

**ORDER NO. 90336**

Federal Grant Opportunities for  
Utilities under the Infrastructure  
Investment and Jobs Act

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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND

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PC56

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**ORDER DENYING REHEARING**

Before: Jason M. Stanek, Chairman  
Michael T. Richard, Commissioner  
Anthony J. O'Donnell, Commissioner  
Odogwu Obi Linton, Commissioner  
Patrice M. Bubar, Commissioner

**Issued: August 29, 2022**

## **I. INTRODUCTION**

1. On July 27, 2022, the Office of People’s Counsel (“OPC”) filed a Motion for Rehearing<sup>1</sup> of Commission Order No. 90272 in Public Conference 56 (“PC56”), which relates to the Federal Grant Opportunities for Utilities Under the Infrastructure Investment and Jobs Act (“IIJA”).

2. The Motion requests the Commission modify its Order to take additional actions and reverse the Commission’s determination granting the utilities’ request for a regulatory asset related to the IIJA.<sup>2</sup>

3. A petition seeking to reverse or modify an order of the Commission shall allege the facts and circumstances which justify the reversal or modification; or the consequences resulting from compliance with the order which justify or entitle the applicant to the reversal or modification. COMAR 20.07.02.08D(2).<sup>3</sup> For the reasons discussed below, OPC’s request for rehearing is denied and Order No. 90272 is clarified as discussed herein.

## **II. BACKGROUND**

4. On November 15, 2021, the President of the United States signed into law the Infrastructure Investment and Jobs Act, H.R. 3684, 117<sup>th</sup> Congress (2021). The IIJA authorizes an historic investment of billions of dollars in federal funds in the nation’s utility infrastructure and creates programs of federal financial assistance to states to be used in coordination and collaboration with electric utility companies in order to improve

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<sup>1</sup> Office of People’s Counsel’s *Motion for Rehearing of Commission Order No. 90272* (“OPC Rehearing Motion”), PC56, July 27, 2022.

<sup>2</sup> OPC Rehearing Motion at 7.

<sup>3</sup> *See also* Md. Code Ann., Pub. Util. Art. (“PUA”) § 3-114(a)(1) (“On rehearing, the Commission may . . . consider facts not presented in the original hearing, including facts arising after the date of the original hearing[.]”).

transmission, storage, and distribution infrastructure to fortify and enhance grid resilience and reliability.

5. On April 8, 2022, the Maryland General Assembly passed the Climate Solutions Now Act (“CSNA”), Senate Bill 528, which requires the Commission to “provide assistance and support” to Maryland utilities in applying for and obtaining access to IJJA funds to meet the State’s policy goals for the electric distribution system, in addition to other requirements.<sup>4</sup>

6. On May 5, 2022, OPC filed a petition with the Commission requesting that the Commission initiate a proceeding on opportunities under the IJJA. Specifically, OPC requested that a docket be opened to allow utilities and other interested parties to file written comments regarding the following: “(a) Identification of all possible programs under the IJJA available to Maryland Commission-regulated utilities; (b) Recommendations for actions utilities should take with respect to identified programs; and (c) Recommendations for actions the Commission should take to facilitate the application, receipt, and deployment of available federal funds.”<sup>5</sup>

7. On May 20, 2022, OPC filed a subsequent letter with the Commission reiterating its petition and requesting that the Commission “promptly open a docket that allows coordination between utilities and other stakeholders to identify available funds and plan for their application and use.”<sup>6</sup>

8. On June 10, 2022, Baltimore Gas and Electric Company (“BGE”), Potomac Electric Power Company (“Pepco”), Delmarva Power & Light Company (“Delmarva

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<sup>4</sup> 2022 Bill Text MD S.B. 528, Maryland General Assembly, Senate Bill 528, Climate Solutions Now Act of 2022 (April 9, 2022) (codified, in pertinent part, as PUA §§7-801 through 7-804).

<sup>5</sup> *Petition of the Office of the People’s Counsel Requesting a Proceeding on Federal Grant Opportunities for Utilities Under the Infrastructure Investment and Jobs Act*, May 5, 2022 (“OPC Petition”), Maillog No. 240572 at 5-6.

<sup>6</sup> Maillog No. 240783.

