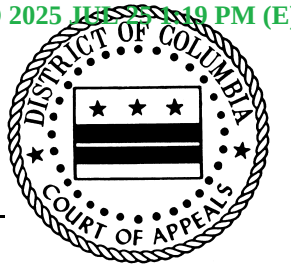

APPEAL NOS. 25-AA-250 & 25-AA-310

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

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

v.

D.C. PUBLIC SERVICE COMMISSION,
Respondent

APPEAL FROM THE
PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERVENOR POTOMAC ELECTRIC POWER COMPANY

Anne Bancroft, D.C. Bar No. 440339
Kimberly A. Curry, D.C. Bar No. 477867
Dennis P. Jamouneau, D.C. Bar No. 983357*
Taylor W. Beckham, D.C. Bar No. 1542117
Kunle Adeyemo, D.C. Bar No. 90016255
POTOMAC ELECTRIC POWER COMPANY
701 Ninth Street, N.W.
Washington, D.C. 20063
(202) 872-2890

* Counsel Designated to Argue Appeal

July 23, 2025

CERTIFICATE AS TO PARTIES, INTERVENORS, AMICI CURIAE, AND THEIR COUNSEL AND CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 26.1(a) and 28(a)(2), intervenor Potomac Electric Power Company submits the following Statement Regarding Corporate Status and Certificate as to Parties, Intervenors, Amici Curiae, and their Counsel.

1. PARTIES AND INTERVENORS BEFORE THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ("COMMISSION")

The parties and intervenors and their counsel before the Commission in Formal Case No. 1176 were:

a. **Potomac Electric Power Company**: Anne C. Bancroft, Kimberly A. Curry, Dennis P. Jamouneau, Taylor W. Beckham and Kunle Z. Adeyemo.

b. **Office of the People's Counsel**: Sandra Mattavous-Frye, Karen R. Sistrunk, Laurence C. Daniels, Ankush Nayar, Knia Tanner, Kintéshia S. Scott, Jason T. Grey, Tim Hamilton and Kevin J. Conoscenti

c. **Apartment and Office Building Association of Metropolitan Washington**: Frann G. Francis and Excetral K. Caldwell.

d. **District of Columbia Government**: Brian R. Caldwell, Argatonia D. Weatherington and Alec Bowman.

e. **DC Water and Sewer Authority**: Michael R. Engleman, Robert C. Fallon, Marc Battle and Barbara Mitchell.

f. **U.S. General Services Administration**: Kristi Singleton, Kelly Y. Burnell and Mark Kaminski.

2. PARTIES, INTERVENORS, AND AMICI CURIAE AND THEIR COUNSEL BEFORE THIS COURT

a. The Petitioners are: (i) the Office of People's Counsel for the District of Columbia, which is represented by Sandra Mattavous-Frye, Karen R. Sistrunk, Laurence C. Daniels, Ankush Nayar, Jason T. Gray and Timothy B. Hamilton and (ii) Apartment and Office Building Association of Metropolitan Washington, which is represented by Frann G. Francis and Jason T. Gray.

b. The Respondent is the Public Service Commission of the District of Columbia, which is represented by Jamond D. Perry, Brian O. Edmonds, Naza N. Shelley, Kenneth R. Stark and Robert A. Weishaar, Jr.

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

3. CORPORATE DISCLOSURE STATEMENT

Potomac Electric Power Company ("Pepco") is a corporation duly incorporated under the laws of the District of Columbia and the Commonwealth of Virginia. Pepco is a wholly owned subsidiary of Pepco Holdings LLC ("PHI"), a limited liability company organized and existing under the laws of the State of

Delaware. PHI is, in turn, a wholly owned subsidiary of PH Holdco LLC ("PHLLC"), a Delaware limited liability company organized and existing under the laws of the State of Delaware. PHLLC is, in turn, 99.9% owned by Exelon Energy Delivery Company, LLC ("EEDC"), a limited liability company organized and existing under the laws of the State of Delaware. EEDC in tum is a limited liability company wholly owned by Exelon Corporation, which is a publicly traded company.

TABLE OF CONTENTS

Page

I. STATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 2

III. STATEMENT OF FACTS 2

IV. STATEMENT OF THE STANDARD OF REVIEW 2

V. SUMMARY OF ARGUMENT 5

VI. ARGUMENT 8

A. THE ARGUMENTS PRESENTED BY OPC DO NOT WARRANT REVERSAL OF THE COMMISSION'S DECISIONS 8

1. The Commission's Adoption of the FC 1176 Extended Pilot MRP Was Well Within Its Statutory Authority, Within Its Discretion, and Consistent With the Requirements of D.C. Code § 34-1504(d) 8

2. The Commission's Decision to Incorporate A Formal Lessons Learned Process For the FC 1156 Pilot MRP Into the FC 1176 Expanded Pilot MRP Was Not Reversible Error. 13

3. The Commission's Schedule Allowed The Submission Of Multiple Rounds Of Testimony And Discovery, As Well As A Legislative-Style Hearing And Dispositive Briefs; OPC's Allegation That There Was An Absence of Due Process Under These Facts Is Not Credible. 18

4. OPC's Other Claims Of Due Process Violations Are Also Without Merit 23

5. The Commission Was Not Required To Hold A Formal Evidentiary Hearing Given Its Determinations In FC 1176 27

B. AOBA HAS NOT MET ITS BURDEN TO SHOW A FATAL FLAW IN THE COMMISSION'S ACTIONS THAT WOULD WARRANT REVERSAL 34

1. The Commission's Determination That The Effective Rate Adjustment Was Appropriate Was Reasonable And Consistent With Commission Precedent And The Commission Explained The Basis For Its Determination 34

2. The Commission Appropriately Rejected AOBA's Suggestion That The GT-LV Class BSA Deferral Balances Attributable To The COVID-19 Pandemic That Were Transferred To A Regulatory Asset Should Be Recovered From All Classes Rather Than The GT-LV Class 39

3. The Commission Appropriately Declined AOBA's Suggestion To Reduce The BSA Deferral Balances For The GT-LV Class 44

VII. CONCLUSION 49

TABLE OF AUTHORITIES

Page

Cases

Apartment & Off. Bldg. Ass'n of Metro. Washington v. Pub. Serv. Comm'n,
203 A.3d 772 (D.C. 2019) 31

Armstrong v. Manzo,
380 U.S. 545 (1965)..... 20

Bokat v. Tidewater Equipment Co.,
363 F.2d 667 (5th Cir. 1966) 13

Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n,
514 A.2d 1159 (D.C. 1986) 3

Chicago Automobile Trade Ass'n v. Madden,
328 F.2d 766 (7th Cir. 1964) 13

City of San Antonio v. C.A.B.,
374 F.2d 326 (DC Cir. 1967)..... 13

Cutler v. Hayes,
818 F.2d 879 (DC Cir. 1987)..... 13

District of Columbia v. Pub. Serv. Comm 'n,
802 A.2d 373 (D.C. 2002) 13

District of Columbia v. Pub. Serv. Comm 'n,
905 A.2d 249 (D.C. 2006) 46

Johnson v. D.C. Dep't of Emp't Servs.,
167 A.3d 1237 (D.C. 2017) 26

Mathews v. Eldridge,
424 U.S. 319 (1976)..... 20,21,22

Metropolitan Washington Board of Trade v. Pub. Serv. Comm'n,
432 A.2d 343 (D.C. 1981) 3,4

Mississippi Power Co. v. Goudy,
459 So.2d 257 (Miss.1984)..... 22

Office of the People's Counsel v. Pub. Serv. Comm'n,
520 A.2d 677 (D.C. 1987) 3

Office of the People's Counsel v. Pub. Serv. Comm'n,
610 A.2d 240 (D.C. 1992) 5

Office of the People's Counsel v. Pub. Serv Comm'n,
797 A.2d 719 (D.C. 2002) 5,31

People's Counsel v. Pub. Serv. Comm'n,
399 A.2d 43 (D.C. 1979) 4

People's Counsel v. Pub. Serv. Comm'n,
455 A.2d 391 (D.C. 1982) 3,12

Potomac Elec. Power Co. v. Pub.Serv. Comm'n,
402 A.2d 14 (D.C.)(en banc), cert. denied, 444 U.S. 926 (1979)..... 2

Potomac Elec. Power Co. v. Pub. Serv. Comm'n,
457 A.2d 776 (D.C. 1983) 3,5,28

Potomac Elec. Power Co. v. Pub. Serv. Comm'n,
661 A.2d 131 (D.C. 1995) 2

Public Serv. Co. of Colo. v. Public Utilities Comm'n,
653 P.2d 1117 (Colo. 1982)..... 22

Quick v. Dep't. of Motor Vehicles,
331 A.2d 319 (D.C. 1975) 26

Thermal Ecology Must Be Preserved v. A. E. C.,
433 F.2d 524 (DC Cir. 1970)..... 13

Walker v. Brigham City,
856 P.2d 347 (Utah 1993)..... 21

Washington Gas Light Co. v. Pub. Serv. Comm'n,
450 A.2d 1187 (D.C. 1982) 3

Washington Gas Light Co. v. Pub. Serv. Comm 'n,
452 A.2d 375 (D.C. 1982) 4

Washington Gas Light Co. v. Pub. Serv. Comm 'n,
982 A.2d 691 (D.C. 2009) 40

Washington Metro. Area Transit Auth. v. Pub. Serv. Comm'n,
486 A.2d 682 (D.C.1984). 5

Washington Urban League, Inc. v. Pub. Serv. Comm'n,
295 A.2d 906 (D.C.1972) 13

Watergate East, Inc., v. Public Serv. Comm'n,
662 A.2d 881 (D.C. 1995) 28,30,31

Statutes

D.C. Code § 34-603 46
D.C. Code § 34-604 40
D.C. Code § 34-606 2
D.C. Code § 34-1123 46
D.C. Code § 34-1129 46
D.C. Code § 34-1504(d)..... *passim*

Public Service Commission of the District of Columbia Orders[*]

Formal Case No. 1053, Order No. 15556 (September 28, 2009)..... 38,46
Formal Case No. 1082, Order No. 16077 (December 6, 2010).....14
Formal Case No. 1156, Order No. 20273 (December 20, 2019).....9
Formal Case No. 1156, Order No. 20755 (June 8, 2021)..... *passim*
Formal Case No. 1156, Order No. 21563 (December 22, 2022).....37
Formal Case No. 1176, Order No. 21886 (July 28, 2023)..... 12,24
Formal Case No. 1176, Order No. 22013 (June 28, 2024)..... *passim*
Formal Case No. 1176, Order No. 22328 (November 26, 2024) ..... *passim*
Formal Case No. 1176, Order No. 22358 (January 28, 2025)..... *passim*
PEPBSAR-2016-01, Order No. 18138 (March 11, 2016).....46

[*] Some of the Commission's orders are included in the Joint Appendix. All of the Commission's orders are publicly accessible on the Commission's website at https://edocket.dcpsc.org/public/search/filingtype/128.

