 1169*, Order No. 21885, ¶ 18, rel. July 27, 2023.

<sup>100</sup> *Formal Case No. 1169*, Order No. 21582, ¶ 9.

<sup>101</sup> *Formal Case No. 1169*, Order No. 21582, ¶ 9.

30. The Commission has previously determined that issues presented by parties, “such as those asking whether an issue is ‘proper,’ reasonable,’ ‘appropriate,’ ‘prudent,’ ‘justified,’ or ‘necessary’ involved a policy or legal judgment by the Commission” and that such issues “can be resolved by briefing without a hearing.”<sup>102</sup> Where the issue turns on the existence of the fact, “the response to those questions is a simple response that the fact is either present or absent,”<sup>103</sup> so “these inquiries do not present a material issue of fact in dispute.”<sup>104</sup> Where the issue turns on the accuracy of a fact, further testimony or data request responses can be entered into the record containing the necessary information to resolve these questions.<sup>105</sup> Whether a value is properly calculated or reflected in expenses, rate base, or RMAs raised a question of policy.<sup>106</sup> Policy judgments can be used to determine if incurred costs are “appropriate, properly calculated, [and] prudently incurred, and can be resolved without an evidentiary hearing.”<sup>107</sup>

31. Relevant to the applications for reconsideration before us, we note that OPC and AOBA initially joined DCG in asking the Commission to either dismiss the MRP proposal or grant summary judgment, stating “*there are no genuine issues of material fact in dispute* regarding Pepco’s failure to justify the adoption of its proposed MYP.”<sup>108</sup> In their joint motion for summary judgment, OPC, AOBA, and the District Government challenged the Commission to “identify each genuine issue of material fact that cannot be resolved at this stage of the case and distinguish factual issues from those issues the Commission deems to be issues of law or policy.”<sup>109</sup> While OPC contends that the Office, AOBA, and the District Government do not represent all the other stakeholders in this case, no other parties identified disputed issues of material fact for the Commission’s consideration.

32. After repeatedly asserting that there are no disputed issues of material fact in their dispositive motions, AOBA and OPC now pivot asserting that the Commission should have conducted a hearing to resolve disputed issues of material fact. However, even now, AOBA and OPC have not articulated what disputed issues of material of fact exist. OPC raises two concerns regarding disputed issues of material fact: (1) Pepco’s rate base and the validity of Pepco’s

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<sup>102</sup> *Formal Case No.1169*, Order No. 21582, ¶ 10.

<sup>103</sup> *Formal Case No.1169*, Order No. 21582, ¶ 10.

<sup>104</sup> *Formal Case No.1169*, Order No. 21582, ¶ 10.

<sup>105</sup> *See Formal Case No.1169*, Order No. 21582, ¶ 28.

<sup>106</sup> *See Formal Case No.1169*, Order No. 21582, ¶ 28.

<sup>107</sup> *Formal Case No.1169*, Order No. 21582 at ¶ 36.

<sup>108</sup> *Formal Case No. 1176*, Motion to Dismiss or, in the Alternative, Motion for Summary Disposition of the Office of the People’s Counsel for the District of Columbia, District of Columbia Government, and the Apartment and Office Building Association of Metropolitan Washington at 26, filed March 12, 2024. (emphasis added).

<sup>109</sup> *Formal Case No. 1176*, Motion to Dismiss or, in the Alternative, Motion for Summary Disposition of the Office of the People’s Counsel for the District of Columbia, District of Columbia Government, and the Apartment and Office Building Association of Metropolitan Washington at 26.

June 2024 Quarterly Report;<sup>110</sup> and (2) facts concerning BGE's MRP pilot in Maryland.<sup>111</sup> Despite these issues being raised for the first time on reconsideration,<sup>112</sup> we note these concerns are not disputed issues of material facts. With respect to OPC's assertion that the Commission cited Pepco's June 2024 Quarterly Report to calculate rate base, this issue is one of policy. It is not a disputed fact because it seeks determinations of whether costs are appropriate, properly calculated, and prudently incurred that the Commission can decide without an evidentiary hearing.<sup>113</sup> Regarding the reference to BGE's MRP in Maryland raised during the July 30 hearing, it is factually undisputed that the Maryland Public Service Commission ("Maryland PSC") has approved an MRP for BGE. Consequently, OPC failed to raise an issue of material fact in dispute. AOBA's concerns regarding "the factual correctness" of Pepco's testimony and exhibits is a policy issue. Further testimony or data request responses were entered into the record containing the necessary information to resolve these questions.<sup>114</sup> Thus, these concerns do not present a material issue of fact in dispute.

33. In their applications for reconsideration, neither OPC nor AOBA demonstrates that they are unduly prejudiced by the Commission's admission of all the Parties' pre-filed testimony, exhibits, and responses to data requests into the evidentiary record, nor do they identify any portion of these filings to which they object.

34. AOBA's and OPC's prior contention in their joint motion that Pepco's application did not present genuine material issues of fact undermines their argument on reconsideration of Order No. 22328 that an evidentiary hearing is now required, especially in light of their failure to identify any disputed material issues of fact that would require such a hearing.

35. Here, the Commission found a non-evidentiary hearing to be sufficient. In *United States v. Pub. Serv. Comm'n of D.C.*, a previous administrative decision where the Commission opted to use a legislative-style hearing in lieu of an evidentiary hearing, the Commission allowed GSA "to submit pre-filed and supplemental testimony and to conduct discovery."<sup>115</sup> The Commission noted that "it was not until filing an application for reconsideration of the approved settlement agreement that GSA identified 21 specific issues for consideration."<sup>116</sup> The Commission further noted, in denying GSA's reconsideration petition, that "GSA has yet to enunciate what it hoped to accomplish had the Commission allowed further cross-examination on

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<sup>110</sup> *Formal Case No. 1176*, OPC Application at 7, 11, 24-25.

<sup>111</sup> *Formal Case No. 1176*, OPC Application at 24-25.

<sup>112</sup> *See Formal Case No. 1139*, Order No. 19130, ¶ 4 (petition for reconsideration is not an occasion to raise new issues for the first time that, with due diligence, could have been raised and addressed earlier in the case).

<sup>113</sup> *Formal Case No. 1169*, Order No. 21582, ¶ 36.

<sup>114</sup> *See Formal Case No. 1169*, Order No. 21582, ¶ 28.

<sup>115</sup> *United States v. Pub. Serv. Comm'n of D.C.*, 465 A.2d 829 (D.C. 1983).

<sup>116</sup> *United States v. Pub. Serv. Comm'n of D.C.*, 465 A.2d at 833.

its submitted list of “unresolved major issues.”<sup>117</sup> The procedural fact scenario in this proceeding is similar to the GSA case. Here, the Commission allowed the parties to submit pre-hearing and post-hearing briefs<sup>118</sup>, and OPC’s application lacks a detailed and specific application of the law to the facts of the case. Thus, AOBA and OPC’s application suffers from the same ailments as GSA’s application in *United States v. Pub. Serv. Comm’n of D.C.* Accordingly, the Commission denies reconsideration on whether an evidentiary hearing is required.

### C. OPC’s Application for Reconsideration - Constitutional Due Process and Official Notice

#### 1. Constitutional Due Process

36. **OPC.** OPC contends that Order No. 22328 results from procedural errors that led to findings of fact and conclusions of law unsupported by substantial evidence, resulting in a Commission decision that is arbitrary, capricious, and not in accordance with the law.<sup>119</sup> Thus, according to OPC, the Parties were deprived of the opportunity to challenge the facts and conclusions that formed the basis of Order No. 22328, infringing on the Parties’ procedural due process rights.<sup>120</sup> OPC argues that utility services have been recognized as a protected property interest for ratepayers such that there are procedural protections for the administration of utility service.<sup>121</sup> OPC argues that where state laws prohibit a utility from terminating its service to customers without cause, there is a “‘legitimate claim of entitlement’ under the protection of the Due Process Clause.”<sup>122</sup> OPC further contends that the Commission must approve a utility’s application to increase rates only after holding an evidentiary hearing for which notice has been provided.<sup>123</sup> OPC contends that the Commission was required to convene a trial-type hearing to afford the parties the right to present and challenge evidence and cross-examine witnesses as needed for the full and true disclosure of the facts.<sup>124</sup> OPC argues that by not holding an evidentiary hearing the Commission “violated the [Constitutional] due process rights of ratepayers in the District of Columbia.”<sup>125</sup>

37. **Pepco.** Pepco asserts that the various process complaints raised by OPC do not

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<sup>117</sup> *United States v. Pub. Serv. Comm’n of D.C.*, 465 A.2d at 833.

<sup>118</sup> *Formal Case No. 1176*, Order No. 22013, ¶ 30.

<sup>119</sup> *Formal Case No. 1176*, OPC Application at 3-4, 10, 15-20.

<sup>120</sup> *Formal Case No. 1176*, OPC Application at 15.

<sup>121</sup> *Formal Case No. 1176*, OPC Application at 21.

<sup>122</sup> *Formal Case No. 1176*, OPC Application at 21 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (citations omitted)).

<sup>123</sup> *Formal Case No. 1176*, OPC Application at 21.

<sup>124</sup> *Formal Case No. 1176*, OPC Application at 21-22 (citing *Price v. D.C. Bd. of Ethics & Gov’t Accountability*, 212 A.3d 841 (D.C. 2019)).

<sup>125</sup> *Formal Case No. 1176*, OPC Application at 22.



warrant reconsideration. OPC asserts that certain processes ordered by the Commission will “increase, rather than decrease, regulatory burdens on the Commission and parties.”<sup>126</sup> Pepco counterargues that the Commission “struck the appropriate balance among the competing interests in this proceeding by permitting the Company to continue to operate under an MRP while ensuring that this second pilot will allow interested parties and the Commission to assess lessons learned, improve transparency into the process used in the MRP, and provide an independent evaluation of the Company’s performance.”<sup>127</sup>

### **Decision on Constitutional Due Process**

38. The Commission rejects OPC’s contention that Constitutional due process requires the Commission to hold a trial-like evidentiary hearing in utility rate proceedings. Initially, there are important differences between the due process requirements of the DCAPA and the requirements pertaining to constitutional due process. Whereas the DCAPA generally requires a formal hearing in contested cases, the constitutional requirements for procedural due process allow for less formal procedures under the circumstances of each individual case, given the relative weight of the interests at stake. While the DCAPA provides procedural requirements for District administrative agencies, the federal constitutional due process requirements also bind the agencies, the Commission, and all other state actors. However, through reference to “constitutional right” within the definition of “contested case,”<sup>128</sup> the DCAPA incorporates the constitutional due process requirements by reference.<sup>129</sup>

39. Fundamentally, procedural due process requires (1) notice and (2) an opportunity to be heard.<sup>130</sup> When considering how much process is due to satisfy Constitutional requirements, the Commission has applied the balancing test that the U.S. Supreme Court developed in *Mathews v. Eldridge*. The factors involved in the balancing test include: “(1) the private interest affected by the agency, (2) an evaluation of the agency’s procedures to determine if they will lead to an accurate result, and (3) the government’s interest in utilizing the existing procedures weighed against the fiscal and administrative burdens that it could conceivably encounter if new procedures are mandated.”<sup>131</sup>

40. The Court of Appeals has applied the *Mathews v. Eldridge* balancing test to the proceedings of other agencies. For example, the Court applied the test to the D.C. Board of

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<sup>126</sup> *Formal Case No. 1176*, Pepco Response at 31

<sup>127</sup> *Formal Case No. 1176*, Pepco Response at 32.

