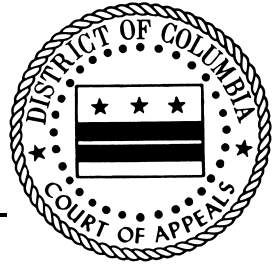


NOS. 25-AA-0250 & 25-AA-0310



Clerk of the Court
Received 08/13/2025 03:28 PM

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

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

v.

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

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

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

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PUBLIC SERVICE COMMISSION ORDERS

<i>Formal Case No. 1156, In the Matter of the Application of Potomac Elec. Power Co. for Authority to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia</i> , Order No. 20368 (rel. June 18, 2020)	15
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Petitioner the Office of the People’s Counsel for the District of Columbia (“OPC”), respectfully submits its Reply Brief in response to the briefs of Respondent (“PSC Brief”), the District of Columbia Public Service Commission (“PSC”), and Intervenor, the Potomac Electric Power Company (“Pepco”).

INTRODUCTION AND SUMMARY

The PSC’s Brief begins where Order Nos. 22328 and 22358 concluded – in plain disregard for the PSC’s obligations under statute, the U.S. Constitution, and precedent. Contested rate cases by statute and by their fact-intensive nature require evidentiary hearings. However, the PSC no longer believes it is beholden to this or other requirements under the D.C. Administrative Procedures Act or the Constitution. In defending its orders, it plainly states that it can make factual determinations, including credibility determinations, through reading written filings. And it attempts to recast well-recognized factual issues as strictly policy matters, ignoring Supreme Court precedent. OPC’s Reply will address the folly in this thinking, which results in a PSC decision unsupported by substantial evidence and inconsistent with the law.

Equally problematic is the PSC’s failure to address repeated departure from its own precedent. Formal Case No. 1176 added extra layers of complexity as it required review of Pepco’s first multiyear rate plan (“MRP” or “MYP”) pilot from Formal Case No. 1156 (“Formal Case No. 1156 Pilot”), a traditional one-year rate

application, and Pepco's second MRP application. OPC will reiterate the PSC's commitment to a deliberative approach to evaluating Alternative Forms of Ratemaking ("AFORs"), which it abandoned, hindering a fair evaluation of this case.

ARGUMENT

A. By the PSC's reasoning, agencies would never be required to hold evidentiary hearings.

The PSC goes far beyond arguing that it applied a valid exception to the requirement for an evidentiary hearing in this case. It posits that it is never required to hold an evidentiary hearing in a rate case: It can resolve all disputes of fact by reading written filings, and it recasts well-established, fact-driven issues in a rate proceeding, which were raised by OPC in this case, as matters of policy—all without any legal basis. Agency interpretations of law are afforded the least deference and are reviewed *de novo*. Thus, the PSC's attempt to overturn well-established precedent in reaching its orders warrant vacatur.

1. The PSC tacitly acknowledges there were disputed issues of material fact but argues it is not bound by statute or court precedent.

The PSC's Brief adopts the contravention of basic legal principles in Order Nos. 22328 and 22358, in which the PSC claims it has the authority to make credibility determinations and resolve disputed facts exclusively by reading filings. It effectively concedes that while there may have been disputed facts raised by OPC, it is not required to resolve them through an evidentiary hearing. However,

credibility determinations are pure questions of fact.¹ Such questions of fact must be resolved through the procedures mandated by D.C. Code §2-509, which include the right for parties to present evidence. Credibility determinations, in particular, cannot be based on written statements—a reason cited by the Supreme Court as to why appellate courts are refrained from making such determinations.² Moreover, this Court recently found that § 2-509 requires that PSC commissioners must personally hear the evidence in a contested case.³

The PSC’s Brief purports to identify a well-reasoned legal rebuttal to OPC’s calls for an evidentiary hearing, citing Paragraphs 28-35 from Order 22358.⁴ Among the assertions here include the idea that “credibility determinations” could be made from written testimony:

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.^[5]

¹ *Hernandez v. New York*, 500 U.S. 352, 364 (1991) (stating that a credibility determination is a “pure issue of fact”).

² *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (noting that a reviewing court affords deference to a trial court because a reviewing court “analyzes only the transcripts from *voir dire*” and “is not as well positioned as the trial court is to make credibility determinations.”).

