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IN THE

SUPREME COURT OF VIRGINIA

Record No. 171428
(SCC Case No. PUE-2015-00097)

CITY OF ALEXANDRIA, ET AL.,

Appellants,

v.

STATE CORPORATION COMMISSION, ET AL.

Appellees.

BRIEF OF APPELLEE VIRGINIA-AMERICAN WATER COMPANY

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Pursuant to Rules 5:26 and 5:28 of the Rules of the Supreme Court of Virginia, Appellee Virginia-American Water Company ("Virginia-American" or "Company") hereby submits its Brief.

STATEMENT OF THE CASE

This is an appeal of right by the City of Alexandria and the City of Hopewell (the "Cities") from an order of the Virginia State Corporation Commission (the "Commission") authorizing Virginia-American to file an application to implement a three-year pilot program of a Water and Wastewater Infrastructure Service Charge ("WWISC") in the Company's Alexandria Service District ("Alexandria").[1] Once implemented, the WWISC will permit Virginia-American to recover the costs of replacing mains and other aging infrastructure that have reached the end of their useful lives through a rate mechanism separate from the Company's base rates. JA 9-9B.

It was undisputed throughout the proceeding that there is a significant and growing need to accelerate the pace of investment in replacing mains and other infrastructure in the Company's Alexandria distribution system, portions of which were installed in the early 1900s. JA 9-9A, 1319-22. The

[1] Although the Commission's Final Order refers to the WWISC as a "surcharge," the WWISC was also referred to as a "service charge" during the course of the proceeding below.

Commission was presented with conflicting evidence regarding the most appropriate way to recover the costs of these investments, but it was undisputed that the Company must accelerate the level of investment in its infrastructure in Alexandria and throughout the Company's service territory to continue to maintain its system and replace infrastructure before it fails.

The Company presented evidence to highlight why recovery of these investments through base rates, while perhaps possible, would be inefficient, more burdensome, and more costly to both the Company and its customers than if those costs were recovered through an alternative mechanism such as the WWISC. Accordingly, after weighing the competing evidence, the Commission, pursuant to its well-established authority to permit the implementation of a variety of rate mechanisms—which this Court has acknowledged and affirmed since at least 1955—found that it was appropriate to authorize Virginia-American to implement a WWISC.

The Cities now appeal the Commission's finding on two main grounds: (1) that the Commission lacks the authority to implement a rate mechanism such as the WWISC; and (2) that the Commission's decision permitting the implementation of the WWISC was "plainly wrong" and "without evidence of public interest and need." Opening Br. at 3 ("Cities'

Brief"). As demonstrated in the Cities' Brief, the Cities cannot show error in the Commission's finding based on the clear precedent of this Court and under this Court's standard of review for decisions by the Commission. Accordingly, this Court should affirm the Commission's finding.

COUNTERSTATEMENT OF FACTS

The Cities' Brief fails to provide this Court with any substantial context in which to evaluate the Commission's finding in the Final Order or the issues under review in this appeal. Accordingly, this brief begins with a discussion of the relevant context for the Commission's decision to authorize Virginia-American to implement a WWISC, including an explanation of what the Commission actually approved in authorizing the Company to file an application to implement a WWISC.

I. WWISC Rulemaking Proceeding

The Commission has a long history of approving special rate mechanisms when it determines that there is a better manner to recover a particular category of costs than through a utility's base rates. As examples,, the Commission has approved rate mechanisms to recover the costs of fuel, purchasing water, and various other costs.[2] Most relevant for

[2] The Company has utilized a purchased water surcharge to recover the cost of purchasing water for Alexandria for many decades. JA 1175,

this appeal, the Commission specifically has approved rate mechanisms to recover the costs of replacing infrastructure, both under its general ratemaking authority and within the context of specific acts of the General Assembly.[3]

The underlying proceeding in this case is not the first in which the Commission has considered approval of a WWISC for water and wastewater companies. In 2014, Virginia-American, along with two other water utilities, filed a petition requesting that the Commission establish rules pursuant to which an individual utility could seek approval of a WWISC from the Commission ("Rulemaking proceeding"). JA 1262-76. In the Rulemaking proceeding the Commission was presented with details of a sample WWISC mechanism for it to consider. JA 767-69, 2004-21. The sample WWISC in the Rulemaking was nearly identical to the proposed WWISC filed by Virginia-American in this proceeding, the only substantial difference being that the proposed WWISC in this proceeding incorporates certain safeguards suggested by parties to the Rulemaking proceeding (and adopted by the Commission in the proceeding below). JA 775-76.

1935-36. The Cities have not contested the Commission's long-standing approval of this mechanism that is adjusted outside of base rate cases.

[3] *See infra* Section II.4 (discussing the Commission's approval of Roanoke Gas Company's DSR Surcharge and subsequent approval of natural gas utility SAVE plans).

Numerous parties intervened in the Rulemaking proceeding, including the City of Alexandria, which challenged the Commission's authority to establish the requested rules as well as whether the Commission had the authority to approve a WWISC under the proposed rules.[4] Ultimately, the Commission determined that it would not implement the requested rules through the Rulemaking proceeding, but stated in its September 9, 2015 Order that "the need for such investment, along with the appropriate recovery thereof, can be reasonably addressed on a case-by-case basis." Order, *Petition of Va. Amer. Water Co., Aqua Va., Inc, and Massanutten Pub. Serv. Corp., For Rulemaking to establish a Water and Wastewater Infrastructure Service Charge*, Case No. PUE-2014-00066, 2015 Va. PUC LEXIS 668, at *6 (Sept. 9, 2015) ("Rulemaking Order"). In reaching this conclusion, the Commission specifically stated that it was not ruling on the "appropriateness of various rate design mechanisms that may be utilized in association with new infrastructure investment." *Id.* at *7.

