DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-SF-15-20,126

In re: 1754 Lanier Pl., N.W.

Ward One (1)

TENANTS OF 1754 LANIER PLACE, N.W.
Tenants/Appellants

v.

1754 LANIER, LLC
Housing Provider/Appellee

DECISION AND ORDER

March 25, 2016

McKOIN, COMMISSIONER. This case is on appeal to the Rental Housing Commission ("Commission") from a final order of the Office of Administrative Hearings ("OAH"), based on a petition filed in the Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD").[1] The applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 - 3509.07 (2012 Repl.), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE § 2-501 - 510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899, 1 DCMR §§ 2920-2941, and 14 DCMR §§ 3800-4399, govern these proceedings.

---

[1] OAH assumed jurisdiction over contested petitions from the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA") pursuant to the Office of Administrative Hearings Establishment Act of 2001, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to the RAD in DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

I. PROCEDURAL HISTORY

On January 27, 2015, 1754 Lanier, LLC ("Housing Provider") filed related services or facilities petition RH-SF-15-20,126 ("SF Petition"), which requested authorization to convert the housing accommodation located at 1754 Lanier Place, N.W. ("Housing Accommodation") from a centrally metered electrical system to individual metering and payment and to implement a corresponding reduction in rents charged. R. at 3-147. The SF Petition was opposed by several tenants residing in the Housing Accommodation (collectively, "Tenants"). *See* Scheduling Order; R. at 174.

An evidentiary hearing on the SF Petition was held before Administrative Law Judge Margaret A. Mangan ("ALJ") on May 28, 2015. *See* Transcript of May 28, 2015 Evidentiary Hearing ("Tr."); R. at 192-307. On October 29, 2015, the ALJ issued a final order approving the SF Petition. 1754 Lanier, LLC v. Tenants of 1754 Lanier Pl., N.W., 2015-DHCD-SF 20,126 (OAH Oct. 29, 2015) ("Final Order"); R. at 341-50. The Final Order requires the Housing Provider to implement rent reductions for each rental unit in accordance with a schedule developed by its expert witness, and provides for the Tenants to begin directly paying their electric bills to the utility company ("Pepco"). *Id.* at 5-6; R. at 344-45.

In the Final Order, the ALJ made the following findings of fact:[2]

1. The housing accommodation at issue, at 1754 Lanier Place, NW, has 33 units. The 26 studio units range from 310 to 480 square feet; the six one-bedroom units range from 338 to 628 square feet; and the single two-bedroom unit has 650 square feet.

2. Housing Provider 1754 Lanier Place LLC purchased the housing accommodation in April 2014. At the time of the purchase, the electrical system at the housing accommodation had one electrical meter and the boiler provided heat for the entire building, which often was uneven. Parts

[2] The findings of fact are recited here using the same language and numbering as used by the ALJ in the Final Order.

of the electrical system, installed when the building was constructed, did not meet current national and local electrical codes.

3. Housing Provider paid – and continues to pay – for heat and electricity, except for air conditioning, in all rental units, and in the common areas. Tenants who wanted air conditioning paid $65 per month for four months in the summer for the service.

4. Housing Provider upgraded the electrical system at the housing accommodation and decommissioned the boiler that provided uneven heat. In rental units, deteriorating wires were replaced. And, outdated fuse boxes were replaced with circuit breakers, with 125 amp service. Housing Provider is installing individual electrical meters for each rental unit.

5. Each rental unit now has an individual heating, ventilation, and air conditioning (HVAC) unit. Each Tenant now has a thermostat and can control the temperature in that Tenant's unit.

6. A building with individual meters is environmentally friendly because tenants who pay their own electric costs are more energy conservative and therefore individual metering is recommended by the International Energy Conservation Code, which has been adopted by the District of Columbia.

7. Housing Provider proposes to reduce rent in each unit in amounts ranging from $35.67 to $57.30 (2.48% to 8.49%), in exchange for Tenants paying for electricity. The new rent will apply going forward to current and future tenants.

8. Tenants propose basing the rent reduction on actual Pepco bills for each apartment. Under this proposal, the tenant will receive the bill, deduct the amount from the rent, and will submit the bill to Housing Provider to confirm the accuracy of the calculation.

9. Scott Kaufman, Housing Provider's expert, a Mechanical Engineer from Intec, arrived at rates for individual apartments. Intec determined by engineering estimates and historical data energy usage level for each of the occupied apartment types and assigned the annual and monthly cost at today's electric utility rates. PX 100 at 18. The heating requirements for the apartment and typical general electrical usage for similar residences were the bases for the energy assessment. *Id.* at 20.

10. At the beginning of the analysis, heating usage and general electrical (non-heating) usage were considered separately. *Id.* at 19-20. The analysis of general electrical usage was made from combining data for EIA (Energy Information Association), HUD (Department of Housing and Human [sic] Development), DOE (Department of Energy), EPRI (Electric Power Research Institute) and prior Intec work. *Id.* at 21.

11. Intec looked at the square footage of units, construction of walls, window types, and sizes, and the type of equipment installed in each unit in determining general energy usage. *Id.* at 24.

12. The estimate of heating energy used was based on the exposure of the apartment to weather conditions, the hours of use, equipment, and fuel used. Once the maximum heating required, based on the coldest day of the year, was determined, a degree-day method was used to estimate heating energy for the season. *Id.* at 29.

13. Usage was converted to dollars based on Pepco rates, which varied by several factors, including the number of kilowatt hours used and whether usage was at peak or non-peak times. Air conditioning was not part of the analysis.

14. Mr. Kaufman does not plan to recalculate costs based on actual energy use. Tr. 28:1-7; 69:21-70[:]4.

15. At least nine units were vacant at the time the Intec report was generated.

16. Housing Provider does not know how much tenants will actually pay for electricity. Tr, 33:19. Tenants may pay less or more than what Intec estimated. Tr. 25-26.

17. Heating units in some apartments do not look exactly like those proposed, and in one Tenant's opinion, the new unit did not provide enough heat. Tr. 77:16-20; 83:22-85[:]1. But, no expert testimony was presented to prove that the heat production was different.

18. Actual energy usage in a particular apartment depends on a number of factors, including the hours the electricity is used and the equipment in a particular unit. A tenant who does not use much electricity because of frequent travel will pay less than one who is away from the apartment during a work day, and even less than one who works at home. Such a difference occurs even when the apartments are the same size and equipment is comparable.

