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**COMMONWEALTH of VIRGINIA**  
*Office of the Attorney General*

Mark R. Herring  
Attorney General

202 N. Ninth St.  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

August 28, 2020

**VIA ELECTRONIC FILING**

Clerk of the Commission  
c/o Document Control Center  
State Corporation Commission  
1300 E. Main Street  
Richmond, Virginia 23219

**Re:** *Application of Appalachian Power Company, For a 2020 triennial review of its base rates, terms and conditions pursuant to § 56-585.1 of the Code of Virginia*  
**Case No. PUR-2020-00015**

Dear Sir or Madam:

Please find enclosed for filing in the above-referenced matter the Motion for Leave to File Reply and Reply of the Office of the Attorney General's Division of Consumer Counsel.

Thank you for your assistance in this matter.

Sincerely,

/s/ C. Mitch Burton Jr.

C. Mitch Burton Jr.  
Assistant Attorney General

cc: Service List

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

APPLICATION OF

APPALACHIAN POWER COMPANY

CASE NO. PUR-2020-00015

For a 2020 triennial review of its  
base rates, terms and conditions  
pursuant to § 56-585.1 of the Code of Virginia

**MOTION FOR LEAVE TO FILE REPLY AND REPLY OF  
OFFICE OF ATTORNEY GENERAL'S  
DIVISION OF CONSUMER COUNSEL**

Pursuant to Rule 110 of the State Corporation Commission's ("Commission") Rules of Practice and Procedure ("Rules"), and in accord with the Commission's August 5, 2020 Order on Motion Schedule, the Office of the Attorney General's Division of Consumer Counsel ("Consumer Counsel") hereby respectfully requests leave from the Commission to reply to the Responses to Virginia Poverty Law Center's ("VPLC") Motion for Ruling and Request for Expedited Consideration ("VPLC Motion"), which was filed in this matter on July 27, 2020, and submits its Reply for the Commission's consideration.

**BACKGROUND**

On March 31, 2020, Appalachian Power Company ("APCo" or "Company") filed its Application for a 2020 Triennial Review of Rates, Terms and Conditions for the Provision of Generation, Distribution and Transmission Services pursuant to § 56-585.1 ("Application").

On July 27, 2020, VPLC filed its Motion seeking a ruling from the Commission that 2020 House Bill 528<sup>1</sup> ("HB 528") is effective and will apply to any appropriate generation

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<sup>1</sup> 2020 Va. Acts, ch. 662.

facility early retirement costs that the Commission determines to be eligible for recovery from APCo customers in connection with this case. The Motion further requested expedited consideration on the legal issue of whether HB 528 applies to this proceeding.<sup>2</sup>

On July 30, 2020, Consumer Counsel filed, contemporaneous with the pre-filed testimony and exhibits of its expert witnesses, a Legal Memorandum in response to APCo's proposal to adjust its 2019 earnings by approximately \$90 million associated with the Company's early retirement of certain generation plants in 2015 and 2016 ("Non-Period Retirement Costs").

On August 3, 2020, APCo filed a Motion to File Legal Memorandum in Lieu of a Response to the VPLC Motion ("APCo Motion"). The APCo Motion sought to respond to the VPLC Motion, as well as Consumer Counsel's Legal Memorandum and anticipated Staff testimony or legal memoranda on the same topic, in a consolidated legal memorandum filed with its rebuttal testimony on August 28, 2020.<sup>3</sup>

On August 5, 2020, the Commission entered an Order on Motion Schedule ruling that the time for filing responses and a reply to the VPLC Motion shall remain as required by the Commission's Rules, i.e., responses on or before August 14, 2020 and VPLC's reply on or before August 28. Consumer Counsel, Staff, and APCo filed responses on August 14, 2020.

#### **MOTION FOR LEAVE TO FILE REPLY**

Rule 110 provides that "any reply by the moving party must be filed within ten days of the filing of the response [to the moving party's motion]."<sup>4</sup> Although this Rule on motions envisions that a reply to a response would be filed by only the moving party, it does not

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<sup>2</sup> *Id.*

<sup>3</sup> APCo Motion at 2-3.

<sup>4</sup> 5 VAC 5-20-110.

expressly prohibit the filing of a reply from other parties. Furthermore, the Commission may waive or modify any provision of its Rules to the extent it deems appropriate.<sup>5</sup> The Commission's Order on Motion Schedule provided that "time periods for filing responses and reply on the Motion for Ruling shall remain as required by the Commission's Rules of Practice and Procedure."

Consistent with Consumer Counsel's independent Legal Memorandum submitted on July 30, 2020, Consumer Counsel's Response agrees with the VPLC Motion that HB 528 operates with "full force and effect" in this proceeding and "without obstruction from" any other rule or provision of law. Consumer Counsel's Response incorporated by reference its Legal Memorandum.

APCo and the Staff also filed responses to the VPLC Motion. The respective responses raise legal arguments that are contrary to Consumer Counsel's Legal Memorandum concluding that HB 528 applies to this case. As noted in Consumer Counsel's Response, Consumer Counsel's ability to represent its interests in this proceeding will be harmed if it is deprived of the opportunity to respond to opposing legal arguments. Consumer Counsel therefore finds it necessary to seek leave to submit this Reply.

Consumer Counsel continues to assert that this issue can be resolved as part of the Commission's final order to be entered at the conclusion of the case. Nonetheless, while the Commission may wait until its final order to address this issue, nothing currently prevents issuance of a ruling on the VPLC Motion upon conclusion of the procedural schedule identified in the Commission's Order on Motion Schedule. Out of an abundance of caution, to promote judicial economy, and to "provide the Commission with an opportunity 'to rule intelligently

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<sup>5</sup> 5 VAC 5-20-10.

on”<sup>6</sup> all legal arguments presented, Consumer Counsel respectfully requests that the Commission accept this Reply.

### REPLY

**I. APCo’s Response impermissibly attempts to take successive legal positions that are inconsistent and mutually contradictory with other legal positions that it brings into this case.**

APCo is estopped from advancing the legal arguments contained in its Response to the VPLC Motion. As the Supreme Court of Virginia has stated in its review of a prior Commission proceeding, “a litigant may not take ‘successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory.’”<sup>7</sup> And when a party takes such successive inconsistent positions, the court refuses to consider the merits of the position.<sup>8</sup> The doctrine prohibiting what is known as approbation and reprobation “applies both to assertions of fact and law, and precludes litigants from ‘playing fast and loose’ with the courts, or ‘blowing hot and cold’ depending on their perceived self-interests[.]”<sup>9</sup>

In this Triennial Review proceeding, with respect to its end-of-year capital structures, the Company relies on what it has termed its “consistent” legal position “that, unless the terms of the law explicitly state otherwise, *the law in effect at the time the Commission makes its decision in any proceeding controls that decision*[.]”<sup>10</sup> and that until the Commission makes its decision on a rate application, the Company *does not* have a vested right in any particular ratemaking

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<sup>6</sup> *Bd. of Supervisors v. State Corp. Comm’n*, 292 Va. 444, 455 n.11, 790 S.E.2d 460, 466 (quoting *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 204, 788 S.E.2d 237, 258 (2016)).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Babcock & Wilcox Co.*, 292 Va. at 204-04, 788 S.E.2d at 258-59 (citations omitted).

<sup>10</sup> Ex. A (Rebuttal Testimony of Jenifer B. Sebastian in Case No. PUR-2019-00038) at page 3 of 4 (emphasis added).

methodology.<sup>11</sup> APCo has confirmed through discovery that it continues to rely on its legal position that changes to Va. Code § 56-585.1 A 10 (“Subsection A 10”) allow for it to exclude securitized bonds from the end-of-year capital structures (years 2017-2019) that are the subject of this case.<sup>12</sup>

That is, APCo carries over *into this case* its legal theories regarding the applicability of 2018 Senate Bill 922 (“SB 922”).<sup>13</sup> The Company had explained in December of 2019, the very same month that the Company adjusted its books to expense the Non-Period Retirement Costs, that it was the Company’s plan “to reach back to 2017 using the provisions [of SB 922] – the amendments to [Subsection A 10]”<sup>14</sup> to give it “legal authority to reach back all the way to [the] 2017 [capital structure] in the upcoming triennial [review.]”<sup>15</sup> APCo went so far as to say that the “law of Virginia, when the Commission [] look[s] at capital structure in [the triennial review] as part of regulating [] rates, [the Commission] [has] to exclude securitized bonds. There’s no ambiguity in there. And so that’s the Company’s position here, and that’s our view of what our position will be in the [triennial review] case.”<sup>16</sup> Furthermore, the Company has indicated through testimony *in this case* that its “methodology for calculating the cost of long-term debt

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<sup>11</sup> Ex. B (Transcript from Case No. PUR-2019-00038) at 82 (The Company agreed that “there [are not] the same sort of vested rights from either the utility’s standpoint or the customer’s standpoint” when analyzing whether a vested right is “implicated” in the retroactive application of a law requiring a specific ratemaking method and that “until the Commission makes [its] decision[]” the Company does not have a such a right.).

<sup>12</sup> Ex. C (APCo’s Response to OAG 6-113).

<sup>13</sup> In 2018, the General Assembly passed Senate Bill 922, 2018 Va. Acts, ch. 795 (“SB 922”), which altered § 56-585.1 A 10 (“Subsection A 10”) in a manner that precludes the Commission from using the Company’s actual cost of capital in setting and reviewing the rates for APCo’s Virginia jurisdictional customers. Specifically, SB 922 requires that the Commission ignore the fact that the Company actually has debt associated with securitized bonds that are the obligation of the Company’s West Virginia customers. That is, Virginia customers are prevented from receiving the benefit of the cheap cost rate associated with those securitized bonds – and this makes the overall cost of capital more expensive for APCo’s Virginia customers.

<sup>14</sup> *Id.* at 91.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 92.

[is] consistent with the methodology approved in the G-RAC in Case Number PUR-2019-[0]0038.”<sup>17</sup>

With respect to the potential retroactive applicability of SB 922, the Company has relied on its legal position that “the only strict bar on retroactive applications is limited to the criminal context” and that it is “deeply rooted” in Virginia case law that “where there [are] no vested rights affected by a change in law, . . . there [is] no prohibition that would prevent its application even if it would be considered retroactive . . . .”<sup>18</sup> Application of SB 922, according to the Company, does not “require the Commission to reach back and affect any vested right . . . .”<sup>19</sup> In supporting this argument, the Company agreed that the type of rights protected against retroactivity<sup>20</sup> were not implicated by the ratemaking change enacted by SB 922, “because there are [not] the same sort of vested rights [at issue] either from the utility’s standpoint or the customer’s standpoint[.]”<sup>21</sup> Significantly, the Company relies on the use of the word “any”<sup>22</sup> by the General Assembly as showing the necessary intent for SB 922 to apply to “anything that came before the statute or after.”<sup>23</sup> The Company relies further on the “clear Virginia precedent [which is] that the General Assembly is presumed to know all the factors that impact their decision . . . when they ma[ke] amendment[s] to [a] statute.”<sup>24</sup> Of note, with respect to retroactive application, APCo has stated:

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<sup>17</sup> Hawkins Direct at 5.

<sup>18</sup> *Id.* at 84.

<sup>19</sup> *Id.* at 80.

<sup>20</sup> Ex. B at 82 (APCo agreeing that *Washington v. Commonwealth of Virginia*, 216 Va. 185, 193, 217 S.E. 2d 815, 823 (1975), and other cases like it, were not implicated.).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 85.

<sup>23</sup> *Id.*

<sup>24</sup> Ex. B at 91.



The court has held that there [are] no magic words to show intent for a retroactive application or broader application as we suggest. Indeed, the court has even found that simply the inclusion of the word “any” in a statute has been found to demonstrate the intent for application regardless of time period, before or after the amendment occurred, and without any further limiting language. . . . I think it’s important here on this to remember the General Assembly has said that the Commission when the Commission sets rates under the statute, it will be excluding any debt associated with securitized bonds, not bonds — not — excluding for periods after July 1 any securitized debt, any securitized bonds. It has a clear “any.”

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Clearly, the General Assembly was aware that when making that decision and looking back to what that capital structure should be, that it would have to look back in time. That’s how ratemaking works, the Commission always has to look back at some amount in time and has to determine what to use to set the rate, and the General Assembly understands this, and it must be presumed to understand this.

And as we [have] heard, too – and it [has] come up certainly – in the same session, the General Assembly determined that APCo’s first triennial review would utilize 2017 and 2018 as test years, yet it made no distinction in the application – in the language of the statute when it passed Senate Bill, I believe, 922, it made no distinction about this language not applying to those, this broadly applicable, unambiguous language. It made no distinction. So while, yes, there’s an effective date, the General Assembly showed no intent that that effective date should have any impact on this very clear instruction to the Commission.<sup>[25]</sup>

As confirmed by APCo in this case, the Company has followed through on its plan to use SB 922 to exclude securitized debt from its end-of-year capital structure for earnings test periods before and after SB 922 took effect. This position allows the Company to charge its Virginia

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<sup>25</sup> Ex. B at 84-88.

customers a higher overall cost rate of debt (i.e., take more money from its customers) associated with its cost of capital.

Where APCo emphasized the word “any” with respect to SB 922, APCo’s Response does not even attempt to address the multiple uses of the word “any” in HB 528. APCo’s unwillingness to tackle the multiple uses of the word “any” contained in HB 528 is perhaps because the Company knows what the term “any” may mean in this context. As explained in APCo’s argument for the applicability of SB 922, which includes a reference to the term “any debt,” the word “any” in this context means “that [the provisions] could apply to anything that came before the statute or after.”<sup>26</sup> That is, in this case, APCo relies on a legal theory that the words “any debt” included in SB 922 shows that the provisions should apply to periods before or after that legislative change took effect. But with respect to applicability of HB 528, the Company conveniently ignores the meaning of “any” in this context.

Consumer Counsel understands the Company’s position on capital structure is generally consistent with the Commission’s Final Order in Case No. PUR-2019-00038. In that case, the Commission found “that the Company’s calendar year 2018 end-of-test period capital structure shall exclude ‘any debt associated with securitized bonds that are the obligation of non-Virginia jurisdictional customers’ as stated in the plain language [of SB 922].”<sup>27</sup> The effective date of SB 922 was July 1, 2018, yet the Commission’s application of the change in the law extended over a period of time (January 1, 2018 through June 30, 2018) during which SB 922 was not the law. That is, consistent with the Company’s argument in PUR-2019-00038, SB 922 was found to be

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<sup>26</sup> Ex. B at 85.

<sup>27</sup> *Petition of Appalachian Power Company, For revision of a rate adjustment clause pursuant to § 56-585.1 A 6 of the Code of Virginia with respect to the Dresden Generating Plant*, Case No. PUR-2019-00038, Final Order at 4 (Feb. 25, 2020), <https://scc.virginia.gov/docketsearch/DOCS/4lkz011.PDF>.

applicable to time periods before and after its effective date.<sup>28</sup> Consumer Counsel has not challenged in this case the Company's exclusion of the securitized debt from the 2017 end-of-year capital structure, or any other end-of-year capital structure, used in the Company's Triennial Review Application.

APCo seems to offer a thin attempt at differentiating the issue presented in PUR-2019-00038 and this case. The Company cites to the Commission's Final Order in that proceeding to support the proposition that "[a]pplying HB 528 as the [VPLC] Motion implies does not simply impact how the Commission should calculate, for instance, the Company's cost of capital for setting forward-looking rates."<sup>29</sup> But the issue in PUR-2019-00038 also involved a "look-back" period – i.e., the "true-up" period – for purposes of setting rates. That is, APCo's position is that SB 922 applies backwards to historical "true-up" periods,<sup>30</sup> which represent periods of time for which a forward-looking rate had already been set by the Commission. Setting that aside, APCo made clear in PUR-2019-00038 its intention to apply SB 922 to the historical earnings test periods in this Triennial Review, including year 2017, which it has followed through with in this case. Thus, even assuming that the historical earnings tests (and the resulting outcomes) represent something other than the setting of a going-forward rate, APCo itself seeks to apply SB 922 in a manner that "does not simply impact how the Commission should calculate . . . the Company's cost of capital for setting forward-looking rates."<sup>31</sup> And as stated by APCo, the "General Assembly was aware that when making that decision [to pass SB 922] and looking

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<sup>28</sup> Yet the Commission made an explicit finding that "applying the plain language of the statute in this manner does not give it retroactive application." *Id.*

<sup>29</sup> APCo's Response at 11.

<sup>30</sup> Ex. B at 87.

<sup>31</sup> *Id.*

back to what that capital structure should be, that [the Commission] would have to look back in time.”<sup>32</sup> The same principal is true for HB 528.

In sum, in light of the Company’s legal positions on the applicability of SB 922 to aspects of this case, the Company is now prohibited by the doctrine of approbation and reprobation from arguing that (1) it is not the law at the time the Commission makes its decision that controls the question of HB 528’s application to this case;<sup>33</sup> (2) that there is “a substantive, vested right” that is implicated by HB 528<sup>34</sup> and (3) HB 528 cannot apply retroactively,<sup>35</sup> as HB 528, similar to SB 922, includes the same operative word “any.”

## **II. The Commission, and not the monopoly electric utility, has authority over jurisdictional rates.**

APCo claims that there is no requirement that the Company receive approval from the Commission to recognize the approximately \$90 million in Non-Period Retirement Costs in the 2019 earnings test.<sup>36</sup> This is incorrect, even assuming the plain language of Subsection A 8 applied to the Non-Period Retirement Costs. At the conclusion of the Triennial Review proceeding, Subsection A 8 may ultimately require a particular accounting treatment for certain *eligible* costs, but the law does not require the Commission to approve “per books” accounting treatment for costs that are *ineligible* for Subsection A 8 treatment. That is, APCo’s argument in this regard assumes, without support, that the Company, and not the Commission, is the sole arbiter in determining the law applicable to the earnings test period. But APCo is not the Commission; the Commission is the entity that regulates APCo’s jurisdictional rates. It should

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<sup>32</sup> Ex. B. at 87-88.

<sup>33</sup> *Id.* at 11, 13.

