IN THE

Supreme Court of Virginia

RECORD NO. 171428

CITY OF ALEXANDRIA, *et al.*,

Appellants,

v.

STATE CORPORATION COMMISSION, *et al.*,

Appellees.

BRIEF *AMICUS CURIAE* OF AQUA VIRGINIA, INC.

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BRIEF *AMICUS CURIAE* OF AQUA VIRGINIA, INC.

STATEMENT OF THE CASE

I. Nature of the Case and Material Proceedings Below.

The case follows a decision of the Virginia State Corporation Commission ("SCC" or Commission") on a petition for rulemaking to establish rules for the filing of water and wastewater infrastructure service charge ("WWISC") plans and riders filed by Appellee, Virginia-American Water Company ("Virginia-American" or "Company"), Amicus, Aqua Virginia, Inc. ("Aqua Virginia" or "Aqua") and others, Case No. PUR-2014-00066 ("WWISC Rulemaking Proceeding"). (Joint Appendix, hereinafter "J.A.," 467, 517). In its September 9,

2015 Order in the WWISC Rulemaking Proceeding, the Commission concluded that the proposed WWISC rules "need not and should not be implemented." As the Commission stated, however:

> While we recognize the problem of aging infrastructure for many water and wastewater companies and appreciate Petitioner's desire to improve the quality and service of their systems, we find that the need for such investment, along with the appropriate recovery thereof, can be reasonably addressed on a case-by-case basis wherein the Commission and interested parties may consider the specific circumstances attendant to each utility.

(*Id*.). In a concurring opinion, Commissioner Jagdmann further explained that:

> Where a company is faced with large and/or important infrastructure replacements or other capital projects that may be burdensome to ratepayers, surcharges may be an appropriate rate recovery mechanism when tailored to the project . . . . In my view, such surcharges can be fashioned on a case-by-case basis and can be designed to comport with the requirements of Chapter 10 of the Code . . . . In short, I believe that, under appropriate circumstances and with Commission oversight, surcharges are a viable mechanism to achieve infrastructure replacement or other high capital expenditures in a way that is manageable for ratepayers.

(J.A. 517).

In the WWISC Rulemaking Proceeding, Senior hearing Examiner Skirpan likewise acknowledged that the adoption of a separate rate surcharge might be appropriate on a case-by-case basis, where the specific facts and circumstances, including customer safeguards, establish that such mechanism is in the public interest and that the resulting rates are just and reasonable. (*Id*.).

In accordance with the SCC decision in the WWISC Rulemaking Proceeding, Virginia-American filed the instant application, SCC Case No. PUE-2015-00097 ("Application"), seeking an increase in water rates pursuant to Article 2, Chapter 10 of Title 56 of the Code of Virginia and 20 VAC 5-201-10, *et seq*., the Commission's Rules governing Utility Rate Applications and Annual Informational Filings. (J.A. 1-9H, 398). In its Application, Virginia-American proposed establishing a WWISC, "[i]n order to meet the need to invest in and replace[ ] aging infrastructure and other investments in its systems that do not generate additional revenue for the Company." (J.A. 9A).

Following a three-day evidentiary hearing ("Evidentiary Hearing"), Hearing Examiner Howard P. Anderson, Jr. issued his report ("Hearing Examiner's Report" or "Report") (J.A. 395-523), recommending, *inter-alia*, that the Commission authorize Virginia-American to implement a three-year WWISC pilot program in the Company's Alexandria District, subject to certain enumerated safeguards and restrictions. (J.A. 518-20).

On May 24, 2017, the Commission entered a Final Order which, "upon consideration of the record . . ., the Hearing Examiner's Report, and the applicable laws and statutes," adopted the Hearing Examiner's recommendations authorizing implementation of the proposed WWISC (J.A. 649-52). From this judgment, the

City of Alexandria ("Alexandria") and the City of Hopewell ("Hopewell") (collectively, the "Cities") appeal, contending that:

> The State Corporation Commission erred in establishing a three-year pilot Water and Wastewater Infrastructure Surcharge program in the City of Alexandria without express statutory authority (Assignment of Error No. 1); and
>
> 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 program in the City of Alexandria (Assignment of Error No. 2).

(Opening Brief of Appellants, filed February 1, 2018, "Op. Br." at 6). These alleged errors are unfounded and must be disregarded as discussed, *infra*.

