

BEFORE THE  
PUBLIC SERVICE COMMISSION OF MARYLAND

IN THE MATTER OF THE \*  
PETITION FOR RULEMAKING \*  
GOVERNING PROCEDURES FOR \* RM NO.  
OFFICE OF PEOPLE'S COUNSEL \*  
REQUESTS TO INITIATE PROCEEDINGS \*  
\*

**PETITION FOR RULEMAKING GOVERNING PROCEDURES FOR OFFICE  
OF PEOPLE'S COUNSEL REQUESTS TO INITIATE PROCEEDINGS**

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## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
SUMMARY OF RELEVANT LAW AND FACTS .....	3
1.    The Office of People’s Counsel. ....	3
2.    Relevant Public Service Commission Procedural Rules.....	6
3.    Illustrations of Commission responses to OPC requests for proceedings. ....	7
a.    Petition for an investigation into scandal-ridden FirstEnergy’s ownership and control over Potomac Edison.....	7
b.    Washington Gas’s green marketing. ....	10
c.    Implementation of legislation to protect low-income customers from retail suppliers. ....	11
d.    Investigation into customer impacts of gas utility practices. ....	13
ARGUMENT .....	15
I.    The Commission’s repeated failures to docket proceedings or rule on the merits of OPC requests in a timely manner is harming residential customers, warranting clear procedural rules.....	15
II.   OPC’s and the Commission’s statutory responsibilities are undermined by a lack of procedures to address OPC actions. ....	21
A.    The lack of clear procedural rules is undermining the PUA’s plain language and the Office of People’s Counsel’s statutory purpose...	21
B.    The Commission cannot fulfill its own statutory obligations if it does not address actions initiated by OPC. ....	22
III.  Regulations governing OPC-requested proceedings will promote administrative efficiency and improve transparency. ....	23

A.	Procedural ambiguity creates inefficiencies for OPC, stakeholders, and the Commission. ....	24
B.	The procedural confusion undermines transparency and creates ambiguity over the statutory prohibition on <i>ex parte</i> communications. ....	25
	CONCLUSION .....	27
	APPENDIX A: CONCEPTS FOR PUBLIC SERVICE COMMISSION RULES GOVERNING OPC REQUESTS FOR COMMISSION PROCEEDINGS .....	A-1

## TABLE OF AUTHORITIES

	Page(s)
<b>Maryland Public Service Commission Decisions</b>	
Order No. 89888, Case No. 9667 (July 26, 2021) .....	8
Order No. 90033, Case No. 9667 (Jan. 6, 2022) .....	8
Order No. 90057, Case No. 9673 (Feb. 7, 2022) .....	10, 11
Order No. 90175, Case No. 9673 (Apr. 20, 2022) .....	11

### Cases

<i>Elec. Power Supply Ass’n v. F.E.R.C.</i> , 391 F.3d 1255 (D.C. Cir. 2004).....	26
<i>Mid-Atl. Power Supply Ass’n v. Pub. Serv. Comm’n of Md.</i> , 361 Md. 196 (2000) .....	3, 22
<i>Pub. Serv. Comm’n of Md. v. Md. People’s Counsel</i> , 309 Md. 1 (1987) .....	5, 15, 22

### Maryland Statutes

PUA § 2-113 .....	23, 28
PUA § 2-121 .....	23, 28
PUA § 2-201 .....	3, 21
PUA § 2-203 .....	5
PUA § 2-204 .....	<i>passim</i>
PUA § 2-205 .....	5
PUA § 2-213 .....	1

PUA § 3-104 .....	22, 27
PUA § 3-107 .....	5
PUA § 3-108 .....	24, 26
PUA § 4-204 .....	17
PUA § 4-308 .....	11, 12, 13
PUA § 6-105 .....	7

### **Maryland Regulations**

COMAR 20.07.01.06.....	6
COMAR 20.07.02.10.....	7
COMAR 20.07.04.02.....	7
COMAR 20.07.04.03.....	7
COMAR 20.07.04.04.....	7
COMAR 20.07.04.05.....	7
COMAR 20.07.04.07.....	7
COMAR 20.07.04.12.....	6

### **Maryland Session Laws**

1924 Md. Laws Ch. 534 .....	3, 4
1955 Md. Laws Ch. 441 .....	5
1976 Md. Laws Ch. 756 .....	5

## INTRODUCTION

The Office of People’s Counsel respectfully requests that the Public Service Commission promulgate procedural regulations to facilitate the Commission’s docketing and consideration of OPC requests for Commission action to protect the interests of residential and noncommercial ratepayers.<sup>1</sup> The lack of procedural rules is undermining OPC’s efforts to advance the interests of residential customers, resulting in instances in which residential customer interests are not protected and customers are harmed.

Events over the past two years establish the need for this petition and written rules. With no procedures in place to assure the Commission’s consideration of matters OPC brings before it, OPC cannot effectively perform its statutory role of representing the interests of residential ratepayers. Correspondingly, and of more importance, the Commission’s lack of clear processes for matters OPC presents for determination has undermined the Commission’s own ability to perform its statutory responsibility of ensuring that the public interest is advanced and that customers are receiving adequate, economical, and efficient utility services at just and reasonable rates.<sup>2</sup>

The procedural gap has adversely affected customer interests on a range of issues. OPC’s recent efforts have been hampered or thwarted on the following matters, among others: (1) OPC’s 2021 request for an investigation into FirstEnergy’s ownership and control over Potomac Edison in light of FirstEnergy’s racketeering and bribery scandal;

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<sup>1</sup> Md. Code Ann., Pub. Util. Article Art. (“PUA”) § 2-204(a)(3).

<sup>2</sup> PUA § 2-213.

(2) OPC’s 2021 complaint regarding Washington Gas’s green marketing practices; (3) OPC’s 2022 petition for rules to implement legislation to protect low-income customers from exorbitant retail supply rates; and, most recently, (4) OPC’s 2023 petition for gas utility planning in light of the misalignment between the coming substantial reductions in gas consumption and the hundreds of millions of dollars that gas utilities are spending annually on fossil fuel infrastructure. On these and other matters, the Commission has ignored OPC’s filings, dismissed them without rulings on the merits, or allowed the filings to linger for extended periods with no decision and sometimes without even creating a docket. As these examples—explained further below—make clear, written procedures have become necessary to ensure that residential customer interests are sufficiently represented before the Commission as the General Assembly intended. Those procedures will further promote administrative efficiency and transparency.

