

Kimberly A. Curry
Associate General Counsel

EP9628
701 Ninth Street NW
Washington, DC 20068-0001

Office 202.428.1141
Fax 202.331.6767
pepco.com
Kimberly.curry@exeloncorp.com

June 17, 2024

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

Re: Formal Case No. 1176

Dear Ms. Westbrook-Sedgwick:

Enclosed please find Potomac Electric Power Company's response to AOBA and OPC's Motion to Dismiss in the above-referenced proceeding.

If you need additional information or have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Kimberly A. Curry

Kimberly A. Curry

Enclosures

cc: All parties of record

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA**

IN THE MATTER OF)	
)	
THE APPLICATION OF THE POTOMAC)	
ELECTRIC POWER COMPANY FOR)	Formal Case No. 1176
AUTHORITY TO IMPLEMENT A)	
MULTIYEAR RATE PLAN FOR)	
ELECTRIC DISTRIBUTION SERVICE)	
IN THE DISTRICT OF COLUMBIA)	

**RESPONSE OF
POTOMAC ELECTRIC POWER COMPANY
IN OPPOSITION TO
MOTION TO DISMISS OR, IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 105.8 of the Rules of Practice and Procedure of the Public Service Commission of the District of Columbia (“Commission”),¹ Potomac Electric Power Company (“Pepco” or the “Company”) respectfully responds to the Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (“Motion”) of the Office of the People’s Counsel for the District of Columbia (“OPC”) and the Apartment and Office Building Association of Metropolitan Washington (“AOBA” and, collectively with OPC, the “Joint Movants”) filed on June 10, 2024. As discussed below, the Motion fails to present any credible basis to dismiss Pepco’s Multiyear Rate Plan (“MYP”) application (“Application”) and should be denied by the Commission.²

¹ 15 D.C.M.R. § 105.8.

² The Motion also seeks to dismiss the traditional test year compliance filing (“TTYCF”) that the Company submitted on October 16, 2023 to comply with the Commission’s directive in Order No. 21886. Motion at n.3. Unless the context indicates otherwise, the term “Application” refers to both Pepco’s MYP as well as the TTYCF.

SUMMARY

Contrary to the Motion's claims, the information presented in the 2023 Report does not require dismissal of the Application. The Motion should be denied and the Company's Application should be considered on its merits in accordance with the schedule the Commission establishes for this proceeding for the reasons discussed below, including:

- This rate proceeding presents a range of complex technical and policy issues for the Commission to resolve. Dismissal is inappropriate as the Joint Movants cannot reasonably argue that there are no genuine issues of material fact or that they are entitled to judgment as a matter of law. Pepco has made out a *prima facie* case for a rate increase and under applicable law and precedent, the Commission must render a decision on a complete record. It should not entertain the Joint Movants' request to dismiss or resolve Pepco's Application arbitrarily.
- The underlying premise of the Motion, that the numbers shown in the TTYCF and the 2023 Report should be the same, is incorrect. The 2023 Report reflects historic results that include the ratemaking adjustments the Commission adopted in Formal Case No. 1156, not what Pepco has proposed and may be adopted in this proceeding. By contrast, the TTYCF, includes a number of proposed ratemaking adjustments to annualize test year cost increases and includes *pro forma* adjustments to provide more contemporaneous recovery or better represent the proposed rate effective period, which is not 2023.
- The Motion is contrary to well-established Commission precedent and is not supported by the Public Utilities Act or by the Commission's regulations. Nothing in the governing law, regulations or Commission precedent supports the Joint Movants' contention that a public utility cannot file a new rate proceeding unless it is under-earning the ROE set in a prior rate proceeding. Moreover, as the Company's testimony in this case demonstrates that the ROE set in the prior case is no longer appropriate for rates with an effective date after 2023.
- The Motion does not establish any legal basis for any refunds based on the 2023 Report. The reconciliation provisions of Formal Case No. 1156 were expressly limited to the period ending December 31, 2022. Even if the Company were overearning in 2023, no refunds could be ordered based on the Commission's

decision in Formal Case No. 1156 and the 2023 Report as that would be retroactive ratemaking.

- The Motion fails to present any reasonable basis to require any update to the Company's Application or for additional discovery.

Under Commission precedent and consistent with controlling law and regulations, for the reasons discussed more fully below, the Motion should be denied.

ARGUMENT

The Joint Movants state that the Application should be dismissed because the financial reports filed by Pepco in Formal Case No. 1156 indicate the Company is earning in excess of the 9.275% return on equity ("ROE") the Commission authorized in that proceeding.³ In particular, the Motion focuses on the Quarterly ROR Report the Company filed on May 3, 2024 covering the 12 months ending December 31, 2023 (the "2023 Report"). The 2023 Report indicated that, for the period in question, on a fully-adjusted basis, Pepco earned an ROE of 9.511%.

Contrary to the Motion's claims, however, the information presented in the 2023 Report does not warrant dismissal of the Application. For the reasons set forth below, the Motion should be denied and the Company's Application should be considered on its merits in accordance with the schedule the Commission establishes for this proceeding.⁴

³ Motion at 5. Pursuant to Order No. 20755 in Formal Case No. 1156, the Commission authorized an ROE of 9.275% for the MYP approved in that proceeding. Formal Case No. 1156, Order No. 20755 at ¶476d(vi) (June 8, 2021).

⁴ The Motion also argues that, if the Commission declines to dismiss the Application, the projections for rate base and operating revenue in 2023 included in the MYP and the TTYCF were sufficiently misstated as to warrant the Company being required to refile its Application. Motion at 17. This argument is addressed in Sections 2 and 4.G below.

1. Standard of Review.

The Motion refers to Rule 12(b)(6) of the District of Columbia Rules of Civil Procedure;⁵ however, the rule is not applicable in the current context. In the context of complaints filed to open an investigation, the Commission has referenced Rule 12(b)(6) in considering motions to dismiss.⁶ However, the rule is not directly applicable to a rate case, such as this, in which there is no complaint and the record consists of thousands of pages addressing a range of complex technical issues and policy considerations.

