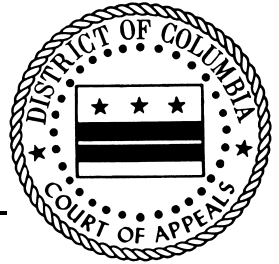


Nos. 25-AA-0250 & 25-AA-0310  
Consolidated

---



Clerk of the Court  
Received 07/24/2025 11:31 AM

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

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

v.

D.C. PUBLIC SERVICE  
COMMISSION,  
Respondent.

and

POTOMAC ELECTRIC  
POWER COMPANY  
Intervenor.

**BRIEF OF RESPONDENT**

Jamond D. Perry  
Brian O. Edmonds\*  
Naza N. Shelley  
Stephan Jaksch  
Shanelle C. Patterson  
PUBLIC SERVICE COMMISSION OF  
THE DISTRICT OF COLUMBIA  
1325 G Street, NW, Suite 800  
Washington, DC 20005  
(202) 626-5100

Kenneth R. Stark  
Robert A. Weishaar, Jr.  
McNEES WALLACE & NURICK LLC  
1200 G Street, NW, Suite 800  
Washington, DC 20005  
(202) 898-5700

*Attorneys for the Public Service Commission of the District of Columbia*

\*Counsel expected to argue

July 23, 2025

## **TABLE OF CONTENTS**

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES .....	1
III.	STATEMENT OF THE CASE.....	2
IV.	STATEMENT OF FACTS .....	6
	A. Statutory Authorization for Alternative Forms of Regulation and the Development of Pepco’s Multi-Year Rate Plan .....	6
	B. The Bill Stabilization Adjustment and Effective Rate Adjustment .....	8
V.	STANDARD OF REVIEW .....	14
VI.	SUMMARY OF ARGUMENT.....	15
VII.	ARGUMENT .....	18
	A. Petitioners Either Abandon or Fail To Substantiate Their Due Process Violation Claims.....	18
	B. The Commission Did Not Violate OPC or AOBA’s Due Process Rights By Not Holding An Evidentiary Hearing and the Commission Provided Sufficient Notice and Opportunity for the Parties To Be Heard Satisfying The Due Process Requirement.....	20
	1. The Commission’s Determination that An Evidentiary Hearing Was Not Required is Consistent with the D.C. Code and Case Law.....	21
	2. The Commission’s Process and Extensive Procedures – Including Multiple Rounds of Testimony, Extensive Discovery, Community Hearings, a Legislative-Style Hearing, Motions, and Briefing – Provided Petitioners with Sufficient Due Process.....	24
	3. As Sophisticated Parties That Routinely Appear Before the Commission, AOBA and OPC Must Accept the Consequences of the Litigation Strategies They Advanced Before the Commission and Their Failure to Motion for an Evidentiary Hearing.....	26
	4. The Commission Provided Reasoned Consideration in Developing the Record and Admitting Evidence.....	29
	C. Utilizing Its Ratemaking Expertise and Statutory Authority in D.C. Code § 34-1504(d)(1), the Commission Approved Pepco’s Application as an Extended Pilot in Formal Case No. 1176 Prior to Completing a	

Comprehensive Lessons Learned Review of Pepco’s Multi-Year Rate Plans .....	33
1. The Commission Did Not Establish a Required MRP Pilot Lessons Learned Review Framework.....	33
2. The Commission Adhered to Statutory Requirements to Protect Consumers and the Public Interest When Engaging in Alternative Forms of Ratemaking.....	34
3. OPC Advances Policy Arguments in Opposition to Alternative Regulation and Collaterally Attacks the Commission’s Final Orders in Formal Case No. 1156 .....	38
D. The PSC’s Rate Determinations Concerning GT-LV Customers Are Just and Reasonable and Supported by Substantial Evidence. ....	40
1. The PSC’s Determinations Regarding Pepco’s Cost Recovery of Bill Stabilization Adjustment Deferral Balances Reflect Reasoned Consideration. ....	40
2. The PSC’s Acceptance of Pepco’s Proposed Effective Rate Adjustment for the GT-LV Class Reflects Reasoned Consideration. ....	43
VIII. CONCLUSION.....	48

## TABLE OF AUTHORITIES

### **Federal Cases**

<i>Citizens for Allegan County v. Federal Power Comm’n</i> , 414 F.2d 1125 (D.C. Cir. 1969) .....	21
<i>FCC v. Schreiber</i> , 381 U.S. 279 (1965) .....	26
<i>Mathews v. Elridge</i> , 424 U.S. 319 (1976) .....	20, 24
<i>Vermont Yankee v. NRDC</i> , 435 U.S. 519 (1978) .....	26

### **D.C. Court of Appeals Cases**

<i>Columbia Realty Venture v. D.C. Rental Hous. Comm’n</i> , 590 A.2d 1043 (D.C. 1991) .....	22
<i>D.C. Dept. of Corrections v. D.C. Dept. Employment Servs.</i> , 281 A.3d 588 (D.C. 2022) .....	23
<i>D.C. Hous. Auth. v. D.C. Office of Human Rights</i> , 881 A.2d 600 (D.C. 2005) .....	33
<i>District of Columbia v. PSC</i> , 802 A.2d 373 (D.C. 2002) .....	31
<i>Fair Care Found. v. District of Columbia Dep’t of Ins. &amp; Sec. Regulation</i> , 716 A.2d 987 (D.C.1998) .....	33
<i>Green v. D.C. Child &amp; Fam. Servs. Agency</i> , 322 A.3d 542 (D.C. 2024) .....	20
<i>Haight v. District of Columbia Alcoholic Beverage Control Bd.</i> , 439 A.2d 487 (D.C. 1981) .....	31
<i>In re Walker</i> , 856 A.2d 579 (D.C. 2004) .....	40
<i>Johnson v. D.C. Dept. of Health</i> , 163 A.3d 746 (D.C. 2017) .....	31
<i>Johnson v. United States</i> , 398 A.2d 354 (D.C. 1979) .....	31
<i>McKinley v. D.C. Dept’ of Emp. Servs.</i> , 696 A.2d 1377 (D.C. 1996) .....	15, 22
<i>Metropolitan Washington Board of Trade v. PSC</i> , 432 A.2d 343 (D.C. 1981) .....	15
<i>Mitchell v. Gales</i> , 61 A.3d 678 (D.C. 2013) .....	39
<i>Moore Energy Res., Inc. v. Pub. Serv. Comm’n</i> , 785 A.2d 300 (D.C. 2001) ...	14, 25, 30
<i>Niagara Mohawk v. FPC</i> , 379 F. 2d. 153 (D.C. 1976) .....	26
<i>Office of the People’s Counsel v. Pub. Serv. Comm’n</i> , 571 A.2d 206 (D.C. 1990) ..	14
<i>OPC v. PSC</i> , 284 A.3d 1027 (D.C. 2022) .....	14
<i>OPC v. PSC</i> , 797 A.2d 719 (D.C. 2002) .....	15, 46
<i>OPC. v. PSC</i> , 163 A.3d 735 (D.C. 2017) .....	15
<i>Pepco. v. Pub. Serv. Comm’n</i> , 319 A.3d 392 (D.C. 2024) .....	8, 15, 17, 21
<i>Rose v. United States</i> , 629 A.2d 526 (D.C. 1993) .....	19
<i>Thomas v. D.C. Dep’t of Emps. Servs.</i> , 547 A.2d 1034 (D.C. 1988) .....	26
<i>Washington Gas Light Co. v. PSC</i> , 450 A.2d 1187 (D.C. 1982) .....	14, 48
<i>Washington Urban League, Inc. v. Pub. Serv. Comm’n</i> , 295 A.2d 906 (D.C. 1972) .....	31

<i>Watergate East Inc. v. PSC</i> , 662 A.2d 881, 890 (D.C. 1995) .....	21
<i>Williamson v. District of Columbia Bd. of Dentistry</i> , 647 A.2d 389 (D.C. 1994).....	31

## **Statutes**

D.C. Code § 2-509 .....	21, 31
D.C. Code § 34-150 .....	6
D.C. Code § 34-1504 .....	1, 7, 17, 34, 38, 39, 40
D.C. Code § 34-901 .....	6, 7, 34, 37
D.C. Code § 34-908 .....	21

## **Commission Orders**

<i>Formal Case No. 1017, In the Matter of the Develop. And Desig. Of Standard Offer Serv. In the Dist. of Columbia.,</i> Order No. 18829 .....	23
<i>Formal Case No. 1053, In the Matter of the Application of the Potomac Elec. Power Co. for Authority to Increase Existing Retail Rates and Charges for Elec. Distrib. Serv.,</i> Order No. 14712 .....	8, 41
<i>Formal Case No. 1053, In the Matter of the Application of the Potomac Elec. Power Co. for Authority to Increase Existing Retail Rates and Charges for Elec. Distrib. Serv.,</i> Order No. 15556 .....	8
<i>Formal Case No. 1087, In the Matter of the Application of the Potomac Elec. Power Co. for Authority to Increase Existing Retail Rates and Charges for Elec. Distrib. Serv.,</i> Order No. 16930 .....	9, 17
<i>Formal Case No. 1139, In the Matter of the Application of the Potomac Elec. Power Co. for Authority to Increase Existing Retail Rates and Charges for Elec. Distrib. Serv.,</i> Order No. 18846 .....	7
<i>Formal Case No. 1156, In the Matter of the App. Of Potomac Elec. Power Co. For Authority to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. In the Dist. of Columbia</i> Order No. 20755 .....	7, 35, 36
<i>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,</i> Order No. 21886 .....	2, 3
<i>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</i>	

<i>the Dist. of Columbia,</i>	
Order No. 21903 .....	2, 3
<i>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,</i>	
Order No. 22013 .....	4, 28, 32, 33
<i>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,</i>	
Order No. 22328 ...	1, 4, 5, 6, 9, 10, 11, 12, 13, 16, 18, 25, 26, 29, 32, 34, 35, 37, 38, 40, 42, 43, 44, 45, 46, 47
<i>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,</i>	
Order No. 22358 .....	1, 6, 15, 20, 21, 22, 23, 24, 25, 27, 30, 33, 38, 41
<i>In the Matter of the Application of the Potomac Elec. Power Co. for Authority to Increase Existing Retail Rates and Charges for Elec. Distrib. Serv.,</i>	
Order No. 17424 .....	9, 17

## **GLOSSARY OF ABBREVIATED TERMS**

<b>Abbreviated Term</b>	<b>Description</b>
AOBA	Apartment and Office Building Association of Metropolitan Washington
Br.	Brief
BSA	Bill Stabilization Adjustment
CY	Calendar Year
ERA	Effective Rate Adjustment
Extended Pilot	The Multi-Year Rate Plan that the Commission approved in <i>Formal Case No. 1176</i> as an extension to the Multi-Year Rate Plan approved in <i>Formal Case No. 1156</i>
First Summary Judgment Motion	Summary judgment motion filed by OPC, AOBA, and the District of Columbia Government on March 12, 2024 in <i>Formal Case No. 1176</i>
GT-LV	Rate Schedule Time Metered General Service – Low Voltage Service
Initial Pilot	The Multi-Year Rate Plan that the Commission approved in <i>Formal Case No. 1156</i>
LLWG	Formal Case No. 1176 Modified MRP Extended Pilot Lessons Learned Working Group
J.A.	Joint Appendix
MRP	Multi-Year Rate Plan
Pepco	The Potomac Electric Power Company
Petitioners	The Office of the People’s Counsel for the District of Columbia and the Apartment and Office Building Association of Metropolitan Washington
PSC or Commission	The District of Columbia Public Service Commission
OPC	Office of the People’s Counsel for the District of Columbia
Orders	Commission Order Nos. 22328 and 22358 in <i>Formal Case No. 1176</i> that are on review in Case Nos. 25-AA-0250 & 25-AA-0310
Second Summary Judgment Motion	Summary judgment motion filed by OPC and AOBA on June 10, 2024 in <i>Formal Case No. 1176</i>

## **I. INTRODUCTION**

Petitioners the Office of People’s Counsel for the District of Columbia (“OPC”) and the Apartment and Office Building Association of Metropolitan Washington (“AOBA”) seek review of the Public Service Commission of the District of Columbia’s (“Commission” or “PSC”) Order Nos. 22328 and 22358 in *Formal Case No. 1176* (collectively, “Orders”)<sup>1</sup> approving a modified version of the Potomac Electric Power Company’s (“Pepco”) Multi-Year Rate Plan (“MRP”) application as an extended pilot (“Extended Pilot”) and alternative form of regulation for jurisdictional public utilities as prescribed by D.C. Code § 34-1504(d). The Orders reflect reasoned consideration and the Commission’s balancing of competing views and public interest considerations. Because the Orders are supported by substantial evidence in the record, the Court should affirm the Orders in all respects and deny the Petitions for Review.

