ORDER NO. 90592

2021-2023 EmPOWER Maryland Program	* * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 9648

Issue Date: April 18, 2023

ORDER DENYING REHEARING

1. On January 30, 2023, Baltimore Gas and Electric Company, Delmarva Power & Light Company, and Potomac Electric Power Company ("the Exelon Utilities") filed an Application for Rehearing to the Commission's Order No. 90456, issued on December 29, 2022.[1] The Order directed the Exelon Utilities to follow a specific future cost recovery structure and unamortized balance retirement plan.[2] The Exelon Utilities request that the Commission modify the Order to approve the Exelon Utilities' preferred future cost recovery structure and unamortized balance retirement plan. For the reasons set forth below, the Exelon Utilities' Application for Rehearing is denied.

I. BACKGROUND

2. The cost recovery mechanism for the EmPOWER Maryland Program was established in 2007 when the Commission directed the utilities participating in

[1] Maillog No. 301085: The Exelon Utilities Application for Rehearing (January 30, 2023); corrected by Maillog No. 301128: The Exelon Utilities Errata to Application for Rehearing ("Application") (February 1, 2023).
[2] Maillog No. 300652: Order No. 90456 (December 29, 2022).

EmPOWER[3] to self-finance their respective programs and recover the costs through a monthly surcharge to ratepayers, with a five-year amortization schedule implemented to reduce the upfront financial impact to ratepayers.[4] Minor modifications have been made over time, including expensing all administrative and behavioral programs in the same year the expenses were incurred; however, the overall cost recovery structure has remained largely unchanged.[5]

3. The cost recovery method minimized EmPOWER's upfront costs to ratepayers, but also resulted in the accumulation of uncollected program costs. When combined with program costs progressively increasing over time, this resulted in a combined balance for the utilities of over $800 million in unamortized program costs and interest.

4. In Order No. 90306, the Commission found that the continued accumulation of the unamortized balance was not in the public interest and stated its intention to take steps to ensure that the unamortized balance would be paid in full by the end of 2029.[6] The Commission noted the necessity to develop a plan to retire the accumulated unamortized balance over time, as well as to transition to a full annual expensing of EmPOWER costs to keep the unamortized balance from continuing to increase.[7]

5. The Commission directed the utilities to submit unamortized balance retirement plans that would result in a full payoff by the completion of the 2027-2029 program cycle

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[3] The utilities that currently participate in the EmPOWER Program are the Exelon Utilities, Southern Maryland Electric Cooperative, Inc. ("SMECO"), The Potomac Edison Company ("Potomac Edison"), and Washington Gas Light Company ("Washington Gas") (collectively, "the utilities").

[4] Case No. 9111, *In the Matter of the Commission's Investigation of Advanced Metering Technical Standards, Demand Side Management Cost Effectiveness Tests, Demand Side Management Competitive Neutrality, and Recovery of Costs of Advanced Meters and Demand Side Management Programs*, Order No. 81637 at 6 (September 8, 2007).

[5] Maillog No. 233021: Order No. 89679, para.'s. 29 and 35 (December 18, 2020).

[6] Maillog No. 241928: Order No. 90306, para. 23.

[7] *Id*. at para. 25.

(*i.e.*, December 31, 2029).[8] The utilities were directed to include at least three separate proposals, one with the payoff through the EmPOWER Maryland surcharge mechanism, and two with the payoff through base rates - one over a five-year period and the other over a 10-year period. The Order allowed the utilities to include an additional proposal - also subject to the payoff date of December 31, 2029 - and to indicate their preferred payoff structure.[9]

6. In Order No. 90456, the Commission gave a comprehensive summary of all the payoff proposals submitted by the utilities, as well as the comments filed thereon by various stakeholders. Of relevance to this Order was the Exelon Utilities' Scenario 3 - its preferred method of cost recovery - which the Commission summarized as retiring the unamortized balance through base rates over a 10-year period with a rider, with ongoing program costs to be amortized over five years or less through 2033.[10]

7. Also in Order No. 90456, the Commission directed all of the utilities to implement the future cost recovery structure and unamortized balance retirement plan detailed in SMECO'S alternate scenario, beginning January 1, 2024.[11] Under the alternate scenario, the utilities' unamortized balances would be recovered through each utility's respective monthly surcharge, with 33 percent of 2024 program costs being expensed, 67 percent of 2025 program costs being expensed, all program costs being expensed in 2026 and thereafter, and the remaining uncollected balance of 2024 and 2025 program costs being amortized over five years.[12]

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[8] *Id*. at para. 27.
[9] *Id*. at para. 26.
[10] Order No. 90456, para. 24.
[11] *Id*. at para.'s. 33, 39, 45, and 52.
[12] *Id*. at para 31.

