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People's Counsel

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, D.C. 20005

Re: Formal Case No. 1156, *In the Matter of the Application of the Potomac Electric Power Company for Authority to Implement a Multiyear Rate Plan for Electric Distribution Service in the District of Columbia*

Dear Ms. Westbrook-Sedgwick:

Attached for filing in the above-referenced proceeding, please find *the Office of the People's Counsel for the District Of Columbia's Request for Reconsideration and Clarification of Order No. 20755 and Comments on Pepco's Tariff Compliance Filing*.

If there are any questions regarding this matter, please contact me at apatel@opc-dc.gov or 202.727.3071.

Sincerely,

/s/ Anjali G. Patel

Anjali G. Patel
Senior Assistant People's Counsel

Enclosure
cc: 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 Implement a Multiyear	§	**Formal Case No. 1156**
Rate Plan for Electric Distribution	§	
Service in the District of Columbia	§	

THE OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA'S REQUEST FOR RECONSIDERATION AND CLARIFICATION OF ORDER NO. 20755 AND COMMENTS ON PEPCO'S TARIFF COMPLIANCE FILING

1133 15th St., NW
Washington, D.C. 20005
202-727-3071

July 8, 2020

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I. INTRODUCTION

Pursuant to D.C. Code § 34-604(b) and Rule 140.1 of the Public Service Commission of the District of Columbia's ("PSC" or "Commission")[1] Rules of Practice and Procedure, the Office of the People's Counsel for the District of Columbia ("Office" or "OPC"), the statutory representative of District of Columbia ("District") ratepayers with respect to utility matters,[2] hereby respectfully seeks rehearing and clarification of the Order No. 20755[3] in which the Commission authorized Potomac Electric Power Company ("Pepco" or "Company") to implement an alternative form of ratemaking, which the Commission calls "a Modified Enhanced Multiyear Plan" ("Modified EMRP"), and a $108.6 million rate increase. The filing of this application for reconsideration acts as a stay upon the execution of the Order.[4]

The case before the Commission comes at a time when the electric industry, the District of Columbia and indeed, the nation are facing unprecedented challenges. Climate Change, a devastating global pandemic; and new statutory and legal mandates enacted by the Council of the District of Columbia that apply to the Commission and OPC, are the new norms.[5] While modifications to the regulatory regime may be warranted, regulators must continue to address this unique set of circumstances in a manner that preserves the bedrock regulatory principles of just,

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1 15 DCMR § 140.1.

2 D.C. Code § 34-804 (Lexis 2019).

3 *Formal Case No. 1156*, *In the Matter of the Application of the Potomac Electric Power Company for Authority to Implement a Multiyear Rate Plan for Electric Distribution Service in the District of Columbia ("Formal Case No. 1156")*, Order No. 20755, rel. June 8, 2020 ("Order No. 20755" or "Order").

4 D.C. Code § 34-604(b); 15 DCMR ¶ 140.7. Because the Order includes a July 1, 2021 rate effective date, refunds may be warranted based on the decision made in the any final order by the Commission or a court.

5 *See, e.g.* D.C. Code § 34-808.02.

reasonable, and affordable rates and services;[6] and their decision must be in the public interest.[7] At bare minimum, the Commission must base its decision on a fully supported evidentiary record and fully and clearly articulate why it has taken a particular action.[8]

Unfortunately, Order 20755 does not meet its mark. It contains numerous legal and factual errors related to the adoption of the Modified EMRP and the approved rate increase, fails to explain why it is taking a particular action, and arbitrarily introduces facts that are not in the record. Further, with little rhyme or reason, it accepts bald assertions from the utility and discounts the positions of all non-utility parties who collectively opposed the adoption of Pepco's MRPs and the overwhelming number of public witnesses that asked the Commission to reject Pepco's proposal. The Order also includes statements and calculations that must be clarified in order to ensure that ratepayers rights are protected and assure the public that the Order has no intention of misleading consumers.

Formal Case No. 1156 is a landmark public interest case. The Commission's final decision will have a long-term impact on the regulatory process in the District, and importantly, on the conduct of future Commissions. Advancing a corporate agenda must not take precedence over the public's rights and entitlements. For these reasons, and as more fully discussed below, OPC respectfully requests that the Commission reconsider its Order, reject the Modified EMRP, and adopt the recommendations provided herein and OPC's earlier filings in order to reach a just and reasonable rate that is in the public interest.

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6 D.C. Code § 34-901.

7 *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 715, 607 (1942); *see id*., 315 U.S. at 608.

8 *Washington Pub. Interest Org. v. Pub. Serv. Comm'n*, 393 A.2d 71, 76-77 (D.C. 1978), *supplemental opinion and dissent*, 404 A.2d 541 (D.C. 1979), *cert. denied, sub nom Potomac Electric Power Co. v. Pub. Serv. Comm'n*, 444 U.S. 926 (1979); *see also id*., 393 A.2d at 86.

II. EXECUTIVE SUMMARY

Order No. 20755, like the rate case application that it addresses, is unprecedented in many respects. In issuing the Order, the Commission was asked to rule on three different rate proposals from the Company, a traditional test year and the first multiyear rate plan proposals to be considered in the District— an Original Multiyear Rate Plan proposal ("Original MRP") and an Enhanced Multiyear Rate Plan proposal ("MRP"). This is the first litigated rate case order issued by the Commission under its statutory mandate to consider the impacts of the application on "global climate change and the District's public climate commitments."[9] And most importantly, there is the fact that the worldwide COVID-19 pandemic hit the District and the nation in the midst of litigating the case, and the Order had to contend with the impacts of the pandemic on Pepco's requests.

Though dealing with unprecedented conditions, the Order must still comply with the law. Indeed, as a creature of statute, the Commission's power to act on Pepco's rate case application is controlled by its authorizing statute[10] which requires that any change to a utility's rate must be reasonable, fair, and just,[11] and be backed by findings of fact and conclusions of law that are supported by and in accordance with the reliable, probative, and substantial evidence.[12] Courts

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[9] D.C. Code § 34-808.02. As referenced in Order No. 20755 (¶¶ 151, 470), the Commission recently issued a decision in Formal Case No. 1162 on Washington Gas Light Company's request to increase rates but that case involved a traditional rate case application and the Order approved a settlement without modification. *Formal Case No. 1162*, *In the Matter of the Application of Washington Gas Light Company for Authority to Increase Existing Rates and Charges for Gas Service ("Formal Case No. 1162")*, Order No. 20705, rel. Feb. 24, 2021.

[10] *See, e.g. Chesapeake & Potomac Tel. Co. v. Public Service Com.*, 378 A.2d 1085, 1089 (D.C. 1977)("The Commission is a creature of statute and has only those powers given to it by statute.")(internal citations omitted).

[11] D.C. Code § 34-901; *See* also D.C. Code § 1-204.93 (Lexis 2020) (The Commission must "insure that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just, and nondiscriminatory.").

[12] D.C. Code § 2-509.

have made clear that the Commission may not grant a utility's rate request unless it can be shown with substantial evidence that the request is reasonable for consumers.[13] And the Supreme Court has mandated that "[t]he consumer interest cannot be disregarded in determining what is a 'just and reasonable' rate"[14] and that "in prescribing rates to be charged by a corporation . . . stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored."[15]

Furthermore, if deciding whether to adopt an alternative form of ratemaking, as occurred in Order No. 20755, the Commission's governing statute also requires that such action may not be taken unless it can be shown with substantial evidence that the alternative form of regulation: (1) protects consumers, (2) ensures the quality, availability, and reliability of regulated services, and (3) is in the interest of the public, including the electric company's shareholders.[16] While such a showing must be made *in addition to* the finding that the resulting rate is just and reasonable, similar to the just and reasonable calculus, the alternative form of regulation public interest determination must result in benefits to consumers, not just to the applicant utility.[17] Moreover, the public interest determination cannot be made in a vacuum; rather, it must account for the statutorily directed considerations of "the economy of the District. . .[and] the preservation of

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[13] "Equitable factors from the ratepayer perspective. . .are equally a part of the just and reasonable rate calculus." *Washington Pub. Interest Org.*, 393 A.2d at 76 ("[T]he end of public utility regulation has been recognized to be protection of consumers from exorbitant rates.") (quoting *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950)).

[14] *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 715, 607 (1942).

[15] *Id*., 315 U.S. at 608.

[16] D.C. Code § 34-1504(d)(2).

[17] *See, e.g.,* Order No. 20755 ¶ 2 (explaining that the Commission's "focus in considering any alternative mechanism will include a review of the benefits that accrue to customers as opposed to solely focusing on the utility.")

environmental quality, including effects on global climate change and the District's public climate commitments."[18]

As the statutory representative of the District's ratepayers, OPC began this case open to examining whether Pepco's MRP proposal offered real consumer benefits. In order to effectuate more informed decision-making, OPC also proposed that the Commission hold a technical conference and develop a framework to evaluate whether an alternative form of ratemaking proposal meets the statutory criteria,[19] which ultimately led to the issuance of Order No. 20273.[20]

But after spending eighteen months fighting for due process, and reviewing and addressing at length Pepco's shifting applications,[21] OPC reached the same conclusion as all of the active intervenor parties that the record evidence does not support adopting either of Pepco's MRP proposals. The proposals neither protect nor provide benefits to consumers, especially in light of the devastating economic impacts the COVID-19 pandemic and the uncertainty surrounding the impacts of the pandemic on energy usage in the near future, nor do they support the District's ambitious climate goals.[22] Commissioner Beverly, one of two Commissioners present through the eighteen months of litigation, agreed, issuing a strongly worded statement in the fall of 2020

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[18] D.C. Code § 34-808.02.

[19] *See Formal Case No. 1156*, Order No. 20204, ¶¶ 17, 32, rel. Aug. 9, 2019; *see also* Minutes from the June 28, 2019 Status Conference and Parties' Telephonic Conference on July 1, 2019 at 3-5 & Attachment 2, n.8, filed July 8, 2019.

[20] *Formal Case No. 1156,* Order No. 20273, ¶ 1, rel. Dec. 20. 2019 ("AFOR Order or Order No. 20273").

[21] *See generally, Formal Case No. 1156*, Initial Brief of the Office of the People's Counsel for the District of Columbia, at 9-15, filed Dec. 9, 2020 ("OPC Initial Br.").

[22] *See, e.g., Formal Case No. 1156*, Initial Post-Hearing Brief of the Apartment and Office Building Association of Metropolitan Washington, filed Dec, 9, 2020 at 92-93, *Formal Case No. 1156*, Initial Brief of the Baltimore-Washington Construction and Public Employees Laborers' District Council, filed Dec. 9, 2020 at 30, *Formal Case No. 1156,* Initial Post-Hearing Brief of the District of Columbia Government, filed Dec. 9, 2020 at 33-34, and *Formal Case No. 1156*, Initial Brief of the United States General Services Administration, filed Dec. 9, 2020 at 50.

against the adoption of the MRPs[23] and eventually dissenting from the majority decision.

In Order No. 20755, the majority of the Commission,[24] however, opts to follow a different direction. Order No. 20755 rightly rejects Pepco's Original MRP,[25] but then incorrectly adopts a modified version of Pepco's EMRP and authorizes a $108.6 million rate increase between July 1, 2021 and January 1, 2022 with partial offsets, and the full $108.6 million increase in 2023 with no offsets. OPC supports some of the modifications that the Commission makes to Pepco's EMRP proposal as they are needed to mitigate the most egregious aspects of Pepco's proposal. These modifications include a reduction in Pepco's inflated return on equity request to an authorized rate of 9.275%, the adoption of certain OPC proposed ratemaking adjustments to correct rate base, a more equitable allocation of the rate increase to the residential class, and the rejection of Pepco's proposed financial PIMs.[26]

But even with these corrections, the Commission's modified EMRP, still fails to meet the statutory standard. The premise of Pepco's multi-year rate plan is the belief that the Company and the Commission can predict with considerable confidence the actions that will be taken by Pepco during the MRP period. But the uncertainties currently facing the District and its consumers as we continue to experience and navigate the impacts of the pandemic make the approval of the modified EMRP—even on a "pilot" basis—unjust and unreasonable. There are simply way too many unknowns, and nothing in either the proposal or the Order's approval of it addresses this

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[23] *Formal Case No. 1156*, Statement of Commissioner Beverly, p. 4, rel. Oct. 21, 2020 ("Commissioner Beverly Statement").

[24] As noted on the cover of the Order, Commissioner Thompson's term began April 12, 2021 after the close of the evidentiary record.

[25] *Formal Case No. 1156*, Order No. 20755 ¶ 476.c (holding that the Original MRP "is not in the best interest of ratepayers because it does not meet the requirements of D.C. Code § 34-1504(d), nor does it take into account the social and economic conditions that have occurred as a result of the COVID-19 pandemic.")

[26] *E.g.*, *id.* at ¶¶ 6, 166, 352, 356, 394.

concern in a satisfactory manner. The combination of the challenges posed by COVID and need for the District's utilities to play a key role in meeting the region's ambitious climate goals mean that the Commission should be ramping up its regulation and oversight—not ceding the field to Pepco. While the Order claims that the Commission will continue to have such oversight and that the Modified EMRP will result in consumer benefits, the record belies such findings. While the Order claims that the Modified EMRP will support the District's climate goals, there is no evidence to support this claim, and substantial evidence to the contrary. Taken as a whole, the evidentiary record supports the conclusion that the only reasonable action available to the Commission under the current conditions in the District and the infirmities in Pepco's proposal is to process Pepco's filing as a traditional rate case and reject moving ahead with an MRP.

The Order also errs in ignoring OPC's arguments in testimony and brief regarding: (a) the imprudence of the Potomac River Crossing Project, (b) the existence of a settlement agreement that bars Pepco from including any costs related to the Benning Generating Station in calculating its revenue requirement, and (c) why Pepco's proposed energy efficiency loan and rebate program is contrary to District law. In issuing its reconsideration, the Commission must address and correct each of these errors.

III. STATEMENT OF ERRORS

Pursuant to Commission Rule 140.2,[27] OPC respectfully submits that Order No. 20755 contains the following unlawful, erroneous and/or arbitrary and capricious findings and conclusions:

1. The Order errs in approving the Modified EMRP as:

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[27] 15 DCMR § 140.2 (2020).

a. The revenue requirement calculations for the Modified EMRP are not supported by reasoned decision-making and substantial evidence;

b. Pepco, the applicant of the rate case, failed to show that its proposed MRPs have any relevance to the achievement of the District's ambitious climate goals, and the Commission's modifications to the EMRP do not resolve this issue;

c. the claim that the Modified EMRP will result in a reduced regulatory burden is unsupported by the record and contrary to substantial evidence in the record that instead supports a finding that the resulting processes will reduce Commission oversight and regulation, increase costs, and shift the risk onto consumers while abridging their due process rights; and

d. the Order provides no metrics to assess the ratemaking regime after the "pilot" is concluded.

2. The Order errs in failing to remove the Potomac River Crossing project from the rate base calculations.

3. The Order errs in allowing Pepco to continue to recover costs related to the Benning regulatory asset when such recovery is barred by a prior Settlement Agreement and Commission orders and the Company has not met its burden to show that the costs are properly recoverable.

4. The Order errs in authorizing Pepco to issue energy efficiency rebates and loans as such authorization is contrary to the Clean Energy Omnibus Act of 2018.

IV. APPLICABLE LEGAL STANDARDS

A "utility rate cannot be deemed 'reasonable' simply because an expert agency says it is."[28] Rather, to survive judicial review, the Commission must explain "fully and clearly why it has taken a particular ratemaking action. Absent such comprehensive explanation, judicial review of the Commission's substantive decisions cannot be completed, and the rate order finally approved—or set aside."[29] Courts look for several interrelated hallmarks to determine whether a Commission order satisfies these requirements.

As a threshold matter, the Commission must state on the record the criteria governing its decision. It must also explain how its particular decision applies these criteria to the facts of the particular case.[30] The basis of the ruling must be provided "in sufficient detail so that both parties may, if they desire, object and seek to persuade [the Commission] to change the basis."[31] "Absent precise explanation of methodology as applied to the facts of the case, there is no way for a court to tell whether the Commission, however expert, has been arbitrary or unreasonable."[32]

Tying these concepts together is the requirement that the Commission's "[f]indings of fact and conclusions of law … be supported by and in accordance with the reliable, probative, and

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28 *Washington Pub. Interest Org*, 393 A.2d at 77.

29 *Id*.

30 *See id*., 393 A.2d at 75; *see also id*., 393 A.2d at 76 ("[T]he Commission's orders will . . . function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act.") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968)).

31 *Winkler v. Ballard*, 63 A.2d 660,662 (D.C.1948).

