RECEIVED 2015 JAN 22 4:13 PM

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1333 H STREET, N.W., SUITE 200, WEST TOWER
WASHINGTON, D.C. 20005

ORDER DENYING RECONSIDERATION

January 22, 2015

FORMAL CASE NO. 1116, IN THE MATTER OF THE APPLICATION FOR APPROVAL OF TRIENNIAL UNDERGROUND INFRASTRUCTURE IMPROVEMENT PROJECTS PLAN, Order No. 17769

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia ("Commission") denies the Application for Reconsideration ("Application") of Order No. 17697 filed by the Apartment and Office Building Association of Metropolitan Washington ("AOBA").[1]

II. BACKGROUND

2. Pursuant to Mayor's Order 2012-130 (August 16, 2012),[2] Mayor Vincent Gray established the Mayor's Power Line Undergrounding Task Force ("Task Force"), which was given specific directives for analyzing "the technical feasibility, infrastructure options and reliability implications of undergrounding new or existing overhead electrical distribution facilities in the District of Columbia."[3] The Task Force ultimately decided that the undergrounding of power lines could be a feasible initiative to improve electric system reliability in the District of Columbia. In October 2013, the Task Force issued the Final Report which recommended that the Mayor accept the Task Force's recommendations and further recommended immediate development of an implementation plan for expedited legislative and regulatory processes that would allow design and construction activities for undergrounding facilities to begin.[4]

---

[1] *See Formal Case No. 1116, In the Matter of the Application for Approval of Triennial Underground Infrastructure Improvement Projects Plan* ("*Formal Case No. 1116*"), Application for Reconsideration of the Apartment and Office Building Association of Metropolitan Washington ("Application"), filed December 12, 2014.

[2] Mayor's Order 2012-130 was amended by Mayor's Order 2012-182 (October 19, 2012).

[3] Mayor's Power Line Undergrounding Task Force Findings and Recommendations Final Report, at 8 (October 2013) (the "Final Report").

[4] The Final Report at 9.

3. Legislation governing the public-private partnership between the Potomac Electric Power Company ("Pepco") and the District Department of Transportation ("DDOT") to improve electric service reliability in the District of Columbia D.C. Bill 20-387, the "Electric Company Infrastructure Improvement Financing Act of 2013," was introduced in the Council of the District of Columbia (the "Council") on July 9, 2013. The legislation was approved by the Council on February 4, 2014, and signed by Mayor Gray on March 3, 2014. The legislation, herein referred to as the "Act" or "ECIIFA," became effective on May 3, 2014.[5]

4. On June 17, 2014, in accordance with Section 307(a) of the Act, Pepco and DDOT ("Joint Applicants") filed an application with the Commission, seeking the approval of their Triennial Underground Infrastructure Improvement Projects Plan (the "Joint Application" and "Triennial Plan"). In the Joint Application, Pepco and DDOT requested, *inter alia*, (a) authority to implement a three year project (2015-2017) to expand the undergrounding of certain electric distribution feeders (the "Undergrounding Project") in order to increase the reliability of the electric distribution system in the District of Columbia; and (b) approval of the Underground Project Charge ("UPC") to be charged by Pepco with respect to Electric Company Infrastructure Improvement Costs incurred for the Undergrounding Project. The entire Undergrounding Project is expected to extend for a period of 7-10 years at a total cost of approximately $1 billion.[6]

5. On November 12, 2014, the Commission issued decisional Order No. 17697 in this matter, which among other things, approved the Joint Application and Triennial Plan and authorized the imposition of a periodic true up of the UPC. On December 12, 2014, AOBA filed its Application for Reconsideration of Order No. 17697 arguing that "the Commission's decision [ ] regarding the allocation of revenue requirements among ratepayer classes for undergrounding projects [ ] is arbitrary, capricious, an abuse of discretion, contrary to law and the facts in the record."[7] On December 19, 2014, Pepco and DDOT (the "Joint Responders") filed a Joint Response to AOBA's Application[8] and the Office of the People's Counsel ("OPC") filed its Reply to

---

[5] D.C. Law 20-102 (May 3, 2014).

[6] *Formal Case No. 1116*, Joint Application of Pepco and DDOT for Approval of the Triennial Underground Infrastructure Improvement Projects Plan, filed June 17, 2014 ("Joint Application").

[7] Application at 1.

[8] *Formal Case No. 1116*, Joint Response of Potomac Electric Power Company and the District Department of Transportation to the Application for Reconsideration of the Apartment and Office Building Association of Metropolitan Washington ("Joint Response"), filed December 19, 2014.

AOBA's Application.[9] On December 23, 2014, AOBA filed an Erratum to its Application.[10] A discussion of AOBA's Application and the parties' responses follows.

III. DISCUSSION

A. AOBA's Application for Reconsideration

i. The Commission's Statutory Interpretation of Section 34-1313.10(c)(1) of the ECIIFA as Requiring a Monthly Residential Customer Impact of $1.50 is Arbitrary, Capricious, and Abuse of Discretion and Contrary to the ECIIFA

6. AOBA contends that "there is no basis on which the Commission can legally conclude that Section 34-1313.10(c)(1) of the ECIIFA is ambiguous" and asserts that it "has demonstrated in its extensive Briefs and testimony that the clear statutory language [of the Act] requires that the determination of the UPC [ ] be based on the class cost of service study ("CCOSS") in Formal Case No. 1103, Order No. 17424;" an argument that AOBA preserves on Reconsideration.[11] However, AOBA argues, that when the Commission rejected AOBA's argument that the language of the statute clearly required the UPC to be based on the CCOSS, "the Commission arrived at an erroneous conclusion of its own."[12] AOBA contends that by finding the statutory language ambiguous with respect to the allocation of revenues for recovery of UPC revenue requirements, the Commission was able to "apply governing principles of statutory construction" to "reach a seemingly pre-destined customer bill impact of $1.50 for the [UPC] for residential customers in Year 1 of the recovery for approved underground project plans."[13] AOBA asserts that "[n]othing in the Council's findings as set forth in § 34-1311.02 compels or suggests a cap on residential UPC charges or preference for

---

[9] *Formal Case No. 1116*, Reply of the Office of the People's Counsel for the District of Columbia to the Application of the Apartment and Office Building Association of Metropolitan Washington for Reconsideration of Order No. 17697 ("OPC Reply"), filed December 19, 2014.

[10] The Commission notes, and incorporates by reference throughout the discussion of AOBA's Application, that on December 23, 2014, AOBA filed an Erratum to its Application wherein it indicated: "All references to a '$1.50 per month first year UPC for residential classes' (and variations thereof) in this Application and all references to a '$3.25 per month year seven UPC for residential classes' (and variations thereof) are intended to reference the combination of the UPC and the DDOT Improvement Charge." *Formal Case No. 1116*, AOBA's Errata to the Application for Reconsideration ("AOBA Errata"), at 4, filed December 23, 2014.

[11] Application at 6, 13 (referencing *Formal Case No. 1103, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service* ("*Formal Case No. 1103*")).

[12] Application at 6-7.

[13] Application at 7.

residential classes in determining UPC charges."[14] Similarly, AOBA asserts, nothing in Section 34-1313(c)(1) of the Act, which mandates that the Commission "employ the allocations approved in Pepco's most recent base rate case," provides for preferential treatment among rate classes in favor of residential classes.[15]

7. AOBA contends that the Commission found that the Joint Applicants' cost allocation methodology "more reasonably reflects the expressed intensions of the legislature," because "Pepco's proposed residential UPC more closely approximated the $1.50 first year UPC for residential customers referred to in the Task Force Report."[16] However, AOBA asserts that the Commission's conclusion "ignores that the legislative history itself clearly states that the UPC is to be based on a demonstration by Pepco 'that the Underground Project Charge to PEPCO's customers complies with the allocations in PEPCO's last base rate case . . . .'"[17] AOBA argues that the "Task Force Report could not possibly arrive at that result, because the base rate case upon which the Commission must rely at this time[,] based on the language of the statute (i.e., Formal Case No. 1103)[,] was then in the future."[18] AOBA contends that "the Commission dwelled at length on the reference to a '$1.50' residential monthly residential [*sic*] UPC in the Task Force Report, [and] wholly ignores the guiding statement in that Report that: 'Ratepayer contributions shall be through regulated distribution rates. This is the most equitable way to distribute the cost because all users of electricity participate.'"[19] AOBA asserts that the statute requires the Commission to rely on the allocations in *Formal Case No. 1103*, "and not an unsupported dollar amount appearing in the Task Force Report without supporting calculations and [which is] clearly dependent upon data and relationships not considered by this Commission in Formal Case No. 1103."[20]

8. AOBA contends that the Commission's decision to determine the meaning of the statute by comparing methodologies submitted by "two competing parties and then see[ing] which is closer to" the $1.50 estimate contained in the Task Force Report for Year 1 bill impact, was "erroneous as a matter of law," because the Commission, by its own admission, in *Formal Case No. 1103* did not exclude Customer Charge Revenues nor did it ignore the negative residential rate of return ("ROR") in allocating costs

---

14 Application at 8.

15 Application at 8.

16 Application at 8-9 (citing Order No. 17607, ¶ 183).

17 Application at 9, citing December 16, 2013 Committee Report, Committee on Government Operations, at 15 (emphasis in original).

18 Application at 9.

19 Application at 9, citing May 2013 Mayor's Power Line Undergrounding Task Force, Findings and Recommendations.

20 Application at 10.

amongst customer classes.[21] AOBA argues that nothing in the Council's findings as set forth in the Act "provide any reference, explicit or otherwise, to support the Commission's statutory interpretations or the findings of fact and conclusions of law."[22] In fact, AOBA asserts, the Committee Report restates and summarizes the "arguments of witnesses who submitted statements and provided testimony regarding the Mayor's Task Force report and its '$1.50' UPC," but also "makes it clear that the Mayor's Task Force Report was a proposal and not a Council mandate."[23] AOBA contends that the Commission failed to "identify any support that the Council intended for the Commission to cap the monthly residential UPC at $1.50 in year one."[24] AOBA asserts that, "[h]ad the Council wished to impose a cap of $1.50 on residential class UPC charges or impose any other limit on those charges, it would have said so in the statutory text;" instead, AOBA points out, the Act "mandates that the Commission allocate UPC costs in accordance with the '*distribution service customer class cost allocations*' approved in [*Formal Case No. 1103*]."[25]

9. In support of its contention that the Commission misused the legislative history in this case, AOBA cites *Halbig v. Burwell*, No. 14-5018 (D.C. Cir. July 22, 2014), arguing that the legislative history in this matter "provides no basis for imposing a contrary result beyond the words in the statute" and that there has been no "extraordinary showing" of contrary intentions to justify a limitation on the "plain meaning" of the statutory language.[26] AOBA asserts that the Commission, due to its misunderstanding of the legislative history, rewrote the statute to arrive at its desired outcome (*i.e.*, the $1.50 year one bill impact).[27] However, AOBA reiterates, nothing in the language of the statute "authorizes the Commission to exclude consideration of two [*sic*] the major inputs to its most recent base rate case revenue requirements determinations, namely Customer Charge Revenues and reduction of negative rate of return."[28] Therefore, AOBA argues, the Commission's statutory interpretation and conclusions of law are arbitrary and capricious, constitute an abuse of discretion, and are contrary to law.[29]

---

21 Application at 10.

22 Application at 11.

23 Application at 11.

24 Application at 12.

25 Application at 13 (emphasis in original).

26 Application at 10-11 (citing *Halbig*, No. 14-5018 *Slip Opinion* at 32).

27 Application at 15.

28 Application at 15.

29 Application at 15-16.

ii. The Commission's Interpretation of the Council's Legislative Intent in Section 34-1313.10(c)(1) of the ECIIFA is Inconsistent with the Council's Historical Action in Designating Specific Rate Charges or Rate Caps in Utility Legislation

