

ORDER NO. 90847

The Potomac Edison Company's
Application for Adjustments to its
Retail Rates for the Distribution of
Electric Energy

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

Case No. 9695

ORDER ON APPEALS

Before: Frederick H. Hoover, Chair
Michael T. Richard, Commissioner
Anthony J. O'Donnell, Commissioner
Kumar P. Barve, Commissioner
Bonnie A. Suchman, Commissioner

Issued: October 18, 2023

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I. BACKGROUND

On March 22, 2023, The Potomac Edison Company (“Potomac Edison,” “PE” or “the Company”) filed an Application with the Commission pursuant to *Annotated Code of Maryland*, Public Utilities Article (“PUA”) §§ 4-203 and 4-204, requesting a \$50.4 million increase in its retail rates for providing electric energy in its Maryland service territory. On March 24, 2023, the Commission issued an order suspending the proposed rates for an initial period of 180 days from April 23, 2023. On April 21, 2023, the Commission delegated the matter to the Public Utility Law Judge (“PULJ”) Division for evidentiary hearings. A public comment hearing was held on July 10, 2023, before Public Utility Law Judge Jennifer Grace, and evidentiary hearings were held at the Commission on July 18, 19, 20, 21 and 28, 2023.

The PULJ issued a Proposed Order on September 6, 2023,¹ authorizing \$31,435,485 of the Company’s request, and denying approval of the remaining request. Additionally, on May 31, 2023, the Maryland Office of People’s Counsel (“OPC”) and Potomac Edison, with the support of the Commission’s Staff, filed a Consent Motion Requesting Establishment of a Phase II Proceeding to address the Company’s proposals pursuant to PUA § 4-309 establishing an “Energy Assistance Outreach Team” and a “50% Discount Program” to support low-income customers.² In consenting to establish the Phase II proceeding, the Parties agreed these programs would be decided outside of the 180-day suspension period for this case, and the Parties agreed to waive any argument that a Phase II would equate to “single issue ratemaking.”³ On June 7, 2023, the PULJ granted the

¹ An Errata to the Proposed Order was filed by the PULJ on September 22, 2023. All citations to the Proposed Order herein refer to the Errata Version, filed with the Commission on Sep. 22, 2023.

² Maillog No. 303222 (“Phase II Motion”).

³ *Id.* at 4.

Phase II Motion, noting that a procedural schedule for the Phase II proceeding will be issued at a later date.⁴

Pursuant to PUA § 4-309(c)(1), subject to the approval of the Commission, a utility company shall adopt a limited-income mechanism to benefit an eligible limited-income customer. To date, Potomac Edison is the only Maryland utility to have proposed programs or mechanisms under this provision. While the Parties have agreed to remove the Company's proposal from consideration at this time, the Commission will initiate a broader proceeding, incorporating all of the utilities and other stakeholders to consider proposals intended to comply with the statute. Therefore, this Order will toll the establishment of a procedural schedule in any Phase II proceeding for this case. Without prejudice to any positions that Potomac Edison or other parties may take, consideration of Potomac Edison's low-income proposals in this case is transferred to the Commission's future PUA § 4-309 proceeding.⁵

On September 12, 2023, Potomac Edison filed a Request for Clarification and Correction of the Proposed Order, regarding the PULJ-approved depreciation expense.⁶ Staff also filed a Request for Clarification with the PULJ on September 15, 2023, requesting clarification of depreciation rates in Appendix C to the Proposed Order.⁷

On September 20, 2023, OPC filed an appeal of Appendix C to the Proposed Order, requesting that the Commission modify the depreciation rates in Appendix C to make them consistent with OPC witness Garrett's calculations, as reflected in Exhibit 1.⁸ The cover

⁴ Maillog No. 303396.

⁵ The Company may lodge any portions of the record from this case regarding its low-income proposals in the PUA § 4-309 proceedings that the Commission will initiate, or any other proposals at that time. Subject to those proceedings, any further Phase II proceedings in this case may be canceled.

⁶ Maillog No. 304969.

⁷ Maillog No. 305086.

⁸ Maillog No. 305166.

letter to the Errata filed by the PULJ on September 22, 2023, noted a revised revenue requirement—due to a change in the depreciation calculation—on page 7. Additionally, the PULJ noted that Appendices A and B reflect the corresponding changes as reflected in the Proposed Order, as revised.

On September 25, 2023, Potomac Edison filed a Motion to Strike OPC’s September 20, 2023, Appeal regarding Appendix C to the Proposed Order.⁹ On September 29, 2023, OPC filed a “line” withdrawing its September 20, 2023, Appeal of Appendix C. Therefore, the Company’s Motion to Strike OPC’s September 20, 2023, filing is moot.

A. Potomac Edison Appeal

On September 15, 2023, Potomac Edison filed a Notice of Appeal and Memorandum on Appeal,¹⁰ requesting the Commission reverse the PULJ’s findings rejecting (1) Electric Distribution Investment Surcharge (“EDIS”) Phase II projects, (2) certain post-test year adjustments, and (3) recovery of certain COVID-19-related expenses.

B. OPC Appeal

The Maryland Office of People’s Counsel (“OPC”) filed a Notice of Appeal and Memorandum on Appeal,¹¹ disputing the PULJ’s findings regarding (1) the Company’s proposed “Ohio HB6” refund, (2) vendor charges in Federal Energy Regulatory Commission (“FERC”) account numbers 921, 923, 930.1 and 930.2, (3) FirstEnergy Service Company (“FESC”) charges, (4) the increase in Potomac Edison’s residential customer charge, and (5) capitalized Administrative and General (“A&G”) costs under FERC’s Uniform System of Accounts (“USofA”).

⁹ Maillog No. ML 305260.

¹⁰ Maillog No. 305087 (“Potomac Edison Appeal Memorandum”).

¹¹ Maillog No. 305091 (“OPC Appeal Memorandum”).

