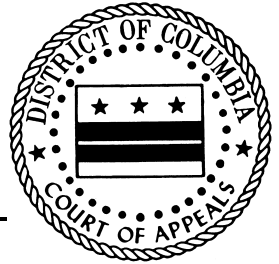


NOS. 25-AA-0250 & 25-AA-0310



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**IN THE DISTRICT OF COLUMBIA  
COURT OF APPEALS**

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**OFFICE OF THE PEOPLE’S COUNSEL  
OF THE DISTRICT OF COLUMBIA, *et al*,  
*Petitioners*,**

**v.**

**D.C. PUBLIC SERVICE COMMISSION,  
*Respondent*.**

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**ON PETITION FOR REVIEW OF FINAL AGENCY  
ACTION OF THE DISTRICT OF COLUMBIA  
PUBLIC SERVICE COMMISSION**

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**OPENING BRIEF OF THE OFFICE OF THE  
PEOPLE’S COUNSEL FOR THE DISTRICT OF COLUMBIA**

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## **Certificate as to Parties, Intervenors, *Amici Curiae*, and Counsel**

### 1. Formal Case No. 1176

In Formal Case No. 1176, the parties, intervenors, and counsel were:

Kimberly A. Curry, Anne C. Bancroft, Dennis P. Jamouneau, Taylor W. Beckham, Kunle Z. Adeyemo for Potomac Electric Power Company; Sandra Mattavous-Frye, Karen R. Sistrunk, Laurence C. Daniels, Ankush Nayar, Knia Tanner, Kintéshia S. Scott for the Office of the People’s Counsel for the District of Columbia; Frann G. Francis and Excetral K. Caldwell for the Apartment and Office Building Association of Metropolitan Washington; Brian R. Caldwell and Argatonia D. Weatherington for the District of Columbia Government; Michael R. Engleman, Robert C. Fallon, Marc Battle, Barbara Mitchell for District of Columbia Water and Sewer Authority; Kristi Singleton and Kelly Y. Burnell for the U.S. General Services Administration.

There were no *amici* before the Public Service Commission.

### 2. Case Nos. 25-AA-0250 and 25-AA-0310

In Case Nos. 25-AA-0250 and 25-AA-0310, the Petitioners are the Office of the People’s Counsel for the District of Columbia (“OPC”) and the Apartment and Office Building Association of Metropolitan Washington (“AOBA”). OPC is represented by Sandra Mattavous-Frye, Karen R. Sistrunk, Laurence Daniels, Ankush Nayar, Jason T. Gray, and Tim B. Hamilton. AOBA is represented by Jason T. Gray and Frann G. Francis.

The Respondent is the Public Service Commission of the District of Columbia, represented by Christopher G. Lipscombe.

Intervenor Potomac Electric Power Company is represented by Kimberly A. Curry, Dennis P. Jamouneau, Anne C. Bancroft, Kunle Adeyemo, and Taylor W. Beckham.

There are no *amici* before the Court.

## **Rule 26.1 Disclosure Statement**

The Office of the People's Counsel for the District of Columbia is a governmental agency of the District of Columbia.

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## Glossary of Abbreviated Terms

Abbreviated Term	Description
AFOR or AFORs	Alternative Form of Regulation or Alternative Forms of Regulation
Formal Case No. 1156 Pilot	The multi-year rate plan the PSC adopted as a pilot program in Pepco's previous rate case, Formal Case No. 1156
HTY	Historical Test Year under traditional regulation and ratemaking
MYP Application	Pepco's April 13, 2023 application in Formal Case No. 1176 for approval of a multi-year rate plan
OPC	The Office of the People's Counsel of the District of Columbia
Pepco	The Potomac Electric Power Company
PSC	The District of Columbia Public Service Commission
WGL	Washington Gas Light Company

Pursuant to Rule 28 of the Rules of the District of Columbia Court of Appeals (“D.C. App. R.”) and this Court’s April 29, 2025 Order, the District of Columbia Office of the People’s Counsel (“Office” or “OPC”), the statutory representative of District of Columbia ratepayers and consumers with respect to utility matters,<sup>1</sup> hereby submits its Opening Brief in this proceeding. As demonstrated herein, the Court should vacate District of Columbia Public Service Commission (“PSC”) Order No. 22328 (Order on the merits) and Order No. 22358 (Order denying application for reconsideration) in Formal Case No. 1176.

### **JURISDICTIONAL STATEMENT**

This appeal challenges PSC orders in 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*. Formal Case No. 1176 involved the PSC’s review of the Potomac Electric Power Company’s (“Pepco”) April 13, 2023 application for approval of a multi-year rate plan (“MYP Application”). In the agency proceedings below, OPC opposed Pepco’s MYP Application on procedural

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<sup>1</sup> D.C. Code § 34-804.

and substantive grounds. Over OPC’s objections, the PSC approved a modified version of Pepco’s MYP Application in Order No. 22328. On December 26, 2024, OPC timely filed an Application for Reconsideration of Order No. 22328. The PSC denied OPC’s Application for Reconsideration in Order No. 22358. On March 18, 2025, OPC timely filed a Petition for Review of Order Nos. 22328 and 22358. This Court has jurisdiction pursuant to D.C. Code §§ 2-510 and 34-605.

### **STATEMENT OF THE ISSUES PRESENTED**

OPC presents the following issues on appeal:

1. Whether the PSC’s actions were arbitrary and capricious when it departed from past practice and policy, *sub silentio*, and approved an alternative form of rate regulation, in the form of a multiyear rate plan, without reviewing the successes and failures of the multiyear rate plan the PSC previously adopted as a pilot program<sup>2</sup> or holding an evidentiary hearing.<sup>3</sup>

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<sup>2</sup> As explained herein, the PSC first adopted an AFOR proposal in Formal Case No. 1156. It adopted that proposal on a “pilot” basis to allow for review of the successes and failures of that program before deciding whether to continue the shift from traditional regulation to AFORs. OPC refers to that pilot program as the “Formal Case No. 1156 Pilot.”

<sup>3</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not ... depart from prior policy *sub silentio* or simply disregard rules that are still on the books.”).

2. Whether the PSC violated OPC's due process rights,<sup>4</sup> violated D.C. Code § 2-509(b),<sup>5</sup> and acted in an arbitrary or capricious manner by (i) identifying, for the first time, the evidence that comprised the evidentiary record in its order on the merits, and (ii) taking official notice of disputed facts in its order on the merits.
3. Whether the PSC fulfilled its obligation to "explain ... fully and clearly" its decision to approve a modified version of Pepco's MYP Application without holding an evidentiary hearing.<sup>6</sup>
4. Whether the PSC, by approving a modified version of Pepco's MYP Application without convening an evidentiary hearing, violated: (a) OPC's statutory and Constitutional due process rights;<sup>7</sup> (ii) D.C.

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<sup>4</sup> See *Quick v. Dep't of Motor Vehicles*, 331 A.2d 319, 323 (D.C. 1975) ("It is fundamental that the mind of the decider should not be swayed by evidence which is not communicated to both parties and which they are not given an opportunity to controvert.").

<sup>5</sup> See D.C. Code § 2-509(b) ("Every party shall have the right ... to submit rebuttal evidence.").

<sup>6</sup> See *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 661 A.2d 131, 135 (D.C. 1995) (discussing the PSC's obligation to "explain its actions fully and clearly"); see also *Wash. Pub. Interest Org. v. Pub. Serv. Comm'n*, 393 A.2d 71, 75 (D.C. 1978) (The PSC must explain "fully and clearly why it has taken a particular ratemaking action. Absent such comprehensive explanation, judicial review of the Commission's substantive decisions cannot be completed, and the rate order finally approved—or set aside.").

