RECEIVED 2021 JUL 8 3:43 PM

pepco
An Exelon Company

Kim F. Hassan
Associate General Counsel

EP9628
701 Ninth Street NW
Washington, DC 20068-0001

Office 202.872.2967
Fax 202.331.6767
pepco.com
kim.hassan@exeloncorp.com

July 8, 2021

Ms. Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission
of the District of Columbia
1325 G Street N.W., Suite 800
Washington, DC 20005

Re: <u>Formal Case No. 1156</u>

Dear Ms. Westbrook-Sedgwick:

Enclosed please find Potomac Electric Power Company's Application for Reconsideration and Clarification of Order No. 20755 in the above referenced proceeding.

Please feel free to contact me if you have any questions. Thank you.

Sincerely,

/s/ *Kim F. Hassan*

Kim F. Hassan

Enclosures

cc: All Parties of Record

BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE	**)**	
	)	
APPLICATION OF THE POTOMAC ELECTRIC	**)**	
POWER COMPANY FOR AUTHORITY TO	**)**	**Formal Case No. 1156**
IMPLEMENT A MULTIYEAR RATE PLAN FOR	**)**	
ELECTRIC DISTRIBUTION SERVICE IN THE	**)**	
DISTRICT OF COLUMBIA	**)**	

APPLICATION OF
POTOMAC ELECTRIC POWER COMPANY
<u>FOR RECONSIDERATION AND CLARIFICATION OF ORDER NO. 20755</u>

Pursuant to Section 34-604(b) of the District of Columbia Official Code and Rule 140.1 of the Rules of Practice and Procedure of the Public Service Commission of the District of Columbia ("Commission"),[1] Potomac Electric Power Company ("Pepco" or "Company") hereby files this Application for Reconsideration and Clarification of Order No. 20755, which was issued by the Commission in the referenced docket on June 8, 2021.

The Commission's decision in this inaugural electric utility multi-year rate plan seeks to strike an appropriate balance between the interests of customers, District citizens and those of the Company and its investors.[2] The Commission has adopted a multiyear rate plan that departs from traditional regulation, with its inherent regulatory lag and mismatches in timing between spending and recovery, in order to improve electric utility regulation in the District of Columbia and support continued essential investment. As the Commission notes, "the vast majority of Pepco's

---

[1] 15 D.C.M.R. § 140.1.

[2] The Commission notes that its Order "represents the Commission's introductory determination of an alternative form of regulation" under D.C. Code §34-1504(d). Order No. 20755, ¶1.

cumulative rate increase . . . is driven by utility infrastructure investments recently made or ongoing to meet the Commission directed reliability improvements."[3] Recognizing the critical importance of these reliability investments, the Commission commits to using "all the regulatory authority at its disposal to ensure that Pepco's reliability continues to improve in all areas of the District and that rates remain just and reasonable."[4] The Commission is to be applauded for its decision to join multiple other jurisdictions in adopting a more progressive and responsive regulatory regime designed to meet the needs of the District going forward.

While the Commission in Order No. 20755 provided a detailed and thoughtful decision that, overall, strikes the balance that it set out to achieve, there are a few items that the Company submits should be reconsidered or clarified in order to attain the targeted results of continued reliability improvements, decreased regulatory lag and equitable cost recovery. The Company therefore respectfully requests that the Commission reconsider its determination in Order No. 20755 regarding:

- The adoption of a stay-out provision that would preclude the Company from filing a new multiyear rate case ("MRP") application before January 2, 2023 and for any rates approved in that proceeding to become effective prior to January 1, 2024, twelve months after the end of the term of the Enhanced Multiyear Rate Plan ("EMRP") approved in Order No. 20755. As discussed below, this provision is not supported by the record in this proceeding, is contrary to law and well-settled precedent, and conflicts with several of the incremental benefits provided by an MRP that the Commission relied upon in its decision.

[3] Order No. 20755, footnote 7.

[4] *Id.* at ¶11.

- The acceptance of only the benefit of the non-protected property excess deferred income tax liability associated with PHISCO's re-measurement of its accumulated deferred income tax balances as a result of the reduction of the federal corporate income tax rate from 35% to 21% in the *Tax Cuts and Jobs Act of 2017* ("TCJA") but the disallowance of the related non-protected non-property deficient deferred income tax asset was arbitrary and capricious.
- The selective adjustment of certain excess deferred income tax balances that results in customers erroneously receiving certain tax benefits from the TCJA twice is an error that the Commission should correct.

In addition, Pepco respectfully requests that the Commission clarify that under Order No. 20755:

- The Company is able to include in the reconciliation process its actual Load-Driven and Customer-Driven capital additions in 2021 and 2022 if over or under the levels assumed by the Commission.

The Company respectfully requests that the Commission provide the clarification sought herein and reconsider its determinations in Order No. 20755 as discussed below and issue the relief requested herein.

DISCUSSION

A The Stay-Out Provision in Order No. 20755 Is Not Supported by the Record, Is Contrary to the Public Utilities Act and Well-Settled Precedent, and Would Reduce Several Incremental Benefits Provided by the MRP upon which the Commission Relied.

In Order No. 20755 the Commission approved an EMRP with a term of 18-months running through 2022,[5] consistent with the EMRP proposal the Company submitted in this proceeding. Order No. 20755, however, also included a stay-out provision under which Pepco is prohibited from filing a new MRP application until at least January 2, 2023, with rates to be effective no earlier than January 1, 2024.[6] This stay-out provision means that, as the Company files its next MRP, there will be no provision for the Company to recover incremental O&M costs incurred in 2023 nor to receive timely recovery of reasonable and prudently incurred capital investments placed into service in 2023. Nothing in the record supports such a finding.