Although the majority of the Commission did not directly address the Commission's authority to implement a mechanism such as the WWISC, Commissioner Jagdmann, in a separate concurrence, stated that she was

[4] In addition, the Commission was presented with a substantial record regarding the operation of the proposed WWISC mechanism and numerous recommended safeguards. *See* JA 1994-2061.

in agreement with the report filed in the proceeding by the Commission's Hearing Examiner regarding the Commission's authority to approve a WWISC-like surcharge. *Id.* at *8. Commissioner Jagdmann stated that "[i]n my view, there is no question that the Commission has jurisdiction to grant a surcharge such as that anticipated by the Proposed Rules." *Id.*

II. Material Proceedings Below

Following the Commission's Order in the Rulemaking proceeding and its determination that such a mechanism was most appropriately considered on a case-by-case basis, the Company included a specific request to implement a WWISC throughout its service territory as part of its application for a general increase in its base rates that it filed on October 30, 2015. JA 3-9E. While the request for the WWISC was filed as part of its application to increase base rates, the rationale for the WWISC was not directly connected to the reasons for which the Company sought an increase in its base rates. Instead, the request to implement a WWISC was premised on, and supported by, ample evidence that established: (i) a clear need for replacing aging infrastructure, particularly in the Company's Alexandria service territory; and (ii) that recovering the costs of the WWISC through a separate rate mechanism would provide benefits to both the

Company and its customers and would ultimately enhance the Company's ability to make these investments.

1. *The Approved WWISC*

Initially, it is important to understand the actual mechanism approved by the Commission in this proceeding. The WWISC approved in this proceeding is a rate that the Company will collect from its customers in its Alexandria service territory separate from base rates.[5] The WWISC rate will be calculated to recover the costs of investments that the Company makes in replacing aging infrastructure, primarily mains and related pipe, throughout Alexandria over a three-year period beginning April 1, 2017.[6] Although the Commission approved a three-year pilot program for the WWISC, it did not authorize a specific rate in the underlying proceeding. Instead, it gave the Company authority to file an application with the Commission to establish a WWISC Plan and Rider to implement the WWISC pilot program.

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[5] The Commission has traditionally set rates for each of the Company's five service districts independently (i.e. rates in Alexandria are set independently of the rates for the Company's Hopewell service district). JA 4-5, 521, 1454-58.

[6] JA 9-9D, 516-20, 651-52. The Commission, in its Final Order, specifically authorized the Company to include investments beginning April 1, 2017 as part of the three-year pilot WWISC program. JA 651-52.

Prior to Virginia-American collecting any revenue under the WWISC, the Commission required it to file an application in a separate docket for approval of the initial WWISC rate. JA 516-20, 651-52. In the initial application, the Company was required to provide both a list of projects that it intended to complete during the initial investment period as well as a rate calculated to collect the eligible costs of these investments, including a return on the investment, depreciation, and taxes. JA 518-19. Following formal notice of the proceeding to the public, the Commission's Staff and any interested parties would be permitted to review and report on the projects that the Company intends to complete and the proposed rate. After the Commission considers all of the evidence, it determines what rate, if any, the Company should be authorized to charge under the WWISC. This process will repeat for each year of the WWISC pilot.

After the Company collects revenue through the WWISC rate for a full year, the Company files details regarding the revenue collected under the WWISC and the actual costs of the WWISC investments in the prior year as part of the next WWISC application. JA 518-19. This permits the Commission, its Staff, and any interested parties to review the Company's actual expenditures and revenues. Following this review, the WWISC rate is adjusted in the next rate year to credit any over collection to customers

or collect any under collection of the Company's actual costs. JA 518-19, 651-52. This will "true-up" the WWISC collections to ensure that the Company does not collect more than its actual costs incurred in making the approved investments.

2. *Need for Infrastructure Replacement*

The critical need for the infrastructure investment that will be accomplished through the WWISC was well documented in the record. As a public service company in Virginia, VAWC is obligated to provide safe and reliable service to its customers and to have adequate distribution, treatment and production facilities to furnish this service. *See* §§ 56-234 and 56-261 of the Code. Much of the water infrastructure in the Company's service territory, particularly in the Company's Alexandria service territory, was installed during the first half of the last century (or earlier) and is quickly approaching the end of its useful life. JA 1102-03.

As detailed in the Company's Application, Virginia-American has been making substantial investments in replacing and improving the infrastructure throughout its system, including significant efforts to replace mains and other aging infrastructure that have reached the end of their useful lives. JA 1097, 1103. These efforts, however, have only amounted to a 0.28% annual replacement rate, which means that approximately one-

quarter of one percent of Virginia-American's infrastructure is replaced each year. JA 1292. In other words, at the current annual replacement rate of 0.28%, it would take over 400 years to replace the Company's entire system even though much of this infrastructure is already near the end of its useful life. JA 1074-75. This is far below the industry's standard (and the Company's goal) to reach a 100 year replacement rate in order to ensure that it can minimize failures and associated disruptions to service from infrastructure that has exceeded its useful life. JA 9A, 515, 1297.

As the Company highlighted throughout the proceeding below, the need to accelerate infrastructure investment is critical. The Company provided the Commission with a detailed report (JA 1303-33), which demonstrated that in recent years the Company has begun experiencing an increase in the number and frequency of main breaks throughout its system, with the most pronounced increase occurring in the Company's Alexandria district. JA 1322-24. At the same time, the Company has faced a significant increase, 53%, in capital expenditures on unscheduled main replacements from 2011 to 2015 to fix failed mains and other portions of the Company's system. *Id.* Replacing mains in emergency situations or in any situation where the Company does not have time to adequately plan

for such a project significantly increases the cost of making these main repairs and replacements. JA 1076-78, 1301.

This is not a situation where the Company has neglected its duty to maintain and invest in its system—it has made and continues to make significant investments in its system; instead, it is a result of the nature of the infrastructure installed throughout the Company's system and the time periods over which it was installed. As the Company described, its system was installed to support the individual growth of the respective communities the Company served. Growth rates have varied significantly over time, often with significant increases in growth during time of economic prosperity. JA 1294. When portions of the Company's system that were installed in times of growth reach the end of their useful lives, the Company is required to make significant amounts of investment to replace the facilities over a short period of time. *Id.* The Company is now approaching a period of unprecedented demand to replace significant amounts of its system in a relatively short period of time. JA 515, 1319-27.

None of the parties to the proceeding disputed the Company's need to make these investments. In fact, many witnesses concurred with the Company's position that there is a critical need for infrastructure replacement. Wayne D. Trimble, testifying on behalf of one of the

respondents, stated: “I can tell you, generally, from my experience in the water business, that I am, I’m convinced that there is a huge need for infrastructure replacement.” JA 839-40. Indeed, even the City of Alexandria specifically supported infrastructure investment below. JA 813-14.