II. THE EXELON UTILITIES' APPLICATION FOR REHEARING

8. On January 30, 2023, the Exelon Utilities filed the Application for Rehearing pursuant to Section 3-114 of the Public Utilities Article ("PUA"), *Annotated Code of Maryland*,[13] and Code of Maryland Regulations ("COMAR") 20.07.02.08.[14] In the Application, the Exelon Utilities request that the Commission reverse the portion of Order No. 90456 directing them to implement SMECO's alternate scenario, and modify the order to instead allow the Exelon Utilities to implement their preferred cost recovery method, hereinafter referred to as "Scenario 3".[15]

9. In the Application, the Exelon Utilities argue that the Commission's decision to direct implementation of SMECO's alternate scenario, 1) was based on an erroneous premise that the EmPOWER Maryland Program will end in 2029, 2) is inconsistent with State policy on how EmPOWER costs should be valued and recovered, and 3) will result in consequences that are contrary to the public interest.

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[13] PUA § 3-114 (a) On rehearing, the Commission may: (1) consider facts not presented in the original hearing, including facts arising after the date of the original hearing; and (2) abrogate, change, or modify the original order by new order. (b) Except as otherwise ordered by the Commission, the rehearing or application for the rehearing does not: (1) stay the enforcement of an order of the Commission; or (2) excuse a person affected by the order from complying with the terms of the order. (c) (1) A party in interest may apply to the Commission for rehearing within 30 days after service of a final order on the party. (2) The Commission may: (i) act on the application; and (ii) rehear a final order or conduct further proceedings on its own motion after the filing of a proposed order, as the Commission considers necessary. (3) If a rehearing is granted on an application under this subsection, the Commission shall decide the case within 30 days after the case is finally submitted on rehearing.

[14] COMAR 20.07.02.08 Rehearings. A. Applications for reopening a cause after final submission, or for rehearing after final order, shall be made by petition in writing, stating specifically the grounds upon which the application is based. B. If the application is to reopen the cause for further evidence, the nature and purpose of the evidence shall be stated, and may not be merely cumulative. C. If the application is for a rehearing, the petition shall specify the findings of fact or of law claimed to be erroneous, together with a brief statement of the ground of the alleged error. D. A petition seeking to reverse or modify a decision, order, or requirement of the Commission shall: (1) Fully set forth the facts, circumstances, and consequences relied upon; and (2) Allege: (a) The facts and circumstances which have arisen after the hearing or order which justify the reversal or modification; or (b) The consequences resulting from compliance with the decision, order, or requirement which justify or entitle the applicant to the reversal or modification.

[15] Application at 12.

10. In support of its contention that the Commission based its decision on an incorrect presumption that the EmPOWER Maryland Program will end in 2029, the Exelon Utilities claim that the specific language of the EmPOWER statute clearly states that the program will continue beyond 2029.[16] The Exelon Utilities rely on the portion of PUA § 7-211 that states the Commission is to require cost-effective energy efficiency and conservation programs designed to achieve targeted annual incremental gross energy savings of "at least 2.5% per year in 2027 and thereafter," claiming that the "and thereafter" language indicates continuance of the EmPOWER program beyond 2029.[17]

11. The Exelon Utilities also claim that, regardless of the effect of the "and thereafter" language, PUA § 7-211 affords the Commission the authority to extend energy efficiency savings goals beyond any statutory deadline.[18] The Application notes that the Commission has exercised that authority in the past by continuing energy efficiency goals beyond 2015, when the goals within the EmPOWER statute were then set to expire.[19]

12. In support of its contention that the Commission's decision is inconsistent with State policy regarding the recovery of EmPOWER costs, the Exelon Utilities point to PUA § 7-211(f)(2), which states:

> The Commission shall… adopt rate-making policies that provide cost recovery and, in appropriate circumstances, reasonable financial incentives for gas companies and electric companies to establish programs and services that encourage and promote the efficient use and conservation of energy.

[16] *Id*. at 6.
[17] *Id*. at 7.
[18] *Id*. at 9-10.
[19] *Id*. at 10, citing Order No. 87082, *In the Matter of Potomac Edison Company D.B.A. Allegheny Power's Energy Efficiency, Conservation and Demand Response Programs Pursuant to the EmPOWER Maryland Energy Efficiency Act of 2008 et. al.*, at 31 (July 16, 2015).

