Case Nos. 15-AA-301 and 15-AA-302 (Consolidated)

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

APARTMENT AND OFFICE BUILDING ASSOCIATION OF METROPOLITAN WASHINGTON,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA,
Respondent,

and

OFFICE OF THE PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA,

and

POTOMAC ELECTRIC POWER COMPANY,

and

DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondents.

On Petitions for Review of Orders of the Public Service Commission of The District of Columbia

Petitioner Apartment and Office Building of Metropolitan Washington's Petition for Rehearing or Rehearing *En Banc*

Vincent Mark J. Policy, #204701
GREENSTEIN DELORME & LUCHS, P.C.
1620 L Street, N.W., Suite 900
Washington, DC 20036-5605
Telephone: (202) 452-1400
E-mail: vmp@gdllaw.com
Cellular Telephone: (202) 306-4993

Frann G. Francis, #210385
APARTMENT AND OFFICE BUILDING ASSOCIATION OF METROPOLITAN WASHINGTON
1050 17th Street, N.W.
Suite 300
Washington, D.C. 20036
E-mail: ffrancis@aoba-metro.org
Cellular Telephone: (202) 296-3390

Counsel for Petitioner
Apartment and Office Building Association of Metropolitan Washington

January 27, 2016

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PETITIONER APARTMENT AND OFFICE BUILDING ASSOCIATION OF METROPOLITAN WASHINGTON'S PETITION FOR REHEARING OR REHEARING *EN BANC*

Pursuant to D.C. App. Rules 35 and 40, Petitioner ("AOBA") petitions the Court for Rehearing or Rehearing *En Banc* of the January 14, 2016 Opinion of the Division.

A. Summary of Proceedings

In Pepco's last rate increase case, Formal Case ("FC") No. 1103, the Public Service Commission ("PSC") allocated 47% of Pepco's revenue increase to Residential Classes and 43% to Commercial Classes (with the remainder to other Classes). In 2014, the Council enacted a new statute, the Electric Company Infrastructure Improvement Financing Act of 2014 (the "Act"), directing a broad scale undergrounding of power lines, chiefly in residential areas (D.C. Code § 34-1311.01, *et seq.*), estimated to cost $1 billion. The Act directed that in the first PSC proceeding on the undergrounding project (there are four), the costs of undergrounding shall be allocated among Pepco's customer classes in accordance with the allocations in FC No. 1103. Instead, in the two Orders now before this Court the PSC allocated 11% of the undergrounding costs to the Residential Classes and 89% to Commercial Classes. AOBA petitioned this Court for review. After AOBA filed its Brief in this Court, in July 2015 the Council amended the Act (the "Amendment"). The Division of this Court held the new Amendment to be applicable in this case, and declined to remand to the PSC to interpret and apply the Amendment, which had never been before the PSC in the proceedings because it did not exist. Instead, the Division itself interpreted and applied the Amendment, and affirmed the PSC's Orders on the basis of the Amendment.

B. Bases for Rehearing or Rehearing En Banc

AOBA's petition satisfies both bases for rehearing *en banc*, as well as rehearing:

First, the Division's Opinion conflicts with the PSC statute (D.C. Code § § 604 and 605), which mandates that the interpretation and application of the Amendment must be done in the first instance by the PSC, and not pre-emptively by this Court. The Division's Opinion also conflicts with

the many precedents (discussed below) holding that this Court may only decide an agency appeal on the grounds relied upon by the agency (a rule made jurisdictional in the PSC statutes cited above). The Amendment was never before the Commission and there is no PSC record applying it, because the Amendment did not exist until long after the Commission proceedings concluded. The Court *en banc* should hold that the PSC statute and these precedents require remand to the PSC. The Division's Opinion also conflicts with controlling precedents of this Court (discussed below) prescribing the very strong presumption against applying new legislative enactments, such as the Amendment, to litigation pending prior to the enactment. The Opinion did not discuss or follow these precedents. Given the Council's repeated attempts in this and other cases to change the course of proceedings pending in this Court, the Court *en banc* should enunciate a cohesive rule as to how that may be done.

