

**BEFORE THE  
MARYLAND PUBLIC SERVICE COMMISSION**

**Application of Baltimore Gas and Electric  
Company for an Electric and Gas Multi-  
Year Plan**

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**Case No. 9692**

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**OFFICE OF PEOPLE’S COUNSEL’S REQUEST FOR REHEARING  
OF COMMISSION ORDER NO. 90948**

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**OFFICE OF PEOPLE’S COUNSEL’S REQUEST FOR REHEARING  
OF COMMISSION ORDER NO. 90948**

Pursuant to Public Utilities Article § 3-114 and COMAR 20.07.02.08, the Office of People’s Counsel requests rehearing of Order No. 90948, in which the Commission approved a multi-year plan for Baltimore Gas & Electric Company (“BGE”) for 2024–2026.

In approving BGE’s second multi-year rate plan (“MRP”), the order erroneously approves significant investments in gas system replacement without due consideration of economic and technical trends, State climate policy, and the legal requirements of Maryland’s Strategic Infrastructure Development and Enhancement (“STRIDE”) Act.<sup>1</sup> The Commission also erroneously and arbitrarily authorizes BGE to capitalize improvements to a conduit system, earning profits for shareholders—as if the conduit was owned by BGE, which it does not—and assigning disproportionate risk of those investments with ratepayers. And it fails to apply a uniform standard in reviewing BGE’s immense electric and gas capital

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<sup>1</sup> Md. Code Ann., Pub. Util. Art. (“PUA”) § 4-210.

investments, instead using different standards that lead to inconsistent outcomes. In addition, the Order erroneously departs from prior established precedents with no explanation or analysis.

OPC notes as a threshold concern that while Order No. 90948 repeatedly cites the testimony presented by OPC's expert witnesses in this case, it refers to OPC's legal briefs only four times—and fails to address several legal arguments made in those briefs that were not presented by OPC's expert witnesses because they are *legal* issues. Among other things, OPC's initial brief argued that the Commission should apply a uniform decisional standard when reviewing BGE's proposed investments and budgets; contended that it is unlawful for the Commission to authorize accelerated recovery of gas infrastructure replacements outside of STRIDE through a ratemaking construct solely of the agency's design; and explained the law requiring that the improvements to the Baltimore City conduit system—if capitalized at all—to be capitalized at the shorter of the term of BGE's lease with the City or the life of the investments. Consequently, while it is generally clear from the order where the Commission reached results that are at odds with OPC's arguments, the Commission did not explain why it rejected those arguments.

The Commission erred on the merits of several OPC arguments and acted arbitrarily and capriciously by failing to provide reasoned analyses to support the Commission's decisions. Moreover, the lack of a clear and uniform standard to guide the Commission's decision-making and anchor BGE's statutory burden of



proof on “every element” of its proposed rate increase leads to outcomes that are inconsistent and—in several instances—erroneous.

The Commission’s errors are especially pronounced on matters for which the Commission departs from its own precedent and longstanding principles of utility regulation. For example, Order No. 90948 provides no explanation for the decision to depart from precedent set in Case No. 9645 by authorizing recovery of STRIDE surcharge overages through the MRP reconciliation rider and introduces a novel conception of due process without *any* legal analysis or justification.

As will be discussed below, rehearing or clarification is warranted given Order No. 90948’s errors of law in Order 90948 and its failure to adequately and thoroughly address several critical legal issues that BGE’s MRP application implicates.

### **STATEMENT OF ISSUES**

Pursuant to COMAR 20.07.02.08C, OPC submits that Order No. 90948 contains the following unlawful, erroneous, unsubstantiated, and arbitrary and capricious findings and conclusions:

1. Because the Commission applied different decisional standards to different BGE investment plans, it appears that the Commission rejected OPC’s argument that the Commission should use a uniform “reasonable and prudent” standard to determine whether proposed investments may be rate-based. However, the Commission did not explicitly address OPC’s argument. OPC therefore requests that the Commission clarify whether it is rejecting OPC’s argument or declining to address it.

2. The Commission's conclusion that terminating the MRP violates BGE's due process rights is erroneous.
3. The Commission's decision to approve BGE's proposed conduit expenditures is legally erroneous and arbitrary and capricious because (a) BGE failed to carry its burden of proof; (b) it violates long-standing ratemaking and accounting principles embedded in Maryland law; and (c) fails altogether to address points raised by OPC.
4. Order No. 90948 does not state the basis of the Commission's decision to allow recovery of STRIDE-eligible capital investment costs through MRP base rates and does not explain its decision to depart from prior precedent and allow recovery of 2021 and 2022 STRIDE surcharge overages.
5. Order No. 90948 fails to address whether BGE must consider alternatives to gas distribution infrastructure replacement pursued through Project 60677 and is inconsistent with the policy on non-pipeline alternatives set forth in its recent decision in CN 9704.<sup>2</sup>

As further discussed below and pursuant to COMAR 20.07.02.08D, compliance with the Commission's decisions in Order No. 90948 would result in unjust and unreasonable rates for Maryland residential ratepayers, and that harm justifies modification of the order as discussed in this motion.

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<sup>2</sup> Case No. 9704, *Washington Gas Light Company's Application for Authority to Increase Rates and Charges for Natural Gas Services*, Order No. 90943 (Dec. 14, 2023).

## ARGUMENT

- I. **The Commission should clarify the decisional standard or standards it used in Order No. 90948 to review and approve, modify, or deny BGE’s proposed MRP investments and budgets.**
  - A. **Order No. 90948 does not address OPC’s argument for a “reasonable and prudent” standard to evaluate BGE’s proposed investments but applies several conflicting standards.**

In its initial brief, OPC explained that the Commission’s past MRP orders left unclear what standard, if any, the Commission had used to approve or deny investments and budgets proposed by utilities. OPC argued that adoption of a clear standard was critical for MRP decisions to result in just and reasonable rates.<sup>3</sup> Specifically, OPC argued that the Commission should evaluate proposed MRP investments and budgets under the standard established by the General Assembly for investments and budgets proposed under STRIDE; namely, whether they are reasonable and prudent.<sup>4</sup>

Neither BGE nor any other party responded to this argument in their reply briefs, and the Commission did not address the argument in Order No. 90948. In practice, however, the order applies OPC’s proposed standard to some BGE investment proposals and different standards to other BGE investment proposals.

For most BGE investments, the Commission appears to have adopted OPC’s proposed standard by (1) first assessing the reasonableness and prudence of a proposed investment on the project or program level and then, for investments

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<sup>3</sup> OPC Initial Br. at 6–7.

<sup>4</sup> *Id.*

that met that test, (2) evaluating BGE’s proposed budgets and reducing them to the extent that they failed, in the Commission’s estimation, to adequately balance system improvement investment needs with ratepayer impacts. Examples of this approach include:

- **BGE’s 4kV conversion project.** The Commission found that this project would “improve the restoration capability of BGE’s distribution system”<sup>5</sup> and could be expected to “significantly improve reliability,”<sup>6</sup> but accepted Staff’s proposal to reduce BGE’s budget from \$51.7 million to \$43.8 million because the lower amount “strikes an appropriate balance between the need to continue 4kV conversion, and the goal of minimizing burden on ratepayers.”<sup>7</sup>
- **BGE’s cable replacement program.** The Commission found that this program “is an important part of BGE’s reliability programs,”<sup>8</sup> but likewise decided to “reduce [BGE’s] rate of spending to balance financial impacts to ratepayers.”<sup>9</sup>
- **BGE’s proactive substation transformer and oil circuit breaker replacements program.** The Commission found that the company’s program was “reasonable”<sup>10</sup> but again reduced BGE’s proposed budget for transformer replacements “to balance the benefits of this program against costs to ratepayers.”<sup>11</sup>
- **BGE’s gas meter conversion project.** The Commission denied BGE cost recovery for this program because it found it to be unreasonable, determining that “it would not be a prudent use of ratepayer funds to scrap existing meters that have not reached the end of their useful life,”<sup>12</sup> and that BGE had failed to

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<sup>5</sup> Order No. 90948 at 57.

<sup>6</sup> *Id.* at 58

<sup>7</sup> *Id.* at 59

<sup>8</sup> *Id.* at 65.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 94.

<sup>11</sup> *Id.* at 95.

