

ORDER NO. 90685

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

Issued: June 27, 2023

ORDER DENYING REHEARING

1. On June 14, 2023, pursuant to Public Utilities Article (“PUA”) § 3-114(c), the Maryland Office of People’s Counsel (“OPC”) filed a Request for Rehearing¹ of Order No. 90626, which denied OPC’s Petition for Rulemaking Governing Procedures for Office of People’s Counsel Requests to Initiate Proceedings (“the Petition”).² For the reasons discussed below, OPC’s Request for Rehearing is denied.

OPC’s Request for Rehearing

2. OPC’s Request for Rehearing raises three principal issues. First, OPC claims that Order No. 90626 improperly conflated residential customers with non-statutory stakeholders. Second, OPC argues that Order No. 90626 confused the merits of OPC’s requests in other proceedings with the procedural gaps its Petition purported to rectify. Third, OPC claims that Order No. 90626 never addressed its argument that additional procedural rules are necessary to remain compliant with the statutory prohibition on ex parte communications. As further discussed below, Order No. 90626 addressed each of OPC’s arguments, OPC provides no facts or arguments that it had not already raised in its Petition, nor does it assert any new consequences—its Request for Rehearing is therefore denied.

¹ Maillog No. 303518.

² Maillog No. 302399.

Standard of Review

3. Public Utilities Article (“PUA”) § 3-114(c) of the *Annotated Code of Maryland* provides that a party in interest may apply to the Commission for rehearing within 30 days after service of a final order on the party. Code of Maryland Regulations (“COMAR”) 20.07.02.08C states that an application for rehearing shall specify the findings of fact or of law claimed to be erroneous, together with a brief statement of the ground of the alleged error. COMAR 20.07.02.08D further provides that a petition seeking to reverse or modify an order of the Commission shall (1) fully set forth the facts, circumstances, and consequences relied upon; and (2) allege the facts and circumstances that have arisen after the 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.

4. Although any party may file a request for rehearing as a matter of right, the request should not be used as a vehicle to merely rehash or repeat previous arguments, or “regurgitate ... the same concerns[.]”³ “Because an agency may grant reconsideration based only on a legally recognized ground, it follows that an agency may not reconsider and reverse a decision based on a ‘mere change of mind,’” nor on the “substitution of a [decisionmaker] of one conviction for a [decisionmaker] of another conviction.”⁴

³ *Giant Foods, Inc. v. Baltimore Gas & Elec. Co.*, 92 Md. P.S.C. 73 (Feb. 27, 2001). Case No. 9651, *In the Matter of Washington Gas Light Company’s Application for Authority to Increase its Rates and Charges*, Order No. 89893 (July 29, 2021); *Cinque v. Montgomery County Planning Bd.*, 173 Md. App. 349 (2007) (“*Cinque*”).

⁴ *Cinque*, 173 Md. App. at 361 (citing *Calvert County Planning Comm’n v. Howlin Realty Mgmt.*, 364 Md. 301, 325 (2001) and *Kay Const. Co. v. Cnty. Council for Montgomery Cnty*, 227 Md. 479, 489 (1962)); see also, *J. Aron & Co., Inc. v. Service Transp. Co.*, 515 F. Supp. 428, 431 n.4 (D. Md. 1981) (“Judges of coordinate jurisdiction should be particularly hesitant to undo, overrule, or refuse to be bound by each other’s decisions in the same case. This is ... based on the salutary principle... that the ends of justice are best served by discouraging litigants from ‘judge shopping’ until they can obtain a favorable ruling.”).

Nowhere in OPC’s Request for Rehearing has it stated overtly that Order No. 90626 should be reversed because new Commissioners have been appointed. However, in its June 14, 2023 Press Release announcing its Request for Rehearing, OPC states: “The Commission’s decision was a 4-1 decision....One of the three commissioners in the majority has since left the Commission and two others in the majority will

Commission Decision

5. The first argument in OPC's Request for Rehearing is that the Commission conflated residential customers with non-statutory stakeholders.⁵ OPC states that the Maryland General Assembly created OPC to advocate for the interests of residential customers and to protect them from the State's utility monopolies. OPC claims that Order No. 90626 "fails entirely to account for this law" by "conflat[ing] OPC's status with other stakeholders, including the monopoly utilities."⁶ In particular, OPC charges that "[n]owhere does Order No. 90626 acknowledge the uniqueness of OPC's statutorily prescribed protection of the legal rights of residential customers."⁷

6. OPC's allegations are false. The Commission went to great lengths in Order No. 90626 to acknowledge OPC's vital role in protecting residential customer interests. *See* Order No. 90626 at 11 ("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;") *id.* at 12 ("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;") and *id.* at 13 ("the Commission relies on OPC to fulfill its role of advocating for residential and noncommercial ratepayers.")