## **II. STATEMENT OF ISSUES**

Issues presented by Petitioners include whether: 1) the PSC provided adequate due process; 2) the PSC exercised its ratemaking expertise consistent with its statutory obligations in DC Code § 34-1504(d)(1); and 3) any of the PSC’s

---

<sup>1</sup> Order No. 22328 (issued Nov. 26, 2025) (J.A. 7246); Order No. 22358 (issued Jan. 28, 2025) (J.A. 8042).



ratemaking determinations for Rate Schedule Time Metered General Service – Low Voltage Service (“GT-LV”) were arbitrary and capricious.

### III. STATEMENT OF THE CASE

On April 13, 2023, Pepco filed an application, “Climate Ready Pathway,” for approval to increase rates through a second MRP for its electric distribution service in the District of Columbia for Calendar Years (“CY”) 2024 to 2026.<sup>2</sup> On July 28, 2023, the PSC issued Order No. 21886 directing Pepco to 1) file supplemental testimony and exhibits explaining lessons learned from the *Formal Case No. 1156* Modified Enhanced MRP pilot (“Initial Pilot”) and 2) file supplemental testimony, exhibits, and supporting schedules for a one-year rate case for the CY 2023 test period.<sup>3</sup>

On August 28, 2023, OPC, with the support of AOBA, filed a Request for Reconsideration of Order No. 21886, arguing that it departed from traditional rate case process and precedent, established a truncated procedural schedule, and violated due process rights by allowing simultaneous review of the Initial Pilot and Pepco’s new proposed MRP. On September 14, 2024, the PSC, in Order No. 21903, denied the Request for Reconsideration of Order No. 21886, concluding that it improperly sought reconsideration of a non-final order.

---

<sup>2</sup> J.A. at 0002.

<sup>3</sup> J.A. at 2468.

On October 16, 2023, Pepco filed its traditional historic test year cost of service rate application, as directed by Order No. 21886. On October 19, 2023, Pepco filed voluntary responses to its traditional test year compliance filing.

On November 13, 2023, OPC filed with this Court a Petition for Review challenging Order Nos. 21886 and 21903.

On January 12, 2024, OPC and AOBA filed direct testimony and exhibits. On February 27, 2024, Pepco filed its rebuttal. On April 22, 2024, OPC filed surrebuttal.

On January 16, 2024, this Court dismissed OPC's petition for review of Order Nos. 21886 and 21903, reluctant to interfere with agency procedural decisions.

On March 12, 2024, OPC, AOBA, and the District of Columbia Government filed a Joint Motion to Dismiss or, In the Alternative, Motion for Summary Judgment ("First Summary Judgment Motion") requesting dismissal of Pepco's application as premature or alternatively, that the PSC "grant summary judgment because it can resolve genuine issues of material fact and issues of law and policy based on the voluminous pre-filed submissions."<sup>4</sup> On the same day, OPC motioned to extend the procedural schedule to allow for more time for discovery and testimony. On April 1, 2024, the Commission issued Order No. 21976, adopting a new procedural schedule, largely in accordance with OPC's proposed schedule. The new schedule

---

<sup>4</sup> First Summary Judgment Motion at 2, J.A. at 6506.

noted that a hearing (if necessary) is to be determined.<sup>5</sup>

On June 10, 2024, OPC and AOBA filed a Motion to Dismiss or, In the Alternative, Motion for Summary Judgment (“Second Summary Judgment Motion”) requesting that the Commission deny Pepco’s MRP application and “ find there is no need for any rate increase via summary judgment, as there is no material fact in dispute that Pepco needs rate relief based on its own admissions.”<sup>6</sup>

On June 13, 2024, the PSC issued a Notice of Legislative-Style Hearing for July 30, 2024, providing parties an opportunity for oral argument on any issues they “believe are fundamental to the Commission’s decisions in this proceeding.”<sup>7</sup>

On June 24, 2024, OPC filed a Motion to Suspend the Procedural Schedule (“Motion to Suspend”).<sup>8</sup> On June 28, 2024, the PSC issued Order No. 22013, granting certain relief, but denying OPC’s Motion to Suspend and denying the Summary Judgment Motions, explaining that any dispositive issues raised therein would be more appropriately decided after the Commission had a more complete record.<sup>9</sup> The Commission directed the parties to appear at the July 30, 2024 hearing

---

<sup>5</sup> J.A. at 8796.

<sup>6</sup> Second Summary Judgment Motion at 2, J.A. at 8800.

<sup>7</sup> J.A. at 6773.

<sup>8</sup> J.A. at 8820.

<sup>9</sup> J.A. at 6774; Order No. 22328 at ¶ 21, J.A. at 7256 (because the PSC had not decided on any issue of policy or law that undergird the summary judgment motions, the Commission explained that the Parties were “free to argue their case as they would have if no dispositive motion had been filed”).

and gave parties the opportunity to file pre-hearing briefs, stipulate to testimony, exhibits, and post-hearing briefs and engage in more discovery to complete the record. No parties sought reconsideration or clarification of Order No. 22013.

The parties filed pre-hearing briefs on July 24, 2024. The Legislative-Style Hearing was held on July 30, 2024. On August 12, 2024, parties submitted pre-filed testimony and exhibits. On August 30, 2024, parties filed post-hearing briefs.

On November 26, 2024, the PSC issued Order No. 22328, approving the Extended Pilot, authorizing a rate increase during a two-year term with a revenue requirement of \$99.7 million in 2025 and \$23.7 million in 2026 for a cumulative increase of \$123.4 million over two years.<sup>10</sup> The PSC reduced Pepco's Return on Equity and Rate of Return, and implemented a \$211 million downward adjustment of Pepco's capital expenditures and proposed operations and maintenance expenses.<sup>11</sup> The PSC established a separate bill line item for the bill stabilization adjustment ("BSA") surcharge, annual BSA reconciliation filings, BSA class revenue targets, and a BSA Working Group to discuss future improvements. The PSC wrote off Pepco's deferral balance revenues by \$15.3 million due to Pepco's prior BSA demand billing determinant error.<sup>12</sup> The PSC committed to formalize an MRP Lessons Learned proceeding, continuing work from *Formal Case No. 1156* and

---

<sup>10</sup> Order No. 22328 at ¶ 6 (J.A. at 7250).

<sup>11</sup> Order No. 22328 at ¶ 7 (J.A. at 7251).

<sup>12</sup> Order No. 22328 at ¶ 8 (J.A. 7251).

precluding Pepco from filing another MRP until the Lessons Learned proceeding concludes with a final PSC order.<sup>13</sup>

On December 26, 2024, OPC and AOBA sought reconsideration of Order No. 22328, contending, *inter alia*, the PSC's procedures, including the legislative-style hearing in lieu of an evidentiary hearing, violated their due process rights. On January 3, 2025, Pepco filed a response. On January 28, 2025, the PSC issued Order No. 22358, denying the Petitions for Reconsideration, finding the arguments presented by OPC and AOBA were previously and fully addressed by the PSC, and that both parties failed to identify any genuine issues of material fact in dispute that warranted an evidentiary hearing. On March 18 and 28, 2025, OPC and AOBA respectively petitioned for review of Order Nos. 22328 and 22358 to this Court.

#### **IV. STATEMENT OF FACTS**

##### **A. Statutory Authorization for Alternative Forms of Regulation and the Development of Pepco's Multi-Year Rate Plan**

On May 9, 2000, the D.C. Code was amended to authorize the PSC to evaluate alternative forms of ratemaking.<sup>14</sup> Pursuant to D.C. Code § 34-901, public utilities like Pepco are authorized to file an application with the PSC to request a rate increase; in determining whether the request is "reasonable, fair, and just," the PSC

---

<sup>13</sup> Order No. 22328 at ¶ 8 (J.A. 7251).

<sup>14</sup> See D.C. Code § 34-150(d)(1).

may grant or deny the application “either in whole or in part.”<sup>15</sup> In *Formal Case No. 1139*, the PSC announced its interest in exploring alternatives to traditional cost-of-service ratemaking in the District to encourage service improvements, management innovation, operational efficiencies, and less frequent rate increase requests.<sup>16</sup>

On May 30, 2019, Pepco filed its first MRP application in *Formal Case No. 1156* pursuant to §§ 34-901 and 34-1504(d)(1) of the D.C. Code for CY 2020-2022. In establishing a framework for alternative forms of regulation, the PSC emphasized that it would be “paying careful attention to the structure and framework for the evaluation of [alternative forms of regulation] so that unintended operational or financial outcomes are mitigated and managed.”<sup>17</sup> On June 8, 2021, in Order No. 20755, the PSC approved a modified version of Pepco’s first MRP application as the Initial Pilot. The PSC established a detailed framework to ensure that “a properly constructed MRP can produce just and reasonable rates and yield several benefits over time.”<sup>18</sup> Such benefits included a shortened cost recovery period, more predictable revenues for utilities, more predictable rates for consumers, spreading changes in rates over multiple years, and decreased administrative burdens on

---

<sup>15</sup> D.C. Code §§ 34-901(c), 34-901(d).

<sup>16</sup> *Formal Case No. 1139*, Order No. 18846, at ¶ 593 (July 25, 2017).

<sup>17</sup> *Formal Case No. 1156*, Order No. 20273 at ¶ 86 (Dec. 20, 2019).

<sup>18</sup> *Formal Case No. 1156*, Order No. 20755 at ¶ 473 (explaining Order No. 20273’s framework).

regulators by staggering filings over several years.<sup>19</sup> While issues pertaining to Pepco's requested cost recovery of certain environmental remediation and investigation costs at Pepco's Benning Road facility were petitioned for review to this Court,<sup>20</sup> neither OPC nor AOBA petitioned for review of the Commission's approval of the Initial Pilot in *Formal Case No. 1156*.

### **B. The Bill Stabilization Adjustment and Effective Rate Adjustment**

The BSA is a decoupling mechanism that separates the link between Pepco's distribution revenues and revenues Pepco collects to realize predictable revenue despite the impacts of energy efficiency, renewable energy, and other economic factors in the city.<sup>21</sup> On January 30, 2008, the PSC issued Order No. 14712 in *Formal Case No. 1053* approving Pepco's proposal for a BSA in concept.<sup>22</sup> On September 28, 2009, after determining that the BSA insulates Pepco from losing revenues, thus lowering Pepco's business risk and cost of capital, the PSC issued Order No. 15556 approving Pepco's proposed BSA with modifications.<sup>23</sup> The BSA ensures that Pepco will collect its approved revenue requirement.<sup>24</sup> The PSC

---

<sup>19</sup> Order No. 20755 at ¶ 473 (citing Order No. 20273 at ¶ 92).