3. *Need for a Special Rate Mechanism*

While the Company has increased the rate of replacement over time as more and more segments of its system begin to reach the end of their useful lives, this investment has had to be funded through the same mechanism (periodic base rate cases) that before was used to recover sporadic investments of this nature. Because the traditional rate model fails to provide a timely source of revenue to help fund accelerated investment, the traditional rate model has been widely recognized as inadequate to support the investment needs for infrastructure replacement. JA 1199-1200, 1219-22.

Without the WWISC, the Company would be required to prepare and file base rate cases with much greater frequency to recover this accelerated investment. JA 1197-98, 1237-39. The investment under the WWISC is different than other utility investment. For example, when a water utility needs to build a new water treatment facility it will generally be

able to plan the project over a long period of time and will know that it will not need to immediately construct another treatment plant. This allows the utility to synchronize construction with the filing of a base rate case to begin realizing a return on its investors' capital within a reasonable period of time. Further, in many situations when a utility makes an investment to expand its system to new customers, it can do so with the knowledge that this investment will provide new and additional revenue until that investment can be included in the Company's base rates in an upcoming rate case. JA 1238-39.

In contrast, the investment the Company proposes to include in the WWISC is a continuous program of investment that the Company needs to make on an ongoing basis. *Id.* The Company specifically proposed limiting the investment to be included in the WWISC to non-revenue generating investment. JA 1198-99. The replacement of this infrastructure cannot be timed to coincide with base rate cases every two to three years; nor will it provide additional revenue like some projects installed to serve new customers. Consequently, without a WWISC, the Company faces the difficult decision to either forego this investment or file more frequent base rate cases.

An accelerated base rate filing schedule presents challenges for all stakeholders. Rate cases are extremely time consuming and require a review of nearly every aspect of the Company's operations. JA 1197-98, 1925, 785-88. A utility is required to invest both significant time and expense each time it undertakes such a filing, as are the Commission's Staff, the Attorney General's Office and intervenors.

Instead of establishing an expensive, untenable, and constant cycle of base rate cases, the proposed WWISC mechanism, in addition to the Commission's other vehicles to monitor the Company's rates, will provide an efficient and cost-effective method through which the Company can make these investments without imposing the significant costs that would be required if the Company filed constant base rate cases. In addition, recovering these costs through the WWISC will ensure that the Commission continues to exercise the same or greater level of oversight of the Company's investment activity, but through a much more streamlined and focused process that will allow the Company to work collaboratively with the Commission and its staff to ensure that the Company is making prudent investment in its system. JA 1924-25.

If the Company is left to recover the costs of the increased level of investment that is needed through base rates, it will significantly reduce the

Company's ability to attract the capital required to make the necessary investments. As discussed extensively before the Commission, particularly where there is no new revenue generated to fund a return on the Company's investment, the Company's ability to attract discretionary capital (that capital not necessary for emergency or non-deferrable investment needs) is determined in part by the likelihood and timing of a return on that investment. JA 2121-22, 1088-89. The Company must be able to demonstrate both timely and adequate return on investment before receiving additional capital for accelerating investment.

It is true that historically utilities generally have been able to attract sufficient capital and to recover their investments in infrastructure through traditional rate-making and base rates. Throughout much of the last century, however, utilities such as Virginia-American were making significant amounts of investment in order to expand their systems to extend service to new customers in previously undeveloped areas. As a result of this investment, the utility would realize additional revenue as new customers began taking service through the new facilities. This additional revenue partially offset the increased expense of providing service to new customers as well as provided incremental revenue before the investment could be reflected in base rates. As discussed extensively during the

proceeding, however, the Company is now faced with having the majority of its investment needs focused on replacing end-of-useful-life infrastructure where it will not receive additional revenue from new customers. JA 1199, 1238-39. Compounding this problem, the Company presented substantial evidence in the proceeding which showed that it faces an actual decline in revenue from existing customers as a result of an industry-wide trend of declining consumption of water. JA 1346-65.

Where investment in infrastructure comes with an assurance of new revenue to partially offset the investment, the Company has greater success in attracting sufficient capital. For the non-revenue producing infrastructure investment that the Company is now faced with making, investors have no similar confidence, absent a mechanism such as the WWISC, that the Company will timely begin to recover its investment so that it can provide a return. If the Company must wait long periods of time before it can begin recovering on its investment (known as “regulatory lag”), it simply cannot provide a return to investors in a reasonable amount of time. JA 1874-75. For the type of investment sought to be included in the WWISC, absent a special collection mechanism, a utility will be asking its investors to supply capital with no ability to provide a timely return, which disadvantages WWISC investments vis-a-vis other revenue-generating

investments. The WWISC, however, helps a utility even the playing field when competing for sufficient capital with other utilities that have either revenue-generating investment, an existing infrastructure replacement mechanism, such as a WWISC, or other innovative rate making mechanisms. JA 1061-63.

4. *WWISC Safeguards and Benefits*

The WWISC as approved by the Commission includes a number of safeguards and other processes to ensure that the mechanism complies with Chapter 10 of Title 56 of the Code of Virginia and safeguards customers. Importantly, recovery of these costs through the WWISC instead of through base rate cases will not deprive the Commission of any oversight or ability to review the Company's cost of service. The Company will continue to be subject to annual earnings tests while it has a WWISC in place. The annual earnings test will allow the Commission to review the Company's costs and revenues, examine the impacts of the WWISC on earnings, and determine if the Company is overearning. JA 651-52. Moreover, because the WWISC only focuses on one aspect of the Company's cost of service, the Company will still need to file base rate cases, which will allow the Commission to periodically review the Company's overall costs and ensure that any efficiencies in the Company's

operations that result from the WWISC are reflected in the Company's rates.

In addition, the proposed WWISC mechanism creates a process whereby the Commission can ensure that the Company does not begin investing imprudently or "gold-plating" its infrastructure investments. Rather than simply encouraging the Company to control costs as occurs in the "traditional" regulatory model, the WWISC will permit the Commission and interested parties to take an active role in reviewing and approving the Company's investments prior to the Company incurring the costs – something not generally available in the traditional model. JA 1924. This pre-investment review process allows for an additional, front-end review of the prudency of the Company's investment that is not available in the traditional rate case process where the Commission generally only reviews costs after they have been incurred. *Id.*

Most importantly, the "true-up" aspect of the WWISC – where the Commission will adjust subsequent WWISC rates to credit customers for any over collection of revenue or charge customers for under-collections – will ensure that the Company collects no more than the actual costs of its investments. As discussed below, this aspect of the WWISC, in

conjunction with the annual earnings test, allows the Commission to ensure that the WWISC meets the requirements of the Code of Virginia.

