

I. BACKGROUND

1. On February 7, 2022, pursuant to the Public Utilities Article (“PUA”), *Annotated Code of Maryland*, § 3-114, and Code of Maryland Regulations (“COMAR”) 20.07.02.08, Delmarva Power and Light Company (“Delmarva Power”) and Potomac Electric Power Company (“Pepco”), joined by Baltimore Gas & Electric Company (“BGE”) (collectively, “the Companies”), filed a Petition for Rehearing of Commission Order No. 90035 (the “Order”).

2. The Petition seeks rehearing of a discrete portion of Order No. 90035. Specifically, the Companies seek rehearing of the Commission’s finding in paragraph 32 of the Order which allows “Staff, OPC and other parties to pursue discovery [regarding the Companies’ SOS returns] in base rate cases to determine whether utilities may be over-earning with regard to SOS revenues.”¹ The Companies argue that the Order reversed what the Companies describe as the Commission’s previously “well-established precedent” that it is “inappropriate” to consider broad Standard Offer Service (“SOS”) issues in electric distribution base rate proceedings.² The Companies further argue that the Commission’s holding is also inconsistent with the Maryland Court of Special Appeals’ holding in *Severstal Sparrows Point, LLC v. Pub. Serv. Comm’n of Md*, which concluded that traditional ratemaking processes related to the Companies’ distribution service do not apply in the unique context of SOS.³

3. A petition seeking to reverse or modify an order of the Commission shall allege the facts and circumstances which have arisen after the hearing or order which justify the

¹ *Petition of Delmarva Power & Light Company and Potomac Electric Power Company, Joined By Baltimore Gas and Electric Company, for Rehearing of Order No. 90035* filed February 7, 2022 (“Companies’ Petition”) at 1-2 (citing Case Nos. 9226 & 9232, Order No. 85797 (Aug. 21, 2013) at 32).

² *Id.* at 1 (citing Case Nos. 9226 & 9232, Order No. 85797 (Aug. 21, 2013) at 33).

³ *Id.* at 2, citing 194 Md. App. 601 (2010).

reversal or modification; or the consequences resulting from compliance with the order which justify or entitle the applicant to the reversal or modification. COMAR 20.07.02.08D(2). For the reasons discussed below, the Companies' request for rehearing is denied.

II. REQUEST FOR REHEARING

4. On rehearing, the Companies argue that the Commission's decision in Paragraph 32 of Order No. 90035 to permit discovery on SOS returns during base rate cases to determine whether utilities are over-earning with regard to SOS revenues is a departure from Commission precedent and was not explained and lacked evidence that would support such a departure from precedent.⁴

5. Referring to the Commission's first remand order in this case,⁵ the Companies argue that in 2013, when the Commission was faced with the question of whether to allow discovery and litigation in rate cases on the utilities' SOS returns and revenues, the Commission expressly held that it would not be appropriate to consider SOS issues in the Companies' future rate cases. The Companies argue that the Commission's holding in its 2013 Order rejected Staff's request to permit parties to seek review of potential over-earning due to SOS returns in the context of a base rate case.⁶ The Companies add that not only did no party seek rehearing of the Commission's ruling in 2013, but the underlying policy of the 2013 Order has been consistently followed including by the Commission in Case No. 9221 involving BGE, where the Commission also held it would not be appropriate to consider SOS issues in BGE's future rate cases because the Commission noted that "rate cases involve the examination of many complex distribution

⁴ *Id.* at 5-6.

⁵ Order No. 85797 (Aug. 21, 2013) ("the 2013 Order").

⁶ Companies' Petition at 6.

rate issues within a statutorily prescribed time frame” and that augmenting such cases with complex SOS issues would not allow the thorough analysis needed to address either distribution rates or SOS issues appropriately.⁷ Additionally, the Companies argue that the precedent of separating SOS returns and revenues issues from traditional base rate cases began with the Commission’s initial SOS proceeding in Case No. 8908.