BRIEF OF INTERVENOR
POTOMAC ELECTRIC POWER COMPANY

Pursuant to Rule 28 of the Rules of the District of Columbia Court of Appeals and the Court's Order filed April 29, 2025, as modified by the Court's Order issued on July 2, 2025, Potomac Electric Power Company ("Pepco" or the "Company") hereby respectfully submits its brief as an intervenor seeking affirmance of the following orders issued by the Public Service Commission of the District of Columbia (the "Commission") in Formal Case No. ("FC") 1176: Order No. 22328 (Order on the merits) and Order No. 22358 (Order denying reconsideration). The Office of the People's Counsel for the District of Columbia ("OPC") and the Apartment and Office Building Association of Metropolitan Washington ("AOBA") have petitioned this Court to reverse the Orders. For the reasons set forth herein, these consolidated appeals should be denied and the Commission's decisions below affirmed.

I. STATEMENT OF THE ISSUES

Pepco agrees with and adopts the Statement of Issues presented in the brief of the Commission.

II. STATEMENT OF THE CASE

Pepco concurs with and adopts the Statement of the Case presented in the brief of the Commission.

III. STATEMENT OF FACTS

Pepco adopts the Statement of Facts pertinent to this appeal as set forth in the Commission's brief.

IV. STATEMENT OF THE STANDARD OF REVIEW

Pursuant to Section 34-606 of the District of Columbia Official Code ("DC Code"), the Court's review of Commission orders is narrowly proscribed and is "limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious."[1]

The Court has noted that the scope of its review of decisions of the Commission "is the narrowest judicial review in the field of administrative law."[2] The Court has also indicated, "in recognition of the authority delegated to the Commission by Congress, and of the expertise of the commissioners in the complex

---

[1] DC Code § 34-606. *See Potomac Elec. Power Co. v. Pub. Serv. Comm 'n*, 661 A.2d 131, 134-35 (D.C. 1995)("By this provision, Congress vested sole ratemaking authority in the expertise of the Public Service Commission.").

[2] *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 402 A.2d 14, 17 (D.C.)(en banc), cert. denied, 444 U.S. 926 (1979).

and esoteric area of utility regulation, . . . [this Court] accord[s] great respect to the decisions of the commissioners."[3] A party seeking to overturn a Commission order therefore "carries the heavy burden of demonstrating clearly and convincingly a fatal flaw in the action taken."[4] This burden is not met by merely proposing an acceptable alternative to the Commission's actions.[5] As the Court has explained, "[p]etitioners' burden is thus substantial, but necessarily so, for a lighter burden would preclude the Commission from engaging in the kind of well-considered experimentation necessary to fulfill its ratemaking function."[6]

While the Court must ascertain that "the Commission has given reasoned consideration to each of the pertinent factors,"[7] the court will not substitute its judgement for that of the Commission.[8] The Court has indicated that "[e]ven though we might arrive at a somewhat different decision than did the Commission, if there

---

[3] *Washington Gas Light Co. v. Pub. Serv. Comm'n*, 450 A.2d 1187, 1193 (D.C. 1982). *See also Office of the People's Counsel v. Pub. Serv. Comm'n*, 520 A.2d 677, 680 (D.C. 1987).

[4] *Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n*, 514 A.2d 1159, 1163 (D.C. 1986)(citing *Washington Gas Light Co. v. Public Serv. Comm'n*, 450 A.2d at 1194 (citations omitted).

[5] *Id*. (citing *People's Counsel v. Pub. Serv. Comm'n*, 455 A.2d 391, 394 (D.C. 1982)

[6] *Metro. Washington Bd. of Trade v. Pub. Serv. Comm'n*, 432 A.2d 343, 352 (D.C. 1981).

[7] *Potomac Elec. Power Co. v. Pub. Serv. Comm 'n,* 457 A.2d, 776, 782 (D.C. 1983).

[8] *Id*. (citing *People's Counsel v. Pub. Serv. Comm'n*, 399 A.2d 43, 45-46 (D.C. 1979).

is substantial evidence to support the Commission's findings and conclusions and the Commission has given reasoned consideration to each of the pertinent factors, we must affirm."[9]

The Commission must provide a full and careful explanation of the basis for its action, and having done so, the Commission's decision "is entitled to great deference."[10] As the Court explained in *Metropolitan Washington Board of Trade v. Pub. Serv. Comm'n*:

> Once the Commission has satisfied this initial burden and has issued a decision, however, the burden of petitioner on appeal to demonstrate reversible error is considerable. More than a difference of opinion with the Commission must be asserted, for the court's responsibility is not to supplant the Commission's balance of (the relevant public) interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Petitioner therefore must establish clearly and convincingly a fatal flaw in the action taken.[11]

This Court has also indicated that "[i]t is especially important to accord great respect to the Commission in a complex, esoteric area such as ratemaking in which the Commission has been entrusted with the difficult task of deciding among many

---

9 *Id*.

10 *Washington Gas Light Co. v. Pub. Serv. Comm 'n*, 452 A.2d 375, 379 (D.C. 1982).

11 *Metropolitan Washington Board of Trade v. Pub. Serv. Comm'n,* 432 A.2d at 352 (citation and internal quotation marks omitted).

competing arguments and policies."[12] The Court has recognized that "[t]he Commission, not this court, has the sole responsibility for balancing consumer and investor interests in designing rate structures and approving specific charges."[13]

Moreover, the Court has found that "[b]ecause 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."[14] The Court has also stated that it appreciates "that 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."[15] Finally, this Court has held that questions of regulatory policy, as distinct from questions of law, "are beyond both the jurisdiction and the competence of a reviewing court."[16]

V. SUMMARY OF ARGUMENT

OPC and AOBA fail to demonstrate a fatal flaw in the Commission's decision or any errors by the Commission warranting reversal or vacatur of its decision.

---

12 *Office of People's Counsel v. Pub. Serv. Comm'n*, 610 A.2d 240, 243 (D.C. 1992) (internal quotation marks and citation omitted).

13 *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 457 A.2d at 782 (citations and internal quotations omitted).

14 *Id*. (internal quotation marks and citations omitted).

15 *Office of People's Counsel v. Pub. Serv. Comm'n*, 797 A.2d 719, 726–27 (D.C. 2002).

16 *Washington Metro. Area Transit Auth. v. Pub. Serv. Comm'n*, 486 A.2d 682, 692 (D.C.1984).

The Commission's authority to adopt an Alternative Form of Regulation ("AFOR") and its right to control its calendar and processes is well established. Its decision to combine the lessons learned review of the FC 1156 Multiyear Rate Plan ("MRP") pilot with that of the extended MRP pilot adopted in this case was consistent with its AFOR policies and well within its discretion.

Neither OPC nor AOBA have demonstrated any violation of procedural due process that would warrant reversal or vacatur. A 19-month proceeding that included multiple rounds of expert testimony, extensive discovery, a legislative-style hearing, and pre- and post-hearing briefs, all of which were admitted into the evidentiary record, provided sufficient due process in this proceeding.

The Commission's conclusion that a formal evidentiary hearing was not required in this proceeding following its legislative-style hearing was within its discretion and reasonable under the facts and circumstances of this case. The absence of an evidentiary hearing in this instance is not a fatal flaw warranting reversal or vacatur by the Court, as the Commission has the discretion to forego a formal evidentiary hearing when, as here, its decision involves inferences to be drawn from the facts established in the record, or issues of policy or law, and there are no disputed material facts to be resolved.

The Commission's use of the Effective Rate Adjustment ("ERA") for all customer classes subject to the Bill Stabilization Adjustment ("BSA") was consistent

with past practice and was not an error. The Commission also did not err in requiring that a regulatory asset created from a portion of the GT-LV class[17] BSA deferral balance be recovered from the GT-LV class, rather than from all customer classes. The Commission's refusal to reduce the BSA deferral balance for the GT-LV class was not in error when the balance was calculated in accordance with the applicable Commission-approved tariff.

The Court should deny the consolidated appeals and affirm the decision of the Commission.

[17] The GT-LV class are customers served under the Time Metered General Service – Low Voltage Service, Schedule GT LV tariff.

VI. ARGUMENT

A. THE ARGUMENTS PRESENTED BY OPC DO NOT WARRANT REVERSAL OF THE COMMISSION'S DECISIONS.

1. The Commission's Adoption of the FC 1176 Extended Pilot MRP Was Well Within Its Statutory Authority, Within Its Discretion, and Consistent With the Requirements of D.C. Code § 34-1504(d).

The Commission is fully within its explicit statutory authority under Section 34-1504 of the DC Code to adopt and to structure alternative forms of regulation and nothing in OPC's appeal gives the Court a basis for challenging the exercise of that authority in this case.[18] In FC 1156, the Commission adopted an MRP pilot, noting that it would be the "Commission's introductory determination of an alternative form of regulation for public utilities. . ."[19] It adopted that first MRP as a pilot with the stated intention that it would provide "an opportunity to gather valuable lessons learned in assessing future MRP proposals and to facilitate the development of AFOR regulations."[20] As set forth in more detail below, the lessons learned from FC 1156 were reflected and continued in FC 1176.

---

[18] D.C. Code § 34-1504(d)(1) provides: "Notwithstanding any other provision of law, the Commission may regulate the regulated services of the electric company through alternative forms of regulation.

[19] FC 1156, Order No. 20755 at ¶1 (Joint Appendix ("JA") at 8591).

[20] *Id.*

OPC's assertion that in FC 1176 the Commission significantly deviated from the policies and framework established in FC 1156 is not borne out by the facts; to the contrary, the Commission made substantially similar findings in FC 1176 as it had in FC 1156 with regard to whether the MRP met the essential requirements of § 34-1504(d).[21] Further, when developing its framework for AFORs in FC 1156, the Commission stated its intention that the AFOR framework could be modified and adapted as appropriate, consistent with the public interest.[22]

In FC 1176, the Commission concluded that it needed additional experience with an MRP prior to deciding whether this form of alternative regulation was appropriate in the long term and whether it could set the stage for adoption of AFOR regulations.[23] The Commission also indicated that more evaluation was necessary due to short duration of the FC 1156 MRP pilot and the fact that its results were impacted by the economic upheaval caused by the COVID-19 pandemic:

> Based on the filings and the testimony throughout the case, the Commission has learned several lessons regarding the *Formal Case No. 1156* Modified EMRP Pilot. Before discussing those lessons, it is important to note that when the Commission first envisioned adopting

---

21 FC 1176, Order No. 22328 at ¶¶12,91 (JA at 7253,7278-7279).

22 *See* FC 1156, Order No. 20755 at ¶32, (JA at 8604), citing FC 1156 Order No. 20273 at ¶95 (the AFOR framework is a starting point for an evolving evaluation process for AFOR proposals which can be reviewed and modified in the future as the public interest requires.)