<sup>7</sup> See U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *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.'") (citation omitted); see also *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded

Code § 2-509;<sup>8</sup> (iii) D.C. Code § 2-510(a)(3)(A),<sup>9</sup> and (iv) D.C. Code § 34-908.<sup>10</sup>

5. In approving a modified version of Pepco's MYP Application, whether the PSC (i) violated D.C. Code § 2-509(e)'s prohibition against making findings of fact that are not supported by reliable, substantial evidence;<sup>11</sup> (ii) violated the requirements in D.C. Code 34-1504(d)(2)(A)-(B);<sup>12</sup> and (iii) adequately explained its

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finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

<sup>8</sup> *See* D.C. Code § 2-509(b) (“Every 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. Where 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>9</sup> *See id.* § 2-510(a)(3)(A) (reviewing courts may “hold unlawful and set aside any action or findings and conclusions found to be ... [a]rbitrary [or] capricious[.]”).

<sup>10</sup> *Id.* § 34-908 (“no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the Commission without a formal hearing.”).

<sup>11</sup> *See id.* § 2-509(e) (“Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence.”).

<sup>12</sup> *See id.* § 34-1504(d)(2)(A) (requiring the PSC to find that an alternative form of regulation “[p]rotects consumers”); *id.* §34-1504(d)(2)(B) (requiring the PSC to find that an alternative form of regulation “[e]nsures the quality, availability, and reliability of regulated electric services.”).

departure from past practice and prior orders regarding consideration of AFORs.<sup>13</sup>

6. Whether the PSC fulfilled its obligation to respond meaningfully to OPC's arguments.<sup>14</sup>

## STATEMENT OF THE CASE

OPC challenges Order Nos. 22328 and 22358 in Formal Case No. 1176, wherein the PSC approved a modified version of Pepco's April 13, 2023 MYP Application without: (1) adhering to the process the PSC established in Formal Case No. 1156 regarding review of multi-year rate plans; (2) providing parties notice of the materials that would compromise the evidentiary record the PSC would consider when addressing the merits of the MYP Application; and (3) affording parties an opportunity to cross examine witnesses and present rebuttal evidence at an evidentiary hearing.

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<sup>13</sup> See *Fox Television Stations, Inc.*, 556 U.S. at 515); *Wash. Pub. Interest Org.*, 393 A.2d at 75 (discussing the PSC's obligation to "fully and clearly [explain] why it has taken a particular ratemaking action.").

<sup>14</sup> See, e.g., *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (Unless an agency "answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.") (citations omitted); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000) (An agency's "failure to respond meaningfully to the evidence renders its decisions arbitrary and capricious.").

Under traditional rate regulation, the PSC reviews historic costs and investments made by the utility and may consider certain forecasted data (typically up to six months into the future).<sup>15</sup> Ratepayers benefit from this approach because rates are based on actual, verifiable facts instead of speculation about future events or forecasts. Investments and expenditures must be shown to have been prudently incurred and used and useful in providing the electric service.

However, Pepco's MYP Application proposed an alternative form of regulation or AFOR, which relied almost exclusively on forecasted expenditures over multiple years, from 2024 through 2026.<sup>16</sup> Instead of a one-time rate increase, Pepco proposed being awarded three rate

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<sup>15</sup> *Formal Case No. 1156, In the Matter of the Application of Potomac Elec. Power Co. for Auth. to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order No. 20273, ¶ 82 (rel. Dec. 20, 2019) <https://edocket.dcpssc.org/apis/api/Filing/download?attachId=89306&guidFileName=91813b51-4d10-4868-8a01-d87138e23adc.pdf> [J.A. at 8523]; *see also id.* at ¶ 11 [J.A. at 8498] (The PSC “uses the traditional methodology of ratemaking to determine ‘just and reasonable rates’ for electric and gas distribution utilities and has primarily relied on a cost of service methodology using a historic test year (‘HTY’). The HTY evaluates the costs incurred by the utility in a recent 12-month period and serves as a reference period for developing the utility’s costs for the prospective period when rates will be effective.”).

<sup>16</sup> MYP Application at 5 [J.A. at 6].

increases (one for each year during the plan).<sup>17</sup> These rate increases would be awarded prior to confirmation that such costs or investments were prudently incurred and used and useful in providing the utility service.

It follows that the PSC recognized that AFORs create risks compared to traditional regulation and established a deliberative process for their review. This included approving an initial one-and-half year long multiyear rate plan pilot program in Formal Case No. 1156 (the “1156 Pilot”). The 1156 Pilot would be followed by an audit to review lessons learned from its initial implementation and to establish regulations to govern any future multiyear rate plan applications.

OPC challenged consideration of the new Pepco MYP Application absent a proper review of the 1156 Pilot. Nevertheless, over OPC’s objections, the PSC abandoned this deliberative process and began review of Pepco’s MYP Application.

After the PSC rejected OPC’s challenges, OPC filed a Petition for Review with this Court, arguing that adjudicating the MYP Application before conducting the requisite review of the Formal Case No. 1156 Pilot

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<sup>17</sup> *Id.*

would cause irreparable harm. The Court denied OPC's Petition for Review as an impermissible challenge to a non-final agency action.

Subsequently, OPC participated in the agency proceedings below. After Pepco finished submitting its pre-filed testimony, OPC filed dispositive motions arguing that the MYP Application should be summarily rejected because the MYP Application was materially deficient,<sup>18</sup> and its consideration was premature. Further, Pepco did not quantify the benefits to ratepayers.<sup>19</sup> OPC argued that if the PSC was not inclined to summarily reject the MYP Application, then the PSC should convene evidentiary hearings and sponsored pre-filed testimony and exhibits challenging Pepco's proposal.

The PSC never convened evidentiary hearings in the proceedings below, nor issued a final decision on OPC's dispositive motions prior to issuing its final order. On November 26, 2024, the PSC issued Order No. 22328, approving a modified version of Pepco's MYP Application via 2-1 vote. On December 26, 2024, OPC filed an application for

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<sup>18</sup> See, e.g., AOBA's and OPC's Joint Motion to Dismiss or in the Alternative, Motion for Summary Disposition (Mar. 12, 2024) [J.A. at 6506] ("March 12 Joint Motion to Dismiss").

<sup>19</sup> *Id.*

Reconsideration of Order No. 22328. On January 28, 2025, the PSC issued Order No. 22358, denying all applications for reconsideration of Order No. 22328 and affirming its prior order in all material respects.

### STATEMENT OF FACTS

The PSC’s traditional approach to regulation and ratemaking involves “review[ing] costs and investments through a historical approach or partially forecasted test year (which provides for six months historical data and six months of forecasted data).”<sup>20</sup> The PSC uses that data to set rates that remain effective unless and until changed through a subsequent application for rate increase. Pepco’s MYP Application sought approval of an AFOR—i.e., a multi-year rate plan—that does not use actual, historical costs as the basis for setting rates. Under Pepco’s proposal, it would “forecast[] the expected capital investments and operations and maintenance costs for 2024 through 2026 and assume[] a

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<sup>20</sup> Order No. 20273 at ¶ 82 [J.A. at 8498]; *see also id.* at ¶ 11 [J.A. at 8498] (The PSC “uses the traditional methodology of ratemaking to determine ‘just and reasonable rates’ for electric and gas distribution utilities and has primarily relied on a cost of service methodology using a historic test year (‘HTY’). The HTY evaluates the costs incurred by the utility in a recent 12-month period and serves as a reference period for developing the utility’s costs for the prospective period when rates will be effective.”).

rate-effective date of February 15, 2024.”<sup>21</sup> According to Pepco, during the three-year period, Pepco would implement “three rate adjustments to allow the Company to recover costs that are prudently incurred and that produce the revenue required to safely maintain and operate reliably its electric distribution business in the District of Columbia consistent with and in furtherance of the District’s leading climate goals.”<sup>22</sup>

At an early stage in the proceeding, OPC challenged Pepco’s ability to file for approval of an AFOR on the grounds that the proposal was premature. In Pepco’s previous rate case—i.e., Formal Case No. 1156—the PSC adopted a modified version of Pepco’s first proposal to establish a multi-year rate plan. Prior to reaching that conclusion, the PSC determined that “review of any changes to the traditional ratemaking methodology must be deliberative, paying careful attention to the structure and framework for the evaluation of AFORs so that unintended operational or financial outcomes are mitigated and managed.”<sup>23</sup>

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<sup>21</sup> MYP Application at 5 [J.A. at 6].

