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December 1, 2022

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c/o Document Control Center
State Corporation Commission
P.O. Box 2118
Richmond, Virginia 23218

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 Mr. Logan:

Please find attached for filing in the above-referenced matter, The Office of Attorney General, Division of Consumer Counsel's Comments to the Hearing Examiner's Report.

Thank you for your assistance in this matter.

Yours truly,

/s/ 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

THE OFFICE OF ATTORNEY GENERAL,
DIVISION OF CONSUMER COUNSEL'S
COMMENTS TO THE HEARING EXAMINER'S REPORT

Pursuant to the Hearing Examiner's Report issued on November 17, 2022, and Rule 120 B and C of the Commission's Rules of Practice and Procedure, the Office of Attorney General, Division of Consumer Counsel ("Consumer Counsel") submits the following Comments.

INTRODUCTION

The Hearing Examiner's Report starts by highlighting the impetus for the base rate increase that is now impacting customer bills: Appalachian Power Company's ("APCo") decision made in 2019 to charge \$88.3 million to account for power plant closures in 2015, "regardless of whether APCo's entry was reasonable."¹ In fact, as stated in Consumer Counsel's opening, this accounting entry has been determined by the Commission to be "factually unreasonable."² And Consumer Counsel's witness described this accounting maneuver to be "unconscionable" in the context of its effects on customers' cost-of-service.³

¹ Report at 1 n.1.

² Tr. 1287.

³ Ex. 70 (Smith Direct) at 26.

These facts notwithstanding, a majority of the Supreme Court of Virginia determined that the General Assembly, through the 2018 Grid Transformation and Security Act,⁴ intended to strip the Commission of its authority to review the reasonableness of a utility’s tactic such as this related to the early retirement of generating facilities. Consumer Counsel argued against such an interpretation of law. But as APCo prevailed in its legal arguments on appeal, Consumer Counsel concurs that: “the Court’s decision: (1) creates a \$37 million regulatory asset that customers must pay for; and (2) triggers a statutory requirement for a Commission decision on the going-forward rate case, where the evidentiary record supports increased base rates.”⁵

With this context, Consumer Counsel has no objection to eight of the nine findings stated in the Report.⁶ Similarly, Consumer Counsel has no objection to the corresponding recommendations stated in the Report. Specifically, Consumer Counsel disagrees with the finding that a “going-forward revenue requirement of \$28.4 million is reasonable and would provide an increase to APCo’s rates that is necessary to provide the opportunity for the Company to fully recover the costs of providing service and to earn not less than such fair combined rate of return[.]”⁷

Consistent with the Commission’s directive,⁸ Consumer Counsel has maintained its position on *ratemaking adjustments* to the going-forward cost-of-service that were explicitly not

⁴ 2018 Va. Acts ch. 296.

⁵ Report at 1.

⁶ Specifically, Consumer Counsel has no objection to Findings 1-3, and 5-9.

⁷ Report at 25.

⁸ Order Initiating Remand Proceedings at 1-2 (“On or before September 23, 2022, the participants that previously submitted an earnings test and going forward revenue requirement may each submit a revised earnings test and going forward revenue requirement for the Rate Year beginning January 1, 2021. Such shall be based on the established evidentiary record in this case and the participant’s stated positions in this proceeding on going-forward adjustments as of the date of the Order on Reconsideration These remand proceedings are limited to conducting a going-forward rate year review in accordance with the Court’s directive. Accordingly, no further information is to be filed on the earnings tests reviewed and ruled upon in the underlying proceedings and subsequent appeal, with the

addressed and disposed of by the Final Order or the Order on Reconsideration. Two of these issues relate to affiliate charges APCo incurs for power purchased from the Ohio Valley Electric Corporation (“OVEC”) and an adjustment recommended by Consumer Counsel to APCo’s Virginia jurisdictional depreciation rate for the Amos Generating Units. These two going-forward ratemaking adjustments largely account for the difference between Consumer Counsel’s and Staff’s recommended revenue requirements. The Report recommends against adopting Consumer Counsel’s adjustments identified above.

Consumer Counsel has not introduced any new cost-of-service issues for the Commission’s consideration with respect to the earnings test or the going-forward revenue requirement. In participating in the going-forward rate year review, Consumer Counsel has not taken any new position on any previously identified going-forward cost-of-service issues subject to this remand proceeding.

COMMENTS

I. The Commission need not approve a base rate increase for prospective rates charged for service in 2020, 2021, and 2022 to accommodate an assumed retirement date of 2032/2033 for the Amos generating units.