<sup>34</sup> *Id.* at 14.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> *Id.* at 6.

go without saying that monopoly utilities should not be authorized to adjust their own rates through unilateral ratemaking maneuvers.

Moreover, the plain language of Subsection A 8 makes it clear that any “per books” accounting treatment of eligible costs must occur as part of “any triennial review proceeding, for the purposes of reviewing earnings . . . .” That is, the Company’s attempt to treat certain costs “per books” for accounting purposes is indeed subject to the Commission’s review of earnings as part of the Triennial Review proceeding. The Company does not have the statutory authority to unlawfully account for costs “per books” and then claim that the Commission is without authority to “overturn a utility’s exercise of this right.”<sup>37</sup> According to APCo’s Response, the “per books” accounting treatment sought by the Company can have no effect on retail ratemaking until the “Earnings Test analysis for the Earnings Test Period[.]” is completed by the Commission at the conclusion of this Triennial Review proceeding.<sup>38</sup> This is consistent with the past tense use of the word “deemed” in Subsection A 8. In other words, it is at the conclusion of the Triennial Review proceeding (through the mandated final order), that such costs “shall be deemed” to be recovered in the test period. Thus, they are subject to Commission review.

Based on its theory that the Company has the unilateral authority to apply Subsection A 8 to the Non-Period Retirement Costs, the Company claims that there are no “remaining undepreciated costs” on its books to be amortized.<sup>39</sup> Thus, it argues that “the plain text of HB 528 is inapplicable to the Application[.]”<sup>40</sup> As explained in Consumer Counsel’s Legal Memorandum and Staff’s Response to the VPLC Motion, however, it is contrary to law and fact

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.* at 4-5.

for APCo to have expensed the Non-Period Retirement Costs in December of 2019. The Company cannot rely on its misapplication of the law and accounting procedures now to claim that there are no costs left to be amortized. Again, the Company is not the sole arbiter over the decision to expense the Non-Period Retirement Costs during the earnings test period. As stated by the Company previously, “if the Company’s right to charge a rate vests at the time it filed its application, then it would raise some questions about whether the Commission actually has the ability to reject a rate application[] [a]nd . . . the Commission has clearly shown that they can do that, and they have done that on numerous occasions.”<sup>41</sup>

**III. APCo uses inapplicable rules of statutory construction in an attempt to frustrate the plain language of HB 528.**

The Company claims that because the General Assembly did not repeal Subsection A 8 explicitly and outright, HB 528 can be given no effect in this proceeding.<sup>42</sup> This tortured attempt at statutory interpretation does not hold water.

The Company relies on the observation that “the General Assembly could have repealed Subsection A 8 in the 2020 [or 2019] legislation session . . . but did not.”<sup>43</sup> Subsection A 8 is a hefty section of law. The provision pertaining to “per books” accounting treatment described in Subsection A 8 applies not only to asset impairments associated with early retirements, but also to numerous other types of costs. Beyond that, Subsection A 8 applies to no less than nine other substantive areas related to the Triennial Review process.<sup>44</sup>

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<sup>41</sup> Ex. B at 80.

<sup>42</sup> APCo’s Response at 8.

<sup>43</sup> *Id.*

<sup>44</sup> Va. Code § 56-585.1 A 8 (Applying to: (i) the amount of excessive earnings that a utility gets to retain and how much is to be refunded to customers; (ii) deferred cost recovery for revenues that are below the bottom of a utility’s earnings band; (iii) Chapter 10’s applicability to adjustments to test period costs when the Commission must consider an overall decrease or increase to a utility’s overall revenues; (iv) revenue reductions determined to relate to energy efficiency programs; (v) the manner and period over which any rate refunds are returned to customers; (vi)

In selecting the method to override the “per books” accounting treatment for costs associated with asset impairments related to early retirement determinations, which represents only a small fraction of the topics covered in Subsection A 8, it is not surprising that the General Assembly did not “repeal” Subsection A 8 in either the 2019 or 2020 legislative sessions. For purposes of reestablishing the Commission’s authority over the amortization of early retirement costs, repealing Subsection A 8 would wield an axe where only a scalpel was needed. The fact that the General Assembly “could have repealed Subsection A 8” has no bearing on the question of whether HB 528 applies to this proceeding. The question is rather, does HB 528 include language that shows that the General Assembly intended for it to apply to this proceeding? As discussed in Consumer Counsel’s Legal Memorandum, and consistent with the same legal principles held in this case by APCo related to capital structure, HB 528 is a clarion call in this respect.

APCo’s response fails to explain correctly the meaning of the *non-obstante* clause contained in HB 528.<sup>45</sup> Consumer Counsel’s Legal Memorandum gives the phrase “notwithstanding any other provision of law” its proper meaning. That is, the terms of HB 528 apply “notwithstanding any other provision of law,” specifically including in this instance, the portion of Subsection A 8 that pertains to “per books” accounting for early retirements. The Company’s interpretation of the *non-obstante* clause does not even attempt a fair explanation as to what the term “notwithstanding any other provision of law” does mean. The Company in effect ignores this plain provision of law, something that the Commission cannot do.

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limitations on the Commission’s discretion to reduce revenues when a utility has earned revenues that exceed the top of its earnings band; (vii) Customer Credit Reinvestment Offsets that a utility may apply after an earnings test to prevent rate refunds; (viii) the strict eight-month deadline in which the Commission’s final order on the triennial review must be entered following the filing date; and (ix) the applicability of any return on equity finding to a utility’s rate adjustment clauses).

<sup>45</sup> APCo’s Response at 8-9.

As has been recognized by the United States Supreme Court, “in construing statutes, the use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.”<sup>46</sup> Similarly, “the Courts of Appeals generally have ‘interpreted similar “notwithstanding” language . . . to supersede all other laws, stating that “[a] clearer statement is difficult to imagine.”’<sup>47</sup>

Finally, the Company’s arguments regarding the disfavor for “repeal by implication” are not persuasive in this case.<sup>48</sup> The very purpose of a *non-obstante* clause is to prevent such circular arguments of statutory construction. An article in the Virginia Law Review explains:

Statutes enacted by the early state legislatures often specified that they applied notwithstanding any provisions to the contrary in prior laws. The precise wording of these clauses varied from state to state and from statute to statute. Many statutes provided that they applied “any law to the contrary notwithstanding” or “any law, usage or custom to the contrary notwithstanding.”

. . . .

The presumption against reading a statute in a way that would contradict prior law (and the related presumption that statutes in derogation of common-law principles should be strictly construed) created an obvious problem for legislatures. . . .

The non obstante clause addressed this problem. Far from being superfluous, it established an important rule of construction: A non obstante clause in the new statute acknowledged that the statute might contradict prior law and instructed courts not to apply the general presumption against implied repeals. Rather than straining the new statute in order to harmonize it with prior law,

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<sup>46</sup> *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (citations omitted).

<sup>47</sup> *Id.*

<sup>48</sup> APCo’s Response at 9.



courts were supposed to give the new statute its natural meaning and to let the chips fall where they may.<sup>[49]</sup>

In any event, as explained in Consumer Counsel’s Legal Memorandum, there is indeed plenty of language in HB 528 that evinces the General Assembly’s intent that it apply to this case notwithstanding Subsection A 8. There is no conflict, and no need to harmonize.

**IV. Subsection A 8 is not applicable to the Non-Period Retirement Costs, but that does not mean that HB 528 does not apply to this case.**

Staff filed a response to the VPLC Motion concluding that because “costs associated with the retirements at issue in this case are not asset impairments due to early retirements that would be subject to HB 528, the Commission need not determine whether HB 528 is applicable to this proceeding.”<sup>50</sup> HB 528, however, applies to the “amortization period for recovery of any appropriate costs due to the early retirement of any electric generation facilities.” A finding that the costs at issue are not factually “asset impairments” in accordance with applicable accounting standards has no bearing on the applicability of HB 528 to this proceeding.<sup>51</sup> Even though Subsection A 8 does not apply to the Non-Period Retirement Costs, the costs at issue must still be accounted for in rates. And in accounting for the costs at issue, irrespective of Subsection A 8’s applicability, the question remains as to how the Commission will treat these costs for ratemaking purposes. HB 528 requires, in mandatory terms, that the Commission:

- (i) perform an independent analysis of the remaining undepreciated capital costs;

<sup>49</sup> Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 237-242 (2000).

<sup>50</sup> Staff’s Response at 2.

<sup>51</sup> Based on the plain language of the statutes, “costs associated with asset impairments related to early retirement determinations” is not the same as the “appropriate costs due to the early retirement of any electric generation facilities.” Staff witness Welsh seems to recognize that these are two distinct concepts. *See e.g.*, Welsh at 24 (“The early retirement determination was made in 2011, and the Company did not consider that determination significant enough to trigger an impairment test.”). In other words, early retirement determinations and asset impairments are not one in the same.

- (ii) establish a recovery period that best serves ratepayers; and
- (iii) allow for the recovery of any carrying costs that the Commission deems appropriate.

Assuming that Staff's factual assessment that Subsection A 8 does not apply to the subject costs is correct, the Commission must still apply HB 528 to the recovery of any "appropriate costs" associated with the Non-Period Retirement Costs. HB 528 is mandatory through use of the word "shall." If the Commission fails to address the applicability of HB 528, as Staff suggests, then it would in effect not apply HB 528, including the provision that the Commission "establish a recovery period that best serves ratepayers[.]" It is Consumer Counsel's legal position, which it has supported with testimony, that HB 528 does apply to the ratemaking associated with the Non-Period Retirement Costs. In fact, Consumer Counsel's witness Ralph C. Smith is the only witness in this case that specifically weighs the second prong in his analysis of this issue.

### CONCLUSION

When it comes to the question of how APCo's end-of-year capital structure should be calculated for the 2017, 2018, and 2019 periods, the Company relies on legal positions that: (i) it is the law at the time the Commission makes its decision that controls;<sup>52</sup> (ii) that a utility and its customers have no right to a particular ratemaking methodology until a rate is ordered by the Commission;<sup>53</sup> and (iii) that by using the word "any" in SB 922, the General Assembly showed its intent for that provision to apply before and after that statutory change went into effect.<sup>54</sup> The result of applying SB 922 to this case is that the Company keeps more money from its customers

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<sup>52</sup> Ex. A at 3 of 4.

<sup>53</sup> *E.g.*, Ex. B at 82.

<sup>54</sup> *Id.* at 84-85.

for service rendered in 2017-2019, and it serves to increase the going-forward rate increase sought by the Company.

In a complete about-face, when responding to whether HB 528 applies to the Non-Period Retirement Costs, the Company argues that: (i) it is not the law at the time the Commission makes its decision that controls;<sup>55</sup> (ii) application of HB 528 destroys a vested and substantive right,<sup>56</sup> despite the fact that the Commission has not yet entered a final order addressing the base rate earnings test period; and (iii) HB 528 contains insufficient language showing retroactive intent,<sup>57</sup> despite the fact that HB 528 states plainly that the “Commission *shall* determine the amortization period for recovery of *any* appropriate costs due to the early retirement of *any* electric generation facilities . . . .” The result of not applying HB 528, and insisting that Subsection A 8 does apply to the subject costs, is that the Company keeps more money from its customers for service rendered in 2017-2019, and the Company is also enabled to seek a rate increase from its customers going forward.

One consistent theme between these legal arguments is that it results in APCo taking more money from its customers. But the doctrine prohibiting “approbation and reprobation” applies to APCo’s inconsistent assertions of law in this one case, and it precludes the Company from blowing hot and cold on rules regarding retroactive application of laws depending on what allows APCo to retain the most money from its customers.

---

<sup>55</sup> APCo’s Response at 11, 13.

<sup>56</sup> *Id.* 14-17.

<sup>57</sup> *Id.* at 10-14.

For the reasons stated above, the Commission must reject the legal arguments asserted by APCo in its Response to the VPLC Motion, and apply the plain and mandatory terms of HB 528.

Respectfully submitted,

DIVISION OF CONSUMER COUNSEL  
OFFICE OF THE ATTORNEY GENERAL

/s/ C. Mitch Burton Jr.  
Counsel

Mark R. Herring  
Attorney General

Samuel T. Towell  
Deputy Attorney General

C. Meade Browder Jr.  
Senior Assistant Attorney General

C. Mitch Burton Jr.  
Katherine C. Creef  
John E. Farmer Jr.  
Assistant Attorneys General

COMMONWEALTH OF VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
202 North Ninth Street  
Richmond, Virginia 23219  
(804) 786-2071

August 28, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served on August 28, 2020, by electronic service, to:

Raymond L. Doggett, Jr. Esquire  
 Frederick Ochsenhirt, Esquire  
 Andrea B. Macgill, Esquire  
 Office of General Counsel  
 State Corporation Commission  
 P. O. Box 1197  
 Richmond, Virginia 23218  
 Raymond.Doggett@scc.virginia.gov  
 Frederick.Ochsenhirt@scc.virginia.gov  
 Andrea.Macgill@scc.virginia.gov

Noelle J. Coates, Esquire  
 American Electric Power Service  
 Corporation  
 1051 East Cary Street, Suite 1100  
 Richmond, Virginia 23219  
 njcoates@aep.com

James R. Bacha, Esquire  
 American Electric Power Service  
 Corporation  
 1 Riverside Plaza  
 Columbus, Ohio 43215  
 jrbacha@aep.com

Cassandra C. Collins, Esquire  
 Timothy E. Biller, Esquire  
 James G. Ritter, Esquire  
 Hunton Andrews Kurth LLP  
 Riverfront Plaza, East Tower  
 951 East Byrd Street  
 Richmond, Virginia 23219  
 scollins@HuntonAK.com  
 tbiller@HuntonAK.com  
 ritterj@HmtonAK.com

Daniel C. Summerlin III, Esquire  
 Charles J. Dickenson, Esquire  
 Woods Rogers PLC  
 10 S. Jefferson Street, Suite 1400  
 Roanoke, Virginia 24011  
 Summerlin@woodsrogers.com  
 cdickens@woodsrogers.com

Shaun C. Mohler, Esquire  
 Stone Mattheis Xenopoulos & Brew, PC  
 1025 Thomas Jefferson Street, N.W.  
 Suite 800 West  
 Washington, DC 20007  
 scm@smxblaw.com

Robert D. Perrow, Esquire  
 John L. Walker, III, Esquire  
 Williams Mullen  
 200 South 10th Street, Suite 1600  
 P.O. Box 1320  
 Richmond, Virginia 23218-1320  
 bperrow@williamsmullen.com  
 jwalker@williamsmullen.com

William Cleveland, Esquire  
 Nate Benforado, Esquire  
 Southern Environmental Law Center  
 201 West Main St., Suite 14  
 Charlottesville, Virginia 22902-5065  
 wcleveland@selcva.org  
 nbenforado@selcva.org

Edward L. Petrini, Esquire  
 Louis R. Monacell, Esquire  
 Timothy G. McCormick, Esquire  
 Christian & Barton, L.L.P.  
 909 East Main Street, Suite 1200  
 Richmond, Virginia 23219  
 epetrini@cblaw.com  
 lmonacell@cblaw.com  
 TMcCormick@cblaw.com

Carrie H. Grundmann, Esquire  
 Spilman Thomas & Battle, PLLC  
 110 Oakwood Drive, Suite 500  
 Winston-Salem, North Carolina 27103  
 cgrundmann@spilmanlaw.com

Derrick Price Williamson, Esquire  
 Spilman Thomas & Battle, PLLC  
 1100 Bent Creek Boulevard, Suite 101  
 Mechanicsburg, Pennsylvania 17050  
 dwilliamson@spilmanlaw.com

Evan Dimond Johns, Esquire  
 Appalachian Mountain Advocates  
 Post Office Box 507  
 Lewisburg, West Virginia 24901  
 ejohns@appalmad.org

Dorothy E. Jaffe, Esquire  
 Sierra Club  
 50 F Street Northwest, Eighth Floor  
 Washington, District of Columbia 20001  
 dori.jajfe@sierraclub.org

Kurt J. Boehm, Esquire  
 Jody Kyler Cohn, Esquire  
 Boehm, Kurtz & Lowry  
 36 E. Seventh St., Suite 1510  
 Cincinnati, Ohio 45202  
 kboehm@BKLawfirm.com  
 jkylercohn@BKLawfirm.com

Daniel A. Kirkpatrick, Esquire  
 Fletcher, Heald & Hildreth, P.L.C.  
 1300 17<sup>th</sup> St. North, 11<sup>th</sup> Floor Arlington,  
 VA 22209  
 kirkpatrick@fhhlaw.com

/s/ C. Mitch Burton, Jr.  
 Counsel

**EXHIBIT A**

December 18, 2019 Transcript

PUR-2019-00038

Transcript of Hearing  
Conducted on December 18, 2019

200840018  
200110029

1 COMMONWEALTH OF VIRGINIA  
 2 STATE CORPORATION COMMISSION  
 3  
 4 PETITION OF APPALACHIAN  
 5 POWER COMPANY  
 6 CASE NO. PUR-2019-00038  
 7 For revision of rate  
 8 adjustment clause  
 9 pursuant to Code Section  
 10 56-585.1 A 6 of the Code  
 11 of Virginia with respect  
 12 to the Dresden Generating  
 13 Plant  
 14  
 15 TRANSCRIPT OF PROCEEDINGS BEFORE  
 16 THE HONORABLE D. MATHIAS ROUSSY, JR.,  
 17 HEARING EXAMINER  
 18  
 19 Wednesday, December 18, 2019  
 20 10:00 a.m.  
 21  
 22 Job No.: 265921  
 23 Pages: 1 - 98  
 24 Reported By: Scott D. Gregg, RPR  
 25

1 APPEARANCES:  
 2 Honorable D. Mathias Roussy, Jr., Hearing  
 3 Examiner, Presiding  
 4  
 5 K. Beth Clowers, Esquire,  
 6 and  
 7 Kelli Cole, Esquire,  
 8 Counsel to the Commission  
 9  
 10 Noelle J. Coates, Esquire,  
 11 Timothy E. Biller, Esquire,  
 12 and  
 13 Cassandra C. Collins, Esquire,  
 14 Counsel to the Applicant  
 15  
 16 Katherine C. Creef, Esquire,  
 17 and  
 18 John E. Farmer, Jr., Esquire,  
 19 Counsel to the Office of the  
 20 Attorney General Division of  
 21 Consumer Counsel  
 22  
 23 Edward L. Petrini, Esquire,  
 24 Counsel to the Old Dominion  
 25 Committee for Fair Utility Rates