10. AOBA argues that the Commission's interpretation of Section 34-1313.10(c)(1) of the Act is "at odds with the Council's historical practice in the area of utility regulation to clearly define its intent in the legislation that it creates, including specific references to the financial considerations that impact ratepayer classes."[30] AOBA asserts that the Council chose the language "*distribution service customer class cost allocations*" after "having been made fully aware of [the] various positions on the impact of the UPC on Pepco's residential and other ratepayer classes prior to the passage" of the Act.[31] Nevertheless, AOBA asserts, the Commission, in Order No. 17697, "does not utilize either the Commission's customer class cost of service determinations or its revenue requirements determinations by class in Formal Case No. 1103, Order No. 17424, to arrive at its approved class revenue requirement and UPC charges for this proceeding."[32] The only justification provided by the Commission, according to AOBA, for its departure from the language of the statute and "for its reliance on non-customer distribution revenue is the perceived need to produce a result that was consistent with the notion that residential customers should pay a first year monthly UPC charge of no greater than $1.50 or pay monthly UPC charges at any time during the seven year plan that would exceed $3.25 per customer."[33] However, AOBA reasserts, such a cap was not created by the Council and the Commission's creation of such a limit is inconsistent with the Act, arbitrary and capricious, represents an abuse of discretion, and [is] otherwise not in accordance with the law.[34]

iii. The Commission's Use of its Discretion is Inconsistent and Demonstrates an Abuse of Discretion

11. AOBA asserts that the Commission's inconsistent exercise of discretion in this proceeding is arbitrary and capricious and constitutes an abuse of discretion. AOBA argues that the "most obvious example of the Commission's abuse of discretion is reflected in its interpretation of Section 34-1313.10(c)(1) of the ECIIFA."[35] AOBA contends that the Commission found, in rejecting AOBA's argument that the cost allocation should be based on the CCOSS, "that the plain wording of the statute does not

---

30 Application at 16.

31 Application at 16.

32 Application at 16-17.

33 Application at 17.

34 Application at 17.

35 Application at 18.

contain language in support of AOBA's recommendation," because the "statute would have to be clear on its face to support" AOBA's position.[36] AOBA asserts that it was an abuse of the discretion for the Commission to "conclude that the statute must contain the 'exact terms' that actually and unequivocally support AOBA's argument regarding allocation of UPC revenue requirements in accordance with" the Act.[37] AOBA contends that the Commission rejected AOBA's position, "adopted an allocation of the UPC revenue requirements that [the Commission] judged to be consistent with a cap of $1.50 on Year One monthly charges," and in so doing "embarked on a journey to find support for its desired '$1.50' result in the legislative history" while excluding the Customer Charge Revenues and ignoring the issue of negative residential rates of return.[38] Actions which AOBA argue, "unquestionably reflects the Commission's exercise of discretion that was not authorized by the Council."[39] AOBA asserts that the purpose of the Commission's actions was "not to correctly apply the statute, but rather to back into a result which ensures that the first year monthly UPC charge for residential customers is capped at $1.50," and the result of the Commission's abuse of discretion is "the development of a revenue allocation, very radically unlike that approved in Formal Case No. 1103."[40]

12. AOBA further argues that the Commission's decision "not to treat master-metered apartments [("MMA")] as a separate category of customer in its allocation of the UPC revenue requirement is arbitrary, capricious, an abuse of discretion, contrary to law and constitutes reversible error."[41] AOBA contends that in *Formal Case No 1103* the Commission treated MMA customers "as a separate category of customer, distinguished from the residential class, and a different[], significantly lower] percentage of revenue increase was allocated to that category of customer."[42] AOBA also asserts that Pepco Exhibit (C)-1, in *Formal Case No. 1103*, "shows non-customer distribution revenue separately for GS-ND and GS-D-LV customer groups for the purpose of allocating UPC revenue requirements;" however, Pepco's compliance filing does not separately compute

---

36 Application at 18.

37 Application at 19.

38 Application at 19.

39 Application at 19.

40 Application at 19. AOBA provided a chart comparing the revenue allocation percentages from *Formal Case No. 1103* to *Formal Case No. 1116* at Attachment A to its Application. The chart shows that for *Formal Case No. 1116* the total residential allocation without RAD is 11.15%, while in *Formal Case No. 1103* the total residential allocation without RAD was 45.55%. Commercial and industrial customers were allocated 51.75% of the revenue increase in *Formal Case No. 1103* and 86.24% of the UPC revenue increase in *Formal Case No. 1116*.

41 Application at 21.

42 Application at 21.

the revenue increases for these customer subgroups within the GS-LV class."[43] AOBA contends that these distinctions clearly demonstrate that the Commission's decision in Order No. 17697 was not based on the revenue allocations of UPC revenue requirements on the same category of customers on which it based the revenue allocations in *Formal Case No. 1103*.[44] AOBA argues that "the Commission's decision to rewrite the revenue allocation applied to Pepco's customer classes to achieve a result not even remotely within the words of [the Act] is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law."[45]

13. AOBA asserts that "[i]n Order No. 17697, the Commission suggests that it does not interpret the language of the statute to be so restrictive to prevent it from excluding Customer Charge Revenues;" however, AOBA contends, in the same order, "the Commission rejects AOBA's argument for consideration of negative rates of return in the determination of class revenue requirements, based on the rationale that '*this is not a base rate proceeding where the Commission has discretion to modify a proposed rate design to achieve various regulatory goals and objectives.*'"[46] AOBA argues that "[t]hese two findings reflect inconsistent assessments of the Commission's ability to depart from the language of the ECIIFA;" the Commission "cannot justifiably argue that [it] has discretion to interpret the language of the ECIIFA in one instance and assert that it has no such discretion in the next."[47] AOBA argues that, despite the Commission's assertion that it does not have discretion to consider negative rates of return in Order No. 17697, the Act's requirement that the UPC revenue requirement by class be determined in the same manner as *Formal Case No. 1103* means that the Commission "cannot ignore negative residential rates of return which constituted a major consideration addressed by the Commission in *Formal case No. 1103*."[48] AOBA adds that "nothing in the Act or the legislative history states that negative rates of return are to be ignored."[49]

14. AOBA asserts that the allocation of the UPC revenue requirement among rate classes as required by the Act "avoids further exacerbation of existing negative rates of return," while the allocation employed by the Commission in Order No. 17697 "produces results that differ markedly from any distribution service customer class cost allocation that Pepco has presented in prior base rate proceedings."[50] AOBA contends

---

43 Application at 22.

44 Application at 22.

45 Application at 23.

46 Application at 24-25.

47 Application at 25.

48 Application at 26 (emphasis added).

49 Application at 27.

50 Application at 27.

that, as a result, "when UPC costs are rolled into base rates in Pepco's next base rate proceeding, the test year UPC revenues from the residential class will fall substantially below residential class responsibility for costs" causing "residential rates of return to become even more negative."[51] AOBA argues, based on the testimony of its witness Oliver, that the failure to address the negative rates of return in this proceeding will "necessitate substantial increases in rates for residential customers in subsequent rate proceedings," effectively causing residential customers to lose the "purported rate protections" intended by the Council.[52] AOBA contends that not only does the Commission have the authority to include the factor of negative rates of return in this matter, but also that it "must" do so.[53] AOBA argues that the "selective inclusion or exclusion . . . of costs and considerations which unquestionably were included in Formal Case No. 1103 and the selective exercise of discretion by the Commission in furtherance of an outcome not reflected in the plain meaning of the ECIIFA" or the Council's findings, as well as the fact that the Commission failed to adequately explain its refusal to address the policy shift regarding negative rates of return, is arbitrary, capricious, an abuse of discretion, and results in a monthly UPC that is "neither just nor reasonable."[54]

iv. The Commission Erroneously Concludes that it has the Authority to Adopt a Rate Design Inconsistent with the Requirements of Section 34-1313.10(c)(1) of the ECIIFA if the Rates are Determined by the Commission to be Just and Reasonable

15. AOBA contends that the Commission erroneously determined in Order No. 17697 "that even where the rate design departs from Order No. 17424 in Formal Case No. 1103, so as [*sic*] long as the rate design is determined by the Commission to be just and reasonable it is appropriate."[55] AOBA argues that "[n]o interpretation of the statutory requirements of the ECIIFA, or the Council's findings . . ., or the specific and unambiguous requirements of [the Act], or a review of the legislative history, can support the Commission's presumption of discretion to redesign the revenue allocations to be utilized in this proceeding in order to arrive at 'just and reasonable' rates."[56] AOBA asserts that not only did the Commission exclude Customer Charge Revenue and fail to consider residential class negative rates of return, but also "the percentage of revenue assigned to each Pepco rate class used to derive the monthly UPC charge in this

---

51 Application at 27.

52 Application at 27.

53 Application at 29.

54 Application at 29, 30.

55 Application at 31.

56 Application at 33.

proceeding is demonstrably inconsistent with the revenue allocations and rate class percentage increases approved in Order No. 17424."[57]

v. AOBA's Request Relief on Reconsideration

16. AOBA requests that the "Commission modify the UPC charges to reflect the revenue allocation percentages approved by the Commission in Order No. 17424 (without exclusion of Customer Charge Revenue and without excluding the factor of Residential negative rates of return) to meet the requirements of Section 34-1313.10(c)(1) of the ECIIFA."[58] Whatever the results among customer classes may be, that according to AOBA, is what the ECIIFA requires.[59]

B. Pepco & DDOT's Joint Response

17. The Joint Responders oppose AOBA's request for Reconsideration generally asserting that "AOBA's Application fails to present any 'error(s) of law or fact' in the determinations set forth in Order No. 17697, as required in Rule 141.2;"[60] therefore, the Commission's decision regarding the cost allocation for the UPC in this matter should "not be disturbed, and AOBA's Application should be denied."[61]

---

[57] Application at 33. AOBA cites *Office of the People's Counsel v. Public Service Commission of the District of Columbia*, 21 A.3d 985 (D.C. 2011), as support for its assertion that "the Commission abused its discretion in fashioning the terms" of Order No. 17697 ("For the commission properly to exercise its discretion it must make decisions 'drawn from a firm factual foundation' – i.e., 'the factual record must be capable of supporting the determination reached.' . . . It must 'exercise its judgment in a rational and informed manner,' meaning that it 'should be apprised of all relevant factors pertaining to the pending decision,' (and, in turn, a reviewing court 'must determine whether the decision maker failed to consider a relevant actor, whether [it] relied upon an improper factor, and whether the reasons given reasonably support the conclusion').") *Id.* at 365 (internal citations omitted).

[58] Application at 35. The Commission notes that AOBA's requested relief is markedly different from the opposition presented. While AOBA argues that the Commission erred in moving past the plain meaning of the statute and the UPC cost allocation should be based on the CCOSS, it requests as relief that the Commission modify the UPC allocations approved in Order No. 17424 to include the Customer Charge Revenues and factor in residential negative RORs. To be consistent with its overarching argument and filings to-date, AOBA should be requesting that the Commission modify the UPC charges to reflect the revenue allocations based on the CCOSS submitted by Pepco in *Formal Case No. 1103*. *See* ¶ 38, *infra*.

[59] Application at 35.

[60] Joint Response at 2 (citing Commission Rule regarding Reconsideration of Orders - 15 D.C.M.R. § 141.2: "The parties shall identify with specificity in the application for reconsideration or modification error(s) of law or fact in the Commission's final order that they seek to have corrected. The application for reconsideration or modification is not a vehicle for losing parties to rehash arguments earlier considered and rejected by the Commission where there exists no error of law or fact.").