Power”), The Potomac Edison Company (“Potomac Edison”), and Southern Maryland Electric Cooperative (“SMECO”) (collectively the “Joint Maryland Utilities”) filed a response opposing OPC’s request to initiate a formal proceeding, recommending instead an alternative approach and requesting that the Commission authorize the Joint Maryland Utilities to each establish an IJJA-specific regulatory asset to track IJJA-related costs and related savings.<sup>7</sup>

9. On June 24, 2022, OPC filed a Reply<sup>8</sup> to the Joint Utilities’ Response reiterating and renewing its request for the Commission to initiate an IJJA proceeding and addressing the arguments by the Joint Utilities that a formal proceeding is not necessary and to deny their request for the creation of a regulatory asset.

10. On June 29, 2022, the Commission issued its Order<sup>9</sup> on OPC’s Petition. The Order: (1) initiates a formal public conference proceeding and repository, in the instant docket (PC56), for federal grant opportunities under the IJJA; (2) requires all Maryland utilities to file monthly reports with the Commission beginning August 1, 2022, that identify all projects for which IJJA funding has been applied and that contain the information required by the Maryland General Assembly’s Climate Solutions Now Act (“CSNA”); (3) allows stakeholders and other interested parties such as OPC to file any written comments and suggestions regarding IJJA-related programs and funding; and (4) allows Maryland utilities to establish an IJJA-specific regulatory asset to track IJJA-related incremental expenditures and savings.

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<sup>7</sup> *Response of the Joint Maryland Utilities to the Petition of the Office of People’s Counsel Requesting a Proceeding on Federal Grant Opportunities for Utilities under the Infrastructure Investment and Jobs Act*, filed June 10, 2022 (“Joint Utilities Response”). Maillog No. 241054.

<sup>8</sup> Office of People’s Counsel’s Reply to Joint Maryland Utilities’ Response to Petition for an IJJA Proceeding, filed June 24, 2022 (“OPC Reply”). Maillog No. 241210.

<sup>9</sup> *Order on Petition, Federal Grant Opportunities for Utilities Under the Infrastructure Investment and Jobs Act*, PC56, Order No. 90272, June 29, 2022 (“IJJA Order”).

11. Also on June 29, 2022, state Delegates C.T. Wilson, Chair of the House Economic Matters Committee, and Ben Barnes, Chair of the House Appropriations Committee, jointly filed a letter requesting that the Commission open a docket to allow for a discussion of IJJA programs and funding available to Maryland utilities.

12. On July 20, 2022, Earthjustice, on behalf of 14 organizations known as Climate Partners, filed a letter requesting that the Commission “reconsider OPC’s request to open a docket to allow a robust discussion of the appropriate proceedings and the parameters of that proceeding which will best enhance Maryland’s ability to obtain the federal funding available.”<sup>10</sup>

13. On July 27, 2022, OPC filed its Motion for Rehearing of Commission Order No. 90272, requesting that the Commission modify its Order as discussed below.<sup>11</sup>

14. On or about August 1, 2022, several Maryland utilities and other interested parties filed their first monthly reports as required by Commission Order No. 90272. Specifically, SMECO filed on July 27, 2022; Potomac Edison filed on July 29, 2022; BGE, Pepco, and Delmarva Power (collectively the “Joint Exelon Utilities”) filed their first Joint Exelon Utilities monthly report on August 1, 2022. Additionally, the Working for Advanced Transmission Technologies (“WATT”) Coalition filed comments on August 2, 2022.

15. On August 8, 2022, the Joint Exelon Utilities filed a response<sup>12</sup> to OPC’s Motion for Rehearing of Commission Order No. 90272, requesting that the Commission deny

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<sup>10</sup> Comments of Earthjustice filed July 20, 2022. Climate Partners did not articulate why it has standing to request reconsideration of Commission Order No. 90272. Because their request for relief is adequately represented by OPC’s Motion for Rehearing, the Commission will consolidate the Climate Partners’ request with OPC’s request for rehearing.

<sup>11</sup> OPC Rehearing Motion at 7.

<sup>12</sup> The Joint Exelon Utilities’ Response to OPC’s Motion for Rehearing of Commission’s Order No. 90272, (“Joint Exelon Utilities Response”) PC56, August 9, 2022.

OPC’s Motion for Rehearing because OPC fails “to present any new facts or arguments that warrant a change or modification to the Order,” which is required under Public Utilities Article (“PUA”), *Annotated Code of Maryland* § 3-114(a)(1)-(2). Additionally, the Joint Exelon Utilities argued that the Commission did not err in allowing the Joint Maryland Utilities to create an IJJA-specific regulatory asset.

