

**PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA  
1325 G STREET N.W., SUITE 800  
WASHINGTON, D.C. 20005**

**ORDER**

**June 17, 2016**

**FORMAL CASE NO. 1119, IN THE MATTER OF THE JOINT APPLICATION OF EXELON CORPORATION, PEPCO HOLDINGS, INC., POTOMAC ELECTRIC POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC AND NEW SPECIAL PURPOSE ENTITY, LLC FOR AUTHORIZATION AND APPROVAL OF PROPOSED MERGER TRANSACTION;**

and

**FORMAL CASE NO. 1130, IN THE MATTER OF THE INVESTIGATION INTO MODERNIZING THE ENERGY DELIVERY SYSTEM FOR INCREASED SUSTAINABILITY, Order No. 18244**

**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”) and the District of Columbia Government’s (“DCG”) independent motions asking the Commission to refrain from using the MEDSIS Pilot Project Fund Subaccount and the Energy Efficiency and Conservation Initiatives Fund Subaccount until the conclusion of any appeal that the parties may choose to file regarding Order No. 18148 (approving the Pepco/Exelon merger). As we explain below, the requests do not meet the standards for stay.

**II. BACKGROUND**

2. On June 12, 2015, the Commission issued Order No. 17912 which opened this proceeding for the purposes of identifying technologies and policies that can be implemented to modernize the energy delivery system for increased sustainability (“MEDSIS”) and make the distribution system more reliable, efficient, cost-effective, and interactive.<sup>1</sup> Since the issuance of Order No. 17912, the Commission has held three workshops; the first in October 2015, the second in November 2015, and the third in April 2016. In the third workshop, the participants commented on the legal and regulatory framework needed to facilitate and support a modern energy delivery system that includes distribution energy resources like high-efficiency combined heat and power and solar photovoltaic systems, distributed storage, demand response, and energy efficiency.

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<sup>1</sup> *Formal Case No. 1130, In the Matter of the Investigation into Modernizing the Energy Delivery System for Increased Sustainability* (“*Formal Case No. 1130*”) Order No. 17912, rel. June 12, 2015.

3. Parallel to the proceeding in *Formal Case No. 1130*, the Commission considered and ultimately approved the Merger Application for a change of control of the Potomac Electric Power Company (“Pepco” or “Company”) in *Formal Case No. 1119*.<sup>2</sup> Among the terms of the approval, is a requirement that “Within sixty (60) days after Merger close, Exelon shall provide funding in the amount of \$21.55 million to the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount within the Formal Case 1119 Escrow Fund.”<sup>3</sup> The Commission stated that the “fund shall be held in escrow until the Commission approves a pilot project and directs that the funds be released.”<sup>4</sup> In that same Order, the Commission also approved certain funds earmarked for the Energy Efficiency and Energy Conservation Initiatives Fund Subaccount.<sup>5</sup>

4. Various parties and non-parties, including OPC and DCG, sought reconsideration of Order No. 18148.<sup>6</sup> In companion Order No. 18243 issued today, those requests for reconsideration are denied.

5. On May 6, 2016, OPC filed a Motion to Hold in Abeyance Release of Funds from the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount Pending Exhaustion of Appellate Rights Regarding Order No. 18148.<sup>7</sup> On May 13, 2016, DCG filed its Motion to Hold in Abeyance Release of Funds from the Energy Efficiency and Energy Conservation Initiatives Fund Subaccount Pending Exhaustion of Appellate Rights Regarding Order No. 18148.<sup>8</sup> On that same day, Pepco filed its Response in Opposition to OPC’s Motion.<sup>9</sup> Subsequently, on May 16, 2016, Pepco filed its Response to DCG’s Motion.<sup>10</sup>

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<sup>2</sup> *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction (“Formal Case No. 1119”)* Order No. 18148, rel. March 23, 2016.

<sup>3</sup> *Formal Case No. 1119*, Order No. 18148 at Attachment B, Page No. 2.

<sup>4</sup> *Formal Case No. 1119*, Order No. 18148 at Attachment B, Page No. 2.

<sup>5</sup> *Formal Case No. 1119*, Order No. 18148, Attachment B, ¶ 7(a).