Second, this proceeding involves questions of exceptional importance, namely the scope of this Court's jurisdiction over PSC matters, when a new statute may be applied to pending litigation, and how the Act requires the PSC to allocate the costs of undergrounding among Pepco's customer classes. Over the life of undergrounding facilities more than $1 billion in charges will be imposed on Pepco's ratepayers, and as it now stands 89% of those charges will be imposed on Commercial ratepayers and only 11% on Residential Classes, contrary to the undergrounding Act. This is the first of four PSC undergrounding proceedings under the Act and the ultimate decision in this case will be critical precedent for future undergrounding proceedings. As the Division noted and the Commission has admitted (Opinion at 5), in FC No. 1103 the Commission took decisive action toward putting an end to Commercial Classes subsidizing Residential Classes, because the Commission found that harms the economic reputation of the District and is inequitable. JA 2472-2473. For that reason, the Act directed the PSC to allocate the costs of undergrounding as it had done in FC No. 1103, namely 47% to Residential Class and 43% to Commercial Classes. *See* AOBA Brief at 23. The PSC's refusal to follow this mandate of the Act and the imposition of 89% of the undergrounding costs on

Commercial Classes are not supported by either the Act or the Amendment and will exacerbate the broad adverse consequences which the Commission found in FC No. 1103. This Court *en banc* should decide this case on the basis of the Act prior to the Amendment.

C. Facts

The facts are stated in the Division's opinion at 2 through 9.

D. The Division Erred by Declining to Remand to the Commission, Contrary to the PSC Jurisdictional Statutes and Controlling Precedents of this Court.

This Court declines to interpret complex and esoteric utility statute provisions, which are best left to the Commission's expertise. *Goodman v. PSC*, 497 F.2d 661 (D.C. Cir. 1974). The Division declined to follow this precedent, and in doing so failed to recognize that very specific statutes control appeals to this Court from the PSC. D.C. Code § 34-604(b) mandates that this Court has no jurisdiction unless a motion for reconsideration has been decided by the Commission, and then this Court cannot hear and decide grounds not set forth in the application for reconsideration. D.C. Code § 34-605(a) further mandates that any appeal to this Court shall be heard only on the record before the PSC. Matters which were not before the PSC cannot be heard by this Court. D.C. Code § § 34-604(b) and 34-605(a). It is undeniable that the meaning and application of the Amendment were never before the Commission, because the Amendment did not exist until after the Commission proceedings had ended, as AOBA's Reply Brief stated (at 12); Opinion at 8. The Division's Opinion is contrary to these statutes, and conflicts with the decision in *Washington Gas Light Co. v. PSC*, 982 A.2d 691 (D.C. 2009) limiting issues not raised below to challenges to the PSC's jurisdiction, which is not involved here (and *see* concurring opinion by Judge Ferrell).[1]

The Division's refusal to remand to the PSC also conflicts with other binding precedents of this Court. Courts defer to the administrative agency to interpret a new statutory enactment. *Frye &*

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[1] In its Brief, the PSC repeatedly objected to this Court hearing issues which it alleged had not been addressed and decided by the PSC on reconsideration. PSC Brief at 26-28.

Welch Associates v. Contract Appeals Board, 664 A.2d 1230, 1233 (D.C. 1995); *NBC v. Commission on Human Rights*, 463 A.2d 657, 663 (D.C. 1983); *Newell-Brinkley v. Walton*, 84 A.3d 53, 59 (D.C. 2014); and cases cited in AOBA Reply Brief at 12. Contrary to the Division's Opinion, the exercise here is not "futile" due to the Amendment and whether there is "ambiguity" is not the test. The PSC jurisdictional statutes in this case make remand mandatory. The Amendment was never before the PSC. Remand in light of the Amendment presents a question of simple fairness to the parties and their right to be heard. *See D.C. v. Fremeau*, 869 A.2d 711, 718 (D.C. 2005).