6. The Companies contend that such “long-standing history of precedent” should not be altered without providing an adequate justification.⁸ They argue that here the Commission provided no justification or basis for changing its precedent regarding the exclusion of SOS-related return and revenue issues from base rate cases.⁹ The Companies noted that “[g]enerally, administrative agencies are afforded ample latitude to adapt their rules and policies to the demands of changing circumstances ... when an agency changes a position clearly established in its own prior precedent, it must supply a reasoned analysis indicating that prior policies or standards are being deliberately changed, not casually ignored.”¹⁰ They argue that, like the Board in *Frederick Classical Charter School*, “the Commission contradicted its own precedent and failed to justify that contradiction or to point to any record evidence that supports such sea change in policy or rules.”¹¹

7. Finally, the Companies argue that the Commission’s determination in the 2013 Order that SOS revenue-related discovery is not appropriate in base rate cases was based on logical, pragmatic reasoning and correctly decided. They then contend that footnote 2

⁷ *Id.*

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ *Id.*, citing *Frederick Classical Charter School, Inc. v. Frederick County Board of Education*, 454 Md. 330 (2017).

¹¹ Companies’ Petition at 9.

in Order No. 87994 (“the *BGE Order on Rehearing*”)¹² stating that parties “will be free at anytime in the future to address any alleged or potential over-earning” was dicta and not a reversal of the 2013 Order which rejected Staff’s request for discovery in base rate cases on the issue, but rather that language “was simply affirming its decision regarding the level to set BGE’s SOS rate of return despite OPC’s contention that it would result in over-earning.”¹³ The Companies argue that they interpreted the Commission’s dicta in the 2013 Order as instructing OPC or Staff or other parties to address any alleged over-earning of SOS revenues in the SOS docketed proceeding in which the Commission had just set the utility’s returns.¹⁴

III. RESPONSIVE PLEADINGS

A. Technical Staff’s Position

8. First, Staff argues that the Petition for Rehearing repeats the same arguments that the Companies originally made in their November 6, 2017 Reply Memorandum on Appeal.¹⁵ Specifically, the Companies’ Reply Memorandum on Appeal argued that the Commission should reject Staff’s request to reverse the September 16, 2017 Proposed Order’s finding disallowing Staff, OPC or other parties to review potential over-earning due to SOS returns in the context of a base rate case.¹⁶ The Companies posited similar arguments in their Reply Memorandum on Appeal as they have put forth in the present Request for Rehearing.

¹² See, *In the Matter of a Request by Baltimore Gas and Electric Company for Recovery of Standard Offer Service-Related Cash Working Capital Revenue Requirement*, Case No. 9221, Order No. 87891 (Nov. 17, 2016) (“the *BGE Order*”). The Order on Request for Rehearing and Clarification (Order No. 87994) was issued by the Commission on January 24, 2017.

¹³ Companies’ Petition at 10.

¹⁴ *Id.*

¹⁵ Office of Staff Counsel, Response to Petition for Rehearing of Order No. 90035 – Standard Offer Service Administrative Charges - Cases Nos. 9226 and 9232 filed February 28, 2022 (“Staff Response”) at 4.

¹⁶ Reply Memorandum of Potomac Electric Power Company & Delmarva Power & Light Company filed in Case Nos. 9226 & 9232 on November 6, 2017 (“Delmarva and Pepco Reply Memorandum”) at 11.

9. As an example, Staff notes that in the Reply Memorandum on Appeal, the Companies argued that it would be inappropriate to review SOS issues in a base rate case because there are different costs and customers when comparing the Companies' distribution business segment with its SOS provision.¹⁷ Nonetheless, the Commission in this case found that "discovery by other parties was not precluded regarding the narrow issue of whether an electric company was over-earning in the provision of SOS."¹⁸

10. Second, Staff argues that by allowing parties to a base rate proceeding to conduct discovery to determine whether an electric company might be over-earning in its provisioning of SOS, the Commission struck the proper balance between litigating SOS issues during a base rate case, which the Commission has previously determined to be inappropriate, and the broad discovery rights of parties.¹⁹ Staff supports its position by noting that footnote 2 in the *BGE Order on Rehearing* allowed Staff, OPC and other parties to seek review of the SOS returns of electric companies at "*anytime*."²⁰

11. Further, Staff argues that allowing discovery on the narrow issue of whether utilities are over-earning on SOS returns promotes administrative efficiency. Staff submits that prohibiting discovery on this issue in a rate case would require that parties contract expert witnesses separately outside of the rate case proceeding which increases costs.²¹ Finally, Staff points out that the Companies did not assert that they were substantially harmed in any manner by allowing parties to conduct discovery during base rate cases on whether utilities are over-earning on SOS.²² Staff argues that the failure of the Companies to allege any substantial harm resulting from allowing discovery on this

¹⁷ *Id.* at 11.