<sup>6</sup> *Formal Case No. 1119*, The Office of People’s Counsel’s Application for Reconsideration of Order No. 18148, filed April 22, 2016 (“OPC’s Application”); The District of Columbia Government’s Application for Reconsideration of Order No. 18148, filed April 22, 2016 (“District Government’s Application”). Another party that filed was DC Solar United Neighborhood (“DC SUN”) and Public Citizen, *see* DC SUN and Public Citizen’s Application for Reconsideration, filed April 22, 2016 (“DC SUN/Public Citizen’s Application”).

<sup>7</sup> *Formal Case No. 1130*, and *Formal Case 1119*, (together, “*Formal Case Nos. 1130 and 1119*”), The Office of the People’s Counsel’s Motion to Hold in Abeyance Release of Funds from the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount Pending Exhaustion of Appellate Rights Regarding Order 18148, filed May 6, 2016 (“OPC’s Motion”).

<sup>8</sup> *Formal Case Nos. 1130 and 1119*, District of Columbia’s Motion to Hold in Abeyance Release of Funds from the Energy Efficiency and Energy Conservation Initiatives Fund Subaccount Pending Exhaustion of Appellate Rights Regarding Order No. 18148, filed May13, 2016 (“DCG’s Motion”).

<sup>9</sup> *Formal Case Nos. 1130 and 1119*, Response of Potomac Electric Power Company in Opposition to the Office of the People’s Counsel’s Motion to Hold in Abeyance Release of funds from the Formal Case No. 1130

### III. DISCUSSION

#### A. OPC's Motion to Hold in Abeyance

6. On May 6, 2016, OPC filed its Motion stating that on “October 6, 2015, the Joint Applicants filed a ‘Motion of Joint Applicants to Reopen the Record in Formal Case No. 1119 to Allow for Consideration of Nonunanimous Full Settlement Agreement and Stipulation, or other Alternative Relief’” and the “purpose of the Motion [ ] was to establish the process necessary to allow the Commission to consider a Nonunanimous Full Settlement Agreement and Stipulation (‘Original NSA’) among the ‘Settling Parties.’”<sup>11</sup> OPC asserts that “[r]elevant to the instant Motion, the Original NSA specified that \$32.8 million from the Customer Investment Fund [‘CIF’] would be earmarked for specified public-benefit uses.”<sup>12</sup> OPC submits that the “Commission granted the Motion to Reopen the Record for the limited purpose of considering the Original NSA” and that “it rejected the Original NSA and approved the proposed merger subject to ‘Revised Terms and Conditions from the Merger.’”<sup>13</sup> According to OPC, “[i]n two ways, the Revised Terms and Conditions for Merger reallocated the \$32.8 million that had been earmarked in the Original NSA; . . . [f]irst, the Commission reallocated \$11.25 million to an ‘Energy Efficiency and Energy Conservation Initiatives Fund Subaccount’ [and s]econd, the Commission reallocated \$21.55 million to a ‘Formal Case No. 1130 MEDIS Pilot Project Fund Subaccount.’”<sup>14</sup> According to OPC, “the \$11.25 million that the Commission reallocated to the Energy Efficiency and Energy Conservation Initiatives Fund Subaccount shows some nexus to the specific public benefits identified by the terms of the Original NSA”<sup>15</sup> but, “the \$21.55

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MEDSIS Pilot Project Fund Subaccount Pending Exhaustion of Appellate Rights Regarding Order No. 18148, filed May 13, 2016 (“Pepco’s Response”).

<sup>10</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response to District of Columbia’s Motion to Hold in Abeyance Release of Funds from the Energy Efficiency and Energy Conservation Initiatives Fund Subaccount Pending Exhaustion of Appellate Rights Regarding Order No. 18148, filed May 16, 2016 (“Pepco’s Response to DCG”) at 1. Also, the Commission notes that DC Solar United Neighborhoods’ (“DC Sun”) response to OPC’s Motion was filed late on May 19, 2016. Pursuant to 15 D.C.M.R. § 105.8 “[r]esponses to a written motion shall be filed no later than ten (10) calendar days after motion has been served.” DC Sun’s response was filed thirteen calendar days after OPC’s Motion was served on DC Sun and DC Sun did not request leave to file its response late. Therefore, the Commission declines to consider DC Sun’s late filed response.