23 Order No. 22328 at ¶144 (JA at 7298)("This second Pilot is a continuation of our efforts to gain additional experience and lessons learned regarding MRP filings so that we can adopt a formal evaluation framework and regulations.")

> an MRP, the proposed term for an MRP was three years. Our AFOR principles are predicated on a three-year MRP. The vast majority of jurisdictions that have adopted MRPs have been for three years. However, due to many factors, including the COVID-19 pandemic, the *Formal Case No. 1156* Modified EMRP Pilot was for only 18 months. Additionally, the majority of the EMRP term occurred during the COVID emergency. These are important considerations that the Commission must consider when reviewing the lessons learned, recognizing that these two substantial variations can skew the lessons learned during the *Formal Case No. 1156* Modified EMRP Pilot.[24]

While recognizing that certain lessons learned could be drawn from the experience with the FC 1156 MRP, nonetheless the Commission determined that it would benefit from more experience under an extended MRP pilot to best evaluate the use of MRPs and AFORs generally, and determine what regulations should be adopted regarding AFORs.[25] Based on these conclusions, the Commission decided that the FC 1176 MRP would be a continuation of the prior FC 1156 pilot MRP:

> By this Order, a majority of the … Commission approves a modified version of the [Company's] Multiyear Rate Plan ("MRP") application ***as an extended pilot program*** (***hereinafter referred to as "Modified MRP Extended Pilot"***). This decision represents the Commission's second approval of an alternative form of regulation ("AFOR") for public utilities under our purview as prescribed by D.C. Code § 34-1504(d). The Modified MRP Extended Pilot will enable the Commission and the Parties to consider further lessons learned, improve the MRP process, and facilitate the adoption of regulations for MRP and other AFOR applications.[26]

---

24 *Id*. at ¶142 (JA at 7297-7298).

25 *Id*. at ¶151 (JA at 7300).

26 *Id*. at ¶1 (emphasis added)(citations omitted)(JA at 7249).

As a result, the Commission decided not to conduct the lessons learned assessment on the 18-month pilot MRP adopted in FC 1156, but rather to assess the effectiveness of the plan following the "extended pilot." As discussed above, the Commission explained its rationale for adopting this approach.[27] Nothing proffered by OPC shows that this decision was arbitrary or capricious or that the Commission's choice to extend the prior pilot MRP for an additional two years was a fatal flaw warranting reversal by this Court.

Among the challenges OPC asserts to the FC 1176 decision is the claim that the Commission erred in allowing a new MRP prior to the full assessment of the results of the FC 1156 pilot and that the Commission impermissibly deviated from the framework adopted in FC 1156.[28] OPC's arguments are without merit. First, the FC 1156 decision explicitly permitted Pepco to file its next AFOR petition at any date after January 2, 2023.[29] OPC could not conceivably be surprised by the fact that Pepco filed, and the Commission acted upon, the FC 1176 MRP. OPC's claim that the Commission deviated from the FC 1156 precedent is without merit. Not

---

[27] In Order No. 22328, the Commission also detailed the enhancements it was implementing to the ongoing MRP Lessons Learned process. Order No. 22328 at ¶¶144-151 (JA at 7298-7300).

[28] OPC Brief at 35.

[29] Order No. 20755 at ¶142(f) (JA at 8649-8650)(Commission-approved MRP contains a "stay-out provision that prohibits Pepco from filing a new MRP application until at least January 2, 2023, with rates to be effective no earlier than January 1, 2024.")

only was the filing of a subsequent MRP expressly anticipated in the FC 1156 decision,[30] but the PSC also heard and rejected OPC's various objections to considering a second MRP multiple times.[31]

Moreover, while Pepco would submit that the decision in FC 1176 is consistent with that in FC 1156, adopting an AFOR, particularly on a pilot basis, is a regulatory policy decision and the Commission has the right to revise, amend or change its policies.[32] Where, as here, the Commission explains its decision making and the rationale for the processes it will follow going forward, there is no legal error or fatal flaw warranting action by this Court and OPC has pointed to none. OPC points to no statute or regulation that would have mandated that the Commission follow the processes OPC advocated for below.

---

30 *Id*.

31 *See*, *e.g*., Order No. 22013 at ¶18 (JA at 6783-6784) in which the Commission denied motions to dismiss or for summary judgment filed jointly by OPC, AOBA and other parties, where the Commission notes OPC's "continuing objection to the simultaneous review" of the FC 1156 MRP pilot and the FC 1176 new MRP but denies the parties' motion. *See also*, Order No. 21886 at ¶23 (JA at 2480) (Commission in responding to OPC's proposed two-year procedural schedule acknowledged the benefits of seeking information on lessons learned, but stated "we do not believe we should delay consideration of the Company's MYP request.")

32 *People's Counsel v. Pub. Serv. Comm'n,* 455 A.2d 391, 396 (D.C.1982)(The Commission "is not bound by a single regulatory formula, ... and may modify policy choices so long as it explains the basis for the change.")

2. The Commission's Decision to Incorporate A Formal Lessons Learned Process For the FC 1156 Pilot MRP Into the FC 1176 Expanded Pilot MRP Was Not Reversible Error.

Among OPC's challenges on appeal to the FC 1176 decision is the fact that the Commission chose not to complete an evaluation of the FC 1156 MRP prior to approving the extended MRP pilot in FC 1176.[33] This claim also lacks merit. The Commission has full discretion over the organization of its docket and its processes.[34] It had the authority, absent OPC's agreement, to review the full effects of the FC 1156 pilot at a later date and to combine such review with the more expansive, extended MRP pilot that it adopted in FC 1176.[35]

The Commission has explained its authority to control and order its docket and proceedings in the past:

---

33 OPC Brief at 35.

34 *Dist. of Columbia v. Pub. Serv. Comm'n*, 802 A.2d 373, 378 (D.C. 2002)("No principle of administrative law is more firmly established than that of agency control of its own calendar.... Consolidation, scope of the inquiry, and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts...." *citing*, *Washington Urban League, Inc. v. Pub. Serv. Comm'n,* 295 A.2d 906, 908 (D.C.1972) (per curiam) (quoting *City of San Antonio v. C.A. B.,* 374 F.2d 326, 329 (1967)). *See also*, *Cutler v. Hayes,* 818 F.2d 879, 896 (1987) ("An agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing.")

35 *See also Washington Urban League, Inc. v. Pub. Serv. Comm'n,* 295 A.2d at 908 ("Courts are especially reluctant to interfere with agency procedural decisions.") *citing*, *Thermal Ecology Must Be Preserved v. A. E. C.*, 433 F.2d 524 (1970); *Bokat v. Tidewater Equipment Co.*, 363 F.2d 667 (5th Cir. 1966); *Chicago Automobile Trade Ass'n v. Madden*, 328 F.2d 766 (7th Cir. 1964).

> The Commission's decision to address particular issues in specific dockets in accordance with certain procedures is solely within the Commission's own discretion. While we appreciate the suggestions of OPC on how to proceed in investigating electric reliability issues, that decision is ours and ours alone. No principle of administrative law is more firmly established than that of agency control of its own calendar. Consolidation, scope of inquiry, and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside (neither of which are present here), are of no concern. The Commission has broad discretion to set its agenda and to apply its limited resources to the regulatory task it deems most pressing and ripe for consideration. Our determination to consider the issues raised by OPC in other proceedings in the manner we determine is a reasonable exercise of the Commission's discretion.[36]

Importantly, the Commission clearly stated that it had not adopted an evaluation process as part of the FC 1156 pilot.[37] Thus, there was no basis for OPC's insistence that the decision not to conduct a lessons learned evaluation on the schedule sought by OPC was a departure from the FC 1156 framework because that framework did not establish a lessons learned process. The Commission chose, instead, to adopt evaluation standards and processes as part of the FC 1176 decision and, as noted above, to treat the new MRP as an extension of the prior pilot MRP, giving the parties and the Commission an expanded timeframe over which to

---

36 FC 1082, Order No. 16077 at ¶9 (December 6, 2010).

37 Order No. 22328 at ¶140 (JA at 7297)("The Commission did not adopt a Formal Case No. 1156 Modified EMRP Pilot evaluation plan concurrent with the approval of Formal Case No. 1156 Modified EMRP Pilot.")

evaluate the pilot and assess whether it should adopt regulations governing the AFOR framework.[38]

To that end, the FC 1176 decision included a detailed and expansive evaluation process, consistent with the parties' requests, allowing for a thorough analysis of the MRP not only over a longer timeframe but also under more normal economic conditions.[39] These decisions were well within the Commission's discretion and OPC fails to demonstrate any error, much less any fatal flaw, that would warrant reversal by this Court.

The Commission adequately addressed all of OPC's objections, including the timing of full evaluations of the pilot, the reasons why an 18-month pilot in the middle of the COVID pandemic did not provide sufficient experience on which to evaluate the continued use of an MRP or other form of AFOR, and whether that abbreviated experience provided sufficient results on which the Commission could fully apprise the impact or assess the reasonableness of an MRP. As the Commission 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

---

38 *Id.* at ¶¶142-144 (JA at 7297-7298).

39 *Id*. at ¶¶145-151 (JA at 7299-7300).

what happened in that pilot and inform future pilots, and those lessons learned can occur in multiple phases."[40]

The FC 1176 decision provided new, detailed processes by which the Commission can assess the ongoing use of an MRP form of rate regulation, addressing concerns parties had raised regarding the use of an AFOR versus reverting back to a traditional historic cost-of-service proceeding.[41] In no way was the Commission's decision to continue the use of an MRP pilot for a longer and more economically stable time period inconsistent with its statutory authority or its prior deliberations and decisions on the use of AFORs.

After noting that the Commission itself had learned certain lessons from the FC 1156 pilot MRP,[42] the Commission stated,

> Taking those lessons learned into account, the Commission has instituted several modifications to this MRP to ensure that it is in the

---

40 *Id*. at ¶141 (JA at 7297).

41 *Id*. at ¶¶145-151 (JA at 7299-7300).

