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2020 triennial review of rates

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VIA ELECTRONIC FILING

Bernard Logan, Clerk
c/o Document Control Center
State Corporation Commission
1300 E. Main Street
Richmond, VA 23219

Re: *Application of Appalachian Power Company, For a 2020 triennial review of rates, terms and conditions for the provision of generation, distribution and transmission services*
Case No. PUR-2020-00015

Dear Mr. Logan:

Pursuant to the Hearing Examiner's November 17, 2022, Report, and Rule 5 VAC 5-20-120 C of the Commission's Rules of Practice and Procedure, please find the attached Comments & Objections of the Virginia Poverty Law Center for filing in the above-captioned matter.

Should you have any questions about this filing, please do not hesitate to contact me.

Sincerely,

/s/ William T. Reisinger

William T. Reisinger

cc: Certificate of Service

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

**COMMENTS AND OBJECTIONS OF THE
VIRGINIA POVERTY LAW CENTER**

Pursuant to the Hearing Examiner’s November 17, 2022, Report, and Rule 5 VAC 5-20-120 C of the Commission’s Rules of Practice and Procedure, the Virginia Poverty Law Center (“VPLC”), by counsel, hereby files its Comments and Objections to the Hearing Examiner’s Report.

INTRODUCTION

Appalachian Power Company (“APCo” or “Company”) filed its application for a triennial review of base rates on March 31, 2020, pursuant to Va. Code § 56-585.1 A. As part of its application, APCo requested a going-forward rate increase. On November 24, 2020, the Commission published a final order that, among other things, denied APCo’s requested rate increase. APCo, alleging several legal errors, appealed the Commission’s final order to the Supreme Court of Virginia. The Court’s August 18, 2022, opinion affirmed most of the final order but reversed one of the Commission’s findings.¹ The purpose of this remand proceeding is to carry out the Court’s directive with respect to the one issue where the Commission erred.

¹ *Appalachian Power Company v. State Corporation Commission*, et al., Record No. 210391, Slip Opinion (Aug. 18, 2022) (“Court’s opinion,” or “opinion” as applicable).

VPLC did not present expert witness testimony in this remand proceeding. VPLC, however, provides limited comments below on some of the issues that are contested in the remand process.

When ruling on all contested issues, VPLC urges the Commission to consider the extraordinary energy cost increases already faced by APCo’s customers. A monthly bill for a residential customer using 1,000 kilowatt-hours already exceeds \$150 – an amount that is 40% higher than when this case began.² In addition to a pending fuel rate increase of approximately \$20 per month, residential customers will bear the costs of additional riders currently under consideration. And these cost pressures are hitting low-income customers in APCo’s service territory at the worst possible time, the start of the winter heating season in Southwest Virginia.

For these reasons, VPLC urges the Commission to use its discretion to limit any future base rate increases to those that are truly necessary, supported by evidence, and required by law.

COMMENTS AND OBJECTIONS

A. The Virginia Supreme Court did not find that APCo is entitled to a rate increase.

The Court issued a majority opinion on August 18, 2022. The Court made findings on four contested issues. On three of those issues, the Court affirmed the Commission’s final order. The only issue where the Court found that the Commission erred concerned APCo’s decision to record certain costs as asset impairments:

“The Commission erred in finding that it was not reasonable for Appalachian to record its costs associated with the early retirement of its coal-fired power plants as asset impairments.”³

The Court did not find that APCo was entitled to a rate increase. Although the Hearing Examiner speculates that “[t]he Court understood its decision would increase rates,” this speculation

² Tr. 1287.

³ Slip Opinion at 39.

is not based on any statements in the majority opinion.⁴ Regardless, the Court certainly did not find that APCo is entitled to a rate increase in any particular amount. Nor did the Court limit the Commission's discretion in carrying out the Court's ruling and, if necessary, resetting APCo's going-forward rates. As the Hearing Examiner correctly recognized, "the Court's remand was a general one without specific instructions."⁵

B. VPLC opposes the Hearing Examiner's finding that APCo should be permitted to recover alleged "unrecovered revenues." The proposed Rider RCR rate increase would result in retroactive ratemaking and lacks an evidentiary basis.

APCo's proposed Rider RCR is designed to recover approximately \$72 million in revenues that the Company alleges it was entitled to recover, but did not actually recover, between January 1, 2021 and October 1, 2022. In effect, APCo wants to go back in time and reprice energy that its customers already purchased and consumed some 23 months ago. This proposal should be rejected for several reasons.

