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PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1333 H STREET, N.W., SUITE 200, WEST TOWER
WASHINGTON, D.C. 20005

ORDER

October 24, 2014

FORMAL CASE NO. 1121, IN THE MATTER OF THE APPLICATION OF POTOMAC ELECTRIC POWER COMPANY FOR ISSUANCE OF A FINANCING ORDER UNDER THE ELECTRIC COMPANY INFRASTRUCTURE IMPROVEMENT FINANCING ACT, Order No. 17682

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia ("Commission") denies the Office of the People's Counsel's ("OPC") request for an evidentiary hearing in this matter. The Commission will consider the Protests of OPC, the Apartment and Office Building Association of Metropolitan Washington ("AOBA"), and the United States General Services Administration ("GSA") as well as the Potomac Electric Power Company's ("Pepco") request for a financing order based on the pleadings in the record.[1] The record in this proceeding will close on October 31, 2014.

II. BACKGROUND

2. On May 3, 2014, the Electrical Company Infrastructure Improvement Financing Act of 2014 ("ECIIFA," or "the Act"), which governs Pepco and the District Department of Transportation's ("DDOT") public-private partnership to bury overhead primary power lines to improve electric service reliability in the District of Columbia ("District"), became effective.[2]

3. Section 307(a) of the ECIIFA requires Pepco and DDOT to submit every three (3) years, through September 30, 2022, a joint application for the Commission's approval of a Triennial Undergrounding Plan consisting of DDOT's Underground Electric Company Infrastructure Improvement Activity and Pepco's Infrastructure Activity. The ECIIFA also authorizes an annually adjusted surcharge to recover costs associated with the Electric Company Infrastructure Improvement Costs ("Underground Project Charge," or "UPC") approved by the Commission. On June 17, 2014, Pepco and DDOT filed the Joint Application requesting: (a) authority to implement a project to underground certain electric distribution feeders in the District, to commence with the

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[1] *Formal Case No. 1121, In The Matter of Application of Potomac Electric Power Company for Issuance of a Financing Order Under the Electric Company Infrastructure Improvement Financing Act* ("*Formal Case No. 1121*").

[2] D.C. Law 20-102 (May 3, 2014); D.C. Code § 34-1311 *et. seq.*

first three (3) years of the undergrounding project (2015-2017), and (b) approval of the UPC to be charged by Pepco with respect to the costs it incurs for the underground project.[3]

4. Section 302 of the ECIIFA also requires an additional application to be submitted to the Commission for approval of a financing order pursuant to which the District will issue bonds to fund the cost of the work to be performed by DDOT and related costs. On August 1, 2014, Pepco, on behalf of the Company and DDOT, filed an application requesting that the Commission issue a Financing Order that, *inter alia*, (a) authorizes the creation of the DDOT Underground Electric Company Infrastructure Improvement Property and (b) approves the imposition, billing and collection of the DDOT Underground Electric Company Infrastructure Improvement Charge.[4] Pursuant to Section 101(13) of the ECIIFA, the proposed DDOT Underground Electric Company Infrastructure Improvement Charge ("DDOT Improvement Charge") will be a non-bypassable, volumetric distribution surcharge, to be collected by Pepco, as Servicing Agent for the District from all customers, except low-income customers served under Pepco's Residential Aid Discount ("RAD") Rider. The surcharge is to pay Debt Service and all other ongoing financing costs of the bonds that will be issued by the District to fund the DDOT Underground Electric Company Infrastructure Improvement Activities.[5] The Application requests that the initial DDOT Improvement Charge become effective upon issuance of the bonds.[6]

5. On August 22, 2014 the Commission opened this proceeding and adopted a discovery schedule for this proceeding which allowed parties to offer any protests or objections to Pepco's financing application.[7] Any protest that included a request for an evidentiary hearing required the party to include a statement that there are contested issues of material fact and to identify with specificity those issues.[8] Accordingly, on October 9, 2014, OPC filed a Protest and Request for Evidentiary Hearing.[9] On the same

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[3] *Formal Case No. 1116, In the Matter of Applications for Approval of Triennial Underground Infrastructure Improvement Projects Plan* ("*Formal Case No. 1116*"), The Joint Application of Potomac Electric Power Company and the District Department of Transportation for Approval of Their Triennial Underground Infrastructure Improvement Projects Plan ("Pepco & DDOT Joint Application"), filed June 17, 2014.

[4] *Formal Case No. 1121,* Application of Pepco for Issuance of a Financing Order filed August 1, 2014 ("Financing Application").

[5] Financing Application at 7.

[6] *See* ECIIFA § 303(e).

