

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1325 G STREET, N.W., SUITE 800
WASHINGTON, D.C. 20005

ORDER

July 8, 2020

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, Order No. 20375

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia (“Commission”) denies the District of Columbia Government’s (“DCG”) Motion for Relief in the Alternative.¹ The Commission adopts the procedural schedule as set forth in Attachment A.

II. BACKGROUND

2. On May 30, 2019, the Potomac Electric Power Company (“Pepco” or “Company”) filed its Application requesting authority to increase rates and charges for electric service through the implementation of a Multiyear Rate Plan (“MRP”) for its electric distribution service in the District of Columbia (“District”) for the years 2020 through 2022 (“Application”).² By Order No. 20349, the Commission directed Parties to file surrebuttal testimony by June 1, 2020, addressing among other things, “how and to what extent the pandemic-related events affect the evaluation of the Potomac Electric Power Company’s Rate Application.”³ Various Parties filed surrebuttal testimony on June 1, 2020.⁴

¹ *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 (“Formal Case No. 1156”)*, District of Columbia Government’s Response to “Joint Emergency Motion to Strike Pepco’s Surrebuttal Testimony and for Summary Judgement on Pepco’s Multiyear Rate Plan” and Motion for Relief in the Alternative, filed June 16, 2020 (“DCG’s Motion”). This Order is only addressing DGC’s Motion for Relief in the Alternative since the DCG’s Comments were addressed in *Formal Case No. 1156*, Order No. 20368, rel. June 18, 2020 (“Order No. 20368”).

² *Formal Case No. 1156, Application of the Potomac Electric Power Company to Implement a Multi-Year Rate Plan for Electric Distribution Service in the District of Columbia*, filed May 30, 2019.

³ *Formal Case No. 1156*, Order No. 20349, rel. May 20, 2020 (“Order No. 20349”).

⁴ *Formal Case No. 1156*, the Potomac Electric Power Company’s Surrebuttal Testimony, filed June 1, 2020; *Formal Case No. 1156*, the Office of the People’s Counsel’s Surrebuttal Testimony, filed June 1, 2020; *Formal Case No. 1156*, the Apartment and Office Building Association of Metropolitan Washington’s Surrebuttal Testimony, filed June 1, 2020; *Formal Case No. 1156*, the District of Columbia Government’s Surrebuttal Testimony, filed June 1,

3. On June 8, 2020, a Joint Motion to strike Pepco’s surrebuttal testimony concerning Pepco’s MRP Enhanced Proposal and motion for summary judgment to reject the MRP portion of Pepco’s rate case application was filed.⁵ On June 16, 2020, the District of Columbia Government filed comments in support of the motion to strike and moved in the alternative for relief in the form of clarification and additional procedures.⁶ On June 18, 2020, Order No. 20368 was issued denying both the Joint Motion to Strike Pepco’s Surrebuttal Testimony and for Summary Judgment on Pepco’s MRP. On June 26, 2020, Pepco filed a response to DCG’s Motion for Relief in the Alternative, and the Office of the People’s Counsel for the District of Columbia (“OPC”) filed on behalf of itself and the Apartment and Office Building Association of Metropolitan Washington (referred to jointly as “Joint Respondents”) a Joint Response in Support of DCG’s Motion.⁷

III. DISCUSSION

4. **DCG’s Motion.** DCG comments that Pepco’s MRP Enhanced Proposal essentially represents “a unilateral [public] settlement agreement offer to the Commission that it believes the other Parties would not accept. DCG argues that if the Commission considers the MRP Enhanced Proposal it should at the very least subject the proposal to the procedures set forth in the Commission’s rules for Non-Unanimous Settlement Agreements. Additionally, DCG states that if the surrebuttal concerning the MRP is not stricken, the Commission should provide due process and clarify which MRP proposal is under consideration since Pepco simultaneously preserved its Original MRP Proposal (“Original MRP”) while submitting the MRP Enhanced Proposal. DCG argues that if the Commission allows the MRP Enhanced Proposal to move forward, the Parties should be provided additional procedures, similar to the Pepco-Exelon proceeding, to clarify which features of the Original MRP Proposal are intact within the MRP Enhanced Proposal.⁸