The Division held that there is precedent for not remanding where a statute is unambiguous. Neither decision cited by the Division involved the mandatory PSC jurisdiction statutes discussed above, nor complex PSC issues. *Le Chic Taxicab Co. v. D.C. Taxicab Comm.*, 614 A.2d 943, 945 (D.C. 1992), concerned a "procedural error", not a substantive legislative change in law as in the present cases. *Bio-Med Applications v. Bd. of Appeals and Review*, 829 A.2d 208, 217 (D.C. 2003), likewise did not involve a legislative change (as here), but rather a "Draft Chapter" which the agency had never adopted and which the Court therefore held was clearly not required to be applied by the agency. Additionally, in support of its refusal to remand, the Division found the Amendment to be completely unambiguous when inserted into the DDOT Charge, as follows:

> "Assess DDOT Underground Electric Company Infrastructure Improvement Charges among the distribution service customer classes of the electric company in accordance with the [allocation of the electric company's revenue requirement to each customer rate class on the basis of the total rate class distribution service revenue minus the customer charge revenue] approved by the Commission for the electric company and in effect pursuant to the most recent base rate case. D.C. Code § 34-1313.01(a)(4)." Opinion at 18-19 (emphasis added).

To say that this complex and technical language is unambiguous is unfounded. Interpreting this language as the Division did (Opinion at 21-22) to mean that all customer charges in FC No. 1103 are to be excluded reduces the allocation to the Residential Classes in FC No. 1103 to zero, because it is undeniable that all of the revenue requirement from Residential Classes (47%) in FC No. 1103 was

included in customer charges. Opinion at 6. This is an absurd result, given that the primary command of the Act is that undergrounding charges are to be allocated in accordance with the allocations in FC No. 1103. The Division also erred when it found the term "customer charge revenue" in the Amendment to be unambiguous. Opinion at 21. Indeed, the Division added to the Amendment's language to make it "sensibly interpreted." Opinion at 20-21. More fundamentally, in the undergrounding proceedings, Pepco asserted that customer charges are typically used to recover costs such as metering and billing, but metering and billing costs are not incurred for undergrounding and so should be excluded under the Act. Opinion at 7. However, the PSC excluded all customer charges which it had included in FC No. 1103. Order No. 17697 at 80-81 (JA 101-102; JA 165). This drove the result that only 11% (not 47%) of the undergrounding costs were allocated to Residential Classes and 89% were allocated to Commercial Classes. AOBA Brief at 40. As the Opinion acknowledges and as AOBA demonstrated in its Brief, by excluding all of the customer charge revenue which the PSC had allocated to Residential Classes in FC No. 1103, the Commission's Orders excluded Pepco's entire infrastructure costs and a wide array of costs and revenues far beyond metering and billing, the very types of costs which are incurred for undergrounding and have nothing to do with metering and billing. Opinion at 6, 21; AOBA Reply Brief at 22-25. The Division upheld this irrationally broad exclusion, because the Amendment refers to excluding "customer charge revenue". However, the question is: what does that term mean? Does it mean to exclude what Pepco said it was excluding – only costs of metering and billing, the classic definition of "customer charges" (AOBA Brief at 24, citing caselaw) – or does it mean to exclude infrastructure costs and other costs which are the predominant costs in the undergrounding project, for which no one had advanced any rationale? Amendments that operate on past events must be examined with particular care to determine whether their retroactive features are themselves irrational or arbitrary. *Petrolite Corporation v. EPA*, 519

F.Supp. 966, 974 (D.D.C. 1981). The Amendment, according to the Division, purports to mirror what the Commission did, and so is just as irrational and arbitrary.[2]

How the Commission would have dealt with the ambiguous and anomalous language of the Amendment was pre-empted by the Division's refusal to remand for that purpose. The pending cases should be remanded to the Commission. It is true that this is an expedited appeal (Opinion at 22), but the Act still commands a thorough and correct analysis in a case of this importance. Moreover, circumstances have changed since the PSC heard these cases. GSA, Pepco's largest customer, is now refusing to pay the DDOT Charge, and there is basic disagreement among government agencies as to the design of the undergrounding project. Commission proceedings are far from finally concluded. AOBA Reply Brief at 10-11. AOBA's issues should be considered by the PSC on remand in that real world context, and not simply on the basis of the words of the Amendment on the page.