<sup>128</sup> D.C. Code Ann. § 2-502(8) (2001).

<sup>129</sup> *See e.g., Richard Milburn Pub. Charter Alternative High Sch. v. Cafritz*, 798 A.2d 531, 538-43 (D.C. 2002).

<sup>130</sup> *See e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“the fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.”) (internal citations omitted).

<sup>131</sup> *Formal Case No. 989, In the Matter of the Application of Washington Gas Light Company, District of Columbia Division, for Authority to Increase Existing Rates and Charges for Gas Service and Formal Case No. 874, In the Matter of the Gas Acquisition Strategies of Washington Gas Light Company, District of Columbia Division, Order No. 12379*, n.39, rel. April 12, 2002 (citing generally *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

Education, where the case involved revoking charters/licenses for charter schools.<sup>132</sup> The Court has also applied the test in a case against the District Department of Transportation in a *de facto* takings case.<sup>133</sup> Furthermore, the Court has employed the balancing test in a case against the District of Columbia Housing Authority,<sup>134</sup> the Traffic Adjudication Appeals Board,<sup>135</sup> the District of Columbia Historic Preservation Review Board,<sup>136</sup> the Alcoholic Beverage Control Board,<sup>137</sup> the District of Columbia Rental Housing Commission,<sup>138</sup> the Board of Elections & Ethics,<sup>139</sup> in guardianship cases,<sup>140</sup> and in custody cases.<sup>141</sup>

41. In *Formal Case No. 1017*, OPC requested an evidentiary hearing to allow stakeholders to address the issues more thoroughly. Still, other parties responded that it would have been an unnecessary forum to debate policy recommendations, causing resource exhaustion on the parties and unreasonable delay to the regulatory program, and that the Commission had not identified specific issues for the parties to address.<sup>142</sup> The Commission cited *Mathews v. Elridge* in denying OPC's request for an evidentiary hearing, stating:

The decision on whether to hold an evidentiary hearing is a matter within the Commission's discretion and driven largely by a consideration of whether a paper proceeding deprives the parties of due process. It is well-settled that due process is a flexible, rather than fixed, concept and requires only such procedural protections as the particular situation demands. The issues before us are primarily issues of policy, not issues of fact or credibility, and can adequately be addressed in writing as each commenter has done. Therefore, an evidentiary hearing is not necessary or useful at this time. Accordingly, we deny OPC's Motion Requesting a Full Evidentiary Hearing.<sup>143</sup>

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<sup>132</sup> See generally *Richard Milburn Pub. Charter Alternative High Sch. v. Cafritz*, 798 A.2d 531 (D.C. 2002).

<sup>133</sup> See generally *Potomac Dev. Corp. v. D.C.*, 28 A.3d 531 (D.C. 2011).

<sup>134</sup> See generally *Powell v. D.C. Hous. Auth.*, 818 A.2d 188 (D.C. 2003).

<sup>135</sup> See generally *DeVita v. D.C.*, 74 A.3d 714 (D.C. 2013).

<sup>136</sup> See generally *Donnelly Assocs. v. D.C. Historic Pres. Rev. Bd.*, 520 A.2d 270 (D.C. 1987).

<sup>137</sup> See generally *Gallothom, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 820 A.2d 530 (D.C. 2003).

<sup>138</sup> See generally *Jerome Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 682 A.2d 178 (D.C. 1996).

<sup>139</sup> See generally *Scolaro v. D.C. Bd. of Elections & Ethics*, 717 A.2d 891 (D.C. 1998).

<sup>140</sup> See e.g., generally *In re A.G.*, 900 A.2d 677 (D.C. 2006)

<sup>141</sup> See e.g., generally *Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2011)

<sup>142</sup> *Formal Case No. 1017, In the Matter of the Development and Designation of Standard Offer Service in the District of Columbia*, Order No. 18829, ¶ 8-9, rel. July 7, 2017 ("Order No. 18829").

<sup>143</sup> *Formal Case No. 1017*, Order No. 18829 at ¶ 10 (internal citations omitted).

42. The Commission has satisfied the Constitutional requirements of procedural due process under the *Mathews v. Eldridge* balancing test. First, the Commission has appropriately balanced the private interests at stake in this proceeding: AOBA and OPC's interests in ensuring that the rates for consumers are just and reasonable and not excessive or unduly burdensome, and Pepco's interests in regulatory certainty and in receiving a rate that allows it an opportunity to realize a reasonable return for the Company's investors. The decision in Order No. 22328 effectuates the Commission's mission to serve the public interest by balancing the interests of Pepco and its shareholders, customers, and District residents in determining that the rate decision is just and reasonable.<sup>144</sup>

43. Regarding the second *Mathews v. Elridge* factor, there is not a significant risk of erroneous deprivation to the Parties and little, if any, probable value in additional safeguards. The Commission allowed the Parties to submit pre- and post-hearing filings and provided ample time to develop testimony and conduct discovery. The Parties filed dispositive motions and could have made hearing requests at any time. These steps of the proceeding gave the Parties ample opportunities to be heard, as evidenced by the thousands of pages of testimony in the record of this proceeding. There is further evidence of a sufficient opportunity to be heard because the Commission enlarged the procedural schedule and provided more time for testimony and discovery in April 2024. To the extent that AOBA and OPC want to cross-examine Pepco's witnesses on their opinion or to allow the parties to determine whether a material fact exists, they were free to do so through discovery.<sup>145</sup> The Commission can decide which witness opinion to credit based on the written testimony and exhibits.<sup>146</sup> Therefore, it is unclear how effective a hearing would be and what additional probable value would result. The Commission employed its discretion to reasonably determine the amount of process that was appropriate for this case.

44. Finally, the Commission's interest includes the costs and resources needed to hold a hearing and our interest in finality when the Commission can render a decision based on the pre-filed testimony and exhibits submitted by the Parties. We reiterate our aim for operational efficiency without needlessly exhausting the Commission and the Parties' resources in an evidentiary hearing that would unlikely produce additional helpful information for the Commission to render a decision supported by substantial evidence.<sup>147</sup> In conclusion, the Commission has balanced the relative weights of the private interests, the lack of probable value in additional procedural safeguards, and the Commission's administrative and financial interests to determine that the process provided in this proceeding was sufficient to meet the constitutional requirements of due process.

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<sup>144</sup> See *Formal Case No. 1176*, Order No. 22328, ¶¶ 10, 12.

<sup>145</sup> *Formal Case No. 1169*, Order No. 21582, ¶ 9.

<sup>146</sup> *Formal Case No. 1169*, Order No. 21582, ¶ 9.

<sup>147</sup> See *Formal Case No. 1169*, Order No. 21582, ¶ 6 (explaining the Commission's ongoing efforts to establish "a more efficient process" for handling rate cases).

45. The Commission has the discretion to hold an additional hearing and to determine that the hearing is not necessary. In accordance with the *FCC v. Schreiber* and *Vermont Yankee* precedents, as well as the D.C. Court of Appeals precedent applying the federal cases, the Court does not impose additional procedural requirements on the agency when the constitutional requirements of procedural due process have been satisfied.<sup>148</sup>

## 2. Official Notice

46. **OPC.** OPC argues that the Commission erred by taking official notice to adopt disputed facts from questionable sources.<sup>149</sup> The Office contends that the Commission made findings from outside of the purported record in an attempt to support its decision and did so erroneously by using official notice to adopt facts of questionable accuracy that pertained directly to disputed issues in this case. Specifically, OPC asserts the Commission took official notice of Pepco's June Quarterly Report as well as the adoption of statements at the July 30th hearing, made by Pepco's counsel, regarding the adoption of Baltimore Gas and Electric's ("BGE") MRP Pilot in Maryland.<sup>150</sup> OPC contends that the Commission took notice of financial data in Pepco's June Quarterly Report to make projections about Pepco's future rate base, which the Office finds concerning because Pepco filed an errata to its previous quarterly report containing financial errors.<sup>151</sup> OPC also contends that the Commission impermissibly relied on statements made by Pepco's counsel during the July 30th hearing regarding the structure of BGE's MRP Pilot in Maryland and that the admissions made by Pepco's counsel during the hearing are not evidence.<sup>152</sup>

47. The Office contends that the amount of the rate base is a disputed issue of material fact. It is further disputed whether Pepco's expenditures have been prudently incurred and whether the investments have been used and useful in providing distribution service. Thus, according to

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<sup>148</sup> See generally *Thomas v. D.C. Dep't of Emp. Servs.*, 547 A.2d 1034, 1038 (D.C. 1988): "A governmental agency given broad authority to administer a statutory program must be accorded wide latitude in making its discretionary decisions concerning the manner in which it will enforce its program. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978) ("administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties'") (quoting *FCC v. Schreiber*, 381 U.S. 279, 290, 85 S.Ct. 1459, 1467, 14 L.Ed.2d 383 (1965)); *Porter County Chapter v. Nuclear Regulatory Comm'n*, 196 U.S.App.D.C. 456, 462, 606 F.2d 1363, 1369 (1979) ("[t]he agency is not bound to launch full-blown proceedings simply because a violation of the statute is claimed"); *Niagara Mohawk Power Corp. v. FPC*, 126 U.S.App.D.C. 376, 382, 379 F.2d 153, 159 (1967) ("the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs"). Only if a decision is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law should this court interfere. D.C. Code § 1-1510(a)(3)(A) (1987)."

<sup>149</sup> *Formal Case No. 1176*, OPC Application at 24-25.

<sup>150</sup> *Formal Case No. 1176*, OPC Application at 24.

<sup>151</sup> *Formal Case No. 1176*, OPC Application at 25.

<sup>152</sup> *Formal Case No. 1176*, OPC Application at 25.

OPC, relying on questionable data in Pepco's June Quarterly Report is inappropriate.<sup>153</sup> OPC further argues that the Commission failed to notify the Parties that it was taking official notice of facts or admitting evidence not part of the record.<sup>154</sup>

48. **Pepco Response.** Pepco challenges as baseless OPC's various arguments concerning notice, including that the Commission: (1) improperly took judicial notice of the quarterly ROR report filed by Pepco in *Formal Case No. 1156*; (2) was required to provide the parties notice before taking administrative notice of the Maryland PSC's lessons learned the process from BGE's MYP proceeding; (3) was required to provide the parties notice that it was admitting into the record all data request responses filed in the proceeding; (4) erred by failing to notify the parties that there would be no evidentiary hearing; and (5) did not provide proper notice regarding the scope of the July 30th hearing.<sup>155</sup>

49. Pepco asserts that OPC misread the Commission's Order regarding how the Commission used the quarterly ROR report that Pepco filed in *Formal Case No. 1156*. OPC asserts that the "Commission took official notice of [the report] to calculate a projected rate base for the MRP."<sup>156</sup> However, Pepco asserts that not only did the Commission show how it derived the adjusted rate base number in Schedule 1 of the Order, [using the report as] merely a data point to confirm that the adjusted rate base it was approving for 2024 was not unreasonable," but also all parties were aware of and had access to the report.<sup>157</sup> Therefore, Pepco concludes, the facts in this case are distinguishable from cited precedent and, because the report was not the basis of the Commission's decision, "there was no requirement that the Commission provide notice."<sup>158</sup>

50. Pepco further asserts that the Commission did not err by taking administrative notice of the lessons-learned process from Maryland's BGE's MYP proceeding because the "Commission regularly takes administrative notice of both its own docket as well as those of other commissions."<sup>159</sup> Pepco asserts that parties were also aware of the Maryland proceeding as the Company noted it during the July 30th hearing and explicitly referenced it in the Company's Post Hearing Brief.<sup>160</sup> Pepco concludes that the Commission was not required to provide the parties notice as suggested by OPC because the Commission "did not indicate that its decision to address

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<sup>153</sup> *Formal Case No. 1176*, OPC Application at 25.