<sup>22</sup> *Id.*

<sup>23</sup> Order No. 20273 at ¶ 86 [J.A. at 8525].

Consistent with its statutory obligations,<sup>24</sup> the PSC established a framework for considering AFOR proposals under this deliberative approach.<sup>25</sup> The PSC described its “framework [as] a starting point for an evolving evaluation process for AFOR proposals [that] can be reviewed and modified in the future as the public interest requires.”<sup>26</sup> The PSC ultimately approved a modified version of Pepco’s AFOR proposal in Formal Case No. 1156. But it did so on a pilot basis, explaining that its decision reflected the PSC’s “introductory determination” of an AFOR.<sup>27</sup> The PSC expressly held that it adopted the Formal Case No. 1156 Pilot as an introductory approach to AFORs because doing so “provides the [PSC], the Parties, and other stakeholders with an opportunity to improve the [multi-year rate plan] process and prudently evaluate the

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<sup>24</sup> D.C. Code § 34-1504(d)(1) vests the PSC with authority to adopt alternative forms of regulation that (i) protect consumers; (ii) ensure quality, availability and reliability of regulated electric services, and (iii) are in the interests of the public, including the utility’s shareholders.

<sup>25</sup> See Order No. 20273 [J.A. at 8487].

<sup>26</sup> *Formal Case No. 1156, In the Matter of the Application of Potomac Elec. Power Co. for Authority to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order No. 20755, ¶ 20 (rel. June 8, 2021) [J.A. at 8598].

<sup>27</sup> See *id.*

overall performance and effectiveness of the” modified AFOR.”<sup>28</sup> Specifically, the PSC explained that establishing the Formal Case No. 1156 Pilot “will allow this first [multi-year rate plan] filing to serve as an opportunity to gather valuable lessons learned in assessing future MRP proposals and to facilitate the development of AFOR regulations.”<sup>29</sup> OPC’s opposition to the MYP Application was premised on its reliance on adhering to the process and principles established in Formal Case No. 1156.

In comments submitted June 23, 2023, OPC argued that the MYP Application was premature because the PSC never reviewed Formal Case No. 1156 Pilot.<sup>30</sup> Consistent with the deliberative approach described above, OPC proposed a procedural schedule that allowed the PSC to perform that threshold review before considering Pepco’s second AFOR proposal.<sup>31</sup>

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<sup>28</sup> *See id.* at ¶ 474 [J.A. at 8767].

<sup>29</sup> *See id.* at ¶ 143 [J.A. at 8650].

<sup>30</sup> OPC’s Comments on Pepco’s Application (June 23, 2023) [J.A. at 2542].

<sup>31</sup> *Id.*

In a July 23, 2023 order, the PSC rejected OPC requests.<sup>32</sup> By 2-1 majority, the PSC decided to proceed with reviewing Pepco’s MYP Application. But the PSC also directed Pepco to file: (1) supplemental testimony and exhibits to “explain in quantitative and qualitative terms the benefits” of the Formal Case No. 1156 Pilot; and (2) supplemental testimony and exhibits along with supporting schedules “to support a traditional one-year rate case for the test period Calendar Year 2023.”<sup>33</sup> In his dissenting opinion, Commissioner Beverly opined that the majority decision takes “the evaluation of the initial [multi-year rate plan] (including the question of whether a general paradigm shift away from traditional ratemaking is in the public interest) and add[ed] the second [multi-year rate plan] into the mix (even though it doesn’t benefit from an evaluation of the first).”<sup>34</sup>

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<sup>32</sup> See *Formal Case No. 1176, In the Matter of the Application of Potomac Elec. Power Co. for Auth. to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order No. 21886 (rel. July 28, 2023)

<https://edocket.dcpsec.org/apis/api/Filing/download?attachId=192392&guidFileName=641ca1e2-b9c2-4203-a3fd-0da3b4b0f109.pdf> [J.A. at 2468].

<sup>33</sup> *Id.* at ¶ 24 [J.A. at 2480-81].

<sup>34</sup> See *id.* (Comm’r Beverly, dissenting, at 2) [J.A. at 2486].

On August 28, 2023, OPC filed an application for reconsideration of the PSC's decision.<sup>35</sup> OPC continued to argue that the PSC erred by proceeding with review of the MYP Application despite the fact that no evaluation of the Pilot had ever been performed.<sup>36</sup> Worse yet, OPC argued that the PSC adversely impacted OPC's rights by establishing a three-part rate case that would include simultaneous review of the MYP Application, review of the Formal Case No. 1156 Pilot, and review of a historical test year filing.<sup>37</sup>

By 2-1 majority, the PSC denied OPC's application for reconsideration on September 14, 2023, holding that OPC was improperly seeking reconsideration of a non-final order.<sup>38</sup> Commissioner Beverly dissented again, noting his disagreement with the majority's holding on finality and opining that "there appears to be no actual process

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<sup>35</sup> OPC's Request for Reconsideration of Order 21886 [J.A. at 2532].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Formal Case No. 1176, In the Matter of the Application of Potomac Elec. Power Co. for Auth. to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order No. 21903 (Sept. 14, 2023) [J.A. at 2668].

to seriously consider the pros and cons of a paradigm shift from traditional ratemaking to [a multi-year rate plan].<sup>39</sup>

On November 13, 2024, OPC filed a motion for Limited Stay, asking the PSC to stay the procedural holdings in its July 28 and September 14, 2023 orders to permit OPC to seek judicial review.<sup>40</sup> On that same day, OPC filed a Petition for Judicial Review with this Court, challenging Order Nos. 21886 and 21903.<sup>41</sup> On January 16, 2024, the Court denied OPC's Petition for Review on the grounds that it challenged a non-final order.<sup>42</sup>

OPC participated in the procedures the PSC established, engaging in discovery. On January 12, 2024, OPC sponsored pre-filed direct testimony and exhibits by five witnesses.<sup>43</sup> On April 22, 2024, OPC sponsored pre-filed surrebuttal testimony<sup>44</sup> in response to rebuttal

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<sup>39</sup> *Id.*

<sup>40</sup> OPC's Motion for Limited Stay (Nov. 13, 2023) [J.A. at 2673].

<sup>41</sup> OPC's Petition for Review (Nov. 13, 2023).

<sup>42</sup> *Office of the People's Counsel of the Dist. of Columbia v. D.C. Pub. Serv. Comm'n*, Case No. 23-AA-0959, Order Dismissing Petition for Review (Jan. 16, 2024).

<sup>43</sup> OPC's Direct Testimony of Witnesses and Supporting Exhibits [J.A. at 2719].

<sup>44</sup> OPC's Surrebuttal Testimony [J.A. at 6555].

testimony that Pepco submitted on February 27, 2024.<sup>45</sup> On March 12, 2024—i.e., after it submitted its pre-filed rebuttal case—OPC and other parties filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, arguing that the PSC should dismiss or reject the MYP Application as materially deficient or premature.<sup>46</sup> To the extent the PSC denied the requested relief, OPC argued that the PSC should:

identify all specific facts and circumstances of the case that militate against dismissal or summary judgment, taking care 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 [PSC] to be issues of law or policy.<sup>[47]</sup>

In the absence of PSC action on the March 12, 2024 motion and in light of additional evidence contained in the pre-filed surrebuttal testimony OPC and other parties sponsored on April 22, 2024, OPC joined other parties in submitting a second Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on June 10, 2024.<sup>48</sup> While the first motion remained pending, the second motion identified additional

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<sup>45</sup> Pepco’s Rebuttal Testimony [J.A. at 5679].

<sup>46</sup> March 12 Joint Motion to Dismiss [J.A. at 6506].

<sup>47</sup> *Id.*

<sup>48</sup> Joint Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (June 10, 2024) (“June 10 Joint Motion to Dismiss”).

deficiencies that, according to OPC, further supported a finding that Pepco failed to establish a *prima facie* case for a rate increase after having had a full opportunity to present its pre-filed evidentiary presentation.