32 *Washington Pub. Interest Org.,* 393 A.2d at 77; *see also id.* at 78-9. ("The less equipped the court is to do the job of the agency, and thus the more deference the reviewing court must show to the agency's authority and expert judgment, the greater the agency's obligation is to explain exactly why it chooses to take a particular course of action. The broad scope of an agency's authority is the very reason why that agency is obliged to explain itself with precision. If such broad authority implied, to the contrary, that the agency need not explain itself, or could do so in shortcut fashion, then judicial review would be a nullity. While our own authority to intrude on agency functions is therefore limited, our authority -- and responsibility -- to find out why an agency acts as it does is considerable.").

substantial evidence."[33] This means that Commission's findings of fact will not be upheld on appellate review if they are "unreasonable, arbitrary, or capricious."[34] Moreover, as the Supreme Court has explained, "substantial evidence" is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[35] Significantly, however, the "'substantial evidence' test is not directed solely at the quantity of evidentiary support for an administrative determination."[36] The Commission must also establish "a 'rational connection between facts found and the choice made.'"[37] And such conclusions must be rationally drawn from the record on which they are based.[38] In sum, "there must be enough evidence, rationally related to the rate order (through clearly articulated criteria), to justify the Commission's decision."[39] Moreover, the Commission may not justify its decision by ignoring relevant evidence to the contrary. Rather, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."[40]

V. REQUEST FOR RECONSIDERATION

A. The Order erred in adopting the Modified EMRP.

In considering a utility's rate proposal—whether "alternative" or "traditional"—the Commission is obligated to balance consumer and shareholder interests.[41] The Commission is

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33 D.C. Code § 2-509(e) (Lexis 2020).

34 D.C. Code § 34-606 (Lexis 2012).

35 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

36 *Washington Pub. Interest Org.*, 393 A.2d at 77 (footnote omitted).

37 *Id*. (citations omitted).

38 *Telephone Users Association v. Public Service Com*., 304 A.2d 293 (D.C. 1973).

39 *Id*.

40 *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 95 L. Ed. 456, 71 S. Ct. 456 (1951), quoted in In re Dwyer, 399 A.2d 1, 11 (D.C. 1979). *Cited by Shaw Project Area Committee, Inc. v. District of Columbia Com. on Human Rights*, 500 A.2d 251, 255, 1985.

41 *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 607 (1942).

required by District law to pay particular attention to the impacts of a proposed rate hike on "the economy of the District," as well as "the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change, and the District's public climate commitment,"[42] and it especially must take these issues into account when determining whether an alternative form of ratemaking proposal is in the public interest. The Commission's approval of a modified version of Pepco's proposed enhanced MRP ("EMRP") meet neither these nor the alternative ratemaking-specific statutory standards. Most notably:

- the Order adopts a revenue requirement that is not supported by reasoned decision-making and substantial evidence;
- Pepco, the applicant of the rate case, failed to show that its proposed MRPs have any relevance to the achievement of the District's ambitious climate goals, and the Order's modifications to the EMRP do not resolve this issue;
- the Order's claim that the Modified EMRP will result in a reduced regulatory burden is unsupported and contrary to substantial evidence in the record which demonstrates that the resulting processes will actually reduce Commission oversight and regulation, increase costs, and shift the risk onto consumers while abridging their due process rights; and
- though the Commission labels the program as a "pilot," the Order provides no metrics to assess the ratemaking regime after it is over.

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[42] D.C. Code § 34-808.02.

1. The Modified EMRP uses a revenue requirement that is unsupported.

Pepco filed its application initiating this proceeding in May 2019.[43] Less than a year later, the District (along with the rest of the world) was facing an unprecedented public health emergency. Thus, this proceeding has been marked by considerable uncertainty for two reasons—first, because of the global pandemic, and second, because Pepco's proposed MRP is a novel form of ratemaking never before implemented in the District. Rather than seek to mitigate uncertainty by relying on familiar ratemaking tools, the Commission has gone in the other direction—adopting an unproven ratemaking paradigm in the face of extraordinary, and continuing, economic dislocation. In doing so, the majority rejected the advice of dissenting Commissioner Beverly, who urged: "We can issue a decision on the traditional aspect of Pepco's rate case and move the MRP and performance incentive mechanisms ("PIMs") into a separate proceeding that provides greater stakeholder involvement."[44] He explained his reasoning:

> We are now faced with a global pandemic that has impacted not only the health of many District residents but also the District's economy. Indeed, the impact that the pandemic is having on Pepco's residential and commercial customers is so severe that the situation may not stabilize for some time. Given the significant change that the MRP is likely to have on how the Commission will regulate Pepco in the future, I see no reason to rush forward with such a paradigm shift right now.[45]

While the Order represents a paradigm shift in the methodology used to set rates in the District—moving from traditional, cost-of-service ratemaking to a multi-year rate plan—the move does not relieve the Commission of its most basic obligation: to ensure that whatever rates Pepco

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43 *Formal Case No. 1156*, Order No. 20755, ¶ 3.

44 *Formal Case No. 1156.* Commissioner Beverly Statement at 4.

45 *Id.* at 3-4.

is authorized to charge District ratepayers are just and reasonable.[46] While the Commission claims to have fulfilled this responsibility here,[47] that finding should be reconsidered and reversed, as it is not supported by "reliable, probative, and substantial evidence."[48] We explain here that OPC continues to object to the adopted revenue requirement because even with modification it is still unjust and unreasonable as: (1) the rates approved by the Commission are based on spending plans which were developed pre-pandemic and contain insufficient detail to determine whether they were just and reasonable; (2) even if Pepco's spending plans were demonstrated to be just and reasonable, they may well change dramatically once the full impacts of the economic and health crisis have been analyzed; and (3) under the procedures adopted by the Commission, ratepayers will have little opportunity to address whatever plans are ultimately adopted.

In short, and as explained by OPC witness DeCourcey:

> The unprecedented uncertainties associated with the ongoing health and economic crises that have befallen the District and the Nation make this a singularly inappropriate time to implement dramatic changes to long-standing regulatory regimes. The problems that afflicted the Original MRP have now been made worse because the Company's current proposal [now adopted by the Commission in Order No. 20755] is based largely on long-term forecasts of utility costs and revenues whose reliability is dubious, and for which there is no mechanism to correct later errors made at the time the new plan is implemented.[49]

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46 D.C. Code § 34-1101.

47 *Formal Case No. 1156*, Order No. 20755 ¶ 11 purports that approval of the Modified EMRP "results in just and reasonable rates for all Pepco customers in the District."

48 *Id.* at 11; D.C. Code § 2-509(e).

49 Exhibit OPC (3C) (DeCourcey) at 4:19-5:4.

a) The revenue requirement adopted in the Order is not just and reasonable where it is based on a preliminary spending forecast that will be updated later and will not be subject to meaningful Commission review.

The revenue requirement adopted in the Order is based on Pepco's proposed spending plan. Witness Wolverton explained that the revenue requirement for each year of the MRP was calculated based on escalated (and adjusted) test year values from 2019.[50] But these spending projections are just that—forecasts based on a time period before the advent of the pandemic. What Pepco will actually do with the money provided through the MRP will not be revealed until after this proceeding has been completed. As explained in the Order, Pepco has been directed to file revised capital (and operations and maintenance) expenditure workplans 120 days from the date of the order.[51] In reviewing Pepco's similar proposal, Witness DeCourcey observed that the spending plans "will include project- and account-specific projections of capital and operational spending. These plans will comprise the basis for both ratemaking and for reconciliation of spending variances" under the MRP.[52] He observes:

> It is the spending plan that will be filed in 2021 that forms the basis for the MRP Enhanced Proposal, including the establishment of spending benchmarks against which subsequent variances are evaluated. This implies that all spending described in the 2021 filing is, by default, prudent, regardless of its consistency with any information provided to date.[53]

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50 Exhibit Pepco (6C) (Wolverton) at 17:17-20.

51 The Order states that "Pepco, for its capital budget filing shall include updated detailed capital additions (by project) and O&M expense projections by FERC account for CY 2021 and CY 2022, within 120 days from the date of this Order as Pepco proposed MRP." *Formal Case No. 1156*, Order No. 20755, ¶ 160. While Witness DeCourcey made this assertion about Pepco's proposed EMRP, the MRP adopted by the Commission raises the same concerns by ordering Pepco to file a revised capital workplan after the issuance of the Order.

52 Exhibit OPC (3C) (DeCourcey) at 7:6-8.

53 *Id.* at 7:8-12 (footnote omitted).

The uncertainties associated with this arrangement are enormous. Even though the Commission has relied on forecasts in the past, in order for rates to be just and reasonable those forecasts need to be based on measurable and verifiable inputs. Here, even though the impacts of the COVID-19 pandemic are unprecedented, and despite the long-running duration of this proceeding, Pepco never presented *any* useable forecasts of how the COVID-19 pandemic could impact its spending.[54] While the Company proposed, and the Order adopts, Pepco's proposed $60 million reduction in capital spending as compared to the Original MRP,[55] Pepco has not identified which projects it will eliminate, presumably because neither the Company (nor, of course, the Commission) knows for certain how the pandemic will impact its construction program. And the Company explained in discovery that it has not developed criteria for selecting which projects to eliminate.[56] Pepco explained that it intends to have "more relevant information on the impact of COVID-19 pandemic and overall economic conditions and outlook in the District of Columbia" at a later date.[57] Such information will presumably be developed or acquired by the time the Company files its binding spending plans with the Commission, since they require project-level data, among other information. As witness DeCourcey explained:

> If the analyses that Pepco has conducted between now and then indicate that the global pandemic and recession could impact utility operations and spending over the next several years compared to the current outlook—an outcome that seems distinctly possible since the current plans include *no* recognition of current crises—the Company would be in the position of having either to file a spending plan that it knew failed to accurately reflect its most current expectations in

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54 *Id.* at 8:7-9.

55 *Formal Case No. 1156*, Order No. 20755, ¶ 476*l* (Commission approval of the Modified EMRP "defers $60 million of capital spending to 2023 or later and include further cap-ex reductions"); Exhibit Pepco (5B) (McGowan) at 24:12.

56 *Id.* at 24:17-19; Exhibit OPC (3C)-2 (Pepco Response to DCG Data Request No. 11-8) and Exhibit OPC (3C)-3 (Pepco Response to Staff Data Request No. 21-2).

57 Exhibit OPC (3C)-2 (Pepco Response to DCG Data Request No. 11-8).

> order to conform with whatever the Commission approves at the conclusion of this proceeding, or to file an adjusted plan that diverges from the Commission's approval without authorization.[58]

Pepco's subsequent workplans will reflect both the Company's proposed $60 million electric plant in service ("EPIS") reductions to reflect COVID-related project deferrals, as well as the Commission directed $25 million EPIS reductions for CY2021 and 2022.[59] But the content of those workplans—i.e., the projects in which Pepco will in fact be investing—is unknown. As explained by witness DeCourcey, Pepco was unable during this lengthy proceeding "to identify which projects it will eliminate because it does not know how impacts from the pandemic will affect its construction program, nor has it developed criteria for selecting which projects to eliminate."[60] What this means is that while a rate hike will go into effect on July 1,[61] customers will be waiting several months before learning how Pepco intends to spend the increased ratepayer funds, and will consequently bear the risk of inflated budgets.

And the process going forward does not provide meaningful opportunities to review Pepco's plans. The Company's 120-day filing appears to be "informational" in nature. The Order does not state that interested parties will be able to file comments on this filing; indeed, the Commission fails to specify what process—if any—will follow its submission. And it is not clear to what extent (if any) this filing will be binding on the company, as it will be followed by a series of reconciliation submissions. While the Commission states that parties may seek discovery concerning the "reconciliation filing for 2022 and 2023,"[62] no similar provision is made as

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58 Exhibit OPC (3C) (DeCourcey) at 8:18-9:8.

59 *Formal Case No. 1156*, Order No. 20755, ¶¶ 155, 476(n).

60 Exhibit OPC (3C) (DeCourcey) at 8:11-13.

61 *Formal Case No. 1156*, Order No. 20755, ¶ 482.

62 *Formal Case No. 1156*, Order No. 20755, ¶ 162.

concerns the 120-day informational filing. Witness DeCourcey commented on the limitations of the Commission's regimen, stating:[63]

> Since there is no evidentiary hearing associated with the filing of the spending plans, the Commission's and stakeholders' ability to analyze the data the Company provides is limited. Even if issues were identified, the Company's proposal provides no mechanism to trigger a hearing or some other form of detailed examination or to compel the production of additional supporting or explanatory information from Pepco . . . .

In these changing circumstances, the shift to an MRP is particularly inappropriate. Witness DeCourcey testifies that the "uncertainties":

> between the indicative spending plan described in the June 1 Filing and the final plan upon which Pepco's MRP Enhanced Proposal would be based highlight the tension between the flexibility to respond to changing circumstances, on the one hand, and customers' needs for rate and cost certainty during times of crisis, on the other. To the extent that the MRP is based on spending forecasts, subsequent flexibility is limited. Preserving flexibility, on the other hand, means that the certainty of customer costs is necessarily eroded, an outcome that is itself not satisfactorily resolved by simply deferring collection of costs to a later date. Under normal circumstances, it may be possible to balance these competing interests by developing an MRP that is based on a spending forecast which is likely to be reasonably accurate. But these are not normal times. The uncertainties that characterize the current market necessarily mean that there are no utility spending forecasts in which either the Commission or customers can be confident.[64]

The Order does not address, let alone alleviate, these concerns.

The Order's approval of a revenue requirement that is based on unknown and non-reviewable capital and O&M workplans is not just and reasonable; in fact, it is contrary to

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63 Exhibit OPC (3C) (DeCourcey) at 9:13-17.

64 *Id.* at 9:19-10:9.

several of the alternate forms of ratemaking ("AFOR") Criteria, specifically including Nos. 4, 9, and 10:

> (4) The AFOR identifies baseline revenue and cost information, and clearly explains what process or mechanism the utility used to project revenues and expenses;
>
> . . .
>
> (9) The AFOR provides an appropriate level of transparency and reporting into the utility's operational and capital plans ensuring that the plans will be maintained during the duration of the AFOR; and
>
> (10) The AFOR avoids any unreasonable shifting of risk to utility customers.[65]

Delaying the submission of the capital and O&M workplans means that the bases for baseline revenue and cost information will not be revealed until after rates are already in effect, making the "transparency and reporting into the utility's operational and capital plans" nonexistent from the very start. *Id.*

Adding to the uncertainty, the Order directs that the delayed workplans consider an annual $25 million revenue requirement reduction "[t]o account for the COVID-19 economic realities."[66] (In addition to Pepco's as-yet-unspecified $60 million in deferred projects.) The Order does not explain how the $25 million reduction was derived, let alone show that it is sufficient to address the economic and energy usage impacts of the COVID-19 pandemic. In lieu of an explanation, the Commission states only: "given the economic effects of the pandemic, our modified EMRP takes these cuts one step further, as we have further reduced the escalated annual additions to EPIS by $25 million in both CY 2021 and 2022 given pandemic economic effects."[67]

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65 *Formal Case No. 1156*, Order No. 20273, ¶ 6.

66 *Formal Case No. 1156*, Order No. 20755, ¶ 294.

67 *Id.* ¶ 158.

And Pepco is likewise of no help on this issue. Witness McGowan acknowledged on cross that "no one knows" when the pandemic impacts will abate.[68] As such, and as Witness DeCourcey points out, the Company "does not know how impacts from the pandemic will affect its construction program" nor does it have "insight into either the length or the magnitude of the pending economic downturn" nor has it commissioned or presented studies with any COVID insights.[69] Specifically, and, again, as presented in witness DeCourcey's testimony:[70]

- Pepco has not conducted significant analyses of COVID impacts;[71]
- The Company has no forecast of how long it will take the economy to recover from the recession that has arisen with the onset of the pandemic;[72]
- Pepco has not developed contingency spending plans that could be triggered in 2020 if load levels decline beyond current expectations;[73] and
- The sales forecast the Company has provided do not account for impacts from the pandemic,[74] nor have those forecasts been updated since the Original MRP proposal was filed.[75]

In fact, given the COVID-19 pandemic and the lack of analysis of its effects on Pepco's forecast, the only thing we can know about the sales forecast is that it is in all probability wrong.

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68 Tr. 73:19-23.

69 Exhibit OPC (3C) (DeCourcey) at 8:12; Exhibit OPC (2C) (DeCourcey) at 13:19-14:5.

70 *Id.* at 22:1-8.

71 Exhibit OPC (3C)-8 (Pepco Response to AOBA Data Request No. 7-18).

72 Exhibit OPC (3C)-9 (Pepco Response to OPC Data Request No. 56-5); Exhibit OPC (3C)-10 (Pepco Response to OPC Data Request No. 56-33).

73 Exhibit OPC (3C)-11 (Pepco Response to OPC Data Request No. 56-9) (*referencing* Exhibit OPC (3C)-12 (Pepco Response to OPC Data Request No. 56-8)). While witness DeCourcey expressed this concern with respect to 2020, it is equally true for 2021.

74 Exhibit OPC (3C)-13 (Pepco Response to Staff Data Request No. 24-17).

75 Exhibit OPC (3C)-3 (Pepco Response to Staff Data Request No. 21-2).

Allowing Pepco to delay its workplan filing and providing for no review of the plan unreasonably shifts the "COVID-19 economic realities" entirely to customers.[76] As information about the lasting effects of COVID-19 develops, it may become clear that a $25 million annual reduction in capital spending is insufficient to account for falling loads in the District. If Pepco should in fact be reducing its spending plan further, stakeholders have no process by which to petition for that change. Pepco should not be the only party given more time to "better assess the longer-term impact on the Company's investment and operating expenses in the future," stakeholders should have the same opportunity to review the impact and then rebut the Company's workplan changes.[77] Allowing this one-sided review unreasonably shifts the risk of COVID's economic impacts to customers.