[7] *Formal Case No. 1121,* Order No. 17601, at ¶ 10, rel. August 22, 2014 ("Order No. 17601").

[8] Order No. 17601, ¶¶ 5-6.

[9] *Formal Case No. 1121,* Protest of the Office of the People's Counsel and Request for Evidentiary Hearing ("OPC Protest"), filed October 9, 2014.

date, AOBA filed a Protest and Objections and the Testimony of Bruce R. Oliver ("Oliver"), responding to the Financing Application,[10] and GSA filed a Protest and Objections.[11]

III. DISCUSSION

A. OPC's Protest and Request for an Evidentiary Hearing

6. OPC's Protest and request for evidentiary hearing identities three (3) issues of what it contends are material issues fact: (1) whether it is just and reasonable to issue the full $375 million in bonds authorized under the Act in a single issuance; (2) whether the servicing fees paid to Pepco in the Servicing Agreement are just and reasonable; and (3) whether the DDOT Improvement Charge has been properly allocated in accordance with the Act.[12] OPC acknowledges in its Protest that only the issue regarding whether the servicing fees paid to Pepco are just and reasonable requires an evidentiary hearing; indicating that holding a hearing on the other two issues would either be "premature" or "unwarranted."[13]

i. The Structure of the Proposed Bond Issuance Requires Further Scrutiny

7. OPC raises several arguments to support its position that the structure of the proposed bond issuance requires further scrutiny while acknowledging that an evidentiary hearing on this issue is "premature."[14] OPC argues first that the Commission should require further explanation of the decision to issue all of the bonds in one issuance.[15] According to OPC, under the current financing plan, District ratepayers will begin paying for the entire bond financing costs in 2015, but DDOT construction will continue through 2022 and that it appears that DDOT may be proposing to pre-fund construction cost and that the difference DDOT will earn on the unexpended funds and the interest rate DDOT will pay on the bonds creates a negative arbitrage situation for ratepayers.[16] OPC's cites its consultant, Saber Partners, LLC's ("Saber") conclusion that

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[10] *Formal Case No. 1121*, Protest and Objection to the Application of Pepco for Issuance of a Bond Financing Order of the Apartment and Office Building Association of Metropolitan Washington filed October 9, 2014 ("AOBA Protest").

[11] *Formal Case No. 1121*, United States General Services Administration's Protest and Objections filed October 9, 2014 ("GSA Protest").

[12] OPC Protest at 3.

[13] OPC Protest at 3, 4.

[14] OPC Protest at 3.

[15] OPC Protest at 5.

[16] OPC Protest at 6.

this impact will cost ratepayers approximately $31 million over seven (7) years. Saber also concluded that there is significant precedent for multiple bond issuances in utility securitizations used for construction of hard assets as opposed to stranded costs. OPC argues that a single issuance may cause the District to use less tax-exempt financing than it would otherwise be allowed under federal tax law – which, in turn, would materially increase the overall cost to ratepayers.[17] OPC further asserts that many of the concerns could be avoided through the use of a properly timed multiple bond issuances; since the potential cost saving to consumers from tax-free financing could be significant. OPC emphasizes that the District should justify its stated preference for a single issuance in light of the potentially significant ratepayer benefits that could be derived from a multiple-issuance approach. Inasmuch as there is no explanation and supporting analyses for the selection of a single issuance, OPC urges the Commission to require such an explanation and analysis so that it can make an informed decision as to whether the District's stated preference to issue all of the bonds in a single issuance has been justified and whether the resulting Financing Charge is just and reasonable and in accordance with section 303(c) of the Act.[18]

ii. The Level of Pepco's Servicing Fee Has Not Been Shown to be Just and Reasonable and Should be Set for Hearing

8. OPC argues that the level of Pepco's servicing fee has not been shown to be just and reasonable and should be set for hearing. According to OPC, under the proposed Servicing Agreement, Pepco will be paid a 7.5 basis points Servicing Fee to serve as Servicing Agent on behalf of the District for the bonds, which will eventually be paid by the District ratepayers through the Financing Charge.[19] OPC asserts, however, that it is impossible for the Commission to determine whether the proposed level of the Servicing Fee to be paid to Pepco is reasonable; therefore, a Commission authorized Servicing Fee must be based upon the Company's incremental costs of providing the service under the Servicing Agreement and include a mechanism for returning to ratepayers any amounts above the Company's actual incremental costs of providing that service. Further, OPC asserts that it is impossible for the Commission to determine whether the proposed Servicing Fee will over-compensate the Company for performing its obligations under the Serving Agreement because Pepco "has not calculated the incremental costs to performing [its duties under the Servicing Agreement]."[20]

9. According to Saber, Pepco's attempt to justify the 7.5 basis point fee by reference to other servicing fees is unpersuasive because it fails to take into account the terms and conditions surrounding the nominal servicing fee of those transactions that

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17 OPC Protest at 7.

