COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 23, 2021

PETITION OF

APPALACHIAN POWER COMPANY

CASE NO. PUR-2020-00258

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

ORDER GRANTING RATE ADJUSTMENT CLAUSE

On December 23, 2020, pursuant to § 56-585.1 A 5 e of the Code of Virginia ("Code"), Appalachian Power Company ("APCo" or "Company") filed with the State Corporation Commission ("Commission") a petition ("Petition") for approval of a rate adjustment clause ("E-RAC") to recover on a timely basis its projected costs to comply with state and federal environmental laws and regulations applicable to generation facilities used to serve the Company's load obligations.

According to the Petition, APCo requested cost recovery for certain environmental projects ("Projects") related to the installation and retrofitting of certain coal ash ponds at the Company's Amos and Mountaineer Plants (collectively, "Plants"), as well as actual and forecast operations and maintenance costs related to compliance with State Solid Waste regulation, the National Pollution Discharge Elimination System, and provisions of the Clean Water Act at the Plants.[1]

APCo stated that the Projects are required to comply with the United States Environmental Protection Agency's ("EPA") rule to regulate the disposal of coal combustion

[1] Ex. 2 (Petition) at 2.

residuals ("CCR Rule") and the EPA's Steam Electric Effluent Limitations Guidelines ("ELG Rule").[2] APCo stated that the CCR Rule regulates the handling and storage of CCR material in an environmentally responsible manner, and the ELG Rule regulates wastewater discharges for the protection of surface water.[3]

According to the Company, these rules require that, absent an extension, unlined CCR storage ponds, such as the bottom ash ponds at the Plants, must cease operations and initiate closure by April 11, 2021, which would cause the Plants to stop operating by that date.[4] APCo stated that after analyzing various compliance options and scenarios, it is seeking approval of cost recovery of CCR and ELG retrofits at the Plants, which will allow the Plants to provide capacity and energy value to APCo's customers through 2040.[5] APCo also asserted that its proposed investments are the most cost-effective means of compliance.[6]

In this proceeding, the Company asked the Commission to approve its E-RAC for the rate year October 1, 2021, through September 30, 2022 ("Rate Year").[7] APCo proposed a total revenue requirement of approximately $31.614 million during the Rate Year.[8] Specifically, the Company indicated that its proposed revenue requirement comprises three elements: (1) a forecast revenue component of $30.791 million, (2) an allowance for funds used during

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[2] Ex. 5 (Spitznogle Direct) at 3-4.

[3] *Id.*

[4] Ex. 3 (Beam Direct) at 3.

[5] Ex. 9 (Martin Direct) at 3.

[6] Ex. 2 (Petition) at 5.

[7] *Id.*; Ex. 11 (Sebastian Direct) at 3.

[8] Ex. 2 (Petition) at 5; Ex. 11 (Sebastian Direct) at 3-4.

construction ("AFUDC") revenue component of $0.823 million, and (3) a true-up revenue component of $0.0 million.[9] For purposes of calculating the revenue requirement, APCo stated that it used an after-tax rate of return on rate base of 7.072% based on the year ended December 31, 2019 capital structure.[10] The Company further stated that this rate of return included the 9.20% return on equity approved by the Commission in Case No. PUR-2020-00015.[11]

APCo stated that it seeks to recover the revenue requirement by allocating costs to the Virginia jurisdiction consistent with the Company's methodology in its Dresden G-RAC.[12] According to the Company, implementation of the proposed E-RAC would increase the monthly bill of a residential customer using 1,000 kilowatt-hours per month by $2.50, or 2.4%, when compared to rates effective November 1, 2020.[13]

On January 14, 2021, the Commission entered an Order for Notice and Comment ("Procedural Order"). The Commission's Procedural Order docketed the Petition; required the Company to publish notice of the Petition; gave interested persons the opportunity to comment on, or participate in, the proceeding; scheduled public evidentiary hearings for June 22 and 23, 2021; and directed the Commission Staff ("Staff") to investigate the Petition and

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[9] Ex. 2 (Petition) at 5; Ex. 11 (Sebastian Direct) at 3-4. APCo states that no true-up is included in this initial proceeding because the Company does not currently have existing rate factors approved for cost recovery under Code § 56-585.1 A 5 e. Ex. 11 (Sebastian Direct) at 6. The Company further states that it anticipates that any true-up will be included in a 2021 update filing for implementation during the October 1, 2022 - September 30, 2023 rate year. *Id.*

[10] Ex. 2 (Petition) at 5; Ex. 11 (Sebastian Direct) at 5-6.

[11] Ex. 2 (Petition) at 5-6; Ex. 11 (Sebastian Direct) at 5-6. *See 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, 2020 S.C.C. Ann. Rept. 421, Final Order (Nov. 24, 2020).