<sup>12</sup> Order No. 90948 at 150-51.

demonstrate that the benefits of the new meters would outweigh the cost of their installation.<sup>13</sup>

Additional instances in which the Commission appears to have used a “reasonable and prudent investment and budget” standard are the decisions concerning BGE’s fiber optics communication program,<sup>14</sup> proactive service replacement program,<sup>15</sup> blue sky vegetation management program,<sup>16</sup> gas transmission investments,<sup>17</sup> and resilience investment plan.<sup>18</sup>

In other cases, however, the Commission appears to have rejected OPC’s proposed standard. Examples include:

- **BGE’s “Priority 3” projects.** The Commission approved most of BGE’s proposed projects without any findings of their reasonableness or prudence, either on the project level or on the budget level, while finding that Staff’s recommendation to remove certain projects to balance rate stability with rising utility costs and revenues was “reasonable.”<sup>19</sup>
- **BGE’s EAM 2.0 project.** The Commission approved BGE’s proposed project based on a finding that it would “provide important benefits” on a project level,<sup>20</sup> but with respect to costs and benefits, agreed with Staff that BGE had failed to consider alternatives or provide cost benchmarks to show that the project was a prudent investment.<sup>21</sup>
- **BGE’s conduit and ADMS projects.** The Commission approved BGE’s proposed conduit and ADMS expenditures without any

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<sup>13</sup> *Id.* at 150. The Commission also found that the project “could leave customers, or shareholders, holding the proverbial bag as gas consumption is reduced.” *Id.* at 151.

<sup>14</sup> *Id.* at 111-113.

<sup>15</sup> *Id.* at 135-136.

<sup>16</sup> *Id.* at 117-118.

<sup>17</sup> *Id.* at 141-144.

<sup>18</sup> *Id.* at 83-86.

<sup>19</sup> *Id.* at 156-157.

<sup>20</sup> *Id.* at 163.

<sup>21</sup> Order No. 90948 at 64.

clear reasons or analysis, again while noting significant shortcomings in BGE's consideration of alternatives and analysis of costs and benefits.<sup>22</sup>

Moreover, the Commission's approval of BGE's expenditures for the conduit, EAM 2.0, and ADMS projects stands in stark contrast to its denial of BGE's expenditures for its blue-sky vegetation management program and its gas meter conversion project. In the latter two cases, the Commission denied cost recovery in part due to BGE's failure to conduct benefit-cost analyses. However, for the conduit, EAM 2.0, and ADMS, the Commission approved cost recovery despite BGE's failure to adequately analyze costs, benefits, and alternatives, and directed BGE to conduct analyses to cure those shortcomings so that the Commission could consider them in future prudency reviews.

**B. The Commission should grant OPC's request for the use of a "reasonable and prudent" decisional standard concerning proposed investments and budgets and clarify any additional or alternative standards it is applying.**

Based on the foregoing examples, it appears that the Commission has applied OPC's proposed decisional standard for BGE's investments and budgets in some instances but not others. OPC asks the Commission to explicitly address OPC's request for the use of a "reasonable and prudent" standard to determine whether proposed investments and budgets should be included in base rates and

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<sup>22</sup> *Id.* at 165, 101-102. For a detailed discussion of the Commission's decision on BGE's proposed conduit expenditures, see Section III *infra*.

clarify the extent to which it is applying a different standard (or declining to adopt a standard).

This MRP sets utility rates, and as Order No. 90948 notes, “[a] public utility must charge just and reasonable rates for the regulated services that it provides.”<sup>23</sup> In addition, MRPs are alternative forms of rate regulation and, as such, must protect consumers, ensure reliability of regulated utility services, and serve the public interest.<sup>24</sup>

In a conventional rate case, the Commission establishes just and reasonable rates by “examining the utility’s income and expenses during a test year, calculating the rate base ... during that year, determining the utility’s cost of capital ... and then multiplying that rate of return against the rate base. The result is the amount of income to which the utility is entitled.”<sup>25</sup> Determining what investments should be included in rate base is largely a matter of determining whether investments are used and useful and were prudently incurred,<sup>26</sup> and the utility has the burden of proof on both counts.<sup>27</sup>

In an MRP, by contrast, the Commission sets base rates based on the forecasted costs of investments a utility proposes to make while the base rates are in effect. But it remains true that as the Commission’s order notes, “in a

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<sup>23</sup> Order No. 90948 at 241, citing PUA § 4-201.

<sup>24</sup> PUA § 7-505.

<sup>25</sup> *Maryland Office of People's Counsel v. Maryland Public Service Com'n*, 226 Md.App. 176 182-83, (Md. App. 2015) (citations omitted).

<sup>26</sup> *Id.* at 182.

<sup>27</sup> PUA § 3-112.

proceeding involving a temporary or permanent new rate, or a temporary or permanent change in rate, the burden of proof is on the proponent of the new rate or change of rate.”<sup>28</sup> In addition, rates must still be just and reasonable and the Commission is tasked with ensuring utilities operate in the “interest of the public.”<sup>29</sup>

The fact that the burden of proof remains with the utility begs the question of what standard or test the utility’s burden of proof attaches to. Or, stated more simply: what must the utility prove to meet its burden before the Commission may approve (or modify) proposed investment budgets for inclusion in rates?

OPC proposes its “reasonable and prudent investment” standard as an answer to this question and posits that an MRP rate cannot be just, reasonable, protective of consumers, and consistent with the public interest unless it is based on investments and budgets that the Commission has determined to be reasonable and prudent. In Order No. 90948, the Commission appears to have applied this standard to some of BGE’s proposed investments while applying different—and in some instances conflicting—standards to others. To ensure that BGE’s statutory burden of proof attaches to its proposed investments and mitigate the risk of ad hoc and arbitrary decision-making, the Commission should grant OPC’s request for the use of a “reasonable and prudent” decisional standard concerning proposed

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<sup>28</sup> Order No. 90948 at 241, citing PUA § 3-112.

<sup>29</sup> PUA §§ 2-113, 5-303.



investments and budgets and clarify any additional or alternative standard or standards it is applying.

**II. The Commission erroneously found that terminating the MRP would violate BGE’s due process rights.**

OPC’s threshold argument in this proceeding was for the Commission to terminate the MRP pilot and transition back to standard cost-of-service ratemaking. OPC made its argument at the outset of this case. The direct and surrebuttal testimonies of OPC witnesses Alvarez-Stephens discussed, at length, the problems with the Commission’s MRP construct and detailed examples of how MRPs in Maryland have harmed consumers and are not consistent with the public interest.<sup>30</sup> Both of OPC’s post-hearing reply briefs set forth the factual and legal grounds for terminating MRPs.<sup>31</sup> BGE opposed OPC’s request, supporting its position with testimony from multiple witnesses as well as responding to OPC’s position and arguments in both its initial and reply briefs.<sup>32</sup>

The Commission’s primary basis for continuing the MRP is a *sua sponte* finding that terminating the MRP would “contravene BGE’s due process rights . . . after Commission notices established this proceeding as an MYP and the parties

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<sup>30</sup> OPC Exhibit 41A (Panel Direct Testimony of Paul J. Alvarez and Dennis Stephens) at 13:05 – 48:15, 95:02 – 109:03; OPC Exhibit 42A (Panel Surrebuttal Testimony of Paul J. Alvarez) at 3:03 – 35:12.

<sup>31</sup> OPC Initial Br. at 7–14; OPC Reply Br. at 4 –9.

<sup>32</sup> BGE Exhibit 46A (Rebuttal Testimony of Mark D. Case) at 3:23 – 14:08; BGE Exhibit 43 (Rebuttal Testimony of David M. Vahos) at 2:06 – 6:02; BGE Exhibit 37 (Rebuttal Testimony of John C. Frain) at 44:05 – 48:08; BGE Exhibit 5 (Rebuttal Testimony of Derrick A. Dickens) at 15:01 – 16:09; BGE Initial Br. at 4, 15–18; BGE Reply Br. at 3, 6–11.

largely proceeded on that basis.”<sup>33</sup> The Commission’s finding on this issue relies on a flawed application of law and is belied by the evidentiary record. Most significantly, it would constitute an inappropriate expansion of procedural rights, potentially inhibiting the Commission’s role in what the Maryland Supreme Court has characterized as the State’s “pervasive” and “extensive” regulation of utility monopolies.<sup>34</sup> The Commission should correct this misstatement of Maryland law and avoid inappropriate and unnecessary limitations on its ability to effectively regulate Maryland utilities.

**A. Neither Maryland law nor the evidentiary record supports the Commission’s unprecedented finding that terminating the MRP would violate BGE’s due process rights.**

There can be no procedural due process violation where a party has notice, presented evidence, cross-examined witnesses, and fully briefed an issue before the Commission. Maryland law does not support a procedural due process violation<sup>35</sup> where a party has been afforded “notice and a meaningful opportunity to be heard.”<sup>36</sup> In the context of administrative adjudication, notice and the

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<sup>33</sup> Order No. 90948 at 9.

<sup>34</sup> *Delmarva Power & Light CO. v. Pub. Service Com’n of Md.*, 370 Md. 1, 7 (2002).

<sup>35</sup> OPC understands the “due process” addressed in Order No. 90948 as procedural due process. Substantive due process “refers to the principle that there are certain liberties protected by the due process clauses in the federal and State Constitutions from government interference.” *Powell v. Md. Dept. of Health*, 455 Md. 520, (2017). To the extent Order No. 90948 may implicate a substantive due process violation, no provisions of the federal or State Constitution entitles BGE (or any public service company) to a multi-year rate plan or approval of any proposed rate increase.