18 OPC Protest at 7-8.

19 OPC Protest at 8.

20 OPC Protest at 8-9.

render those examples inapposite; further, concern with Pepco's proposed Servicing Fee level is heightened by the fact that there is no mechanism in the Servicing Agreement to compensate ratepayers to the extent that the Servicing Fee paid to Pepco proves to be greater than its incremental costs. Saber concludes that "both Pepco's Exhibit A and the District's Exhibit DC A-5 fail to account for refunds, rebates, or credits due to ratepayers based on servicing fees earned in excess of a utility's incremental costs. The list of servicing fees supplied by Pepco (i.e. Exhibit A), therefore, includes rates that are much higher than the effective rates (i.e., the nominal fee less refunds, rebates, and credits), actually earned in those cases because the list they presented does not disclose rebates and credits related to those rates imposed by the utility regulator."[21]

10. OPC recommends that the Commission require that the Servicing Agreement be modified to: (1) reduce the Servicing Fee received by Pepco to a just and reasonable level consistent with Pepco's expected incremental costs; (2) include a mechanism to compensate ratepayers to the extent the Servicing Fee paid to Pepco proves to be greater than the incremental costs actually incurred by the Company; and (3) direct Pepco to submit a compliance filing in this proceeding setting forth (in detail) the incremental costs it will incur in the execution of its functions as a Servicing Agent.[22]

iii. Pepco's Proposed Cost Allocation is Consistent with the Act

11. OPC argues that Pepco's proposed cost allocation is consistent with Section 301(a)(4) of the Act which provides that any financing order shall "assess DDOT Underground Electric Company Infrastructure Improvement Charges among the distribution service customer classes of the electric company in accordance with the distribution service customer class cost allocations by the Commission for the electric company and in effect pursuant to the electric company's most recent base rate case."[23] In addition, the Act provides that no Underground Electric Company Infrastructure Improvement Charges shall be assessed against customers served under the Residential Aid Discount ("RAD") rate. OPC contends that the provisions governing the cost allocation of the Financing Charge are, in all material respects, identical to the provisions governing the allocation of the Underground Project Charge, which the Commission is considering in *Formal Case No. 1116*. For the same reasons as discussed in the OPC Protest of the Joint Application of the Pepco and DDOT for Approval of the Triennial Underground Infrastructure Improvement Projects Plan and Request for Evidentiary Hearing; 10-Day, Post Discovery Pleading of OPC; and the Post-Hearing Brief of OPC filed by the Office in *Formal Case No. 1116*, OPC believes that Pepco's allocation of the Financing Charge is consistent with the requirements of the Act.[24] OPC submits that the

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21 OPC Protest 10-11.

22 OPC Protest at 9-11.

23 OPC Protest at 12.

24 OPC Protest at 13-14.

outcome of the hearing in *Formal Case No. 1116* should apply with equal force to the interpretation of Section 301(a)(4) of the Act. Accordingly, for the reasons put forth by the Office in *Formal Case No. 1116*, OPC believes that the legislative history of the Act plainly supports a finding that its drafters intended to allocate the UPC and the Financing Charge exactly as proposed by Pepco, on the basis of non-customer revenue.[25] OPC asserts that the Task Force Report is significant (which the Commission found in Order No. 17627, is a critical part of the legislative history of the Act) and contained an estimate that the monthly bill impact on residential customers resulting from the Act in Year 1 of the underground process would be approximately $1.50. OPC Witness Smith stated that when the UPC and the DDOT Improvement are allocated on the basis of non-customer charge revenues, the total proposed monthly bill impact for the average residential customer using 750 kilowatt hours would be $1.54. On the contrary, Mr. Smith concluded that if the UPC and Financing Charge are allocated on the basis of the total revenues in *Formal Case No. 1103*, the resulting monthly bill impact for the average residential customer would be $2.83. The significant deviation from the estimates reflected in the Task Force Report serve as strong evidence that the intent of the Act's drafters was to allocate the Financing Charge on the basis of non-customer revenues from *Formal Case No. 1103*. OPC therefore concludes that the Commission should find that the Financing Charge has been properly allocated by Pepco in the Application.[26]

