

ORDER NO. 90626

Petition for Rulemaking Governing	*	BEFORE THE
Procedures for Office of People’s Counsel	*	PUBLIC SERVICE COMMISSION
Requests to Initiate Proceeding	*	OF MARYLAND
	*	
_____	*	_____

Issued: May 15, 2023

ORDER DENYING PETITION FOR RULEMAKING

1. On April 13, 2023, the Maryland Office of People’s Counsel (“OPC”) filed a Petition for Rulemaking Governing Procedures for Office of People’s Counsel Requests to Initiate Proceedings (“the Petition”).¹ For the reasons discussed below, the Petition is denied.

I. OPC’s Allegations

2. In its April 13, 2023 Petition, OPC claims generally that the Commission has not been responsive to its requests to initiate proceedings, by failing to open dockets, delaying the issuance of orders, or otherwise declining to address the merits of OPC’s filings.² OPC contends that the Commission’s rules of procedure treat it in an “arbitrary” fashion because they “do not provide any certainty that the Commission will make a merits-based decision as to whether to hold a proceeding on requests to initiate a proceeding.”³

3. OPC states that as a result of the Commission’s inaction and the lack of a clear administrative process, it “cannot effectively perform its statutory role of representing the interests of residential ratepayers,” which has “undermined the Commission’s own ability

¹ Maillog No. 302399.

² OPC Petition at 1-2, 15.

³ *Id.* at 6, 25-26.

to perform its statutory responsibility....”⁴ Indeed, OPC asserts that the Commission’s “delays and inaction negate OPC’s judicially recognized role” in protecting the rights of Maryland ratepayers, and have resulted in the “suppression of the voice of residential customers.”⁵ OPC provides a list of three petitions and a complaint that it argues the Commission ignored and that support regulatory reform.

4. To resolve these alleged procedural defects, OPC requests that the Commission initiate a rulemaking to establish formal regulations governing the Commission’s response to actions filed by OPC.⁶ In its attached “Concepts for ... Rules Governing OPC Requests,” OPC proposes that Commission regulations be amended such that when OPC files a petition, the Commission would, within a prescribed time period, open a docket, assign a docket number, issue a public notice of OPC’s filing, set a comment period, and issue a decision.⁷

II. Commission Decision

5. As a preliminary matter, the Commission rejects OPC’s allegations that it ignored OPC filings or otherwise acted in an arbitrary manner towards OPC to frustrate or hamper its positions.⁸ The proceedings cited by OPC demonstrate the contrary result—that OPC was treated fairly in accordance with reasonable Commission regulations. Nevertheless,

⁴ *Id.* at 1. OPC argues that “[w]ithout addressing residential customer requests for proceedings, the Commission cannot fulfill its duty to ‘supervise and regulate the public service companies subject to the jurisdiction of the Commission to . . . ensure their operation in the interest of the public.’” Petition at 23, citing PUA § 2-113.

⁵ *Id.* at 15.

⁶ *Id.* at 28.

⁷ *Id.*, Appendix A at A-1.

⁸ *Id.* at 7.

the Commission will briefly address each of OPC's contentions regarding its recent filings.⁹

A. OPC's Examples of Alleged Commission Delay or Nonresponse to OPC Petitions

1. OPC Petition Regarding Potomac Edison and First Energy

6. OPC's first cited proceeding involves its May 11, 2021 petition for an investigation into the relationship between Potomac Edison and its parent company, FirstEnergy Corp., following admissions of bribery by First Energy executives in the state of Ohio. As OPC acknowledges in its Petition, the Commission opened a docket in this matter on July 26, 2021, by issuing Order No. 89888 and establishing Case No. 9667, *Petition of The Office of People's Counsel to Investigate the Future of First Energy's Relationship with Potomac Edison in Light of Recent Events*. While OPC criticizes the Commission for taking 76 days to issue an order on its FirstEnergy petition, the delay did not prevent parties from filing responses to OPC's petition, which were filed prior to the order date and are still publicly available in the Case No. 9667 docket.¹⁰

7. The Commission found some of the issues raised by OPC to be outside of the Commission's jurisdiction, or too minimally related to Potomac Edison's Maryland ratepayers to warrant an investigation. However, the Commission ordered an investigation

⁹ Much of OPC's Petition reiterates points that it made in each of these four proceedings, including its disagreements, where applicable, with final Commission decisions. The Commission assumes OPC repeated these positions to support its claim for prospective regulatory change, rather than as a collateral attack on settled matters. Nevertheless, for the purpose of clarity, nothing in OPC's Petition tolls the statutory period for appeal or otherwise resurrects its claims in those proceedings.

