

**BEFORE THE
MARYLAND PUBLIC SERVICE COMMISSION**

FEDERAL GRANT OPPORTUNITIES
FOR UTILITIES UNDER THE
INFRASTRUCTURE INVESTMENT
AND JOBS ACT

*

*

PC56

*

* * * * * * * * * * * * *

**OFFICE OF PEOPLE’S COUNSEL’S MOTION FOR REHEARING
OF COMMISSION ORDER NO. 90272**

The Office of People’s Counsel submits this motion for rehearing of Commission Order No. 90272 in Public Conference No. 56 related to Federal Grant Opportunities for Utilities Under the Infrastructure Investment and Jobs Act (IIJA).

INTRODUCTION

The IIJA is a historic investment of billions of dollars into the nation’s infrastructure with lofty goals to improve the lives of all Americans. The law seeks to spur critical advancements in infrastructure for the benefit of the public. The IIJA makes available hundreds of millions of dollars directly to utilities to implement the law’s programs. As the regulatory body supervising Maryland’s utilities and tasked with ensuring their operation in the public interest, the Commission must carefully oversee utility applications for and deployment of IIJA funds.

Order No. 90272 is not consistent with the Commission’s statutory mission. The order gives to the utilities wide discretion over IIJA-related decisions with—at most—limited, after-the-fact oversight by the Commission. Utilities, alone, have the choice of

considering comments from non-utility parties when making IJA decisions. Further, the order directs non-utility parties to *not* comment on actions the Commission should take regarding utility IJA efforts. This direction undermines OPC and other stakeholders' ability to advocate and have effective input into the potential for tens or hundreds of millions of federal dollars to benefit Marylanders and further Maryland energy policies. OPC—which is statutorily obligated to advocate for residential utility customers before the Commission—is not aware of any precedent similarly circumscribing OPC's ability to advocate to the Commission.

These outcomes abdicate the Commission's statutory responsibilities to supervise and regulate utilities to advance the public interest. The public interest is distinct from the private interests of Maryland's utilities, most of which are controlled by utility holding companies headquartered hundreds of miles outside of Maryland. Unquestionably, the public interest includes the interests of Maryland's utility customers as well as the General Assembly's policy goals for utility IJA grant efforts, which the General Assembly told the Commission it should consider. The Commission's abdication is not without consequences; it could cause customers to unjustly bear the burden of millions in investments and expenditures that should not be part of customer rates. Already, the utilities have signaled their intent to use IJA grant funding to leverage new capital investments that increase costs to customers, when it seems clear that federal grant dollars can—and should—be used to reduce costs for customers.

Importantly, Order No. 90272 demonstrates a troubling disregard for the role of OPC and other stakeholders in matters before the Commission. For its part, OPC plays a

key function in Maryland’s regulatory scheme as the statutory representative of Maryland’s residential ratepayers. The Commission’s reluctance to fully consider OPC’s filings—or to provide OPC a meaningful opportunity to advocate before the Commission on matters as significant as the IJJA—undermines the public interest by suppressing residential customer representation in matters important to their well-being. Transparency and input also benefit other parties, such as state and local agencies, legislators, and public interest organizations. All these stakeholders have an interest in whether and how IJJA funds are invested in Maryland, and the Commission would be better equipped to make a determination of what IJJA-related actions are in the public interest by allowing these stakeholders to put forth their recommendations to the Commission.

For these reasons, explained more fully below, OPC respectfully requests rehearing of Order No. 90272.