³ *Potomac Elec. Power Co. v. Pub. Serv. Comm’n*, 319 A.3d 392 (D.C. 2024).

⁴ PSC Br. at 22 n.80.

⁵ JA8054 (Order No. 20358 at ¶ 29).

Such assertions are simply untenable. The PSC effectively contends that while there may have been disputed facts raised by OPC, it is not required to resolve them through an evidentiary hearing. The PSC goes on to argue that additional discovery can resolve questions of fact and the “accuracy of a fact” and be entered into the record. The PSC does not appear to provide any circumstance where a hearing would be required to resolve a material issue of fact.

These interpretations flout § 2-509 and this Court’s recent decision in *Potomac Elec. Power Co. v. Pub. Serv. Comm’n* discussed above. The only support the PSC can find for this stance is its own opinion in Order No. 21582, issued about a year-and-half earlier in a separate rate case involving a different utility. The Order is of no precedential value on interpretations of law, and this cavalier approach should end now.⁶

⁶ PSC’s Brief also erroneously cites to *Watergate*, claiming the case states that hearings are not needed to allow “parties to advance opinions on whether material issues of fact exist.” PSC Br. at 21. However, this is nowhere stated in the citation provided. *Watergate* made clear that there were no material issues of fact in dispute—only matters of legal interpretation, which did not necessitate a hearing. *Watergate E. Inc. v. PSC*, 662 A.2d 881, 890 (D.C. 1995).

2. Rate cases involve fact-intensive inquiries that the PSC erroneously recasts as strict policy matters to avoid holding an evidentiary hearing.

Determining core issues in a rate case such as the revenue requirement, the rate of return, and rate base are fact-intensive questions, guided by established legal principles.⁷ OPC raised these questions in this case.

Determining whether adjustments to rates for utility service requires the finder of fact to determine the total revenue a regulated utility is authorized to recover: Revenue Requirement = Operating Cost + (Rate Base x Utility's Cost of Capital).⁸

Courts have opined on each input of this equation. For example, reaching the appropriate rate of return is data driven and based on evaluating “all relevant facts,” including assessing historical rates of return, comparative returns of companies with similar risk profiles, and assessing an array of market conditions to determine a rate that would attract necessary investment.⁹ Similarly, calculating the rate base involves

⁷ *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692 (“just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.”).

⁸ *See, e.g.*, Richard J. Pierce, Jr., The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity, 132 U. Pa. L. Rev. 497, 511 (1984).

⁹ *Bluefield*, 262 U.S. at 692; *Fed. Power Com. v. Hope Nat. Gas Co.*, 320 U.S. 591, 604-05 (1944) (noting that consideration of a “vast array of data” on the utility industry and “general economic conditions” is appropriate in determining rate of return needed to attract investment); *Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 484 (2002) (citing need to attract capital and maintain financial integrity of public utility when determining rates).

a series of factual determinations. It must be determined that the utility's investment is both "used and useful" in providing service, and that the associated costs were prudently incurred.¹⁰ Additionally, the PSC must determine depreciation expense, which may involve choosing the appropriate methodology from multiple choices, as well as accounting for tax expense. Together these factual variables determine the revenue requirement.

After establishing the revenue requirement, the PSC must allocate the cost of service across the customer classes.¹¹ This requires careful, critical analysis. Indeed, the arbitrary and capricious standard of review evaluates the analytical steps the PSC took in reaching its decision to determine whether it constitutes "reasoned decision-making." Courts afford the PSC discretion on factual matters, but it is not unbridled.¹²

3. The factual disputes in this case were material to whether the rates were just and reasonable.

Both the PSC and Pepco accuse OPC of failing to identify disputed material facts and demonstrate prejudice as a result of the decision to not hold an evidentiary

¹⁰ *Potomac Elec. Power Co. v. Pub. Serv. Comm'n.*, 380 A.2d 126, 133 n.8 (D.C. 1977) (Rate base is "defined as the value of a company's property used and useful in the public service minus accrued depreciation[.]").

¹¹ *Apartment House Council, Inc. v. Pub. Serv. Comm'n.*, 332 A.2d 53, 57 (D.C. 1975).