This petition first summarizes the statutes and regulations pertinent to this filing and uses a cross-section of OPC filings from the past two years to illustrate how the Commission has ignored, delayed addressing, or declined to consider the merits of OPC’s filings. Using those illustrations, **Part I** of the Argument explains the procedural gaps and their impacts for residential customers. Argument **Part II** shows how both OPC and the Commission have been unable to fulfill their respective statutory responsibilities because of the lack of Commission procedures that allow for timely consideration on the merits of OPC’s requests. **Part III** further explains why procedures are necessary for OPC, customers, and other stakeholders—as well as for Commission transparency and for fairly applying the statutory prohibition on *ex parte* communications. In Appendix A,

we provide basic concepts for rules that would help ensure residential customers have adequate representation before the Commission.<sup>3</sup>

## SUMMARY OF RELEVANT LAW AND FACTS

### 1. The Office of People’s Counsel.

The General Assembly established the Office of People’s Counsel in 1924.<sup>4</sup> OPC is the oldest utility consumer advocacy office in the nation.<sup>5</sup> OPC’s charge is to advocate for consumers in proceedings that affect the cost, reliability, and quality of public utility service.<sup>6</sup> As Maryland courts have recognized, OPC is “the only entity that enjoys statutory standing as a representative of persons in interest” in Commission matters.<sup>7</sup> OPC operates independently from the Commission to represent the interests of residential and noncommercial users of natural gas, electric, telephone, water, and regulated transportation services, such as taxicabs.<sup>8</sup>

OPC’s authorizing statute charges it with two primary tasks:

1. To advocate on behalf of residential customers in matters pending before the Commission that affect those customers’ interests.<sup>9</sup>

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<sup>3</sup> While this petition focuses on procedural rules governing OPC requests on behalf of residential customers, additional regulations may be appropriate on other matters or for interested persons or organizations. OPC would not oppose a rulemaking proceeding that covered other issues.

<sup>4</sup> 1924 Md. Laws Ch. 534 (codified at 1924 Art. 23 § 349).

<sup>5</sup> *People’s Counsel*, <https://msa.maryland.gov/msa/mdmanual/25ind/html/54peopf.html>.

<sup>6</sup> See generally PUA § 2-201 *et seq.*

<sup>7</sup> *Mid-Atl. Power Supply Ass’n v. Pub. Serv. Comm’n of Md.*, 361 Md. 196, 219 (2000) (Harrell, J., dissenting).

<sup>8</sup> See § PUA 2-201 *et seq.* OPC’s specific mandate is to advocate for “residential users of gas, electricity, telephones, or water and sewerage; and noncommercial users of other services regulated by the Commission.” PUA § 2-201. For shorthand, this brief uses the term “residential customers” to include both residential users of utility services and noncommercial users of other Commission-regulated services.

<sup>9</sup> PUA § 2-204(a)(2).

2. As OPC considers necessary to protect residential customer interests, to *affirmatively* “conduct investigations and request the Commission to initiate proceedings.”<sup>10</sup>

In performing these responsibilities, OPC must “consider the public safety, economic welfare, and environmental interests of the State and its residents, including the State’s progress toward meeting its greenhouse gas emissions reductions goals.”<sup>11</sup>

With regard to its first responsibility for pending matters, OPC’s charge is to evaluate matters before the Commission to determine if the interests of Maryland residential customers are affected.<sup>12</sup> Such matters include “proceeding[s] on the rates, service, or practices of a public service company” or violations of Titles 1-13 of the PUA.<sup>13</sup> Where OPC determines residential customer interests are affected, it appears before the Commission to advocate on behalf of those customers.

OPC’s *affirmative* responsibility to investigate and request the Commission to initiate proceedings is the primary focus of this petition. That responsibility is longstanding—emanating from the 1924 law that established the People’s Counsel. That law provided that one of the People’s Counsel’s responsibilities is to “appear before the Commission in respect to investigations . . . by or on behalf of or in the interest of the public or in defense of the public interests.”<sup>14</sup> In 1955, the General Assembly modified OPC’s affirmative mandate, stating that the People’s Counsel “shall make such investigations as he may deem necessary to the intelligent performance” of the office’s

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<sup>10</sup> PUA § 2-204(a)(3).

<sup>11</sup> PUA § 2-204(a)(1)(ii).

<sup>12</sup> PUA § 2-204(a)(1)(i).

<sup>13</sup> PUA § 2-204(a)(2).

<sup>14</sup> 1924 Md. Laws Ch. 534 (codified at 1924 Art. 23 § 353).

duties and appear before the Commission and the courts “on behalf of the interests of the public.”<sup>15</sup> In 1976, the General Assembly modified the language to resemble current law:

“The Office of the People’s Counsel shall make such investigations and request the Commission to initiate such proceedings as that office deems necessary to protect the interests of residential and noncommercial users.”<sup>16</sup>

Whether exercising its affirmative responsibility or appearing on other matters pending before the Commission, OPC protects the legal rights not of the office itself, but “of the *residential customers* that People’s Counsel is statutorily obligated to protect.”<sup>17</sup> OPC’s actions thus serve “to protect the rights of all residential utility customers in Maryland.”<sup>18</sup>

To fulfill its responsibilities, OPC is authorized to retain experts in various fields of utility regulation, climate change, and related fields of science.<sup>19</sup> The PUA provides that OPC shall have “full access” to the Commission’s records and the benefit of all other facilities or information of the Commission,<sup>20</sup> as well as the assistance of Commission staff to the extent consistent with staff responsibilities and staff’s and OPC’s mutual interests.<sup>21</sup> Finally, OPC’s statutory standing to represent residential customers before the Commission includes all “the rights of counsel for a party to the proceeding,” including the statutory rights conferred to parties under PUA § 3-107.<sup>22</sup>

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<sup>15</sup> 1955 Md. Laws Ch. 441 (codified at 1955 Art. 78 § 2).

<sup>16</sup> 1976 Md. Laws Ch. 756 (codified at 1976 Art. 78 § 15).

<sup>17</sup> *Pub. Serv. Comm’n of Md. v. Md. People’s Counsel*, 309 Md. 1, 10 n.3 (1987) (emphasis added).

<sup>18</sup> *Id.*

<sup>19</sup> PUA § 2-203(f).

<sup>20</sup> PUA § 2-205(c)(1).

<sup>21</sup> PUA § 2-205(c)(2).

<sup>22</sup> PUA § 2-205(a).