BACKGROUND

On May 5, 2022, OPC filed a petition with the Commission requesting a proceeding on opportunities for utilities under the IJJA. OPC’s petition requested that the Commission open a docket to: (1) require utilities to file regular reports on their efforts to obtain IJJA funding, including on the factors required by the Climate Solutions Now Act of 2022 (CSNA)¹; (2) evaluate whether regulations governing utility actions with respect

¹ The CSNA directs the Commission to require utilities to report on “(I) the funding for which the electric company has applied; (II) the purposes for which the funding is intended to be used; (III) the status of the funding applications; and (IV) conditions that must be met to obtain the funding.” Md. Code Ann., Pub. Util. (PUA) § 7-803(D)(1).

to the IJA are necessary and appropriate²; and (3) solicit other interested parties to file comments recommending actions for the utilities and the Commission to take in order to maximize IJA benefits for Maryland customers.³

Maryland's largest electric utilities filed a response in opposition to OPC's petition on June 10, 2022. In addition to their opposition to OPC's petition, the utilities included a new request that the Commission authorize the creation of a regulatory asset "to ensure that additional cost outlays (which are likely to be in the millions of dollars) are acceptable and that the funding of grant applicant matching commitments is presumed reasonable."⁴ The utilities requested that the Commission hear these matters at an administrative meeting.⁵

OPC filed its only reply to the utilities' opposition on June 24, 2022. OPC's reply addressed issues in the utilities' response and included OPC's initial (and only) response and opposition to the utilities' request for a regulatory asset related to IJA expenses.

On June 29, 2022, Maryland General Assembly Delegates C.T. Wilson, Chair of the Economic Matters Committee, and Ben Barnes, Chair of the Appropriations Committee, filed a letter in support of OPC's petition. The letter expressed that "[t]he

² The CSNA authorizes the Commission to "adopt regulations or issue orders that require electric companies to apply for federal and other available funds in a timely manner." PUA § 7-803(D)(2).

³ Petition of OPC Requesting a Proceeding on Federal Grant Opportunities for Utilities Under the IJA (Petition), May 5, 2022, at 5-6.

⁴ Response of the Joint Maryland Utilities to the Petition of the OPC Requesting a Proceeding on Federal Grant Opportunities for Utilities Under the IJA (Response), June 10, 2022, at 4. The Maryland utilities joining the response are Baltimore Gas and Electric Company, Potomac Electric Power Company, Delmarva Power & Light Company, The Potomac Edison Company, and Southern Maryland Electric Cooperative.

⁵ *Id.* at 5.

Commission cannot leave the decision-making regarding this once in a generation funding opportunity solely to the utilities.”⁶

Later the same day, the Commission issued Order No. 90272 establishing PC56 and granting the utilities’ request to establish an IIJA-specific regulatory asset. The order requires monthly reports from utilities in compliance with the CSNA but not does require reports on utility efforts to obtain IIJA funds prior to submitted applications. The order allows for interested parties to submit comments “identifying program opportunities available to Maryland utilities under the IIJA,”⁷ and “encourages the utilities to review and fully consider”⁸ such comments. However, because the Commission expressly declined to accept in the docket comments “for actions the Commission should take”⁹ related to the IIJA, as requested by OPC, the Commission itself will not entertain any input as to how it should oversee utility IIJA efforts. The order does not address OPC’s request that the docket include an evaluation of whether regulations governing utility conduct related to the IIJA are necessary and appropriate pursuant to the CSNA. The order’s discussion of the utilities’ request to create regulatory assets for IIJA spending was a single sentence stating, without further analysis, that regulatory assets are “appropriate.”¹⁰

⁶ Letter of Delegate C.T. Wilson and Delegate Ben Barnes in Support of OPC’s Petition (Delegates’ Letter), June 29, 2022, at 1.

⁷ Public Conference No. 56, Order No. 90272 (June 29, 2022) at 8.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Aside from a footnote mentioning that OPC replied to the utilities' response, the Commission's order does not contain any consideration of OPC's reply. OPC's reply included its only response to the utilities' points as to why they opposed OPC's petition and its only response to the utilities' brand-new request for a regulatory asset. The order erroneously refers to OPC's reply as "surreply comments" and states that OPC should have requested leave from the Commission prior to filing, even though no docket had been opened or procedural order issued.¹¹ The Commission's order also does not contain any reference to, or consideration of, the letter filed by Chairs Wilson and Barnes. The order instead adopts the process of allowing the utilities to control the grant requests—contrary to the delegates' letter.

