COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MAY 29, 2020

Document Control Center 05/29/20@1.34 PM

PETITION OF

CONSTELLATION NEWENERGY, INC. CASE NO. PUR-2020-00072

For a declaratory judgment

FINAL ORDER

On April 17, 2020, Constellation NewEnergy, Inc. ("CNE"), pursuant to Rule 100 of the State Corporation Commission's ("Commission") Rules of Practice and Procedure,[1] filed a petition for declaratory judgment ("Petition") for a Commission determination as follows:

a. Electricity procured by CNE from a pumped storage hydroelectric facility qualifies as "renewable energy" under the current definition of [§ 56-576 of the Code of Virginia ("Code")], and CNE is authorized to rely on that electricity to match its retail load served under [Code § 56-577 A 5];

b. The General Assembly's revised definition of "renewable energy" in [Code § 56-576], adopted as part of the [Virginia Clean Economy Act ("VCEA")] which will become effective on July 1, 2020, does not apply to CNE's retail generation contracts, executed in 2019, for purposes of CNE's provision of 100% renewable energy to individual retail customers under [Code § 56-577 A 5] for the duration of the retail contracts; and

c. Awarding such other and further relief as the Commission may deem appropriate.[2]

CNE represents in its Petition that in December 2019, CNE began contracting with customers. CNE asserts that these contracts include provisions that the renewable energy CNE anticipates providing to customers will come from resources that meet the

[1] 5 VAC 5-20-10 *et seq.*

[2] Petition at 19.

definition of "renewable energy" under Code § 56-576, to include pumped storage hydroelectric energy.[3] CNE represents that on April 1, 2020, Virginia Electric and Power Company ("Dominion") notified CNE that it "disagrees with [CNE's] view that electric energy produced by the pumped storage hydroelectric facility referenced in the materials [CNE] provided qualifies as renewable energy in Virginia for the purposes of serving customers under [Code § 56-577 A 5] because it does not meet the definition of renewable energy under Section 56-576 . . . ."[4] CNE explains that its Petition presents to the Commission the threshold question of whether electricity generated from a pumped storage facility qualifies as "renewable energy" under Code § 56-576.[5]

CNE requests expedited treatment of its Petition and proposes a procedural schedule for the Commission's consideration that would permit the Commission to determine the questions in the Petition before the VCEA July 1, 2020 effective date.[6] CNE further represents that the issues raised in its Petition can be decided without an evidentiary hearing.[7]

On April 24, 2020, the Commission issued an Order that, among other things, docketed this proceeding and established a procedural schedule.

On May 6, 2020, responses to the Petition were filed by: Dominion; Collegiate Clean Energy, LLC ("Collegiate"); and the Apartment and Office Building Association of

[3] *Id.* at 5, 7.

[4] *Id.* at 8, Ex. 3.

[5] *Id.* at 10, 18.

[6] *Id.* at 16-18.

[7] *Id.* at 18.

Metropolitan Washington. On May 12, 2020, CNE filed a reply. On May 13, 2020, Dominion filed a Motion for Leave to File a Surreply ("Motion for Leave") and a Surreply. On May 14, 2020, CNE filed a letter in lieu of a reply to the Company's Motion for Leave and Surreply.[8]

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds as follows.

The Commission has been asked in this proceeding to address a question of statutory interpretation.[9] As instructed by the Supreme Court of Virginia, the Commission starts with the following:

> When we interpret a statute, our primary objective is to ascertain and give effect to legislative intent, as expressed by the language used in the statute. When the language of a statute is unambiguous, we are bound by the plain meaning of that language. And if the language of the statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute. When a statute is clear and unambiguous, we may look only to the words of the statute to determine its meaning. We may not consider rules of statutory construction, legislative history, or extrinsic evidence. However, it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. A statute is not to be construed by singling out a particular phrase.[10]

Code § 56-577 A 5, which is part of Chapter 23 of Title 56 of the Code ("Chapter 23"), states in part (emphasis added):

> 5. Individual retail customers of electric energy within the Commonwealth, regardless of customer class, shall be permitted:

---

[8] CNE did not object to the Motion for Leave, which is hereby granted.

[9] No party requested an evidentiary hearing in this matter. *See, e.g.,* Petition at 18; Dominion's Response at 33; CNE's Reply at 1 n.1.

[10] *Jackson v. Jackson*, 298 Va. 132, 139 (2019) (citations, quotation marks, and internal alterations omitted).

> a. To purchase electric energy provided 100 percent from *renewable energy* from any supplier of electric energy licensed to sell retail electric energy within the Commonwealth, other than any incumbent electric utility that is not the incumbent electric utility serving the exclusive service territory in which such a customer is located, if the incumbent electric utility serving the exclusive service territory does not offer an approved tariff for electric energy provided 100 percent from renewable energy;….