<sup>20</sup> *See Pepco v. Pub. Serv. Comm'n*, 319 A.3d 392, 399 (D.C. 2024).

<sup>21</sup> Order No. 14712 at ¶ 340; Order No. 22328 at ¶ 499; *see also* Pepco Witness Bonikowski Rebuttal Testimony at 6:11-7:4 (J.A. at 5895).

<sup>22</sup> Order No. 14712 at ¶ 350. The PSC has approved the BSA in every Pepco rate case since 2009, including in Formal Case Nos. 1087, 1103, 1139, and 1150.

<sup>23</sup> *Formal Case No. 1053*, Phase II, Order No. 15556 (Sept. 28, 2009).

<sup>24</sup> Order No. 15556 at ¶ 30.

approved the BSA as a factor designed to reflect differences between authorized test year and actual base rate revenues adjusted for any major service outages, plus a factor designed to reconcile prior period BSAs with actual billed BSA adjustments.<sup>25</sup> Each month, Pepco compares what it billed its customers to what it was allowed to collect based on PSC-approved revenue targets.<sup>26</sup> If Pepco billed less than expected, a small charge (surcharge) is added to future bills to make up the difference. If Pepco billed more than expected, a credit is given back to customers. To protect customers from large swings in their bills, BSA charges and credits are capped at no more than 10% of Pepco's typical monthly revenues. Any amounts above that limit are deferred and collected (or refunded) gradually in future months to ensure that Pepco recovers its authorized revenues. This running total is called the BSA deferral balance.<sup>27</sup> In short, the BSA is like a financial shock absorber that helps Pepco stay stable during an unpredictable drop in energy usage, while spreading the cost impact more gently across future customer bills. The PSC has rejected requests to eliminate, modify, or limit the BSA.<sup>28</sup>

Pepco has reported that BSA deferred revenue balances have increased with a

---

<sup>25</sup> Order No. 15556 at ¶ 32.

<sup>26</sup> Order No. 22328 at ¶ 499 (J.A. at 7395).

<sup>27</sup> Order No. 15556 at ¶ 32; *see also* Pepco Witness Bonikowski Direct Testimony at 57:3-14 (J.A. at 0837).

<sup>28</sup> *See Formal Case No. 1087*, Order No. 16930 at ¶ 177; *Formal Case No. 1103*, Order No. 17424 at PP 321-326.



greater proportion of the balances attributed to the GT-LV, GT-3A, and MGT-LV customer classes.<sup>29</sup> AOBA asserts that Pepco's calculation of the allowed BSA revenues for the GT-LV class is inaccurate due to a number of factors, including restrictions on business activities during the COVID-19 pandemic, which led to a decline in consumption.<sup>30</sup> AOBA proposed recovery of the BSA deferred balance identified as COVID-19-related be recovered in a separate regulatory asset.<sup>31</sup>

In the proceeding below, the PSC approved the continued use of the BSA along with the Modified MRP Extended Pilot it approved in Order No. 22328.<sup>32</sup> The PSC accepted Pepco's proposed annual targets per customer class, annual surcharge, and line item proposals, but referred the demand component of the BSA to the BSA Working Group and penalized Pepco for prior errors in billing determinant forecasts that impacted BSA deferral balances.<sup>33</sup> The PSC accepted AOBA's proposal to create a separate regulatory asset for recovery of the COVID-19-related BSA deferral balance to more evenly distribute the cost over time and reduce immediate bill shocks for customers.<sup>34</sup> The Commission further accepted AOBA's proposal to

---

<sup>29</sup> AOBA Post-Legislative-Style Hearing Brief at P 61 (J.A. at 7213).

<sup>30</sup> AOBA Post-Legislative-Style Hearing Brief at P 57 (J.A. at 7209).

<sup>31</sup> See AOBA Witness Bruce Oliver Direct Testimony at 126 (J.A. at 5439); AOBA Witness Timothy Oliver Direct Testimony at 27 (J.A. at 5340).

<sup>32</sup> Order No. 22328 at ¶500 (J.A. at 7395).

<sup>33</sup> See Order No. 22328 at ¶ 500 (J.A. at 7395).

<sup>34</sup> Order No. 22328 at ¶ 500 (J.A. at 7395).

transfer \$39.7 million from the BSA deferral balances to the regulatory asset.<sup>35</sup> After determining that the revenue requirement increase caused by the COVID-19-related BSA Regulatory Asset should be allocated entirely to the GT-LV customer class, the PSC determined that the recovery would be applicable only to the GT-LV customer class.<sup>36</sup> The PSC explained that the disconnect between tariffed rates approved in 2021 for the GT-LV class and revenues that were authorized in the Initial Pilot was “amplified” by growth in the customer class (which created a larger authorized revenue) and inaccurate forecasts stemming from COVID-19 pandemic impacts.<sup>37</sup>

The PSC explained that several modifications to the BSA will create better outcomes.<sup>38</sup> First, the annual per class target provides more rate certainty for customers<sup>39</sup> and helps address AOBA’s concerns that Pepco is allowed to collect an average revenue per customer for commercial customers that were recently transferred to a higher electric demand or usage class.<sup>40</sup> Second, the demand component should alleviate intraclass subsidies and will be reviewed in the BSA Working Group.<sup>41</sup> Third, Pepco’s use of a separate line item for the BSA

---

<sup>35</sup> Order No. 22328 at ¶¶ 514-515 (J.A. at 7398).

<sup>36</sup> See Order No. 22328 at ¶¶ 449, 515 (J.A. at 7382, 7398).

<sup>37</sup> Order No. 22328 at ¶ 473 (J.A. at 7389).

<sup>38</sup> Order No. 22328 at ¶ 501 (J.A. at 7395).

<sup>39</sup> Order No. 22328 at ¶¶ 501, 502-503 (J.A. at 7395).

<sup>40</sup> Order No. 22328 at ¶ 503 (J.A. at 7395).

<sup>41</sup> Order No. 22328 at ¶¶ 501, 505, 507 (noting that any proposed BSA changes are subject to Commission approval) (J.A. 7395, 7397).

surcharge/credit on customer bills will increase transparency.<sup>42</sup> Fourth, the PSC directed Pepco to write off \$15.3 million in Pepco’s revenue for deferral balances caused by Pepco’s failure to adequately manage prior errors in billing determinant forecasts.<sup>43</sup> Fifth, the PSC, in response to AOBA’s testimony, approved a regulatory asset for the GT-LV rate class to account for some of the COVID-19-related BSA deferral balance.<sup>44</sup> The regulatory asset will be recovered over a 10-year period to help mitigate rate impacts on customers.<sup>45</sup> To help minimize future growth in deferral balances, the PSC approved an additional true-up of any under- or over-collections in the BSA for each calendar year, starting in 2025.<sup>46</sup>

When designing rates to be charged to its customers, Pepco determines the level of the Effective Rate Adjustment (“ERA”), customer charge, demand charge, and the energy (volumetric) charge.<sup>47</sup> The ERA establishes a baseline for authorized revenues for each class when the customer counter in each class changes.<sup>48</sup> The ERA calculation aligns tariff revenue with authorized revenue targets for each customer.<sup>49</sup> Stated differently, “the ERA adjusts each decoupled class’s rates to

---

<sup>42</sup> Order No. 22328 at ¶ 506 (J.A. at 7397).

<sup>43</sup> Order No. 22328 at ¶ 500, 508-510 (J.A. at 7395, 7397).

<sup>44</sup> Order No. 22328 at ¶ 511-515 (J.A. at 7397, 7398).

<sup>45</sup> Order No. 22328 at ¶ 513 (J.A. at 7398).

<sup>46</sup> Order No. 22328 at ¶¶ 516-518 (J.A. at 7399).

<sup>47</sup> Order No. 22328 at ¶ 472; Pepco Witness Bonikowski Direct at 23 (J.A. at 0803).

<sup>48</sup> Order No. 22328 at ¶ 472 (J.A. at 7389).

<sup>49</sup> Order No. 22328 at ¶ 472 (J.A. at 7389).

produce the same level of revenue as authorized under the BSA.”<sup>50</sup>

The PSC approved the ERA as necessary for all customer classes whose class revenue changes as customer counts grow or shrink.<sup>51</sup> As the customer count changes, a gap is created between the tariffed revenue (tariff rates times approved billing determinants) and Pepco’s authorized revenue per class (which is calculated monthly).<sup>52</sup> The PSC recognized AOBA’s concern regarding the magnitude of the ERA for the GT-LV class but disagreed that the ERA improperly imputed revenues to the GT-LV class before any increase is applied.<sup>53</sup> The PSC emphasized that changing the BSA structure to include “a flat per-class revenue (with customer growth built-in) and an annual BSA surcharge (as opposed to monthly) aligns tariffed revenues and authorized revenue targets.”<sup>54</sup>

---

<sup>50</sup> Pepco Witness Bonikowski Rebuttal Testimony at 44:16-17 (J.A. at 5933).

<sup>51</sup> The PSC has approved rate adjustment mechanisms to ensure tariff rates produce the same level of revenue in every rate case since the BSA was approved (i.e., Formal Case Nos. 1087, 1103, 1139, 1150, 1156, and 1176).

<sup>52</sup> Order No. 22328 at ¶ 473 (J.A. at 7389). Billing determinants are the building blocks used to calculate customer bills. They include how much energy is used, a customer’s highest level of usage during peak times, and how many customers are being served. Pepco forecasts billing determinants based on historical data collected from customer bills (i.e., billed sales kilowatt-hours or kWh, customer count, and billed demand (in kilowatts or kW)) for revenue forecasting, allocating costs to customer classes, comparing actual versus allowed revenue, and designing rates.

<sup>53</sup> Order No. 22328 at ¶ 473 (J.A. at 7389).

<sup>54</sup> Order No. 22328 at ¶ 473 (J.A. at 7389).

## V. STANDARD OF REVIEW

Broadly, this Court’s review of the PSC’s orders is limited,<sup>55</sup> and “in recognition of the authority delegated to the Commission by Congress, and of the expertise of the commissioners in the complex and esoteric area of utility regulation, [the Court] accord[s] great respect to the decisions of the commissioners.”<sup>56</sup> As a result, “the scope of review for Commission decisions is ‘the narrowest judicial review in the field of administrative law [.] . . . limited essentially to questions of law, including constitutional questions.’”<sup>57</sup> As this Court has stated:

[F]indings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious. Our function is normally exhausted when we have determined that the Commission has respected procedural requirements, has made findings based on substantial evidence, and has applied the correct legal standards to its substantive deliberations.<sup>58</sup>

It is “an appropriate function of the Commission” to engage in “balancing of competing interests.”<sup>59</sup> When “[t]he Commission has offered a reasoned consideration of the relevant factors and interests” this Court will not substitute its

---

<sup>55</sup> *OPC v. PSC*, 284 A.3d 1027, 1033 (D.C. 2022)

<sup>56</sup> *Washington Gas Light Co. v. PSC*, 450 A.2d 1187, 1193 (D.C. 1982) (citations omitted).

<sup>57</sup> *Moore Energy Res., Inc. v. Pub. Serv. Comm’n*, 785 A.2d 300, 307 (D.C. 2001) (quoting *Office of the People’s Counsel v. Pub. Serv. Comm’n*, 571 A.2d 206, 208–09 (D.C. 1990) (internal quotations and citations omitted)).