Following issuance of Order No. 90272, on July 20, 2022, Earthjustice, on behalf of 14 organizations known as the Climate Partners, filed a letter in support of OPC's initial petition asking the Commission to reconsider OPC's request to allow stakeholders to advocate for Commission action.¹² The Climate Partners expressed their particular concern that the Commission issued its order "without seeking comment from stakeholders or interested persons regarding OPC's request," which process they state represents a lack of due process for those stakeholders.¹³

¹¹ *Id.* at 3.

¹² Comments of Climate Partners Re: Petition of OPC, Public Conference No. 56 (July 20, 2022) at 1.

¹³ *Id.*

ARGUMENT

OPC requests rehearing of Order No. 90272 and asks the Commission to modify the order to: (1) require the utilities' reports to include documentation of their pre-application efforts and plans for IJJA funds; (2) solicit recommendations for actions the Commission should take to facilitate the application, receipt, and deployment of federal funds under the IJJA; (3) specify that the Commission will use information submitted in PC56 to evaluate the need for regulations related to federal infrastructure spending; (4) establish a procedural schedule for comments from interested parties and further Commission action; and (5) deny the utilities' request for a regulatory asset related to the IJJA.

An application for rehearing must "specify the findings of fact or of law claimed to be erroneous, together with a brief statement of the ground of the alleged error."¹⁴ A petition seeking to reverse or modify an order of the Commission must "allege...the consequences resulting from compliance with the...order...which justify or entitle the applicant to the reversal or modification."¹⁵

Here, the Commission's order violates its statutory mandate to supervise and regulate public service companies in the public interest and, as a result, harms Maryland's residential ratepayers.¹⁶ The order is also conspicuously silent on if and how the Commission will ensure utility IJJA grant applications promote the General

¹⁴ Md. Code Regs. (COMAR) 20.07.02.08.C.

¹⁵ COMAR 20.07.02.08.D(2)(b).

¹⁶ See Section I below.

Assembly’s policy goals under the Climate Solutions Now Act. Finally, the order erroneously grants the utilities’ request for a regulatory asset, without analysis or any specific showing of extraordinary expense or circumstances that would warrant a regulatory asset.¹⁷

I. The Commission’s order violates its statutory obligation to supervise and regulate public utilities in furtherance of the public interest.

The Commission’s order undermines both the Commission’s and OPC’s capacity to perform their respective statutory duties. First, the order tells OPC—and all other stakeholders—that it is not “soliciting” comments “regarding actions the Commission should take to facilitate the application, receipt, and deployment of available federal funds.”¹⁸ In literal and practical effect, this means that OPC cannot advance any argument *to the Commission* in the PC56 proceeding on IIJA matters. Second, the order wholly disregards OPC’s first and only response to the utilities’ opposition to its petition for an IIJA proceeding in addition to its separate request to create an IIJA regulatory asset. Both rulings serve to silence OPC’s advocacy, undermining both OPC’s statutory mandate as well as the Commission’s own statutory obligation to regulate in the public interest.

A. The Commission erred when it declined to allow stakeholder comments regarding Commission action related to the IIJA.

¹⁷ See Section II below.

¹⁸ Order No. 90272 at 8.

The Public Utilities Article (PUA) requires the Commission to “supervise and regulate the public service companies subject to the jurisdiction of the Commission to . . . ensure their operation in the interest of the public.”¹⁹ Order No. 90272 expressly finds that “it is in the public interest for the public service companies of the State to fully and carefully consider applying for the available funds and financial assistance provides through the IJJA. . . .”²⁰ While the order allows for comments by interested parties, the Commission’s order signals that it will not review stakeholder comments; instead, the order “encourages the *utilities* to review and fully consider” them.²¹ On top of this delegation of its own authority to the utilities, the order further states that it is *not* “solicit[ing] written comments . . . for actions the Commission should take to facilitate the application, receipt, and deployment of available federal funds,” declaring such comments “beyond the scope of what the CSNA requires.”²²

The Commission’s unwillingness to accept comments regarding its own actions or more fully oversee the utilities’ IJJA-related activities is an abdication of its statutory obligations under PUA § 2-113 and the CSNA. Indeed, this deference to the utilities and refusal to hear from OPC and other stakeholders is contrary to the Commission’s acknowledgement that it is in the public interest to have full and careful consideration of IJJA funding opportunities. It is literally true—as the order states—that the CSNA itself doesn’t “require” particular processes for IJJA grants. But the Commission’s order fails

¹⁹ PUA § 2-113(a)(i)(1).