The Company is not aware of the Commission having considered a motion to dismiss a rate case using the Rule 12(b)(6) standard. As the U.S. Court of Appeals for the Fifth Circuit has noted in connection with a rate proceeding before the Federal Power Commission under the Natural Gas Act, “the legal mechanism of the motion to dismiss is of dubious value in an undertaking calling for the delicate adjustment of so many variable factors.”⁷

The Commission has taken a similar position. In Formal Case No. 939, in rejecting an OPC motion for partial dismissal of a portion of Pepco’s rate application under Rule 41, the Commission explained: “Unlike routine civil actions, ratemaking involves the consideration and

⁵ Motion at 11-12. Rule 12(b)(6) addresses dismissal of a complaint in a civil proceeding for failure to state a claim upon which relief can be granted. It is a defense asserting that even if all the factual allegations in a complaint are true, they are insufficient to establish a cause of action and the case should therefore be dismissed.

⁶ See, e.g., Formal Case No. 1090, Order No. 16586 (October 14, 2011); Formal Case No. 1051, Order No. 14157 (December 21, 2006). The Commission has indicated:

The standard for reviewing a Rule 12(b)(6) motion is to take all of the factual allegations in the complaint as true and construe all inferences in the light most favorable to the complainant, in this case OPC. Dismissal of the complaint under Rule 12(b)(6) is proper if, after the Commission views the allegations in the complaint in the light most favorable to the complainant, the Commission finds that the complainant cannot prove beyond doubt that any set of facts would support the claim for relief. In making the determination, the Commission cannot consider any information outside of the pleadings.

Order No. 16586 at ¶9. There is no complaint in this proceeding; however, Pepco’s extensive filings in support of the proposed MYP are more than sufficient to satisfy this standard if it were applicable and defeat the Joint Movants’ motion to dismiss.

⁷ *Hill v. Federal Power Comm’n*, 335 F.2d 355, 364 (5th Cir. 1964).

analysis of complex technical subject matter which requires the Commission to perform the difficult task of deciding among many competing arguments and policies.”⁸ There the Commission held that “given the complex nature of the issues in this case, we are of the view that any decision regarding PEPCO’s application should be based upon the entire record in this proceeding, including all of the testimony, evidence and arguments presented by the parties and Staff.”⁹ Pepco submits that this is equally applicable to the current proceeding, which presents a range of complex technical and policy issues for the Commission to resolve.

OPC has previously sought to dismiss rate proceedings based on its assertion that the utility had failed to establish a right to a rate increase. The Commission has not granted such motions in the past and it should not do so now. For example, in Formal Case No. 798, OPC filed a motion to dismiss the rate case at the conclusion of the utility’s submissions at the hearing. In Order No. 7849,¹⁰ the Commission denied the motion, noting that unlike a complaint in a court case, a rate proceeding is different in nature and the rules applicable are not the same as in simple litigation. After discussing applicable provisions of the *Public Utilities Act* and the *District of Columbia Administrative Procedure Act*,¹¹ the Commission noted that they “raise serious questions

⁸ Formal Case No. 939, Order No. 10624 at 7 (May 24, 1995). In Order No. 16570, in denying an OPC motion to dismiss Pepco’s rate application, the Commission, citing DC Code § 34-901, explained: “Pepco has a statutory right to file a rate application, and the Commission’s consideration of the rate application requires a public hearing.” Formal Case No. 1087, Order No. 16570 at ¶26 (October 3, 2011). The Commission noted that “the precedents OPC cites in support of its request for dismissal show that the dismissal of the utilities’ rate applications in the cited cases occurred after evidentiary hearings were conducted and after briefs were filed.” *Id.*

⁹ *Id.* at 8.

¹⁰ Formal Case No. 798, Order No. 7849 (July 22, 1983).

¹¹ The Commission noted that under the DCAPA, rate proceedings are contested cases in which the parties had a right to a hearing on the merits. Order No. 7849 at 2 (citing then DC Code Section 1-1509(b), which is now codified at DC Official Code Section 2-509).

concerning this Commission’s discretion to terminate this proceeding and at what stage of the proceeding.”¹² In denying the motion, the Commission explained that:

OPC had not carried its burden of showing that the Company is entitled to no rate relief. In legal terms, the Company has made out at least a prima facie case for relief. As we view it, because the Company has made out a prima facie case, we are constrained to permit the proceedings to go forward. We reach this conclusion simply on the basis of the evidence already presented to us, without making any presumptions in favor of the Company’s case.

We wish to make it clear that we do not — and in our view we cannot — conclude here that [the utility] ultimately will prove it is entitled to rate relief, and if so, in what quantity. However, this case presents issues of fundamental importance for this Commission, for the Company and its stockholders, and for [the utility’s] ratepayers alike. Given the significance of this case, we believe it would serve the public interest to have a fuller examination and explication of the issues presented herein.¹³

As the Motion notes, a motion for dismissal under Rule 12(b)(6) may be converted into a motion for summary judgment under Rule 56 if additional information beyond the pleadings is considered.¹⁴ The Commission has held that:

To prevail on a motion for summary judgment, the moving party must “demonstrate that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law.” The substantive law applicable to an individual case determines when a fact is material, and only disputes over facts that “might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” When ruling on a motion for summary judgment, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Genuine factual issues for trial are those that “properly can be resolved only by a finder of fact because they

¹² Order No. 7849 at 3. The Commission indicated:

The issue as to our authority to grant a motion to dismiss during the pendency of a rate hearing is certainly an interesting and novel one which we may one day have to face and determine. However, we have concluded that we need not reach that issue here. In our view, it is not necessary to expressly decide, now, whether we have that legal authority because, in the present circumstances of this rate proceeding, we do not believe that summary dismissal would be appropriate even if our authority in that regard were clear.