Final Order at 2-4; R. at 342-44.

In the Final Order, the ALJ made the following conclusions of law:[3]

A. Issues: Has Housing Provider proven that its Petition should be granted and that the proposed rent reductions are reasonable?

[3] The conclusions of law are recited here using the same language and headings as used by the ALJ in the Final Order, except that the Commission has numbered the paragraphs for ease of reference.

B. Legal Standard for Granting a Services and Facilities Petition

1. The housing regulations provide that I shall approve a related services or related facilities petition if I find the following:

   (a) The change shall not adversely affect the health, safety, and security of the tenants;

   (b) The change shall not directly result in a substantial violation of the Housing Code;

   (c) The change shall not be retaliatory, as defined in § 502 of the Act; and

   (d) The change shall not be intended to cause displacement of tenants from the housing accommodation.

   14 DCMR [§] 4211.2.

2. In considering these factors, I find that Housing Provider's petition should be granted because: (a) [t]here is no evidence that the change adversely affects the health, safety, or security of the Tenants[;] (b) [t]he change does not result in a violation of the Housing Code[;] (c) [t]here was no evidence presented by the Tenants that the change in services was retaliatory[;] (d) [n]o tenants were displaced because of the renovations and no Tenants will be displaced as a result of assuming responsibility for the payment of their own electrical costs.

3. Having determined that the petition should be granted, the Act provides that I may increase or decrease the rent charged to reflect proportionally the value of the change in services or facilities. D.C. Official Code § 42-3502.11 (2005) [sic]. As such, the remaining issue is how much the rent should be decreased.

C. Amount of Rent Increase

4. Housing Provider bases its proposed rent reduction on an opinion of an expert and his scientific model. Mr. Kaufman determined by engineering estimates a realistic energy usage level for each of the occupied apartment types and assigned the annual and monthly cost at today's electric utility rates.

5. Tenants object to rates determined by the expert, arguing that actual energy use should be the basis for the rent reduction. That argument, however, ignores that the cost reduction is based on usage level for a rental unit, not on the variability inherent in an individual tenant's electricity use.

6. Further, Mr. Kaufman's opinion is based on numerous factors, including mathematical models, heating and non-heating units, data from several sources, and conversion to Pepco rates—subjects that are beyond the ken of a layperson. In response, the [Tenants] did not refute the opinion with its own expert testimony. *See, District of Columbia v. Peters*, [527 A.2d 1269, 1273 (D.C. 1987)]; *District of Columbia v. Davis*, [386 A.2d 1195, 1201 (D.C. 1978)] (citing *Waggaman v. Forstmann*, 217 A.2d 310, 311 (D.C. 1966)); *Toy v. [District of Columbia]*, 549 A.2d 1, 6 (D.C. 1988). Lay opinions based on preferences are not sufficient to refute the expert opinion presented. Hence, the rent reductions calculated by Mr. Kaufman are accepted.

Final Order at 4-5; R. at 344-45.

The Tenants filed a timely Notice of Appeal on November 16, 2015, ("Notice of Appeal") and a timely Motion for Stay Pending Appeal on November 17, 2015 ("Motion for Stay"). In the Notice of Appeal, the Tenants raise the following issues:[4]

1. In the Final Order, the [ALJ] erred in finding that, as a matter of law, housing regulations require the [ALJ] to approve a related services or related facilities petition if the factors listed in 14 DCMR [§] 4211.2 are met.

2. The [ALJ] erred in determining that the rent reductions calculated by the Housing Provider's expert would be adopted by the Court for the reason that the [T]enants/Respondents did not present their own expert to refute those calculations.

3. The [ALJ] did not apply the correct legal standard in adjudicating the facts of this case regarding the appropriate monthly rent reduction required of Housing Provider.

4. In the Final Order, the [ALJ] erred as a matter of law in requiring that Housing Provider's rent reductions apply not only to current tenants, but also to new tenants who move into vacant units, both now and in the future.

Notice of Appeal at 1-4.

The Commission granted the Motion for Stay on December 2, 2015. The Tenants filed a brief in support of their appeal on February 19, 2016 ("Tenants' Brief"), and the Housing

[4] The issues on appeal are recited here in the language and numbering used by the Tenants in the Notice of Appeal, except that the Commission recites only the introductory language from each issue to omit supporting arguments.

Provider filed a brief in response on February 29, 2016 ("Housing Provider's Brief"). The Commission held a hearing on March 9, 2016.

II. ISSUES ON APPEAL[5]

1. Whether the ALJ erred in finding that, as a matter of law, housing regulations require the ALJ to approve a related services or facilities petition if the factors listed in 14 DCMR § 4211.2 are met, rather than authorizing the ALJ to approve the petition *only if* those factors are met.

2. Whether the ALJ erred in determining that the rent reductions calculated by the Housing Provider's expert would be adopted by the court because the Tenants did not present their own expert to refute those calculations.

3. Whether, in failing to determine and award the actual cost to each current tenant of obtaining alternate related services under 14 DCMR § 4211.9(a), the ALJ applied the correct legal standard in adjudicating the facts of this case regarding the appropriate monthly rent reduction required of the Housing Provider.

4. Whether the ALJ erred as a matter of law in requiring that the Housing Provider's rent reductions apply not only to current tenants, but also to future tenants who move into vacant units

III. DISCUSSION

1. Whether the ALJ erred in finding that, as a matter of law, housing regulations require the ALJ to approve a related services or facilities petition if the factors listed in 14 DCMR § 4211.2 are met, rather than authorizing the ALJ to approve the petition *only if* those factors are met.

The Tenants argue that the ALJ misinterpreted the regulations governing related services or facilities petitions to require that the SF Petition be approved. Tenants Brief at 5-6. In the Final Order, the ALJ stated that "[t]he housing regulations [sic] provide that I shall approve a related services or related facilities petition if I find" that the four (4) criteria of 14 DCMR § 4211.2 are met. Final Order at 4 (emphasis added); R. at 344. Because the ALJ found that the

[5] The Commission, in its discretion, restates the issues on appeal using the language and numbering used by the Tenants as the "Questions Presented" in the Tenants' Brief at 2.

four (4) criteria were met, she determined that the SF Petition "should be granted." Final Order at 5; R. at 345.[6]

The Commission's standard of review is contained in 14 DCMR § 3807.1 and provides the following:

> The Commission shall reverse final decisions of the Rent Administrator [or OAH] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator [or OAH].