12. OPC requests that the Commission rule: (1) that a single issuance cannot be used unless and until the explanation and analyses the Office identifies herein is provided by the District (through Pepco) and the Commission concludes that such a single issuance would be in the public interest; (2) that there is a disputed issue of material fact requiring an evidentiary hearing regarding whether the proposed Servicing Fee is just and reasonable; and (3) that Pepco's proposed allocation of the Financing Charge is consistent with the Act.[27]

B. AOBA's Protests and Objections

i. Statutory Construction and Legal Standards for Implementing the ECIIFA

13. AOBA argues that the issues associated with the allocation of revenue requirements among rate classes in this proceeding are parallel to those litigated and under consideration in *Formal Case No. 1116*. AOBA indicates that the legal arguments on statutory construction and implementation of the ECIIFA that it included in its *Formal Case No. 1116* Protest, and which constitute a contested issue of material fact, are incorporated by reference in this filing. AOBA argues that Pepco, as the proponent for

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25 OPC Protest at 14-15.

26 OPC Protest at 15.

27 OPC Protest at 16.

the Financing Order, has failed to meet its burden of proof in demonstrating the basis for the Commission's approval of its proposed bond financing order.[28]

14. AOBA argues that Pepco's filings contain several six (6) critical deficiencies that must be corrected before the Commission approves the bond financing order required by the ECIIFA. AOBA identifies the contested issues of material fact as more fully developed in the Direct Testimony of AOBA witness Bruce R. Oliver include:

1) Errors in the Company's determination of class revenue requirements: the proposed DDOT Improvement Charge is not computed in accordance with the provisions of the requirements of the Electric Company Infrastructure Improvement Act of 2014 ("the Act").

2) The need for a separate charge for Master Metered Apartments ("MMA") customers: the Company has not developed proposed DDOT Improvement Charges for each rate class for which "distribution service customer class cost allocations" were made by Pepco in *Formal Case No. 1103*, and in particular this Company has not developed a separate DDOT Improvement Charge for Master Metered Apartment customers.

3) Errors and inconsistencies in the measures of kWh by rate class that Pepco has used to compute the proposed DDOT Improvement Charges by rate class: the measures of kWh sales that the Company employs in the computation of its proposed DDOT Improvement Charges are inappropriate and unreliable.

4) The Company's failure to ensure that the proposed surcharges are truly non-bypassable, as required by the Act: contrary to the requirements of the Act and the Company's representations, the proposed DDOT Improvement Charges do NOT constitute non-bypassable charges.

5) The appropriateness of the Servicing Fees to be paid to Pepco: the magnitude of the Servicing Fee to be paid to Pepco for administering billing and collections for DDOT Improvement Charges is inappropriate and not properly justified.

6) Timing and amounts of planned bond issuances: the proposed DDOT Improvement Charge revenue requirement is unnecessarily inflated by the acquisition of substantial bond funding well in

[28] AOBA Protest at 3.

> advance of the need for such funds without adequate assessment of ratepayer impacts of such actions.[29]

AOBA submits the contested issues of material fact can be resolved by the Commission on the pleadings, without an evidentiary hearing.[30]

C. United States General Services Administration's Protests and Objections

15. GSA argues that the plain meaning of the Act does not support the proposed allocation of the DDOT Underground Electric Company Infrastructure Improvement Charge. Pursuant to a testimony from GSA's consultant, Dr. Dennis Goins, GSA recommends that the Commission reject the allocation methodology proposed by Pepco to develop the DDOT improvement charge and that the Commission instead, for any undergrounding plan it approves, adopt AOBA's allocation methods as described by witness Oliver in AOBA's Protest in *Formal Case No. 1116* to: (1) allocate costs associated with the approved undergrounding plan, and (2) develop class-specific underground project charges. GSA concluded by expressing concern that the recovery of the bonds under the Act may represent a tax to be collected from customers of Pepco.[31]

D. Pepco's Responses to Protests of AOBA, GSA, and OPC

i. The Servicing Fee Negotiated Between the District and Pepco is Reasonable

16. In response to OPC and AOBA's objection to the servicing fee, Pepco asserts that the negotiated Servicing fee is fixed at a reasonable level for the life of the bonds and is based on market-comparable data as well as Pepco's assessment of the work it is obligated to perform as the Servicing Agent, while OPC and AOBA's recommendation that the fee be based on Pepco's incremental cost would be the subject of protracted debate each year and inconsistent with the Act's expedited procedures for reviewing a "true-up request."[32] Pepco contends that the servicing fee was negotiated at an arms' length and is reasonable. In regards to AOBA Witness Oliver's claims, Pepco argues that Oliver "erroneously claims that the District had no substantial incentive to limit the level of the Servicing Fee negotiated with Pepco, mistakenly asserting that the District will not bear the costs of the Servicing Fee which will be incorporated into the

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29 AOBA Protest at 4.