Id. As discussed herein, summary dismissal is not appropriate in this proceeding either.

¹³ Order No. 7849 at 5-6. The Commission has indicated that “[a]lthough Pepco has the burden of proving ultimately that rate relief is justified, it is OPC as the proponent of the motion to dismiss that has the burden of persuasion.” Formal Case No. 1087, Order No. 16742 at n.15 (March 21, 2012).

¹⁴ Motion at 12 (citing Order No. 14157 at ¶10).

may reasonably be resolved in favor of either party.” If the record contains some significant probative evidence, so that a reasonable fact-finder could find in favor of the nonmoving party, genuine issues of material fact exist thereby precluding summary judgment.¹⁵

Where, as here, there is “sufficient evidence supporting the claimed factual dispute . . . shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial” summary judgment is inappropriate.¹⁶

The record before the Commission in this proceeding establishes that Pepco has made out a *prima facie* case for a rate increase and therefore the proceeding should be permitted to go forward so the Commission can render a decision on a complete record, following the submission of all testimony, any hearings the Commission may determine are warranted, and briefing. As detailed below, the Motion’s focus on the ROE authorized in a prior rate proceeding is not a justification for dismissal of Pepco’s Application which, *inter alia*, seeks a different ROE based on significant changes in financial markets and the interest rate environment since Formal Case No. 1156 was decided.

Regardless under what rule the Motion is considered, its arguments do not justify dismissal of Pepco’s Application. Instead, the Company’s Application should be considered on its merits by the Commission following the closing of the record under the schedule the Commission establishes. There is no reasonable basis on which the Company’s Application should be dismissed at this juncture in these proceedings. The Motion should be denied.

¹⁵ Formal Case No. 1156, Order No. 20368 at ¶11 (June 18, 2020). Generally, motions for summary judgment before the Commission in the context of rate cases have been for partial summary judgment regarding discrete issues, not for dismissal of the entire application. *See, e.g.*, Formal Case Nos. 1150, 1151 and 1156, Order No. 20293 (February 5, 2020); Formal Case No. 1054, Order No. 14233 (March 20, 2007); Formal Case No. 922, Order No. 10242 (June 16, 1992).

¹⁶ Order No. 20368 at ¶11 (citing *Nader v. de Toledano*, 408 A.2d 31, 48 (D.C. 1979)).

2. Pepco's Results Presented In The 2023 Report Do Not Justify Dismissing The Application.

The Motion asserts that dismissal of the Company's Application is warranted as the projections for 2023 contained in the Application differ from the figures in the 2023 Report.¹⁷ In particular, the Motion focuses on what it characterizes as significant deviations between the TTYCF's projections for 2023 and the 2023 Report.¹⁸ It notes, for example, that there is a 14% difference between the rate base shown in the 2023 Report and the Company's TTYCF. The import of this argument is that the TTYCF's financial projections should align with the numbers in the 2023 Report, and since they do not, that means the TTYCF's projections were not accurate. This is an incorrect assumption on the part of the Joint Movants.

There are important differences between the two presentations that would necessarily result in their numbers **not** being similar. Unlike the 2023 Report, which is intended to reflect actual ratemaking results for a historic period, as Company Witness Leming explained in his Supplemental Direct Testimony regarding the TTYCF,¹⁹ Pepco's TTYCF includes a number of ratemaking adjustments for known and measurable changes that need to be made to the 2023 test year so that it is more reflective of the rate effective period, which is a period beyond 2023. As Company Witness Leming detailed, the TTYCF includes adjustments to annualize test year cost increases and include *pro forma* adjustments to provide more contemporaneous recovery or better represent a future period. For example, among other adjustments, the TTYCF included specific adjustments to:

¹⁷ Motion at 10-13.

¹⁸ Motion at 5-6. The Motion notes that there were also deviations in the projections for 2023 in the MYP and the 2023 Report but acknowledges that they were not as significant as the TTYCF. *Id.*

¹⁹ PEPCO (2B): Leming Supp. Direct at 7.

- o Annualize test-year reliability closings (TTYCF RMA 1);²⁰
- o Annualize the remainder of rate base (TTYCF RMA 4);²¹
- o Reflect the Company’s proposed Bill Stabilization Adjustment regulatory asset in rate base (TTYCF RMA 12);²²
- o Reflect an adjustment to non-labor O&M expense for inflation (TTYCF RMA 34);²³ and
- o Annualize depreciation expense ((TTYCF RMA 3).²⁴

It bears noting that many of these adjustments incorporated into the TTYCF were not challenged by the Joint Movants in their filed testimony in this proceeding.²⁵

By contrast, the 2023 Report reflects historic results that include the ratemaking adjustments the Commission adopted in Formal Case No. 1156, not what Pepco has proposed in this proceeding. For example, the 2023 Report uses a 13-month average balance for rate base rather than the year-end balance that the Company has proposed in this proceeding to better reflect rate base during the rate effective period. As Company Witness Leming explained in his Supplemental Direct Testimony, the 13-month average balance used in the 2023 Report “understates the Company’s true cost of service for these investments,” whereas the year-end balance used in the TTYCF “provides a better picture of the used and useful investments that serve customers during the rate effective period.”²⁶ Given their differing purposes, one actually would expect that the TTYCF and the 2023 Report would differ.

²⁰ *Id.* at 9; PEPCO (2B)-1 at 4. Company Witness Leming explained that this adjustment was consistent with the Commission’s decision in Formal Case No. 939 and reflects in EPIS “the full value of reliability projects placed in service during the test year and serving customers.” PEPCO (2B): Leming Supp. Direct at 9.

²¹ PEPCO (2B): Leming Supp. Direct at 11; PEPCO (2B)-1 at 7.

²² PEPCO (2B): Leming Supp. Direct at 14-15; PEPCO (2B)-1 at 15.