¹² *See Washington Pub. Int. Org. v. Pub. Serv. Comm'n.*, 393 A.2d 71, 75 (D.C. 1978) (A PSC order cannot be upheld under "guise of expertise" as PSC must show what it has done and why evidence supports it).

hearing.¹³ This is simply untrue. For example, OPC disputed the PSC’s calculation of the rate base and rates of return.¹⁴ As indicated above, these issues are clearly material as they are fundamental inputs for the revenue requirement that Pepco uses to calculate the rates charged to customers.

OPC identified these specific issues during the legislative hearing, in its pre-hearing briefs, and in its Application for Reconsideration.¹⁵ Yet, the PSC took official notice of certain filings—specifically, quarterly financial statements filed by Pepco in a companion case after the post-hearing briefs had been filed—to calculate and project Pepco’s rate base.¹⁶ This action prejudiced OPC and co-Petitioner Apartment and Office Building Association of Metropolitan Washington (“AOBA”) because it deprived them of the ability to challenge the evidence supporting the findings in Order No. 22328.

Furthermore, the failure to properly evaluate the Formal Case No. 1156 Pilot before considering the second MYP proposal resulted in an inflated and inaccurate rate base as well—another factual issue in dispute. Both AOBA and OPC argued that close to \$150 million had not been spent in the manner approved by the PSC in

¹³ PSC Br. at 20; Pepco Br. at 22.

¹⁴ *See generally* JA3452-3576 (testimony of OPC Witness Michael Gorman addressing Pepco’s revenue requirement); *see also* JA3581 (testimony of OPC Witness Christopher Walters addressing Pepco’s return on equity).

¹⁵ JA8851; JA6830-6832; JA7973-7978.

¹⁶ JA7281.

Formal Case No. 1156, which authorized the first multiyear rate plan.¹⁷ As the money was redirected to other projects not approved under the original plan, those expenditures were incorporated into Pepco's current rate base. Though OPC raised this specific factual issue on at least three different occasions,¹⁸ the PSC avoided addressing it. As a result, District ratepayers are paying for investments that have never been properly evaluated or determined to be prudent.

4. Prudence is not a question of policy but a matter of law and fact.

The PSC erroneously argues that determining whether a company's capital expenditures are prudent is exclusively a matter of policy and does not require an evidentiary hearing; such an assessment would also make it beyond the scope of appellate review. This contravenes established law on utility ratemaking and even the PSC's own rate orders specific to multiyear rate plans. Prudence is the legal standard of care used to evaluate management decisions and determine whether investments warrant earning a rate of return.¹⁹ Prudent expenditures are those that are cost-effectively incurred and consistent with the utility's purported costs.²⁰ Prudence review also evaluates whether the decisions made were consistent with that of a reasonably managed utility company, given the available facts. Since the

¹⁷ See, e.g., JA8846; JA6884-6889.

¹⁸ JA7985; JA 8814; JA8846.

¹⁹ *FPC v. Nat. Gas. Pipeline Co.*, 315 U.S. 575, 606 (1942)

²⁰ *Potomac Elec. Power Co. v. Pub. Serv. Comm'n.*, 661 A.2d 131, 137 (D.C. 1995).

rate of return is multiplied by the rate base, a utility has an incentive to increase the rate base through capital investments. Accordingly, it is important to confirm that such investments are not wasteful or excessive.²¹ This Court has reinforced the importance and necessity of prudence review on previous occasions.²²

Similar to *Potomac Elec. Power Co.*, there are discrepancies between purported costs and actual costs in this proceeding as well. The PSC fails to address these discrepancies and explain why it departed from its own well-established precedent. These errors are fatal to the challenged orders.

B. The PSC's claim that OPC did not preserve its due process challenges on appeal is meritless.

The PSC's claim that OPC has not raised issues of material fact is meritless.²³ Notwithstanding this error, the PSC's Brief misapplies the law of waiver and preservation of claims on appeal. In addition, the PSC erroneously frames OPC's due process challenges as predicated on establishing material issues of fact in dispute.²⁴ Finally, the PSC misapplies the basis for OPC's constitutional claims.²⁵

²¹ *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 253 (D.C. Cir. 1995); *see also Verizon Commc'ns, Inc.*, 535 U.S. at 484 n.6.