II. Amicus Statement of Interest

This appeal raises important questions regarding the statutory framework pursuant to which the SCC sets the rates of water and wastewater utility companies in the Commonwealth. Specifically, this case challenges the Commission's manifest authority to enable such companies to implement a water and wastewater infrastructure service charge to recover the cost of replacing aging infrastructure and making other investments in water and wastewater systems that do not generate additional revenues.

Aqua Virginia is a public service corporation comprised of 173 water and 9 wastewater systems serving approximately 25,213 water and 7,620 wastewater customers located in 38 counties across the Commonwealth. Currently, Aqua has

pending before the SCC, an application for an increase in water and wastewater rates filed pursuant to Chapter 10 of Title 56 of the Virginia Code ("Application"), Case No. PUR-2017-00082. Such Application constitutes Aqua's first rate case in nearly three (3) years. Although the Application's base rate request includes in rate base certain significant capital investments made since Aqua Virginia's last consolidated rate case, the Application also includes a request for authorization to implement a WWISC like that at issue in this case, to recover the cost of infrastructure repair/replacement projects that are not included in rate base and which are scheduled to occur during calendar years 2019 through 2022.

The Supreme Court of Virginia's decision in this appeal impacts Aqua Virginia in that a decision for the Appellants could adversely affect Aqua Virginia's request for authorization to implement a WWISC currently pending before the Commission. Such decision, if rendered in the manner and on the basis offered by Appellants would also improperly constrain the SCC's ratemaking authority over water and wastewater utilities like Aqua Virginia and would distort the evidentiary burden born by applicants under Code §§ 56-235, *et seq*. Perhaps most importantly, an adverse decision as urged by the Cities will hinder the efforts of public utilities like Virginia-American, Aqua and others to make much-needed repairs to and to efficiently replace the Commonwealth's aging water and wastewater infrastructure.

STATEMENT OF THE FACTS

For purposes of its Brief *Amicus Curiae*, Aqua Virginia adopts the Counterstatement of Facts set forth in the Brief of Appellee Virginia-American Water Company. Consistent therewith, Aqua notes the following findings and conclusions in the record which support the Hearing Examiner's Report and the Commission's Final Order in this matter:

On October 30, 2015, Virginia-American filed its Application, seeking an increase in total jurisdictional revenues of $8,685,648 comprised of differential increases for each of the Company's five regional operating districts: the Alexandria District; the Hopewell District; the Prince William Water District; the Prince William Wastewater District; and the Eastern District. (J.A. 4-8).[1] Additionally, Virginia-American requested authorization to implement a WWISC, in order to meet the need to replace aging infrastructure and provide other non-revenue-producing investment in a manner which allows for better planning while avoiding frequent and escalating base rate increases. (J.A. 9-9C).

On November 30, 2015, the Commission issued an Order for Notice and Hearing which, *inter-alia*, directed Commission Staff to investigate and file written

[1] Virginia-American is seeking to move gradually toward consolidating the rates of its affiliated water utilities. *See* § 56-235.11 Code of Virginia (1950), as amended. At the time of the Application, however, it had five separate regional operating district subject to differing rates which Virginia-American requested be based on a consolidated total company revenue requirement. (J.A. 4-5).

testimony exhibits regarding the Application, scheduled an Evidentiary Hearing on the Application, appointed a Hearing Examiner to conduct proceedings pursuant to Code § 12.1-31 and Rule 5 VAC 5-20-120 of the Commission's Rules of Practice and Procedure, and established other procedural deadlines and requirements. (J.A. 11-29). On February 4, 2016, the Cities became respondents in the case by filing notices of participation with the Commission. (J.A. 47, 60).

Hearing Examiner Anderson conducted a three-day Evidentiary Hearing on the Application occurring June 21 through June 23, 2016. (J.A. 400, 688-1092 (Transcript of Evidentiary Hearing ("Tr.") at 1-794). Following conclusion of the Hearing and upon consideration of post-hearing briefs filed by Commission Staff (J.A. 106-206), the Office of the Attorney General, Consumer Counsel Division (J.A. 207-220), Virginia-American (J.A. 221-337), the Cities (J.A. 96-105), and other respondents (J.A. 77-95, 338-394), the Hearing Examiner issued his Report. (J.A. 395-523). Therein, the Hearing Examiner recommended that the SCC grant Virginia-American an increase in base rates constituting an increase in gross annual revenues of $4,781,959 and direct the Company to promptly refund all amounts collected under interim rates in excess of the rate increase found just and reasonable. (J.A. 522).