The stay-out provision is unsupported by the record in this proceeding and also is contrary to the terms of the Public Utilities Act and well-established precedent. Moreover, the stay-out provision does not align with key rationales the Commission relied upon to approve the EMRP, that is, to allow rates to properly reflect the cost of service, reduce regulatory lag and smooth out rate adjustments for customers. Further, it is contrary to the Commission's determination that the EMRP reduces the Company's risk warranting a reduction in Pepco's return on equity. As detailed below, the Commission should either eliminate the stay-out provision or, alternatively, allow the Company, at a minimum, to track and record the return on and depreciation of incremental 2023

---

5 *See, e.g.,* Order No. 20755 at ¶143 (The Modified EMRP is approved "through the end of CY 2022, equating to an 18-month MRP term."). In footnote 426 the Commission indicated that "[w]ith the directed stay-out, the term of this Modified EMRP pilot equates to an 18-month EMRP term." During the 18-month term of the EMRP, the restrictions proposed by the Company and adopted by the Commission assure that the rates the Commission approved for the term of the EMRP can be altered only in extremely limited circumstances.

6 Order No. 20755 at ¶476(aa).

capital additions to a regulatory asset. This would allow the Company the opportunity to recover reasonable costs and provide parties an opportunity to issue discovery and review those costs in the Company's next MRP. Moreover, before any such costs are included in customer rates, the prudency of the costs would be reviewed and approved by the Commission.

1. *The Record Does Not Support Imposition of a Stay-Out Provision*.

Pepco's original MRP and EMRP were for a three (3)-year term, 2020 through 2022. As part of the Company's proposal, Pepco agreed that it would generally not be able to apply for a change in distribution rates that would be effective during the term of the MRP.[7] Specifically, Company Witness McGowan explained that "if the MRP Enhanced Proposal is adopted as proposed, Pepco would commit that, other than in certain specific circumstances that trigger the re-opener, the Company would not file a petition to increase distribution rates that would become effective prior to January 1, 2023."[8] No party challenged the Company's testimony that it could file such a petition.

The Company testified that it could file an application to change rates prior to the end of the MRP's term as long as the rates approved in that proceeding would not become effective until after the end of the MRP term.[9] Indeed, in the event Pepco were to file its next MRP prior to the end of the Company's EMRP term, Company Witness Wolverton addressed the mechanism (the consolidated reconciliation filing) by which, consistent with the approach adopted by the Public

---

7 There were limited circumstances identified in the testimony, such as the re-opener provision, in which the Company could seek to change rates within the MRP period. *See, e.g.,* PEPCO (6C): Wolverton Surrebuttal at 18-19.

8 PEPCO (5B): McGowan Surrebuttal at 33. *See also* PEPCO (6C): Wolverton Surrebuttal at 16 n.34 ("Pepco could potentially file an MRP during 2022 with the anticipation that rates would become effective in 2023.")

9 *Id*.

Service Commission of Maryland ("Maryland Commission"),[10] the new proceeding would reconcile all costs incurred during the term of the MRP through the end of the historic test year used in the new rate proceeding.[11]

Such an approach, in which the next MRP period goes into effect shortly after the expiration of the last MRP, is required to achieve reduction of regulatory lag, a key benefit of an MRP, as identified by the Commission. In response to another party's suggestion that the Commission move the MRP period to include 2023, Company Witness McGowan testified that:

> It is vitally important that Pepco's MRP rate increases not be pushed out by a year, as OPC Witness Dismukes suggests. The recommendation by OPC Witness Dismukes implies a lack of understanding of how an MRP is developed and such a recommendation would create a 12-month discrepancy between revenues collected and the actual cost of service (for example, under OPC's proposal, the rates collected in 2021 would be based on costs incurred over the historic 12 month period in 2020). . . One of the purposes of the MRP is to eliminate such mismatches in timing so that revenues in a given year match the cost of service in that given year, and not some other time period.[12]

The stay-out provision in 2023 has the same effect by creating a 12-month mismatch between revenues collected and the actual cost of service, thereby introducing regulatory lag and impairing one of the central purposes of implementing an MRP.

Order No. 20755 indicates that Pepco's MRP proposals included a stay-out provision. For example, Paragraph 50 of Order No. 20755 states that in Company Witness McGowan's Direct

---

[10] In 2020, in connection with its establishment of a framework for an MRP pilot program in Maryland, the Maryland Commission directed that the utility was "required to file either a new traditional or MRP rate case at least 210 days prior to the end of the Pilot MRP, with a rate-effective date of the proposed tariffs such that, after the Commission suspension period, the rates would take effect immediately at the close of the final year of the Pilot MRP." *In the Matter of Alternative Rate Plans or Methodologies to Establish New Base Rates for an Electric Company or Gas Company*, Case No. 9618, Order No. 89482 at ¶7 (MdPSC Feb. 4, 2020).

[11] PEPCO (6C): Wolverton Surrebuttal at 16.

[12] PEPCO (4B): McGowan Rebuttal at 24.

Testimony he "notes that the MRP includes a stay-out provision preventing the Company from filing another rate case until early 2022" citing PEPCO (B) at 24:3-11. The cited testimony was part of a section in Company Witness McGowan's Direct Testimony addressing the benefits of the Company's original MRP proposal and stated that it:

> Provides significant time savings and lower administrative costs, over time, due to fewer rate case filings. The Commission will determine rate adjustments for a future period, in this case through January 1, 2022. This allows for less frequent rate case filings, as the Company would not file another rate case until the early 2022-time frame, almost three years after this rate case filing was made. This will also free up time for the Commission to focus on implementing other important policy priorities related to MEDSIS, transportation electrification, and energy efficiency among others.

This is not comparable to the stay-out provision adopted in Order No. 20755. There was no discussion in the record before the Commission of a stay-out provision through the end of calendar year 2023. The Company's original MRP and EMRP proposals covered the three-year period 2020-2022 and did not run through 2023. The record establishes that the "stay-out" the Company was proposing did not prohibit Pepco from filing for a rate increase that became effective once the term of the MRP had ended. Indeed, as discussed above, the Company explicitly noted that it could file an application in 2022, while the MRP was still in effect, but any rates approved in that proceeding would not become effective until 2023, after the MRP had ended. As a result, the stay out period the Company discussed would allow the next MRP period to begin immediately after the end of the prior MRP period without any gap that introduces regulatory lag.