## **2. Relevant Public Service Commission Procedural Rules.**

Although the Commission serves an adjudicatory role, the Commission has relatively few procedural rules compared to a court. The generally applicable rules do not provide any certainty that the Commission will make a merits-based decision as to whether to hold a proceeding on requests to initiate a proceeding. In particular, COMAR 20.07.01.06, Practice on Receiving Petitions, applies to any petition, whether filed by OPC as the statutory representative of residential customers or any other person. Subsection A of the regulation provides that upon receipt of a petition, application, or complaint in writing, “the Commission will refer it to the Secretary for examination” and if the Secretary determines that it conforms to Commission regulations and statutes, “the Secretary shall report that fact to the Commission.” Subsection B then leaves to the Commission’s discretion whether to set the matter for a hearing and what notice to provide to other interested persons.

COMAR 20.07.04.12 governs “other applications.” The regulation specifies its applicability to “all applications” subject to the Commission’s jurisdiction that are not covered by other Commission regulations. The regulation states that these other applications “shall in every case be made by petition” and that procedures for such applications “shall be such as the Commission may prescribe.” The regulation thus provides no assurance of, or timeline for, Commission action.

Although this lack of procedural rules may concern any party seeking Commission action, it is particularly concerning for OPC, given the office’s affirmative statutory mandate to seek Commission action on behalf of residential customers.<sup>23</sup>

### **3. Illustrations of Commission responses to OPC requests for proceedings.**

Below are four examples from the past two years, in chronological order, of OPC requests for the Commission to initiate proceedings and the Commission’s responses to those requests. They are intended as illustrations and do not cover the universe of matters where OPC’s efforts have been hampered or frustrated.

#### **a. Petition for an investigation into scandal-ridden FirstEnergy’s ownership and control over Potomac Edison.**

On May 11, 2021, OPC filed a petition for an investigation into the relationship between Potomac Edison and its parent company, Akron-based FirstEnergy Corp., following public disclosure of FirstEnergy’s \$60 million racketeering and bribery scandal.<sup>24</sup> Due to significant changes in the ownership and control of FirstEnergy—including an agreement providing board seats for corporate raider Carl Icahn—in the scandal’s immediate aftermath, OPC also asked the Commission to open the statutorily required proceeding for acquisition approvals.<sup>25</sup>

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<sup>23</sup> The Commission has a variety of other procedural regulations that apply to petitions of regulated companies, but which do not apply to an OPC request for Commission action. *See, e.g.*, COMAR 20.07.02.10 (investigations at a corporation’s request); COMAR 20.07.04.02 (applications for issues of stock, bonds, or other indebtedness); COMAR 20.07.04.03 (applications for exercise of franchises); COMAR 20.07.04.04 (applications for assignment, transfer, or lease of franchises); COMAR 20.07.04.05 (applications for authority to acquire stock); COMAR 20.07.04.07 (applications for rate increases).

<sup>24</sup> ML 235219 (May 11, 2021).

<sup>25</sup> *See* PUA § 6-105.

FirstEnergy has faced federal criminal charges, civil and regulatory proceedings in multiple states, and the termination of FirstEnergy's chief executive officer and other executives. FirstEnergy agreed to pay a \$230 million federal fine as part of a deferred prosecution agreement related to the bribery scheme, which included payments of \$4.3 million to the chair of the Ohio regulatory commission.<sup>26</sup> Following OPC's filing, multiple intervenors asked OPC about how to provide input to the Commission and participate because, without a docketed case, they were uncertain of the process.

The Commission did not respond to OPC's petition and did not open a docket until July 26, 2021, 76 days after OPC's initial petition.<sup>27</sup> The Commission's order opened an investigation, though significantly limited its scope.<sup>28</sup> The initial order's narrow scope was further complicated by FirstEnergy's refusal to provide information, leading OPC in October 2021 to file a motion to compel discovery.<sup>29</sup> Commissioner Linton initially granted OPC's motion in substantial part, but the full Commission overturned certain portions of that ruling, with the effect of denying OPC any ability to evaluate the costs allocated to Potomac Edison from the FirstEnergy subsidiary that was the source of bribery funds.<sup>30</sup> At the direction of the Commission, OPC and intervening parties then filed briefs on February 18, 2022, identifying the need for the Commission to continue

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<sup>26</sup> Mark Gillispie, *Takeaways: Ex-utility Regulator Had Outsized Role in Scheme*, AP NEWS (July 22, 2021), <https://apnews.com/article/business-4ed34e3c8d9f18e439f7ac7aff11c38e>.

<sup>27</sup> See Order No. 89888, Case No. 9667, ML 236265 (July 26, 2021).

<sup>28</sup> OPC requested that the Commission open an investigation into 14 separate issues, but the Commission concluded "that many of OPC's issues regarding FirstEnergy's financial status are either outside the Commission's jurisdiction or too attenuated to Potomac Edison's ratepayers to warrant an investigation," and the Commission opened an investigation into just three issues. *Id.* at 6-7.

<sup>29</sup> Case No. 9667, ML 237441 (Oct. 15, 2021).

<sup>30</sup> Order No. 90033, Case No. 9667, ML 238455 (Jan. 6, 2022).

the investigation and expand discovery.<sup>31</sup> Potomac Edison and OPC completed briefing on March 11, 2022.<sup>32</sup>

The Commission has issued no order on OPC’s petition to date, over one year after the last brief was filed. Meanwhile, investigations by federal agencies and other states continue.<sup>33</sup> At the end of 2022, FirstEnergy agreed to pay a \$3.8 million civil penalty for omitting material information from its responses to data requests related to FERC’s auditing of transactions between FirstEnergy services companies and its public utilities—which include Potomac Edison—and for violating FERC’s “Duty of Candor” rule.<sup>34</sup> Just last month, former Ohio House Speaker Larry Householder and former Ohio Republican Party Chair Matt Borges were convicted for their roles in the racketeering and bribery scandal.<sup>35</sup> Also last month, the company announced a new FirstEnergy CEO from recent private equity investor (Blackstone).<sup>36</sup> Most recently, the New Jersey Board of Public Utilities—New Jersey’s utility regulatory commission—published an audit

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<sup>31</sup> See, e.g., Case No. 9667, ML 239254 (Feb. 18, 2022).

<sup>32</sup> Case No. 9667, ML 239527 (Mar. 11, 2022); Case No. 9667, ML 239795 (Mar. 28, 2022).

<sup>33</sup> See, e.g., FirstEnergy SEC Form 10-Q for the quarterly period ended June 30, 2022, at 27 (filed July 26, 2022) (describing additional action taken by the SEC pursuant to its ongoing investigation into security law violations); see also Letter from Kenneth L. Parker, US Attorney, to Public Service Commission of Ohio (PUCO) (August 15, 2022), <https://www.documentcloud.org/documents/22138150-ken-parker-puco-letter-requesting-stay> (referencing ongoing discovery in several dockets before the PUCO related to FirstEnergy’s bribery scandal and indicating that the Department of Justice investigation into FirstEnergy corruption is ongoing).