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CERTIFIED

1 EXHIBITS  
 2 No. Marked for ID Rec'd  
 3 1 7 7  
 4 2 15 15  
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 7 5 22 22  
 8 6 22 22  
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Transcript of Hearing  
Conducted on December 18, 2019

2 (5 to 8)

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5	7
1 PROCEEDINGS	1 defer that for closing.
2 THE BAILIFF: Today's docket consists of	2 And once we're done with closing, if it
3 Case No. PUR-2019-00038, for revision of a rate	3 becomes clear that we still need briefs -- you
4 adjustment clause, pursuant to 56-585.1 A 6 of the	4 know, it's not necessarily an either/or -- we can
5 Code of Virginia with respect to the Dresden	5 talk about that after closing. If there is a need
6 Generating Plant.	6 after we've done arguments for briefs as well, I'd
7 The Honorable D. Mathias Roussy, Jr.,	7 be open to talking about that after arguments as
8 Hearing Examiner, presiding.	8 well.
9 THE HEARING EXAMINER: All right. Good	9 All right. With that, Ms. Coates or
10 morning.	10 Mr. Biller, do you want to start with the notice?
11 Let's start with introduction of counsel	11 MS. COATES: Oh, yes, certainly. I have
12 before we see if there are any public witnesses.	12 the notice of publication and service which was
13 MS. COATES: Good morning, Your Honor. My	13 filed on August 15, 2019.
14 name is Noelle Coates. I'm with the AEP. I'm	14 THE HEARING EXAMINER: All right. Any
15 here with Tim Biller and Sandy Collins, with	15 objection to the notice's admission?
16 Hunton, on behalf of Appalachian Power Company.	16 All right. Let's admit that as Exhibit 1.
17 MR. PETRINI: Good morning, Your Honor.	17 (Exhibit No. 1 was marked and admitted
18 Edward L. Petrini, on behalf of the Old Dominion	18 into evidence.)
19 Committee for Fair Utility Rates.	19 THE HEARING EXAMINER: And the floor is
20 MS. CREEF: Good morning, Your Honor.	20 yours for opening.
21 Kate Creef, along with John Farmer, on behalf of	21 MS. COATES: Okay. Your Honor, very
22 the Office of the Attorney General's Division of	22 short.
23 Consumer Counsel.	23 I'm happy to say that, as you pointed out,
24 MS. CLOWERS: Good morning, Your Honor.	24 there are only a few open issues before you today.
25 Beth Clowers, along with Kelli Cole, on behalf of	25 The first in the 2018 G-RAC order, the Commission
6	8
1 Commission Staff.	1 approved the stipulation in which the Company and
2 THE HEARING EXAMINER: Are there any	2 Staff agreed to defer this legal issue about the
3 public witnesses who wish to testify this morning	3 proper capital structure to be used in the first
4 on Appalachian Power Company's application?	4 month of 2018 until today, until this proceeding,
5 Let the record reflect there are none.	5 and that will be the topic later.
6 All right. I have the order of	6 The Company does agree with a projected
7 presentation proposed by the parties, and I plan	7 rate year component of Staff's recommended revenue
8 to follow it. It looks like we would start with	8 requirement. It's about \$28 million. But, of
9 opening statements. I have asked the Office of	9 course, we disagree with the true-up component
10 General Counsel to pass along a couple questions I	10 because of the capital structure issue.
11 wanted to make sure I was clear on and that they	11 The second issue rises from the
12 were addressed in the record, one of which could	12 Commission's order in the 2018 to the Company to
13 be answered by counsel for APCo, just a clarifying	13 file its next petition on or before May 1st, 2019.
14 question, on the effective date for the new G-RAC	14 In April of 2019, the Company asked and
15 that was proposed. And it could also be addressed	15 the Commission granted a request to extend the
16 by a witness. It does look like Ms. Sebastian	16 filing date until the end of May 31st. And that
17 would take the stand regardless, so whatever the	17 has given rise to some questions that Your Honor
18 Company prefers on that question is fine with me.	18 posed about the effective dates of the various
19 For opening statements, we're definitely	19 rate components; and Ms. Sebastian will respond to
20 going to address the legal issue in closing.	20 those on the stand and hopefully clarify your
21 I know Consumer Counsel and the Committee,	21 questions on the record.
22 you've not kind of planted your flag. If you do	22 And the last issue is the one you raise
23 have a position on the legal issue, feel free to,	23 about carrying costs and whether there are
24 you know, identify it in the opening statement.	24 carrying costs on the over/underrecovery balance.
25 But as far as the substance, you know, please just	25 Ms. Sebastian can testify to this, but I can

Transcript of Hearing  
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9  
1 answer no, simply. And if you have any other  
2 questions about that, she'll be happy to answer  
3 them.  
4 And then I believe all parties have waived  
5 cross-examination of all witnesses except  
6 Ms. Sebastian for the Company, and she'll be ready  
7 to take any answers -- give any answers to any  
8 questions that you have.  
9 Thank you, Your Honor.  
10 THE HEARING EXAMINER: Okay. Thank you.  
11 Mr. Petri.  
12 MR. PETRINI: Thank you, Your Honor.  
13 The Committee waives opening except to  
14 note in response to your remark a moment ago that  
15 our legal position leans toward the Commission  
16 Staff's position on the A 10 issue.  
17 THE HEARING EXAMINER: Okay. Thank you,  
18 sir.  
19 MR. FARMER: Good morning, Your Honor.  
20 John Farmer, on behalf of the office of the  
21 Attorney General's Division of Consumer Counsel.  
22 As Your Honor is aware, Consumer Counsel  
23 did not file expert testimony in this proceeding,  
24 but we have reviewed the application and testimony  
25 and participated in discovery.

10  
1 It is Consumer Counsel's understanding  
2 that the Company and Staff largely agree on the  
3 total revenue requirement in this update, with the  
4 exception of the legal issue Your Honor has noted.  
5 Consumer Counsel will, of course, address the  
6 legal issue at the appropriate time.  
7 If approved as proposed by the Company,  
8 this update would decrease a residential  
9 customer's bill for the total G-RAC factors based  
10 on 1,000 kilowatt-hours of use per month by \$0.86.  
11 Apart from the impact resolution of the  
12 legal issue we may have on this proceeding,  
13 Consumer Counsel does not oppose approval of this  
14 update.  
15 Consumer Counsel also wishes to voice  
16 support for the Company's approach to PJM  
17 revenues; in particular, the Company credits PJM  
18 black start revenues and PJM capacity revenues  
19 attributable to the Dresden Plant to the G-RAC.  
20 This approach directly returns benefits on a  
21 dollar-for-dollar basis to the customers who pay  
22 for the cost of the Dresden facility in the same  
23 rate recovery mechanism.  
24 Consumer Counsel supports this matching  
25 concept as the most equitable approach.

11  
1 Thank you.  
2 THE HEARING EXAMINER: Thank you.  
3 MS. CLOWERS: Good morning, Your Honor.  
4 As part of the order for notice and hearing that  
5 was issued in this proceeding by the Commission,  
6 Staff was directed to investigate APCo's  
7 application for approval to consider -- to recover  
8 costs associated with the Dresden Generating  
9 Plant. And Staff prepared testimony discussing  
10 the results of its investigation on November 4th,  
11 2019.  
12 Specifically, Staff filed the testimony of  
13 Anna L. Clayton and Farris M. Maddox, with the  
14 Commission's division of public utility -- excuse  
15 me -- the Commission's division of utility  
16 accounting and finance, and the testimony of Diane  
17 Jenkins, with the division of public utility  
18 generation.  
19 In her prefiled testimony, Ms. Clayton  
20 addressed Staff's audit of the G-RAC components,  
21 and she addressed the proposed revenue requirement  
22 for the rate year.  
23 Mr. Maddox examined the appropriate  
24 capital structure and the overall weight of cost  
25 of capital to use in the G-RAC.

12  
1 And Ms. Jenkins addressed the proposed  
2 revenue allocation and rate design methodology for  
3 the rate adjustment clause.  
4 As has been noted, there is one  
5 significant, remaining issue in this case, and  
6 that is the appropriate capital structure to use  
7 for the January 1 to June 30th, 2018, portion of  
8 the true-up period.  
9 As will be discussed in more detail later  
10 at the hearing, Staff recommends approval of a  
11 capital structure that includes APCo's West  
12 Virginia securitized debt for those months of  
13 2018.  
14 With the inclusion of this debt in the  
15 capital structure, Staff supports a total revenue  
16 requirement of \$28,482,295.  
17 One other potential issue was raised in  
18 the Company's rebuttal testimony, and that  
19 concerns the appropriate implementation date for  
20 the G-RAC. Based on Staff's understanding of the  
21 Company's request, Staff does not oppose any of  
22 the possible implementation dates that are  
23 described in rebuttal.  
24 However, if that changes based on what we  
25 hear later in the hearing, I'll certainly update

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4 (13 to 16)

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13  
1 that position during my closing.  
2 Staff does believe that the Commission has  
3 the discretion to approve a May 1, 2020,  
4 implementation date since that's one of the option  
5 proposed by the Company should the Commission  
6 choose to do so.  
7 Finally, it's my understanding that the  
8 parties have all agreed to stipulate to the entry  
9 of Ms. Clayton's and Ms. Jenkins' testimony.  
10 However, should any issue arise during the hearing  
11 that would necessitate them testifying,  
12 Ms. Clayton is present.  
13 And I would note that Staff Witness Ruben  
14 Blevins will also be available should Your Honor  
15 have any questions about Ms. Jenkins' testimony,  
16 because she's recently retired and is not here  
17 today.  
18 Thank you.  
19 THE HEARING EXAMINER: Thank you.  
20 All right. Do you want to go ahead and  
21 either call Ms. Sebastian or move for the  
22 admission of the stipulated testimonies?  
23 MS. COATES: Whichever you would prefer.  
24 THE HEARING EXAMINER: I don't have a  
25 preference.

14  
1 MS. COATES: I'll just call Ms. Sebastian  
2 to the stand.  
3 THE HEARING EXAMINER: Okay.  
4 MS. COATES: The Company calls Jennifer  
5 Sebastian to the stand.  
6 And, Your Honor, while she's getting sworn  
7 in, would you like to -- we have a -- doesn't need  
8 to be an exhibit, but maybe more like a display,  
9 explanation of the rate implementation issue, if  
10 Ms. Sebastian can walk through it now and then  
11 people can question her instead of doing it on  
12 rebuttal.  
13 THE HEARING EXAMINER: Yeah, why don't you  
14 go ahead and circulate that. And let's go ahead  
15 and start moving for -- let's go ahead and do --  
16 get the petition and the filing schedules into the  
17 record as well.  
18 MS. COATES: I'd like to mark petition as  
19 Exhibit 2.  
20 THE HEARING EXAMINER: Yeah, I think  
21 there's a confidential disk at least. There might  
22 be other portions, but let's make the petition and  
23 Filing Schedule 46 -- the public version, let's  
24 make that Exhibit 2.  
25 Is there any objection to its admission?

15  
1 All right. It's admitted.  
2 (Exhibit No. 2 was marked and admitted  
3 into evidence.)  
4 THE HEARING EXAMINER: Let's make the  
5 confidential portions of Filing Schedule 46  
6 Exhibit 3C.  
7 (Confidential Exhibit No. 3C was marked  
8 for identification.)  
9 THE HEARING EXAMINER: Any objection to  
10 the admission of Exhibit 3C?  
11 All right. That's admitted.  
12 (Confidential Exhibit No. 3C was admitted  
13 into evidence.)  
14 THE HEARING EXAMINER: Then there was also  
15 a supplemental Filing Schedule 46. I think it was  
16 all public. You can correct me later if I'm  
17 wrong.  
18 Let's make that Exhibit 4.  
19 (Exhibit No. 4 was marked for  
20 identification.)  
21 THE HEARING EXAMINER: Any objection to  
22 Exhibit 4's admission?  
23 All right. That's admitted as well.  
24 (Exhibit No. 4 was admitted into  
25 evidence.)

16  
1 THE HEARING EXAMINER: All right. I think  
2 we're ready. We're up to Ms. Sebastian now.  
3 I'm sorry, go ahead and sit.  
4 JENNIFER B. SEBASTIAN, called as a  
5 witness, having been first duly sworn, was  
6 examined and testified as follows:  
7 DIRECT EXAMINATION  
8 BY MS. COATES:  
9 Q Good morning, Ms. Sebastian.  
10 A Good morning.  
11 Q Would you, please, state your name,  
12 position, and your address for the record?  
13 A Sure. My name is Jennifer B. Sebastian.  
14 I'm a regulatory consultant staff for Appalachian  
15 Power Company. My address is 1051 East Cary  
16 Street, Richmond, Virginia 23219.  
17 Q And did you prepare and cause to be filed  
18 on May 31st, 2019, nine pages of testimony, plus a  
19 summary and two schedules?  
20 A I did.  
21 Q And did you sponsor portions of  
22 Schedule 46?  
23 A I did.  
24 Q Do you have any corrections to your  
25 testimony?

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Transcript of Hearing  
Conducted on December 18, 2019

5 (17 to 20)

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17  
1 A I do not.  
2 MS. COATES: At this time then -- thank  
3 you, Your Honor.  
4 BY MS. COATES:  
5 Q If it's okay with you, can you walk us  
6 through what's on the screen here?  
7 A Sure.  
8 MS. COATES: Can everyone see that?  
9 THE HEARING EXAMINER: Does everyone have  
10 a copy? If they can't see it on the screen, they  
11 can follow along on their copy.  
12 THE WITNESS: So I think this is  
13 responsive in my rebuttal testimony on page four  
14 of four. I had some additional comments to the  
15 tariff implementation.  
16 So what you see here, just so that we can  
17 walk through this in a more organized fashion, are  
18 some of the dates that are important. And I think  
19 this comes down to two topics that we're trying to  
20 tackle. One is that the legislation when you're  
21 talking about from when a petition is filed to  
22 when an order is issued works in months. But from  
23 that point in time, there are 60 days, and 60 days  
24 only, before the tariff can actually be put into  
25 effect.

18  
1 And in the original filing, my request was  
2 May 1st of 2021. The problem with that -- and  
3 you'll see that in, I think, the first small  
4 dot -- is that 60 days from the latest date that  
5 the order can be issued really brings you to  
6 April 29th of 2020. That's in the second smallest  
7 dot that you see there. For us, that is not  
8 ideal; we typically strive to implement our rates  
9 on the first of the month.  
10 So as a result of that, there are two  
11 proposals that I issued in my rebuttal testimony,  
12 and those are basically chalked up in the two  
13 small dots that you see at the end there. The  
14 first is a recommendation that since this is a  
15 G-RAC and since we are accustomed to implementing  
16 these rates, we could accomplish this in 15  
17 calendar days' time from the date an order comes  
18 out, but our preference is that we still implement  
19 on the first of a month. So that would -- the  
20 proposal is that we either -- you know, assuming  
21 the order comes out and we have 15 days before the  
22 first of a month, that we implement in either  
23 March or April 1st of 2020.  
24 Alternatively, we could implement on  
25 May 1st, but that technically is beyond the number

19  
1 of days that's in the legislation, and so that's  
2 the proposal that I'm trying to describe in -- on  
3 page four of four of my rebuttal testimony, is  
4 that if given the opportunity, we'd be willing to  
5 implement these rates either on March 1st or  
6 April 1st, assuming the order comes out, 15  
7 calendar days before that first of the month; or  
8 alternatively, we would implement on May 1,  
9 although that is not in alignment with the  
10 legislation.  
11 The final comment on this, just one last  
12 thing that I think I should point out, the G-RAC  
13 has two components, and we've talked a little bit  
14 about those, we have the base rates and we have  
15 the true-up rates, and so there are actually -- if  
16 you look at the tariff, there are really two  
17 factors for the G-RAC. One of these -- we admit  
18 that that would fall off on March 1 of 2020, and  
19 then we would have to implement the new true-up  
20 factor based upon this order.  
21 So that was just another thing that we  
22 wanted to clarify, is that while the base rates  
23 would stay in effect, the end result of when the  
24 new rates go into effect might have a little  
25 bit -- you know, the customer may have a period of

20  
1 time where the rate changes for one month and then  
2 the new order rates go into effect. And I don't  
3 think there's any way that we can avoid that,  
4 however.  
5 BY MS. COATES:  
6 Q Thank you.  
7 MS. COATES: Did Your Honor have any  
8 questions?  
9 THE HEARING EXAMINER: Yeah, real quick.  
10 I know part of what you're wrestling with  
11 in this case is kind of how we got here based on  
12 the past Commission orders and then APCo's request  
13 for an extension of the filing date.  
14 Going forward, would any of this -- any of  
15 the challenges associated with trying to get an  
16 effective date on the first of the month, while  
17 also staying within that 60-day period you're  
18 talking about, would that be alleviated if there  
19 was a Commission directive for future filings to  
20 be on something other than the end of the month?  
21 If you were, say, a week into a month, would that  
22 help you get to a less challenging place?  
23 THE WITNESS: It could help. A lot of  
24 this is dependent on the date the order is issued.  
25 So the rate implementation is really dependent

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6 (21 to 24)

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21  
1 upon when the order comes out, and so I think that  
2 is also part of the challenge.  
3 THE HEARING EXAMINER: But if we assume  
4 that the Commission's order would be entered close  
5 to a statutory deadline, would having a filing  
6 date being the 7th of the month or the 10th of the  
7 month, would that help with maybe having fewer  
8 circles?  
9 THE WITNESS: Yeah, we could, you know, do  
10 a better job of planning when we file, for sure.  
11 I guess the other thing that we could do is out of  
12 the gates, you know, if we know that we are in a  
13 position where 60 days is not going to bring us to  
14 the first of the month and it's a rate adjustment  
15 clause such as this one where we have all the IT  
16 work done, we could propose a date that is the  
17 first of the month but does not exceed the 60 days  
18 when we do the initial filing.  
19 THE HEARING EXAMINER: All right. Well,  
20 thank you for the clarification.  
21 THE WITNESS: Yes, Hearing Examiner.  
22 MS. COATES: Your Honor, I think I forgot  
23 to ask that Ms. Sebastian's testimony be marked as  
24 Exhibit 5 and moved into the record, subject to  
25 cross.