In a June 13, 2024 Notice, the PSC indicated that, if the pending motions are not granted, the PSC would convene a “legislative-style hearing on July 30, 2024.”<sup>49</sup> In an order dated June 28, 2024, the PSC established additional process in light of confusion created by data contained in a filing Pepco made on June 24, 2024.<sup>50</sup> Noting the pending dispositive motions, the PSC explained that “[t]his case is part of an unprecedented paradigm shift in the way we regulate rates. As a result, any dispositive motion necessarily raises issues of first impression that we think are more appropriately decided after we have a more complete

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<sup>49</sup> *Formal Case No. 1176, In the Matter of the Application of the Potomac Elec. Power Co. for Auth. to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Notice of Legislative-Style Hearing (June 13, 2024) [J.A. at 6773].

<sup>50</sup> *Formal Case No. 1176, In the Matter of the Application of the Potomac Elec. Power Co. for Auth. to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order 22013, ¶ 29 (rel. June 28, 2024)

<https://edocket.dcpsc.org/apis/api/Filing/download?attachId=207482&guidFileName=d9a56afb-d374-4394-8033-7e51bf5f4b9b.pdf> [J.A. at 6788].

record.”<sup>51</sup> The PSC explained that it “ha[d] not decided any issue of policy or law that undergird the motions....”<sup>52</sup> The PSC also indicated that it “will advise the parties” should it determine after the legislative-style hearing “that an evidentiary hearing is necessary.”<sup>53</sup>

In a July 10, 2024 order, the PSC established procedures whereby the parties would file conformed versions of their pre-filed testimony and exhibits on August 12, 2024 and propose admission of stipulated testimony, exhibits, data requests, and data responses on August 21, 2024.<sup>54</sup>

OPC appeared at the July 30, 2024 legislative-style hearing which considered no evidence and consisted solely of oral argument by counsel for the participants. OPC utilized a portion of its allotted time—limited to 30 minutes in total—to reiterate concerns about the lack of process. Specifically, OPC argued that “if this case is not determined by the two

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<sup>51</sup> *Id.* at ¶ 28 [J.A. at 6788].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at ¶ 30 [J.A. at 6789].

<sup>54</sup> *Formal Case No. 1176, In the Matter of the Application of the Potomac Elec. Power Co. for Auth. to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order No. 22015 (rel. July 10, 2024).

dispositive motions [then] further proceedings must take place, specifically evidentiary hearings.”<sup>55</sup> In light of the limitations of a legislative-style hearing, and the fundamental differences between that process and an evidentiary hearing where witnesses are subject to cross examination, OPC also argued that “there’s a lack of a real evidentiary record in this proceeding, and certainly there would need to be additional proceedings of some kind, even if there were not evidentiary proceedings.”<sup>56</sup>

Pursuant to the July 10, 2024 order, parties filed conformed testimony and exhibits on August 12, 2024. No multi-party stipulations regarding admission of data responses were filed.

On November 26, 2024, the PSC issued Order No. 22328 approving a modified version of Pepco’s MRP. In Order No. 22328, the PSC, for the first time, identified the evidentiary record as the parties’ “pre-filed

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<sup>55</sup> *Formal Case No. 1176, In the Matter of the Application of the Potomac Elec. Power Co. for Auth. to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Transcript of Legislative-Style Hearing at p. 58:14-17 (July 30, 2024) [Record Index 72].

<sup>56</sup> *Id.* at 58:18-22 [Record Index 72].

testimony and exhibits” and “responses to data requests . . . .”<sup>57</sup> OPC promptly sought reconsideration and clarification of Order No. 22328 again raising issue with the lack of process afforded to the parties. On January 28, 2025, the PSC denied OPC’s application for reconsideration and clarification.<sup>58</sup> On March 18, 2025, OPC sought review of the PSC’s Orders before this Court.

### STANDARD OF REVIEW

The Court must determine whether the challenged orders are supported by substantial evidence. In making that determination, the Court traditionally applies a three-prong test. First, the Court considers whether the agency made findings on each material issue. Second, the Court considers whether the conclusion reached rationally flows from the

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<sup>57</sup> *Formal Case No. 1176, In the Matter of the Application of Potomac Elec. Power Co. for Authority to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order No. 22328, ¶ 26 (rel. November 26, 2024)

<https://edocket.dcpsec.org/apis/api/Filing/download?attachId=214935&guidFileName=ebccb9f7-667d-4758-af81-1489de100f91.pdf> [J.A. at 7260] .

<sup>58</sup> *Formal Case No. 1176, In the Matter of the Application of Potomac Elec. Power Co. for Authority to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order No. 22358 (rel. Jan. 28, 2025)

<https://edocket.dcpsec.org/apis/api/Filing/download?attachId=217663&guidFileName=0b9bc398-bdee-4dae-b739-98414cf69ba0.pdf> [J.A. at 8042].

facts found. Third, the Court considers whether the agency provided a rational connection between the facts found and the conclusions reached.<sup>59</sup>

Court precedent also provides guidance as to what constitutes substantial evidence. On the one hand, substantial evidence is more than “a mere scintilla and such that reasonable minds might accept it as inadequate to support a conclusion.”<sup>60</sup> On the other hand, an inquiry into whether an agency supported its decision with substantial evidence is not merely a review of “the quantity of evidentiary support for an administrative determination.”<sup>61</sup> Rather, harkening back to the three-pronged test mentioned above, the Court has explained that agencies must “demonstrate[e] in the findings of a rational connection between facts found and the choice made.”<sup>62</sup> In the context of ratemaking determinations by the PSC, the Court has held that the PSC must

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<sup>59</sup> See e.g., *Lim v. Dist. of Columbia Taxicab Comm’n*, 564 A.2d 720, 724 (D.C. 1989); *Scott v. Police & Firemen’s Ret. & Relief Bd.*, 447 A.2d 447, 449 (D.C. 1982).

<sup>60</sup> *Office of The People’s Counsel v. Dist. of Columbia Pub. Serv. Comm’n*, 797 A.2d 719, 726 (D.C. 2002).

<sup>61</sup> *Wash. Pub. Interest Org.*, 393 A.2d at 77.

<sup>62</sup> *Id.*

identify “enough evidence, rationally related to the rate order (through clearly articulated criteria), to justify [its] decision.”<sup>63</sup>

OPC recognizes that, as the Petitioner, it bears the burden of “showing convincingly” that the challenged findings are “unreasonable.”<sup>64</sup> Significantly, however, the Court has made clear that the PSC bears the burden, independent of a petitioner’s burden, of showing “fully and clearly why it has taken the particular ratemaking action.”<sup>65</sup> The Court will not deem “[a] utility rate [to] be ... ‘reasonable’ simply because an expert agency says it is.”<sup>66</sup> Rather, where, as here, the Court is “presented with a nonfrivolous petition for review,” it “has a responsibility to hold the [PSC] accountable—through as many remands as necessary—for satisfying [that] burden.”<sup>67</sup> If the Court finds that the

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<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 75 (The Court “can only set aside a rate order upon a ‘convincing showing’ of unreasonableness[.]”).

<sup>65</sup> *Id.*; *see also id.* at 78 (explaining that the PSC must “explain itself with precision.”).

<sup>66</sup> *Id.* at 75; *see also id.* at 78 (“[T]he more deference the reviewing court must show to the agency’s authority and expert judgment, the greater the agency’s obligation is to explain exactly why it chooses to take a particular course of action.”).

<sup>67</sup> *Id.* at 75.

PSC failed to provide “such comprehensive explanation, judicial review of the [PSC’s] substantive decisions cannot be completed and the rate order finally approved – or set aside.”<sup>68</sup>

Finally, agencies are free to depart from established practices and policies. But they must recognize the departure and provide a reasoned justification for it.<sup>69</sup> Failure to do so constitutes arbitrary and capricious action.

The challenged orders do not satisfy the requisite standard of review. Instead, they represent extreme examples of arbitrary and capricious decision-making at every turn—i.e., the departure from the Formal Case No. 1156 framework for considering AFORs, the consideration of the MYP Application without first evaluating the successes and failures of the Formal Case No. 1156 Pilot, and the design

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<sup>68</sup> *Id.*; see also *id.* at 78 (“It would be wholly at odds with the concept of judicial review to close a rate case in the [PSC’s] favor, upon an insufficient showing by a petitioner, when the [PSC’s] own order, under the guise of expertise, may preclude effective attack by inadequately explaining what the [PSC] has done and why the evidence supports it.”).