<sup>34</sup> *Order Approving Stipulation and Consent Agreement*, 181 FERC ¶ 61,277, Docket No. IN23-2-000 (Dec. 30, 2022).

<sup>35</sup> Julie Carr Smyth, *Former GOP Ohio Speaker, Lobbyist Guilty in \$60 Million Bribery Scheme*, PBS NEWS HOUR/AP NEWS (Mar. 9, 2023), <https://www.pbs.org/newshour/politics/former-gop-ohio-speaker-lobbyist-guilty-in-60-million-bribery-scheme>.

<sup>36</sup> *FirstEnergy Names Brian X. Tierney President and Chief Executive Officer*, FIRSTENERGY (MAR. 27, 2023), [https://www.firstenergycorp.com/newsroom/news\\_articles/firstenergy-names-brian-x--tierney-president-and-chief-executive.html](https://www.firstenergycorp.com/newsroom/news_articles/firstenergy-names-brian-x--tierney-president-and-chief-executive.html).

report of FirstEnergy’s relationship with its New Jersey operating company. Among its many findings and recommendations, the auditor “found existing ring-fencing ineffective in protecting” the operating company from FirstEnergy’s scandal-related credit issues,<sup>37</sup> and found “an extraordinary lack of transparency” in FirstEnergy’s dealings related to the scandal, which poses significant risk to customers.<sup>38</sup> The New Jersey Board is now positioned to implement remedies in order to protect New Jersey utility customers.

**b. Washington Gas’s green marketing.**

On November 23, 2021, OPC filed a complaint with the Commission alleging that marketing language included in bills sent to customers of Washington Gas & Light Company and its affiliate, WGL Energy Services, Inc., was deceiving and misleading customers about the environmental and cost attributes of natural gas.<sup>39</sup> Among other misleading statements, the marketing materials broadly describe natural gas as “clean energy” and a “smart decision for the environment and your wallet.”<sup>40</sup> Accepting at face value WGL’s representations about the nature and scope of the marketing<sup>41</sup>—and without

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<sup>37</sup> *Final Rep., Phase One of an Audit of the Affiliated Trans. and Mgmt. Audit of Jersey Central Power & Light Co.*, New Jersey Board of Public Utilities Docket No. EA20110733, ES17-18 (April 12, 2023).

<sup>38</sup> *Final Rep., Phase Two of an Audit of the Affiliated Trans. and Mgmt. Audit of Jersey Central Power & Light Co.*, New Jersey Board of Public Utilities Docket No. EA20110733, ES16 (April 12, 2023).

<sup>39</sup> Case No. 9673, ML 237960 (Nov. 24, 2021).

<sup>40</sup> *Id.* at 3.

<sup>41</sup> The Commission’s order repeated falsely that OPC did not communicate with Washington Gas before filing its complaint regarding the marketing and who was responsible for it. Order No. 90057, Case No. 9673, ML 238984 (Feb. 7, 2022), at 6. In fact, OPC communicated with Washington Gas multiple times over an extended period before filing its complaint, as documented in an email exchange between OPC and utility counsel attached to Washington Gas’s motion to dismiss. Case No. 9673, ML 238461 (Jan. 7, 2022), at Exhibits 1, 2. The utility told OPC it was not responsible for and had no control over the marketing—a statement it rescinded when it moved to dismiss. *Id.* at 2-3. Despite the uncontroverted evidence of OPC communicating with the utility, as recently as six weeks ago, the Commission chair repeated the falsehood at a legislative hearing, stating that “the Commission found that a phone call from

ever addressing OPC’s claims and factual assertions—the Commission dismissed OPC’s complaint.<sup>42</sup> The Commission conducted no investigation, made no independent factual findings, and its order entirely ignored Washington Gas’s marketing message. The order stated that OPC’s complaint “is not the proper forum in which to address such broad issues”<sup>43</sup> while, paradoxically, simultaneously rejecting OPC’s complaint as too “narrow.”<sup>44</sup> On appeal before the circuit court, the Commission candidly acknowledged that it dismissed OPC’s complaint because it has “no interest” in it.<sup>45</sup>

**c. Implementation of legislation to protect low-income customers from retail suppliers.**

In the 2021 legislative session, the General Assembly enacted legislation, PUA § 4-308, prohibiting retail suppliers from serving low-income households receiving energy assistance unless the Commission has approved a supplier’s particular supply offer.<sup>46</sup> The Commission cannot approve a retail supplier’s offer to serve energy assistance households unless, among other things, the supplier’s offer includes a commitment to charge at or below the standard offer service rate or gas commodity rate

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[OPC] to the gas utility would have resolved the entire need for this complaint.” *See* <https://www.youtube.com/watch?v=J4ygaATyr68&t=2231s> at 23:06.

<sup>42</sup> Order No. 90057.

<sup>43</sup> *Id.* at 6; *see also* Order No. 90175, Case No. 9673, ML 240270 (Apr. 20, 2022) (Order Denying Rehearing), at 3.

<sup>44</sup> Order No. 90175 at 3.

<sup>45</sup> Md. Pub. Serv. Comm’n’s Memo. of Law, Case No. C-15-CV-22-001977 (Cir. Ct. for Montgomery Cnty.) (Oct. 3, 2022), at 1 (“the Commission simply has no interest in opening a proceeding to investigate a short statement on Washington Gas’s residential bills and using Washington Gas’s arguable true claims to initiate a broad proceeding involving national energy policy”) and 9 (“the Commission has no interest in this policy dispute”). The Commission’s order in the case is under review before the Appellate Court of Maryland.

<sup>46</sup> 2021 Maryland Laws Ch. 636 (codified at PUA § 4-308).

charged by the customer’s utility.<sup>47</sup> The statute required the Commission to establish an administrative process to implement the legislation “on or before January 1, 2023” with the key prohibitions taking effect July 1, 2023.<sup>48</sup> After making informal efforts over the course of more than a year to have the Commission implement the legislation, on April 13, 2022, OPC filed a petition for a rulemaking, including draft regulations.<sup>49</sup>

The Commission never docketed or even acknowledged OPC’s petition.

The Commission subsequently established a work group to discuss implementation of PUA § 4-308 as part of Public Conference 55 (“PC55”). OPC requested clarification from the Commission about how its petition would be handled in light of PC55, but the Commission never responded.<sup>50</sup> The work group’s first meeting occurred on July 14, 2022—three months after OPC filed its petition. Almost two months later, the Commission finally agreed that regulations were necessary to implement the legislation (as OPC’s petition had explained originally). Although the Commission eventually initiated a rulemaking docket<sup>51</sup> and held hearings in November 2022, the regulations resulting from that rulemaking were not published in the Maryland Register until just recently, on March 24, 2023.<sup>52</sup> The delays mean that the Commission did not meet the statutory requirement to establish a process by January 1, 2023.<sup>53</sup> It remains

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<sup>47</sup> See PUA § 4-308(b)(2).