With regard to the proposed WWISC, the Hearing Examiner ruled that:

> There is substantial statutory support for the Commission's authority to implement a WWISC under Chapter 10 of Title 56 of the Code.

> Specifically, § 56-235 of the Code gives the Commission the authority to fix just and reasonable 'rates, tolls, charges or schedules'. The Commission has broad authority under this statute, and Chapter 10 in general, to implement any mechanism it finds in compliance with the Code.

(J.A. 518, *citing* City of Norfolk v. Virginia Elec. & Power Co., 197 Va. 505, 90 S.E.2d 140 (1955)).

The Hearing Examiner considered testimony and evidence regarding the proposed WWISC presented by Company witnesses, William R. Walsh (J.A. 400-02, 1123-34), Gary L. Akmentins (J.A. 405-06, 416-18, 756-96, 1031-67 (Tr. at 684-720), 1197-1204, 1231-51, 1923-32, 1993-2022), Timothy Z. O'Brien (J.A. 418-19, 1281-86), Michael D. Youshock (J.A. 419-21, 1068-83 (Tr. at 757-72), 1293-1339, 2097-2110) and Barry L. Suits (J.A. 749-54, 1084-94 (Tr. at 773-94), 2121-23). He considered testimony and evidence presented by: Staff witnesses Marc A. Tufaro (J.A. 466, 848-54 (Tr. 237-61),1467-73) and Scott C. Armstrong (J.A. 467-72, 999-1030 (Tr. at 558-603), 1790-1812); Consumer Counsel witness Ralph C. Smith (J.A. 422-26, 909-94 (Tr. at 310-404), 1643-79); and witnesses for the Cities, Michael P. Gorman (J.A. 428-30, 859-908 (Tr. at 269-318), 1488-91, 1504-07) and D. Wayne Trimble (J.A. 436-38, 815-44 (Tr. 199-228), 1413-24).

As the Hearing Examiner emphasized, "[n]o one denied the need for infrastructure replacement." (J.A. 518). He found that Virginia-American had demonstrated the need to accelerate the rate of infrastructure replacement and

noted that Staff agreed with the Company that increasing its main replacement rate between 0.65% and 0.80% was reasonable. (J.A. 518, 1026 (Tr. at 587)). The Hearing Examiner further noted that Virginia-American's Alexandria District had the highest average frequency of main breaks of all the Company's districts (J.A. 518), and that the mains in use within the City were primarily cast iron, accounting for 94% of the main breaks in that district. (*Id*.). The estimated useful life of cast iron mains is 100-110 years (J.A. 518, 1075-76 (Tr. at 764-65)); nevertheless, the evidence showed that, "in the City of Alexandria, there are water mains that date back to the 1800s." (J.A. 518-19, 1074-75 (TR. at 763-64)). For these reasons, the Hearing Examiner concluded that "[c]learly, the Alexandria District has the highest degree of infrastructure in need of replacement within the Company's operating systems." (J.A. 518). He further found that, at the current rate of replacement, it would take 430 years to completely replace the City's water mains yet, as Company witness Youshock pointed out, the rate at which existing infrastructure is reaching the end of its useful life continues to increase at a quicker pace than the current level of work to replace it. (J.A. 520, 1292).

The delay and inefficiency in replacing aging infrastructure, the Hearing Examiner found, is partly – if not entirely – due to the nature of the investment. As he explained,

> It is important to note [that] replacing existing infrastructure does not generate new or additional income for the Company. Because the

> replacement of existing infrastructure does not generate revenue, the Company currently must file a base rate case to recover that investment.

(J.A. 518). As a result of this mechanism, infrastructure repairs/replacement are done on a periodic and/or as-needed basis, even though the evidence indicates that planned replacements are much less expensive, on a per-unit basis, than the cost of increasingly frequent pipe breaks, service disruptions and resulting property damage. (J.A. 520, 2102). Alternatively, the Hearing Examiner concluded that:

> The WWISC would provide a dedicated, ongoing revenue stream to address the accelerating need for infrastructure replacement that would replace the start-stop regime that currently exists. Construction crews and material suppliers would be maintained on an ongoing basis. Further, because the WWISC would allow the Company to recover a significant level of its infrastructure replacement costs outside of a base rate case , it could potentially extend the time between such cases.