¹⁰ See the June 9, 2021 Reply to Petition of the Potomac Edison Company; the June 15, 2021 letter of OPC; the June 15, 2021 letter in support of the Solar United Neighbors of Maryland; the June 24, 2021 letter in support of Montgomery County, Maryland; the June 25, 2021 Reply of OPC; and the June 25, 2021 correspondence of the Potomac Edison Company.

regarding multiple other issues.¹¹ The Commission additionally invited petitions to intervene and established a four-month discovery period whereby OPC and other parties could request discovery of Potomac Edison.

8. In its Petition, OPC expresses disagreement with the Commission’s decision to deny OPC’s motion to compel discovery from Potomac Edison, which the Commission considered and rejected in its January 6, 2022 order denying appeal (Order No. 90033), and March 2, 2022 order denying reconsideration (Order No. 90100).¹² Those types of discovery disputes are commonly resolved by the Commission, however, and do not evidence a breakdown of the Commission’s procedural rules or otherwise demonstrate inconsistency with the Public Utilities Article (“PUA”) or unfair treatment of OPC.

9. Indeed, OPC and other parties exercised the opportunity to conduct discovery of Potomac Edison and to file substantive comments in the docket. In its Initial Post-Discovery Brief, for example, OPC argued for a continuation and broadening of the Commission’s investigation into Potomac Edison and FirstEnergy.¹³ Even following the conclusion of briefing in April 2022, the Commission left the proceedings open to give OPC the opportunity to file any additional evidence of adverse impact on Maryland ratepayers. On May 5, 2023, the Commission issued Order No. 90615, concluding that insufficient evidence exists to establish that Potomac Edison’s Maryland customers have

¹¹ Order 89888 at 6. Specifically, the Commission authorized a proceeding to investigate (i) The extent that the bribery scandal may have affected Potomac Edison’s cost to access funds from FirstEnergy; (ii) Whether FirstEnergy used any funds from Potomac Edison to pay for the bribes, lobbying costs, legal fees or any other costs associated with the misconduct by FirstEnergy; and (iii) Whether FirstEnergy’s agreement to increase the size of its board of directors from 12 to 14 may have invoked the “substantial influence” clause of PUA § 6-105.

¹² OPC Petition at 8.

¹³ Initial Post-Discovery Brief of the Office of People’s Counsel, Maillog No. 239254.

been harmed by FirstEnergy's misconduct in Ohio, and concluding the investigation.¹⁴ That outcome, however, does not contradict the fact that all parties to the proceeding, including OPC, were treated with fairness, due process, and in accordance with the PUA and Commission regulations.

2. OPC Complaint Regarding Washington Gas' Green Marketing

10. OPC next criticizes the Commission with regard to its decision to dismiss a complaint filed by OPC. On November 23, 2021, OPC filed a complaint alleging that marketing language included in bills sent to customers of Washington Gas & Light Company and its affiliate, WGL Energy Services, Inc., was deceiving and misleading customers about the environmental and cost attributes of natural gas.¹⁵ On that same day, the Commission issued an order opening a complaint proceeding as Case No. 9673, *Complaint of the Office of People's Counsel Against Washington Gas Light Company and WGL Energy Services, Inc.*¹⁶ The Commission also requested comments from interested parties. Comments were submitted by Montgomery County, Maryland, Commission Staff, and the Sierra Club. Washington Gas Light Company filed an opposition and motion to dismiss the complaint, and WGL Energy Services, Inc. likewise filed a motion to dismiss, which were opposed by OPC and the Sierra Club.

11. On February 7, 2022, the Commission dismissed the complaint, holding, *inter alia*, that "a complaint against one utility is an inappropriate forum to address the broader issues raised by natural gas and its role in greenhouse gas emissions."¹⁷ OPC requested rehearing

¹⁴ Maillog No. 302786.

¹⁵ OPC Petition at 10.

¹⁶ See November 24, 2021 Notice Initiating a New Docket and Request for Comments, Maillog No. 237969.

¹⁷ Order No. 90057, Order Dismissing Complaint, at 6.

of the Commission’s decision on March 9, 2022,¹⁸ which the Commission denied on April 20, 2022. OPC appealed that decision to the Circuit Court for Montgomery County.¹⁹ The Circuit Court affirmed the Commission’s order on December 29, 2022, and OPC appealed that decision to the Maryland Court of Special Appeals (now the Appellate Court of Maryland), where it is currently being litigated.