22  
1 THE HEARING EXAMINER: Any objection to  
2 Ms. Sebastian's testimony, including all her  
3 attached schedules, being admitted as Exhibit 5?  
4 It's admitted, subject to any  
5 cross-examination.  
6 (Exhibit No. 5 was marked and admitted  
7 into evidence.)  
8 THE HEARING EXAMINER: Would it help --  
9 MS. COATES: It's up to you, Your Honor.  
10 THE HEARING EXAMINER: I'd prefer it be a  
11 part of the record.  
12 MS. COATES: Exhibit 6, I think.  
13 THE HEARING EXAMINER: All right. The  
14 document that's already been circulated and  
15 discussed with the header PUR-2019-00038, rate  
16 implementation information, let's mark that as  
17 Exhibit 6.  
18 (Exhibit No. 6 was marked for  
19 identification.)  
20 THE HEARING EXAMINER: Any objection to  
21 its admission?  
22 All right. Exhibit 6 is admitted.  
23 (Exhibit No. 6 was admitted into  
24 evidence.)  
25 MS. COATES: Would you like to mark

23  
1 Ms. Sebastian's supplemental testimony now or wait  
2 until after we go through the direct case?  
3 THE HEARING EXAMINER: Oh, no, that's  
4 fine, let's go ahead.  
5 MS. COATES: Supplemental testimony of  
6 July 23rd, four pages, a summary, and five  
7 exhibits.  
8 THE HEARING EXAMINER: All right. Any  
9 objection to its admission?  
10 All right. That will be Exhibit 7, and  
11 it's admitted.  
12 (Exhibit No. 7 was marked and admitted  
13 into evidence.)  
14 MS. COATES: I think that is it, and I  
15 think Ms. Sebastian is now ready for  
16 cross-examination.  
17 THE HEARING EXAMINER: All right.  
18 Mr. Petrini?  
19 MR. PETRINI: No questions, Your Honor.  
20 MS. CREEF: Briefly, Your Honor.  
21 CROSS-EXAMINATION  
22 BY MS. CREEF:  
23 Q Good morning, Ms. Sebastian. Kate Creef,  
24 on behalf of the Office of the Attorney General's  
25 Division of Consumer Counsel.

24  
1 A Good morning.  
2 Q I'm going to ask you what I think is a  
3 straightforward question, not meant to be a trick  
4 question; and I don't mean to get into the Hearing  
5 Officer's legal issue. I'll save that.  
6 So in the spirit of just clarifying the  
7 record, I'm going to project page nine of your  
8 direct testimony. And the highlighted sentence  
9 says -- please correct me if I read it  
10 correctly -- effective January 1st, 2018, the  
11 Company excluded debt associated with securitized  
12 bonds that are the obligations of non Virginia  
13 jurisdictional customers, end quote.  
14 Did I read that correctly?  
15 A Yes, that's what it appears to say.  
16 Q Okay. My question is, upon what authority  
17 did you rely to do this?  
18 MS. COATES: Your Honor, that does get  
19 into the legal issue.  
20 MS. CREEF: Your Honor, if she answers the  
21 way I think she is, I just am trying to clarify  
22 that that is actually what she relied on and not,  
23 say, accounting guidance or anything else.  
24 MS. COATES: I'm still somewhat confused  
25 by the question.

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7 (25 to 28)

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25  
1 MS. CREEF: My question is upon what  
2 authority did she rely.  
3 THE HEARING EXAMINER: I think there's  
4 probably a way to ask this without asking her for  
5 whether she relied upon legal authority.  
6 Is the question whether she relied on --  
7 MS. CREEF: Sure -- and I'm sorry. The  
8 reason I didn't use legal authority is because I  
9 was trying to keep it broad. So if it was  
10 internal company policy, if it was accounting  
11 guidance --  
12 THE HEARING EXAMINER: Okay. Why don't  
13 you ask her those questions, and that would seem  
14 to be maybe less objectionable.  
15 THE WITNESS: I mean, I think I relied  
16 upon the legislation as I know it. And I think  
17 this has been our position in terms --  
18 BY MS. CREEF:  
19 Q That's sufficient, Ms. Sebastian. That's  
20 all I needed just for the record. Thank you.  
21 MS. CREEF: Thank you. That's all I have,  
22 Your Honor. Thank you.  
23 CROSS-EXAMINATION  
24 BY MS. COLE:  
25 Q Good morning, Ms. Sebastian. I'm Kelli  
26 Cole, on behalf of Commission Staff. I'm going to  
2 place Exhibit 6 back up.  
3 A Uh-huh.  
4 Q Can you read that okay?  
5 A I can.  
6 Q Okay. You commented that the 2018 true-up  
7 rates will expire March 1, 2020; is that correct?  
8 A That's correct.  
9 Q Okay. Am I also correct that to the  
10 extent that -- well, let me back up.  
11 And I also understand that the Company is  
12 willing to concede to rates being set on May 1 --  
13 the new rates starting May 1, 2019 -- 2020, excuse  
14 me?  
15 A Yes.  
16 Q I got my dates backward.  
17 A Yeah, May 1, 2020.  
18 Q All right. So if you stipulated to May 1,  
19 2020, and the rates expire March 1, 2020, am I  
20 correct that the true-up would cover any gaps?  
21 A That is correct, that's right. You would  
22 have one rate change as opposed to potentially  
23 multiple rate changes, yep.  
24 Q Thank you.  
25 But a true-up does cover any gaps?

27  
1 A If implemented on March 1. If implemented  
2 on April 1, then the true-up factors would go to  
3 zero and we would have to implement April 1 with  
4 the new true-up factor that comes out as a result  
5 of this case.  
6 Q Understood.  
7 But in the end, you would be covered --  
8 that gap would be covered by the true-up?  
9 A Yep.  
10 Q Thank you for the clarification.  
11 MS. COLE: Nothing further, Your Honor.  
12 THE HEARING EXAMINER: Okay. Before you  
13 get to redirect, can you -- and I'll ask Staff the  
14 same question -- can you explain to me what  
15 capital structure is typically used for the G-RAC,  
16 setting aside this issue -- and I'm not talking  
17 about what the components are; I'm talking about  
18 more of a timing issue. Say in -- well, let's  
19 take this case. If we didn't have the new  
20 securitization legislation, would it be Commission  
21 practice or consistent with Commission practice to  
22 take the end of calendar year 2018 capital  
23 structure and apply that both to the true-up and  
24 for purposes of calculating rate year, the second  
25 set of rates you were talking about, the rate year  
28 rates, is that what would be used or would it be  
2 something different? What is the usual practice  
3 for the G-RAC, do you know?  
4 THE WITNESS: I mean, I can say for the  
5 most part we do use an end-of-year capital  
6 structure.  
7 THE HEARING EXAMINER: Do you typically  
8 have one that is applied both for purposes of  
9 true-up and prospective rates based on projected  
10 costs or do you typically have two capital  
11 structures that are being built into the rates?  
12 THE WITNESS: We typically have one that  
13 is used for that accounting period, I believe.  
14 THE HEARING EXAMINER: Okay. And is it  
15 typically an end-of-year capital structure?  
16 THE WITNESS: Yes.  
17 THE HEARING EXAMINER: Okay. Thank you.  
18 MS. COATES: Your Honor, very quickly.  
19 Just one question.  
20 REDIRECT EXAMINATION  
21 BY MS. COATES:  
22 Q To clarify the Consumer Counsel's  
23 question, you stated was the Company's position  
24 that -- what is the Company's position about  
25 whether or not the securitization is part of our

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8 (29 to 32)

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29  
1 capital structure -- the securitization debt from  
2 West Virginia -- is it the Company's position that  
3 the securitization debt is part of our capital  
4 structure in Virginia?  
5 A Is it part of our capital structure?  
6 Q Is it the Company's position? It's not a  
7 trick question. I think I just confused you.  
8 You stated it was the Company's position  
9 that supported your testimony that the Consumer  
10 Counsel put up?  
11 A Well, it's the Company's position. And I  
12 think this is one that we should exclude in the  
13 securitization.  
14 MS. COATES: That's all I had to ask.  
15 THE WITNESS: That's been our position for  
16 sometime now --  
17 MS. COATES: Thank you.  
18 THE WITNESS: -- yeah.  
19 MS. COATES: No further questions.  
20 THE HEARING EXAMINER: Okay. Thank you  
21 for your testimony. Sorry to keep you standing  
22 earlier.  
23 MS. COATES: I think that was my fault  
24 with passing out the -- would Your Honor like me  
25 to move the direct testimony that's been

30  
1 stipulated into the record?  
2 THE HEARING EXAMINER: Sure, let's go  
3 ahead and do that.  
4 It's my understanding the direct  
5 testimonies of Ms. Helmick and Ms. Walsh have been  
6 stipulated for their admission by agreement of the  
7 parties.  
8 All right. Ms. Helmick's testimony will  
9 be Exhibit 8, and it's admitted.  
10 (Exhibit No. 8 was marked and admitted  
11 into evidence.)  
12 THE HEARING EXAMINER: And Ms. Walsh's  
13 testimony will be Exhibit 9, and it's admitted.  
14 (Exhibit No. 9 was marked and admitted  
15 into evidence.)  
16 THE HEARING EXAMINER: Then I guess  
17 Ms. Walsh also had supplemental testimony?  
18 MS. COATES: Yes, from July 23rd.  
19 THE HEARING EXAMINER: Okay. Let's make  
20 that Exhibit 10, and it's admitted.  
21 (Exhibit No. 10 was marked and admitted  
22 into evidence.)  
23 MS. COATES: And I believe that is all of  
24 the Company's direct case, Your Honor.  
25 THE HEARING EXAMINER: All right.

31  
1 MS. COLE: I'm sorry, sir.  
2 THE HEARING EXAMINER: I was just waiting  
3 to see if you were done before I asked you if  
4 Staff is prepared --  
5 MS. CLOWERS: Yes, Your Honor, but could  
6 you run through the last couple of exhibits? I  
7 apologize.  
8 THE HEARING EXAMINER: Sure. So Exhibit 7  
9 is Ms. Sebastian's supplemental testimony.  
10 Exhibit 8 is Ms. Helmick's direct  
11 testimony.  
12 Exhibit 9 is Ms. Walsh's direct testimony.  
13 And Exhibit 10 is Ms. Walsh's supplemental  
14 testimony.  
15 MS. CLOWERS: Thank you, Your Honor.  
16 THE HEARING EXAMINER: Sure.  
17 MS. COLE: Staff would like to call Rusty  
18 Maddox to the stand.  
19 FARRIS M. MADDOX, called as a witness,  
20 having been first duly sworn, was examined and  
21 testified as follows:  
22 DIRECT EXAMINATION  
23 BY MS. COLE:  
24 Q Good morning, Mr. Maddox.  
25 A Good morning.

32  
1 Q Please state your name and position with  
2 the Commission.  
3 A Yes. My name is Farris M. Maddox. And  
4 I'm a manager with the Commission's division of  
5 utility accounting and finance.  
6 Q And did you prefile direct testimony in  
7 this case on November 4th, 2019, that was prepared  
8 by you or under your direct supervision and  
9 consisting of a one-page summary, eight pages of  
10 questions and answers, and appendices A, B, and C?  
11 A Yes.  
12 Q And do you have any changes or corrections  
13 to that testimony?  
14 A Yes, I have a couple of minor corrections.  
15 On the summary page, the next-to-the-last line  
16 references a date that reads June 30th, 2019. It  
17 should read June 30th, 2018.  
18 And next on page five, the second line of  
19 the chart at the top of the page indicates a  
20 period that reads January 2018 through  
21 October 2018, and it should read July 2018 through  
22 October 2018.  
23 Those changes reflect all of my  
24 corrections.  
25 Q Very good, sir.

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9 (33 to 36)

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1 Have you reviewed the rebuttal testimony  
2 filed by Company Witness Jennifer Sebastian filed  
3 in the case on November 25th, 2019?  
4 A Yes.  
5 Q Do you have any comments on that rebuttal  
6 testimony?  
7 A Yes. I disagree with Ms. Sebastian's  
8 position regarding treatment of APCo's West  
9 Virginia securitized debt. Staff believes the  
10 year-end capital structure for true-up recovery of  
11 capital cost over the period January through June  
12 of 2018 should include the securitized debt.  
13 Q And in her rebuttal testimony,  
14 Ms. Sebastian states that Staff's position  
15 concerning the inclusion of the West Virginia  
16 securitized debt in the 2018 G-RAC case is, quote,  
17 inconsistent with Staff's position and  
18 recommendation in the instant case.  
19 Do you agree with that?  
20 A No, I do not. On page two of her rebuttal  
21 testimony, she cites an excerpt from my testimony  
22 in a 2018 G-RAC case where I stated upon advice of  
23 counsel, Staff understands that unless changes to  
24 statutory language specify otherwise, the law in  
25 effect at the time a proceeding is filed will

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1 determine the rights of the parties involved.  
2 She then posits that if my position from  
3 the prior case is correct, that the law in effect  
4 at the time of the Company's filing in the instant  
5 case would explicitly exclude securitized debt  
6 from APCo's capital structure in this case, and I  
7 disagree with her conclusion.  
8 Q Can you explain for the Hearing Officer  
9 why you disagree with that conclusion?  
10 A Yes. Staff's position and recommendation  
11 in the last case was in the context of the capital  
12 structure used in the development of the projected  
13 factor.  
14 The issue in this proceeding relates to  
15 the capital structure used in the true-up factor.  
16 And Ms. Sebastian appears to be conflating two  
17 different things.  
18 Q Did the Commission -- did the Commission  
19 have discretion to include or exclude the  
20 securitized debt in APCo's capital structure prior  
21 to July 1, 2018?  
22 A Yes. The Commission affirmatively --  
23 MR. BILLER: I just want to object to the  
24 extent he's giving a legal conclusion, legal  
25 opinion. If it's his personal opinion, I guess we

35

1 take it --  
2 MS. COLE: I can rephrase.  
3 THE HEARING EXAMINER: I mean, the  
4 Commission did exclude it, so I don't know that --  
5 MS. COLE: I'm sorry, Your Honor?  
6 THE HEARING EXAMINER: The Commission had  
7 excluded the securitized debt from the capital  
8 structure before the law became effective, so I  
9 don't know that we need an evidentiary basis for  
10 whether or not the Commission had the authority to  
11 do something that it actually did do, do we?  
12 MS. COLE: We will withdraw the question.  
13 Thank you.  
14 BY MS. COLE:  
15 Q Now, Mr. Maddox, how is your position in  
16 the instant proceeding consistent with your  
17 position in the '18 G-RAC case?  
18 A Changes to the regulation act regarding  
19 the treatment of securitized debt in the capital  
20 structure did not become effective until July 1,  
21 2018. And such changes were not and are not  
22 retroactive prior to July 1, 2018.  
23 Consequently, Staff's position is that the  
24 capital structure used to support the true-up of  
25 G-RAC capital costs from January 1, 2018, through

36

1 June 30th of 2018 includes securitized debt as  
2 established in the Commission's 2014 biennial  
3 review decision.  
4 The capital structure to support true-up  
5 of G-RAC capital costs from July 2018 forward  
6 excludes that debt, consistent with the effective  
7 date of the statutory change.  
8 Q Thank you.  
9 And with regard to the difference in the  
10 Company's position and Staff's position on the  
11 treatment of securitized debt, do you have any  
12 idea of the approximate value to the true-up  
13 component of costs?  
14 A Yes. On page six of Staff Witness Anna  
15 Clayton's testimony, if you can refer to that, she  
16 indicates a value where it says capital structure  
17 in true-up of \$268,878.  
18 THE HEARING EXAMINER: Is that specific  
19 only to the legal issue, or is there something  
20 else in there as well? Is that solely the legal  
21 issue?  
22 THE WITNESS: That is related to the legal  
23 issue here for capital structure. There are other  
24 parts of the true-up, I think she's indicated in  
25 her table, here for updated actuals and what she's

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10 (37 to 40)

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1 indicated there. But just relative to capital  
2 structure change is that amount.  
3 THE HEARING EXAMINER: I guess it's the  
4 second column where there is an amount that's  
5 associated with the projected rate year and the  
6 capital structure, right?  
7 So, clearly, for -- there are non legal  
8 issues that are resulting in some sort of a  
9 difference between the original -- or the revised  
10 revenue requirement and the Staff revenue  
11 requirement.  
12 Are there -- is there like a small amount  
13 also in there associated with maybe the same issue  
14 that affects the \$268,000 figure or is -- are  
15 whatever the issues associated with the capital  
16 structure and the projected rate year, are they  
17 specific to the projected rate year and don't  
18 affect the true-up number that we see here?  
19 MS. COLE: Mr. Hearing Officer, I may be  
20 able to shed a little bit of light on this.  
21 Ms. Clayton advises that the number under the  
22 projected year with regard to the capital  
23 structure, this 1867, that that's a rounding  
24 issue. That's from rounding. And she's here if  
25 you need additional clarification on that point.

38

1 THE HEARING EXAMINER: Okay. Well, I'll  
2 accept that representation that whatever -- that  
3 the 268,878 for the true-up is the legal issue and  
4 any potential rounding error.  
5 All right. Now that Ms. Clayton has  
6 testified from the audience.  
7 Go ahead.  
8 BY MS. COLE:  
9 Q Does the capital structure issue in this  
10 case have broader implications for any other  
11 cases?  
12 A Yes. The Commission's decision in this  
13 case regarding the treatment of securitized debt  
14 will have implications for 2017 and 2018 earnings  
15 tests in APCo's upcoming triennial review. The  
16 treatment of securitized debt is expected to have  
17 a revenue requirement impact of approximately  
18 three million for calendar year 2018 earnings  
19 based upon analysis of APCo's earnings information  
20 in the Commission's CEUR report.  
21 While not yet estimated, Staff would  
22 expect the revenue requirement impact would be  
23 greater for 2017 earnings, as the relevant capital  
24 structure cost would apply to the entire year as  
25 opposed to six months.