The Exelon Utilities point out that EmPOWER utilities have historically "been provided their approved rate of return on unrecovered EmPOWER investments,"[20] and argue that the Commission's decision to reject Scenario 3 was incorrect and against State policy "in part because it postpones costs associated with transitioning to an expensing model" and because "the longstanding return allowance complied with the General Assembly's directive to provide cost recovery and… reasonable financial incentives."[21]

13. In support of its contention that the consequences of the Commission's decision would be contrary to the public interest, the Exelon Utilities claim that their customers will experience a 23 to 39 percent increase in their electric and gas surcharge rates with the implementation of the SMECO alternate scenario.[22] The Exelon Utilities also point out that the actual surcharge increases may be even higher, given that utility investments may need to increase in order to meet the more ambitious targets of the Climate Solutions Now Act ("CSNA").[23]

14. On February 16, 2023, the Maryland Office of People's Counsel ("OPC") filed a Response in opposition to the Exelon Utilities' Application, arguing that the Commission acted within its legal authority when rejecting Scenario 3, and that Scenario 3 is contrary to the public interest in that it would result in unjustly high costs for ratepayers while decreasing the transparency of those costs.[24] OPC noted its full support of the

[20] *Id*. at 12.
[21] *Id*. at 13.
[22] *Id*. at 16.
[23] The CSNA requires Maryland to "reduce statewide greenhouse gas emissions by 60% from 2006 levels by 2031" and to "achieve targeted annual incremental gross energy savings of at least 2.5% per year in 2027 and thereafter." *Id*. at 7 and 17.
[24] Maillog No. 301382, Office of People's Counsel Response in Opposition to the Exelon Utilities' Application for rehearing ("OPC Opposition"), at 1.

Commission's order, providing detailed arguments against each point raised by the Exelon Utilities.[25]

III. COMMISSION DECISION

15. In the Application for Rehearing, the Exelon Utilities challenge the Commission's mention of "the statutory conclusion of the EmPOWER program in 2029,"[26] and state that "the Commission's decision is also based on an erroneous legal premise that the EmPOWER program will conclude at the end of 2029."[27] The Exelon Utilities also argue that the specific language of the EmPOWER statute is clear that EmPOWER will continue beyond 2029, based upon the appearance of the words "and thereafter" in the statute.[28]

16. While the Application for Rehearing takes issue with the decision made in Order No. 90456, the Commission's position being challenged by the Exelon Utilities appeared several months earlier in Order No. 90306, wherein it was stated,

> State law currently authorized two additional three-year program cycles for EmPOWER, ending on December 31, 2029. (*footnote*, *Annotated Code of Maryland*, Public Utilities Article ("PUA") §7-211(g)(2)(i) mentions program requirements for "2027 and thereafter." Given that EmPOWER Maryland operates in three-year program cycles, the 2027-2029 program cycle, with an end date of December 31, 2029, is the latest program cycle currently required by statute.)[29]

The Commission notes, however, that the Exelon Utilities did not take issue with the Commission's supposed position until <u>after</u> Order No. 90456 denied their preferred cost recovery structure. In fact, in their follow-up filing to Order No. 90306, wherein the Exelon

[25] *See*, *e.g.*, *Id*. at 5, 7, 8, 10, and 11.
[26] Application at 5.
[27] *Id*. at 4.
[28] *Id*. at 6-7.
[29] Order No. 90306, para. 4, fn. 9 (August 16, 2022).

Utilities put forth their cost recovery proposals, they acknowledged "the extension of EmPOWER Maryland through 2029."[30]

17. Regardless of the Exelon Utilities' delayed - if not contradictory - position, the Application failed to acknowledge a very important point made by the Commission in Order No. 90306:

> The Commission recognizes the possibility that the EmPOWER Maryland program may be statutorily reauthorized at some point, thereby continuing to function beyond December 31, 2029, but the uncertainty of whether or not that will occur, combined with the magnitude of the unamortized balance, require action to be taken now to address the payoff.[31]

The Commission is clearly aware of the possibility of the EmPOWER programs continuing beyond 2029, thereby invalidating the Exelon Utilities' argument as to the "erroneous legal premise."

18. Despite the Commission's express acknowledgment of the possibility of EmPOWER's continuation, the Application states - several times - that the Commission based its decision regarding cost recovery "on the erroneous premise."[32] The Application even goes so far as to claim, "[I]t is erroneous to reject the Exelon Utilities' preferred 10 year payoff with a rider scenario ***primarily*** out of concern that the scenario goes beyond a purported statutory conclusion of EmPOWER in 2029…"[33] (*emphasis added*). This allegation regarding the Commission's decision-making process is misleading and incomplete.