Upon consideration of these matters, the Commission affirms in part, reverses in part and modifies in part the Proposed Order as set forth herein. Based upon this Order, the Company is authorized to increase its electric rates by **\$28,038,042**.¹²

II. DISCUSSION

In reviewing the PULJ's findings, the Commission affirms findings that are: (1) supported by substantial evidence; (2) within the Commission's statutory authority or jurisdiction; (3) not arbitrary or capricious; and (4) not affected by any error of law. With regard to PULJ recommendations, it is within the Commission's discretion to adopt or reject such recommendations as long as the Commission's decision is not arbitrary or capricious or unreasonably discriminatory.¹³

A. EDIS Phase II

In its Application, Potomac Edison proposed a Phase II of EDIS to continue proactive investments in four programs supporting system reliability and resiliency.¹⁴ If an EDIS Phase II were authorized through this proceeding, those costs would be added to EDIS Phase I costs incurred as of January 2023 to calculate the EDIS going forward.¹⁵ The three programs requested by Potomac Edison for EDIS Phase II include: (1) Underground Cable Replacement program; (2) Substation Recloser Replacement program; and (3)

¹² Bill Impact: The average Standard Offer Service residential customer using 1,000 kWh per month should expect to see a bill increase of \$4.84, an increase of approximately 4.93 percent.

¹³ Order No. 89795, *In the Matter of the Complaint of the Staff of the Public Service Commission v. SmartEnergy Holdings, LLC d/b/a SmartEnergy*, Case No. 9613 (Mar. 31, 2021), slip op. at 53, citing *Md. Office of People's Counsel v. Md. Pub. Serv. Comm'n*, 246 Md. App. 388, 407 (2020) (“[W]e find nothing inappropriate in the Commission adopting the findings of the PULJ, since it was they who charged the PULJ with making those findings.”)

¹⁴ Potomac Edison Application at 2; Proposed Order at 6.

¹⁵ Proposed Order at 15.

Resiliency program, including the previously approved distribution automation (“DA”) program.¹⁶

Regarding the EDIS Phase II projects, the PULJ noted that Potomac Edison’s testimony at the hearing reiterated that the Company intends to spend \$316,779 on the Reclosers Project in 2025 and 2026, \$5,122,134 on the Underground Cable Project in 2024 through 2027, and will make no expenditures on the Resiliency Project if the EDIS Phase II Surcharge Mechanism is rejected. The Proposed Order notes that at issue is the lack of incremental-spend that the Company will not make if it is not guaranteed recovery through a Phase II EDIS surcharge. Should EDIS Phase II be approved, the Parties agree that approval of this program and the accelerated surcharge recovery does not constitute a prudency review, which will be completed within a subsequent rate base proceeding after the projects are complete and are in service to ratepayers. However, Staff and OPC recognize that a thorough prudency review is made more difficult by the decreased time frame in the EDIS Surcharge review process as proposed.

The PULJ agreed with OPC that the Company has failed to meet its burden to show that a surcharge recovery mechanism should be allowed. Judge Grace found that, “while these programs may increase reliability, the Company has not provided sufficient evidence to show that extra-ordinary surcharge recovery is merited at this time.”¹⁷ She noted that while the incremental spend proposed by the Company is large, the amount and timing of the spend is not volatile and is entirely within Potomac Edison’s control, and it is Potomac Edison who is ultimately responsible for ensuring adequate levels of reliability and resiliency to its customers. She noted further that while Potomac Edison has struggled with

¹⁶ Potomac Edison at 16.

¹⁷ Proposed Order at 22.

reliability and resiliency, the evidence in the record shows that Potomac Edison has been, for the most part, meeting its mandated reliability standards. As those standards change, it will be the Company's duty to plan and spend to meet the new standards, and thus reliability spend is expected to be ongoing. However, Potomac Edison's reliability is not so dire as to merit extraordinary surcharge recovery at this time, and there is no detriment to Potomac Edison by recovering its future reliability-spend through the typical ratemaking process.¹⁸ The Company's EDIS Phase II request was denied.¹⁹

1. Potomac Edison

Potomac Edison argues that in denying the Company's EDIS Phase II request, the PULJ applied the incorrect legal standard, arguing that the Commission's longstanding legal standard for evaluating reliability-related surcharge programs is that surcharge recovery is appropriate for accelerated, incremental, and non-revenue producing reliability improvement programs.²⁰ Instead, Potomac Edison argues, the Proposed Order incorrectly "evaluated the Company's proposed EDIS II programs by applying a new surcharge evaluation criteria of (i) whether the 'incremental spend proposed by the Company is 'volatile' and outside of 'Potomac Edison's control' and (ii) whether the Company's reliability performance is 'dire'."²¹

Under what it argues is the Commission's longstanding standard, Potomac Edison argues that the programs proposed by the Company under EDIS II are "incremental,

¹⁸ *Id.* at 22-23.

¹⁹ *Id.* at 23.

²⁰ Potomac Edison Appeal Memorandum at 6, citing *Re Potomac Electric Power Co.*, Case No. 9311, Order No. 85724 (Jul. 12, 2013) slip op. at 159; *Re Baltimore Gas & Elec. Co.*, Case No. 9326, Order No. 86060 (Dec. 13, 2013) slip op. at 136; *Re Potomac Edison*, Case No. 9490, Order No. 89072 (Mar. 22, 2019) slip op. at 8-10.

²¹ *Id.* at 7.

accelerated, non-revenue producing, cost-effective, and beneficial to customers,”²² adding that this was undisputed by the parties, and that Staff recommended EDIS II approval.²³ Additionally, Potomac Edison argues that its EDIS II proposal complies with the Commission’s policy objectives regarding incremental grid resiliency and reliability, and that EDIS I contributed to the Company’s successful reliability and resiliency performance.²⁴

Additionally, Potomac Edison notes that as the utilities are preparing for an “electrification future in line with the State’s greenhouse gas emissions reduction targets,” programs like those included in the Company’s EDIS II proposal will play an important role in that effort.²⁵ In its Appeal Memorandum, the Company noted that Staff found the proposed EDIS II programs to be highly cost-effective, with benefit/cost ratios ranging from 110% to 4,239%,²⁶ and that Staff recommended that the Commission approve Phase II of the EDIS program, subject only to a slight modification of the EDIS reporting requirements and the surcharge’s rate design, to which the Company agreed.²⁷

2. OPC

OPC argues that the Proposed Order correctly evaluates Potomac Edison’s current reliability and resiliency metrics and properly determined that they are largely sufficient, answering, in the negative, the question of “whether the level of increased reliability and resiliency gained warrant a departure from Commission precedent.”²⁸ OPC argues that the

²² *Id.* at 8.