<sup>154</sup> *Formal Case No. 1176*, OPC Application at 4, 10, 26-29.

<sup>155</sup> *See Formal Case No. 1176*, Pepco Response at 18-24.

<sup>156</sup> *Formal Case No. 1176*, Pepco Response at 18.

<sup>157</sup> *Formal Case No. 1176*, Pepco Response at 19.

<sup>158</sup> *Formal Case No. 1176*, Pepco Response at 18.

<sup>159</sup> *Formal Case No. 1176*, Pepco Response at 19.

<sup>160</sup> *Formal Case No. 1176*, Pepco Response at 19-20. Pepco asserts these facts distinguish this case from *Quick v Dep't of Motor Vehicles*, 331 A.2d 319 (D.C. 1975) and *M.B.E. Inc. v Minority Business Opportunity Comm'n*, 485 A.2d 152 (D.C. 1984) relied upon by OPC, noting that both parties and the Commission regularly reference publicly available decisions from other jurisdictions. So, there is no way OPC can argue that an AFOR ruling in Maryland is a fact known only to the decision-makers or undisclosed to parties.

an Integrated Distribution System Planning ('IDSP') process in another docket [ ] or to pursue a robust lessons learned process [ ] rested on the BGE Pilot proceeding."<sup>161</sup> To the contrary, the Commission "merely noted that there were similarities between the processes it was implementing and that proceeding in an adjoining jurisdiction."<sup>162</sup>

51. Pepco also counters OPC's argument that, because there was no formal evidentiary hearing, "there is no record or evidence for the purposes of supporting the substantive decisions contained in the Order."<sup>163</sup> Pepco asserts that the Commission acted "on an extensive record," including multiple rounds of pre-filed expert witness testimony, data requests, data request responses, community member testimony, detailed discovery, oral arguments, and briefs.<sup>164</sup> Pepco asserts that there "is no statutory requirement that only evidence introduced at a formal evidentiary hearing is considered to be in the record" and that D.C. Code § 2-509(c) clearly states that "testimony and exhibits, together with all papers and requests filed in the proceeding, and all material facts not appearing in evidence but with respect to which official notice is taken, shall constitute the exclusive record for order or decision."<sup>165</sup> Therefore, Pepco concludes, "absence of an evidentiary hearing [ ] does not negate the existence of a record, and, [ ] an extensive evidentiary record exists in this proceeding."<sup>166</sup>

### **Decision on Official Notice**

52. D.C. Code § 2-509(b) recognizes an agency's authority to take official notice of a fact.<sup>167</sup> The D.C. Court of Appeals has maintained that an agency has the "inherent right to take judicial notice of certain facts not presented in evidence."<sup>168</sup> That does not mean that the agency must accept as true all facts set forth in the documents in its records.<sup>169</sup> While the Commission cited the June Quarterly Report it did not rest its rate base determination on the Report. The Commission thoroughly explained the rate base determination in paragraphs 209-303 of Order No. 22328. We address the rate base determination again below in paragraphs 71-78 of this Order.

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<sup>161</sup> *Formal Case No. 1176*, Pepco Response at 19.

<sup>162</sup> *Formal Case No. 1176*, Pepco Response at 19.

<sup>163</sup> *Formal Case No. 1176*, Pepco Response at 15, *citing* OPC Application at 2.

<sup>164</sup> *Formal Case No. 1176*, Pepco Response at 15, 17.

<sup>165</sup> *Formal Case No. 1176*, Pepco Response at 18.

<sup>166</sup> *Formal Case No. 1176*, Pepco Response at 17-18.

<sup>167</sup> D.C. Code §2-509(b) (2001) provides that "[w]here any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary."

<sup>168</sup> *Johnson v. District of Columbia Rental Hous. Comm'n*, 642 A.2d 135, 138 n. 6 (D.C.1994) (quoting *Aquino v. Knox*, 60 A.2d 237, 239 (D.C.Mun.App.1948)).

<sup>169</sup> *Renard v. District of Columbia Dept. of Employment Services*, 673 A.2d 1274, 1276 (1996) *citing Mannan v. District of Columbia Bd. of Medicine*, 558 A.2d 329, 338 (D.C. 1989) (citations omitted).

53. The Office asserts that while statements made by an attorney do not constitute evidence, it appears the Commission adopted these facts by official notice.<sup>170</sup> OPC contends that documents or filings not entered into the exclusive record cannot be used as evidence to support a finding of fact or decision in a contested case.<sup>171</sup> However, OPC fails to identify which documents or filings – to which OPC takes issue – that the Commission rests its decision on in Order No. 22328. The Commission took notice of Pepco’s counsel’s statements about the actions taken by the Maryland PSC but did not base its decision on the lessons learned process adopted in this proceeding on counsel’s statements.<sup>172</sup> Instead, the Commission noted the existence of the BGE pilot<sup>173</sup> and observed that lessons can be learned from observing other pilot programs and reviewing multiple phases of an MRP pilot.<sup>174</sup> Consequently, OPC does not demonstrate that the Commission improperly took official notice of any evidence or that OPC was prejudiced by its inability to respond to or challenge certain evidence that became part of the record through the issuance of Order No. 22328.

54. OPC relies on *M.B.E., Inc. v. Minority Bus. Opportunity Comm’n*, for the proposition that an agency decision in a contested case “can only be based” on evidence contained in an “exclusive record” where the evidence is admitted at the formal hearing and Parties have an opportunity to challenge and respond to the evidence that forms the basis of the agency’s decision. However, *M.B.E.* concerned the Commission’s failure to disclose and include *ex parte* materials into the record, not the admission of evidence through an Order after a hearing. Not only did OPC and the other Parties have access to the documents the Commission moved into evidence, but also the Commission’s decisions in Order No. 22328 were based on the Parties’ pre-filed testimony and exhibits, which constitute the exclusive record.<sup>175</sup>

55. OPC contends that 15 DCMR § 134.1 requires the Commission to apply the Federal Rules of Evidence at formal hearings and when considering information and exhibits to admit into the record.<sup>176</sup> However, OPC does not demonstrate that the Federal Rules of Evidence prohibit the approach the Commission took in Order No. 22328 or that the Commission’s approach was an abuse of its discretion.<sup>177</sup> Consequently, OPC does not demonstrate that it was

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<sup>170</sup> *Formal Case No. 1176*, OPC Application at 25.

<sup>171</sup> *See Formal Case No. 1176*, OPC Application at 23 (citing *Cooper v. D.C. Dep’t of Emp’t Servs.*, 588 A.2d 1172, 1176 (D.C. 1991)).

<sup>172</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 121.

<sup>173</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 121, n.262 (citing Case Nos. 9618 and 9645 before the Maryland PSC).

<sup>174</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 141.

<sup>175</sup> *See* D.C. Code § 2-509 (c) (2001) (“[t]he testimony and exhibits, together with all papers and requests filed in the proceeding, and all material facts not appearing in the evidence but with respect to which official notice is taken, shall constitute the exclusive record for order or decision.”) (emphasis added).

<sup>176</sup> *Formal Case No. 1176*, OPC Application at 25.

<sup>177</sup> *See Formal Case No. 1176*, OPC Application at 25.

prejudiced through an inability to respond to or challenge certain evidence that became part of the record through the issuance of Order No. 22328.

### 3. Admission of Data Request Responses

56. **OPC.** OPC contends that the Commission did not inform the Parties that all responses to data requests would be admitted into the record and considered.<sup>178</sup> The Office asserts that no party moved to have its responses to data requests admitted into the record.<sup>179</sup> OPC contends that it was deprived of the opportunity to challenge the admission or veracity of responses that were not part of pre-filed submission.<sup>180</sup> OPC contends that an administrative agency cannot unilaterally admit thousands of pages of discovery – only to inform the parties of its intention to do so for the first time in the final order.<sup>181</sup>

57. **Pepco Response.** In response to OPC’s assertion that the Commission erred by failing to provide parties “notice in advance of Order No. 22328 that it was admitting into the record all of the data responses,”<sup>182</sup> Pepco asserts that “OPC fails to show that any decision by the Commission [ ] rests on a material fact the Commission derived from a data request response that was provided in this proceeding.”<sup>183</sup> Pepco further asserts that “certain parties refused to stipulate to the admission of evidence outside of an evidentiary hearing,” concluding that the “Commission’s actions were reasonable under the circumstances and OPC fails to show how it was prejudiced thereby.”<sup>184</sup>

#### Decision on the Admission of Data Request Responses

58. Neither OPC nor AOBA demonstrates that the Commission erred or strayed from the DCAPA by admitting all the testimony, exhibits, and data request responses into the record in Order No. 22328. The D.C. Court of Appeals has afforded administrative agencies like the Commission greater discretion and flexibility in conducting agency proceedings based on the agency’s expertise. The Court concluded that housekeeping details are best left to the agency, not the courts.<sup>185</sup> Although the Parties did not agree on stipulating evidence into the record, the Commission reasonably admitted all of the Parties’ pre-filed testimony, exhibits, and responses to

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<sup>178</sup> *Formal Case No. 1176*, OPC Application at 29.

<sup>179</sup> *Formal Case No. 1176*, OPC Application at 29.

<sup>180</sup> *Formal Case No. 1176*, OPC Application at 29.

<sup>181</sup> *Formal Case No. 1176*, OPC Application at 29.

<sup>182</sup> *Formal Case No. 1176*, Pepco Response at 20.

<sup>183</sup> *Formal Case No. 1176*, Pepco Response at 20.

<sup>184</sup> *Formal Case No. 1176*, Pepco Response at 21.

<sup>185</sup> *District of Columbia v. Pub. Serv. Comm’n*, 802 A.2d 373, 378-79 (D.C. 2002) (citing *Washington Urban League, Inc. v. Pub. Serv. Comm’n*, 295 A.2d 906, 908 (D.C. 1972) and *Haight v. District of Columbia Alcoholic Beverage Control Bd.*, 439 A.2d 487, 491 (D.C. 1981)).



data requests into the evidentiary record, thus treating all parties similarly, and no one party was prejudiced by our action. Such an approach is consistent with the approach taken in legislative-style hearings.

#### 4. Hearing Notice

59. **OPC.** OPC contends that the Commission did not clarify the process it would follow (*i.e.*, whether an evidentiary hearing would be granted, issue a decision on the merits of the Movants' two dispositive motions, leading to a legislative-style hearing that lacked scope or properly identified the outstanding issues in the case),<sup>186</sup> thus failing to provide proper notice regarding the scope of the July 30th hearing and the subsequent procedure it intended to follow.<sup>187</sup>

60. **Pepco Response.** Pepco argues that "OPC's claims that it was harmed by the absence of a Commission notification regarding evidentiary hearings should be rejected" as baseless.<sup>188</sup> Pepco avers that the Commission made it clear that if it determined an evidentiary hearing was needed after the July 30th hearing, it would advise the parties. Therefore, "the parties were on notice that there would *not* be an evidentiary hearing [ ] unless the Commission advised the parties otherwise."<sup>189</sup> Pepco further asserts that at the July 30th hearing, Commissioner Beverly noted that "the commission could proceed to a decision after they get the post-hearing briefs."<sup>190</sup>

61. Pepco asserts that OPC incorrectly claims that the Commission did not provide proper notice as to the scope of the hearing, arguing that D.C. Code § 2-509 pertains to formal evidentiary hearings so that the notice requirement would be inapplicable to the July 30th hearing held in this proceeding. In any event, Pepco contends that the Commission provided parties with notice that satisfied the requirements of § 2-509, *i.e.*, provide notice regarding the time, place, and issues involved.<sup>191</sup> Specifically, "the Commission gave the parties broad latitude regarding the issues on which they could present [indicating] that they should be ones the Parties believe are fundamental to the Commission's decisions in this proceeding."<sup>192</sup> Pepco argues that "OPC's claims that the Commission was required to more narrowly define the scope of the [ ] hearing are

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<sup>186</sup> *Formal Case No. 1176*, OPC Application at 26.