²⁰ *Id.* at 7.

²¹ *Id.* at 8 (emphasis added).

²² *Id.* at 8 (internal quotations omitted) (emphasis added).

entirely to consider what processes are necessary for the Commission to fulfill its PUA obligations to ensure utility grant applications serve the public interest and promote the state policies set forth in the CSNA.²³ The PUA requires that the Commission not simply use adjectives and adverbs to describe what utility conduct would be in the public interest and then trust the utilities to act in the public interest; rather, it requires the Commission to “supervise and regulate” utilities to ensure they take actions consistent with the public interest.

The Commission appears to misunderstand its role as a regulatory agency. Order No. 90272’s statement that the CNSA does not “require” the Commission to deploy processes for IJA funding fundamentally mischaracterizes the legislature’s delegation of regulatory power to the Commission. In delegating powers to administrative agencies like the Commission, the General Assembly rarely prescribes precisely what the Commission must do; rather, it provides general guidance, factors for consideration, and *authorizes* action. Here, for example, the CSNA delegates to the Commission the authority to issue “orders or regulations” related to utility IJA efforts and directs the Commission to use that authority “as needed to promote the State’s policy goals.” The General Assembly identified policy goals in the CSNA’s addition of PUA §§ 7-801, 7-802, and 7-803. In

²³ PUA §§ 2-113, 7-803(d), 7-802. The Commission’s trust in the utilities to solely manage the process of identifying and applying for grants was reiterated at the Administrative Meeting on July 13, 2022. While the Commission reviewed a tariff change for Pepco and Delmarva related to their EV Smart Change Management project, Chairman Stanek made parallel reference to the utilities’ alleged proactivity related to the IJA with the statement: “There are some among us who believe that the utilities will leave money on the table when grant offerings from the federal government become available. I am not one of those people. I appreciate our utilities being extremely proactive with respect not only to the IJA funding but this other federal DOE-based funding...” at 34:29.

<https://www.youtube.com/watch?v=qwJ5nCBYfh4&t=2095s>.

fact, Order No. 90272 directly undermines one of those state policy goals for utility IJA efforts; specifically, the order undermines the goal of “transparent stakeholder participation in ongoing electric distribution planning processes.”²⁴ Regardless, what the CSNA does not “require” says nothing about how the Commission must affirmatively exercise its supervisory powers to further the General Assembly’s mandates under all the provisions of the PUA, including § 2-113 and the new provisions of the CSNA.

Finally, the Commission’s order also deters interested parties from making comments about opportunities directly available to the Commission under the IJA. For example, the Commission can itself apply for section 40103 grant funds.²⁵ It is unclear why the Commission would not find it in the public interest to hear input about its activities related to these opportunities.

B. On rehearing, the Commission should address comments filed by OPC, the State’s statutory residential customer advocate.

The interests of residential customers are unquestionably part of the “public interest” that the Commission is statutorily charged with advancing through its regulation and supervision of the public utilities.²⁶ The “public interest” requirement—and the fundamental purpose of much of the PUA—is the General Assembly’s recognition that left to their own devices, public utilities will advance their private interests over the public interest. This is the historic reason why the utilities—private entities that are

²⁴ PUA § 7-802(11).

²⁵ Pub. L. No. 117-58, 135 Stat. 928 (2021) (including “a public utility commission” as an “eligible entity” for the Energy Infrastructure Federal Financial Assistance Program).