The Commission will review legal questions raised by an ALJ's interpretation of the Act *de novo* to determine if it is unreasonable or embodies a material misconception of the law. *See* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014); Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007) (citing Sawyer Prop. Mgmt. of Md. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-03 (D.C. 2005)); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Carpenter v. Markswright, RH-TP-10-29,840 (RHC June 5, 2013). Nonetheless, the Commission may find that an error of law is harmless where the application of the correct legal standard would not change the ultimate result. *See, e.g.,* United Dominion, 101 A.3d at 430 (erroneous statement of deferential standard of review was immaterial where review was in fact thorough and de novo); LCP, Inc. v. D.C. Alcoholic Beverage Control Bd., 499 A.2d 897, 903 (D.C. 1985) ("[R]eversal and remand is required only if substantial doubt exists whether the agency would have made the same ultimate finding with the error removed.") (quoting Arthur v. D.C. Nurses' Examining Bd., 459 A.2d 141,146 (D.C. 1983)); Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) at n.15 (defining "harmless error" as "[a]n

[6] The Tenants do not argue on appeal that the ALJ erred in finding that each of the four (4) criteria were met.

error which is trivial... and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case . . . .") (quoting BLACK'S LAW DICTIONARY 646 (5th ed. 1975)).

A housing provider's petition to adjust related services or facilities at a housing accommodation is governed by D.C. OFFICIAL CODE § 42-3502.11[7] and the Commission's implementing regulations at 14 DCMR § 4211.[8] Pursuant to 14 DCMR § 4211.2 (emphasis added):

> The Rent Administrator [or OAH] shall approve a related services or related facilities petition only if the [OAH] finds the following:
>
> (a) The change shall not adversely affect the health, safety, and security of the tenants;
>
> (b) The change shall not directly result in a substantial violation of the Housing Code;
>
> (c) The change shall not be retaliatory, as defined in § 502 of the Act; and
>
> (d) The change shall not be intended to cause displacement of tenants from the housing accommodation.

In applying its regulations, "the Commission is guided by well-established rules of statutory construction." Cook v. Edgewood Mgmt. Corp., 825 A.2d 939, 944 (D.C. 2003) ("In interpreting statutory or regulatory provisions, we look first to the plain meaning."); Williams v. Thomas, TP 28,530 (RHC Dec. 24, 2015) at 18; Bower v. Chastleton Assocs., TP 27,838 (RHC

---

[7] D.C. OFFICIAL CODE § 42-3502.11 provides:

> If the Rent Administrator [or OAH] determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator [or OAH] may increase or decrease the rent charged, as applicable, to reflect proportionally the value of the change in services or facilities.

[8] Both the Act and the implementing regulations provide that a related services or facilities petition shall be decided by the Rent Administrator. As noted *supra* at n.1, jurisdiction to hear contested cases on petitions arising under the Act has been transferred to the Office of Administrative Hearings. D.C. OFFICIAL CODE § 2-1831.03(b-1). Accordingly, the Commission substitutes the term "ALJ" or "OAH" as applicable in this decision.

Mar. 27, 2014) at 23. The difference between the regulatory language, "shall approve only if," and the ALJ's statement, "shall approve if," is plain: under 14 DCMR § 4211.2, the listed conditions are necessary gatekeepers to the approval of a related services or facilities petition; under the ALJ's construction, meeting those four (4) conditions is sufficient for approval.

Moreover, if approval were required solely based on those four (4) conditions being met, much of the remainder of § 4211 would be superfluous. *See* 14 DCMR § 4211.8, .9 (requiring ALJ to determine monthly value of change in related services or facilities);[9] Thompson v. District of Columbia, 863 A.2d 814, 818 (D.C. 2004). Therefore, the Commission determines that the ALJ erred by stating that the SF Petition "shall be approved . . . if" and that the SF Petition "should be granted." Final Order at 4-5; R. at 345-46; 14 DCMR § 3807.1; *see* Cook, 825 A.2d at 944; Thompson, 863 A.2d at 818.

However, the Commission is satisfied that the ALJ's error was harmless. United Dominion, 101 A.3d at 430. As noted, 14 DCMR § 4211.8 and .9 require the determination of the "monthly value of the change in related services or facilities" to be made by the ALJ. In the Final Order, after finding that the Housing Provider met the four (4) criteria of 14 DCMR § 4211.2, the ALJ specifically identified the amount of the rent adjustment as "the remaining issue," and proceeded to evaluate the evidence presented by the Housing Provider's expert witness. Final Order at 5; R. at 345. Indeed, the ALJ's valuation of the reduction in service is the subject of the Tenants' second and third issues in this appeal. *See infra* at 11 and 19.

The Commission's review of the Act and its implementing regulations does not reveal, nor have the Tenants identified, any other necessary elements of a related services or facilities petition that the ALJ failed to address in the Final Order. *See* D.C. OFFICIAL CODE § 42-

[9] For the text of 14 DCMR § 4211.8 and .9, *see infra* at 14.

3502.11; 14 DCMR § 4211. Because the ALJ actually performed the required analysis, the incorrect statement of the gatekeeper requirements in 14 DCMR § 4211.2 in the Final Order is "ultimately immaterial." United Dominion, 101 A.3d at 430-31 ("[G]iven the thorough nature of the RHC's decision and order affirming the ALJ's decision, it is apparent that the RHC's decision amounted to a *de novo* review of the legal issues . . . , even though the RHC did not acknowledge it as such.").

Accordingly, the Final Order is affirmed on this issue.

2. Whether the ALJ erred in determining that the rent reductions calculated by the Housing Provider's expert would be adopted by the court because the Tenants did not present their own expert to refute those calculations.

The Tenants argue that the ALJ incorrectly imposed a burden on the Tenants to produce expert testimony to establish the monthly value of the elimination of electric service. Tenants' Brief at 7. Specifically, they argue that the ALJ cited inapplicable cases for the proposition that expert testimony is required and also argue that there is no requirement for tenants to rebut or refute a housing provider's evidence in a related services or facilities petition. *Id.* at 7-9. The Housing Provider argues, on the other hand, that Commission precedent does shift the burden of production to tenants after a housing provider produces its initial evidence to establish the monthly value of a related service or facility. Housing Provider's Brief at 5-6.