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[30] Maillog No. 242856: Joint Exelon Utilities' Proposed EmPOWER Maryland Program Unamortized Balance Retirement Plan at 5 (October 28, 2022).
[31] Order No. 90306, para. 23, fn. 30.
[32] *See*, *e.g.*, Application at 4, 5, 6, 7, 8, 9, and 11.
[33] *Id*. at 6.

19. While the Commission did note - also in Order No. 90306 - that ratepayers should not pay for EmPOWER program costs beyond the conclusion of the program,[34] it also gave several other reasons for its decision regarding future cost recovery methods. These reasons included, but were not limited to:

> The Commission finds that the continued accumulation of the unamortized balance and interest is not in the public interest.[35]
>
> Failure to [take steps now] not only allows carrying charges to continue to compound indefinitely, but does nothing to slow the growth of the current unamortized balance as it approaches $1 billion.[36]
>
> It is undisputed that a full paydown of the balance by the end of 2029 would save ratepayers over $300 million dollars in interest charges (using present dollars).[37]
>
> [I]t is necessary to transition to full expensing of EmPOWER costs to avoid the unamortized balance from continuing to increase.[38]
>
> The Commission seeks a balance of near-term bill impacts against the longer-term payoff impacts to ratepayers.[39]
>
> This goal involves the avoidance of sudden and significant rate increases, the smooth and gradual transition to an expensing of costs-based system of cost recovery, and the clear, open communication to ratepayers of the EmPOWER program and its associated costs.[40]

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[34] Order No. 90306 at para. 23.
[35] *Id*.
[36] *Id*.
[37] Order No. 90456 at para. 8.
[38] Order No. 90306 at para. 25.
[39] Order No. 90456 at para. 52.
[40] *Id*.

Many factors, including these and others noted within this Order, support the Commission's decision regarding future cost recovery and the retirement of the unamortized balance.

20. The Commission notes that SMECO's alternate scenario was the only scenario proposed by a utility that received unanimous support from Staff, OPC, and the Maryland Energy Administration. OPC also recommended the Commission direct all utilities to implement this scenario going forward.[41] It follows that the Commission's decision was well-supported, well-reasoned, was made transparently, and was arrived at with the need for balance in mind.

21. In the Application for Rehearing, the Exelon Utilities also argue that the Commission's decision is inconsistent with State policy regarding the recovery of EmPOWER costs. The Exelon Utilities point to PUA § 7-211(f)(2) in support of its position but fail to note that the Commission's direction to follow SMECO's alternate scenario does provide for cost recovery, and therefore is clearly not inconsistent with statutory requirements.

22. It appears the Exelon Utilities would prefer a cost recovery method that guarantees a return, claiming that would be "better designed to promote investments in reducing greenhouse gas."[42] However, the Exelon Utilities tell only half of the story in their Application.

23. First, the Exelon Utilities have a duty to comply with State law regarding greenhouse gas reductions regardless of whether or not a return is earned. Second, the cost recovery method the Exelon Utilities have been directed to implement does not eliminate

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[41] *Id*. at para.'s. 14 and 32.
[42] Application at 14.

the ability to earn a return; rather, it phases in expensing, during which the Exelon Utilities will still earn a return. Third, PUA § 7-211(f)(2) gives the Commission discretion as to whether financial incentives should be afforded to utilities, therefore *not* providing for financial incentives does *not* equate to a statutory violation.

24. Finally, and perhaps most importantly, the Exelon Utilities disregard the attention the Commission has given to the issue of utility compensation. In Order No. 90306, the Commission noted that, while the Future Programming Work Group did not reach a consensus regarding performance incentive mechanisms ("PIMs"), several parties supported the transition from the then-current model of earning a return to a model that would provide performance-based earnings.[43] The Joint Utilities - of which the Exelon Utilities are a part - ultimately proposed "delaying the use of a PIM until the final year of the 2024-2026 program cycle to allow all parties and the Commission additional time to better understand the new goal aspects of EmPOWER and how a PIM would operate."[44] The Commission responded with the following:

> The Commission recognizes that a well-designed PIM based on clearly defined rules and targets could promote innovation, increase spending efficiency, and boost the performance of EmPOWER programs and promote State climate goals. However, the primary focus at this time must be on reducing the unamortized balance and determining a new cost recovery structure. In the near term the Commission will also be implementing a clearly defined goal structure for the next EmPOWER Maryland program cycle, based on any statutory changes during the 2023 legislative session. Implementing a performance-based incentive mechanism in the next EmPOWER program cycle will be an important next step as the EmPOWER programs evolve.[45]

[43] Order No. 90306 at para. 14.
[44] *Id*. at para. 17.
[45] *Id*. at para. 29.