12. In its Petition, OPC criticizes the Commission for failing to conduct an investigation or making independent factual findings in the complaint docket.²⁰ It alleges as a procedural defect that “[t]he Commission determined that it can dismiss an OPC complaint without ever addressing the complaint’s merits.”²¹ However, it is the nature of a motion to dismiss in court or Commission proceedings that the underlying complaint will be dismissed without addressing the merits if the complaint is procedurally defective or fails to state a claim upon which relief may be granted.²² As noted, OPC has appealed the Commission’s dismissal of its complaint, and the Commission will not reiterate those allegations or the Commission’s rationale for its decision here. However, nothing in the Petition evidences a breakdown of the procedural rights of OPC to argue its positions before the Commission or to represent ratepayers. To the contrary, the Washington Gas complaint proceeding demonstrates an alternative route—formal complaint procedures—that, under the right circumstances, OPC can use to bring matters to the Commission’s attention.²³

¹⁸ Maillog No. 239495.

¹⁹ See Case C-15-CV-22-001977.

²⁰ OPC Petition at 11.

²¹ *Id.* at 18.

²² COMAR 20.07.03.03A(3) provides that the Commission may dismiss a complaint if it fails to state a claim upon which relief can be granted.

²³ OPC filed its complaint pursuant to PUA § 3-102 (Complaints, investigations, and hearings).

3. OPC Petition Regarding Implementation of Legislation to Protect Low-income Customers

13. In its third example of alleged Commission dereliction of responsibility, OPC refers to the General Assembly's 2021 passage of Chapter 637. That law amended PUA § 4-308 by prohibiting retail suppliers from serving low-income households receiving energy assistance, unless the Commission has approved a supplier's particular supply offer. On April 13, 2022, OPC filed a petition for a rulemaking on implementing this legislation.²⁴ OPC observes that the Commission did not formally respond to that petition, and it claims that the Commission did not meet the statutory deadline of PUA § 4-308(a) to establish an administrative process by regulation or order before January 1, 2023.

14. The Commission decided on a different course of action. Instead of immediately initiating the requested rulemaking, on May 16, 2022, the Commission issued an order establishing Public Conference 55, *Retail Gas and Electric Supply Offers to Low Income Customers* ("PC55").²⁵ In that proceeding, the Commission provided an opportunity for stakeholders and members of the public to submit written comments on several enumerated issues, including definitions of statutory terms, processes for application and approval of supplier offers, customer eligibility requirements and determinations, data sharing, relative valuation of standard offer service or gas commodity rates and supply offers, reporting procedures, and procedural timelines necessary for Commission action and stakeholder implementation of the requirements of the new law. The Commission also requested

²⁴ OPC Petition at 12, referencing Maillog No. 240680.

²⁵ Maillog No. 240714.

proposed regulatory language to properly implement the law. Numerous parties²⁶ filed comments, including OPC, which additionally filed proposed regulations.²⁷

15. On September 2, 2022, after reviewing party comments, the Commission issued an order initiating a rulemaking to develop regulations to implement Chapter 637, and directing Commission Staff, the Competitive Markets and Customer Choice working group, and the Electronic Data Interchange (“EDI”) and Extensible Markup Language (“XML”) working groups to begin work.²⁸ The Commission’s September 2 order also directed Staff to develop a draft retail supplier application form that is consistent with the draft regulations, and provided that applications may be filed in PC55 beginning January 1, 2023—the deadline provided in PUA § 4-308(a) for the Commission to establish an administrative process.²⁹ The order further provided that the Commission would schedule hearings on applications as part of its weekly administrative meetings. The Commission held hearings on October 27, 2022, November 2, 2022, and November 9, 2022,³⁰ and published regulations resulting from the rulemaking in the *Maryland Register* on March 24, 2023.³¹

²⁶ In addition to OPC, comments were filed by the Potomac Edison Company, and Baltimore Gas and Electric, Potomac Electric Power Company, Delmarva Power & Light Company, Washington Gas Light Company, the Southern Maryland Electric Cooperative, SFE Energy Maryland, Inc. and StateWise Energy Maryland, the Retail Energy Supply Association and NRG Energy, Inc., the Cancer Support Foundation, Montgomery County, the National Consumer Law Center, and the Energy Supplier Reform Coalition, and Commission Staff.

²⁷ Order No. 90342 at 3-4.

²⁸ The EDI and XML working groups provide technical recommendations to the Commission regarding electronic transactions in the retail energy market. For purposes of implementing Chapter 637, the Commission directed the EDI and XML working groups to develop communication capabilities that would allow a utility to provide updated energy assistance household status to suppliers for their existing customers. On April 12, 2023, the Commission approved the proposed customer communications plan filed by the PC44 work group. April 12, 2023 letter order, Maillog No. 302361.