In the Final Order, the ALJ credited the testimony of the Housing Provider's expert witness, Mr. Kaufman, as to the monthly cost of electricity at current Pepco rates. *See* Final Order at 5; R. at 345. The ALJ then concluded as follows:

> In response, the [Tenants] did not refute the opinion with its own expert testimony. *See* District of Columbia v. Peters, [527 A.2d 1269, 1273 (D.C. 1987)]; District of Columbia v. Davis, [386 A.2d 1195, 1201 (D.C. 1978)] (citing Waggaman v. Forstmann, 217 A.2d 310, 311 (D.C. 1966)); Toy v. [District of Columbia], 549 A.2d 1, 6 (D.C. 1988). Lay opinions based on preferences are not

> sufficient to refute the expert opinion presented. Hence, the rent reductions calculated by Mr. Kaufman are accepted.

Id.

As noted, the Commission's standard of review requires it to reverse findings of fact and conclusions of law that are unsupported by substantial evidence on the record, are arbitrary, capricious, or an abuse of discretion, or not in accordance with the Act. 14 DCMR § 3807.1. Although findings of fact will be affirmed where there is substantial evidence on the record to support them, the Commission's review of legal conclusions is *de novo*. United Dominion, 101 A.3d at 430-31.

"Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10, (D.C. 1994); Allen v. D.C. Rental Hous. Comm'n, 538 A.2d 752, 753 (D.C. 1988); Tenants of 2480 16th St. N.W. v. Dorchester House Assocs., RH-SF-09-20,098 (RHC Sept. 25, 2015) at 13; Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014) at 31. The Commission has consistently stated that "[w]here substantial evidence exists to support the [ALJ's] findings, even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [ALJ].'" Palmer v. Clay, RH-TP-13-30,431 (RHC Oct. 5, 2015) at 13-14; Boyd v. Warren, RH-TP-10-29,816 (RHC June 5, 2013) at 10-11 (quoting Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Aug. 4, 2011) at 6); Loney v. Tenants of 710 Jefferson St., N.W., SR 20,089 (RHC Jan. 29, 2013) at n.13. The role of the Commission on appeal "is not to 'weigh the testimony and substitute ourselves for the trier of fact who heard the conflicting testimony, observed the adversary witnesses, and determined the weight to be accorded their testimony.'" Washington Cmtys. v. Joyner, TP 28,151 (RHC Jul. 22, 2008) at 15 (quoting Fort Chaplin Park Assocs., 49 A.2d at 1079).

In administrative proceedings under the Act, the proponent of a rule or order bears the burden of proof. D.C. OFFICIAL CODE § 2-509(b) ("In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof."); 1 DCMR § 2932.1 ("When the housing provider files a petition, the housing provider has the burden to prove the claims."). To meet its burden:

> Unless otherwise provided by law, a party must prove each fact essential to his or her claim by a preponderance of the evidence so that the Administrative Law Judge finds that it is more likely than not that each fact is proven.

1 DCMR § 2932.2. The Commission's regulations governing related services or facilities petitions provide:

> 4211.8 The amount of a rent . . . adjustment which a housing provider may . . . implement . . . pursuant to a final order of the Rent Administrator [or OAH] on a related services or facilities petition shall . . . include only the monthly value of the change in related services or facilities, as determined by the Rent Administrator [or ALJ].
>
> 4211.9 To determine the monthly value of changes in related services or facilities, the Rent Administrator [or ALJ] may consider the following:
>
> (a) The cost to the tenant of obtaining alternate related services or facilities comparable to those reduced by the housing provider;
>
> (b) The operating cost to the housing provider of the related services or facilities which are changed; or
>
> (c) The fair market value of comparable related services or facilities.

14 DCMR § 4211. Therefore, the Housing Provider was required, in the hearing before the ALJ, to produce evidence of the cost of electric service to the Tenants, the operating costs to the Housing Provider of providing electric service, or the fair market value of comparable electric service. *Id.*

The Commission observes that the cases directly cited by the ALJ for the proposition that the Tenants "did not refute the opinion with its own expert testimony" are all civil tort claims

alleging negligence by law enforcement officers. *See* Toy, 549 A.2d at 6 (plaintiffs required to introduce expert testimony to establish standard of care by corrections officers in use of emergency equipment or "proper method for administering CPR and the circumstances under which CPR is appropriate"); Peters, 527 A.2d at 1273 (plaintiffs required to introduce expert testimony to establish standard of care in "train[ing of] police officers with regard to the handling of mentally disturbed persons or persons under the influence of drugs"); Davis, 386 A.2d at 1201 (plaintiffs required to introduce expert testimony to establish standard of care in "adequate weapons safety training and evaluation" of police officers). One case listed, cited in turn by the D.C. Court of Appeals ("DCCA"), establishes only that expert testimony is not necessary when a civil plaintiff seeks to establish the value of damages to a furnished apartment. Waggaman, 217 A.2d at 311. Although the plaintiff in a civil case unquestionably bears the burden of proving each element of his or her claim, nothing in those cases supports the proposition that the Tenants, as respondents in this administrative proceeding, bear any burden in order to prevail.

The Housing Provider argues that the ALJ was nonetheless correct to impose a burden of production on the Tenants. Housing Provider's Brief at 5-6. Specifically, the Housing Provider argues that the Commission has applied a burden-shifting framework in housing provider petition cases, citing Johnson v. Hughes, SF 20,040 (RHC Apr. 11, 1996), and Albemarle House Tenants Association v. Albemarle Towers Co., CI 20,523 (RHC Feb. 6, 1997). In Johnson, the Commission upheld a hearing examiner's valuation of the elimination of natural gas service where the housing provider satisfied his burden of producing evidence of gas costs, and the tenant did not provide any evidence. Johnson, SF 20,040 at 5-6. Nothing in the Commission's decision imposed a burden on the tenant; the Commission merely determined that the evidence

introduced by the housing provider was sufficient to affirm the final order. *Id.* (citing D.C. OFFICIAL CODE § 2-509(b)).