<sup>48</sup> See PUA § 4-308(a)-(b).

<sup>49</sup> ML 240680 (Apr. 13, 2022).

<sup>50</sup> OPC’s clarification request was filed on May 20, 2022. ML 240787 (May 20, 2022).

<sup>51</sup> PC55 and RM78, ML 242190 (Sept. 2, 2022).

<sup>52</sup> 50:6 Md. Reg. 232 (Mar. 24, 2023).

<sup>53</sup> See PUA § 4-308(a).

unclear whether final rules will be in place on the statutory effective date of July 1, 2023.<sup>54</sup>

**d. Investigation into customer impacts of gas utility practices.**

On February 9, 2023, OPC filed a petition for near term priority actions and comprehensive long-term planning for Maryland’s gas companies.<sup>55</sup> The petition comprehensively describes—over 63 pages plus appendices—the significant impacts that gas utility spending and practices have on utility customers and the Commission’s authority and obligation to address them. Today, more than two months later, the Commission has taken no action in response to OPC’s petition.

OPC’s petition was preceded by two reports related to the future of the State’s gas utilities that OPC released in the fall of 2022. The first report, *Maryland Gas Utility Spending: Projections and Analysis*, shows that Maryland customers of the State’s three largest gas utilities face continuing, substantial increases in the price of gas delivery service.<sup>56</sup> Utilities are annually spending hundreds of millions of dollars on gas infrastructure and are on track to spend tens of billions of dollars replacing their entire local distribution systems and expanding pipeline capacity, with the State’s largest gas utility this year spending at a rate of more than \$1.2 million per day.<sup>57</sup> Further, the analysis shows that delivery rates for the State’s largest gas utility have already doubled

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<sup>54</sup> See PUA § 4-308(b)(1).

<sup>55</sup> ML 301247 (Feb. 9, 2023).

<sup>56</sup> DHInfrastructure, *Maryland Gas Utility Spending: Projections and Analysis* (Oct. 2022) (“*Gas Spending Report*”), <https://opc.maryland.gov/Gas-Utility-Spending-Report>.

<sup>57</sup> *Id.* at 9-20.

since 2010,<sup>58</sup> and that gas utilities are spending more than \$125 million a year for new customers and customer expansion.<sup>59</sup> These costs are planned for recovery over many decades into the future, long past the time they can reasonably be expected to be fully useful if the State is to meet its climate goals.<sup>60</sup>

The second report, called *Climate Policy for Maryland's Gas Utilities: Financial Implications*, shows that Maryland's gas utility rates can be expected to spiral upward—doubling or tripling 2021 levels by 2035, and, by 2050, reaching levels more than 10 times higher than today—as fossil gas consumption drops significantly under all scenarios for meeting State climate goals.<sup>61</sup> According to the report, Maryland gas home heating systems already have been gradually losing market share to electric heating systems since 2010,<sup>62</sup> and alternatives to fossil gas are cost prohibitive and not available at any scale sufficient to replace gas.<sup>63</sup>

With the Commission having taken no action in the months following the issuance of these reports, OPC filed its petition on February 9, 2023. To date, the Commission has not acknowledged OPC's filing by docketing the matter or otherwise addressing it or the

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<sup>58</sup> *Id.* at 38.

<sup>59</sup> *Id.* at 35-37.

<sup>60</sup> *Id.* at 24-26.

<sup>61</sup> Synapse Energy Economics, Inc., *Climate Policy for Maryland's Gas Utilities: Financial Implications* (Nov. 2022) (“*Gas Climate Policy Report*”), <https://opc.maryland.gov/Gas-Rates-Climate-Report>, at 19-21.

<sup>62</sup> *Id.* at 3-4.

<sup>63</sup> *Id.* at 7-10.

filings advocacy and governmental organizations have made with the Commission in support of it.<sup>64</sup>

## ARGUMENT

### **I. The Commission’s repeated failures to docket proceedings or rule on the merits of OPC requests in a timely manner is harming residential customers, warranting clear procedural rules.**

OPC has made several requests for the Commission to initiate proceedings in recent years in response to which the Commission failed to open dockets, allowed prolonged and indefinite delays in issuing orders, or otherwise declined to address the merits of OPC’s filings. In one case, the Commission candidly admitted to refusing to address the merits of an OPC complaint about deceptive gas utility green marketing because it had “no interest” in the matter.<sup>65</sup> In other situations, it has entirely ignored OPC’s official requests. The result is a substantial diminution of residential customers’ voices at the Commission. The delays and inaction negate OPC’s judicially recognized role in “protect[ing] the rights of all residential utility customers in Maryland.”<sup>66</sup> The suppression of the voice of residential customers correlates to an enhancement of the monopoly interests of the very entities the Commission is charged with regulating by allowing the conduct OPC has contended is unlawful to continue indefinitely.

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<sup>64</sup> See ML 301302 (Feb. 14, 2023) (letter of support from RMI); ML 301374 (Feb. 16, 2023) (letter of support from 15 non-profit organizations); ML 301389 (Feb. 17, 2023) (letter of support from Montgomery County); ML 301858 (Mar. 17, 2023) (letter of support from the Maryland Department of the Environment).

<sup>65</sup> See n.45 above.

<sup>66</sup> *Pub. Serv. Comm’n of Md. v. Md. People’s Counsel*, 309 Md. 1, 10 n.3 (1987).

We provided four examples in the Summary of Relevant Law and Facts to illustrate how OPC's efforts have been disregarded in full or in part because of the Commission's flawed process or lack thereof. The Commission's inaction or delays on these and other matters means that harms to customers go unabated, indefinitely. Below, for each of the four examples, we highlight (a) the procedural problems and (b) the impact on customers.

**A. Petition for an investigation into scandal-ridden FirstEnergy's ownership and control over Potomac Edison.**

As described more fully above,<sup>67</sup> this OPC petition was filed in May 2021. It was hampered by initial delays, limited by the narrow scope of the eventual order initiating an investigation, further stymied by FirstEnergy's refusal to cooperate, and now has been awaiting a Commission decision for more than a year. While other regulatory agencies have issued substantial fines and continue their investigations, no Maryland Commission rulings have fully assessed the impact of the major bribery and racketeering scandal on Maryland customers.