<sup>36</sup> *Roberts v. Total Health Care, Inc.*, 349 Md. 499, 509 (1998).

opportunity to be heard is afforded though the elements of a trial type hearing, including:

- notice of the subjects and issues involved in the case;
- opportunity to present evidence and argument and rebut adverse evidence through cross examination;
- having a decision based only on evidence introduced into the record of the hearing; and
- having a complete record of the proceeding that includes copies of record evidence and papers filed in the proceeding and transcripts of live testimony and hearings.<sup>37</sup>

Stated otherwise, a party is afforded due process if it has notice, is given the opportunity to present its case, and the resulting decision is based solely on the evidence and arguments presented to the administrative agency during a hearing on the matter. Indeed, there are no prior Commission cases finding a due process violation where a party has presented evidence, cross-examined witness, and filed briefs with the Commission.

**1. BGE and all parties had sufficient notice that the Commission could deny BGE's request for an MRP.**

BGE's filing of its case as an MRP does not obviate the fact that it was on notice that the Commission could deny it. Indeed, it cannot be reasonably disputed that BGE has long been on notice that MRPs continue to be evaluated for their impacts and are subject to being pulled back. *First*, there is no inherent right to a multi-year plan recognized in the Public Utilities Article. Nor does the

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<sup>37</sup> *Boehm v. Anne Arundel County*, 54 Md. App. 497, 512 (1983).

Commission order establishing the MRP pilot require the pilot utility to file a second MRP.<sup>38</sup> In fact, the framing of the initial MRP as a “pilot” provides notice that the “pilot” may be subject to change, withdrawn, or terminated at a future point.

*Second*, as required by the pilot order, BGE proposed an off-ramp procedure that any party could invoke. The party would file a petition with “a recommended proposal, timeline and procedural schedule.”<sup>39</sup> The procedural rights envisioned for the off-ramp process—notice provided through the filing of a petition and the opportunity be heard through a litigated proceeding—are akin to those BGE was actually afforded *in this case*. Just like the off-ramp is not barred by due process, the fact that BGE filed its case as an MRP does not create a due process right to an order that sets rates for multiple years.

*Third*, commissioner dissents to Order No. 89868 in Case No. 9655 put BGE on further notice that a subsequent MRP application may not be approved. Commissioner Linton’s dissent argued against approving additional MRPs until the pilot was complete, noting that a stand-alone MRP application could be rejected if it is not “consistent with the public good” or “is not in the public

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<sup>38</sup> Order No. 89482 at 30 (“Accordingly, the Pilot Utility must file a new rate case at least 210 days prior to the conclusion of the authorized Pilot MRP period. The new rate case must have an effective date that would take effect immediately at the close of the final year of the Pilot MRP.”). Further, in Case No. 9645, BGE witness Case stated that BGE will file “a traditional rate case or a new MRP application at least 210 days prior to January 1, 2024. . . .”). Case No. 9645, *Baltimore Gas and Electric Company’s Application for an Electric and Gas Multi-Year Plan*, BGE Exhibit 4 (Direct Testimony of Mark D. Case) at page 22, line 22 through p. 23, line 1.

<sup>39</sup> Case No. 9645, *Baltimore Gas and Electric Company’s Application for an Electric and Gas Multi-Year Plan*, BGE Exhibit 4 (Direct Testimony of Mark D. Case) at page 23, lines 1–13.

interest” at the time it is filed, and that “Pepco witnesses testified that the Commission has the authority to reject an MRP filing and convert it to a traditional historic test year case.”<sup>40</sup> Commissioner Herman’s dissent states that she “would have denied the Company’s Application in this case and attempted to set rates on the basis of a historic test year.”<sup>41</sup> In other words, Commissioner Herman suggested the Commission could take the *very same approach* that OPC witnesses Alvarez-Stephens and Effron advocated for in rejected BGE’s MRP 2.

*Fourth*, the Commission clearly has authority to deny an application for a rate increase. Here, that means the Commission can deny BGE’s MRP. That authority to deny the MRP subsumes the authority to accept the filing and set standard rates that will be in effect until further order of the Commission, all without implicating due process. BGE’s rights would be fully protected because it would retain the right to file a new rate application that the Commission would then review and approve or deny. None of these outcomes implicate due process.

**2. The facts do not support the conclusion that BGE lacked an opportunity to be heard.**

Aside from notice, any conclusion that BGE lacked an opportunity to be heard on whether the Commission should convert the MRP into a standard rate case lacks factual support. BGE never disputed that it had a meaningful opportunity to be heard on the issue of whether MRPs should continue in

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<sup>40</sup>Case No. 9655, *Potomac Electric Power Company’s Application for an Electric Multi-Year Rate Plan*, Order No. 89868, Dissenting Statement of Commissioner Odogwu Obi Linton at 5–7.

<sup>41</sup> Order No. 89868, Dissenting Statement of Commissioner Mindy L. Herman at 1.

Maryland. OPC first raised these issues in the filed direct testimony of Messrs. Alvarez and Stephens.<sup>42</sup> The rebuttal testimonies of BGE witnesses Case, Vahos, Frain, and Dickens directly responded to the issues concerning the MRP construct raised by OPC's witnesses and provided evidence supporting BGE's preference to retain the MRP construct.<sup>43</sup> BGE had more than two months to seek discovery from OPC and its witnesses on this issue. During the evidentiary hearings, BGE's witnesses provided additional live testimony—through responses to questions from OPC counsel—in support of the MRP construct,<sup>44</sup> and BGE had the opportunity to cross examine Messrs. Alvarez and Stephens on their testimony concerning the MRP construct.<sup>45</sup> Additionally, BGE devoted more than 10 pages of its post-hearing briefs solely to the issue of whether the MRPs should be retained.<sup>46</sup>

Nowhere in its briefs does BGE raise any issue with its due process rights being deprived if the Commission were to agree with OPC's position and terminate its MRP. In fact, BGE witness Case stated during the evidentiary hearing that BGE was not challenging the Commission's authority to terminate the MRP.<sup>47</sup>

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<sup>42</sup> OPC Exhibit 41A (Panel Direct Testimony of Paul J. Alvarez and Dennis Stephens) at 13:05 – 48:15, 95:02 – 109:03; OPC Exhibit 42A (Panel Surrebuttal Testimony of Paul J. Alvarez) at 3:03 – 35:12.

<sup>43</sup> BGE Exhibit 46A (Rebuttal Testimony of Mark D. Case) at 3:23 – 14:08; BGE Exhibit 43 (Rebuttal Testimony of David M. Vahos) at 2:06 – 6:02; BGE Exhibit 37 (Rebuttal Testimony of John C. Frain) at 44:05 – 48:08; BGE Exhibit 5 (Rebuttal Testimony of Derrick A. Dickens) at 15:01 – 16:09.

<sup>44</sup> Tr. 1113:20 – 1135:08 (Case).

<sup>45</sup> Tr. 1267:3 – 1286:6 (Alvarez-Stephens).

<sup>46</sup> BGE Initial Br. at 4, 15–18; BGE Reply Br. at 3, 6–11.

<sup>47</sup> Tr. 1136:5–8:

There is no legal or factual basis to conclude that the MRP cannot be terminated without infringing BGE's due process rights. BGE applied for an MRP with full awareness that the Commission retained authority to reject any rate application that is not in the public interest. Further, BGE fully engaged with OPC's arguments as to why the MRP should be terminated and presented its case arguing why MRPs should be retained. The Commission's finding that terminating BGE's MRP would violate the utility's "due process rights" is erroneous.

**B. Order No. 90948's due process finding is harmful to the public interest, including the Commission's discretion to regulated public utilities and the interests of intervenors.**

The Commission's regulation of public service companies is "pervasive."<sup>48</sup> The PUA affords the Commission broad discretion in approving or rejecting rate case applications. Section 4-102 broadly authorizes the Commission "to set a just and reasonable rate of a public service company," with section 4-101 setting forth only three conditions required of "just and reasonable" rates: (1) the rate does not violate of the public utilities article; (2) the rate "fully considers and is consistent with the public good;" and (3) the rate results in an operating income that yields a reasonable return on the fair value of a utility's used and useful property. Section 2-112 further provides the Commission "has the implied and incidental powers needed or proper" to exercise its regulatory authority and that the Commission's

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Q. (OPC Counsel) Is it the company's position that the Commission does not have the authority to terminate MRP's in this proceeding?

A. (Case) No, it isn't.

<sup>48</sup> *Delmarva Power & Light Co. v. Public Service Com'n of Maryland*, 370 Md. 1, 7 (2002).

powers “shall be construed liberally.”<sup>49</sup> Moreover, given the considerable regulatory authority and discretion afforded to the Commission, “every final decision, order, or regulation of the Commission is prima facie correct.”<sup>50</sup>

Yet Order No. 90948’s interpretation of “due process” risks curtailing how the Commission may exercise its broad authority. The order concludes—with no supporting analysis—that terminating the MRP would violate BGE’s due process rights because “Commission notices established this proceeding as an MYP and the parties largely proceeded on that basis.”<sup>51</sup> While BGE may have filed an application for a second MRP, the case is, more broadly, an “application for authority to adjust its retail rates” over which the Commission retains broad discretion.<sup>52</sup> The Commission has broad rate setting authority, and it should not constrain its own authority to set rates as appropriate where—as here—the issues have been vetted through litigation.