5. **Pepco’s Response.** Pepco argues that DCG’s motion for clarification should be denied “because the Commission has before it two distinct rate plan proposals—the Original MRP and the MRP Enhanced Proposal.”⁹ Pepco states that it submitted the traditional test period information to comply with Order No. 18846, but is not proposing the traditional test period submission and that it was proposing the Original MRP.¹⁰ Pepco states that the Original MRP is

2020; and *Formal Case No. 1156*, the United States Government Services’ Administration’s Surrebuttal Testimony, filed June 1, 2020.

⁵ Motion at 1-13.

⁶ DCG’s Motion at 1-9.

⁷ *Formal Case No. 1156*, the Response of Potomac Electric Power Company’s to the District of Columbia Government’s Motion, filed June 26, 2020 (“Pepco’s Response”); *Formal Case No. 1156*, the Office of the People’s Counsel and the Apartment and Office Building Association of Metropolitan Washington’s Joint Response in Support of the District of Columbia Government’s Motion for Relief in the Alternative, filed June 26, 2020 (“Joint Response”).

⁸ DCG’s Motion 3-9.

⁹ DCG’s Response at 2.

¹⁰ Pepco’s Response at 2. Referring to *Formal Case No. 1139*, Order No. 18846 ¶ 594.

viable and continues to support it and would not object if the Commission chooses to pursue the Original MRP Proposal.¹¹

6. Pepco asserts that it introduced the MRP Enhanced Proposal as an alternative to the Original MRP Proposal as surrebuttal in response to the Commission's directive in Order No. 20349. Pepco contends that the MRP Enhanced Proposal includes additional measures and programs to address the impact of the COVID-19 pandemic on Pepco's customers.¹² Pepco states that the MRP Enhanced Proposal balances the interest of all Parties and allows for flexibility and options not available in a traditional rate case and is in the public interest.¹³

7. Pepco argues that there is nothing that prevents the Commission, in its discretion, from considering both the Original MRP Proposal and the MRP Enhanced Proposal.¹⁴ Moreover, Pepco states that the MRP Enhanced Proposal should not be treated as a non-unanimous settlement because it was not intended as an offer of settlement. Pepco argues that it is disingenuous for DCG to claim that the MRP Enhanced Proposal should be treated as a settlement agreement and subject the proposal to the procedures that would apply to a properly negotiated settlement agreement.¹⁵ Pepco argues that it should not be required to conform its Original MRP Proposal testimony with the new positions contained in the MRP Enhanced Proposal because it is not a replacement for the Original MRP Proposal and Pepco is not withdrawing the Original MRP Proposal. Pepco asserts that both proposals remain pending before the Commission.¹⁶

8. **OPC's Joint Response.** Joint Respondents support DCG's motion for clarification and additional procedures and argue that "Pepco's use of the surrebuttal process to inject a new MRP Proposal ... while simultaneously preserving its Original MRP Proposal ... imperils and prejudices the parties' ability to present their respective cases...."¹⁷ Joint Respondents assert that the Commission needs to make clear which proposal is under consideration since they believe that Order No. 20368 leaves that question open to interpretation.¹⁸ Joint Respondents state that due process requires that consumers understand the rate changes being proposed and how they affect their interest.¹⁹ Joint Respondents note that Pepco has not filed a new public notice notifying the public of the specific ways in which Pepco's application has been amended and the effects it will

¹¹ Pepco's Response at 2-3.

¹² Pepco's Response at 2.

¹³ Pepco's Response at 3-4.

¹⁴ Pepco's Response at 4.

¹⁵ Pepco's Response at 4.

¹⁶ Pepco's Response at 5.

¹⁷ Joint Response at 2, *citing* DCG's Motion at 4.

¹⁸ Joint Response at 2-3.