²⁶ PUA § 2-113(a)(i)(1).

monopoly providers of essential services—are state-regulated.²⁷ By establishing OPC in 1924, the General Assembly provided a check against the powerful private interests of utility monopolies.²⁸ In establishing OPC, the General Assembly recognized the high transaction costs for individual residential customers to fend for themselves in utility proceedings.²⁹ OPC’s advocacy is thus crucial to the Commission’s fulfillment of its own statutory mission, and in that sense, OPC is an ally in the Commission’s ongoing endeavor to define and enforce the public-interest standard.

To promote the residential customers’ interest and help the Commission determine what is in the public interest, the General Assembly gave OPC not just a reactive role, but an affirmative role. PUA § 2-204(a)(3) provides that OPC “shall conduct investigations and request the Commission to initiate proceedings to protect the interests” of residential utility customers. OPC’s petition at issue here is one such affirmative request to protect the interests of residential customers. But OPC cannot perform its mandate if Commission processes do not allow for actions it initiates to be fully vetted by the Commission and other stakeholders. For example, OPC’s mandate is thwarted if the Commission processes allow OPC actions to sit indefinitely without so much as a

²⁷ See Scott Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* 3 (2d ed. 2021) (the legislative command to regulate “in the public interest” “implies a statutory judgment—that absent regulation’s constraints and inducements, private behavior will diverge from the public interest...”).

²⁸ Maryland State Archives Maryland Manual On-Line, Office of People’s Counsel Origin & Functions, available at <https://msa.maryland.gov/msa/mdmanual/25ind/html/54peopf.html>.

²⁹ See generally Elin Swanson Katz and Tim Schneider, *The Increasingly Complex Role of the Utility Consumer Advocate*, 14 Energy L.J. 1, 7 (2020) (“While spiraling utility costs had a major impact on the household budgets of many consumers, the costs to individual consumers were generally not enough to justify investing the time and energy to participate in a utility rate proceeding, or hire counsel or experts to do so on their behalf, even though the impact for residential customers as a class might be quite large.”).

procedural order or the creation of a docket or if the Commission denies it the opportunity to adequately respond—or the chance to respond at all, as in this case—to filings adverse to actions OPC initiates.³⁰

In its order at issue here, the Commission mistakenly characterized OPC’s reply to the utilities’ response as “surreply comments” that require leave of the Commission prior to filing.³¹ A surreply is “[a] movant’s *second supplemental response* to another party[]...usually in answer to a surresponse.”³² OPC’s filing was not a surreply—it was OPC’s only reply to the utilities’ only response to OPC’s petition. The Commission routinely receives and considers reply briefings in the course of its proceedings. It was an error for the Commission not to consider OPC’s reply in this case. It is particularly important for the Commission to consider a reply when a party’s response raises new arguments or new requests, as the utilities did with their arguments as to why OPC’s requested proceeding should be denied and with their request for an IJJA-specific regulatory asset.

³⁰ The Commission’s order in this case seems to reflect an apparent recent Commission effort to, in effect, dissuade OPC from advocating before the Commission. *See, e.g.,* Case No. 9673, *Complaint of the Office of People’s Counsel Against Washington Gas Light Company and WGL Energy Services, Inc.* Washington Gas filed a motion to dismiss OPC’s complaint. The Commission’s order dismissed OPC’s only response to that motion in a footnote, never addressing its substance (compare OPC response, ML No. 238714, with Order No. 90057). *See also* Public Conference No. 55, *Retail Gas and Electric Supply Offers to Low Income Customers*. OPC filed a Request for Clarification on May 20, 2022 that the Commission has not addressed. *See also* Case No. 9613, *In the Matter of the Complaint of the Staff of the Public Service Commission Against SmartEnergy Holdings, LLC*. OPC filed a Motion for Clarification on April 12, 2021 and filed a Request for Rehearing on April 23, 2021 of the Commission’s order granting SmartEnergy’s motion to stay. The Commission did not rule on either filing.

³¹ Order No. 90272 at 3, n. 4.

³² Black’s Law Dictionary (11th ed. 2019) (emphasis added).