[61] Joint Response at 2.

i. The Commission's Approval of the Joint Applicant's Cost Allocation Methodology was Reasoned, Rational and Substantiated with Adequate Evidence

18. The Joint Responders assert that the Commission's decisions in Order No. 17697 were supported by "reasoned," "rational" explanations and "substantiated with adequate evidence and legislative history of the Act."[62] The Joint Responders argue that, therefore, "under well-settled law, AOBA has a 'heavy burden of demonstrating clearly and convincingly a fatal flaw in the action taken'" – a burden which the Joint Responders contend AOBA has failed to meet.[63] The Joint Responders identify the contested language in Section 1313.10(c)(1) of the Act as: "*in accordance with the distribution service customer class cost allocations approved by the commission for the electric company in the electric company's most recent base rate case*," and assert that they "proposed to allocate the costs of the DC PLUG initiative to customers in the same manner as the Commission allocated the cost" in *Formal Case No 1103*.[64] Specifically, the Joint Responders assert that they "allocated the total revenue requirement for the DC PLUG initiative to each rate class on the basis of the rate class-specific levels of non-customer-related distribution revenue approved by the Commission in Formal Case No. 1103," which excluded Customer Charge Revenues.[65] The Commission, according to the Joint Responders, "provided a well-reasoned, well-substantiated approval of the Joint Applicants' proposed allocation excluding customer charges."[66]

19. The Joint Responders assert that the "Act does not define the term 'distribution service class cost allocations,' and in light of the competing interpretations of the phrase put forth by AOBA and GSA as opposed to OPC and the Joint Applicants, the Commission found the Act was ambiguous and held a hearing to allow all parties the opportunity to provide the Commission with additional materials and arguments for their positions."[67] The Joint Responders further assert that "the Commission [then] consulted the legislative history of the Act," finding "that 'the legislative history bolstered by the hearing record confirmed that the same costs methodology that formed the basis of the Mayor's Task Force Report recommendations was considered in the Council mark-up of the ECIIFA legislation' and held that the Joint Applicants' 'allocation methodology based on non-Customer Charge Revenues allocates costs in a manner that is similar to the

---

62 Joint Response at 4.

63 Joint Response at 5 (citing *Watergate East, Inc. v District of Columbia Public Service Comm'n*, 662 A.2d 881, 886 (D.C. 1995)).

64 Joint Response at 5.

65 Joint Response at 5.

66 Joint Response at 5.

67 Joint Response at 6.

allocation used in Formal Case No. 1103 and is consistent with the legislative intent discussed in the Committee Report.'"[68]

20. The Joint Responders argue that the Commission found the Council's Committee Report to be particularly significant as "the primary piece of legislative history of the act."[69] The Council's Committee Report, according to the Joint Responders, "made it clear that: '(1) there was a concern about the financial impact of any UPC on residential customers; (2) the bill impact in year one, based on the work of the Mayor's Undergrounding Task Force Report, was expected to be approximately $1.50 and in year seven was expected to be approximately $3.25; and (3) the undergrounding project would place a heavier financial burden on the commercial class than on the residential customers.'"[70] The Joint Responders contend that, in comparing the methodologies proposed by AOBA and the Joint Applicants to "these three significant factors from the Act's legislative history, the Commission properly concluded that 'the Joint Applicants' methodology more reasonably reflects the expressed intentions of the legislature.'"[71]

21. The Joint Responders assert that after rejecting AOBA's proposed methodology as inconsistent with the legislative intent, the Commission turned to whether the Joint Applicants' proposed methodology, which excluded the Customer Charge Revenues, comported with the Act.[72] According to the Joint Responders, the Commission found that Pepco's basis for excluding Customer Charge Revenues was reasonable considering that "[t]he UPC is to recover the 'costs associated with the undergrounding project in a manner that's as close as possible to how comparable assets are recovered in base distribution rates'" and that recurring or ongoing customer charges for customer-related assets like customer meters, service lines, and billing costs were properly "excluded from the allocation on the basis that the DC PLUG initiative does not include infrastructure such as meters and services that would normally be recovered through a customer charge" and, therefore, the Act "did not require including unrelated costs in the UPC."[73] The Joint Responders argue that the Commission's conclusion that the Joint Applicants' proposed methodology reflected the intentions of the legislature was "reasoned and rational" as well as supported by testimony of Company Witnesses McGowan and Janocha who testified that the model underlying the numbers presented in the Mayor's Undergrounding Task Force Report was the same model, with updated

---

68 Joint Response at 6. *See also*, Joint Response at 7 wherein the Joint Responders more fully explain their understanding of the Commission's step-by-step decision-making process.

69 Joint Response at 7.

70 Joint Response at 8 (citing Order No. 17697 at ¶ 182).

71 Joint Response at 8 (citing Order No. 17697 at ¶ 183).

72 Joint Response at 9.

73 Joint Response at 9-10.

inputs for *Formal Case No. 1103*, that was used in the Joint Application and "was developed based on the distribution service customer class cost allocation, excluding Customer Charge Revenues, in Formal Case No. 1087."[74] The Joint Responders conclude that "AOBA's Application fails to identify any clear and convincing fatal flaw in the Commission's actions, and, as such, there is no basis for altering the Commission's determination in Order No. 17697 regarding the allocation of customer costs."[75]

ii. There is no Inconsistency between the Commission's Acceptance of the Exclusion of Customer Charge Revenues and Its Statement that It Cannot Depart from the Language of the Act to Achieve Policy Goals

22. The Joint Responders argue that "AOBA erroneously claims that the Commission abused its discretion by inconsistently excluding the Customer Charge Revenues while simultaneously claiming that the Act bars the Commission from implementing policy goals such as reducing the negative rate of return for the residential customer class."[76] However, the Joint Responders assert that, contrary to AOBA's contentions on this issue, the Commission's decisions "are wholly consistent and do not constitute an abuse of discretion."[77] Specifically, the Joint Responders compare the Commission's findings in Paragraph 187 of Order No. 17697, wherein the Commission discusses Pepco's decision to remove Customer Charge Revenues, to those in Paragraph 189, wherein the Commission discusses the negative ROR issue. The Joint Responders assert that, when the statements in those two paragraphs are reviewed in context, they are consistent because the statutory mandate that the Commission allocate costs in the same manner as in *Formal Case No. 1103* required the Commission to exclude Customer Charge Revenues, like the Commission would exclude any unrelated costs in a base rate proceeding; the Commission's stated policy of moving away from negative residential rates of return "was a policy decision that it was making in base rate cases," which this proceeding is not.[78] Therefore, the Joint Responders contend, "the Commission was not free to make policy decisions about the steps that should be taken to move away from a negative rate of return for residential customers."[79]

---

74 Joint Response at 9-11.

75 Joint Response at 11.

76 Joint Response at 12 (citing Order No. 17697, ¶¶ 187, 189).

77 Joint Response at 13.

78 Joint Response at 13-14.

79 Joint Response at 14.

iii. The Commission Used the First Year Rate Impact of $1.50 as a Point of Comparison for Joint Applicant's Proposed Methodology and AOBA's Alternative Methodology

23. The Joint Applicants assert that "[a] primary argument in AOBA's Application is that the Commission found that the Act's 'legislative history mandated a $1.50 first year UPC charge for residential classes.' Thereby imposing a 'cap' of $1.50 on the UPC's first year bill impact."[80] However, the Joint Applicants contend, "AOBA provided no citation to Order No. 17697 or to the record where the Commission or any party argued that the legislative history imposed a cap."[81] The Joint Responders assert that, contrary to AOBA's contentions, the Commission used the $1.50 figure from the legislative history "as a point of comparison for the Joint Applicants' and AOBA's methodologies in order to 'determine whether an alternative construction should be ascribed to the statutory language to help resolve the ambiguity" that the Commission found in the language of Section 1313.10(c)(1) of the Act.[82] The Joint Responders further assert that "[t]he Commission was careful to indicate that the $1.50 figure was an approximate amount and that it was only an expectation[; s]uch equivocal language in no way provides the type of mandate and certainty that AOBA's claims require."[83]

24. The Joint Responders assert that the $1.50 figure from the legislative history was "one of many reference points" used by the Commission in reaching its decision on the cost allocation issue.[84] The other factors, besides the first year bill impact, that the Joint Responders assert were considered by the Commission were: (1) the estimated peak bill impact for Year 7; and (2) "the percent of the DC PLUG costs that would be allocated to residential customers."[85] In considering the second point, the Joint Responders point out that the Commission referenced "AOBA's own testimony from the Council's Committee Report on the Act," wherein AOBA testimony "makes clear, 'over 82% of the costs of the proposed undergrounding program will be borne by commercial and master metered apartment building customers.'"[86]

---

80 Joint Response at 14 (citing AOBA's Application at 3.).

81 Joint Response at 14.

82 Joint Response at 14-15 (citing Order No. 17697, ¶ 183).

83 Joint Response at 15.

84 Joint Response at 15.

85 Joint Response at 15.

86 Joint Response at 15-16 (citing Commission Exhibit 16, Attachment F at 2 of AOBA Council Testimony) ("AOBA's Council Testimony evidences that AOBA understood how the words 'distribution service customer class cost allocations' operated in the cost allocation model. For example, Exhibit Pepco (C)-1, page 2 of 25, provides the allocation of the Authorized Demand/Energy Charge Recovery for the relevant rate classes in Year 1. The sum of those amounts for GS-D-LV ($31,767,790), GS-3A ($39,205),

25. The Joint Responders argue that "AOBA's assertion that the legislative history was not reflective of the mark up of the legislation is meritless" because the contested language – "distribution service customer class cost allocations" – was in the Mayor's Task Force Report and "did not change between the initial legislation about which AOBA was testifying and the final legislation signed into law."[87] The Joint Responders assert that the consistency between the initial and final language in the legislation is not surprising "because the same methodology was consistently used in the Mayor's Task Force report, the legislative history of the Act and the UPC cost allocation, [which] all produce a first year bill impact that is around $1.50 for residential customers."[88] The Joint Responders further note that the cost allocations in base rate proceedings "have historically assigned more of the cost recovery to commercial customers," a fact which the Joint Responders contend AOBA was well aware of as it testified to the Council that, if the Act passed, "commercial, multifamily and institutional properties will have to pass on over $70 million annually in increased electric costs to their tenants, customers, students, and patients."[89] The Joint Responders conclude that, based on the arguments presented, AOBA's Application "should be rejected as baseless."[90]

iv. The Commission's Conclusion that MMA Customers Should be Included in the Residential Rate Class was Reasoned, Rational and Substantiated with Adequate Evidence

26. The Joint Responders assert that the Commission properly included MMA customers in the residential rate class in its computation of the UPC.[91] The Joint Responders argue that the Commission "looked at the issue in the most recent Pepco base rate case, [wherein] it did not approve the separate MMA rate design proposal that was submitted."[92] The Joint Responders contend that AOBA mistakenly cites language from Order No. 17424 as support for its argument that "the MMA customers should have been broken out as a separate rate class for the purposes of the UPC," when the "operative language" on this issue "appears in Paragraph 484 of Order No. 17424 where the Commission rejected Pepco's proposal for a separate MMA rate and required it to 'report

---

GT-LV ($147,804,194) and GT-3A ($46,351,698) represents 82% of the total revenue of $272,658,959 – or more than 82% of the cost of the DC PLUG initiative, as stated in the AOBA Council Testimony.")

87 Joint Response at 16.

88 Joint Response at 17.

89 Joint Response at 17 (citing Commission Exhibit No. 16, Attachment F at 2 of the AOBA Council Testimony) (internal quotations omitted).