²³ PEPCO (2B): Leming Supp. Direct at 26; PEPCO (2B)-1 at 37.

²⁴ PEPCO (2B): Leming Supp. Direct at 10-11; PEPCO (2B)-1 at 6.

²⁵ TTYCF RMAs 1, 3 and 4 were not challenged by any party in Formal Case No. 1176. Although AOBA opposed TTYCF RMA 34, OPC did not argue that the adjustment be eliminated, merely modified.

²⁶ PEPCO (2B): Leming Supp. Direct at 11

Rather than compare the TTYCF's adjusted numbers with those in the 2023 Report, a more appropriate comparison would be the *unadjusted projections* for 2023 from the TTYCF²⁷ and *unadjusted results* reported in the 2023 Report. For example, the Company projected an unadjusted rate base for 2023 in the TTYCF of \$2,695,518,000 whereas the actual unadjusted rate base for 2023 was \$2,669,573,000. Similarly, the projected unadjusted operating income in the TTYCF was \$163,162,000 and the unadjusted operating income in the 2023 Report was \$160,377,000. Moreover, the submissions show that on an unadjusted basis Pepco projected an ROR of 6.05% in the TTYCF, but actually earned an ROR of 6.01% on an unadjusted base per the 2023 Report. As demonstrated by these figures, Pepco's unadjusted projections in the TTYCF were actually very close to the unadjusted results in the 2023 Report. Indeed, given the TTYCF's lower unadjusted ROR, these unadjusted numbers indicate that Pepco's projections actually understated the Company's financial need.

Merely because there are differences between the reporting in the 2023 Report and the projections in the TTYCF, for the reasons explained above, does not call into question the Company's entire TTYCF submission. It is important to understand the context and manner in which financial results are calculated when seeking to make comparisons. Otherwise, one can, as the Joint Movants have here, draw highly inaccurate conclusions.

Furthermore, even if there were a difference in an apples-to-apples comparison of the projections for 2023 and the results achieved during that period, this would not render the Company's Application for rates during the period 2024 to 2026 infirm, much less justify dismissal of this Application. Forecasts and actual results by their nature will not always align. Because of this reality, the Commission adopted an asymmetrical reconciliation process in Formal Case No.

²⁷ See PEPCO (2B)-1 at 1.

1156 to protect customers. The Company's Formal Case No. 1176 MYP proposal continues that reconciliation process.

The Motion does not dispute that the Company will continue to invest in the distribution system to provide safe, reliable and resilient service to its District customers. Or, that like many other businesses, Pepco will continue to have to manage costs in an inflationary environment. The Company's proposed rate changes in this proceeding are not based solely on the projections for 2023, but rather include numerous significant factors, including an increased ROE of 10.50%,²⁸ modified depreciation rates and a range of ratemaking adjustments, all of which the Commission should consider and decide based on the full record developed in this proceeding.

The Joint Movants are free to argue in this proceeding, as they have, that the evidence supports a lower rate increase, or that particular ratemaking adjustments should be modified or rejected, or that an ROE other than 10.50% is appropriate. They can argue myriad other issues that are presented for the Commission's consideration in this case; however, the differences between the 2023 Report and the 2023 projections used in the Application are not a basis to dismiss this matter.

3. The Motion Is Contrary To Well-Established Commission Precedent And Is Not Supported By Law Or Regulation.

Under the *Public Utilities Act*, a public utility is permitted to file an application to increase rates at the time of its choosing.²⁹ Section 34-901(c) of the District of Columbia Official Code provides:

²⁸ Although OPC does not support the Company's proposed ROE, OPC's ROE witness in this proceeding acknowledges that an increase in the Company's ROE is warranted. See OPC (C): Walters Direct at 2.

²⁹ The Commission may impose a stay-out under certain circumstances; however, no stay-out directive bars the Company's Application in this proceeding. The Motion does not claim otherwise.

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

In Formal Case No. 939, the Commission, after quoting this statutory language, held: “The law is clear, therefore, that PEPCO has the statutory right to apply to the Commission to change its rates.”³⁰ *See also* Formal Case No. 1087, Order No. 16570 at ¶26 (October 3, 2011)(“Pepco has a statutory right to file a rate application.”). There is no statutory or legal requirement that to request a rate change, a public utility must be earning less than the authorized return on equity approved in its most recent rate case or any other specified return on equity. As is the case here, there may be a significant shift in capital market conditions and/or interest rates that requires that the public utility’s authorized return be increased above the level approved in its last rate case. The issue in a rate proceeding is not what the Company has earned in relation to the authorized return on equity established in Pepco’s last concluded rate case, but rather what the Company should be authorized to earn in the future, given the conditions that are expected to prevail in the economy as well as the investments it will make and the costs that it will incur during the period when new rates are in effect. As the District of Columbia Court of Appeals has explained:

the question of whether PEPCO's rates are unjust and unreasonable does not depend on the degree of difference between the actual and previously authorized rates of return. Under the Public Service Commission Law and the fifth amendment to the United States Constitution, the District of Columbia Public Service Commission is required to establish utility rates which are “reasonable, just and nondiscriminatory.” The Commission is not required to adopt as “just and reasonable” any particular rate level.³¹

Moreover, in Formal Case No. 1156, the Commission expressly provided that Pepco could file a case in 2023, from January 2, 2023 onward, with the only *proviso* that the rates established

³⁰ Formal Case No. 939, Order No. 10624 at 6 (May 24, 1995).

³¹ *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 457 A.2d 776, 787 (D.C. 1983)(citation omitted)

through the proceeding could become effective no earlier than January 1, 2024.³² There was no requirement that Pepco be earning less than any specified ROE – and with good reason as there is no regulation or statute that a public utility be earning under a particular ROE before it can file a rate application. Tellingly, the Joint Movants’ Motion points to no such statute or regulation.