²³ *Id.*

²⁴ *Id.*

²⁵ OPC Reply Memorandum at 4.

²⁶ Potomac Edison Appeal Memorandum at 5.

²⁷ *Id.* at 6.

²⁸ OPC Reply Memorandum at 3.

Company does not need to be incentivized to meet its statutory obligations at ratepayers' expense, and "[t]he sense of urgency for resolving reliability and resiliency concerns from Case Nos. 9311 and 9326 is absent in this case."²⁹

OPC notes that Potomac Edison has a statutory duty to provide safe, adequate service and acknowledges that even without the approval of the surcharge, it "would engage in whatever reliability investments it thinks are reasonable and prudent, meets its safety and safety metrics, and provide reliable service."³⁰

Commission Decision

In its appeal, Potomac Edison notes that, while the Commission only initially approved the EDIS through 2022, the Commission invited the Company to seek continuation of the program in a future rate case.³¹ Citing from Order No. 89072, which states "Potomac Edison is permitted to return to the Commission before the conclusion of the EDIS sunset and make a case for extension of surcharge recovery for any of the three programs," the Company argues that the PULJ's rejection of the EDIS Phase II surcharge should be reversed.

As noted in the Proposed Order, the Commission authorized a one-year extension of the EDIS surcharge through 2023.³² While Staff recommended approval of EDIS Phase II with certain conditions, including a new reporting date of November 1st annually,³³ OPC recommended denying the Company's request, noting that the Company has not justified

²⁹ *Id.* at 4.

³⁰ *Id.* at 5.

³¹ Potomac Edison Appeal Memorandum at 4.

³² Proposed Order at 15, n.92, citing Commission Letter Order dated June 15, 2022, Maillog Nos. 240413 and 240434.

³³ *Id.* at 19.

further extraordinary ratemaking treatment.³⁴ OPC does not object to the Company's EDIS projects, but argues that "no compelling justification has been proven to necessitate a surcharge recovery for these costs,"³⁵ and that the Company "does not need to be incentivized" to meet its statutory obligations at ratepayers' expense.³⁶

The Commission affirms the PULJ's finding that the Company has failed to demonstrate that continuation of the EDIS surcharge should be allowed. As the PULJ notes, "[w]hile the incremental spend proposed by the Company is large, the amount and timing of the spend is not volatile and is entirely within Potomac Edison's control, and it is Potomac Edison who is ultimately responsible for ensuring adequate levels of reliability and resiliency to its customers."³⁷ OPC correctly notes the Commission's precedent is to not allow surcharge recovery, except in limited situations.³⁸ Only in a narrow range of circumstances are surcharges appropriate,³⁹ and the Commission's allowance of a surcharge is in many cases —though not in all cases—synonymous with reducing volatility.

On the other hand, surcharge mechanisms guarantee *dollar-for-dollar* recovery of specific costs, diminish the utility's incentive to control these costs, and exclude classic, ongoing utility expenses from the standard, contextual ratemaking analysis. The Commission has therefore limited this recovery mechanism to "very large, non-recurring expense items that have the potential to seriously impair a utility's financial well-being and

³⁴ *Id.* at 20.

³⁵ *Id.*

³⁶ OPC Reply Memorandum at 4.

³⁷ Proposed Order at 22.

³⁸ *See* OPC Reply Memorandum at 2.

³⁹ Order No. 85724, *In the Matter of the Application of Potomac Electric Power Company for an Increase in Its Retail Rates for the Distribution of Electric Energy* (Case No. 9311, July 12, 2013) slip op. at 160.

that do not contribute to the Company's rate base" as opposed to "classic, ongoing costs of running a utility company."⁴⁰

Summarizing Staff's position on Potomac Edison's EDIS Phase I programs as "cost-effective and beneficial to ratepayers," OPC notes that the level of increased reliability and resiliency gained by approving the surcharge for EDIS Phase I warranted a departure from Commission precedent.⁴¹ Consistent with the Commission's precedent disfavoring surcharge mechanisms,⁴² the PULJ notes that while these programs may increase reliability, the Company has not provided sufficient evidence to show that extraordinary surcharge recovery is merited at this time. The Commission affirms the PULJ's findings on this issue, and Potomac Edison's appeal is denied.

B. Post-Test Year Adjustments

Potomac Edison proposed a number of post-test year adjustments that were rejected in the Proposed Order, including: (1) Adjustment 18, reflecting going-level increases in depreciation expense associated with the terminal treatment of capital expenditures for reliability-related projects to be placed in service between the end of the test year and June 30, 2023; (2) Adjustment 32b, for the terminal treatment of Construction Work in Progress ("CWIP") for two large projects (West Jefferson Substation and Myersville Energy Storage) to reflect a full 13-month inclusion in average rate base in the test year; (3) Adjustment 34, a rate base adjustment to reflect the increase in accumulated depreciation

⁴⁰ See, Order No. 83085, *In the Matter of the Application of Delmarva Power and Light Company for an Increase in Its Retail Rates for the Distribution of Electric Energy*, Case No. 9192 (Dec. 30, 2009) (citations omitted).

⁴¹ OPC Reply Memorandum at 3.

⁴² See e.g., *Columbia Gas Transmission, LLC*, 142 F.E.R.C. P61,062 (2016) (order approving a contested settlement), noting however this Commission's objection to Columbia Gas' surcharge-tracker mechanism as "inappropriate for core infrastructure spending because they reduce the [utility's] incentive to maximize revenues and minimize costs." *Id.* at para. 16.

associated with the terminal treatment of capital expenditures for the same post-test year reliability projects; and (4) Adjustment 38, a rate base adjustment for accumulated deferred income taxes (ADIT) related to the post-test year reliability projects.⁴³

1. Potomac Edison

Potomac Edison argues that the PULJ's rejection of these post-test year costs departs from the Commission's longstanding precedent and creates a "new requirement" that only rate case applicants that provide forecasted test years are entitled to recovery of post-test year reliability and safety-related investments.⁴⁴ The Company argues that the Commission has historically allowed recovery of post-test year investments consisting of actual, prudently incurred costs for non-revenue producing safety and reliability projects that are completed before the rate case hearing date and that are known and measurable.⁴⁵ Additionally, Potomac Edison argues that disallowing post-test year costs based on a utility's filing a fully historical test year rate case—as it asserts was done in the Proposed Order—would unnecessarily limit the Commission's tools to facilitate the acceleration of utility reliability improvements.⁴⁶

2. OPC

OPC argues that the Proposed Order correctly applies the legal standard applicable to this issue to find that Potomac Edison failed to meet its burden for justifying post-test year reliability projects, and the corresponding effects on depreciation and ADIT.⁴⁷ OPC witness Morgan testified that there were inconsistencies in how the Company's CWIP

⁴³ Proposed Order at 24.