Order No. 90948’s conclusion that the scope of the Commission’s review is limited to the “basis” of what has been filed risks curtailing the Commission’s regulatory discretion. The Public Utilities Article does not limit the Commission’s authority to consider or address issues raised by a party in a rate case. So long as the decision and order is “based on consideration of the record,” “in writing,” and

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<sup>49</sup> PUA §§ 2-112(b), (c).

<sup>50</sup> PUA § 3-203.

<sup>51</sup> Order No. 90948 at 9.

<sup>52</sup> Order No. 90513 at 1, *Order Initiating Docket, Suspending Tariff Revisions, and Scheduling Prehearing Conference*.



states the grounds for the Commission’s conclusions,<sup>53</sup> the Commission has discretion to decide on issues raised by other parties outside of the filing initiating the proceeding. Under the precedent set in Order No. 90948, the Commission opens the door to parties raising a due process issue any time it decides an issue first raised by Staff, OPC, or an intervening party. Order No. 90948’s largely unexplained “due process” language signals an unnecessary and undue limitation the Commission’s ability to exercise its authority to set just and reasonable rates that “are consistent with the public good” and should be removed on rehearing.<sup>54</sup>

Aside from implicating the Commission’s discretion in rate cases, the broad declaration that deciding an issue properly raised in a litigated rate case proceeding can harm a party’s “due process rights” has implications for Staff, OPC, and intervenors in pending and future rate cases. Order No. 90948 provides no indication of what amount of notice and opportunity would be appropriate to avoid raising a due process issue if a party introduces an issue not addressed in an applicant’s initial filing. Order No. 90948 indicates that accepting any argument first raised in an intervenor’s filed testimony risks infringing on an applicant’s due process rights, irrespective of whether the applicant has addressed the issue in filed testimony, during cross-examination, and in its post-hearing briefs.

This narrow view of what constitutes due process unwittingly risks allowing filing parties to control the issues that may be addressed in litigated

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<sup>53</sup> PUA § 3-113(a).

<sup>54</sup> PUA § 4-101(2).

proceedings. Intervenors should not be prevented from raising a relevant and appropriate issue implicated by a utility's filing—such as whether MRPs can ensure just and reasonable rates—because it was not part of the rate application.<sup>55</sup> More problematically, a future Commission could rely on the precedent set by Order No. 90948 to dismiss issues raised by intervening parties that it does not want to address on the merits. This outcome is detrimental to residential ratepayers and harmful to the public interest.

\* \* \*

The unsupported and unprecedented finding in Order No. 90948 that terminating the MRP would violate BGE's due process rights is contrary to law and unsupported in the evidentiary record. This finding harms the public interest by reducing the Commission's regulatory discretion and prejudices intervenors' ability to raise issues before the Commission. The Commission should rehear its finding that terminating the MRP would violate BGE's due process rights and, on rehearing, address the issue of whether to terminate BGE's MRP on its merits.

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<sup>55</sup> In the ongoing litigation concerning Pepco's MRP 2, OPC's filed testimony challenged whether Pepco's MRP should be rejected and terminated. It is unclear to OPC whether, in light of Order 90948, the fact that Pepco filed its application for rate increase as an MRP precludes OPC from raising these arguments.

**III. Order No. 90948 erred in approving BGE’s proposed conduit expenditures because BGE failed to show that capitalizing those investments as “fixed assets” would result in just and reasonable rates and imprudently entered into its 2023 agreement with Baltimore City.**

Order No. 90948 approves BGE’s proposed conduit expenditures with no clear reason for doing so other than that the approval is consistent with Staff’s recommendation. This is not a legally sufficient reason for approval; moreover, OPC’s initial brief presents legal arguments—which the order arbitrarily fails to address—showing why approval is unlawful and improper.

Put simply, BGE failed to show either that it is lawful for it to capitalize its conduit expenditures for 50 years or that it acted reasonably and prudently in entering into the 2023 conduit agreement with the City. Approval of BGE’s conduit expenditures would therefore result in unjust and unreasonable rates, and for that reason OPC requests that the Commission modify its order to deny BGE approval of its proposed conduit expenditures. The Commission should instead authorize BGE to recover \$32.31 million per year in operations and maintenance expenses for the conduit over the term of the MRP, as recommended by OPC’s initial brief.<sup>56</sup>

Should the Commission decline to modify its order, OPC requests that the Commission clarify the reasons for its decision, explicitly address the arguments in OPC’s brief, and clarify the parameters for the benefit-cost analysis that it ordered BGE to conduct.

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<sup>56</sup> OPC Initial Brief at 39, footnote 215.

**A. Order No. 90948 does not provide a legal or reasoned basis for the Commission’s decision to approve BGE’s recovery of its proposed conduit expenditures as a capital asset.**

The Commission’s decision approving BGE’s proposed conduit expenditures consists of three paragraphs.<sup>57</sup> The first announces the Commission’s decision, while the second finds that the evidentiary record in the case “is unclear as to whether [BGE’s 2023 conduit agreement with Baltimore City] will inure to the benefit of ratepayers or impose significant future burdens.”<sup>58</sup> The second paragraph also notes that Staff and OPC identified numerous reasons to question the prudence of BGE’s decision to execute the agreement, and summarizes several of those reasons. It does not acknowledge any of the legal arguments raised in OPC’s Initial Brief, however.

The third paragraph begins, “For all of these reasons, the Commission will authorize BGE’s proposed expenditures associated with the new Baltimore City Conduit agreement, but the Commission will require that BGE provide a benefit cost analysis....”<sup>59</sup> This statement is problematic because all the “reasons” to which the Commission refers are examples of ways in which BGE failed to show that its decision to enter into the conduit agreement was reasonable and prudent, and therefore are reasons for the Commission to *disapprove* BGE’s proposed conduit expenditures.

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<sup>57</sup> Order No. 90948 at 101-102.

<sup>58</sup> *Id.* at 101.

<sup>59</sup> *Id.* at 102.

The issues identified in the Commission’s second paragraph—and the additional issues discussed in OPC’s initial brief, which are summarized below—show that BGE failed to carry its burden of proof regarding its proposed conduit expenditures. The lawful and appropriate Commission response to this failure is disapproval of BGE’s request for cost recovery. Instead, the Commission approved cost recovery without further explanation except to say that Staff recommended it. But as OPC noted in its reply brief, Staff at trial did not articulate any reason for its recommendation other than the fact that a prudency review will be conducted in the future:

...[T]ypically in the way MRPs are set up here, we do the prudency review at the time of reconciliation. So that’s the reason why I did not ... recommend a disallowance at this point. They would still be subject to ... a prudency review in 2026 and 2027, so I didn’t prejudge the prudency of it right now.<sup>60</sup>

Effectively, Staff’s reasoning—which the Commission appears to have adopted—is that any reasons to doubt the prudency of a proposed utility investment can be disregarded when MRP rates are established because of the prudency review that will be conducted at the reconciliation stage of the case. But this approach is contrary to the statutory directive that a utility seeking a rate increase bears the burden of proof for every element of its request,<sup>61</sup> and—as a result—also contrary to the requirement that rates be just and reasonable. Among

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<sup>60</sup> OPC Reply Brief at 37, citing Tr. 1553:11-18 (Dererie).

<sup>61</sup> PUA § 3-112(b)

other things, if a utility fails to carry the burden for an element of a rate increase but the rate increase is granted nonetheless, the resulting rate necessarily violates PUA § 4-101(1).<sup>62</sup>

As OPC showed in initial brief, and as is discussed in detail below, there are several reasons in addition to those discussed in Order No. 90948 why BGE failed to carry its burden of proof that its proposed conduit expenditures are reasonable and prudent and will result in just and reasonable rates.

**B. BGE failed to show that it should be permitted to capitalize improvements to the conduit over the 50-year lifetime of those improvements.**

Sections IV.A and IV.C of OPC’s initial brief discuss BGE’s proposal to depreciate its improvements to the conduit over the 50-year lifetime of those improvements. In Section IV.A,<sup>63</sup> OPC notes that, generally, utilities may rate-base only assets that they own and explains that this restriction is important because as customers pay for a utility asset through depreciation expense, they acquire a benefit—a legally cognizable interest in the asset. This legal interest is reflected in ratepayer compensation for any “net salvage” value. It is also reflected in the treatment of a depreciated asset that is sold, giving ratepayers the benefit of any market value over book value<sup>64</sup>. That interest is analogous to the interest

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<sup>62</sup> PUA § 4-101(1) states, “In this title, ‘just and reasonable rate’ means a rate that... does not violate any provision of this article.”

<sup>63</sup> OPC Initial Brief at 38-39.