<sup>11</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 2.

<sup>12</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 2.

<sup>13</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 2.

<sup>14</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 2-3.

<sup>15</sup> In its Motion, OPC identifies five specific earmarks from the \$32.8 million in the Original NSA’s CIF that go toward providing public benefits; specifically Paragraph 6, 7, 8, 9(b), and 9(c) (*i.e.*, sustainability, energy efficiency, energy conservation, and assistance to low-income ratepayers). *See Formal Case No. 1119 and Formal Case 1130*, OPC’s Motion at 4-5.

million that the Commission reallocated to the Formal Case No. 1130 MEDIS Pilot Project Fund Subaccount is undefined and unrelated to any use of funds specified in the Original NSA.”<sup>16</sup>

7. OPC goes on to state that, during the third workshop, Commissioner Phillips asked: “Where do you think it would be best used for us to have one pilot project microgrid?” “one speaker may have been alluding to the funds in the Formal Case No. 1130 MEDIS Pilot Project Fund Subaccount” when she suggested that the money could be used for “an experimental microgrid for instance.”<sup>17</sup> OPC contends that “[t]his colloquy suggests, if not demonstrates, that parties and possibly the Commission itself are currently considering how to deploy the \$21.55 million in the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount.”<sup>18</sup>

8. OPC asserts that “the Commission should not release any funds from the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount until Appellate Rights concerning Order No. 18148 have been exhausted,” noting that “several applications for reconsideration of Order No. 18148 are pending” and “[i]f the Commission denies those applications, the importance of this proceeding and the severity of the errors underlying Order [No.] 18148 render it a near certainty that Order [No.] 18148 will be challenged via petition for judicial review.”<sup>19</sup> OPC states that “[i]f, as OPC anticipates, the appellate court remands this proceeding back to the Commission, residential ratepayers will suffer irreparable injury to the extent the Commission had already released any portion of \$21.55 million in the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount—*i.e.*, it would be impossible to ‘claw back’ those funds, precluding the parties from using those funds to craft conditions similar to those the Settling Parties specified in the Original NSA.”<sup>20</sup> Also, OPC states that “while the instant motion does not seek a stay of Order [No.] 18148, OPC notes that the four criteria the Commission considers in evaluating requests for a stay militate against releasing funds from the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount prior to exhaustion of appellate rights relating to Order No. 18148.”<sup>21</sup>

9. With regard to the first criterion, OPC states that the Commission must consider “whether the stay is necessary to avoid irreparable injury.”<sup>22</sup> According to OPC, if the Commission releases any portion of \$21.55 million in the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount prior to such an order by the appellate court, residential ratepayers will be irreparably harmed because, by virtue of the premature release of funds, those funds will not

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<sup>16</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 3.

<sup>17</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 6.

<sup>18</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 7.

<sup>19</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 7.

<sup>20</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 8.

<sup>21</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 10.

<sup>22</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 10.

be available to use in crafting conditions consistent with the public-interest uses identified in the Original NSA.<sup>23</sup>

10. OPC submits that “[u]nder the second criterion governing requests for a stay, the Commission considers the likelihood of success on the merits.”<sup>24</sup> According to OPC, its “Application for Reconsideration demonstrated that the due process violations underlying Order [No.] 18148 are material and should compel the Commission to reverse that decision.”<sup>25</sup>

11. OPC asserts that the third criterion “necessitates balancing the equities implicated by the request.”<sup>26</sup> OPC submits that “[u]nder this criterion, the Commission should consider whether the ‘abeyance’ requested in this Motion will negatively impact opposing parties.”<sup>27</sup> OPC asserts that “[a]ssuming, *arguendo*, that an appellate court ultimately affirms Order [No.] 18148, OPC’s request for relief would not *deny* the public any benefit resulting from the release of funds from the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount.”<sup>28</sup> In OPC’s view, its “request for relief would simply delay any such benefit for the period of time necessary to complete the appellate proceedings.”<sup>29</sup>

12. OPC asserts that the “fourth and final criterion governing requests for a stay involves viewing the request in light of the public interest.”<sup>30</sup> According to OPC, “Application for Reconsideration raises serious questions about whether Order [No.] 18148 violated OPC’s due process rights.”<sup>31</sup> “In light of these serious concerns, and given the irreparable harm residential ratepayers will suffer if the Commission releases funds from the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount prior to the exhaustion of the appellate-review process, OPC submits that the public interest weighs in favor of granting the instant Motion.”<sup>32</sup>

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<sup>23</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 9-10.