²⁹ Order No. 90342 at 11-12.

³⁰ See Notice of Additional Rulemaking Session, Maillog Nos. 242846 and 300000.

³¹ 50:6 Md. Reg. 232 (Mar. 24, 2023).

16. Contrary to OPC’s allegations, the Commission did not ignore its statutory duty to implement Chapter 637 or OPC’s valuable input, including its comments and proposed regulations. To the contrary, the published regulations benefited from OPC’s contributions.

4. OPC Petition Regarding Investigation into Customer Impacts of Gas Utility Practices

17. In its final example, OPC points to its recent February 9, 2023 petition related to near term priority actions and comprehensive long-term planning for Maryland’s gas companies.³² In that petition, OPC claimed that Maryland’s gas utilities are spending excessively in replacing and expanding their local gas distribution systems, resulting in substantial increases in the price of gas delivery service to Maryland customers.³³ OPC argued that the gas companies’ expenditures are misaligned with economic reality, government policy, and the interests of residential utility customers because technological changes and climate policy are driving customers away from gas and towards electricity.³⁴ Accordingly, OPC requested that the Commission establish “a proactive and comprehensive investigation that ends in a rulemaking that governs the procedures and requirements for gas utility transition plans.”³⁵ In its current Petition, OPC criticizes the Commission for not yet acting on this filing.

18. OPC correctly observes that the Commission has not yet acted on this petition. The petition proposes to significantly curtail the discretion of Maryland’s gas utilities to replace

³² Petition of the Office of People’s Counsel for Near-Term, Priority Actions and Comprehensive, Long-Term Planning for Maryland’s Gas Companies, Maillog No. 301247.

³³ OPC Petition at 13-14, citing DHInfrastructure, Maryland Gas Utility Spending: Projections and Analysis (Oct. 2022).

³⁴ See Maillog No. 301247 at 26.

³⁵ *Id.* at 62.

and expand their infrastructure to meet the needs of existing and projected new customers. The Commission will not announce how it will respond to OPC’s policy setting petition in this Order.

B. OPC’s Proposed Regulatory Reform

19. OPC criticizes the Commission’s procedural regulations for granting the Commission a degree of latitude on whether and when to respond to an OPC petition. *See* OPC Petition at 23: “OPC cannot effectively advocate for—and the Commission cannot effectively respond to—residential customers if the Commission can pick and choose what requests, if any, it will respond to.” In particular, OPC disparages COMAR 20.07.01.06 for creating ambiguity over whether the Commission will make a merits-based decision, stating it “leaves to the Commission’s discretion whether to set the matter for a hearing and what notice to provide to other interested persons.”³⁶

20. Notwithstanding OPC’s criticisms, the Commission’s regulations are consistent with the requirements of the PUA. Section 2-204(a)(3) of the PUA provides: “As the Office of People’s Counsel considers necessary, the Office of People’s Counsel shall conduct investigations and *request* the Commission to initiate proceedings to protect the interests of residential and noncommercial users.” (Emphasis added). The use of the word “request” makes clear that the Commission retains discretion whether to grant or deny OPC’s petitions. In contrast, OPC’s proposal to initiate a proceeding and comment period automatically upon the filing of any OPC petition would remove that discretion and conflict with the language in PUA § 2-204(a)(3).

³⁶ OPC Petition at 6.

21. Unlike OPC's proposed regulation, COMAR 20.07.01.06 (Practice on Receiving Petitions) is consistent with the PUA. The Commission's current regulations provide at 20.07.01.06A that the Office of the Executive Secretary will examine any petition, application, or complaint, make a determination of conformity with applicable regulations and statutory provisions, and report to the Commission. COMAR 20.07.01.06B provides that when filings are in proper form, "a time and place for a hearing on them *may* be appointed" by the Commission, and that the Commission will direct what notice of a hearing shall be given. (Emphasis added). Again, the discretion regarding how to respond to a petition is consistent with that afforded by the General Assembly in the PUA. That leeway is also consistent with the fact that the Commission does not just sit in a quasi-adjudicative fashion calling balls and strikes. It is an independent agency that can and must have a measure of discretion to set its own agenda, not simply respond to the policy initiatives proposed by stakeholders.³⁷