²² *See, e.g., Potomac Elec. Power Co.*, 661 A.2d at 137.

²³ PSC Br. at 23-24.

²⁴ *Id.* at 19.

²⁵ *Id.* at 20.

1. OPC identified material issues of fact in the proceeding below and expressly requested evidentiary hearings.

Typically, an issue is barred from consideration on appeal only where the issue was not raised at the proceeding under review.²⁶ However, even an argument raised for the first time on reply may be considered if the respondent is not substantially prejudiced.²⁷ So long as the point is raised with sufficient precision to indicate a party's position, particularly in the lower proceeding, it will not be spurned on appeal.

Here, OPC raised numerous issues of fact in the agency proceeding and highlighted several in its agency appeal of the rate order, Order No. 22328. OPC referenced these material issues of fact in its Opening Brief.²⁸ The PSC's assertion that no issues of material fact in dispute were identified before this Court is without basis.²⁹ Perhaps it attempts to state that specific examples were not recited in the body of the Opening Brief. But this is insufficient to claim waiver. Moreover, the PSC cannot deny that the factual issues and arguments were not presented in the agency proceeding or the Opening Brief, nor can it argue it was prejudiced; its Brief

²⁶ See *Little v. United States*, 665 A.2d 977, 980 (D.C. 1995).

²⁷ *Pitt-Bey v. District of Columbia*, 942 A.2d 1132, 1137 n.8 (D.C. 2008); see also *Gathy v. United States*, 754 A.2d 912, 916 (D.C. 2000) (agreeing to hear an argument raised for the first time in a reply brief where the government had the opportunity to refute the argument and was not substantially prejudiced by the appellant's failure to raise it in his opening brief).

²⁸ See OPC Opening Br. at 37-38.

²⁹ PSC Br. at 19.

responds to these specific issues.³⁰ The PSC’s assertion that OPC’s use of “arbitrary and capricious” instead of “legal error” constitutes waiver is also meritless.³¹ Any alleged conflation of legal standards—such as between the “arbitrary and capricious” standard and constitutional due process—does not amount to a waiver of OPC’s due process claims, which have been pled in extensive detail. While OPC’s arguments before this Court may emphasize the arbitrary and capricious nature of the PSC’s actions, this does not preclude or diminish its assertion of legal error grounded in due process violations.

2. OPC has distinct due process claims that the PSC cannot refute.

While arguing waiver, the PSC also mischaracterizes OPC’s due process claims as hinging on identifying material factual disputes warranting an evidentiary hearing. However, OPC has pled additional due process claims independent of the need for an evidentiary hearing and distinct from issues of material fact. These errors include failing to provide adequate notice of the evidence used to create the decisional record, notice of the procedures it was undertaking in deciding the case, and its misuse of official notice.

In fact, it is the PSC that cannot establish that there were *not* issues of material fact in this case or that it took steps to confirm that there were none. Because the

³⁰ *Id.* at 20.

³¹ *Id.*

PSC failed to provide any notice as to what it was adopting into the decisional record, including taking official notice of information filed after the post-hearing briefs, it had no way to confirm whether those facts were in dispute or not. Additionally, there were no stipulations as to the admission of any facts, exhibits, or testimony. Yet, the PSC's Brief fails to appreciate that it could not prove there were no disputes of material fact even though OPC and AOBA identified multiple examples of such issues and did not stipulate to admission of Pepco's pre-filed exhibits. Nor does the PSC recognize that some disputes of material fact are not identified until the evidentiary hearing.³² Likewise, the PSC cannot deny that it identified the contents of the "record" for the first time when it issued Order No. 22328, underscoring the lack of notice.