42 *Id*. at ¶143 (JA at 7298). The main lessons from the FC 1156 Pilot that the Commission identified were:

a. Future lessons learned processes should be clearly prescribed by the Commission with input from stakeholders;

b. Enhancing data collection and analysis of operational metrics is essential to identifying areas for improving operating and capital cost efficiency;

c. There needs to be greater opportunity for stakeholders to participate in key aspects of the MRP, *i.e.*, the Long-Range Plan ("LRP"); and

d. Additional safeguards are necessary to protect consumers in the event the Company over-earns during the MRP period.

> public's interest. The first such modification is the creation of a prescribed lessons-learned framework to evaluate the *Formal Case No. 1176* Modified MRP Extended Pilot. This framework provides clear direction for the Lessons Learned process in this proceeding. This second Pilot is a continuation of our efforts to gain additional experience and lessons learned regarding MRP filings so that we can adopt a formal evaluation framework and regulations. However, we emphasize that the over-arching evaluation of the MRPs is prescribed by law; that is, the MRP results in just and reasonable rates for all Pepco customers, protects consumers, ensures the quality, availability, and reliability of regulated electric services, and is in the public interest, including Pepco's shareholders.[43]

While OPC disagrees with that approach, it has not offered any support for its claim that such a review process violates any applicable statute, regulation or rule, or violates any party's due process rights, or is arbitrary and capricious. To the contrary, the Commission explained its reasoning and in its decision in FC 1176 established a detailed process for the very evaluation and assessment that OPC purported to want. Those processes are now underway pursuant to the requirements adopted by the Commission in FC 1176.[44]

---

[43] *Id*. at ¶144 (JA at 7298)(the Commission has made use of extended pilot programs on numerous occasions; and no party to FC 1176 alleged that the resulting MRP rates were unjust or unreasonable)(citations omitted).

[44] *Id*. at ¶¶145-151(JA at 7299-7300)(Commission adopted detailed processes regarding lessons learned, auditing, refunds for over-earning and other issues, noting that the "Commission believes that the addition of these modifications from the lessons learned of *Formal Case No. 1156* greatly enhances the Modified MRP Extended Pilot we are approving in *Formal Case No. 1176* and the ongoing MRP Lessons Learned process.")

As noted above, the Commission in FC 1156 permitted Pepco to file a new MRP application after January 2, 2023. Unlike FC 1176, the Commission's decision in FC 1156 did not include a process for evaluating the first MRP.

In light of the Commission findings, OPC's argument that the Commission committed reversible error by departing in part from its FC 1156 AFOR framework in order to better accommodate the need for a full assessment of the expanded pilot MRP within the new FC 1176 framework is simply wrong and should be rejected.

3. The Commission's Schedule Allowed The Submission Of Multiple Rounds Of Testimony And Discovery, As Well As A Legislative-Style Hearing And Dispositive Briefs; OPC's Allegation That There Was An Absence of Due Process Under These Facts Is Not Credible.

In deciding FC 1176, the Commission had an extensive record, including multiple rounds of pre-filed testimony from the Company's expert witnesses, OPC's expert witnesses, and AOBA and other intervenors' expert witnesses.[45] The Commission also admitted into the record discovery, consisting of voluminous data

[45] *Id*. at ¶26 (JA at 7260)("The Commission accepts Pepco, OPC, AOBA, DCG, DC Water, and GSA's pre-filed testimony and exhibits into the evidentiary record of this proceeding. The Commission also accepts the Parties' responses to data requests into the evidentiary record of this proceeding."). The prefiled testimony included direct testimony, supplemental direct testimony, rebuttal testimony and surrebuttal testimony.

requests and data responses of the parties, which totaled many thousands of pages.[46] The Commission received testimony from community members who participated in three separate public community hearings.[47]

Following multiple rounds of testimony and discovery, certain parties filed two joint motions seeking summary disposition of the Company's Application.[48] The Commission denied those motions, but advised the parties that it had scheduled a legislative-style hearing that would "allow the Parties to present oral arguments before the Commissioners regarding matters raised in the two Joint Motions and other relevant legal and policy issues that the Parties believe are fundamental to the Commission's decisions in this proceeding."[49] All parties were permitted to file pre-

---

[46] Not all discovery was transmitted as part of the record initially filed by the Commission even though all discovery was expressly included in the evidentiary record referenced by the Commission. However, on July 7, 2025, the Commission filed a supplemental record with the Court that included all of the data request responses in FC 1176.

[47] In addition to the testimony of the parties, more than thirty witnesses testified at three community hearings the Commission held and the Commission also received several hundred comments from the public over the course of the proceeding. Order No. 22328 at ¶¶550-561 (JA at 7408-7410).

[48] Order No. 22328 at ¶21 (JA at 7256); Order No. 22358 at ¶7 (JA at 8044).

[49] *Id*. (citing Order No. 22013 at ¶30)(JA at 6789). The Commission also directed Pepco to supplement the Year-End 2023 ROR report (originally filed in FC 1156) in FC 1176 along with "a detailed demonstration of the prudence of Pepco's Calendar Year 2023 capital and operating expenditures." The Commission also allowed the parties to conduct discovery on this new Pepco filing in advance of the legislative-style hearing and to comment on it in their pre-hearing briefs. FC 1176 Order No. 22013 at ¶¶29-30 (JA at 6788-6789).

hearing briefs in advance of the legislative-style hearing and to present oral argument before the full Commission regarding matters raised in the dispositive motions and other relevant legal and policy issues that the parties believed were fundamental to the Commission's decisions in this proceeding. The parties also filed post-hearing briefs that were not subject to page limits nor restricted in the issues the parties were permitted to address.

While OPC would have preferred more process, the Commission provided extensive opportunities for the parties to be heard over a period of nineteen months. At the conclusion of this extensive process, the Commission included all of the testimony and the discovery in the evidentiary record.[50]

OPC's due process arguments are unavailing.[51] Under the circumstances of this case, the Commission met the basic due process requirement articulated in *Mathews v. Eldridge* that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[52] The Commission in this instance concluded that the inability to conduct live cross examination of expert witnesses when the parties had filed multiple rounds of direct (including supplemental direct), rebuttal and surrebuttal testimony, as well as

---

50 Order No. 22328 at ¶26 (JA at 7260).

51 OPC Brief at 36-49.

52 *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

hundreds of data requests propounded to those expert witnesses and thousands of pages produced in response thereto, did not deprive OPC of a "meaningful" manner in which to be heard.[53]

OPC's effort to analogize itself to utility customers and their due process rights in connection with utility service disconnections, is unreasonable and not grounded in fact.[54] While OPC may represent the interests of consumers, FC 1176 was a proceeding to establish rates,[55] not a proceeding regarding the disconnection

---

[53] *See* Order No. 22358 at ¶¶42-45 (JA at 8060-8061). Citing *Mathews*, the Commission stated that it had "balanced the relative weights of the private interests, the lack of probable value in additional procedural safeguards, and the Commission's administrative and financial interests to determine that the process provided in this proceeding was sufficient to meet the constitutional requirements of due process." *Id*. at ¶44 (JA at 8060).

Contrary to OPC's argument, a Commission decision not to hold an evidentiary hearing in FC 1176 is not equivalent to the deprivation of property rights addressed by the Court in *Mathews*. In that case, the appellant's disability income was terminated and an evidentiary hearing offering an opportunity for reinstatement could be delayed for as much as a year. A lower court held that the administrative procedures followed by the agency were unconstitutional. The Supreme Court, however, reversed, finding that an evidentiary hearing prior to termination of benefits was not a constitutional requirement. *Mathews*, 424 U.S. at 349.

[54] OPC Brief at 36.

[55] Unlike the disconnection of a customer's utility service, courts have concluded that there is no due process right to be charged a reasonable utility rate and no entitlement to be charged a particular rate. *See*, *Walker v. Brigham City*, 856 P.2d 347, 351 n.20 (Utah 1993), in which the petitioner challenged rate decision, arguing that municipal utility's rates were "excessive" and therefore unconstitutional. The court held that while the right to continue to receive utility service has been found to be an entitlement, the right to receive service at a particular price is not. "While several courts addressing claims alleging violation of procedural

of a customer's utility service. As such, it does not require the due process protections that OPC attempts to abrogate to itself. OPC and AOBA are sophisticated and experienced parties that regularly appear before the Commission and have participated in numerous rate cases.[56] They were able to litigate their interests in this case over a period of 19 months, including through extensive motions practice, discovery, multiple rounds of pre-filed testimony and exhibits, a legislative-style hearing and briefing. While OPC and AOBA may have wanted more process, the Commission determined that, under these circumstances, they were provided sufficient process.[57]

---

due process have recognized continued uninterrupted utility service as a protected property interest, ...none to our knowledge has acknowledged a property interest in the rate charged for utility service." *Id.* (quotations and citations omitted). *See also*, *Mississippi Power Co. v. Goudy,* 459 So.2d 257, 263 (Miss.1984) (plaintiff had "no property right in a fair and reasonable utility rate"); *Public Serv. Co. of Colo. v. Public Utilities Comm'n,* 653 P.2d 1117,1121 (Colo. 1982)(plaintiffs did not have "a legitimate claim of entitlement" to utility service at a certain rate).

[56] As the Court in *Mathews* noted, the capacities and capabilities of the individual directly influence the process to which that individual is due:

> The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it. All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case.

Mathews v. Eldridge, 424 U.S. at 348–49 (quotations and citations omitted).

[57] Order No. 22358 at ¶¶42-44 (JA at 8060)(discussing how the Commission satisfied the requirements of procedural due process in FC 1176 under the balancing test in *Mathews.*) *See also id*. at ¶38 (JA at 8058)("constitutional requirements for

Finally, OPC's argument that the Commission defined the contents of the evidentiary record only in its initial decision is misleading. The Commission included ALL substantive filings, including discovery among the parties, in the evidentiary record, the record before the Commission was comprehensive and reflected all of the testimony that OPC and other parties had provided. Since no evidence was excluded, the specific identification of record evidence that OPC argues was necessary prior to a decision, had no meaningful negative impact on OPC or any other party.

4. OPC's Other Claims Of Due Process Violations Are Also Without Merit.

OPC argues that the Commission erred in adopting as evidence statements made by Pepco's counsel during the legislative-style hearing, noting in particular the statement that the Company had incorporated lessons learned from the FC 1156 MRP into Pepco's FC 1176 MRP, for which OPC cites to Paragraph 121 of Order No. 22328.[58] However, this paragraph does not provide proof of "treating arguments from counsel as evidence" as it simply acknowledges, accurately, the Company's position as presented at the legislative style hearing.