<sup>58</sup> *Id.* (internal quotations and citations omitted).

<sup>59</sup> *Moore*, 785 A.2d at 308.

judgment for that of the Commission.<sup>60</sup> “[D]eference is contingent on the Commission ‘fully and clearly explain[ing] what it does and why it does it.’”<sup>61</sup> “To permit meaningful judicial review, [this Court] require[s] the Commission to explain its actions fully and clearly.”<sup>62</sup> Challengers to a PSC order must do more than assert “a difference of opinion;” instead, Petitioners “must establish clearly and convincingly a fatal flaw in the action taken.”<sup>63</sup> Because the agency’s decision is “presumed to be correct,...the burden of demonstrating error is on the appellant or petitioner who challenges the decision.”<sup>64</sup>

## VI. SUMMARY OF ARGUMENT

The Commission’s Orders provide reasoned consideration of all relevant factors and interests, reflect expert ratemaking judgment that balances competing interests, and are supported by substantial evidence. Petitioners have not demonstrated otherwise. The Orders should be affirmed in their entirety.

---

<sup>60</sup> *Id.*; *Pepco. v. Pub. Serv. Comm’n*, 319 A.3d 392, 399 (D.C. 2024).

<sup>61</sup> *OPC. v. PSC*, 284 A.3d at 1032 (quoting *Pepco. v. PSC*, 457 A.2d 776, 783-84 (D.C. 1983)).

<sup>62</sup> *OPC. v. PSC*, 163 A.3d 735, 739 (D.C. 2017).

<sup>63</sup> *Metropolitan Washington Board of Trade v. PSC*, 432 A.2d 343, 352 (D.C. 1981) (citations and internal quotations omitted); *OPC v. PSC*, 797 A.2d 719, 723 (D.C. 2002) (“In light of the Commission’s expertise, its rate orders are presumptively valid, and the petitioner challenging an order carries the heavy burden of demonstrating clearly and convincingly a fatal flat in the action taken”).

<sup>64</sup> *McKinley v. D.C. Dept’ of Emp. Servs.*, 696 A.2d 1377, 1883 (D.C. 1996) (internal citations omitted).

Despite contending that the PSC violated their due process rights, neither OPC nor AOBA, on review to this Court, confront the extensive discussions in Order No. 22358 where the PSC addressed constitutional due process claims, the evidentiary hearing requirement, official notice, the hearing notice, and admission of data request responses. The PSC's Orders comply with the D.C. Code, applicable case law, and PSC precedent. Petitioners were provided with adequate notice and an opportunity to be heard and fully litigate their positions. The Commission held a legislative-style hearing, based on its discretion, consistent with governing law. Even before this Court, Petitioners do not identify any genuine issues of material fact in dispute that warrant an evidentiary hearing. The PSC provided reasoned consideration in developing the record and admitting evidence. The Petitions for Review do not specify or demonstrate any error of law, abuse of discretion, or fatal flaw that warrants reversal or vacatur by this Court.

As sophisticated parties that routinely appear before the Commission, Petitioners must accept the consequences of their litigation strategies before the Commission. In March 2024 and June 2024, Petitioners requested the PSC to grant summary judgment, arguing there were no material facts in dispute (and if there were, the PSC could resolve any issues of material fact, law, and policy based on the filed submissions). On reconsideration of Order No. 22328, Petitioners then contest the PSC's decision to hold a legislative-style hearing in lieu of an

evidentiary hearing. Notably, unlike in prior cases, neither OPC nor AOBA formally requested an evidentiary hearing *in this case* identifying material facts in dispute that would support such request.

The PSC utilized its ratemaking expertise<sup>65</sup> and statutory authority under D.C. Code § 34-1504(d)(1) when it approved Pepco's application as a Modified MRP Extended Pilot in *Formal Case No. 1176*. The PSC is statutorily authorized to approve alternative forms of ratemaking, and it adhered to all statutory requirements to protect consumers and the public interest. OPC's policy arguments in opposition to alternative regulation and its collateral attack on the PSC's approval of the Initial Pilot in *Formal Case No. 1156* should be disregarded.

Finally, the PSC's ratemaking determinations concerning all customer classes are just, reasonable, and supported by substantial evidence. Although AOBA argues that the PSC's determinations regarding the BSA deferral balances and the ERA are arbitrary and capricious, the Commission exercised reasoned consideration and its expertise in utility ratemaking when accepting AOBA's proposed cost recovery of the deferral balances and Pepco's proposed ERA for all rate classes subject to the BSA, including the GT-LV class. Notably, Pepco has been using a PSC-authorized BSA mechanism for 15 years and during that time the

---

<sup>65</sup> *Pepco. v. PSC*, 457 A.2d at 782 (Because "theories of ratemaking in particular fall within the special province of the PSC, such theories are not subject to the same substantiation principle applicable to fact-finding").



PSC has thoroughly reviewed the BSA mechanism on several occasions, including in response to challenges to the BSA by OPC and AOBA.<sup>66</sup> In response to AOBA's testimony, the PSC approved three modifications to the BSA as reasonable and did not approve the demand component of the BSA, instead sending that issue to the BSA Working Group.<sup>67</sup> To help mitigate rate impacts associated with the BSA deferral balance and ERA for the GT-LV class, the Commission 1) approved a regulatory asset to allow for cost recovery over an extended 10-year period; 2) implemented an additional true-up of any under- or over-collections in the BSA for each calendar year; and 3) disallowed recovery by Pepco of \$15.3 million in revenue deferral balances as a result of certain errors made by Pepco.

## **VII. ARGUMENT**

### **A. Petitioners Either Abandon or Fail To Substantiate Their Due Process Violation Claims.**

As a threshold matter, on review to this Court, both OPC and AOBA have scaled back contentions raised in their applications for reconsideration of Order No. 22328 that the PSC violated their due process rights. AOBA initially alleges a due process violation as an issue but subsequently abandons this argument by not only

---

<sup>66</sup> See, e.g., *Formal Case No. 1087*, Order No. 16930 at ¶ 177; *Formal Case No. 1103*, Order No. 17424 at ¶¶ 321-326.

<sup>67</sup> Order No. 22328 at ¶ 489 (J.A. at 7393).

failing to reference “due process” in its brief but also failing to apply the law on due process to the facts of this case to demonstrate a due process violation that constituted legal error.<sup>68</sup> Instead, AOBA argues that the Orders’ substantive ERA and BSA revenue referral recovery determinations applicable to the GT-LV class are arbitrary, capricious, and lack sufficient supportive rationale.<sup>69</sup> Thus, AOBA fails to show that the PSC violated any applicable due process rights.

OPC’s due process violation argument is predicated on the lack of an evidentiary hearing in this case. However, even before this Court, OPC has not identified any material issues of fact in dispute to demonstrate that the Commission was required to have an evidentiary hearing. OPC’s broad and sweeping allegations that the Commission violated its due process rights are unsupported because OPC does not explain how any specific alleged violation by the PSC prejudiced OPC or failed to provide OPC with notice and an opportunity to be heard. OPC not only failed to identify any error in the PSC’s application of the *Mathews v. Eldridge* test,

---

<sup>68</sup> AOBA Br. at 4. AOBA has thus waived any claims of legal error due to the process provided by the Commission below. *See Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993) (“It is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived.”).

<sup>69</sup> AOBA Br. 24-25 (Commission “sidestepped or ignored AOBA’s arguments”). In the summary of AOBA’s argument (Br. 24-26), AOBA briefly references its desire to cross-examine witnesses at an evidentiary hearing, yet AOBA fails to further raise any substantive due process argument in its brief to demonstrate an error of law by the PSC or to show AOBA was prejudiced. AOBA does not incorporate by reference the due process arguments of OPC, as AOBA would then violate Rule 32(a)(5) of this Court’s rules establishing a 50-page word count for the initial brief.

but OPC also fails to rebut the PSC’s extensive determinations in Paragraphs 38-45 of Order No. 22358 addressing OPC’s generic constitutional due process claims. Like AOBA, OPC’s arguments before this Court center around the “arbitrary and capricious” standard<sup>70</sup> and not assertions of legal error.<sup>71</sup> Because this Court “does not consider arguments that are not raised in an opening brief,”<sup>72</sup> OPC is now precluded from arguing against the PSC’s constitutional due process determinations in its reply brief.

**B. The Commission Did Not Violate OPC or AOBA’s Due Process Rights By Not Holding An Evidentiary Hearing and the Commission Provided Sufficient Notice and Opportunity for the Parties To Be Heard Satisfying The Due Process Requirement.**

OPC cites *Mathews v. Eldridge* for the proposition that the “fundamental requirement of due process is the opportunity to be heard at a ‘meaningful time and in a meaningful manner.’”<sup>73</sup> OPC and AOBA claim that the PSC’s decision not to hold an evidentiary hearing constitutes a violation of this fundamental requirement. However, Petitioners fail to 1) identify material issues of fact in dispute that required the PSC to have an evidentiary hearing, and 2) explain how the notice and ample opportunities to be heard provided by the Commission, including the legislative-

---

<sup>70</sup> See OPC Br. 20-24 (advancing arguments around a lack of evidence and arbitrary and capricious decision-making); see AOBA Br. 26-36 (arguing that the PSC’s GT-LV determinations are arbitrary and capricious).

<sup>71</sup> Order No. 22358 at ¶¶ 28-35, 62, 99 (J.A. 8054-8056, 8067, 8082).

<sup>72</sup> *Green v. D.C. Child & Fam. Servs. Agency*, 322 A.3d 542, 557, n.6 (D.C. 2024).

<sup>73</sup> OPC Br. 3, n.7 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

style hearing, were inadequate to satisfy the due process requirement.

**1. The Commission’s Determination that An Evidentiary Hearing Was Not Required is Consistent with the D.C. Code and Case Law.**

D.C. Code § 34-908 requires a formal hearing in contested cases and D.C. Code § 2-509(b) empowers parties to submit evidence and “conduct such cross-examination *as may be required for a full and true disclosure of the facts.*”<sup>74</sup> However, in *Watergate East*, this Court clarified that “[e]ven when an agency is required by statute or by the Constitution to provide an oral evidentiary hearing, it need do so only if there exists a dispute concerning a material fact. An oral evidentiary hearing is never required if the only disputes involve issues of law or policy.”<sup>75</sup> The Court further explained that a formal hearing is not needed to allow parties to advance opinions on whether material issues of fact exist.<sup>76</sup>

OPC acknowledges this Court’s exception to the hearing requirement in *Watergate East*<sup>77</sup> but instead of identifying the material issues of fact in dispute that warranted the evidentiary hearing, OPC curiously argues the PSC did not

---

<sup>74</sup> Order No. 22358 at ¶ 29 (J.A. at 8054) (citing D.C. Code § 2-509(b) (emphasis in original)).

<sup>75</sup> *Watergate East Inc. v. PSC*, 662 A.2d 881, 890 (D.C. 1995) (citing 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994)).

<sup>76</sup> *Watergate East*, 662 A.2d at 890 (citing *Pepco v. PSC*, 457 A.2d at 789 and *Citizens for Allegan County v. Federal Power Comm’n*, 414 F.2d 1125, 1128 (D.C. Cir. 1969)).