30 AOBA Protest, at 5.

31 GSA Protest at 1.

32 *Formal Case No. 1121*, Response of Potomac Electric Power Company to the Protests of the Apartment and Office Building Association of Metropolitan Washington, the United States General Services Administration, and the Office of the People's Counsel at 3, filed October 20, 2014 ("Pepco Response").

DDOT Improvement Charge."[33] Further, Pepco argues that AOBA Witness Oliver's argument that the District will not bear the cost of the Servicing Fee is incorrect and should be rejected. Pepco claims that Oliver's position ignores the fact that the District is one of Pepco's largest distribution services customers, and has the incentive to ensure that the Servicing Fee is as low as reasonably possible since the District will have to pay the DDOT Improvement Charge established by the Commission in this proceeding.[34]

17. In response to the arguments that the Servicing Fee "must be based upon Pepco's incremental costs of providing the service under the Servicing Agreement and include a mechanism for returning to customers any amounts above the Company's actual incremental costs of providing that service," Pepco asserts that the Act does "not require that the Servicing Fee be structured as OPC and AOBA propose, and that their approach is antithetical to the abbreviated process contemplated by the Act which prescribes that the Commission's review of a True-Up Request is "limited to a determination of whether there is any mathematical error."[35] Additionally, Pepco contends that AOBA and OPC's approach is contrary to the language of Section 301(a)(9) of the Act which states that a "financing order issued by the Commission is to authorize the execution and delivery of a servicing agreement that includes "provisions for fixing the servicing fee . . . ." Based on this language, Pepco claims that the Act, in its language, does not provide for an investigation into and resolution of any disputes regarding Pepco's incremental cost of performing as the Servicing Agent under the Servicing Agreement.[36]

18. Moreover, despite OPC and AOBA's claims, Pepco contends that basing servicing fees on incremental costs is "clearly not the manner in which a significant majority of other public service commissions have approved servicing fees in recent securitization transactions."[37] In nine of the ten transactions listed in one of Pepco's exhibits, the applicable commission approved a servicing fee based on either a percentage of the principal amount of the bonds issued or a specific dollar amount with the servicing fees approved ranging from a high of approximately 12 basis points to a low of 3 basis points. This range, Pepco argues, aptly illustrates that the Servicing Fee negotiated between the District and Pepco "is reasonable and falls squarely within the range of servicing fees other commissions have found to be appropriate."[38]

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33 Pepco Response at 4.

34 Pepco Response at 4.

35 Pepco Response at 5.

36 Pepco Response at 5.

37 Pepco Response at 6.

38 Pepco Response at 7.

19. Pepco states that the Servicing Fee negotiated between the District and Pepco is reasonable as it falls within the range that public service commissions have approved in other recent securitization bond issuances and is aligned with the Act. Moreover, given Pepco's clear and unambiguous commitment to include the Servicing Fee revenue and associated costs in any future distribution service base rate proceedings, any net margin that Pepco may realize from its activities as Servicing Agent will be credited against the revenue requirement to benefit District customers. Thus, Pepco request that the arguments advanced by AOBA and OPC in the Protests regarding the Servicing Fee be rejected and submits that this issue can be decided based on the pleadings.[39]

ii. The District's Approach to the Bond Issuance is to Issue in a Manner that Achieves the Best Result for District of Columbia Customers

20. Pepco asserts that the District's intent to have a single bonds issuance achieves the best result for District customers. Pepco cites an analysis prepared by the District and described in Jeffrey Barnette's Affidavit ("Barnette") as Attachment A, responding to AOBA and OPC's suggestion that two (2) issuances might save ratepayers' money.[40] The District's analysis shows that when transaction costs and the risk of higher interest rates are taken into account, a second issuance could result in ratepayers paying more. Another factor affecting the cost of issuance is the proportion of tax-exempt bonds the District can issue. Barnette alleges that the proportion used in the original Application was conservative and it may be possible to substantially increase the tax-exempt portion while staying within IRS requirements.[41] Barnette estimates the maximum tax-exempt issuance to be $345 million.[42] Pepco states that the District and its financial advisors and underwriters will continue to monitor the markets to determine the best approach to issuance of the bonds. At all times the basis of the analysis and the final decision will be to issue the bonds with a structure that result in the best result for District customers. Pepco concludes that OPC and AOBA have raised no material issue of fact to support the substitution of their market-timing preferences for the reasoned judgment of the District.

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39 Pepco Response at 9.