---

procedural due process allow for less formal procedures under the circumstances of each individual case, given the relative weight of the interests at stake.")

[58] OPC Brief at 39.

Moreover, the statement to which OPC refers is reflective of statements that were in the sworn testimony of Pepco witnesses that are part of the record. In Order No. 21886, the Commission directed Pepco to submit supplemental direct testimony that, *inter alia*, addressed the benefits of, problems identified, and lessons learned from the FC 1156 MRP.[59] In Section III of her Supplemental Direct Testimony,[60] Company Witness O'Donnell discussed the areas for improvement identified in and lessons learned from the FC 1156 MRP and referenced the direct testimony of several Pepco witnesses that detailed how these were incorporated in the Company FC 1176 MRP.[61] OPC's arguments on this point should be rejected.

OPC also asserts that the Commission erred by taking "official notice of disputed facts."[62] OPC fails to identify in its brief the specific facts at issue. However, to the extent OPC is referring to the Commission's references to the Baltimore Gas and Electric Company ("BGE") pilot in Maryland, which OPC had

---

59 FC 1176, Order No. 21886 at ¶¶29-30 (July 28, 2023) (JA at 2482).

60 PEPCO (2A) (O'Donnell Supplemental Direct) at 20-25 (JA 2574-2579).

61 For example, Company Witness O'Donnell discusses the enhancements Pepco made to its billing determinants forecasting as a result of lessons learned from the FC 1156 MRP that were detailed in the Direct Testimony of Company Witness Efimova as well as why the use of up-to-date billing determinants is important. *Id*. at 23-24 (JA at 2577-2578). The Company's Post Legislative Style Hearing Brief also noted that the FC 1176 MRP "builds upon and incorporates enhancements based on the experience gained from operating under the FC 1156 MYP." Pepco Post Legislative Style Hearing Brief at 10 (August 30, 2024)(JA at 6925).

62 OPC Brief at 40.

referenced in its Application for Reconsideration,[63] as the Commission noted in Order No. 22358, it is not disputed that the Maryland Public Service Commission has approved an MRP for BGE.[64] Moreover, as the Company noted in its Response to OPC's Application for Reconsideration, the BGE Pilot proceeding was discussed in footnote 112 of the Company's Post Hearing Brief.[65]

---

63 OPC Application for Reconsideration at 25 (JA at 7965).

64 Order No. 22358 at ¶32 (JA at 8055-8056).

65 Response of Potomac Electric Power Company to the Applications for Reconsideration and Clarification of the Office of the People's Counsel and the Apartment and Office Building Association of Metropolitan Washington at 19-20 (January 3, 2025) (JA at 8013-8014). In footnote 112 of Pepco's Post-Hearing Brief, the Company explained that the Commission's approach in this proceeding was consistent with decisions from Maryland:

> In Maryland, the MYP pilot utility was Baltimore Gas and Electric Company (BGE). *See* Md PSC Case No. 9618, Order No. 89482. When BGE filed its second MYP application, the MD People's Counsel argued that the lessons learned proceeding on the pilot MYP should be completed in advance of the next MYP being adopted. The Maryland Commission denied that request. Instead, the Commission reiterated that while it would complete its lessons learned proceeding at the conclusion of BGE's first MYP, it would nonetheless proceed with BGE's then current rate case as a new MYP. *See* Application of Baltimore Gas and Electric Company for an electric and gas multi-year plan, Maryland Public Service Commission Case No. 9692, Order on Application for A Multi-Year Rate Plan, Order No. 90948 at 10-12 (December 14, 2023). The Commission reiterated that since there were options for an "off ramp" built into the MYP structure, if the lessons learned proceeding indicated that there were extraordinary circumstances warranting modification or termination of the MYP, then the Commission could exercise that off ramp. The Commission noted that such an exit from the second MYP would only be warranted if "extraordinary circumstances [ ] call into question whether the existing

In contrast to the case cited by OPC,[66] where an administrative law judge erred in taking notice of the definition of the very term that was in dispute in the litigation, here the Commission noted the undisputed fact that the Maryland Commission had an ongoing proceeding regarding lessons learned under an MRP. Moreover, in Order No. 22358, the Commission explained that, its decision regarding the lessons learned process adopted in Order No. 22328 was not based on counsel's statements, rather "the Commission noted the existence of the BGE pilot and observed that lessons can be learned from observing other pilot programs and reviewing multiple

---

> rates are just and reasonable." *Id*. On August 15, 2024, in Case Nos. 9618 and 9645, the Maryland Commission issued a notice convening that lessons learned proceeding. In the instant case, Pepco's case is the pilot, and if the Commission desires a lessons learned process, the Commission can take a similar approach here and proceed with approval of this MYP, while at the same time considering lessons learned in parallel.

Pepco Post Legislative Style Hearing Brief at 26 n.112 (JA at 6941).

[66] OPC Brief at 40 n.108 (citing *Johnson v. D.C. Dep't of Emp't Servs.*, 167 A.3d 1237, 1242 (D.C. 2017)). In *Johnson*, the Court found that the ALJ's reference to a dictionary definition of the medical condition that was at issue in the case was error because no party had put that definition into evidence and it was material to the proceeding. *Id*. Although not discussed in OPC's argument, OPC does reference *Quick v. Dep't. of Motor Vehicles*, 331 A.2d 319 (D.C. 1975), as prohibiting an administrative agency from taking official notice of *ex parte* facts. OPC Brief at 3. In *Quick,* the DMV examiner's *ex parte* review of the appellant's driving record was held to be in error because the driving record was material to the examiner's decision and the appellant should have had the opportunity to rebut or contest the facts stated in that record. Nothing about the circumstances in *Johnson* or *Quick*, however, is similar to the circumstances in this case.

phases of an MRP pilot."[67] OPC's assertion that the Commission took notice of "disputed facts" is spurious and should be rejected.

Finally, although the Commission initially omitted a portion of the record below, in particular, omitting the extensive data requests and responses of the parties, that does not make "specious" the Commission's statement in its orders that it did in fact incorporate all discovery responses into the record upon which it decided FC 1176.[68] OPC's attempt to exploit this administrative error into a substantive one warranting reversal should be rejected out of hand. This is especially true given that the Commission filed a supplemental record with the Court on July 7, 2025 that included all of the data request responses in FC 1176.

5. The Commission Was Not Required To Hold A Formal Evidentiary Hearing Given Its Determinations In FC 1176.

OPC argues that the Commission did not undertake the case-specific analysis required to invoke the exception to the hearing requirement that this Court has recognized.[69] This is not the case.

---

67 Order No. 22358 at ¶53 (JA at 8064).

68 Order No. 22328 at ¶26 (JA at 7260)("The Commission also accepts the Parties' responses to data requests into the evidentiary record of this proceeding."); Order No. 22358 at ¶11 (JA at 8047)(" The Commission accepted the Parties' pre-filed testimony and exhibits and admitted the Parties' responses to data requests into evidence.")

69 OPC Brief at 44-46.

In Order No. 22328, the Commission explained why it determined that a formal evidentiary hearing was not required, stating, "[t]he Commission is not required to hold an evidentiary hearing where no material facts are in dispute or where the disposition of claims turns on the inferences and legal conclusions to be derived from facts already established and not a determination of facts."[70] Subsequently, in Order No. 22358, Commission further elaborated, based on its prior decisions, why a formal evidentiary hearing was not required in this proceeding. The Commission indicated:

> However, the D.C. Court of Appeals has ruled that a formal hearing (and thus the opportunity to cross-examine witnesses) is not required "where no material facts are in dispute or where the disposition of claims turns not on the determination of facts, but inferences and legal conclusions to be derived from facts already established or inferences to be drawn or issues of policy or law and not a determination of facts." The Commission has recognized that "a factual issue is 'genuine' if it is not capable of being conclusively foreclosed by reference to undisputed facts [and] a fact is 'material' when its existence facilitates the resolution of an issue" material to the outcome of the case." If a dispute about whether a matter is true or false and it is material to the

---

[70] Order No. 22328 at ¶21 & n.43 (JA at 7256-7257). The Commission in footnote 43 cited to this Court's decision in *Watergate East Inc. v. District of Columbia Public Service Commission*, 662 A.2d 881, 890 (D.C. 1995) (*citing Potomac Elec. Power Co. v. Public Serv. Comm'n*, 457 A.2d 776, 789 (D.C.1983)). "Even 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," *Watergate East Inc. v. District of Columbia Public Service Commission*, 662 A.2d at 890 (*citing* 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (3d ed. 1994)(emphasis in original).

> Commission's decision, it may rise to a genuine issue of material fact in dispute, and an evidentiary hearing may be required. However, there is little need for a formal hearing so each party can cross-examine a witness on their opinion or to allow the parties to determine whether a material fact exists. The Commission can decide which witness opinion to credit based on the written testimony and exhibits.
>
> The Commission has previously determined that issues presented by parties, "such as those asking whether an issue is 'proper,' reasonable,' 'appropriate,' 'prudent,' 'justified,' or 'necessary' involved a policy or legal judgment by the Commission" and that such issues "can be resolved by briefing without a hearing." Where the issue turns on the existence of the fact, "the response to those questions is a simple response that the fact is either present or absent," so "these inquiries do not present a material issue of fact in dispute." Where the issue turns on the accuracy of a fact, further testimony or data request responses can be entered into the record containing the necessary information to resolve these questions. Whether a value is properly calculated or reflected in expenses, rate base, or RMAs raised a question of policy. Policy judgments can be used to determine if incurred costs are "appropriate, properly calculated, [and] prudently incurred, and can be resolved without an evidentiary hearing."[71]

OPC claims that the Commission did not undertake the analysis necessary for its decision. However, the Commission was clear and thorough in Order No. 22358 regarding the basis for its determination.

Moreover, the issue of whether to approve an AFOR, particularly, as was the case here, on an extended pilot basis, is ultimately a policy decision for the Commission to make. Section 34-1504(d) of the DC Code gives the Commission

---

71 *Id.* at ¶¶29-30 (JA at 8054-8055).

the discretion to implement an AFOR[72] if the Commission makes certain findings,[73] as was the case in Order No. 22328.[74] However, the adoption of an AFOR, particularly on a pilot basis, is a matter of regulatory policy for the Commission, not the parties, to decide.

