

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 *
*

**OFFICE OF PEOPLE'S COUNSEL'S REQUEST FOR REHEARING
OF COMMISSION ORDER NO. 90626**

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residential customers for non-transparent, arbitrary reasons, denying those customers their legal rights to be heard at the Commission. *First*, Order No. 90626 fails to address the unique statutory rights the General Assembly has granted residential customers in recognition of their substantial interests in utility costs and services and their diffuse interests that create a hurdle for their participation before the Commission. *Second*, rather than addressing the merits of having written procedures, Order No. 90626 pivots to defending various substantive matters without ever addressing the procedural gaps that permit residential customers to have their interests deferred indefinitely or ignored entirely. Indeed, Order No. 90626 itself reveals the Commission has forgone addressing the merits of OPC's filings because the Commission disagrees with the merits of those filings. It is the epitome of arbitrary agency action, however, to ignore a request for agency action in order to avoid a ruling on the merits. A decision on the merits—up, down, or otherwise—is necessary for due process and to ensure legal rights are protected, in this case, the rights of residential customers captive to a utility monopoly. *Third*, Order No. 90626 fails to address the petition's arguments regarding the uncertainty and unfairness the lack of written procedures causes for application of the PUA § 3-108 prohibition on *ex parte* communications.

STATEMENT OF ERRORS

Pursuant to COMAR 20.07.02.08C, and as further described in the argument below, Order No. 90626 contains the following erroneous and arbitrary and capricious findings and conclusions:

1. Order No. 90626 equates residential customer statutory standing before the Commission with other stakeholders, which is both legally erroneous and arbitrary and capricious because (a) it fails to address the law presented in OPC's petition that gives residential customers unique rights of representation before the Commission; and (b) it asserts that residential customers, whom the public utility laws are intended to protect, are similarly situated as public utilities, which hold monopolies subject to the regulatory powers of the state.
2. Order No. 90626 is arbitrary and capricious because it explains away the need for written procedures by addressing substantive matters, rather than the procedural defects to which OPC's petition is directed and that the petition's examples illustrate.
3. Order No. 90626 is arbitrary and capricious because it neglects entirely to address the petition's argument that written procedures are necessary for parties to comply with the statutory prohibition on *ex parte* communications.

Moreover, as further discussed below and pursuant to COMAR 20.07.02.08D, Order No. 90626 would significantly harm the ability of Maryland's residential customers to have a voice before the Commission, and that harm justifies a reversal of the order.

ARGUMENT

I. Order No. 90626 improperly conflates residential customers—whose legal interests are created and protected by statute—with non-statutory stakeholders.

Maryland’s residential customers pay the most substantial share of the more than \$10 billion in annual revenues Maryland utilities take in from customers, yet in the absence of policy intervention, residential customers are the least likely to be effectively represented before the Commission that approves those revenues. The General Assembly addressed this gap by adopting laws specific to protecting residential customers of the State’s utility monopolies.⁴ The legislature created an independent state agency—OPC—with a mandate to ensure the protection of residential customer interests. OPC’s express mandate extends to evaluating all matters pending before the Commission and to conducting investigations and requesting the Commission to initiate proceedings when the interests of residential customers are at stake.⁵ No other stakeholder group’s interests are similarly embedded in statute. No other stakeholders have statutory standing.⁶ As the Supreme Court of Maryland has found, OPC is not a stakeholder protecting its own legal rights, but the legal rights “of the residential customers that People’s Counsel is statutorily obligated to protect.”⁷

⁴ See PUA § 2-201 *et seq.*

⁵ See PUA § 2-204.

⁶ *Pub. Serv. Comm’n of Md. v. Md. People’s Couns.*, 309 Md. 1, 10 (1987) (observing that, under Maryland law, “People’s Counsel is granted all the rights of counsel for a party to the proceeding”).

⁷ *Id.* at 10, n.3.

Order No. 90626 fails entirely to account for this law. Instead, Order No. 90626 conflates OPC’s status with other stakeholders, including the monopoly utilities—the very entities from whom residential customers need protection and those whom the Commission is charged with supervising and regulating.⁸ This was a legal error. It is legally incorrect for the Commission to conflate OPC’s statutorily prescribed role with other stakeholder interests. The General Assembly has not created an independent State agency to represent the interests of other stakeholders, given them a budget, and *required* them to request that the Commission initiate proceedings to protect their interests.