40 Pepco Response at 11.

41 Pepco Response at 12.

42 Pepco Response at 12.

iii. Pepco's Calculation of the DDOT Improvement Charge is in Compliance with the Act

21. According to Pepco, the issues regarding allocation of cost to customers have been fully litigated in *Formal Case No. 1116*, and requests that the Commission take administrative notice of the record in that proceeding. Pepco concludes that the arguments in the AOBA and GSA Protest are meritless and should be rejected.[43]

a. The Cost Allocation Methodology Filed with the Financing Order Application Complies with the Act and the Rulings in Formal Case No. 1103 and is Consistent with the Model Used by the Mayor's Task Force that Formed the Basis for the Act

22. Pepco contends that it has proposed an appropriate DDOT Improvement Charge for recovery of District's cost incurred in issuing bonds in connection with the DC Plug Initiative, as further described in the Financing Order Application. Company Witness Joseph Janocha explains that the cost allocation reflected in the DDOT Improvement Charge complies with the method of cost allocation set forth in the Act and reflects the manner of cost allocation approved by the Commission in *Formal Case No. 1103*, Pepco's most recent distribution service base rate case. Pepco claims that its methodology is the same as the allocation approach employed by the Mayor's Task Force and described in the Mayor's Task Force Report, which formed the basis for the Act.[44]

23. Pepco argues that: (1) the cost allocation model filed with the Financing Order Application complies with Section 301(a)(4) of the Act, and should be approved.[45] Pepco argues that in order to allocate the cost of Pepco allocated to the DDOT Underground Electric Company Infrastructure Improvement Annual Revenue Requirement in accordance with the Commission's decision *Formal Case No. 1103*, Pepco must first determine the cost of the initiative and then allocate that cost to customers in the same manner as the Company's costs for electric distribution service are currently allocated to customers, which Pepco has precisely done;[46] (2) the canons of statutory interpretation validate the proposed DDOT Improvement Charge referencing a D.C. Court of Appeals decision enunciating the statutory interpretation principles which has recognized that in interpreting a statute one "must give effect to all of the provisions of the [act under review], so that no part of it will be either redundant or superfluous."[47]

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43 Pepco Response at 15.

44 Pepco Response at 16.

45 Pepco Response at 17.

46 Pepco Response at 16-19.

47 Pepco Response at 19.

Further, Pepco asserts that Section 301(a)(4) of the Act must also be read in harmony with Section 303(c), which requires the Commission, in order to approve the DDOT Improvement Charge, to find that the DDOT Improvement Charge is "just and reasonable;" (3) the DDOT Improvement Charge as proposed is consistent with the Mayor's Task Force recommendation. According to Pepco, in Pepco Exhibit 3 in *Formal Case No. 1116*, the Mayor's Task Force Finance Committee concluded that "[r]atepayer contributions shall be through regulated distribution rates" because "[t]his is the most equitable way to distribute the cost and will be allocated among customer classes consistent with the cost allocation methods as approved by the Public Service Commission."[48] (4) AOBA's and GSA's position is contrary to the Act and the Mayor's Task Force Report. AOBA and GSA Witness Goins disagree with Pepco's approach to cost allocation and proposes to allocate costs to customer classes based on allocation factors found in the Class Cost of Service Study ("CCOSS") filed by Pepco in *Formal Case No. 1103*. Pepco argues this is inconsistent with AOBA's position in *Formal Case No. 1116* relative to the allocation of the DC Plug revenue requirement in which AOBA Witness Oliver claims that AOBA's position is based on the "plain language" of the Act, which "is a matter of fact" and "is observable and verifiable." Pepco argues that AOBA has not adhered either to the plain language or the plain meaning of Section 301(a)(4) of the Act. Further, Pepco argues that the Commission does not set rates in blind application of the CCOSS, a key fact ignored by AOBA and GSA. In addition, Pepco argues that the AOBA Council Testimony in *Formal Case No. 1116* Commission Exhibit No. 16 provides evidence contemporaneous with the consideration of the Act by the D.C. Council's Committee on Government Operations and the Committee on Finance and Revenue that contradicts AOBA's position before the Commission in this case. Pepco concludes that AOBA was fully aware of the operative language of the Act, and testified in opposition to the Act on that basis. Thus, Pepco argues that AOBA's "late found belief that 'distribution service customer class cost allocations' as used in the Act means allocation factors used in Pepco's CCOSS should be dismissed for what it seems to be, namely, a creative attempt to cloud the record."[49]

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[48] Pepco Witness McGowan testified to his belief that the cost allocation proposal filed in the Triennial Plan and the Financing Order Application and the model relied upon by the Mayor's Task Force are fully consistent with each other and the language included in Sections 301 and 310 of the Act with respect to distribution service customer class cost allocations as well as the discussions among the Mayor's Task Force members that participated in the drafting of the legislation. Pepco Response at 24-26.