90 Joint Response at 18.

91 Joint Response at 18.

92 Joint Response at 18.

back to the Commission with improved MMA rate design proposals in Pepco's next rate case.'"[93] Therefore, according to the Joint Responders, the Commission's decision to include "MMA customers in the residential rate class was firmly based on and consistent with Order No. 17424 in Formal Case No. 1103" and AOBA's "baseless" arguments on this issue "should be rejected."[94]

C. OPC's Reply

27. OPC generally asserts that AOBA's Application is without merit, arguing that "[t]he Commission's decision approving the joint Application was well-reasoned and supported by substantial record evidence."[95] OPC contends that "AOBA presented a radical interpretation of section 1313.10(c)(1) of the Act that would increase the cost allocations to residential customers exponentially over the allocations approved in the most recent base rate case (*i.e.*, Formal Case No. 1103)."[96] OPC asserts that "[d]espite AOBA's remonstrations to the contrary, the Commission rightly (1) found [*sic*] the provisions of section 1313.10(c)(1) were ambiguous; (2) turned to the Act's legislative history to determine the legislative intent underlying the statutory language in question and to resolve the ambiguity; (3) rejected the AOBA position as inconsistent with how the Commission allocated costs in Formal Case No. 1103; and confirmed the appropriateness of its decision and Pepco's proposed methodology through a detailed analysis of the legislative history of the Act and the record evidence."[97] OPC argues that the Commission's actions "are entirely consistent with its statutory obligations and the fundamental concept of reasoned decision-making."[98]

i. AOBA's Application Misrepresents the Commission's Decision-Making Process in Order No. 17697

28. OPC argues that AOBA's contentions that the Commission: "(1) erroneously concluded the words of section 1313.10(c)(1) of the Act were ambiguous[,] (2) then proceeded to improperly interpret the legislative history of the Act as 'requiring a monthly residential customer impact' of $1.50[,] and (3) began with a preconceived result and then developed an interpretation of the statue [sic] to reach that result," "greatly

---

93 Joint Response at 18-19 (citing *Formal Case No. 1103*, Order No. 17242 ("Order No. 17424"), ¶ 484, rel. March 26, 2014).

94 Joint Response at 18, 19.

95 OPC Reply at 2.

96 OPC Reply at 2.

97 OPC Reply at 2-3.

98 OPC Reply at 3.

mischaracterizes the Commission's decision-making process and use of legislative history in reaching its decision in Order No. 17697."[99]

29. First, OPC asserts that "AOBA's contention that the Commission found a $1.50 cap on Year 1 UPC charges is plainly erroneous," because the Year 1 UPC impact was $0.18 and the "$1.50 figure comes from the Act's legislative history; it refers to the sum total of the Year 1 UPC and DDOT Charge approved by the Commission in Formal Case No. 1103 – not merely the UPC."[100] OPC argues that, in reaching a determination on the cost allocation issue and ultimately establishing the Year 1 UPC, the Commission properly began its analysis "with the text of the statute that the Commission was charged with implementing" and that, based on that analysis, "the Commission rejected AOBA's argument that the plain language of the Act required it to base its allocation on the CCOSS submitted in Formal Case No. 1103."[101] OPC argues that the Commission explained why it found the language of the statute to be ambiguous in Order No. 17697, stating that "if Section 1313.10(c)(1) actually read that the UPC is to be imposed and collected 'as set out in the electric company's class cost of service study,'" instead of "in accordance with the distribution service customer class cost allocations approved by the Commission for the electric company and in the electric company's most recent base rate case," then the language would have clearly supported AOBA's interpretation.[102] However, OPC relates, "[t]he Commission ultimately found that the language of section 1313.10(c)(1) of the Act is ambiguous and raised the question of 'whether the phrase was intended to refer to the Commission's overall determination of costs and rates in the most recent rate case.'"[103]

30. After reasoning that the language of the statute in question was ambiguous, OPC asserts that the Commission properly moved on to the legislative history of the Act to determine the legislative intent.[104] OPC asserts that, despite AOBA's position to the contrary, "it is clear that the Commission used the legislative history to resolve an ambiguity created by two competing interpretations of section 1313.10(c)(1) of the Act" and that "[t]he $0.18 Year 1 UPC was not a product of the Commission's preconceived notion of the proper UPC."[105] OPC asserts that "it was the

---

99 OPC Reply at 8.

100 OPC Reply at 8. As noted in footnote 10, *supra*, subsequent to OPC filing its Reply, AOBA filed an Erratum to its Application clarifying that all references to the $1.50 per month first year UPC for the residential classes and to the $3.25 per month year seven UPC for residential classes in the Application are intended to reference the combined UPC and DDOT Improvement Charge.

101 OPC Reply at 8-9.

102 OPC Reply at 9.

103 OPC Reply at 9.

104 OPC Reply at 9.

105 OPC Reply at 9

Commission's obligation to determine whether [the UPC proposed by the Joint Applicants] was just and reasonable and otherwise in accordance with the requirement of the Act."[106] OPC contends that the Commission "properly relied on the available legislative history to resolve the ambiguity . . . and weigh the relative merits of the competing interpretations of section 1313.10(c)(1) that were presented in this proceeding."[107] OPC argues that, in ultimately concluding that the Joint Applicant's proposed methodology "more reasonably reflects the expressed intentions of the legislature," the Commission found that "AOBA could not reconcile its interpretation of the statute with the anticipated level of UPC charges that were presented and considered during the legislative process."[108] OPC further argues that in reaching its decision, the Commission never concluded that the "legislative history mandated a $1.50 first year UPC charge for residential classes;" a mischaracterization of the Commission's holding by AOBA according to OPC. Instead, OPC argues, the legislative history served as a source of "several important insights that support the proposed UPC-related cost allocations included in the Joint Application."[109]

31. OPC argues that the three most important insights from the legislative history that the Commission relied upon were: (1) that the Council was concerned about the financial impact of any UPC on residential customers; (2) the approximate bill impact in year 1 was expected to be $1.50 and in year seven was expected to be $3.25; and (3) the undergrounding project would place a heavier financial burden on the commercial class customers than it would on residential customers.[110] OPC asserts that the Commission noted in Order No. 17697 that "AOBA's own testimony before the City Council 'clearly contemplates that the bulk of the Undergrounding Project costs (*i.e.* about 82%) would be borne by the commercial classes and Master Metered Apartment buildings while the remaining 18% would be allocated to the residential classes.'"[111] Therefore, legislative history, according to OPC, while not the sole basis of the Commission's decision, "serves as a further confirmation that the cost-allocation methods approved by the Commission . . . were the methods that the Act's drafters intended and

---

106 OPC Reply at 9.

107 OPC Reply at 9-10.

108 OPC Reply at 10.

109 OPC Reply at 10. OPC cites Order No. 17697, ¶ 183 where the Commission determined that "the Joint Applicants' methodology . . . results in a charge of $0.18 for the UPC and $1.12 for the DDOT Surcharge (for a combined impact of $1.30.)".

110 *See* OPC Reply at 11 (citing Order No. 17697, ¶ 182; *see also*, Testimony of City Administrator Lew and the Mayor's Undergrounding Task Force Report).

111 OPC Reply at 11 (citing Order No. 17697, ¶ 183).

what the District Council understood would be the expected rate impacts of the Act on District ratepayers."[112]

32. OPC addresses, what it characterizes as "inconsequential arguments" proffered by AOBA "that have no bearing on the merits of the Commission's reliance on the Task Force Report and other legislative history to confirm its analysis of the appropriate cost-allocation process."[113] According to OPC, those three inconsequential arguments are: (1) AOBA's reference to the fact that the Act states that an "unprecedented level of investment" will be required to modernize the electric system in the District; (2) that the "Task Force Report is unreliable because the 'last base rate case' at the time the [ ] Final Report was drafted was Formal Case No. 1087;" and (3) that the Commission "wholly ignores" the Task Force Report's "guiding statement" that the "Ratepayer contributions shall be through regulated distribution rates."[114]

33. In response to AOBA's first point, OPC argues that AOBA offers no explanation as to why the referenced statement regarding the level of investment the undergrounding project will require had any bearing on the interpretation of the contested language regarding the proper cost allocation methodology.[115] OPC further argues, in response to AOBA's second point, that the numbers underlying the Task Force Report's estimated bill impacts that were based on *Formal Case No. 1087* "were subsequently updated to reflect the Commission's final decision in Formal Case No. 1103," "[t]hus, the record evidence allowed the Commission to trace the development of the UPC from Formal Case No. 1087 to Formal Case No. 1103 and, ultimately, to the UPC included in the Triennial Plan."[116] Therefore, according to OPC, the Commission was able to determine "that the Act's drafters were consistently working with the same model – one that allocated costs on the basis of non-customer distribution revenue and that produced the results approved in Order No. 17697 following the issuance of the Commission's decision in Formal Case No. 1103."[117] In response to AOBA's third point, OPC asserts that it fails to see the relevance of AOBA's argument because there "is no dispute over whether to recover the UPC through regulated distribution rates."[118]

ii. <u>The Commission Properly Explained its Decision to Exclude Customer Charge Revenues from the UPC Calculation</u>

---

112 OPC Reply at 11.

113 OPC Reply at 11.

114 OPC Reply at 11-13.

115 OPC Reply at 12.

116 OPC Reply at 12.

117 OPC Reply at 12-13.

118 OPC Reply at 13.

34. OPC argues that AOBA's contention that the "only justification" that the Commission provided for excluding Customer Charge Revenues from the UPC calculation was its "reliance on non-customer distribution revenue . . . to produce a result that was consistent with the notion that residential customers should pay a Year 1 monthly UPC charge of no greater than $1.50" is incorrect.[119] OPC asserts that the "Commission offered a lengthy explanation of its decision to exclude customer charge related revenue when allocating the UPC;" relying on "Pepco's explanation that 'removing Customer Charge Revenues is appropriate because costs that are typically recovered through the customer charge, such as billing and metering costs, will not be incurred in connection with the undergrounding costs associated with the Triennial Undergrounding Plan.'"[120] OPC further asserts that "[t]he Commission also noted that 'Pepco witness Janocha testified during the evidentiary hearing that Pepco intends to recover costs associated with the undergrounding projects in a manner that will be as close as possible to the way comparable assets are recovered in base distribution rates'" and that, typically, "the Company would not include in rates unrelated charges and, therefore, it was appropriate to remove the customer charges unrelated to the undergrounding project from the cost allocation."[121] OPC asserts that, despite AOBA's assertions to the contrary, the Commission's decision to exclude the Customer Charge Revenues from the UPC allocations was not based on the imposition of any cap on the UPC, but rather OPC argues, the Commission clearly explained that it found "Pepco's explanation of its decision to remove the customer charge from the cost allocation [to be] a credible one given that the UPC-related costs do not involve what is customarily considered customer charge related costs."[122] Therefore, OPC concludes, AOBA's Application "offers no basis for the Commission to reconsider this conclusion."[123]

iii. The Commission did not Err by not Moving Towards Equalized Class Rates of Return in this Process

35. OPC argues that because the Act requires that the "cost allocations of the UPC be made 'in accordance with the distribution service customer class cost allocations approved by the Commission for the electric company and in the electric company's most recent base rate case,'" the Commission did not err by not moving towards equalized class rates of return as AOBA contends.[124] OPC agrees with AOBA that in *Formal Case*

---

119 OPC Reply at 13-14.

120 OPC Reply at 14 (citing Order No. 17697, ¶ 186).

121 OPC Reply at 14 (citing Order No. 17697, ¶ 186).

122 OPC Reply at 14 (citing Order No. 17697, ¶ 187).

123 OPC Reply at 14.

124 OPC Reply at 15.

No. 1103, the most recent base rate case, "the Commission made a substantial movement towards equalized class rates of return and allocated 47% of the approved rate increase to residential customers."[125] However, OPC asserts, "the allocation of the UPC, which is based on the allocations approved in Formal Case No. 1103, already includes the Commission's decisions with respect to equalized class rates of return as adopted in Formal Case No. 1103."[126] Furthermore, OPC contends, the Act "limits the Commission's discretion to move any further as it mandates that the UPC must be allocated in accordance with" *Formal Case No. 1103*.[127] Therefore, OPC argues, "[t]he Commission correctly concluded in Order [No.] 17697 that 'this is not a base rate proceeding where the Commission has the discretion to modify a proposed rate design to achieve various regulatory goals and objectives," and that "[a]ny additional movement towards equalized class rates of return approved by the Commission in the next Pepco base rate case, would be reflected in the UPC when it is recalculated following that future base rate case."[128] OPC further points out that the Commission stated in *Formal Case No. 1103* that "customer class rates of return need not be equal considering only the class cost of service" and that "the residential class would 'still be providing the Company with a negative class ROR.'"[129] Therefore, OPC asserts, the Commission's treatment of this issue was "consistent with Formal Case No. 1103" and "AOBA's Application is [ ] incorrect when it alleges Commission error based on a perceived lack of consideration for negative class rates of return."[130] OPC concludes by addressing "AOBA's concern that 'when the UPC costs are rolled into base rates in Pepco's next base rate case proceeding . . . residential rates of return will fall substantially below residential class responsibility for those cost," asserting that AOBA's concern is "clearly premature" and can be addressed by the Commission in Pepco's next base rate case.[131]