(J.A. 518). This, too, would enable companies to accelerate infrastructure replacement in a more efficient, less costly manner because base rate cases are expensive for the applicant, the Commission and the customers. (*Id*.).

With all of these considerations in mind, the hearing Examiner found that the need to accelerate the rebuilding of the Company's distribution structure via implementation of a WWISC "is essential to meet the ongoing needs of the community and customers to maintain system reliability." (J.A. 520). Accordingly, the Hearing Examiner recommended that the Commission authorize a WWISC, albeit with certain safeguards and limitations, including:

- Limiting WWISC-eligible infrastructure to mains and main-related infrastructure in the Alexandria District;
- Limiting duration of the WWISC to a period of three (3) years, at the expiration of which time the WWISC may be ended, expanded or otherwise modified;
- Imposing a requirement that an Earnings Test accompany the annual WWISC review and, to the extent that WWISC collections result in annual earnings above the mid-point of the Company's authorized ROE range, requiring a refund of such over-earnings to customers, with interest;
- Specifying that the WWISC should not be approved as an automatic rate adjustment clause;
- Requiring review of annual updates to the WWISC rider to Virginia-American's tariff ("WWISC Rider") and amendments to the WWISC Plan in docketed proceedings before the Commission;
- Requiring that such annual filing(s) occur 120 days prior to the requested WWISC effective date;
- Requiring submission of detailed accounting information with annual WWISC filing(s); and
- Adopting tariff revisions and revisions to the calculation of the WWISC proposed by Staff.

(J.A. 519). The Hearing Examiner also found that a 7.5% cap should be applied to the WWISC, allowing Virginia-American to ramp up its infrastructure replacement operations throughout the three-year course of the program, while providing an adequate customer safeguard. As he explained, with a 7.5% cap, the typical residential customer's bill would increase, on average, by $0.20, which increase represented the maximum impact which would only be realized when the Company reaches the cap. Until the cap is reached (i.e., while the program is ramping-up which could take a year or more), the actual bill impact would be much less. "This is a small price to pay," the Hearing Examiner stated, "for much-

needed infrastructure improvements that will not only improve customers' service but service reliability as well." (J.A. 520).

With these safeguards and limitations, the Hearing Examiner found that:

> The Company's recovery of infrastructure replacement costs through the WWISC mechanism instead of through base rate cases would not deprive the Commission of appropriate oversight or ability to review the Company's cost of service. The annual review of the WWISC in the context of a formal proceeding, coupled with an Earnings Test, would permit the Commission and interested parties the opportunity to take an active role in reviewing the Company's investments prior to the Company incurring costs.

(J.A. 518). According to the process established for the WWISC, the Hearing Examiner explained that:

> Specifically, the Company would file a list of the projects it anticipates completing in the upcoming year along with its cost estimates for those projects. This would allow any interested party the opportunity to review this information to evaluate the prudence of the Company's plans. The Company would file a reconciliation and report on its investments with details on the projects it completed during the preceding WWISC year and would match this investment against the revenue it received from customers during that same time period.

(J.A. 518-19, 1922-23). "It should be pointed out," the Hearing Examiner made clear, "that this pre-investment review process allows for an additional review of the prudency of the Company's investment that is not available in the traditional ratemaking process where the Commission generally only reviews costs after they have been incurred." (J.A. 519, 1923). Through the WWISC, therefore, "the Company, the Commission and any interested parties would be able to work

collaboratively to evaluate the Company's need for infrastructure investment and design a plan that is both efficient and effective." (J.A. 519).

In its Final Order, the Commission adopted the findings and recommendations enumerated in the Hearing Examiner's Report and authorized Virginia-American to implement a three-year pilot WWISC in its Alexandria District, subject to the safeguards and limitations described in the Report. (J.A. 651-52). This decision should be affirmed for the reasons discussed below.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

As this Court recently has recently reiterated, "[w]hen the SCC is conducting a ratemaking procedure, it is exercising a legislative function delegated to it by the General Assembly." Old Dominion Comm. For Fair Utility Rates v. State Corp. Comm'n, 294 Va. 168, 180, 803 S.E.2d 758, 764 (2017). 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 and afford it a reasonable amount of discretion in so doing. Va. Elec. & Power Co. v. State Corp. Comm'n, 284 Va. 726, 735, 735 S.E.2d 684, 688 (2012); Central Tel. Co. v. State Corp. Comm'n, 219 Va. 863, 874-75, 232 S.E.2d 575, 581-82 (1979). Accordingly, a decision of the SCC can be overturned only by a finding of abuse of legislative discretion.