<sup>24</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 10.

<sup>25</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 10.

<sup>26</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 11.

<sup>27</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 11.

<sup>28</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 11 (emphasis in original).

<sup>29</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 11.

<sup>30</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 11.

<sup>31</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 12.

<sup>32</sup> *Formal Case Nos. 1130 and 1119*, OPC’s Motion at 12.

**B. DCG's Motion to Hold in Abeyance**

13. DCG argues, “[w]hile the purposes of the [Revised Nonunanimous Settlement Agreement’s (“RNSA”)] Energy Efficiency Subaccount are in some respects similar to the purposes of the [Original Nonunanimous Settlement Agreement (“NSA”)] provisions for assistance to low and limited income residents, there are also fundamental differences.”<sup>33</sup> According to DCG, the “NSA set aside a total of \$16.15 million for assistance to low and limited income residents in the District of Columbia,” with \$9 million of that sum “earmarked for supplemental funding of the District’s Low Income Home Energy Assistance Program (“LIHEAP”), and \$6.75 million earmarked for energy efficiency programs.”<sup>34</sup> DCG states that, “[i]n contrast, the RNSA allocates a total of \$11.25 million for energy efficiency and energy conservation programs, and these programs are not devoted exclusively to assisting low and limited income residents.”<sup>35</sup> DCG adds that “the RNSA allows funds for these programs to be requested by the District *or by ‘qualified non-profit entities.’*”<sup>36</sup> DCG asserts that “the RNSA’s Energy Efficiency Subaccount provisions alter the NSA’s provisions in at least the following material respects: (1) by reducing the overall amount of funding for programs targeting low and limited income residents; (2) by eliminating \$9 million earmarked for LIHEAP; (3) by expanding the scope of energy efficiency programs eligible for funding to include programs not necessarily limited to low and limited income residents; and (4) by expanding the pool of potential recipients of program funding beyond the District to include ‘qualified non-profit entities.’”<sup>37</sup> Also, DCG states that it strongly supports OPC’s Motion to Hold in Abeyance Release of Funds from the Formal Case No. 1130 Pilot Project Fund Subaccount Pending Exhaustion of Appellate Rights Regarding Order No. 18148.<sup>38</sup>

14. DCG notes that it “is currently seeking reconsideration of Order No. 18148 in order to reinstate the terms of the original NSA, subject to such additional terms as the Commission determines will satisfy the public interest.”<sup>39</sup> However, DCG asserts that “if the Commission concludes, after further proceedings, that the public interest cannot be satisfied by adding terms to the NSA, then the District would seek disapproval of the merger.”<sup>40</sup> DCG states

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<sup>33</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 2.

<sup>34</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 2 (emphasis in original).

<sup>35</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 2 citing Order No. 18148, Attachment B ¶ 7(a) (. . . “Fund to support innovative energy conservation or energy efficiency programs targeted *primarily* towards both affordable multifamily units and master metered multifamily buildings which include low and limited income residents . . .” [emphasis added]).

<sup>36</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 2 citing the RNSA ¶ 7(a) (emphasis added).

<sup>37</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 2-3.

<sup>38</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 1 referencing OPC’s Motion.

<sup>39</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 3.

<sup>40</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 3.

that it reserves its right to exhaust all of its appellate remedies, so it can pursue the aforementioned procedural alternatives.<sup>41</sup>

15. DCG also argues that if the funds in the Energy Efficiency Fund Subaccount are released before the Commission issues an order approving the NSA, then DCG “would be irreparably harmed because the released funds would not be available to the District for the uses contemplated by the NSA (i.e. LIHEAP funding and District-crafted energy efficiency programs).”<sup>42</sup> DCG adds, “if the Commission were to release funds in the Energy Efficiency Subaccount to a non-profit entity prior to issuing an order that disapproves the merger, there would be much uncertainty as to whether, and from whom, Exelon could recover the funds.”<sup>43</sup> Thus, DCG requests the Commission “issue an order affirming that it will not release funds from the Energy Efficiency Subaccount until all appellate rights regarding Order No. 18148 have been exhausted.”<sup>44</sup>