Having determined that there were no material issues in dispute or that the disposition of claims turned not on the determination of facts, but inferences and legal conclusions to be derived from facts already established or inferences to be drawn or issues of policy or law and provided a more fulsome explanation of the basis for its determination in Order No. 22358, under this Court's precedent, the Commission was not required to hold a formal evidentiary hearing. As the Commission noted in Order No. 22328,[75] in *Watergate East Inc. v. Pub. Serv. Comm'n*, 662 A.2d 881 (D.C. 1995), this Court stated: "Even when an agency is

---

72 DC Code § 34-1504(d)(1) provides: "Notwithstanding any other provision of law, the Commission ***may*** regulate the regulated services of the electric company through alternative forms of regulation." (emphasis added). This provision was added the Retail Electric Competition and Consumer Protection Act, D.C. Law 13-107, effective May 9, 2000. However, more than 20 years elapsed before the Commission first adopted an AFOR when it approved the FC 1156 MRP in Order No. 20755.

73 DC Code § 34-1504(d)(1) provides: "(2) The Commission ***may*** adopt an alternative form of regulation if the Commission finds that the alternative form of regulation: (A) Protects consumers; (B) Ensures the quality, availability, and reliability of regulated electric services; and (C) Is in the interest of the public, including shareholders of the electric company." (emphasis added).

74 Order No. 22328 at ¶12 (JA at 7253).

75 *Id*. at ¶21, n.43 (JA at 7256-7257).

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."[76]

OPC's attempts to distinguish the decision in *Watergate East* are unavailing.[77] The exception the Court recognized in *Watergate East* is not dependent on the type of case before the Commission but rather the nature of the determinations the Commission is required to make in a case. Where, as here, the Commission has explained that the issues before it do not present any material issues in dispute or that the disposition of the parties' claims turns not on the determination of facts, but inferences and legal conclusions to be derived from facts already established or inferences to be drawn or issues of policy or law, the Commission is not required to hold a formal evidentiary hearing.

---

[76] *Watergate East*, 662 A.2d at 890 (emphasis in original). *See also*, *Office of the People's Counsel v. Pub. Serv. Comm'n*, 797 A.2d at 726 n.9 ("We note, however, that a formal hearing is unnecessary when there is not a dispute over material facts, and the only disputes concern inferences to be drawn or issues of policy or law."); *Apartment & Off. Bldg. Ass'n of Metro. Washington v. Pub. Serv. Comm'n*, 203 A.3d 772, 782 (D.C. 2019)("As a general matter, the Commission is required to hold a hearing if there is a dispute concerning a material fact, but not if the only dispute involves issues of law or policy.")

[77] OPC Brief at 45-46.

OPC also notes that it had argued that, if the Commission did not grant OPC's dispositive motions for summary dismissal of Pepco's MRP Application, then the Commission should have identified the material issues of fact in dispute and was required to hold a formal evidentiary hearing.[78] However, in Order No. 22013, after noting that "granting dispositive motions remains a matter entirely within the broad discretion of the Commission,"[79] the Commission explained that the issues raised in the dispositive motions were "more appropriately decided after we have a more complete record."[80] The Commission also stated: "Although the motions are denied, we have not decided any issue of policy or law that undergird the motions so the parties remain free to argue their case as they would if no dispositive motion had been filed."[81]

OPC equates the Commission's statement in Order No. 22013 regarding a more complete record as requiring additional evidence and asserts that the evidence submitted between the issuance of Order No. 22013 and the Commission's decision in Order No. 22328 did not develop a more complete record.[82] However, OPC fails to acknowledge that during this period, (i) Pepco was directed to supplement its

78 OPC Brief at 43, 48.
79 Order No. 22013 at ¶28 (JA at 6788).
80 *Id*.
81 *Id*.
82 OPC Brief at 49.

recent quarterly earnings filings with certain specific information;[83] (ii) the parties were permitted to conduct additional discovery on Pepco's recent filings and the supplemental information;[84] (iii) the parties were permitted to file limited pre-hearing briefs;[85] (iv) the parties were permitted to present oral arguments at a legislative-style hearing before the Commissioners regarding matters raised in the dispositive motions and other relevant legal and policy issues that the parties believed were fundamental to the Commission's decisions in this proceeding;[86] and (v) the parties were permitted to file post-hearing briefs that were not page-limited.[87] Contrary to OPC's claims, the Commission did develop a more complete record following its decision not to grant the dispositive motions filed by the parties. The Commission then used the comprehensive record that had been developed over a period of nineteen months to render its decision in Order No. 22328.[88]

As detailed above, the Commission determined, based on this Court's precedent, that a formal evidentiary hearing was not required in this proceeding.[89]

---

83 Order No. 22013 at ¶29 (JA at 6788).
84 *Id*. at ¶30 (JA at 6789).
85 *Id*.
86 *Id*.
87 *Id*. at ¶30 (JA at 6789).
88 Order No. 22328 at ¶11 (JA at 7253)(Acknowledging that the Commission's consideration of Pepco's Application has taken over 19 months.)
89 In Order No. 22013, the Commission advised the parties that "[s]hould the Commission determine after the legislative-style hearing that an evidentiary hearing is necessary, the Commission will advise the parties." *Id*. at ¶30 (JA at 6789).

OPC's arguments that the Commission was required to hold a formal evidentiary hearing in FC 1176 should be rejected.[90]

B. AOBA HAS NOT MET ITS BURDEN TO SHOW A FATAL FLAW IN THE COMMISSION'S ACTIONS THAT WOULD WARRANT REVERSAL.

1. The Commission's Determination That The Effective Rate Adjustment Was Appropriate Was Reasonable And Consistent With Commission Precedent And The Commission Explained Adequately The Basis For Its Determination.

AOBA argues that the Commission erred by not excluding the GT-LV Class from the Effective Rate Adjustment ("ERA").[91] AOBA's arguments should be rejected. The Commission explained the basis of its determination that, consistent

---

[90] Although AOBA's Brief lists the Commission's failure to convene a formal evidentiary hearing as an issue on appeal (AOBA Brief at 4, 24), the issue was not addressed in the arguments presented in the AOBA Brief; however, it should also be denied for the reasons set forth in this Section A.5.

[91] AOBA Brief at 26-33. As was explained in Pepco's compliance filing pursuant to Order No. 22328:

> The ERA is an adjustment to distribution rates applied prior to the approved incremental revenue requirement to eliminate the difference between authorized test year revenue and forecast revenue at current tariff rates. For rate classes with only volumetric or demand charges, the ERA is applied to the applicable energy or demand charge. For rate classes with both volumetric and demand charges, the ERA is allocated between charge components in proportion to the forecast revenues at tariff rates produced by each charge.

FC 1176, Pepco Compliance Filing, App. B at 3 (December 9, 2024) (JA at 7488).

with Commission precedent,[92] the ERA was appropriately applied to all rate classes that are subject to the Bill Stabilization Adjustment ("BSA").[93] AOBA fails to present any viable legal challenge to the Commission's regulatory policy of applying the ERA.

The ERA is used to establish a baseline for authorized revenues per class for those classes that have higher (or lower) customer counts than were used to set rates in the Company's immediately prior rate case. As the Commission explained:

> Currently, Pepco's authorized revenue per class is calculated monthly: the authorized revenue per customer for the specific month multiplied by the actual customer count for that month. As the customer counts change, the "tariffed revenue," which is the tariffed rates multiplied by approved billing determinants, does not match the authorized revenue previously described. The ERA is the difference between the tariffed revenue and the authorized revenue.[94]

The Commission approved the same approach in connection with Pepco's first MRP in FC 1156.[95]

---

92 As Pepco Witness Bonikowski testified, the Commission has approved similar adjustments to ensure rates and BSA targets produce the same level of revenue in every rate case since the BSA was approved, including in Pepco's first MRP, FC 1156. PEPCO (E) (Bonikowski Direct) at 26 (JA at 806).

93 Pepco Witness Bonikowski discussed why the ERA was appropriately included as an element in the Company's rate design in FC 1176 using the GT-LV class as an example. PEPCO (E) (Bonikowski Direct) at 24-26 (JA at 804-806).

94 Order No. 22328 at ¶472 (JA at 7389).

95 In FC 1156, the ERA was referred to as the Bill Stabilization Adjustment or BSA Revenue Annualization. The adjustment was renamed in FC 1176, "to avoid confusion with the Company's BSA mechanism, BSA targets, and BSA surcharge." PEPCO (E) (Bonikowski Direct) at 26 (JA at 806).

The Commission indicated that while the ERA was appropriate given the structure of the BSA prior to the decision in FC 1176, the changes it approved in Order No. 22328, such as use of flat per-class revenue (with customer growth built-in) and an annual rather than a monthly BSA surcharge, would align Pepco's tariffed revenues and authorized revenues going forward.[96]

AOBA asserts that "a similar problem was encountered in Formal Case No. 1156" and indicates that the Commission in Order No. 21563 rejected Pepco's ERA in connection with the New Billing Determinant Forecast and Rate Design Update for 2023 that the Commission had directed the Company to file in Order No. 20755.[97] The Commission did not reject the ERA in Order No. 21563. Rather, the Commission found that, because Pepco had "proposed significant changes which represent a major departure from its [billing determinant] calculations and forecasting" and in light of the "significant economic uncertainty related to continued pandemic effects and economic volatility related to higher interest rates resulting from mid-2022 and ongoing action by the Federal Reserve," "[a]dditional

---

[96] Order No. 22328 at ¶472 (JA at 7389). *See also* Order No. 22358 at ¶99 (JA at 8082)("Additionally, our adoption of a per-class revenue target also partially addresses AOBA's concerns.")

[97] AOBA Brief at 32-33. The increase in rates for 2023 was necessary to reflect the end of various credit offsets the Company provided as a result of the COVID-19 pandemic to the rates approved for 2022. Order No. 20755 at ¶154, 159 (JA at 8654-8656).

examination of [Pepco's] forecasting method to develop customer counts, energy sales, and electricity demand is needed."[98] However, such a review was not possible if rates were to become effective on January 1, 2023 given that Order No. 21563 was issued on December 22, 2022, and so, in Order No. 21563, the Commission directed Pepco "to include its proposed [billing determinant] calculations and forecasting with its next rate case for a full, detailed review by the Commission and other parties."[99] I The Commission subsequently acknowledged in FC 1176 that if it had "approved Pepco's billing determinant update for 2023 in Formal Case No. 1156, the "distortions" that AOBA is claiming would likely have been limited.[100]

---

98 Order No. 21563 at ¶15 (JA at 8790-8791).

99 *Id*. at ¶15 (JA at 8700).

100 Order No. 22358 at ¶99 (JA at 8082). As the Commission explained in Order No. 22328:

> The misalignment is amplified by two factors: the growth in customers in the class, which leads to a larger authorized revenue, and the inaccuracy of Pepco's forecasts in setting rates in the Formal Case No. 1156 Modified EMRP Pilot. If Pepco's forecasts were more accurate (acknowledging that COVID-19 pandemic impacts were a large part of the inaccuracy), the magnitude of the ERA would have shrunk. Likewise, if the billing determinants were able to be reset in the interim period, the billing determinants would have incorporated more recent historical data and been more accurate than those established in Formal Case No. 1156.