ARGUMENT

The Cities assert that the Commission's decision to authorize Virginia-American to implement a WWISC both exceeds the Commission's authority and is contrary to the evidence before the Commission. In support of these arguments the Cities attack the Commission's core ratemaking authority while dismissing this Court's precedent—without analysis or citation in the Cities' Brief—which supports the Commission's authority for the actions below. Additionally, while arguing that the Commission's decision is contrary to the evidence, the Cities fail to clearly articulate the basis upon which they seek to have this Court conclude that the Commission's decision is contrary to the evidence. Instead, they cite exclusively to evidence that attempted to dissuade the Commission from approving the WWISC.

Ultimately this appeal reflects the Cities' disagreement with the Commission's decision on the evidence presented below and, despite this Court's long-standing deference to the Commission's judgment on appropriate ratemaking treatment, a request that this Court substitute its

judgment for that of the Commission. The Commission's decision, however, is well-supported by precedent regarding its ratemaking authority and by ample evidence in the record. Accordingly, this Court should affirm the decision of the Commission.

I. **Standard of Review**

This Court has stated that "a decision by the Commission comes to this [C]ourt with a presumption of correctness." *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 515, 675 S.E.2d 458, 460 (2009) (quoting *N. Va. Elec. Coop. v. Va. Elec. & Power Co.*, 265 Va. 363, 368, 576 S.E.2d 741, 743 (2003)); *see also BASF Corp. v. State Corp. Comm'n*, 289 Va. 375, 391, 770 S.E.2d 458, 467 (2015) (citations omitted). The Court has also noted:

> The Constitution of Virginia and statutes enacted by the General Assembly thereunder give the Commission broad, general and extensive powers in the control and regulation of a public service corporation. The Commission is charged with the responsibility of finding the facts and making a judgment. This [C]ourt is neither at liberty to substitute its judgment in matters within the province of the Commission nor to overrule the Commission's finding of fact unless we can say its determination is contrary to the evidence or without evidence to support it.

Bd. of Supervisors of Campbell County v. Appalachian Power Co., 216 Va. 93, 105, 215 S.E.2d 918, 927 (1975) ("*Campbell County*"); *see Va. Elec. &*

Power Co. v. State Corp. Comm'n, 284 Va. 726, 735, 735 S.E.2d 684, 688 (2012) (quoting same); *Appalachian Voices*, 277 Va. at 515-16, 675 S.E.2d at 460-61 (quoting same); *N. Va. Elec. Coop.*, 265 Va. at 368, 741 S.E.2d at 743 (quoting same). Further, the "Commission's decision 'is entitled to the respect due judgments of a tribunal informed by experience.'" *Va. Elec. & Power Co.*, 284 Va. at 735-36, 735 S.E.2d at 688 (quoting *Lawyers Title Ins. Corp. v. Norwest Corp.*, 254 Va. 388, 390-91, 493 S.E.2d 114, 115 (1997)).

"On appeal, the findings of the Commission are presumed to be just, reasonable, and correct." *Piedmont Envtl. Council v. Va. Elec. &. Power Co.*, 278 Va. 553, 563, 684 S.E.2d 805, 810 (2009) ("*PEC*") (quoting *Swiss Re Life Co. Am. v. Gross*, 253 Va. 139, 144, 479 S.E.2d 857, 860 (1997)). Specifically, findings of fact by the Commission are entitled to a presumption of correctness. *Rappahannock League for Envtl. Prot., Inc. v. Va. Elec. & Power Co.*, 216 Va. 774, 783, 222 S.E.2d 802, 808 (1976). Additionally, "although questions of law are reviewed de novo, the practical construction given by the Commission to a statute it is charged with enforcing 'is entitled to great weight by the courts and in doubtful cases will be regarded as decisive.'" *PEC*, 278 Va. at 563, 684 S.E.2d at 810 (quoting *Appalachian Voices*, 277 Va. at 516, 675 S.E.2d at 461); *Office of the AG*

v. State Corp. Comm'n, 288 Va. 183, 191, 762 S.E.2d 774, 778 (2014) (quoting same); *Commonwealth v. Appalachian Elec. Power Co.*, 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951).

Although the Commission's application of law is reviewed de novo, its factual findings are entitled to deference, and those factual findings are viewed in the light most favorable to the prevailing party and "will not be disturbed 'unless it is plainly wrong or without evidence to support it.'" *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 90, 726 S.E.2d 339, 345 (2012) (quoting *Hedrick v. Commonwealth*, 257 Va. 328, 340, 513 S.E.2d 634, 641 (1999) (citing Va. Code § 8.01-680)); *Am. Tradition Inst. v. Rector and Visitors of the Univ. of Va.*, 287 Va. 330, 338-39, 756 S.E.2d 435, 439 (2014).

Assignment of Error 1, a legal question, generally would be subject to de novo review; however, because the Cities' challenge is to the Commission's application of a statute that is central to its regulatory authority, the Commission's practical construction of this statute is entitled to great weight and in doubtful cases should be considered decisive. Assignment of Error 2 is a purely factual question; therefore, the Commission's findings warrant deference unless such finding is not supported by any evidence or found to be contrary thereto.

II. The Commission has both the authority and the discretion to approve a rate mechanism such as the WWISC. (Assignment of Error 1)

The Cities argue that the Commission erred in adopting the WWISC program because the Commission does not have the legal authority to adopt such a program. Cities' Br. at 8. Although the Cities' arguments in the Cities' Brief are difficult to follow, they primarily appear to base this contention on two main points: (1) that the statement in Virginia Code Section 56-235.2(A) that "the public utility [must have] demonstrated that such rates, tolls, charges or schedules in the aggregate provide revenues not in excess of the aggregate actual costs incurred by the public utility" somehow *mandates* that the Commission cannot consider a rate outside of the context of a general base rate case[7] (Cities' Br. at 13-17); and (2) that the SAVE Act (Chapter 26 of Title 56 of the Code of Virginia), which only applies to natural gas utilities, is the only authority that the Commission has to permit the recovery of infrastructure costs outside of a general base rate case and that similar legislation for water utilities would have to be enacted by the General Assembly for the Commission to have the authority to approve the WWISC. Cities' Br. at 17-22. Even a cursory review of these

[7] The Cities' Brief also appears to imply that Va. Code 56-235 sets the same requirement. Cities' Br. at 12. Although this portion of the Cities' argument is not clear and disconnected from the main arguments, *see infra* Section II.3.B, for a discussion of this contention.

statutes reveals that they in no way restrict the Commission from approving the WWISC in this proceeding as neither preempt the Commission's discretion in its ratemaking authority, which this Court has repeatedly confirmed is a legislative function delegated by the General Assembly.