### C. Pepco’s Response to OPC’s Motion

16. In Response to OPC’s Motion, Pepco states that “the relief OPC seeks is a stay or injunction of indefinite duration.”<sup>45</sup> According to the Company, “Order No. 18148 provides that the MEDSIS Fund amounts will be released when ‘the Commission approves a pilot project and directs that the funds be released’” and that “OPC is asking the Commission to—in effect—issue an order enjoining itself from proceeding with this aspect of Order No. 18148.”<sup>46</sup> Pepco asserts that “[t]here is no precedent for such relief, and the Commission does not need to enjoin itself from retaining the ability to decide when and how to deploy the MEDSIS Fund.”<sup>47</sup>

17. Pepco further asserts that the “relief OPC seeks is also premature [and t]here is no reason to believe that disbursement of any portion of the MEDSIS Fund is imminent;” arguing that “it is much more likely that no amount will be disbursed for at least 9-12 months and quite possibly longer.”<sup>48</sup> The Company contends that “Paragraph 5 of the Merger Commitments requires that the Commission complete two important steps prior to disbursement[: f]irst, the Commission must approve a pilot project in Formal Case No. 1130; [and s]econd, the

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<sup>41</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 3.

<sup>42</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 3.

<sup>43</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 3.

<sup>44</sup> *Formal Case Nos. 1130 and 1119*, DCG’s Motion at 3.

<sup>45</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 3.

<sup>46</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 3.

<sup>47</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 3.

<sup>48</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 4.

Commission must take further action to direct the release of the funds.”<sup>49</sup> Pepco states that the “Commission explained that it expected to ‘award these funds through competitive procurement or through a memorandum of understanding with the District Government’ [and that t]hose steps are likely to take additional time.”<sup>50</sup> In addition, Pepco asserts that “[c]learly, as Chairman Kane noted [during the April Workshop], there is considerable work yet to be completed before a plan for further proceedings can be issued in the fall.”<sup>51</sup> According to Pepco, “if the Commission intends the next steps in this proceeding to include pilot projects that will receive financial support from the MEDSIS Fund, the Commission will need to establish a process to invite proposals, conduct a proceeding to select the projects, issue an order to approve the projects, and then direct release of funding from the MEDSIS Fund.”<sup>52</sup> The Company asserts that “OPC’s Motion inappropriately seeks to predetermine the resolution of questions that likely will not be presented for many months.”<sup>53</sup>

18. Pepco further asserts that “OPC ignores Chairman Kane’s description of the path forward in Formal Case No. 1130” and “focuses on a series of questions posed by Commissioner Phillips at the Workshop that asked participants to consider where a pilot project would best serve the District if there could only be one pilot project.”<sup>54</sup> According to Pepco, “[w]hile Commissioner Phillips succeeded in his objective to stimulate healthy debate among the participants, he did not suggest that there was funding from the MEDSIS Fund available to support a project or that his question or any response was intended to circumvent the orderly process of Formal Case No. 1130.”<sup>55</sup>

19. The Company submits that “OPC provides no meaningful support for the assertion that a reviewing Court will remand Order No. 18148 to the Commission to restore funding under the original NSA.”<sup>56</sup> The Company submits that “OPC’s attempt to show the required likelihood of success on the merits is especially inadequate because, to be entitled to the relief it seeks, OPC must do more than show that ‘the reviewing court will remand Order No. 18148 back to the Commission for additional process.’”<sup>57</sup> According to Pepco, “OPC must *also* show that the Court of Appeals will direct, or the Commission will independently conclude, that

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<sup>49</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 4.

<sup>50</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 4.

<sup>51</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 5.

<sup>52</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 5.

<sup>53</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 5.

<sup>54</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 5.

<sup>55</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 5.

<sup>56</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 6.