In Albemarle House, the housing provider and tenants disputed the number of smoke detectors required in a capital improvement, and the tenants did not produce any evidence to contradict the testimony by the housing provider's witness as to the number required. Albemarle House, CI 20,523 at 8-9. The Commission stated that, because there was no evidence in the record to contradict that testimony, "the Commission holds that the tenants failed to meet their burden of proof." *Id.* at 9 (citing D.C. OFFICIAL CODE § 2-509(b) to state that "a party asserting a particular fact has the burden of affirmatively proving that fact"). The Commission further concluded, nonetheless, that its standard of review required it to uphold a hearing examiner's decision that was supported by substantial evidence. *Id.* at 9-10. The Commission, in this case, is satisfied that the statement in Albemarle regarding the tenant's "burden" was merely *dicta*, having no legal effect or precedential value, and that the dispositive holding in that case was that the hearing examiner's decision was supported by substantial evidence on the record. *See* 14 DCMR § 3807.1; *see also* Palmer, RH-TP-13-30,431 at 13-14; Boyd, RH-TP-10-29,816; Loney, SR 20,089.

Therefore, the Commission determines that the burden of production in the hearing before the ALJ did not, at any point, shift to the Tenants. *See* D.C. OFFICIAL CODE § 2-509(b); 1 DCMR § 2932.2.

Moreover, nothing under the Act, regulations, or Commission precedent requires tenants in a related services or facilities petition to use expert testimony to put on rebuttal evidence, if they elect to do so. D.C. OFFICIAL CODE § 2-509(b) provides, in relevant part, that:

> Any oral and any documentary evidence may be received, but the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious

> evidence. Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

The Commission has consistently held that, in assessing the value of related services or facilities, an ALJ is not required to make the determination with "scientific precision," but may rely on his or her "knowledge, expertise, and discretion, as long as there is substantial evidence in the record of the nature of the violation, duration, and substantiality." Palmer, RH-TP-13-30,431 at 22-23 (quoting Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000) at 8).

The Housing Provider argues that "when expert testimony is uncontradicted, unimpeached, and not discredited by cross-examination, it must be taken as true." Housing Provider's Brief at 6 (quoting Warner Fruehauf Trailer Co. v. Boston, 654 A.2d 1272, 1280 (D.C. 1995)) (internal alterations omitted). The Commission is satisfied that Warner Fruehauf is inapplicable for two reasons.

First, the issue before the DCCA in Warner Fruehauf was whether a directed verdict was properly granted in a products liability case, where expert testimony was required to establish that a product was "defectively designed and unreasonably dangerous." 654 A.2d at 1280. As stated, expert testimony is not required in a related services or facilities petition for the party with the burden of proof to establish the value of the service or facility. Palmer, RH-TP-13-30,431 at 22-23. Therefore, the Commission is satisfied that the issue decided by the DCCA is distinguishable from the issue in this case.

Second, the DCCA in Warner Fruehauf followed the U.S. Court of Appeals for the Tenth Circuit's decision in Hurd v. American Hoist & Derrick Co., 734 F.2d 495 (10th Cir. 1984), which upheld a products liability directed verdict on the grounds that no contradictory evidence was offered. The Court in Hurd cited its own earlier decision that stated "although expert

evidence may be contradicted by lay testimony, if 'evidence – expert or non-expert – is all one way, there is no room for a contrary finding.'" 734 F.2d at 500 (quoting Stafos v. Missouri Pac. R.R., 367 F.2d 314, 317 (10th Cir. 1966)) (emphasis added). The Commission is thus not persuaded that the line of cases offered by the Housing Provider dictates that the Tenants could only rebut the Housing Provider's expert witness with an expert of their own.

Therefore, the Commission determines that the ALJ erred in stating that the Tenants were required to refute the Housing Provider's expert and that they were required to do so by producing expert testimony of their own.

However, the Commission is satisfied, based on its review of the record, that the ALJ's error was harmless. United Dominion, 101 A.3d at 430. As noted, the Commission is bound by its standard of review to affirm an ALJ's decision that is supported by substantial evidence and to not second-guess credibility determinations or the weighing of the evidence. 14 DCMR § 3807.1; Fort Chaplin Park Assocs., 649 A.2d at 1079; Palmer, RH-TP-13-30,431 at 20; *see also* Dorchester House, RH-SF-09-20,098 at 42 ("the relevant inquiry is whether the [ALJ's] decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence") (quoting Gary v. D.C. Dep't of Emp't. Servs., 723 A.2d 1205, 1209 (D.C. 1998)).

The Commission's review of the record reveals that Mr. Kaufman's testimony and report constitute relevant evidence that can reasonably be accepted as adequate to support the rent reductions proposed, *i.e.*, substantial evidence. Fort Chaplin Park Assocs., 649 A.2d at 1079; Dorchester House Assocs., RH-SF-09-20,098 at 53-54 (affirming final order that credited similar testimony by Mr. Kaufman over that of competing expert witness); *see* Petitioner's Exhibit

("PX") 100 at 16-75;[10] Tr. at 45-72; *see also* 14 DCMR § 4211.9(b) (ALJ may determine monthly value of change in service based on operating cost to the housing provider). The Tenants had a full opportunity to cross-examine Mr. Kaufman. Tr. at 52-70; *see also* D.C. OFFICIAL CODE § 2-509(b) ("Every party shall have the right to . . . conduct such cross-examination as may be required for a full and true disclosure of the facts."). It is clear from the Final Order that the ALJ credited Mr. Kaufman's testimony and report. Final Order at 3, 5; R. at 343, 345; *see* Fort Chaplin Park Assocs., 49 A.2d at 1079; Joyner, TP 28,151 at 15.

The Tenants, on the other hand, did not offer any evidence that would tend to prove the monthly value of the electric service. The Commission's review of the record shows that, despite the ALJ's statement in the Final Order regarding rebuttal by expert testimony, the ALJ did nothing during or prior to the evidentiary hearing to prevent the Tenants from presenting evidence. *Cf.* D.C. OFFICIAL CODE § 2-509(b) ("Every party shall have the right to . . . submit rebuttal evidence"). In fact, the Tenants designated a consultant as a witness for the hearing, but did not call him. *See* Respondents' List of Witnesses and Documents; R. at 168; Tr. at 97:17-18. Instead, the Tenants' core argument, addressed *infra* at 19, is that the ALJ should have determined the monthly value of the reduction based on the value to the Tenants, rather than the operating costs to the Housing Provider, *see* 14 DCMR § 4211.9(a), (b), and that this could only be proven with actual Pepco bills following the elimination of central metering. Tenants' Brief at 11-12.