<sup>187</sup> *Formal Case No. 1176*, OPC Application at 11, 15, 29-31.

<sup>188</sup> *Formal Case No. 1176*, Pepco Response at 23.

<sup>189</sup> *Formal Case No. 1176*, Pepco Response at 22.

<sup>190</sup> *Formal Case No. 1176*, Pepco Response at 22, *citing* Statements by Commissioner Beverly, *Formal Case No. 1176* Legislative Style Hearing Transcript at 175, 181 ("there has been no determination to have evidentiary hearings"); and 176 ("So as it stands now, I don't know anything about any evidentiary hearing").

<sup>191</sup> *Formal Case No. 1176*, Pepco Response at 23.

<sup>192</sup> *Formal Case No. 1176*, Pepco Response at 23 (internal quotations omitted). Pepco reiterates that Parties were permitted to file limited pre-hearing briefs "identifying the issues they intended to discuss" and post-hearing briefs.

baseless and should be rejected.”<sup>193</sup>

### **Decision on Hearing Notice**

62. We have pronounced our efforts to streamline our ratemaking procedures to make them more administratively efficient without needlessly exhausting party and Commission resources in an evidentiary hearing that would not be likely to produce additional helpful information to allow the Commission to render a decision supported by substantial evidence.<sup>194</sup> In the absence of an evidentiary hearing, this includes providing other process sufficient for the full and fair litigation of matters when material issues of fact are not disputed. In this instance, we reject OPC assertion that the Commission failed to identify any specific issues the July 30th hearing intended to cover.<sup>195</sup> Our June 13, 2024, notice clearly advised the Parties that the Commission would convene a hearing on July 30, 2024, to allow the Parties to present oral arguments regarding matters raised in the two Joint Summary Motions and *other relevant legal and policy issues that the Parties believe are fundamental to the Commission’s decisions in this proceeding.*<sup>196</sup> The Commission advised the Parties that because the Commission had not decided any issue of policy or law that undergirded the Joint Motions, the Parties were permitted to argue their case as they would if *no dispositive motion had been filed.*<sup>197</sup> The Commission encouraged the Parties to file pre-hearing briefs “identifying the issues to be discussed, including arguments and references to testimony.”<sup>198</sup> At the July 30th hearing, the Commission provided each party with 30 minutes for oral arguments and permitted the filing of post-hearing briefs.<sup>199</sup> The Commission made it clear, then, that should it “determine after the [ ] hearing that an evidentiary hearing is necessary, the Commission will advise the parties.”<sup>200</sup> The Parties were provided ample opportunity and process to advance any arguments they found fundamental to this proceeding, including offering material issues of fact in dispute. Neither OPC nor AOBA advanced arguments during the July 30, 2024, legislative-style hearing that the Commission’s failure to hold an evidentiary hearing in this case would deprive parties of their fundamental due process rights.

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<sup>193</sup> *Formal Case No. 1176*, Pepco Response at 23.

<sup>194</sup> *See Formal Case No. 1169*, Order No. 21582, ¶ 6, and *Formal Case No. 1154, In the Matter of the Application of Washington Gas Light Company for Approval of PROJECTpipes 2 Plan*, Order No. 20615, ¶ 4, rel. August 20, 2020.

<sup>195</sup> *Formal Case No. 1176*, OPC Application at 30.

<sup>196</sup> *Formal Case No. 1176*, Notice of Legislative-Style Hearing, rel. June 13, 2024.

<sup>197</sup> *Formal Case No. 1176*, Order No. 22013, ¶ 28 (emphasis added). *See Formal Case No. 1169*, Order No. 21582, ¶ 6 (issues of law or policy should be addressed in written filings without a hearing).

<sup>198</sup> *Formal Case No. 1176*, Order No. 22013, ¶¶ 1, 30.

<sup>199</sup> *Formal Case No. 1176*, Order No. 22013, ¶ 30.

<sup>200</sup> *Formal Case No. 1176*, Order No. 22013, ¶ 30.

## 5. Burden of Proof

63. **OPC.** OPC argues that the Commission's actions relieved Pepco of its burden of proof by ignoring unanswered questions regarding the expenditures from the *Formal Case No. 1156 Modified EMRP Pilot*, and the Commission declined to issue an Order on the merits for both dispositive motions. OPC asserts that the motions demonstrated that Pepco's MRP Application was materially deficient and the data supporting it are either inaccurate or no longer timely.<sup>201</sup> According to OPC, the Commission's reasoning was based on a record that was not developed because the Commission was not interested in holding an evidentiary hearing.<sup>202</sup> The Office also argues that the Commission appears to have approved aspects of Pepco's proposal primarily because no Parties objected, which presumes the Parties would not have objected through cross-examination at an evidentiary hearing or in post-evidentiary hearing briefs.<sup>203</sup>

64. **Pepco Response.** Pepco opposes OPC's argument that due to procedural errors in this proceeding, "the Commission shifted the burden of proof." Specifically, OPC asserts that the Commission ignored unanswered questions regarding expenditures from the prior pilot, an issue that Pepco contends has been repeatedly raised by OPC and "consistently rejected" by the Commission.<sup>204</sup> Pepco asserts that "OPC presents no compelling basis for the Commission to revisit its decisions on this matter."<sup>205</sup>

### Decision on Burden of Proof

65. OPC argues that the Commission relieved Pepco of its burden of proof as the proponent of the MRP application by ignoring OPC's unanswered questions regarding the expenditures from the *Formal Case No. 1156 Modified EMRP Pilot* and declining to issue an order on the merits for both dispositive motions that Pepco's MRP Application was materially deficient and the data supporting it either inaccurate or no longer timely.<sup>206</sup> However, at no time did the Commission shift Pepco's burden of persuading the Commission that the Company was entitled to a rate increase under its MRP application. After considering the MRP application and the Parties' positions, the Commission approved a Modified MRP for two years rather than the three years Pepco requested and with a revenue requirement that represented a 35% reduction in the revenue requirement Pepco proposed due to reductions in Pepco's proposed ROE, ROR, 2025 and 2026 capital expenditures, proposed Net Rate Base for 2025 and 2026, proposed 2025 and 2026 O&M expenditures, and Pepco's proposed depreciation rates.<sup>207</sup> We found that Pepco's proposed

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<sup>201</sup> *Formal Case No. 1176*, OPC Application at 11, 31-33.

<sup>202</sup> *Formal Case No. 1176*, OPC Application at 32.

<sup>203</sup> *Formal Case No. 1176*, OPC Application at 32-33.

<sup>204</sup> *Formal Case No. 1176*, Pepco Response at 24.

<sup>205</sup> *Formal Case No. 1176*, Pepco Response at 24.

<sup>206</sup> *Formal Case No. 1176*, OPC Application at 11, 31-33.

<sup>207</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 7.

MRP, with our modifications, met the requirements for approval and would result in just and reasonable rates.<sup>208</sup> The Commission determined that approval of an MRP with modifications addresses the Parties' concerns, protects customers, and ensures the quality, availability, and reliability of the electric delivery system, and is in the public interest.<sup>209</sup> The Commission similarly approved the *Formal Case No. 1156* Modified EMRP Pilot after considering Pepco's MRP Application and the Parties' positions in making modifications to Pepco's proposals to ensure that our decision resulted in just and reasonable rates.<sup>210</sup>

## 6. Rate Base and Other Determinations

66. **OPC.** OPC contends that the Commission-developed rate base is unsupported by substantial evidence, resulting in an arbitrary rate increase.<sup>211</sup> According to the Office, the Commission does not explain how it defined rate base growth, and Order No. 22328 is silent as to the starting point and the initial rate base amount from which growth is being measured.<sup>212</sup> OPC asserts that the Commission does not explicitly state how it reached a 6.5% reduction compared to Pepco's forecasted rate base for December 2024.<sup>213</sup> The Office contends that the Commission does not explain why a 6.5% deviation from Pepco's projections is acceptable.<sup>214</sup> OPC argues that it is unclear how the Commission arrived at the \$2,991 million figure or how it arrived at this number based on the cited deviation of 6.5%. According to OPC, the difference between the Commission authorized rate base of \$2,991.0 million and the unadjusted rate base in the most recent quarterly report of \$2,796.7 million is \$194 million. The Commission provides no methodology or explanation indicating that Pepco can add approximately \$194 million in capital investments over six months between June 2024 and December 2024.<sup>215</sup> According to the Office, actual expenditures indicate the rate base is not expanding at this pace. Yet, as OPC contends, the Commission does not explain why the actuals are not examined further and how it reconciles the divergence between the actuals and the projections.<sup>216</sup> OPC asserts that Pepco's MRP projections suggest a slower pace of growth than the \$194 million cited in Order No. 22328, resulting in a smaller rate base by the end of 2024.<sup>217</sup> According to the Office, the Commission's analysis

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<sup>208</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 92.

<sup>209</sup> *Formal Case No. 1176*, Order No. 22328, ¶¶ 90-92. The Commission listed eight items to explain why it found that the Modified MRP Extended Pilot would be in the public interest in paragraph 92.

<sup>210</sup> *See Formal Case No. 1156*, Order No. 20755, rel. June 8, 2021.

<sup>211</sup> *Formal Case No. 1176*, OPC Application at 11, 33-38.

<sup>212</sup> *Formal Case No. 1176*, OPC Application at 33-34.

<sup>213</sup> *Formal Case No. 1176*, OPC Application at 34 and 36.

<sup>214</sup> *Formal Case No. 1176*, OPC Application at 33-34.

<sup>215</sup> *Formal Case No. 1176*, OPC Application at 34.

<sup>216</sup> *Formal Case No. 1176*, OPC Application at 35.

<sup>217</sup> *Formal Case No. 1176*, OPC Application at 36.

ignores more granular details commonly addressed through cross examination at an evidentiary hearing and in post-evidentiary hearing briefs and notes that weather and other factors may limit investments in certain projects during certain times of the year, which the Commission could consider.<sup>218</sup>

67. The Office contends that including certain investments in Pepco's rate base as investments made during the *Formal Case No. 1156 Modified MRP Extended Pilot* that have not been determined to be prudent is a fundamental issue.<sup>219</sup> OPC states that while the Commission may have accepted Pepco's RMA 29 to remove projects located in Maryland that were identified by OPC's witness Kevin Mara, Pepco's revised proposed RMA 29 removed certain planned investments such as those intended to be made beyond the life of the MRP.<sup>220</sup> According to OPC, RMA 29 would not address past investments made in CY 2022 and 2023, which may have been improperly included in Maryland and the District.<sup>221</sup> OPC argues that these investments are now potentially improperly baked into the rate base and the revenue requirement because Order No. 22328 glosses over this issue and does not appropriately distinguish between the duplicative costs raised initially by AOBAs regarding past investments for CY 2023 with future investments, the rate base, and subsequently the rates and revenue requirement, are not supported by substantial evidence.<sup>222</sup> According to OPC, conflating past costs with potential future costs to be addressed by RMA 29 results in a failure to address the double recovery for past investments, thus creating an inaccurate rate base from which to project the future rate base. This results in rates that are unjust and unreasonable.<sup>223</sup>

68. OPC further states that Order No. 22328 does not address that the investments made during the *Formal Case No. 1156 Modified MRP Extended Pilot* were never properly reviewed or the discrepancies between how the money Pepco received was not spent pursuant to what the Commission approved in Order Nos. 20755 and 21042.<sup>224</sup> The Office states that it and others noted that close to \$150 million was not spent, and the Commission makes no finding that this deviation from the approved plan was justified.<sup>225</sup> According to OPC, Order No. 22328 presumes, without explanation, that the rate base for the end of CY 2022 is appropriate despite evidence indicating that the investments do not match what was approved in *Formal Case No. 1156*.<sup>226</sup> The

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<sup>218</sup> *Formal Case No. 1176*, OPC Application at 36.