As discussed further below, the ROE that the Motion’s arguments are built around is the authorized ROE established in 2021 in Formal Case No. 1156. That ROE was based on testimony from 2019 and 2020. By any objective measure, capital markets and the interest rate environment today are very different from those that existed during the litigation of Formal Case No. 1156. The ROE authorized in Formal Case No. 1156 is not a standard against which Pepco’s Formal Case No. 1176 Application should be considered – let alone a basis to dismiss the Application as the Motion suggests.

4. The Motion’s Arguments Are Substantively Incorrect And Do Not Support Dismissal.

As discussed above, the Motion is contrary to Commission precedent and is not required by any Commission regulation or provision of the *Public Utilities Act*. The arguments the Motion presents also are substantively incorrect and are not a reasonable basis for dismissal of Pepco’s Application.

A. *The 2023 Report Is Not An Appropriate Basis For Dismissal Of Pepco’s Application In This Proceeding.*

The 2023 Report presents a representation of Pepco’s results in 2023; however, as discussed further below, it was required to reflect the adjustments approved in Formal Case No. 1156 and therefore does not present the full picture of the Company’s final results for 2023.

³² Order No. 20755 at ¶476(aa).

Moreover, even if it did, it would not be a basis to dismiss Pepco's Application. The 2023 Report covers the twelve-month period ending December 31, 2023. Pepco's Application does not seek rate relief during that period – nor could it.

In Order No. 20755, the Commission imposed a stay-out provision that prohibited Pepco from filing a new application for rate relief that had rates that became effective prior to January 1, 2024.³³ Consistent with the Commission's directive in Order No. 20755, Pepco's Application seeks a change in rates starting in 2024. Indeed, given the current procedural posture of this proceeding, it is unlikely that any change in rates will become effective until the 3rd or 4th quarter of 2024. Pepco anticipates that for 2024 it will be under-earning – even under the authorized ROE established in Formal Case No. 1156, which as discussed in the following section is no longer reasonable given changes in financial market conditions and the current interest rate environment. The Motion fails to present any credible arguments to the contrary.

B. *The Authorized ROE From Formal Case No 1156 Is An Inappropriate Basis For Dismissal Of Pepco's Application In This Proceeding.*

The Motion asserts that, because Pepco over earned the authorized ROE established in Formal Case No. 1156 in 2023 according to the 2023 Report, the Application should be denied as the Company does not require a rate change in this proceeding.³⁴ The Motion ignores, however, that Pepco is not proposing to maintain the ROE authorized in Formal Case No. 1156. To the contrary, the Company's testimony in this proceeding demonstrates that the ROE authorized in Formal Case No. 1156 is no longer a reasonable ROE in light of changes in the financial markets and the interest rate environment.

³³ Order No. 20755 at ¶11 (“Our decision also includes a stay-out provision that prohibits Pepco from filing a new MRP application until at least January 2, 2023, with rates to be effective no earlier than January 1, 2024.”)

³⁴ Motion at 13-14.

As Company Witness McKenzie detailed in his testimony regarding why his proposed 10.50% ROE in this proceeding was reasonable, the cost of capital (both debt and equity) has increased significantly since the Commission approved a 9.275% ROE for Pepco in 2021 in Formal Case No. 1156.³⁵ For example, between June 2021 and December 2023, the yield on 10-year Treasury Bonds, 30-year Treasury Bonds and Baa rated utility bonds increased by 250, 198 and 227 basis points, respectively.³⁶ During the same period, the Federal Funds rate increased from 0.13% to 5.38%.³⁷ By any objective measure, long-term capital costs, including the cost of equity, have increased significantly since Formal Case No. 1156.³⁸ Similarly Company Witness McKenzie showed that, unlike in Formal Case No. 1156, no reduction to the Company's ROE is warranted as a result of the MYP.

Given the undeniable changes in the capital markets and interest rates since Formal Case No. 1156, OPC's use of the authorized ROE from that proceeding is an inappropriate basis upon which to dismiss Pepco's Application in this proceeding. Pepco's MYP Application deserves to be heard on its merits and not prejudicially dismissed.

³⁵ PEPCO (3F): McKenzie Rebuttal at 8:4-5.

³⁶ PEPCO (3F): McKenzie Rebuttal at 7, Table AMM-R1. Company Witness McKenzie explained that it took 22 years for interest rates to fall by one half, but more recently the Baa utility bond yield has almost doubled in just 22 months. *Id.* at 16:4-5.

³⁷ PEPCO (3F): McKenzie Rebuttal at 7, Table AMM-R1. In this regard, even the testimony of OPC's ROE witness in this proceeding acknowledges that an increase in the Company's ROE is warranted. *See* OPC (C): Walters Direct at 2.

³⁸ PEPCO (F): McKenzie Direct at 20:8-10. He explained that since Formal Case No. 1139, in which the Commission left Pepco's ROE unchanged at 9.5%, the yield on public utility bonds have increased over 120 basis points and the midpoint of the target range for the Federal Funds rate has increased 425 basis points. PEPCO (3F): McKenzie Rebuttal at 19:9-13.

C. *The 2023 Report Does Not Reflect Costs Pepco Has Incurred And Should Be Allowed To Recover In Rates.*

The Company's case in this proceeding includes a number of costs that are not in Pepco's existing rates and, as a result, are not reflected in the 2023 Report. Those costs, which are detailed in the testimony filed by the Company's witnesses in this proceeding, include higher depreciation rates,³⁹ recovery of the regulatory asset the Commission authorized in Order No. 20329 for Pepco's incremental COVID-19 costs ("COVID-19 Regulatory Asset"),⁴⁰ and recovery of the regulatory asset the Commission established in Order No. 19898 for the costs of the approved offerings in Pepco's Transportation Electrification program ("EV Regulatory Asset")⁴¹ amongst others. The case for the Company's request to recover those costs deserves to be heard on its merits and not arbitrarily dismissed. Indeed, the appropriateness of Pepco's recovery of some of these costs has not been contested by the other parties in this proceeding. For example, no party has filed testimony objecting to the Company's recovery of Pepco's incremental COVID-19 costs⁴² or its Electric Vehicle pilot program costs.⁴³ Because none of these costs are reflected in the 2023 Report or Pepco's current rates, the Joint Movants' suggestion to dismiss the Company's Application in Formal Case No. 1176 based on the 2023 Report submitted in Formal Case No. 1156 is inappropriate and should be rejected.

