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July 26, 2021

BY ELECTRONIC FILING

The Honorable Bernard J. Logan, Clerk
State Corporation Commission
Document Control Center
1300 East Main Street, First Floor
Richmond, Virginia 23219

Re: Petition of Appalachian Power Company for approval of a rate adjustment clause, the E-RAC, for costs to comply with state and federal environmental regulations pursuant to § 56-585.1 A 5 e of the Code of Virginia
Case No. PUR-2020-00258

Dear Mr. Logan,

Enclosed for filing in the above-referenced case is Appalachian Power Company's Comments to the July 8, 2021 Report of A. Ann Berkebile, Senior Hearing Examiner.

Sincerely,

WOODS ROGERS PLC

Charles J. Dickenson

CJD:

Enclosure
cc. Frederick D. Ochsenhirt, Esq.
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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

PETITION OF

APPALACHIAN POWER COMPANY

for approval of a rate adjustment clause, the E-RAC, for costs to comply with state and federal environmental regulations pursuant to §§ 56-585.1 A 5 e of the Code of Virginia

Case No. PUR-2020-00258

APPALACHIAN POWER COMPANY'S COMMENTS TO THE HEARING EXAMINER'S REPORT

Pursuant to Rule 120 C of the Rules of Practice and Procedure of the State Corporation Commission ("Commission"), Appalachian Power Company ("APCo" or the "Company") submits its comments to the Hearing Examiner's Report dated July 8, 2021.

I. BACKGROUND

On December 23, 2021, pursuant to Va. Code § 56-585.1 A 5 (e) (the "E-RAC statute"), APCo filed a petition (the "Petition"), along with supporting direct testimony and exhibits, for approval of operations and maintenance ("O&M") costs associated with fly-ash management and costs necessary to comply with two federal environmental rules and regulations, the Coal Combustion Residual ("CCR") and Effluent Limitation Guidelines ("ELG") Rules, that are applicable to APCo's Amos and Mountaineer coal-fired generation units ("Amos" and "Mountaineer" or the "Plants"). The estimated total company cost of completing both the CCR and ELG investments amount to $250 million.[1] The total company cost of CCR only compliance

[1] Exhibit 6 at 9.

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at both Plants is $125 million,[2] which means that the incremental total company cost of CCR and ELG compliance is approximately $125 million. The Virginia jurisdictional share of ELG incremental compliance costs at both Plants therefore amounts to approximately $60 million, based upon the 47% jurisdictional allocator used by Company witness Sebastian in this case.[3] Completing all aspects of the projects to comply with the CCR and ELG Rules would also allow the Plants to operate past 2028, while just completing the CCR work would only allow the Plants to operate until 2028.

Notices of participation were filed by the Office of Attorney General, Division of Consumer Counsel, Sierra Club, Old Dominion Committee for Fair Utility Rates, and Steel Dynamics. After the submission of direct testimony by Sierra Club, Office of Attorney General, Division of Consumer Counsel ("OAG"), and Commission Staff ("Staff"), APCo filed rebuttal testimony on May 21, 2021.

The hearing was held as scheduled on June 22-24, 2021 with appearances by APCo, Staff, OAG, and Sierra Club.

The report of Hearing Examiner Ann Berkebile was filed on July 8, 2021 (the "Report"). In the Report, the Hearing Examiner recommended approval of the Company's request for $26.1 million in O&M compliance expenses related to the handling and disposal of fly-ash, bottom ash and FGD by-product at the Plants, which the Company has incurred to comply with current requirements of the CCR Rule, and Virginia's jurisdictional share of estimated costs to comply with the new requirements CCR Rule. The Hearing Examiner also recommended that, at this time, the Commission "withhold" approval of the ELG investments until the Company presents a

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[2] *Id.* at 11.

[3] Exhibit 11, Schedule 46, Section 3, Statement 2.

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new economic analysis that contains a more detailed examination of the effects of the Virginia Clean Economy Act ("VCEA") on the Company's conclusions, quantification of the estimated stranded costs and transmission grid upgrades necessitated by a 2028 retirement of the Plants, and effect of an accelerated depreciation schedule for the Plants caused by the early retirement. The Hearing Examiner's recommendation was seemingly supported, in part, by an erroneous belief that the Company has until 2025 to decide whether to comply with the ELG Rule and thus has time to re-submit an entirely new Petition in its next E-RAC proceeding with an analysis that incorporates the Hearing Examiner's recommended inputs, among other things.