Moreover, and as explained by Witness DeCourcey, the failure to adopt a reasonable EPIS estimate, and to permit potentially significant revisions after-the-fact, poses real risks for customers. Even if the EPIS estimate was reasonable, it provides no "certainty." The approved MRP instead poses risks for "potentially unlimited cost increases, with the only 'mitigation' of such increases being the timing of their recovery."[78] The reason is that, given the pandemic and falling loads in the District, the spending plans on which the rates are based may well be overstated. (We address below our concerns with the Order's adopted escalation rate.) But under the arrangement approved in the Order, if it were determined that load reductions mean that much less capital investment was needed, there would be no mechanism to refund subsequent

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76 *Formal Case No. 1156*, Order No. 20755, ¶ 294.

77 Exhibit OPC (3C)-2 (Pepco Response to DCG Data Request No. 11-8).

78 Exhibit OPC (3C) (DeCourcey) at 25:7-10.

over-recoveries.[79] The spending plan that Pepco proposes to file after the conclusion of this proceeding is the basis for the analysis of variances in spending that will take place during these proceedings.[80] In other words, the capital spending plan that the Company will file in 2021 will form the basis for the rates that will be effect during the MRP Period, and also for the reconciliation of Company revenues later on—but that plan will evidently not be subject to an evidentiary hearing or require Commission approval. As Witness DeCourcey explains:

> The MRP Enhanced Proposal does not require or envision the Commission's approval of any specific spending measures, only escalation rates that result in total spending amounts that may nor may not be permissible to change between the time of the Commission's approval of an MRP and Pepco's filing of specific spending amounts sometime in 2021. Later, during the reconciliation and prudence reviews, only the variances from that spending plan are subject to review. This means that the plan itself is, *de facto*, deemed prudent and recoverable in its entirety.[81]

The consequence of the arrangement approved in the Order is that potentially-inflated capital and O&M plans have been adopted as the basis for setting rates. And, as approved by the Commission, even if "it was later determined that load reductions mean that much less capital investment was needed, there would be no mechanism to recover the capital later on."[82]

In these circumstances, the Commission's adoption of Pepco's EMRP is neither just nor reasonable. There are far too many uncertainties, and the MRP mechanisms to address them are inadequate. The Commission should at least provide stakeholders a review process for the future workplans—including a meaningful opportunity for discovery and the ability to trigger an evidentiary hearing. Leaving Pepco's spending essentially up to the Company's "discretion" is

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79 *Id.* at 27:9-10.

80 Exhibit Pepco (6C) (Wolverton) at 18:2-3; Exhibit OPC (3C) (DeCourcey) at 26:12-17.

81 Exhibit OPC (3C) (DeCourcey) at 26:19-27:5.

82 *Id.* at 27:8-10.

unjust and unreasonable.[83]

b) The Commission escalates Pepco's revenue requirement using an escalator percentage that is not based on substantial evidence.

The Commission adopts a 2.17% escalator to increase Pepco's EPIS year-over-year, explaining: "Given the recent inflationary expectations and that the CPI obviously will change through time, we believe that a 2.17% escalator is a reasonable estimate for inflation during the EMRP period."[84] The Order posits that OPC Witness DeCourcey suggested this inflation factor, but this interpretation of that testimony is incorrect.

In testimony filed prior to the onset of the COVID-19 pandemic,[85] Witness DeCourcey recommended that the Commission reject Pepco's proposal because of a number of serious shortcomings, but testified that if the Commission determined to move forward with a MRP, adopting a plan that indexed *the Company's revenue requirement*, which he estimated at the time to be 2.17%, and adopting other changes he recommended, would address some of the more problematic elements of the Company's proposed plan.[86] That recommendation is not equivalent to adopting a 2.17% escalator to be used as Pepco proposes in its EMRP. As witness DeCourcey explained in subsequent testimony:

> My recommendation to index the Company's revenue requirement to an inflation index meant increasing that amount at a constant rate year by year. Witness Wolverton instead proposes to apply his (higher) rate of 2.5% ***to the annual increase amount***. This means that under witness Wolverton's approach, the ***increase*** gets bigger each year. In this case, the result is the creation of a compounding effect, leading to a rate of increase in Pepco's EPIS that is much

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83 *Formal Case No. 1156*, Order No. 20755, ¶ 295.

84 *Id.* at ¶ 195.

85 Exhibit OPC (C) (DeCourcey) at 56:8-9, filed March 6, 2020.

86 *Id.* at 53:1-56:12.

> higher than inflation and, therefore, inconsistent with my recommendation.[87]

There is no evidence to support the conclusion that annual escalations in capital spending of 2.17% as proposed by Pepco, in concert with the other elements in the Pepco plan, could possibly be just and reasonable.

Moreover, following Witness DeCourcey's initial testimony, "the world literally changed."[88] Witness DeCourcey retracted his escalator proposal in his Surrebuttal and Supplemental Testimonies, explaining that forecasting spending with any degree of confidence is no longer possible due to the economic instability introduced by the pandemic:

> [T]he rate . . . from my testimony is no longer relevant. As I explain in my Direct Testimony, the 2.17% estimate was from a survey conducted by the Federal Reserve Bank of Philadelphia at the end of 2019. It is certain that inflation expectations are lower now than they were then because of the economic impacts stemming from the COVID-19 pandemic.[89]

Even if inflation expectations have rebounded since OPC witness DeCourcey authored his Surrebuttal and Supplemental Testimonies, the impacts of the COVID-19 pandemic on the energy sector in the District is unclear and it may no longer be the case that Pepco's EPIS needs to expand so rapidly:

> One clear impact from the pandemic has been the curtailment of economic activity with associated reductions in energy consumption. For example, in my Surrebuttal Testimony I explained that the then-current Short Term Energy Outlook . . . indicated that energy consumption in 2020 and 2021 would each be well below 2019 levels. Yet this change is not captured in Pepco's current spending plans . . . . the escalation rates that are embedded in Pepco's indicative spending plans go in the other direction—forecasting very rapid EPIS expansion . . . The proposed

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87 Exhibit OPC (3C) (DeCourcey) at 15:5-11.

88 *Formal Case No. 1156,* Commissioner Beverly Statement at 3.

89 Exhibit OPC (3C) (DeCourcey) at 14:17-15:2 (footnotes omitted).

> continuation of 'business as usual' in a world in which energy demand is contracting is a near-certain recipe for over-spending.[90]

Pepco provided no testimony to refute witness DeCourcey's statements,[91] and the Commission asked no questions at hearing on the use of the escalator.[92] Despite OPC's retraction of its escalator proposal, the Commission adopts the number as a "reasonable estimate" that falls within an undefined "range of reasonableness," even as it acknowledges "that the economic outlook at present remains uncertain."[93] But the uncertainty is far greater than the Commission allows. Given the lack of any understanding in this record of the impacts that the pandemic will have on Pepco's going-forward plans, it is not reasonable for the Commission to adopt a 2.17% escalator in the Company's forecasted expenditures during the period in which the MRP will be in place. There is simply no basis in record that justifies the reasonableness of this method and substantial evidence to the contrary.[94]

2. The Modified EMRP does not align or advance the District's climate and energy goals.

AFORs are not new to the District of Columbia or Pepco. The District's regulatory framework already incorporates elements of alternative ratemaking—including decoupling (through the Bill Stabilization Adjustment ("BSA")), the availability of partially forecasted test years, and streamlined approval and cost recovery processes for major infrastructure projects such

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90 *Id.* at 24:5-16.

91 *See* OPC Initial Br. at 128.

92 *See, generally, Formal Case No. 1156,* Transcripts of Evidentiary Hearing held on October 26 and 27, 2021.

93 *Formal Case No. 1156*, Order No. 20755, ¶¶ 192, 195.

94 D.C. Code § 2-509(e); Indeed, "Commission expertise alone cannot support so pivotal as assumption. Failure to subject this issue to inquiry at the hearing and the consequent inadequacy of the record and the findings render the Commission's conclusion that the [resulting] rates are 'reasonable, just and non-discriminatory' devoid of substance and wholly ineffective for its purpose. Without any evidence on this essential issue, there is no basis for application of any standard and the judicial review authorized by the statute becomes a formal but futile gesture." *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 16-17 (D.C. 1950).

as DC PLUG. Those ratemaking mechanisms limit Pepco's risk and increase the Company's opportunity to earn its allowed return.

The question in this case is therefore not whether to have AFORs, but whether adding an MRP to the existing menu of Pepco alternative ratemaking mechanisms provides *incremental* benefits, including with respect to the achievement of the District's ambitious climate goals. The record makes clear that the EMRP will not advance the District's efforts to meet its climate goals. As dissenting Commissioner Beverly explained in his separate Statement, "the District has set ambitious goals to improve our climate, and it is going to take bold steps to get there. Quite frankly, Pepco's MRP is underwhelming in this regard."[95]

Order No. 20755's conclusion to the contrary is in error, and its approval of the EMRP on that basis should be reconsidered and reversed.

a) **Order No. 20755 errs in approving an MRP that neither aligns with nor advances the District's climate and energy goals.**

The Commission and the parties have expended considerable time and resources developing the criteria to be used in evaluating AFORs. As part of this proceeding, the Commission conducted a two-day technical conference (which included the post-conference receipt of comments) focused on potential AFOR evaluative criteria. The conference and related comment submission culminated in the issuance of Order No. 20273, in which the Commission "establishe[d] a framework for alternative forms of regulation ('AFORs') in the District of Columbia."[96] This "framework" is the "starting point for an evolving evaluation process for AFOR proposals to be reviewed in the future by the Commission as the public interest requires."[97] And

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95 *Formal Case No. 1156,* Commissioner Beverly Statement at 3.

96 *Formal Case No. 1156*, Order No. 20273, ¶ 1.

97 *Id.* at ¶ 95 (footnote omitted).

the Commission left no doubt as to the significance of its action to Pepco's MRP, stating: "The framework adopted in this Order will be used to evaluate Pepco's proposed MRP/PIMs proposal in this proceeding."[98] In accordance with the Commission's directives, the parties have litigated this case with the AFOR Order framework as the basis for their evidentiary presentations and subsequent briefing.[99]

The AFOR Order enumerates ten framework principles that the Commission finds must be incorporated into any proposed AFOR. Those principles include that the proponent must demonstrate that the proposed AFOR:

> (2) . . . advances the public safety, the economy of the District, the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change and the District's public climate commitments; [and]
>
> (3) . . . advance[s] or otherwise align[s] with the District's public policy goals[.][100]

As explained by Commissioner Beverly, in considering a proposed AFOR mechanism, the Commission "must consider . . . whether . . . [Pepco's] proposal aligns with *and* advances the District of Columbia's climate and energy goals."[101] This obligation is likewise consistent with

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98 *Id.* The Commission's claim "that Order No. 20273 is a policy decision which sets principles and guidelines rather than bright-line requirements" (Order No. 20755, ¶ 32; *see, id.* ¶ 39, n.99) is of no moment as the Commission must either follow its own policies or provide a reasoned basis for failing to do so.

99 While Order No. 20755 claims that "Pepco indicates in its testimony how the MRP and EMRP align with the Commission's AFOR Order" (Order No. 20755, ¶ 33, n.87) and that the Commission "affirrms that Pepco's EMRP meets the Commission's AFOR framework," (*id.* ¶ 39, n.99), the record is clear that Company presented no testimony on how the EMRP proposal meets the AFOR framework. And all of the testimony that the Commission cites for this claim was filed in January, 2020—six months before the EMRP was presented in the proceeding. There is no evidence—substantial or otherwise—to support the Commission's conclusion.

100 *Id.* ¶ 94. *See also id.* ¶ 7 ("In response to the District's policy goals, the Commission is examining the possibility of adopting AFORs aimed at accelerating the utilities' cost recovery for infrastructure improvement projects and aligning utility incentives with these policy goals").

101 *Formal Case No. 1156,* Commissioner Beverly Statement at 2 (emphasis in original).

the Commission's statutory obligations.[102]

It is also consistent with the Commission's November 2020 action in Formal Case Nos. 1142 and 1167. In Order No. 20662, issued in those dockets, the Commission opened a new proceeding to "consider whether and to what extent utility or energy companies under the Commission's purview are meeting and advancing the District of Columbia to achieve its energy and climate goals[.]"[103] In so doing, the Commission made clear that

> Any new proposal shall contain, at a minimum, the following information: a detailed description of the proposal; an explanation of how the proposal would accomplish and advance the District of Columbia's climate change goals; and a rigorous cost-benefit analysis (using the Commission approved methodology) along with detailed descriptions of costs and a proposed recovery methodology.[104]

The EMRP proposed by Pepco and approved by the Commission with modifications neither aligns with nor advances the District's climate and energy goals.[105] The evidence in support of this contention is overwhelming, as the record is replete with statements by Pepco that its EMRP is not designed to meet DC's climate goals. Pepco witness McGowan testified at his deposition[106] that while the Company would "certainly want to support" the District's energy policy goals,

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102 D.C. Code § 34-808.02 says: "In supervising and regulating utility or energy companies, the Commission shall consider the public safety, the economy of the District, the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change and the District's public climate commitments." AFOR Criteria 2 mirrors D.C. Code § 34-808.02 and AFOR Criteria 3 requires Pepco to "provide information as to how . . . the AFOR's ratemaking mechanisms advance or otherwise align with the District's public policy goals." *Formal Case No. 1156*, Order No. 20273, ¶ 6. PIM Criteria 1 states: "PIMs should advance or otherwise align with the District's public policy goals and the PowerPath DC objectives (such as grid modernization, energy efficiency, clean energy, and climate goals)." *Id.* ¶ 103.

103 *Formal Case No. 1167*, *In the Matter of the Implementation of Electric and Natural Gas Climate Change Proposals* ("*Formal Case No. 1167*"), Order No. No. 20662 ¶ 13, rel. Nov. 18, 2020 ("Order No. 20662").

104 *Id.* ¶ 12 (footnote omitted).

105 Nor does it contain any cost-benefit analysis—perhaps because it promises no specific actions that will be taken to advance the District's climate goals.

106 The transcript of the McGowan deposition is Exhibit OPC-S1 (McGowan Dep. Tr.) in this record.

Pepco's responsibility to provide safe and reliable service does not include the obligation to make investments that are supportive of the District's energy policy goals.[107] Instead, Pepco's position seems to be that "business as usual" is sufficient to meet and advance the District's goals. In answer to the question of whether the MRP contains specific investments that relate to the District's goals, he testified:

> There's no specific investment I recall that is targeted to have, to lower greenhouse gas emissions. However, the Company continues to invest in tools around AMI, around the customer website, to allow customers more access to information on how they use energy. And to the extent that they can use less energy, that helps reduce overall greenhouse gas emissions.[108]

Mr. McGowan went on to state that he was not aware of any specific planned investments in the MRP concerning the streamlining of interconnection of new solar plus battery projects,[109] or enabling third-party owned microgrids.[110] More broadly, Mr. McGowan testified that Pepco "has not developed an improved detail plan on grid modernization beyond the current MRP,"[111] and has not done a calculation of the estimated greenhouse gas reductions that will be experienced if the proposed MRP is approved.[112]

Pepco's positions on this issue have not evolved over the past two-plus years of this proceeding. Witness DeCourcey explains in his Surrebuttal Testimony:

> In his Rebuttal Testimony, Witness McGowan explains that Pepco has not made investments in support of the District's policy goals

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107 Exhibit OPC (C) (DeCourcey) at 39, *citing* Exhibit OPC-S1 (McGowan Dep. Tr.) at 119:20-120:3. Testimony filed by witnesses by other parties to this proceeding makes the same observation. *See*, *e.g.*, Exhibit DCG (A) (Lane) at 26:5-16.

108 Exhibit OPC-S1 (McGowan Dep. Tr.) at 159:11-19.

109 *Id*. at 162:3-7.

110 *Id*. at 162:8-11.

111 *Id*. at 160:19-21

112 *Id*. at 169:21-170:3. This information was presented in Exhibit OPC (C) (DeCourcey) at 39-40.

> because those goals have not been established by this Commission. Specifically, he states that in the ongoing PowerPath DC proceeding, "the Commission is examining how best to help the District of Columbia meet its ambitious clean energy goals" He also claims that the Commission's Order No. 20286 in the same proceeding addresses only seven of thirty-six directives proposed by a previous order and that the Commission has already "departed" from certain other directives, such that Pepco cannot be clear what the District's goals actually are.[113]

OPC summarized the evidence in its Initial Brief, stating: "Pepco's MRP proposals . . . include no measurable plans to advance the District's policy goals such as investments in non-wires alternatives, battery storage or other DER related projects."[114]

Rather than confront the specifics of presentations from OPC and others, the Order summarily asserts that its "PIMs decision refutes OPC, DOEE, and other consumers' contentions that Pepco's plan does not support a cleaner, smarter, sustainable environment or otherwise advances the District's ambitious environmental and climate action goals."[115] But this claim is unsupported by the record. The Commission is required to "take into account whatever in the record fairly detracts" from evidence in favor of an action.[116] Order No. 20755 falls short of meeting that standard.

b) Tracking PIMs will not align with or advance the District's climate goals.