### **III. REQUEST FOR REHEARING**

16. On rehearing, OPC requests the Commission modify its 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.”<sup>13</sup>

17. First, OPC argues that Order No. 90272 violates the Commission’s statutory obligations to supervise and regulate public utilities in furtherance of the public interest<sup>14</sup> primarily because the Order did not explicitly solicit comments “for actions the Commission should take to facilitate the application, receipt, and deployment of available federal funds.”<sup>15</sup> OPC argues that by not including its requested language “OPC cannot advance any argument *to the Commission* in the PC56 proceeding on IJJA matters.”<sup>16</sup> OPC claims that not adopting its specific language in the Order “... signals that [the

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<sup>13</sup> OPC Rehearing Motion at 7.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (original emphasis).

Commission] will not review stakeholder comments....”<sup>17</sup> OPC characterizes this posture as the Commission’s “unwillingness to accept comments regarding its own actions or [to] more fully oversee the utilities’ IJJA-related activities,” which OPC alleges is an abdication of the Commission’s statutory obligations under PUA § 2-113 and the CSNA.<sup>18</sup> Further, OPC argues that on rehearing the Commission should address OPC’s reply to the utilities’ opposition to its petition for an IJJA proceeding in addition to OPC’s opposition to the utilities’ request to create an IJJA regulatory asset. OPC asserts that by not addressing its response regarding an IJJA-specific regulatory asset the Commission curtails OPC’s ability to perform its mandate as the State’s residential customer advocate.<sup>19</sup>

18. Second, OPC claims the Commission erred in granting the Joint Maryland Utilities’ request to create an IJJA-specific regulatory asset because the utilities have not “put forth concrete evidence” showing that one is needed in relation to a specific IJJA-related project.<sup>20</sup>

#### **IV. RESPONSIVE PLEADING**

19. The Joint Exelon Utilities first argue that OPC’s Motion “should be wholly denied because it fails to present any new facts or arguments that warrant a change or modification to the Order.”<sup>21</sup> The Joint Exelon Utilities assert that “[a]ll of OPC’s arguments were before the Commission when it issued the Order; OPC is simply reiterating the same objections it voiced in response to the Joint Maryland Utilities’<sup>22</sup>

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<sup>17</sup> *Id.* at 9.

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

<sup>19</sup> *Id.* at 11-14.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> Joint Exelon Utilities Response at 1.

<sup>22</sup> The Joint Maryland Utilities consisted of the Joint Exelon Utilities, The Potomac Edison Company and Southern Maryland Cooperative.

initial filing.”<sup>23</sup> The Joint Exelon Utilities argue that “the Commission did respond to OPC’s request for a proceeding by opening Public Conference 56 and requiring in its Order that utilities provide monthly reporting on applications for IJJA funding opportunities and that stakeholders have the opportunity to comment in writing on those opportunities.”<sup>24</sup>

20. Second, the Joint Exelon Utilities argue that Order No. 90272 correctly allows the utilities to establish an IJJA-specific regulatory asset and requires the utilities to provide detailed information to warrant a regulatory asset.<sup>25</sup> The Joint Exelon Utilities assert that “OPC cannot point out a prior case where the Commission established a bright line test for determining if and when a regulatory asset is appropriate. That is because regulatory assets are reserved for those situations that do not fit squarely within the standard regulatory constructs for cost recovery and must be evaluated on a case-by-case basis.”<sup>26</sup> The Joint Exelon Utilities point out that the two cases - AMI technology deployment and COVID-19 - that OPC uses to support its opposition to the IJJA-specific regulatory asset were ultimately authorized by the Commission to establish regulatory assets and had the same specificity as granted in Order No. 90272.<sup>27</sup>

## V. COMMISSION DECISION

21. Commission Order No. 90272 effectively grants OPC nearly all of its requested relief. First, the Order opens a docket by initiating an open and transparent public conference to review and evaluate IJJA-related activities by utilities in Maryland. Second, the Order requires each utility to file monthly reports containing all the

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<sup>23</sup> Joint Exelon Utilities Response at 1.

<sup>24</sup> *Id.* at 2-3.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.* at 5-6.



information set forth in the CSNA, including the identification of IJJA funding opportunities for which each utility has applied. Third, the Order allows stakeholders and interested parties to file written comments in this docket (PC56) that identify program opportunities available to Maryland utilities under IJJA and associated projects that may align with State policy goals. Moreover, the Order does not preclude any interested party from submitting any comments into this docket. While the Commission did not explicitly adopt OPC's language and solicit comments, interested parties may always file material they feel is necessary to assist the Commission, and as is Commission practice, all comments will be reviewed and considered.