39

1 In that context, the significance of the  
2 issue is much greater than the approximately  
3 269,000 reflected in this case.  
4 Q And do you have anything else you'd like  
5 to add to your testimony?  
6 A No, I do not.  
7 MS. COLE: And before we tender Mr. Maddox  
8 for cross-examination, we would like to ask that  
9 you move his direct testimony -- in fact, if it's  
10 all right with Your Honor, I'd like to go ahead  
11 and move -- unless you have questions for  
12 Ms. Clayton or anybody else does, that we move all  
13 of Staff's testimony into the record.  
14 And I've got Mr. Maddox in particular,  
15 since he's just testified, was approximately 21  
16 pages of testimony and exhibits. And we also have  
17 testimony from Ms. Clayton, was -- she was part A  
18 of the filing. She was 61 pages of testimony and  
19 exhibits, plus an appendix of approximately 62  
20 additional pages.  
21 And then part C of the filing was  
22 Ms. Jenkins, which is adopted by Mr. Ruben  
23 Blevins, and that is approximately nine pages.  
24 And if we can have those marked and entered into  
25 the record.

40

1 THE HEARING EXAMINER: All right. Is  
2 there any objection to the admission of those  
3 three testimonies with Mr. Maddox's testimony,  
4 subject to cross-examination?  
5 All right. We'll make Ms. Clayton's  
6 testimony Exhibit 11. It's admitted.  
7 (Exhibit No. 11 was marked and admitted  
8 into evidence.)  
9 THE HEARING EXAMINER: Ms. Jenkins'  
10 testimony, Exhibit 12, and it's admitted.  
11 (Exhibit No. 12 was marked and admitted  
12 into evidence.)  
13 THE HEARING EXAMINER: And Mr. Maddox's  
14 testimony, Exhibit 13, it's admitted, subject to  
15 cross-examination.  
16 (Exhibit No. 13 was marked and admitted  
17 into evidence.)  
18 MS. COLE: And Ms. Jenkins' would be 147  
19 THE HEARING EXAMINER: Ms. Jenkins is  
20 No. 12.  
21 MS. COLE: I'm sorry. No. 12, all right.  
22 So did we include -- I apologize, I didn't  
23 hear you, Your Honor. Part A and Appendix A,  
24 Ms. Clayton's testimony and the appendix are one  
25 exhibit?

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11 (41 to 44)

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1 THE HEARING EXAMINER: Yeah. Any  
2 testimony I admit will include any attached  
3 schedules, appendices, or any other similar  
4 attachments.  
5 MS. COLE: Thank you, Your Honor. Thank  
6 you for the clarification.  
7 With that, we tender the witness for  
8 cross-examination.  
9 THE HEARING EXAMINER: Okay. Mr. Petrini?  
10 MR. PETRINI: Thank you, Your Honor. Just  
11 a quick clarifying question.  
12 CROSS-EXAMINATION  
13 BY MR. PETRINI:  
14 Q Mr. Maddox, Ms. Cole asked you about the  
15 impacts -- other impacts of the A 10 issue, and I  
16 thought I heard you say that the impact on the  
17 earnings test in 2018 was three million because we  
18 were looking at half a year, correct?  
19 A Correct.  
20 Q And -- but that three million does not  
21 include the impact on the earnings test going all  
22 the way back to calendar 2017?  
23 A Correct.  
24 MR. PETRINI: Okay. That's all I had.  
25 Thank you.

42

1 MS. CREEF: No questions, Your Honor.  
2 MR. BILLER: Just briefly, Your Honor.  
3 CROSS-EXAMINATION  
4 BY MR. BILLER:  
5 Q Good morning, Mr. Maddox.  
6 A Good morning.  
7 Q Tim Biller, for Appalachian Power.  
8 I just want to clarify one thing that I  
9 heard in your surrebuttal today, and I think I'll  
10 just -- to reference your testimony, this is  
11 page five of your testimony.  
12 And so you said in your surrebuttal that  
13 Staff's position is that the year-end capital  
14 structure through June 30th should include the  
15 securitized debt, securitized bonds?  
16 A Let me clarify that. I think that might  
17 respond to the question from the bench.  
18 The year-end capital structure is used in  
19 this G-RAC proceeding, and there are two different  
20 components of it, there's the true-up and the  
21 projected.  
22 The true-up component goes month to month,  
23 so that end of test year capital structure, what  
24 Staff is proposing, includes that securitized debt  
25 in that end of test year capital structure, in

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1 that 2018 capital structure, year-end capital  
2 structure, from January through June. And that  
3 capital structure from July forward would exclude  
4 that debt as well as in the projected factor; that  
5 capital structure would exclude that debt.  
6 Q So for clarity, how many capital  
7 structures is Staff proposing in this case?  
8 A There is one year-end capital structure,  
9 but that capital structure is including that debt  
10 for six months of that true-up period, post  
11 that -- excluding that debt.  
12 So I guess in response to your question,  
13 you can say there's two 2018 year-end capital  
14 structures if you want to be technical about it.  
15 Q End of test period, but they cover only  
16 six months each?  
17 A Yes.  
18 MR. BILLER: Okay. Thank you. I just  
19 wanted to clarify that.  
20 THE HEARING EXAMINER: So, Mr. Maddox,  
21 just the same question I asked Ms. Sebastian, if  
22 there wasn't the 2018 legislation for the  
23 securitized debt, what would be consistent with  
24 standard Commission practice when setting rates  
25 for the G-RAC? Would you be looking at the 2018

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1 year-end capital structure without any sort of  
2 distinction between the first six months and the  
3 second six months; and would that year-end capital  
4 structure apply both to the true-up and also to  
5 the calculation of going-forward rates?  
6 THE WITNESS: I believe the answer -- the  
7 short answer is yes. The true-up is to recover  
8 actual costs over that period, so you would  
9 have -- the year-end 2018 capital structure would  
10 be trueing up 2018 costs because 2019 G-RAC factor  
11 going forward would not have a year-end 2019  
12 capital structure; you would use the 2018 year-end  
13 capital structure.  
14 THE HEARING EXAMINER: And then in future  
15 cases, to true up those costs, you would look  
16 at --  
17 THE WITNESS: 2019 actual.  
18 THE HEARING EXAMINER: Okay. For 2019  
19 costs?  
20 THE WITNESS: Yes.  
21 THE HEARING EXAMINER: Okay. Thank you.  
22 Some of your testimony about the potential  
23 implications of this issue is -- obviously I  
24 understand the biennial review piece or the  
25 triennial review piece, whatever it is now.

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12 (45 to 48)

200840018  
200110012

45

1 Is this legislation -- as we sit here  
2 today, is it specific to Appalachian Power  
3 Company? In other words, does Dominion have any  
4 of the sort of securitized debt that is identified  
5 by the statute, or is it just APCo that has that,  
6 as we sit here today?  
7 THE WITNESS: Practically speaking, it's  
8 just APCo, but that doesn't preclude any other  
9 utilities from in the future making use of  
10 securitized debt, which would fall under the  
11 statute.  
12 THE HEARING EXAMINER: Understood. All  
13 right. Thank you for that.  
14 I don't have any additional questions, if  
15 you're ready for --  
16 MS. COLE: We have no redirect.  
17 THE HEARING EXAMINER: Okay.  
18 MS. COLE: Thank you.  
19 THE HEARING EXAMINER: Thank you for your  
20 testimony, Mr. Maddox.  
21 THE WITNESS: Thank you.  
22 MS. COATES: Your Honor, the Company  
23 recalls Ms. Sebastian.  
24 JENNIFER B. SEBASTIAN, recalled as a  
25 rebuttal witness, having been previously duly

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1 sworn, was examined and testified as follows:  
2 DIRECT EXAMINATION (Reb.)  
3 BY MS. COATES:  
4 Q Are you the same Ms. Sebastian that was on  
5 the stand a little while ago?  
6 A I am.  
7 Q Did you prepare and cause to be filed on  
8 November 25th, 2019, four pages and a summary of  
9 rebuttal testimony?  
10 A I did.  
11 Q Do you have any corrections to that  
12 testimony?  
13 A I do not.  
14 MS. COATES: And with that, Your Honor,  
15 I'd ask that we mark Ms. Sebastian's testimony as  
16 Exhibit 14, I believe, and moved into the  
17 market -- moved into the record, subject to cross.  
18 THE HEARING EXAMINER: Any objection?  
19 All right. Ms. Sebastian's rebuttal  
20 testimony is admitted as Exhibit 14.  
21 (Exhibit No. 14 was marked and admitted  
22 into evidence.)  
23 MS. COATES: Thank you, Your Honor. With  
24 that, Ms. Sebastian is available for  
25 cross-examination.

47

1 MR. PETRINI: No questions, Your Honor.  
2 MS. CREEF: No questions, Your Honor.  
3 MS. CLOWERS: Just one, Your Honor.  
4 CROSS-EXAMINATION (Reb.)  
5 BY MS. CLOWERS:  
6 Q Does the Company plan to exclude the West  
7 Virginia securitized debt from its 2017 and 2018  
8 earnings tests in its upcoming triennial review  
9 which will be filed in 2020?  
10 MS. COATES: Your Honor, I object. I fail  
11 to see how this is relevant to the case at hand;  
12 and I'm not entirely sure Ms. Sebastian would be  
13 the witness who would answer that in any event.  
14 THE HEARING EXAMINER: Okay. I might have  
15 questions for counsel about it though.  
16 MS. COATES: Certainly. Right now or  
17 later?  
18 THE HEARING EXAMINER: No. I can wait a  
19 couple of minutes.  
20 Go on with your next question.  
21 MS. CLOWERS: That was my only question.  
22 Sustaining?  
23 THE HEARING EXAMINER: Yeah, I'll sustain  
24 the objection for now, but I'll want an answer  
25 from that during argument.

48

1 MS. COATES: I have no redirect then.  
2 Thank you.  
3 THE HEARING EXAMINER: All right. Thank  
4 you.  
5 I think the closing sequence is already  
6 laid out in the order of presentation.  
7 And, Mr. Petrini, do you want to go ahead  
8 and get us started?  
9 MR. PETRINI: Thank you, Your Honor. I'll  
10 be brief.  
11 In our view, the statutory context for the  
12 instant case argues for Staff's view of the  
13 Commission's authority to determine Appalachian's  
14 pre July 1, 2018, capital costs in this case.  
15 This case was brought pursuant to Section  
16 56-585.1 A 6 of the Code. The language in that  
17 section of the Code provides for the recovery from  
18 customers of the costs of certain generation. I'm  
19 going to put that on the screen because that's  
20 what we're really about here.  
21 A utility may -- and I've highlighted  
22 language here -- petition the Commission for  
23 approval of a rate adjustment clause for recovery  
24 of the costs of one or more other generation  
25 facilities.

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13 (49 to 52)

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1 That's why we're here. That's this case.  
2 Certain of Appalachian's Dresden costs,  
3 that is its cost of capital for that generation,  
4 are tied to the capital structure. So the  
5 question raised by APCo's rebuttal is this: Did  
6 the Commission's authority to determine Dresden's  
7 cost of capital which was incurred prior to  
8 enactment of the 2018 amendment to Subsection A 10  
9 changed due to that enactment?  
10 In the absence of specific legislative  
11 language to that effect, we believe that the  
12 answer to the question is no, nothing in the 2018  
13 amendment to A 10 suggests that it was intended to  
14 be given retroactive effect; that is, that it was  
15 intended to apply to costs already incurred prior  
16 to enactment.  
17 Again, A 6 speaks to the recovery of the  
18 costs of generation; that is, it applies to the  
19 costs incurred by the utility for the generation.  
20 The cost of that generation incurred prior to  
21 July 1, 2018, that is the cost ultimately to be  
22 recovered through the RAC contemplated by A 6,  
23 obviously did not change as a result of the 2018  
24 amendment to A 10. Those pre July 1, 2018, costs  
25 which were to be recovered through the RAC were

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1 simply not affected at all by an amendment that  
2 did not take effect until July 1, 2018, and that  
3 did not contain any language suggesting a  
4 legislative intent that it apply retroactively to  
5 costs already incurred prior to enactment.  
6 Importantly, we should remember that  
7 APCo's legal issue arises in the context of the  
8 2007 act as amended, and it's well settled that  
9 that act, Section 56-585.1 of the Code, is an  
10 extremely prescriptive statute with respect to the  
11 Commission's ratemaking authority, and that where  
12 the Assembly has not in that act limited the  
13 Commission's authority, it's preexisting authority  
14 to set rates continues.  
15 Again, however, nothing in the 2018  
16 amendment to A 10 reveals a legislative intent to  
17 limit the Commission's authority to determine  
18 capital costs incurred prior to the effective date  
19 of the amendment.  
20 APCo's legal issue also arises as a result  
21 of an amendment enacted at the same time as  
22 SB 966, the Grid Transformation and Modernization  
23 Act of 2018, the major electric utility rate  
24 legislation that significantly modified Section  
25 56-585.1 of the Code and added and modified other

51

1 related provisions, SB 966 was arguably even more  
2 prescriptive in many ways than the 2007 act as  
3 previously amended. And that fact further  
4 supports the Commission's discretion here.  
5 The specificity of the concurrently  
6 enacted law, SB 966, suggests that the Assembly  
7 knew how to be prescriptive if it wanted to;  
8 however, it did not do so with respect to  
9 preenactment recovery of the cost of capital  
10 pursuant to the A 10 amendment.  
11 APCo suggests that the resolution of the  
12 issue somehow turns on the timing of the filing of  
13 its application in this case. More specifically,  
14 as I understand it, APCo maintains that by filing  
15 its application subsequent to July 1, 2018, it can  
16 now take advantage of the A 10 amendment to  
17 include the securitized debt in the capital  
18 structure for the first six months of 2018 because  
19 unlike APCo's prior G-RAC case, the instant case  
20 was filed subsequent to the effective date of the  
21 A 10 amendment.  
22 Respectfully, I guess I view that as a  
23 kind of red herring. The law in effect at the  
24 time that the application is filed based on  
25 Commission precedent controls the application.

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1 And the A 10 amendment is now in effect. The  
2 question before us is the meaning of the A 10  
3 amendment.  
4 More specifically, does it restrict the  
5 Commission's authority to calculate capital costs  
6 that already were incurred prior to its enactment?  
7 Again, due to the absence of any language  
8 evincing such legislative intent, the Commission's  
9 authority to determine such already incurred costs  
10 does not appear to have been affected by that  
11 amendment.  
12 That concludes my argument. Thank you.  
13 THE HEARING EXAMINER: Thank you,  
14 Mr. Petrini.  
15 Consumer Counsel.  
16 MS. CREEF: Good morning, Your Honor.  
17 Kate Creef, appearing on behalf of the Division of  
18 Consumer Counsel, along with John Farmer.  
19 From Consumer Counsel's perspective, this  
20 update is notable for two reasons. The first has  
21 already been noted during opening, the issue of  
22 crediting revenues associated with the facility  
23 back to the same rate recovery mechanisms the cost  
24 for that facility are recovered by.  
25 Here, this involves PJM black start

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14 (53 to 56)

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53  
1 revenues and PJM capacity revenues. This, quote,  
2 matching issue has been raised in other  
3 proceedings, including Dominion's US-3 and US-4  
4 proceedings. Consumer Counsel appreciates that  
5 APCo recognizes that these revenues attributable  
6 to Dresden should be matched in a rate recovery  
7 mechanism with the associated costs of Dresden.  
8 In this case, that rate recovery mechanism is the  
9 G-RAC.  
10 Turning to the legal issue, specifically  
11 whether a statutory change effective July 1, 2018,  
12 controls the January to June 2018 component of the  
13 true-up. Consumer Counsel believes the law is  
14 clear on this issue.  
15 Before addressing this, however, we think  
16 it is instructive to consider what a true-up is.  
17 First, the Commission considers capital structure  
18 a, quote, cost under subsection -- a Subsection  
19 A 6 RAC, such as this.  
20 Second, as set forth in the stipulation  
21 approved by the Commission in the initial  
22 proceeding establishing this G-RAC, which is in  
23 Docket PUE-2011-00036 -- I'll project it just so  
24 it's easier -- quote, the stipulating parties  
25 agree that the actual costs incurred associated

54  
1 with Dresden shall be reconciled with actual  
2 revenues collected pursuant to the G-RAC and the  
3 difference reflected in the revenue requirement in  
4 future G-RAC proceedings. Actual costs incurred  
5 will incorporate, among other things, the  
6 Commission approved capital structure. And that's  
7 in paragraph nine.  
8 THE HEARING EXAMINER: Is this -- what you  
9 just put on the overhead -- I know sometimes the  
10 Commission's orders attach the stipulations that  
11 are approved and some do not.  
12 Is this a part of the Commission's order?  
13 MS. CREEF: This was entered as an exhibit  
14 and referenced in the hearing examiner's report in  
15 2011. In later G-RAC proceedings, it was actually  
16 included as an attachment to the report. In 2011,  
17 my understanding is that it was entered as an  
18 exhibit and referenced by the hearing examiner.  
19 And this is that exhibit that was entered during  
20 the hearing.  
21 THE HEARING EXAMINER: Okay. Well, did  
22 the Commission's order in 2011-00036 adopt this  
23 stipulation?  
24 MS. CREEF: It -- Your Honor, I can  
25 confirm for you. Would it be all right for me --

55  
1 I'm not sure if it was incorporated by reference.  
2 I'm pretty sure that it was. But to make sure the  
3 record is clear, is it okay for me to confirm?  
4 THE HEARING EXAMINER: Sure, absolutely.  
5 And I just -- if it's not something I can find and  
6 take judicial notice of but it was something the  
7 Commission approved -- but for whatever reason, it  
8 happens from time to time; sometimes it's attached  
9 to the order, sometimes it's not -- I would like  
10 it to be part of the record if the Commission  
11 approved it.  
12 MS. CREEF: Understand.  
13 THE HEARING EXAMINER: So I need to  
14 understand is there a Commission order that says  
15 we approve this? And if it does, then the  
16 question is, can I find it in the annual reports?  
17 And if I can't, I'd like this to be a part of the  
18 record in this case for clarity. So that's where  
19 I'm coming from in asking you these questions.  
20 MS. CREEF: I understand, Your Honor. I  
21 should have been prepared with the answer, so I  
22 will find it for you.  
23 THE HEARING EXAMINER: We'll circle back  
24 with you.  
25 MS. CREEF: Thank you very much.