C. The PSC and Pepco misconstrue OPC's Constitutional claims.

The PSC and Pepco misapply *Mathews v. Elridge*, 424 U.S. 319 (1976) and misconstrue OPC's constitutional due process arguments. *Mathews* addresses a challenge to the adequacy of agency regulations or laws in place and whether they provide sufficient due process for a protected interest. OPC is not arguing that the statutory procedures are constitutionally insufficient—rather, the PSC chose to

³² For example, a material issue of credibility would not arise until the hearing if a witness, who sponsored pre-filed testimony, was not able to support that testimony when subjected to cross examination.

ignore them. Ignoring the statutory mandates resulted in violations of constitutional due process.³³

Accordingly, the PSC and Pepco simply miss the mark when they extoll the multiple rounds of testimony, voluminous filings, or the thirty-minute oral argument each party was afforded at the legislative hearing. The PSC did not abide by D.C. Code § 2-509. The size and number of filings does not abrogate the need for evidentiary hearings but instead show why this statutory provision is so important. An evidentiary hearing with even a relaxed application of the rules of evidence helps bring relevant information into focus, disregards non-probative material, and allows for proper determinations of credibility. Contrary to the PSC's decision, the Maryland Public Service Commission's decision of Pepco's application for a second multiyear rate plan was the result of a seven-day evidentiary hearing.³⁴

D. The PSC and Pepco misrepresent the facts while neglecting the PSC's burden on appeal.

Attempting to sidestep its burden of persuasion to defend its own rate orders, the PSC intentionally misleads this court, arguing that OPC claimed there were no

³³ It is for this reason that the non-controlling cases Pepco cites in arguing against a due process property interest for a particular rate is inapplicable. Those cases do not involve statutes creating procedural protections or necessarily involve contested cases.

³⁴ Pepco's second multiyear rate plan proposal was subsequently rejected in Maryland. Case No. 9702, Potomac Elec. Power Co.'s Application for Adjustments to its Retail Rate for the Distribution of Elec. Energy, Order No. 91181 (Md. P.S.C. June 10, 2024).

issues of material fact in this case in its dispositive motions and failed to pursue a sound litigation strategy.³⁵ Even if this were true, and as discussed above it is not, this does not absolve the PSC of its responsibility to put forward an order supported by substantial evidence reflecting well-reasoned analysis.

While the PSC's brief argues that OPC neglected to move for an evidentiary hearing at the administrative level,³⁶ it fails to mention that the PSC had informed all the parties in Order No. 22013 that it had *not* ruled out the need for an evidentiary hearing when it scheduled the legislative-style hearing.³⁷ Even at the legislative hearing, the PSC stated it was unsure if there were issues of material fact in dispute.³⁸ OPC stated the need for an evidentiary hearing, and it remains unclear what more it could have done prior to issuance of the final order. Regardless, the PSC's Brief does not explain what steps it took to ensure no issues of material fact were in dispute. For its part, it never extended a formal opportunity to the parties to file disputed facts and then issue an order explaining why such disputes would not necessitate a hearing.³⁹

³⁵ PSC Br. at 26-28.

³⁶ PSC Br. at 17.

³⁷ "Should the Commission determine after the legislative-style hearing that an evidentiary hearing is necessary, the Commission will advise the parties." JA8876 (Order No. 22013 at 16).

³⁸ See JA8876 (where Commissioner Beverly states that "there's been no decision that there are material issues of fact.").

³⁹ OPC also identified issues of fact in its pre-hearing brief prior to the legislative hearing. See JA6831.

The PSC’s Brief intimates that filing dispositive motions was inconsistent with claiming the need for an evidentiary hearing, stating that OPC and AOBA are responsible for the “consequences of their litigation strategy.” However, as OPC explained in its Opening Brief, the filing of a dispositive motion is not an admission that there are *no* facts in dispute. Curiously, the two dispositive motions were initially denied by the PSC on “policy grounds” and the need for a “more complete record.” The stated basis only highlights the contradiction in the PSC’s argument. If the record was incomplete, it logically follows that material facts exist.⁴⁰ OPC further explained at the legislative hearing that there were facts in dispute, namely the structure and amount of the rate increase, but this continues to be ignored by the PSC and Pepco. AOBA also identified material facts in dispute.

Furthermore, the PSC’s actions depart from its own precedent, *sub silentio*. In Formal Case No. 1156, the PSC denied a joint Motion for Summary Judgment, which OPC had joined. Among the reasons supporting the motion were the unknown impacts of the Covid-19 pandemic on Pepco’s projections for capital expenditures, which had been submitted before the motion. The PSC considered the motions under Rule 56(c) of the Superior Court.⁴¹ It recognized that changes to the planned

⁴⁰ See JA6811 (“Denying the dispositive motions means that material fact issues exist in a contested case.”).