The heart of the Commission's support for its approval of the modified EMRP is the finding that "tracking PIMs" align with and advance the District's climate goals.[117] This finding is

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113 Exhibit OPC (2C) (DeCourcey) at 21 (footnotes omitted).

114 OPC Initial Br. at 24.

115 *Formal Case No. 1156*, Order No. 20755, ¶ 472.

116 *Universal Camera Corp. v. Nat'l Lab. Rels. Bd.*, 340 U.S. 474, 488 (1951).

117 *Formal Case No. 1156*, Order No. 20755, ¶ 9.

contrary to the evidence in the record, and, frankly, common sense. A requirement to "track" information will perhaps provide data, but data compilation does not require any further action by Pepco—let alone actions aimed at advancing the District's climate goals.[118]

As a threshold matter, the PIMs themselves are unknown and uncertain as of the issuance of the Commission's decision and, as such, do not comport with the Commission's own broad general guidelines that "PIMs should be clearly defined."[119] In Order No. 20755, the Commission ordered the PIMs Working Group to reconvene within 90 days of the issuance of the order to propose data measurement methodologies for the PIMs approved by the Commission.[120] Absent a review and analysis of the results of that Working Group, there is no evidentiary basis for the Commission to conclude that the PIMs will have the purported impact on Pepco's operations in the District or what if any benefits customers will received from these PIMs.

In Order No. 20273, the Commission concluded that "*properly designed* [PIMs] represent an important tool to align utility incentives with public policy goals, such as the District's aggressive clean energy and environmental goals."[121] The corollary to that statement is that improperly designed PIMs can lead to negative consequences.[122] In Order No. 20755, the Commission presupposes that the PIMs ultimately produced by the working group will produce the right incentives with respect to, for example, greenhouse gas reduction and neighborhood reliability goals. This, however, is entirely dependent on a number of variables not addressed in Order No. 20755. For example, the Commission orders a DER PIM and directs that "[b]oth energy

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118 OPC Initial Br. at 24.

119 *Formal Case No. 1156*, Order No. 20273 ¶ 103.

120 *Formal Case No. 1156*, Order No. 20755, ¶ 173.

121 *Formal Case No. 1156*, Order No. 20273, ¶ 5 (emphasis supplied).

122 *E.g.*, *id.* at ¶¶ 23, 38, 43.

savings (kWh) and demand (kW) reductions should be reported for certain DER types which will help parties see the potential benefits of the different DER types and will help target incentives for maximum benefit and potential."[123] While these items can be tracked, the ability of District ratepayers to ultimately derive benefits from any DER demand reductions depends on, among other things, the willingness of Pepco to include these DER demand reductions and capabilities in its load forecasting models and, ultimately its construction budgets. Moreover, both this PIM and the Peak Demand Reduction PIM concern programs that are beyond Pepco's control. PIMs are intended to encourage desired performance as such it is essential that they target issues within the Company's control. But the Order's statements notwithstanding,[124] under District law Pepco may not own or operate solar or storage generating facilities.[125] As such, it is not clear what type of performance from Pepco is being targeted.

Furthermore, tracking PIMs require no action on the part of Pepco other than reporting information—a concern that Commissioner Beverly has also expressed explaining that: "proposing trackers for the pursuit of an undertaking does not, in and of itself, demonstrate that it will help the District achieve its climate and energy commitments merely by tracking what it does."[126] The information reporting required in Order No. 20755 is not paired with a requirement

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123 *Formal Case No. 1156*, Order No. 20755, ¶ 171.

124 While the Commission claims that the peak demand reduction tracking metric will "incentivize new DER implementation for Pepco in the future," (*Formal Case No. 1156*, Order No. 20755 ¶ 170), Pepco is prohibited from owning or operate some of the items listed therein, including rooftop solar, and storage if used as generation.

125 D.C. Code § 34-1513 ("Other than its provision of standard offer service, the electric company shall not engage in the business of an electricity supplier in the District of Columbia except through an affiliate."); D.C. Code § 1501(17)(defining "electricity supplier" as "a person, including an aggregator, broker, or marketer, who generates electricity; sells electricity; or purchases, brokers, arranges or, markets electricity for sale to customers."); D.C. Code § 8-1774(g)(7) (emphasizing that authorization for utility to apply to the Commission to implement an energy efficiency and/or demand response program did not "permit the electric company . . . to own an energy generation asset or [] otherwise alter the provisions prohibiting such ownership.")

126 *Formal Case No. 1156,* Commissioner Beverly Statement at 3.

to reduce GHG emissions or peak demand or to increase energy efficiency and DER adoption. Worse, the obligation to collect data is not "new" because Pepco is already tracking GHG emissions and through Formal Case No. 1160 will be tracking energy efficiency savings related to any Pepco-EE programs that are ultimately approved by the Commission.[127] Similarly, while the Office applauds the Commission's decision to adopt a CEMI-3 tracking PIM to identify neighborhood reliability issues,[128] the ultimate consumer benefit of the PIM will depend on whether the appropriate incentive/penalty mechanism can be developed to provide the appropriate signals to the Company to improve neighborhood reliability.

The Commission acknowledges these concerns, but finds that tracking PIMs have an independent value in that they "can be readily converted to fully functioning PIMs with incentive and penalty mechanisms . . . during 2022 and beyond."[129] There is no evidence in the record to support the PSC's contention, however, even if were to turn out to be true, this scenario does not justify approval of the EMRP.[130] If the data are already being collected, then the EMRP is not

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127 "The Company currently sets targets for GHG emissions . . . within the Pepco service territory . . . and reduces these targets year over year to achieve GHG reductions and to contribute to the District's clean energy goals." Exhibit Pepco (3K) (Sanford) at 3:11-15; *Formal Case No. 1160*, *In the Matter of the Development of Metrics for Electric Company and Gas Company Energy Efficiency and Demand Response Programs Pursuant to Section 201(B) of the Clean Energy DC Omnibus Amendment Act,* Order No. 20654, ¶ 8 (setting reporting requirements for Quantitative Performance Indicators including (1) program participation; (2) measure count and category by program; (3) annualized energy savings by program, in both gross and net wholesale MWh; (4) demand reduction by program, in wholesale MW; (5) levels of participation, program spending, and energy savings for customers receiving energy assistance; (6) budget and spend by program; and (7) potential program modifications); *see also id.* ¶ 76 (setting mid-term energy savings metrics for Pepco).

128 *Formal Case No. 1156*, Order No. 20755, ¶ 171.

129 *Id.* at ¶ 172.

130 Note that "MRPs often are paired with performance incentive mechanisms (PIMS) in an attempt to ensure that cost containment does not come at the expense of service quality, reliability, sustainability or other performance-related goals the regulator wants the utility to achieve." OPC Technical Conference Comments at 31. But Pepco's approved MRP Pepco's MRP is not designed to do anything specific, nor do the PIMs adopted by the Commission provide any rewards for achievement. There is therefore no reason that the two need to be linked—meaning, again, that these PIMs could be imposed without an MRP.

needed to facilitate the forecast "conver[sion]." The Commission can accomplish the same result as part of a traditional rate case.

Worse, the record reflects that Pepco has already objected to tracking certain information that the Commission now seeks to incorporate through a PIM. For example, as part of its affordability PIM proposal, OPC proposed tracking certain efficiency measures. As explained in OPC's brief:[131]

> While Pepco witness Zarakas suggests that affordability can be achieved by increasing the adoption among low-income customers of energy efficiency measures, Pepco witness Bell-Izzard objects to Witness Dismukes' proposal to help the Commission achieve that adoption. Dr. Dismukes proposes that Pepco track the number of RAD ratepayers who are using the District's energy efficiency programs, but Pepco Witness Bell-Izzard says that Pepco would have no way of reporting on energy efficiency use "unless it were a program offered by Pepco." But that criticism is of no moment, as Witness Dismukes was anticipating that Pepco would report only on Pepco programs. Pepco witness Bell-Izzard also objects on the grounds that such tracking is "likely not possible at this time." Witness Dismukes designed this PIM based on the Company's representation that the MRP was "fundamental" to achieving the District's goal of improving energy efficiency. OPC is unsure how the Company can make that assertion, or expect the Commission to verify that assertion in future evaluations of the MRP, if Pepco cannot track energy efficiency adoption amongst ratepayers.

The Commission attempts to justify its determination that tracking PIMs advance the District's climate goals by referencing a Commission order regarding a settlement reached in another case:

> Our adoption of these tracking PIMS including the GHG emission reduction tracking PIM is consistent with our approval of a similar Washington Gas Light Company's ["WGL"] commitment to track and file an annual report on GHG emissions associated with the Company's gas distribution system. In *Formal Case No. 1162*, OPC

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[131] OPC Initial Br. at 242 (citing Exhibit Pepco (2Q) (Bell-Izzard) at 7:9-17, Exhibit (2A) (Dismukes) at 22:20-22, and Exhibit Pepco (B) (McGowan) at 25:7-8 and 26:5-8).

> and the settling parties represented that this commitment meets the standard set forth in D.C. Code § 34-808.02. Based on the parties' representation in that proceeding the Commission found Washington Gas Light's GHG tracking commitment would help the Commission in advancing the District's climate goals. We are likewise convinced that the adopted Modified EMRP tracking PIMs will advance the District climate goals. Once fully deployed, these PIMs will facilitate investments that support the District's energy policy goals.[132]

The referenced settlement does not support the decision reached here; in fact, it serves only to highlight the weakness of the evidentiary basis for the Commission's approval of the EMRP. It is correct that the parties in *Formal Case No. 1162* reached a settlement of a traditional rate case that included the filing utility, WGL, adopting a greenhouse gas emission tracker. But the settlement *does not* include a statement by the settling parties that WGL's GHG tracking satisfies D.C. Code § 34-808.02. In fact, D.C. Code § 34-808.02 and the District's climate goals are not referenced in the settlement at all. Settlement Section 8, headed, "Climate," states in its entirety:

> Washington Gas agrees to file an annual report with the Commission that reports the greenhouse gas emissions associated with the Company's delivery of gas to District of Columbia customers in the previous calendar year. Washington Gas agrees to meet with the Settling Parties within 60 days after this Settlement Agreement is approved by the Commission to discuss the contents of the annual report. This settlement term does not constrain the Settling Parties' rights to take any positions in any other proceeding on climate issues and policy issues. All parties retain their rights to take positions in any other proceeding on climate issues and policy terms.[133]

As shown, OPC did not "represent" that the GHG tracking PIM in the WGL Settlement satisfied D.C. Code § 34-808.02, and, as such, the Order's contrary statement is in error.

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132 *Formal Case No. 1156*, Order No. 20755, ¶ 151 (footnote omitted).

133 *Formal Case No. 1162,* Joint Motion and Non-Unanimous Agreement of Stipulation and Full Settlement, p. 6-7, rel. Dec. 8, 2020 ("WGL Settlement").

More broadly, the willingness of parties to *settle* with WGL on a basis that includes a GHG tracker could not reasonably justify the Commission's assertion that the GHG tracking PIM adopted in this case "meets the standard set forth in D.C. Code § 34-808.02."[134] A settlement in another case with different parties and involving a different utility, is obviously not precedential for any purpose. Indeed, the parties to the WGL settlement made clear, stating: "This settlement term does not constrain the Settling Parties' rights to take any positions in any other proceeding on climate issues and policy issues. All parties retain their rights to take positions in any other proceeding on climate issues and policy terms."[135]

Pepco's EMRP must rise or fall based on the evidence in this record, not a settlement reached with another utility in a different proceeding. And, as explained here, the only valid use of the WGL settlement in this proceeding is to confirm that tracking requirements can be imposed without an MRP. The settlement establishes that a traditional rate case can be a vehicle for adopting a tracking provision.

c) The Commission only points to possible effects of the MRP on the District's climate goals, but does not require any climate-specific action on Pepco's part.

Other than the tracking PIMs, the Commission states that "the Modified EMRP will allow Pepco to redeploy resources from rate case litigation" to various climate commitments, including Non-Wires Alternatives and DER interconnection improvements.[136] Despite attempts by several parties, including OPC, to obtain a quantification of rate case savings from Pepco, no such information was provided.[137] In any event, as described further below in Section IV.A.3. it is

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134 *Formal Case No. 1156*, Order No. 20755 ¶ 151.

135 WGL Settlement at 7.

136 *Formal Case No. 1156*, Order No. 20755, ¶ 8.

137 *See, e.g.,* Exhibit OPC-S1 (McGowan Dep. Tr.) at 124:20-125:9.

unlikely that there will any rate case savings, as the process anticipated by the EMRP is resource-intensive. Worse, the shortened process cannot be justified on a cost-benefit basis, as the truncated proceedings envisioned under the EMRP will substantially and unfairly limit parties' due process rights.

The Commission also claims that the Modified EMRP will "strengthen Pepco's credit profile and help retain its investment-grade credit rating," which will in turn enable Pepco to invest in projects that "improve system resiliency and enhance hosting capacity for the District's grid modernization as climate changes."[138] It is unlikely that an 18-month pilot program on its own will "strengthen Pepco's credit profile" as OPC Witness O'Donnell explained "it is undisputed that rating agencies use several criteria and more than one credit metric."[139] Moreover, as there is no indication what, if any, grid modernization investments are anticipated by Pepco's EMRP, there is no basis to find that the "strengthen[ing]" of Pepco's credit profile will advance the District's climate goals. There has been no showing that an MRP is required in order for Pepco to conduct business as usual—keeping the infrastructure sufficiently in shape so as to be able to provide reliable service, pursuant to Pepco's statutory duty.[140]

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138 *Formal Case No. 1156*, Order No. 20755, ¶ 6.

139 Exhibit OPC (3D) (O'Donnell) at 14: 14-16 (referencing Exhibit OPC (3D)-10 (Pepco Response to Staff Data Request No. 21-3)); *accord* Exhibit OPC (3D)-11 (Pepco Response to OPC Data Request No. 60-7); *see also Formal Case No. 1156*, Reply Brief of the Office of the People's Counsel for the District of Columbia, at 53, filed Dec. 23, 2020 ("OPC Reply Br.").

140 D.C. Code § 1-204.93 (The Commission must "insure that every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.")

d) The Commission errs in finding support for the Modified EMRP on the basis of ongoing projects in the District unrelated to the multi-year rate plan.

Similarly, the Commission approves the Modified EMRP, in part, based on the finding that:[141]

> …the Modified EMRP will allow Pepco to redeploy resources from rate case litigation during the term of the Modified EMRP and focus additional attention on: (1) continued enhancements to the interconnection process for renewable energy facilities, project interconnection improvements, and the Company's emerging Climate Commitment Plan; and (2) pending DER initiatives currently in progress, including: targeted Non-Wires Alternative ("NWA") Request for Proposals ("RFP") process, battery energy storage pilot projects under development at Mt. Vernon Substation, Ward 8 Alabama Avenue Substation, and other projects.

First, as discussed further below in Section IV.A.3, the record does not contain evident sufficient to support a finding that the modified EMRP will lead to measurable rate case savings, and any savings that might be achieved will come at a high cost: the loss of Commission regulation and oversight of Pepco's operations. Further, the Commission cannot know with any degree of confidence how the Company will "redeploy" its resources (to the extent there are resources to redeploy) based on the Commission's approval of the Modified EMRP, as there is no evidence in the record explaining such redeployment.

As of the filing of this motion for reconsideration the Company has not yet filed a "Climate Commitment Plan." Indeed, the Commission's order directing Pepco to file one was not issued until shortly before Order No. 20755 and Pepco was subsequently granted an extension of time to file the climate change plans required therein.[142] As such, there is no evidence in this or any other

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141 *Formal Case No. 1156*, Order No. 20755, ¶ 8 (citations omitted).

142 *See Formal Case No. 1167,* Order No. 20754, rel. June 4, 2021; *see also Formal Case No. 1167,* Order No. 20763, rel. June 29, 2021 (granting requested extensions of time).

record that Pepco's Climate Commitment Plan is reasonable or will facilitate benefits for consumers such that resources should be redeployed to that effort. Further, to the extent that that Company can and does redeploy resources, it does not follow that the purported benefits identified in Order No. 20755 will accrue though acceptance of a multi-year rate plan. With the exception of the Climate Commitment Plan (which has not yet been filed) many, if not all, of the items listed by the Commission are already progressing in the District and predate the passage of the Modified EMRP.

For example, in February 2021, Pepco announced that it had completed its RFP process for an NWA solution at the Waterfront Substation and anticipates issuing an award for an NWA project in July 2021.[143] This project is for an NWA that can delay the need for a fifth transformer at the Waterfront Substation through 2026[144] and this NWA project was set to move forward in the District regardless of whether the Commission approved the Modified EMRP. There is no evidence of record demonstrating that other NWA projects could not be implemented on the Pepco distribution system without a multi-year rate plan in place.