¹⁹ Joint Response at 3.

have on the ratepayers.²⁰ Joint Respondents argue that Pepco should not be allowed to advance two different MRP Proposals and should make clear the exact contours of the MRP Proposal that is under consideration.²¹ Lastly, Joint Respondents argue that “the Commission has previously made clear that ‘it has long expected applicants to meet the applicable legal standard by putting forward their best proposal and relying on the merits of that proposal ... and is a tradition and practice worth keeping.’”²² Joint Respondents request that Pepco be directed to provide a full explanation of its proposal.²³

IV. DECISION

9. In response to the Joint Emergency Motion to Suspend Rate Case During the Pendency of the COVID-19 Crisis, the Commission noted that the General Counsel offered surrebuttal testimony as a possible mechanism to allow the Parties an opportunity to more fully address what they perceive as the impact of the COVID-19 emergency on our consideration of Pepco’s rate application.²⁴ In his surrebuttal testimony, Pepco witness Kevin McGowan states,

The COVID-19 pandemic does not materially impact the Company’s Original MRP Proposal as any modifications to the Company’s future capital and operation spending due to COVID-19, or any other event, can be addressed within the Original MRP Proposal, and the Original MRP Proposal is designed to ensure customer rates reflect the Company’s cost to provide service. However, in direct response to the Commission’s directives in Order No. 20349 and to give customers more certainty, the Company has developed the MRP Enhanced Proposal that is explained in detail below. The Company believes that this enhancement to the Original MRP Proposal is responsive to many of the concerns raised by other parties, by the Commission and by the public. In addition, the MRP Enhanced Proposal will allow the Company to continue providing essential and requested services at this critical time. The MRP Enhanced Proposal allows significant flexibility and optionality, not available in a traditional rate case, that will eliminate the overall distribution rate impact to customers in the near-term and will be directly responsive to their needs, while providing the

²⁰ Joint Response at 3.

²¹ Joint Response at 4.

²² Joint Response at 4, citing *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*, Order No. 17947 ¶ 353, rel. August 27, 2015.

²³ Joint Response at 4.

²⁴ *Formal Case No. 1156*, Order No. 20349, ¶ 9.

Company with certainty of revenues and cash flow during the later term of the plan.²⁵

10. Pepco's surrebuttal testimony was proffered to address the Parties' concerns regarding the impact of the COVID-19 emergency on its Original MRP. Thus, Pepco intended its MRP Enhanced Proposal as an alternative to its Original MRP. In Order No. 20368, the Commission viewed Pepco's MRP Enhanced Proposal as an amendment and relied on Superior Court Rule 15 (a) governing the amendment of pleadings. As a general rule, an amended pleading supersedes the original unless the amended pleading specifically refers to or adopts the earlier pleading.²⁶ Pepco states that the Original MRP is viable and continues to support it and would not object if the Commission chooses to pursue the Original MRP Proposal.²⁷ Thus, in light of these unusual circumstances, and given the nature of Pepco's representations, we will not view the Original MRP as superseded.²⁸ Just as the Parties have addressed Pepco's traditional rate filing as an alternative to Pepco's Original MRP, the Commission sees no harm, with the additional process, in allowing Pepco's MRP Enhanced Proposal proffer as an alternative to the Original MRP.²⁹ Moreover, the burden remains squarely on Pepco for approval of its Original or MRP Enhanced Proposal. Accordingly, the Parties should focus any new supplemental testimony on the features of the MRP Enhanced Proposal since the Parties have already conducted extensive discovery and filed testimony on the Original MRP. Since the Commission is allowing additional discovery and submission of additional testimony to address the MRP Enhanced Proposal, we believe it's unnecessary to require Pepco to make an additional filing updating their previously submitted testimonies to conform with the MRP Enhanced Proposal since we will consider both proposals.

²⁵ *Formal Case No. 1156*, Exhibit Pepco (5B) (McGowan) at 7-8. Pepco Witness Kevin McGowan's surrebuttal testimony provides a high-level comparison table of the MRP Enhanced Proposal and demonstrates with broad strokes the MRP Enhanced Proposal's modifications to the Original MRP Proposal. Additionally, Pepco's chart set forth the areas of alignment with parties' recommendations on the Original MRP and the MRP Enhanced Proposal. Exhibit Pepco (5B) at 14.