The Company’s going-forward base rate revenue requirement includes depreciation expense for the Amos generating units that is approximately 32% higher than the depreciation rates approved in the West Virginia jurisdiction for the same generating units.⁹ In explaining why Virginia customers are being asked to pay higher depreciation rates for the Amos generating units as compared to the West Virginia jurisdiction, APCo has stated “that the primary factor causing these significant increases in the proposed Amos depreciation rates is that the Company

exception of adjustments necessary to incorporate the Court’s rulings and calculate the going-forward revenue requirement.”).

⁹ Ex. 59 (Norwood) at 24.

changed the planned retirement dates for the Amos units, from 2040 to 2032.”¹⁰ In response to APCo’s proposal to change the planned retirement date for the Amos generating units, Consumer Counsel recommends a going-forward cost-of-service adjustment to maintain a 2040 retirement date.¹¹ From a going-forward cost-of-service perspective, this is a major issue for this case, and it represented approximately 40% of APCo’s \$65 million rate increase proposal.¹²

Depreciation expense is largely based on the amount of years remaining on the planned life of an underlying asset. The fewer years remaining in the planned life, the higher the annualized expense; the more years remaining in the planned life, the lower the annualized expense. In the case below, APCo argued that the Amos generating units should be depreciated (for purposes of setting base rates) assuming a retirement date of 2032/2033. Beyond the plain conflict with the West Virginia jurisdiction’s depreciation rate, this was a change from previous representations where APCo advanced a 2040 retirement date for the Amos generating units.¹³ The standards of Va. Code § 56-235.2 support Consumer Counsel’s adjustment to going-forward depreciation expense for years 2020, 2021, and 2022 where it can be reasonably predicted that the Amos generating units have planned retirement dates of 2040 – and not 2032/2033.

There is a generational inequity in the fold here. Customers of APCo in Virginia in 2020, 2021, and 2022, are being asked to pay a disproportionately high rate of depreciation (based on a 2032/2033 retirement date) for an asset that APCo expects to run through 2040. If all depreciation is paid by 2032/2033, and the Amos generating units continue operation, customers in 2034 and beyond will realize that benefit at the expense of the prior generation of customers.

¹⁰ Ex. 59 (Norwood) at 25.

¹¹ *See, e.g.*, Ex. 70 (Smith Direct) at 64-66.

¹² Consumer Counsel Post-Hearing Brief at 60.

¹³ Ex. 59 (Norwood) at 25-28.

There is no longer any debate as to when APCo expects the Amos generating units will retire from service. Based on APCo's own representations made over the relevant period of time – representations which have been relied on by the Commission to increase customer bills since 2020 – APCo is on record stating that the Amos generating units *will not retire* in 2032 or 2033. Nonetheless, APCo has sponsored evidence supporting a going-forward rate increase of which a significant portion is justified by that 2032/2033 retirement date.

Consumer Counsel was prevented at the hearing from offering or proffering documents (some of which are already on file with the Commission as part of other dockets) that impeach the credibility of APCo's position that the Amos generating units will be retired in 2032 and 2033.¹⁴ On this issue, Consumer Counsel readily acknowledges that the Hearing Examiner was persuaded by the legal arguments offered in APCo's Motion to Exclude Potential Exhibits. And the Report recognizes that parties are provided the opportunity to object to this ruling through comments.¹⁵

For purposes of the Commission's consideration of the recommended base rate increase associated with the going-forward cost-of-service, Consumer Counsel should not have been prohibited from offering or proffering relevant impeachment evidence, and Consumer Counsel notes its objection to the Hearing Examiner's interpretation of the Commission's September 13, 2022 Order to conduct further proceedings.¹⁶ That Order required that the November 2, 2022 hearing "be limited to a going forward rate year review in accordance with the Court's directive

¹⁴ Tr. 1259-61.

¹⁵ Report at 3 n.10.

¹⁶ Tr. 1263 (The Hearing Examiner rejected a proposal to proffer such evidence, subject to the Hearing Examiner's ruling, for the purpose of developing the record in the event that the Commission disagreed with the Hearing Examiner's ruling that the *Commission's* Order prevented Consumer Counsel from offering the evidence on this issue. Consumer Counsel frames its objection as being to the Hearing Examiner's *interpretation* of the Commission's September 13, 2022 Order, not as an objection to the September 13, 2022 Order.)