*Procedural problems*

- The Commission took no action to docket OPC's initial petition for 76 days.
- A year has now passed with no action while parties await a Commission decision.

*Customer implications*

- Although OPC's investigation was stymied by FirstEnergy's refusal to cooperate, it nonetheless has shown Potomac Edison's lack of

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<sup>67</sup> See section 3.a above.

independence from FirstEnergy and elevated concerns that Maryland customers are paying costs that have nothing to do with the service provided to them.

- No one in Maryland has investigated how much Maryland customers are paying in rates for the FirstEnergy racketeering and bribery scandal. Neither the Commission, nor OPC, nor even Potomac Edison itself—based on its assertions during the discovery dispute— has reviewed the underlying data. We only have the unverified amounts to which FirstEnergy—still under numerous federal and other state investigations— has admitted.
- Corporate takeover specialists—including Blackstone and Carl Icahn— have taken control of FirstEnergy board seats and, most recently, the top executive position. OPC’s outstanding petition explains that this change of control has potentially significant ramifications for Potomac Edison customers and requires approval under Maryland law.
- Potomac Edison’s recent rate case filings suggest that Potomac Edison’s initial assertion—based on the undisclosed investigation by FirstEnergy— incorrectly understated the amount Potomac Edison overcharged Maryland customers related to the scandal by a factor of almost seven.<sup>68</sup> As a practical matter, the petition was necessary because it will not be possible to evaluate—in a rate case that must be decided on all issues within 210 days of filing<sup>69</sup>—whether the utility’s proposal for refunds related to the bribery scandal and other improper charges is sufficient.<sup>70</sup>

## **B. Washington Gas’s green marketing on utility bills.**

OPC filed its complaint regarding the utility’s green marketing and cost claims in November 2021, only to have the Commission dismiss it without addressing its merits, as

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<sup>68</sup> See Case No. 9695, ML 301935 (Mar. 22, 2023), Direct Testimony of Potomac Edison witness Raymond E. Valdes at 28-29.

<sup>69</sup> PUA § 4-204.

<sup>70</sup> The total amount Potomac Edison proposes to refund to customers for all categories of costs improperly included in its distribution rates is \$1,668,447. See Valdes Direct Testimony at 30.

explained in the Summary of Relevant Law and Facts.<sup>71</sup> The Commission’s orders and briefing on appeal fail to address numerous issues and misstate key facts.<sup>72</sup>

### *Procedural problems*

- The Commission determined that it can dismiss an OPC complaint without ever addressing the complaint’s merits.
- If not reversed, the Commission’s handling of OPC’s complaint creates a precedent that the Commission need not address an issue if it has “no interest” in doing so.<sup>73</sup>

### *Customer implications*

- Washington Gas customers—and potentially other customers—remain vulnerable to deceptive marketing practices.
- Customers are being encouraged to make long-term investments (on home heating and other appliances) that are not likely to be in their long-term economic interests.<sup>74</sup>
- Under the Commission’s rationale, utility customers have no guaranteed forum for having complaints about violations of the Public Utilities Article heard, giving utility customers much less recourse than customers in non-regulated utility markets who can freely access the courts.

### **C. Implementation of legislation to protect low-income customers from retail suppliers.**

As described in the Summary of Relevant Law and Facts,<sup>75</sup> the Commission never docketed OPC’s petition to implement the legislation intended to benefit low-income customers, resulting in substantial delays in progress toward finalizing regulations. That

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<sup>71</sup> See section 3.b above.

<sup>72</sup> See, e.g., n.45 above.

<sup>73</sup> *Id.*

<sup>74</sup> See *Gas Climate Policy Report* at 5-10.

<sup>75</sup> See section 3.c above.

delay undermines the legislative effort to protect low-income customers and the State budget from retail suppliers that are charging exorbitant rates.

### *Procedural problems*

- The Commission took no action on OPC's petition for a rulemaking or its request for clarification as to how to proceed with its petition after the Commission established the working group process.
- OPC and other parties spent unnecessary time and made unnecessary filings as a result of the Commission's failure to acknowledge or address OPC's petition.<sup>76</sup>

### *Customer implications*

- Because the rules were not in place by the statutorily required date, the protections are not available for low-income customers that retail suppliers enrolled or renewed at high rates between January 1, 2023, and July 1, 2023, as they could have been.
- It remains possible that the regulations will not become final on the statutory effective date of July 1, 2023, particularly if changes are made or if the regulations are challenged, risking further harm to customers.

#### **D. Investigation into customer impacts of gas utility practices.**

As described in the Summary of Relevant Law and Facts,<sup>77</sup> on February 9, 2023, OPC filed a petition for near term priority actions and comprehensive long-term planning for Maryland's gas companies.<sup>78</sup> The petition came months after OPC released two comprehensive reports detailing the potentially devastating residential customer impacts

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<sup>76</sup> See n.50 above.

<sup>77</sup> See section 3.d above.

<sup>78</sup> See n.55 above.

of the gas utilities continuing business-as-usual. Numerous organizations and agencies have written letters supporting OPC’s petition.

### *Procedural problems*

- Two months have passed, and the Commission has taken no action—not even to create a docket as a repository for the filings of interested parties—to acknowledge OPC’s filing.
- Potential parties, as well as policymakers, have no certainty as to whether—or when—the Commission will address OPC’s petition.

### *Customer implications*

- Gas utilities continue—with no end in sight—to engage in practices and operations based on the fiction that business-as-usual will continue—that is, that gas sales will continue as they have, and that gas sales volume will remain sufficient in 40 to 70 years to recover massive gas utility spending. Gas utilities have spent approximately \$100 million on new capital infrastructure since OPC filed its petition.<sup>79</sup>
- Utility customers are investing in home heating and other appliances that are fueled with gas, when such purchases may not be consistent with their financial interests and are inconsistent with State climate policies calling for fossil fuel heating systems to convert to efficient electric heat pumps.<sup>80</sup>
- Maryland utility customers, gas companies, and taxpayers all face risks from tens of billions of dollars in potentially stranded fossil fuel infrastructure investments, with no planning effort for how to pay for that spending nor any analysis of technological and climate-policy impacts.

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<sup>79</sup> *Gas Spending Report* at 18-20.

<sup>80</sup> Md. Comm’n on Climate Change, *Building Energy Transition Plan: A Roadmap for Achieving Net-Zero Emissions in the Residential and Commercial Buildings Sector* (Nov. 2021), at 6, <https://mde.maryland.gov/programs/air/ClimateChange/MCCC/Documents/2021%20Annual%20Report%20Appendices%20FINAL.pdf>.