The Hearing Examiner provided an opportunity for the parties to comment on the Report on or before July 26, 2021. Accordingly, APCo hereby files its comments. Although the Company supports the Hearing Examiner's recommendation regarding O&M expenses, the following comments demonstrate the weaknesses and inaccuracies of the underpinnings of the Report with respect to its CCR/ELG recommendation.

II. COMMENTS

As more fully explained below, if the Commission chooses to adopt the recommendations in the Report and deny the Company's immediate recovery of costs related to the ELG investments, the Company will find itself in a precarious situation, especially if the Public Service Commission of West Virginia reaches a different conclusion. Such Commission action could lead the Company to make a decision to retire Amos and Mountaineer in 2028 and, as a result, to replace the 4,250 megawatts ("MW") of generating capacity,[4] and consequently make extensive upgrades to its transmission grid, in less than seven years. Virginia ratepayers will bear the costs of this unprecedented capacity overhaul along with an accelerated recovery of

[4] Exhibit 6 at 2-3. The Virginia jurisdictional share of this capacity is approximately 2,000 MW.

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the undepreciated balances[5] associated with Amos and Mountaineer due to a 2028 retirement date.[6]

The Hearing Examiner discussed at the length varying factors that affect the reasonableness of the ELG investments, but the Report contains no analysis of the effects of the recommendation, if adopted by the Commission, on Virginia ratepayers. That is, the Hearing Examiner fails to consider or even discuss the reasonableness and prudence of a 2028 retirement date for Amos and Mountaineer. Simply put, no party to this proceeding has presented a realistic plan for the Company to replace the 4,250 MW of capacity that would ensue from retirement of the Plants without leading to drastic increases in customer rates. Of the six non-Company witnesses in this case, only one presented an alternative economic analysis (Sierra Club witness Rachel Wilson), and after APCo established that her analysis contained numerous shortcomings and unrealistic assumptions,[7] Sierra Club and Ms. Wilson have downplayed the significance of Ms. Wilson's analysis by merely deeming it an "option."[8] The inability of any party to present a credible alternative analysis of a 2028 retirement date for the Plants only illuminates the reasonableness of the Company's proposed ELG investments at Amos and Mountaineer. If the Commission is inclined to scrutinize the ELG investments at the same level as the Hearing

[5] The undepreciated balances refer to the stranded costs and undepreciated balances of Amos and Mountaineer referenced in the Record and in the Report.

[6] Tr. 137-138.

[7] Exhibit 19 at 9-10 (noting that, among many other things, Sierra Club witness Wilson unreasonably assumes "[t]hat APCo can have 15,000-16,000 MW of total nameplate capacity (3 times projected peak load) by 2040 including new resources, which will cost $12-14 billion, without massive rate increases that would make that plan untenable," and that "that both the capital cost and Fixed O&M cost on storage will cost 45% less in 2028 than they did in 2018 in real dollar terms.").

[8] Tr. 285; *see also* Tr. at 142-143, cross examination of Rachel Wilson ("So I will first just reiterate that I'm not necessarily recommending that this is the path that APCo follow.").

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Examiner (which it should not), it must also scrutinize the consequences of a 2028 retirement (or sooner) of Amos and Mountaineer for Virginia ratepayers.

The impracticality of the schedule and procedure suggested in the Report, and the likelihood of increased cost of service to Virginia ratepayers that would occur if the Commission approved the Hearing Examiner's recommendations guides that the Commission should approve the ELG investments and reject the Hearing Examiner's Report.

1. The Report Misstates the Actual Time By Which the Company Must Make a Decision on the ELG Investments and Come into Compliance.

At the outset, the Report recommends that the Commission should "withhold its approval of the ELG investment" at Amos and Mountaineer based on an apparent (and incorrect) belief that APCo has until 2025 "to formulate and present a more comprehensive analysis supporting its request with its next E-RAC petition."[9] But, as Company witness Spitznogle testified, in order for the Company to forego the ELG investments but keep Amos and Mountaineer in operation until 2028, the Company must give notice to the state permitting agency of a decision to retire Amos and Mountaineer by October 13, 2021 (*i.e.* in less than three months).[10] If the Company does not give timely notice but later decides that the Plants should be retired (due to Commission Order or otherwise), the Company would have to retire Amos and Mountaineer by December 31, 2025.[11] This would leave less than four years for the Company to replace 4,250 MW of capacity. The Report assumes that APCo has time to conduct additional analyses, wait for further guidance on a carbon tax, and then decide whether to pursue the ELG projects. The record clearly reflects this is not the case. Thus, the Report's recommendation of deferred

[9] Report at 52.

[10] Exhibit 5 at 9-10.