E. The Division's Decision to Apply the Amendments to the Present Cases Conflicts with Controlling Precedents of this Court.

To begin with, the precedents cited by the Division do not involve the PSC jurisdictional statutes discussed above or for that matter when to apply a new law to pending litigation. *Davis v. Moore*, 772 A.2d 204, 228 (D.C. 2001) instead merely distinguishes legislation as presumptively prospective whereas judicial decisions are presumptively retrospective. *Id.* at 228-229. *In re Ancillary Liquidation*, 580 N.W. 2d 348, 352 (Wis 1998), a Wisconsin case, has no bearing because the claims in that case were filed after the effective date of the statute, not before as is in the present cases. 580 N.W. 2d at 352. And this Wisconsin decision does say that Wisconsin requires "an express statement of intent" by the legislature for an amendment to apply to pending cases. *Id.* The

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[2] Additionally, does the phrase "allocation of the electric company's revenue requirement" in the quotation above refer to the allocation of costs of undergrounding or to Pepco's revenue requirement already allocated in the preceding base rate case (Formal Case No. 1103)? The Division did not answer that, because it misunderstood AOBA's argument to be that "proceeds from the DDOT Charge are revenues to Pepco." Opinion at 19. To the contrary, AOBA was saying that at a minimum the amended language is ambiguous and that referring in the calculation of the DDOT Charge to Pepco's revenue requirements is wrong, because the calculation of the DDOT Charge is to be based on the principal and interest on the Bonds. The statute makes that clear. D.C. Code § 34-1311.01(13) (DDOT Charge must be calculated to ensure payment of principal and interest on Bonds).

Division cites the Maine case *Bernier v. Data Geo Corp.*, 787 A.2d at 150 as not requiring an express reference to pending proceedings or "magic words", but in that case the statute did expressly apply to any conveyance "whether made before or after the effective date of this section." 787 A.2d at 150.

The District of Columbia precedent relied upon by the Division is *Berretta U.S.A. Corp.* The Division held that *Berretta* only requires that the legislature has made its intent "clear". This ignores that the Court in *Berretta* said "[u]ndeniably, Congress meant the [Amendment] to apply to pending" cases, because it expressly and beyond question said exactly that. 940 A.2d at 174. Beyond *Berretta*, however, this Court has repeatedly rejected attempts by the legislature to impose substantive statutory changes (as is the case here, Opinion at 16) on pending litigation and has imposed a firm presumption against imposing such changes and a far more stringent test than the Division did. *Recio v. ABC Board*, 75 A.3d 134, 140 (D.C. 2013). ("The Council did not state what, if any, effect it intended the Act to have on claims that were pending upon its effective date. In similar circumstances, this court has found that without an 'unequivocal statement of the Council's intent,' the new law will not apply retroactively.") (emphasis added.); *Nield v. D.C.*, 110 F.2d 246, 254 (D.C. Cir. 1940) (requiring "that a statute ought not to be construed to operate retrospectively in the absence of clear, strong, and imperative language commanding it and if a double sense is possible that which rejects retroactive operation must be selected."); *Mayo v. DOES*, 738 A.2d 807, 811 (D.C. 1999) (retroactive operation will not be given to a statute, "unless such be the 'unequivocal and inflexible import of the terms'."); *Bank of America v. Griffin,* 2 A.3d 1070, 1074 (D.C. 2010) ("Statutes are not to be applied retroactively unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot otherwise be satisfied."); *Tippett v. Daly*, 10 A.3d 1123, 1132 (D.C. 2010) (*en banc*) ("Given the absence of clearly expressed intent to the contrary, we presume that the amendment does not apply retroactively."); *West End Tenants Assn. v. George Washington University*, 640 A.2d 718, 724, 730-731 (D.C. 1994) (substantive amendment