⁴⁴ Potomac Edison Appeal Memorandum at 10.

⁴⁵ *Id.* at 10, citing Commission Order No. 85724 at 159 (Case No. 9311), Order No. 88975 at 12 (Case No. 9484), and Order No. 89072 at 20 (Case No. 9490).

⁴⁶ Potomac Edison Appeal Memorandum at 12.

⁴⁷ OPC Reply Memorandum at 5.

balances were calculated for ratemaking Adjustment 32b, and both OPC and Staff presented evidence that raised concerns regarding the Company's CWIP calculation that were not adequately addressed by Potomac Edison.⁴⁸

Commission Decision

Contrary to the Company's assertion that the PULJ did not apply the proper standard in rejecting its post-test year reliability adjustments, the Proposed Order—noting that there is indeed a Commission-adopted exception in some cases—states the exception standard as applying to “actual, prudently incurred costs for non-revenue producing safety and reliability investments that are completed before the hearing date and that are known and measurable.”⁴⁹

In Order No. 84475,⁵⁰ the Commission reaffirmed its 2010 position when it declined to accept end of test year and post-test year reliability plant adjustments proposed by Pepco. Likewise, in Order No. 87591,⁵¹ the Commission rejected post-test year adjustments proposed by BGE, as not known and measurable.

In applying the Commission's well-established standard to the post-test year adjustments proposed by Potomac Edison, the PULJ concluded that the Company failed to meet its burden to justify these “out of test year costs, ... were completed before the

⁴⁸ *Id.* at 7-8.

⁴⁹ Proposed Order at 26.

⁵⁰ Order No. 84475, *In the Matter of the Application of Washington Gas Light Company for Authority to Increase Its Existing Rates and Charges and to Revise Its Terms and Conditions for Gas Service*, Case No. 9267 (Nov. 14, 2011).

⁵¹ Order No. 87591, *In the Matter of the Application of Baltimore Gas and Electric Company for Adjustment to Its Electric and Gas Base Rates*, Case No. 9406 (Jun. 3, 2016) (“Order No. 87591”) slip. op. at 100. (“While the Commission has allowed post-test year adjustment for particular types of expenses, such as reliability expenses, such adjustments must be known and measurable as of the time of the hearings and are still exceptions to the historical test year approach.”)

hearing,” and therefore were “known and measurable, and were used and useful.”⁵² This is consistent with Commission precedent, as noted in the cases cited by Potomac Edison. The Company’s failure to demonstrate that its post-test year adjustments were for projects completed before the hearing does not support its assertion that the PULJ misapplied the standard.

The PULJ’s finding is affirmed, and Potomac Edison's appeal on this issue is denied.

C. COVID-19-Related Expense

Potomac Edison proposed several Covid-19-related adjustments, including a COVID Pandemic Recognition Award regulatory expense adjustment which was rejected in the Proposed Order as a discretionary cost that the PULJ found was not unavoidable and related only to the pandemic.⁵³

1. *Potomac Edison*

Potomac Edison argues that the standard that the Commission should apply in resolving this issue is whether the payments were a prudent pandemic-related cost.⁵⁴ It asserts that the frontline employees receiving awards were those who could not stay home—they were the workers who “maintain and repair the electrical distribution systems and substations, meter readers, the crews in the bucket trucks, on ladders and poles,” and respond to downed power lines, storm damage, and other outages,” and that the Company’s

⁵² Proposed Order at 26. Staff witness Ostrander noted that “[i]f PE subsequently provided proper and adequate documentation on a timely basis to support actual reliability plant additions (to substitute for its forecasted amounts) through the approximate date of hearings in this rate case, then I would revise my adjustment to include such known and measurable amounts in rate base – and this appears consistent with Commission treatment in most prior rate cases.” (Ostrander, Surrebuttal at 6).

⁵³ *Proposed Order* at 43.

⁵⁴ Potomac Edison Appeal Memorandum at 13.

cash awards to these frontline workers were in line with peer companies' pandemic-related compensation policies.⁵⁵

2. *Staff*

Staff noted that the Company's PRA bonus was calculated as 3.5% of the employee's annual salary and was awarded in the fourth quarter of 2020. Staff opposed the recovery of this expense because it argues the bonuses were "a discretionary cost paid by [the Company] and were not unavoidable cost[s] directly related to the pandemic."⁵⁶ Staff adds that "[n]owhere does Potomac Edison assert, much less demonstrate, that it was necessary for it to grant the COVID bonus."⁵⁷

Commission Decision

In reply to Potomac Edison's appeal on this issue, Staff—citing the testimony of Staff witness Ostrander—notes that the Company's COVID bonus costs "were a one-time extraordinary cost paid only in 2020 and were not paid again in the 2021 portion of the pandemic (or in 2022), so the costs were an avoidable nonrecurring cost."⁵⁸ Staff emphasizes—citing the Commission's 2016 decision in BGE Case No. 9406—that under PUA § 4-101, the Commission is required to set "just and reasonable rates" based only on "necessary and proper costs."⁵⁹ While the payment of bonuses to its frontline employees for their work during the COVID-19 is indeed laudable, the PULJ concluded properly that the Company's Pandemic Recognition Award bonuses was a discretionary cost. Therefore, Staff's revised surrebuttal COVID-19 adjustments were proper.

⁵⁵ *Id.* at 13-14.

⁵⁶ Staff Reply Memorandum at 4, quoting Staff Ex. 14 at 30.

⁵⁷ *Id.* (emphasis original).

⁵⁸ *Id.* at 4.

⁵⁹ Order No. 87591 at 67.

The PULJ's finding is affirmed, and Potomac Edison's appeal of this issue is denied.