56  
1 Here, the costs at issue were incurred  
2 during the January to June 2018 time period.  
3 As explained by Staff Witness Ellis during  
4 the 2013 G-RAC proceeding in PUE-2013-00009 and as  
5 summarized in the hearing examiner's report,  
6 quote, a true-up allows customers to pay for  
7 actual costs incurred by the Company rather than  
8 projected costs, end quote.  
9 And that is in the hearing examiner's  
10 report, Your Honor.  
11 Turning to the Company's capital  
12 structure. In the Company's 2014 biennial review,  
13 Docket No. PUE-2014-00026, the Commission clearly  
14 determined that APCo's capital structure included  
15 the debt and equity from its wholly-owned  
16 subsidiaries under A 10 at that time. This was  
17 the law applicable to APCo until a law was changed  
18 by Senate Bill 922, effective July 1st, 2018, to  
19 specifically exclude securitized bonds associated  
20 with non Virginia jurisdictional customers.  
21 As the Virginia Supreme Court has  
22 explained in the case Whitlock v. Hawkins, 105 Va.  
23 242, quote, retrospective laws are not favored.  
24 And a statute is always to be construed as  
25 operating prospectively unless a contrary intent

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15 (57 to 60)

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57

1 is manifest, unquote.  
2 Unlike Senate Bill 922, Senate Bill 966  
3 stands as an example of a law that clearly had  
4 retroactive effect in part.  
5 As we all know, Senate Bill 966 was all  
6 passed in the 2018 legislative session and was  
7 referenced in Mr. Petrini's closing.  
8 But if you look there, you can see an  
9 example of where the General Assembly did intend  
10 clear retroactive effect, and that relates to  
11 undergrounding.  
12 So on page 12 of Senate Bill 966, which  
13 I'm projecting on the screen, you can see that the  
14 General Assembly clearly intended for the costs to  
15 be recoverable dating back to September 1st, 2016.  
16 And for the record, Senate Bill 966 was passed  
17 during the 2018 legislative session.  
18 Your Honor, you're making a face and I  
19 want to make sure you're following.  
20 THE HEARING EXAMINER: No. I'm trying to  
21 figure out what version I have compared to yours.  
22 Do you have the first page?  
23 MS. CREEF: I do, Your Honor.  
24 THE HEARING EXAMINER: I thought I had the  
25 Acts of Assembly, but I'm realizing mine is not

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1 dated, so you have a better one.  
2 Okay.  
3 MS. CREEF: You're welcome to have it.  
4 THE HEARING EXAMINER: No. Will you flip  
5 back though, I want to make sure I note in the  
6 right place where you're citing to because my  
7 pagination is a little different.  
8 MS. CREEF: It's page 12 of the PDF, and  
9 it is in part -- the A 6 part of the statute.  
10 THE HEARING EXAMINER: Okay. I'm there.  
11 Thank you.  
12 MS. CREEF: Consumer Counsel notes that no  
13 such clause or similar clause appears in A 10 as  
14 amended by Senate Bill 922 or in A 6.  
15 Accordingly, as explored during  
16 cross-examination, because the Company relies on  
17 Senate Bill 922, there is no apparent legal basis  
18 upon which the Company -- quoting the direct  
19 testimony of Company Witness Sebastian at page  
20 nine, quote, effective January 1st, 2018, excluded  
21 debt associated with securitized bonds that are  
22 the obligation of non Virginia jurisdictional  
23 customers, end quote.  
24 The significance of January 1st, 2018,  
25 here is that it's the start of the Company's

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1 true-up period. But what if the true-up period  
2 began October 1st, 2017, instead, or in 2016? In  
3 either case, following the Company's logic, it  
4 would have been appropriate for the Company to  
5 reach back even further into its books to alter  
6 already incurred costs.  
7 But the Company points to no legal basis  
8 for this. The revisions to A 10 were effective  
9 July 1st, 2018, and not before. Consumer Counsel  
10 is deeply troubled by the precedent that could be  
11 established if the Commission goes along with the  
12 Company's approach.  
13 Turning now to what Consumer Counsel  
14 understands is the Company's argument that the law  
15 is in effect at the time the Commission makes its  
16 decision in a proceeding controls, that's at  
17 Sebastian rebuttal page three.  
18 In a nutshell, while these costs were  
19 undisputedly incurred during the January to  
20 June 30th, 2018, time period, the Company argues  
21 that because of timing, the law applicable to  
22 these unchanging costs has somehow changed,  
23 despite the absence of a clear retroactive mandate  
24 in legislation. In other words, Consumer Counsel  
25 understands the Company to be saying that if the

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1 parties had resolved this issue last year by a  
2 stipulation, approved by the Commission in an  
3 order in June 2018, there would be no dispute that  
4 the Commission's decision in the 2014 biennial  
5 review controlled, which is Staff's position now.  
6 In conclusion, for these reasons, Consumer  
7 Counsel supports Staff's recommendation that  
8 APCo's West Virginia securitization debt be  
9 reflected in its capital structure for G-RAC  
10 related capital costs incurred from January 2018  
11 through June 30, 2018, consistent with Virginia  
12 law in place during that time period.  
13 Thank you.  
14 THE HEARING EXAMINER: Thank you.  
15 MS. CLOWERS: Good morning, Your Honor.  
16 The sole legal question before you today is  
17 whether the Commission must exclude APCo's West  
18 Virginia securitized debt from the Company's  
19 capital structure for the period of January 1  
20 through June 30, 2018.  
21 The answer to that question is no.  
22 And I'd like to begin by providing a brief  
23 history of this issue.  
24 In 2007, the General Assembly passed the  
25 Virginia Electric Utility Regulation Act. As part

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16 (61 to 64)

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1 of the Regulation Act, investor-owned electric  
2 utilities could seek approval of rate adjustment  
3 clauses for timely and current recovery of costs  
4 of generation facilities from customers.  
5 APCo received Commission approval to  
6 acquire the Dresden Generating Plant, which is a  
7 613 megawatt natural gas-fired power station in  
8 2011, and that was Case No. PUE-2011-00023.  
9 The Company received approval of the G-RAC  
10 for the first time under Section 56-585.1 A 6 in  
11 2012, and that was Case No. PUE-2011-36. And it  
12 has since filed several updates to that rate  
13 adjustment clause.  
14 In its G-RAC petitions, the Company  
15 requests approval of a total revenue requirement  
16 that is composed of two separate factors, a  
17 projected factor and a true-up factor.  
18 The projected factor includes the  
19 projected operating costs for the plant during the  
20 rate year. The true-up factor reconciles the  
21 amounts collected by the Company with its actual  
22 plant costs and then it grants relief for the over  
23 or undercollections.  
24 The Regulation Act also provided for  
25 biennial and now triennial reviews. In APCo's

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1 2014 biennial review, Case No. PUE-2014-26, the  
2 Commission rejected the Company's request to  
3 remove actual securitized debt belonging to a West  
4 Virginia wholly-owned subsidiary from APCo's  
5 consolidated ratemaking capital structure.  
6 The Commission found that its  
7 determination was consistent with the language of  
8 Section 56-585.1 A 10 of the Regulation Act.  
9 During the 2018 legislative session, the General  
10 Assembly approved Senate Bill 922.  
11 Turning to the exact language, Senate  
12 Bill 922 adds language to Section A 10 so that it  
13 now reads in part, for purposes of this section,  
14 the Commission shall regulate the rates, terms and  
15 conditions of any utility subject to this section  
16 on a standalone basis, utilizing the actual end of  
17 test period capital structure and cost of capital  
18 of such utility, excluding any debt associated  
19 with securitized bonds that are the obligation of  
20 non Virginia jurisdictional customers. And then  
21 it goes on from there.  
22 Senate Bill 922 became effective on  
23 July 1, 2018. APCo filed its 2018 G-RAC  
24 proceeding on March 29th, 2018. In that case, the  
25 Company supported a 2017 capital structure that

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1 excluded the West Virginia securitized debt.  
2 Staff supported a capital structure that included  
3 the debt.  
4 In a stipulation that was approved by the  
5 Commission, the parties agreed to defer the  
6 question of the appropriate capital structure for  
7 calendar year 2018 costs to the following G-RAC  
8 proceeding, and that brings us to the present  
9 case.  
10 For the portion of 2018 before Senate  
11 Bill 922 went into effect, so that would be  
12 January 1st through June 30th, 2018, Staff  
13 recommends a capital structure for the true-up  
14 that includes the West Virginia securitized debt.  
15 For the remainder of the true-up period  
16 from -- for the remainder of the true-up period,  
17 so from July 1st, 2018, forward, Staff excludes  
18 the West Virginia debt. The Company recommends  
19 excluding the debt for the entire true-up period.  
20 In its rebuttal testimony, APCo addressed  
21 a comment that Staff made in the 2018 G-RAC.  
22 Specifically Staff Witness Maddox stated in his  
23 testimony in that proceeding that upon advice of  
24 counsel, Staff understands that unless changes to  
25 statutory language specify otherwise, the law in

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1 effect at the time of a proceeding is filed will  
2 determine the rights of the parties involved.  
3 The Company appears to have two issues  
4 with Staff's statement. First, it claims that  
5 Staff's position in the 2018 case is inconsistent  
6 with its recommendation in the present proceeding  
7 to include the West Virginia securitized debt in  
8 the capital structure for the first months of  
9 2018.  
10 Second, the Company appears to disagree  
11 with Staff's legal position altogether stating  
12 this inconsistency in Staff's position aside, upon  
13 advice of counsel, it has been the Company's  
14 consistent position that unless the terms of the  
15 law explicitly state otherwise, the law in effect  
16 at the time the Commission makes its decision in  
17 any proceeding controls the decision.  
18 As the Supreme Court of Virginia has noted  
19 in several cases, including -- I'm going to put  
20 one on the screen, Washington v. Commonwealth --  
21 THE HEARING EXAMINER: Can you give me the  
22 cite -- give everyone the cite to that before you  
23 flip to --  
24 MS. CLOWERS: I'm sorry.  
25 THE HEARING EXAMINER: It's okay.

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17 (65 to 68)

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1 MS. CLOWERS: It is 216 Va. 185, and the  
2 date is 1975.  
3 THE HEARING EXAMINER: Thank you.  
4 MS. CLOWERS: The general rule is that  
5 statutes are prospective in the absence of an  
6 expressed provision by the legislature. Thus when  
7 a statute is amended while an action is pending,  
8 the rights of the parties are to be decided in  
9 accordance with the law in effect when the action  
10 was begun unless the amended statute shows a clear  
11 intention to vary such rights.  
12 And to give Your Honor just one more, the  
13 court made a similar finding in the case *Burton*  
14 vs. *Seifert Plastic Relief Company*, and the cite  
15 for that is 108 Va. 338. And in that case, the  
16 court held, in general, when the law is altered  
17 pending an action, the rights of the parties are  
18 decided according to the law as it existed when  
19 the action was begun, unless the new statute shows  
20 a clear intention to vary such rights.  
21 Staff continues to support the position  
22 that the law in effect at the time a proceeding is  
23 filed will determine the prospective rights of the  
24 parties involved.  
25 The controversy in this case arises

66

1 because there is both historic and projected costs  
2 in the case. Through Section 56-585.1 A 6 of the  
3 Regulation Act, the General Assembly permitted  
4 electric utilities to receive rate adjustment  
5 clauses for certain types of generation costs.  
6 Those RACs include both a prospective and a  
7 retrospective review of costs.  
8 I think it's important to note as well  
9 that the present proceeding is part of an  
10 interlinked chain of cases that began in 2012 when  
11 the G-RAC was first approved and will continue so  
12 long as the Company seeks to recover the cost of  
13 Dresden through a rate adjustment clause.  
14 In one case, we project future operating  
15 costs. In a subsequent case, we true up the  
16 amounts collected based on those projections to  
17 APCo's actual cost and project new future  
18 going-forward costs.  
19 The Company claims that the Commission has  
20 lost discretion to include the West Virginia  
21 securitized debt in the retrospective or true-up  
22 portion of this case because the case was filed  
23 after the effective date of Senate Bill 922.  
24 Staff disagrees.  
25 We believe that the language in Senate

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1 Bill 922 should be applied to the true-up  
2 prospectively from the dates July 1st, 2018,  
3 effective date.  
4 In other words, because -- for the aspects  
5 of this proceeding -- and the proceeding was filed  
6 on May 31st, 2019 -- there are pieces of that or  
7 aspects of that, this case, that relate back as  
8 far as January 1, 2018, six months prior to the  
9 date Senate Bill 922 became law.  
10 The Commission has the discretion to apply  
11 the law as it existed before Senate Bill 922  
12 became effective to that -- to those January 1st  
13 through June 30th costs. And Staff believes that  
14 this position is appropriate for several reasons.  
15 First, Senate Bill 922 does not include  
16 any emergency clause or enactment clause that  
17 makes it applicable prior to July 1, 2018.  
18 Second, the General Assembly did not  
19 specify any date by which the Commission must  
20 begin to exclude costs, though it certainly knows  
21 how to include such language when it chooses.  
22 For example, looking at it again -- I  
23 believe this is a third version -- Senate  
24 Bill 966, which was approved on March 9th, 2018,  
25 in that case, as we have heard already today, that

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1 case mandated that costs associated with the  
2 conversion of any facilities from overhead  
3 distribution -- excuse me.  
4 Senate Bill 966 mandated the costs  
5 associated with conversion of any facilities from  
6 overhead distribution tap lines to underground  
7 lines on and after September 1, 2016, are deemed  
8 to be reasonably and prudently incurred and shall  
9 be approved for recovery by the Commission.  
10 It's important to note that Senate  
11 Bill 966 was approved in the same session that  
12 Senate Bill 922 was, 2018 session, and it had the  
13 same effective date, July 1, 2018. But in Senate  
14 Bill 966 the General Assembly specifically reached  
15 back and mandated how the Commission should treat  
16 costs as far back as 2016.  
17 The Supreme Court of Virginia held in the  
18 2012 case, *Virginia Electric and Power Company vs.*  
19 *State Corporation Commission* -- and, Your Honor, I  
20 can get that cite for you.  
21 THE HEARING EXAMINER: That one is pretty  
22 easy, I think.  
23 MS. CLOWERS: -- that when a statute  
24 delegates legislative authority to the Commission,  
25 it presumes that any limitation on the



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18 (69 to 72)

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69

1 Commission's discretionary authority by the  
2 General Assembly will be clearly expressed in the  
3 language of the statute.  
4 The court stated that in the absence of an  
5 express limitation, it will not add language to  
6 the statute by inference. APCo is attempting to  
7 add words to limit the Commission's discretion in  
8 the present case the General Assembly did not  
9 include in Senate Bill 922.  
10 Comparing that to Senate Bill 966, which  
11 was passed during the same session, as I said, the  
12 General Assembly clearly placed a limitation on  
13 the Commission's authority to determine whether  
14 undergrounding costs incurred as far back in 2016  
15 should receive cost recovery. There is no similar  
16 mandate in Senate Bill 922.  
17 Third, Staff's recommendation to include  
18 the debt through June 30th, 2018, is comparable to  
19 how the Commission has treated other costs in  
20 cases that have both prospective and retrospective  
21 components.  
22 One example of this would be return on  
23 equity, or ROE. For a portion of the true-up  
24 period in the present case, APCo incorporates into  
25 its cost of capital the 9.4 percent ROE approved

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1 in its 2018 -- excuse me -- 2016 ROE proceeding.  
2 The Company appropriately includes the  
3 9.4 percent ROE in its true-up even though this  
4 case was filed on May 31st, 2019, after the  
5 Commission's November 7th, 2018, order in the  
6 Company's 2018 ROE proceeding. And in that case,  
7 the Commission approved an ROE of 9.42 percent --  
8 THE HEARING EXAMINER: It's hard to keep  
9 up with the changes in the law, but don't the ROE  
10 provisions directing the Commission to apply the  
11 ROE determined in the statutory ROE proceeding to  
12 RACs, don't they include some specific language as  
13 far as when that new ROE becomes effective maybe  
14 on the date of the order?  
15 MS. CLOWERS: Yes, Your Honor, there is an  
16 effective date in the legislation, but there's  
17 also, we believe, an effective date in this case  
18 July 1, 2018, the effective date of the law, so we  
19 still think it's a comparable situation. And I  
20 would say that's because when the Commission sets  
21 ROE, it sets that ROE not just for all components  
22 of all proceedings that are filed after the  
23 effective date of the Commission's order date, but  
24 for costs incurred after the effective date. And  
25 this is comparable to the present situation.