IV. DECISION

36. A Petition for Reconsideration by an administrative agency is addressed to that body's discretion.[132] The purpose of a Petition for Reconsideration is to identify with specificity errors of law or fact in the Commission's order so that they can be

---

125 OPC Reply at 15 (referencing *Formal Case No. 1103*, Order No. 17424, ¶ 437).

126 OPC Reply at 15.

127 OPC Reply at 15.

128 OPC Reply at 15 (citing Order No. 17697, ¶ 189).

129 OPC Reply at 15-16 (citing Order No. 17424, ¶ 438) (internal quotations omitted).

130 OPC Reply at 16.

131 OPC Reply at 16.

132 *District of Columbia v. District of Columbia Pub. Serv. Comm'n*, 963 A.2d 1144, 1152 (D.C. 2009), citing *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981).

corrected.[133] It is not a vehicle for the losing party to rehash arguments previously considered and rejected. If there is substantial evidence in the record to support the decision of the Commission, that decision is not erroneous simply because there is substantial evidence that could support a contrary conclusion.[134] Commission decisions on questions of law are subject to an arbitrary and capricious standard of review which is the "the narrowest judicial review in the field of administrative law" and are limited to determining whether the overall impact of the order is just and reasonable, and "whether the Commission 'respected procedural requirements, has made findings based on substantial evidence, and has applied correct legal standards."[135] Finally, the Commission enjoys wide discretion on the issues that come before it, and on a Petition for Reconsideration or Clarification may clarify certain findings and conclusions set forth in its initial decision.[136]

37. Commission Order No. 17697 approved the Joint Application and Triennial Plan and authorized the imposition of a periodic true up of the Underground Project Charge. In the Order, the Commission also decided the cost allocation issue that was the subject of the September 16, 2014 evidentiary hearing, reasoning that the Joint Applicants' proposed method of allocating costs for the UPC both complied with the Act and effectuated the intent of the legislature. This determination was based on both our reasoned interpretation of Section 1313.10(c)(1) of the Act and recognized principles of statutory construction first addressing the plain language and ordinary meaning of the statute at issue which lead to our reasoned conclusion that the language was ambiguous thus triggering an examination into the legislative history of the Act. Our conclusion specifically rejected AOBA's cost allocation proposal as being inconsistent with how the Commission allocated costs in the last base rate case (*Formal Case No. 1103*) and the intent of the legislature.[137]

---

133 *See Formal Case No. 1103*, Order No. 17539 ("Order No. 17539"), ¶ 4, rel. July 10, 2014 (citing D.C. Code § 34-604(b) (2001)). *See also*, 15 DCMR § 140.2 (June 25, 1982) (An Application for Reconsideration "shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous.").

134 *See Formal Case No. 1053, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rate and Charges for Electric Distribution Service*, Order No. 14832 at ¶ 5, rel. June 13, 2008, citing *State of New York v. United States*, 880 F. Supp. 37 (D.D.C. 1995) and *Washington Gas Light Co. v. District of Columbia Pub. Serv. Comm'n*, 856 A.2d 1098, 1104 (D.C. 2004).

135 *Washington Gas Energy Services, Inc. v. District of Columbia Public Service Comm'n*, 893 A.2d 981, 986 (D.C. 2006) citing *Office of People's Counsel v. Public Service Comm'n*, 610 A.2d 240, 243 (D.C. 1992)(internal citations and quotations omitted); *People's Counsel v. Public Service Comm'n of Dist. Of Columbia*, 455 A.2d 402, 403-04 (D.C. 1982) (internal citations omitted).

136 *See, e.g., Formal Case No. 1087, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rate and Charges for Electric Distribution Service*, Order No. 17027 at ¶ 3, rel. December 26, 2012.

137 Order No. 17697, ¶¶ 175-89.

38. While AOBA divides its Petition for Reconsideration into four (4) interrelated arguments,[138] the Commission really sees only a reiteration of two (2) main points, within which all of AOBA's assertions are encompassed: (1) that the Commission erred in finding that the language of Section 34-1313.10(c)(1) of the Act was ambiguous with regard to the appropriate cost allocation methodology; and (2) that the Commission erred and abused its discretion by excluding the Customer Charge Revenues and failing to consider the Residential negative rates of return in the allocation of the UPC. The Commission notes, additionally, that AOBA's requested relief is markedly different from the arguments presented on reconsideration. While AOBA initially argued that the Commission erred in moving past the plain meaning of the statute and asserted that the UPC cost allocation should be based on the CCOSS, it requests as relief on reconsideration that the Commission modify the UPC allocations approved in Order No. 17697 and base the allocations on the revenue allocation in *Formal Case No. 1103* but include the Customer Charge Revenues and factor in Residential negative RORs. To be consistent with the argument that AOBA maintains on reconsideration, AOBA should be requesting that the Commission modify the UPC charges to reflect the revenue allocations based on the CCOSS submitted by Pepco in *Formal Case No. 1103*. It seems, however, that now AOBA would accept either a cost allocation based on Pepco's *Formal Case No. 1103* CCOSS or one based on *Formal Case No. 1103*, Order No. 17424 revenue rate increase allocation, because both result in a cost reduction for its constituents (*i.e.*, a more favorable result than the cost allocation that was determined appropriate in Order No. 17697). Nevertheless, despite this inconsistency and the repetitious nature of AOBA's Petition, for continuity's sake, we will address AOBA's Petition point-by-point.

A. The Threshold Issue of the Ambiguity in § 34-1313.10(c)(1) of the Act

39. As a threshold issue, we note that AOBA initially argued that Pepco's filing was inconsistent with the Act because the UPC allocation was not based on the CCOSS, which AOBA argued the plain meaning of the contested phrase in the Act "in accordance with the distribution service customer class cost allocation" required. We rejected that argument finding that the contested phrase was ambiguous and that the legislative history did not support a cost allocation based on the Pepco's last CCOSS.[139]

---

[138] Despite the manner in which AOBA structured its Petition, upon review of AOBA's arguments, which we have summarized in full in ¶¶ 6-16, *supra*, the Commission has determined that AOBA has presented four (4) interrelated arguments: (1) that the Commission erred in finding that the language of Section 34-1313.10(c)(1) of the Act was ambiguous with regard to the appropriate cost allocation methodology; (2) that the Commission erred and abused its discretion by excluded the Customer Charge Revenues and failing to consider the Residential negative rates of return in the allocation of the UPC; (3) that the Commission erroneously placed a cap of $1.50 on the UPC for Residential customers for Year One of the project based on a misguided interpretation of the statute and an inappropriate application of the legislative history; and (4) that the Commission erred in failing to create a separate rate design for the MMA class.

[139] Order No. 17697, ¶¶ 180-84.

While AOBA does not reiterate its original argument in depth on reconsideration, AOBA preserves the argument maintaining that the contested phrase: "in accordance with the *distribution service customer class cost allocations* approved by the Commission for the electric company and in the electric company's most recent base rate case," unambiguously means that the allocations should be based on the CCOSS filed by Pepco in *Formal Case No. 1103*. The Joint Applicants, on the other hand, submitted and maintain that the phrase in question means that the allocations should be done in the same manner as approved by the Commission in the last rate case; first determining the cost of the initiative and then allocating the costs in the same manner that current rates or costs are allocated.[140]

40. Normally, words and phrases are construed according to rules of grammar and according to their common usage; but technical words and phrases which have acquired a peculiar and appropriate meaning in the law shall be construed according to their meaning acquired in the law.[141] The phrase at issue here (*i.e.*, "in accordance with the *distribution service customer class cost allocations* approved by the Commission for the electric company and in the electric company's most recent base rate case") is clearly technical.[142] As the Court of Appeals has noted, statutory interpretation is a holistic endeavor.[143] While the Commission is aware that "the ultimate responsibility for determining the correct interpretation of a statute rests with the courts, 'it is settled that courts should give great weight to any reasonable construction of a regulatory statute

---

[140] Different interpretations of the same statutory language can provide sufficient basis upon which to find that language ambiguous. *See Formal Case No. 1044, In the Matter of the Emergency Application of the Potomac Electric Power Company for a Certificate of Public Convenience and Necessity to Construct Two 69kv Overhead Transmission Lines and Notice of the Proposed Construction of Two Underground 230kv Transmission Lines, Order No. 13850* ("*Formal Case No. 1044*"), 2005 WL 3607899 (D.C. P.S.C.) at ¶ 10. "The language of the statute can support either interpretation and is, therefore, ambiguous."

[141] *See Barber v. Gonzales*, 347 U.S. 637 (1954) (statutory language should be interpreted according to common usage but some acquire a special technical meaning by process of judicial construction); *see also, Intex Recreation Corp. v. Metalast, S.A. Sociedad Unipersonal*, 245 F. Supp. 2d 65, 70 (2003) (testimony from experts in relevant field may be useful in assisting court to understand technical terms and even discerning the ordinary meaning of the claimed term).

[142] "When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

[143] *Cook v. Edgewood Mgmt. Corp*., 825 A.2d 939, 946 (D.C.) (quoting *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed. 2d 402 (1993)).

adopted by the agency charged with the enforcement of that statute.'" [144] Furthermore, "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" and in order for a Commission's interpretation to be sustained, the reviewing court "need not find that its construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings."[145]

41. In parsing Section 34-1313.10(c)(1) of the ECIIFA, we began our decision on this issue at Paragraph 175 of Order No. 17697, as ever, with the plain language and ordinary meaning of the statute at issue,[146] with the understanding that normally, where the plain meaning of the statutory language is unambiguous, we need go no further.[147] In support of its contention AOBA cites the D.C. Circuit's recently vacated decision in *Halbig* for the proposition that when statutory language is clear on its face, it takes an extraordinary showing of contrary legislative intent to justify moving beyond the plain meaning of the statutory language. However, as the Commission's reasoning revealed in Order No. 17697, the statutory language at issue was not clear on its face; therefore, moving past the words of the statute to the legislative history was the proper course for the Commission to take in order to give proper effect to both the ambiguous phrase and the legislature's intent.[148] We determined that AOBA's argument that the statute was plain on its face was unsupported by the language of the statute since the provision does not expressly state that the UPC is to be collected from distribution service customers in

---

144 *Watergate Imp. Associates v. Public Service Commission*, 326 A.2d 778,785 (D.C. 1974) (citations omitted).

145 *Watergate Imp. Associates v. Public Service Commission*, 326 A.2d 778,785 (D.C. 1974) (citations omitted). Not only is there "wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination" where, as here, the literal words of some portion of the statute "would bring about a result completely at variance with the purpose of the act, it is proper to consider the statute's legislative history." *District of Columbia v. Reid*, 2014 WL 7202066 (D.C.) (citing *Baltimore v. District of Columbia*, 10 A.3d 1141, 1146 (D.C. 2011); and *Dyer v. D.C. Dep't of Hous. & Cmty Dev.*, 452 A.2d 968, 969-70 (D.C. 1982)) (internal quotations omitted); *See also, District of Columbia v Edison Place*, 892 A.2d 1108, 1111 (D.C. 2006) (citations omitted); citing *Peoples*, 470 A.2d 751; *see also, District of Columbia v Gallagher*, 734 A.2d 1087, 1091 ("[W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history ...." (quoting *Harrison v. Northern Trust Co.*, 317 U.S. 476, 63 S.Ct. 361, 87 L.Ed. 407 (1943))); *Jeffrey v. United States*, 878 A.2d 1189, 1193 (D.C. 2005) ("The literal words of [a] statute ... are not the sole index to legislative intent, but rather, are to be read in the light of the statute taken as a whole, and are to be given a sensible construction and one that would not work an obvious injustice." (quoting *Columbia Plaza Tenants' Ass'n v. Columbia Plaza L.P.*, 869 A.2d 329, 332 (D.C.2005))).