³⁹ Company Witness Allis presents Pepco's depreciation study (PEPCO (L)-1) and addressed the need for higher depreciation rates for a number of accounts. *See generally*, PEPCO (L): Allis Direct.

⁴⁰ The recovery of the COVID-19 Regulatory Asset was addressed by Company Witness Leming in connection with MYP RMA 17.

⁴¹ The recovery of the EV Regulatory Asset was addressed by Company Witness Leming in connection with MYP RMA 23.

⁴² While no party challenges Pepco's recovery of the COVID-19 Regulatory Asset, OPC Witness Gorman recommended that the regulatory asset be amortized over a six-year period rather than the five-year period Company Witness Leming had proposed. OPC (B): Gorman Direct at 38-39.

⁴³ Similarly, although no party challenges Pepco's recovery of the EV Regulatory Asset, like the COVID-19 Regulatory Asset, OPC Witness Gorman recommended that the regulatory asset be amortized over a six-year period rather than the five-year period Company Witness Leming had proposed. OPC (B): Gorman Direct at 39.

D. *The 2023 Report Is Not Reflective Of The Company's Actual Financial Condition.*

While Pepco's ability to file a rate application is not constrained by the authorized ROE in Formal Case No. 1156, for the reasons set forth above, the 2023 Report on which OPC's Motion is based is not reflective of the Company's actual financial condition, as was indicated when the 2023 Report was filed. When adjusted to reflect Pepco's actual financial position, the Company did not earn an ROE in excess of 9.275%. As Pepco explained in the cover letter that accompanied the 2023 Report:

Consistent with Order No. 20755, Pepco has adjusted its actual revenues to reflect authorized Bill Stabilization Adjustment (BSA) revenues for decoupled classes. Throughout this reporting period, as a result of distribution rates being based on an outdated billing determinant forecast from 2019 that is not reflective of current conditions, the Company could not fully collect its authorized BSA revenues from customers, nor fully recognize its authorized BSA revenues under Generally Accepted Accounting Principles (GAAP).⁴⁴

In her Direct Testimony in this proceeding, Company Witness O'Donnell detailed how this issue adversely impacts Pepco:

Pepco's current billing determinants were determined in 2019 using data from 2018 and have not been updated. As such they are not reflective of either the changes in usage since the onset of the COVID-19 pandemic or the growth in customers in many classes since 2018. Due to the operation of the BSA, in particular its 10% cap on monthly adjustments, this has resulted in increasing BSA deferral balances for certain commercial customer classes. One result of this is that the Company has not been able to recognize approximately \$15 million in revenue as of December 31, 2022 under GAAP accounting. This revenue recognition issue will continue until Pepco's billing determinants used to design rates are updated and the BSA deferral balances can be reduced.⁴⁵

⁴⁴ Formal Case No. 1156, *Pepco Quarterly Report for the 12 Months Ended December 31, 2023* at 1 (May 3, 2024).

⁴⁵ PEPCO (A): O'Donnell Direct at 55. See also PEPCO (G): Barnett Direct at Section VIII.

The 2023 Report reflects that Pepco collected all of its currently authorized BSA revenues; however, this is actually not the case as explained in the 2023 Report.⁴⁶ If the 2023 Report had reflected the revenues the Company was *actually able to recognize* during 2023 under GAAP accounting rules, Pepco’s revenue would have been lowered by over \$23 million. This in turn means Pepco *actually underearned* by \$13.8 million in 2023. Thus, based on the revenue and actual operating earnings Pepco was actually able to recognize under GAAP accounting rules, Pepco’s ROE was below 9.275% from a GAAP perspective.

Moreover, as Company Witness O’Donnell addressed, this revenue recognition issue is not the only adverse impact on Pepco’s financials that results from the current high BSA deferral balances:

[T]he total BSA deferral balance is currently in excess of \$100 million. Because Pepco is not authorized to accrue a return on the BSA deferral balances, none of the carrying costs incurred to fund the under-collected BSA deferral balances are reimbursed by customers, with the result that Pepco’s District earnings are reduced.⁴⁷

To provide some perspective on the impact of the unrecovered carrying costs associated with the BSA deferral balance on Pepco’s ROE, Company Witness Barnett testified that if the BSA deferral balance had been included in the Company’s rate base, it would have reduced Pepco DC’s ratemaking ROE by approximately 55 basis points in 2022.⁴⁸ As noted above, the BSA deferral balance increased in 2023 and these carrying costs are not reflected in the 2023 Report.

⁴⁶ The cover letter to the 2023 Report says, in relevant part, “Consistent with Order No. 20755, Pepco has adjusted its actual revenues to reflect authorized Bill Stabilization Adjustment (BSA) revenues for decoupled classes. Throughout this reporting period, as a result of distribution rates being based on an outdated billing determinant forecast from 2019 that is not reflective of current conditions, the Company could not fully collect its authorized BSA revenues from customers, nor fully recognize its authorized BSA revenues under Generally Accepted Accounting Principles (GAAP).”

⁴⁷ PEPCO (A): O’Donnell Direct at 55. *See also* PEPCO (G): Barnett Direct at Section VIII.

⁴⁸ PEPCO (G): Barnett Direct at 56.