1. *The lack of an explicit grant of authority in the Constitution of Virginia does not limit the Commission's regulatory authority over water companies.*

Prior to addressing the specific contentions raised by the Cities, the Cities appear to argue generally that the Commission's authority to regulate water companies is somehow inferior to its authority over electric and natural gas companies. Cities' Br. at 9-10. This argument is based solely on the fact that the Commission's regulatory authority over water companies is not explicitly mentioned in Article IX of the Constitution of Virginia. In reaching this conclusion, however, the Cities' Brief fails to examine the breadth of authority that the General Assembly has delegated to the Commission with respect to all public service companies, and water companies in particular.

Article IX, Section 2 not only grants the Commission authority over "railroad, telephone, gas, and electric companies," but also expressly states that "[t]he Commission shall have such other powers and duties not inconsistent with this Constitution as may be prescribed by law." Va.

Const. Art. IX, Section 2. Consistent with this, the General Assembly has granted the Commission broad and extensive authority over the regulation of public services companies.

Specifically, Va. Code § 12.1-12 provides that:

> Subject to such criteria and other requirements as may be prescribed by law, the Commission shall have the power and be charged with the duty of regulating the rates, charges, and facilities of all public service companies as defined in § 56-1.[8]

It is not a coincidence that this statutory language mirrors the Constitution's grant of authority to the Commission over "railroad, telephone, gas, and electric companies."[9] Clearly the General Assembly intended to grant the Commission the same plenary regulatory authority, "[s]ubject to such criteria and other requirements as may be prescribed by law," over all public service companies, including water companies, as that granted over the companies specifically enumerated in the Constitution.

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[8] Section 56-1 includes "water supply companies" in the definition of "public service companies."

[9] Specifically, Article IX, Section 2 states:

> Subject to such criteria and other requirements as may be prescribed by law, the Commission shall have the power and be charged with the duty of regulating the rates, charges, and services and, except as may be otherwise authorized by this Constitution or by general law, the facilities of railroad, telephone, gas, and electric companies.

Similarly, Va. Code § 56-35 states:

> The Commission shall have the power, and be charged with the duty of supervising, regulating and controlling all public service companies doing business in this Commonwealth, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies.

In both statutes the Commission's plenary authority over the rates of public service companies is clear. This Court previously has found that the Commission's ratemaking authority has the same attributes whether the Commission's authority is delegated to it by the General Assembly or is granted directly from the Constitution. *See Norfolk v. Va. Elec. & Power Co.*, 197 Va. 505, 514, 90 S.E.2d 140, 147-48 (1955) (where, in reference to the Commission's authority over electric companies under the Virginia Constitution of 1902--when the Commission's authority over electric companies was not enumerated in the Constitution—the Court stated: "[t]he power delegated by the legislature has the same attributes as the power directly delegated by the Constitution to the Commission . . ."). Similarly, particularly given the nearly identical grants of authority discussed above, the Commission's authority over the regulation of water companies is in no way diminished because water companies are not explicitly enumerated in the Constitution.

2. *The approved WWISC complies with the requirements of Virginia Code Section 56-235.2.*

The Cities argue that the Commission acted contrary to the requirements of Va. Code § 56-235.2(A), because its adoption of the WWISC does not take into account all components required to be considered when approving a public utility company's proposed rates. Cities' Br. at 14. Section 56-235.2(A) requires, in part, that for any toll, rate, charge or schedule to be considered just and reasonable by the Commission:

> the public utility [must have] demonstrated that such rates, tolls, charges or schedules in the aggregate provide revenues not in excess of the aggregate actual costs incurred by the public utility in serving customers within the jurisdiction of the Commission, including such normalization for nonrecurring costs and annualized adjustments for future costs as the Commission finds reasonably can be predicted to occur during the rate year …

The Cities argue that the WWISC does not comply with this statutory language as the WWISC does not consider all of the components mandated by this Code section. Cities' Br. at 13-15.

Initially, the Cities' Brief states: "a WWISC program only considers infrastructure costs *and does not consider returns on investment or profit to be derived from system improvements*." Cities' Br. at 14. To the contrary, however, the WWISC explicitly includes as an eligible cost, to be

considered when setting the WWISC rate, the utility's "return on investment." In addition, as approved by the Commission, the Company must submit an earnings test along with its WWISC filings, which allows the Commission to evaluate the Company's earnings in relation to the WWISC, ensuring that the return on investment is considered and monitored.

The Cities' Brief states:

> A WWISC considers only the cost of replacement of a water main, but not the additional profits that might be obtained from that replacement due to elimination of inflow and infiltration, and ignores potential new customers or profits from replacement of smaller, older lines with larger mains carrying more water volume.

Cities' Br. at 15. Although not articulated in the Cities' Brief, the Cities are correct that these costs are examples of potential cost savings that a utility implementing a WWISC could achieve in its base rates. JA 1005-06. These cost savings, however, cannot be quantified in advance and only are realized slowly, if at all, over a long period of time. JA 786-88, 1249-50. Nevertheless, the WWISC as approved by the Commission does consider such cost savings. The annual earnings test is designed to measure the revenue collected under the WWISC in relation to the Company's earnings from both base rates (where the cited cost savings would be realized) and from the WWISC and to provide refunds "to ratepayers, with interest, to the

extent WWISC collections result in annual earnings above the rate of return on common equity of 9.25% approved." JA 652. The Cities' argument simply ignores these components of the WWISC; when included and properly considered, the omitted components nullify the Cities' argument.

3. *The Commission has been delegated broad authority and discretion in how to structure utility rates.*

In addition to the expansive delegations of authority over public service companies in Va. Code §§ 12.1-12 and 56-35, the Code of Virginia specifically grants the Commission broad authority and discretion in setting rates under Chapter 10 of Title 56. Section 56-235 broadly empowers the Commission to fix just and reasonable "rates, tolls, charges or schedules." The Court has long-held that this statute, read in conjunction with §§ 56-236 and 56-237, permits the Commission to implement any rate mechanism that it determines to be appropriate, provided it is found to be just and reasonable. *See Norfolk*, 197 Va. 505, 90 S.E.2d 140 (upholding a Commission order authorizing an purchased gas adjustment clause for a gas utility as within the Commission's legislative discretion under the statute).