While the Commission concludes that the Modified EMRP will result in the Company increasing its focus on NWA alternatives, there is record evidence that a multi-year rate plan may, in fact, deter these investments. The Office's review of the MRP budget found that there is no funding in the MRP budget plan for the NWA alternative under consideration at the Waterfront

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[143] *See Formal Case No. 1130*, *In the Matter of the Investigation into Modernizing the Energy Delivery System for Increased Sustainability ("Formal Case No. 1130"),* Pepco Letter Update on the Status of the Distribution System Planning for Non-Wires Alternatives, filed Feb. 26, 2021.

[144] *See Formal Case No. 1130*, Pepco Letter Update on Distribution System Planning for Non-Wires Alternatives, filed Nov. 2, 2020.

Substation.[145] There is, however, a project (UDSPLM7WF3) that covers the costs associated with the fifth transformer at the Waterfront Substation.[146] This project epitomizes how the pre-approval of fixed capital projects over a three-year period may actually hinder deployment of NWAs. If the Company senses a risk that cost recovery could be jeopardized by deviating from the MRP budget – *e.g.*, from funding a capital project to funding an NWA deferral project – this risk would serve as a barrier to broader NWA deployment.

The Office raised the concern that the structure of the MRP and the pre-approval of a three-year capital budget could hinder deployment of grid modernization technologies and that the structure of the reconciliation process would further foreclose stakeholders from advocating for NWA alternatives once the capital budget is approved for the duration of the multi-year rate plan.[147] The Commission fails to come to terms with these structural deficiencies and their potential impact on NWA deployment in the District in Order No. 20755. The Commission instead approves the Modified EMRP on the speculative finding that the Modified EMRP will permit the Company to "focus additional attention" on NWA and other initiatives in the District. The Commission, however, cannot simply attribute these benefits to the Modified EMRP. It must establish "a 'rational connection between facts found and the choice made.'"[148] Here, there is no evidence that the Modified EMRP will actually produce the benefits that the Commission has attributed to it in Order No. 20755.[149]

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145 *See* Exhibit OPC (3E) (Mara) 49:8-9.

146 Exhibit Pepco (I)-2 at 109.

147 OPC Initial Brief at 118-19; Exhibit OPC (3E) (Mara) 49:12-16.

148 *Washington Pub. Interest Org.*, 393 A.2d at 77 (footnote omitted).

149 The Order also attributes several "customer assistance programs" to the Modified EMRP including "(1) suspending service disconnections; (2) extending the suspensions of disconnection and waiving of late fees; (3) working with customers to use customer assistance programs, including installment arrangements and budget billing; (4) using of customer assistance programs including waiver of late fees; (5) educating consumers on federal

As with NWA, there are no specific projects or programs included in the Modified EMRP construction budget that provide for enhancements to the interconnection process for renewable energy facilities. There are, however, other dockets, such as *Formal Case No. 1130*, that are working specifically on interconnection and DER initiatives. Order No. 20755 attempts to link these advances to the approval of the Modified EMRP, but there is no basis for doing so when this process has been ongoing for many years and the order provides no explanation or evidentiary basis for how the EMRP will improve upon the progress made during a period of traditional rate-making in the District.

Order No. 20755 also provides no rational basis for the finding that the Modified EMRP will "foster continued grid modernization grid reliability, grid resiliency and energy infrastructure projects."[150] Specifically, the Commission identifies the following projects as energy infrastructure investments "related to the Modified EMRP":

1. Distribution automation and smart grid programs;
2. Neighborhood reliability programs;
3. Area Reliability programs;
4. Harrison Substation upgrade;
5. Upgrade/replacement of distribution transformers;
6. DC PLUG; and
7. Capital Grid Project.

But each of these projects was already planned to occur under the traditional rate as filed by Pepco in this proceeding. The following list of projects included in the Company's Rate Making Adjustments under the "traditional" rate submitted in this proceeding demonstrates that these

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and local energy assistance; (6) supporting COVID-19 relief efforts in the amount of an $825,000 charitable donation; and (7) providing health and childcare benefits to support employees who do essential work." *Formal Case No. 1156*, Order No. 20755, ¶ 85, 476v. But these programs have nothing to do with the EMRP, modified or otherwise. Rather, they are programs that Pepco claims it already implemented in response to the public health emergency. Exhibit Pepco (5B) (McGowan) at 4:6-5:4.

150 *Formal Case No. 1156*, Order 20755, ¶ 8.

projects were already ongoing and additional spending was planned on these projects with or without Commission approval of a multi-year rate plan.[151]

RMA 3 Projects Planned Regardless of EMRP		
UDLPRM4DJ	Pepco DC Add Recloser Sectionalization (UDLPRM4DJ)	Area Reliability Programs
UDLPRM4WA2	Pepco DC: Benning Sub Area Plan (UDLPRM4WA2)	Area Reliability Programs
UDLPRM63D	Pepco DC: Feeder Reliability Improvements (UDLPRM63D)	Area Reliability Programs
UDSPRD8H	4kv Substation Automation (UDSPRD8H)	DA/Smart Grid
UDLPRM4SD1	DA Pepco DC Distrib OH Fault	DA/Smart Grid
UDSPRD8SG	Digital Fault Rcrdr Expert Sys	DA/Smart Grid
UDLPRDA1D	Distribution Automation Pepco DC (UDLPRDA1D)	DA/Smart Grid
UDSPRD8SD	Install Smart Relays & Replace RTU's DC (UDSPRD8SD)	DA/Smart Grid
UDSPLNW2	Harrison Sub: Construct New Sub (UDSPLNW2)	Harrison Substation Upgrade
UDLPLNW3	Harrison Sub: Extend New Dist Fdrs to 38 (UDLPLNW3	Harrison Substation Upgrade
UDSPRD8JD	Animal Guards in Dist Subs: Pepco DC (UDSPRD8JD)	Neighborhood reliability programs
UDLPRM4WJ	Pepco DC: Single Phase Reclosing Devices (UDLPRM4WJ)	Neighborhood reliability programs
UDLPRM4BF	PSC Priority Ckt Impvt: Benning (UDLPRM4BF)	Neighborhood reliability programs
UDLPRM4BQX	Reliability Improvements DC	Neighborhood reliability programs
UDLPRM41D	Reliability Improvements OH DC	Neighborhood reliability programs
UDLPRM42D	Reliability Improvements UG DC	Neighborhood reliability programs
UDLPRM4BN	Network Xfmr&Prot Repl Planned: Benni (UDLPRM4BN)	Upgrade/replacement of distribution transformers
UDSPRD9GD	Replace Deteriorated Dist Transformers DC (UDSPRD 9GD)	Upgrade/replacement of distribution transformers

There is, therefore, no rational basis for the Commission to conclude that these projects are benefits of the Modified EMRP. Similarly, the DC Plug program and the Capital Grid Program are currently in progress and there is no suggestion in the record that these programs would not continue in the absence of a multi-year rate plan. Pepco recently informed the Commission that the first DC PLUG feeder, Feeder 308, has been undergrounded and that Feeder 14900 is currently under construction for undergrounding and civil construction is expected to be completed in the fourth quarter of 2021.[152] Accordingly, while the Commission finds that these programs are

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[151] These classifications are based on OPC's review of the projects listed in the Construction report (Exhibit PEPCO (I)-2) and Pepco's workpapers for RMA3 (Exhibit OPC (E)-2 (Pepco Response to OPC Data Request No. 37-2, Attachment)).

[152] *In the Matter of Applications for Approval of Biennial Underground Infrastructure Improvement Projects Plans and Financing Orders, Formal Case No. 1145*, and *In the Matter of Applications for Approval of Biennial Underground Infrastructure Improvement Projects Plans and Financing Orders*, *Formal Case No. 1159*, Annual

related to the Modified EMRP, the record evidence shows that these projects would also proceed under a traditional ratemaking approach and therefore they do not provide any reasonable basis to approve the Modified EMRP.

3. The Modified EMRP lessens regulation, increases costs, and unreasonably shifts the risk of over-recovery to customers.

OPC has repeatedly argued throughout this proceeding that the condensed timelines and limited discovery options associated with the reconciliation mechanism of Pepco's proposed MRP would not result in significant cost savings, while reducing to an unacceptable degree the level of customer (and, in turn, Commission) oversight of Pepco spending.[153] OPC's Technical Conference Comments urged that the Commission ensure that any adopted alternative ratemaking proposal "leav[e] stakeholders with sufficient time and resources available to accomplish all essential reviews."[154] These comments informed the Commission's issuance of the AFOR Criteria, in which the Commission acknowledged both the need for transparency and the importance of customers retaining their due process rights. AFOR Criteria 8 through 10 state that in reviewing proposed ratemaking alternatives, the Commission will consider:

> (8) The risk of over-earning a utility's authorized return will be mitigated during the duration of AFOR for the benefit of the

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Status Report on Electric Company Infrastructure Improvement Activity, filed September 30, 2020.

[153] *See Formal Case No. 1156*, Post-Technical Conference Comments of the Office of the People's Counsel for the District Of Columbia, p. 43, filed Nov. 1, 2019 ("OPC Technical Conference Comments") ("no alternative proposal should be adopted unless it . . . leav[es] stakeholders with sufficient time and resources available to accomplish all essential reviews"); Exhibit OPC (C) (DeCourcey) at 8:9-11 ("[T]he Company's claim of reductions in regulatory burdens are . . . derived from corresponding and detrimental reductions in oversight by the Commission and customer representatives."); Exhibit OPC (3C) (DeCourcey) at 3:10-12 ("the proposed Earnings Sharing Mechanism [] and Annual Reconciliation Filings [] will in all likelihood add costs while diminishing needed oversight."); Exhibit OPC (3C) (DeCourcey) at 33:7-9 ("Limiting the Commission to review of informational filings and after-the-fact prudency reviews leaves it in an even worse position and may curtail the Commissions' ability to fulfill its primary mission effectively."); OPC Initial Br. at 126 ("[T]here is no question that approval of either the Enhanced or Original MRP will result in a diminution in the level of regulatory oversight that the Commission currently exercises over Pepco."); OPC Reply Br. at 9 ("Both of Pepco's proposals erode oversight, reduce flexibility, and increase customer costs—dangers magnified by their occurrence during a period of unprecedented uncertainty.").

[154] OPC Technical Conference Comments at 43.

> customers, while also preserving the Commission's ability to conduct cost prudency reviews as needed;
>
> (9) The AFOR provides an appropriate level of transparency and reporting into the utility's operational and capital plans ensuring that the plans will be maintained during the duration of the AFOR; and
>
> (10) The AFOR avoids any unreasonable shifting of risk to utility customers.[155]

Approving multi-year rate hikes necessarily means a lessening of Commission oversight—an especially unwelcome prospect during this period of great uncertainty created by the COVID-19 pandemic and at a time when it is increasingly important that the Commission play its part in advancing the District's ambitious climate goals. All of the non-utility parties and a significant portion of the community comments urged the Commission to reject any ratemaking paradigm that would degrade or diminish regulation and oversight of Pepco.[156] Commissioner Beverly agrees, stating: "I do not think it is worth surrendering our normal oversight over public utilities at a time when our involvement is increasingly important to ensuring that the District can meet its climate and energy goals."[157] Commissioner Beverly urged against adopting the "significant change that the MRP is likely to have on how the Commission will regulate Pepco in the future" and not "rush forward with such a paradigm shift right now."[158] The Commission has nonetheless

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155 *Formal Case No. 1156*, Order No. 20273, ¶ 6.

156 *See, e.g.,* OPC Initial Br. at 121 ("[N]ow is a time in which the Commission 'should be working more closely with Pepco on an ongoing basis until the current situation has improved'" (quoting Exhibit OPC (2C) (DeCourcey) at 17:15-21)); AOBA Br. at 30 ("The uncertainties regarding the Covid-19 impacts undermine the very premise of multi-year ratemaking proposals that are heavily dependent on forecasted data. As uncertainties associated with the Company's forecasts of costs and usage increase, the potential that risks will be shifted from the Company to its ratepayers also increase."); GSA Br. at 33 ([I]n light of the COVID-19 pandemic, now would be a particularly bad time to implement an MRP.").

157 *Formal Case No. 1156,* Commissioner Beverly Statement at 3.

158 *Id.* at 4.

"rush[ed] forward," proposing a paradigm shift that will unquestionably reduce Commission oversight of Pepco below "normal" levels.

The Commission finds that adoption of the MRP and related reconciliation processes will result in rate case savings. But the evidence is to the contrary. Adoption of the MRP has the potential to increase administrative burden and rate case expense, while reducing customer and Commission oversight. OPC identified the reconciliation process as a "recipe for extensive additional litigation, albeit with customer-side interests facing compressed litigation timelines and a process tilted firmly in the Company's favor."[159] As explained by OPC witness DeCourcey:

> If there is a reduction in regulatory burden associated with participation in rate cases and the expenses that come with it, that reduction has not been quantified, and the offsetting increase in the burden associated with frequent reviews of ARFs will partially or entirely offset any savings associated with reduced workloads to a degree that is also not quantified.[160]

Pepco offered no rebuttal to this testimony; in fact, witness McGowan testified that the Company has not examined the issue:

> Q: And am I correct then that the Company hasn't done an analysis of the resources that will be devoted to the reconciliation process, is that correct?
>
> A: That is correct. We have not done a detailed analysis.
>
> Q: Sir, the Company hasn't looked at what resources it would expect to expend or certainly what others would expend on the process, is that correct?
>
> A: So we haven't done a detailed analysis, that is correct. [161]

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159 OPC Initial Brief at 144.

160 Exhibit OPC (C) (DeCourcey) at 40:11-16.

161 Exhibit OPC-S1 (McGowan Dep. Tr.) 124:20-125:9 (*citing* OPC Data Request 12-14 (OPC Exhibit 11)).

The Order wrongly ignores the concerns raised by Commissioner Beverly, OPC, and the intervenor parties. Assuming the Commission decides, contrary to the record in this proceeding, that it is just and reasonable to move ahead with an MRP, it should reconsider its Order and adopt a more fair and balanced reconciliation process—one that provides both customers and the Commission itself with a sufficient opportunity to assess and address differences between planned and actual performance. The need to address this concern is particularly important given that, as noted earlier, the Company's revised or "reconciled" workplans may differ substantially from the basis on which the Commission approved Pepco's revenue requirement.

a) The reconciliation process adopted by the Commission is time-consuming and therefore expensive, a condensed timeline does not equate to less expense, just fewer procedural rights.

Pepco's EMRP proposed a three-part reconciliation structure: (1) an annual information filing to compare projected data to actuals; (2) a consolidated reconciliation and prudency review' to occur in a subsequent rate case; and (3) a final reconciliation and prudency review filed after the conclusion of the term of the rate plan.[162] The Commission adopts Pepco's EMRP reconciliation mechanism largely unedited, notwithstanding that it remains "difficult to see how the Company's proposed reconciliation mechanisms could be more administratively efficient than traditional rate case litigation."[163]

Annual Informational Filings. As approved, the Modified EMRP includes two annual informational filings, one for CY 2021 and another for CY 2022.[164] The CY 2021 informational

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162 *Formal Case No. 1156*, Order No. 20755, ¶ 96.

163 OPC Initial Br. at 149.

164 *Formal Case No. 1156*, Order No. 20755, ¶¶ 160-61. Note that the Commission appears to use the terms reconciliation filing and informational filing interchangeably. For clarity, OPC refers to them solely as informational filings.

filing will be filed on March 31, 2022.[165] The CY 2022 informational filing will be "processed" at some point in 2023, potentially as part of a rate case.[166] These informational filings trigger potentially significant administrative processes for stakeholders, under very compressed timeframes:

- A forty-five day discovery period;
- A fifteen day period to file comments after the close of discovery;
- A petition for a rate reduction if Pepco is over-earning;[167]
- A request for an evidentiary hearing if there are "significant differences" between forecasted expenditures and actuals;[168]
- An opportunity to raise potential prudence challenges; and
- An evidentiary hearing, if necessary.[169]

It is important to note that, as discussed in the Order, the second (CY 2022) informational filing may be addressed as part of a rate case, adding to the burden on OPC, the parties, and other interested stakeholders, who will have to review and respond to both an informational filing and a new rate case at the same time.

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165 *Formal Case No. 1156*, Order No. 20755, ¶ 161.

166 *Id.*

167 The annual informational filing will "allow" a rate reduction if Pepco is over-earning, but stakeholders may have to bear the burden of requesting and supporting that relief; the Order does not indicate whether the Commission will order a reduction on its own. *Id.* at ¶ 162.

168 The Commission does not define what magnitude of difference would be considered "significant." *Id.*

169 *Id.* at ¶¶ 161-62.