[12] Ex. 2 (Petition) at 6; Ex. 11 (Sebastian Direct) at 7.

[13] Ex. 2 (Petition) at 6; Ex. 11 (Sebastian Direct) at 8.

file testimony and exhibits containing its findings and recommendations. The Old Dominion Committee for Fair Utility Rates; the Sierra Club; Steel Dynamics, Inc.; and the Office of the Attorney General, Division of Consumer Counsel ("Consumer Counsel") filed notices of participation.

On March 11, 2021, the Commission entered an Order appointing a Hearing Examiner to conduct all further proceedings on behalf of the Commission. On April 19, 2021, a Hearing Examiner's Ruling directed that the June 23, 2021 hearing would be convened virtually due to the ongoing COVID-19 emergency.

On June 22, 2021, the Senior Hearing Examiner convened a hearing to receive public witness testimony telephonically and to receive opening statements from the parties and Staff. No members of the public signed up to testify.

On June 23, 2021, the Senior Hearing Examiner convened a hearing to receive the testimony and evidence of the parties and Staff, as scheduled, using Microsoft Teams. The Company, Sierra Club, Consumer Counsel, and Staff participated in the hearing.

On July 8, 2021, the Senior Hearing Examiner issued the Report of A. Ann Berkebile, Senior Hearing Examiner ("Report"). In the Report, the Senior Hearing Examiner made the following findings:

1. The Commission should approve an E-RAC for APCo's recovery of environmental compliance costs including operating and maintenance compliance expenses related to the handling and disposal of fly ash, bottom ash and flue gas desulfurization by-product, and the costs of CCR investments at the Plants;

2. The Commission should deny, at this time, APCo's request for the approval of ELG investments at the Plants based upon the Company's failure to establish such investments are reasonable and prudent;

3. The Commission should delay its consideration of APCo's proposed deferral of depreciation expense and the reasonableness and prudence of previously incurred ELG investment costs until a future case;

4. If the Commission decides not to approve the ELG investment at this time, the Commission should approve an E-RAC with a Rate Year revenue requirement of $27.437 million, consisting of a forecast revenue component of $27.173 million, an AFUDC revenue component of $0.264 million, and a true-up revenue requirement of $0;

5. In the alternative, should the Commission find it appropriate to approve the Company's proposed ELG investment, the Commission should approve an E-RAC with a Rate Year revenue requirement of $31.614 million, consisting of a forecast revenue component of $30.791 million, an AFUDC revenue component of $0.823 million, and a true-up revenue requirement of $0; and

6. The Commission should approve the Company's alternative rate design for GS and MGS rates.[14]

The Senior Hearing Examiner then recommended that the Commission enter an Order that adopts the findings of the Report and dismisses this case from the Commission's docket of active cases.[15]

On July 26, 2021, APCo, Sierra Club, and Consumer Counsel each filed comments on the Report.

NOW THE COMMISSION, having considered this matter, is of the opinion and finds that the Report's findings and recommendations should be adopted except as modified by the discussion herein. Specifically, we find that approval of the Company's proposed ELG investment costs, including those previously incurred, should be denied based on the record

[14] Report at 53-54.

[15] *Id.* at 54.

before us. This finding is without prejudice, and the Company may re-file for approval of these costs should APCo conclude circumstances so warrant. Accordingly, a revenue requirement of $27.437 million, as recommended by the Senior Hearing Examiner in the Report's fourth finding,[16] should be approved.

Statutory Authority

Code § 56-585.1 A 5 states in relevant part as follows:

> 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:
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> . . . .
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> 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 . . . . The Commission shall approve such a petition if it finds that such costs are necessary to comply with such environmental laws or regulations;

Code § 56-585.1 D further states in relevant part the following:

> 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. A determination of the Commission regarding the reasonableness or prudence of any such cost shall be consistent with the Commission's authority to determine the reasonableness or prudence of costs in proceedings pursuant to the provisions of Chapter 10 (§ 56-232 et seq.).

[16] *See id.*

ELG Investment Costs

The Company has proposed both ELG and CCR Projects at the Plants. According to the Company's testimony at the hearing, the Virginia jurisdictional share of the ELG investments would be approximately $60 million.[17]

Sierra Club argued that, consistent with the Commission's Final Order and Order on Reconsideration in Case No. PUR-2018-00195, the Company's request for approval of the proposed ELG investment costs should be denied because those costs do not make economic sense and therefore are not reasonable and prudent.[18] Similarly, Consumer Counsel asserted that the Commission should withhold approval of the ELG investment costs until the Company has established that those costs are reasonable and prudent.[19]

In her Report, the Senior Hearing Examiner found that the Commission should deny, at this time, APCo's request for the approval of ELG investments at the Plants based upon the Company's failure to establish such investments are reasonable and prudent.[20] The Senior Hearing Examiner made that finding after "taking into account the overall deficiencies and uncertainties associated with the Company's supporting analysis and the relatively small level of potential savings ultimately forecasted by APCo."[21] Still, the Senior Hearing Examiner did not recommend that the Commission deny the Company's request for approval of the ELG investments outright, but withhold approval until APCo conducted a more comprehensive and

[17] *Id.* at 34 (citing Tr. 205).