D. Ohio HB6 Refund

In rejecting OPC's protest regarding a \$38,000 HB6 Refund expense, the PULJ found that Potomac Edison met its burden regarding both the HB6 customer refund and the additional customer refund amounts identified in this proceeding and directed that those amounts be refunded to customers.⁶⁰

1. OPC

OPC argues that the PULJ erred in approving the proposed refund with interest, and failed to address OPC's objection that no Company witness testified that Potomac Edison's Ohio HB6 refund calculation was accurate and complete.⁶¹

2. Potomac Edison

Potomac Edison maintains that substantial evidence supports the PULJ's finding that the Company's proposed Ohio House Bill 6 ("HB6")-related refund to Maryland customers—related to \$38,000 of costs that lacked proper documentation or were improperly classified or misallocated—was accurate and the Company's calculations supporting that refund were well documented and reliable.⁶² With regard to supporting documentation, Potomac Edison notes that in Case No. 9667, the Commission repeatedly rejected OPC's requests for certain privileged material regarding FirstEnergy, and finding of privilege rendered by the Public Utilities Commission of Ohio.⁶³

⁶⁰ Proposed Order at 63.

⁶¹ OPC Appeal Memorandum at 3, 5.

⁶² Potomac Edison Reply Memorandum at 2.

⁶³ *Id.* at 5.

The Company insists that it has (i) disclosed the source documents that it relied on to perform its refund analyses, (ii) disclosed the vendors whose costs were improperly allocated to PE, and (iii) explained how PE identified the amounts to be returned to its customers.⁶⁴

Commission Decision

The Commission agrees with Potomac Edison that Case No. 9667 addressed the costs wrongly passed through to the Company’s ratepayers due to the HB6 scandal. When the Commission issued Order No. 90615, it noted that “OPC seems unwilling to accept the fact that the proper investigations into that misconduct were conducted by the relevant authorities and those of the State of Ohio.... The Commission simply is not the proper authority to conduct the type of investigation that OPC seeks.”⁶⁵

The Commission did recognize that OPC (like all parties) will have an opportunity to conduct discovery into any improper impact that the HB6 scandal may have had on the Company’s ratepayers in Case No. 9667. However, the Commission never changed its multiple rulings that it lacked jurisdiction over FESC and FirstEnergy, as both entities reside in Ohio. The Commission lacks any authority to issue a subpoena to either entity. FirstEnergy did submit to Maryland jurisdiction for purposes of enforcing the merger approval’s many commitments.⁶⁶ Although the Commission will grant OPC’s request for an independent audit of the disbursements to Potomac Edison (see below), that audit may face jurisdictional challenges.

⁶⁴ *Id.* at 9.

⁶⁵ Order No. 90615, *Re Petition of The Maryland Office of People’s Counsel to Investigate the Future of First Energy’s Relationship with Potomac Edison in Light of Recent Events*, Case No. 9667 (May 5, 2023) slip op. at 16.

⁶⁶ Order No. 83788, *In the Matter of the Application of the Merger of FirstEnergy and Allegheny Energy, Inc.*, Case No. 9333 (Jan. 18, 2011).

OPC continues to request that the Commission order the Company to produce FirstEnergy's internal Investigation Report. In Order No. 90033, the Commission explained in detail its reasons for concluding that this report was protected by attorney-client privilege.⁶⁷ In that order, the Commission explained:

FirstEnergy has not disclosed any of its counsel's legal conclusions or advice either in this proceeding or any of the ongoing proceedings outside of Maryland. To the contrary, the Public Utilities Commission of Ohio, following an *in-camera* review of the Investigation Report, concluded that it contained privileged attorney-client communications and that "the Investigation Report is clearly prepared in reasonable anticipation of litigation. Therefore, the Investigation Report is protected from disclosure by both attorney-client privilege and the work-product doctrine."⁶⁸

Additionally, although the Commission did not directly rule on OPC's argument that FirstEnergy possessed practical control over this report, it did note that:

Because FirstEnergy has not provided the Investigation Report to Potomac Edison, the Company has repeatedly stated that it could not waive FirstEnergy's privilege even if it wished to do so. The Commission agrees with this repeated argument by Potomac Edison. The record contains no evidence that Potomac Edison is any more aware of the contents of this investigation than OPC.⁶⁹ In conclusion, the Commission determined that "the Investigation Report is protected by attorney-client privilege and that no party has waived that privilege."⁷⁰

The present proceeding provided no additional evidence to alter the Commission's prior conclusion, and the Commission affirms the PULJ's conclusion that the decision in Case No. 9667 dictates the denial of OPC's request for this report.

OPC also argues that Potomac Edison failed to substantiate the FESC's allocations. However, the Commission concluded in Case No. 9667 that Potomac Edison had provided

⁶⁷ Order No. 90033 at 6-11.

⁶⁸ *Id.* at 8.

⁶⁹ *Id.*

⁷⁰ *Id.* at 10.

all documents upon which Mr. Valdes relied when he performed his analysis of FESC allocations to Potomac Edison following the HB6 scandal.⁷¹ In the same hearing on OPC's motion to compel several documents, Potomac Edison's Counsel testified under oath that the Company had provided OPC with all documents in its possession upon which Mr. Valdes had calculated that Potomac Edison had wrongfully attributed \$38,000 to ratepayers. In closing Case No. 9667, the Commission stated that "[T]o the extent OPC wishes to depose or otherwise examine Mr. Valdes' conclusions, it may do so in Case No. 9695. However, to date, the record contains no basis to conclude that Mr. Valdes did not conduct his audit in good faith – an audit that FESC or Potomac Edison could have conducted at any time."

OPC chose to appeal the Commission's order closing Case No. 9667, so all conclusions the Commission reached in that case are currently before the Circuit Court for Baltimore City,⁷² and the Commission lacks jurisdiction to address them here. We affirm the PULJ's findings on these issues.

E. Vendor Charges in FERC Accounts 921, 923, 930.1, 930.2 and FESC Charges

In addressing OPC's request for cost disallowances associated with various FERC Accounts, the Proposed Order notes that while Potomac Edison accepted these inappropriate charges, OPC still argued that the Company allocated a portion of these costs to Potomac Edison's Maryland distribution service, accepting a modified proposed reduction of \$321,434.⁷³ Also, regarding FESC charges, the PULJ noted that this Commission has no jurisdiction over FirstEnergy's misconduct in Ohio, that investigations

⁷¹ *Id.* at 3-4.