[and] [n]o evidence is to be considered on the earnings tests reviewed and ruled upon in the underlying proceedings and subsequent appeal, *apart from adjustments necessary to incorporate the Court's rulings and calculate the going-forward revenue requirement.*"¹⁷

Pointing to APCo's own position for the planned retirement date for the Amos generating units does not involve only an earnings test issue previously "reviewed and ruled upon[,]" and it is evidence relevant to a previously identified adjustment necessary to calculate the going-forward revenue requirement. Specifically, with respect to the instant issue, the retirement date associated with Amos generating facilities used for prospective ratemaking is necessary to calculate the going forward revenue requirement.

Consumer Counsel has at no point attempted to bring a new cost-of-service issue into the going-forward rate case, nor has it taken a new position on a going-forward cost-of-service issue. Consumer Counsel has not sought to litigate any earnings test issue. Although the Commission has indeed limited the scope of issues that may be addressed with respect to the going-forward rate year, evidence as to the validity of previously identified issues not yet ruled on is relevant to whether certain costs satisfy the legal standard for increasing a going-forward revenue requirement. Within the scope of the previously identified issues, the Commission must ensure that prospective rate changes are reasonable and prudent, and that prospective rate increases are based on a reasonable prediction of costs (including annualized adjustments for future costs) that will occur in a forward-looking rate year.¹⁸

¹⁷ Emphasis added.

¹⁸ Va. Code § 56-235.2.

The Commission is certainly aware of its own dockets,¹⁹ and it is able to take judicial notice of the public documents published therein.²⁰ If the Commission determines that APCo's own stated position (during the rate years at issue) on when the Amos generating units will retire (*i.e.*, 2040) is relevant to APCo's request to increase rates based on a conflicting retirement date (*i.e.*, 2032/2033), then the Commission should indeed take judicial notice of those inconsistent positions.

If the Commission agrees with the Hearing Examiner's ruling on the rationale to exclude certain potential exhibits, Consumer Counsel maintains that the evidence available prior to the date of the Order on Reconsideration supports Consumer Counsel's prospective adjustment. In fact, the Company's position on Amos retirement date, as of the date of the Order on Reconsideration, is far from certain. At the November 2, 2022 hearing, APCo's witness stated the Company had no position on the Amos retirement date.²¹ And the Commission, through an August 23, 2021 rate order, acknowledged that APCo on December 23, 2020²² (before the date of the Order on Reconsideration) made a request for a new E-RAC that sought "approval of cost

¹⁹ See, e.g., *Wal-Mart Stores E., LP v. State Corp. Comm'n*, 299 Va. 57, 75 n.7, 844 S.E.2d 676, 685 (2020).

²⁰ In Case No. PUR-2022-00001, the Commission, within the last month, issued an order approving a rate increase for APCo to charge its customers dollar-for-dollar cost recovery for new environmental costs that APCo asserts are needed to keep the Amos generating units operating through year 2040. On November 29, 2022, APCo made a tariff filing to implement that rate increase. And in Case No. PUR-2022-00051, in a hearing concluded just over a month ago on APCo's Integrated Resource Plan, APCo submitted, and the Commission accepted into the record, APCo's IRP filing that rejects the premise that the Amos generating units will be retired in the 2032-2034 timeframe. In fact, APCo's IRP assumes as a base case that the Amos generating units will *not* be retired in any year through at least 2040. APCo's position that the planned retirement dates for the Amos generating units will not occur until at least year 2040 is consistent with Consumer Counsel recommended going-forward cost-of-service adjustment to use a 2040 retirement date.

²¹ Tr. 1307.

²² *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*, SCC Case No. PUR-2020-00258, Order Granting Rate Adjustment Clause at 1 (Aug. 23, 2021), <https://scc.virginia.gov/docketsearch/DOCS/5hhg01!.PDF>.

recovery of CCR and ELG retrofits at the Plants, which will allow the [Amos generating units] to provide capacity and energy value to APCo's customers through 2040."²³

At the hearing, APCo made the claim that it is aware of the circumstances facing its customers in light of APCo's rate increases.²⁴ And although Consumer Counsel understands that no party, including APCo, was free to change its position on a particular cost-of-service issue, it stands to reason that APCo would at a minimum not object to reconciling its base rate increase proposal with its stated position that the Amos generating units will operate beyond 2033. The impact of not doing so is significant for Virginia customers. Approving a rate that accepts APCo's position that Amos will retire in 2032/2033 adds about \$25 million to the annual amount Virginia customers pay for Amos. That is, customers will pay a going-forward rate of about \$75 million in *additional* depreciation expense over a period of time where APCo has adamantly maintained that a 2032/2033 retirement date is incorrect.