<sup>219</sup> *Formal Case No. 1176*, OPC Application at 37.

<sup>220</sup> *Formal Case No. 1176*, OPC Application at 37.

<sup>221</sup> *Formal Case No. 1176*, OPC Application at 37.

<sup>222</sup> *Formal Case No. 1176*, OPC Application at 37.

<sup>223</sup> *Formal Case No. 1176*, OPC Application at 37-38.

<sup>224</sup> *Formal Case No. 1176*, OPC Application at 38.

<sup>225</sup> *Formal Case No. 1176*, OPC Application at 38.

<sup>226</sup> *Formal Case No. 1176*, OPC Application at 38.

Office argues that outstanding issues concerning investment and rate base demonstrate that the Commission has failed to adequately explain its decisions based on substantial evidence.<sup>227</sup>

69. **Pepco Response.** Pepco argues that “OPC erroneously asserts that the Commission’s rate base determination was based on the quarterly earnings report that Pepco filed in *Formal Case No. 1156* and that the Commission failed to explain how it reached the rate base it approved for 2024.”<sup>228</sup> Pepco points to Schedule 1 of the Order to support its assertion that the Commission did explain how the adjusted rate base was derived for 2024.<sup>229</sup> Pepco further argues that the Commission incorporated safeguards into the current MRP by requiring “a refund to customers” if Pepco over earns and ordering “a management audit” to examine the 2023-2024 MRP period.<sup>230</sup> Pepco also asserts that OPC’s repeated attempt to question 2022 expenditures after failing to avail itself of the reconciliation process established in *Formal Case No. 1156* should be rejected.<sup>231</sup>

70. With respect to OPC’s assertion that the “MRP suffers from ‘structural deficiencies’ that warrant reconsideration of the Order,”<sup>232</sup> Pepco argues that the Modified MRP is consistent with the Commission’s previously adopted AFOR framework, meets statutory requirements, benefits customers, and advances the District’s policy goals.<sup>233</sup> Pepco asserts that the Commission clarified that “it viewed the adoption of an AFOR as an iterative process, one that can be evaluated over the course of several years, rather than all at once.”<sup>234</sup> Pepco emphasizes that the approval of an MRP is a policy determination and that the Commission appropriately justified its decision in accordance with the discretion conferred upon it in D.C. Code § 34-1504(d)(2), stating “[W]e believe the *Formal Case No. 1176* Modified MRP Extended Pilot [ ] strikes the appropriate regulatory balance and results in just and reasonable rates for all Pepco customers.”<sup>235</sup> Pepco concludes that OPC’s “mere disagreement with the Commission’s conclusions is not a sufficient basis for reconsideration nor an adequate reason to set aside the

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<sup>227</sup> *Formal Case No. 1176*, OPC Application at 38.

<sup>228</sup> *Formal Case No. 1176*, Pepco Response at 30.

<sup>229</sup> *Formal Case No. 1176*, Pepco Response at 30.

<sup>230</sup> *Formal Case No. 1176*, Pepco Response at 30.

<sup>231</sup> *Formal Case No. 1176*, Pepco Response at 31. Similarly, Pepco asserts that OPC’s attempt to relitigate the prudence of expenditures under the *Formal Case No. 1156* MRP should be rejected. Concluding that the time to challenge such expenditures has passed. Pepco Response at 35-36.

<sup>232</sup> *Formal Case No. 1176*, Pepco Response at 13.

<sup>233</sup> *Formal Case No. 1176*, Pepco Response at 12.

<sup>234</sup> *Formal Case No. 1176*, Pepco Response at 13.

<sup>235</sup> *Formal Case No. 1176*, Pepco Response at 13, citing *Formal Case No. 1176*, Order No. 22328, ¶ 12 (“The Commission finds that the *Formal Case No. 1176* Modified MRP Extended Pilot protects consumers, ensures the quality, availability, and reliability of regulated electric services, and is in the public interest, including Pepco’s shareholders.”)

well-reasoned, carefully developed conclusion.”<sup>236</sup>

### **Decision on Rate Base and Other Determinations**

71. OPC contends that the Commission stated, “it took notice of financial data in the June Quarterly Report to make projections about Pepco’s future rate base.”<sup>237</sup> OPC now, for the first time, asserts that the amount of the rate base established in Order No. 22328 is a disputed issue of material fact. The Office argues that whether Pepco’s expenditures has been prudently incurred and whether the investments have been used and useful in providing distribution service is further disputed. Thus, according to OPC, relying on questionable data in Pepco’s June Quarterly Report is inappropriate.<sup>238</sup>

72. However, the Commission relied on Pepco’s calculation of the Company’s 2024 rate base as provided in the testimony of Pepco Witness Leming, not the June Quarterly Report as OPC contends.<sup>239</sup> The Commission relied on Pepco Witness Leming’s schedules as the initial basis of our rate base determination in Order No. 22328.<sup>240</sup>

73. In determining the approved revenue requirement, the Commission reviewed the evidence in record and made reasonable and appropriate adjustments to the Company’s proposed rate base, rate of return, return on equity and operating revenues and expenses for CY 2024, CY 2025 and CY 2026. The Commission also reviewed the Company’s proposed rate base of \$2,510.9 million for CY 2022 (Test Year) and \$ 2,755.3 million for CY 2023 (Bridge Year 1) and supporting evidence on record and accepted the proposed rate base for both years with no adjustments.<sup>241</sup> For CY 2024, the Commission examined Pepco’s proposed rate base of \$3,006.6 million<sup>242</sup> and made adjustments to Accumulated Depreciation, Accumulated Amortization, Cash Working Capital, Accumulated Deferred Taxes, and Regulatory Asset accounts resulting in a \$15.6 million total reduction to rate base. This \$15.6 million reduction resulted in the authorized rate base of \$2,991.0 million for CY 2024. The Commission also made adjustments to the Company’s proposed operating expenses for 2024 including Operation and Maintenance, Depreciation, Amortization and DC and Federal Taxes resulting in a \$22.1 million reduction to operating expenses. Using the Commission-approved ROR of 7.27% for CY 2024, the impact of

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<sup>236</sup> *Formal Case No. 1176*, Pepco Response at 13.

<sup>237</sup> *Formal Case No. 1176*, OPC Application at 25.

<sup>238</sup> *Formal Case No. 1176*, OPC Application at 25.

<sup>239</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 97. The Quarterly Report is not the basis of the Commission’s adjusted rate base for 2024 of \$2,991 million. The Commission showed how that number was derived in Schedule 1 of the Order. The Report was merely a data point that the Commission examined to confirm that the adjusted rate base it was approving for 2024 was not unreasonable. However, it was not the basis of the Commission’s decision. As such there was no requirement that the Commission provide notice.

<sup>240</sup> Pepco (3B)-1 (Leming Rebuttal) at 1.

<sup>241</sup> Pepco (3B)-1 (Leming Rebuttal) at 1.

<sup>242</sup> Pepco (3B)-1 (Leming Rebuttal) at 1.

the rate base and operating expenses adjustments result in a revenue requirement of \$63.4 million for CY 2024.

74. For CY 2025, the Commission examined Pepco's proposed rate base of \$3,224.1 million<sup>243</sup> and made adjustments to EPIS, Accumulated Depreciation, Accumulated Amortization, Cash Working Capital, Accumulated Deferred Taxes, and Regulatory Asset accounts resulting in a \$4.4 million total addition to rate base. This \$4.4 million increase resulted in the authorized rate base of \$3,228.5 million for CY 2025. For CY 2026, the Commission examined Pepco's proposed rate base of \$3,391.7 million and made adjustments to EPIS, Accumulated Depreciation, Accumulated Amortization, Cash Working Capital, Accumulated Deferred Taxes, and Regulatory Asset accounts resulting in a \$88.8 million total reduction to rate base. This \$88.8 million reduction resulted in the authorized rate base of \$3,302.9 million for CY 2026. The Commission also made adjustments to the Company's proposed operating expenses for 2025 and 2026 including Operation and Maintenance, Depreciation, Amortization and DC and Federal Taxes resulting in operating expense reductions of \$20.4 million for 2025 and \$21.6 million for 2026. Using the Commission-approved ROR of 7.28% for CY 2025 and 7.29% for CY 2026, the impact of the rate base and operating expenses This results in an authorized revenue requirement of \$99.7 million for CY 2025 and \$123.4 million for CY 2026. Schedules 1 and 3 of the Order contain the details of the Commission adjustments, and the final adjusted rate base and revenue requirement adopted by the Commission.<sup>244</sup>

75. Schedule 1 shows the Modified MRP Revenue Requirements adopted by the Commission for CY 2022 through CY 2026 in Column C (page 175 to page 177), including the Company's proposed rate base, rate of return, operating revenues, operating expenses and revenue requirements in Column A, and the Commission's Adjustments in Column B.<sup>245</sup>

76. Schedule 2 (page 178) shows the approved rate of return for the Modified MRP of 7.28% in 2025 and 7.29% in 2026, which was used to calculate the revenue requirement approved by the Commission for MYP Years 1 and 2.<sup>246</sup>

77. Schedule 3 (page 179 to page 181) shows the Commission approved revenue requirements and ratemaking adjustments.<sup>247</sup> Schedule 3 includes detailed information regarding all Commission approved adjustments to Pepco's proposed 2024, 2025 and 2026 revenue requirements, broken down by rate base and operating income. For the years 2024 through 2026, Schedule 3 uses the Company's proposed revenue requirements as a starting point and applies the impact of the approved rate of return as well as the impact of the Commission authorized

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<sup>243</sup> Pepco (3B)-1 (Leming Rebuttal) at 1.

<sup>244</sup> See *Formal Case No. 1176*, Order No. 22328 at 175-181.

<sup>245</sup> *Formal Case No. 1176*, Order No. 22328 at 175-177.

<sup>246</sup> *Formal Case No. 1176*, Order No. 22328 at 178.

<sup>247</sup> *Formal Case No. 1176*, Order No. 22328 at 179-181.



ratemaking adjustments, culminating in a modified approved revenue requirement of \$63.4 million for CY 2024, \$99.6 million for CY 2025 and \$123.4 million for CY 2026.

78. The Commission also observes that OPC has not identified any errors in the Commission's computation of Pepco's rate base in this proceeding. We also note OPC's failure to avail itself of the process the Commission established for identifying concerns and addressing reconciliation matters regarding the previous MRP period, which included CY 2022. The Commission has clearly identified its methodology for arriving at its rate base decision. For these reasons, the Commission rejects OPC's claims that the rate base determined by the Commission is unsupported by substantial evidence. We affirm our previous decision on the rate base and conclude that the Commission-adjusted rate base is just and reasonable.