<sup>77</sup> See Order No. 22358 at ¶ 17 (J.A. at 8050) (explaining OPC’s application for reconsideration).

sufficiently show the exception applies here.<sup>78</sup> OPC argues that the PSC did not “engage in an analysis to demonstrate it is appropriate to apply the exception” in this case,<sup>79</sup> while failing to acknowledge the PSC’s detailed reasoning in Order No. 22358 as to why an evidentiary hearing is not required.<sup>80</sup> Further, OPC did not meet its burden to proffer and show any genuine issue of material fact in dispute.<sup>81</sup>

AOBA mentions that it argued in its application for reconsideration that “the PSC’s refusal to convene evidentiary hearings deprived AOBA of the opportunity to ‘cross-examine Pepco witnesses on their testimony and exhibits’ and more fully develop the ‘factual correctness of AOBA’s assessment...’”<sup>82</sup> However, a formal hearing is not needed to allow parties to cross-examine witnesses, as the PSC can

---

<sup>78</sup> See OPC Br. 43-47.

<sup>79</sup> See OPC Br. 44. OPC proceeds to argue that the PSC should have conducted a case-by-case analysis regarding the use of alternative ratemaking procedures. See *id.* However, OPC confuses substantive issues around alternative ratemaking within its procedural argument on due process and evidentiary hearing requirements.

<sup>80</sup> See Order No. 22358 at ¶¶ 28-35 (decision on hearing requirement) (J.A. at 8054-8056), ¶¶ 38-45 (decision on constitutional due process) (J.A. at 8058-8061), ¶¶ 52-55 (decision on official notice) (J.A. at 8063-8064), ¶ 58 (decision on admission of data requests) (J.A. at 8065), ¶ 62 (decision on hearing notice) (J.A. at 8067).

<sup>81</sup> See *Columbia Realty Venture v. D.C. Rental Hous. Comm’n*, 590 A.2d 1043, 1048 (D.C. 1991); *McKinley*, 696 A.2d at 1883.

<sup>82</sup> AOBA Br. at 28-29. (citations omitted).

decide using its discretion in a proceeding with an extensive paper record which witness opinion to credit based on written testimony and exhibits.<sup>83</sup>

Petitioners have not identified any genuine issue of material fact that is in dispute that warrants holding an evidentiary hearing. The PSC analogized this case to Order No. 18829 in *Formal Case No. 1017*, where the PSC invoked the *Mathews v. Eldridge* balancing test to determine that an evidentiary hearing is not necessary to address issues of policy.<sup>84</sup> In response to OPC's reconsideration application, the Commission explained that OPC's attempt to raise concerns regarding "disputed issues of material fact" concerning Pepco's rate base and facts concerning a MRP pilot in Maryland, respectively, concern an issue of policy as to Pepco's rate base and undisputed facts as to the Maryland MRP pilot.<sup>85</sup> Tellingly, OPC does not raise those issues before this Court. Instead, OPC raises concerns regarding Pepco's alleged failure to meet its burden;<sup>86</sup> however, the burden of proof is a legal issue<sup>87</sup> and it is not clear why OPC is advancing issues concerning Pepco's burden in an argument concerning due process and hearing requirements. Because Petitioners did

---

<sup>83</sup> Order No. 22358 at ¶ 29 (J.A. at 8054) (citing Formal Case No. 1169, Order No. 21582 at ¶ 9 and Order No. 21885 at ¶ 18).

<sup>84</sup> Order No. 22358 at ¶ 41 (J.A. at 8059) (citing *Formal Case No. 1017*, Order No. 18829 at ¶ 10).

<sup>85</sup> Order No. 22358 at ¶ 32 (J.A. at 8055).

<sup>86</sup> OPC Br. at 47.

<sup>87</sup> See *D.C. Dept. of Corrections v. D.C. Dept. Employment Servs.*, 281 A.3d 588, 592 (D.C. 2022) (application of the burden of proof is "a purely legal issue").

not articulate any material fact in dispute that would warrant an evidentiary hearing, the Commission did not violate their due process rights by not convening an evidentiary hearing.<sup>88</sup>

**2. The Commission’s Process and Extensive Procedures – Including Multiple Rounds of Testimony, Extensive Discovery, Community Hearings, a Legislative-Style Hearing, Motions, and Briefing – Provided Petitioners with Sufficient Due Process.**

The PSC provided OPC and AOBA with notice and ample opportunity to be heard at a meaningful time and in a meaningful manner.<sup>89</sup> In determining that sufficient process was provided to satisfy Constitutional requirements, the PSC thoroughly explained its application of the *Mathews v. Eldridge* balancing test,<sup>90</sup> applying three factors: 1) the private interests affected by the agency; 2) evaluating whether agency procedures will lead to an accurate result; and 3) the government’s interest in weighting the use of existing procedures against fiscal and administrative burdens in using new or other procedures.<sup>91</sup>

Here, the PSC balanced Petitioners’ interests “in ensuring that rates for consumers are just and reasonable and not excessive or unduly burdensome” with “Pepco’s interests in regulatory certainty and in receiving a rate that allows it an

---

<sup>88</sup> Order No. 22358 at ¶¶ 33, 53, 55, 58 (J.A. at 8056, 8064, 8065).

<sup>89</sup> *Mathews v. Eldridge*, 424 U.S. at 333.

<sup>90</sup> Order No. 22358 at ¶¶ 38-40 (J.A. at 8058- 8059).

<sup>91</sup> Order No. 22358 at ¶ 39 (J.A. at 8058) (citing *Formal Case Nos. 874 and 989*, Order No. 12379, n.39 (Apr. 12, 2002) (citations omitted)).

opportunity to realize a reasonable return for...investors.”<sup>92</sup> The PSC emphasized that approving the Modified MRP Extended Pilot helps Pepco maintain its current investment-grade credit rating to secure financing at favorable interest rates for Pepco to optimize its cost profile to cost-effectively invest in important capital projects.<sup>93</sup> Given the impacts of distribution rate increases on customers, the PSC emphasized the availability of several customer assistance programs.<sup>94</sup>

The PSC determined that parties were not deprived of any process and that little, if any, probable value existed in providing additional safeguards.<sup>95</sup> The PSC granted OPC’s request to enlarge the procedural schedule.<sup>96</sup> Further discovery and testimony ensued. No party advanced material issues of fact in dispute that could only be resolved through an evidentiary hearing instead of through discovery, testimony, the legislative-style hearing held by the Commission, and briefing.<sup>97</sup> Given the PSC’s interest in operational efficiency and avoiding expenditure of unnecessary resources to prepare and hold an evidentiary hearing and given the absence of demonstrated material issues of fact in dispute, the PSC reasonably

---

<sup>92</sup> Order No. 22358 at ¶ 42 (J.A. at 8060) (citing Order No. 22328 at ¶¶ 10, 12); *see Moore Energy v. PSC*, 785 A.2d 300 at 308 (PSC must balance competing interests).

<sup>93</sup> Order No. 22328 at ¶ 10 (J.A. at 7252).

<sup>94</sup> Order No. 22328 at ¶ 9 (J.A. at 7252).

<sup>95</sup> Order No. 22358 at ¶ 43 (J.A. at 8060).

<sup>96</sup> Order No. 21976 (April 1, 2024).

<sup>97</sup> Order No. 22358 at ¶ 43 (J.A. at 8060).



determined to hold a legislative-style hearing.<sup>98</sup> In weighing competing interests and relative weights of the party interests, the lack of probable value in additional procedures, and the PSC's administrative and financial resources, the Commission met the constitutional requirements of due process.<sup>99</sup> Petitioners fail to show otherwise.

**3. As Sophisticated Parties That Routinely Appear Before the Commission, AOBA and OPC Must Accept the Consequences of the Litigation Strategies They Advanced Before the Commission and Their Failure to Motion for an Evidentiary Hearing.**

It bears emphasizing the inconsistent litigation positions advanced by the Petitioners before the PSC. On March 12, 2024, Petitioners filed a Summary Judgment Motion, arguing for dismissal of Pepco's application as premature or alternatively requesting that "the Commission should grant summary judgment because it can resolve genuine issues of material fact and issues of law and policy based on the voluminous pre-filed submissions."<sup>100</sup> On June 10, 2024, Petitioners filed a Second Summary Judgment Motion asking the PSC to deny the Pepco MRP application and find that there is no need for a rate increase because there is no

---

<sup>98</sup> Order No. 22358 at ¶ 44 (J.A. at 8060).

<sup>99</sup> Order No. 22358 at ¶¶ 44-45 (J.A. at 8060-8061) (citing *Thomas v. D.C. Dep't of Emps. Servs.*, 547 A.2d 1034, 1038 (D.C. 1988) (citing *Vermont Yankee v. NRDC*, 435 U.S. 519, 543 (1978); *FCC v. Schreiber*, 381 U.S. 279 (1965); *Niagara Mohawk v. FPC*, 379 F.2d. 153, 159 (D.C. Cir. 1976)) (omitting and correcting citations).

<sup>100</sup> Summary Judgment Motion at 2, J.A. at 6508.

material fact in dispute that Pepco needs rate relief. After the PSC denied their summary judgment motions and in their applications for reconsideration of Order No. 22328, OPC and AOBA asserted that the Commission was required to hold an evidentiary hearing. The Commission observed this tactic: “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.”<sup>101</sup>

On April 1, 2024, the Commission issued Order No. 21976, granting OPC’s motion for Enlargement of Time and adopting a new procedural schedule, largely in accordance with OPC’s proposed schedule, noting that a hearing (if necessary) is to be determined.<sup>102</sup> Neither OPC nor AOBA sought reconsideration of Order No. 21976.

On June 13, 2024, the PSC issued a Notice of Legislative-Style Hearing for July 30, 2024 to provide parties an opportunity for oral argument on any issues they believe are fundamental to the PSC’s ultimate decision. On June 24, 2024, OPC filed the Motion to Suspend. On June 28, 2024, the PSC issued Order No. 22013, denying the Summary Judgment Motions and denying OPC’s Motion to Suspend. The PSC directed the parties to appear at the July 30, 2024, hearing, provided more

---

<sup>101</sup> See Order No. 22358 at ¶ 32 (J.A. at 8055).

<sup>102</sup> Order No. 21976 at Attachment A (J.A. 8796).

opportunity to issue discovery on recent Pepco filings, and authorized pre-hearing briefs, stipulated testimony, exhibits, data requests, data responses, and post-hearing briefs (without restrictions on scope or length) to complete the record. Neither OPC nor AOBA sought reconsideration or clarification of Order No. 22013. Even if the Petitioners – or any other party – believe that an evidentiary hearing was required, as sophisticated parties that routinely appear before the commission, they did not present any material facts in dispute that would warrant an evidentiary hearing as required by *Watergate East* or formally motion for an evidentiary hearing. Notably, both AOBA and OPC have previously filed formal requests for evidentiary hearings.<sup>103</sup>

OPC and AOBA are responsible for fully litigating their cases and the consequences of their litigation strategies; it is not the PSC's obligation to fix litigation tactics that did not pan out or otherwise assist a party in advancing its positions. The Commission's job is to balance competing interests, serve the public interest, and provide adequate process, which it did in this case.

---

<sup>103</sup> See "Office of the People's Counsel Request for Hearing Date and Procedural Schedule," *Formal Case No. 1002* (filed July 29, 2004); "Protest and Request for Hearing of AOBA," *Formal Case No. 1145* (filed Sep. 13, 2017); "OPC Comments and Request for Hearing Proceedings," *Formal Case Nos. 1086 & 1109* (filed Dec. 30, 2013); "Comments, Request for Hearing and Objection to Expedited Review of AOBA", *Case No. GT 2014-03* (filed Oct. 20, 2014).

#### **4. The Commission Provided Reasoned Consideration in Developing the Record and Admitting Evidence.**

OPC argues that the PSC's alleged failure to identify and take necessary steps to establish the record violated OPC's due process rights.<sup>104</sup> Yet, OPC does not tie any specific procedural error by the PSC to any actual due process violation under the law, nor does OPC demonstrate any actual prejudice to OPC that prevented OPC from fully prosecuting its case in the proceeding below.