⁴¹ Formal Case No. 1156, *In the Matter of the Application of Potomac Elec. Power Co. for Auth. to Implement a Multiyear Rate Plan for Elec. Distrib. Serv. in the Dist. of Columbia*, Order No. 20368 at p. 5-6 (rel. June 18, 2020).

expenditures concerned factual issues but found these changes were not undisputed nor dispositive of the entire rate case and proceeded with an evidentiary hearing.⁴²

Below, the PSC abandoned the Rule 56(c) standard and declined to rule on the merits for either dispositive motion, failing to explain this departure from past practice. Its refusal to issue a merits decision further undermines the assertion that the rate orders reflect well-reasoned decision-making.

E. The PSC fails to acknowledge and provide a reasoned basis for departing from its established AFOR-review process.

An agency must acknowledge and provide a reasoned basis for departing from prior policy or practice.⁴³ OPC's Opening Brief demonstrated that the PSC did not provide a reasoned basis for abandoning a sequential review, *i.e.*, completing a review of the Formal Case No. 1156 Pilot prior to considering Pepco's second MRP.⁴⁴ The PSC advances three arguments in response: (1) it never committed to a sequential review of proposed AFORs after adopting the Formal Case No. 1156 Pilot;⁴⁵ (2) it used its ratemaking expertise when approving Pepco's second MRP

⁴² OPC's second dispositive motion raised similar concerns, arguing that the projected investments for calendar year 2024 had deviated considerably from those in Pepco's application filed over a year earlier.

⁴³ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not ... depart from prior policy *sub silentio* or simply disregard rules that are still on the books.").

⁴⁴ OPC Opening Br. at 33-36.

⁴⁵ See PSC Br. at 34 ("OPC does not point to any prior commitment made by the PSC to finalize its review of lessons learned from the Initial Pilot prior to completion of Pepco's 2023 rate application, because the [PSC] made no such commitment.").

proposal before completing review of the previous pilot;⁴⁶ And (3) its actions are consistent with its statutory authority under D.C. Code 34-1054(d)(1).⁴⁷ The PSC's arguments are unsupported and, therefore, should be rejected.

1. The PSC committed to sequential review of AFORs in Formal Case No. 1156 to leverage lessons learned, make improvements, and avoid prior mistakes.

As OPC highlighted in the proceedings below, the PSC explained that its AFOR framework was simply the “starting point for an evolving evaluation process for AFOR proposals” that were “to be reviewed in the future.”⁴⁸ The PSC also explained that it established a pilot program in Formal Case No. 1156 to provide itself and stakeholders “an opportunity to improve the [MYP] process and prudently evaluate the overall performance and effectiveness” of the Pilot.”⁴⁹ A “deliberative” approach was needed to ensure that “unintended operational or financial outcomes” were “mitigated.”⁵⁰ Though the PSC did not heed this reminder, it acknowledged that it approved a “Pilot” to serve as “an experiment to determine if something should be pursued more broadly.”⁵¹ It strains credulity that the PSC could now disclaim this commitment.

⁴⁶ PSC Br. at 31.

⁴⁷ PSC Br. at 34.

⁴⁸ JA 2538-2539 (quoting Order No. 20273 at ¶ 95).

⁴⁹ JA 2458-2459.

⁵⁰ JA 2539 (quoting Order No. 20273 at ¶ 86).

⁵¹ JA 2538 (citing Order No. 21886 at ¶ 23) (emphasis added).

The failure to evaluate the Formal Case No. 1156 Pilot precluded proper evaluation of the Formal Case No. 1176 MRP as investments in the first pilot were never reviewed for prudence. There was also no determination of how to treat investments that deviated from the plan approved under that pilot. Accordingly, the PSC cannot claim that it has remained committed in mitigating against unintended operational or financial outcomes. These unresolved issues are the direct result of failing to have an informed review.