If the ALJ had denied the Tenants their opportunity to contest the Housing Provider's evidence, the Commission might find the ALJ's error to be reversible. *See* D.C. OFFICIAL CODE § 2-509(b) ("Every party shall have the right to present . . . his case or defense by oral and

[10] The Commission notes that Petitioner's Exhibits 100 and 101 are included in the certified record from OAH, but the page numbering is not continuous with the remainder of the record.

documentary evidence, to submit rebuttal evidence, and to conduct . . . cross-examination"); *see, e.g,.* Palmer, RH-TP-13-30,341 at 30-31 (plain error for ALJ to instruct tenant at hearing that "you can't offer evidence of what occurred after you filed your tenant petition," contrary to Commission precedent); Dorchester House, RH-SF-09-20,098 at 59-60 (ALJ failed to make findings of fact and conclusions of law on contested issue that expert report did not account for multiple HVAC units in certain apartments). However, because the ALJ credited the Housing Provider's witness, despite the Tenants' cross-examination, and the Tenants did not produce any contrary evidence, the Commission is satisfied that there is substantial, uncontested evidence on the record to support the ALJ's conclusion regarding the monthly value of the eliminated electric service. LCP, Inc., 499 A.2d at 903 ("[R]eversal and remand is required only if substantial doubt exists whether the agency would have made the same ultimate finding with the error removed."); *see also* 14 DCMR § 3807.1; Fort Chaplin Park Assocs., 649 A.2d at 1079; Dorchester House Assocs., RH-SF-09-20,098 at 13-14.[11] Therefore, the Commission determines that the ALJ's statements suggesting that the Tenants had a burden to produce expert testimony constitute harmless error. United Dominion, 101 A.3d at 430; LCP, Inc., 499 A.2d at 903.

Accordingly, the Final Order is affirmed on this issue.

3. Whether, in failing to determine and award the actual cost to each current tenant of obtaining alternate related services under 14 DCMR § 4211.9(a), the ALJ applied the correct legal standard in adjudicating the facts of this case regarding the appropriate monthly rent reduction required of the Housing Provider.

The Tenants argue that the ALJ erred by relying on the Housing Provider's expert witness to determine the monthly value of the elimination of electric service, because his report

[11] The Commission additionally observes that, in this respect, cases such as Warner Fruehauf, 654 A.2d at 1280, Hurd, 734 F.2d at 500, and Stafos, 367 F.2d at 317, are applicable: where substantial evidence is produced by one party and credited by the trier of fact, a party that fails to produce any contrary evidence has no basis to argue on appeal that the trier of fact reached the wrong conclusion.

did not reflect the "precise value to each current tenant," but a series of estimates based on current usage figured. Tenants' Brief at 9-10. Instead, they argue, the Tenants should be allowed to submit their future, actual Pepco bills to calculate reductions in the rent charged for each rental unit. *Id.* at 11-13.

As noted, the Commission's standard of review requires it to reverse findings of fact and conclusions of law that are unsupported by substantial evidence on the record, are arbitrary, capricious, or an abuse of discretion, or not in accordance with the Act. 14 DCMR § 3807.1. The Commission reviews an ALJ's interpretation and application of the Act *de novo*. United Dominion, 101 A.3d at 430-31.

The Act provides that, in a related services or facilities petition, an ALJ "may increase or decrease the rent charged, as applicable, to reflect proportionally the value of the change in services or facilities." D.C. OFFICIAL CODE § 42-3502.11. As noted *supra* at 13, the Commission's implementing regulations provide that:

> To determine the monthly value of changes in related services or facilities, the Rent Administrator [or ALJ] may consider the following:
>
> (a) The cost to the tenant of obtaining alternate related services or facilities comparable to those reduced by the housing provider;
>
> (b) The operating cost to the housing provider of the related services or facilities which are changed; or
>
> (c) The fair market value of comparable related services or facilities.

14 DCMR § 4211.9 (emphasis added). The Commission has previously determined that, among the three (3) considerations listed, "[t]he regulations do not . . . fix a preference for one over any other." Hughes, SF 20,040 at 5; *see also* Shipley Gardens v. Tenants of Shipley Park Apartments, CIs 20,130-20,151 (RHC Dec. 18, 1987) at 6-7. Moreover, under any of the three

(3) considerations, an ALJ's determination does not need to be made with "scientific precision." Kemp, TP 24,786 at 8.

In Hughes, a housing provider sought to eliminate the gas utility service that it previously provided, and it produced evidence of the monthly value by dividing its annual, total gas costs among the several rental units in the housing accommodation. Hughes, SF 20,040 at 4-5. The Commission affirmed the hearing examiner's determination of the monthly value of the gas utility service, noting that the evidence was relevant under 14 DCMR § 4211.9(b). *Id.* at 5-6. Similarly, in Shipley Gardens, the Commission observed that actual electric utility bills would be the "most appropriate" evidence of monthly costs under 14 DCMR § 4211.9, but, where evidence of past costs to the housing provider was introduced, it was error to summarily reject the evidence that was made relevant by § 4211.9(b). Shipley Gardens, CIs 20,130-20,151 at 6.

The Commission is satisfied that the ALJ did not err by failing to "determine the value *to the affected tenants*" of the elimination of electric service. Tenants' Brief at 10.[12] The ALJ was permitted by the plain language of 14 DCMR § 4211.9 to use any of the three (3) listed considerations. *See* Cook, 825 A.2d at 944; Williams, TP 28,530 at 18; Chastleton, TP 27,838 at 23.

In the Final Order, the ALJ found that the Housing Provider's expert, Mr. Kaufman, provided "a realistic energy usage level for each of the occupied apartment types and assigned

[12] The Commission observes that the Tenants' Brief places emphasis on the use of the phrase "to the affected tenants" in Lustine Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1989), and Wash. Realty Co. v. Rowe, TP 11,802 (RHC May 14, 1986). Those cases arose from tenant petitions filed when housing providers reduced or eliminated related services (specifically, by substantially violating the housing code) without prior approval of the Rent Administrator. In such circumstances, a tenant would not have standing to complain of a reduction in related services if he or she were not an "affected tenant," *i.e.*, if housing code violations only existed in another tenant's rental unit. Moreover, those cases do not hold that 14 DCMR § 4211.9(a) (cost to tenants) is the only appropriate measure of an affected tenant's damages. Rather, the Commission notes that the degree of discretion afforded to an ALJ in determining value based on knowledge and experience indicates that 14 DCMR § 4211.9(c) (fair market value) may be equally relevant. *See* Kemp, TP 24,786, at 8.

the annual and monthly cost at today's electric utility rates." Final Order at 5; R. at 345. The Commission's review of the record shows that Mr. Kaufman's report and testimony use the past operating costs of the housing provider to estimate the energy usage per unit and then apply residential Pepco rates to calculate the likely, future costs to the tenants. *See* Final Order at 3; R. at 343; PX 100 at 20-21.