OPC argues that the PSC, through Order No. 22328, contemporaneously identified the evidentiary record for the first time, depriving OPC of the opportunity to respond to or rebut materials identified as evidence.<sup>105</sup> OPC claims the PSC admitted some, but not all, of Pepco's data responses into the record.<sup>106</sup> Yet, the PSC explained that it admitted all testimony, exhibits, and data responses into the record.<sup>107</sup> The PSC recognizes OPC's concern that the agency record filed by the PSC in this proceeding on May 8, 2025 only contained six items identified as a response to data requests.<sup>108</sup> When the record was submitted to the Court, the PSC only included the data request responses identified in Order No. 22328 to keep the record from being voluminous. On July 7, 2025, the PSC supplemented the agency

---

<sup>104</sup> OPC Br. at 37-38.

<sup>105</sup> OPC Br. at 38.

<sup>106</sup> OPC Br. at 40.

<sup>107</sup> Order No. 22358 at ¶ 58 (J.A. at 8065); Order No. 22328 at ¶¶ 23-26 (J.A. at 7258-7260).

<sup>108</sup> See OPC Br. at 39-40.

record to include all data request responses compiled in the proceeding below.

In Order No. 22328, the PSC indicated it was accepting the parties' pre-filed testimony, exhibits, and data request responses.<sup>109</sup> The PSC balanced "competing interests"<sup>110</sup> and placed all parties on equal footing. The parties had access to all evidence compiled in the proceeding. No party was prejudiced by the PSC's admission of all evidence into the record, and an all-encompassing approach to creating the record is consistent with the PSC's past approaches to legislative-style hearings.<sup>111</sup> Accordingly, OPC's claim that the PSC "cannot accurately identify the evidence it believes it admitted into the record"<sup>112</sup> is unfounded.

In its Application for Reconsideration, OPC argued that the PSC "fail[ed] to create an exclusive record that could support an agency decision"<sup>113</sup> and that "there is no exclusive record supporting the findings and conclusions in Order No. 22328 with substantial evidence."<sup>114</sup> These assertions do not accurately represent the standard to which the PSC must adhere in the D.C. Code:

The 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

---

<sup>109</sup> Order No. 22328 at ¶ 26 (J.A. at 7260).

<sup>110</sup> *Moore*, 785 A.2d at 308.

<sup>111</sup> Order No. 22358 at ¶ 58 (J.A. at 8065); *see* Formal Case No. 1169, Order No. 21602 at ¶ 47.

<sup>112</sup> OPC Br. at 40.

<sup>113</sup> OPC Application for Reconsideration at 15 (J.A. 7955).

<sup>114</sup> OPC Application for Reconsideration at 22. (J.A. 7962).

record for order or decision.<sup>115</sup>

The PSC enjoys discretion over its procedural calendar and the admissibility of evidence.<sup>116</sup> Given the flexibility in conducting agency proceedings based on the agency’s expertise and control of its own calendar, administrative agencies like the PSC are afforded greater discretion than trial judges.<sup>117</sup> Such housekeeping details, as this Court has described them, are best left to the agency.<sup>118</sup> OPC also argues the PSC erred by taking official notice of disputed facts in Pepco’s June 2024 Quarterly Report or the Maryland MRP pilot. The PSC did not assert that it adopted any facts contained in either document by judicial notice.<sup>119</sup> The PSC is afforded such discretion, and OPC has not argued or demonstrated – either in its application for reconsideration or on review to this Court – that the PSC abused that discretion.<sup>120</sup>

---

<sup>115</sup> D.C. Code § 2-509(c).

<sup>116</sup> See *District of Columbia v. PSC*, 802 A.2d 373, 379 (D.C. 2002).

<sup>117</sup> See *Haight v. District of Columbia Alcoholic Beverage Control Bd.*, 439 A.2d 487, 491 (D.C. 1981).

<sup>118</sup> *D.C. v. PSC*, 802 A.2d at 378-79 (citing *Washington Urban League, Inc. v. Pub. Serv. Comm’n*, 295 A.2d 906, 908 (D.C. 1972)).

<sup>119</sup> Order No. 22358 at ¶ 53 (J.A. at 8064)

<sup>120</sup> In assessing whether an agency abused its discretion, this Court will evaluate “whether the decision maker failed to consider a relevant factor, [or] . . . relied upon an improper factor.” *Johnson v. D.C. Dept. of Health*, 163 A.3d 746, 753 (D.C. 2017) (quoting *Johnson v. United States*, 398 A.2d 354, 365 (D.C. 1979)). Further, this Court will be deferential “where the decision lies within the agency’s expertise.” *Id.* (citing *Williamson v. District of Columbia Bd. of Dentistry*, 647 A.2d 389, 394 (D.C. 1994)). Here, OPC has not shown that the Commission’s decision-making rests on an improper factor or is not within the PSC’s expertise.

OPC uses the PSC's statement in Order No. 22013 regarding a more complete record to contend that the PSC never developed a complete record of evidence.<sup>121</sup> This is an inflated misstatement at best, as the agency record in the proceeding is very extensive and consists of thousands of pages of testimony, exhibits, briefs, and data responses. While OPC attempts to assert an evidentiary gap between June 28, 2024 and November 26, 2024, it omits the Legislative-Style Hearing on July 30, 2024, and its corresponding transcript admitted into evidence. OPC also attempts to consider the period between June and November in a vacuum, ignoring the PSC's directive to Pepco to supplement recent quarterly earnings filings<sup>122</sup> and ignoring all evidence, testimony, exhibits, data responses, and public hearing transcripts prior to June 28, 2024 as well as the post-hearing briefs and additional filings following the PSC's denial of dispositive motions. OPC ignores that all parties have access to all documents comprising the record.

Neither OPC nor AOBA can demonstrate specific undue prejudice by the PSC's creation of the exclusive record, or that the PSC strayed from any duty by admitting all testimony, exhibits, and data responses into the record in Order No. 22328 and further explaining its rationale in Order No. 22358. Accordingly, OPC's generic assertions of due process violations and prejudice are meritless.

---

<sup>121</sup> OPC Br. at 49; *see* Order No. 22328 at ¶ 28 (J.A. at 7261).

<sup>122</sup> Order No. 22013 at ¶ 29 (J.A. at 6788).

**C. Utilizing Its Ratemaking Expertise and Statutory Authority in D.C. Code § 34-1504(d)(1), the Commission Approved Pepco's Application as an Extended Pilot in Formal Case No. 1176 Prior to Completing a Comprehensive Lessons Learned Review of Pepco's Multi-Year Rate Plans**

**1. The Commission Did Not Establish a Required MRP Pilot Lessons Learned Review Framework.**

OPC argues the PSC erred when it “inexplicably departed” from the *Formal Case No. 1156* framework by reviewing Pepco’s 2023 MRP application before “auditing” the Initial Pilot.<sup>123</sup> As a threshold matter, OPC points to no authority or commitment made by the Commission to “audit” the Initial Pilot or otherwise finalize a review of the Initial Pilot prior to acting on a future Pepco rate application.<sup>124</sup> Instead, OPC’s claimed error of law is that “OPC fully *expected* that the PSC would adhere to the [ ] framework established in Formal Case No. 1156.”<sup>125</sup> Yet, a review of the PSC’s determinations of the relevant orders in *Formal Case Nos. 1156* and *1176*, in the context of the PSC’s administration of its governing statutes, does not support OPC’s expectations.

---

<sup>123</sup> OPC Br. at 33.

<sup>124</sup> Because OPC did not argue in its application for reconsideration of Order No. 22328 that the PSC’s failure to audit the Initial Pilot prior to adjudicating Pepco’s second MRP application deviated from any prior established approach, such argument is waived. *D.C. Hous. Auth. v. D.C. Office of Human Rights*, 881 A.2d 600, 609, 611 (D.C. 2005); *see also Fair Care Found. v. District of Columbia Dep’t of Ins. & Sec. Regulation*, 716 A.2d 987, 993 (D.C.1998) (“Administrative and judicial efficiency require that all claims be first raised at the agency level to allow appropriate development and administrative response before judicial review.”).

<sup>125</sup> OPC Br. at 35 (emphasis added).



## 2. The Commission Adhered to Statutory Requirements to Protect Consumers and the Public Interest When Engaging in Alternative Forms of Ratemaking.

OPC invokes language from *Formal Case No. 1156* to show that the PSC adopted Pepco’s first multiyear rate plan as a pilot to allow parties “an opportunity to gather valuable lessons learned in assessing future MRP proposals and to facilitate the development of [alternative ratemaking] regulations.”<sup>126</sup> OPC does not point to any prior commitment made by the PSC to finalize its review of lessons learned from the Initial Pilot prior to completion of Pepco’s 2023 rate application, because the Commission made no such commitment.<sup>127</sup> Instead, as recognized by OPC, the PSC committed to engage in a “deliberative approach,” consistent with the PSC’s statutory obligations in D.C. Code § 34-1504(d)(1) to ensure that alternative regulation: 1) protects consumers; 2) ensures quality, availability, and reliability of regulated electric services; and 3) is in the interest of the public and the regulated electric utility.<sup>128</sup> The PSC complied with that statutory requirement and its obligation to ensure any authorized rate increase for a jurisdictional public utility is “reasonable, fair, and just” per D.C. Code § 34-901(d).

---

<sup>126</sup> OPC Br. at 34 (quoting Order No. 20755 at ¶ 20).

<sup>127</sup> See Order No. 22328 at ¶ 114 (“the Commission did not specify in Order No. 20755 when and how...[the Initial Pilot’s] lessened-learned process would occur”) (J.A. at 7287).

<sup>128</sup> See OPC Br. at 33, n.89.

The PSC approved Pepco's second MRP application as a Modified MRP Extended Pilot to allow the PSC, Pepco, and parties more time to complete their study of the benefits of MRPs and propose recommendations for future plans.<sup>129</sup> The PSC explained: "[e]valuations of a pilot are not meant to be dispositive or occur in a singular, one-off fashion. Instead, lessons learned can and should be used to inform what happened in that pilot and inform future pilots, and those lessons learned can occur in multiple phases."<sup>130</sup> The PSC provided reasoned consideration to arguments that it is premature to approve Pepco's second MRP application prior to an assessment of the *Formal Case No. 1156* Initial Pilot by explaining that the *Formal Case No. 1176* Modified MRP Extended Pilot includes several modifications designed to protect customers, ensure that Pepco's electric distribution remains reliable and available, and protect the public interest.<sup>131</sup> Upon review of the extensive record, the PSC approved the MRP Extended Pilot as in the public interest because it: 1) includes an automatic credit adjustment to prevent potential utility overearning; 2) allows for reductions in plant in-service and proposed operations and maintenance expenditures; 3) initiates a Lessons Learned

---

<sup>129</sup> See Order No. 22328 at ¶ 40 (J.A. at 7264).

<sup>130</sup> Order No. 22328 at ¶ 141 (J.A. at 7297). When developing alternative forms of regulation in *Formal Case No. 1176*, the PSC observed that its alternative regulation framework could be modified and adapted, consistent with the public interest. *Formal Case No. 1156*, Order No. 20755 at ¶ 32 (citing Order No. 20273 at ¶ 95).