On brief, the PSC tacitly concedes the importance of completing a review of an AFOR proposal before considering a subsequent proposal. The PSC explains that “lessons learned can and should be used to inform what happened in that pilot and inform future pilots[.]”⁵² It further states that in approving the second MYP, it “preclude[ed] Pepco from filing another [MYP] until the Lessons Learned proceeding concludes with a final PSC order.”⁵³

2. There is no basis for the PSC’s claim that it acted within its statutory authority.

As the PSC recognizes, D.C. Code § 34-1504(d)(1) requires, *inter alia*, that any AFOR “protect[] consumers” and be “in the interest of the public.”⁵⁴ At the

⁵² PSC Br. at 35.

⁵³ PSC Br. at 5-6; *see also id.* at 35-36 (“requir[ing] a robust set of lessons learned prior to submission of any future multi-year rate plan” and “prohibit[ing] another MRP until the PSC issues a decision on the Lessons Learned proceeding”); *id.* at 37.

⁵⁴ PSC Br. at 34.

legislative hearing, the PSC’s Chairman explained that, in the early stages of Formal Case No. 1176, the PSC required Pepco to submit testimony providing a qualitative and quantitative assessment of “benefits of, problems identified, and lessons learned from” the Formal Case No. 1156 Pilot.”⁵⁵ In response to a question by the Chairman about Pepco’s apparent failure to provide the requisite quantitative analysis,⁵⁶ Pepco’s counsel confirmed no quantitative analysis was performed.⁵⁷ Without that analysis, there is no basis for the PSC’s claim that it acted pursuant to its statutory authority when approving an MYP proposal in Formal Case No. 1176 before completing a review of the Formal Case No. 1156 Pilot.⁵⁸

In further support of its decision to approve an MYP proposal in Formal Case No. 1176 before completing a review of the effectiveness of the Formal Case No. 1156 Pilot, the PSC resorts to knocking down strawmen. As one example, the PSC claims that “OPC overlooks the PSC’s statutory obligation to review a rate application filed by a jurisdictional public utility.”⁵⁹ This claim is not true. OPC

⁵⁵ JA 8838-8839 (discussing Order No. 21886).

⁵⁶ See JA 8839 (“I fail to see in there any quantitative analysis. Is there something I’m missing?”).

⁵⁷ See *id.* (“[T]o your question, we do not have an analysis of the cost side by side for doing a historic test year and an MYP.”).

⁵⁸ See *Washington Pub. Int. Org.*, 393 A.2d at 75. Further, courts owe the PSC no deference regarding its claims of compliance with the procedural requirements of the Administrative Procedures Act. *Washington Gas Energy Servs., Inc. v. Pub. Serv. Comm’n*, 893 A.2d 981 (D.C. 2006).

⁵⁹ PSC Br. at 37.

expressly recognized Pepco’s right to file rate applications and the PSC’s obligation to review those applications. Indeed, OPC submitted two dispositive motions arguing that Pepco failed to meet its burden of proof and, therefore, the PSC should exercise its statutory authority to reject the MYP proposal.⁶⁰

As another example, the PSC accuses OPC of collaterally attacking final orders in Formal Case No. 1156.⁶¹ On the contrary, OPC is not collaterally attacking those orders but instead asking this Court to require the PSC to follow those so as to restore structure to the PSC’s consideration of the paradigm shift to AFORs that the PSC established in Formal Case No. 1156.⁶²

CONCLUSION

For the reasons stated above and in OPC’s Opening Brief, the Court should vacate the challenged orders.

Respectfully submitted,

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⁶⁰ See JA6506; JA8798.

⁶¹ See PSC Br. at 39 (“OPC does not raise specific legal errors regarding the PSC’s specific justification to approve the Modified MRP Extended Pilot,” but rather “advanc[es] policy arguments to defend “traditional regulation.”).

⁶² Similarly, the PSC attempts to rebut OPC by relying on its general discretion to “control of its own calendar[.]” PSC Br. at 31. OPC is not challenging whether the PSC can control its own calendar but rather that it failed to follow its own precedent for reviewing AFORs set in Formal Case No. 1156.

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Dated: August 13, 2025

CERTIFICATE OF SERVICE

I certify that on the 13th day of August, 2025, a copy of the foregoing Reply Brief of the Office of the People's Counsel was served on the parties of record identified below through the District Court of Appeals E-File System.

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