<sup>69</sup> See *Fox Television Stations, Inc.*, 556 U.S. at 515 (“An agency may not ... depart from prior policy *sub silentio* or simply disregard rules that are still on the books.”).

to approve an MYP Application without convening an evidentiary hearing. The Court should vacate the challenged orders.

### **SUMMARY OF THE ARGUMENT**

OPC and the PSC are both independent agencies of the District of Columbia, charged by statute with serving complementary roles in regulating the operations of energy companies.<sup>70</sup> Given their overlapping areas of expertise and complementary yet different roles, it is not uncommon for OPC to disagree with the PSC's decisions. But OPC recognizes that every disagreement does not warrant judicial intervention. OPC takes great care in evaluating the reasons and bases for its disagreements when deciding whether to seek judicial review. In assessing the challenged orders through that exacting standard, OPC determined that judicial review cannot be avoided here because the

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<sup>70</sup> *Compare* D.C. Code § 34-808.02 (“In supervising and regulating utility or energy companies, the [PSC] shall consider the public safety, the economy of the District, the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change and the District's public climate commitments.”), *with* D.C. Code 34-804(e) (“In defining its positions while advocating on matters pertaining to the operation of public utility or energy companies, [OPC] shall consider the public safety, the economy of the District of Columbia, the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change and the District's public climate commitments.”).

challenged orders represent such extreme departures from the statutory requirements and regulatory norms that facilitate the proper functioning of administrative agencies. Three examples demonstrate this point.

First, the challenged orders deviate from the traditional, standard rate case application. Instead, the challenged orders involved review of Pepco's second request for approval of an alternative to the PSC's traditional approach to regulation.<sup>71</sup> As explained in Section I of the Argument below, this distinction is critical because, in dealing with Pepco's first proposal in Formal Case No. 1156, the PSC: (1) acknowledged the protections embedded in and the advantages afforded by traditional regulation;<sup>72</sup> (2) recognized that alternatives like that

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<sup>71</sup> Under the traditional approach, the PSC “generally reviews costs and investments through a historical approach or partially forecasted test year (which provides for six months historical data and six months of forecasted data).” Order No. 20273 at ¶ 82 [J.A. at 8523]; *see also id.* at ¶ 11 [J.A. at 8498] (The PSC “uses the traditional methodology of ratemaking to determine ‘just and reasonable rates’ for electric and gas distribution utilities and has primarily relied on a cost of service methodology using a historic test year (‘HTY’). The HTY evaluates the costs incurred by the utility in a recent 12-month period and serves as a reference period for developing the utility’s costs for the prospective period when rates will be effective.”).

<sup>72</sup> *Id.* at ¶ 11 [J.A. at 8498] (“Advantages of using an HTY approach include ensuring that rates are based on actual costs that have been

Pepco proposed constituted a major “paradigm shift” away from its well-established, traditional approach;<sup>73</sup> and (3) “recognize[d] the concerns expressed by OPC” and others “about implementing AFORs” instead of adhering to traditional regulation and ensuring that OPC enjoys the protections afforded by that traditional approach.<sup>74</sup> Although D.C. Code § 34-1504(d)(1) permits the PSC to adopt AFORs, it specifies requirements that must be met before an AFOR can be adopted. Chief among those requirements is that the AFOR produce customer benefits. These statutory requirements led to the PSC’s determination that “review of any changes to the traditional ratemaking methodology must be deliberative, paying careful attention to the structure and framework for the evaluation of AFORs so that unintended operational or financial outcomes are mitigated and managed.”<sup>75</sup> Consistent with its statutory

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verified and that utility investments are consistent with cost minimization principles.”)

<sup>73</sup> Order No. 20755 at ¶ 473 [J.A. at 8767].

<sup>74</sup> Order No. 20273 at ¶ 92 [J.A. at 8528].

<sup>75</sup> *Id.* at ¶ 86 [J.A. at 8525].

obligations,<sup>76</sup> it established a framework for considering AFOR proposals under this deliberative approach.<sup>77</sup>

Pepco's MYP Application in Formal Case No. 1176 was "an outgrowth of Pepco's prior rate case," i.e., Formal Case No. 1156.<sup>78</sup> OPC fully expected the PSC to follow the framework and deliberative process it established in Formal Case No. 1156. While OPC had concerns with how that framework was implemented,<sup>79</sup> the framework provided protections in the sense that it ensured an AFOR proposal would not be reviewed in a hasty and haphazard manner. Unfortunately, the PSC immediately abandoned that approach.

Over OPC's objection, the PSC established a process whereby it took "the evaluation of the initial [multi-year rate plan] (including the question of whether a general paradigm shift away from traditional

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<sup>76</sup> D.C. Code § 34-1504(d)(1) vests the PSC with authority to adopt alternative forms of regulation that (i) protect consumers; (ii) ensure quality, availability and reliability of regulated electric services, and (iii) are in the interests of the public, including the utility's shareholders.

<sup>77</sup> See Order No. 20273 [J.A. at 8487].

<sup>78</sup> Order No. 21886 (Comm'r Beverly, dissenting, at 2) [J.A. at 2486].

<sup>79</sup> See Order No. 20755 at ¶ 113 [J.A. at 8637] (citing OPC's concerns about the sufficiency of the prudence review and reconciliation processes).

ratemaking is in the public interest) and add[ed] the second MRP into the mix (even though it doesn't benefit from an evaluation of the first)."<sup>80</sup> By adopting a cavalier approach at the outset to reviewing a regulatory proposal that the PSC itself described as a paradigm shift away from traditional regulation and the protections afforded by the traditional approach, the PSC set a began down a path that Commissioner Beverly would ultimately characterize as "a regulatory trainwreck that unreasonably promotes Pepco's interest at the expense of ratepayers."<sup>81</sup>

The PSC's second major error materialized as it implemented the review procedure that departed from the framework and deliberative process established in Formal Case No. 1156. As detailed in Section II of the Argument below, that process culminated in the PSC's issuance of an order on the merits of Pepco's MYP Application without ever convening an evidentiary hearing. By doing so, the PSC abrogated its statutory obligation to base its decision on the fact in evidence in the case before it, thereby denying OPC procedural rights and due process protections. The

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<sup>80</sup> Order No. 21886 (Comm'r Beverly, dissenting, at 2) [J.A. at 2486].

<sup>81</sup> Order No. 22328 (Comm'r Beverly, dissenting, at ¶ 1) [J.A. at 7434].

PSC’s decision was a *de facto* denial of OPC’s statutory “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>82</sup>

When OPC presented this error to the PSC, the PSC responded by reciting the exception to the general rule—i.e., that it “is not required to hold an evidentiary hearing where no material facts are in dispute or where the disposition of claims turns on the inferences and legal conclusions to be derived from facts already established and not a determination of facts.”<sup>83</sup> Significantly, however, the PSC never

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<sup>82</sup> D.C. Code § 2-509(b). The regulatory compact grants utilities a monopoly in exchange for a duty to serve all customers reliably, affordably, and without discrimination, under strict regulatory oversight. That oversight is not symbolic; it must be rigorous and based in evidence. Evidentiary hearings are the foundation of the regulatory compact. They ensure that rates and infrastructure decisions are examined in the light of public scrutiny, expert testimony, and factual analysis—not shrouded in administrative discretion. When the PSC bypasses evidentiary hearings, it erodes the integrity of the compact, undermines the public interest and tips power toward the utility.

<sup>83</sup> See Order No. 22328 at ¶ 21 [J.A. at 7256-57] (citing *Watergate E. Inc. v. Pub. Serv. Comm’n*, 662 A.2d 881, 890 (D.C. 1995); *Potomac Elec. Power Co. v. Pub. Serv. Comm’n*, 457 A.2d 776, 789 (D.C. 1983); 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994)); see also Order No. 22358 at ¶ 29 [J.A. at 8054].

analyzed the propriety of applying that exception to the facts of the proceeding below. OPC submits that the PSC must do more than recite the exception and summarily assume that the exception applies, particularly in a proceeding where the PSC is evaluating a proposed paradigm shift away from its traditional approach to regulation.