Moreover, as discussed above and in greater detail in Section 3 below, the approach adopted in Order No. 20755 would result in increasing regulatory lag due to the Company's inability to recover for any increased 2023 costs, which undercuts one of the benefits to implementing an MRP, i.e., the timely recovery of a utility's costs due to the reduction of regulatory lag.

2. *The Stay-Out Provision is Contrary to the Public Utilities Act and Well-Settled Precedent.*

The Public Utilities Act allows a public utility to file an application to increase rates at the time of its choosing. Section 34-901(c) of the District of Columbia Official Code provides:

> Any public utility desiring to advance or discontinue any rate or rates may make application to the Commission in writing, stating the advance in or discontinuance of the rate or rates desired, giving the reasons for such advance or discontinuance.

In Formal Case No. 939, the Commission, after quoting this statutory language, held: "The law is clear, therefore, that PEPCO has the statutory right to apply to the Commission to change its rates."[13]

The Commission has also held that it does not have the authority unilaterally to limit public utility rate case filings. For example, in Formal Case No. 890, the Coalition of Concerned Citizens filed a motion for leave to intervene out of time as it was concerned with the frequency of WGL's rate filings and wanted the Commission to designate a supplemental issue regarding limiting WGL's ability to file for a rate increase. The Commission denied the Coalition's petition, explaining:

> In Formal Case No. 785, the Commission had the opportunity to address the issue of its authority to limit rate case filings. In that instance, OPC had filed with the Commission a motion seeking dismissal of the Potomac Electric Power Company's (PEPCO) rate increase request filed only three months after the conclusion of another rate case before the Commission that resulted in PEPCO being awarded higher rates. In denying OPC's motion the Commission quoted from Formal Case No. 748, in which it stated that:
>
>> While the concept of a period of "repose" between rate cases is very appealing in light of the Commission's calendar, we are not persuaded that it constitutes a legal justification for disallowing PEPCO from filing a new application.

[13] Formal Case No. 939, Order No. 10624 at 6 (May 24, 1995). *See also* Formal Case No. 1087, Order No. 16570 at ¶26 (Oct. 3, 2011)("Pepco has a statutory right to file a rate application.").

> Formal Case No. 785, Order No. 7547 at 2 (April 19, 1982)(quoting Formal Case No, 748, Order No. 7219 (November 28, 1980)).[14]

While parties may agree to limit their statutory rights in the context of a settlement agreement's moratorium, for example, such a limitation is inapplicable in this context, as the Commission itself acknowledged last year in Order No. 20375. In rejecting an argument that Pepco's EMRP should be considered a settlement agreement, the Commission explained:

> [W]e note that a settlement agreement is a contract, and is, therefore, construed under general principles of contract law. In order to have a contract, two essential elements must be present: (a) one party must make an offer and (b) the other party must accept it. Here, neither element is present because Pepco did not offer its MRP Enhanced Proposal as a settlement nor has any party formally accepted it as such.[15]

Pepco did agree that under the Re-Opener provision, it would limit the circumstances in which it could seek to reopen the EMRP. The Company did not agree, however, that it would give up its statutory right to seek a rate increase that would become effective following the expiration of the term of the MRP. To the contrary, as noted in Section 1 above, the Company testified that it would likely file an application in 2022 with rates that would become effective in 2023 after the term of the MRP ended. As Company Witness McGowan explained during the virtual evidentiary hearing:

> In a multi-rate plan, three year multi-rate plan there would be a filing every three years. And then the multi-rate plan would cover the three year period in the plan. Since this multi-rate plan was filed in May of 2019, three years after that you would expect another multi-rate plan to be filed, and then every three years after that point.[16]

Commission precedent establishes that the Commission does not have the statutory authority unilaterally to bar Pepco from filing an application that would allow rates to be adjusted

---

14 Formal Case No. 890, Order No. 9482 at n.3 (May 31, 1990).

15 Formal Case No. 1156, Order No. 20375 at ¶11 (July 8, 2020).

16 Formal Case No. 1156, Oct. 26, 2020 Evidentiary Hearing Transcript at 74.

in 2023 once the term of the EMRP has expired. Furthermore, applying a stay-out provision in 2023 would violate the principles of utility regulation that the United States Supreme Court established in *Bluefield*[17] and *Hope*.[18] In *Hope*, the Supreme Court explained:

> From the investor or company point of view, it is important that there be enough revenue not only for operating expenses, but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard, the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[19]

Both the Commission as well as the District of Columbia Court of Appeals have referenced and relied upon the *Bluefield* and *Hope* decisions and the principles espoused in those seminal decisions.[20] If the stay-out provision as adopted in Order No. 20755 were to remain in effect, Pepco would be unable to seek rates that would be effective in 2023 that would allow the Company a reasonable opportunity to recover for any increases in its reasonable and prudently incurred costs.

3. *Options Available to the Company to Mitigate the Stay-Out Provision are Inefficient, Costly and Further Reduce the Incremental Benefits Provided by the MRP.*

Under the stay-out provision the Company is prohibited from filing a new MRP that would allow it to timely recover its incremental costs in 2023. An option theoretically available to the

---

[17] *Bluefield Water Works & Improvement Co. v. Public Service Comm'n*, 262 U.S. 679, 690 (1923) ("Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service of the utility to the public are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property, in violation of the Fourteenth Amendment").

[18] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[19] *Id*. at 603.

[20] *See, e.g., Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 380 A.2d 126, 139 (D.C. 1977)(Vacating and remanding Commission decision that "all but made it certain that Pepco would not be able to earn the rate of return which the Commission found to be necessary to attract capital and maintain investor confidence."); Formal Case No. 1076, Order No. 15710 at ¶43 (Mar. 2, 2010).

Company to recover such costs in 2023 would be to file a new traditional rate case in 2022 with a partially forecasted test year and to separately file its next MRP on January 1, 2023 for the period 2024 through 2026, litigating and seeking approval of both cases back to back. This option, however, would be inefficient, expensive and would be time consuming for all parties and therefore the Company does not view this as a viable alternative.