**A) Commission Authority, CSNA Requirements and Level of Commission IJJA Oversight**

22. Pursuant to PUA § 2-112(a), the Maryland General Assembly grants the Commission jurisdiction over each public service company that engages in or operates a utility in the State. The statute further states in PUA § 2-112(b) that the Commission's "*powers are those specifically conferred by law.*" Therefore, when exercising its supervisory and regulatory powers<sup>28</sup> over Maryland utilities the Commission's actions are dictated by statutory language.

23. The relevant statute in this proceeding is the Climate Solutions Now Act of 2022. The CSNA enacts extensive climate change laws to reduce greenhouse gas emissions ("GHG") and to establish a net-zero statewide greenhouse gas emissions goal. The CSNA takes various measures and adopts extensive provisions to meet the goals set forth in the statute. One such provision is PUA § 7-803, directing the Commission and MEA

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<sup>28</sup> PUA § 2-113 provides that "[t]he Commission shall (i) supervise and regulate the public service companies subject to the jurisdiction of the Commission to: (1) ensure their operation in the interest of the public; and (2) promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination;..."

to assist and support Maryland utilities in taking advantage of the IIJA funding opportunities to meet the State's policy goals. Specifically, CSNA § 7-803 provides that:

(A) The General Assembly strongly encourages the electric companies of the State to pursue diligently federal funds to meet the State's policy goals for the electric distribution system, including funds made available under §§ 40101, 40103, and 40107 of the Federal Infrastructure Investment and Jobs Act.

(B) The Commission and the Maryland Energy Administration shall provide assistance and support to electric companies for applying for and obtaining access to federal and other available funds to meet the State's policy goals for the electric distribution system.

(C) The Maryland Energy Administration shall identify funding sources that may be available to electric companies to implement the State's policy goals under § 7-802 of this subtitle, including funding for:

(1) increasing the efficiency of electric distribution systems, including through installation and integration of energy storage devices and operational changes and upgrades;

(2) Grid-hardening activities to reduce the occurrence of consequences of events that disrupt operations of the electric distribution system due to extreme weather or natural disasters;

(3) Other distribution system-related upgrade activities available for funding under § 40101, § 40103, or § 40107 of the Federal Infrastructure Investment and Jobs Act; and

(4) Other specific activities that the Commission identifies.

(D) As needed to promote the State's policy goals under §7-802 of this subtitle, the Commission:

(1) shall require each electric company to report to the Commission and the Maryland Energy Administration 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; and

(2) May adopt regulations or issue orders that require  
electric companies to apply for federal and other available  
funds in a timely manner.

24. Order No. 90272 complies with the statutory language of CSNA § 7-803. First, pursuant to CSNA § 7-803(A), the Order strongly encourages Maryland utilities to fully and carefully consider applying for available funds and financial assistance provided through IJJA programs. Second, in accordance with CSNA § 7-803(B), the Commission initiated an open and transparent public conference to provide “assistance and support” to Maryland utilities in gathering information on IJJA funding opportunities and programs. Third, to satisfy the requirements of the statute, the Commission established a monthly reporting requirement for the utilities to file in the public docket the information listed in CSNA § 7-803(D)(1).

25. Contrary to OPC’s Rehearing Motion, the Commission did not abdicate<sup>29</sup> its statutory responsibilities to supervise and regulate utilities to advance the public interest pursuant to PUA § 2-113. The Commission’s primary regulatory power is setting just and reasonable rates under PUA § 4-102. In doing this, the Commission reviews utility actions and disapproves imprudent spending to protect ratepayers from paying for imprudent utility decisions. Commission action in pre-approving, directing, or otherwise participating in the utility decision-making process regarding IJJA funding would compromise that primary authority to protect ratepayers. The process the Commission

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<sup>29</sup> OPC Rehearing Motion at 2.

established in Order No. 90272 strikes an appropriate balance of the requirements of § 7-803, the Commission's obligations under §§ 2-113 and 4-102, and the interests of stakeholders and the utilities in transparency and open communication.