A. The Final Order did not make findings on adjustments to a going-forward revenue requirement used to change base rates.

The Report introduces a threshold issue with respect to Consumer Counsel's recommended cost-of-service adjustment for the Amos generating units. That is, whether the Commission's Final Order, after finding that APCo had earned within the earnings band, disposed of recommended adjustments to the going-forward cost-of-service. Consumer Counsel's position is that based on the clear language of the Final Order, the Commission did not address *ratemaking adjustments* to the going-forward cost-of-service for purposes of changing rates, including recommended adjustments to going-forward depreciation expense reflected in rates to be paid by customers. The Final Order in fact states that because "the statutory outcome

²³ *Id.* at 2.

²⁴ Tr. 1358.

does not result in a prospective change in rates, the Commission does not herein address issues related thereto”²⁵ Nonetheless, the Report concludes that the Final Order resolved Consumer Counsel’s going-forward ratemaking adjustment.²⁶

Consumer Counsel’s recommendation to adjust the cost-of-service using a retirement date of 2040 for the Amos generating units was relevant to both the earnings test and the going-forward rate year.²⁷ Adjustment OAG-14 recommended decreased depreciation expense for the 2018 and 2019 earnings test years on a Virginia jurisdictional basis by approximately \$8 million annually. And adjustment OAG-14 recommended decreasing Virginia jurisdictional depreciation expense by \$27,667,853 for prospective ratemaking.²⁸ The details of Consumer Counsels’ ratemaking adjustment included other impacts that increased the cost-of-service.²⁹

The Commission’s Final Order states that it was not addressing recommended ratemaking adjustments to the going-forward cost-of-service.³⁰ Consumer Counsel acknowledges that the Final Order includes a finding that the 2019 Depreciation Study should be approved as of the study date,³¹ a decision rendered at a time when prospective rates were not changing – which is no longer the case. But Consumer Counsel objects to the Report’s finding that the Final Order settles with finality proposed ratemaking adjustments to the cost-of-service for the going-forward rate year. Although the Commission approved a depreciation study with a study date of January 1, 2020, it does not follow that approval of a study reached Consumer

²⁵ Final Order at 25 n.107.

²⁶ Report at 19.

²⁷ See Ex. 71 (Smith Direct) at LA-3, Schedule OAG-14

²⁸ See Ex. 138R (Smith Remand) at LA-3R page 10 of 11.

²⁹ See Ex. 71 (Smith Direct) at LA-3, Schedule OAG-14

³⁰ Final Order at 25 n.107.

³¹ *Id.* at 15.

Counsel's proposed ratemaking adjustment to the going forward cost-of-service, as the Final Order never reached that step of analysis. Approval of the 2019 depreciation study could not change – by the Final Order's own acknowledgement – going-forward rates associated with the going-forward cost-of-service, and there was no need to address "issues related thereto."³²

How could the Commission implicitly address Consumer Counsel's recommended ratemaking adjustment to the going-forward cost-of-service by approving a study if, as the Commission states explicitly, it was making no findings on "issues related" to a prospective change in rates? The simple answer is that the Final Order did not. Any other answer requires the conclusion that the Commission was in fact making the determination to reject Consumer Counsel's recommended ratemaking adjustment to the going-forward cost-of-service.

The time to address the merits of Consumer Counsel's going-forward ratemaking adjustment to the cost of service reflecting a 2040 retirement date for Amos was not after the Commission determined that it was barred from making a change to prospective rates based on a going-forward cost-of-service analysis.³³ The time to address the merits of Consumer Counsel's adjustment is now, as the Commission has effectively been directed to conduct prospective ratemaking for purposes of changing APCo's going-forward rates.

Once the threshold issue is resolved, the question before the Commission is simple. In approving going-forward rates, is it reasonably predictable that APCo's annualized depreciation for the Amos generating units will be based on a 2040 retirement date or a 2032/2033 retirement date? For all the reasons stated in Consumer Counsel's testimony and briefs,³⁴ and separately for all the reasons stated by APCo over the period at issue, Consumer Counsel asserts that its

³² *Id.* at 25 n.107.

³³ Final Order at 24-25.

³⁴ Tr. 1290-91.

ratemaking adjustment is consistent with the “reasonably . . . predicted” standard contained in Va. Code § 56-535.2 A.