The Commission’s order—both in granting the utilities’ request for a regulatory asset without allowing input by OPC or other parties and in denying stakeholders a meaningful opportunity to advocate before the Commission in PC56—raises serious questions about whether the Commission is affording the process due to OPC and other stakeholders. Relatedly, the order contradicts the state policy—recently enacted in the CSNA—favoring transparency and stakeholder participation in distribution planning.³³ OPC thus suggests, respectfully, that the Commission ensure transparent processes that provide OPC adequate opportunity to further its statutory mandate.

II. The Commission erred when it granted the joint utilities’ request to create an IIJA-specific regulatory asset.

The Commission’s order authorizes the utilities to create a regulatory asset “to track IIJA-related incremental expenditures and savings.”³⁴ The order contains no analysis other than a single sentence simply declaring regulatory assets “appropriate.”³⁵ The Commission does not identify what these expenditures and savings may be, why the circumstances of the IIJA require a regulatory asset, what reporting utilities are required to do in connection with the regulatory asset, or how parties can determine whether the IIJA-related incremental expenditures are appropriately identified and prudent. Indeed, the Commission does not know at this time for what projects the utilities will seek and use IIJA program funds, or what specific criteria will ensure those projects are completed

³³ PUA § 7-802(11).

³⁴ Order No. 90272 at 8.

³⁵ *Id.*

in the public interest. It is inappropriate for the Commission to authorize a regulatory asset in these circumstances. The appropriate time to consider a regulatory asset is when utilities put forth concrete evidence that one is needed in relation to a specific IJJA-related project.³⁶

A regulatory asset is comprised of “costs of past service whose recovery was deferred for various reasons to a future accounting period by the regulatory process.”³⁷ These “various reasons” include situations in which utilities encounter extraordinary or unexpected expenses³⁸ or when the utility undertakes a specific project that is significantly beneficial to the public interest and for which it makes sense for ratepayers to share some of the utility’s cost risk.³⁹ In any case, a regulatory asset is a discrete and limited regulatory tool that allows recovery of expenses outside of the norms of a typical rate proceeding. As such, it is imperative that the regulatory asset be fully vetted and well-defined.

³⁶ See, e.g., Case No. 9433, Order No. 88324 (August 1, 2017), where the Commission considered a request for a regulatory asset related to specific “Gas Access Program” projects. The Commission denied the regulatory asset based on critical project-specific findings, stating that “we do not see how the Company would be better situated by deferring cost recovery...into a regulatory asset, when our regulatory structure has allowed utilities to earn a return of...such projects through rates.” *Id.* at 24-25. Further, to create the regulatory asset would upset precedent and “allow WGL to change the way it funds expansion projects.” *Id.* at 25. Such a project-specific review, providing critical context for the potential appropriateness of a regulatory asset, is lost in the Commission’s approval of this broad IJJA-related asset.

³⁷ Case No. 8738, Order No. 73834 (December 3, 1997) at n. 51. Effectively, this special regulatory treatment means that expenses incurred outside of a historic test year can be considered for capitalization and recovery in rates.

³⁸ E.g., for serious storm-related costs, or for costs related to the COVID-19 pandemic, as is referenced below.

³⁹ E.g., for the deployment of a large-scale smart grid initiative, as is referenced below.

It has indeed been the Commission’s practice to thoroughly review requests for regulatory assets and, when it authorizes such assets, to specify conditions or restrictions on the utility’s use of the assets to ensure compliance with all relevant statutes. When several utilities undertook large-scale projects to install smart meters (AMI projects), for example, the Commission approved regulatory assets for the AMI projects only after conducting thorough evidentiary hearings.⁴⁰ Each regulatory asset was specific to the utility’s particular AMI project, and the Commission took care to specify that recovery of the regulatory asset was contingent on the achievement of certain benefits for customers and cost-effectiveness.⁴¹ The Commission further established detailed metrics against which to monitor the progress of each utility’s AMI project to aid in an ongoing review of the prudence of incurred costs.⁴²

⁴⁰ The Commission expressly rejected the PHI Companies’ request for the “expeditious creation of a regulatory asset” even when PHI stated it would “enhance [their] ability to obtain federal funding for AMI pursuant to the recently enacted...ARRA of 2009,” Case No. 9207, Order No. 83571 (September 2, 2010). Thus, the Commission rejected a PHI argument that is similar to the unsupported claim that the utilities made in the present case that a regulatory asset would assist them in obtaining IJA funds.