Final Reconciliation. The final reconciliation will be filed by Pepco up to ninety days after the end of the Modified EMRP.[170] This third filing will trigger yet more administrative process, including:

- A forty-five day discovery period;
- A fifteen day period to draft and file comments after the close of discovery;
- A petition for a rate reduction if Pepco is over-earning;
- A request for an evidentiary hearing if there are "significant differences" between forecasted expenditures and actuals;
- An opportunity to raise potential prudence challenges;
- An evidentiary hearing, if necessary.[171]

In other words, during the two and a half years that these rates are in effect, the reconciliation process *will* involve: (1) examination of three different filings; (2) three different discovery periods (one of which could be happening simultaneously with a rate case); and (3) three potential prudency reviews. The reconciliation process *could* involve: (1) three sets of comments; (2) two petitions for rate reduction; (3) three requests for evidentiary hearings; and (4) three evidentiary hearings. This level of process will require a significant mobilization of resources on behalf of stakeholders and the Commission which will make the purported rate case savings found by the Commission nonexistent. This error is especially problematic because, as described in Section IV.A.3., the Commission uses these illusory rate case savings as justification for adopting Pepco's MRP.

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170 *Id.* at ¶ 160.

171 *Id.* at ¶¶ 161-162.

b) Sixty days for discovery and comments on the informational filing and final reconciliation filing is not sufficient and will tilt the recovery of over-spending in Pepco's favor as customers face a compressed litigation timeline.

As described above, the administrative burden in the Modified EMRP is heavy. To be clear, OPC supports a thorough administrative process, especially as this is a pilot program. But the Commission's Order will essentially force stakeholders to attempt to pack a rate case's worth of procedures, normally a process that takes a year or more, into sixty days—forty-five days for discovery and fifteen days to draft and file comments.[172] This is not a sufficient amount of time for parties to be able to protect their due process rights and will hamper transparency, unreasonably shifting risk to customers.

This compressed timeline for discovery and the submission of comments will also affect the ability of the Commission to perform a prudency review, contradicting AFOR Criteria 8, which requires the Commission's prudency review ability to remain in place. The Commission may lack a sufficient record in order to perform its prudence review duties as stakeholders will have such a shortened timeframe to review the documents, conduct discovery, and then draft and file comments and/or petitions if stakeholders contend that Pepco is over-earning. As prudency reviews are fact-specific, the likelihood is that it will be difficult to determine whether there is a prudence concern absent sufficient opportunities both for discovery, and the review and analysis of whatever information has been provided.[173]

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[172] *See* Exhibit OPC (C) (DeCourcey) at Table 5. As shown there, Pepco has typically filed a rate case every two years.

[173] In these circumstances prudence reviews will be particularly challenging. As OPC witness DeCourcey testified:

> It is very difficult for a regulator to "claw back" spending that has already been deployed and placed into service—potentially some time previously—and the process of undertaking a counterfactual review to evaluate managerial decision-making at some point in the past can be problematic . . . As a general matter, after-

The Order does not address whether Pepco will be required to respond to discovery requests on an expedited basis during the forty-five day period. And, in any event, sixty days is a short amount of time to conduct the requisite reviews even if parties are able to complete the discovery process in a timely manner and with no disputes. OPC asked Pepco witness Wolverton on cross-examination what would happen if there were discovery disputes during the forty-five day discovery period.[174] The witness responded that he did not know whether stakeholders would have the opportunity to petition the Commission to direct a response or if the discovery period would pause pending a Commission order on that motion.[175] The Order likewise does not address what process-if any—will be followed if stakeholders disagree with Pepco about what information should be provided. But without rights to the receipt of responses on an expedited basis and to compel responses where needed, there seems little doubt that the 45-60 day process described in the Order will be inadequate.

As OPC understands the Commission's Order, the first annual informational filing will be stakeholders' first opportunity to challenge the spending in the capital workplan as no comment period is ordered after the Company files the edited workplan in October.[176] This makes it even

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> the-fact prudence reviews do not require that managerial decisions be perfect in hindsight, only that they be reasonable based on the circumstances exigent at the time they were made. In this instance, decisions are being made at a time of unprecedented uncertainty, so evaluating a decision's reasonableness at the time it was made will be even more difficult.

Exhibit OPC (3C) (DeCourcey) at 29:16-30:12.

[174] Tr. 143:6-12. Despite stating that this is something Pepco "wouldn't do," there is no way to know what disagreements parties will have over data requested and provided. *Id.* at 143:12.

[175] *Id.* at 143:13-17.

[176] OPC asks the Commission to clarify that stakeholders will have an opportunity to comment on the capital workplan when it is filed in Section V.C.

more unlikely that sixty days is enough time to conduct a sufficient prudence review to maintain stakeholders' due process rights and the Commission's ability to conduct prudence review.

Overall, the proposed sixty-day period within which to review the annual filings will not "provide[] an appropriate level of transparency and reporting into the utility's operational and capital plan" so the Commission and stakeholders cannot "ensur[e] that the plans will be maintained during the duration of the AFOR."[177] As OPC explained on brief, a "truncated opportunity to pursue prudence litigation is not an improvement--to transparency or to efficiency."[178] The Commission should, at a minimum, expand the timeline for examining Pepco's reconciliation filings. This need for an expanded review period is especially acute because this is a pilot program, a first-of-its-kind MRP in the District, so there will inevitably be "growing pains" as all parties get acquainted with the MRP process. Placing unreasonable constraints on OPC's ability to review and question Pepco's data shifts unfairly the risk of over-spending to consumers and is not "in the interest of the public."[179]

c) The Modified EMRP Annual Reconciliation Process is insufficient to ensure that only prudently-incurred expenses associated with used and useful facilities are included in rates.

As part of the Modified EMRP, the Commission approves an annual reconciliation process that is designed to "compare[] revenue requirement line items based on updated 2021 projections."[180] In describing the reconciliation process, the Commission states that the 2021 Reconciliation filing "shall cover the capital spending projects completed in the CY 2021, including the effects on electric plant in service, deferred taxes, rate base, as well as depreciation

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177 AFOR ¶ 6.

178 OPC Reply Br. at 18.

179 D.C. Code § 34-1504(d)(2)(C).

180 *Formal Case No. 1156*, Order No. 20755, ¶ 160.

expense."[181] The Commission explains further that "[t]he filing shall also include details on any capital spending variances between projected and actual results for those items set forth in this paragraph during CY 2021."[182] The Office seeks clarification regarding the scope of the annual reconciliation process described in Order No. 20755 and, absent the requested clarifications, seeks reconsideration of the Commission's decision to approve of the Modified EMRP for the reasons identified herein.

First, the Office seeks clarification that as part of the reconciliation process, Pepco will be obligated to submit the closed-out cost data and indicate whether individual projects included in the MRP budget were completed or not completed as part of the reconciliation filing. As the Office has explained, without closed-out cost data, stakeholders will not be able to determine any cost overruns or if projects were even completed.[183] Given the 45-day period allotted for discovery and 60-day period for comments on the reconciliation filing,[184] it is imperative that Pepco presents the critical information as part of the initial filing so that stakeholders can promptly begin their review and have time for meaningful input during the reconciliation process. The Commission should therefore clarify that interested parties will not need to seek discovery of the closed-out cost data necessary to assess the annual reconciliation filing, and should direct Pepco to provide that information, as well as supporting workpapers, as part of their filing.

The Commission should further clarify that the Office and other interested parties will have an opportunity to challenge whether projects moved into rates under the Modified EMRP

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181 *Id.* at ¶ 161.

182 *Id.*.

183 OPC Initial Brief at 113; Exhibit OPC (E) (Mara) at 40:19-41:2.

184 *Formal Case No. 1156*, Order No. 20755, ¶ 162.

procedures are actually in service and providing benefits to ratepayers. For example, the Office raised significant concerns with the Company's proposed rate treatment for the costs of adding sub-transmission conduit to the Frederick Douglas Bridge and the potential that costs associated with the engineering and design of the project would be included in rates even though the project would not be in service and providing benefits to ratepayers for several years.[185] As the Office explained, the project would not provide benefits to ratepayers until the civil work was completed, which includes constructing the new duct bank and installing the new 69kV cables and is not scheduled to be completed until sometime in 2022.[186]

While the Commission did not address this traditional rate case issue in light of the approval of the Modified EMRP, these issues can still arise in connection with the scheduled rate increases authorized under the Modified EMRP. In Order No. 20755, the Commission stated that the parties can "request a hearing if significant differences exist between forecasted and actual expenditures."[187] But if the annual reconciliation process contemplated in Order No. 20755 is simply a comparison of budgeted costs to actual costs, there will be no opportunity for meaningful review to determine if the costs to be included in rates are associated with used and useful projects providing benefits to ratepayers. Failure to include such a requirement – and the ability for stakeholders to raise these issue before the Commission – would constitute a departure from long-standing precedent with respect to ratemaking and the requirement that items should only be

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185 OPC Initial Brief at 35-37.

186 *Id.* at 36. The Office also raised other spending concerns, including regarding the level of proposed spending on Paper Insulated Lead Covered ("PILC") cable replacement as the costs appear to be significantly overstated, and the costs for the Walter Reed facility. OPC Initial Br. at 163-64 (referencing testimony of OPC witness Mara). These issues will need to be confronted in reviewing the reconciliation filing.

187 *Formal Case No. 1156*, Order No. 20755, ¶ 162.

included in rates when they are "used and useful" in providing service.[188] In providing this clarification, the Commission should also clarify that the right to request a hearing under the Modified EMRP would encompass such issues. Absent the requested clarification, this narrow right will preclude the types of challenges necessary to ensure that only prudently-incurred expenses associated with used and useful facilities are included in rates paid by District consumers.

4. Despite being called a Pilot, the Modified EMRP contains no metrics by which to measure its success or failure.

The Commission Order asserts that "[a]dopting the Modified EMRP as a pilot program provides the Commission, the Parties, and other stakeholders with an opportunity to improve the MRP process and prudently evaluate the overall performance and effectiveness of the Modified EMRP."[189] But the Order does not describe or mandate how that improvement and evaluation is supposed to occur—the Order contains no evaluative criteria against which to measure the pilot program's performance, identifies no reports that Pepco will be required to file, and promises no post-program meetings to facilitate discussion among stakeholders. Pepco suggested that "the most effective way for the Commission to evaluate [the MRP] is to have a lessons learned meeting. And have input from all parties."[190] Pepco's recommendation is vague and lacks detail. And notably, Order 20754 does not include even Pepco's suggestion.

The Order is based heavily on the Maryland Public Service Commission's December 2020 adoption of an Exelon Corporation-proposed MRP Pilot Program.[191] The distinctions between the

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188 "[A]n item may be included in a rate base only when it is 'used and useful' in providing service. In other words, current rate payers should bear only legitimate costs of providing service to them." *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 606 F.2d 1094, 1109 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 920 (1980); *accord, Washington Gas Light Co. v. Public Service Commission*, 450 A.2d at 1226.

189 *Id.* ¶ 474.

190 Exhibit OPC-S1 (McGowan Dep. Tr.) at 150:6-9.

191 The Maryland PSC adopted an MRP Pilot Program for Baltimore Gas and Electric ("BGE") in Order No. 89678, issued in December 2020. Like Pepco, BGE is a subsidiary of Exelon. *Case No. 9648, In the Matter of*

two cases are pronounced. The Maryland Commission's Order was issued pursuant to an earlier, February 2020 "Pilot Order," in which the Maryland Commission set the standards for the adoption of a Pilot MRP in the state.[192] The Maryland Pilot Order was based on an evidentiary record that is not before this Commission and the Maryland PSC's consideration of an alternative form of ratemaking is not subject to the same statutory requirements of consumer protection and a finding of public interest as Pepco's application is here. Notwithstanding these differences, the Maryland Pilot Order finds that implementation of a Pilot MRP will afford the Maryland PSC "valuable experience with implementing the Pilot MRP," after which "the [Maryland] Commission will promulgate regulations to ensure the orderly consideration of MRPs statewide."[193] To put this process in motion, the Maryland Commission provides for a post-MRP lessons learned review process, which includes participation by stakeholders—an initiative that the Commission finds "would be helpful to inform future MRP filings."[194] Maryland Commission Staff will also file a report after the conclusion of an MRP "detailing recommendations to improve MRP filings and the review process."[195]

By contrast, while Order No. 20755 asserts that the pilot could "*facilitate* the adoption of regulations for MRP and other AFOR applications," it says nothing about the processes through which this "facilitation" will occur, or whether (and how) "lessons learned" will be identified and

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Application of Baltimore Gas and Electric Company for an Electric and Gas Multi-Year Plan, Order No. 89678 ¶ 240 rel. Dec. 16, 2020 ("MD Order No. 89678").

192 *See* Maryland PSC, *Case No. 9618, In The Matter Of Alternative Rate Plans Or Methodologies To Establish New Base Rates For An Electric Company Or Gas Company*, Order No. 89482, rel. Feb. 4, 2020 ("Pilot Order").

193 *Id.* ¶ 2.

194 *Id.* ¶ 25.

195 *Id.*

used in the future.[196] The Order does not mandate any post-Pilot process. For its part, Pepco seems equally in the dark. Witness McGowan testified that neither Pepco nor Exelon Utilities have developed any criteria for determining whether an MRP has been a success.[197]

If the Commission affirms its decision to move ahead with the pilot, it should make clear that doing so sets no precedent for the future. GSA, for example, recommended that a pilot program "should not be considered precedent. In other words, approval of an MRP in this case should not be considered determinative of whether another MRP would be approved by the Commission in the future."[198] In approving BGE's pilot program, the Maryland Commission makes clear that its approval is not precedential.[199] This approach seems especially appropriate here, as the Order offers no path for how to evaluate if the MRP Pilot has been successful. In these circumstances, OPC asks that the Commission follow Maryland's lead and make it clear that the Order's approval here of a pilot MRP for Pepco is not a finding that an MRP should or will be adopted in the future. Alternatively, to the extent the Commission considers the pilot program approved here to be a potential model for future ratemaking, then the Commission should at least adopt criteria for evaluating whether the program has been a success, and convene a "lessons learned" proceeding in which stakeholders will have a chance to evaluate the MRP and suggest pathways for the future.

B. The Order erred in failing to consider evidence demonstrating that Pepco's decision to build the Potomac River Crossing was imprudent.

The Office submitted substantial record evidence in this proceeding demonstrating that the Company's decision to construct the Potomac River Crossing was imprudent and the associated

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196 *Formal Case No. 1156*, Order No. 20755, ¶ 143 n.408 (emphasis added).

197 GSA Initial Br. at 33.

198 GSA (A) (Goins) at 15:19-20; *Formal Case No. 1156*, Order No. 20755, ¶ 139(h).

199 MD Order No. 89678 ¶ 370. *See also* Richard Dissent in Part and Concurrence in Part in MD Order 89678 ¶ 10 ("this case is a pilot MRP and does not set precedent").

costs allocated to the District – *i.e.* $9,487,853 – should be removed from rate base.[200] Specifically, the Office demonstrated that there were more economical options known to the Company at the time the decision to construct the Potomac River Crossing was made that would have alleviated the emergency condition at a fraction of the cost to District ratepayers.[201] The Commission erred by failing to address this substantial record evidence in Order No. 20755. As the Commission acknowledged, "because the EMRP is based upon an adjusted historical test year, the Commission must first address the starting period to establish a base from which to forecast expenditures during the MRP."[202] The Office's claim of imprudent expenditures associated with the Potomac River Crossing is directly relevant to the determination of a just and reasonable starting rate base for the Modified EMRP. The effect of Order No. 20755 is to permit the recovery of these costs in rate base without any explanation as to how the Commission reached its conclusion and without any assessment of the record evidence submitted by the Office. The Commission's failure to consider this evidence is plain error and should be corrected on reconsideration.[203]

C. The Order erred in authorizing Pepco to continue to recover under the Benning regulatory asset.

In its initial proposal, Pepco proposed three ratemaking adjustments related to environmental remediation and investigation costs at the Benning Road Facility: Ratemaking Adjustments 5, 20a, and 20b. Order No. 20755 correctly removes Adjustment 20b (per Pepco's

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200 OPC Initial Br. at 42-29.

201 *Id.*

202 *Formal Case No. 1156*, Order No. 20755, ¶ 177.

203 *See, e.g., Washington Pub. Interest Org.*, 393 A.2d at 75 ("A utility rate cannot be deemed 'reasonable' simply because an expert agency says it is. Independent of a petitioner's burden to show convincingly that a Commission-prescribed rate is unreasonable, the Commission—as we shall develop below—has the burden of showing fully and clearly why it has taken the particular ratemaking action.")

own EMRP proposal which removed post test-year costs)[204] and denies regulatory treatment of Adjustment 20a and costs related to the Anacostia River Sediment Project.[205] But the Order errs in authorizing Pepco to continue to include Ratemaking Adjustment 5 (Remedial Investigation Costs for the Benning Road Facility) as the Commission has not yet found the costs are allowed under the valid and enforceable Settlement Agreement and prior Commission orders, and the evidentiary record supports a finding that such recovery is contrary to the prohibitions set forth in those documents.[206]

1. The Order is contrary to the 1999 Settlement Agreement.

In its testimony and briefs, OPC addressed at length why Pepco's request to recover any costs related to the Benning Generating Station is contrary to Pepco's obligations under PSC Order No. 11576 and the Settlement Agreement that was approved therein.[207] Specifically OPC explained that:[208]

> In the 1999 Settlement Agreement, Pepco agreed to "auction its plants, facilities and equipment used in the generation of electricity" but retained the flexibility not to offer the Benning Road and Buzzard Point generating stations for sale when it auctioned the balance of its generating stations. . .
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> The 1999 Settlement Agreement specified that:

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204 *Formal Case No. 1156*, Order No. 20755, ¶¶ 175, 177.

