ORDER DENYING APPEAL

On July 9, 2019, Chief Public Utility Law Judge Ryan C. McLean (the “PULJ”) issued a Proposed Order of Public Utility Law Judge (“Proposed Order”) on the above-captioned application of the Potomac Electric Power Company (“Pepco”) for adjustments to its retail rates for the distribution of electric energy. On July 18, 2019, the Technical Staff (“Staff”) of the Public Service Commission filed this limited appeal of the Proposed Order, pursuant to Ann. Code of Maryland, Public Utilities Article (“PUA”), § 3-104(d). On July 24, 2019, Pepco and the Office of People’s Counsel (“OPC”) filed responsive memoranda. For the reasons discussed below, the Commission denies Staff’s Appeal and affirms the Proposed Order.

Staff’s Appeal

Staff’s Appeal memorandum identifies three areas of disagreement with the Proposed Order: (1) Staff disagrees with the PULJ’s inclusion in rate base of certain expenses from Pepco’s 69 kV Feeder Rebuild Program (“FRP”) incurred during the test year for plant that did not come into use until later; (2) Staff argues that the PULJ applied
an incorrect standard of review in evaluating Staff’s argument that the FRP expenses were not prudent; and (3) Staff disagrees with the PULJ’s rejection of Staff’s proposal to transfer from Pepco shareholders to ratepayers the gain related to a June 1, 2017 sale of land in Prince George’s County, Maryland.

1. Whether the FRP expenses incurred within the test year that did not become operational until afterward should be included within rate base

   a. Staff’s position

      Staff challenges the Proposed Order’s conclusion that certain expenses from the FRP should be included within electric plant. Staff makes two arguments on this point.

      Staff first argues that the specific portion of FRP expenses (part of RMA 2) incurred during the test year that paid for plant which did not become operational until after the test year closed, should be excluded from rate base. Staff argues that the inclusion of expenses for plant that comes online after the test year is, under Commission precedent, permitted only as an exception from the general rule “where special incentives are required to improve performance.” Staff argues that Pepco does not need any special incentive to make the replacements and repairs related to the FRP, for which it specifically points to Pepco’s history of making resiliency improvements supported through the Grid Resiliency Charge.1

      In so arguing, Staff draws a distinction, derived from the above-mentioned Grid Resiliency Charge debate, between resiliency and reliability. Staff argues that resiliency investment—investment aimed at addressing future risks of non-routine,

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1 The Grid Resiliency Charge, an alternative rate-making approach for funding grid resiliency, is addressed at length in Re Potomac Electric Power Company, 104 Md. P.S.C. 292, 357-369 (2013, Order No. 85724).
high-impact disruption, as opposed to routine events—should not be eligible for the historic exception the Commission has sometimes given for reliability plant investment that did not come into use during the test year.

Staff also argues that the accelerated FRP expenses, as what Staff terms “resiliency” investment, should be denied for failure to comply with Merger Condition 12 of the PHI/Exelon merger, which Staff argues requires Pepco to work with Staff to develop new resiliency targets for Commission approval through a separate process, outside the regular rate-making process.

A condition of the PHI/Exelon merger, Condition 12 reads:

Exelon shall cooperate with Staff and other stakeholders to determine the funding and other resources necessary to meet future resiliency targets that may be established by the Commission. The Commission does not endorse any recommended funding or resource requirements until such time as the recommendations are fully considered and approved by the Commission.

106 Md. P.S.C. at 152.

Staff argues that, as a result of Condition 12, “resiliency is separated from reliability until resiliency targets and treatments have been established.” Staff asserts that “the extraordinary expense of pure resiliency improvements such as the [FRP] would be recovered without annualization and within the test year.” Staff further notes that it is concerned that permitting the accelerated recovery of resiliency projects like the FRP would improperly burden ratepayers because the projects can be very large.

b. Pepco’s position

In response, Pepco argues that similar expenditures to those in question have been repeatedly approved as part of Pepco’s past rate cases and that Baltimore Gas and Electric
Company has also been able to include within rate bate similar reliability investments in its latest rate case.  Pepco also disputes Staff’s characterization of the FRP as being exclusively a resiliency project without reliability improvements.

Pepco also argues that Condition 12 has no effect in this case because the Commission has not yet set future resiliency targets, which was also the conclusion of the Proposed Order.