## 7. Performance Incentive Mechanisms, Integrated Distribution System Planning, and Regulatory Burden

79. **OPC.** OPC argues that the *Formal Case No. 1176* Modified MRP Extended Pilot suffers from structural deficiencies, and the Commission does not address the absence of Performance Incentive Mechanisms ("PIMs") and the lack of an IDSP.<sup>248</sup> OPC contends that the Modified MRP Extended Pilot will not reduce the regulatory burden or address existing problems with the *Formal Case No. 1176* Modified MRP Extended Pilot.<sup>249</sup>

80. OPC contends that having a working group create an IDSP is insufficient to support approving Pepco's MRP and leaves stakeholders and the Commission with a set of policy goals and proposed investments with limited ability to determine how those investments advance policy goals.<sup>250</sup> The Office asserts that the Commission acknowledges that an MRP without an IDSP is deficient and states that creating a working group to address the topic is too little too late.<sup>251</sup> OPC asserts that there are distinctions between the Commission's decision and the actions taken by the Maryland PSC.<sup>252</sup> OPC argues that if the Commission intends to follow the Maryland PSC, the Commission should reject *Formal Case No. 1176* Modified Extended Pilot until the IDSP Working Group convenes and produces recommendations to be integrated into the *Formal Case No. 1176* Modified Extended Pilot.

81. **Pepco Response.** OPC asserts that the Commission "erred in approving an MRP without establishing [PIMs because this decision] deviated from Commission precedent without justification."<sup>253</sup> Pepco counterargues that directing "Pepco to continue reporting on the performance tracking metrics approved in *Formal Case No. 1156*" was a reasonable exercise of

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<sup>248</sup> *Formal Case No. 1176*, OPC Application at 11-12, 38-42.

<sup>249</sup> *Formal Case No. 1176*, OPC Application at 12, 42-46.

<sup>250</sup> *Formal Case No. 1176*, OPC Application at 40-41.

<sup>251</sup> *Formal Case No. 1176*, OPC Application at 41.

<sup>252</sup> *Formal Case No. 1176*, OPC Application at 41-42.

<sup>253</sup> *Formal Case No. 1176*, Pepco Response at 27.

the Commission's discretion and that there "is no legal or factual error with the Commission's decision."<sup>254</sup> Pepco adds that OPC's PIMs arguments were previously presented and rejected by the Commission in this proceeding and "[n]othing in the Application warrants the Commission reversing its [prior] decision..."<sup>255</sup> With respect to OPC's assertion that "the Commission erred in approving an MRP without an IDSP being in place," Pepco contends that "there can be no 'error' because there is no statutory or regulatory requirement that mandates an IDSP be in place before an MRP can be approved."<sup>256</sup>

82. Pepco counters OPC's argument on regulatory burden by asserting that OPC does not note that these processes the Commission established to address the interests of the Parties were created by the Commission in response to concerns raised by the Parties' requests.<sup>257</sup> Pepco contends that the Commission has instituted processes to address lessons learned, issues with reconciliation and increased transparency, among others, to improve the use of AFORs going forward.<sup>258</sup> Pepco argues that the Commission struck the appropriate balance among the competing interests permitting the Company to continue to operate under an MRP, while ensuring that the *Formal Case No. 1176* Modified MRP Extended Pilot allows interested parties and the Commission to assess lessons learned, improve transparency into the processes used in the MRP, and provide an independent evaluation of the Company's performance.<sup>259</sup> Pepco notes that several of the ordered processes were implemented to mitigate concerns raised by OPC, AOBA, and other parties, namely, the detailed lessons learned process.<sup>260</sup> Pepco asserts that it is reasonable and necessary that these processes may require the expenditure of time and resources, acknowledging, however, that as these processes are developed and improved, "the overall regulatory burden will decrease."<sup>261</sup>

### **Decision on Performance Incentive Mechanisms, Integrated Distribution System Planning, and Regulatory Burden**

83. OPC argues that the Commission does not explain its decision to continue only with performance tracking mechanisms ("PTMs") nor explain the departure from precedent in which a working group was established to develop PIMs, and it provides no plan by which PIMs can be developed.<sup>262</sup> OPC contends that the Commission grants Pepco the benefit of an MRP and deprives ratepayers of the plan, which is the consideration for those benefits when it approves

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<sup>254</sup> *Formal Case No. 1176*, Pepco Response at 28.

<sup>255</sup> *Formal Case No. 1176*, Pepco Response at 28.

<sup>256</sup> *Formal Case No. 1176*, Pepco Response at 29.

<sup>257</sup> *Formal Case No. 1176*, Pepco Response at 31 (citing *Formal Case No. 1176*, Order No. 22328, ¶¶ 90-91).

<sup>258</sup> *Formal Case No. 1176*, Pepco Response at 31.

<sup>259</sup> *Formal Case No. 1176*, Pepco Response at 32.

<sup>260</sup> *Formal Case No. 1176*, Pepco Response at 34.

<sup>261</sup> *Formal Case No. 1176*, Pepco Response at 32.

<sup>262</sup> *Formal Case No. 1176*, OPC Application at 39.

*Formal Case No. 1176* Modified Extended Pilot without PIMs and an IDSP.<sup>263</sup> We considered the Parties' positions on PIMs and determined that PIMs were not required for the MRP in this case. The Commission directed Pepco to include PIMs with financial incentives in the Company's next MRP filing and directed Pepco to continue tracking the metrics included in its *Formal Case No. 1156* performance tracking metrics report.<sup>264</sup>

84. In Order No. 20273, the Commission proposed broad general guidelines that Pepco and the Parties could consider in proposing PIMs.<sup>265</sup> OPC fails to mention that in Order No. 20632, the Commission denied a Joint Motion to Dismiss the MRP Enhanced Proposal in *Formal Case No. 1156* because, among other things, Pepco did not propose PIMs in its MRP application, as Order No. 20273 "sets out 'principles and guidelines' rather than bright-line requirements. In our view, the Order does not reasonably place Pepco on notice that its case can be dismissed for failure to address the principles and guidelines in a particular manner or to the satisfaction of the opposing Parties."<sup>266</sup> Order No. 22328 adheres to that ruling. Moreover, the Parties are still working on developing PIMs. Pepco was directed to file quarterly PTMs reports. The data in these reports will assist the development of PIMs for the future. Thus, we expect Pepco to propose PIMs in the Company's next MRP filing.<sup>267</sup>

85. The Commission directed Pepco to file supplemental testimony explaining how the process addresses the Commission's AFOR requirement for utility planning details and identifying additional enhancements that can be implemented to improve the process so that the Commission and stakeholders have sufficient information to determine the need for capital investments.<sup>268</sup> OPC and the Intervenors were allowed to file direct testimony responding to Pepco's supplemental testimony. The Commission did not notify the Parties that it would not approve an MRP without an IDSP and does not believe an IDSP was required. After reviewing the filings in this proceeding, the Commission found that IDSP may create a resilient, flexible, and reliable distribution grid, noted that we had initiated an IDSP proceeding in *Formal Case No. 1182*, and directed Pepco to file an updated Long Range Plan in *Formal Case No. 1182*.<sup>269</sup> We invited interested persons to comment on the various electric utility distribution system planning matters in *Formal Case No. 1182*.<sup>270</sup> It would be inappropriate to deny consideration of the MRP Application on this basis.

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<sup>263</sup> *Formal Case No. 1176*, OPC Application at 40.

<sup>264</sup> *Formal Case No. 1176*, Order No. 22328, ¶¶ 92, 575.

<sup>265</sup> *Formal Case No. 1156*, Order No. 20273, ¶ 103, rel. December 20, 2019.

<sup>266</sup> *Formal Case No. 1156*, Order No. 20632, ¶ 21, rel. September 24, 2020.

<sup>267</sup> *Formal Case No. 1176*, Order No. 22328, ¶ 575.

<sup>268</sup> *Formal Case No. 1176*, Order No. 21886, ¶ 25, rel. July 28, 2023.

<sup>269</sup> *Formal Case No. 1176*, Order No. 22328, ¶¶ 150, 549.

<sup>270</sup> *Formal Case No. 1182, In the Matter of the Investigation into the Implementation of Integrated Distribution System Planning for Electric Utilities*, Notice of Inquiry, issued November 27, 2024. We note that the Maryland PSC has been developing an IDSP pursuant to subtitle 8 of S.B. 528, Climate Solutions Now Act of 2022. The Maryland PSC established a Distribution System Planning Work Group in Case No. 9665 in June 2021 to review the Jade Process

We are taking steps toward having an IDSP process and look forward to its implementation in the future. The Commission's actions are not errors warranting reconsideration.

86. The Commission agrees with Pepco that many of the processes we have established in Order No. 22328 require the Commission and the Parties to expend time and resources to allow the Parties to participate in discussions to refine MRPs. We concluded that the Modified MRP Extended Pilot will reduce the regulatory burden on the Commission and stakeholders by reducing the frequency and number of rate cases.<sup>271</sup> Ultimately, as we make refinements, the burden on the Commission and stakeholders will further diminish.

### **8. OPC Request for Clarification**

87. OPC requests clarification on the following:

- a. In ¶ 104, how does the Commission define “significant differences” between forecasted and actual expenditures that would warrant a hearing?
- b. Would the hearing referenced in ¶ 104, to resolve significant differences between forecasted and actual expenditures, be an evidentiary or legislative-style hearing?
- c. The Commission references a prudence review in ¶ 106 and alludes to a prudence review in ¶ 104. Please define it by the terms “prudence review” and “prudently incurred” in the context of the reviews discussed in ¶¶ 106 and 104 of Order No. 22328.
- d. Please clarify the remedial or corrective steps that are available to the parties if, based on the reconciliation filings, it is believed that Pepco's expenditures during the MRP Extended Pilot were not prudent.
- e. Are the reconciliation filings intended to determine whether Pepco's expenditures were directed toward investments that were used and useful in providing services?
- f. What recourse would be available, or steps are to be followed, if any, if a review of Pepco's financials shows the Company shifted funds from projects approved under the MRP Extended Pilot to new projects not approved under the Pilot?
- g. What recourse or corrective measures, if any, would be available if filings, such as the annual or reconciliation filings, indicate or suggest that Pepco's accounting is inconsistent with controlling regulations such as FERC's Uniform System of Accounts?
- h. The Commission discusses that ratepayers would be entitled to a surcredit if the

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Map in the Blueprint for State Action and consider its relevance and application to Maryland electric distribution companies.