But the General Assembly *has* recognized the unique stake residential customers have in utility regulation. Residential customers have significant financial and performance interests in utility service, but unlike the utilities, which control vast resources, residential customers have little control over utility services. Further, their interests are diffuse, making it irrational for individual residential customers to participate in Commission proceedings at a level equivalent to the utilities. Indeed, the Maryland General Assembly’s statutory recognition of the challenges residential customers face is widely accepted throughout the United States. As one journal article explains, “State consumer advocate offices were created in order to level the playing field and give

⁸ See, e.g., PUA § 2-112 (establishing the Commission’s “jurisdiction over each public service company” and giving it the “implied and incidental powers needed or proper to carry out its functions”); PUA § 2-113 (providing that the Commission “shall...supervise and regulate the public service companies”); *Delmarva Power & Light Co. v. Pub. Serv. Comm’n of Md.*, 370 Md. 1, 7 (2002) (stating: “[T]he Legislature created the Public Service Commission and authorized it to regulate the activities of public service companies, including gas and electric companies. The regulation was pervasive.”).

consumers a chance to have their voices heard in an effective manner.”⁹

Order No. 90626, on the other hand, erroneously equates OPC’s role protecting residential customers with that of other stakeholders. Nowhere does Order No. 90626 acknowledge the uniqueness of OPC’s statutorily prescribed protection of the legal rights of residential customers. In fact, it does the opposite. At paragraph 22, the Commission expressed concern that OPC’s petition would give it “unique” rights vis-a-vis other stakeholders, including the “public utility companies.”¹⁰ At paragraph 24, Order No. 90626 again equates residential customer interests with those of utilities and other parties: “[T]he Commission is statutorily bound to consider all stakeholder interests in setting just and reasonable rates, including residential ratepayers, but also commercial and industrial ratepayers, public utility companies, the public interest, and more recently, environmental issues.”¹¹

Aside from the legal error committed here by disregarding express Maryland law, Order No. 90626 is also arbitrary and capricious because it ignores entirely the stated basis for OPC’s petition: that the lack of Commission procedures for OPC actions undermines the plain language of OPC’s statutory mandate, the General Assembly’s purpose in establishing OPC, and—most importantly—the voice of residential customers

⁹ Elin Swanson Katz & Tim Schneider, *The Increasingly Complex Role of the Utility Consumer Advocate*, 41 Energy L.J. 1 (2020) at 7.

¹⁰ Order No. 90626 at ¶ 22.

¹¹ Order No. 90626 at ¶ 24.

before the Commission.¹² The Commission should rectify this error and give residential customers the procedural process they are due.¹³

II. Order No. 90626 errs by confusing the merits of OPC’s requests in other matters with the procedural gaps that the petition for a rulemaking proceeding seeks to rectify.

OPC’s petition used several examples to illustrate the procedural gaps that have left the merits of OPC’s requests for Commission action unaddressed. The examples did not purport to—nor did they—provide the universe of instances in which OPC’s advocacy before the PSC has been ignored or indefinitely delayed.¹⁴ The examples also did not intend to show that the Commission should have agreed with OPC in each of these cases. Rather, the examples show the *procedural* defects in the handling of matters raised by OPC. Indeed, the petition might have included a longer list of examples, but those provided are more than sufficient to illustrate the *procedural* gaps left by the lack of written procedures and how those gaps affect residential customers’ legal rights to be heard at the Commission.

But Order No. 90626 does not address the procedural gaps on which the petition

¹² OPC Petition at 21-23.

¹³ Alternatively, although OPC’s petition focused on procedural rules governing OPC requests on behalf of residential customers, OPC readily admitted that additional regulations may be appropriate on other matters or for other stakeholders. *See* OPC Petition at 3, n.3. OPC would not object if the Commission were to determine that universal procedures were a more appropriate approach.

¹⁴ OPC Petition at 1 (“OPC’s recent efforts have been hampered or thwarted on the following matters, among others...”); *id.* at 2 (“On these and other matters...”); *id.* at 7 (“[The four examples] are intended as illustrations and do not cover the universe of matters where OPC’s efforts have been hampered or frustrated.”).

focuses. Instead, Order No. 90626 addresses the merits of the examples provided, as summarized in paragraph 24:

“The fact that OPC has not achieved its litigation goal in every one of the petitions or complaints it has filed does not mean that the Commission has negated its statutory role in advocating for Maryland ratepayers or is attempting to suppress the voice of residential customers.”¹⁵

This statement exposes Order No. 90626’s logical failure. It is premised on an argument that OPC did not make—that OPC’s failure to *win* on the merits of a given issue illustrates the procedural flaws. OPC makes no such argument. Rather, OPC’s petition explains that the lack of Commission procedures means the Commission can arbitrarily avoid addressing the merits of OPC’s efforts *at all*, to the unlawful detriment of residential customers’ rights to be heard.