**Commission Decision**

Resiliency is an essential consideration in developing modern electricity grids, and measuring and improving grid resiliency is an ongoing area of study by the State and the Commission. Past efforts have included former-Governor Martin O’Malley’s Grid Resiliency Task Force, the Maryland Energy Administration’s Resiliency Through Microgrids Task Force, and the Commission’s prior approval of the Grid Resiliency Charge as an alternative cost-recovery mechanism in an earlier Pepco rate case, as discussed above. Resilience was also an important consideration in the Commission’s approval of the PHI/Exelon merger, one result of which was Condition 12, quoted above.

The Commission notes Staff’s concerns about the large costs associated with the FRP and the need for a thorough review to ensure that ratepayers are not funding unnecessary gold-plating of the grid. Staff points out that permitting inclusion of the challenged investment incentivizes Pepco to make those types of investments because it

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2 Established via Executive Order 01.01.2012.15, the task force was charged with evaluating methods for improving the resiliency and reliability of Maryland's electric distribution system and assessing “what steps can be taken to strengthen Maryland's electric distribution to better withstand the stresses that come with severe weather events.”

3 The Maryland Energy Administration maintains related materials on its website at [https://energy.maryland.gov/Pages/resiliency.aspx](https://energy.maryland.gov/Pages/resiliency.aspx).
will be able to recover their costs more quickly. Nonetheless, the Staff’s appeal in this case is not the forum for developing long-range plans on an issue, which also is certain to impact other utilities.

The Commission also finds that Condition 12 does not have material effect until the Commission approves resiliency targets, which the Commission has not yet done.

Accordingly, the Commission finds no error in the PULJ’s decision to permit the inclusion in rate base of the FRP expenditures at issue. The Commission also requests that Staff provide an update on work done to establish resiliency standards contemplated by Condition 12.

2. Whether the Proposed Order applied the correct standard of review in considering Staff’s challenge to the prudence of certain FRP expenses

a. Staff’s position

Staff argues that the PULJ improperly placed the burden of proof for establishing the prudence or imprudence of certain challenged FRP expenses on Staff, rather than Pepco. In particular, Staff challenges the following language from the Proposed Order: “[I]n light of Staff’s sole reliance on the DOE ICE calculator results, which it agreed found Pepco’s reliability plan and included[sic] the 69 kV FRP to be cost effective, I find no basis to determine the Program is imprudent from a reliability perspective.”

Staff argues that the Proposed Order’s focus on Staff’s argument, without making a specific finding as to the adequacy of Pepco’s evidence, violates PUA § 3-112(b), which provides: “In a proceeding involving a temporary or permanent new rate, or a temporary or permanent change in rate, the burden of proof is on the proponent of the new rate or change in rate.”
Secondarily, Staff also argues that it presented evidence that the FRP expenses were imprudent. For this, Staff relies on its prior analysis in Case No. 9353\(^4\) of Pepco’s complete reliability portfolio. Specifically, Staff points to its calculations using the Department of Energy’s Interruption Cost Estimate (“DOE ICE”) calculator which, it claims, showed Pepco’s entire reliability program from 2020 to 2023 as having a 278% cost/benefit ratio without the inclusion of the FRP, but only 104% with the FRP.

b. **Pepco’s position**

In its Reply, Pepco acknowledges that it has the burden of proof and argues that it presented evidence to support of a finding that the challenged expenses were prudent. It further argues that Staff failed to present any evidence in support of its claim that the challenged FRP expenses were imprudent.

Based on this, Pepco argues that the PULJ applied the appropriate standard, for which it cites federal decisions for the rules that “a utility’s costs are presumed to be prudently incurred,”\(^5\) a “utility need not demonstrate in its case-in-chief that all expenditures are prudent,”\(^6\) and that “only when a party in the proceeding creates a serious doubt as to the prudence of the expenditure does the utility have the burden of dispelling those doubts and proving the questioned expenditures to have been prudent.”\(^7\)

\(^4\) That case, captioned “IN THE MATTER OF THE REVIEW OF ANNUAL PERFORMANCE REPORTS ON ELECTRIC SERVICE RELIABILITY FILED PURSUANT TO COMAR ൬൪.൯൪.൫ ൬.൫൫,” is an ongoing Commission review of each Maryland electric utility’s reliability performance.


\(^7\) Id.
Commission Decision

There is no dispute that, under PUA § 3-112(b), the proponent of any change in rate bears the burden of proof. As the moving party in this rate case, Pepco is the proponent and bears that burden.