205 *Id.* ¶ 277.

206 *Id.* ¶¶ 276-77. The Order allows Pepco to continue to track and defer costs related to: (1) Benning Road environmental investigation and remediation that were incurred since the Formal Case No. 1150 settlement and (2) the Anacostia River Sediment Project. *Id.*, ¶¶ 277-78. To the extent the Commission considers those costs in the future it must do so through the lens of the 1999 Settlement Agreement.

207 OPC Initial Br. at 208-217 and references cited therein, OPC Reply Br. at 82-93; *see also* Exhibit OPC (F) (Wielgus); Exhibit OPC (2F) (Wielgus).

208 OPC Initial Br. at 210-11 (*citing* Formal Case No. 945, In the Matter of Investigation into Electric Services, Market Competition and Regulatory Policies ("Formal Case No. 945"), Order No. 11576, Appendix A (Non-Unanimous Stipulation and Settlement Agreement in December ("1999 Settlement Agreement")) at Section 1.05, rel. December 30, 1999 ("Order No. 11576"); Exhibit Pepco (K) (Sanford) at 5:13-15.)

> In connection with any Pepco base rate proceeding in the District of Columbia instituted after June 30, 2000, the Benning Road and Buzzard Point generating stations shall not be included in the cost of service for purposes of determining the Company's District of Columbia jurisdictional revenue requirement.
>
> On December 30, 1999, the Commission issued Order No. 11576 approving the settlement agreement as filed, including the dictates in Section 1.

In its Reply Brief, OPC further explained that:[209]

> Section 1.05's prohibition on including the Benning Road Generating Station in a rate case cost of service calculation includes no qualifiers—the language is broad and absolute. . . in this case, the Company's presented its proposal to recover Benning-related environmental investigation and remediation costs as regulatory assets and ratemaking adjustments in its cost of service calculations—this is contrary to the plain language of the 1999 Settlement Agreement.

The Order neither references OPC's arguments[210] nor makes any attempt to confront the cost recovery prohibitions of the valid Settlement Agreement. Such failure constitutes both a legal and a factual error.

First and foremost, the Order's determination that Pepco may recover Ratemaking Adjustment 5 and may continue to track Benning-related costs is contrary to long-standing principles of contract law[211] which require that the Commission use "the written language

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209 OPC Reply Br. at 84.

210 *See generally,* Order No. 20755, ¶¶ 259-278.

211 District of Columbia v. Young, 39 A.3d 36, 39-40 (D.C. 2012)(holding that "Settlement agreements are construed under general principles of contract law[,]" and that Courts will "enforce a valid and binding settlement agreement just like any other contract.");*Formal Case No. 1057*, *In the Matter of Verizon Washington, D.C. Inc.'s Price Cap Plan 2007 for the Provision of Local Telecommunications Services in the District of Columbia*, Order No. 14883, at 19, rel. August 7, 2008 (citations omitted) (a "settlement agreement is a binding contract, to be interpreted

embodying the terms of an agreement [to] govern the rights and liabilities of the parties [regardless] of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite undertaking, or unless there is fraud, duress, or mutual mistake."[212] As OPC explained in its Initial Brief:[213]

> The plain language of the Formal Case No. 945 Settlement Agreement is clear and absolute, Pepco may not include the Benning Road Generating Station in its cost of service in any rate case following June 30, 2000. And there is no other provision in Order No. 11576 or in the 1999 Settlement Agreement that would supersede[] this language and allow Pepco to collect from ratepayers costs related to future environmental investigation or remediation activities related to the Benning Road Generating Station.

Moreover, the conclusion is contrary to District law which requires that "[a]ll orders and decisions of the Commission shall remain in full effect [] unless and until they are suspended, superseded, or rescinded by the Commission or are vacated by lawful order of the District of Columbia Court of Appeals."[214] As OPC explained in its Initial Brief, "there is no evidence in the record that the Agreement has been superseded or changed by any subsequent Commission order;" as such, the prohibition stands.[215] The Commission has no legal authority to allow Pepco to continue to recover costs related to Benning, when such recovery is prohibited by a valid Settlement Agreement and a valid Order approving that Settlement Agreement.

The Commission's failure to confront OPC's arguments is also contrary to the Administrative Procedures Act which requires all findings of fact and conclusions of law be

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according to contract law principles").

212 *Formal Case No. 945*, Order No. 11576 ¶ 20 (additional language in original).

213 Initial Br. at 214.

214 D.C. Code § 34-607 (providing for certain exceptions outlined in D.C. Code § 34-604, none of which are relevant here.)

215 Initial Br. at 214.

"supported by and in accordance with the reliable, probative, and substantial evidence."[216] The Supreme Court has made clear that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."[217] But the Order makes no accounting of the record evidence provided OPC on the impact of the Settlement Agreement on Pepco's request to recover costs related to the Benning facility. Indeed, the Order's only mention of the 1999 Settlement Agreement is in Paragraph 262 which states that "Pepco also argues that recovery of costs for remediation of the cooling tower basins is reasonable, consistent with Commission precedent, and not barred by the Formal Case No. 945 Settlement Agreement." While Pepco may feel that the Settlement Agreement does not apply, Pepco is a party to—not the arbiter of—the settlement agreement and the Commission order approving the same. Respectfully, it is the Commission—not Pepco—that must interpret and enforce the Settlement Agreement.

2. The Order is contrary to the evidentiary record.

In approving Ratemaking Adjustment 5, the Order claims that

> Pepco contends the RI/FS is necessary and provides a benefit to current customers as the Benning Road site is currently devoted entirely to Pepco's Service Center's operations. These facts are for the most part uncontested and we are persuaded by Pepco that the remediation, investigation, and feasibility study costs were prudently incurred and are recoverable consistent with Commission precedent.[218]

But as OPC explained in its Reply Brief,[219] Pepco provided no evidentiary support for this claim:

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216 D.C. Code § 2-509 (e).

217 *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 95 L. Ed. 456, 71 S. Ct. 456 (1951), *quoted in* In re Dwyer, 399 A.2d 1, 11 (D.C. 1979)(*cited by Shaw Project Area Committee, Inc. v. District of Columbia Com. on Human Rights*, 500 A.2d 251, 255, 1985).

218 *Formal Case No. 1156*, Order No. 20755, ¶ 276.

219 OPC Reply Br. at 87.

> Though Pepco['s Initial Brief] cites to Ms. Sanford's Direct Testimony ([Exhibit Pepco (K)] at 3:3-10) for this statement, Ms. Sanford's Direct Testimony makes no such assertion. The cited portion of Ms. Sanford's Direct Testimony references the Benning Road Service Center, which is located on a portion, but does not cover all of, the Benning Road Property. Rather Ms. Sanford's Direct Testimony goes onto to discuss that the Benning Road facility encompasses not just the Benning Road Service Center, but also housed the now-decommissioned Benning Road power plant.

As the proponent of the rate case, Pepco has the burden of proof to demonstrate that the requested recovery is just and reasonable, and to support such requests with reliable and probative evidence.[220] Unsworn statements by counsel on brief do not constitute "evidence."

And contrary to the Order's claim that these facts "are for the most part uncontested," OPC filed extensive testimony contesting Pepco's assertion, stating among other things that:

> As OPC witness Wittliff explains in his Direct Testimony, nearly 24 acres out of the 77-acre facility were used for the former power plant, cooling towers, and historical power generation station auxiliary equipment (e.g. coal pile, clarifier sludge dewatering area, above ground oil storage tanks, and the railroad switchyard.) Though Ms. Sanford's rebuttal testimony states that Pepco has expanded its service center to use areas formerly occupied by the Benning Generating Station, discovery made clear that these areas of expansion are limited and that "Pepco has no specific plans at this time for future expansion of Service Center operations within the former generating station area.[221]

OPC further explained that "'Pepco has provided no information as to whether these 'expanded' uses are occurring in areas that are under investigation in the RI/FS or are the cause of the

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220 *Atlantic Tel. Co. v. Public Service Com.*, 390 A.2d 439, 443 (D.C. App. 1978)("Under the District of Columbia Administrative Procedure Act, the proponent of a rate order has the burden of proving that the proposed rates are just and reasonable. . . . And, the utility must show that expenditures relied upon as a basis for the rates are themselves reasonable.)(*citing Pacific Northwest Bell Telephone Co. v. Sabin*, 21 Or.App. 200, 534 P.2d 984, 991 (1975*); State ex rel. Utilities Commission v. General Telephone Co. of Southeast*, 281 N.C. 318, 336, 189 S.E.2d 705, 723 (1972).

221 OPC Reply Br. at 88 (*citing* Exhibit OPC (G) (Wittliff) at 13:4-16:2).

contamination that underly the environmental response activities.'"[222] Although the Order recognizes that "a review of the Company's request raises concerns about the past uses of the site and how costs for the RI/FS and actual remediation should be allocated among generation, transmission, and distribution, and ultimately the amount that should be recovered from District distribution customers,"[223] the Order provides no explanation as to why recovery of Ratemaking Adjustment 5a is warranted at this time when that allocation has not yet been conducted.

And while the Order claims that the Commission is "persuaded by Pepco that the remediation, investigation, and feasibility study costs were prudently incurred and are recoverable consistent with Commission precedent," the Order provides no findings of fact as to how the Commission made this conclusion. Such silence constitutes a failure to engaged in reasoned decision-making.[224]

Moreover, this conclusion ignores entirely OPC (and DCG's) extensive testimony and briefing explaining why Commission precedent is inapplicable in this case. As OPC explained in its Reply Brief, [225]

> the referenced standard was set forth in Formal Case No. 922, Order No. 10307. This Order was issued in 1993, well before the District adopted electric and gas retail choice, and directed the unbundling of generation, distribution, and transmission. As such the rate case at issue in Formal Case No. 922 was for bundled gas service, and did not address the portioning of environmental contamination or investigation/remediation costs as must be done in this case where the requested rate increase is limited to the Company's distribution service.
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> Further, Pepco has not met any of the four prongs announced in Order No. 10307. In particular, and as addressed by OPC witness

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222 OPC Reply Br. at 88 (*referencing* Exhibit OPC (2G) (Wittliff) at 5:19-21).

223 *Formal Case No. 1156*, Order No. 20755, ¶ 274.

224 *Washington Pub. Interest Org.,* 393 A.2d at 77.

225 OPC Reply Br. at 90-91.

> Wittliff's testimony Pepco has not produced record evidence demonstrating that the RI/FS costs "were prudent and necessary with respect to [distribution] ratepayer cost recovery," has not demonstrated that Pepco's distribution ratepayers will receive a benefit as a result of investigating and remediating environmental contamination at the Benning Road Facility, and has not demonstrated that it is the appropriate time for the Commission to review the Company's actions with respect to the site.

The Commission's failure to address OPC's legal and evidentiary arguments regarding the Benning environmental costs must be corrected on reconsideration.

D. The Order committed legal error in authorizing Pepco to issue energy efficiency rebates and loans.

The Order "approves Pepco's Energy Efficiency $2 million zero-interest loans and the $3 million Supplemental Energy Efficiency Incentive programs and allows the creation of a regulatory asset to track the costs for these programs,"[226] but such authorization is contrary to District law.

Through the CleanEnergy DC Omnibus Amendment Act of 2018, D.C. Council laid out a specific process for a utility to propose and for the Commission to approve utility energy efficiency and demand response programs. Specifically, D.C. Code § 8-1774.07(g)(4) states that:

> As of October 1, 2019, the electric company or gas company, after consultation and coordination with the Department of Energy and the Environment and the District [Sustainable Electric Utility] SEU and its advisory board, may apply to the Commission to offer energy efficiency and demand reduction programs in the District that the company can demonstrate are not substantially similar to programs offered or in development by the SEU, unless the SEU supports such programs.

The record contains no evidence that Pepco consulted with the Department of Energy and Environment or the DC SEU and its Advisory Board before proposing the $5 million energy

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[226] *Formal Case No. 1156*, Order No. 20755, ¶ 147.

efficiency loan and rebate program, nor is there any evidence that these programs are not substantially similar to programs offered or development by the DC SEU.[227] Pepco's failure to conduct the prerequisite consultation deals a fatal blow to its proposal.

But the error is even deeper than the utility's failure to comply with the law. While the Commission is allowed to approve a utility application for an energy efficiency and demand reduction program, such authority is predicated on a

> Commission find[ing] the proposed program and cost recovery mechanisms as set forth in the application to be in the public interest and consistent with the District's public climate change commitments as determined by the Mayor, unlikely to harm or diminish existing energy efficiency or demand response markets in which District businesses are operating, and consistent with the long-term and annual energy savings metrics, quantitative performance indicators, and cost-effective standards established by the Commission pursuant to paragraph (1) of this subsection.[228]

The order includes no such findings and there is no evidence in the record that would support a finding. To the contrary, OPC witness Dismukes testified why these programs are problematic:[229]

> First, the Company is seeking to place to the costs of the program (up to $5 million) in a regulatory asset and to earn a return at its authorized weighted cost of capital. This means the Company will profit from programs that are purportedly designed to assist customers in a time of need. Second, the District has already started a Green Bank, which customers fund through their energy bills, and the Commission already has an active case addressing potential Pepco-led energy efficiency programs, Formal Case 1160, which was just started earlier this year. The programs that Pepco proposes as part of its MRP Enhanced proposal may simply circumvent these programs and working group processes, including the

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227 To the contrary, the evidence shows that Pepco's programs are duplicative of what the SEU is offering. *See, e.g.* Exhibit OPC (4A)-5 (Pepco Response to OPC Data Request No. 59-40) (stating that "Pepco will propose to offer measures eligible under the existing DC SEU program).

228 *Id.* § 8-1774.07(g)(6).

229 Exhibit OPC (4A) (Dismukes) at 15:5-16:2 (internal citations omitted).

> recommendations that the FC1160 Working Group has provided to the Commission and the comments that were lodged by stakeholders on the same. Additionally, though Pepco claims that its proposed programs will be "complementary to the programs administered by the DC SEU," programs which customers already fund through the energy bills, Pepco has not provided enough details to determine that will indeed be the case.

The Order's sole justification for approving the program is the claim that "the exigency of the unprecedented COVID-19 pandemic convinces the Commission to adopt and approve Pepco's programs."[230] But, there is no evidence in record that the energy efficiency loans and rebates will alleviate any of impacts of COVID-19 on customers.[231] Moreover, as Pepco benefits from a Bill Stabilization Adjustment that makes the Company whole for any lost revenues—whether due to changes in usage due to the pandemic, customer attrition, or the implementation of energy efficiency programs—the Commission's claim that it "will provide needed relief to customers during the COVID-19 pandemic" is illusory at best.

As a creature of statute, the Commission's exercise of its authority must be consistent with its authorizing legislation. The Commission's authorization of $5 million in loans and rebates, that will be underwritten by ratepayers, does not comport with the strictures of its statute, and must be reversed on reconsideration.

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230 *Formal Case No. 1156*, Order No. 20755, ¶ 148.

231 *See Washington Public Interest Organization*, 393 A.2d at 75 (A utility rate cannot be deemed "reasonable" simply because an expert agency says it is. . .the Commission. . .has the burden of showing fully and clearly why it has taken the particular ratemaking action.")

VI. REQUEST FOR CLARIFICATION

A. The Commission should modify Schedule 3 of its Order to reflect the Commission's ruling concerning PHISCO Deficient Deferred Income Taxes.

The Order states that the Commission "agrees with OPC's position that . . . PHISCO non-property related ADIT [accumulated deferred income taxes] are not [authorized to be included in rate base]."[232] The Commission therefore "denies the Company's revised proposal to include the NPNP DDIT [Non-Protected Non-Property Deficient Deferred Income Taxes] asset."[233] To effect this change, Pepco's rate base needs to be reduced by $5,268,000, as recommended by OPC witness Ramas.[234] The Commission indeed orders that change in the body of the order by reducing rate base "by $5.3 million."[235] However, this change is not reflected in Schedule 3 of the Commission's Order, which only shows a reduction of $3,818,000 to Pepco's rate base.[236] OPC respectfully asks that the Commission clarify its Order by correcting Schedule 3 to reflect the entire $5.3 million reduction to rate base.

B. The Commission should clarify its Order to provide the specifics on how it calculated the ADIT rate base reduction.

Schedule 1, Line 6 of the Commission's Order shows the reduction to rate base due to the Commission's rulings concerning ADIT, but that figure is not broken down into separate line items. For example, in Pepco's Compliance Filing, Line 6 of Attachment H breaks ADIT down into three categories: ADIT, Federal Tax Cuts and Jobs Act ("TCJA") excess deferred income

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232 *Formal Case No. 1156*, Order No. 20755, ¶ 356.