[18] *Id.* at 46-47 (citing Tr. 277).

[19] *Id.* at 47 (citing Tr. 291-92).

[20] *Id.* at 53.

[21] *Id.* at 51.

updated analysis supporting this investment, including full consideration of the Virginia Clean Economy Act's impacts.[22]

In its comments on the Report, APCo argued, as it did at the hearing,[23] that, among other things, "[t]he [m]andatory [l]anguage" of Code § 56-585.1 A 5 e supersedes the "[g]eneral [g]uidance of [Code] § 56-585.1 D."[24] APCo states that "[t]he Hearing Examiner's decision to elevate the general 'reasonable and prudent language' of [Code § 56-585.1 D] over the specific, mandatory guidance of the [Code § 56-585.1 A 5 e] runs contrary to well-accepted principles of statutory interpretation."[25]

Specifically, the Company argues that "the Commission cannot use the discretionary 'reasonable and prudent' catch-all of [Code] § 56-585.1 D to trump the mandatory language of [Code § 56-585.1 A 5 e] that is specifically applicable to this proceeding."[26] APCo asserts "[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.'"[27] APCo further asserts that "[t]he Hearing Examiner's interpretation of the two statutes creates a conflict."[28]

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[22] *Id.*

[23] *Id.* at 48 (citing Tr. 312).

[24] APCo Comments at 8. The quotation incorrectly cites the statute as "56.585.1 D."

[25] *Id.* at 9.

[26] *Id.* at 10.

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

[28] *Id.* at 10-11.

APCo also argues that "[w]hen read in whole, [Code § 56-585.1 A 5 e] places an affirmative obligation on the Commission to approve any costs that are necessary to comply with state and federal regulations."[29] The Company asserts that "[r]eading [Code § 56-585.1 A 5 e] 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."[30] In support of its argument, APCo maintains that in its "2011 E-RAC proceeding, the [Supreme Court of Virginia] reversed a Commission [f]inal [o]rder that attempted to add a requirement into [Code § 56-585.1 A 5 e] 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."[31]

We find APCo's argument that Code § 56-585.1 A 5 e supersedes Code § 56-585.1 D to be unpersuasive and without merit. As we held in a recent case involving these two statutory provisions,[32] "[t]he unambiguous plain language of *both* Code § 56-585.1 A 5 e and Code § 56-585.1 D applies to this proceeding."[33] We then explained that "the analysis does not end with a finding that the projects are necessary to comply with environmental regulations."[34] Instead, "the Company must also establish that it was reasonable and prudent to decide - at the

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[29] *Id.* at 9.

[30] *Id.*

[31] *Id.* at 10 (citing *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 706-07 (2012)).

[32] *See 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*, Case No. PUR-2018-00195, 2019 S.C.C. Ann. Rept. 333, Order on Reconsideration (Nov. 14, 2019) ("2019 Rider E Order").

[33] 2019 Rider E Order, 2019 S.C.C. Ann. Rept. at 337.

[34] *Id.*

time of the decision - to incur such costs, as opposed to avoiding the capital expense by retiring the units prior to the environmental compliance deadlines."[35] We do not reach a different conclusion on the applicability or interplay of these statutory provisions in this case.

Code § 56-585.1 D states: "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."[36] The plain and unambiguous language of this statutory provision contains no express limitation regarding its applicability to proceedings under Code § 56-585.1 A 5. The plain and unambiguous language of Code § 56-585.1 A 5 e likewise contains no express limitation on the applicability of subsection D of Code § 56-585.1. No conflict exists between the plain, unambiguous language of Code § 56-585.1 A 5 e and the plain, unambiguous language of Code § 56-585.1 D, and therefore we need not resort to rules of statutory construction.

Moreover, the General Assembly knows how to expressly limit Code § 56-585.1 D and, indeed, has done so in subsection A of Code § 56-585.1 - the very same subsection of the Code at issue here. Code § 56-585.1 A 6 provides that "the costs associated with such new underground facilities are deemed to be *reasonably and prudently incurred*, and *notwithstanding the provisions of [Code § 56-585.1] C or D*, shall be approved for recovery by the Commission pursuant to this subdivision . . . ."[37] The Supreme Court of Virginia has "repeatedly said that, when interpreting and applying a statute, we assume that the General Assembly chose, with care, the words it used in enacting the statute, and we are bound by those words. Therefore, when the

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[35] *Id.*

[36] Emphasis added.