Review of the Proposed Order reveals that the PULJ conducted his analysis in two logically distinct steps. First, he observed that earlier expenditures under the FRP have already been considered and approved, though under different names, in multiple prior Pepco rate cases and that Staff has been aware for years that Pepco is rebuilding its 69 kV lines. Second, he reviewed the evidence and argument presented by the parties and concluded that there was no basis to change that original conclusion.8

The Commission finds no error in the PULJ’s use of this approach. Although prior rate case decisions are not binding precedent, consistency in decision-making provides predictability for the parties and avoids the risk of arbitrary decisions. In the absence of persuasive evidence or argument in the other direction, the PULJ is entitled to rely on earlier Commission decisions—addressing the same issue and applying the same standard—and avoid risking the introduction of unnecessary inconsistency. By this decision, the Commission is neither adopting nor applying a formal presumption, as Pepco argues for but which does not appear in PUA § 3-112. This decision merely finds no conflict between the PULJ’s approach and PUA § 3-112, given the specific facts presented by this case.

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8 Although Staff and Pepco have also included within their briefs discussion of the evidence presented on prudence, the specific question raised in Staff’s appeal is whether the Proposed Order incorrectly placed the burden of proof on Staff. This decision therefore does not address the merits of Staff’s underlying argument before the PULJ on prudence, but only the procedural route followed by the Proposed Order in ruling on that argument.
3. Whether the gain related to a June 1, 2017 sale by Pepco of land in Prince George’s County, Maryland should be transferred from Pepco shareholders to ratepayers

a. Staff’s position

Third and finally, Staff appeals the PULJ’s denial of a proposed adjustment to transfer to ratepayers, and away from Pepco shareholders, the proceeds from a 2017 sale by Pepco of land in Prince George’s County, Maryland. Staff states that, although this transfer occurred prior to a previous Pepco rate case, Case No. 9472, the associated revenue was not included in Pepco’s initial filing in that case because of an accounting error on Pepco’s part. Staff acknowledges that it discovered the discrepancy during discovery in Case No. 9472. Staff argues, however, that it was deprived an opportunity to take action on this adjustment in Case No. 9472 because that case was resolved via a “black box settlement.”

b. Pepco’s position

Pepco opposes the proposed adjustment. It argues that the adjustment should be deemed considered as part of the previous rate case settlement because Staff was aware of it at the time, could have raised the issue, and should be presumed to have considered it in agreeing to the settlement. It further argues that the Commission has historically declined to include similar adjustments from outside the test year barring extraordinary circumstances.

c. OPC’s position

OPC argues in favor of upholding the PULJ’s conclusion and rejecting Staff’s proposed adjustment. OPC is concerned that Staff’s adjustment would create uncertainty
among the parties about how settlements will be enforced, which will reduce efficiencies for all parties by discouraging settlement and creating more litigation.

**Commission Decision**

In denying the requested adjustment, the Proposed Order quotes a prior Pepco rate case, *Re Potomac Edison Co.*, 82 Md. P.S.C. 470, 477 (1991). In that case, the Commission affirmed its traditional “policy to treat gains on the sale of real estate as an extraordinary item for rate-making, with the benefits inuring to the ratepayers because they paid a return on the property while it was in rate base.” Nonetheless, the Commission in that case rejected a Staff adjustment covering gains from sale of property occurring outside the test year, noting the absence of “extraordinary circumstances.”

The Commission today declines to depart from that earlier approach and further finds that there does not exist extraordinary circumstances such as would justify Staff’s proposal to transfer the 2017 revenue into the current rate case. Although Staff argues that it was deprived of the opportunity to address this adjustment in Case No. 9472, it is undisputed that Staff was aware of the relevant facts prior to the settlement in that case. Staff was also a party to the settlement. Moreover, there is also no dispute as to the intended result or interpretation of that settlement agreement. Staff’s adjustment is therefore denied.

**IT IS THEREFORE**, this 12th day of August, Two Thousand Nineteen, by the

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9 Staff filed testimony in support of the settlement, ML# 220206, and the Commission’s Order ratifying the settlement agreement, ML# 220725, identifies Staff as a signatory and settling party.
Public Service Commission of Maryland,

ORDERED: (1) That Staff’s appeal is denied; and

(2) That the Proposed Order of the Public Utility Law Judge is affirmed and adopted.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O’Donnell

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman

Commissioners