146 *See e.g., 1836 S Street Tenants Ass'n. Imc. V. Estate of B. Battle*, 965 A2d. 832, 838 (D.C. 2009); *Veney v. United States*, 936 A.2d. 811, 822 (D.C. 2007).

147 *See, e.g., United States v. Young*, 376 A.2d 809, 813 (D.C. 1977) ("If the meaning of a statute is plain on its face, resort to legislative history or other extrinsic aids to assist in its interpretation is not necessary.").

148 *Halbig v. Burwell*, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014) (vacated July 22, 2014 Order)

accordance with the distribution service "customer class cost of service study" approved by the Commission in its most recent base rate case. We specifically stated:

> [W]e do not agree with AOBA's argument that the language is clear on its face. AOBA's argument would have been persuasive if the language in question used the exact terms that are argued by AOBA, *i.e.*, if Section 1313.10(c)(1) actually read that the UPC is to be imposed and collected 'as set out in the electric company's class cost of service study.' That would have been unambiguous language. But that is not the language used in the statutory phrase at issue. . . . In our opinion, the reference to the 'cost allocation approved by the Commission for the electric company's most recent base rate case' raises the question of whether this phrase was intended to refer to the Commission's *overall* determination of costs and rates in the most recent rate case.[149]

AOBA did not cite any nor did we find any textual clues, in Section 1313.10(c)(1) or elsewhere in the Act, that indicate that the Council intended the Commission to rely on the customer class cost of service study in determining the cost allocation issue. Furthermore, putting aside the fact that the Joint Applicants and OPC disagree with AOBA's current statutory interpretation, the fact that AOBA has itself interpreted the language differently is a reasonable basis upon which to conclude that the language can have more than one meaning and is, therefore, ambiguous.[150] Based on our determination that the contested language is ambiguous, we went on to apply the governing principles of statutory construction reviewing the legislative history related to Section 1313.10(c)(1) of the Act in order to help resolve the ambiguity in the statutory language.[151] On Reconsideration, AOBA has provided no convincing argument to justify a change our determination that the contested language of the Act was ambiguous. Therefore, AOBA's request for reconsideration of this issue is denied.

---

149 Order No. 17697 at ¶ 180 (emphasis added).

150 *See* footnote 140, *supra.*

151 When statutory language is ambiguous, giving way to more than one interpretation, we look to the legislative history. *District of Columbia v Edison Place*, 892 A.2d 1108, 1111 (D.C. 2006) (citations omitted); citing *Peoples*, 470 A.2d 751; *see also, District of Columbia v Gallagher*, 734 A.2d 1087, 1091 ("[W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history ...." (quoting *Harrison v. Northern Trust Co.*, 317 U.S. 476, 63 S.Ct. 361, 87 L.Ed. 407 (1943))); *Jeffrey v. United States*, 878 A.2d 1189, 1193 (D.C. 2005) ("The literal words of [a] statute ... are not the sole index to legislative intent, but rather, are to be read in the light of the statute taken as a whole, and are to be given a sensible construction and one that would not work an obvious injustice." (quoting *Columbia Plaza Tenants' Ass'n v. Columbia Plaza L.P.*, 869 A.2d 329, 332 (D.C.2005))).

B. The Commission Did Not Find that Section 34-1313.10(c)(1) of the Act Required a Monthly Residential Customer Impact of $1.50

42. AOBA asserts that the Commission's interpretation of Section 34-1313.10(c)(1) of the ECIIFA as requiring a monthly residential customer impact of $1.50 was arbitrary, capricious, an abuse of discretion and contrary to the Act. AOBA does not provide any citation to Order No. 17697 where the Commission found that Section 1313.10(c)(1) required a monthly residential customer impact of $1.50. Contrary to AOBA's contentions, the Commission used the $1.50 figure from the legislative history referenced in the Committee report "as a point of comparison for the Joint Applicants' and AOBA's methodologies in order to 'determine whether an alternative construction should be ascribed to the statutory language to help resolve the ambiguity" that the Commission found in the language of Section 1313.10(c)(1) of the Act.[152] We were careful to indicate that the $1.50 figure was an approximate amount and that it was only an expectation.[153]

43. AOBA asserts that the Commission, based on the content of the Mayor's Undergrounding Task Force Report, erroneously placed a $1.50 cap on the combined UPC and DDOT Surcharge for the residential rate class for Year 1 of the Undergrounding Project. The Joint Responders and OPC both respond, asserting that the Commission used the $1.50 figure from the Committee and Task Force Reports as an indication of the legislature's intent and as a point of reference to compare the results of the proposed methodologies.[154] When we examined Pepco's methodology, it was not to set a cap as AOBA maintains but rather to determine whether the methodology was consistent with legislative intent. The Commission at no point in our analysis of the cost allocation issue in Order No. 17697, either explicitly or implicitly, indicated that there was a cap on the Year 1 bill impact.[155]

44. Further, contrary to AOBA's assertion that the Commission had a pre-destined conclusion that caused it to erroneously determine the meaning of the statute by comparing the methodologies submitted by AOBA and the Joint Applicants and seeing which of the two resulted in a UPC equal to the cap of $1.50, the Commission had no preconceived notion of what the UPC amount should be. Instead, the Commission's

---

[152] Order No. 17697, ¶ 183.

[153] Order No. 17967, ¶ 182.

[154] As OPC correctly pointed out, in the Task Force Final Report the annual rate impacts would range from $1.50 in Year 1, to $3.25 in Year 7, to $1.41 in Year 15. (Final Report at 84 as cited in OPC Reply at 5.) We note that the $1.50 is not the lowest estimated bill impact reflected in the Task Force Report.

[155] The Commission's entire discussion of this issue and decision can be reviewed in full in Paragraphs 175-189 of Order No. 17697. The Commission does note that AOBA argued that the methodology presented by the Joint Applicants could not be consistent with legislative intent if it excluded Customer Charge Revenues but has not argued, nor is it otherwise evident, how you can rationally get to the 82% figure included in AOBA's uncontradicted Council testimony by any other means.

determination of the appropriate UPC was based on the clearly expressed concerns of the legislature.[156] Moreover, we analyzed not only the methodologies proposed by AOBA and the Joint Applicants and their resultant impacts, but also the "impact that would occur had Pepco allocated costs using total distribution revenue" (*i.e.*, including Customer Charge Revenues) to determine which, if any, aligned in accord with the expressed intent of the legislature.[157]

45. As asserted by the Joint Responders and OPC, the Commission used the *estimated* bill impacts reflected in the Committee and Task Force Reports,[158] as well as the other two factors therein that evidenced the legislature's intent (*i.e.*, that the financial impact on residential ratepayers was of primary concern and that the major share of the Undergrounding project costs should be borne by the commercial and MMA classes), as a way to compare the results of the methodologies submitted by AOBA and the Joint Applicants. Even after we determined that AOBA's methodology produced results far out-of-line with the expressed legislative intent (*i.e.*, a combined $3.79 Year 1 impact, that was over 2.5 times the estimate of $1.50 reflected in the Committee Report), we looked at the percentage impact on residential versus commercial class customers, as compared to the estimates expressed in the Committee Report (with AOBA's methodology placing 47% of the costs on residential class customers, roughly double the impact estimated during the Council hearings of approximately 22%[159]). We determined that AOBA's approach was inconsistent with the Task Force cost allocation numbers described in the Committee Report (with AOBA's methodology allocating 53% to

---

156 Order No. 17697, ¶ 183. "'The literal words of [a] statute, however, are not the sole index to legislative intent, but rather, are to be read in light of the statute taken as a whole, and are to be given a sensible construction and one that would not work an obvious injustice. We must also be mindful that our interpretation is not at variance with the policy of the legislation as a whole, 'requiring that we remain more faithful to the purpose than the word.' Toward this end, in certain cases, we also consult the legislative history of a statute." *Jeffrey v. United States*, 892 A.2d 1122, 1128 (D.C. 2006).

157 *See* Pepco's Response to DR1-2 (July 10, 2014) addressing the Commission's request for *Formal Case No. 1103* data. *See also*, Order No. 17627, ¶ 87 (Sept. 9, 2014) where the Commission asked for updated information based on the *Formal Case No. 1103* allocation.

158 The Commission notes that in Order No. 17627, wherein we set an evidentiary hearing on the cost allocation issue, we also stated: "We find it significant to note that the Task Force was not focused on the customer class cost of service study and, in fact, did not mention it. Instead, the Task Force thought the most equitable way to distribute cost was to use the same method that had already been approved in the prior rate case." Order No. 17627, ¶ 83. This point was not reiterated in Order No. 17697, but is none-the-less a part of the record upon which the Commission made its decision regarding the proper cost allocation methodology.

159 As we stated in Order No. 17697, Paragraph 183, based on testimony from the Mayor's Task Force and AOBA, 82% of the undergrounding costs would be allocated to Commercial and MMA classes. However, the actual MMA class cost allocation is around 4% of total distribution revenue. Therefore, since the MMA class is a part of the Residential class, when the 4% MMA class allocation is added to the Residential class cost allocation, the total Residential class cost allocation share increases from 18% to 22%. Thus, this translates to a 22% total cost allocation to the Residential class and a 78% allocation to the Commercial class.

commercial class customers, as opposed to the 78% that had been discussed during the Council hearings). It was based on this analysis, not a desire to "back into a result" or to "reach a pre-destined customer bill impact of $1.50," that the Commission rejected AOBA's proposed methodology and approved the Joint Applicants' approach.

46. Moreover, AOBA argues that the Task Force Report could not possibly arrive at the result reflected in the Joint Applicants' proposed methodology because the Task Force was relying on cost allocation factors from *Formal Case No. 1087*, not *Formal Case No. 1103*, which had not concluded by the time the Task Force Report was completed. OPC appropriately addresses this contention in its Reply, correctly indicating, as the Commission was aware, that the Joint Applicants subsequently updated the numbers in its filings to reflect the Commission's final decision in *Formal Case No. 1103*, "[t]hus, the record evidence allowed the Commission to trace the development of the UPC from Formal Case No. 1087 to Formal Case No. 1103 and, ultimately, to the UPC included in the Triennial Plan."[160] Therefore, the Commission was able to determine that the same model – one that allocated costs on the basis of non-customer distribution revenue – was also used in the cost allocation determinations we approved in Order No. 17697. Therefore, AOBA's request for reconsideration of this issue is denied.

C. The Commission did not Err in Relying on the Legislative History of the Act

i. The Legislative History of the Act Supports the Commission's Determination that The Joint Applicants' Cost Allocation Methodology was Appropriate

47. Based on our determination that the contested language of the Act is ambiguous, we went on to review the legislative history to help resolve the ambiguity and determine the meaning of the contested phrase.[161] In doing so, we examined the D.C.

---

160 *See* Pepco's Response to DR1-2 (July 10, 2014) addressing the Commission's request for *Formal Case No. 1103* data. *See also*, Order No. 17627, ¶ 87 (Sept. 9, 2014) where the Commission asked for updated information based on the *Formal Case No. 1103* allocation.

161 "Chief Justice Marshall noted that '[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.' Consonant with this idea, courts construing an ambiguous statute do no limit their search for legislative intent to sources in the published act, known as 'intrinsic' aids, which include the act's title, its preamble, chapter, article and section headings, and marginal notes. Instead, courts also may consider sources beyond the printed page. These sources from outside a statute's text are known as 'extrinsic' aids to interpretation. Extrinsic aids relate to a statute's history, and may be legislative, executive, judicial, or nongovernmental in origin. Extrinsic aids can be divided chronologically into: (1) preenactment history, including circumstances and events leading up to the bill's introduction; (2) enactment history, including all actions taken and statements made during legislative consideration of the original bill from the time of its introduction until final enactment; and (3) postenactment history, including amendments and any other developments relevant to a statute's operation subsequent to enactment." 2A Sutherland Statutory Construction § 48:1 – Extrinsic aids to interpretation (7th ed.) (Emphasis added).