[49] Pepco Response at 26-31.

b. The Use of Forecasted kWh is Reasonable

24. Pepco challenges AOBA Witness Oliver's statement that the Commission should require Pepco to use the 2012 test-year sales, asserting that the forecasted sales figures used by Pepco are "speculative" and not required by the Act, by asserting that the criticisms are "misplaced."[50] Pepco argues that its use of forecasted sales data more closely resembles the time period for which customers will be assessed the DDOT Improvement Charge in comparison to AOBA's proposed use of 2012 test-year data, which is "stale" and "does not as closely align with the sales data for the years in which customers will be charged for the DDOT Improvement Charge." Pepco concludes that the Commission should approve its approach and reject AOBA's.[51]

25. Furthermore, Pepco rejects AOBA's arguments about the adjustments Pepco made to forecasted sales in determining the DDOT Improvement Charge. First, Pepco rejects AOBA's argument that the difference in sales for the Residential AE class between the initial and corrected versions of Exhibit PEPCO (B)-1 is not explained, by asserting that AOBA's contention is not accurate since the cover letter to Pepco's August 25, 2014, errata filing states: "Additionally, the sales for the AE rate class have been adjusted to reflect sales for the 12 months ending February 2016 in Exhibit PEPCO (B)-1 and for the six months ending August 2016 in Exhibit PEPCO (B)-4." Pepco also rejects AOBA's argument that the approach of using forecasted kWh is not consistent with the true-up process, by asserting that in either direction, under collection of the DDOT Improvement Charge by Pepco or over-collection, the true-up process would address the difference in collections resulting from the difference between actual and forecasted sales. Pepco concludes that the adjustments to the initial DDOT Improvement Charge revenue requirement to account for billing lag based on forecasted sales is appropriate and reasonable.[52]

c. The DDOT Improvement Charge is Nonbypassable

26. Pepco argues that the AOBA Protest challenge to the nonbypassable nature of the DDOT Improvement Charge is meritless. Pepco contends that the term "nonbypassable" in the context of U.S. utility tariff bonds have a very specific meaning and that nonbypassability "focuses specifically on the assessment of the charge based on delivery service over the utility's wires, regardless of which electricity provider supplies the energy to the customer. If the customer receives delivery service, then the customer will be assessed the charge based on actual kWh delivery service; the charge is nonbypassable because the customer does not have the option of determining whether they pay that particular line item on their bill. Further, the level of the kWh delivery service received by a customer does not determine whether the charge is bypassable or

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50 Pepco Response at 32.

51 Pepco Response at 32.

52 Pepco Response at 32-33.

nonbypassable rather, the charge is nonbypassable because the customer is assessed the charge based on actual kWh usage and must pay the amount assessed based on actual kWh delivery service. Pepco further contends that when the Act uses the term 'nonbypassable,' it is using that term in the same way as a credit agency because the reason for making it nonbypassable is to meet the credit rating agency requirements and achieve the desired credit rating. The Act provides that the DDOT Improvement Charge must be nonbypassable, meaning that the Pepco can collect these charges from all existing retail electric customers and all future retail electric customers within the service territory, without any (or with a few) exceptions, based on the distribution service provided by Pepco."[53] Pepco concludes that AOBA's argument should be rejected and the DDOT Improvement Charge should be approved.[54]

IV. DECISION

27. The filings of the parties raise two (2) threshold issues for the Commission's consideration: (1) whether there are any contested issues of material fact; and (2) if so, whether a formal hearing is required to resolve them. We address each issue in turn.

28. Section 303(b) of the Act requires that the Commission hold a formal evidentiary hearing in this proceeding "if contested issues of material fact are present and those issues cannot be resolved by the Commission on the basis of the pleadings and discovery responses filed" on the record.[55] For the reasons set forth below, we find a hearing is not necessary to resolve the issues in this case.[56] The D.C. Court of Appeals has relied on the Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) when seeking guidance in determining what constitutes "genuine issues of material fact."[57] In *Anderson* the Court discussed genuine issues of material fact in the context of a motion for summary judgment in a trial proceeding; however, the discussion applies with equal force to administrative proceedings. The Court in *Anderson* held that in order for there to be a genuine issue of material fact in dispute more than "the mere

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53 Pepco Response at 33-35.