⁴¹ *See, e.g.*, Case No. 9294, Order No. 85678 (June 21, 2013) at 11-12 (“Even with a projected positive business case outcome...as with our prior AMI-related approvals [for BGE and Pepco], we will not authorize cost-recovery until SMECO demonstrates actual operational and supply-side benefits and an overall cost-effective system.”) Cost-effectiveness was a particular requirement for the AMI cases in order to comply with PUA § 7-211. This requirement or another statutory requirement could apply to any IJA-related project, but having pre-approved a regulatory asset, the Commission will be unable to easily apply these conditions.

⁴² *See, e.g.*, Case No. 9208, Order No. 83531 (August 13, 2010) at 48 (“We also can, and will mitigate both the technological and financial risks further by requiring BGE to measure its performance with regard to deployment and customer benefits and reviewing the status of the Initiative regularly. These reviews will monitor the progress of the Initiative against concrete metrics – the results may well inform our analyses of prudence and cost-effectiveness in the rate cases to follow, and thus our future cost-recovery decisions.”). The establishment of prudence conditions and metrics have enabled thorough analysis of the regulatory asset during BGE’s subsequent rate cases. In one such case, Commissioners Richard and Williams expressed why such a close review is important: “Although we agree with BGE that investing in new technologies can be beneficial, we fully expect, and our ratepayers deserve, that those investments be delivered as promised and provide meaningful bill savings for all customers.” Case No. 9406, Order No. 87593 (June 3, 2016), Comm’r Williams and Comm’r Richard Dissent, at D-1.

It has also been the Commission’s practice to clearly define which expenses are eligible to be included in a regulatory asset and the requirements for utilities to provide regular reports as to the expenses being included. When the COVID-19 pandemic impacted the operations of Maryland’s utilities, the Commission approved a regulatory asset because it was a “catastrophic health emergency ... outside the control of the Utility and a non-recurring event.”⁴³ The asset was approved specifically for “costs prudently incurred for the provisioning of utility services used to maintain health, safety and welfare of Maryland customers during the COVID-19 pandemic.”⁴⁴ The Commission further imposed a strict duty on the utilities to “maintain detailed records of the incremental costs”⁴⁵ in order for them to be eligible for inclusion in the regulatory asset.

In the present case, contrary to precedent, the Commission-authorized regulatory asset has no connection to a specific project, no clear definition of eligible expenses, and no conditions or reporting safeguards to ensure a prudence review can be meaningfully completed in a future rate case. The Commission’s grant of a “blanket” IJIA-related regulatory asset makes it difficult for the Commission to consider project-specific factors that are essential to determining whether a regulatory asset is appropriate. These considerations include statutory requirements, as discussed above with the AMI cases, and public interest determinations.

⁴³ Case No. 9639, Order 89542 (April 9, 2020) at 1.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.*

In this case, one important public interest determination is whether the utilities are seeking IIJA grant funds for projects the utilities would undertake anyway. The IIJA makes funding available for investments that the utilities make—or should be making—in the normal course of operations. For example, the Department of Energy recently opened the application period for a grid resiliency grant program covering everything from utility-pole upkeep and vegetation management, to distribution grid enhancements and the integration of distributed energy resources, such as solar and batteries.⁴⁶ These are usual utility undertakings. The expenses related to projects the utilities would have undertaken anyway are not extraordinary or unexpected and would have been incurred in any case. Authorizing a regulatory asset that does not expressly delineate these expenses allows for special rate treatment to the detriment of customers.