[11] *Id.* at 7.

consideration of the ELG investments until a subsequent E-RAC filing has the same effect of the Commission issuing a final order that Amos and Mountaineer be retired in 2028.

Even ignoring the October 13, 2021 deadline, the intervenors and Hearing Examiner appear to conflate the "as soon as possible but no later than December 31, 2025" language of the ELG Rule as simply meaning "December 31, 2025."[12] But "as soon as possible" is defined in 40 CFR 423.11(t) as follows:[13]

> The phrase "as soon as possible" means November 1, 2018 (except for purposes of § 423.13(g)(1)(i) and (k)(1)(i), in which case it means October 13, 2021), unless the permitting authority establishes a later date, after receiving site-relevant information from the discharger . . . .

Furthermore, the preamble to the ELG Rule explains that, "[w]hile EPA is postponing the 'no later than' dates in this final rule, where plants can comply with these final limitations sooner, NPDES permitting authorities are already required to incorporate those earlier permit dates, as specified in 423.11(t)."[14] Finally, the ELG Rule carries the presumption that companies should be able to comply by October 13, 2021, and only if they can sufficiently justify the need for an extension would they be given an alternative to the "as soon as possible" date for compliance:

> The "as soon as possible" date determined by the permitting authority may or may not be different for each wastestream. The NPDES permitting authority should provide a well-documented justification of how it determined the "as soon as possible" date in the fact

[12] Report at 47 ("[G]iven that the EPA's deadline for ELG Rule compliance is not until 2025 . . . .").

[13] Although the entire ELG Rule was not submitted as evidence in the record, multiple references were made to the "as soon as possible language" in the ELG Rule throughout the proceeding, (*see* Tr. 51, 68-69, 72), and as a publicly available document, the entire ELG Rule is entitled to judicial notice. *Taylor v. Commonwealth*, 28 Va. App. 1, 7–8 (1998) ("A trial court may take judicial notice of those facts that are either (1) so "generally known" within the jurisdiction or (2) so "easily ascertainable" by reference to reliable sources that reasonably informed people in the community would not regard them as reasonably subject to dispute.").

[14] Effluent Limitation Guidelines, Steam Electric Reconsideration Rule, 85 FR 64650, 64684 (Oct. 13, 2020)(emphasis added).

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sheet or administrative record for the permit. If the permitting authority determines a date later than October 13, 2021, the justification would explain why allowing additional time to meet the final limitations is appropriate, and why the discharger cannot meet the effluent limitations as of October 13, 2021. . . .[15]

The result of these directives means that the Company only has the ability to complete the ELG projects beyond October 13, 2021 if the NPDES permitting authorities permit an extension, and that extension would contain a date certain—not just "before December 31, 2025."[16] Indeed, the West Virginia Department of Environmental Protection ("WVDEP") recently issued a final NPDES permit for Amos[17] and has proposed a NPDES permit for Mountaineer.[18][19] Both of those permits include the "as soon as possible" guidance from the ELG Rule *and* require completion of the ELG projects by December 2022—the estimated completion time provided in the project schedules submitted by Company witness Sherrick in this proceeding.[20] Accordingly, the Hearing Examiner's conclusion that APCo has until 2025 to come into compliance with the ELG Rule is simply incorrect.[21] Assuming the Company were to pursue the ELG investments and keep the Plants operational beyond 2028, EPA's deadline for ELG Rule

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[15] 85 Fed. Reg. 64707 (emphasis added).

[16] The West Virginia DEP recently approved the Company's application to pursue to the ELG investments at the Amos Plant. While the Company has appealed a narrow portion of the approving order, that appeal will have no impact on the project schedule and the Company is prepared to begin pursuing the investments if and when the Commission approves them. Accordingly, the Hearing Examiner's suspicion that the appeal would have some impact on the ELG investments is entirely unfounded. *See* Hearing Examiner Report at 52, n.478.

[17] https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OWR/OWR_Permit_details.cfm?permit_id=WV0001074&dep_office_id=OWR&responsible_party_name=AEP%20APPALACHIAN%20POWER

[18] https://apps.dep.wv.gov/MLists2/Archive/index.cfm?ListID=1&MessageID=31147&Type=text&Button=View

[19] The Amos permit and Mountaineer draft permit notice are publicly available records subject to judicial notice. See *Taylor*, 28 Va. App. at 7–8.

[20] Exhibit 6 at Schedule 46, Section 2 Statement 2.

[21] Report at 52.

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compliance is not 2025. It is "as soon as possible," which means October 13, 2021, or as soon as possible thereafter. And while that cannot be later than December 2025 per the ELG Rule, the permits issued by the WVDEP establish that "as soon as possible" means December 2022.