City of Lynchburg v. C&P Tel. Co., 200 Va. 706, 107 S.E.2d 462 (1959); City of Norfolk v. C&P Tel. Co., 192 Va. 292, 64 S.E. 2d. 772 (1951). As the Court has stated, "[i]t is firmly established that a decision by the Commission comes to this court with a presumption of correctness" Va. Elec. & Power Co., 284 Va. at 735, 735 S.E.2d at 688. "The Commission's decision is entitled to the respect due to judgments of a tribunal informed by experience, and [the Court] will not disturb the Commission's analysis when it is based upon the application of correct principles of law." *Id*., *citing*, Lawyer's Title Insurance Corp. v. Northwest Corp., 254 Va. 388, 390-91, 493 S.E.2d 114, 115 (1997); Swiss Re Life Co. Am. V. Gross, 253 Va. 139, 144, 479 S.E.2d 857, 860 (1997) (internal quotation marks omitted). The SCC's exercise of its legislative authority in the context of a ratemaking decision will be reversed only if based upon a mistake of law. *Id*. at 736, 735 S.E.2d at 688. In reviewing the Commission's interpretation of its own statutory authority, this Court "gives great weight to the practical construction given to a statute by public officials charged with its enforcement." BASF Corp. v. State Corporation Comm'n, 289 Va. 375, 403, 770 S.E.2d 458, 473 (2015); Commonwealth v. Appalachian Elec. Power Co., 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951). However, it is not inexorably bound by that construction. *Id*.

With regard to the Commission's findings of fact, these, too, carry a presumption of correctness on appeal. In ratemaking proceedings, "[t]he

Commission is charged with the responsibility of finding the facts and making a judgment." Thus, this Court "is neither at liberty to substitute its judgment in matters within the province of the Commission nor to overrule the Commission's findings of fact unless . . . its determination is contrary to the evidence or without evidence to support it." Va. Elec. & Power Co., 284 Va. at 735, 735 S.E.2d at 688, *citing* Campbell County v. Appalachian Pow. Co., 216 Va. 93, 105, 215 S,E,2d. 918, 927 (1975).

Applying these standards, the SCC properly exercised its legislative discretion and acted well within its constitutional and statutory authority in authorizing the WWISC, which decision must be affirmed.

II. IN AUTHORIZING VIRGINIA-AMERICAN TO IMPLEMENT A WWISC, THE SCC PROPERLY EXERCISED ITS RATEMAKING AUTHORITY PURSUANT TO CHAPTER 10 OF TITLE 56 OF THE VIRGINIA CODE (Assignment of Error No. 1)

In their first assignment of error, the Cities aver that the State Corporation Commission erred in authorizing a three-year WISCC pilot program in the City of Alexandria without statutory authority. (Op. Br. 8-22). In making this argument, the Cities discuss constitutional foundation for the Commission's statutory authority as well as the precept – not at issue in this case – that the SCC's legislative authority remains subordinate to that of the Virginia General Assembly. (Op. Br. 9-11). As they point out, this Court has ruled that the SCC has no

inherent power simply because it was created by the Virginia Constitution; and therefore its jurisdiction must be found either in constitutional grants or in statutes that do not contravene that document. (*Id*. at 11, quoting Elizabeth River Crossings v. Meeks, 286 Va. 286, 307, 749 S.E.2d 176 (2013); VYVXof Va., Inc. v. Cassell, 258 Va. 276, 290, 519 S.E.2d 124, 131 (1999) (internal quotation marks omitted)). The Cities argue that the Virginia Code does not give the Commission the affirmative authority to approve the WWISC, but apparently quote Code Section 56-235 for the proposition that this statute "gives the Commission the authority to fix just and reasonable 'rates, tolls, charges or schedules'." (Op. Br. 12).[2] They nevertheless vehemently disagree with Hearing Examiner Anderson's ruling, adopted by the Commission, that this section empowers the Commission to authorize the WWISC because, they argue, the WWISC does not enable the Commission to investigate the reasonableness of the rate prior to implementation