The Cities appear to contend that § 56-235.2 limits the Commission to setting rates only in one, all-encompassing rate review and that this statute prevents the Commission from establishing multiple rates through

which a utility can recover different costs. This argument has no basis in the plain language of the statute. This Court has repeatedly held that "when the Commission is conducting a ratemaking procedure, it is exercising a legislative function delegated to it by the General Assembly." *Va. Elec. Power Co. v. State Corp. Comm'n*, 284 Va. at 741, 735 S.E.2d at 691 (citing *Potomac Edison Co. v. State Corp. Comm'n*, 276 Va. 577, 587, 667 S.E.2d 772, 777 (2008)). This Court has stated that it will: "presume that where the General Assembly has not placed an express limitation in a statutory grant of authority, it intended for the Commission, as an expert body, to exercise sound discretion." *Id*. 284 Va. at 741, 735 S.E.2d at 691. Further:

> when a statute delegates such authority to the Commission, we presume that any limitation on the Commission's discretionary authority by the General Assembly will be clearly expressed in the language of the statute. In the absence of an express limitation, we will not add language to the statute by inference.

Va. Elec. Power Co. v. State Corp. Comm'n, 284 Va. at 741, 735 S.E.2d at 691 (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) ("Courts cannot 'add language to the statute the General Assembly has not seen fit to include.'") (quoting *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003)). For

the Cities interpretation of the statute to prevail, they must be able to identify an express limitation—which they do not and cannot. Instead, the Cities' entire argument is based on inference and is directly contrary to long-standing precedent.

A. *The Cities' arguments are undermined by the plain language of Virginia Code Section 56-235.2.*

The language of Va. Code § 56-235.2(A) does not explicitly address the procedure that the Commission must follow in setting just and reasonable rates under that chapter of the Code – it only requires that when the Commission sets rates, it must be satisfied that the *aggregate* revenues the utility earns will not exceed *aggregate* costs, plus a fair return. As discussed above, the WWISC clearly does so through the "true-up" mechanism and the additional earnings test approved by the Commission. Moreover, the use of the term "aggregate" makes clear that the General Assembly: (a) was aware that the Commission may find that more than one rate was appropriate to recover costs; and (b) determined that ultimately the Commission must be satisfied that when all rates are aggregated together, revenues do not exceed costs plus a fair return.

The Cities' argument focuses exclusively on the language in the first half of § 56-235.2(A), and fails to address or reconcile the remaining portions of § 56-235.2, which in fact undermine any claim that the statute

requires all of a utility's rates be set in a single base rate proceeding. Indeed, the second half of § 56-235.2(A) (as well as § 56-235.2(B)) make clear that requiring a single rate proceeding for all rates was not the intent of the General Assembly in enacting § 56-235.2. This Code section specifically contemplates the approval of "special rates, contracts, incentives or other alternative regulatory plans" "either in the context of *or apart from a rate proceeding*."[10] It defies reason and this Court's precedent to conclude that the General Assembly would intend to mandate, by implication rather than specific wording, that all rates be set in a single base rate proceeding in one half of a statute only to disregard this later in the same statute and permit a rate to be set through a proceeding separate from a rate proceeding.

[10] Indeed, while not a necessary source of authority for the Commission's approval of a WWISC in the current proceeding given the Commission's clear authority under Section 56-235, the Hearing Examiner in the Rulemaking proceeding found that the Commission's authority under 56-235.2 to approve special rates reinforced the conclusion that the Commission has the authority to approve a WWISC. Report of Alexander F. Skirpan, Jr., Senior Hearing Examiner, *Petition of Va. Amer. Water Co., Aqua Va., Inc., and Massanutten Pub. Serv. Corp., For Rulemaking to Establish a Water and Wastewater Infrastructure Service Charge*, Case No. PUE-2014-00066, 2015 WL 6161269 , at *22 (June 8, 2015).

B. *The Commission's authority to approve the WWISC is supported by long-standing precedent.*

The Cities state that they "vehemently disagree" with the analysis of the Commission's legal authority set forth by the Commission's Hearing Examiner. Cities' Br. at 12. As the apparent basis for this disagreement, the Cities appear to contend that Va. Code § 56-235 – which they correctly quote, but incorrectly cite as Va. Code § 12.1-12 – requires that all rates be set in one base rate proceeding.[11] Cities' Br. at 12. This Court, however, has previously found essentially the opposite when reviewing the authority granted to the Commission by Va. Code § 56-235. *See Norfolk*, 197 Va. 505, 90 S.E.2d 140 (upholding a Commission order authorizing a rate to recover certain costs separate from base rates). This Court's decision in *Norfolk* has long stood and been accepted as confirmation that Va. Code § 56-235 permits the Commission to approve and administer rate mechanisms separate from base rates, as the Hearing Examiner recognized when citing *Norfolk* as support for the Commission's authority to approve the WWISC. JA 518.

[11] For the majority of the Cities' Brief, this argument is based on the requirements of Va. Code § 56-235.2, but the Cities' Brief also appears to imply that the requirements of Va. Code § 56-235 form part of the basis of its disagreement with the Hearing Examiner's analysis of the Commission's legal authority.

Despite "vehemently disagree[ing]" with this analysis, the Cities' Brief does not cite the *Norfolk* decision, but rather summarily rejects it without analysis because it was decided prior to a water company proposing that the Commission approve a WWISC. Cities' Br. at 11. Although *Norfolk* was decided by this Court in 1955, "[c]ase law construing a statute is controlling precedent [] until the General Assembly effects a substantive change in the law." *Ford v. Richmond*, 239 Va. 664, 669, 391 S.E.2d 270, 272-73 (1990) (quotation omitted). The General Assembly has not substantively altered the language of § 56-235 since *Norfolk* was decided, other than adding language to confirm that the requirements of the remainder Chapter 10– including the just and reasonable standard made explicit in § 56-235.2– must be complied with in setting rates.[12]

4. *The existence of the SAVE Act does not impact the Commission's authority to approve the WWISC.*

The Cities argue that because the General Assembly enacted legislation relating to the recovery of the costs of replacing infrastructure for natural gas companies through a mechanism that is separate from base rates, but did not include water companies in this legislation, the

[12] Specifically, in 1977, the General Assembly added the following sentence to the end of § 56-235: "All rates, tolls, charges or schedules set by the Commission shall be valid only if they are in full conformance with the provisions of this chapter." 1977 Va. Acts, ch. 336.