<sup>57</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 7.



on remand the moneys in the MEDSIS Fund should be restored to one or more of the purposes for which the [CIF] was created in the [Original NSA].”<sup>58</sup> Pepco asserts that “OPC has not shown that such a result is likely.”<sup>59</sup> According to the Company, “[t]he Commission in Order No. 18109 considered the uses of the CIF as proposed in the Original NSA, and concluded that a better use of the CIF was to fund modernization of ‘our distribution grid to accommodate the growing use of [DER] and to accommodate new technologies to improve our grid’s operations and resiliency’ in the context of Formal Case No. 1130.”<sup>60</sup> The Company submits that “OPC provides no reason to believe that the Commission or a reviewing court will rule that the MEDSIS Fund should be redirected to the previously rejected CIF.”<sup>61</sup>

#### **D. Pepco’s Response to DCG’s Motion**

20. In response to DCG’s Motion, Pepco states that because DCG “has made substantially the same arguments with respect to the Energy Efficiency Fund as OPC has made with respect to the MEDSIS Fund, Pepco incorporates by reference its position set forth in [its] Response to [OPC’s Motion] in opposition to the District’s Motion.”<sup>62</sup> Pepco argues, “[DCG] presents no new arguments to bolster its support of OPC’s Motion, nor does the [DCG] demonstrate that there are any unique considerations with respect to the Energy Efficiency Fund that would dictate a different result with respect to its Motion than OPC’s Motion.”<sup>63</sup> Pepco, therefore, concludes that the both DCG’s and OPC’s Motions should be denied.<sup>64</sup>

#### **IV. DECISION**

21. In analyzing a request for a stay, we consider the following: (1) the likelihood that the requesting party will succeed on the merits; (2) whether the denial of the request for stay will result in irreparable injury; (3) balance of equities; and (4) the public interest.<sup>65</sup> All four criteria must be met in order to warrant granting the stay.<sup>66</sup> Because we have denied both OPC and

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<sup>58</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 7 (emphasis in original).

<sup>59</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 7.

<sup>60</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 7 (emphasis in original).

<sup>61</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response at 7.

<sup>62</sup> *Formal Case Nos. 1130 and 1119*, (“Pepco’s Response to DCG”) at 1.

<sup>63</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response to DCG at 2.

<sup>64</sup> *Formal Case Nos. 1130 and 1119*, Pepco’s Response to DCG at 2.

<sup>65</sup> *See Barry v. Washington Post Co.*, 529 A.2d 319 (1987); *see also Formal Case No. 869, In the Matter of the Application of Potomac Electric Power Company for an Increase in its Retail Rates for the Sale of Electric Energy* (“*Formal Case No. 869*”), Order No. 9337, rel. Aug 28, 1989.

<sup>66</sup> The D.C. Court of Appeals recognizes that “[w]hen the last three factors strongly favor interim relief, only a ‘substantial’ showing of likelihood of success, not a ‘mathematical probability,’ is necessary for the court to grant

DCG's requests for reconsideration in companion Order No. 18243 issued today for what we are confident are good reasons, we are not persuaded that there is a likelihood of success on the merits for either applicant and, therefore, the first criteria cannot be met. We need not opine on the other three.

22. Additionally, the parties cite to Commissioner Phillips' question regarding what pilot projects MEDSIS funds should be used as a basis for their motion. His question was posed for the sake of discussion and was not intended to signal a present intent to act. As Pepco properly notes, Chairman Kane set the context for the meeting and explained that not only is the Commission in the early stages of delineating what types of projects and programs would be appropriate for such funding, but she also explained that the Commission would lay out a process so all stakeholders can have their views heard on how the money can be most appropriately used to advance the overall public interest. Therefore, based on the current posture of both Formal Case No. 1119 and Formal Case No. 1130, the Commission believes that OPC and DCG's requests are premature.

**THEREFORE, IT IS ORDERED THAT:**

23. The Office of the People's Counsel's Motion to Hold in Abeyance Release of Funds from the Formal Case No. 1130 MEDSIS Pilot Project Fund Subaccount is **DENIED**; and

24. District of Columbia Government's Motion to Hold in Abeyance the Release Funds from the Energy Efficiency Fund Subaccount is **DENIED**.

**A TRUE COPY:**

**BY DIRECTION OF THE COMMISSION:**



**CHIEF CLERK:**

**BRINDA WESTBROOK-SEDGWICK  
COMMISSION SECRETARY**