4. *The Stay-Out Provision Will Reduce Several Incremental Benefits Provided by the MRP and Increase Regulatory Lag and Risk for the Company, Thus Eliminating the Rationale for Reducing Pepco's ROE.*

The imposition of a stay out through 2023 undermines key benefits of the MRP, including those that the Commission relied upon in making findings in this proceeding. As such, the Commission should reconsider its decision in Order No. 20755 and remove the stay-out provision. If the Commission is inclined to keep the stay-out provision, however, a reasonable means to partially address the challenges and issues the stay-out creates for the Company regarding the timely recovery of its incremental capital investments would be to authorize Pepco to establish a regulatory asset to record actual depreciation expense and the return on new capital additions not included in rates during 2023, as measured based on the change in the thirteen-month average plant balance between December 2023 and December 2022. The Company is only requesting to record to the regulatory asset costs associated with new capital investments and will not seek recovery of incremental costs associated with normal ongoing O&M expenses in 2023. This 13-month calculation is consistent with the approach used to calculate the plant in service adopted by the Commission in the EMRP.[21] The Company believes this approach strikes a balance to address the issues created by the 1-year stay-out provision, as it allows the Company an opportunity to

[21] See, e.g., Order No. 20755 at ¶¶177-178.

recover the costs of the investments that have been placed in service for the benefit of customers. This approach would also provide parties an opportunity to issue discovery and review the costs in the Company's next MRP. Moreover, before any such costs are included in customer rates, the Commission would review and approve the prudency of the costs.

One of the purposes of an MRP is to eliminate mismatches in timing in traditional ratemaking so that revenues in a given year better match the cost of service in that time period. The Commission identified this as one of the advantages of MRPs in the AFOR Order.[22] The Commission was not alone in recognizing this benefit of an MRP. The Maryland Commission, in its order adopting an MRP Pilot, explained:

> One of the key benefits of an MRP is rate stability for both the utility and customers during the rate-effective period. Another benefit is reducing regulatory lag for utilities. A well-designed MRP must ultimately balance rate stability and rising utility costs and revenues.[23]

While the Commission may have struck such a balance during the 18-month term of the MRP, the stay-out provision, as adopted, ensures that there is no such balance in 2023. The Company will experience regulatory lag throughout the 12-months of 2023 until such time as new rates can be adopted in 2024. In addition, the stay-out provision will result in a higher rate increase in 2024 since the rates in 2024 will be required to recover two years of capital investments rather than one-year: new capital investments placed in service in 2024 plus the catch-up of the remaining book

---

22 Formal Case No. 1156, Order No. 20273 at ¶17 (Dec. 20, 2019). One of the other advantages the Commission identified was that "customers pay no more or no less than actual cost (this assumes the existence of a reconciliation process)." *Id*. The stay-out provision would also thwart this advantage in 2023, as customers would not be paying for any of Pepco's increased costs and there would be no reconciliation (or other mechanism) to address this cost increase. The change in rates in 2023 approved in Order No. 20755 is the result of the end of the billing offsets implemented by the Commission to mitigate the effect of the rate changes to address increases in Pepco's costs through 2022. It does not reflect any change in the Company's costs in 2023.

23 Case No. 9618, Order No. 89482 at ¶51 (MdPSC Feb. 4, 2020).

value of investments placed in service during 2023. This introduction of regulatory lag is inconsistent with the principles expressed in the AFOR Order and with the overarching justifications for Order No. 20755.

In Order No. 20755, the Commission specifically noted the reduction of financial risk and financial lag as a justification for reducing the Company's return on equity from the current 9.525% to 9.275%.[24] The stay-out provision is contrary to the Commission's rationale as it results in a mismatch in timing between the Company's 2023 costs of operations and its recovery of those costs. Thus, rather than reducing regulatory lag and financial risk, the stay-out provision will increase both for 2023.

For all the foregoing reasons, the Commission should reconsider its decision in Order No. 20755 and either (1) eliminate the stay-out provision, or (2) allow the Company to establish a regulatory asset to record actual depreciation expense and the return on new capital additions not included in rates during 2023, as measured based on the change in the thirteen-month average plant balance between December 2023 and December 2022.

B. The Treatment of PHISCO Deficient Deferred Income Tax in Order No. 20755 Is Arbitrary and Capricious.

As a result of the reduction of the federal corporate income tax rate from 35% to 21% in the *Tax Cuts and Jobs Act of 2017* ("TCJA"),[25] PHISCO appropriately re-measured its accumulated deferred income taxes ("ADIT") balance related to PHISCO costs. These excess deferred income tax ("EDIT") liability and deficient deferred income tax ("DDIT") asset balances

---

[24] Order No. 20755 at ¶476(d)(vi).

[25] Public Law 115-97 (Dec. 22, 2017).

were then appropriately allocated to the PHI utilities, including Pepco, in accordance with the PHISCO Service Agreement and the Company's Cost Allocation Manual.

As Company Witness Ziminsky explained, the PHISCO balances that were created due to the TCJA were comprised of (i) a property-related EDIT liability, generated primarily by the underlying tax depreciation (accelerated) versus book depreciation (straight-line) timing differences on PHISCO property; and (ii) a non-property-related DDIT asset, generated primarily by payroll-related timing differences, where PHISCO has deducted accrued expense on its books and, for tax purposes, it must deduct the cash payment.[26] Both of these elements are non-protected, i.e., their amortization is not subject to the normalization requirements of the Internal Revenue Code and applicable regulations.

In Order No. 20755, the Commission included in its revenue requirement determination the liability but disallowed the asset. The Commission stated: "while the PHISCO plant assets and property related ADIT balances are authorized in rate base, the PHISCO non-property related ADIT balances are not."[27] The Commission explained that "PHISCO non-property ADIT is not a component of rate base."[28]

The decision on this point is facially deficient, as the ADIT on certain PHISCO non-property costs ***are*** reflected in rate base. Both the DDIT asset and EDIT liability at issue arise as a result of the revaluation PHISCO appropriately performed to reflect the lower corporate income tax rates adopted by the TCJA. While they may relate to property in the case of the liability and

---

[26] PEPCO (D): Ziminsky Direct at 37. The Company originally had proposed a DDIT asset of $6.834 million but this was reduced to $5.853 million in Rebuttal Testimony. PEPCO (4D): Ziminsky Rebuttal at 21.