By misdirecting its attention to the substance, Order No. 90626 avoids ever addressing the purpose of having written procedures—to assure parties that the substance of their claims will be heard and will not be arbitrarily dismissed or ignored. Only with “[r]ules for the transaction of business by public agencies,” the Maryland Supreme Court has warned, “can there be some assurance against arbitrary and capricious conduct on the part of the agency.”¹⁶ The U.S. Supreme Court similarly has observed that regulations “avoid the inherently arbitrary nature of unpublished ad hoc determinations.”¹⁷

¹⁵ Order No. 90626 at ¶ 24.

¹⁶ *Calvert Cnty. Planning Comm’n v. Howlin Realty Mgmt., Inc.*, 364 Md. 301, 322 (2001).

¹⁷ *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (citations omitted).

Procedural rules governing complaints, for example, prevent disregard of parties or legal filings for whimsical or non-meritorious reasons, protecting the rights of litigants. A judge cannot dismiss a legally cognizable claim because the judge finds the claim uninteresting, personally unpalatable, or simply because she wants to keep a clear docket.¹⁸ Procedural rules prevent such arbitrary results and further protect those rights by ensuring public transparency and a record for appeal.

Order No. 90626 evidences the very arbitrariness that the Maryland Supreme Court and U.S. Supreme Court warn against. Consider OPC’s request for a Commission proceeding on gas utility planning. As OPC’s petition at issue here explained, the Commission took no action for over four months to establish a docket or otherwise even acknowledge in any way OPC’s request for a gas planning proceeding.¹⁹ But Order No. 90626 candidly explains why the Commission has not acted on OPC’s petition— providing a prime example of how the lack of written rules is allowing the Commission

¹⁸ See Maryland Rule 2-322 (listing the bases for a motion to dismiss); *Ricketts v. Ricketts*, 393 Md. 479, 492 (2006) (“Dismissal is proper *only if* the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff.”) (emphasis added).

¹⁹ OPC’s request has been the subject of numerous filings noting interest in its petition, including from governmental and non-profit stakeholders and businesses, but that information cannot be easily obtained. In a typical PSC docket, anyone interested could identify the case number in the PSC portal and retrieve all documents in the case. But without a docket, there is no case number, making it nearly impossible to locate on the PSC portal the filings responding to OPC’s petition. As explained in OPC’s petition, the failure of the Commission to take the simple step of creating a docket number upon OPC’s filing of a request has been a persistent problem for parties with interest in actions OPC has raised to the Commission.

Shortly before OPC filed the instant request for rehearing, the Commission issued a Revised Notice Initiating a New Docket and Request for Comments on OPC’s gas petition. ML No. 303506 (June 14, 2023). The Notice requests that interested persons file written comments by October 10, 2023.

to arbitrarily decide to ignore OPC’s requests.

Specifically, at paragraph 18, Order No. 90626 explains that OPC’s request for a gas planning proceeding would “significantly curtail the *discretion of Maryland’s gas utilities* to replace and expand their infrastructure to meet the needs of existing and projected new customers.”²⁰ The premise of OPC’s request for a gas planning proceeding, however, is that the *Commission* has the legal authority—and, in fact, a legal obligation to exercise its authority—to create guidance and standards for gas infrastructure spending, among other gas utility matters.²¹ Paragraph 18 reveals the Commission’s substantive disagreement with OPC’s request—where Order No. 90626 says the utilities have discretion over gas spending that the Commission cannot or will not disturb, OPC’s request on gas utility planning asserts the Commission has authority and an obligation to act.²²

Stated otherwise, Order No. 90626’s language regarding the “discretion of

²⁰ Order No. 90626 at ¶ 18 (emphasis added). It is not clear what, if any, law the Commission refers to concerning utility “discretion” for infrastructure spending. Utility infrastructure spending can only be recovered from customers in rates upon a Commission finding that the spending is prudent, rates are just and reasonable, and in the public interest. The only specific law on gas infrastructure spending, STRIDE, is permissive, stating that utilities “may” file STRIDE programs and the Commission “may” approve them if the costs are “reasonable and prudent,” among other requirements. PUA § 4-210.