7. The genesis of OPC's pique appears to be the Commission's acknowledgement that it has a statutory duty to weigh all stakeholder interests, and not just OPC's. In its Request for Rehearing, OPC claims the Commission "equates residential customer interests with those of

be departing in the coming weeks." OPC's underlying motive therefore appears to be the commissioner shopping discouraged by the case law cited above. Nevertheless, the Commission has not considered that motive and has addressed OPC's Rehearing Request on its merits.

⁵ OPC Request for Rehearing at 4.

⁶ *Id.* at 5.

⁷ *Id.* at 6.

utilities and other parties” when it stated that “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.”⁸ The Commission’s statement is legally correct and hardly controversial. For purposes of addressing OPC’s Request for Rehearing, however, the Commission will simply state that it understands that OPC has a unique statutory duty under the PUA to represent residential ratepayers and that the Commission did not confuse the rights of those ratepayers or OPC itself with other stakeholders.⁹

8. OPC’s second argument in its Request for Rehearing is that Order No. 90626 confuses the merits of OPC’s requests in other proceedings with the procedural gaps that it seeks to rectify through its Petition.¹⁰ In its underlying Petition, OPC enumerated four proceedings in which it claimed the Commission failed to properly address OPC’s requests. Commission Order No. 90626 addressed each of those proceedings at length to demonstrate that OPC’s requests were not ignored. OPC now appears to be arguing it was legal-error to address the examples it provided of ostensible Commission neglect of OPC petitions. OPC’s arguments are invalid for two reasons. First, Order No. 90626 clearly acknowledges that OPC cited the four proceedings for purposes of demonstrating a putative procedural defect and not to further argue the merits of each case. The Commission observed in Order No. 90626 that “[m]uch of OPC’s Petition reiterates points that it made in each of these four proceedings.... The Commission assumes OPC repeated these positions to support its claim for prospective regulatory change, rather than as a collateral attack on settled matters.”¹¹

⁸ *Id.*, citing Order No. 90626 at 13.

⁹ The Commission acknowledges that OPC is statutorily unique in that it is automatically a party to all proceedings without having to intervene.

¹⁰ OPC Request for Rehearing at 7.

¹¹ Order No. 90626 at 3, n. 9.

9. Second, the Commission squarely addressed OPC’s procedural argument that it should have special rights vis-à-vis other parties regarding how the Commission responds to OPC petitions. Specifically, the Commission stated that OPC’s request that any OPC petition automatically receive a case number, comment period, and deadline for Commission action was inconsistent with PUA § 2-204(a)(3).¹² That statute 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). Order No. 90626 noted that “[t]he 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).”¹³

10. The Commission also provided policy reasons for why it did not support an automated process for responding to OPC petitions. Order No. 90626 provided that the Commission “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;” and “The outcomes of any OPC petitions cannot and should not be determined on an a priori basis.... [E]ach petition of OPC or any other stakeholder should be examined on its own merits;” and further that “OPC’s Petition would grant it unique rights vis-à-vis other parties.”¹⁴ OPC’s arguments that

¹² *Id.* at 10.