26. In its request for rehearing, OPC asks the Commission to reverse its decision and explicitly adopt OPC's language allowing parties to file written comments "for actions the Commission should take to facilitate the application, receipt, and deployment of available federal funds." Order No. 90272 accomplishes this objective by explicitly finding it in the public interest to create a Public Conference "where government agencies and interested parties may file written comments" to exchange information and ideas concerning IJJA opportunities and associated programs that may align with State policy goals.<sup>30</sup> The Order does not prevent OPC or any stakeholder from submitting comments to the Commission, including those that recommend actions that the Commission should take concerning the IJJA. This central forum will allow the Commission to execute its duties to review, monitor or otherwise act upon any comments filed by any party related to IJJA funding. The Conference is already serving this important purpose, as evidenced by the WATT Coalition's unsolicited filing on August 1, 2022. This filing contains a description of the organization's focus and connection to IJJA opportunities as well as suggestions for the Commission to consider when allocating grant funds under IJJA Section 40107 and directing utilities to submit certain grant proposals to the U.S. Department of Energy.<sup>31</sup>

27. It is the Commission's practice in every proceeding to exercise its supervisory and regulatory powers, which necessitates that the Commission review each filing and

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<sup>30</sup> Order No. 90272 at 8.

<sup>31</sup> Comments of the WATT Coalition, August 1, 2022.

make determinations on whether additional measures should be taken – such as conducting investigations<sup>32</sup> or hearings<sup>33</sup>, requesting parties submit additional filings or documentation<sup>34</sup>, issuing appropriate orders, or adopting new or modifying existing regulations,<sup>35</sup> if required. The Commission has always done so and will continue to do so in this proceeding. For these reasons, the Commission finds that this proceeding satisfies its statutory obligation to supervise and regulate Maryland public utilities in furtherance of the public interest.

#### **B) OPC’s Alleged New Facts/Consequences**

28. COMAR 20.07.02.08D(2) provides that “[a] petition seeking to reverse or modify an order of the Commission shall allege the facts and circumstances which have arisen **after** the hearing or order which justify the reversal or modification; or the consequences resulting from compliance with the order which justify or entitle the applicant to the reversal or modification.” (Emphasis added).

29. OPC’s Motion requests rehearing but fails to allege any new facts or circumstances that arose after Order No. 90272 was issued that would otherwise justify reversal or modification of the Order. OPC alleges that as a consequence of the Order, it will not be able to carry out its statutory obligations to represent the State’s residential ratepayers. To the contrary, Order No. 90272 provides the forum in which utilities will provide monthly reports on their IJA activities. A public conference provides a single clearing house for interested parties to provide comments on all IJA matters; the utilities

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<sup>32</sup> PUA § 2-115. Investigations - (a) Required. – The Commission shall initiate and conduct any investigation necessary to execute its powers or perform its duties under this division.

<sup>33</sup> PUA § 3-104. Proceedings – (a) In general – (1) The Commission shall institute and conduct proceedings reasonably necessary and proper to the exercise of its powers or the performance of its duties

<sup>34</sup> PUA § 2-112(2). Jurisdiction; general powers - The Commission has the implied and incidental powers needed or proper to carry out its function under this division.

<sup>35</sup> PUA § 2-121. Regulations. The Commission may adopt reasonable regulations as necessary to carry out any law that relates to the Commission.

and parties can review all the material in one place for maximum transparency and administrative efficiency. Finally, as noted above, the Commission will also carefully review and consider all comments. Therefore, the Commission finds that nothing in the Order should hamper OPC's ability to fulfill its duties pursuant to Md. Annotated Code PUA § 2-204 and that there are no new consequences resulting from compliance with the Order which justify or warrant a reversal or modification.

30. The CSNA requires, among other things, that each utility report to the Commission and the Maryland Energy Administration on the funding for which the utility has applied.<sup>36</sup> The CSNA does not require utilities to report on "pre-application efforts and plans." OPC's Motion offers no support or rationale to justify a modification requiring the utilities' reports to include documentation of their pre-application efforts and plans for IJA funds, which go beyond the requirements of the CSNA. Therefore, the Commission denies this request. OPC's primary concern appears to be that PC56 will not provide an opportunity for the Commission, or OPC, to exert influence over the Utilities' actions in seeking grants. However, significant Commission involvement in utility decision-making risks compromising the Commission's primary responsibility to conduct a prudency review to hold utilities accountable and protect ratepayers. Moreover, formal pre-application review for utility IJA programs goes far beyond "assistance and support" as outlined in the CSNA and could be detrimental to securing benefits for Maryland utilities by slowing the grant application process or providing information to competing grant-seekers. Finally, nothing in the Order prevents OPC from seeking this information on its own if this is deemed important to fulfilling its responsibilities to residential ratepayers.

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<sup>36</sup> CSNA § 7-803(D)(1)(I).