The third example of arbitrary and capricious decision-making is closely related to the second issue discussed immediately above. Due in part to its decision not to hold an evidentiary hearing, the PSC contemporaneously identified the contents of the “evidentiary record” and issued its order on the merits based on its consideration of that evidence.<sup>84</sup> As detailed in Section II.A of the Argument below, OPC could not possibly have had an opportunity to respond to or rebut materials that the PSC did not identify as evidence until it issued a merits determination on that evidence. Further, some of the “evidence” on which the PSC relied was not evidence at all.<sup>85</sup> Also, the PSC purported

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<sup>84</sup> The PSC also claimed that it “reviewed all evidence and testimony presented” and, “based on the record,” decided to approve a modified version of the MYP Application *See* Order No. 22328 at ¶ 5 [J.A. at 7250].

<sup>85</sup> *See id.* at ¶ 121 [J.A. at 7290] (relying on a statement by Pepco’s counsel as “evidence” of how Pepco incorporated “lessons learned” from the

to accept all “pre-filed testimony and exhibits into the evidentiary record of this proceeding,” as well as “the Parties’ responses to data requests[.]”<sup>86</sup> In section II of the Argument below, OPC demonstrates that this latter claim is, at most, specious. In fact, it is demonstrably false. When challenged on reconsideration to support its actions with substance, the PSC was summarily dismissive, overly reliant on general discretion that has not be shown to be justified here, or otherwise non-responsive to OPC’s arguments. If the public is to have confidence in regulatory proceedings and the validity of the orders they produce, it is imperative that the Court require much more from the PSC.

### **ARGUMENT**

Adherence to bedrock principles of due process and administrative procedure are paramount when regulating a public utility that provides an essential service such as the distribution of electricity within the District. These principles have heightened importance where, as here, an agency is reviewing a proposal that implicates, by its own admission, a major paradigm shift in how it regulates the public utility. The threat

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Formal Case No. 1156 Pilot to enhance the multi-year rate plan process in Formal Case No. 1176).

<sup>86</sup> *See id.* at ¶ 26 [J.A. at 7260].

of losing the public's confidence in the agency is most acute when the agency ignores its own deliberative process, established to safeguard the essential service against unintended consequences in the wake of such paradigm shifts. And while exceptions certainly exist to the general rule requiring evidentiary hearings, courts should hold an agency to account when it seeks to apply that exception in a proceeding with magnified impact. Under the most normal of circumstances, the PSC's actions should not pass muster. But the PSC's review of Pepco's MYR Application are not normal circumstances. Unfortunately, the PSC took shortcuts and flaunted its responsibilities at every turn. The compounding effect of the PSC's abrogation of its responsibilities culminated in agency action that is an archetypal example of arbitrary and capricious decision-making. If vacatur is not warranted in a proceeding that one Commissioner described as "a regulatory trainwreck,"<sup>87</sup> when would it be warranted?

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<sup>87</sup> Order No. 22328 (Comm'r Beverly, dissenting, at ¶ 1) [J.A. at 7434].

**I. The PSC Inexplicably Departed from Its Formal Case No. 1156 Framework By Reviewing the MYP Application Before Auditing the Formal Case No. 1156 Pilot.**

D.C. Code § 34-1504(d)(1) permits the PSC to adopt AFORs. However, in response to concerns raised by OPC and other parties about the potential adverse impacts of such a major paradigm shift away from traditional regulation, the PSC determined that “review of any changes to the traditional ratemaking methodology must be deliberative, paying careful attention to the structure and framework for the evaluation of AFORs so that unintended operational or financial outcomes are mitigated and managed.”<sup>88</sup> Consistent with its statutory obligations,<sup>89</sup> the PSC established a framework for considering AFOR proposals under this deliberative approach.<sup>90</sup> The PSC described its “framework [as] a starting point for an evolving evaluation process for AFOR proposals

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<sup>88</sup> Order No. 20273 at ¶ 86 [J.A. at 8525].

<sup>89</sup> D.C. Code § 34-1504(d)(1) vests the PSC with authority to adopt alternative forms of regulation that (i) protect consumers; (ii) ensure quality, availability and reliability of regulated electric services, and (iii) are in the interests of the public, including the utility’s shareholders.

<sup>90</sup> See Order No. 20273 [J.A. at 8487].

[that] can be reviewed and modified in the future as the public interest requires.”<sup>91</sup>

Though the PSC approved an AFOR in Formal Case No. 1156, its application of the AFOR framework resulted in adoption of a modified version of Pepco’s proposal. And the PSC adopted the Formal Case No. 1156 Pilot, explaining that its decision reflected the PSC’s “introductory determination” of an AFOR.<sup>92</sup> The PSC expressly held that it adopted the modified AFOR as a pilot program because doing so “provides the [PSC], the Parties, and other stakeholders with an opportunity to improve the [multi-year rate plan] process and prudently evaluate the overall performance and effectiveness of the” modified AFOR.”<sup>93</sup> Specifically, the PSC explained that establishing the Formal Case No. 1156 Pilot “will allow this first [multi-year rate plan] filing to serve as an opportunity to gather valuable lessons learned in assessing future MRP proposals and to facilitate the development of AFOR regulations.”<sup>94</sup>

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<sup>91</sup> Order No. 20755 at ¶ 20 [J.A. at 8598].

<sup>92</sup> *See id.*

<sup>93</sup> *See id.* at ¶ 474 [J.A. at 8767].

<sup>94</sup> *See id.* at ¶ 143 [J.A. at 8650].

Pepco's MYPR Application in Formal Case No. 1176 was "an outgrowth" of Formal Case No. 1156.<sup>95</sup> OPC fully expected that the PSC would adhere to the AFOR framework established in Formal Case No. 1156. Unfortunately, the PSC abandoned that framework when presented with the MYP Application in Formal Case No. 1176: it never provided a rational basis for that departure.

Over OPC's objection, the PSC established a process whereby it took "the evaluation of the initial [multi-year rate plan] (including the question of whether a general paradigm shift away from traditional ratemaking is in the public interest) and add[ed] the second MRP into the mix (even though it doesn't benefit from an evaluation of the first)."<sup>96</sup> By adopting a cavalier approach at the outset to reviewing a regulatory proposal that the PSC itself described as a paradigm shift, the PSC set a troubling course. When compounded by the material deficiencies identified in Section II below, the result is the "regulatory trainwreck" Commissioner Beverly identified in his dissenting opinion attached to Order No. 22328.

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<sup>95</sup> Order No. 21886 (Comm'r Beverly, dissenting, at 2) [J.A. at 2486].

<sup>96</sup> See Order No. 22328, (Comm'r Beverly, dissenting, at 1) [J.A. at 7434].

The PSC has an obligation to recognize and justify departures from past practices and policies.<sup>97</sup> In the proceedings below, the PSC fundamentally failed to fulfill that obligation. As a result, the Court should vacate the challenged orders.

## **II. The PSC Violated OPC's Due Process Rights.**

Procedural due process exists where there are safeguards in place to guard against the deprivation of a protected interest, namely life, liberty, and property.<sup>98</sup> A state statute creates a protected interest where it mandates that certain procedures be followed before an individual can be deprived of that interest.<sup>99</sup> Utility services have been recognized as a protected property interest for the ratepayer where there are procedural protections in place governing the administration of that service.<sup>100</sup> Thus, where there are state laws in place prohibiting a utility from terminating its service to customers without a showing of “cause,” there is a

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<sup>97</sup> See *Fox Television Stations, Inc.*, 556 U.S. at 515); *Wash. Pub. Interest Org.*, 393 A.2d at 77 (discussing the PSC's obligation to “fully and clearly [explain] why it has taken a particular ratemaking action”).

<sup>98</sup> *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 11.

“legitimate claim of entitlement’ under the protection of the Due Process Clause.”<sup>101</sup> Further, OPC is a party by right in PSC proceedings.<sup>102</sup> Consistent with OPC’s Constitutional rights, D.C. Code § 2-509(b) affords “[e]very party ... 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.” The PSC’s failure to identify the record prior to issuing a merits decision and failure to adequately support its decision to forego an evidentiary hearing deprived OPC of its statutory and due process rights. As a result, the Court should vacate the challenged orders.