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1 Fourth, Staff's position appropriately  
2 complies with all other requirements of  
3 Section A 10. Specifically, Staff agrees that it  
4 is appropriate to use the end of period capital  
5 structure to calculate the true-up factor in this  
6 proceeding. Staff uses the December 31st, 2018,  
7 capital structure, so the end of year capital  
8 structure, including securitized debt to calculate  
9 financing costs from January 2018 to June 2018.  
10 Staff uses the December 31st, 2018, capital  
11 structure, excluding the securitized debt to  
12 calculate the costs after July 1, 2018. Both  
13 capital structures are December 31st, 2018, end of  
14 period capital structures.  
15 Additionally, and as Staff Witness Maddox  
16 noted today, this capital structure issue has  
17 implications for cases beyond the present  
18 proceeding. First, in APCo's upcoming triennial  
19 review, the Commission will review earnings from  
20 2017 through 2019. Since the triennial review  
21 will be filed after the July 1, 2018, effective  
22 date of Senate Bill 922, Staff expects APCo based  
23 on its position in this case to exclude the  
24 securitized debt from its 2017 and 2018 earnings.  
25 If this is incorrect and the Company does not plan

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1 on doing this, then Staff believes that is  
2 inconsistent with the position it is putting forth  
3 in this case.  
4 As noted earlier today, Staff Witness  
5 Maddox estimated that this would have a revenue  
6 requirement impact of approximately \$3 million for  
7 APCo's 2018 earnings alone. And it would have a  
8 greater impact when you incorporate the 2017  
9 earnings piece as well.  
10 Second, while the statute concerning  
11 securitized debt only relates to APCo, the  
12 Commission's determination here could have  
13 implications for how other future changes in the  
14 law are implemented both for APCo and for other  
15 utilities. Staff admits the Commission retains  
16 the discretion to decide whether to include or  
17 exclude the West Virginia debt from the true-up  
18 for periods prior to July 1, 2018.  
19 Given the potential, detrimental effect  
20 that approving APCo's position could have on  
21 customers in this case and on other future  
22 proceedings, Staff believes the Commission should  
23 utilize that discretion to include APCo's West  
24 Virginia securitized debt for the period January 1  
25 through June 30th, 2018.

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19 (73 to 76)

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73

1 As I noted earlier, the legal issue before  
2 you today is whether the Commission must exclude  
3 APCo's debt from the Company's capital structure.  
4 We believe that the Commission retains the  
5 discretion to include the securitized debt for  
6 that period, as Staff Witness Maddox recommends.  
7 Thank you.  
8 THE HEARING EXAMINER: Thank you.  
9 MS. CLOWERS: Your Honor, if you would  
10 like the case for the Virginia American vs. State  
11 Corporation Commission, if you'd like the cite,  
12 it's 284 Va. 726, decided in 2012.  
13 THE HEARING EXAMINER: 284 Va. 726?  
14 MS. CLOWERS: Yes, Your Honor.  
15 THE HEARING EXAMINER: Thank you.  
16 MR. BILLER: Thank you, Your Honor.  
17 Again, Timothy Biller, for Appalachian Power  
18 Company.  
19 We've heard a lot about this issue, but I  
20 think at its basic this is a really fairly simple  
21 issue of statutory -- reading the statute,  
22 frankly. The statute provides clear instructions  
23 to the Commission that when it acts to set rates  
24 in this or any proceeding under 585.1, that it  
25 shall use the actual end of test period capital

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1 structure and cost of capital of the utility; and  
2 that in determining this capital structure, it  
3 shall exclude any debt associated with securitized  
4 bonds that are the obligation of non Virginia  
5 jurisdictional customers.  
6 There's no ambiguity in this language.  
7 There's no limiting language or language stating  
8 this exclusion is only intended to apply after a  
9 certain date. The word shall, of course, as the  
10 Commission has recognized on numerous occasions is  
11 a word that indicates a legislative mandate that  
12 does not allow discretion. Nothing in the statute  
13 manifests any intent from the General Assembly  
14 that the Commission should do anything other than  
15 what the statute says.  
16 Moreover, nothing in the language permits  
17 the Commission to use anything other than an end  
18 of test period capital structure and certainly  
19 doesn't contemplate or permit the Commission using  
20 two different capital structures for one test  
21 period, as Staff now appears to suggest.  
22 Sitting here today and in this case, for  
23 the Commission to set a rate that is based on a  
24 capital structure that is different than the end  
25 of test period actual capital structure and

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1 includes any securitized bonds would be in  
2 contravention of the clear and unambiguous  
3 requirements of the statute.  
4 We've heard a lot about what the General  
5 Assembly can say and can't say and has said in  
6 other places, and I think there's certainly  
7 examples all over the place, but it is very clear  
8 that the General Assembly does know how to limit  
9 application of changes in law when it wants to.  
10 And just to show a few examples, we've run  
11 through a number, but there's certainly others to  
12 look at as well, the recent changes in the 2019  
13 session to 56-577, in Section A 6 did specifically  
14 exclude any applications that were pending before  
15 the Commission as of January 1, 2019, indicating  
16 that the General Assembly knew how to exempt  
17 certain cases from or certain buckets of  
18 application of that statute.  
19 Similarly, in the actual Code section, the  
20 statute we're talking about now, the Commission  
21 when changing in A 6, changing the application of  
22 the adders to the ROE, specifically grandfathered  
23 in applications that were filed on or before  
24 January 1, 2013, showing that the change in  
25 application of that, although otherwise mandatory,

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1 didn't apply to already-filed cases as of that  
2 date.  
3 So just a few examples that clearly the  
4 Commission knows how to limit application -- the  
5 General Assembly knows how to limit application of  
6 its statutory amendments, but in this case there's  
7 no indication whatsoever of any limitations of  
8 this very unambiguous language.  
9 And I think we just heard today -- and I  
10 think this goes a little bit beyond where even we  
11 thought Staff was going -- Staff's position now  
12 sounds as though the Commission never actually has  
13 to exclude securitized debt, as I believe I heard  
14 Staff raised that there's no beginning date,  
15 there's no -- when the Commission has to start  
16 excluding this debt. I think that is troubling in  
17 that that would mean that the statute really has  
18 no effect. And the Commission has rejected  
19 arguments like this before. This is not a new  
20 argument where somebody tries to push off a change  
21 to the General Assembly's clear language. An  
22 example of that would be in the APCo's fuel factor  
23 case, PUE-2007 -- I believe it's 67 -- related to  
24 OSS margins. I know many people were in that case  
25 as well where the Commission clearly found that

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20 (77 to 80)

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1 they had to give effect to the statute and move  
2 forward to do that.  
3 THE HEARING EXAMINER: Wasn't there a  
4 question about the effect of that began July 1,  
5 2007, versus September 1, 2007, based on  
6 circumstances that are a little different from  
7 this case?  
8 MR. BILLER: Yeah. I believe in that  
9 case, Your Honor, there were already rates  
10 established that customers had -- the Commission  
11 had already set certain rates that were passing  
12 back OSS margins at the time -- and I'll get into  
13 this point a little bit later, but that was -- the  
14 Commission already made that determination about  
15 what that rate would pass back. And so at that  
16 point there was already, I would say, a vested  
17 right from the customer's standpoint to be charged  
18 that rate until the legislation became effective.  
19 And that's different here. The Commission here is  
20 setting a prospective rate using this capital  
21 structure as an input to set that going-forward  
22 rate. And, again, I'll explain this in a little  
23 bit more detail. It's a very different context in  
24 my -- in our read of that.  
25 But to go back, I think -- we've heard

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1 before -- Staff gave a good run through of the  
2 history of the issue, but I do think context is  
3 important here.  
4 It's undeniable that this change in the  
5 law is a direct response by the General Assembly  
6 to the Commission's decision in the Company's 2014  
7 biennial where the Commission decided to include  
8 the securitized bonds in APCo's capital structure.  
9 And as you see here, the Commission based this on  
10 the Commission's interpretation of this exact same  
11 statute -- and just to read for the record, the  
12 Commission stated, accordingly, we reject the  
13 Company's request to remove from its actual  
14 capital structure actual securitized debt that is  
15 included on its books for 2013. Taking such  
16 action would result in something other than APCo's  
17 actual end of test period capital structure and  
18 would be contrary to the plain language of the  
19 statute.  
20 I think it's hard to look over that  
21 clearly the General Assembly saw, was aware of  
22 this decision, determined that was not the correct  
23 result, and as a result passed this amendment to  
24 the statute to confirm the General Assembly's view  
25 of this. This is not something that the General

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1 Assembly intended to be a going-forward new way to  
2 set rates, a new policy goal, but instead is  
3 clearly the General Assembly's instruction to the  
4 Commission that it did not agree with the  
5 Commission's decision in 2014 and that the  
6 Commission should exclude these securitized bonds  
7 from the Company's capital structure.  
8 Now, there's been a lot of discussion  
9 about retroactive application, that accepting the  
10 Company's position would constitute retro  
11 application of the amendment.  
12 I think, frankly, that's -- I heard the  
13 term; I'll use it as well -- a little bit of a red  
14 herring as well. What the Commission is doing  
15 here is setting a prospective rate.  
16 What the statute says is that when the  
17 Commission sets rates, it needs to determine a  
18 capital structure to set that rate with. This is  
19 a going-forward application. We're not going back  
20 and changing prior rates that the Commission has  
21 already charged and getting into any retroactive  
22 ratemaking here. This is a prospective ratemaking  
23 proceeding.  
24 Capital structure is -- looking at an end  
25 of test period capital structure is, of course, by

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1 its very nature a backward-looking analysis; you  
2 always have to go back in time to look at it. And  
3 just for that and any other cost that goes into  
4 rates, the Commission always has to look back and  
5 determine how to appropriately calculate those  
6 costs that have already been incurred.  
7 Here, the General Assembly is simply  
8 providing clear guidance on what is to use to  
9 calculate one of these inputs, the capital  
10 structure.  
11 Importantly, as I mentioned before,  
12 application of the statute does not require the  
13 Commission to reach back and affect any vested  
14 right that has already been there. In a  
15 legislative proceeding such as all Commission rate  
16 cases, the right to charge the rate at a rate  
17 case, that's at the time -- does not vest at the  
18 time the Company files its application. I think  
19 if the Company's right to charge a rate vests at  
20 the time it filed its application, then it would  
21 raise some questions about whether the Commission  
22 actually has the ability to reject a rate  
23 application. And I think the Commission has  
24 clearly shown that they can do that, and they have  
25 done that on numerous occasions.

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21 (81 to 84)

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81  
1 So when we start getting into -- and we  
2 went through -- some of the other counsel went  
3 through some cases -- when we start getting  
4 into -- even if we are considering this somehow a  
5 retroactive application, whether that is actually  
6 permissible under Virginia law or not -- counsel  
7 for the Staff raised *Washington v. Commonwealth*.  
8 I think one important point to point out about  
9 *Washington v. Commonwealth*, that's a criminal  
10 case. Criminal cases are very distinct in  
11 Virginia law and very clearly *ex post facto* laws  
12 and all of those concepts from the constitutional  
13 protections very clearly and strongly apply in  
14 criminal cases. We're not in a criminal case.  
15 We're in a legislative proceeding here, so I think  
16 there's an important distinction to make there.  
17 But in a civil case, Virginia law is also  
18 very clear that this is not permitted -- this is  
19 not prohibited by the law. The cases that do  
20 address retroactive application of new or amended  
21 laws, they are all rooted in consideration of  
22 whether any vested rights are affected by the  
23 application of such law. It's not a general rule  
24 of broad applicability. In all of the cases, once  
25 that statement is made -- and it was quoted many

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1 times -- it then goes on to talk about if it  
2 impacts vested rights is the actual analysis that  
3 used to be made.  
4 THE HEARING EXAMINER: And is your -- this  
5 may not -- I may be taking two pieces of the  
6 argument that don't fit together, but are you  
7 saying that, as we sit here today, for purposes of  
8 the G-RAC that there aren't vested rights either  
9 on the customer's side or the utility's side, and  
10 that *Washington*, other cases like *Washington*, or  
11 the statute that is in Title 1 that has to do with  
12 the same issues, that those aren't implicated  
13 because there aren't the same sort of vested  
14 rights either from the utility's standpoint or the  
15 customer's standpoint?  
16 MR. BILLER: I think that's right. We're  
17 setting the going-forward rate. The Commission  
18 could make a decision to reject that rate. The  
19 customers don't have a right one way or the other  
20 on that. And until the Commission makes this  
21 decision, neither does the Company. There may  
22 some procedural rights and things along those  
23 natures, but in terms of a change of how the  
24 capital structure is calculated, there's no vested  
25 right relating to that other than what's provided

83  
1 clearly in the statute.  
2 THE HEARING EXAMINER: What about the  
3 provisions of A 6 that say the utility has a right  
4 to recover costs through a RAC that's been  
5 approved?  
6 MR. BILLER: So I should clarify -- that's  
7 a good point -- that there are certain  
8 procedural -- if you follow these rules and you  
9 meet these tests, you do have a right. But  
10 there's not a general right that thou shall have  
11 the rate going forward that is calculated as you  
12 think it should be calculated. I think there's a  
13 distinction to make there.  
14 And so the cases are clear where there's  
15 no vested rights affected by a change in law,  
16 application of a change in law as it's worded,  
17 there's no prohibition that would prevent its  
18 application even if it would be considered  
19 retroactive or just generally application -- just  
20 to provide a cite for Your Honor on this, a case  
21 to look at is *Commonwealth v. United Cigarette*  
22 *Machine Co.*, that's 120 Va. 835. It's a 1917  
23 case, but when you look back in the case law here,  
24 we jump pretty quickly back to the early 1900s and  
25 the 1870s, and you get back to 1790 even, so this

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1 is all deeply rooted in Virginia law and going  
2 back even to Supreme Court -- US Supreme Court  
3 decisions as well.  
4 And as I mentioned, the only strict bar on  
5 retroactive applications is limited to the  
6 criminal context. And, again, in one example in  
7 *Commonwealth v. United Cigarette Machine Co.*, the  
8 court has found on numerous occasions that this  
9 does not -- the bar on retro applications does not  
10 apply to civil proceedings, and instead it looks  
11 at is the application of the statute affecting a  
12 vested right.  
13 And even when there's a right that may be  
14 impacted, there's no clear prohibition in Virginia  
15 law from still having a retroactive application.  
16 I think that's an important point, too. The  
17 General Assembly just has to make its intent clear  
18 that it will have that broad application.  
19 And it's very important to point out  
20 there's been a lot of statements that there's no  
21 intent -- there's no showing of intent here. The  
22 court has held that there's no magic words to show  
23 intent for a retroactive application or broader  
24 application as we suggest.  
25 Indeed, the court has even found that

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22 (85 to 88)

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1 simply the inclusion of the word "any" in a  
2 statute has been found to demonstrate the intent  
3 for application regardless of time period, before  
4 or after the amendment occurred, and without any  
5 further limiting language. And a citation for  
6 that for Your Honor, Sussex Community Services  
7 Association vs. Virginia Society, which is  
8 251 Va. 240 -- and I will note in that case, it's  
9 helpful to look at that the court in that case  
10 found instructive that there was a clear  
11 legislative intent behind the change, and the  
12 court used that as support for its conclusion that  
13 the word "any" meant -- in that context meant that  
14 it could apply to anything that came before the  
15 statute or after.

16 I think it's important here on this to  
17 remember the General Assembly has said that the  
18 Commission -- when the Commission sets rates under  
19 the statute, it will be excluding any debt  
20 associated with securitized bonds, not bonds --  
21 not -- excluding for periods after July 1 any  
22 securitized debt, any securitized bonds. It has a  
23 clear "any."

24 But another citation, too, just to add to  
25 that point, *Allen v. Mottley Construction Co.*,

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1 which is 160 Va. 875, and that's a 1933 case which  
2 stands behind the Community Services Association  
3 case and is cited many times.

4 That case elaborates or sets the stage  
5 that the court cannot add language to a statute to  
6 give only a prospective if there's no -- if the  
7 language shows a broad application. For instance,  
8 the court in that case said to limit application  
9 only prospectively of that statute or only after  
10 passage that it would require the court to read in  
11 the word "hereafter." And I think that's exactly  
12 what the other parties are asking the Commission  
13 to do here, is to read in a "hereafter" which does  
14 not appear in the statute.

15 THE HEARING EXAMINER: Mr. Biller, was  
16 that 160 Va. 165?

17 MR. BILLER: It's 160 Va. 875. I  
18 apologize.

19 And the court also found that in that case  
20 nothing in the phrasing used by the General  
21 Assembly can find the operation to any time  
22 period. It was a generally applicable  
23 application. So I think there's -- when you  
24 really dig into the case law in here and get  
25 beyond the top-level statements that the courts

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1 have made about retroactive application where  
2 we're in the context -- many of those cases are  
3 either criminal cases or contractual disputes  
4 between parties where there's a cause of action  
5 has arose and parties are pursuing their actions,  
6 that's a very different thing when you actually  
7 dig down and look at what's being affected, what  
8 the court has actually found for what can be the  
9 intent of a statute and what can indicate intent  
10 from the General Assembly.

11 So here for determining the capital  
12 structure to use in setting a going-forward  
13 rate -- and we've mentioned that there's true-ups  
14 and projected factors, but ultimately the  
15 Commission setting a rate that once it's approved,  
16 APCo will go out and charge to its customers,  
17 that's a going-forward rate, that's a prospective  
18 application of this.

19 The General Assembly is just looking at --  
20 is just providing clear instruction for how the  
21 Commission is to calculate that rate for a  
22 going-forward basis.

23 Clearly, the General Assembly was aware  
24 that when making that decision and looking back to  
25 what that capital structure should be, that it

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1 would have to look back in time. That's how  
2 ratemaking works, the Commission always has to  
3 look back at some amount in time and has to  
4 determine what to use to set the rate, and the  
5 General Assembly understands this, and it must be  
6 presumed to understand this.

7 And as we've heard, too -- and it's come  
8 up certainly -- in the same session, the General  
9 Assembly determined that APCo's first triennial  
10 review would utilize 2017 and 2018 as test years,  
11 yet it made no distinction in the application --  
12 in the language of the statute when it passed  
13 Senate Bill, I believe, 922, it made no  
14 distinction about this language not applying to  
15 those, this broadly applicable, unambiguous  
16 language. It made no distinction.

17 So while, yes, there's an effective date,  
18 the General Assembly showed no intent that that  
19 effective date should have any impact on this very  
20 clear instruction to the Commission.

21 THE HEARING EXAMINER: What -- and this  
22 has been mentioned by a couple of folks already --  
23 I mean, your argument doesn't -- I mean, there's  
24 no limiting date anywhere pursuant to your  
25 argument, I think is what I've heard.