Commission is without authority to approve a similar mechanism for water companies. Cities' Br. at 17-18. Specifically, the Cities cite to Va. Code § 56-603 *et seq.*, (the "SAVE Act") as proof that General Assembly action is required to grant the Commission authority to approve specialized treatment for infrastructure costs such as would be provided by the WWISC. Cities' Br. at 18.

As an initial matter, at no point does the Commission cite the SAVE Act as a basis for its authority to adopt the WWISC program. Indeed, while the WWISC recovery mechanism was designed to function similarly to the SAVE Act recovery mechanism, no party has ever claimed that the SAVE Act provides a basis for the Commission's authority to approve the WWISC.

The Cities first raise their mistaken argument that the Commission's authority over the rates of water companies is somehow less than its authority over the rates of natural gas companies. As discussed above in Section II.1, this is simply incorrect. Moreover, where the General Assembly has chosen to enact legislation establishing parameters for setting rates for a particular type of cost, this does not mean, as the Cities would have this Court believe, that the Commission did not have such authority without the legislation. Instead, the actual words of the legislation

must be examined in relation to the Commission's existing authority prior to reaching such conclusion. *See Cuccinelli v. Rector & Visitors of the Univ. of Va.* 283 Va. 420, 425-26, 722 S.E.2d 626, 629-30 (2012) (confirming that the General Assembly's intent in passing a statute must be ascertained from the words used in the statute).

Nowhere in Chapter 26 of Title 56 of the Code is there a grant of any authority to the Commission –indeed, based on the Commission's broad authority discussed above, such a grant is unnecessary. This Chapter instead provides a series of procedures and criteria that apply should a natural gas utility file a plan pursuant to this part of the Code. For instance, Va. Code § 56-604 states that "[t]he Commission shall approve or deny, within 180 days, a natural gas utility's initial application for a SAVE plan" (§ 56-604(B)); and that "[n]o other revenue requirement or ratemaking issues may be examined in consideration of the application filed pursuant to the provisions of this chapter." (§ 56-604(D)). By examining the express words of the statute it becomes clear that the SAVE Act is not a grant of authority to the Commission, but is instead a limitation on the Commission's otherwise broad discretion.

Beyond the fact that the SAVE Act functions more as a limitation on the Commission's authority than as a specific grant of authority, the Cities

ignore the fact that the Commission approved a rate mechanism similar to both the WWISC and the SAVE mechanism prior to the passage of the SAVE Act. In 1999, the Commission approved Roanoke Gas Company's ("Roanoke") request to implement a Distribution System Renewal Surcharge ("DSR Surcharge") to recover the costs of replacing aging infrastructure. Final Order, *Application of Roanoke Gas Company, For general increases in rates and to revise its tariff,* Case No. PUE-1998-00626, 1999 S.C.C Ann. Rep. 44, 1999 Va. PUC LEXIS 284 (Sept. 15, 1999). The DSR Surcharge approved for Roanoke is similar to the WWISC approved by the Commission and the SAVE mechanism currently used by natural gas utilities. JA 247, 1004-05, 1021-22, 1800-02, 1826-29. They each allow for the collection and annual adjustment of a rate mechanism outside of the scope of a full rate case and include safeguards to ensure that the utility does not over-earn as a result of the additional charge.

The Commission approved Roanoke's DSR Surcharge under its general ratemaking authority. No challenges were raised to the Commission's exercise of its authority to approve the DSR Surcharge. Moreover, the General Assembly has not made any statutory changes that express any intent to limit the Commission's general authority to implement similar mechanisms for other utilities since that time. Accordingly,

consistent with this Court's precedent, it would be unfounded to read into the SAVE Act a limitation on the Commission's ratemaking authority by inference. *Va. Elec. Power Co. v. State Corp. Comm'n*, 284 Va. at 741, 735 S.E.2d at 691 (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. at 313, 608 S.E.2d at 906).

The fact that the Commission has the authority to implement a rate mechanism similar to the SAVE mechanism does not render the SAVE Act superfluous as suggested by the Cities. Instead, the SAVE Act functions to provide specific procedures and limitations on the Commission should a natural gas utility seek to establish a SAVE plan in conformance with the requirements of the SAVE Act. This is nothing new or unique to Virginia or this Court. *See e.g., Old Dominion Comm. For Fair Util. Rates v. State Corp. Comm'n*, 294 Va. 168, 172-73, 803 S.E.2d 758, 760-61 (2017)(discussing at length limitations placed on the Commission's authority by the General Assembly regarding electric rates).

Ultimately, it is clear that the Commission has authority under Chapter 10 of Title 56 to approve a rate mechanism such as the WWISC. While the General Assembly may have set certain parameters and restrictions on the Commission's consideration of such a mechanism for natural gas utilities through the SAVE Act, the General Assembly has not

seen fit to place an express limitation on similar mechanisms for other utilities. Accordingly, consistent with the Commission's broad authority and discretion in ratemaking matters, the Court should affirm the Commission's authority to approve the WWISC.

III. There is ample evidence in the record to support the Commission's approval of the WWISC. (Assignment of Error 2)

The Cities vociferously assert in their Brief that the Commission did not have the authority to approve the WWISC and that Commission's decision failed to comply with the requirements of § 56-235.2. *See, e.g.*, Cities' Br. at 22. Curiously, however, in Assignment of Error 2, the Cities appear to abandon their argument that the Commission did not have authority to approve the WWISC and instead concede that the Commission has the authority to approve the WWISC.[13] In keeping with this concession, rather than assert that the evidence shows that the Commission's finding did not meet the statutory standard that applies to approval of rates, the Cities' Brief appears to argue that the evidence did not support the Commission's exercise of its *discretion* to approve an alternative rate mechanism such as the WWISC. Even if the Cities

[13] Assignment of Error 2 states: "The State Corporation Commission erred in finding that the facts of this case *warranted their exercise of the authority* to impose a pilot Water and Wastewater Infrastructure Surcharge ("WWISC") program in the City of Alexandria." JA 687 (emphasis added).

intended to assert that the Commission's decision was contrary to the evidence when weighed under the applicable statutory standard, the Cities' Brief fails to articulate what that statutory standard is and how the Commission's decision is contrary to that evidence under the relevant standard.