The Report assumes that the ELG investments would not be burdened by withdrawing the permit applications and project schedules that have already been submitted and approved by the WVDEP, solely because of the "December 31, 2025" language cherry-picked from the ELG Rule. But as Company witness Sherrick testified, delays to engineering, permitting, procurement, and material delivery could lead to compliance schedule and cost impacts.[22] A more comprehensive reading of the statute and the "as soon as possible" language of the ELG Rule, along with the actual language of the NPDES permits currently approved for the ELG project, confirms that APCo's withdrawal of the existing NPDES permits and submission of a brand new schedule would likely jeopardize the ELG projects. The Report's recommendation to delay approval of the ELG projects is fundamentally flawed and be rejected.

2. **The Mandatory Language of the E-RAC Statute Supersedes the General Guidance of 56.585.1 D.**

Under the E-RAC Statute,

> 5. A utility may at any time, after the expiration or termination of capped rates, but not more than once in any 12-month period, petition the Commission for approval of one or more rate adjustment clauses for the timely and current recovery from customers of the following costs:
>
> e. Projected and actual costs of projects that the Commission finds to be necessary . . . to comply with state or federal environmental laws or regulations applicable to generation facilities used to serve the utility's native load obligations, including the costs of allowances purchased through a market-based trading program for carbon dioxide emissions. **The Commission shall approve such a petition if it finds that such costs are necessary to comply with such environmental laws or regulations.** (emphasis added).

[22] Tr. at 73-75.

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All parties agreed, and the Hearing Examiner found, that the investments in this Petition are necessary to comply with the CCR and ELG Rules applicable to Amos and Mountaineer. Nonetheless, the Hearing Examiner refused to follow the unambiguous, mandatory language of the E-RAC statute and recommended denial of the ELG costs (at least at this time), relying entirely on the language of 56-585.1 D, which states:

> D. The Commission may determine, during any proceeding authorized or required by this section, the reasonableness or prudence of any cost incurred or projected to be incurred, by a utility in connection with the subject of the proceeding. . . . In determining the reasonableness or prudence of a utility providing energy and capacity to its customers from renewable energy resources, the Commission . . . shall also consider whether the costs of such resources is likely to result in unreasonable increases in rates paid by customers.

The Hearing Examiner's decision to elevate the general "reasonable and prudent language of subsection D over the specific, mandatory guidance of the E-RAC statute runs contrary to well-accepted principles of statutory interpretation.

When a statute is unambiguous, the Commission "may not interpret statutory language in a way that effectively holds that the General Assembly did not mean what it actually expressed."[23] When read in whole, the E-RAC statute places an affirmative obligation on the Commission to approve any costs that are necessary to comply with state and federal regulations.[24] Reading the E-RAC statute as giving the Commission discretion to deny necessary environmental investments would inevitably result in an interpretation that runs directly contrary to the words used by the General Assembly.

[23] *Chesapeake Bay Found., Inc. v. Commonwealth ex rel. Virginia State Water Control Bd.*, 90 Va. Cir. 392 (2015) (citing *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 439 (2005)).

[24] *Dwyer v. Town of Culpeper*, 297 Va. 204, 205 (2019) ("Read in context, the language of the statute manifests an intent that the word "shall" is mandatory."); *Appalachian Power Company v. State Corporation Commission*, 284 Va. 695 (2012) (rejecting Commission's decision to include conditional language in previous E-RAC statute that contained the word "shall").

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Notably, the Virginia Supreme Court has rejected an interpretation of the E-RAC statute analogous to that proposed by the Hearing Examiner. In APCo's 2011 E-RAC proceeding, the Court reversed a Commission Final Order that attempted to add a requirement into the E-RAC statute that would have prevented the Company from recovering costs in a rate-adjustment clause when it could have recovered the same costs through base rates.[25] In rejecting the Commission's decision, the Court explained that the "Commission's methodology not only contradicts the intent of the legislature reflected in the statute, it effectively adds a fourth condition to the statute."[26] Furthermore, the Virginia Supreme Court stressed the mandatory language of the E-RAC statute: "[p]roviding a utility with the opportunity to recover environmental compliance costs is inconsistent with the statutory mandate providing for the timely and current actual recovery of such costs which, in this case, means such costs will never be recovered."[27] So too here.