<sup>131</sup> Order No. 22328 at ¶ 90 (J.A. at 7278).

proceeding and requires a robust set of lessons learned prior to submission of any future multi-year rate plan; 4) prohibits another MRP until the PSC issues a decision on the Lessons Learned proceeding; 5) requires a Pepco compliance filing showing forecasted capital additions and operations and maintenance expenses; 6) requires reporting of Performance Tracking Metrics; 7) requires Pepco to submit performance assessment during a final reconciliation filing wherein other parties may challenge the prudence of utility capital investments; and 8) initiates a two-phased independent management audit to review the accuracy of Pepco's actual spending compared to forecasts.<sup>132</sup> Further, the PSC reduced the length of Pepco's desired MRP from three years to two years.<sup>133</sup>

OPC challenged the Orders on generic grounds but failed – both before this Court and in its Application for Reconsideration of Order No. 22328 – to engage the specific reasoning supporting the PSC's determination to extend Pepco's MRP for only two years, with several modifications designed to protect customers and the public interest. Critically, OPC overlooks the PSC's commitment not to approve another Pepco MRP until the PSC issues a decision on the Lessons Learned.<sup>134</sup> Accordingly, OPC's unsupported assertion that the PSC “never provided a rational

---

<sup>132</sup> Order No. 22328 at ¶ 92 (J.A. at 7279). The reconciliation process and audit helps address any discrepancies with forecasts and forward-looking projections.

<sup>133</sup> Order No. 22328 at ¶ 93 (J.A. at 7279).

<sup>134</sup> Order No. 22328 at ¶ 148 (J.A. at 7299).

basis”<sup>135</sup> for its “cavalier approach”<sup>136</sup> in departing from any framework in *Formal Case No. 1156* rings hollow.

The PSC, after considering the testimony and filings, directed the Commission staff to convene the *Formal Case No. 1176* Modified MRP Extended Pilot Lessons Learned Working Group (“LLWG”) to discuss and develop a framework for the evaluation of Formal Case No. 1176.<sup>137</sup> The LLWG was directed to submit a report prior to the end of 2025.<sup>138</sup> The PSC also directed Pepco to undergo an audit and indicated that it would issue an order on the LLWG and audit by June 2026.<sup>139</sup>

Finally, OPC overlooks the PSC’s statutory obligation to review a rate application filed by a jurisdictional public utility,<sup>140</sup> such as Pepco’s 2023 MRP, and Pepco’s right “to recover the necessary and prudent investments it has made and will invest in the distribution system.”<sup>141</sup> Notably, the PSC carefully reviewed Pepco’s application for an extended period from April 2023 to January 2025, including granting separate motions to enlarge and extend the procedural schedule filed by

---

<sup>135</sup> OPC Br. at ¶ 35.

<sup>136</sup> OPC Br. at ¶ 35.

<sup>137</sup> Order No. 22328 at ¶ 145 (J.A. at 7299). The Petitioners have been participating in the LLWG meetings, which began in February 2025.

<sup>138</sup> Order No. 22328 at ¶ 146 (J.A. at 7299).

<sup>139</sup> Order No. 22328 at ¶ 148 (J.A. at 7299).

<sup>140</sup> D.C. Code § 34-901(d).

<sup>141</sup> Order No. 22328 at ¶ 10 (J.A. at 7252).

AOBA and OPC.<sup>142</sup> Ultimately, the PSC issued a reasoned and supported rate order approving the Modified MRP Extended Pilot that modified elements of Pepco's application, penalized Pepco, and denied cost recovery due to certain errors made by Pepco. OPC has not shown that PSC approval of the Modified MRP Extended Pilot – which substantially and materially modified Pepco's initial MRP application to satisfy the requirements of D.C. Code § 34-1504(d)(1) – is arbitrary and capricious.

### **3. OPC Advances Policy Arguments in Opposition to Alternative Regulation and Collaterally Attacks the Commission's Final Orders in Formal Case No. 1156**

Unable to demonstrate that the PSC erred by approving the Extended Pilot prior to finalizing a review of Lessons Learned from the Initial Pilot, OPC advances several policy arguments against the PSC's authority to use alternative regulation, contending that the PSC's Orders "deviate from the traditional, standard rate case application."<sup>143</sup> However, the PSC approved an alternative form of regulation by approving the Initial Pilot pursuant to D.C. Code § 34-1504(d)(1), and Pepco, pursuant to that statute, has the authority to propose an MRP. The PSC modified Pepco's rate application and approved it as a shorter, two-year Modified MRP Extended Pilot with a firm commitment to conclude a robust, stakeholder-involved

---

<sup>142</sup> Order Nos. 22015 and 21976.

<sup>143</sup> OPC Br. at 25.

Lessons Learned process prior to the approval of any additional MRP by Pepco. In both its application for reconsideration of Order No. 22328 and in its petition for review to this Court, OPC generically raises concerns with the PSC's allowance of a MRP and acts as though the PSC has suddenly and abruptly finalized a "paradigm shift."<sup>144</sup> Yet, the PSC first announced its interest in exploring alternative ratemaking in July 2017 in *Formal Case No. 1139*, and since that time, the PSC has approved one 18-month pilot for Pepco and one two-year, modified extension of that pilot. Rather than abruptly finalize any paradigm shift, the PSC has been thorough, deliberate, and measured in approaching alternative regulation and MRPs.

Because OPC does not raise specific legal errors regarding the PSC's specific justification to approve the Modified MRP Extended Pilot, it is apparent that OPC is instead advancing policy arguments to defend "traditional regulation"<sup>145</sup> and oppose alternate regulation in D.C. Code § 34-1504(d)(1), which the PSC authorized for the Initial Pilot. Notably, OPC did not challenge the PSC's determination to approve the ratemaking structure of Pepco's MRP in the Initial Pilot and is prohibited from collaterally attacking determinations regarding the Initial Pilot.<sup>146</sup> OPC must

---

<sup>144</sup> OPC Br. at 26.

<sup>145</sup> OPC references traditional regulation using the historic test year throughout its brief (Br. 2, 6-7, 9-10, 25-30, 33-35) and emphasizes the need for protections when using alternative regulation (Br. 26-27, 33-35).

<sup>146</sup> See *Mitchell v. Gales*, 61 A.3d 678, 680 (D.C. 2013) ("Collateral attacks are only permitted where a challenge is made to the original tribunal's jurisdiction or an assertion is made that the original order was procured through fraud.")

advance policy concerns via a petition for a rulemaking or advocate for legislative changes to D.C. Code § 34-1504(d)(1), not through a petition for review.<sup>147</sup>

**D. The PSC’s Rate Determinations Concerning GT-LV Customers Are Just and Reasonable and Supported by Substantial Evidence.**

**1. The PSC’s Determinations Regarding Pepco’s Cost Recovery of Bill Stabilization Adjustment Deferral Balances Reflect Reasoned Consideration.**

AOBA argues that the Orders’ substantive rate determinations for the GT-LV class are arbitrary and capricious. AOBA contends that the PSC did not meaningfully address AOBA’s challenges to the PSC’s decisions around Pepco’s recovery of COVID-19-related BSA deferred revenue balances from GT-LV customers and revenue balances attributed to the number of customers used by Pepco in developing updated rates for CY 2023.<sup>148</sup> AOBA argues that the PSC in Order No. 22358 rehashed earlier arguments opposing BSA revenue deferrals.<sup>149</sup>

AOBA’s narrow issues with the BSA overlook the historical context of the BSA and the PSC’s efforts to mitigate rate impacts to the GT-LV class in *Formal Case No. 1176*. Pepco has been utilizing a PSC-authorized BSA mechanism for 15 years.<sup>150</sup> Since initial approval of the BSA in 2009, the PSC has carefully

---

<sup>147</sup> See *In re Walker*, 856 A.2d 579, 588 (D.C. 2004) (policy-based arguments should be raised before the legislature, not the courts).

<sup>148</sup> OPC Br. at 33-35.

<sup>149</sup> OPC Br. at 34 (citing Order No. 22358 at ¶ 98).

<sup>150</sup> See *Formal Case No. 1053*, Order No. 14712 (issued Jan. 30, 2008).

evaluated and adjusted components of the BSA to ensure that the BSA is fulfilling its intended purpose: separating the link between a utility's profits (or allowed revenues) and the utility's sales (or received revenues). Previously, Pepco's BSA used an approved revenue per customer number, resulting in changes in customer counts per class, driving changes in the allowed revenue Pepco is authorized to earn. While AOBA complains that such an approach is not cost-based, AOBA has not shown that Pepco's computations of the BSA deferral balances are inconsistent with the Commission-approved Bill Stabilization Adjustment Rider.

In *Formal Case No. 1176*, the PSC modified the BSA structure to use a target revenue per customer class, which will reduce the impact that changes and movement in customers will have on Pepco's allowed revenue.<sup>151</sup> The per-class revenue target also addresses AOBA's concerns regarding the accuracy of customer class counts.<sup>152</sup> Importantly, AOBA Witness Oliver asserted that if the PSC approves the BSA, three of Pepco's four proposed BSA enhancements are reasonable, including: 1) the transition to flat revenue targets per customer class, 2) the transition from monthly to annual surcharge adjustments, and 3) the display of the BSA as a separate line item on customer bills.<sup>153</sup> Witness Oliver questioned

---

<sup>151</sup> See Order No. 22328 at ¶ 502-503 (J.A. at 7395-7396).

<sup>152</sup> Order No. 22328 at ¶ 503 (J.A. at 7396).

<sup>153</sup> Order No. 22328 at ¶ 489 (J.A. at 7393); see AOBA Witness B. Oliver Direct Testimony at 64-65 (J.A. at 5377-5378).



whether the introduction of the demand component to the BSA would add unnecessary complexity, and as a result of those concerns, the PSC did not approve the demand component and directed the BSA Working Group to consider it.<sup>154</sup>

On brief to this Court, AOBA overlooks the PSC's acceptance of two of its recommendations on the BSA. In response to AOBA's testimony, the PSC approved the creation of a regulatory asset for the GT-LV rate class to account for the growth in the COVID-19-related BSA deferral balance.<sup>155</sup> The regulatory asset will be recovered over a 10-year period to help mitigate rate impacts on customers, especially commercial customers, who are still recovering from the pandemic.<sup>156</sup> Finally, to help minimize future growth in the BSA deferral balances, the PSC implemented an additional true-up of any under- or over-collections in the BSA for each calendar year, starting in 2025.<sup>157</sup>

AOBA continues to take issue with the rate impacts caused by the GT-LV BSA revenue deferrals, complains that the PSC did not address AOBA's specific arguments, and disagrees with Pepco's calculation of the BSA deferral balance.<sup>158</sup> First, the PSC addressed immediate rate impacts by: 1) directing Pepco to write off \$15.3 million in revenue from the BSA deferral balance caused by Pepco's failure

---

<sup>154</sup> Order No. 22328 at ¶¶ 505, 507 (J.A. 7396, 7397).

<sup>155</sup> Order No. 22328 at ¶¶ 511-515 (J.A. 7397-7398).

<sup>156</sup> Order No. 22328 at ¶ 513 (J.A. at 7398).

<sup>157</sup> Order No. 22328 at ¶¶ 516-518 (J.A. at 7399).

<sup>158</sup> AOBA Br. at 34-35.

to adequately control and manage prior errors in billing determinant forecasts; and 2) creating a regulatory asset for the COVID-19-related BSA deferral balance for the GT-LV class over a 10-year period to help mitigate rate impacts on customers.<sup>159</sup> Second, AOBA has not demonstrated any miscalculation by Pepco or the PSC regarding the BSA deferral balance. The larger deferral balances are a product of COVID-19 deferrals, and the BSA mechanism has been operating as intended, making Pepco whole for revenues that it is authorized to collect. AOBA has not demonstrated any flaw in the PSC's reasoning, and Pepco detailed the conditions giving rise to the actual number of GT-LV customers being higher than previously reflected in *Formal Case No. 1156*.<sup>160</sup> The BSA deferral balance determinations are supported by substantial evidence.