¹⁸ Staff Response at 4.

¹⁹ *Id.* at 5.

²⁰ *Id.* (emphasis added).

²¹ Staff Response at 6.

²² *Id.* at 7.

issue indicates that the requirements to receive relief under the rehearing statute have not been met, and therefore the Petition for Rehearing should be denied.²³

B. Office of People's Counsel

12. OPC argues that the Commission's decision to allow parties to pursue discovery in base rate cases to determine whether utilities may be over-earning with regard to SOS revenues is not a change in precedent but is consistent with the BGE Order in Case No. 9221 and consistent with the Commission's mission of ensuring just and reasonable rates.²⁴ OPC points out that, contrary to the Companies' analysis of *Frederick Classical Charter School v. Frederick County Board of Education* to support its position, the Court in *Frederick Classical* does not require an agency to restate that it will fully consider evidence and arguments in a future case, without prejudging the outcome of that consideration, arbitrary and capricious.²⁵ OPC also noted that unlike the Companies' analysis in its Petition, the court's holding in *Severstal Sparrows Point, LLC v. Public Service Commission* does not support the utilities' Petition. OPC points out that the central issue in the *Severstal* case was the extent to which the Commission retained authority to regulate the electricity supply after the 1999 Act, it did not address the recovery of the utility's own costs for providing SOS or the utility's return for providing either SOS or distribution service as the Companies suggests.²⁶

13. Further, OPC argues that the utilities' Petition for Rehearing is "premature" because Order No. 90035 makes no decision on how the Commission will ultimately

²³ *Id.*

²⁴ Office of People's Counsel Opposition, filed February 22, 2022 ("OPC Opposition") at 4-5.

²⁵ *Id.* at 5.

²⁶ *Id.* at 5- 6.

view the relevance of the SOS return in setting the return in a base rate proceeding.²⁷ OPC also notes that nothing in Order No. 90035 prevents the utilities from objecting to any evidence or arguments regarding their return in a future rate case when the evidence is actually presented and the arguments actually made.²⁸ OPC further argues that the utilities' concern about the complexity of rate cases is not a reason to rule out consideration of an issue that may result in customers paying more than they should.²⁹

C. The Companies' Reply

14. In reply, the Companies argue that Staff's and OPC's positions that the Commission should allow for "open-ended" discovery regarding SOS returns for the purpose of establishing an "overall authorized rate of return" would create "improper and legally impermissible" cross-subsidization between SOS and distribution customers.³⁰ The Companies point out that Staff's and OPC's approach regarding discovery go beyond what the Commission authorized in Paragraph 32 of the Order.³¹ The Companies contend that allowing the approach advocated by Staff and OPC would not inform the Commission on issues that are properly decided in a base rate case, but instead would cause conflated analyses of two returns that are statutorily designed to be separate.³²

15. The Companies also argue that OPC's representation that Paragraph 32 in Order No. 90035 aligns with Commission's Order No. 87891 (regarding a need to consider SOS and distribution returns together) is incorrect.³³ The Companies reject OPC's

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ *Id.* at 7.

³⁰ *Delmarva Power & Light Company, Potomac Electric Power Company, and Baltimore Gas and Electric Company Joint Response To Oppositions Filed In Response To Joint Petition for Rehearing of Order No. 90035* filed March 10, 2022 ("Companies' Reply") at 2.

³¹ *Id.* at 2-3.

³² *Id.* at 3.