Instead, the Cities' Brief simply highlights a few segments of testimony, proffered by witnesses for parties who opposed the WWISC. The Cities completely ignore the remainder of the evidence in the record that supports the WWISC. As highlighted below, the Commission's decision was well-supported by the evidence in the record under the criteria set by the Commission in a previous proceeding for the approval of such a mechanism, as well as under the applicable statutory standard. Ultimately, based on the broad authority for the Commission to approve a mechanism that it determines to be appropriate so long as it results in just and reasonable rates, the Court should follow its precedent giving deference to Commission decisions regarding factual determinations, particularly in setting rates.

1. *The Cities' Brief fails to articulate the standard applicable to the Commission's decision.*

In the course of attempting to show that the Commission's finding was contrary to the evidence in the record, the Cities fail to clearly

articulate any standard, statutory or otherwise, by which the evidence in the record can be judged. It is not sufficient, under this Court's standard of review for Commission decisions, that there simply be some evidence in the record that contradicts the Commission's decision. Instead, the Commission's findings must be "contrary to the evidence or without evidence to support it" under the applicable statutory standard governing such findings. *Campbell County,* 216 Va. at 105, 215 S.E.2d at 927.

Rather than identifying the applicable standard for the Commission's decision, and then detailing how the evidence presented failed to meet the applicable standard, the Cities instead wander through a different standard for each piece of evidence, without ever establishing that such standard was a valid standard by which to weigh the evidence. For instance, the Cities' Brief variously states that "there was simply no evidence showing that the WWISC program was needed to serve the public interest," Cities' Br. at 22; "Clearly the costs of infrastructure replacement are simply not volatile or outside the control of the utility such that the costs need to be recovered through an extraordinary separate surcharge mechanism," Cities' Br. at 27; and that the WWISC is "not needed," Cities' Br. at 27-28. None of these articulates the correct standard applicable to the

Commission's exercise of its legislative discretion in setting rates under Va. Code § 56-235.

2. *The applicable statutory standard is whether the WWISC will result in just and reasonable rates and there is substantial evidence to support the Commission's conclusion on this standard.*

Virginia Code § 56-235 sets the statutory standard applicable to the Commission's decision below: that the rates set by the Commission are just and reasonable as defined in § 56-235.2. As discussed above in Section II.2, the approved WWISC clearly meets this standard. Moreover, the Commission was presented with substantial evidence to confirm this. For instance, the Commission Staff conducted a thorough review of the proposed WWISC and recommended numerous safeguards, including that the approved WWISC include an earnings test and a refund mechanism to ensure that customers are not contributing to over-earnings through the WWISC. JA 1826-29. Additionally, the Company provided testimony supporting the ability of the earnings test, in addition to the '"true-up" mechanism in the WWISC, to ensure that the Company earned no more than a reasonable return as a result of the WWISC. JA 1926, 1931-32.

None of the evidence cited in the Cities' Brief purports to show that the WWISC would produce rates that are not just and reasonable. While certain witnesses for parties opposing the WWISC contended that the

WWISC was not needed and that the Company *could* recover its investments through base rates, these witnesses did not testify that the resulting WWISC rates would not be just and reasonable. *See* Cities' Br. at 26-29.

3. *The Commission's exercise of its discretion to establish the WWISC mechanism was supported by substantial evidence.*

In addition to the statutory standard, the Commission's Order in the Rulemaking proceeding also established the additional showing a utility would need to make prior to the Commission using its discretion under its statutory authority to approve an alternative rate mechanism for a water utility. Specifically, the Commission determined that a utility should present evidence so that the Commission may determine that there is a "need for such investment" and also consider "the appropriate recovery thereof . . . on a case-by-case basis." Rulemaking Order at *6. Although the Commission did not purport to establish this as a firm standard for such approval, it nevertheless made clear that it had determined these were the appropriate considerations to be addressed prior to approval of a mechanism such as the WWISC.

As described thoroughly earlier in this brief, during the proceedings in this matter before the Commission, the Company presented extensive evidence for the Commission's consideration regarding both the need for

the investment to be included in the WWISC (*see supra* Section II.2 of the Counterstatement of Facts) and the need for and appropriateness of recovery of these investments through the WWISC, rather than through base rates (*see supra* Section II.3 of the Counterstatement of Facts).

The testimony cited in the Cities' Brief does challenge these two showings; however, this Court has stated that "[t]he Commission [i]s entitled to interpret [] conflicting evidence and to decide the weight to afford it." *Bd. of Supervisors of Loudoun Cnty. v. State Corp. Comm'n, et al.*, 292 Va. 444, 458, 790 S.E.2d 460, 467-68 (2016) (citing *GTE South Inc. v. AT&T Commc'ns of Va., Inc.*, 259 Va. 338, 344, 527 S.E.2d 437, 441 (2000); *Shenandoah Sav. & Loan Ass'n v. Front Royal Sav. & Loan Ass'n*, 220 Va. 718, 722, 261 S.E.2d 325, 328 (1980); *S. Ry. Co. v. Commonwealth*, 193 Va. 291, 298, 68 S.E.2d 552, 557 (1952)). Accordingly, while the Commission may have been presented with competing evidence, it clearly had evidence to support these findings. Consequently, the Cities cannot show that the Commission's decision was contrary to the evidence or without evidence to support it.

CONCLUSION

For the reasons stated above, the Court should affirm the ruling of the Commission in its Final Order approving the WWISC mechanism and authorizing the Company to file an application to implement a three-year WWISC pilot program.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(h) this Brief of Appellee complies with Rule 5:26(b) by containing a total of less than 50 pages.

Counsel for Appellee hereby certifies that on this 26th day of February 2018, three bound copies of the foregoing Brief of Appellee were hand-filed with the Clerk of the Supreme Court of Virginia, and one electronic version of the Brief of Appellee was submitted via the Virginia Appellate Court eBrief System (VACES), pursuant to Rules 5:26 and 5:32(a)3(i) of the Rules of the Supreme Court of Virginia.

I further certify that, on this same day, one electronic copy of the Brief of Appellee was served via email on each of the following:

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