E. *The 2023 Report Is Not A Basis For Requiring Pepco To Issue Refunds.*

The Joint Movants assert that Pepco should be required to issue refunds based on the 2023 Report;⁴⁹ however, the Joint Movants claims are contrary to the Commission’s decision in Formal Case No. 1156 and the terms of the reconciliation process adopted therein. Calendar year 2023 was *not* part of the MYP approved in Formal Case No. 1156. The Commission was clear that the MYP in that proceeding ran through the end of 2022, and did not include 2023. For example, in Order No. 20755, the Commission stated:

Pepco proposed a three-year rate effective period beginning 2020. However, with CY 2020 and the first half of CY 2021 having elapsed, the Commission is adopting an initial 18-month Modified EMRP pilot, from July 1, 2021, until December 31, 2022.⁵⁰

See also id. at ¶476d(i) (“The Modified EMRP is executed as a pilot MRP program through the end of CY 2022, equating to an 18-month initial MRP term.”); *id.* at ¶159 (“for the Modified EMRP for the 18-month initial pilot period of July 1, 2021, through December 31, 2022”). Indeed, the Motion acknowledges this fact. *See* Motion at 3 (“On June 8, 2021, the Commission issued Order No. 20755, which approved the modified Enhanced Multiyear Rate Plan Pilot (“MRP Pilot”), **an 18-month pilot spanning from June of 2021 until December 31, 2022.**” (emphasis added)).

The rates approved in Formal Case No. 1156 did not include any capital investments the Company would complete and place in service during 2023 or any incremental increases in O&M costs incurred in 2023,⁵¹ and the Commission ordered a stay-out for 2023, pursuant to which Pepco was prohibited “from filing a new [MYP] rate application until at least January 2, 2023, with rates

⁴⁹ Motion at 14-15,

⁵⁰ Formal Case No. 1156, Order No. 20755 at ¶153.

⁵¹ Pepco’s rates did change on January 1, 2023 but the Commission was clear that this was due to the expiration of various offsets Pepco provided during the term of the MYP as a result of COVID-19. *Id.* at ¶154.

to become effective no earlier than January 1, 2024.”⁵² However, nothing in Order No. 20755 or Order No. 21042 made the reconciliation process applicable to Pepco’s earnings results in 2023. To the contrary, in Formal Case No. 1156, the Commission was clear that the reconciliation process related to the term of the MYP. For example, in Order No. 20755, the Commission indicated:

That a reconciliation and prudence process is adopted encompassing two steps that: (1) includes an annual information filing that compares revenue requirement line items based on updated 2021 projections; and (2) provides for final reconciliation and prudence review no later than 90 days after the end of the Modified EMRP;⁵³

The Commission also explained the reconciliation process it was adopting:

As part of the Modified EMRP approval, we adopt a reconciliation and prudence process involving two steps that: (1) includes an annual information filing that compares revenue requirement line items based on updated 2021 projections; and (2) provides for a final reconciliation and prudence review no later than 90 days after the end of the Modified EMRP. Because of our requirement for a stay-out for any MRP proposal until at least January 2, 2023, and to ensure there is an annual review of the Modified EMRP forecasted amounts, we direct Pepco to file a reconciliation report similar to the Maryland PSC’s Step 1 Annual Information Filing for CY 2021, as described below. The 2022 prudence review will cover the CY 2021 and the 2023 prudence review or final reconciliation will cover CY 2022.

In Order No. 21042,⁵⁴ in response to a request for clarification submitted by AOBA,⁵⁵ the Commission was clear and unambiguous regarding the scope of the reconciliation process and that the final reconciliation was for 2022, not 2023. The Commission stated:

The Commission clarifies that the reconciliation process adopted in the Modified EMRP does not include a CY 2023 performance year or a CY2024 reconciliation filing. Since there is no “escalation” rate to be applied to the CY 2023 revenue requirement model and because there are no capital expenditure or O&M escalation

⁵² *Id.* at ¶476aa.

⁵³ *Id.* at ¶476m.

⁵⁴ Formal Case No. 1156, Order No. 21042 (October 26, 2021).

⁵⁵ AOBA sought clarification whether the Commission intended that “there be no review of Pepco’s CY 2023 expenditures and their prudence” as part of the reconciliation process adopted in Formal Case No. 1156. *Id.* at ¶215.

in Year CY 2023 no reconciliation is necessary. CY 2023 expenditures-related issues will be reviewed in the next base rate case.⁵⁶

The Motion's claim that the 2023 Report requires Pepco to issue refunds is contrary to the Commission's clarification in Order No. 21042 regarding the scope of the reconciliation process adopted in Formal Case No. 1156 and that it does **not** to encompass 2023. Moreover, in light of the Commission's directives in Formal Case No. 1156, the Motion's claims in this regard would constitute retroactive ratemaking that is barred under well-established precedent in the District of Columbia. *See, e.g., Off. of People's Counsel v. Pub. Serv. Comm'n*, 989 A.2d 190, 193 (D.C. 2010); *District of Columbia v. Pub. Serv. Comm'n*, 905 A.2d 249 (D.C. 2006). The Motion's arguments on this point should therefore be denied.

F. *Dismissal Of The Company's Application Based On Claims Of Administrative Efficiency Would Be Inappropriate.*

The Motion claims that Pepco's Application should be dismissed because to do so "would promote administrative efficiency."⁵⁷ The Company submits that to dismiss this matter at this stage in the proceeding not only would present due process issues but it would be inequitable and contrary to the statutory requirements of the *Public Utilities Act*. Moreover, as this response demonstrates, the Joint Movants' arguments are without merit and substantively wrong.

G. *It is Not Necessary for Pepco To File Any Updates To The Application As A Result Of The 2023 Report.*

Finally, the Motion asserts that, if the Commission declines to dismiss the Company's Application, as it should for the reasons discussed above, the Commission must now, after more than a year of litigation, require Pepco to file an updated Application based on actual 2023 results

⁵⁶ *Id.* at ¶217.

⁵⁷ Motion at 15.

and to reopen discovery for the parties.⁵⁸ There is no need for such an update or for additional discovery.