³³ *Id.* at 4-5.

characterization of Order No. 90035 and states that nowhere does the *BGE Order* say this explicitly or impliedly. According to the Companies, the Commission addressed only the meaning of a reasonable return under PUA § 7-510, *not* any purported need to combine consideration of SOS and distribution returns.³⁴

16. Additionally, the Companies argue that contrary to Staff's position regarding the legal standard associated with petitions for rehearing, neither the Public Utilities Article nor the Code of Maryland Regulations requires that a petitioner for rehearing must allege or demonstrate harm or substantial harm resulting from the Commission order at issue in order to be granted relief.³⁵ The Companies contend that the only harm that needs to be shown is that the Commission's decision was based on legal error.

IV. COMMISSION DECISION

17. Commission proceedings are governed by the Public Utilities Article and the Code of Maryland Regulations. In accordance with PUA § 3-101(b), the Commission is not bound by the court's formal rules of evidence, although it often looks to the Maryland Rules for guidance in conducting its proceedings.³⁶ Under Maryland's discovery rules, specifically Rule 2-401, the parties' rights to engage in discovery generally are not restricted or limited, other than by the time frame which the adjudicatory body finds reasonable after an action or matter has been initiated. Whether or not the information obtained in discovery is admissible in a particular proceeding is a question of relevance which is determined under Maryland Rule 5-402.

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *See, e.g., In the Matter of the Mid-Atlantic Petroleum Distributors Association and the Mid-Atlantic Propane Gas Association's Request for Investigation and Petition for Declaratory Order Against Southern Maryland*, 94 MD PSC 209 (Jul. 23, 2003).

18. The Companies primarily argue that permitting discovery regarding SOS returns in a base rate case regarding whether utilities are over-earning with regard to SOS violates Commission precedent. The Companies point to language in the Commission's 2013 Order which states that "it would not be appropriate to consider SOS issues in the Companies' future rate cases."³⁷ The Companies argue that the Commission has relied on this language to consistently find that SOS issues should not be considered during base rate cases, and that even discovery should not be permitted.

19. In the BGE orders, the Commission responded to arguments made for the first time by OPC and Staff that allowing the utility to recover its SOS Cash Working Capital ("CWC") as well as a separate Return on SOS--for providing the service appeared to result in allowing the utility a double return on its investment. While the Commission rejected OPC's request for rehearing and Staff's request for clarification of the *BGE Order* on this issue, the Commission noted that BGE's analysis—in that case—demonstrated to the Commission's satisfaction at that time, that the Company was not over-earning on SOS (from any of its customer classes) based on the Administrative Charge authorized in Order No. 87891.³⁸ However, the Commission made no direct finding on whether OPC, Staff and other parties could possibly demonstrate over-earning by a utility with regard to providing SOS in the future. Therefore, the Commission augmented its prior pronouncements and found that since the Company was required to include in its next base rate case a Cost of Service Study of costs associated with providing SOS, any party could raise any argument

³⁷ Companies' Petition at 6 citing Case Nos. 9226 & 9232, Order No. 85797 (August 21, 2013) at 33.

³⁸ *Order on Request for Rehearing and Clarification* (Order No. 87994) at 2-3.

regarding potential over-earning in a future rate case.³⁹ This approach ensures that all rates, including SOS rates are examined thoroughly to ensure that they are just and reasonable.

20. Following OPC's petition for judicial review and appeal of the *BGE Order* to the Circuit Court and the Court of Special Appeals,⁴⁰ the *BGE Order* was twice affirmed – leaving intact OPC's and Staff's concern that utilities could be over-earning on SOS due to the fact that both CWC and a separate Return component are permitted by the utilities when providing SOS service.

21. In Order No. 90035, the Commission affirmed the PULJ – finding that these two ratemaking components were separate and independent from one another and represent two differing sources of recovery and revenue to the Companies.⁴¹ The Commission emphasizes, however, that in all circumstances the rates charged to ratepayers must be just and reasonable. Although the Commission had not—as the Companies suggest—expressly prohibited discovery regarding SOS revenues in other cases, the statement in footnote 2 of the *BGE Order on Rehearing* that parties may address any alleged or potential over-earnings in the future coupled with the clarification in Order No. 90035 that this includes allowing for discovery regarding SOS revenues in base rate cases, reflects the changing demands of ratemaking.⁴²

³⁹ See, *BGE Order on Rehearing*, n. 2.