Council's Committee Report on the Act and noted that the Report made clear that: "(1) there was a concern about the financial impact of any UPC on residential consumers; (2) the bill impact in year one, based on the work of the Mayor's Undergrounding Task Force Report referenced in the Committee Report, was expected to be *approximately* $1.50 and in year seven was expected to be *approximately* $3.25; and (3) there was an expectation that the undergrounding project would place a heavier financial burden on the commercial class than on the residential customers."[162]

48. Furthermore, AOBA's uncontradicted testimony before the Council reveals that AOBA knew that the legislation as drafted could place more than 80% of the cost on the commercial and MMA classes.[163] In fact, it was quite clear that the Council understood and intended that the legislation would place most of the cost on commercial building owners as evidenced by the colloquy from the Council's October 21, 2013 Hearing on the Act that took place between Councilmember Evans and AOBA representatives. Councilmember Evans asked AOBA representatives specific questions regarding the representation made by AOBA in its testimony that "[o]ver 82% of the costs of the proposed undergrounding program will be borne by the commercial and master metered apartment building consumers – primarily businesses and apartment residents."[164] Mr. Evans specifically questioned:

> About the costs, it appears that the commercial interests will be bearing a lot of this cost. And so you raise some concerns about that so I wanted to delve into that a little bit more because if the commercial interests do bear the costs then they would simply be passed on the same way that if an office building is assessed a certain cost it would be passed to the tenants. If the tenants happen to be retail, then it may or may not raise prices and it would go to the people who buy the merchandise from the tenant and if it goes to individuals in apartment buildings then certainly they would bear the costs. So what are your thoughts about this, I mean somebody has to pay for this at the end of the day, and so what would you do differently if you don't like the way that this is structured?[165]

---

[162] Order No. 17697, ¶ 182 (emphasis added).

[163] AOBA testified that the legislation would place 74% on Commercial Class Customers and 8% on MMA Class Customers, for a combined total of 82% on its constituents.

[164] AOBA's Testimony before the Committee on Government Operations under the Committee on Finance and Revenue on Bill 20-387, the "Electric Company Infrastructure Improvement Financing Act of 2013" Presented by W. Shaun Pharr, Frann G. Francis, and Nicola Y. Whiteman, at page 2, October 21, 2013.

[165] Committee on Government Operations and the Committee on Finance and Revenue on Bill 20-387, the "Electric Company Infrastructure Improvement Financing Act of 2013" Presented by W. Shaun Pharr, Frann G. Francis, and Nicola Y. Whiteman,

49. In response to Councilman Evans' question, AOBA representative Pharr stated:

> …The allocation of the costs that we see right now does disproportionately affect multifamily properties, master-metered apartment buildings in particular and most master-metered apartment buildings, by the way, happen to also be under rent control. And so you've got these constraints on the owners of those buildings, in terms of what they can do, if they have to absorb this, then something else most likely is going to have to give. In the commercial core, the impact on our office building members that house district businesses, operating expenses - utilities are already 30% of that. I won't say that we have no control, but it's our same members, our office building owners and managers that have made the district number one in the nation in terms of lead certified buildings, so they are doing everything they can to improve and enhance the energy efficiency of their buildings and minimize operating costs, but when you've got these double and triple whammies . . . We are not saying, by the way, that there is never any utility to undergrounding, it's just that the costs are so significant, they bring their own vulnerabilities as well, so you just have to be exceedingly careful in examining and making a decision to go that route at the expense of ratepayers[166]

50. Moreover, Councilmember Kenyan McDuffie asked AOBA representatives, "…you mentioned in your testimony, . . . , if passed commercial, multifamily, and institutional properties would have to pass on over $70 million annually in increased electric costs to their tenants, can you expand a little bit about that and where you came up with those numbers?"[167] In response, AOBA representative Pharr stated:

> Yes, Chairman McDuffie. I'm actually going to dish that off to Frann Francis, our general counsel, because we derived those numbers based on the working papers that we

---

www.oct.dc.gov/services/on_demand_video/channel13/October2013/10_21_13_FINANCE.asx at 35:20-:36:08, October 21, 2013 ("Joint Public Hearing").

[166] Joint Public Hearing at 36:42-38:25.

[167] Joint Public Hearing at 19:00-19:19.

> received from Pepco that had also been considered in the Task Force Report.[168]

AOBA representative Frann Francis stated:

> We received some spreadsheets from Pepco outlining some of the assumptions that they made in projecting their increases. And while our numbers are not significantly different than theirs, we do believe that some of the assumptions that they utilized regarding interest rates in the future were a bit low. But, nevertheless, what our analysis showed was that approximately this bill would cause $87 million if implemented in Year 1 per year. Out of that [$]87 million, based on the cost allocation and the way Pepco chose to design rates based on that allocation, our members and all commercial customers, all non-residential customers in the city, would be faced with $70 million per year in increased costs. Now that was based on our analysis and out of an $87 million annual requirement.[169]

When given the opportunity to propose an alternate cost allocation structure (*i.e.*, one that resulted in an impact on commercial class customers of less than the 82% AOBA projected) before the Council, AOBA offered no alternative proposal and does not cite to or proffer any evidence that the Council changed the cost allocation language of the proposed bill in response to the concerns expressed by AOBA.[170] Furthermore, AOBA indicated that it based its determination of the costs that its constituents would incur on the model provided to it by Pepco – the same model which excluded Customer Charge Revenue and underlies the cost allocation Pepco presented in this proceeding that AOBA now challenges as inconsistent with the Act.

---

168 Joint Public Hearing at 19:20-19:39.

169 Joint Public Hearing at 19:40-20:50.

170 The Council did not materially alter the cost allocation of the Act. At the time that the bill was introduced to the D.C. Council the language of Section 310(c)(1) stated: ". . . in accordance with the distribution service customer class cost allocations approved by the Commission for the electric company and in effect as of the effective date of this act." When the bill was enacted, the language was changed to "in the electric company's most recent base rate case." *See* Committee on Government Operations Report on Bill 20-387, the "Electric Company Infrastructure Improvement Financing Act of 2013," (Dec. 16, 2013) at p.6. *See also*, Attachment C to the Committee Report from the October 2013 Mayor's Power Line Underground Task Force Final Report. The references in the Task Force Final Report are at pp. 12 and 86: "The impact on customer rates will on average be a 3.22% ($3.25) increase for residential customers in year seven and between 1% and 9.22% for commercial customers. These increases reflect average usage and for commercial customers the financial impact will vary between customers."

51. Moreover, the 82% figure is also consistent with both the Task Force Report and testimony by City Administrator Allen Lew, who explained the expected bill impact that the legislation would have on residential customers.[171] Therefore, although AOBA understood the language at issue was clear enough to place an 82% burden on its members at the time it testified before the Council, it now thinks that same language unequivocally establishes that the burden on its members must, as a matter of law, be significantly less. On Reconsideration, in the face of the legislative history of the Act and our decision in Order No. 17697, AOBA has offered no persuasive argument to explain why the Commission erred by relying on the Council's legislative record or how the Commission could effectuate the intent of the legislature by using only the CCOSS that AOBA proposes is the legislatively mandated cost allocation methodology. The Commission based its decision on established principles of statutory construction and; therefore, AOBA's request for reconsideration of this issue is denied.[172]

D. The Commission did not err in Excluding Customer Charge Revenues and not further Reducing Negative Rates of Return

i. The Commission did not err in Excluding Customer Charge Revenues from the UPC Cost Allocation

52. On Reconsideration AOBA argues that a literal reading of the statute means that Pepco must include Customer Charge Revenue because it was part of the cost allocation in *Formal Case No. 1103*. The Joint Applicants, in their Response, confirmed that Customer Charge Revenues were removed, but asserted that it was appropriate to remove those costs because they were unrelated to the undergrounding effort and "in any typical rate case proceeding, the Company would not include in rates unrelated charges."[173] AOBA offers no rebuttal to the Joint Applicants' explanation for excluding the customer charge; instead AOBA argues that nothing in the language of the statute explicitly authorizes the Commission to exclude Customer Charge Revenues and that to

---

[171] Order No. 17697, ¶ 182 (emphasis added) (referencing Committee on Government Operations Report on Bill 20-387, the "Electric Company Infrastructure Improvement Financing Act of 2013," (Dec. 16, 2013) at p.6. City Administrator "Lew testified that under this financing arrangement, the residential rate structure starts at $1.50 (Year 1) and it is at the peak monthly rate of $3.25 in Year 7, but by Year 15, after the $375 million is repaid, the rate drops to $1.41 and continues to decline throughout the remaining finance period." *See also*, Attachment C to the Committee Report from the October 2013 Mayor's Power Line Underground Task Force Final Report. The references in the Task Force Final Report are at pp. 12 and 86: "The impact on customer rates will on average be a 3.22% ($3.25) increase for residential customers in year seven and between 1% and 9.22% for commercial customers. These increases reflect average usage and for commercial customers the financial impact will vary between customers.").

[172] *Watergate East Committee Against Hotel Conversion to Co-op Apartments v. District of Columbia Zoning Comm'n*, 953 A.2d 1036, 1043 (D.C. 2008) ("If there is substantial evidence to support the [Commission's] finding, then the mere existence of substantial evidence contrary to that finding does not allow this court to substitute its judgment for that of the [Commission]." citing *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 52 (D.C.1984) (en banc) (quotation omitted).

[173] Order No. 17697, ¶186.

consider otherwise, after rejecting AOBA's CCOSS argument because it did not comport with a literal reading of the statute, is an abuse of discretion by the Commission. AOBA cites to *Office of the People's Counsel v. Public Service Commission*, for the proposition that proper exercise of discretion requires decisions to be "drawn from a firm factual foundation" (*i.e.*, considering all relevant factors).[174] However, AOBA's reliance on *OPC v. PSC* is misplaced because the Commission did consider all the relevant factors contributing to our decisions to accept the Joint Applicant's exclusion of Customer Charge Revenue and to exclude any additional adjustments for negative rates of return from the UPC allocation. Adding Customer Charge Revenue to the cost allocation in the fashion AOBA suggests would reduce the burden on AOBA's members to 53%,[175] something the Council never debated or even considered. Furthermore, as stated in Order No. 17697, as argued by the Joint Applicants, and reiterated below, including Customer Charge Revenue would be inconsistent with the rate making principles on which the allocations in *Formal Case No. 1103* were based.[176]

53. To begin with, rates are premised on the principle of cost causation – a customer class receiving a specific service bears the responsibility to pay, through rates, the electric company's cost of providing it with that service.[177] A customer charge is a

---

[174] *See Office of the People's Counsel v. Public Service Commission*, 21 A.3d at 985.

[175] Order No. 17697, ¶ 183.

[176] Order No. 17697, ¶ 185. The Commission also discussed how, in base rate cases, the cost allocation decision in made, indicating that:

> [O]ur cost allocation decision is inseparably tied to our overall determination of the revenue increase awarded. That is, after the revenue requirement of the utility has been determined, the proper allocation of the increase among the customer classes and the appropriate rate design becomes the issue. In developing the rate structure, we examine the cost of service for each customer class which typically begins with an examination of the utility's class cost of service study, the CCOSS that AOBA argues that should be used exclusively to set the UPC. In *Formal Case No. 1103* while noting that Pepco's CCOSS could use some improvements, we accepted and used that CCOSS to assist us with the class revenue requirement allocations and rate design for the proceeding to set the appropriate distribution rates for Pepco customers. We further indicated that we have wide discretion in setting class revenue requirements and that we not only consider the class cost of service for each class, but also a broad range of other cost and non-cost factors that are not based on allocations produced by the CCOSS. We concluded that Pepco's customer class rates of return need not be equal and should not consider only the results of the class cost of service study. With this in mind we address the parties' contentions. (Order No. 17697, ¶ 179 (citing Order No. 17424, ¶¶ 385, 406, 434)).