Furthermore, the Commission cannot use the discretionary "reasonable and prudent" catch-all of 56-585.1 D[28] to trump the mandatory language of the E-RAC statute that is specifically applicable to this proceeding. "A cardinal rule of statutory interpretation is that '[w]hen one statute addresses a subject in a general manner and another addresses a part of the same subject in a more specific manner, the two statutes should be harmonized, if possible, and when they conflict, the more specific statute prevails.'"[29] The Hearing Examiner's interpretation

[25] *Appalachian Power Company v. State Corporation Commission*, 284 Va. 695, 706-07 (2012).

[26] *Id.*

[27] *Id.* at 707.

[28] Importantly, Subsection 56-585.1 D only states that the Commission "may" determine the "reasonableness and prudence" of costs incurred or projected to be incurred. There is no mandatory language in that subsection that requires use of the reasonable and prudent standard in every proceeding under 56-585.1.

[29] *Lynchburg Div. of Soc. Servs. v. Cook*, 276 Va. 465, 481 (2008).

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of the two statutes creates a conflict. The E-RAC statute unambiguously provides for mandatory approval of all costs that are necessary to comply with federal and state environmental regulations applicable to generating facilities, yet the Hearing Examiner extrapolated a "reasonable and prudent" limitation on the E-RAC statute via 56-585.1 D.[30] Given that the E-RAC statute contains specific guidance over the purpose of this proceeding, and 56-585.1 D generally applies to electric rate proceedings, the Commission should defer to the specific language of the E-RAC statute and apply its mandatory guidance to this proceeding.

3. The ELG Investments are a Reasonable and Prudent Investment that Will Prevent Avoidable Increases in Costs to Virginia Ratepayers.

a. Amos and Mountaineer are "used and useful" to Virginia Ratepayers.

The Report relies on an onerous burden of reasonableness that is irreconcilable with Commission precedent. In the *2018 Dominion Rider E* proceeding, the Commission approved the recovery of similar environmental costs of retrofitting coal units at the Chesterfield station (Units 5 and 6) because the units "provide a reasonable benefit to customers by remaining available for service when needed."[31] This was decided over objections as to the changing role of the units in that company's generation fleet.[32] In so doing, the Commission refused to condition approval or denial of environmental investments for the units despite numerous objections to "shortcomings" of Dominion's economic analysis.[33] The Commission did not

[30] The Company understands that a similar argument was raised by Dominion in the 2018 Dominion Rider E Proceeding. However, it is not clear that the Commission directly addressed whether the word "shall" in the E-RAC statute creates a mandatory directive.

[31] Final Order at 9-10, *Petition of Virginia Electric and Power Company, For approval of a rate adjustment clause, designated Rider E, for the recovery of costs incurred to comply with state and federal environmental regulations pursuant to § 56-585.1 A 5 e of the Code of Virginia,* ("2018 Dominion Rider E"), Case No. PUR-2018-00195 (Aug. 5, 2019).

[32] *Id.*

[33] June 11, 2019 Hearing Transcript, at 130-36, 2018 Dominion Rider E, PUR-2018-00195.

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investigate whether Dominion had considered every possible option and instead deemed the investments reasonable and prudent solely because the plants were "used and useful" for ratepayers.[34]

The same is true of Amos and Mountaineer. The Plants are currently used and useful for Virginia ratepayers, who will continue to enjoy both their capacity value, and reliable energy from these units when called upon. Most significantly for the bills of APCo's customers, these units provide the vast majority of the Company's PJM capacity requirements, and APCo's physical ownership of the units acts as a hedge against price fluctuations.[35]

The Hearing Examiner's "reasonable and prudent" inquiry is irreconcilable with the 2019 Dominion Rider E Final Order and imposes unreasonable burdens on the Company. For example, according to the Report, a "reasonable and prudent" economic analysis would have incorporated the recommendations of a 2021 VCEA IRP Order that was not issued until the week before the hearing in this case, seven months after the Company filed its application, and eight months after the Company conducted the economic analysis supporting the Petition. This standard is impossible to meet: if imposed, the Company would be left in a constant state of flux, constantly guessing how to create a reasonable and prudent analysis with each new day, administration, regulation, statute, or market condition.

b. The Record Confirms the ELG Investments Will Delay Billions in Replacement Capacity and Facilitate the Company's Responsible Transition to Renewable Energy.

Even though the Company established that an expenditure of $60 million to comply with the ELG Rule would delay approximately $1.5 billion of investments to replace the lost capacity

[34] Final Order at 10, 2018 Dominion Rider E, PUR-2018-00195 (Aug. 5, 2019).

[35] Exhibit 9 at 19.