For any IIJA projects that the utilities would *not* have undertaken without the funds, and for which the utility wants ratepayers to provide the matching portion, the Commission must exercise its supervisory powers to ensure such efforts are consistent with the public interest. For these expenditures to be placed in a regulatory asset, the utilities should provide concrete support for how the projects will impact operations, depreciation, or tax expenses. If the utilities present such evidentiary support, the Commission can consider such request with input from other interested parties, as occurred with the AMI project cases.

⁴⁶ See Department of Energy press release at <https://www.energy.gov/articles/biden-administration-announces-23-billion-states-and-tribes-strengthen-and-modernize>.

Finally and importantly, on rehearing the Commission should address the utilities' statement that a regulatory asset would demonstrate that "the funding of grant applicant matching commitments is *presumed* reasonable."⁴⁷ This statement appears to be an effort to create a presumption inconsistent with previous Commission decisions allowing the creation of regulatory assets and with the utilities' burden of proof in a rate case. The utilities have made clear that they want full discretion over applying for and administering IJJA grant funds with little scrutiny. The Commission's order, both in granting the regulatory asset and in its deference to the utilities, could later be used by the utilities to argue in favor of a presumption that their IJJA spending was reasonable. While the Commission noted the creation of a regulatory asset is not a determination of prudence nor does it provide predetermined certainty of recovery, the Commission did not carefully design the regulatory asset to define eligible expenses or prudence conditions. Leaving the utilities free to argue for a presumption later, particularly absent the usual safeguards that the Commission builds into regulatory assets, imposes unwarranted risks on customers and is not in the public interest.

It is appropriate for the Commission to support and encourage utilities in their plans to obtain and apply IJJA funds, but it is not appropriate for the Commission to approve the creation of regulatory assets without analysis and specific guidance. The Commission should reject the utilities' request for a regulatory asset at this time.

⁴⁷ *Id.* (emphasis added).

CONCLUSION

The Commission has a responsibility to regulate and supervise Maryland's utilities to ensure their operation in the interest of the public. Although the IJJA, one of the largest infrastructure packages in U.S. history, was expressly enacted to benefit the public, the Commission's Order No. 90272 suggests that the Commission would trust the utilities to regulate themselves to ensure the hundreds of millions of dollars in grant funds are used to achieve the public interest. This is a violation of the Commission's statutory obligations pursuant to the PUA and the CSNA. The interests of the utilities and the public, though sometimes overlapping, are often at odds. Investor-owned utilities, in particular, have fiduciary obligations to shareholders, not to customers nor to the advancement of state policies. It is the responsibility of the Commission, not the utilities, to ensure the utilities operate in the public interest. Especially where tens or hundreds of millions of dollars for Maryland's benefit are at issue, the Commission cannot fulfill its responsibility by sealing itself off from input from the State's statutory representative of residential customers as well as other stakeholders.

For these reasons, OPC respectfully requests that the Commission modify Order No. 90272 to: (1) require the utilities' reports to include documentation of their pre-application efforts and plans for IJJA funds; (2) solicit recommendations for actions the Commission should take to facilitate the application, receipt, and deployment of federal funds under the IJJA; (3) specify that the Commission will use information submitted in PC56 to evaluate the need for regulations related to federal infrastructure spending; (4) establish a procedural schedule for comments from interested parties and further

Commission action; and (5) deny the utilities' request for a regulatory asset related to the IIJA.

Respectfully submitted,

DAVID S. LAPP
PEOPLE'S COUNSEL

William F. Fields
Deputy People's Counsel

Juliana Bell
Deputy People's Counsel

Frederick H. Hoover
Assistant People's Counsel

/electronic signature/
Irene N. Wiggins
Assistant People's Counsel

Office of People's Counsel
6 St. Paul Street, Suite 2102
Baltimore, Maryland 21202
(410) 767-8150

July 27, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July, 2022, the foregoing Motion of the Office of People’s Counsel for Rehearing was e-mailed to all parties of record in PC56.

Respectfully submitted,

/electronic signature/

Irene N. Wiggins
Assistant People’s Counsel

Maryland Office of People’s Counsel
6 St. Paul Street, Suite 2102
Baltimore, Maryland 21202
(410) 767-8150