<sup>64</sup> *See, e.g.*, PUA § 7-513(e)(2) (requiring an “equitable allocation of costs or benefits between shareholders and ratepayers” and outlining factors to be considered by the Commission in allocating costs and benefits from the liquidation of utility generation assets under the Electric Customer Choice and Competition Act of 1999).

homebuyers acquire as they pay down the principal when making mortgage payments; the homebuyer has the benefit over the entire life of the mortgage and whenever the house is sold, the homeowner gets the benefit of any sale price above the outstanding principal on the mortgage.

Section IV.C of OPC's Initial Brief<sup>65</sup> discusses the leasehold improvement exception to the general rule that only investments in assets that a utility owns are placed into rate base to generate investor profits. The leasehold improvement exception says that when a utility leases an asset—as BGE leases the conduit system—the utility may amortize the costs of its improvements and earn a profit from its investment. But that exemption has a limitation to ensure fair treatment to ratepayers; namely, that the period over which the asset must be amortized is the shorter of (i) the lifetime of the lease or (ii) the lifetime of the asset. In the case of the conduit, the term of BGE's 2023 agreement with the City is through the end of 2026.<sup>66</sup>

Order No. 90948 did not address either the general rule against rate-basing assets a utility does not own or the applicable leasehold improvement exception. Nor does it explain how it is fair for utility customers to pay for depreciation and utility profits on an investment when they get no corresponding benefit and the utility takes on no corresponding risk. Thus, it is unclear on what grounds the Commission rejected OPC's arguments.

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<sup>65</sup> OPC Initial Brief at 41-43.

<sup>66</sup> See OPC Exhibit 20 (2023 conduit agreement). See also BGE Exhibit 43B (Exhibit DMV-11).

In its reply brief, BGE suggests that OPC is arguing that utilities may *never* capitalize assets they do not own and cites the definition of “own” in the Public Utilities Article for the proposition that they can.<sup>67</sup> (PUA § 1-101 defines the term “own” to include plant that a utility leases). But OPC is not arguing that capitalization of assets not owned by utilities is never appropriate. OPC is arguing that because BGE leases the conduit system, improvements could be capitalized only as leasehold improvements, i.e., amortized over the shorter of the term of the lease or the lifetime of the improvement.<sup>68</sup> Stated otherwise, the issue is not whether the term “own” in the Public Utilities Article can also mean “lease” (OPC acknowledges that it can), but whether allowing BGE to rate-base and profit for fifty years on improvements made to an asset that it leases for which ratepayers can receive no benefit that corresponds to their depreciation payments would result in a reasonable return on BGE’s spending to improve leasehold property.

OPC posits that such a return is not reasonable and obligates customers to pay for utility profits on an asset for which the utility incurs no risk and there is no certainty that customers will receive a benefit. Moreover, it is improper for customers to fund improvements on an asset that the utility leases without any arrangement to collect contributions from other conduit tenants or certainty

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<sup>67</sup> BGE Reply Br. at 35.

<sup>68</sup> BGE has not proposed to capitalize its improvements to the conduit in this manner and OPC has not analyzed the rate impact that this manner of capitalization would have.



concerning BGE's obligations to pay for conduit occupancy after the term of the 2023 agreement.

BGE also argues in its reply brief that its "fixed asset" characterization of conduit expenditures is "confirmed by PricewaterhouseCoopers, BGE's independent auditor."<sup>69</sup> But BGE never presented testimony from PricewaterhouseCoopers, only hearsay testimony from BGE witness Vahos to which OPC properly objected.<sup>70</sup>

Equally important, as DMV-11 shows, the conclusions reached by BGE's accountants and PricewaterhouseCoopers depend on its circular position that it can treat the conduit improvements as if they were utility-owned fixed assets *because* it was anticipating that the Commission would approve its proposal.<sup>71</sup> But BGE's *hope* for approval cannot logically serve as the *basis* for the Commission's approval. Finally, BGE's change at the hearing to describe the conduit improvements as a "fixed asset" rather than a "leasehold improvement" (as it stated in testimony and in response to discovery requests) still leaves the question of how a utility can capitalize improvements on a "fixed asset" for which it holds only a leasehold interest.

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<sup>69</sup> BGE Reply Brief at 35.

<sup>70</sup> Tr. 900:4-10, 955:18-20.

<sup>71</sup> BGE Exhibit 42B (Exhibit DMV-11) at 7.

**C. BGE failed to show that it acted reasonably and prudently in entering into its 2023 conduit agreement with Baltimore City.**

As is discussed in section IV.B of OPC’s initial brief,<sup>72</sup> BGE’s decision to enter into the 2023 conduit agreement with Baltimore City was unreasonable and imprudent for at least three reasons: *First*, BGE failed to analyze the long-term costs of the agreement for customers.<sup>73</sup> *Second*, BGE executed the agreement two days before filing its MRP application, presenting it to the Commission as a *fait accompli* rather than the extraordinary departure from BGE’s prior, long-term arrangement with Baltimore City that it is. *Third*, BGE took no action to secure financial contributions from other conduit tenants who will benefit from BGE’s improvements.<sup>74</sup>

Based on these facts, BGE’s decision to enter into agreement was unreasonable and imprudent and the Commission should deny BGE “fixed asset” recovery of its conduit expenditures through MYP rates for that reason.

Order No. 90948’s deferral of *any* determination of BGE’s prudence until it can review a benefit-cost analysis at the reconciliation stage of this case is both unnecessary and unreasonable because prudence analysis is based on the facts

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<sup>72</sup> OPC Initial Br. at 39–41.

<sup>73</sup> There is no factual agreement in this case that BGE would have a 50-year revenue requirement for its conduit investments if they are permitted to be capitalized as “fixed assets.” *See* Tr. 961:10-962:11. Nor did BGE dispute that there will be additional costs from whatever new agreement with the City may follow the current agreement. Tr. 978:2-16. BGE did not even dispute the calculation of OPC witnesses Alvarez and Stephens that the nominal cost of this revenue requirement would be \$860 million, only (in the rejoinder testimony of Mr. Vahos) the net present value (NPV) of that amount. *See* Tr. 896:22-898:10. Mr. Vahos did not, however, provide any workbook to substantiate his NPV calculations.

<sup>74</sup> Indeed, Mr. Vahos testified that BGE did not even know the identity of those tenants. Tr. 963:15-16.

known to (or not investigated by) the utility at the time of its decision—and the record is clear on those facts now. And the decision is arbitrary because, as noted *supra*, in other instances in Order No. 90948 the Commission denied cost recovery of proposed BGE projects due to BGE’s failure to perform important threshold analysis—including, in the case of the blue-sky vegetation management program, a benefit-cost analysis.

**D. Should the Commission decline to modify its approval of BGE’s conduit expenditures, OPC requests clarification concerning the parameters of the benefit-cost analysis that BGE must conduct.**

Order No. 90948 directs BGE to “provide a benefit cost analysis consistent with the recommendation and the parameters provided by Staff witness Dererie”<sup>75</sup> to inform the Commission’s prudence analysis at reconciliation. Those parameters include:

- “Demonstration of quantitative reliability and other benefits that BGE ratepayers accrued from the new framework and will continue to accrue,”<sup>76</sup> and
- “Quantification of all costs incurred that benefit both BGE and other non-ratepayer conduit occupiers through BGE emergency response, maintenance, and capital improvement needs,” with the costs to be allocated “between BGE, general conduit health and improvements and other non-ratepayer conduit occupiers.”<sup>77</sup>

Ms. Dererie stated that “the benefit cost analysis should demonstrate that the new agreement, overall, is more cost beneficial to ratepayers compared to the

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<sup>75</sup> Order No. 90948 at 102.

<sup>76</sup> Staff Exhibit 3 (Direct Testimony of Samrawit Dererie) at 22-26.

<sup>77</sup> *Id.* at 26

previous agreement” and added that “BGE should also provide a full explanation of assumptions and projections used to perform the benefit cost analysis.”<sup>78</sup>

In light of the limited details in Ms. Dererie’s testimony, OPC requests that Commission clarify its directive for BGE to conduct a benefit-cost analysis in two respects. First, consistent with the testimony of OPC witnesses Alvarez and Stephens,<sup>79</sup> the Commission should explicitly direct BGE to quantify risk reduction benefits (for example, a reduction in service interruptions or interruption durations from the new conduit) in dollars so that they can be directly compared to costs. Second, the Commission should direct BGE to calculate all costs as customers actually experience them (i.e., as the present value of the revenue requirement).<sup>80</sup>

#### **IV. Order No. 90948 conflicts with the STRIDE statute and fails to explain its allowance for recovery of STRIDE-eligible capital investment costs through MRP base rates and the MRP adjustment rider.**

In its MRP application BGE stated that it would no longer seek accelerated recovery for its gas investments through an investment plan and surcharge under the Strategic Infrastructure Development and Enhancement (“STRIDE”) law.<sup>81</sup>

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<sup>78</sup> *Id.* at 26.