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23 (89 to 92)

200840018  
200110042

89

1 I mean, what is the limiting principle?  
2 Why doesn't your argument allow you to reach  
3 beyond 2017, back to 2011 when these costs began  
4 to be incurred?  
5 If that's something that troubles the  
6 Commission, what is your answer?  
7 MR. BILLER: So the answer is -- and we're  
8 getting back to the position that we had put  
9 forward based on our initial read of Staff's cases  
10 that the law in effect when the Commission makes  
11 this decision, it's at that point -- when the  
12 Commission makes a decision and sets a rate going  
13 forward, it's the law in effect at that time that  
14 controls. So the Commission set rates for these  
15 costs when the Commission -- it's what applies to  
16 the Commission's decision. So the Commission in  
17 this case is looking at the bucket of costs that  
18 we have now in front of us --  
19 THE HEARING EXAMINER: But what if you  
20 made that bucket of costs go back to 2011 in your  
21 application? What if your next application  
22 proposes a true-up of costs going back to 2011?  
23 MR. BILLER: Your Honor, I would have to  
24 look back at the statute and see if we would even  
25 have the ability to do that. I think the process

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1 on this has been well in place that we true-up the  
2 costs that were underlying the prior collection  
3 and we come in with those costs, that's the cost  
4 the Commission has established. The General  
5 Assembly is presumed to know that that's how the  
6 process has worked at the Commission.  
7 I think it's an open question. If we  
8 would go back -- if we even had the authority to  
9 go back -- and I'm not sure I'm prepared to say  
10 that right here. We can certainly look at that,  
11 but --  
12 THE HEARING EXAMINER: Are you prepared to  
13 make any commitments about whether that's  
14 something that the Company would even look at?  
15 MR. BILLER: I'm not prepared to make  
16 commitments on that, but I'm not aware of any  
17 intent to do that. I mean, we have put the  
18 application in, and what's before us is the  
19 going-forward rate, which we all agree on, for  
20 projected costs and the true-up of the costs  
21 incurred in calendar year 2018. That's what we've  
22 come in with, that's where we're going forward  
23 with.  
24 THE HEARING EXAMINER: Are you also  
25 presuming -- I think I heard you weave this into

91

1 your argument -- are you also presuming an  
2 awareness of the General Assembly of how far back  
3 RAC applications typically do reach? Was that  
4 part of your argument that there was some  
5 awareness of how RAC cases work by the General  
6 Assembly even if it's not in the expressed words  
7 of the statute, that they were aware of that when  
8 they enacted the amendment, is that part of your  
9 argument?  
10 MR. BILLER: Yes, Your Honor, that's a  
11 clear Virginia precedent that the General Assembly  
12 is presumed to know all the factors that impact  
13 their decision, and so that's just something that  
14 is very key in Virginia law, that they are  
15 presumed to know how these work when they set that  
16 and when they made the amendment to the statute.  
17 THE HEARING EXAMINER: Okay. Just so I  
18 don't interrupt you and I don't forget as well,  
19 the answer to the question of does the Company  
20 plan to reach back to 2017 using the provisions --  
21 the amendments to A 10, it sounded like you came  
22 close to saying that that was the Company's plan,  
23 that you do have in your view a legal authority to  
24 reach back all the way to 2017 in the upcoming  
25 triennial.

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1 Is that the Company's plan?  
2 MR. BILLER: Yes, Your Honor. I mean,  
3 obviously we haven't filed the case yet, but as of  
4 now, the current intention is to follow the clear  
5 guidance of the statute and exclude the  
6 securitized bonds. The case will be in front of  
7 the Commission. That's the law of Virginia, when  
8 the Commission is looking at capital structure in  
9 that case as part of regulating the rates, they  
10 have to exclude securitized bonds. There's no  
11 ambiguity in there. And so that's the Company's  
12 position here, and that's our view of what our  
13 position will be in that case.  
14 THE HEARING EXAMINER: Okay. Thank you.  
15 MR. BILLER: So I think I've -- I think  
16 I've reached the end of where I'm going. I think  
17 the statute is very clear, this should be,  
18 frankly, a simple case. The statute says very  
19 clearly that when the Commission's regulating  
20 rates in the way that it regulates the rates under  
21 this Code section, it shall exclude any debt  
22 associated with securitized bonds. And it's  
23 certainly not unprecedented for the Commission to  
24 follow the plain language of the statute, and I  
25 think this is the plain language of the statute as

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24 (93 to 96)

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93  
1 some of the counsel said earlier -- or contrary to  
2 what some of the counsel said earlier, this would  
3 not be an unprecedented decision, this would not  
4 be a monumental decision to follow the plain  
5 language of the law. The Commission does it  
6 regularly and should do it here.  
7 So thank you, Your Honor.  
8 THE HEARING EXAMINER: Thank you.  
9 Ms. Creef, you look like you have  
10 something to say?  
11 MS. CREEF: Your Honor, if this would be  
12 an appropriate time, I'd just like to close the  
13 loop on the citation.  
14 THE HEARING EXAMINER: Let's do that on  
15 the record, please.  
16 MS. CREEF: Sure. It might be easier --  
17 THE HEARING EXAMINER: Wherever you're  
18 comfortable.  
19 MS. CREEF: So during my closing, I  
20 referenced a stipulation from the 2011 proceeding  
21 that is Docket No. PUE-2011-00036.  
22 I projected on the screen Exhibit No. 2  
23 which was then included in the hearing examiner's  
24 report in that case in the body of the report  
25 dated September 20th, 2011. The Commission then

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1 also set forth the same provision in its order  
2 dated January 3rd, 2012. And I wanted to note for  
3 the record that the Commission rejected the  
4 stipulation but said that if APCo agreed to two  
5 provisions, that it would approve the stipulation,  
6 and this provision was something the Commission  
7 approved.  
8 APCo filed a letter two days later, on  
9 January 5th, 2012, saying that it agreed to the  
10 terms that the Commission asked to be included, so  
11 the stipulation as I projected, reflected in  
12 Exhibit 2, the hearing examiner's report, and the  
13 Commission's order remain intact.  
14 THE HEARING EXAMINER: Let me ask you  
15 this: Is the provision that you were discussing,  
16 did you just say it's actually in the Commission's  
17 order?  
18 MS. CREEF: It's in the Commission's order  
19 and the hearing examiner's report.  
20 THE HEARING EXAMINER: I'd just as soon  
21 take judicial notice of the order rather than get  
22 into an evidentiary question of the stipulation if  
23 what you have is already in the order.  
24 MS. CREEF: It is in the order, Your  
25 Honor.

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1 THE HEARING EXAMINER: I'll just take  
2 judicial notice of it then.  
3 MS. CREEF: Thank you.  
4 THE HEARING EXAMINER: Thank you.  
5 MS. COATES: Your Honor, if I can make one  
6 more statement and clarification about  
7 Mr. Biller's closing statement, I know he probably  
8 doesn't want to tie the Company and get himself in  
9 trouble, but I have no problem getting myself in  
10 trouble and tying the Company.  
11 I think your question was, would -- if the  
12 Commission granted our request, would the Company  
13 come in our next G-RAC proceeding and seek to  
14 recover costs going as far back to 2011.  
15 I'm not an accountant, but I don't even  
16 think this is possible. No, the Company would not  
17 take advantage of the provision in that way,  
18 although I believe the statute as Mr. Biller  
19 demonstrated is to be read by its plain language.  
20 We would not go back and request recovery from  
21 costs from 2012 in a 2022 or 2021 proceeding, if  
22 that answers your question?  
23 THE HEARING EXAMINER: It does.  
24 MS. COATES: Thank you.  
25 THE HEARING EXAMINER: All right. Is

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1 there anything else we need to talk about on the  
2 record before we go off the record for a second  
3 and see whether there's a need or a desire for  
4 briefs on the issue that we just discussed?  
5 MS. CLOWERS: Your Honor, if you'd permit  
6 it, I think we have one more clarification since  
7 there maybe was some confusion according to the  
8 Company's closing argument.  
9 Staff does believe that the language of  
10 the Senate Bill 922 is effective and binds the  
11 Commission as of July 1st going forward. And to  
12 the extent I in any way misspoke and said  
13 something different, that is not our position.  
14 Thank you.  
15 THE HEARING EXAMINER: Thank you. All  
16 right. Let's go off the record for a minute.  
17 (There was a discussion off the record.)  
18 THE HEARING EXAMINER: Let's go back on  
19 the record.  
20 We just had some discussion about whether  
21 or not the parties or Staff wanted briefs on the  
22 legal issue just addressed through oral arguments,  
23 and there was no request for briefs.  
24 So unless there are any other matters we  
25 need to take up -- and I'll look right, look

Transcript of Hearing  
Conducted on December 18, 2019

25 (97 to 100)

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1 left — hearing none, the Commission is adjourned.  
2 And I will issue my report as soon as possible.  
3 Thank you.  
4 (The proceedings adjourned at 11:57 a.m.)  
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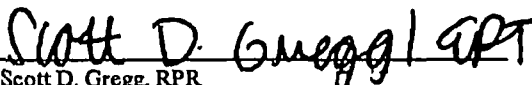
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1 COURT REPORTER'S CERTIFICATE  
2  
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4 I, Scott D. Gregg, Registered  
5 Professional Reporter, certify that I recorded  
6 verbatim by stenotype the proceedings in the  
7 captioned cause before the Honorable D. Mathias  
8 Roussy, Jr., Richmond, Virginia, on the 18th day  
9 of December, 2019.

10 I further certify that to the best of my  
11 knowledge and belief, the foregoing transcript  
12 constitutes a true and correct transcript of the  
13 said proceedings.

14 Given under my hand this 31st day of  
15 December, 2019, at Norfolk, Virginia.

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17   
18 Scott D. Gregg, RPR  
19 Notary Public  
20 Notary Registration No. 215323  
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**EXHIBIT B**

Rebuttal Testimony of Jennifer B. Sebastian

PUR-2019-00038

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STATE CORPORATION COMMISSION  
RECEIVED  
DEC 18 2019

Case No. PUR-2019-00038  
Sponsor: ("APCo")  
Exhibit No. 14

Witness: JENNIFER B. SEBASTIAN  
Bailiff: JABARI T. ROBINSON

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APCo Exhibit No. \_\_\_\_\_

Witness: JBS

**SUMMARY OF REBUTTAL TESTIMONY OF JENNIFER B. SEBASTIAN**

My rebuttal testimony addresses the Staff testimony filed in this case and explains that the Company does not object to the Projected Rate Year revenue requirement developed by Staff witness Clayton. The Company does object to Staff witness Clayton's proposed True-Up revenue requirement based on her use of the capital structure recommended by Staff witness Maddox. I also discuss how Staff witness Maddox's rationale for the proposed G-RAC capital structure has changed from the last G-RAC proceeding (Case No. PUR-2018-00018, the 2018 G-RAC proceeding) to this G-RAC proceeding and explain why the Company does not agree with Staff's position on this topic. The capital structure for January 2018 through June 2018 should not include its West Virginia securitized debt, which is a legal issue for the Commission to resolve.

EXHIBIT# 14

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APCo Exhibit No. \_\_\_\_\_  
Witness: JBS

**REBUTTAL TESTIMONY OF  
JENNIFER B. SEBASTIAN  
FOR APPALACHIAN POWER COMPANY  
IN VIRGINIA S.C.C. CASE NO. PUR-2019-00038**

- 1 **Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND POSITION.**
- 2 A. My name is Jennifer B. Sebastian. My business address is Three James Center, Suite
- 3 1100, 1051 East Cary Street Richmond, Virginia 23219. I am employed by Appalachian
- 4 Power Company (APCo or the Company) as Regulatory Consultant Staff VA/TN.
- 5 **Q. ARE YOU THE SAME JENNIFER B. SEBASTIAN WHO SUBMITTED DIRECT**
- 6 **TESTIMONY IN THIS CASE?**
- 7 A. Yes.
- 8 **Q. ARE YOU SPONSORING ANY EXHIBITS?**
- 9 A. No.
- 10 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY IN THIS**
- 11 **PROCEEDING?**
- 12 A. The purpose of my testimony is to respond to the recommendations made by Staff
- 13 witnesses Clayton and Maddox.
- 14 **Q. PLEASE SUMMARIZE THE REVENUE REQUIREMENT DEVELOPED BY**
- 15 **STAFF WITNESS CLAYTON.**
- 16 A. First, Ms. Clayton recommends a Projected Rate Year revenue requirement of \$27.894
- 17 million. Second, in the True-Up Component, Ms. Clayton recommends a True-Up
- 18 revenue requirement of \$0.588 million. Although the Company does not object to the
- 19 Projected Rate Year revenue requirement, the Company does not agree with the proposed

1 capital structure recommended by Staff witness Maddox and used by Staff witness  
2 Clayton to develop the proposed True-Up revenue requirement.

3 **Q. WHAT CONCERNS DO YOU HAVE WITH THE CAPITAL STRUCTURE**  
4 **PROPOSED BY STAFF WITNESS MADDOX FOR THE PERIOD JANUARY**  
5 **2018 THROUGH JUNE 2018?**

6 A. Consistent with its position since Va. Code §56-585.1 A 10 was amended to state that the  
7 Commission must exclude from the Company's capital "any debt associated with  
8 securitized bonds that are the obligation of non-Virginia jurisdictional customers," the  
9 Company did not include the West Virginia Securitized debt in its proposed capital  
10 structure for any period in this proceeding. In his testimony, consistent with his  
11 testimony in the 2018 G-RAC proceeding, Staff witness Maddox supports a capital  
12 structure for January 2018 through June 2018 that includes APCo's West Virginia  
13 securitized debt. The rationale offered by Mr. Maddox has changed since the 2018 G-  
14 RAC proceeding. In that case, Mr. Maddox testified that, "[u]pon advice of counsel,  
15 Staff understands that unless changes to statutory language specify otherwise, the law in  
16 effect *at the time a proceeding is filed* will determine the rights of the parties involved."<sup>1</sup>  
17 (emphasis added) In contrast, in this proceeding, Mr. Maddox's testimony recommends  
18 the inclusion of the West Virginia securitized debt in the capital structure from January  
19 2018 through June 2018 because "it is consistent with the capital structure methodology  
20 approved by the Commission in APCo's last biennial review proceeding, Case No. PUE-

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<sup>1</sup> Prefiled Staff Testimony of Farris M. Maddox at 6, *Petition of Appalachian Power Company, for revision of rate adjustment clause pursuant to §56-585.1 A 6 of the Code of Virginia with respect to the Dresden Generating Plant*, Case No. PUR-2018-00018, Doc. Con. Cen. No. 180830064 (Aug. 14, 2018).

1 2014-00026, under the statute in effect at the time.”<sup>2</sup> From my perspective, these are two  
2 significantly different approaches proposed for the same time period depending upon the  
3 case filing date.

4 Moreover, upon advice of counsel, if Mr. Maddox’s position from the prior  
5 proceeding were correct, the securitized debt would not be included in the capital  
6 structure for those months in this proceeding because, according to Mr. Maddox, “the law  
7 in effect at the time a proceeding is filed will determine the rights of the parties  
8 involved,”<sup>3</sup> and the law in effect when this proceeding was filed explicitly excludes such  
9 debt from APCo’s capital structure. This inconsistency in Staff’s position aside, upon  
10 advice of counsel, it has been the Company’s consistent position that, unless the terms of  
11 the law explicitly state otherwise, the law in effect at the time the Commission makes its  
12 decision in any proceeding controls that decision.

13 **Q. HOW SHOULD THESE DIFFERENCES IN THE PROPOSED CAPITAL**  
14 **STRUCTURE BE HANDLED?**

15 A. As this appears to be a legal issue, the Company prefers to address it in briefing, in oral  
16 argument, or in whatever manner the Commission deems appropriate to ensure that the  
17 Commission is fully and appropriately advised regarding the legal precedent applicable to  
18 its decision on this issue.

<sup>2</sup> Maddox testimony at p. 5 (Doc. Con. Cen. No. 191110172, filed Nov. 4, 2019).

<sup>3</sup> Maddox, *supra* note 1.

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1 Q. DO YOU HAVE ANY COMMENTS ON STAFF WITNESS JENKINS'  
2 TESTIMONY?

3 A. I do not have any specific comments on Staff witness Jenkins' testimony. I do have a  
4 recommendation on the tariff sheets provided in the Company's testimony.  
5 Although the tariff sheets and Petition in the original filing request an implementation  
6 date of May 1, 2020, the Company proposes, for billing purposes, that Rider G-RAC  
7 have an effective date for usage on and after the first day of the month that is the earlier  
8 of fifteen calendar days following the date of any Commission order approving Rider G-  
9 RAC or May 1, 2020 (which is technically more than 60 days from the legislatively  
10 required deadline for a Commission order in this proceeding). Consistent with the terms  
11 of the G-RAC tariff, current G-RAC Rider Base surcharge rates (Sheet No. 56) will  
12 remain in effect until such time as the rates approved in this proceeding go into effect.

13 Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

14 A. Yes, it does.

**EXHIBIT C**

APCo Response to OAG 6-113



**COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
APPLICATION OF  
APPALACHIAN POWER COMPANY  
SCC CASE NO. PUR-2020-00015  
Interrogatories and Requests for the Production  
of Documents by the OFFICE OF THE ATTORNEY GENERAL'S DIVISION OF  
CONSUMER COUNSEL  
OAG Set 6  
To Appalachian Power Company**

Interrogatory 6-113:

With reference to Ms. Hawkins testimony at page 5, please explain whether the Company excluded from the calculation of its cost of capital, for each earnings test period (2017, 2018, and 2019), the cost rate associated with securitized bonds that are the obligation of the Company's West Virginia customers? Please provide a narrative explanation supporting this treatment.

Response 6-113:

The Company objects to this request to the extent that it calls for a legal opinion. Without waiving this objection, the Company states as follows.

Va. Code § 56-585.1 A 10 provides that in regulating rates under Va. Code § 56-585.1, the Commission must utilize the Company's "actual end-of-test period capital structure and cost of capital [], excluding any debt associated with securitized bonds that are the obligation of non-Virginia jurisdictional customers." In accordance with this statute and on advice from counsel, the Company excluded from the calculation of its cost of capital for the earnings test period the cost rate associated with securitized bonds that are the obligation of the Company's West Virginia customers.

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The foregoing response is made by Renee V. Hawkins, Mng Dir Corporate Finance, on behalf of Appalachian Power Company.