25. Then, in Order No. 90456 - the order being challenged by the Exelon Utilities - the Commission confirmed its intentions by stating, "[I]n preparation for the next EmPOWER program cycle, the Commission will consider alternative approaches for compensating utility program administrators, including the use of performance incentive mechanisms, which may have an impact on future EmPOWER program expenses."[46]

26. Finally, the Commission further stated with regard to the 2024-2026 EmPOWER programs to be proposed by the utilities:

> The Commission therefore expects EmPOWER program administrators to propose performance-based cost recovery approaches in addition to traditional recovery approaches. Additionally, the Commission invites and encourages other stakeholders to also propose performance-based approaches to providing program administrators cost recovery and incentive mechanisms.[47]

It follows that the Commission has not only made decisions that are consistent with State policy regarding the recovery of EmPOWER costs but has also kept the matter of financial incentives in mind while making those decisions. The Commission has elected - with the utilities' support - to prioritize the new goal structure for EmPOWER and has continued to make clear its intention to explore financial incentive possibilities, even going so far as to solicit recommendations from the utilities and stakeholders.

27. The final claim made by the Exelon Utilities in the Application for Rehearing is that the consequences of the Commission's determination on the future cost recovery method and the retirement of the unamortized balance are contrary to public interest. The Exelon Utilities' basis for this claim is that their customers will experience increased monthly surcharges, alleged to be a 25 percent increase for Potomac Electric Power

[46] Order No. 90456 at para. 54.
[47] Maillog No. 301876: Order No. 90546, para. 44 (March 20, 2023).

Company's customers, a 39 percent increase for Delmarva Power & Light Company's customers, and a 23 percent and 37 percent increase for Baltimore Gas and Electric Company's electric and gas customers, respectively.[48]

28. In Order No. 90456, as part of its analysis of the different cost recovery and balance payoff scenarios put forth by the EmPOWER utilities, the Commission summarized the Exelon Utilities' Scenario 3 as presenting a 34 percent increase in the electric surcharge rate for residential customers from 2023 to 2029, a 39 percent increase in the electric surcharge rate for commercial and industrial customers from 2023 to 2029, and a 33 percent increase in gas surcharge rates from 2023 to 2029.[49] The surcharge increases resulting from the Exelon Utilities' preferred scenario are actually higher than the surcharge increases the Exelon Utilities claim will come from following SMECO's alternate scenario.

29. The Commission-directed future cost recovery method and unamortized balance retirement plan are consistent with the public interest. While the paydown of the unamortized balance does make financial impact to ratepayers unavoidable, the Commission's decision avoids sudden and significant rate increases, and also provides a smooth and gradual transition to a full expensing system to recover EmPOWER costs.[50] Furthermore, unlike the Exelon Utilities' Scenario 3, the Commission-directed method does not perpetuate amortization or embed EmPOWER program costs in base rates, but instead provides a clear path to payoff and prevention of future debt accumulation, as well

[48] Application at 16.
[49] Order No. 90456 at para. 24.
[50] "[I]t provides a gradual rate increase for residential and C&I customers through 2026, followed by a gradual decline through 2029. This allows ratepayers time to adjust to an increasing surcharge, while also eventually experiencing decreasing surcharges in the near future." *Id*. at para.33.

as transparent and up-front communication regarding the EmPOWER program and its associated costs, costs that will be entirely paid for by ratepayers.

30. Finally, the Commission notes one of several points made by OPC in its opposition to the Application: that the capitalization of energy efficiency expenditures is a practice no longer followed by many states as it "spreads out cost recovery over an extended period, raises the total cost of efficiency programs, and allows a return on capitalized program costs that is not tied to program performance."[51] It follows that it is the Exelon Utilities' request, and not the Commission's decision, that is contrary to the public interest, in that its request would cost ratepayers more over time and would cause ratepayers to pay a return to the utilities for its financing of the energy efficiency programs.

IT IS THEREFORE, this 18th day of April, in the year Two Thousand Twenty-Three, by the Public Service Commission of Maryland, **ORDERED**, that the Exelon Utilities' Application for Rehearing is DENIED.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Patrice M. Bubar

Commissioners

[51] OPC Opposition at 8, *citing*, American Council for an Energy-Efficient Economy (ACEEE), *Aligning Utility Business Models with Energy Efficiency* (November 27, 2017), https://www.aceee.org/toolkit/2017/11/aligning-utility-business-models-energy-efficieny.