⁷² Case No. 24-C-23-003077, Circuit Court for Baltimore City.

⁷³ Proposed Order at 60.

were conducted by the U.S. Department of Justice, FERC, the SEC, the Attorney General in Ohio, and the Public Utilities Commission of Ohio, and that this Commission is not the proper authority to conduct the type of investigation that OPC recommends.⁷⁴

1. Vendor Charges

a. OPC

On appeal, OPC continues to request adjustments to 2022 test year vendor charges in FERC accounts 921, 923, 930.1 and 930.2, which it argues the PULJ “implicit[ly] rejected.”⁷⁵ According to OPC, when pressed to verify the exclusion of costs from accounts 923 and 930.2 of \$35,317 in donations, Company witness Colflesh admitted that she had no documentation, but claimed to have checked to assure that they were excluded.⁷⁶ OPC adds that, when confronted with a spreadsheet detailing FERC account 923 entries containing a blank “exclusion” line, Company witness Colflesh acknowledged that the line’s inclusion was in error.⁷⁷

b. Potomac Edison

The Company maintains that in Order No. 90033 (Case No. 9667), Potomac Edison witness Valdes was provided with a list of certain vendor accounts to verify the accuracy of the allocation of funds among its subsidiary utilities and that “Potomac Edison has provided these documents to OPC”.⁷⁸ Potomac Edison argues that OPC appears to be simply dissatisfied with the Company’s response, but has identified no additional vendor costs that were improperly allocated.⁷⁹

⁷⁴ *Id.* at 63.

⁷⁵ OPC Appeal Memorandum at 6.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Potomac Edison Reply Memorandum at 7, n.25.

⁷⁹ *Id.*

2. *FESC Charges*

a. OPC

On appeal, OPC notes that at present Potomac Edison lacks the ability to contest FESC charges, therefore—it submits—the PULJ’s finding that expenses charged to PE by FESC are outside of Potomac Edison’s control “is correct.”⁸⁰ OPC submits that this finding should have justified granting OPC’s request that the Commission order a shareholder-funded, independent audit into FESC’s cost allocation and charge practices.⁸¹ It argues that this Commission has “exclusive authority” to review of affiliate charges in Potomac Edison’s retail rates⁸²

OPC argues further that the PULJ “sidesteps” OPC’s audit request, by wrongly concluding that the Commission already rejected it in Case No. 9667.⁸³ Noting that Case No. 9667 was “investigatory,” OPC notes that the Commission made clear that the propriety of FESC allocations to Potomac Edison for ratemaking purposes was to be addressed in this proceeding. OPC submits that its proposed audit should examine all financial information and backup documentation necessary to determine how much of PE’s prior and current Maryland customer rates are the result of inappropriate cost allocations from its affiliate.⁸⁴

b. Potomac Edison

Potomac Edison argues that this Commission “consistently” held that it has no authority or jurisdiction over FirstEnergy or FESC and the Commission has already

⁸⁰ OPC Appeal Memorandum at 8.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 10.

⁸⁴ *Id.* at 11.

determined that it should not order an audit of either FirstEnergy or FESC's books and records.⁸⁵ The Company notes further that the Commission repeatedly rejected OPC's requests for these materials because they are undoubtedly privileged and are consequently undoubtedly protected from production.⁸⁶

Finally, Potomac Edison notes that after the Commission closed Case No. 9667, OPC filed a petition for judicial review of the Commission's rulings, a matter which is pending review in the Circuit Court for Baltimore City. The Company argues that OPC's pursuit of these issues in this case constitutes an impermissible "collateral attack" on the Commission's rulings outside of the judicial review process.⁸⁷

Commission Decision⁸⁸

Although the two cases currently operating in parallel tribunals do complicate OPC's repeated request that the Commission order a new independent audit of the costs allocated to Potomac Edison by FESC, the Commission does agree with OPC that the Commission instituted Case 9667 to specifically investigate fall-out from the HB6 scandal. The current rate case is much broader, and OPC requests an independent audit into any costs between FESC and the Company that may go beyond HB6.

Potomac Edison has produced audits conducted by Craig Energy & Financial Services, Inc. (CEFS) and others. However, the Commission recognizes that, in the context of a rate case, the party that hires an expert witness - whether for an audit or live testimony - may affect the substance of the expert evidence.

⁸⁵ Potomac Edison Reply Memorandum at 4.

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 5-6.

⁸⁸ Commissioner Anthony J. O'Donnell dissents from Part II.E. A partial dissenting statement is appended to this order.

The Commission therefore directs Staff to identify an independent auditing company to investigate all allocations between FESC and Potomac Edison based upon the documents in the possession of Potomac Edison and submit its final report to the Commission. Additionally, the Company is directed to establish a regulatory liability account to track costs allocated by FESC, inclusive of costs recovered by Potomac Edison in this case and any costs allocated prospectively through the test-year of any future rate case. The findings of the independent audit shall be used to adjust or true-up FESC allocated costs in a future rate case, initiated either by Potomac Edison, Staff or OPC. In consultation with the Commission's Staff and OPC, the Company shall draft a Request for Proposals ("RFP") and a list of audit firms that may be qualified to conduct the audit directed in this Order.⁸⁹

This directive is in keeping with the Commission's determination in Case No. 9667, noting that OPC should be able to pursue its challenges to FESC allocations to Potomac Edison for ratemaking purposes in the context of appropriate rate case proceedings. This applies to both FESC charges and vendor charges. It does not set aside the Commission's Case No. 9667 findings and conclusions regarding the limits of the Commission's jurisdiction. However, the actions of the management and executives of FirstEnergy entailed in the Ohio bribery scandal caused harm to Potomac Edison-Maryland. This Commission's duty to the ratepayers of that entity requires us to exercise due diligence in assuring that no financial harm affects the Company's ratepayers. We note that the audit directed in this Order is similar to actions recently taken by our counterparts at the West Virginia Public Service Commission, pertaining to FirstEnergy affiliates in that state that

⁸⁹ Staff shall recommend the audit firm to be selected by the Commission.

are also served by FESC.⁹⁰ If, as a result of the audit investigation directed herein, there are findings that support rate adjustments adopted in this Order, the regulatory liability accounting established herein will allow for prospective ratemaking with regard to such findings. Based on the findings in the Proposed Order, the Commission affirms the PULJ's allowance of Potomac Edison's recovery of FESC and vendor charges in their new rates for the reasons stated in the Proposed Order. However, this recovery may be modified prospectively based upon the results of the independent audit.