Rider RCR would result in unlawful retroactive ratemaking. One of the fundamental rules in utility ratemaking is that the Commission cannot adjust rates that were previously in effect. The Commission may not impose a retroactive rate increase on customers to compensate a utility for any past deficiency – or alleged deficiency – in earnings.⁶ The Virginia Supreme Court has recognized that the Commission "does not have the power to redetermine rates for a past period at a different level from those actually charged ... because that would be to make retroactive rates."⁷ The Commission has previously explained that retroactive ratemaking occurs when it "adjusts rates for a

⁴ Report at 1, note 2. The Hearing Examiner cites statements from a dissenting opinion to reach this conclusion.

⁵ Report at 23.

⁶ See *Virginia Elec. and Power Co. v. State Corp. Com'n*, 226 Va. 541, 549 (1984).

⁷ *City of Norfolk v. Virginia Electric and Power Company*, 197 Va. 505, 516 (1955) (citing *Commonwealth v. Old Dominion Power Co.*, 184 Va. 6 (1945) and *Mathieson Alkali Works v. Norfolk, etc. R. Co.*, 147 Va. 426 (1927)).

past period at a different level from those actually charged.”⁸ “Neither the Commission nor [the Virginia Supreme Court] has [the] power to impose such retroactive rate increases.”⁹

The rule against retroactive ratemaking is important because the public should always have notice of, and an opportunity to contest, proposed rate increases *before* they go into effect. Virginia’s utility regulatory structure “contemplates that all parties involved in rate-making proceedings ... be afforded fair notice and an opportunity to introduce evidence and be heard before the Commission renders its decision.”¹⁰

Here, the public has had no notice of, and no opportunity to contest, APCo’s evidence of alleged uncollected revenues between January 1, 2021, and October 1, 2022. In fact, there is no evidence. For all we know, APCo may have earned well above its authorized rate of return of 9.2% during this time period. Additionally, the General Assembly has determined that if a utility’s earnings fall within a 70-basis-points earnings band surrounding its authorized return, such earnings are not insufficient.¹¹ In other words, even if APCo failed to earn its 9.2% authorized return during this 16-month period, those earnings may still be sufficient as a matter of law.

In sum, Rider RCR improperly and retroactively raises rates to recover “uncollected revenues” that may or may not exist. To make matters worse, the Rider RCR retroactive price increase would incorporate a full 9.2% rate of return, which is not necessary for APCo’s earnings to be deemed sufficient as a matter of law.

Instead of retroactively increasing rates without an evidentiary basis to do so, the Commission should evaluate APCo’s earnings between January 1, 2021, and October 1, 2022, as

⁸ *Application of Toll Road Investors Partnership II, L.P., for an increase in tolls*, Case No. PUE-2013-00139, Final Order (April 8, 2014).

⁹ *Virginia Elec. and Power Co. v. State Corp. Com’n*, 226 Va. 541 (1984).

¹⁰ *Id.* at 226 Va. 546.

¹¹ The triennial review statute states that an earned return that is up to 70 basis points above or below the utility’s authorized rate of return “shall not be considered either excessive or insufficient, respectively.” See Va. Code § 56-585.1 A 2 g.

part of the utility's next triennial review proceeding. At the hearing, VPLC noted that we are "on the doorstep of" the next triennial review. The current review period runs through December 31 of this year, and APCo will soon be filing its next triennial review application.¹² While the Code allows "true up" cases for certain costs recovered through riders, Virginia law does not allow such true ups or interim adjustments for base rates. The 2007 Electric Utility Regulation Act established a specific earnings review process for APCo's base rates. The Commission should adhere to that process when determining whether APCo did or did not recover sufficient revenues during the current triennial review period.

C. VPLC supports the Hearing Examiner's decision to exclude projected storm expenses in going-forward rates.

VPLC supports the Hearing Examiner's recommendation to exclude projected storm expenses in APCo's going-forward base rates. In recent years, the Commission has not approved normalized levels of storm expenses when setting future rates. The Commission declined to do so in APCo's 2014 rate review proceeding, finding that "under the current statutory framework for biennial reviews, it is no longer appropriate to include an estimated cost of future major storm damage in operating expenses for prospective ratemaking."¹³ The Commission noted that these costs may be deferred for future recovery pursuant to the triennial review statute.¹⁴ Accordingly, approving APCo's request to include hypothetical storm expenses in going-forward rates would unnecessarily increase consumer rates and bills.

¹² Tr. 1275-1276.

¹³ Report at 14-15 (citing APCo 2014 Biennial Review Order).

¹⁴ See Va. Code § 56-585.1 A 8.

CONCLUSION

For the foregoing reasons, VPLC urges the Commission to limit any going-forward rate increases to those that are truly necessary, supported by evidence, and required by the Court's ruling.

Respectfully submitted,

VIRGINIA POVERTY LAW CENTER

By counsel

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December 1, 2022

CERTIFICATE OF SERVICE

I, William T. Reisinger, hereby certify that a true copy of the foregoing was served this 1st day of December, 2022, by e-mail to:

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