**A. The PSC First Identified the Materials Constituting the Evidentiary Record in the Same Order Where It Made a Merits Determination Based on that Evidence.**

Throughout the proceedings below, OPC consistently raised genuine questions about the materials that the PSC would consider to be

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<sup>101</sup> *Id.* at 11-12; *see also Bd. of Regents*, 408 U.S. at 577 (“It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”).

<sup>102</sup> D.C. Code § 34-804(a) (“The Office shall be a party, as of right, in any investigation, valuation, revaluation, or proceeding of any nature by the Public Service Commission of or concerning any public utility operating in the District of Columbia.”).

evidence when making a merits determination. As noted above, OPC argued as late as the legislative-style hearing on July 30, 2024 that “there’s a lack of a real evidentiary record in this proceeding” and that steps would need to be taken to establish a record, regardless of whether the PSC was inclined to hold an evidentiary hearing or not.<sup>103</sup> Yet the PSC took no such step, leading to untenable results that violate OPC’s due process rights.

The PSC’s ruling on the merits—i.e., Order No. 22328—contemporaneously identified, for the first time, what the PSC deemed to constitute the “evidentiary record” and also reached a decision based on the PSC’s consideration of that “evidence.”<sup>104</sup> Because there was no hearing at which parties could present evidence—the PSC’s approach meant that OPC could not possibly have had an opportunity to respond to or rebut materials that the PSC identified as evidence when it published Order No. 22328.

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<sup>103</sup> Transcript of Legislative-Style Hearing at p. 58:18-22.

<sup>104</sup> The PSC also claimed that it “reviewed all evidence and testimony presented” and, “based on the record,” decided to approve a modified version of the MYP Application. See Order No. 22328 at ¶ 5 [J.A. at 7250].

Furthermore, the PSC erroneously adopted arguments made by Pepco’s counsel at the legislative-style hearing as evidence. At the hearing, OPC cautioned the PSC about improperly treating arguments from counsel as evidence. Yet, that is precisely what the PSC did in justifying its approval of a modified version of Pepco’s MYR Application. In particular, the PSC relied on a statement by Pepco’s counsel as “evidence” of how Pepco incorporated “lessons learned” from review of the Formal Case No. 1156 Pilot to enhance the multi-year rate plan process in Formal Case No. 1176.<sup>105</sup>

Another major problem with the PSC’s actions is its purported acceptance of all “pre-filed testimony and exhibits into the evidentiary record of this proceeding” and “the Parties’ responses to data requests[.]”<sup>106</sup> At most, the claim is specious. The agency record that the PSC filed in this proceeding on May 8, 2025 contains six items that are identified as responses to data requests.<sup>107</sup> None of those entries identify

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<sup>105</sup> *See id.* at ¶ 121 [J.A. at 7290] (relying on a statement by Pepco’s counsel as “evidence” of how Pepco incorporated “lessons learned” from the Formal Case No. 1156 Pilot).

<sup>106</sup> *See id.* at ¶ 26 [J.A. at 7260].

<sup>107</sup> Index 5 is Pepco’s Responses to AOBA’s Data Request No. 1-25; Index 7 is Pepco’s Responses to AOBA’s Data Request No. 2-20; Index 15 is

data responses provided by OPC or intervenors. Rather, they are Pepco's responses to data requests. And they are not all of Pepco's responses. The numbering conventions for those responses strongly suggest, if not demonstrate, that the PSC did not admit all of Pepco's responses. For example, Index 15 is Pepco's Responses to OPC Data Request No. 4-5. The implication is that OPC propounded Data Request Nos. 1, 2, 3, and the first four questions of Data Request No. 4 on Pepco before propounding Data Request 4-5. But the agency record does not include those responses, contrary to the PSC's claim about the scope and contents of the evidentiary record. An agency cannot be found to have satisfied its duty to make a rational connection between facts found and conclusions reached when it cannot accurately identify the evidence it believes it admitted into the record and purported to consider.

Finally, Order No. 22328 took official notice of disputed facts, which contravenes the utility and function of official notice.<sup>108</sup> The PSC violated

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Pepco's Responses to OPC Data Request No. 4-5; Index 20 is Pepco's Responses to Data Request Nos. 4-1; Index 66 is Pepco's Responses to PSC Staff Data Requests 6-3; Index 95 is Pepco's Responses to PSC Staff Data Requests 12-1 and 12-2.

<sup>108</sup> See, e.g., *Johnson v. D.C. Dep't of Emp't Servs.*, 167 A.3d 1237, 1242 (D.C. 2017) (prohibiting administrative law judge from taking official notice of the definition of "PTSD" from particular medical dictionary

OPC’s due process rights by taking official notice of facts that were of questionable accuracy and pertained directly to disputed issues in this case and failed to afford OPC an opportunity to respond.

OPC raised these issues in its Application for Reconsideration.<sup>109</sup> Rather than fulfill its obligation to meaningfully engage OPC’s arguments, the PSC affirmed many of its prior rulings without seriously engagement or analysis. The PSC relies generically on the “discretion and flexibility” it has been afforded by courts in “conducting agency proceedings based on the agency’s expertise.”<sup>110</sup> Or the PSC claims that it merely noted questionable “evidence” but did not rely on it<sup>111</sup>—an explanation that is nowhere to be found in Order No. 22328. On the issue of responses to data requests, the PSC did not seem to recognize that it did not, in fact, admit all responses.<sup>112</sup> On the most overarching issue—i.e., the violation of OPC’s due process rights—the PSC summarily

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where parties were contesting the precise definition of PTSD, including circumstances triggering PTSD).

<sup>109</sup> OPC’s Application for Reconsideration of Order No. 22328 [J.A. at 7931].

<sup>110</sup> Order No. 22358 at ¶ 58 [J.A. at 8065-66].

<sup>111</sup> *Id.* at ¶ 53 [J.A. at 8064].

<sup>112</sup> *Id.* at ¶ 58 [J.A. at 8065-66].

concludes without any justification whatsoever that OPC did not suffer prejudice.<sup>113</sup> This unsupported claim falls flat in the face of the actual circumstances of this case and the material concerns OPC raised about the insufficiency of the PSC's process.

In sum, the Court must require more of an agency, particularly in proceedings as important as the proceedings below. If the PSC had valid reasons for its arguments, it should have provided them. If the PSC was able to conclusively refute OPC's arguments, it should have done so. It would be untenable to permit the PSC to evade its statutory obligations and endorse the cavalier approach it took to this important proceeding. Consequently, the Court should vacate the challenged orders; doing so will send a clear message that the PSC's aversion to convening evidentiary hearings—which is part and parcel of its core function as a fact-finding regulator—is unacceptable in general and acutely problematic in important proceedings such as those below.<sup>114</sup>

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<sup>113</sup> Order No. 22328 at ¶¶ 33, 53, 55 [J.A. at 7262, 7267, 7268].

<sup>114</sup> The Court has recently admonished the PSC for its approach to evidentiary hearings and the sufficiency of its processes. *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 319 A.3d 392 (D.C. 2024).

**B. Reciting a Narrow Exception to the Requirement to Convene an Evidentiary Hearing is No Substitute for the Case-Specific Analysis Required to Show the Exception Applies Under these Circumstances.**

Throughout the proceedings below, OPC consistently argued that: (1) after Pepco submitted its pre-filed evidentiary presentation, summary dismissal was appropriate because that evidentiary presentation was not sufficient to satisfy Pepco's burden of proof; but (2) if the PSC declined to summarily reject the MYP Application, it must establish evidentiary hearings to elicit the evidence necessary to fill the gaps in Pepco's evidentiary presentation and develop a record on which it could base a reasoned decision.<sup>115</sup> With regard to the latter point, OPC's argument was consistent with the PSC's prior commitment to "determine on a case-by-case basis whether the principles of the [AFOR] framework have been met in the proposed AFOR under the specific facts and circumstances of the case."<sup>116</sup>

In response to OPC's requests, the PSC noted the exception to the general rule requiring evidentiary hearings. Specifically, the PSC

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<sup>115</sup> See, e.g., March 12 Joint Motion to Dismiss; June 10 Joint Motion to Dismiss.