¹³ *Id.*

¹⁴ Order No. 906262 at 11-12. In Order No. 906262 at 12, the Commission observed that “[n]o 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.” The Commission neglected to state that not even Commission Staff possesses the rights OPC has requested for itself. Instead, the Commission’s procedural rules regarding petitions apply to all parties.

the Commission “left the merits of OPC’s requests for Commission action unaddressed” is therefore simply wrong.¹⁵

11. OPC next argues that existing “Commission procedures allow it to arbitrarily disregard OPC’s requests in order to avoid a merits-based decision,” and it cites to the delay in the Commission’s response to OPC’s petition related to long-term planning for Maryland gas companies in support.¹⁶ First, OPC is speculating about the Commission’s motives when it claims the Commission is delaying a decision on an OPC request “in order to avoid a merits-based decision.” As explained in Order No. 90626, OPC’s gas petition involved highly complex matters that required time to consider. The time required to address OPC’s gas filing supports the Commission’s denial of OPC’s Petition, which would automate the time for parties to respond to and the Commission to issue orders on all OPC petitions. Second, since the issuance of Order No. 90626, the Commission opened a docket in response to OPC’s gas petition. *See Case No. 9707, Petition of the Office of People’s Counsel for Near-Term, Priority Actions and Comprehensive, Long-Term Planning for Maryland’s Gas Companies.* OPC’s arguments that the Commission neglected to rule on the merits of its Petition are therefore premature.

12. OPC’s third and final argument is that the Commission erred by never addressing its argument that procedural rules are necessary for fair application of the statutory prohibition on ex parte communications.¹⁷ In particular, OPC states: “It is unfair for commissioners to

¹⁵ OPC makes other factually inaccurate allegations in its Request for Rehearing, such as “without a docket, there is no case number, *making it nearly impossible* to locate on the PSC portal the filings responding to OPC’s petition.” (Emphasis added). Order No. 90626 noted that: “Each filing made with the Commission receives a unique identification number and is made publicly available online through the Commission’s website.” Order No. 90626 at 9, n. 19. Finding a filing based on that identification number merely requires clicking on “Case/Maillog Portal” on the Commission’s home website and entering the maillog number in the Maillog Search dialogue box. There is nothing “nearly impossible” about that task.

¹⁶ OPC Request for Rehearing at 10, 14.

¹⁷ *Id.* at 14-15.

communicate with potential parties about requests that have been formally filed with the Commission, based only on the technicality that the Commission has chosen not to docket the matter.”¹⁸

13. The Commission notes that OPC’s arguments are based on the unproven hypothesis that the Commission communicates with parties after requests have been filed and does so merely because a case number has not yet been assigned. OPC’s allegations are meritless. The Commission does not communicate in an *ex parte* fashion with parties regarding matters pending before the Commission that are or could be in contention. The substitution of a case number in lieu of a maillog number would not change that obligation pursuant to PUA § 3-108 or the approach the Commission takes in handling such matters. For example, all informal customer complaints are entered into the Commission’s system without either a maillog number, or a case number. When those cases are appealed from the Consumer Affairs Division to the Commission, (still without a case number), only in the *rarest* of cases does the Commission initiate *ex parte* procedures with either the utility or the customer. Although COMAR 20.07.03A(1) provides for the option of *ex parte* proceedings in complaint cases, in the vast majority of cases the Commission issues a satisfy or answer directive to the public service company or other party complained of and proceeds as it does in contested proceedings. The Commission’s decisions in “*ex parte* proceedings” are—nonetheless also—public.¹⁹ The Commission therefore denies rehearing on this argument as well.

14. None of OPC’s arguments raise new facts or consequences, as required by PUA § 3-114 and COMAR 20.07.02.08D, supporting rehearing of Order No. 90626. Therefore, the Request for Rehearing is hereby denied.

¹⁸ *Id.* at 14.

¹⁹ *See, e.g., Re National Birchwood Corporation v. Baltimore Gas and Electric Company*, 69 Md. P.S.C. 122 (1978) (order denying *ex parte* relief to petitioner requesting regulated utility to provide natural gas service to residential units being developed by complainant).

IT IS THEREFORE, this 27th day of June, in the year Two Thousand Twenty-Three, by the Commission, **ORDERED** that the Request for Rehearing of the Maryland Office of People’s Counsel is hereby denied.

/s/ Jason M. Stanek _____

/s/ Anthony J. O'Donnell _____

/s/ Odogwu Obi Linton _____
Commissioners²⁰

²⁰ Commissioner Kumar P. Barve did not participate in this decision. Commissioner Michael T. Richard dissents from this order for the same reasons expressed in his dissent in Order No. 90626.