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of Amos and Mountaineer,[36] the Hearing Examiner rejected the ELG investments and found that the Company's cost comparison did not consider additional costs of labor and upkeep to keep the Plants running.[37] These grounds for disallowance are tenuous, because analogous day-to-day running costs would also apply to generating units the Company would acquire to replace Amos and Mountaineer. Furthermore, the Hearing Examiner all but ignores the obvious benefits of extending the lifespan of the Plants to keep customer costs down as the Company begins to replace its generating fleet with renewable resources. No party disputes that the Company will have to acquire replacement capacity for the Plants at some point in the future. What is also indisputable is that making the $60 million ELG investment would give the Company significantly more lead time to seek out and find that replacement capacity in a deliberate and responsible manner.

These investments make economic sense regardless of which retirement date beyond 2028 the Commission chooses to consider. The Company provided economic analyses that contemplate (a) a 2040 retirement date for Amos and Mountaineer[38] or (b) a 2032/33 retirement date for Amos and a 2040 retirement date for Mountaineer.[39] Both analyses confirm the ELG investments are the least-cost alternative for customers versus retirement of both Plants in 2028. Notably, OAG moved to compel APCo to re-run the PLEXOS model with 2032/33 retirement dates for Amos and pleaded the "critical" importance of that analysis, but failed to reference or

[36] Tr. at 215-16.

[37] Hearing Examiner Report at 51.

[38] Exhibit 9, Schedule 46, Section 2, Statement 1.

[39] Exhibit 19, JFM Rebuttal Schedule 2 – OAG 1-6 Supplemental Analysis.

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mention the results of the supplemental analysis in pre-filed testimony or during the evidentiary hearing.[40]

c. There is Significant Overlap in the Necessary Scope of Work to Comply with CCR and ELG Rule.

The Company's project cost estimates assumed an ability to simultaneously come into compliance with the CCR *and* ELG Rule. For instance, Company witness Spitznogle's direct testimony references the EPA CCR extension request filing for Amos.[41] In that extension application, "Table 3: Alternatives for Disposal Capacity"[42] demonstrates that "Conversion to Dry Handling" is the selected approach because it furthers compliance with both the CCR and ELG Rules and therefore achieves compliance in a shorter period of time.[43] Furthermore, the Company achieves significant efficiencies by pursuing the ELG and CCR Rules in the same project schedule. This includes shared resources, permitting, infrastructure, and labor contracts. If the Commission follows the Hearing Examiner's recommendation and withholds the ELG investments, and assuming the Company attempted to come into ELG compliance, APCo would be forced to file a separate project schedule for the ELG investments, which would increase the costs of compliance far beyond the current project estimates.

d. The Hearing Examiner's Report Imposes Unreasonable Critiques on Witness Martin's Economic Analyses.

The Hearing Examiner gives four reasons to discount Company witness Martin's testimony: (1) the analysis uses an estimated retirement date of 2040 for Amos as opposed to the 2032/33 estimated retirement dates used in the Company's most recent depreciation study, (2)

[40] *Office of the Attorney General, Division of Consumer Counsel, Motion to Compel* at 7-8 (March 10, 2021).

[41] Exhibit 5 at 6 n.1, 2.

[42] *Id.* at n.1 (the relevant language is on page 6 of the application).

[43] *Id.* (the relevant language is on page 9 of the application).

the Hearing Examiner claims, without any specific anecdotes, that the replacement capacity metrics "may have been inflated," (3) the analysis did not "fully consider the requirements" of the VCEA, and (4) the savings gained from the investments are apparently insufficient on a percentage basis and "unclear."

First and foremost, there is nothing "unclear" about the savings customers would expect from APCo pursuing the investments. As Mr. Martin confirms, customers would expect to see savings anywhere from $176 to $622 million of net present value ("NPV") by pursuing both the ELG and CCR investments.[44] These savings should be considered in comparison to the costs of the investments themselves ($250 million) and not based on the percentage of a thirty-year undiscounted cost of service ($49 billion).[45] While the intervenors and the Hearing Examiner are free to discount these savings as a percentage, there is nothing inconsequential about up to $622 million in savings on customers' power bills.

Furthermore, the Commission need not scrutinize the appropriate retirement date to apply when analyzing the benefits of the Amos ELG investments. As shown by Company witness Martin, use of either a 2040 or 2032/33 retirement date still results in savings to customers.[46] As to the Company "inflating" replacement capacity costs, Sierra Club questioned the figures used in Mr. Martin's analysis to establish the estimated cost of replacement capacity. Yet a similar charge could be said of Sierra Club's own analysis, which remarkably asserts that a more "reasonable" path would be acquiring an amount of solar MW capacity equivalent to 66 square miles of solar installations in seven years to replace the capacity lost by Amos and

[44] Exhibit 19 at 7.