The "usage level" cited in Mr. Kaufman's report was based on general electrical and heating usage, in consideration of, among other things, the square footage of rental units, construction of walls, window types and sizes, and the type of equipment installed in each unit. Final Order at 3 (citing PX 100 at 18-29); R. at 343. However, on cross-examination by counsel for the Tenants, Mr. Kaufman testified that the report does not state exactly how much each Tenant will pay, which may be more or less than the estimate provided. Final Order at 4 (citing Tr. at 25-26); R. at 344.

Although Mr. Kaufman's estimates of usage may not be as precise as future, actual Pepco bills to the Tenants will be, the Commission is not persuaded that the ALJ is required by the Act or regulations to rely on "the amounts of the [T]enants' future monthly Pepco bills [that] will be exactly the value to the [T]enants." Tenants' Brief at 11; *see* Shipley Gardens, CIs 20,130-20,151 at 7 ("we find nothing in the law that requires [a housing provider] to develop and present such an estimate in lieu of the experiential data that was available"). On the contrary, a related services or facilities petition is specifically available to a housing provider "who . . . proposes to change the related services or facilities at a rental unit or housing accommodation." 14 DCMR § 4211.1 (emphasis added); *see, e.g.,* Hughes, SF 20,040 at 5 (rejecting argument that future cost to tenants must include consideration of annual increase in gas utility costs and inflation rates).

The Commission has previously found that actual utility bills constitute substantial evidence of the monthly value of a related service that has been eliminated without prior approval, *i.e.*, damages for an unlawful act. *See, e.g.,* Taylor v. Chase Manhattan Mortgage, TP 24,303 & TP 24,420 (RHC Sept. 9, 1999) at 11 (noting that the record contained either bills or summaries of charges from three utility providers);[13] *see also* 14 DCMR § 4211.5-.7.[14] However, in this case, the Housing Provider seeks, through the SF Petition, to obtain prior approval for the prospective elimination of a related service, and nothing in the Commission's regulations requires a housing provider that does so to have perfect knowledge of future costs to tenants. *See* 14 DCMR § 4211;[15] Hughes, SF 20,040 at 5; Shipley Gardens, CIs 20,130-20,151

[13] The Commission observes that the Tenants appear to rely on the statement in Taylor that the DCCA "has held that housing providers are required to reimburse tenants for utility bills paid by the tenants[.]" Taylor, TP 24,303 & TP 24,420 (citing Harris v. D.C. Rental Hous. Comm'n, 505 A.2d 66, 68 (D.C. 1986)). However, Taylor and Harris were both decided on the grounds that substantial evidence supported the conclusion that the housing providers were obligated to pay for utility services; evidence of the value of the service, as contested in this appeal, was not an issue. *See* Harris, 505 A.2d at 69-70; Taylor, TP 24,303 & TP 24,420; *see also* Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012) (finding that housing provider had waived lease provision requiring tenant to pay utilities).

[14] 14 DCMR § 4211.5 - .7 provide as follows:

> 4211.5 A housing provider shall not change substantially related services or facilities in violation of § 4211.2 or decrease substantially related services or facilities at a rental unit or housing accommodation without the prior approval of the Rent Administrator [or OAH].
>
> 4211.6 If related services or facilities at a rental unit or housing accommodation decrease by accident, inadvertence or neglect by the housing provider and are not promptly restored to the previous level, the housing provider shall promptly reduce the rent for the rental unit or housing accommodation by an amount which reflects the monthly value of the decrease in related services or facilities.
>
> 4211.7 The Rent Administrator [or an ALJ] on his or her own motion or by tenant petition may review and adjust a rent decrease implemented under § 4211.6, and a housing provider who fails to promptly and adequately reduce rent under § 4211.6 may be liable for additional penalties under the Act.

[15] The Commission observes that the Tenants' suggestion that they "would be willing to implement the rent reductions by paying their monthly electric bills to Pepco and deducting such payments, as a credit, from their monthly payments to the Housing Provider" would not be a reduction in related services at all: they could continue to use as much electricity as they choose, with the cost borne by the Housing Provider in reduced rents. *See* D.C. OFFICIAL CODE § 42-3501.03(27), (28); Kuratu, RH-TP-07-28,985 (provision of electricity is related service when included in rent). Whether or not such a system would be "an accounting nightmare," *see* Tenants' Brief at 13, an order to implement that proposal would amount to a *de facto* denial of the SF Petition.

at 6-7; *see also* Kemp, TP 24,786 at 8. Therefore, the Commission determines that the ALJ did not err by not requiring the Housing Provider to reduce rents in the amount of the Tenants' actual, future Pepco bills and that substantial evidence on the record supports the ALJ's determination of the monthly value of the elimination of electric service. 14 DCMR § 3807.1.

Accordingly, the Final Order is affirmed on this issue.

4. Whether the ALJ erred as a matter of law in requiring that the Housing Provider's rent reductions apply not only to current tenants, but also to future tenants who move into vacant units

The Tenants argue that a related services or facilities petition may not be used to adjust rents charged or related services or facilities for rental units that are vacant. Tenants' Brief at 13. Specifically, they argue that electric service is not a "related service" under the Act for the vacant units in the Housing Accommodation because there is no rental agreement in place that requires it. *Id.* at 13-14; D.C. OFFICIAL CODE § 42-3501.03(27).[16]

The Tenants describe the Housing Provider's use of a related services or facilities petition as "an ill-fitting device for prospective use, and its use here leads to confusion." Tenants' Brief at 15; *see also* Hearing CD (RHC Mar. 9, 2016) at 11:19, 11:26 (describing this issue as "a conundrum"). The Housing Provider counters that the Tenants have no standing with respect to the interests of future tenants, and that the value of related services is determined on a per-unit basis, not per-tenant. Housing Provider's Brief at 9-10; *see also* Hearing CD (RHC Mar. 9, 2016) at 11:39-11:40.

---

[16] D.C. OFFICIAL CODE § 42-3501.03(27) provides:

> "Related services" means services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse.