Order No. 22328 at ¶473 (JA at 7389). This is further discussed in Section B.3 below.

AOBA also fails to mention that the Commission approved the same approach used in the ERA in FC 1156.[101] Moreover, the Commission approved similar adjustments to ensure rates and BSA targets produce the same level of revenue in every traditional cost-of service rate case since the BSA was approved in 2009,[102] including FC 1087, 1103, 1139, 1150.[103]

In its orders in FC 1176, the Commission explained why the ERA was appropriate in the current context and in light of its decisions in prior proceedings and appropriately rejected AOBA's arguments that the GT-LV class should be exempted from application of the ERA. The Commission's determination to continue its existing regulatory policy and approve the use of the ERA for all classes, including the GT-LV class, should be affirmed.

---

101 *See* FC 1156, Order No. 20755 at ¶427 (footnotes omitted) (JA at 8751):

> Pepco has used the same approach to calculate the BSA impact and rate impact as in previous rate cases, including the latest litigated rate case, Formal Case No. 1139. Pepco notes that "[o]ver time, as the billing determinants change and as usage change and the BSA amount changes, those changes aren't rate increases, they are just adjustments to collect the revenues that the Commission previously approved." To the extent that forecasted billing determinants are not the same (or within a reasonable range) as actual billing determinants, the BSA mechanism adjusts to provide the revenue per customer determined at the end of a rate case.

102 The BSA was approved by the Commission in Order No. 15556 in FC 1053, Phase II issued on September 28, 2009 (JA at 8259).

103 PEPCO (E) (Bonikowski Direct) at 26 (JA at 806).

2. The Commission Appropriately Rejected AOBA's Suggestion That The GT-LV Class BSA Deferral Balances Attributable To The COVID-19 Pandemic That Were Transferred To A Regulatory Asset Should Be Recovered From All Classes Rather Than The GT-LV Class.

AOBA argues that the Commission erred by failing to address AOBA's arguments regarding recovery solely from the GT-LV Class of the COVID-19 related balances transferred from the BSA Deferral Balance for the GT-LV Class to a regulatory asset.[104] This is not the case.

As an initial matter, AOBA's Application for Reconsideration did not specifically argue that the Commission should have directed the regulatory assets be recovered from all customer classes and not just the GT-LV class. Rather, in its Application for Reconsideration, AOBA requested the Commission "to remove Pepco's "Effective Rate Adjustment" from the Company's computed revenues at present rates for the GTLV class" and "to eliminate BSA revenue Deferrals over the last two calendar years (i.e., 2023 and 2024) that inappropriately and unjustifiably provide Pepco claims of revenue requirements far in excess of the revenues that this Commission approved for Rate Schedule GT-LV when it accepted the Company's January 11, 2023, Compliance rates in Formal Case No. 1156."[105] Because this argument was not specifically made on reconsideration before the Commission, it is

104 AOBA Brief at 33.

105 AOBA Application for Reconsideration at 2-3 (JA at 7900-7901).

barred under DC Code Section 34-604(b)("No public utility or other person or corporation shall in any court urge or rely on any ground not so set forth in said application [for reconsideration].") This Court has held that, although this sentence in DC Code 34-604(b) is not a jurisdictional bar, it "will not examine unexhausted issues unless extraordinary circumstances compel us to do so."[106] No such extraordinary circumstances are presented by AOBA's appeal. AOBA's argument also should be rejected on substantive grounds.

Specifically, Pepco had not proposed recovering portions of the BSA deferral balance related to the impacts of COVID-19 through a regulatory asset in the MRP originally filed in FC 1176. However, in Direct Testimony, both OPC and AOBA recommended that the Commission should consider recovery of the BSA deferral balances associated with declining customer usage during the COVID-19 pandemic outside of the BSA.[107] In particular, AOBA proposed that $39.7 million be removed from Pepco's BSA Deferred Revenue Balance for the GT-LV class and moved to a regulatory asset that the Company would recover over 10 years with a return on the

---

106 *Washington Gas Light Co. v. Pub. Serv. Comm'n*, 982 A.2d 691, 695–96 (D.C. 2009).

107 OPC (A) (Dismukes Direct) at 111 (JA at 2835); AOBA (A) (B.Oliver Direct) at 126 (JA at 5439); AOBA (B) (T.Oliver Direct) at 27 (JA at 5650)("AOBA acknowledges that the portion of Pepco's BSA deferred balance attributable to revenue under-recoveries caused by the COVID-19 pandemic are appropriate for treatment as a COVID-19 regulatory asset.")

unamortized balance.[108] The Company, in Rebuttal Testimony, agreed with OPC and AOBA that a portion of the existing BSA deferral balance could be recovered through a regulatory asset, although Pepco's analysis suggested that approximately $46.8 million of the then-current Schedule GT LV BSA deferral balance could be moved to the regulatory asset.[109]

In Order No. 22328, the Commission largely adopted AOBA's proposal for creation of the regulatory asset.[110] The Commission indicated that creation of a regulatory asset for COVID-19 costs had been adopted by regulatory bodies in many jurisdictions[111] and explained why it was appropriate to create a separate regulatory asset for the GT-LV class BSA deferral balance related to the COVID-19 pandemic.[112] The Commission authorized a 10-year amortization for the regulatory

---

108 AOBA (A) (B.Oliver Direct) at 61,134 (JA at 5374,5447); AOBA (B) (T.Oliver Direct) at 27 (JA at 5650)("AOBA proposes to remove the referenced $39.7 million of identified COVID-19-related under-recoveries from Pepco's BSA Deferred Revenue Balance and allow the Company to amortize the recovery of that regulatory asset with a ten-year amortization period with a return on the unamortized balance.") *See also* AOBA Post-Legislative-Style Hearing Brief at 64-65 (JA at 7216-7217).

109 PEPCO (3E) (Bonikowski Rebuttal) at 4-5,18;28-34 (JA at 5893-5894,5905,5917-5923).

110 Order No. 22328 at ¶513 (JA at 7398)("The Commission accepts the proposal of a regulatory asset with a return, as AOBA suggests.")

111 *Id*. at ¶511-12 (JA at 7397-7398).

112 *Id*. at ¶513 (JA at 7398)(" By isolating the pandemic-related impacts from broader revenue recovery, this approach would distribute the cost more evenly over time, reducing immediate bill shocks for customers while fairly treating Pepco shareholders.")

asset and allowed a return on the asset, as AOBA had suggested.[113] Additionally, the Commission also adopted AOBA's recommendation that $39.7 million be transferred from the GT-LV class BSA deferral balance to the regulatory asset.[114]

The one aspect of AOBA's recommendation that the Commission did not adopt was the suggestion that the resulting regulatory asset be recovered from all rate classes. Although OPC was supportive of the Commission considering alternative recovery options for current BSA deferral balances attributable to the COVID-19 pandemic, OPC had testified that the Commission should not transfer revenue responsibility from one rate class to another, as AOBA suggested, as this "would be retroactive ratemaking and violate the principle of cost causation."[115]

In Order No. 22328, the Commission determined that the regulatory asset, just as the BSA deferral balance from which it was transferred, should be recovered from the GT-LV class. As the Commission indicated, "[s]preading the recovery of the asset across other classes of service has not been justified."[116] The Commission

---

113 *Id*. at ¶513 (JA at 7398). AOBA had proposed including the regulatory asset in rate base, which usually would have resulted in a return at the Company's approved rate of return - 7.28% in 2025 under Order No. 22328. However, in Order No. 22328, the Commission directed that the return be set at Pepco's cost of debt, which is lower - 5.02% in 2025. Order No. 22328 at ¶¶207 & 515 (JA at 7316 & 7399).

114 *Id*. at ¶514-15 (JA at 7398-7399).

115 OPC (2A) (Dismukes Surrebuttal) at 22 (JA at 6687).

116 Order No. 22328 at ¶515 (JA at 7399).

explained "that the revenue requirement increase caused by COVID-19-related BSA Regulatory Asset should be allocated in its entirety towards the GT-LV class, as this rate class causes this revenue requirement increase. Such allocation follows the cost-causation principle, which is a cost sharing mechanism which assesses cost based on a rate class's impact on the system."[117] In this case, it is beyond dispute that the amount transferred to the regulatory asset came solely from the BSA deferral balance of the GT-LV class.

AOBA does not claim that there is anything legally infirm with the Commission's decision. Indeed, the Commission's decision to create the regulatory asset in question was largely based on AOBA's own proposal. The crux of AOBA's argument is that the Commission should have required all rate classes to be responsible for that regulatory asset; however, it points to nothing that would require the Commission to adopt such a regulatory policy, engage in retroactive ratemaking as OPC cautioned against, or provide such a subsidy to the GT-LV class.

The Commission determination that the GT-LV class should continue to bear the revenue responsibility for the $39.7 million transferred from the GT-LV class BSA deferral balance to the regulatory asset was reasonable, is supported by the record in FC 1176 and should be affirmed by this Court.

---

117 *Id*. at ¶449 (JA at 7382).

3. The Commission Appropriately Declined AOBA's Suggestion To Reduce The BSA Deferral Balances For The GT-LV Class.

AOBA argues that the Commission's determination not to adjust the GT-LV class BSA deferral balance accrued during the period from January 1, 2023 to reflect the balance that would have resulted if the customer counts in Pepco's compliance filing in FC 1156 were used was unreasonable and should be vacated.[118] AOBA's position is misplaced and was appropriately rejected by the Commission.[119] This issue is interrelated to the ERA discussed in Section B.1 above. In both, AOBA seeks to disregard the Commission's established regulatory practice.

AOBA's argument is based on its recalculation of the BSA deferral balance for the GT-LV Class since January 1, 2023 based on the customer counts contained in the Company's compliance filing in FC 1156 in response to Order No. 21563. However, this is not how the BSA deferral balance is determined under the Commission-approved Rider BSA that was then in effect.[120] Moreover, as the

---

118 AOBA Brief at 33.

119 The Commission in Order No. 22328, reduced the BSA deferral balance for the GT-LV class by $15.3 million as it determined these were the result of an error the Company made in its demand billing determinants used in FC 1139 and 1150 that Pepco identified and corrected in FC 1156. Order No. 22328 at ¶510 (JA at 7397). This reduction is not challenged by AOBA or OPC in these consolidated appeals.