[27] Order No. 20755 at ¶376.

[28] *Id*.

non-property in the case of the asset, this is a distinction without relevance to the issue at hand. ***All*** of the costs included in the DDIT asset, as revised in Company Witness Ziminsky's Rebuttal Testimony and its accompanying compliance filing update, are costs that are appropriately recoverable in customer rates based on Commission precedent for recovery of such costs.[29]

For example, ratemaking adjustment ("RMA") 10, which was unopposed and which the Commission found in Order No. 20755 to be just and reasonable,[30] includes (non-protected) PHISCO pension and OPEB expenses. The RMA also includes adjustments to the PHISCO (non-property) prepaid pension asset, as well the PHISCO (non-property) OPEB liability (which are also included in Pepco's unadjusted rate base on an allocated basis). These amounts are included on a "net-of-tax" basis, meaning that they are net of PHISCO (non-property) ADIT. This means that the Commission's statement that "PHISCO non-property ADIT is not a component of rate base" is demonstrably incorrect, at least as it relates to PHISCO pension and OPEB costs. As

[29] Although the PHISCO Non-Property DDIT included $9,545,154 in SERP, none of this amount was included in the allocation to Pepco DC Distribution as Commission precedent does not support the recovery of SERP in customers' rates. *See* Formal Case No. 1139, Order 18846 at ¶249. As was detailed in the Company's 21-Day Compliance Filing for Rebuttal Testimony ("Compliance Filing") at Section 206.9 Attachment B29 page 3 of 5, the other elements that made up the PHISCO DDIT liability balance, some portion of which were allocated to Pepco DC Distribution and included in RMA 29 were: Long-term Incentive Plan ("LTIP"); OPEB; Pension; Benefits and Other Timing Differences. The largest category, Benefits, consisted of the following sub-elements: Worker's Compensation; Disability; Severance; Retention; Vacation; Deferred Compensation; and Edison Place Lease Accrual. The Compliance Filing indicated that the Edison Place Lease Accrual accounted for almost 50% of the amount in the Benefits category. With the exception of the retention and deferred compensation payments, all of these sub elements are appropriately included in customers' rates. As was detailed in the Compliance Filing, amounts included in the updated RMA-29 included in Rebuttal Testimony removed the amounts included in the Retention and Deferred Compensation sub-elements and also reduced the Severance balance so it only reflected non-executive severances consistent with the approach the Commission approved in connection with the Cost to Achieve regulatory asset. Thus, with the small adjustment to the LTIP to comport with Commission precedent, all of the amounts included in RMA-29 were appropriately reflected in customers' rates. Indeed, OPC Witness Ramas in her surrebuttal testimony did not dispute that the modifications made to RMA-29 in Company Witness Ziminsky's Rebuttal Testimony removed items associated with costs that had not been recoverable in past proceedings in the District. *See* OPC (2B): Ramas Surrebuttal at 25-26.

[30] Order No. 20755 at ¶¶257-258.

such, at least in the case of the PHISCO pension and OPEB non-protected DDIT asset, the associated ADIT is in fact reflected in rate base as a reduction to customer rates. Thus, the determination in Order No. 20755 that "PHISCO non-property ADIT is not a component of rate base," which was the basis for the Commission's disallowance of the PHISCO non-property-related excess deferred tax asset, is inaccurate and this error should be corrected. As noted in testimony, however, the issue at hand should be whether the underlying costs are reflected in customer rates. This was true of the Pepco non-property EDIT liability that was included as part of the FC 1150/1151 Settlement Agreement that the Commission approved, and it is true of the PHISCO non-property DDIT asset at question here.

In Case No. 9602, the Maryland Commission approved both components of a similar adjustment. Adjustment 27 in that proceeding addressed the amortization of PHISCO DDIT. That adjustment was comprised of a property-related excess deferred tax liability and a non-property-related excess deferred tax asset. The adjustment was unopposed.[31]

Ultimately, it is arbitrary and capricious for the Commission to accept one aspect of the re-measurement of PHISCO's ADIT balance—the property-related DDIT liability—but deny the other, the non-property-related EDIT asset.[32] The effect of this mismatch is to distort the actual effects of the tax changes and the adjustments necessary accurately to reflect them, and inappropriately to exclude EDIT asset amounts from being reflected in customer rates. The Commission should accept Pepco's treatment that recognizes both components. However, the

---

[31] Case No. 9602, Proposed Order at 11 (July 9, 2019), affirmed by Order No. 89227 (Aug. 12, 2019).

[32] *See, e.g.*, Formal Case No. 1053, Order No. 14832 at ¶9 (June 13, 2008)("both the prepaid pension asset and the OPEB liability result from the existence of a differential between the Company's obligation regarding future benefits owed to current employees and the level of funding for those benefits, and consequently ***both should be included in rate base with the liability offsetting the asset***.")(emphasis added).

Commission should be consistent in its application of its policy on how to treat TCJA-related assets and liabilities and if it elects to reject one, it should reject both to be consistent.

C. Order No. 20755's Adjustment of Some but Not All EDIT Balances Is Arbitrary and Results in the Customers Erroneously Receiving Certain Tax Benefits Resulting from the TCJA Twice.

Consistent with the Commission's decision in Order No. 20293, the Company updated RMA 26 to reflect the actual 13-month averages for Non-Protected Property and Non-Protected Non-Property EDIT. The Commission approved this in Order No. 20755.[33] However, with regard to the protected property EDIT balances and the tax flow through adjustment, the Commission neglected to reflect the amounts reflected in the Non-Unanimous Full Settlement Agreement and Stipulation approved in Formal Case Nos. 1150 and 1151 ("FC 1150/1151 Settlement Agreement").