31. The CSNA plainly states that the Commission “*may* adopt regulations or adopt orders that require electric companies to apply for federal funds in a timely manner” as needed to promote State policy goals.<sup>37</sup> OPC’s Motion fails to provide any support or rationale for modifying the Order to specify that the Commission will use the information gathered in the Public Conference to evaluate the need for regulations concerning the IJJA. The Commission has reviewed and considered the various documents filed in this public docket to date. At this time, the Commission does not find it necessary to oversee IJJA-related activities by way of regulations rather than issuance of orders. Proceeding via the public conference and associated orders, provides several immediate benefits over a rulemaking. First, the timelines for IJJA grants are unlikely to provide sufficient time for the Commission to undertake lengthy rulemakings. Orders, however, allow the Commission to act more quickly in response to changing circumstances and information. Second, regulations must be crafted for uniform application to all utilities and simply cannot address all possible funding scenarios. In dealing with the IJJA and the intricacies of Maryland’s individual utilities, proceeding via Commission order gives the Commission more flexibility to craft actions and guidance specific to the needs of each utility. Therefore, the Commission denies this request but clarifies that as part of its regulatory function, the Commission will continue to review all filings and stakeholder comments in this Public Conference docket to determine if further action or measures are required.

32. As noted above, the Order has established a monthly reporting schedule for utilities and allows interested stakeholders to file comments at any time. The Commission, therefore, denies OPC’s specific request to “establish a procedural schedule

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<sup>37</sup> CSNA § 7-803(D)(2).

for comments from interested parties and further Commission action.” But for the benefit of all interested parties, the Commission provides details regarding a procedural schedule for a proceeding described below.

### **C) Establishment of an IJJA-Specific Regulatory Asset**

33. OPC’s Rehearing Motion reiterates and repeats its pre-Order arguments against providing Maryland utilities with an IJJA-specific regulatory asset. These arguments are twofold - the Commission did not require sufficient evidence and process before granting a regulatory asset, and it did not create sufficient safeguards around the contents of the asset. The Commission has broad discretionary power to carry out its regulatory functions as needed, including establishing a regulatory asset based on an evaluation of each specific circumstance.<sup>38</sup> The Commission disagrees with OPC’s suggestion that an evidentiary hearing and specific findings are necessary before establishing a regulatory asset. In this case, the Commission received a request from the Joint Maryland Utilities for establishment of an IJJA-specific regulatory asset and provided OPC an opportunity to reply. While Order No. 90272 did not specifically note OPC’s arguments opposing the IJJA-specific regulatory asset, the Order did consider those arguments when granting OPC’s request for a proceeding—which according to OPC “would be a more effective signal to federal decision-makers than a blank check”<sup>39</sup>—by establishing specific requirements for the IJJA-specific regulatory asset, including monthly reporting on IJJA-related projects, expenditures, and cost savings. Indeed, the Commission has established both regulatory liabilities (e.g., Tax Cuts and Jobs Act)<sup>40</sup> and regulatory assets (e.g.,

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<sup>38</sup> Joint Exelon Utilities Response at 5. *See generally* PUA §2-112.

<sup>39</sup> OPC Reply at 11.

<sup>40</sup> Order No. 88530.



COVID-19)<sup>41</sup>, as needed, to ensure both the protection of ratepayers and the financial integrity of the utilities. Finally, as the Joint Exelon Utilities point out, there is no “bright line test for determining if and when a regulatory asset is appropriate.”<sup>42</sup> In this instance, as discussed below, a regulatory asset will provide both assistance and support to the utility in seeking IJJA funding and to stakeholders in eventual review of these costs.

34. OPC’s concerns about the safeguards and processes around the IJJA-specific regulatory asset were considered in Order No. 90272 and informed the safeguards that the Commission established. OPC seeks identification of specific IJJA expenditures and savings. The Commission is requiring each utility to submit monthly reports identifying the specific project(s) for which the utilities will seek ratepayer funding prior to any incremental costs being deferred into the regulatory asset. Further, the Order defines the eligible expenses as only those “IJJA-related incremental expenditures and savings.”<sup>43</sup> Next, OPC raises concerns about what reporting the utilities are required to do in connection with the regulatory asset. Order No. 90272 established monthly reporting and, as noted by the Joint Exelon Utilities, “OPC’s concerns that the Order did not provide conditions or reporting safeguards to ensure prudence review are wholly mitigated by the monthly reporting.” Finally, OPC questioned whether the existing process will provide for a meaningful prudence review in future rate cases. The Order explicitly states that “the establishment of an IJJA-specific regulatory asset is not a finding of prudence and does not provide a predetermined certainty of cost recovery for

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<sup>41</sup> Contrary to OPC’s assertion that the COVID-19 regulatory asset was only granted after an evidentiary hearing, this asset was granted in Order No. 89542 on April 9, 2020 in Case No. 9639. The Commission did not establish PC53 until July 8, 2020 and did not hold legislative-style hearings until August of 2020 which focused on customer arrearages, rather than the already established regulatory asset.