120 The Company's tariffs are publicly available through a link on the Commission's website and may also viewed at https://www.pepco.com/my-account/my-dashboard/rates-tariffs/district-of-columbia.

Commission acknowledged in Order No. 22358, the customer counts Pepco was required to use for the compliance filing were not what the Company had proposed, but were used because of objections AOBA had made to the updated customer counts Pepco had proposed.[121]

Contrary to AOBA's arguments, the BSA deferral balances appropriately reflect the balances Pepco was required to file with the Commission in Docket PEPBSAR[122] for the period in question and were determined using actual customer counts in accordance with the then-effective, Commission-approved Rider BSA tariff.[123] The Commission has consistently held that:

> For each rate class and for each billing month, the Commission-approved test year revenue per customer for each service classification is applied to the number of customers in each billing month to arrive at target monthly revenue for each service classification. The difference between the target revenue and the actual revenue collected forms the basis for the BSA for the following month. ***That is, the revenue that Pepco is allowed to collect in a given month is based on the revenue per customer, approved in the last rate case, times the current number***

---

[121] Order No. 22358 at ¶99 (JA at 8082). The Commission stated that in response to AOBA's challenge, in Order No. 21563, the Commission determined that "so that neither Pepco nor AOBA are unnecessarily disadvantaged, we agreed with AOBA's request that the approved CY 2023 revenue increases by rate class should be calculated using our previously approved billing determinants." *Id*.

[122] The Company's monthly and annual filings in the PEPBSAR Docket regarding the BSA Rider are publicly available on the Commission's website through its E-Docket system.

[123] The customer counts Pepco was required to use for purposes of the compliance filing were not those the Company had proposed. PEPCO (3E) (Bonikowski Rebuttal) at 25-26 (JA at 5914-5915).

> ***of customers.*** This allowed revenue is then compared to revenue received.[124]

AOBA's position would require the Commission to disregard the terms of that Commission-approved tariff. This would be contrary to law[125] and well-established precedent.[126]

Moreover, the reasons for differences in the actual customer counts and those used in Pepco's compliance filing in FC 1156 were addressed at length both in the Company's testimony in this proceeding as well as in the Commission's orders.

In Rebuttal Testimony, Company Witness Bonikowski discussed why the Company's inability to update to more current billing determinants contributed to the actual number of GT-LV customers being higher than reflected in the compliance

---

[124] PEPBSAR-2016-01, Order No. 18138 at ¶2 (March 11, 2016) (emphasis added) (citing FC 1053, Order No. 15556 at ¶32 (September 28, 2009)). *See* PEPCO (3E) (Bonikowski Rebuttal) at 27 (JA at 5916).

[125] DC Code §§ 34-603 ("All rates, tolls, charges, time and condition of payment thereof, schedules, and joint rates fixed by the Commission shall be in force and shall be prima facie reasonable until finally found otherwise in an action brought for that purpose."); 34-1123 ("The rates, tolls, and charges shown on such schedules . . . shall remain and be in force until set aside by the Commission"); 34-1129 ("The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges until the same are changed as provided in this subtitle.")

[126] *See, e.g.*, *District of Columbia v. Pub. Serv. Comm'n*, 905 A.2d 249 (D.C. 2006). *See also* PEPCO (3E) (Bonikowski Rebuttal) at 28 (JA at 5917)("AOBA's proposal seeks to reach back in time and alter the Commission's decision in FC 1156 to not modify the BSA mechanism, and thereby retroactively disallow revenues authorized under BSA structure approved by the Commission and defined in the Company's Commission-approved tariff.")

filing in FC 1156 for rates that became effective in January 2023.[127] He explained that Pepco "does not currently have the authority to update the billing determinants that underly base distribution rates and BSA targets outside of a base distribution rate case, even if actual billing determinants begin to vary from the latest Commission-approved forecasts."[128] He also indicated although "Pepco has made repeated efforts to update its billing determinants to reflect more recent actuals and forecasts, the Commission has continued to find the Company's CY22 billing determinant forecast from Formal Case No. 1156 to be reasonable and appropriate for establishing rates."[129]

As the Commission explained in Order No. 22358, the BSA deferral balances that AOBA contests were, in part, the result of AOBA's challenge to Pepco's request to update its billing determinants for the period commencing January 1, 2023,[130]

---

127 PEPCO (3E) (Bonikowski Rebuttal) at 24-26 (JA at 5913-5915).

128 PEPCO (3E) (Bonikowski Rebuttal) at 25 (JA at 5914).

129 PEPCO (3E) (Bonikowski Rebuttal) at 26 (JA at 5915).

130 In FC 1156, due to concerns raised by AOBA, the Commission rejected Pepco's proposal to submit an Annual Billing Determinant Update in connection with the MRP in order to minimize the variance between the Company's allowed level of revenue and the actual revenues collected due to differences between the forecasted and actual billing determinants for the applicable period. The Commission stated:

> AOBA believes that an annual billing determinants update would make the compliance filing like a dress rehearsal and conflicts with bill certainty and rate certainty, we agree. To address AOBA's concerns, we will reexamine the billing determinants forecast for rates to be

"which would have reset the customer counts and adjusted the BSA revenue per customer amounts accordingly."[131] As noted in Section B.1 above, AOBA's challenge resulted in the Commission directing Pepco to continue to use the billing determinants from FC 1156, which used data from 2018.[132] As the Commission acknowledged in Order No. 22358, "[h]ad the Commission approved Pepco's billing determinant update for 2023 in Formal Case No. 1156, the "distortions" that AOBA is claiming would likely have been limited."[133]

> effective January 1, 2023, when the offsets expire. Pepco is directed to provide new rates and new billing determinants to be used for CY2023 on July 30, 2022. Pepco's filing shall also provide a BSA revenue per customer update.

Order No. 20755 at ¶429 (JA at 8752).

131 Order No. 22358 at ¶99 (JA at 8082).

132 As Pepco cautioned on pages 9-10 of its January 20, 2023 application for reconsideration of the Commission's decision in Order No. 21563 not to update the Company's billing determinants:

> By rejecting the use of updated billing determinants at this time, Order No. 21563 continues to rely on billing determinants that are based on data from 2018 and are demonstrably not reflective of current conditions. One implication of continuing to use these outdated billing determinants is that the BSA deferral balances for certain customer classes, in particular the GT-LV class, likely will increase. This is due to the variance between the Company's allowed level of revenue and the actual revenues collected resulting from differences between the forecasted and actual billing determinants for the applicable period coupled with the operation of the BSA's monthly cap on adjustments.

This is exactly what subsequently happened.

133 Order No. 22358 at ¶99 (JA at 8082).

The Commission appropriately declined AOBA's suggestion to reduce Pepco's BSA deferral balances for the GT-LV class from the level calculated in accordance with the then-effective Rider BSA using the required actual customer counts to a lower level calculated using the inapplicable customer counts approved in 2021 in Order No. 20755 in FC 1156. The Commission explained the basis for its decision based on the record before it. The Commission's determination should be affirmed.

VII. CONCLUSION

The record in FC 1176 and the decisions embodied in Order Nos. 22328 and 22358 indicate that the Commission appropriately exercised its decision-making authority with respect to the issues before the Court. The Commission provided the parties with extensive due process over the course of this proceeding, including motions, multiple rounds of expert testimony, extensive discovery, a legislative-style hearing, and pre- and post-hearing briefs, all of which were admitted into the evidentiary record. The Commission reviewed and considered the extensive record developed in this proceeding in reaching its decisions. The Commission exercised reasonable judgment based on the record before it in ruling as it did on the issues OPC and AOBA now challenge on appeal. Moreover, the Commission explained the bases for its decisions on these issues. While OPC and AOBA may disagree

with the decisions the Commission reached, they have failed to identify any fatal flaw in the orders below. Therefore, for the reasons set forth herein, Pepco respectfully asks that the Court deny these consolidated appeals and affirm the Commission's decisions in Order Nos. 22328 and 22358.

Respectfully submitted,

/s/ *Kimberly A. Curry*
Anne C. Bancroft, DC Bar No. 169791
Kimberly A. Curry, DC Bar No. 477867
Dennis P. Jamouneau, DC Bar No. 983357
Taylor W. Beckham, D.C. Bar No. 1542117
Kunle Adeyemo, DC Bar No. 90016255
POTOMAC ELECTRIC POWER COMPANY
701 Ninth Street, N.W.
Suite 900
Washington, DC 20068
(202) 872-2890

Attorneys for Potomac Electric Power Company

July 23, 2025

CERTIFICATE OF SERVICE

APPEAL NOS. 25-AA-250 & 25-AA-310

I hereby certify that a copy of Intervenor Potomac Electric Power Company's Brief has been served this July 23, 2025 electronically on:

Ms. Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission
of the District of Columbia
1325 G Street, N.W.
Suite 800
Washington, DC 20005
bwestbrook@psc.dc.gov

Sandra Mattavous-Frye, Esq.
Laurence C. Daniels, Esq.
Karen Sistrunk, Esq.
Jason T. Gray, Esq.
Timothy B. Hamilton, Esq.
People's Counsel
Office of the People's Counsel
655 15th Street NW, Suite 200
Washington, DC 20005
smfrye@opc-dc.gov
ldaniels@opc-dc.gov
ksistrunk@opc-dc.gov
jtgray@opc-dc.gov
tbhamilton@opc-dc.gov

Brian Edmonds, Esq.
Christopher Lipscombe, Esq.
General Counsel
Public Service Commission
of the District of Columbia
1325 G Street N.W. Suite 800
Washington, DC 20005
clipscombe@psc.dc.gov
dedmonds@psc.gov

Dennis P. Jamouneau, Esq
Anne C. Bancroft, Esq.
Kimberly A. Curry, Esq.
Kunle Adeyemo, Esq.
Dennis.jamouneau@exeloncorp.com
Anne.Bancroft@exeloncorp.com
kimberly.curry@exeloncorp.com
Kunle.adeyemo@exeloncorp.com

Taylor W. Beckham, Esq.
Potomac Electric Power Company
701 9th Street, NW, 9th Fl
Washington, DC 20068
Taylor.beckham@exeloncorp.com

Jason T. Gray, Esq.
Timothy B. Hamilton, Esq.
Duncan & Allen, LLP
1730 Rhode Island Avenue, NW
Suite 700
Washington, DC 20036
jtg@duncanallen.com
tbh@duncanallen.com

Fran Francis, Esq.
Apartment & Office Building Assoc
1025 Connecticut Ave, NW
Suite 1005
Washington, DC 20036
ffrancis@aoba-metro.org

/s/*Kimberly A. Curry*
Kimberly A. Curry