[37] Emphasis added.

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 choice of language was intentional."[38]

The Commission's interpretation of these two statutory provisions is not, as APCo argues, "directly contrary to the words used by the General Assembly."[39] It is instead APCo's interpretation that would require the Commission to add a limitation to Code § 56-585.1 A 5 e that the General Assembly chose not to add. Indeed, APCo's reliance on *Appalachian Power Company v. State Corporation Commission*,[40] is misplaced for the same reasons that we noted in the 2019 Rider E Order. Namely, "[t]he cited case . . . had nothing to do with the Commission's exercise of discretion under Code §56-585.1 D. . . . [T]he question before the Court was what ratemaking methodology was appropriate for recovery of the costs at issue. Nothing in the Court's opinion spoke to the applicability of [Code § 56-585.1 D] to a [Code § 56-585.1 A 5 e RAC]."[41]

The Commission has fully considered the evidence and arguments in the record both supporting and opposing the Company's requests. To the extent that there is conflicting evidence or differing opinions from expert witnesses, the Commission has interpreted such and decided how much weight to afford it. Further, the Commission has concluded that its findings in this matter are properly supported by the record.

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[38] *Newberry Station Homeowners Ass'n, Inc. v. Bd. of Sup'rs of Fairfax County*, 285 Va. 604, 613 (2013) (citations, internal quotation marks, and internal alterations omitted).

[39] APCo Comments at 9.

[40] 284 Va. 695 (2012).

[41] 2019 Rider E Order, 2019 S.C.C. Ann. Rept. at 338 n.37.

Based on the evidentiary record before us, we find that the Company has not met its burden of proving the reasonableness and prudence of the proposed ELG investment costs, including those previously incurred.[42] For example, we find APCo has not currently established that the ELG investment is reasonable and prudent from an economic or a resource adequacy perspective. We also agree with the Senior Hearing Examiner that the Company should be permitted to provide additional analyses and evidence to support this ELG investment.[43]

Indeed, we find it is critically important to analyze the overall impact of this investment on both customer rates and reliability, and that the instant record is currently lacking in both regards.[44] The statutory requirements for this proceeding, however, establish a deadline of August 23, 2021, for the Commission to issue a final order in this matter (with which we herein comply).[45] Accordingly, while the Company's request for approval of the ELG costs is denied at this time, such denial is without prejudice, and the Company may re-file for approval of these costs should APCo conclude circumstances so warrant.

Finally, we find that the Company's E-RAC with a Rate Year revenue requirement of $27.437 million, consisting of a forecast revenue component of $27.173 million, an AFUDC revenue component of $0.264 million, and a true-up revenue component of $0, should be

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[42] The Company should not interpret this finding as discouraging utilities from "conduct[ing] feasibility analyses or price estimates of infrastructure projects prior to seeking approval from the Commission." *See* APCo Comments at 19. Our findings herein are based on the evidentiary record before us in this case and do not foreclose future requests regarding these specific costs.

[43] *See* Report at 51.

[44] As to reliability, we further find that the record is unclear as to exactly when specific resource decisions must be made and the impacts thereof. For example, while certain evidence showed that the Plants can remain operational until 2028 as currently configured, APCo claims in its comments on the Report that the Plants could be required to close in 2025. *See, e.g.,* APCo Comments at 5.

[45] *See* Code § 56-585.1 A 7 ("The Commission's final order regarding any petition filed pursuant to subdivision 4, 5, or 6 shall be entered not more than three months, eight months, and nine months, respectively, after the date of filing of such petition.").

approved.[46] In approving this E-RAC Rate Year revenue requirement, the Commission notes its awareness of the ongoing COVID-19 public health issues, which have had negative economic effects that impact all utility customers. We are sensitive to the effects of rate increases, especially in times such as these. The Commission, however, must follow the laws applicable to any rate case, as well as the findings of fact supported by the evidence in the record. This is what we have done herein.

Accordingly, IT IS ORDERED THAT:

(1) The findings and recommendations set forth in the Senior Hearing Examiner's Report are adopted, as modified herein.

(2) The E-RAC is approved, as discussed herein, with a revenue requirement of $27,437,000 for the Rate Year.

(3) The E-RAC, as approved herein, shall be effective for usage on and after October 1, 2021.

(4) The Company forthwith shall file a revised E-RAC and supporting workpapers with the Clerk of the Commission and shall submit the same to the Commission's Divisions of Public Utility Regulation and Utility Accounting and Finance, as is necessary to comply with the directives set forth in this Order. The Clerk of the Commission shall retain such filings for public inspection in person and on the Commission's website: scc.virginia.gov/pages/Case-Information.

(5) This case is dismissed.

[46] *See* Report at 54.

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.