22. The Commission disagrees with OPC's sentiment that it is wasting its time if it does not achieve its desired goal in filing a petition. *See* OPC Petition at 24, stating "OPC's efforts to investigate and request the Commission to initiate proceedings ... effectively are wasted or underutilized if the Commission disregards its filings or delays their consideration indefinitely." OPC has a statutory duty to appear before the Commission and courts on behalf of residential and noncommercial ratepayers where their interests are at stake, and to conduct investigations and to file requests with the Commission where appropriate. The outcomes of any OPC petitions cannot and should not be determined on

³⁷ *See generally, Christ v. Dep't of Natural Res.*, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations").

an *a priori* basis, however. Instead, each petition of OPC or any other stakeholder should be examined on its own merits. The Commission is also concerned that OPC's Petition would grant it unique rights vis-à-vis other parties. Namely, its petitions would require the opening of a docket and comment period, and start the clock for a required Commission order. No other stakeholder before the Commission, including the utilities, the Maryland Energy Administration, the Department of Human Services, or the Maryland Office of the Attorney General would receive such rights.³⁸ The Commission therefore denies OPC's proposal that would make mandatory the docketing of a formal proceeding and comment period whenever OPC files a petition.

23. Additionally, the Commission finds unpersuasive OPC's argument that every OPC petition should automatically receive its own docket number. Pursuant to PUA § 2-104(c), the Commission's Office of the Executive Secretary maintains a public record of every document that is filed with the Commission. Every filing—including the petitions and complaint referenced by OPC—are mail-logged and provided to each commissioner and relevant staff.³⁹ It is therefore not necessary that every OPC petition automatically receive its own case number. To the extent the public or interested persons wish to respond, they may file responsive correspondence with the Office of the Executive Secretary

24. Nothing in this Order should be construed as minimizing OPC's important role as advocate for residential and noncommercial users. Those interests are vital to the State of Maryland and are weighed heavily by the Commission, as evidenced by countless orders

³⁸ There is an exception for utility rate cases filed pursuant to PUA § 4-204 (Effective Date of Proposed Rate; Suspension), which sets forth the timeline for a new utility rate to become effective. The General Assembly did not include a similar provision for other forms of petitions filed by any other party, however.

³⁹ Each filing made with the Commission receives a unique identification number and is made publicly available online through the Commission's website. In addition, parties that have requested alerts in advance of certain filings receive immediate notice.

on rate cases, mergers, and other proceedings, which discuss ratepayer impacts—in particular impacts upon residential ratepayers—in detail. However, the 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.⁴⁰ 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. To the contrary, the Commission relies on OPC to fulfill its role of advocating for residential and noncommercial ratepayers.

25. For these reasons, the Commission finds that the changes to Commission regulations requested by OPC are not necessary to effectuate its statutory duties or the Commission's. Accordingly, OPC's Petition is denied.

IT IS THEREFORE, this 15th day of May, in the year Two Thousand Twenty-Three, by the Commission, **ORDERED** that the Petition of the Maryland Office of People's Counsel for Rulemaking Governing Procedures for Office of People's Counsel Requests to Initiate Proceedings is hereby denied.

/s/ Jason M. Stanek

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Patrice M. Bubar

Commissioners

⁴⁰ See 2021 Maryland Laws Ch. 615, amending PUA § 2-113(a)(2), by adding to the list of required Commission considerations the preservation of environmental quality, including protection of the global climate from continued short-term and long-term warming; and the achievement of the State's climate commitments for reducing statewide greenhouse gas emissions.

**Dissenting Statement of
Commissioner Michael T. Richard**

I disagree with the Commission’s Order Rejecting OPC’s Petition. OPC states that the purpose of its request is to have the Commission establish a proceeding to promulgate procedural regulations that would facilitate the Commission’s docketing and consideration of OPC requests for Commission action to protect the interests of residential and other non-commercial ratepayers. (OPC Petition at 1.) While the Order states that “the Commission relies on OPC” to fulfill its role in protecting consumers, the Commission nonetheless 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. In my opinion, OPC’s Petition makes a strong case that current Commission procedures are frustrating OPC’s statutory purposes, and that these procedures have led to inefficiencies in how OPC allocates its resources, resources that are—pursuant to its statutory charge—dedicated to protecting Maryland utility consumers. The Commission notes that it too has this responsibility, and that it looks to OPC for support in fulfilling its mandate. Yet still – without even exploring the matter in greater depth – such as in a Public Conference, the Order concludes that the changes to Commission regulations requested by OPC are not necessary to effectuate OPC’s statutory duties or the Commission’s. (Order at 12, P25.)

Regrettably, I think OPC’s petition was mis-timed. However, should the petition be renewed in the future, I believe that this Order should be reconsidered. Therefore, I respectfully dissent.

/s/ Michael T. Richard

Commissioner