<sup>271</sup> *Formal Case No. 1176, Order No. 22328, ¶ 40.*

Final Reconciliation shows that the Company over-earned in ¶¶ 106-107 of the Order. Would this credit be based on over-earning in CY 2026, the entire length of the MRP Extended Pilot, or another period of time?<sup>272</sup>

88. **Pepco Response.** With respect to OPC’s request for clarification, Pepco argues that “[m]ost of the clarifications that OPC seeks are inappropriate at this juncture and are more appropriately determined on the basis of specific facts and circumstances.”<sup>273</sup> For example, Pepco asserts, “the corrective actions the Commission orders [will adopt] could vary significantly among various factual scenarios [and it is] counterproductive for the Commission to try and assess the options that may be appropriate across a range of factual situations that may or may not occur.”<sup>274</sup> Pepco avers, for similar reasons, the Commission “should retain broad discretion to determine whether a hearing is warranted and the type of hearing that is most appropriate...”<sup>275</sup> Finally, Pepco asserts that OPC’s request to clarify the period for which the over-earning surcredit ordered in Order No. 22328 at ¶¶ 106-107 would be based on, should be rejected because “Order No. 22328 is clear that the Final Reconciliation covers the 2-year term of the MRP;” explicitly referencing the Final Reconciliation filed in *Formal Case No. 1156*.<sup>276</sup>

### **Decision on OPC Request for Clarification**

89. OPC requests that the Commission clarify various aspects of Order No. 22328, mainly pertaining to our decision on the Annual Reconciliation Filing process ordered in ¶¶ 103-108. The Commission recognizes that “[t]he general purpose of a motion for clarification is to explain or clarify something ambiguous or vague, not to alter or amend.”<sup>277</sup> However, most of the matters raised by OPC concern fact-specific determinations and are premature to consider at this juncture, and thus, we reject OPC’s request for clarification. For example, in ¶ 104 of the Order it states that “Parties can request a hearing if significant differences exist between forecasted and actual expenditures.” OPC requests that the Commission define “significant differences” that would warrant a hearing. However, the Commission rejects OPC’s request because doing so is premature and could be unnecessarily prescriptive. That determination should be made based on the facts and arguments presented by the parties. After analyzing the reconciliation filing, the Parties can determine whether they believe significant differences exist in the expenditures and can request a hearing explaining the rationale for their conclusions for Commission consideration.

90. Regarding the prudency review, the D.C. Court of Appeals, citing the D.C. Circuit’s decision in *Anaheim, Riverside v. FERC*, stated

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<sup>272</sup> *Formal Case No. 1176*, OPC Application at 46-47.

<sup>273</sup> *Formal Case No. 1176*, Pepco Response at 37.

<sup>274</sup> *Formal Case No. 1176*, Pepco Response at 37.

<sup>275</sup> *Formal Case No. 1176*, Pepco Response at 37-38.

<sup>276</sup> *Formal Case No. 1176*, Pepco Response at 38.

<sup>277</sup> *United States v. Philip Morris USA Inc.*, 793 F. Supp. 2d 164, 168 (D.D.C. 2011).

[U]tilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent.... However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.<sup>278</sup>

If a party raises doubt about the prudence of any project investment and costs in the Final Reconciliation and Prudency Review discussed in paragraph 106 of Order No. 22328, the Company has the burden of dispelling these doubts and proving the questioned project investments and costs were reasonably and prudently incurred.<sup>279</sup>

91. With respect to OPC's request that the Commission clarify the period for which the over-earning surcredit ordered in ¶ 106 would be based, Order No. 22328 states: "[t]o ensure there is a final prudence review and reconciliation of the two-year *Formal Case No. 1176 Modified MRP Extended Pilot*, Pepco is directed to file a final reconciliation report... This filing will cover the CY 2025 and CY 2026 *Formal Case No. 1176 Modified MRP Extended Pilot* periods." It is clear that the Final Reconciliation covers the 2-year term of the MRP. Therefore, Order No. 22328 is clear and OPC's request for clarification on this matter is denied.

#### **D. AOBA Application for Reconsideration**

92. **AOBA.** AOBA contends that Pepco's rate design methodology employs Effective Rate Adjustments ("ERA") to substantially increase the revenues for which the Company claims the GT-LV rate class is responsible at present rates.<sup>280</sup> AOBA states that in Pepco's December 11, 2024, Updated Compliance Rates filing, Pepco's computed ERA for Rate Schedule GT-LV added \$32,575,865 of annual claimed revenue requirements to the GT-LV class, representing an effective 36% increase over the level of annual revenue that the Company's currently approved rates are designed to produce. AOBA argues that Pepco imposes this increase before considering the additional revenue requirements the Commission approved in Order No. 22328.<sup>281</sup>

93. AOBA states that current bills for Rate Schedule GT-LV customers only reflect the rates and revenue requirements recently approved by the Commission, along with capped monthly BSA rate adjustments. AOBA asserts that the increases in charges that Pepco labels "Effective Rate Adjustments" do not reflect the effective rates at which Rate Schedule GT-LV customers are

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<sup>278</sup> *Potomac Electric Power Co. v. Public Serv. Comm'n of the District of Columbia*, 661 A.2d 131, 140 (1995) (citing *Anaheim, Riverside, Banning, Colton and Azusa, Cal. V. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1991) (internal quotations and citations omitted)).

<sup>279</sup> *Potomac Electric Power Co. v. Public Serv. Comm'n of the District of Columbia*, 661 A.2d at 140.

<sup>280</sup> *Formal Case No. 1176*, AOBA Application at 13.

<sup>281</sup> *Formal Case No. 1176*, AOBA Application at 13-14.

presently billed.<sup>282</sup> According to AOBA, Pepco uses inflated revenue requirements at present rates to disguise the magnitude of the rate impacts the Rate Schedule GT-LV customers in the District face if the Company's December 11, 2024, Updated Compliance Rates are allowed to become effective.<sup>283</sup> AOBA asserts that without consideration of the Commission's directed BSA revenue, the GT-LV rate class will see increases in base rate revenue requirements of over \$55 million. According to AOBA, the recovery of Pepco's reported deferred BSA revenue balances will add roughly \$12.5 million to GT-LV class revenue requirements.<sup>284</sup>

94. AOBA states that its review of Pepco's December 11, 2024, Updated Compliance Rates filing and its impacts on Rate Schedule GT-LV customers does not support the Commission's assessment that Order No. 22328 produces just and reasonable rates and that Order No. 22328 cites no evidence that refutes AOBA's assessment.<sup>285</sup> AOBA argues that the factual correctness of AOBA's assessment of Pepco's filed testimony and exhibits could have been more fully developed at an evidentiary hearing.<sup>286</sup>

95. AOBA contends that Order No. 22328 does not provide a numeric assessment of its determinations' impacts on non-residential service classes, including Rate Schedule GT-LV customers.<sup>287</sup> AOBA further contends that the rate recovery for the portions of Pepco's GT-LV Deferred Revenue Balance to be collected from Rate Schedule GT-LV customers will add another \$11.9 million to the annual revenue requirements of the GT-LV rate class and that, when the estimated \$11.9 million of incremental BSA recoveries is considered, the annual increase in Rate Schedule GT-LV revenue requirements rises to over \$67 million.<sup>288</sup> AOBA argues that the combined impacts of the Commission's approved revenue increase for the GT-LV rate class and the approved changes in BSA revenue recoveries for that class are neither just nor reasonable, not reflective of cost-based ratemaking determinations, and ignores consideration of the principle of gradualism in the adjustment of rates.<sup>289</sup>

96. AOBA contends that its review of Pepco's December 11, 2024, Updated Compliance Rates filing suggests that the GT-LV class is not under-collecting its allocated revenue requirements to the extent Pepco claims. By comparing monthly GT-LV base rate revenues approved in Pepco's January 11, 2023, Revised Compliance Filing with actual collections from January 2023 through November 2024, AOBA calculates an under-recovery of only \$8,769,909.

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<sup>282</sup> *Formal Case No. 1176*, AOBA Application at 14.

<sup>283</sup> *Formal Case No. 1176*, AOBA Application at 14.

<sup>284</sup> *Formal Case No. 1176*, AOBA Application at 14-15.

<sup>285</sup> *Formal Case No. 1176*, AOBA Application at 15.

<sup>286</sup> *Formal Case No. 1176*, AOBA Application at 15.

<sup>287</sup> *Formal Case No. 1176*, AOBA Application at 16-19.

<sup>288</sup> *Formal Case No. 1176*, AOBA Application at 19.

<sup>289</sup> *Formal Case No. 1176*, AOBA Application at 19-20.

However, Pepco's monthly BSA filings report under-recoveries totaling \$57,833.313—a difference exceeding \$49 million. According to AOBA, those calculations are the product of Pepco's use of substantially erroneous numbers of GT-LV customers in its design of rates and the continued application of a BSA mechanism that erroneously assumes changes in the numbers of customers served in the GT-LV rate class necessarily yield proportional increases in Pepco's costs of providing service to that class.<sup>290</sup> AOBA argues that no cost basis supports this discrepancy, and that Order No. 22328 cites no evidentiary findings to justify Pepco's BSA adjustments for the GT-LV class.<sup>291</sup> Finally, AOBA contends that it does not understand the Commission's acceptance of more than \$49 million in claimed BSA under-recoveries for the GT-LV rate class in 2023 and 2024, absent a demonstrated cost basis.<sup>292</sup>

97. **Pepco Response.** Pepco asserts that AOBA's additional arguments challenging the ERA and the BSA deferral balances for the GT-LV class should be rejected. Pepco states that AOBA asserts that (1) the ERA added revenues before any increase was applied, and (2) the Commission erred in approving the use of the ERA for the GT LV class.<sup>293</sup> Pepco asserts these arguments have already been raised and either deemed invalid or should continue to be rejected by the Commission.<sup>294</sup>

#### **Decision on AOBA Application for Reconsideration – GT-LV Rate Class**

98. AOBA's Application rehashes its earlier arguments opposing the ERA and the BSA revenue deferrals. AOBA contends that the Commission erred by not explaining the basis for its determinations regarding Pepco's revenue requirement, including the ERA for the GT-LV rate class and the recovery of the BSA Deferred Revenue Balances.<sup>295</sup> AOBA notes that the Commission evaluated the impact of its decision on the residential class but did not undertake a comparable analysis for other rate classes.<sup>296</sup> AOBA argues that Order No. 22328 does not cite evidence to refute AOBA's assertion that the ERA amplifies bill impacts on GT-LV customers and further states that the factual correctness of its assessment could have been addressed at an evidentiary hearing.<sup>297</sup> AOBA again asks the Commission to remove Pepco's ERA from Pepco's computed rates and revenues at present rates for Rate Schedule GT-LV and eliminate certain BSA revenue deferrals over the last two calendar years.<sup>298</sup> AOBA contends that if AOBA had an

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<sup>290</sup> *Formal Case No. 1176, AOBA Application at 22.*

<sup>291</sup> *Formal Case No. 1176, AOBA Application at 22-23.*

<sup>292</sup> *Formal Case No. 1176, AOBA Application at 23.*

<sup>293</sup> *Formal Case No. 1176, Pepco Response at 39-40.*

<sup>294</sup> *Formal Case No. 1176, Pepco Response at 39-40.*

<sup>295</sup> *Formal Case No. 1176, AOBA Application at 13-14.*

<sup>296</sup> *Formal Case No. 1176, AOBA Application at 16 (citing Order No. 22328, ¶ 5, Table 1).*

<sup>297</sup> *Formal Case No. 1176, AOBA Application at 15.*

<sup>298</sup> *Formal Case No. 1176, AOBA Application at 25-26.*



opportunity for an evidentiary hearing, then AOBA could have cross-examined Pepco witnesses on their testimony and exhibits to assess the factual correctness of that testimony and to help develop a fuller record.

99. We have previously addressed AOBA's arguments and determined that AOBA's complaint regarding the ERA application to the GT-LV class was not valid.<sup>299</sup> Indeed, while AOBA acknowledges that the Company has underestimated the GT-LV customer count, AOBA previously opposed Pepco's billing determinants update filing for 2023, which would have reset the customer counts and adjusted the BSA revenue per customer amounts accordingly.<sup>300</sup> Specifically, in Order No. 21563, the Commission determined that new rates can go into effect by January 1, 2023, and so that neither Pepco nor AOBA are unnecessarily disadvantaged, we agreed with AOBA's request that the approved CY 2023 revenue increases by rate class should be calculated using our previously approved billing determinants.<sup>301</sup> Had the Commission approved Pepco's billing determinant update for 2023 in *Formal Case No. 1156*, the "distortions" that AOBA is claiming would likely have been limited. Moreover, AOBA's repeated contentions are not disputed material issues of fact that would warrant an evidentiary hearing. Additionally, our adoption of a per-class revenue target also partially addresses AOBA's concerns. AOBA's petition for reconsideration is denied.