54 Pepco Response at 33-35.

55 ECIIFA Section 303(b) (emphasis added). The D.C. Court of Appeals has treated the phrases "contested issue of material fact" and "genuine issue of material fact" interchangeably. *See, e.g., In re Estate of Burleson*, 738 A.2d 1199, 1206 (D.C. 1999) ("Thus, as the undisputed facts establish that the 1993 will was void and inadmissible for probate, we concur with the trial court that there were no contested issues of material fact concerning Merritt's standing and the United States is entitled to judgment as a matter of law against appellant.").

56 *See* Order No. 17501, ¶ 9, rel. May 30, 2014 ("First, if the post-discovery pleading requests an evidentiary hearing, the party must include a statement that there are issues of material fact and must specifically identify those issues").

57 *See generally, Tolu v. Ayodeji*, 945 A.2d 596 (D.C. 2008).

existence of *some* alleged factual dispute between the parties" must exist.[58] As to materiality, the Court found that "the substantive law will identify which facts are material [but o]nly disputes over facts that might affect the outcome of the suit under governing law will properly" warrant a hearing.[59] The Court determined that, in order for a dispute to be "genuine," the evidence presented must present "sufficient disagreement to require" a hearing – the parties "may not rest upon mere allegations or denials of [ ] pleadings, but . . . must set forth specific facts showing there is a genuine issue" requiring a hearing.[60] In other words, "reasonable minds could differ on the import of the evidence" but the evidence must not be "so one-sided that one party must prevail as a matter of law."[61] The Court also made it clear that, at the summary judgment stage of the case, it is not the judge's, in this case the Commission's function "to weigh the evidence and determine the truth of the matter," but instead the Commission should determine whether the parties have presented a genuine disputed issue warranting a hearing.[62]

29. With regard to AOBA, it has set out issues that it believes constitute material issues of fact but also conceded that these issues can be resolved on the record without a hearing. No party has objected to resolving AOBA's issues on the record. In light of AOBA's concession, and there being no objection, we deem a hearing unnecessary. GSA's Protest did not cite any material issues of fact in dispute or request that the Commission convene an evidentiary hearing in this proceeding. OPC's Protest maintains that there are three material issues of fact. However, in OPC's opinion only the Servicing Fee issue requires a hearing. No party disagrees that the other two issues can be decided on the record. Although OPC clearly disagrees with Pepco on the Service Fee issue, the reasonableness of the proposed fee is a matter of opinion rather than an issue of fact. Even if it were an issue of fact, OPC has not explained, nor is it otherwise evident, why the issue of reasonableness cannot be addressed in a legal brief. Under the circumstances, and given the expedited nature of this proceedings we believe that this issue can be resolved on the record without a hearing, as is the case with the other two issues OPC has raised.[63]

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58 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

59 *Anderson*, 477 U.S at 248. In *Copanos v. FDA*, 854 F.2d 510, 523 (D.C. Cir. 1988) the U.S. Court of Appeals for the D.C. Circuit held that the principles described in *Anderson* (defining materiality) apply with equal force in the context of administrative proceedings.

60 *Anderson*, 477 U.S at 248.

61 *Anderson*, 477 U.S at 248, 251-52.

62 *Anderson*, 477 U.S at 249.

63 The overarching tenor of the ECIIFA requires expedited action by Pepco, DDOT, interested parties, and the Commission. For example, s*ee* ECIIFA § 303(f) - Commission shall expedite its consideration of any applications for financing order; *see also* "Subtitle C. Expedition; Reconsideration; Judicial review; Review and Analysis," which prescribe expedited timelines for the Commission and the Court of Appeals in its consideration of applications emanating from the ECIIFA.

30. Accordingly, pursuant to Section 303(b) of the Act, the Commission will decide on Pepco/DDOT's financing application based on the record pleadings and discovery responses filed to date. To facilitate any other matters or pleadings that the parties may want to submit for our consideration, the Commission will hold the record open in this proceeding until October 31, 2014.

THEREFORE, IT IS ORDERED THAT:

31. The Office of the People's Counsel's request for an evidentiary hearing on the just and reasonableness of the Servicing Fees to be paid to Potomac Electric Power Company's is **DENIED;**

32. The Commission will consider the Protests of the Office of the People's Counsel, the Apartment and Office Building Association of Metropolitan Washington, and the United States General Services Administration as well as the Potomac Electric Power Company's request for a financing order based on the pleadings and discovery responses filed in the record; and

33. The record in this matter will close on October 31, 2014.

A TRUE COPY: **BY DIRECTION OF THE COMMISSION:**

CHIEF CLERK: **BRINDA WESTBROOK-SEDGWICK**
COMMISSION SECRETARY