As described in Company Witness Ziminsky's Rebuttal Testimony, the authorized treatment in Order No. 20755, results in "a double counting of EDIT benefits by providing the very same benefits in two places, through 1) the non-protected EDIT as well as 2) the protected EDIT and flow through adjustment."[34] Further, Table 1 in Company Witness Ziminsky's Second Supplemental Direct Testimony showed the various EDIT amounts included in subsequent Pepco filings.[35] Table 1 is copied below.[36]

33 Order No. 20755 at ¶348.

34 PEPCO (4D): Ziminsky Rebuttal at 17.

35 PEPCO (3D): Ziminsky Second Supp. Direct at 2.

36 The header in the last column of Table 1 has been updated to reflect that PEPCO (3D) showed the Company's final position on this issue.

Table 1	**FC 1150/1151 Settlement**		**FC 1156 Supplemental Direct**		**FC 1156 Second Supplemental Direct (Final Position)**	
	FC 1150/ 1151 Settlement	**Flow Back Period**	**FC 1156 PEPCO (2D)-1 (9/16/19)**	**Flow Back Period**	**FC 1156 PEPCO (3D)-1 (2/20/20)**	**Flow Back Period**
Protected Property-Related (ARAM)	**$134.1**	**ARAM**	$142.1	ARAM	**$134.1**	**ARAM**
Non-Protected Property-Related (10 Yrs)			$109.2	10 Years		
Non-Protected Property-Related Flow Through			$17.0	Useful Life		
Total Non-Protected Property-Related	**$137.5**	**10 Years**	$126.2		**$137.5**	**10 Years**
Non-Protected Non-Property-Related	**$20.1**	**5 Years**	$20.2	5 Years	**$20.1**	**5 Years**
Total EDIT Benefits	**$291.7**		$288.5		**$291.7**	

Order No. 20755 has the effect of combining amounts from the various columns in Table 1, creating a hodgepodge of EDIT benefits and a clear double-counting of amounts to be refunded to customers. Specifically, Order No. 20755 included the amounts, which are highlighted in the table above, totaling $316.7 million of EDIT benefits to be provided to District of Columbia customers. This is approximately $25 million more than the $291.7 million amount referenced in Company Witness Ziminsky's Supplemental Direct Testimony in Formal Case No. 1150 in

PEPCO (2C)-1, RMA 39.[37] That $25 million reflects benefits already conferred on District customers, thus representing a double-counting of refunded amounts.

The Commission's treatment of this issue is arbitrary and capricious. In Order No. 20293, the Commission directed Pepco to revise its Application in this proceeding to conform to the FC 1150/1151 Settlement Agreement and provide the $291.7 million of EDIT benefits as agreed to by the parties.[38] Company Witness Ziminsky in his Second Supplemental Direct Testimony complied with the Commission's directive and detailed that the EDIT balances used complied precisely with the FC 1150/1151 Settlement Agreement.[39]

In Order No. 20755, although the Commission acknowledged that the $134.1 million protected property EDIT balance used in Company Witness Ziminsky's Second Supplemental Direct Testimony would "match the value in the Formal Case Nos. 1150 and 1151 filing," the Commission nonetheless held that this balance should not be used because it would "make a difficult-to-verify calculation more intractable for oversight."[40] Instead, Pepco was directed to use the actual book balances and PP credits computed by the Company's tax accounting system"[41] the very source of the numbers that the Commission ***directed Pepco not to use*** in Order No. 20293. The Commission reasoned that because there was no explicit statement in the FC 1150/1151 Settlement Agreement regarding the protected property balance, it was free to use this balance.[42]

---

37 This is the exact same information as provided Formal Case No. 1151 and Formal Case No. 1156.

38 Order No. 20293 at ¶¶1, 25.

39 *See* PEPCO (3D): Ziminsky Second Supp. Direct at 2. *See also* Pepco Reply Brief at 103-108.

40 Order No. 20755 at ¶349.

41 *Id*.

42 *Id*.

However, the record in this proceeding is clear that the balance set forth in PEPCO (2D)-1 was ***not*** in existence at the time the FC 1150/1151 Settlement Agreement was entered into – that balance was not filed until September 16, 2019, thus it clearly was not relied upon by the parties to the Settlement Agreement. The Commission's use of such a protected property EDIT balance is therefore arbitrary and capricious and should be reversed. In light of its determination in Order No. 20293, the Commission should consistently use the balances that were in the record in Formal Case No. 1150 and that were the basis for the FC 1150/1151 Settlement Agreement. That balance for protected property EDIT is the $134.1 million balance used in Company Witness Ziminsky's Second Supplemental Direct Testimony.

The Commission also faults the Company for failing to "recognize the separate treatment for tax flow-through items during the [FC 1150/1151] settlement negotiations."[43] While the Commission concedes that tax flow-through is a "well-established ratemaking concept which ***all*** Parties knew or should have known about when they negotiated the Settlement Agreement,"[44] the Commission's directive nonetheless imposes an unreasonable and confiscatory result on the Company. The failure to recognize the separate treatment for tax flow through was a failure of all the parties to the FC 1150/1151 Settlement since all were similarly well aware of the normal treatment of tax flow-through items. Rather than penalize Pepco for a collective failure of the parties, the Commission should stand by the "well-established ratemaking concept" and allow the use of the flow-through tax treatment.

---

43 *Id.* Pepco had comprehensively addressed why the Adjustment to Flow-Through presented in Company Witness Ziminsky's Second Supplemental Direct Testimony was necessary in order to avoid double counting. PEPCO (3D): Ziminsky Second Supp. Direct at 3-4; Pepco Reply Brief at 108-110.

44 Order No. 20755 at ¶349 (emphasis added).

The effect of not allowing use of the flow-through tax treatment is that customers would receive benefits in excess of that the parties negotiated in the FC 1150/1151 Settlement. Such an approach is erroneous and should be set aside. ***No party disputes that under Pepco's proposal the full amount of the TCJA tax benefit associated with the non-protected property EDIT will be returned to customers, which was the purpose of the FC 1150/1151 Settlement***. Providing benefits that are ***in excess*** of that amount is inappropriate. The Company, therefore, requests that the Commission also reconsider its decision in Order No. 20755 that provides customers double the non-protected property tax benefits to which they are entitled.