The above are illustrations of the Commission’s treatment of recent OPC requests for Commission action, but they are not the only instances. Similar problems exist with the Commission’s treatment of other OPC actions and requests.

**II. OPC’s and the Commission’s statutory responsibilities are undermined by a lack of procedures to address OPC actions.**

OPC and the Commission cannot meet their statutory obligations without processes that ensure OPC’s requests for Commission proceedings are heard timely and on the merits, as both OPC’s and the Commission’s authorizing statutes show.

**A. The lack of clear procedural rules is undermining the PUA’s plain language and the Office of People’s Counsel’s statutory purpose.**

The General Assembly established OPC as an independent statutory agency to represent the interests of residential customers of electric, gas, water, and sewage disposal utilities in proceedings before the Commission.<sup>81</sup> The legislature further charged OPC with the obligation, when it considers it necessary, “to conduct investigations and request that the Commission initiate proceedings to protect the interests of” consumers.<sup>82</sup>

OPC’s statutory obligation to investigate and bring actions before the Commission to protect consumers presumes that the Commission will address those actions within a reasonable timeframe.<sup>83</sup> If the Commission simply disregards OPC’s efforts—for

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<sup>81</sup> PUA § 2-201 *et seq.*

<sup>82</sup> PUA § 2-204(a)(3).

<sup>83</sup> *See, e.g., Chesek v. Jones*, 406 Md. 446, 459 (2008) (“That which necessarily is *implied* in the statute is as much a part of it as that which is expressed.”) (emphasis added) (internal citations omitted).

example, by never addressing an OPC action or allowing it to sit indefinitely—the purpose of PUA § 2-204 is undermined.

The end result of untimely Commission review of or disregard for the merits of OPC requests for proceedings is that residential customers do not get the representation the legislature intended. OPC is “the only entity that enjoys statutory standing as a representative of persons in interest” in Commission matters.<sup>84</sup> OPC has resources and the mandate to advance residential customer interests. In exercising its affirmative responsibility by investigating and requesting the Commission to initiate proceedings, OPC’s actions serve “to protect the rights of all residential utility customers in Maryland.”<sup>85</sup> When OPC’s actions are ignored or not timely addressed, residential customers do not receive the protection to which they are statutorily entitled.

**B. The Commission cannot fulfill its own statutory obligations if it does not address actions initiated by OPC.**

The Commission is required to “institute and conduct proceedings reasonably necessary and proper to the exercise of its powers or the performance of its duties.”<sup>86</sup> As described in the Summary of Relevant Law and Facts,<sup>87</sup> the Commission’s procedural regulations leave entirely to its own discretion how to address requests from OPC to initiate proceedings. Recent events show that the lack of a written process has caused OPC’s requests to go unheeded entirely or with significant lapses in time.

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<sup>84</sup> *Mid-Atl. Power Supply Ass’n v. Pub. Serv. Comm’n of Md.*, 361 Md. 196, 219 (2000) (Harrell, J., dissenting).

<sup>85</sup> *Pub. Serv. Comm’n of Md. v. Md. People’s Counsel*, 309 Md. 1, 10 n.3 (1987).

<sup>86</sup> PUA § 3-104(a).

<sup>87</sup> See section 2 above.

Without addressing residential customer requests for proceedings, the Commission cannot fulfill its duty to “supervise and regulate the public service companies subject to the jurisdiction of the Commission to . . . ensure their operation in the interest of the public.”<sup>88</sup> The General Assembly assigned OPC the important role of investigating and bringing matters (“initiat[ing] proceedings”) before the Commission to protect the interests of residential customers. Procedural standards for OPC-requested proceedings are “reasonably necessary and proper” to the Commission’s exercise of its responsibilities and further the purposes of the Public Utilities Article generally. And the Commission is authorized to adopt rules “as necessary” to carry out its responsibilities.<sup>89</sup>

The Commission should provide Maryland’s residential customers a clear and certain process when their statutory representative—OPC—files an action with the Commission. The lack of written procedures enables any customer harm emanating from conduct raised in an OPC request for Commission action to continue for an indefinite period, and even permanently. Put simply, OPC cannot effectively advocate for—and the Commission cannot effectively respond to—residential customers if the Commission can pick and choose what requests, if any, it will respond to.

### **III. Regulations governing OPC-requested proceedings will promote administrative efficiency and improve transparency.**

The examples described above illustrate the types of customer harm that can continue unabated as a result of Commission inaction, but the problems are not limited to

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<sup>88</sup> PUA § 2-113.

<sup>89</sup> PUA § 2-121.

customer impacts. The procedural gaps undermine the Commission as an institution, because of the uncertainties and confusion they create. They also impact Commission transparency, specifically by causing ambiguity over the application of the statutory prohibition on *ex parte* communications.<sup>90</sup>

**A. Procedural ambiguity creates inefficiencies for OPC, stakeholders, and the Commission.**

The lack of procedures causes inefficiencies for OPC, the Commission, and other parties. For its part, OPC's efforts to investigate and request the Commission to initiate proceedings—as it is required to do by law—effectively are wasted or underutilized if the Commission disregards its filings or delays their consideration indefinitely. For its investigation regarding gas utilities, for example, OPC retained consultants and expended considerable resources to develop the reports, including extensive research and data analysis. Then it spent considerable resources developing its extensively researched and comprehensive gas planning petition—only to have that petition sit with the Commission indefinitely, and without any certainty that the Commission will *ever* take any action on it, as it has failed to with other OPC filings.

The procedural gaps also unnecessarily create confusion for parties other than OPC. For example, interested individuals or organizations that want to meaningfully participate before the Commission have been confused by the Commission's failure to open a docket. OPC has repeatedly been asked by interested parties for docket numbers

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<sup>90</sup> PUA § 3-108.

and how they can participate in proceedings that OPC has requested.<sup>91</sup> These parties cannot conveniently find OPC’s petition on the Commission’s website, nor is there a docket in which parties supporting (or opposing) OPC’s petition can submit comments. Examples include OPC’s petitions for the FirstEnergy investigation and the petition on gas planning, as mentioned above.<sup>92</sup> A separate example is OPC’s petition for a proceeding on federal grant opportunities, where, after the Commission’s significant delay in opening a proceeding, OPC had to submit a further request to add its petition and the filings of numerous other parties, including by legislators, to the docket that was finally created.<sup>93</sup> These inefficiencies affect OPC, interested parties, and the Commission, and they are the result of the Commission’s failure to establish dockets for OPC’s requests—a basic procedure that does not require any substantive decision on the Commission’s part.<sup>94</sup>

**B. The procedural confusion undermines transparency and creates ambiguity over the statutory prohibition on *ex parte* communications.**

The procedural gaps allow the Commission to address OPC filings in an arbitrary fashion. Whether the arbitrariness is intended or not, it undermines the Commission’s statutory mission. The Commission is served by transparent processes that put customer

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<sup>91</sup> As described in section 3.c above, even OPC’s request for clarification in one such case went unanswered. ML 240787 (May 20, 2022).