As was detailed in Section 2, the Motion incorrectly presumes that the TTYCF filed in this proceeding and the 2023 Report filed in Formal Case No. 1156 should present similar numbers. This is fundamentally incorrect as the TTYCF, unlike the 2023 Report, includes ratemaking adjustments for known and measurable changes that are appropriately made to the 2023 test year to make it more reflective of the rate effective period. As a result of these ratemaking adjustments, that were detailed in the Supplemental Direct Testimony of Company Witness Leming, the adjusted numbers presented in the TTYCF will differ from those in the 2023 Report. When the unadjusted numbers in the TTYCF are compared to those in the 2023 Report, it indicates that Pepco's projections were close to the actual unadjusted results and, in fact, slightly understated the Company's financial need. As such, the Motion presents no reasonable basis to require any update to the TTYCF or additional discovery.

Similarly, there is no reason to update the Company's MYP Application, which is for the 3-year period from 2024 through 2026. The 2023 Report does not address the accuracy of the Company's projection over this rate-effective period. An MYP is necessarily based on projections and so there invariably will be differences with the actual results ultimately achieved; however, this is not a reason to dismiss Pepco's Application. In fact, because there will be such divergences, the Commission in Formal Case No. 1156 adopted an asymmetrical reconciliation process to protect customers. Pepco's proposal in this proceeding continues to provide such protections.

The parties have had more than a year to assess Pepco's forecasts, issue discovery, and to recommend reductions to the Company's proposed rate base and modifications to its operating

⁵⁸ Motion at 17.

income and costs. Moreover, the TTYCF filing more than 6 months ago indicated a \$58 million reduction in unadjusted rate base for 2023 relative to the MYP's base year as well as a \$6 million change in unadjusted operating income. Parties had discovery available to them as well as the opportunity to file Direct, Rebuttal and Surrebuttal testimony to address these changes, recommend adjustments to Pepco's forecasts, or recommend other modifications to the Company's proposed MYP.

Additionally, adoption of the Joint Movants' position would result in a series of unending updates to reflect new actuals as they become available. This would increase the administrative burden on the Commission, parties, and the Company over the course of litigation.

Finally, the Motion does not claim that the Company has not complied with the Commission's directives in this proceeding. As the Motion evidences, the parties have the information presented in the 2023 Report that was filed in Formal Case No. 1156 – again as per the Commission's directives. This is not a justification to dismiss Pepco's Application at this juncture or to require the Company to refile its Application or, given the passage of time, submit a new application altogether.

CONCLUSION

For the reasons set forth herein, Pepco respectfully requests that the Commission deny the Motion.

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

By: /s/ Kimberly A. Curry
Kimberly A. Curry
Associate General Counsel

Kimberly A. Curry, DC Bar No. 477867
Anne C. Bancroft, DC Bar No. 169791
Dennis P. Jamouneau, DC Bar No. 983357
Taylor W. Beckham, DC Bar No. 1542117
Kunle Z. Adeyemo, DC Bar No. 90016255

701 Ninth Street, NW
Suite 900
Washington, DC 20068
(202) 428-1141

Counsel for Potomac Electric Power Company

June 17, 2024

CERTIFICATE OF SERVICE

I hereby certify that a copy of Potomac Electric Power Company's response to AOBA and OPC's Motion to Dismiss has been served via email on this June 17, 2024 on:

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

Christopher Lipscombe, Esq.
General Counsel
Public Service Commission
of the District of Columbia
1325 G Street N.W. Suite 800
Washington, DC 20005
clipscombe@psc.dc.gov

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

Kristi Singleton, Esq.
Senior Assistant General Counsel
Real Property Division (LR), GSA
1800 F. Street, NW Room 2016
Washington, DC 20405
Kristi.singleton@gsa.gov

Marc Battle, Esq. Chief Legal Officer & Executive Vice
President, Government & Legal Affairs
Barbara Mitchell, Esq. Assistant General Counsel District
of Columbia Water and Sewer Authority
1385 Canal Street SE
Washington, D.C. 20003
(202) 787-2000
Marc.battle@dcwater.com
barbara.mitchell@dcwater.com

Sandra Mattavous-Frye, Esq.
Laurence C. Daniels, Esq.
Ankush Nayar, Esq.
Karen Sistrunk, Esq.
Knia Tanner, Esq.
People's Counsel
Office of the People's Counsel
655 15th Street NW, Suite 200
Washington, DC 20005
smfrye@opc-dc.gov
ldaniels@opc-dc.gov
anayar@opc-dc.gov
ksistrunk@opc-dc.gov
Frann G. Francis, Esq.
Senior Vice President and General Counsel
AOBA
1025 Connecticut Avenue, NW
Suite 1005
Washington, DC 20036
ffrancis@aoba-metro.org
ecaldwell@aoba-metro.org

Christopher Lipscombe, Esq.
General Counsel
Public Service Commission
of the District of Columbia
1325 G Street N.W. Suite 800
Washington, DC 20005
clipscombe@psc.dc.gov

Laura Baker
Stoney Mattheis Xenopoulos & Brew, PC.
1025 Thomas Jefferson St, NW, 8th Floor
Washington, DC 20007
lwb@smxblaw.com

Mike Lavanga
Stoney Mattheis Xenopoulos & Brew, PC.
1025 Thomas Jefferson St, NW, 8th Floor
Washington, DC 20007
MKL@smxblaw.com

Dennis Goins
Potomac Management Group
P.O. Box 30225
Alexandria, Virginia 2310-8225
dgoinspmg@verizon.net

Michael R. Engleman, Esq.*
Robert C. Fallon, Esq.
Engleman Fallon, PLLC
1717 K Street NW, Suite 900
Washington, DC 20006
mengleman@efenergyllaw.com
rfallon@efenergyllaw.com

/s/ Dennis P. Jamouneau
Dennis P. Jamouneau