D. <u>The Commission Should Clarify that the Reconciliation Process Encompasses any Difference Between the Actual Load-Driven and Customer-Driven Capital Additions the Company Is Required to Make and the Levels Assumed by the Commission in Order No. 20755.</u>

In Order No. 20755, in addition to the $60 million deferral in capital spending that Pepco proposed as part of its EMRP, the Commission assumed a further reduction in additions to Electric Plant in Service ("EPIS") of $25 million in each of 2021 and 2022 from customer-driven and load-driven plant additions.[45] The Commission's decision was based on its belief that reductions in business activity resulting from the COVID-19 pandemic will impact such expenditures.[46] It is important to recognize, however, that the Company does not control such activity. The level of business activity in the District of Columbia over the next few years will be driven by outside economic forces and market perceptions. Moreover, the Company does not have the discretion to defer or deny customer-driven projects, which are, as the name implies, driven by requests from individual customers for new services, relocation of facilities due to street modifications, and other

45 Order No. 20755 at ¶294.

46 *Id*. at ¶292.

customer requested activities. As businesses, public entities, and individuals move into and expand within the District of Columbia, Pepco must accommodate customer needs by upgrading infrastructure and providing new or expanded services in both existing and new locations.[47] Similarly, load-growth projects respond to increases in load at existing customer sites as well as the aggregate impact of load growth that necessitate system upgrades beyond the point of interconnection.[48] Such projects are necessary to ensure reliable service to customers.

Because these two areas of capital spending are ultimately responding to market forces over which the Company has no control and therefore may differ from the levels the Commission established in Order No. 20755 and to avoid any ambiguity, Pepco requests that the Commission clarify that if capital additions for load-driven and/or customer-driven projects are higher or lower than the levels the Commission assumed for purposes of Order No. 20755, Pepco will be able to address the differential in capital spending in the reconciliation process approved in Order No. 20755.[49] The Company's approach proposed herein is consistent with the MRP framework adopted by the Maryland Commission.[50]

---

[47] PEPCO (I)-1 at 63.

[48] *Id*.

[49] If the level of capital additions is higher, the Company would be required to establish that the level of capital expenditures was reasonable.

[50] Case No. 9618, Order No. 89482 at ¶7 (MdPSC Feb. 4, 2020)("Any over- or under- collections determined from the consolidated reconciliation filing will be flowed through base rates in the rate-effective period as part of the new rate case.") *See also, Application of Baltimore Gas and Electric Company for an Electric and Gas Multi-Year Plan,* Case No. 9645, Order No. 89678 at ¶111 (MdPSC Dec. 16, 2020) (Reconciliation process to be held at conclusion of MRP, where difference between forecasted and actual amounts will be evaluated).

PEPCO'S CONSENT TO ORDER NO. 20755 NOT BEING STAYED.

Section 34-604(b) of the District of Columbia Official Code provides: "The filing of an application for reconsideration stays the execution of Commission order until the final Commission action upon the application, provided that the utility may consent, in writing, to the order not being stayed during the pendency of the Commission's final action." Pepco hereby consents to Order No. 20755 not being stayed.

CONCLUSION

Pepco respectfully requests that the Commission reconsider and clarify the referenced portions of Order No. 20755 as set forth in this Application, and specifically:

1. The Commission should either (a) eliminate the stay-out provision, or (b) allow the Company to establish a regulatory asset to record actual depreciation expense and the return on new capital additions not included in rates during 2023, as measured based on the change in the thirteen-month average plant balance between December 2023 and December 2022 for review and recovery in Pepco's next MRP..

2. The Commission should accept both the non-protected property EDIT liability as well as non-protected non-property DDIT asset that resulted from PHISCO's re-measurement of its accumulated deferred income tax balances as a result of the reduction of the federal corporate income tax rate from 35% to 21% in the TCJA.

3. The Commission should reconsider its decision in Order No. 20755 regarding the protected property EDIT balances and the tax flow through adjustment and reflect the amounts reflected in the FC 1150/1151 Settlement Agreement as otherwise customers will receive a non-protected property tax benefit in excess of that to which they are entitled.

4. The Commission should clarify that if the Company's capital additions for load-driven and/or customer-driven projects are higher or lower than the levels the Commission assumed for purposes of Order No. 20755, Pepco will be able to address the differential in capital spending in the reconciliation process approved in Order No. 20755.

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

By: /s/ *Kim F. Hassan*
Kim F. Hassan
Associate General Counsel

Kim F. Hassan, DC Bar No. 489367
Andrea H. Harper, DC Bar No. 483246
Dennis Jamouneau, DC Bar No. 983357

701 Ninth Street, N.W., 9th Floor
Washington, D.C. 20068

Counsel for Potomac Electric Power Company

July 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that a copy of Potomac Electric Power Company's Application for Reconsideration and Clarification of Order No. 20755 has been served this July 8, 2021 on:

Ms. Brinda Westbrook-Sedgwick
Commission Secretary
Public Service Commission
of the District of Columbia
1325 G Street, N.W.
Suite 800
Washington, DC 20005
bwestbrook@psc.dc.gov

Sandra Mattavous-Frye, Esq.
Anjali Patel, Esq.
People's Counsel
Office of the People's Counsel
1133 15th Street, NW, Suite 500
Washington, DC 20005
apatel@opc-dc.gov
smfrye@opc-dc.gov

Kimberly Lincoln-Stewart, Esq.
Attorney Advisor
Public Service Commission
of the District of Columbia
1325 G Street, N.W.
Suite 800
Washington, DC 20005
kstewart@psc.dc.gov

Noel Antonio, Esq.
Attorney Advisor
Public Service Commission
of the District of Columbia
1325 G Street, N.W.
Suite 800
Washington, DC 20005
nantonio@psc.dc.gov

Craig Berry, Esq.
Attorney Advisor
Public Service Commission
of the District of Columbia
1325 G Street, N.W.
Suite 800
Washington, DC 20005
cberry@psc.dc.gov