to statute not retroactively applied); *Williams v. D.C.*, 825 F.Supp. 2d 88, 96-97 (D.D.C. 2011) (applying non-retroactivity rules to "clarifying" amendments). *See Martin v. Hadix*, 527 U.S. 343, 354-355 (1999) (describing "the language that we suggested in *Landgraf* might qualify as a clear statement that a statute was to apply retroactively: The new provisions shall apply to all proceedings pending on or commenced after the date of enactment.")

There clearly is no express directive in the Amendment to apply the Amendment in these appeals. That triggered the firm presumption against applying the Amendment in these appeals (precedents of this Court cited *supra*) and that presumption was not overcome. By declining to apply retroactivity principles and the firm presumption against retroactivity (Opinion at 15), the Division overlooked the substantive effects of the Amendment which make it impermissible in these appeals. In *Recio* this Court refused to apply the amendment to the case before it, because to do so would have the effect of retroactively altering, indeed eliminating, the petitioner's substantive right to protest before the agency. 75 A.3d at 140. In the present case, the Division's application of the Amendment has exactly that effect: the prior hearing before the Commission is a nullity and, due to the Amendment, the Division holds there is no hearing on remand. AOBA Reply Brief at 15; Opinion at 18. This interpretation should be rejected, as it deprives AOBA of its due process and statutory right to a hearing, and is in direct conflict with *Recio*. Other decisions of this Court have refused to apply changes in law to cases after a hearing has been concluded, because to do so would be a "fundamental unfairness" and "financial waste". *1880 Columbia Road, NW, Tenants Assn. v. Rental Accommodations Division*, 400 A.2d 333, 338 (D.C. 1979). As shown above, the PSC jurisdictional statutes makes the Commission the forum for interpretation of the Amendment, not this Court, and, moreover, the Amendment is ambiguous in complex and specialized respects. AOBA is entitled "to have the opportunity to be heard and to present its case [to the agency] in accordance with the agency's factors... The deprivation of that opportunity to be heard is a retroactive effect" which is

impermissible. AOBA has the right to the opportunity to adapt its position before the PSC in light of the Amendment. *Lee v. Reno*, 15 F.Supp. 2d 26, 46 (D.D.C. 1998) (brackets added). The well-known retroactivity factors of not taking away vested rights or imposing new obligations retroactively "do not purport to define the outer reach of retroactivity" (*Lee v. Reno*, 15 F.Supp. 2d 26 (D.D.C.)), but they are also violated here. The rights of Commercial Classes which AOBA advances in these cases arise under FC No. 1103, in which the allocation of costs was fixed at 47% for Residential Classes and 43% for Commercial Classes. The original Act directed that the result in the undergrounding cases was to be the same. According to the Division, the Amendment changed that result by excluding customer charges (*See* Opinion at 16) which resulted in 89% of the undergrounding costs being allocated to Commercial Classes. AOBA Brief at 13, 38-44; AOBA Reply Brief at 22-27. This impermissibly imposed new obligations on Commercial Classes and altered their rights.

Finding no express directive in the Amendment to apply it in these appeals and disregarding this Court's precedents discussed above, the Division's holding to apply the Amendment in this case rests on implications derived from piecing together three observations: First, the Division relied on the effective date of the amendment – stated to be May 3, 2014. The Council did the same "effective date" maneuver in *West End, supra*, 640 A.2d at 724, and this Court found it "unavailing" in the case before it. *Id.*, 640 A.2d at 732. Every amendment which purports to clarify the legislature's intent of the initial enactment purports to apply as of the date of the initial enactment. That has never been held by this Court to be sufficient. Other courts have found such retroactive "effective dates" to be ambiguous. *City of Apache Junction v. City of Casa Grande*, 345 P.2d 138, 141-142 (Ct. App. Ariz 2015) (Ct. App. Arizona 2015). That is true in this case. The Division's Opinion overlooks that the Council Committee on Business, Consumer and Regulatory Affairs said that the passage of the Amendment itself "will allow the District to obtain financing". Attachment to PSC Brief beginning at SA-436, at page 90 in the Committee Report. Whatever that ambiguous statement says or means, it