<sup>42</sup> Joint Exelon Utilities Response at 5.

<sup>43</sup> *Id.* at 8.

those expenses.”<sup>44</sup> The Order makes clear that this regulatory asset is for tracking purposes to segregate IJJA-related incremental expenditures and savings.<sup>45</sup> The contents of the reporting will not limit or otherwise diminish the information available in a subsequent rate case where all parties will have a full opportunity to review and challenge the contents of the asset. The utilities clearly understood this ruling, as evidenced in the Joint Exelon Utilities’ response to OPC’s Motion for Rehearing.<sup>46</sup>

35. The Commission finds that the safeguards that OPC claims are missing from the IJJA-specific regulatory asset are, in fact, provided in the Order.

36. The Commission also finds that establishment of a regulatory asset does not solely benefit the utility - it also provides benefits to ratepayers. As an accounting mechanism it acts to isolate IJJA spending from general utility activities both enhancing prudency reviews and preventing unintentional ratepayer recovery in base rates. Moreover, similar to the time-sensitive nature of the Commission’s COVID-19 regulatory asset, the federal IJJA legislation is time bound with only a five-year window for many programs.<sup>47</sup> As such, federal, state and local agencies, utilities and other interested parties cannot wait to take advantage of this historic investment of billions of dollars in federal funds in the nation’s utility infrastructure for programs that distribute financial assistance to states to be used in coordination and collaboration with electric and gas utilities. The Commission’s approval of an IJJA-specific regulatory asset simply serves as an accounting mechanism that allows the utilities to expediently pursue projects

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Joint Exelon Utilities’ Response at 3-4.

<sup>47</sup> See DOE Bipartisan Infrastructure Law Funding Opportunities, <https://www.energy.gov/bil/bipartisan-infrastructure-law-homepage> (last visited Aug. 19, 2022).

that advance State policy goals.<sup>48</sup> It will enhance OPC’s and the Commission’s future prudence review by tracking and segregating IJA expenditures from other spending. Further, the Commission finds that authorizing the IJA-related regulatory asset provides “assistance and support” as required by CSNA § 7-803(B) and requested in the June 10th Response of the Joint Maryland Utilities, which stated that “[s]upportive regulatory action from the Commission would provide an important signal to decision-makers at the federal level of the State of Maryland’s seriousness about supporting Maryland utilities to move forward with transformative IJA projects.”<sup>49</sup> Therefore, the Commission did not err in allowing the utilities to establish an IJA-related regulatory asset based on the specific circumstances.

#### **D) Further Matters**

37. Commission Order No. 90272 requires each electric and gas public service company to file a monthly IJA report on or about the first of the month, beginning August 1, 2022. To ensure the timely exchange of comments, information and ideas between parties, the Commission further finds that stakeholders and other interested parties desiring to comment on a utility’s current monthly IJA report should file such responsive written comments within ten (10) days of the utility’s monthly report being filed with the Commission. This does not foreclose any party from filing comments at a

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<sup>48</sup> See *In the Matter of Potomac Electric Power Company and Delmarva Power & Light Company Request for the Deployment of Advanced Meter Infrastructure*, Order No. 83571, September 2, 2010, at 52-53, where the Commission authorized Pepco to establish regulatory asset and noting that “As PHI properly acknowledges, however, our authorization of a regulatory asset is not an advance determination that all costs associated with the Proposal were prudently incurred. Rather, it provides the Company “the opportunity to recover[] prudently incurred costs associated with the deployment of AMI,” while also preserving the Parties’ ability to challenge – and our ability to determine – the prudence of those costs “when the Company seeks to recover them” in the context of a future base rate case. The Commission’s determinations in that regard will be informed by whether the Companies have, in fact, delivered a cost-effective AMI system, the individual and collective benefits of which are worth the ratepayers’ investment. The Companies will have the burden to make that showing with respect to all costs booked to the regulatory asset (including, but not limited to, deferred “start-up” costs)” (emphasis added).

<sup>49</sup> Joint Utilities Response at 4.

later time, but it will assist the utilities and the Commission with more timely information of concerns or issues that may need to be addressed.