[177] *See generally*, Section 2621(d)(1) of the Public Utility Regulatory Policies Act of 1978: "Rates charged by any electric utility for providing electric service to each class of electric consumers shall be

fixed charge rather than a volumetric charge and recovers the cost of services provided by a utility like billing, metering, customer service and service drop costs, most of which are on-going or reoccurring costs.[178] In *Formal Case No. 1103* Customer Charge Revenues were appropriately included in the rate recovery for Pepco because the base rate distribution case involves costs related to all categories of distribution service, which includes customer-related costs. However, here recovering Customer Charge Revenues would be inappropriate because, as indicated by Pepco, there are no customer-related costs associated with the Undergrounding project. The Undergrounding project costs are generally demand-related costs, associated with increasing the capacity of producing electricity during peak demand hours. Therefore, in order to recover costs in this proceeding in the same manner as costs were recovered in *Formal Case No. 1103* (*i.e.*, "in accordance with"), it is necessary and appropriate to only include costs for recovery that were or would be incurred by the electric company in the undergrounding effort.

54. While AOBA disagrees with the Commission's determination on this issue, it provided no basis in its Application to justify a change in our determination. The mere fact that the Act does not explicitly state that Customer Charge Revenues could be removed is insufficient grounds to conclude that the Commission erred by allowing them to be removed. In light of the record evidence and reasoned analysis supporting our decision to approve the Joint Applicants' removal of the Customer Charge Revenues from the UPC cost allocation, we deny AOBA's request for reconsideration of this finding.

ii. The Commission did not err by Failing to Further Reduce the Negative Rates of Return

55. AOBA argues that the Commission abused its discretion by arbitrarily deciding that it did not have authority to include the factor of negative rates of return in the calculation of the UPC. The Joint Responders and OPC assert that the Commission did not err by not moving further towards the reduction of negative rates of return because: (1) the allocation of the UPC, which is based on the allocations approved in *Formal Case No. 1103*, already includes the Commission's decisions with respect to equalized class rates of return as adopted in *Formal Case No. 1103*, and (2) the Act's language limits the Commission's authority to separately address this issue. As stated above, Commission decisions on questions of law are subject to arbitrary and capricious standard of review which is the "the narrowest judicial review in the field of

---

designed, to the maximum extent practicable, to reflect the costs of providing electric service to such class, as determined under section 2625 (a) of this title." (15 U.S. Code § 2621(d)(1)).

178 "The basis for the customer charge is that there are certain fixed costs that each customer should bear whether any gas is used at all. Examples of such costs are those associated with a service line, a regulator and a meter, recurring meter reading expenses and administrative costs of servicing the account." *See* Gas Distribution Rate Design Manual by NARUC, June 1989. As also indicated in the testimony Pepco Witness Janocha during the September 16, 2014 hearing, "customer-related costs, and this is not intended to be an exhaustive list, include things such as meters, service [drops], billing systems and related expenses to all those types of assets and activities." *See* Tr. at 80:22-81:6.

administrative law" and limited to determining whether the overall impact of the order is just and reasonable, and "whether the Commission 'respected procedural requirements, [ ] made findings based on substantial evidence, and [ ] applied correct legal standards.'"[179]

56. In Order No. 17697, we acknowledge that AOBA was correct in its assertion that in recent *base rate cases* we have expressed a policy of addressing the negative rates of return being recovered from the residential rate class by making discretionary adjustments to a proposed rate design; however, we also indicated that *Formal Case No. 1116* "is not a base rate proceeding where the Commission has the discretion to modify a proposed rate design to achieve various regulatory goals and objectives."[180] Contrary to AOBA's assertion that the Commission was statutorily required to make the identical percentage adjustment to the UPC that the Commission made to the rate design in *Formal Case No. 1103* to adjust for negative rates of return and that our failure to do so was an improper abuse of discretion, we concluded that we had neither the discretion to act nor any updated data (such as update class rates of return) upon which to act. Therefore, we did not further modify the UPC to address the negative rate of return issue as we would in a typical base rate case. Furthermore, the Commission anticipated a remaining negative class ROR for the residential class at the conclusion of *Formal Case No. 1103,* thus, we agree with OPC that "it is therefore entirely consistent with Formal Case No. 1103 for residential class rates of return to remain negative following the implementation of the UPC."[181]

57. Furthermore, as noted earlier, the Commission has, throughout this process, attempted to establish the UPC using a methodology that is consistent with the legislative intent. In Order No. 17697, we approved the Joint Applicants' decision to remove the unrelated Customer Charge Revenues from the cost allocation for the UPC because placing the lion's share of the cost on the commercial class was consistent with the discussions with the Councilmembers and AOBA's own Council testimony and consistent with the language of the Act that "indicates that the costs should be allocated '*in accordance with*' the most recent base rate case" – not *identical* to the most recent base rate case. In the same vein, we concluded that exercising our policy prerogative regarding negative rates of return to shift costs to residential customers would be inconsistent with legislative intent and inappropriate. Nothing AOBA argues persuades us to change our initial decision given that there is no evidentiary basis to make such a determination. Moreover, when the UPC costs are rolled into base rates in Pepco's next base rate proceeding the Commission will have an adequate record on which to address

---

179 *Washington Gas Energy Services, Inc. v. District of Columbia Public Service Comm'n*, 893 A.2d 981, 986 (D.C. 2006) citing *Office of People's Counsel v. Public Service Comm'n*, 610 A.2d 240, 243 (D.C. 1992)(internal citations and quotations omitted); *People's Counsel v. Public Service Comm'n of Dist. of Columbia*, 455 A.2d 402, 403-04 (D.C. 1982) (internal citations omitted).

180 Order No. 17967, ¶ 189.

181 OPC Reply at 16.

AOBA's contentions on negative rates of return among classes. Accordingly, the Commission rejects AOBA's contention that it did not "adequately explain" our decision on this issue and denies AOBA's request for reconsideration of this issue.

E. The Commission Did Not Abuse its discretion by Inconsistently Treating the MMA Class and Determining it Could Adopt Any "Just and Reasonable" Rate Design

i. The Commission did not Err by Failing to Treat the MMA Class Separately in Establishing the UPC

58. AOBA argues in its Application that in *Formal Case No. 1103* the Commission treated MMA customers as a separate category of customer, distinguished from the residential class and with a significantly lower percentage of the revenue increase and, therefore, erred when it declined to treat the MMA class in the same fashion when setting the UPC. The Joint Responders rebut AOBA argument asserting that AOBA mistakenly cites language from Order No. 17424 as support for its argument that "the MMA customers should have been broken out as a separate rate class for the purposes of the UPC," when the "operative language" on this issue "appears in Paragraph 484 of Order No. 17424 where the Commission rejected Pepco's proposal for a separate MMA rate and required it to 'report back [ ] with improved MMA rate design proposals in Pepco's next rate case.'"[182]

59. In Order No. 17697, the Commission addressed AOBA's specific request that the charges applied to MMA customers be separated from the UPC charges to all other rate classes. On this point we stated:

> Although the Commission has recognized that there is merit to the argument for a separate MMA class, and, in fact looked at that issue in the most recent Pepco base rate case, it did not approve the separate MMA rate design proposal that was submitted in that case. Instead, it directed the Company to submit an improved MMA rate design in its next rate case. Consequently in this proceeding, where the Commission is required to use the most recent base rate case findings as a touchstone, there is no basis for the Commission to approve a separate UPC for MMA customers.[183]

Therefore, the Joint Responders are correct in their assertion that the Commission rejected Pepco's proposal to treat MMA customers as a separate class in *Formal Case*

---

182 Joint Response at 18-19 (citing Order No. 17242, ¶ 484).

183 Order No. 17697, ¶ 190.

No. 1103, instead ordering Pepco to "report back to the Commission with improved MMA rate design proposals in Pepco's next rate case."[184]

60. However, in *Formal Case No. 1103*, Order No. 17424, the Commission stated:

> We are using our discretion to increase the Customer Charge rate of the MMAs at a different level than the increase that is being imposed on other Customer Charges in recognition of the differences in the UROR of the Residential subclasses and the MMA subclass. Consequently, the Commission is approving a $1.00 per unit per month increase in the MMA Customer Charge which will raise the existing Customer Charge from $9.25 to $10.25 per unit per month.[185]

This language shows that, similar to our policy decision to reduce negative rates of return, we also exercised our wide discretion in base rate proceedings to increase the Customer Charge rates for the MMA class. However, as explained in our discussion of our treatment of customer charge revenues, there is no customer charge revenue resulting from this undergrounding initiative and we have, therefore, excluded customer charges from the allocations for the UPC. That exclusion includes the customer charges for the MMAs from *Formal Case No. 1103* which were increased at a different rate from other charges. Based on these facts, AOBA's representations about the Commission's treatment of the MMA class in this proceeding are clearly in error. Accordingly, based on the cost-causation principles we espoused in Paragraph 53, *supra*, the Commission treated the MMA class in the same manner as it was treated in *Formal Case No. 1103* and consistent with the exclusion of Customer Charge Revenues for all classes in this proceeding.[186] Therefore, the Commission's decision is not an abuse of discretion or arbitrary and capricious as AOBA has alleged but has failed to show. Accordingly, the Commission denies AOBA's request for reconsideration of this issue.

ii. <u>The Commission did not Determine that It could Adopt Any Rate Design Desired as Long as it was "Just and Reasonable" Despite the Language of the Act</u>

---

184 *See* Order No. 17242, ¶ 484.

185 Order No. 17424, ¶ 486.

186 WMATA (RT class) is billed on a fixed average monthly basis in the form of a customer charge but these charges represent demand related costs only. *See* Pepco RT tariff posted on Pepco's website at http://www.pepco.com/uploadedFiles/wwwpepcocom/Content/Page_Content/my-business/10.DC%20Rates%20Update%2012-01-2014%20%20RT.pdf

61. AOBA asserts in its Application that the Commission determined in Order No. 17697 that it could, despite the language of the statute, approve any rate design as long as that design was "just and reasonable." AOBA contends that the Commission's determination that it had the "discretion to redesign the revenue allocations to be utilized in this proceeding in order to arrive at 'just and reasonable' rates" caused the Commission to erroneously exclude the Customer Charge Revenues and fail to consider residential class negative rates of return.[187]

62. Section 1313.10(b)(6) of the Act states: "For the electric company to recover expenses and costs pursuant to subsection (a) of this section, the Commission shall find that the electric company's proposed Underground Project Charges will be just and reasonable."[188] Therefore, as a point of clarification, the Commission, in Paragraph 187 of Order No. 17697, stated that "the Commission can certainly consider and adopt a rate design consistent with setting just and reasonable rates for various customer classes." This statement, in context, was made as a buttress to our determination that the Joint Applicants provided sufficient rationale to justify their decision to exclude Customer Charge Revenues from the UPC cost allocation.[189] In the quoted paragraph, the Commission was stating that in addition to the fact that the contested language in Section 1313.10(c)(1) of the statute permits the exclusion of the Customer Charge Revenues and that the removal of unrelated costs was reasonable given the Joint Applicants' explanation, other sections of the Act, like Section 1313.10(b)(6), require that the Commission also determine that the proposed UPC is just and reasonable. The Commission determined that charging customers for costs unrelated to the undergrounding efforts would not be just or reasonable. AOBA either misunderstands this point or has mischaracterized the Commission's comment, believing it to be a reference to our plenary authority rather than to the mandate of Section 1313.10(b)(6) to set just and reasonable rates. Either way, AOBA has failed to persuade the Commission that an error was made and the Commission denies AOBA's request for reconsideration of this issue.

---

187 Application at 33.

188 *See* D.C. Code § 1313.10(b)(6).

THEREFORE, IT IS ORDERED THAT:

63. The Application for Reconsideration of the Apartment and Office Building Association of Metropolitan Washington is **DENIED**.

A TRUE COPY: **BY DIRECTION OF THE COMMISSION:**

CHIEF CLERK: **BRINDA WESTBROOK-SEDGWICK**
COMMISSION SECRETARY