<sup>79</sup> See OPC Exhibit 41A (Direct Testimony of Paul J. Alvarez and Dennis D. Stephens) at 102:19 – 104:3.

<sup>80</sup> As noted above, in testimony OPC witness Alvarez calculated BGE’s total revenue requirement for conduit under the 2023 agreement with the City as \$860 million in nominal dollars and used a weighted average cost of capital of 7.45 percent—the after-tax return on capital BGE requested in its application—to determine that that net present value of that amount was \$262.5 million. OPC Exhibit 42a (Surrebuttal Testimony of Paul J. Alvarez and Dennis D. Stephens) at 39:19-40:2. BGE witness Vahos took issue with the net present value calculation but unlike Mr. Alvarez provided no workbook to substantiate his alternative calculation.

<sup>81</sup> PUA § 4-210.

Rather, BGE proposed to recover the costs of STRIDE-eligible infrastructure investments through the base rates authorized in this MRP.<sup>82</sup> Additionally, despite Commission precedent to the contrary, BGE requested to recover STRIDE-related costs not already recovered through the STRIDE surcharge in 2021 and 2022 through the MRP adjustment rider.<sup>83</sup> Order No. 90948 grants both of BGE's requests.<sup>84</sup>

OPC's briefs argued that recovery of STRIDE-type gas investments envisioned through MRP rates conflicts with STRIDE. But Order No. 90948 ignores OPC's legal arguments in approving BGE's request to recover STRIDE-eligible investment costs through the MRP. Additionally, Order No. 90948 provides no explanation for the Commission's decision to depart from prior precedent and authorize recovery of 2021 and 2022 STRIDE revenues in excess of the surcharge cap.

**A. The Commission never reconciled the conflict between the STRIDE law and the MRP identified by OPC.**

In granting BGE's request to incorporate STRIDE Operation Pipeline replacement projects into the MRP, the Commission fails to address, let alone reconcile, the clear conflict between the STRIDE law and the MRP construct.

While the Commission may have authority under PUA § 7-505 to "adopt an alternative form of regulation," it must do so in a way that comports with all of the

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<sup>82</sup> BGE's STRIDE-eligible investments are primarily pursued through Project 60677 (Operation Pipeline). Order 90948 directs BGE to pursue such projects exclusively through Project 60677.

<sup>83</sup> Frain Rebuttal at 36:17 – 37:07.

<sup>84</sup> Order 90948 at 131–2.

statutes that the Commission is charged with administering under the Public Utilities Article—including the STRIDE law. It is well established that an administrative agency cannot engage in actions that subvert or impair a statute that it administers.<sup>85</sup> An administrative action that conflicts with or undermines the purpose of a statutory provision is erroneous and subject to reversal.<sup>86</sup>

As OPC explained in its brief, in STRIDE the General Assembly identified a *specific* type of infrastructure improvement that it believed warranted special treatment *outside of base rates*: the accelerated replacement of existing gas distribution infrastructure.<sup>87</sup> In allowing special treatment for replacement investments, the General Assembly created specific consumer protection guardrails.

*First*, a utility is required to file a detailed infrastructure investment plan specific to the investments it seeks to recover.<sup>88</sup> That plan allows intervenors to

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<sup>85</sup> *Insurance Com'r of State of Md. v. Bankers Independent Ins. Co.*, 326 Md. 617, 624 (1992).

<sup>86</sup> *E.g., Matter of Maryland Office of People's Counsel*, ACM-REG-2023-2022, 2023 WL 8797959, slip op. at 17 (Md. App. Dec. 20, 2023) (reversing Commission dismissal of complaint in part because the Commission's broad exercise of discretion conflicted with its "statutory mandate that the Commission hear complaints to ensure that utilities act in the public interest").

<sup>87</sup> OPC Brief at 21–22. The STRIDE law states that "the purpose of this section is to accelerate gas infrastructure improvements in the State by establishing a mechanism for gas companies to promptly recover reasonable and prudent costs of investments in eligible infrastructure replacement projects separate from base rate proceedings." PUA § 4-210(b). Investments eligible for recovery through STRIDE are defined as "improvements in existing infrastructure of a gas company that (i) is made on or after June 1, 2013; (ii) is designed to improve public safety or infrastructure reliability; (iii) does not increase the revenue of a gas company by connecting an improvement directly to new customers; (iv) reduces or has the potential to reduce greenhouse gas emissions through a reduction in natural gas system leaks; and (v) is not included in the current rate base of the gas company as determined in the gas company's most recent base rate proceeding." PUA § 4-210(a)(3). There is no dispute that the projects BGE intends to pursue through Operation Pipeline at the time its MRP 2 application was filed would be STRIDE-eligible.

<sup>88</sup> PUA § 4-210(d)(1).

assess the reasonableness and prudence of work proposed in the plan and the Commission to determine if the proposed work “is reasonable and prudent both from an infrastructure and cost standpoint.”<sup>89</sup>

*Second*, the costs of the investments pursued through STRIDE are recovered through a surcharge on customer bills.<sup>90</sup> The bill surcharge increases transparency to customers, as the costs of gas infrastructure investments are made visible rather than mixed “inextricably with all the other elements of BGE’s rates.”<sup>91</sup>

*Third*, the STRIDE surcharge is capped at \$2 per month for residential customers, limiting the extent to which the costs of accelerated gas infrastructure investment can be imposed on customers without a prudence review in a base rate case.

As noted in OPC’s brief, the Commission first grappled with the intersection of the STRIDE law and the MRP construct in Case No. 9645.<sup>92</sup> In that case, BGE provided two different proposals for recovering STRIDE revenues through MRP base rates. Under the first, the STRIDE surcharge

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<sup>89</sup> PUA § 4-210(e)(3) (“The Commission may approve a plan if it finds that the investments and estimated costs of the eligible infrastructure replacement projects are: (i) reasonable and prudent; and (ii) designed to improve public safety or infrastructure reliability over the short term and long term.”); Case No. 9331, *In the Matter of the Application of the Baltimore Gas and Electric Company for Approval of a Gas System Strategic Infrastructure Development and Enhancement Plan and Accompanying Cost Recovery Mechanism* (“*BGE STRIDE P*”), Order No. 86147 at 32 (Jan. 29, 2014).

<sup>90</sup> PUA § 4-210(d)(2).

<sup>91</sup> Order No. 89678 at 29 ¶ 60.

<sup>92</sup> OPC Initial Br. at 22.

would continue and BGE would recover STRIDE revenue requirements above the statutory cap in MRP rates.<sup>93</sup> Under the second, the STRIDE surcharge would be set to zero for the duration of the MRP period and all STRIDE investments costs would be recovered through MRP base rates.<sup>94</sup>

The Commission rejected both proposals in its order (MRP I Order), that the legislature “required that the surcharge be visible to customers” and that putting STRIDE into the base rates “circumvents that transparency” by “mixing costs inextricably with all the other elements of BGE’s rates” thereby enabling approval of advanced recovery “with no visibility to customers.”<sup>95</sup> Order No. 89678 further observed that the “General Assembly put a specific limit on customer bills . . . rather than providing a range or giving discretion to the Commission to consider particular circumstances.”<sup>96</sup> Based on these observations, the Commission found that allowing STRIDE costs in excess of the \$2 surcharge cap “would likely be contrary to the intent of the General Assembly.”<sup>97</sup>

Order No. 90948 departs from the precedent established by the MRP I Order. While Order No. 90948 acknowledges the “concerns” about reduced transparency that the Commission previously expressed, it erroneously concludes that reports that it is requiring BGE to file in this case can substitute for the

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<sup>93</sup> Order 89678 at 20–21 ¶¶ 44.

<sup>94</sup> Order 89678 at 21 ¶ 45.

<sup>95</sup> Order No. 89678 at 29 ¶¶ 60.

<sup>96</sup> Order No. 89678 at 29 ¶¶ 60.

<sup>97</sup> Order No. 89678 at 29 ¶¶ 60, 61.



transparency that a visible bill surcharge provides to utility customers.<sup>98</sup> There are two main problems with this argument, however.

First, when the Commission began to implement the STRIDE law, it established the reporting requirements that BGE would have to meet under Order No. 90948 as *supplemental* transparency measures—not replacements for the STRIDE’s statutory measures. At the time, the Commission stated that the reporting requirements would function as “further accountability measures” to ensure that “each proposed project is reasonable and prudent both from an infrastructure and cost standpoint.”<sup>99</sup>

Order No. 90948 provides no explanation for how the Commission found that the supplemental reporting requirements that provide direct information only to the parties before the Commission can appropriately substitute for the STRIDE law’s transparency measures that directly benefit customers. Likewise, the Commission never explains its legal rationale for authorizing accelerated cost recovery for gas infrastructure investments outside of STRIDE. The accelerated cost recovery authorized by the STRIDE law applies to specific types of investments with a limited scope, as the Commission determined when it excluded

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<sup>98</sup> Order No. 90948 at 131.

<sup>99</sup> Order No. 86147 at 32, 35–37.