233 *Id.*

234 *Id.* at ¶ 355.

235 *Id.* at ¶ 356.

236 *Id.* at Attach. C, Sched. 3, l. 7.

taxes ("EDIT"), and DC EDIT.[237] Without these separate line items, OPC is unable to determine how the Commission derived the ADIT balances shown in Schedule 1 for rate years 1 and 2. OPC respectfully requests that Commission clarify its Order to provide an itemization of the separate components of the ADIT that breaks that number down into separate line items so that OPC can ensure that the Commission's finding on the TCJA balances and the amortization discussed in Section XIII.B.1 of the Order are considered in the derivation of the Schedule 1 ADIT balances for rate years 1 and 2.

C. The Commission should clarify that stakeholders will have an opportunity to comment on the capital workplan that is yet to be filed.

As discussed in Section IV.A.1, the Commission has ordered Pepco to file a revised capital workplan in October, and to take into account the (1) $60 million in COVID reductions the Company proposed in its EMRP Proposal and (2) the additional $25 million COVID-related reduction ordered by the Commission for CY 2021 and CY 2022. For the reasons explained previously, OPC requests clarification that it—and other stakeholders—will be afforded an opportunity to review, conduct discovery concerning, and provide comments—including objections to--the Company's final capital workplan, under the same time schedules that are provided with respect to the reconciliation filings.

OPC assumes that this request will not be controversial. In discussing the $25 million COVID-related reductions, the Order states:

> We are not reducing the forecasted capital expenditure for reliability projects. However, given the reduced load growth due to the pandemic, unless the expenditure is absolutely necessary for reliability, we expect the Company to defer additional capital expenditures during 2021 and 2022. We encourage the Company to

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[237] *Formal Case No. 1156*, Pepco Compliance Filing, Attach. H, p. 1, l. 6, filed June 24, 2021 ("Pepco Compliance Filing").

> use its discretion to pursue additional cost-containment activities without reducing the quality, availability, and reliability of customer service. Furthermore, with the Commission adopting the annual information filing and final reconciliation, the Company will need to fully justify that all its capital expenditures were prudently incurred to maintain the quality, availability, and reliability of customer service.[238]

In line with this explanation, OPC seeks a full and fair opportunity to explore, understand, and confirm—or, if necessary—contest the extent to which the proposed capital expenditures set forth in the workplan were "prudently incurred to maintain the quality, availability, and reliability of customer service."[239]

While the record evidence in this proceeding supports a reduction in Pepco's proposed additions to EPIS in 2021 and 2022 in light of the downturn in economic activity in the District as a result of COVID-19,[240] there is no evidence to support the amount that the Commission chose.[241] To the extent the Commission does not grant reconsideration on the approval of the modified EMRP, the Office seeks clarification that it will have an opportunity to review and comment on the Company's final capital workplan and ensure that it complies with the Commission's directives in Order No. 20755 and is otherwise just and reasonable and consistent with District law and Commission precedent. In the absence of this clarification, the Office seeks reconsideration of the Commission's decision as it would permit the starting capital budget for the Modified EMRP to go into effect without stakeholder scrutiny and a Commission order on the merits of the final capital budget. In addition, if the Modified EMRP is sustained on reconsideration, it is critical that

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238 *Formal Case No. 1156*, Order No. 20755, ¶ 295.

239 *Id.*

240 *Id.*

241 *Id.* (Directing Pepco to remove $25 million in budgeted EPIS costs from capital spending for each of 2021 and 2022.)

stakeholders are not presented with a moving target heading into the annual reconciliation process. Stakeholders must know definitively what is in the capital plan and what is not included in the Company's plan in order to have the basis for a meaningful review of the Company's construction spending during the annual reconciliation process. The additional review and comment procedures sought by the Office will help facilitate that understanding.

Moreover, the Office identified several sources of potentially inflated costs in the Company's proposed capital budget including items designed to achieve the Company's proposed elevated PIMs reliability targets,[242] extensive use of "blanket" work orders,[243] and overstated Paper-Insulated Lead Cable replacement spending.[244] In addition, the Office submitted record evidence demonstrating that "if the pandemic continues to slow down construction, and the Mt. Vernon Substation in service date is delayed, it is reasonable to believe that $90.5 million of plant additions in the MRP budget could be delayed by at least one year."[245] These items demonstrate that additional oversight of the Company's modified budgets is warranted to ensure that the revised budget is responsive to the Commission's order and not simply a product of reducing already overinflated line items or, in the case of the Mt. Vernon Substation, a prudent deferral of a project based on shifting load growth projections. The Commission found in Order No. 20755 that the Company should "use its discretion to pursue additional cost-containment activities without reducing the quality, availability, and reliability of customer service."[246] Without additional review and comment on the revised capital workplan it is impossible for stakeholders to have

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242 OPC Initial Br. at 114-15.

243 OPC Initial Br. at 115-16.

244 OPC Initial Br. at 116-18.

245 OPC Initial Br. at 163.

246 *Formal Case No. 1156*, Order No. 20755, ¶ 295.

confidence that the Company is complying with these obligations and ensure that the final construction plan is in accordance with District law, Commission precedent and is otherwise just and reasonable.

D. The Commission should correct the reconciliation filing in Pepco's compliance filing.

Order No. 20755 directed Pepco to file revised rate schedules in accordance with the Order by June 21, 2021.[247] Pepco's Compliance Filing only provides for two reconciliation filings, one Annual Informational Filing coming "no later than March 31, 2022" and a Final Reconciliation "within 90 days of the end of the Modified EMRP, no later than March 31, 2023."[248] However, the Modified EMRP includes the entirety of CY 2023.[249] If the Commission were to allow Pepco's reconciliation filing schedule to go into effect, as described in its Compliance Filing, the variances in CY 2023 would not be examined and, if Pepco over-earns in that year, customers would not have a chance to recover those over-earnings.

To the extent the Commission does not grant OPC's reconsideration with respect to the approval of the Modified EMRP, the Commission should clarify that the reconciliation process is to proceed as described in Section IV.A.3, namely that the Order requires *three* filings during the period of the Modified Enhanced MRP: two informational filings and a final reconciliation filing. The first informational filing, covering CY 2021, must be filed by March 31, 2022.[250] The second informational filing will be "processed" within 2023, either independently or as part of a rate case.[251] Then the final reconciliation is "to be conducted at the conclusion of the Modified

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247 *Id.* at ¶ 481. The compliance date was later extended to June 24, 2021 pursuant to a Pepco motion.

248 *Formal Case No. 1156*, Pepco Errata to Revised Rate Schedules, p R-58.1, filed June 30, 2021.

249 *Formal Case No. 1156*, Order No. 20755, ¶ 476(aa).

250 *Id.* at ¶ 161 & n.437.

251 *Id.* While the Order does not require Pepco to file a rate case in CY 2023, but prohibits new rates from going

EMRP."[252] This final reconciliation would need to be filed in CY 2024 so as to account for any over- or under-earning by Pepco in CY 2023, which is included in the period covered by the Commission's Order.[253] If the Commission grants this clarification, it should also order Pepco to update its Compliance Filing accordingly.

E. The Commission's directives regarding the Bill Stabilization Adjustment are confusing and require further clarification to ensure the structural deficiencies are addressed.

The BSA has been an issue of concern for some time.[254] Given those longstanding concerns, and the troubling issues that arose during the pendency of this proceeding, OPC explained on brief that calls for the BSA's discontinuance are well-founded.[255] If the Commission is not inclined to eliminate the BSA, however, OPC asked the Commission to initiate an investigation to examine the continuing justness and reasonableness of the BSA.[256] OPC explained that the scope of the investigation should include, at a minimum, Pepco's quality control measures and the prudence of both Pepco's management of the BSA and recovery of deferred BSA balances that accrued due to Pepco's failure to administer the BSA correctly.[257]

In Order No. 20755, the Commission recognized the concerns that OPC and others have raised regarding the BSA. The Commission explained that it "share[d] Parties' concerns regarding a significant BSA deferral linked to the pandemic and associated economic downturn, as well as

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into effect before January 1, 2024. OPC presumes, and the Commission should make clear, that the CY 2023 rates will continue to be in effect until Pepco files a new rate case and new rates are adopted by the Commission.

252 Order No. 29755, ¶ 161.

253 *Id.* at ¶¶ 161, 476(aa).

254 OPC Br. at 202.

255 *Id*. at 201-203.

256 *Id*. at 200-208.

257 *Id*. at 206-208.

whether the BSA is operating as the Commission intended in terms of the reasons and goals for the decoupling mechanism or whether that goal is being diluted by other unintended consequences."[258] The Commission also acknowledged that "Pepco's failure to monitor and analyze the growing deferred BSA balances has created timing and fairness problems for its demand rate customers."[259] In that regard, the Commission found that "Pepco's error represents a material weakness in internal controls which went on for an extended period of time."[260] Addressing the error further, the Commission expressed a lack of confidence "that Pepco's internal controls will solve the Errata problems for the future."[261] Ultimately, however, the Commission was "not persuaded to eliminate the BSA at this time."[262] Instead, it identified plans to "host a technical conference to address OPC's concern about the BSA structural deficiencies due to the pandemic"[263] and "convene a technical conference(s) to discuss possible reform of the BSA to address revenue pressures unrelated to the Company's energy efficiency efforts."[264]

OPC is heartened by the Commission's decision to investigate the BSA. As explained below, however, OPC is concerned that the scope of the Commission's investigation and/or technical conferences may be insufficient to adequately protect consumers from the effects of a flawed rate design mechanism. OPC asks the Commission to provide clarity to Pepco and customers by resolving the following issues on reconsideration.

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258 *Formal Case No. 1156*, Order No. 20755, ¶ 316.

259 *Id*. at ¶ 423.

260 *Id*. at ¶ 424.

261 *Id*.

262 *Id*. at ¶ 313.

263 *Id*.

264 *Id*. at ¶¶ 316, 425; *see also id*. at ¶ 425 (The Commission "will perform a comprehensive evaluation of the BSA operations and Pepco's quality control procedures [and] will investigate and evaluate the BSA and conduct an audit of the BSA amounts and calculations after August 2018, including the pandemic period.").

First, the Commission failed to meaningfully address OPC's argument about the prudency of recovering BSA deferral balances that were exacerbated as a result of Pepco's billing determinants error.[265] The Commission should squarely address OPC's argument by clarifying that (i) this issue will be within the scope of the BSA investigation, and (ii) the Commission did not make any findings regarding, or otherwise prejudge, whether Pepco should not be allowed to recover from customers BSA deferrals that are a direct result of Pepco's billing error. Any other result would require customers to pay rates that include costs that have not been demonstrated to be prudent, just, and reasonable.

Second, the Commission should adopt measures to protect consumers from the effects of a poorly administered rate design mechanism during the pendency of the Commission's upcoming investigation. It is beyond dispute that "Pepco's failure to monitor and analyze the growing deferred BSA balances" resulted in an error that negatively impacted customers for years.[266] While the Commission found that the "internal controls" Pepco proposed in the wake of discovering the error in BSA billing determinants "will help Pepco identify any errors early on,"[267] there is no basis for that claim. As OPC demonstrated on brief, Pepco conceded that none of the quality control measures would have identified the error.[268] The error was only identified after an employee from another utility noticed it and made Pepco aware of the problem. Had those fortuitous circumstances not unfolded, it is not clear when, if ever, Pepco would have identified the error. Further, the Commission expressed doubt that Pepco's quality-control measures will

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265 The Commission acknowledged OPC's argument but failed to address it. *Id*. at ¶¶ 405, 407.

266 *Id*.

267 *Id*. at ¶ 424.

268 OPC Br. at 204-205.

resolve similar errors in the future.[269] Consequently, it is imperative that the Commission put Pepco on notice now that it is adopting preemptive protections such as refund authority to ensure that customers are not harmed should the Commission subsequently determine that Pepco's quality-control measures are ineffective, Pepco acted imprudently, or Pepco committed other errors that impacted rates and rate design.

Third, OPC explained that "[t]he District's Sustainable Energy Utility is charged with promoting energy efficiency."[270] Consequently, OPC has had longstanding concerns that the BSA may duplicate or undermine energy-efficiency programs administered by the Sustainable Energy Utility. The Commission found that "the BSA mechanism provides adequate incentive for Pepco to develop energy efficiency programs to achieve GHG reduction and clean energy goals to address the District climate plans."[271] But it did not address the overlap between energy-efficiency programs administered by Pepco and the Sustainable Energy Utility. The Commission should clarify that its investigation and/or technical conferences will explore this overlap to ensure that ratepayers are not paying for duplicative programs or, worse yet, programs that work against the Sustainable Energy Utility's efforts to advance the District's energy-efficiency goals.

In sum, the Commission's recognition of concerns with Pepco's administration and operation of the BSA is an important first step. But the next step is the most important. That is, the Commission's investigation/technical conferences must establish an evidentiary record to support the BSA's continuance. If further flaws or errors are identified through those processes, the Commission must either eliminate the BSA or adopt reforms that protect ratepayers from the

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269 *Formal Case No. 1156*, Order No. 20755, ¶ 424.

270 OPC Reply Br., Appendix, ¶ 131.

271 *Formal Case No. 1156*, Order No. 20755, ¶ 313.

BSA's flaws (as well as explain why it is just and reasonable to allow the BSA to continue in light of such flaws). To that end, the Commission should provide guidance by identifying the circumstances that would need to be present to eliminate the BSA. For example, if Pepco's failure to monitor BSA deferral balances and inadequate quality-control measures are not sufficient bases for discontinuing the BSA, the Commission should explain what harms the BSA would have to expose customers to in order for the BSA to be deemed unjust and unreasonable. Further, if the investigation determines that the BSA duplicates or undermines the Sustainable Energy Utility's mission, the Commission should explain whether such circumstances would be sufficient to eliminate the BSA. Under no circumstances should customers continue to be subject to the continuing series of issues that have plagued the BSA's operation for years.

F. The Commission should clarify Order No. 20755 to remove any misleading statements.

Order No. 20755 contains a number of misleading and incorrect statements that should be removed in order to preserve the public's confidence in the integrity of the regulatory process. Below are two of the most concerning claims, though OPC requests that the Commission review the Order in its entirety and remove any misleading claims.

In its discussion of the BSA, the Order appears to blame customers for the "timing problem" that resulted from Pepco's erroneous determination of BSA billing determinants. Specifically, the Order explains that "[t]he timing issue occurs because *the customers* have paid the billed amounts and *did not know to book or reserve a liability for undercollected revenues due to Pepco's error*."[272] Customers should never be expected to take preemptive actions to protect against the effects of errors Pepco may commit, especially, when the error is one that Pepco failed

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272 *Formal Case No. 1156*, Order No. 20755, ¶ 423 (emphasis added).

to identify on its own accord. Customers' knowledge (or lack thereof) of the need to book or reserve a liability for undercollected revenues due to Pepco's error is simply irrelevant. The Commission should correct this unfortunate misstatement by expressly affirming that customers bear no responsibility whatsoever for Pepco's error.

In responding to Community comments, the Order makes the claim that "this is the first net increase to residential distribution bills since 2014."[273] To the contrary, in Order No. 18846 in Formal Case No. 1139, the Commission authorized a $36.888 million increase in the distribution service rates which amounted to a $2.09 increase for a typical residential customer.[274] This increase was originally offset by a Customer Base Rate Credit ("CBRC") that was one of the customer benefits that was initially proposed by OPC and that was ultimately provided by Pepco in exchange for authorization to merge with Exelon. Through a Settlement Agreement in Formal Case Nos. 1150/1151, rates were reduced and the customer base rate credit was offset because Pepco agreed to refund money that customers had prepaid when corporate tax rates were higher. No rate increase has been withheld from Pepco. Moreover, the customer base rate credit for residentials expired in mid-February 2021 and the higher rates from Formal Case No. 1139 were then reflected on customer bills.[275] OPC raised this issue of the CBRC expiring in testimony and again on brief;[276] customers should not be misled about their bills and Pepco's rates.

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273 *Id.* at ¶ 470.

274 *Formal Case No. 1139*, Order No. 18846, ¶ 1, rel. July 25, 2017 ("Order No. 18846").

275 *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction*, Pepco's Letter to the Public Service Commission Re Customer Base Rate Credit for Residential Customers, filed Feb. 11, 2021.

276 *See, e.g.* Exhibit OPC (A) (Dismukes) at 55:16-56:10; OPC Reply Br. at 5-6 & n.20.

VII. CONCLUSION

Wherefore, the Office respectfully requests the Commission reconsider and clarify Order No. 20755 and direct Pepco to correct its tariffs as provided for herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Formal Case No. 1156, ***In the Matter of the Application of Potomac Electric Power Company for Authority to Implement a Multiyear Rate Plan for Electric Distribution Service in the District of Columbia***

I certify that on July 8, 2021, The Office of the People's Counsel for the District Of Columbia's Request for Reconsideration and Clarification of Order No. 20755 and Comments on Pepco's Tariff Compliance Filing, was served on the following parties of record by hand delivery, first class mail, postage prepaid or electronic mail:

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