Frann G. Francis, Esq.
Senior Vice President and General Counsel
AOBA
1025 Connecticut Avenue, NW
Suite 1005
Washington, DC 20036
ffrancis@aoba-metro.org

Brian Caldwell, Esq.
Assistant Attorney General
DC Government
441 4th Street, NW
Suite 600-S
Washington, DC 20001
Brian.caldwell@dc.gov

Kristi Singleton, Esq.
Assistant General Counsel
The U.S. General Services Administration
1800 F Street, NW #2016
Washington, DC 20405
Kristi.singleton@gsa.gov

Dennis Goins
Potomac Management Group
P.O. Box 30225
Alexandria, VA 22301
dgoinspmg@verizon.net

Lariza Sepulveda
Economist
Public Utility Rates and Regulations
Energy Division
1800 F Street, NW, Room 5122
Washington, DC 20405
Lariza.sepulveda@gsa.gov

Cathy Thurston-Seignious, Esq.
Supervisor, Administrative & Associate General Counsel
Washington Gas
1000 Maine Avenue, SW, Suite 700
Washington, DC 20024
Cthurston-seignious@washgas.com

Bruce R. Oliver
Revilo Hill Associates, Inc.
7103 Laketree Drive
Fairfax Station, VA 22039
revilohill@verizon.net

Lucas R. Aubrey
Logan J. Place
Bart Sheard
Sherman Dunn, P.C.
900 Seventh Street, NW, Suite 1000
Washington, DC 20001
aubrey@shermandunn.com
place@shermandunn.com
sheard@shermandunn.com

Brian J. Petruska
General Counsel
LIUNA Mid-Atlantic Region
11951 Freedom Drive, Suite 310
Reston, VA 20190
bpetruska@maliuna.org

Gabriele Ulbig
Associate Counsel
LIUNA Mid-Atlantic Region
11951 Freedom Drive, Suite 310
Reston, VA 20190
gulbig@maliuna.org

May Va Lor
Corporate Affairs Department
LIUNA
905 16th Street, NW
Washington, DC 20006
mlor@liuna.org

Michael R. Engleman, Esq.
Engleman Fallon, PLLC
1717 K Street, NW, Suite 900
Washington, DC 20006
mengleman@efenergylaw.com

James Birkelund
Small Business Utility Advocates
548 Market St, Suite 11200
San Francisco, CA 94104
james@utilityadvocates,org

Brian R. Greene
Eric J. Wallace
1807 Libbie Avenue, Suite 102
Richmond, VA 23226
bgreene@greenehurlocker.com
ewallace@greenehurlocker.com

Michael Converse
Real Property Division
General Services Administration
1800 F Street, Room 2012
Washington, DC 20405
Michael.converse@gsa.gov

John Adragna, Esq.
Kevin Conoscenti, Esq.
McCarter & English, LLP
1015 Fifteenth Street, NW
Twelfth Floor
Washington, DC 20005
jadragna@mccarter.com
kconoscenti@mccarter.com

Scott Strauss, Esq.
Jeff Schwarz, Esq.
Spiegel & McDiarmid, LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
Scott.strauss@spiegelmcd.com
Jeffrey.schwarz@spiegelmcd.com

Jason Gray, Esq.
John Coyle, Esq.
Duncan & Allen
1730 Rhode Island Ave, NW, Suite 700
Washington, DC 20036
jtg@duncanallen.com
jpc@duncanallen.com

Amy McDonnell, Esq.
Ken Holmboe, Esq.
Duncan & Allen
1730 Rhode Island Ave, NW, Suite 700
Washington, DC 20036
aem@duncanallen.com
kh@duncanallenc.om

Adrienne Clair, Esq.
Nicole Allen, Esq.
Thompson Coburn, LLP
1909 K Street, NW,Suite 600
Washington, DC 20006
aclair@thompsoncoburn.com
nallen@thompsoncoburn.com

Kayla Grant, Esq.
Thompson Coburn, LLP
1909 K Street, NW,Suite 600
Washington, DC 20006
kgrant@thompsoncoburn.com

Bhaveeta Mody, Esq.
Kristen Connolly McCullough, Esq.
Duncan, Weinberg, Genzer & Pembroke, P.C.
1667 K Street, N W, Suite 700
Washington, DC 20006
bkm@dwgp.com
kc@dwgp.com

Eli Eilbott, Esq.
Adriana Velez Leon, Esq.
Duncan, Weinberg, Genzer & Pembroke, P.C.
1667 K Street, N W, Suite 700
Washington, DC 20006
ede@dwgp.com
avl@dwgp.com

Michael Deupree
Taylor Deshotels
Taylor Moragas
Acadian Consulting Group, LLC
5800 One Perkins Place Drive, Suite 5-F
Baton Rouge, Louisiana 70808

Michael Gorman
Brian Andrews
Sally Wilhelms
Miranda Cotton
Brubaker &- Associates, Inc
16690 Swingley Ridge Road, Suite 140
Chesterfield, MO 63017

Donna M. Ramas
4654 Driftwood Drive
Commerce Township, Michigan 43832

John Cochrane
Maryanne Hatch
Zack Campbell
Ian McGinnis
FTI Consulting, Inc.
200 State Street, 9th Floor
Boston, MA 02109

Keving Mara
Linda Gray
John Hutts
Ryan Johnson
Jacob Thomas
Dan Wittliff
Jack Madden
Megan Morello
Paul Wielgus
GDS Associates, Inc.
1850 Parkway Place, Suite 800
Marietta, GA 30067

Kevin O'Donnell
Nova Energy Consultants, Inc.
1350 SE Maynard Road
Suite 101
Cary, NC 27511

Meena Gowda
Deputy General Counsel
District of Columbia Water and Sewer Authority
5000 Overlook Avenue, S.W.
Washington, D.C. 20032

Brian Petruska
General Counsel
LIUNA Mid Atlantic Regional
11951 Freedom Drive, RM 310
Reston, VA 20190
bpetruska@maliuna.org

/s/ *Kim F. Hassan*
Kim Hassan