STRIDE-eligible investments from base rates in BGE’s first MRP.<sup>100</sup> The Commission must explain why it changed its mind in Order No. 90948.<sup>101</sup>

Pursuing STRIDE-eligible investments through the MRP would enable BGE to realize all of the financial benefits of the STRIDE law without the transparency and consumer protection guardrails the General Assembly established for accelerated recovery of gas infrastructure replacements. Allowing BGE (and other utilities) to seek accelerated cost recovery for accelerated pipeline replacement through the MRP circumvents the STRIDE law and renders it a nullity. The Commission cannot subvert the consumer protections in the STRIDE statute simply because BGE’s request is contained within an MRP.<sup>102</sup>

Order No. 90948 also fails to explain how the Commission reconciled the conflict between the STRIDE law’s \$2-per-month customer bill surcharge and the MRP. BGE’s gas infrastructure replacement plans—the subject of the STRIDE statute—have massive impacts on future customer rates,<sup>103</sup> as well as massive

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<sup>100</sup> Order No. 89678 at 27 ¶ 58 (“It is not clear that the General Assembly intended that a utility could put an unlimited amount of gas infrastructure costs on ratepayers through a forecasted, alternative ratemaking mechanism.”).

<sup>101</sup> *Md. Office of People’s Counsel v. Md. Pub. Serv. Comm’n*, 461 Md. 380, 405 (2018) (“[T]he assessment whether an agency decision is arbitrary or capricious is a deferential standard in which a court may consider such things as the agency’s expertise, policy goals stated in pertinent statutes or regulations, consistency with the agency’s past decisions, and whether it is possible to follow the path of the agency’s reasoning.”).

<sup>102</sup> The Commission’s rate making authority is legislative in character. *West v. United Rys. & Electric. Co of Baltimore*, 155 Md. 572 (1928). Agencies cannot engage in actions that are “inconsistent, out of harmony with, or which alters, adds to, extends or enlarges, subverts, impairs, limits, or restricts the act being administered.” *Insurance Com’r of State of Md. v. Bankers Independent Ins. Co.*, 236 Md. 617, 624 (1992).

<sup>103</sup> See OPC Exhibit 49A (Direct Testimony of Dr. Asa S. Hopkins), Exhibit ASH-4 (*Climate Policy for Maryland’s Gas Utilities: Financial Implications*).

implications for the State’s efforts to combat climate change.<sup>104</sup> The STRIDE surcharge on customer bills informs customers of long-term spending on fossil fuel infrastructure, and in general the STRIDE statute ensures scrutiny over such infrastructure investments and costs through a five-year plan that must be found reasonable and prudent. Order No. 90948 undermines that scrutiny and transparency.

**B. The Commission arbitrarily and capriciously departed from its MRP I Order by allowing STRIDE spending over the surcharge amount.**

Order No. 90948 grants BGE’s request to recover STRIDE surcharge overages from 2021 and 2022, in addition to authorizing BGE to include Operation Pipeline projects in MRP base rates<sup>105</sup> But as explained above, the MRP I Order expressly rejected BGE’s request to recover surcharge costs that exceed the \$2 cap, finding that imposing a surcharge impact in excess of \$2 likely contravened the intent of the General Assembly.<sup>106</sup> The result of the MRP I Order was that the 2021 and 2022 STRIDE costs above the \$2 surcharge were denied immediate recovery through MRP rates, with BGE having an opportunity to

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<sup>104</sup> PUA § 2-113(a)(2)(v), (vi); Md. Dept. of Env., *Maryland’s Climate Pollution Reduction Plan* at 7 recommending “natural gas utility companies to plan their gas system investments and operations for a net-zero emissions future”) (Dec. 28, 2023), <https://mde.maryland.gov/programs/air/ClimateChange/Maryland%20Climate%20Reduction%20Plan/Maryland%27s%20Climate%20Pollution%20Reduction%20Plan%20-%20Final%20-%20Dec%2028%202023.pdf>.

<sup>105</sup> Order No. 90948 at 132.

<sup>106</sup> Order 89678 at 29 ¶ 61.

recover the costs of those investments through base distribution rates after a prudency review.

Order No. 90948 departs from the MRP I Order by allowing retroactive recovery of STRIDE surcharge overages that the Commission previously said it would not allow. The Commission thus allows greater STRIDE recovery for 2021 and 2022 than the General Assembly permitted. For STRIDE projects, non-surcharge recovery is permissible only through base rates. Since the Commission did not find any of BGE’s 2021 and 2022 STRIDE projects imprudent, BGE will be already recovering the costs of those projects through the base rates authorized by Order No. 90948. Recovery of surcharge overages through the MYP adjustment rider would be in *addition* to the recovery BGE is entitled to through base rates. Additional recovery for the same projects through the reconciliation mechanism retroactively circumvents the \$2 surcharge cap, imposing additional costs on customers that the STRIDE law otherwise prohibits.

Despite the Commission’s significant change in policy direction on its treatment of excess STRIDE surcharge costs, Order No. 90948 does not discuss the basis for this change in direction. Nor does Order No. 90948 address any of the legal arguments that parties raised questioning whether permitting such recovery is permissible. Rather, the sole basis for the Commission’s change in direction appears to be that “no projects were deemed imprudent.”<sup>107</sup> Yet, whether to permit

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<sup>107</sup> *Id.*

recovery of STRIDE surcharge overages is a purely legal issue that turns on how the Commission interprets the STRIDE law. The STRIDE law requires the Commission to find the overall proposed plan and costs—not each individual project—reasonable and prudent to authorize surcharge recovery. Thus, the prudence of the individual projects is relevant only to determining whether associated project costs can be removed from the surcharge and recovered through base rates. Whether those projects are prudent is not relevant to the reconciliation.

An administrative agency has ““ample latitude to adapt [its] rules and policies to the demands of changing circumstances.”<sup>108</sup> But “when an agency changes a position clearly established in its own prior precedent it ‘must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’”<sup>109</sup> In approving BGE’s request to recover STRIDE surcharge overages from 2021 and 2022, Order No. 90948 fails to explain its decision to depart from the precedent set in Order No. 89678 and. The lack of analysis is arbitrary and capricious and warrants rehearing.

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<sup>108</sup> *Frederick Classical Charter School, Inc. v. Frederick Cnty. Bd. of Ed.*, 454 Md. 330, 406 (2017) (quoting *Montgomery Cty. v. Anastasi*, 77 Md. App. 126, 137 (1988)).

<sup>109</sup> *Id.* at 407 (quoting *Montgomery Cty. v. Anastasi*, 77 Md. App. 126, 137 (1988)).

**V. Order No. 90948 errs by failing to require BGE to consider alternatives to gas distribution infrastructure replacement pursued and its cursory explanation for its decision.**

By authorizing recovery of leak-prone pipe replacements through Project 60677, Order No. 90948 endorses a replacement-first approach to infrastructure investment that wholly ignores cost-effective alternatives to pipeline replacement. This willful ignoring of potentially cost-effective alternatives to replacement warrants rehearing for two reasons.

*First*, the Commission erred by not applying the STRIDE law’s “reasonable and prudent” standard when reviewing Project 60677. The approval of Project 60677 without any consideration of alternatives is impudent and results in unjust and unreasonable rates.

*Second*, Order No. 90948 errs for its multiple failures of explanation. For example, it does not explain why Project 60677 costs should be included in rates without any evaluation of alternatives that might be more cost-effective than wholesale system replacement, nor how its failure to require that evaluation is consistent with its conclusion statement in its separate decision—on the very same day—that “to prudently justify their system safety and reliability spending in the future,” gas utilities must consider “all cost-effective non-pipeline alternative options available to defer, reduce, or remove the need to construct or upgrade

components of their natural gas systems, and not solely pursue infrastructure replacement.”<sup>110</sup>

**A. Order No. 90948 errs by authorizing an investment approach that has not been shown to be reasonable and prudent.**

Order No. 90948 grants BGE’s request to include the costs of Operation Pipeline replacement work through Project 60677 in MRP base rates without any discussion as to what decisional standard the Commission is applying.<sup>111</sup> As noted in Section I and argued in OPC’s brief, the appropriate standard for reviewing capital spending programs is the “reasonable and prudent” standard articulated in the STRIDE law.<sup>112</sup> The Commission may have some discretion as to the decisional standard for the MRP generally. But for Project 60677, the Commission *must* apply the “reasonable and prudent” standard. It is this standard that specifically enables the Commission to approve accelerated cost recovery for the specific investments qualifying as “eligible infrastructure” under the STRIDE law.<sup>113</sup>

The General Assembly specifically carved out a category of infrastructure investments for accelerated cost recovery, as discussed *supra* in Section IV.

Section 4-210(e)(3) prescribes a specific standard for reviewing and approving the

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<sup>110</sup> Case No. 9704, *Washington Gas Light Company’s Application for Authority to Increase Rates and Charges for Natural Gas Services*, Order No. 90943 at 135 (emphasis added) (Dec. 14, 2023).

<sup>111</sup> Order No. 90948 at 131–32.