²¹ See Petition of the Office of People’s Counsel for Near-Term Priority Actions and Comprehensive, Long-Term Planning for Maryland’s Gas Companies, ML 301247 (Feb. 9, 2023) at Part I, 8-12; Part IV, 42-52.

²² At a recent Commission administrative meeting, Commissioner O’Donnell similarly stated his view that the Commission has an obligation to continue approving gas replacement infrastructure programs, a view that the Commission chair said he shared. Md. Pub. Serv. Comm’n, *Administrative Meeting – 05/31/23* at 1:10:30, <https://www.youtube.com/watch?v=KbSbf5QZfM>. As explained in OPC’s petition and contrary to the commissioner’s statements, OPC’s gas petition includes an expansive legal analysis showing the Commission’s legal authority and obligation to oversee gas transition planning.

Maryland’s gas utilities” evidences a merits-based decision—essentially, that the petition would impede the utilities’ “discretion,” a result the Commission apparently finds unpalatable. Simply put, the language suggests the Commission is choosing to ignore OPC’s petition because it disagrees with its substance. But by shelving the petition, the Commission avoids having to explain its decision. The Commission has not made that statement in an order on OPC’s gas planning petition. An actual Commission order rejecting OPC’s request for a gas planning proceeding would have to provide the Commission’s rationale for why OPC’s legal and policy arguments supporting such a proceeding were incorrect.

The law does not allow the Commission to arbitrarily withhold any action because it disfavors the merits of an OPC requested action.²³ Indeed, such arbitrary withholding of action would deny residential customers their due process rights.²⁴ Under core administrative law principles, an agency decision must provide a rationale for the conclusions it draws.²⁵ That rationale facilitates public accountability and is subject to

²³ *Harvey v. Marshall*, 389 Md. 243, 299 (2005) (explaining that arbitrary or capricious decision-making can occur “when decisions are made impulsively, at random, or according to individual preference rather than motivated by a relevant or applicable set of norms”).

²⁴ *See Calvert Cnty. Planning Comm’n*, 364 Md. at 323 (observing that “[d]ue process is concerned with fundamental fairness in the proceeding”).

²⁵ *See, e.g., Md. Off. of People’s Couns. v. Md. Pub. Serv. Comm’n*, 246 Md. App. 388, 413 (2020) (observing that it must be “possible to follow the path of the [Commission’s] reasoning’ in reaching its decision” (quoting *Md. Off. of People’s Couns. v. Md. Pub. Serv. Comm’n*, 461 Md. 380, 392 (2018))); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that even under the deferential arbitrary and capricious standard, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection

judicial review. In the example of OPC’s gas planning petition, the Commission would have to issue an order explaining the source of the utilities’ alleged “discretion” to spend hundreds of millions of customer dollars on gas infrastructure and why it is not exercising its authority to grant the relief OPC requests. The order would have to explain why such a proceeding is unnecessary for the Commission to perform its statutory obligations to supervise and regulate the utilities and ensure just and reasonable rates. The order need not grant OPC’s requested proceeding, but the law would require the Commission to explain its decision.²⁶

The obligation for a merits-based decision triggers other processes that serve to protect residential customer rights. If the decision contains factual or legal errors, OPC can request rehearing from the Commission, as OPC does here.²⁷ Or it can seek judicial review in the courts, where the Commission’s decision will be reviewed for legality and arbitrary and capriciousness, among other grounds for appeal.²⁸ The availability of judicial review and the standards set forth in PUA § 3-203 further ensure residential customers’ ability to have their rights vindicated on matters subject to Commission jurisdiction. By not ruling on OPC’s request, none of those protections are invoked.

between the facts found and the choice made”); PUA § 3-113(a) (requiring that “[a] decision and order of the Commission in a contested proceeding shall ... state the grounds for the conclusions of the Commission”).

²⁶ *Id.*

²⁷ PUA § 3-114; COMAR 20.07.02.08C.

²⁸ PUA § 3-203.

Order No. 90626 also creates a false choice between unlimited Commission discretion and no discretion. Contrary to the order, OPC’s petition does not “disparage” the discretion afforded the Commission under PUA § 2-204(a)(3) or COMAR 20.07.01.06, nor would it deny the Commission “a degree of latitude on whether and when to respond to an OPC petition.”²⁹ Indeed, the law gives the Commission some discretion, even broad discretion, but that discretion is not without limits. It does not allow the Commission to indefinitely (or permanently)³⁰ disregard an OPC request or not respond at all. Such a result would not be consistent with OPC’s statutory mandate. Rather, the logical import of the General Assembly’s intent in creating OPC, funding it, and mandating its efforts on behalf of residential customers is that the Commission will address—and not arbitrarily disregard—those efforts. COMAR 20.07.01.06 must be interpreted consistently with that statutory scheme.