²⁶ *West Run Student Housing Associates, LLC v. Huntington National Bank*, 712 F.3d 165, 171 (3rd Cir. 2013) (an amended Complaint supersedes the original complaint and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading).

²⁷ Pepco's Response at 2-3.

²⁸ Although offered as an alternative Pepco's surrebuttal pleading is more akin to a Rule 15 supplemental pleading. *See Habitat Educ. Center, Inc. v. Kimbell*, 250 F.R.D. 397, 401-402. A supplemental pleading differs from an amended pleading in two respects. While an amended pleading relates to matters that occurred prior to the filing of the original pleading and entirely replaces such pleading, a supplemental pleading addresses events occurring subsequent to the initial pleading and adds to such pleading. 6A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure* § 1504, at 183-84 (2d Ed.1990)..

²⁹ *Cf., In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota*, Docket No. E-002/GR-15-826, Order issued June 12, 2017 (Minnesota Commission reviewed alternative MRPs with settlement being reached as a compromise). Similarly, nothing prevents Pepco and the parties from pursuing this matter further in settlement negotiations.

11. With regard to treating Pepco's MRP Enhanced Proposal as a settlement agreement, we note that a settlement agreement is a contract, and is, therefore, construed under general principles of contract law.³⁰ In order to have a contract, two essential elements must be present: (a) one party must make an offer and (b) the other party must accept it.³¹ Here, neither element is present because Pepco did not offer its MRP Enhanced Proposal as a settlement nor has any party formally accepted it as such. Since there is no settlement agreement before the Commission, the provisions under Section 130 of the Commission's Rules of Practice and Procedure are inapplicable, and, therefore, the District Government's Motion must be denied.

12. Finally, the General Counsel convened a virtual status conference with the Parties on Monday, June 22, 2020, to discuss the procedural schedule that allows for supplemental testimony addressing Pepco's MRP Enhanced Proposal and additional time to prepare for evidentiary hearings. Based on the status conference discussion and the Parties' filings the Commission adopts the procedural schedule set forth in Attachment A. The Commission believes that the procedural schedule provides adequate time for discovery and protects all Parties' due process rights.

THEREFORE, IT IS ORDERED THAT:

13. The District of Columbia Government's Motion for Relief in the Alternative is **DENIED**; and

14. The Commission **ADOPTS** the procedural schedule set forth in Attachment A.

A TRUE COPY:

BY DIRECTION OF THE COMMISSION:



CHIEF CLERK:

**BRINDA WESTBROOK-SEDGWICK
COMMISSION SECRETARY**

³⁰ See *Dyer v. Bilaal*, 983 A.2d 349, 354 (D.C. 2009).

³¹ See RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 50.

Attachment A: Procedural Schedule

<u>Action</u>	<u>Date</u>
Virtual Community Hearings (Date & Locations)	TBD
Discovery Ends	July 15, 2020
OPC/ Intervenors Parties file Supplemental Testimony on Pepco's June 1, 2020, Surrebuttal testimony	July 27, 2020
Limited Discovery on OPC/Intervenor Parties' Supplemental Testimony	July 27 – July 31, 2020
Status Conference	July 31, 2020
Joint Prehearing Statement and Joint Witness Cross Examination Matrix	August 14, 2020
Prehearing Status Conference	August 21, 2020
Order and Report on Status Conference	August 26, 2020
Hearings	September 10, 11, 14, 15, 16, 2020
Post-Hearing Brief	October 16, 2020
Post-Hearing Reply Brief	November 2, 2020³²

³² In Order No. 20273, the Commission indicated that any MRP that is adopted should be accompanied by performance incentive mechanisms ("PIMs"). In the Joint Report on the two PIMs meetings held earlier this year, the participants asked that the Commission provide a deadline for and accept into the record comments from any participant in the first two PIMs meetings that is not a party to *Formal Case No. 1156*, so that these participants also have an opportunity to provide their own specific views on Pepco's proposed PIMs, and their organization's desired outcomes, proposed metrics, potential performance incentive mechanisms, and supporting justification. No action has been taken on this request. Parties have until the close of the record (November 2, 2020) to submit any proposed PIMS for our consideration.