<sup>116</sup> Order No. 20273 at ¶ 96 [J.A. at 8530].

explained that it “is not required to hold an evidentiary hearing where no material facts are in dispute or where the disposition of claims turns on the inferences and legal conclusions to be derived from facts already established and not a determination of facts.”<sup>117</sup> Significantly, however, the PSC never analyzed the propriety of applying that exception to the facts of the proceeding below.

While the PSC accurately cites the exception to the general rule, it failed to engage in an analysis to demonstrate that it is appropriate to apply the exception under the facts of this specific case. That is particularly true in a proceeding that, as discussed above, hinges on a case-by-case basis analysis of whether the principles of the AFOR framework have been met in the proposed AFOR under the specific facts and circumstances of the case. Yet, the PSC never engaged in this analysis.

In its Application for Reconsideration, OPC reiterated that the “legal standard is not in dispute. Rather, the issue is how that legal

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<sup>117</sup> See Order No. 22328 at ¶ 21 [J.A. at 7256-57] (citing *Watergate E. Inc.*, 662 A.2d at 890; *Potomac Elec. Power Co.*, 457 A.2d at 789; 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994)).

standard should be applied based on the facts and circumstances of this case.”<sup>118</sup> OPC explained that “Order 22328 is silent as to what facts had already been established and when, and it does not state the specific inferences and legal conclusions the [PSC] drew that justified depriving parties of their right to an evidentiary hearing.”<sup>119</sup> In fact, OPC noted that Order No. 22328 “cites numerous factual issues, disagreements, and differences.”<sup>120</sup> The PSC had an opportunity to engage these arguments on reconsideration and provide the analysis necessary to justify its conclusion. It either declined or failed to do so.

In Order No. 22358, the PSC continued to expand on the exception to the general rule requiring evidentiary hearings.<sup>121</sup> But it failed to recognize that the *Watergate* opinion on which the PSC relied is distinguishable. That proceeding focused on the interpretation of 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

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<sup>118</sup> Application for Reconsideration at 18 [J.A. at 7958].

<sup>119</sup> *Id.* at 19 [J.A. at 7959].

<sup>120</sup> *Id.*

<sup>121</sup> Order No. 22358 at ¶¶ 29-30 [J.A. at 8054-55].

(“WGL”) formally filing a tariff amendment approved by the order.<sup>122</sup> The appellant argued that it should have been afforded a hearing when WGL filed an amendment to its tariffs.<sup>123</sup> The PSC rejected that argument as meritless because WGL was simply filing an amendment to a previous proceeding. At issue was the effect of the prior order in tandem with WGL’s filing. In contrast, Formal Case No. 1176 was a contested case involving review of a new application. It is not limited to a utility’s decision to enforce an existing PSC order authorizing a rate increase. Accordingly, there were no “facts established” from a prior evidentiary hearing from which “inferences and legal conclusions” could be derived. If anything, *Watergate* demonstrates the type of analysis the PSC must perform to justify a decision not to hold an evidentiary hearing—an analysis that is lacking here.

In Order No. 22358, the PSC also misconstrued the two-part argument in OPC’s dispositive motions, accusing OPC of arguing that

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<sup>122</sup> *Watergate*, 662 A.2d at 886 (explaining that the basic challenge was to the determination of a replacement rate schedule—a determination that was not a factual finding but rather a conclusion about the legal effect of WGL’s subsequent filing on the PSC’s prior rate determination).

<sup>123</sup> *Id.* at 884-85.

there are no genuine issues of material fact in dispute.<sup>124</sup> After purporting to “repeatedly assert[] that there are no disputed issues of material fact in [the] dispositive motions,” the PSC claimed that “OPC now pivot[s] asserting that the [PSC] should have conducted a hearing to resolve disputed issues of material fact.”<sup>125</sup> This claim is a disingenuous *non-sequitur*.

As explained above, OPC argued in its dispositive motions that, after having a full opportunity to present evidence to meet its burden of proof through pre-filed submissions, Pepco failed to do so. On the question of burden of proof as presented in the dispositive motion, OPC argued that there were no genuine issues of material fact in the pre-filed “record” that existed at that time that would preclude the PSC from summarily rejecting the MYP Application. But if the PSC disagreed, and if its disagreement was based on a finding that genuine issues of material fact existed, OPC asked the PSC to identify those issues: identifying the genuine issues the PSC believed were in play would streamline the hearing and allow the parties to focus on a subset of material issues.

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<sup>124</sup> Order No. 22358 at ¶ 31 [J.A. at 8055].

<sup>125</sup> *Id.* at ¶ 32 [J.A. at 8055-56].

Specifically, OPC argued that to the extent the PSC denied the requested relief, it should identify all specific facts and circumstances militating against dismissal, as well as each genuine issue of material fact that cannot be resolved at this stage of the case.<sup>126</sup> The PSC identified neither.

In its June 28, 2024 order, the PSC denied the motions, though its denial came with the caveat that the PSC “ha[d] not decided any issue of policy or law that undergird the motions....”<sup>127</sup> Significantly, the PSC recognized that “[t]his case is part of an unprecedented paradigm shift in the way we regulate rates.”<sup>128</sup> As a result, the PSC held that “any dispositive motion necessarily raises issues of first impression that we think are more appropriately decided after we have a more complete record.”<sup>129</sup> That statement is consistent with OPC’s arguments that, in the absence of summary dismissal, the PSC must establish procedures to

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<sup>126</sup> March 12 Joint Motion to Dismiss at p. 26 [J.A. at 6532].

<sup>127</sup> Order 22013 at ¶ 28 [J.A. at 6788].

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (emphasis added).

allow for the development of a more complete record. OPC argued for evidentiary hearing procedures in particular.<sup>130</sup>

Moreover, given the PSC's June 28, 2024 statement about the need to develop a more complete record, it is important to look at the steps the PSC took to develop that evidence. The agency record the PSC submitted in this proceeding on May 8, 2025 demonstrates that the PSC never developed such evidence. Between June 28, 2024 and the November 26, 2024 issuance of Order No. 22328, the evidence the PSC received consisted entirely of: (1) Pepco's July 19, 2025 Response to Commission Staff Data Request No. 6-3;<sup>131</sup> (2) Pepco's August 27, 2025 Responses to Commission Staff Data Request Nos. 12-1 and 12-2;<sup>132</sup> and (3) the August 12, 2025 submissions of fully conformed versions of pre-filed testimony and exhibits. None of this evidence fills the evidentiary gap identified on June 28, 2024.<sup>133</sup>

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<sup>130</sup> See, e.g., Transcript of Legislative-Style Hearing at p. 58:14-22.

<sup>131</sup> Index 66, Pepco's July 19, 2025 Responses to Commission Staff Data Request No. 6-3.

<sup>132</sup> Index 95, Pepco's Responses to Commission Staff's Data Requests Nos. 12-1 and 12-2.

<sup>133</sup> Order No. 22328 makes no mention of the Pepco's August 27, 2025 Responses to Commission Staff Data Request Nos. 12-1 and 12-2. It does mention Pepco's July 19, 2025 Responses to Commission Staff Data

## CONCLUSION

**WHEREFORE**, the District of Columbia's Office of the People's Counsel asks the Court to vacate District of Columbia Public Service Commission Order Nos. 22328 and 22358 in Formal Case No. 1176.

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Request No. 6-3 in paragraph 340. The PSC cites that response to support the following indictment of an important aspect of Pepco's MYP Application: "Considering that the Company has not performed any specific analysis around the 2023 O&M variance drivers between budget and actuals, the [PSC] believes that the Company's O&M forecasts for years 2024, 2025, and 2026 are overstated and need modification."

## CERTIFICATE OF SERVICE

I certify that on the 9th day of June, 2025, a copy of the foregoing Opening Brief of the Office of the People's Counsel for the District of Columbia was served on the parties of record identified below through the District Court of Appeals E-File System.

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