**THEREFORE, IT IS ORDERED THAT:**

100. The Apartment and Office Building Association of Metropolitan Washington's Application for Reconsideration of Order No. 22328 is **DENIED**;

101. The Office of the People's Counsel for the District of Columbia's Application for Reconsideration of Order No. 22328 is **DENIED**; and

102. The Office of the People's Counsel for the District of Columbia's Request for Clarification is **DENIED**.

**A TRUE COPY:**

**BY DIRECTION OF THE COMMISSION**



**CHIEF CLERK:**

**BRINDA WESTBROOK-SEDGWICK  
COMMISSION SECRETARY**

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<sup>299</sup> *Formal Case No. 1176*, Order No. 22328, ¶¶ 472, 473.

<sup>300</sup> *Formal Case No. 1176*, Pepco Reply to AOBA's Application at 40.

<sup>301</sup> *See Formal Case No. 1156*, Order No. 21563, ¶ 16, rel. December 22, 2022.

**PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA  
1325 G STREET, N.W., SUITE 800  
WASHINGTON, D.C. 20005**

January 28, 2025

**FORMAL CASE NO. 1176, IN THE MATTER OF THE APPLICATION OF POTOMAC  
ELECTRIC POWER COMPANY FOR AUTHORITY TO IMPLEMENT A MULTIYEAR  
RATE PLAN FOR ELECTRIC DISTRIBUTION SERVICE IN THE DISTRICT OF  
COLUMBIA,**

**DISSENT OF COMMISSIONER RICHARD BEVERLY TO ORDER NO. 22358**

1. A motion for summary judgment is a request to decide the issue without going to trial. The moving party needs to show that there are no material issues of fact in dispute AND that the moving party is entitled to judgment as a matter of law (or in this case policy). OPC filed a joint motion for summary judgment, and the Commission declined to grant it, not because the Commission thought there were issues of fact but because it did not think the policies were sufficiently established to warrant a “summary” ruling in OPC’s favor. The Commission expressly stated that the policy issues undergirding the motion remained available to the parties such that the parties could continue to argue that Pepco was over-earning even though the motion had been denied. I don’t see any clear error in the Commission determining that an evidentiary hearing was unnecessary based on OPC’s unopposed representation that there were no material issues of fact.<sup>1</sup> But after that, the Order falls apart.

2. The non-utility parties have complained throughout this case that they could not tell how Pepco was calculating its revenue requirement or even tell whether Pepco was over- or under-earning its authorized rate of return without a prudence review or sufficient documentation. And OPC is still making the point. Specifically, OPC states:

“[T]he Order does not address the fact that the investments made during the prior MRP Pilot were never properly reviewed. The Commission does not address the

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<sup>1</sup> Although I don’t see the absence of an evidentiary hearing as a problem, the process is riddled with so many other problems that it is fundamentally unfair to the non-utility litigants. For instance, OPC requested reconsideration of Order No. 21886 which adopted a procedural schedule in this case, arguing “The Commission assured stakeholders there would be a full and comprehensive review of the MRP Pilot before moving forward with a ‘paradigm shift’ away from traditional rate cases. Order No. 21886 abandons that assurance.” (Office of the People’s Counsel for the District of Columbia’s Request for Reconsideration of Order 21886, pg. 2). The Commission’s failure to review the first pilot in advance of Pepco’s new MRP filing and the failure to develop regulations governing MRPs, including minimum filing requirements, contributes to the difficulties the parties have in reviewing an application submitted without any Commission rules governing the filing. On top of that, Pepco’s responsibility to carry the burden of proof by a preponderance of the evidence seems to have been implicitly watered down to only requiring Pepco to make a weak prima facie showing. Under this weakened standard, Pepco makes any representation that it cares to make and then the burden shifts to the non-utility litigants to rebut Pepco by trying to squeeze information out of the company through discovery under a tight schedule in a confusing simultaneous review of a pilot, MRP, and traditional rate case. What makes it worse is that any gaps in Pepco’s case are apparently being filled by the Commission itself through staff’s data requests. This entire process needs to be revised so we do not inadvertently stack the deck against ratepayers.

numerous discrepancies between how the money Pepco received was not spent in accordance with the proposal approved by the Commission in Order Nos. 20755 and 21042. OPC and others noted that there was close to \$150 million that was not spent in accordance with what was approved by the Commission. There is no finding that this deviation from the approved plan was justified. Order No. 22328 presumes, without explanation, that the rate base for the end of CY 2022 is appropriate, despite evidence indicating that the investments do not match what was approved in Formal Case No. 1156. This rate base forms the basis from which the rate base for CY 2023 is subsequently developed, which in turn forms the rate base for CY 2024 and the MRP. Together these issues demonstrate the Commission has fallen well short of its charge to provide adequate explanation of its decisions based on substantial evidence. The Order is therefore arbitrary, capricious, contrary to law, and should be vacated.”<sup>2</sup>

3. As OPC argues, the lack of prudence review corrupts not just the prior MRP but the present one. As I pointed out in my dissent to Order No. 22328, it is not possible to determine the direction or magnitude of Pepco’s over- or under-earning without first undertaking a prudence review,<sup>3</sup> particularly of the projects that make up the \$150 million dollar discrepancy. OPC goes on to state that the Commission’s Order No. 22328 does not explain how the revenue requirement was calculated. While this Order points to paragraph 97 of Order No. 22328 for an explanation that the Commission adopted the revenue requirement in Witness Leming’s testimony, paragraph 97 of Order No. 22328 simply states: “We find that the Company’s MRP revenue requirements methodology, as modified by the Commission, is reasonable”<sup>4</sup> before moving on to discussing the June 2024 ROR report, without explaining either how the initial figure was derived nor what the Commission’s modifications were. While this Order on reconsideration also states that the information OPC seeks is provided in the Schedules attached to Order No. 22328, it’s not clear to me how simply looking at a schedule is an ipso facto explanation of the calculation for the revenue requirement unless it’s based on some unstated and arguably inappropriate deference to Pepco. To be clear, although the schedules may demonstrate the *impact* of the Commission’s decisions to amend Pepco’s revenue requirement, the methodology or basis for the calculations is not provided.<sup>5</sup>

4. The second problem is the ERA and BSA deferral balance. Regarding the ERA, AOBA warned the Commission in testimony that Pepco’s use of the ERA was problematic and

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<sup>2</sup> The Office of the People’s Counsel for the District of Columbia’s Application for Reconsideration and Request for Clarification (“OPC Motion”), filed December 26, 2024. Pg 38.

<sup>3</sup> I incorporate my dissent to Order No. 22328 by reference.

<sup>4</sup> Order No. 22382, ¶ 97.

<sup>5</sup> For example, the Schedules appended to Order No. 22328 do not itemize the changes to rate base based on the Commission’s review of individual projects. The Schedules do not provide calculations of Pepco’s figures nor the Commission’s amendments.

would lead to a 60% increase in rates for the GT-LV class by more than doubling the requested revenue requirement.<sup>6</sup> AOBA states in its motion for reconsideration:

“As shown in Pepco’s December 11, 2024 Updated Compliance Filing ... the Company’s computed Effective Rate Adjustment for Rate Schedule GT-LV adds **\$32,575,865** of annual claimed revenue requirements to the GT-LV class. That represents an effective **36% increase** over the level of annual revenue that the Company’s currently approved rates are designed to produce, and the Company imposes that increase **before** any consideration of the additional revenue requirements the Commission approved for Pepco in Order No. 22328... Pepco rate design pages ... portray the Company’s calculated ‘Revenues at Effective Rates’ as including its Effective Rate Adjustments, implying that its computed Revenues at Effective Rates’ represent revenue requirements for which each rate class is currently responsible. That is a significant and important distortion of fact.”<sup>7</sup>

5. In Order No. 22328, the Commission dismissed AOBA’s objection, stating: “The Commission approves the use of the ERA to establish a baseline for current authorized revenues per class. The mechanism (previously known as the BSA Revenue Annualization) is necessary for BSA classes whose class revenue changes as customer counts grow or shrink.”<sup>8</sup> The Commission also stated “We do not believe that AOBA’s complaint that the ERA is ‘adding’ revenues to the GT-LV class before any increase is applied is valid.”<sup>9</sup> There is no stated basis for why the Commission disagrees with AOBA. Attachment 1 to AOBA’s motion appears to demonstrate exactly what AOBA has argued, that the ERA is added to the GT-LV rates in advance of the approved revenue requirement, adding approximately \$30 million in revenue to that rate class. As the majority concedes in Order No. 22328: “If Pepco’s forecasts were more accurate (acknowledging that COVID-19 pandemic impacts were a large part of the inaccuracy), the magnitude of the ERA would have shrunk.”<sup>10</sup>

6. Regarding the BSA deferral balances, AOBA highlights a major discrepancy between how AOBA calculates the deferral balance versus how Pepco calculates it. According to AOBA, the GT-LV class actual under-recovery is \$8,769,909. Pepco’s monthly BSA filings over the same period claim the BSA revenue under-recovery is \$57,833,313.<sup>11</sup> That equates to a difference of more than \$49 million, and as AOBA asserts, is 50% of the annual Rate Schedule GT-LV annual revenue requirement. AOBA had previously enumerated these concerns with differences in calculations due to Pepco under-counting the number of customers in a given rate

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<sup>6</sup> Apartment and Office Building Association Direct Testimony of Bruce R. Oliver at 109.

<sup>7</sup> Apartment and Office Building Association of Metropolitan Washington’s Application for Reconsideration of Order No. 22328 (“AOBA Motion”), filed December 26, 2024. PP 13-14

<sup>8</sup> Order No. 22328, ¶ 472.

<sup>9</sup> Order No. 22323, ¶ 473.

<sup>10</sup> Order No. 22323, ¶ 473.

<sup>11</sup> AOBA Motion at 21.

class.<sup>12</sup> AOBA avers that Order No. 22328 did not provide any cost basis or other evidentiary support for accepting Pepco's calculation of the BSA deferral balance.<sup>13</sup> It is not clear to me from either Order No. 22328 or this Order how the majority arrived at adopting Pepco's calculations over AOBA's.

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<sup>12</sup> Apartment and Office Building Association Direct Testimony of Bruce R. Oliver at 59-63.

<sup>13</sup> AOBA Motion at 23.

COMMISSION ACTION

**FORMAL CASE NO. 1176, IN THE MATTER OF THE APPLICATION OF THE POTOMAC ELECTRIC POWER COMPANY FOR AUTHORITY TO IMPLEMENT A MULTIYEAR RATE PLAN FOR ELECTRIC DISTRIBUTION SERVICE IN THE DISTRICT OF COLUMBIA,**

Date 1/28/25 Formal Case No. 1176 Tariff No. \_\_\_\_\_ Order No. 22358

	Approve Initial & Date	Dissent Initial & Date	Abstain Initial & Date
Chairman Emile Thompson	<u>ET/CL 1/28/25</u>	_____	_____
Commissioner Richard A. Beverly	_____	<u>RB/CL 1/28/25</u>	_____
Commissioner Ted Trabue	<u>TT/CL 1/28/25</u>	_____	_____

Certification of Action

C. Lipscombe  
General/Deputy General Counsel

Brian Edmonds  
OGC Counsel/Staff