[45] Exhibit 19 at 5.

[46] Exhibit 19 at 8; Tr. at 219-220.

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Mountaineer.[47] The Company understands that the Hearing Examiner placed the burden of "reasonableness" on the Company and not intervenors, but leaving the Company with no legitimate plan to replace 4,250 MW of capacity, while at the same time pursuing transmission investments necessary to accommodate the replacement capacity in seven years, calls into question what is effectively a recommended 2028 retirement for Amos and Mountaineer and further supports the Company's proposed course of action.

Finally, contrary to the Report, Company witness Martin did consider the effects of the VCEA on the Company's economic analysis.[48] As clarified by Mr. Martin in rebuttal and at the hearing, both economic analyses contemplate use of renewable capacity. Moreover, additional analysis conducted for Mr. Martin's rebuttal testimony shows the difference between the renewable resources applied in Mr. Martin's analysis and those required under the VCEA by 2028 amounts to 100 MW—a small fraction of the Company's overall capacity requirements.[49] Nevertheless, the Report sidesteps all of Mr. Martin's testimony regarding the VCEA and asserts that a proper analysis of the VCEA would have modeled the requirements from the 2021 APCo IRP Modeling Order.[50] But that Order did not exist when Mr. Martin performed his initial economic analysis and rebuttal economic analysis that contemplates a 2032/33 retirement date for Amos.[51]

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[47] Tr. at 143.

[48] Exhibit 19 at 2-5; Exhibit 19, JFM Rebuttal Schedule 2 – OAG 1-6 Supplemental Analysis; Tr. at 220-228.

[49] Exhibit 19 at 4-5; *see also* Tr. at 220-221; 227-28 ("I will say that, in some of our cases, we had the exact same total megawatts of solar in these cases, 3,400 megawatts, as we had in the VCEA filing, 3,400 megawatts. So it isn't as if we didn't add renewables at all. We added lots of renewables in these cases. It's just we didn't exactly match what was in the VCEA filing.").

[50] Hearing Examiner Report at 48.

[51] Indeed, Sierra Club witness Wilson's economic analysis also failed to consider or even reference the effects of the VCEA, and no party requested that APCo conduct any additional analysis of the effects of the VCEA on its economic analyses during discovery.

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Given the stringent timing requirements of the ELG Rules, and the requirements to be in compliance with its governing regulations, the Company does not have the luxury of time to conduct additional analyses while awaiting clarity on vague factors like the exact amount of a carbon tax allegedly to be imposed by the EPA.[52] The Company has established that its proposed course of action will save ratepayers hundreds of millions of dollars, provide certainty to the Company's capacity obligations, and will allow the Company to transition to renewable energy in a measured and responsible way.

4. APCo's Previously-Incurred ELG Compliance Costs Were Reasonable and Necessary to Comply with the ELG Rules.

In addition to recommending that the Commission withhold, for now, recovery of the estimated costs of future ELG investments, the Hearing Examiner recommends that the Commission should withhold approval of the previously-incurred ELG expenses until a subsequent E-RAC filing. In so doing, the Hearing Examiner held hostage approximately $18 million of expenses APCo incurred to conduct feasibility studies, project planning, and preliminary engineering in order to meet environmental agency mandates that require compliance "as soon as possible." And like the forecasted ELG compliance costs, these already-incurred expenses were devoted to generating units that are still "used and useful" and provide benefits to APCo customers. Accordingly, the Commission should reject the Hearing Examiner's recommendations and adopt the Company's request to include these costs in the Company's revenue requirement.

[52] All parties conceded at the hearing that, while a carbon tax may be "coming," the exact time and amount of that tax is entirely subject to conjecture. And in any event, the Company established that Amos and Mountaineer are projected to run at very low capacity factors (*i.e.* load) and not always be operational, thus minimizing the frequency or amount of a "tax" while the Plants are operating. *See* Tr. at 216-218.

As explained by Company witness Spitznogle, the initial ELG and CCR rules were published in 2015, but the final rules were not issued until the second half of 2020.[53] Under the CCR Rule, absent an extension, bottom ash ponds like the ones at Amos and Mountaineer would need to initiate closure by April 11, 2021. Under the ELG Rule, APCo is required to give notice to the WVDEP by October 13, 2021 if it chooses to retire the units and forego the ELG investments.[54] Because of this "as soon as possible" schedule, and the interconnected nature of the two projects,[55] the Company's engineering team worked closely with the environmental team to determine if a compliance plan was economically feasible and if so, the quickest path to compliance.[56] At the same time, the Company had to submit extension requests, applications, and project schedules with the EPA for approval.[57] Given the obligations and timing constraints imposed by the ELG and CCR Rules, the Company had no opportunity to wait for this Commission's approval because a lag time would inevitably result in cancellation of the project and an early retirement of the Plants due to the deadlines imposed by the ELG Rule.