<sup>112</sup> OPC Initial Br. at 6–7.

<sup>113</sup> PUA § 4-210(e)(3). if “the investment and estimated costs . . . are (i) reasonable and prudent; and (ii) designed to improve public safety or infrastructure reliability over the short term and long term.”

programs proposed to pursue those investments. Given the high cost of gas infrastructure replacement, the General Assembly sought to enable the Commission to protect customers from unreasonable and imprudent investments that may improve system safety and reliability and would otherwise be STRIDE-eligible.

Order No. 90948 not only fails to address whether the Project 60677 investments are reasonable and prudent; its broad approval sanctions an imprudent investment approach. The order approves Project 60677 without requiring BGE to consider alternatives to pipeline replacement, giving blanket approval to a program budget based on an estimated 42 mile-per-year replacement target. It cannot be prudent to spend hundreds of millions of dollars<sup>114</sup> on projects without evaluating the alternatives.

Economics, technology, and Maryland climate policy will likely drive large reductions in gas consumption, raising significant questions about whether gas distribution infrastructure installed as Maryland accelerates its decarbonization efforts will remain useful over its entire lifetime.<sup>115</sup> As OPC's briefing emphasized, prioritizing the systematic replacement of BGE's entire gas distribution system exposes BGE customers to the risk of stranded costs in the not-to-distant future.<sup>116</sup> No party disputes that, in some instances, safety needs require

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<sup>114</sup> Project 60677 is the largest single spending program within BGE's proposed gas capital workplan, costing \$151-155 million for *each MRP year*. BGE Exhibit 34 (Direct Testimony of Dawn C. White), DCW-1G at 13.

<sup>115</sup> See OPC Initial Br. at 20–21.

<sup>116</sup> OPC Initial Br. at 15–21; OPC Reply Br. at 21–27.



pipeline replacement. However, intervenors disputed the prudence of a planning process that ignores alternative risk-mitigation measures that could provide similar safety benefits as complete pipeline replacement.<sup>117</sup> In short, replacement investments cannot be prudent without consideration of available alternatives that could be more cost effective and more consistent with State climate policy to reduce the use of fossil fuels while reducing utility stranded cost risks. The Commission itself recognized that prudence requires consideration of alternatives in its same-day order in Washington Gas Light Company’s rate case (Case No. 9704, Order No. 90943, the “WGL Order”). The WGL Order expressly recognizes how an evaluation of alternatives is a necessary element of a prudence evaluation:

The Commission recognizes that the future of natural gas will continue to be considered by State policy makers. For this reason, WGL – *and all Maryland gas companies* – must consider the likely contraction in gas consumption *in all capital expenditure plans intended to maintain required levels of system safety.*

Gas utilities *must consider all cost-effective non-pipeline alternative options* available to defer, reduce, or remove the need to construct or upgrade components of their natural gas systems, and not solely pursue infrastructure replacement, *in order to prudently justify their system safety and reliability spending in the future.* Future remaining customers on the system should not be burdened with excessive costs and stranded assets due to hasty and unwise decisions made today.<sup>118</sup>

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<sup>117</sup> OPC Br. at 16–18; OPC Reply Br. at 24–27; Sierra Club Initial Br. at 39–41; MEA Initial Br. at 13.

<sup>118</sup> Case No. 9704, *Washington Gas Light Company’s Application for Authority to Increase Rates and Charges for Natural Gas Services*, Order No. 90943 at 135 (emphasis added) (Dec. 14, 2023).

The WGL Order endorses applying a “reasonable and prudent” standard to reviewing proposed investments that necessarily involves a consideration of alternatives. The WGL Order correctly defines prudence as requiring consideration of “all cost-effective non-pipeline alternatives options available” and “not solely pursu[ing] infrastructure replacement.” This language correctly recognizes that a myopic focus on pipeline replacement—with no consideration of other alternatives—results in an investment program that may be more expensive in the near and long term and, therefore, imprudent. The inclusion in BGE’s MRP rates of projected costs that are premised on an imprudent “sole[ly]” pursuit of “infrastructure replacement” cannot be just and reasonable.

**B. Order No. 90948 is arbitrary and capricious because it never addresses whether BGE must consider non-pipeline alternatives and is inconsistent with other Commission rulings.**

Order No. 90948’s failure to address the issue of alternatives to systemic pipeline replacement is notable because of the issue’s importance, as well as its inconsistency with rulings in the same case and in the WGL Order issued the same day.

*First*, intervenors testified at length to the many problems with BGE’s prioritization of system-wide pipeline replacement over non-replacement alternatives. Yet Order No. 90948 simply approves a blanket pipeline replacement budget based on an estimated 42-mile per-year replacement pace—without any discussion of whether non-replacement alternatives must be considered.

*Second*, the Commission failed to explain how its blanket acceptance of BGE’s Project 60677 work is consistent with its WGL Order issued the same day as Order No. 90948, declaring that, “to prudently justify their system safety and reliability spending,” gas utilities must consider “all cost-effective non-pipeline alternative options available to defer, reduce, or remove the need to construct or upgrade components of their natural gas systems, and not solely pursue infrastructure replacement.”<sup>119</sup> Order No. 90948 plainly conflicts with the WGL Order.

The different outcomes in the BGE and WGL cases cannot be attributed to differing evidence. In Case No. 9711, just as with respect to BGE in this case, OPC and other intervenors presented evidence about Washington Gas’s prioritization of pipeline replacement in light of the impending decrease in gas consumption driven by state policies.<sup>120</sup> In this case, OPC, Sierra Club, and MEA all explained that gas’s uncertain future in Maryland is not adequately reflected in the BGE’s gas distribution capital plan.

In rhetorical terms, the Commission agreed, finding that “prioritizing risk reduction and cost-effectiveness, taking rapidly changing current and future State and federal policies into consideration, and proactively considering non-pipeline alternatives will be necessary for ensuring that the utility is able to meet long-term

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<sup>119</sup> Order No. 90943 at 135.

<sup>120</sup> Order 90948 at 124–130.

system needs and maintain safe and reliable systems.”<sup>121</sup> The Commission further states that BGE “can and should do a more comprehensive job of incorporating the concerns [about the long-term use of its gas distribution system and how policy and market forces may change the impact of the useful life of the gas assets] presented by OPC.”<sup>122</sup> Yet in substantive terms, Order No. 90948 approves an investment program based on a planning process that ignores other alternatives which, as BGE’s own witness explains, has not changed since 2014.<sup>123</sup>

Order No. 90948 also fails to address the internal inconsistency between the order’s treatment of Project 60677 costs and its treatment of certain BGE proposed gas transmission projects.<sup>124</sup> For certain gas transmission projects BGE proposed in its MRP 2—unlike the Commission’s blanket approval of Project 60677—the Commission rejected BGE’s replacement-first approach to its gas-transmission infrastructure, determining that “BGE has not demonstrated that its plan is the most cost-effective means of complying with PHMSA’s Transmission Rule.”<sup>125</sup> The Commission found that BGE may have selected the most costly compliance method without sufficient consideration of less costly alternatives and the “long-term future of natural gas.”<sup>126</sup>

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<sup>121</sup> Order No. 90948 at 184.

<sup>122</sup> *Id.* at 185.

<sup>123</sup> BGE Exhibit 35A (White Rebuttal) at 72, lines 1-3; OPC Initial Br. at 3.

<sup>124</sup> These projects are Projects 55633, 58079, and 58080.

<sup>125</sup> Order No. 90948 at 141

<sup>126</sup> Order No. 90948 at 143–4.

Order No. 90948's failure to address whether and to what extent BGE must consider alternatives to pipeline replacement in Project 60677 is arbitrary and capricious. It reflects an inexplicable difference from the policy set forth in the WGL Order, as well as the Commission's consideration and approval of BGE's gas system investments.

Order No. 90948 confuses the Commission's policy on gas pipeline replacement and appears to endorse an investment approach that underlies precipitous rate increases and exacerbates future risks of stranded costs. Rehearing is warranted to ensure that the Commission's approval of Project 60677 accords with the WGL Order and limits customer exposure to stranded cost risks by requiring BGE to consider and prioritize alternatives to pipeline replacement.

## **CONCLUSION**

Order No. 90948's legal errors and lack of clarity and explanation of its consequential decisions regarding MRP termination and the recovery of investments in Baltimore City's conduit system and BGE's gas distribution system warrant rehearing. Commission orders must state the basis of the Commission's decisions such that a party can follow the path of the Commission's reasoning. As discussed above, Order No. 90948 fails to do so in multiple instances. Moreover, Order No. 90948 does not explain significant departures from past precedent and, with respect to due process, risks setting new precedent that is harmful both to the

Commission and to parties before it. OPC urges the Commission to rehear Order No. 90948.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16<sup>th</sup> day of January 2024, the foregoing Request for Rehearing of Order No. 90948 was e-mailed to all parties of record to this proceeding.

Respectfully submitted,

*/electronic signature/*  
Michael F. Sammartino