## **2. The PSC's Acceptance of Pepco's Proposed Effective Rate Adjustment for the GT-LV Class Reflects Reasoned Consideration.**

In a separate argument related to the BSA mechanism, AOBA contends that the PSC's acceptance of the ERA for the GT-LV class was arbitrary and capricious.<sup>161</sup> However, AOBA overlooks the PSC's rationale for adopting the ERA in the context of the BSA modifications. The ERA calculation aligns tariff

---

<sup>159</sup> Order No. 22328 at ¶¶ 511-515 (J.A. at 7397-7398).

<sup>160</sup> See Bonikowski Rebuttal at ¶¶ 24-26 (J.A. 5913-5915).

<sup>161</sup> AOBA Br. at 26-33.

revenue with authorized revenue targets for each customer.<sup>162</sup> The PSC found that Pepco's proposed rate design for adjusting customer charges, demand charges, and volumetric rates was consistent with past practice.<sup>163</sup> In approving the ERA, the PSC explained that the ERA – previously called the BSA Revenue Annualization – was necessary for all BSA classes whose class revenue changes as customer counts grow or shrink,<sup>164</sup> including the GT-LV commercial class. As the customer count changes, a gap is created between the tariffed revenue (tariff rates times approved billing determinants) and Pepco's authorized revenue per class (which is calculated monthly). The ERA calculation aligns tariffed rates and billing determinants (such as energy consumed, peak demand, and fixed customer charges) with authorized revenue per class; it is not a revenue increase.<sup>165</sup> The ERA is Pepco's way of accounting for revenue it is allowed to recover, based on the previously approved class revenue per customer number times the number of customers in the class.

The PSC recognized AOBA's concern as to the magnitude of the ERA for the GT-LV class but disagreed that the ERA improperly imputed revenues to the GT-LV class before any increase is applied.<sup>166</sup> Pepco Witness Bonikowski

---

<sup>162</sup> Order No. 22328 at ¶ 472 (J.A. at 7389).

<sup>163</sup> Order No. 22328 at ¶ 468 (J.A. at 7388) (*citing* Order No. 20775 at ¶ 444).

<sup>164</sup> Order No. 22328 at ¶ 472 (J.A. at 7389).

<sup>165</sup> Order No. 22328 at ¶ 472 (J.A. at 7389); *see also* Pepco Witness Bonikowski Rebuttal Testimony at 44-45 (J.A. at 5933-5934).

<sup>166</sup> Order No. 22328 at ¶ 473 (J.A. at 7389); *see* AOBA Br. at 27-29.

indicates that “the ERA increases or decreases base distribution rates to produce the same level of revenue as authorized under the BSA. Absent this adjustment, rates may be inappropriately designed to produce a higher or lower level of revenue than is actually authorized to be collected from a given class.”<sup>167</sup>

The PSC’s determination that the ERA is not adding revenues to the GT-LV class before any increase is applied reflects reasoned consideration. The PSC explained that the disconnect between tariffed rates approved in 2021 for the GT-LV class and revenues that were authorized in the Initial Pilot was “amplified” by the growth in the customer class (which created a larger authorized revenue) and inaccurate forecasts largely resulting from the COVID-19 pandemic impacts.<sup>168</sup> The PSC emphasized that changing the BSA structure to include “a flat per-class revenue (with customer growth built-in) and an annual BSA surcharge (as opposed to monthly) aligns tariffed revenues and authorized revenues.”<sup>169</sup> Therefore, the PSC authorized a regulatory asset for the GT-LV rate class to account for some of

---

<sup>167</sup> Pepco Witness Bonikowski Rebuttal Testimony at 44:5-8 (J.A. at 5933).

<sup>168</sup> Order No. 22328 at ¶ 473 (J.A. at 7389). Importantly, in a settlement in *Formal Case No. 1150*, the parties agreed to use forecasted customer counts instead of actual customer counts to reflect anticipated customer growth; however, in reality, fewer customers migrated into the GT-LV class. See Pepco Witness Bonikowski Rebuttal Testimony at 21:15-22:6 (J.A. at 5910-5911).

<sup>169</sup> Order No. 22328 at ¶ 473 (J.A. at 7389).

the COVID-19-related BSA deferral balance<sup>170</sup> and allow cost recovery over a 10-year period to help mitigate rate impacts on the GT-LV class.<sup>171</sup>

AOBA complains that the PSC did not quantify any rate impact on the GT-LV class in its orders.<sup>172</sup> While the PSC did not delineate a separate quantitative impact or assessment in a decision paragraph in the Orders, the Commission was persuaded by Pepco's proposed rate design,<sup>173</sup> which is supported by substantial evidence in the record.<sup>174</sup> Pepco Witness Bonikowski's Rebuttal Testimony and supporting exhibits detail the rate impact on the customer class.<sup>175</sup> The PSC also explained that Pepco modified rate schedule MGT-LV and GT-LV customer unit costs, as recommended by AOBA, and proposed updated customer charges (resulting in a decrease to the Rate GT-LV customer charge).<sup>176</sup>

---

<sup>170</sup> Order No. 22328 at ¶¶ 511-515 (J.A. at 7397-7398).

<sup>171</sup> Order No. 22328 at ¶ 513 (J.A. at 7398).

<sup>172</sup> AOBA Br. at 29.

<sup>173</sup> *OPC v. PSC*, 797 A.2d 719, 726-727 (D.C. 2002) ("Commission decisions may be based on regulatory policy choices as much as on purely factual determinations, and that the Commission may modify policy choices so long as it explains the basis for the change").

<sup>174</sup> See Pepco Witness Bonikowski Rebuttal Testimony Exhibits at J.A. 5943-6156.

<sup>175</sup> See *id.* at 27, 43-45 (J.A. 5916, 5932-5934), Exhibit Nos. 3E-3 (Customer Charge Rate Design) (J.A. at 5949), 3E-5 at 7-8 (Rate Design Sheets) (J.A. at 5962-5963), and 3E-7 (Bill Impact Analysis) at 26-37 (J.A. at 6043-6054). Exhibit No. 3E-12 at page 8 of 35 shows rate calculation details. (J.A. at 6088).

<sup>176</sup> Order No. 22328 at ¶ 465 (J.A. at 7387) (citing Pepco Witness Bonikowski Rebuttal at 1, 49:5-9 (J.A. at 5890, 5938)).

Pepco presents bill impacts in rate cases by comparing revenues at current rates after the ERA is applied with the revenues under proposed rates. AOBA focuses on the change in tariffed rates while discrediting the ERA (or any other rate design mechanism that adjusts for actual authorized revenues). Although AOBA points out that the revenues based on tariffed rates increased at a higher percentage, AOBA ignores the adjustment that the Commission approved in previous rate cases to align authorized revenues with tariffed rates (before any revenue increase is applied). AOBA continues to dismiss this rate adjustment mechanism by arguing it is not cost-based;<sup>177</sup> however, the BSA tariff mechanism is a well-established formula in Pepco's tariff that allows changes in customer numbers to flow through to changes in revenue allowed to be collected from the class.

Finally, AOBA invokes the PSC's review of Pepco's ERA in *Formal Case No. 1156*<sup>178</sup> to presumably imply the PSC should have rejected Pepco's approach here. First, because AOBA did not raise this argument in its application for reconsideration, it is waived. Second, AOBA does not show that the PSC established precedent in *Formal Case No. 1156* to which it has deviated here.

In rendering a determination on the BSA mechanism and the ERA, the PSC balanced the interests of the GT-LV rate class, all of the other rate classes (as

---

<sup>177</sup> See AOBA Br. at 7, 30.

<sup>178</sup> AOBA Br. at 32 (citing *Formal Case No. 1156*, Order No. 2055 at ¶ 479).

shifting costs away from GT-LV would trigger increases revenue allocations to other customers like the residential class represented by OPC),<sup>179</sup> the public interest, and Pepco. The PSC properly exercised its ratemaking role to establish rates for all rate classes based on both cost and non-cost factors in the record.<sup>180</sup>

## VIII. CONCLUSION

For the reasons stated herein, this Honorable Court should affirm the Commission's orders in all respects and deny the Petitions for Review.

Dated: July 23, 2025

<u>/s/ Brian O. Edmonds</u> Brian O. Edmonds (D.C. Bar 475869) Naza N. Shelley (D.C. Bar 1017299) Jamond D. Perry (D.C. Bar 242450) Stephan Jaksch (D.C. Bar 90005129) Shanelle C. Patterson (D.C. Bar 1021899) PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA 1325 G Street, NW, Suite 800 Washington, DC 20005 (202) 626-5100	Robert A. Weishaar, Jr. (D.C. Bar 475818) Kenneth R. Stark (D.C. Bar 90029735) McNEES WALLACE & NURICK LLC 1200 G Street, NW, Suite 800 Washington, DC 20005
--	---

*Attorneys for the Public Service Commission of the District of Columbia*

---

<sup>179</sup> See Pepco Witness Bonikowski Rebuttal at 44:20-45:9 (J.A. at 5933) (observing that AOBA's position on the ERA would trigger "a reallocation of currently authorized revenues between rate classes").

<sup>180</sup> *Washington Gas & Light v. PSC*, 450 A.2d at 1195.

## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July 2025, a copy of Respondent's Brief was served on the parties of record identified below via the District of Columbia Court of Appeals E-File System.

Jason T. Gray, Esq.  
Timothy B. Hamilton, Esq.  
DUNCAN & ALLEN LLP  
1730 Rhode Island Avenue, NW  
Suite 700  
Washington, D.C. 20036  
[jtg@duncanallen.com](mailto:jtg@duncanallen.com)  
[tbh@duncanallen.com](mailto:tbh@duncanallen.com)

Sandra Mattavous-Frye, Esq.  
Karen R. Sistrunk, Esq.  
Laurence C. Daniels, Esq.  
Ankush Nayar, Esq.  
Office of the People's Counsel for the District of Columbia  
655 15th Street, NW  
Suite 200  
Washington, D.C. 20005  
[smfrye@opc-dc.gov](mailto:smfrye@opc-dc.gov)  
[ksistrunk@opc-dc.gov](mailto:ksistrunk@opc-dc.gov)  
[ldaniels@opc-dc.gov](mailto:ldaniels@opc-dc.gov)  
[anayar@opc-dc.gov](mailto:anayar@opc-dc.gov)

Frann G. Francis, Esq.  
Apartment and Office Building Association of Metropolitan Washington  
1025 Connecticut Avenue, NW  
Suite 1005  
Washington, D.C. 20036  
[ffrancis@aoba-metro.org](mailto:ffrancis@aoba-metro.org)

Kimberly A. Curry, Esq.  
Dennis Jamouneau, Esq.  
Kunle Adeyemo, Esq.  
Anne Bancroft, Esq.  
Taylor Beckham, Esq.  
Potomac Electric Power Company  
701 9th Street, NW  
Ninth Floor  
Washington, D.C. 20068  
[kimberly.curry@exeloncorp.com](mailto:kimberly.curry@exeloncorp.com)  
[djamouneau@pepcoholdings.com](mailto:djamouneau@pepcoholdings.com)  
[kunle.adeyemo@exeloncorp.com](mailto:kunle.adeyemo@exeloncorp.com)



[anne.bancroft@exeloncorp.com](mailto:anne.bancroft@exeloncorp.com)  
[taylor.beckham@exeloncorp.com](mailto:taylor.beckham@exeloncorp.com)

*/s/ Brian O. Edmonds*  
Brian O. Edmonds  
Counsel for Respondent

Dated: July 24, 2025