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STATEMENT OF COMMISSIONER RICHARD BEVERLY

The Commission’s decision to allow Pepco to introduce an Enhanced Multiyear Rate Plan (“MRP”) Proposal in surrebuttal is certainly a “flexible” approach to litigation and, although it’s highly unusual, I permitted it as long as it didn’t unfairly prejudice the cases of the opposing parties. However, a flexible approach to litigation should be a two-way street. As I stated in my dissent to Order No. 19956, there should be an opportunity for all stakeholders to provide input in the development of alternative forms of regulating the District’s electric company.

In 2017, the Commission indicated that it would allow Pepco to include in its next rate case a request for a fully forecasted test year and or an MRP proposal, in addition to a traditional test year filing, subject to certain conditions.¹ That was before the enactment of the CleanEnergy DC Omnibus Amendment Act of 2018 and before the entire country was thrown into a pandemic. Consistent with my earlier dissent, I continue to believe that considering an alternative form of regulation within the rate case slows the traditional rate case down by effectively turning it into a stakeholder working group to navigate the complexities involved in developing the components of an alternative regulation plan going forward. The better course of action would be to move the discussion of alternative forms of regulation into a separate non-adjudicatory case that is informal in nature and open to all interested stakeholders, rather than just parties in the rate case.² In my opinion, that would also make settlement of the traditional rate case more likely and litigation less expensive. A separate proceeding, as many states have experienced, also provides an opportunity to develop core regulatory principles, goals, and outcomes necessary to determine what form of alternative regulation would not only ensure the quality, availability, and reliability of regulated services, protect consumers, and serve the public interest, including alignment with the District’s clean energy goals.³

In Order No. 20349, we noted that the General Counsel offered surrebuttal testimony as a possible mechanism to allow the parties an opportunity to more fully address what they perceive as the

¹ *Formal Case No. 1139, In the Matter of the Application of Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 18846, ¶ 594, rel. July 25, 2017.

² In reviewing a rate case, the D.C. Court of Appeals has observed that utility ratemaking is a complex and esoteric area of administrative law, *see Washington Gas Light Co. v. Public Service Com’n of District of Columbia*, 450 A.2d 1187, 1193 (1982).

³ In Order No. 20273, we indicated that any MRP that is adopted should be accompanied by performance incentive mechanisms (“PIMs”). In the Joint Report on the two PIMs meetings held earlier this year, the participants asked that the Commission provide a deadline for and accept into the record comments from any participant in the first two PIMs meetings that is not a party to Formal Case No. 1156, so that these participants also have an opportunity to provide their own specific views on Pepco’s proposed PIMs, and their organization’s desired outcomes, proposed metrics, potential performance incentive mechanisms, and supporting justification. The merits of the request have not been addressed.

impact of the COVID-19 emergency on our consideration of Pepco's rate application and directed the parties to include in their Surrebuttal Testimony how and to what extent the pandemic-related events affect the evaluation of Pepco's rate application.

While I commend Pepco for offering its MRP Enhanced Proposal for consideration, it went a bit beyond our directive in Order No. 20349 because we did not solicit alternative MRPs from Pepco or anybody else. In fact, it is not clear from our orders whether the parties are limited to commenting on Pepco's MRPs or whether the process is flexible enough to allow interested persons to propose their own MRPs for our consideration at some point in this process.

D.C. Code § 34-1504 (d) governs our consideration of alternatives to traditional regulation.⁴ Nothing in that section requires us to consider alternatives to regulation exclusively within the confines of a rate case and exclusively at the behest of Pepco.

The Commission is being asked to consider an entirely new paradigm in regulating Pepco. If there continues to be no willingness to move the MRP into a separate case, then the next best course of action is to make the rate case flexible enough so all our stakeholders have a meaningful opportunity to propose alternative regulation schemes of their own for our consideration.

⁴ The Commission may adopt an alternative form of regulation if it finds that it (1) protects consumers; (2) ensures the quality, availability, and reliability of regulated electric services; and (3) is in the interest of the public, including Pepco's shareholders.