Code § 56-576, which is also part of Chapter 23, defines "renewable energy" as follows (emphases added):

> As used in this chapter: …
>
> "Renewable energy" means energy *derived from* sunlight, wind, *falling water*, biomass, sustainable or otherwise, (the definitions of which shall be liberally construed), energy from waste, landfill gas, municipal solid waste, wave motion, tides, and geothermal power, and does not include energy derived from coal, oil, natural gas, or nuclear power. Renewable energy shall also include the proportion of the thermal or electric energy from a facility that results from the co-firing of biomass.

The Commission finds no ambiguity in the phrase "derived from … falling water." Under this definition, energy generated from a pumped storage hydroelectric facility is "renewable energy," because it is derived from water that falls from a higher point to a lower point.[11] The Commission further finds that this plain meaning does not create inconsistency or disharmony with other portions of the statute. The General Assembly has expressly demonstrated – at least twice – that it knows how to exclude pumped storage from this plain language definition when that is the legislative intent.

First, for purposes of a utility's renewable portfolio standard program, renewable energy "shall have the same meaning ascribed to it in [Code] § 56-576," except that renewable energy therein "*shall not include electricity generated from pumped storage*,

[11] *See, e.g.,* CNE's Reply at 11-13.

but shall include run-of-river generation from a combined pumped-storage and run-of-river facility."[12] Second, when the General Assembly passed the VCEA during the 2020 Session, it modified the definition of renewable energy in Code § 56-576 and expressly added a sentence to exclude pumped storage therefrom: "'Renewable energy' *does not include ... electricity generated from pumped storage*, but includes run-of-river generation from a combined pumped-storage and run-of-river facility."[13] Both of these examples illustrate that the General Assembly knows how to exclude pumped storage from "falling water" – and from the definition of renewable energy – when it so chooses.[14] Thus, the current definition of "renewable energy" in Code § 56-576 includes energy derived from a pumped storage hydroelectric facility.

Next, the parties agree that the definitional change in the VCEA noted above becomes effective July 1, 2020. That is, effective July 1, 2020: (1) pumped storage is excluded from the definition of "renewable energy" in Code § 56-576; and, as a result (2) individual retail customers are not permitted to purchase from licensed suppliers

[12] Code § 56-585.2 A (emphasis added). Moreover, the different meaning of "renewable energy" for purposes of Code §§ 56-577 A 5 and 56-585.2 A does not represent inconsistency or disharmony but, rather, simply reflects different requirements imposed by the General Assembly for different purposes under Chapter 23. *See, e.g., Virginia Elec. & Power Co. v. State Corp. Comm'n*, 295 Va. 256, 266 (2018) (explaining that differences between Code §§ 56-577 A 3 and A 5 do not create an inconsistency but, rather, "simply reflect[] different requirements imposed by the General Assembly for different competitive purchase options explicitly permitted by statute.") (internal quotation marks omitted).

[13] Emphasis added. *See* 2020 Va. Acts ch. 1193 and ch. 1194, Enactment Cl. 1.

[14] *See also Zinone v. Lee's Crossing Homeowners Ass'n,* 282 Va. 330, 337 (2011) ("Moreover, when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.") (citations omitted).

electricity derived from pumped storage under the renewable energy provisions of Code § 56-577 A 5.

In this regard, and in accordance with the law of the Commonwealth as set forth by the Supreme Court of Virginia, this Commission will not apply a statute retroactively absent an express intent manifesting otherwise. Specifically, as directed by the Court:

> Virginia law does not favor retroactive application of statutes. *Windmill Meadows,* 287 Va. at 180, 752 S.E.2d at 843 (collecting cases). For this reason, we interpret statutes to apply prospectively "unless a contrary legislative intent is manifest." *Id.* (citation and internal quotation marks omitted). "[N]ew legislation will ordinarily not be construed to interfere with existing contracts, rights of action, suits, or vested property rights...." *Harbour Gate Owners' Ass'n v. Berg,* 232 Va. 98, 103, 348 S.E.2d 252, 255 (1986); *see also Gloucester Realty Corp. v. Guthrie,* 182 Va. 869, 875, 30 S.E.2d 686, 688–89 (1944) ("The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared."). Absent an express manifestation of intent by the legislature, this Court will not infer the intent that a statute is to be applied retroactively. *See Ferguson v. Ferguson,* 169 Va. 77, 87, 192 S.E. 774, 777 (1937) ("It is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention.").[15]

Thus, the Commission will not apply the revised definition of "renewable energy" in Code § 56-576 – which becomes effective on July 1, 2020 – to CNE's retail generation contracts executed in 2019 to supply electric energy provided 100 percent from renewable energy under Code § 56-577 A 5.[16]

---

[15] *Bailey v. Spangler*, 289 Va. 353, 358-59 (2015).

[16] As a result of the Commission's decision herein, we need not rule on CNE's assertion that Collegiate lacks standing in this matter.

Accordingly, it is so ORDERED, the Petition is GRANTED, and this case is DISMISSED.

A COPY hereof shall be sent electronically by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the Commission.