II. The OVEC affiliate arrangement adds high-cost power to the going-forward revenue requirement.

The Commission required that all parties stick to their positions on ratemaking adjustments as of the date of the Order on Reconsideration. At that time, Consumer Counsel’s position was that for ratemaking purposes APCo’s cost-of-service should be reduced to reflect the fact that power purchased by APCo from its affiliate OVEC exceeds viable market alternatives. Consumer Counsel’s adjustment applied both to the earnings test and the going-forward revenue requirement. Relevant at this point in the case, adjustment OAG-15 recommends a Virginia jurisdictional adjustment to going-forward expense by approximately \$15.1 million annually.³⁵ This adjustment is based on the cost of power (capacity *and* energy) that APCo can avail itself to as a member of PJM, and is the price of power that APCo would receive when and if OVEC contributes to APCo selling excess capacity and energy into the PJM markets.³⁶ At the remand hearing, Consumer Counsel acknowledged that the Commission decided this issue against Consumer Counsel for purposes of the earnings test, and that the Commission may decide this issue in the same fashion for the going-forward revenue requirement.³⁷

But the Commission’s findings with respect to the earnings test did not touch on Consumer Counsel’s going-forward ratemaking adjustments. There has been no ruling on the appropriateness of the OVEC affiliate charges in the going-forward cost-of-service. Advocating

³⁵ Ex. R138 (Smith Remand) at LA-3R page 10 of 11.

³⁶ Ex. 59 (Norwood) at 11-12.

³⁷ Tr. 1285.

for this result in the rate year is no more “taking another bite at the apple”³⁸ than APCo arguing that the going-forward rate year should include a level of major storm expense – something the Commission has already decided should be excluded from a prospective rate year revenue requirement.³⁹

Consumer Counsel does not believe it is reasonable for APCo to incur power costs from its affiliate at a price that grossly exceeds prices from non-affiliates existing in a readily available market. *Ad hominem* statements aside,⁴⁰ Consumer Counsel cannot be expected to do anything other than take positions consistent with its statutory mandate to represent the interest of customers, especially when and where affiliate issues are present.

III. The Commission should act now to protect customers against a double recovery of costs that could result from the requirement to initiate Rider R.C.R.

The Commission ordered that APCo implement interim rates beginning October 1, 2022, which remain subject to Commission review and potential refund and may be adjusted by further Commission order.⁴¹ Consumer Counsel was concerned that Rider R.C.R. could result in a future double recovery from customers of costs recovered during the 2021 and 2022 periods.⁴² The law already permits APCo to recover from customers amounts through future rates that protect the utility against earning less than 70 basis points below its approved profit.⁴³ If that feature of the law were to be triggered without considering the additional Rider R.C.R. charge,

³⁸ Tr. 1358.

³⁹ *Application of Appalachian Power Company, For a 2014 biennial review of the rates, terms and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, SCC Case No. PUE-2014-00026, Final Order at 42 (Nov. 26, 2014), <https://scc.virginia.gov/docketsearch/DOCS/303%2301!.PDF>.

⁴⁰ Tr. 1354-1359.

⁴¹ For current customers, any refunds of excess interim rates should be realized as a customer bill credit, similar to how bill credits are implemented in § 56-585.1 A 8.

⁴² Tr. 1352.

⁴³ Va. Code § 56-585.1 A 8.

that would likely result in a double recovery of period costs. The Report recommends that if Rider R.C.R. is approved it should be conditioned on mechanisms that prevent such a double recovery. Consumer Counsel agrees that it is vital to “address[] this issue in the instant case to eliminate any uncertainty in this regard.”⁴⁴

To avoid a double recovery, Consumer Counsel recommended at the remand hearing that all revenues projected to be recovered through Rider R.C.R. be imputed into the relevant earnings test periods. As an alternative or “complementary safeguard,” the Report further finds that “Rider R.C.R. could remain subject to refund until the Commission has completed the earnings test in the upcoming triennial review.”⁴⁵ If the Commission approves Rider R.C.R., Consumer Counsel supports both of these conditions. If the Commission is inclined to select one condition over the other, Consumer Counsel recommends approval of Rider R.C.R. subject to refund until the Commission has completed the earnings test in the upcoming triennial review as the best protection against double-recovery, *only if* the Commission makes clear that such refund will be made for all revenues not necessary to provide APCo with what the law deems to be a sufficient return.⁴⁶

CONCLUSION

There is little dispute remaining over the implications of the Supreme Court of Virginia’s remand directives. Consumer Counsel concurs that: “the Court’s decision: (1) creates a \$37 million regulatory asset that customers must pay for; and (2) triggers a statutory requirement for

⁴⁴ Report at 24.

⁴⁵ Report at 25.

⁴⁶ Va. Code § 56-585.1 A 2 g.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on December 1, 2022, by electronic service, to:

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