⁴⁰ *Maryland Office of People's Counsel v. Maryland Public Service Commission*, Sep. Term, 2017, No. 1366. (This is an unreported opinion of the Court of Special Appeals. Pursuant to Rule 1-104, the opinion is not cited here as precedent.)

⁴¹ Order No. 90035 at 10, ¶ 24.

⁴² As evidenced in Case Nos. 9221, 9223, and 9226, the gaps between SOS cases and adjustments to SOS rates has been fairly extensive, and with the utilities' increasing reliance on multi-year plans the same may be true for the rate effective period from rate case to rate case. Therefore, if there is some chance that utilities could be over earning on SOS, any opportunity that parties have to investigate through discovery merits Commission approval.

22. Contrary to the Companies' presumption, Paragraph 32 in Order No. 90035 does not assume that parties will be allowed to litigate SOS-related issues within the context of a base rate case as implied by the Companies. Rather, the Commission's holding of Paragraph 32 (permitting Staff, OPC and other parties to pursue discovery in base rate cases to determine whether utilities may be over-earning with regard to SOS revenues) simply makes plain that under generally recognized rules of procedure, the discovery rights of any party requesting information will not be curtailed or limited by the language of the Commission's 2013 Order. As noted by OPC, the Companies are free to object to any evidence or arguments regarding their returns in a future rate case when the evidence is presented and arguments actually made. Similarly, any party proffering evidence or arguments in a rate case continues to have the burden of meeting the relevance standard. The Commission's holding does not in any manner pre-judge the Commission's determination of whether it will allow parties to litigate an issue within the base rate case proceeding or find that the matter must be resolved within the context of a separate SOS proceeding.

23. Finally, the Companies and Staff argue over whether substantial harm must be shown in order to obtain rehearing. COMAR 20.07.02.08D(2) states that "A petition seeking to reverse or modify an order of the Commission shall allege the facts and circumstances which have arisen after the hearing or order which justify the reversal or modification; or the consequences resulting from compliance with the order which justify or entitle the applicant to the reversal or modification." Regarding the first prong, the Companies have not alleged or shown that new facts or circumstances have arisen to justify a reversal or modification. As to the second prong, Staff's analysis equates

“substantial harm” with the requirement of petitioners to allege “consequences resulting from compliance” with the Order which justify a reversal or modification. In doing so, Staff argues that “the failure of the Companies to allege any substantial harm resulting from allowing discovery in this issue indicates that the requirements to receive relief under the rehearing statute have not been met.”⁴³ The Companies, however, contend that the only “harm” that needs to be proffered is that the Commission’s decision was based on legal error. The Companies point out that a showing of substantial harm is not required by the Public Utilities Article or the Code of Maryland Regulations for rehearing relief to be granted.

24. The Companies are correct that a party seeking rehearing need not demonstrate substantial harm to merit rehearing. However, as discussed above, under Maryland’s discovery rules, parties’ have the right to engage in discovery which is generally unrestricted or limited other than by timeframe. The Commission finds that contrary to the Companies’ assertion, there was no legal error in the Commission’s decision to allow for discovery regarding SOS in other cases, including in base rate cases. Further, the Commission finds that discovery of SOS revenues in base rate cases **alone** would not lead to the cross-subsidization harm underlying the Companies concern. Such discovery, coupled with litigation regarding SOS revenues would be required in order to validate that concern. For all of the above reasons, the Companies’ Petition for Rehearing is denied.

IT IS THEREFORE, this 28th day of April, in the year Two Thousand Twenty Two, by the Public Service Commission of Maryland,

⁴³ Staff Response at 7.

ORDERED: That the Petition of Delmarva Power & Light Company and Potomac Electric Power Company, Joined By Baltimore Gas and Electric Company, for Rehearing of Order No. 90035 is denied.

/s/ Jason M. Stanek _____

/s/ Michael T. Richard _____

/s/ Anthony J. O'Donnell _____

Odogwu Obi Linton _____
Commissioners⁴⁴

⁴⁴ Commissioner Mindy L. Herman did not participate in this matter.