[2] At page 12 of their Opening Brief, the Cities cite Code § 12-1-12, the authorizing statute found in Chapter 3 of Title 12.1 which describes the powers and duties of the Commission generally and provides that "[e]xcept as may be otherwise prescribed by law, the Commission shall be charged with the duty of administering the laws made for the regulation and control of corporations doing business in this Commonwealth" and that "[s]ubject 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, services, and facilities of all public service companies as defined in § 56-1." *See* Va. Code Ann. § 12.1-12 (A). The quoted language regarding the Commission's authority to fix just and reasonable "rates, tolls, charges and schedules," however, appears to Come from Chapter 10 of Title 56. *See* Va. Code Ann. § 56-235.

as required by Code § 56-235.2. (*Id*.). More specifically, the Cities argue that the WWISC does not enable the Commission to determine the reasonableness of the rate considering the factors required by Code § 56-235.2 (A), including not only costs, "but a company's operating costs, profits, growth of revenues, return on investment and many other factors." (Op. Br. 14-17). These arguments lack merit.

A. Code § 56-235 Authorized the SCC to Approve the WWISC.

At the threshold, Code § 56-235 clearly authorizes the SCC to approve the WWISC. That section provides, that:

> [i]f upon investigation the rates, tolls, charges, schedules, or joint rates of any public utility operating in this Commonwealth shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of law, the State Corporation Commission shall have power to fix and order substituted therefor *such rate or rates, tolls, charges or schedules as shall be just and reasonable*.

Va. Code Ann. § 56-235 (emphasis added). As this Court stated in *Virginia Electric and Power Company*, under the statutory authority conferred by § 56-235,

> it is manifest that the Commission has the power, upon investigation and due notice to the public, to change fix and order substituted for any filed schedule, rate rule or regulation found to be unjust, unreasonable, insufficient or unjustly discriminatory etc., *any other schedules, rates, rules or regulations that in any manner affect the rates charged or to be charged.*

Norfolk v. Virginia Elec. & Power Co., 197 Va. 505, 515, 90 S.E.2d 140, 147 (1955) (emphasis added). Indeed, in exercising the legislative authority conferred

upon it by § 56-235, the Commission "has the power not only to change a rate but to change, under certain conditions, *any part* of a filed schedule, rate, rule or regulation that in any manner affects the rates." Virginia Elec. & Power Co. v. State Corp. Com., 219 Va. 894, 902, 252 S.E.2d 333, 338 (1979) (emphasis added), *citing* Newport News v. Telephone Company, 198 Va. 645, 648, 96 S.E. 2d 145, 148 (1957); Virginia Elec. Co., 197 Va. at 516, 90 S.E.2d at 148. The Commission's authority under § 56-235 is bounded by the requirement of due notice to the public, Va. Code Ann. § 237, and that rate(s) set be determined upon investigation by the Commission. Virginia Elec. & Power Co., 197 Va. at 515, 90 S.E.2d at 147. The resulting rates must also be "just and reasonable." Va. Code Ann. § 56-235.2.

Exercising its broad ratemaking authority the Commission has an extensive history of establishing specialized rates for recovery certain elements of a utility's overall cost of service - even prior to enactment of legislation expressly and specifically codifying such rates. *See*, *e.g.*, Old Dominion Power Co. v. State Corporation Commission, 228 Va. 528 (1984) (application for automatic purchased power clause denied, although historically long-established for rural electric cooperatives); Norfolk v. Virginia Elec. & Power Co., 197 Va. 505, 90 S.E.2d 40 (1955) (escalator clause for recovery of electric utility gas costs granted). As the Court has noted, specialized rate clauses, particularly those for recovery of gas,

fuel and similar expenses, have been approved by the Commission since the early 1900s. *See* Virginia Elec. & Power Co., 197 Va. at 517, 90 S.E.2d at 149. Even more significantly, exercising its ratemaking authority pursuant to Code §56-235, the SCC approved recovery of infrastructure costs by Roanoke Gas Company via a WWISC as early as 1999 - more than a decade prior to enactment Chapter 26 of Title 56 of the Code, §§ 56-605, *et seq*. the Steps to Advance Virginia's Energy Plan (SAVE) Act. *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). This interpretation of the Commission's authority to authorize a WWISC pursuant to its general ratemaking authority under §56-235 is inarguably long-standing and has been uncontroverted by the General Assembly for nearly 20 years. Accordingly, it should be affirmed. Appalachian Power Co. v. State Corp. Comm'n, 284 Va. 695, 703-04, 733 S.E.2d 250, 254-55 (2012); Piedmont Envtl. Council v. Virginia Elec. & Power Co., 278 Va. 553, 563, 684 S.E.2d 805, 810 (2009); Appalachian Voices v. State Corp. Comm'n, 277 Va. 509, 516, 675 S.E.2d 458, 461 (2009); Commonwealth v. Appalachian Elec. Power Co., 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951).