38. The Commission also finds that, as the IJJA legislation has the potential to greatly support the development of Maryland’s utility infrastructure, a series of educational sessions to facilitate a broader understanding of the IJJA legislation as well as the State’s strategies to coordinate and administer IJJA funds will be helpful to the Commission, stakeholders, and other interested parties. The Commission’s Advisory staff can perform the administrative function of organizing these sessions. Therefore, the Commission hereby directs the Commission’s Advisors to work with the U.S. Department of Energy and the Maryland Energy Administration to develop at least two virtual educational sessions open to all interested stakeholders for the purpose of providing background on: (1) the IJJA legislation, including funding sources, funding opportunities for Maryland utilities and the Commission, implementation guidelines, application requirements, etc.; and (2) the State’s ongoing efforts to coordinate grant applications for infrastructure improvements, including efforts by the Governor’s subcabinet<sup>50</sup> on infrastructure. Additional educational sessions may be added as the Commission deems necessary.

39. The Commission also reiterates that Maryland utilities are strongly encouraged to fully and carefully consider applying for any available funds and financial assistance provided through IJJA programs, including federal funds related to offshore wind.<sup>51</sup>

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<sup>50</sup> Maryland Executive Order 01.01.2022.01.

<sup>51</sup> In Order No. 90011, the Commission required successful offshore wind applicants US Wind, Inc. and Skipjack Offshore Energy, LLC to use “best efforts to apply for all eligible State and federal grants, rebates, tax credits, loan guarantees, or other similar benefits as those benefits become available for the life of the project[s]” and to pass along 80% of the value of those benefits to ratepayers without the need for subsequent Commission approval. *Skipjack Offshore Energy, LLC and US Wind, Inc.’s Offshore Wind Applications under the Clean Energy Jobs Act of 2019*, Order No. 90011 at Appendix A, Condition 7(C), and Appendix B, Condition 7(C).

40. For all of the above reasons, OPC’s Rehearing Motion is denied and Order No. 90272 is clarified as discussed herein.

**IT IS THEREFORE**, this 29<sup>th</sup> day of August, in the year Two Thousand Twenty-Two, by the Public Service Commission of Maryland, **ORDERED** that:

(1) The Office of People’s Counsel’s Motion for Rehearing of Order No. 90272 is denied;

(2) Stakeholders and other interested parties may file any written comments to the utilities current monthly IJA report within ten (10) days of the utilities’ monthly report being filed with the Commission; and

(3) Commission Advisors work with the U.S. Department of Energy and the Maryland Energy Administration and other State agencies to develop at least two virtual educational sessions, as discussed in the body of this Order.

*/s/ Jason M. Stanek* \_\_\_\_\_

*/s/ Michael T. Richard* \_\_\_\_\_

*/s/ Anthony J. O’Donnell* \_\_\_\_\_

*/s/ Odogwu Obi Linton* \_\_\_\_\_

*/s/ Patrice M. Bubar* \_\_\_\_\_

Commissioners

## **CONCURRENCE OF COMMISSIONER MICHAEL T. RICHARD**

While I largely agree with the decisions made in this Order - namely to reaffirm the Commission's intent to adopt OPC's recommendation to open a proceeding by initiating a Public Conference, and to clarify the reasoning for allowing utilities to track IJJA expenses and savings in a regulatory asset with the clear conditions to protect ratepayers - I write separately because I believe the Order should go further to satisfy the legislature's intent.

In my opinion the most appropriate and effective "assistance and support" the Commission can provide is creating an inclusive and transparent process that will allow utilities to benefit from the input of interested parties in how to use IJJA funds to further State goals. I believe the Commission's Order falls short of this outcome.

It has been my experience at the Commission that a "Public Conference" proceeding has the important component of a live and public session giving the Commission an opportunity to hear and act on input from interested and important stakeholders on any topic that is timely and important to ratepayers - and the legislature made clear in the Climate Solution Now Act that the IJJA is important and urgent. It has been clear to me that to-date the Commission has failed to clearly communicate on this matter, as evidenced by filings from legislators, fourteen environmental organizations represented by Earth Justice, and OPC, all requesting clarifications and re-hearings on this matter.

For that reason, I would have scheduled (as is customary) a live, legislative-style hearing to formally initiate the IJJA public conference, affording all interested parties an opportunity to be heard directly, and for real communication and coordination to take place, as I believe the legislature intended on this matter. While I find the "educational" session an intriguing half measure, it too falls short in this Order by not clearly stating that all interested parties have a role

to play in these sessions, particularly OPC, the statutory representatives of the very customers that the legislature is most interested in seeing protected and benefited by the IJA.

For these reasons, I write separately in support of the major decisions contained in this Order.

*/s/ Michael T. Richard*

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Commissioner