F. Residential Customer Charge

The PULJ denied Potomac Edison's proposal to increase the residential customer charge from \$5.70 to \$8.00.⁹¹ OPC's recommended \$6.00 residential customer charge was also rejected. The PULJ adopted Staff's recommended residential customer charge of \$7.21, noting that Staff's recommendation aligns with cost-causation principles, adheres to the principle of gradualism, and will avoid rate shock.⁹²

1. OPC

OPC argues that the residential customer charge increase authorized in the Proposed Order is "dramatically higher" than recent Commission precedent.⁹³ OPC argues further that a 26.5 percent increase in Potomac Edison's residential customer charge is a

⁹⁰ See *Re Monongahela Power Company and The Potomac Edison Company*, 2023 W. VA. PUC LEXIS 313; West Virginia P.S.C. Case No. 23-0270-E-GI (Mar. 2, 2023) (Order requiring a Focused Management Audit of Monongahela Power Company and The Potomac Edison Company, directing "an in-depth investigation of (1) lobbying and image building activities that result in charges directly or indirectly included on the Companies' books and (2) accounting for charges included in [the companies' expanded net energy cost] cost recovery accounts.")

⁹¹ Proposed Order at 81.

⁹² *Id.* at 82.

⁹³ OPC Appeal Memorandum at 12.

deviation from Commission precedent, which the PULJ fails to explain, rendering this finding arbitrary and capricious.⁹⁴

2. *Potomac Edison*

The Company submits that the PULJ weighed the evidence in this proceeding and concluded that a \$7.21 residential customer charge, as proposed by Staff, was reasonable and consistent with traditional ratemaking principles such as gradualism and cost causation.⁹⁵ The Company argues that “[a]fter concluding that Potomac Edison’s proposal for a 40% customer charge increase was “too extreme,” Judge Grace “balance[d] the competing interests and policy objectives related to fixed costs” and accepted Staff’s proposal.”⁹⁶

Commission Decision

As the Proposed Order states, Staff’s recommendation aligns with cost-causation principles, adheres to the principle of gradualism, and will avoid *some level of* rate shock. However, this is equally true with the \$6.00 residential customer charge proposed by OPC.

In the Company’s last rate case—Case No. 9490—the Commission approved a 14 percent increase in Potomac Edison’s residential customer charge, an increase from \$5.00 to \$5.70.⁹⁷ In this case, the \$7.21 residential customer charge recommended by Staff and adopted by the PULJ represents a 26.5 percent increase from the previous amount.⁹⁸ While Staff’s proposal is below the \$8.00 residential customer charge proposed by the Company, from the standpoint of gradualism and avoidance of rate shock, it still pushes this

⁹⁴ *Id.* at 13.

⁹⁵ Potomac Edison Reply Memorandum at 14.

⁹⁶ *Id.* at 14.

⁹⁷ Order No. 89072 at 113.

⁹⁸ Proposed Order at 81.

company's residential customer charges too far too quickly. The Commission finds that, in this case, OPC's proposal is better aligned with the principle of gradualism. Additionally, as the Commission noted in Order No. 89072, an increase of the magnitude of the customer charge could also be inconsistent with goals of encouraging energy conservation and promoting control over customer bills.⁹⁹ Therefore, the Company's residential customer charge is hereby modified to reflect the \$6.00 amount proposed by OPC. As such, the PULJ's finding is modified.

G. A&G Overhead Costs

In the Proposed Order, the PULJ found that there was insufficient evidence in the record to conclude that the capitalized A&G overhead costs challenged by OPC were imprudent.¹⁰⁰ On appeal, OPC argues the PULJ erred in allowing continuing recovery for these costs, and also argues that the *capitalized* costs should not have been eligible for recovery in prior and current rate proceedings.¹⁰¹

1. OPC

OPC argues that Potomac Edison made an accounting error, which continued between 2015 and 2021, resulting in the capitalization of certain costs that should have been expensed.¹⁰² OPC submits that this issue is not solely whether the costs were prudently incurred, but whether the capitalized costs should have been eligible for recovery in the prior and current rate proceedings.

⁹⁹ Order No. 89072 slip op at 113. *See also*, Order No. 88432 at 127 (“determining the appropriate increase in [the] customer charge is not an exact science, but rather involves balancing many considerations”).

¹⁰⁰ *Id.* at 34.

¹⁰¹ OPC Appeal Memorandum at 14.

¹⁰² *Id.*

OPC argues that the Company's rates—as established in Case No. 9490—were higher than they should have been due to the effects of inappropriate capitalization on depreciation, return, and taxes on costs that should have instead been expensed beginning in 2015, when the accounting error began, through the June 2018 test year.¹⁰³ Noting that the Proposed Order failed to consider overhead costs prior to the current rate case, OPC argues that if the Proposed Order is approved, the order will allow costs that should have been expensed between 2015 and 2021—"thus continuing to allow return and tax allowance for which PE is not eligible."¹⁰⁴

2. *Potomac Edison*

Potomac Edison argues that OPC has not identified any legal or factual error to warrant reversal of the Proposed Order on this issue. The Company argues that the record supports the PULJ's conclusion that: (i) the costs at issue were reviewed and deemed prudent in the Company's prior rate authorization of regulatory asset recovery for the Company's reclassified A&G costs case (and OPC did not argue or submit evidence to the contrary); (ii) the Company needs recognition of this regulatory asset so it can continue to recover these approved costs—costs that are simply being reclassified; and (iii) the Company is not being "reward[ed]" for this reclassification: recovery of the regulatory asset has no impact on customers' rates.¹⁰⁵

Commission Decision

The Commission affirms the PULJ's conclusion that these capitalized costs were previously found to be prudently incurred in Case No. 9490. The question is whether the

¹⁰³ *Id.* at 14.

¹⁰⁴ *Id.* at 14-15.

¹⁰⁵ Potomac Edison Reply Memorandum at 14-15.