does not clearly, unequivocally and imperatively command or say to apply the Amendments to pending cases such as AOBA's. It says that the Amendment alone is sufficient to satisfy Wall Street. Moreover, what does it mean to apply the Amendment back to May 3, 2014, a date on which Pepco's undergrounding application had not even been filed and which was long before the hearing on AOBA's protest? The undeniable fact is that the Amendment did not then exist. AOBA Reply Brief at 12. Second, the Division found the "context and timing" of the Amendment to demonstrate that it was a response to these appeals and thus applicable to these appeals. The fact that the Council amends a statute expressly because of its views of pending litigation has been rejected by this Court as overcoming the presumption against applying an amendment to the very cases which give rise to the amendment. *West End, supra*, 640 A.2d at 724; *Tippett v. Daly, supra*, 10 A.3d at 1131-1132. *Williams v. D.C., supra*, 825 F.Supp. 2d 88, 96-97 (D.D.C. 2011). Third, the Division held, the Amendment "appears" to adopt the cost allocation methodology the Commission approved. Opinion at 13. That observation does not answer the question: is the Amendment to be applied prospectively to future undergrounding proceedings before the Commission or is it to be applied to these pending appeals from already concluded Commission proceedings in the past? Again, in both *West End, supra*, 640 A.2d at 724 and *Tippett, supra*, 10 A.3d at 1131-1132, the enactment by the legislature of an amendment adopting the exact position of one of the parties to the pending litigation was held to be insufficient to conclude that the legislative amendment was to be applied in the pending cases.

The Amendment to the Act therefore does not apply to the appeals before this Court.

F. Conclusion

For the reasons stated, rehearing *en banc* by the Court or rehearing by the Division should be granted.

Respectfully submitted,

Vincent Mark J. Policy
Greenstein DeLorme & Luchs, P.C.
D.C. Bar No. 204701
1620 L Street, N.W., Suite 900
Washington, D.C. 20036
Telephone Number: (202) 452-1400
Email: vmp@gdllaw.com

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Frann G. Francis
Apartment and Office Building Association of
Metropolitan Washington
D.C. Bar No. 210385
1050 17th Street, N.W.
Suite 300
Washington, D.C. 20036
Telephone Number: (202) 296-3390
Email: ffrancis@aoba-metro.org

Counsel for Petitioner Apartment and Office Building Association of Metropolitan Washington

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2015, the attached Petition for Rehearing or Rehearing *En Banc* was sent by Federal Express to Brinda Westbrook-Sedgwick, Commission Secretary, District of Columbia Public Service Commission, 1325 G Street, N.W., Suite 800, Washington, D.C. 20005, and copies were sent by first-class mail, postage prepaid, to the following service list:

Peter E. Meier, Esq.
Wendy E. Stark, Esq.
Andrea H. Harper, Esq.
Dennis Jamouneau, Esq.
Potomac Electric Power Company
701 Ninth Street, N.W.
Washington, D.C. 20068

Sandra Mattavous-Frye, Esq.
Karen R. Sistrunk, Esq.
Travis R. Smith, Esq.
Office of The People's Counsel
1133 15th Street, N.W., Suite 500
Washington, D.C. 20005-2710

Richard A. Beverly, Esq.
Naza N. Shelley, Esq.
Christopher Lipscombe, Esq.
D.C. Public Service Commission
1325 G Street, N.W., Suite 800
Washington, D.C. 20005

James C. McKay, Jr., Esq.
Todd S. Kim, Esq.
Loren L. Alikhan, Esq.
Solicitor General
441 4th St., N.W., - #600S
Washington, D.C. 20001

Vincent Mark J. Policy