As further testified by Company witness Brian Sherrick, the CCR and ELG Rules are comprehensive and require careful analysis and planning to ensure APCo can maintain compliance while supplying low cost power to customers.[58] APCo took prudent steps to analyze

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[53] Exhibit 5 at 5.

[54] *Id.*

[55] The Company achieves significant efficiencies by pursuing the ELG and CCR Rules in the same project schedule. For instance, Company's NPDES application and its CCR extension request both contain a plan to convert the wet bottom ash system to a dry handling system, close the BAP Complex by CCR material removal, and construct new wastewater ponds within the BAP footprint to manage non-CCR waste-waters. This alternative compliance strategy was decided, in part, because it furthers compliance with both the CCR and ELG rules at Amos. *See* Exhibit 5 at 6 n.1. The relevant compliance strategy is discussed on pages 6-9 of the CCR extension application.

[56] *Id.* at 6.

[57] *Id.* at 9.

[58] Exhibit 6 at 5-10.

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the ELG and CCR rules as they were being finalized including: evaluating the feasibility and high level cost estimates of different technology options to comply with the rules and continue coal fired operations, preliminary engineering to further define the project and integrate the systems with each other and the power plant operations and controls system.[59] All of these steps were necessary to inform the cost estimates, required to support the detailed economic analysis for this case, and to complete the permitting process. Additionally, the regulatory and permitting activities are approximately 6 month activities, with an additional 2-3 months for preparation and filing, thus requiring that APCo start the projects as early as it did.[60]

Simply put, the Company could not have filed the Petition with a legitimate understanding of the estimated costs or project schedule without first completing the planning and feasibility phases of the project. Denying these costs would set a standard where a utility has no ability to conduct feasibility analyses or any price estimate of infrastructure projects prior to seeking approval from the Commission. Such a result would be absurd, as the utility would never be able to present a fair and educated analysis of what its projects would cost or even entail. The Hearing Examiner appears to recognize this issue in granting the previously incurred CCR costs, but that decision cannot be rationalized with her recommendation to withhold approval of the comparable ELG costs.

5. The Report Misstates Elements of the Depreciation Testimony Presented by Company Witness Ross.

[59] *Id.*

[60] Exhibit 6, Schedule 46 Section 2 Statement 2. Although the Amos permit took approximately six months to obtain, the Company had to request a Stay of certain provisions that are still pending with the WVDEP. The same challenge is also presented with the draft Mountaineer permit.

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Additionally, the Report misstates the depreciation testimony presented by Company witness Ross. The Report claims that "Mr. Ross testified that the Company proposed a 9.25% annual depreciation rate for CCR and ELG investments at the Amos Plant and a 5.71% annual depreciation rate for the CCR and ELG investments at the Mountaineer Plant." However, witness Ross actually proposed a 9.52% depreciation rate for CCR/ELG investments at Amos. Additionally, the Report mischaracterizes Mr. Ross' testimony, stating:

> [Witness Ross] explained that such depreciation rates were approved by the Commission in the APCo 2020 Triennial Review Order using 2032 and 2033 retirement dates for units 1-3 at the Amos Plant and a 2040 retirement date for the Mountaineer Plant.

Company witness Ross did not testify that his depreciation schedule has been approved by the Commission, but rather explained that the 9.52% and 5.71% depreciation rates for CCR and ELG investments are based on the current estimated retirement dates approved by the Commission for depreciation of existing Amos and Mountaineer Plant generation assets.[61] If the Commission adopts APCo's position on the CCR/ELG investments, it should approve the depreciation rates recommended by Company witness Ross. If it adopts the Hearing Examiner's recommendations, it should authorize APCo to follow the accounting and deferral process outlined in Mr. Ross's rebuttal testimony.[62]

CONCLUSION

All parties agree that the Company must make a shift to renewable energy over the coming years. As it makes that shift, the Company will continue to meet its duty to customers to provide affordable and reliable capacity and energy during this transition. The ELG investments,

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[61] Exhibit 10 at 9-10.

[62] Exhibit 20 at 4-5.

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which will ensure APCo's coal-plant operations meet environmental regulations, allow the Company to achieve both of these obligations in a responsible manner.

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