<sup>92</sup> See section 3 above.

<sup>93</sup> Letter from Irene N. Wiggins, Assistant People’s Counsel, Office of People’s Counsel, to Andrew Johnston, Executive Secretary, Public Service Commission (July 8, 2022) (on file with author) (requesting the Commission to move various documents into the PC56 docket to ensure a “full transparent record of the proceeding”).

<sup>94</sup> Indeed, the creation of a docket for OPC’s request no more reflects the Commission’s agreement with the substance of the request any more than the creation of a docket for a utility’s request to increase rates reflects the Commission’s agreement with the utility’s proposed increase.

interests and the monopoly interests that it is charged with regulating on a similar procedural footing. It is a fundamental role of regulation to align the private behavior of regulated monopolies with the public interest. And a critical element of the public interest is the interest of residential utility customers in having a voice before the Commission.

The perception of arbitrariness is exacerbated by the uncertainty the lack of procedures causes for the statutory prohibition against *ex parte* communications. The *ex parte* statute prohibits any communications between parties to a Commission proceeding—including any action brought by OPC—if it could affect the merits of a case. Specifically, PUA § 3-108 provides:

“Unless notice is provided to each other party in a case before the Commission, a party or person acting on behalf of a party may not contact *ex parte* a commissioner or a public utility law judge regarding the merits of the case.”

The *ex parte* prohibition is critical to ensure fairness to Commission adjudications.

Prophylactic in nature, the prohibition applies whether or not the communication actually affects a case’s outcome.<sup>95</sup> The rule does not defer to the Commission’s subjective evaluation of whether the communication will influence the case’s outcome, but rather presumes that a communication goes to the merits unless it—objectively—does not go to the merits.

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<sup>95</sup> Because the Maryland courts have had no opportunity to address the issue, federal law is instructive. In reviewing an analogous *ex parte* prohibition of the Federal Energy Regulatory Commission, the D.C. Circuit rejected FERC’s argument that its prohibition on *ex parte* contacts applies only if FERC relies on the communication in reaching its decision. *Elec. Power Supply Ass’n v. F.E.R.C.*, 391 F.3d 1255, 1265 (D.C. Cir. 2004). Rather, the court said the question is “whether there is a possibility that the communication could affect the agency’s decision in a contested on-the-record proceeding.” *Id.* at 1259.

But without written procedures, the policies the *ex parte* prohibition seeks to advance are undermined. OPC has sought to understand how the Commission applies the statutory prohibition on *ex parte* communications, and it is OPC's understanding that the Commission interprets the prohibition to allow communications with interested entities prior to the opening of a docket.<sup>96</sup>

Given that the Commission has repeatedly delayed or failed to open a docket after OPC has filed an action, it creates the appearance that commissioners could be engaged in *ex parte* communications with entities that will be parties to OPC's action. If, in fact, such communications are occurring, those communications would be unfair to the interests of residential customers and potentially give undue influence to regulated entities, as it is OPC's practice to comply with the spirit of the *ex parte* prohibition by declining such communications on a matter for which it has filed a request for a Commission proceeding. At the very least, Commission rules should clarify if and how the Commission applies the statutory prohibition on *ex parte* communications to OPC-requested actions when it fails to open or delays the opening of a docket for those actions.

## CONCLUSION

The Commission is required to "institute and conduct proceedings reasonably necessary and proper to the exercise of its powers or the performance of its duties."<sup>97</sup> One

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<sup>96</sup> After the Commission docketed a proceeding, the *ex parte* rule applies to "parties" to the case.

<sup>97</sup> PUA § 3-104(a).

such duty is to “supervise and regulate the public service companies subject to the jurisdiction of the Commission to . . . ensure their operation in the interest of the public.”<sup>98</sup> The Commission is authorized to adopt rules “as necessary” to carry out its responsibilities.<sup>99</sup> The General Assembly assigned OPC the important role of investigating and bringing actions before the Commission to protect the interests of residential customers.<sup>100</sup> Procedural standards for OPC-requested proceedings are “reasonably necessary and proper” to the Commission’s exercise of its responsibilities and further the purposes of the Public Utilities Article generally. As this petition has illustrated, recent events demonstrate that certain and transparent Commission procedures for actions brought by OPC are now necessary to satisfy the Commission’s obligation to regulate and supervise public service companies consistent with the interests of the public and to further promote administrative efficiency and transparency.

Wherefore, OPC respectfully requests that the Commission initiate a rulemaking to establish formal regulations governing the Commission’s response to actions filed by OPC in furtherance of its statutory mission. We have attached, in Appendix A, draft concepts in order to assist the development of regulations.

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<sup>98</sup> PUA § 2-113.

<sup>99</sup> PUA § 2-121.

<sup>100</sup> PUA § 2-204.

Respectfully submitted,

/s/ David S. Lapp

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**APPENDIX A:  
CONCEPTS FOR PUBLIC SERVICE  
COMMISSION RULES GOVERNING OPC  
REQUESTS FOR COMMISSION PROCEEDINGS\***

1. Upon receiving an OPC request for an investigation or the opening of a proceeding, the Commission shall:
  - a. open a docket;
  - b. assign a docket number; and
  - c. issue a public notice of the filing.
2. The opening of the docket and public notice shall start the following timeline:
  - a. 30 days—comments or opposition due
  - b. 60 days—OPC response due
  - c. 90 days—Commission must issue an initial decision
3. The initial decision shall:
  - a. Dispose of the request by granting or denying the relief sought in whole or in part, or by adopting any modified form of relief;
  - b. Set in whole or in part the request for an evidentiary hearing, either before the Commission or a Public Utility Law Judge;
  - c. Set in whole or in part the request for consideration in an existing or new non-adjudicatory proceeding; or
  - d. Set in whole or in part the matter for further briefing or argument.
4. If the initial decision does not dispose of the request in whole, the Commission shall:
  - a. Provide additional notice and 30 days from the date of the decision for any other parties to intervene in the proceeding; and
  - b. Issue a final decision resolving the request within 180 days of the initial decision, unless the Commission determines that the issues presented require an additional period not to exceed 180 days.

\* OPC provides these concepts as exemplary, reserving our ability to make additional or different recommendations as part of a rulemaking proceeding.