The Commission is satisfied, for the following reasons, that the Housing Provider may, and is required to, file a related services or facilities petition to eliminate a related service from a vacant rental unit. First, the plain language of the Act and regulations that govern services and facilities apply to "rental units," not tenants. *See* D.C. OFFICIAL CODE §42-3502.11 ("related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation may serve as the basis for an adjustment in the rent charged." (emphasis added));[17] 14 DCMR § 4211.5 ("A housing provider shall not . . . decrease substantially related services or facilities at a rental unit or housing accommodation without . . . prior approval[.]" (emphasis added)).

Second, related services and facilities that are provided by a housing provider are required to be registered with the RAD on the Registration/Claim of Exemption form for the housing accommodation at which they are provided. Specifically:

> Each housing provider of a rental unit or units covered by the Act shall file an amendment to the Registration/Claim of Exemption form provided by the Rent Administrator in the following circumstances: . . .
>
> (d) Within thirty (30) days after the implementation of . . . any substantial change in the related services or facilities pursuant to [D.C. Official Code § 42-3502.11.]"

[17] The Commission notes that the statutory use of the term "rent charged" may be confusing in the context of a vacant rental unit. *Cf.* D.C. OFFICIAL CODE § 42-3502.08(h)(1) ("Unless the increase in the amount of rent charged is implemented pursuant to . . . § 42-3502.11 . . . , an increase in the amount of rent charged while the unit is vacant shall not exceed the amount permitted under § 42-3502.13(a)." (emphasis added)). Pursuant to the Rent Control Reform Amendment Act of 2006, D.C. Law 16-145, "rent ceilings," formerly the measure of maximum, lawful rents, were abolished, and the term "rent charged" was substituted throughout the Act, sometimes with results that are difficult to parse. *See, e.g.,* D.C. OFFICIAL CODE § 42-3502.10(c)(3) ("The rent increase shall not be calculated as part of either the base rent or rent charged of a tenant when determining the amount of rent charged."). However, the vacancy of a rental unit does not nullify or abrogate the regulated rent level of that unit. *See* D.C. OFFICIAL CODE §§ 42-3502.08(h)(1), 42-3502.13(a) ("When a tenant vacates a rental unit . . . the amount of rent charged may . . . be increased . . . [b]y 10% of the current allowable rent charged for the vacant unit[.]" (emphasis added)). Similarly, the Commission, as described in this decision, is satisfied that the "related services" provided in connection with a rental unit are not nullified or abrogated by a vacancy. *See infra* at 26-27.

14 DCMR § 4103.1. Thus, related services or facilities that are registered for a rental unit are required by law.

Third, the Commission has adopted a broad reading of the definition of "related service" under the Act, specifically the phrase "required by law or the terms of a rental agreement." D.C. OFFICIAL CODE § 42-3501.03(27); Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012) at 21-23 (finding electric service was "related service" where housing provider consistently paid tenant's utility bill for three years, waiving lease clause placing responsibility on tenant).[18] Because the Housing Provider in this case concedes that electric service has been historically provided in connection with each rental unit,[19] the Commission is satisfied that it meets the definition of a "related service" provided by the Act. D.C. OFFICIAL CODE § 42-3501.03(27); Kuratu, RH-TP-07-28,985 at 21-23.

For the foregoing reasons, the Commission is satisfied that the Tenants arguments regarding "future tenants" misconstrue the Act and the applicability of its "related services" provisions to vacant rental units. Moreover, it is not clear what legal remedy would be available to the Tenants if electric service were not a related service in vacant units; the Housing Provider, in that situation, could lawfully eliminate a service without prior approval of the SF Petition. *See* D.C. OFFICIAL CODE § 42-3502.11. Therefore, the Commission is also satisfied that it does not need to address the Housing Provider's argument that the Tenants lack standing to assert the interests of future tenants. *See* Smith Prop. Holdings Consulate, LLC v. Lutsko, RH-TP-08-

[18] *See also* Kuratu v. Ahmed, Inc., RH-TP-07-28,895 (RHC Jan. 29, 2013) at 7-9 (Order on Reconsideration) (clarifying that prior approval of related services or facilities petition is exclusive means to shift responsibility for utility costs back to tenant).

[19] Although the record reflects that the current Registration/Claim of Exemption form for the housing accommodation does not list electric service as a related service, PX 101 at 2, the Commission observes that a witness for the Housing Provider testified that the omission is incorrect and electric service is provided to each unit. Tr. At 11:7-13. Nonetheless, the Commission is satisfied that the Housing Provider has waived any argument that electric service is not a related service in each unit for which it filed the SF Petition.

29,149 (RHC Mar. 10, 2015) at n.29; Fidelity Props., Inc. v. Tenants of 3446 Conn. Ave. NW., HP 20,355 (RHC Apr. 10, 1995) at 4 ("'[c]ourts do not, or at least should not, issue generalized edicts'") (quoting Mims v. Mims, 635 A.2d 320, 325 n.12 (D.C. 1993)).

Accordingly, the Final Order is affirmed on this issue.

IV. CONCLUSION

For the foregoing reasons, the Commission determines that, although the ALJ erred in stating that a related services or facilities petition must be granted when the criteria listed in 14 DCMR § 4211.2 are met, this error is harmless. The Commission also determines that the ALJ erred in stating that, although the Tenants were required to rebut the Housing Provider's expert witness with an expert witness, this error is also harmless. The Commission additionally determines that the ALJ did not err in determining the monthly value of the electric service based on substantial evidence of past usage and estimates of proportional electrical usage in each rental unit. The Commission finally determines that the ALJ did not err by approving the SF Petition with regard to vacant rental units in the Housing Accommodation. Accordingly, the Final Order is affirmed.

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

CLAUDIA L. McKOIN, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823, final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1, provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2012 Repl.), "[a]ny person aggrieved by a decision of the Rental Housing Commission...may seek judicial review of the decision...by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

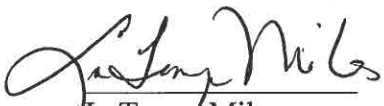
D.C. Court of Appeals
Office of the Clerk
430 E. Street, N.W.
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-15-20,126 was mailed, postage prepaid, by first class U.S. mail on this **25th day** of **March, 2016,** to:

Blake A. Biles, Esq.
Brett E. Marston, Esq.
Arnold & Porter, LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001

Richard W. Luchs, Esq.
Greenstein, Delorme & Luchs, PC
1620 L Street, N.W.
Washington, DC 20036



LaTonya Miles
Clerk of Court
(202) 442-8949