

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

ORDER ON REMAND

July 27, 2023

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, Order No. 21884

I. INTRODUCTION

1. By Order No. 20755, the Public Service Commission of the District of Columbia (“Commission”) approved the Potomac Electric Power Company’s (“Pepco”) request for authorization of a multiyear rate plan.¹ As part of that approval, the Commission allowed Pepco to recover the Benning Road Generating Station Remedial Investigation and Feasibility Study process (“RI/FS”) costs from its District of Columbia customers. The Office of the People’s Counsel for the District of Columbia (“OPC”) objected, arguing that recovery of such costs is barred by the terms of a 1999 settlement agreement with Pepco.

2. In *Office of the People’s Counsel v. D.C. Public Service Commission*, 284 A.3d 1027 (2022), the Court determined that the Commission misread the language of the 1999 settlement agreement as only barring “future operating costs” when, in fact, the agreement contained no language limiting its application as to time (past, present, or future) or to types of costs (i.e., only operating costs). The Court vacated the Commission’s decision on this issue and remanded the matter for further review.² As we explain in more detail below, Pepco’s request for recovery of its RI/FS costs is barred by the 1999 settlement agreement.

II. BACKGROUND

3. In 1999, Pepco requested that the Commission allow it to sell its generation assets and the Commission docketed the application in *Formal Case No. 945*. Eventually, the parties agreed to settle the case but included specific language regarding the generating stations at Benning Road and Buzzard Point. If for some reason, either of these two plants are not included in the sale,

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*”), Order No. 20755, rel. June 8, 2021.

² As to the EERL programs, the Court held that the Commission should have required Pepco to take the preliminary step of consultation with DOEE, the DC SEU, and the DC SEU Board before including the programs in its application. The Court vacated the approval of the EERL programs.

the settlement states:

... the Company shall be thereafter barred and estopped from asserting or exercising any legal right that it might otherwise have to recover from customers located in the District of Columbia any stranded costs associated with those generating stations. 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.³

4. In 2011, the United States Environmental Protection Agency ("EPA") released a report regarding the discovery of polychlorinated biphenyl ("PCB") contaminants found on or around the Benning Road site. The source of the contamination was traced to the cooling towers used in the Benning Road generating station. After the District Government's Department of Energy and Environment threatened to sue Pepco for abatement of a hazardous condition, Pepco entered into a consent decree wherein Pepco agreed to conduct the remedial investigation and feasibility study ("RI/FS") at issue in this case.⁴

5. On appeal, the Court ruled that the Commission improperly allowed Pepco to recover the RI/FS costs based on a misreading of the 1999 settlement provisions and vacated the decision. However, in its brief before the Court, the Commission responded to a cost allocation issue raised by OPC in the OPC brief that had not been addressed by the Commission in either Order No. 20755 or Order No. 21042.

6. OPC took the position in its brief that recovery of the RI/FS costs is premature because the Commission had not yet determined how costs would be allocated among generation, transmission, and distribution functions nor had it addressed the final end-use of the property. The Commission, on the other hand, noted that, although remediation investigation costs and the actual costs of remediation are related, they are two separate things. Inasmuch as Pepco was requesting recovery of remediation investigative costs rather than actual remediation costs, the Commission argued that Pepco should be able to recover the investigative costs without violating the settlement agreement and that OPC could challenge any costs related to actual remediation in a future rate case at the time Pepco seeks to recover them. This prompted the Court to state "to the extent that the Commission is asking this Court to conclude in the first instance that no RI/FS costs are actually attributable to the Benning Road generating station and thereby uphold its determination that Pepco could pass on these costs to its distribution customers, we cannot do so."⁵ The Court remanded the matter to the Commission to answer this complicated question itself, supported by a reasoned interpretation that sets out why "the RI/FS costs are or are not within the settlement's

³ *Formal Case No. 945, In the Matter of the Investigation into Electric Service Market Competition and Regulatory Practices*, Order No. 11576, rel. December 30, 1999, Appendix.

⁴ *District of Columbia v. Potomac Elec. Power Co.*, No. 1:11-cv-00282-BAH (D.D.C. Aug. 17, 2011) ("Consent Decree"), <https://www.benningservicecenter.com/library/documents/BenningConsentDecree.pdf>.

⁵ *Office of the People's Counsel v. D.C. Public Service Commission*, 284 A.3d 1034 (2022).

reach.”⁶

III. DECISION

7. The Court has made clear that we cannot read into the settlement agreement words that aren’t there. The settlement agreement makes no distinction between costs for remediation studies and costs for actual remediation. Instead, it bars all costs associated with the Benning Road generating station whether as a stranded generation cost or as a cost of service for distribution customers. Pepco has become a distribution company with no generation costs or associated “bucket” in which to place these generation-related costs.⁷ In that sense, all costs associated with generation become stranded and are barred under the settlement agreement. It is also not a distribution or transmission cost. Although there were six leaks identified in the EPA report, the one that triggered the consent decree is directly connected to the generator’s cooling towers and the cooling towers are not part of the distribution or transmission systems. That situation doesn’t change based on the future use of the property or its size. Inasmuch as there is no “bucket” in which to place the costs that would not be barred by the settlement agreement, we must deny Pepco’s request for cost recovery. Consistent with this determination, we rescind our decision approving Pepco’s RMA-5’s costs for regulatory asset treatment and recovery.

8. In addition, within 30 days of the date of this Order, Pepco shall file with the Commission an accounting and reconciliation, detailing any costs placed into the regulatory asset for the Benning Road site.

THEREFORE, IT IS ORDERED THAT:

9. The Commission **DENIES** cost recovery by the Potomac Electric Power Company for the Benning Road Generating Station Remedial Investigation and Feasibility Study;

10. The Potomac Electric Power Company **SHALL** cease regulatory asset treatment of the Benning Road site; and

11. Within 30 days of the date of this Order, the Potomac Electric Power Company **SHALL** file an accounting and reconciliation detailing any costs that were placed into the regulatory asset for the Benning Road site.

A TRUE COPY:

BY DIRECTION OF THE COMMISSION



CHIEF CLERK:

**BRINDA WESTBROOK-SEDGWICK
COMMISSION SECRETARY**

⁶ *Office of the People’s Counsel v. D.C. Public Service Commission*, 284 A.3d 1034 (2022).

⁷ The Benning Road and Buzzard Point generation plants were retired in 2012.