²⁹ Order 90626 at ¶ 19-21. OPC’s petition requests nothing more than consideration of what processes are appropriate for assuring residential customers that the issues raised on their behalf are heard on the merits. Yet, as Commissioner Richard explains in his dissent, “without even exploring the matter in greater depth,” Order No. 90626 “slams the door on any meaningful engagement with OPC in regard to reviewing the Commission’s current procedures and rebuffs any discussion on how those procedures could be improved.” Dissenting Statement of Commissioner Michael T. Richard, Order No. 90626 at 14.

³⁰ In addition to examples of prolonged or indefinite delay in responding to OPC’s requests for Commission action, at times the Commission has failed to respond to OPC’s requests entirely. Part 3.c of OPC’s petition provides one such example at 11-13 (explaining that the Commission never acknowledged OPC’s petition for a rulemaking to implement PUA § 4-308 or OPC’s request for clarification for how its petition would be handled in light of the newly established work group). The Commission also never ruled on OPC’s request for clarification of Order No. 89795 or initial request for rehearing of Order No. 89800 in Case No. 9613. In the Matter of the Staff of the Public Service Commission Against SmartEnergy Holdings, LLC D/B/A SmartEnergy, ML No. 234709 (Apr. 9, 2021) and ML No. 234947 (Apr. 23, 2021). Nearly one year and ten months later, the Commission ruled on one aspect of OPC’s request, *see* Order No. 90515, ML No. 301459 (Case No. 9613, Feb. 22, 2023), but only after OPC filed a renewed request for rehearing., ML No. 301149 (Case No. 9613, Feb. 2, 2023).

As the statutory protector of residential customers, it is OPC's responsibility to raise matters before the Commission,³¹ but that statutory responsibility is meaningless—and residential customers' rights are denied—if Commission procedures allow it to arbitrarily disregard OPC's requests in order to avoid a merits-based decision. Order No. 90626 evidences that arbitrariness and must be reversed.

III. Order No. 90626 errs by never addressing the petition's argument that procedural rules are necessary for fair application of the statutory prohibition on *ex parte* communications.

Order No. 90626 fails altogether to address how the Commission's procedural gaps affect the statutory prohibition on *ex parte* communications.³² This significant gap in Order No. 90626 renders it arbitrary and capricious.³³ The *ex parte* rule issues arising from not having written procedures issues are set forth in OPC's petition,³⁴ and they require the Commission's attention. It is unfair for commissioners to communicate with potential parties about requests that have been formally filed with the Commission, based only on the technicality that the Commission has chosen not to docket the matter. That would be a violation of the spirit—and likely the letter—of the law. OPC will not repeat, but incorporates by reference, the points made on this issue in its petition.

³¹ See PUA § 2-204(a)(3).

³² PUA § 3-108.

³³ See *Md. Off. of People's Couns.*, 461 Md. at 399, n.16 (citing *State Farm*, 463 U.S. at 43) (identifying an agency's failure "to consider an important aspect of the problem" as a factor that could render an agency action arbitrary or capricious under the comparable federal standard).

³⁴ OPC Petition at 25-27.

CONCLUSION

The General Assembly recognized that residential utility customer interests will not be adequately protected if residential customers cannot investigate and request the Commission to initiate proceedings necessary to protect their interests. It thus created the Office of People's Counsel and mandated that OPC investigate and request proceedings to protect residential customer interests in the many billions of dollars they spend annually on utility services for which they are captive to their local utilities.

Order No. 90626, however, is directly contrary to the General Assembly's clear intent and purpose in giving residential customers a voice before the Commission. OPC's petition showed that the Commission's lack of procedures means that the voices of residential customers are being neglected or even ignored entirely, and Order No. 90626 confirms that the lack of procedures is resulting in arbitrary Commission action. The order legally errs by failing to address OPC's express and unique statutory mandate to protect residential utility customers; erroneously misdirecting attention to the merits of OPC's efforts, thus revealing the inherent arbitrariness of its withholding of Commission action; and failing to address critical transparency issues argued in the petition. Because such a decision perpetuates a status quo that harms the interests of residential customers, it must be reversed.

[Continued for Signatures]

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