Commission should accept the continuing capitalization of these costs, in light of the FERC audit. OPC characterizes FERC’s findings as defining an accounting “error” by Potomac Edison. Potomac Edison refers to its A&G costs as simply being “reclassified” and therefore still entitled to the regulatory asset authorized by the PULJ.

The Commission agrees with OPC that these A&G costs are more properly expensed, for the reasons stated in OPC’s memorandum on appeal. The Commission determines that the Company’s A&G costs should have been expensed from 2015-2021, discontinues the error in this proceeding, and also corrects that mistake going forward. As OPC asserts: “[T]he rates established in Case No. 9490 were higher than they should have been due to the effects of inappropriate capitalization on depreciation, return, and taxes on costs that should have been expensed beginning in 2015, when the accounting error began, through the June 2018 test year.”

In reaching this decision, the Commission credits the testimony of OPC witness Hunt noting that:

[I]n proposing to recover the regulatory asset for A&G overhead costs, Potomac Edison takes a single rate issue approach that fails to verify that it has accounted for all accounting changes it implemented since the last base rate case in Case No. 9490 or conducted an analysis of all cost changes included in the revenue requirement included in currently effective rates.¹⁰⁶

He notes further that under the rate approved in Case 9490, “Potomac Edison was not guaranteed to recover its authorized rate of return” and, in this proceeding, has not demonstrated that it would have materially fallen short of its authorized rate of return considering the effect of the accounting error correction of A&G overhead costs.¹⁰⁷ On

¹⁰⁶ OPC Direct (Hunt) at 11.

¹⁰⁷ *Id.* at 11-12.

the other hand, Potomac Edison argues that “trying to readjust prior rates raises fundamental concerns of retroactive ratemaking.”¹⁰⁸

In his surrebuttal testimony, OPC witness Hunt again states “[t]he use of the accounting balances determined in accordance with the FERC USofA that do not reflect the continuance of the prior period error does not now constitute retroactive ratemaking. The Commission is not bound to endorse an accounting error it did not previously approve.”¹⁰⁹ We agree.¹¹⁰

The Commission therefore reverses that portion of the PULJ’s findings on this issue and adopts OPC’s adjustment removing \$13.2 million from Plant in Service, leading to a decrease in depreciation expense of \$1,482,947.¹¹¹

III. CONCLUSION

For the foregoing reasons, the Commission affirms in part, reverses and modifies in part, the Proposed Order in this case. Except with regard to (1) the proposed Phase II proceeding regarding the consideration of Company’s PUA § 4-309 low-income proposals, (2) the requirement directing an independent audit of vendor charges in FERC Accounts 921, 923, 930.1, 930.2, and 903.3, and FESC charges allocated to Potomac Edison, (3)

¹⁰⁸ Potomac Edison Rebuttal (Valdes) at 9.

¹⁰⁹ OPC Surrebuttal (Hunt) at 9.

¹¹⁰ See, e.g., Order No. 88432, *In the Matter of the Application of Potomac Electric Power Company for Adjustments to Its Retail Rates for the Distribution of Electric Energy*, Case No. 9443 (Oct. 20, 2017) (“Order No. 88432”) slip op. at 50. (Commission decision rejecting Pepco’s proposal to change the method of income tax accounting from flow through to normalization for the cost of removal for plant acquired prior to 1981, noting “we are sympathetic to Staff’s view that the regulatory asset can be viewed as the product of a ‘serious accounting error on the Company’s part, for which ratepayers should not be asked to pay.’”)

¹¹¹ Proposed Order at 33, citing OPC Exhibit 35 (Morgan Direct) at 10. This adjustment impacts depreciation by a similar amount in income and the removal of \$772,000 of non-recoverable A&G expenses that are also excluded from income. Reflecting these adjustments results in a revenue requirement of **\$28,038,042** based on an adjusted rate base of \$681,954,468 and Adjusted Operating Income of \$29,038,682.

reversal of accounting relating to Potomac Edison's A&G costs, and (4) modification of Potomac Edison's residential customer charge, the Proposed Order is otherwise affirmed.

The Phase II proceeding for consideration of the Company's PUA § 4-309 low-income proposals is tolled to a future date to be determined by the Commission. The residential customer charge set forth in the Proposed Order is modified to \$6.00 per month. Further, the Company is directed to establish a regulatory liability account to track costs associated with the affiliate-related activities of its parent company, FirstEnergy Corporation, contingent upon the findings of an independent audit, as discussed herein.

IT IS, THEREFORE, this 18th day of October, in the year Two Thousand Twenty-Three by the Public Service Commission of Maryland, **ORDERED:**

(1) that the findings of the Public Utility Law Judge as set forth in the Proposed Order, unless reversed or modified herein, are affirmed;

(2) that the Proposed Order is modified to require an independent audit of vendor charges in FERC accounts 921, 923, 930.1, 930.2, 903.3 and FESC charges allocated to Potomac Edison;

(3) that within 30 days of this Order, the Commission's Technical Staff shall file a proposed Request for Proposals, developed in consultation with OPC, for audit services focused on vendor charges and FESC charges allocated by FESC to Potomac Edison as directed herein. Audit services selected by the Commission based upon the approved RFP shall be contracted by and invoiced to Potomac Edison;

(4) that Potomac Edison shall establish a regulatory liability account to track the accounting findings of the independent audit of vendor and FESC charges allocated to the Company;

(5) that the A&G cost-capitalization error identified in the Proposed Order is corrected as set forth in this Order, removing \$13.2 million from Plant in Service and decreasing the Company's depreciation expense in the amount of \$1,482,947. This results in \$3,397,443 decrease in the revenue requirement authorized in the Proposed Order;

(6) that the residential customer charge as set forth in the Proposed Order is modified from \$7.21 to \$6.00;

(7) that establishment of a procedural schedule for any Phase II proceeding for consideration of the Company's PUA § 4-309 low-income proposals in this case is hereby tolled. Consideration of the Company's proposals are deferred, without prejudice, pending consideration of these proposals—or any other proposals the Company might make—in a future Commission-initiated PUA § 4-309 proceeding involving all Maryland utilities and other stakeholders; and

(5) that the Company shall file revised Tariff pages consistent with this Order within 30 days.

/s/ Fredrick H. Hoover, Jr.

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Kumar P. Barve

/s/ Bonnie A. Suchman

Commissioners