1. The WWISC, including the terms and conditions approved by the Commission, provides for a more extensive investigation prior to implementation than required by statute.

The Cities argue that "the WWISC program does not allow [the investigation required by Code § 56-235] to be done, but rather is a direct recoupment of infrastructure costs without all the considerations mandated by statute." Virginia-American's Application and testimony, the Cities maintain, "reflect its desire to quickly recoup the costs of infrastructure upfront as opposed to a base rate case with all attendant customer safeguards." (Op. Br. 12-13). To the contrary, the record reflects that, with the safeguards and limitations proposed by Staff and accepted by the Company, the WWISC will afford the Commission – as well as other interested parties – a robust and extensive opportunity to investigate the WWISC prior to implementation.

In recommending that the Commission authorize the WWISC, the Hearing Examiner adopted several recommended conditions and limitations proposed by Staff and uncontested by the Company. Fundamentally, the Hearing Examiner recommended that the WWISC not be approved as an automatic rate adjustment clause; rather, he recommended that Virginia-American file a separate docketed proceeding, for review of the projects to be included in the WWISC Plan and the costs recovered by the WWISC Rider, prior to implementation. He further recommended review of annual updates to the WWISC Rider and amendments to

the WWISC Plan in additional annual docketed proceedings, requiring that such filings occur at least 120 days prior to the requested effective date of the WWISC for that period. Moreover, the WWISC program, as approved, requires submission of detailed accounting information directed by Staff, with each annual WWISC filing. (J.A. 519).

As the Hearing Examiner's Report explained, pursuant to the WWISC as approved, Virginia-American will file a list of the projects it anticipates completing in the upcoming year along with its cost estimates for each such project. Such process will allow Staff and any interested party the opportunity to review this information and evaluate the prudence of the Company's plans *prior* to implementation of the rate recovering costs approved to be incurred. (J.A. 518-19, 1922-23). As the Hearing Examiner noted, such pre-investment review process allows for an *additional* level of review of the prudency of the Company's infrastructure investment that is not available in base rate cases where the Commission generally reviews utilities' costs only *after* they have been incurred. (J.A. 519, 1923). As approved, therefore, the WWISC clearly satisfies the requirements of § 56-235 that the Commission thoroughly investigate the rate prior to implementation.

2. The WWISC, as approved, provides for the reasonableness analysis set forth in Code § 56-235.2

The Cities contend that the WWISC cannot be determined to be "just and reasonable" according to the requirements of Code § 56-235.2 because, in their view, "a WWISC program only considers infrastructure costs" while § 56-235.2 "requires . . . consideration not only of costs but a company's operating costs, profits, growth of revenues, return on investment and many other factors." (Op. Br. 14, citing Va. Code Ann. § 56-235.2 (A)). This argument, too, is misplaced.

The Cities appear to argue that each individual rate or component of a rate like the WWISC must incorporate consideration of all of the factors that they contend that § 56-235.2 (A) mandate be considered, including, "not only costs, but a company's operating costs, profits, growth of revenues, return on investment" and "many other" unidentified factors. (Op. Br. 14). As the Cities acknowledge, however, § 56-235.2 requires that a utility "demonstrate that *aggregate* revenues do not exceed *aggregate* actual costs, including normalization for nonrecurring costs and annualized adjustments for future costs as the Commission finds can reasonably predicted to occur during the rate year." (Op. Br. 14, quoting Va. Code Ann. § 56-235.2 (A) (emphasis added)). More precisely, they argue that the WWISC fails to comply with § 56-235.2 because "a WWISC considers only the cost of replacement of a water main, but not the additional profit s that might be obtained from that replacement due to elimination of inflow and infiltration." The

WWISC, they assert, also "ignores potential new customers or profits from replacement of smaller, older lines with larger mains carrying more water volume." (Op. Br. 15).

These arguments are plainly refuted by the record. As the Hearing Examiner found, the replacement of the existing infrastructure targeted for inclusion in the WWISC will not increase Virginia-American's revenues. (J.A. 518). WWISC-eligible infrastructure does not include new mains or extensions to serve new customers but only aged existing structures, past the end of their useful lives, the replacement of which will not "generate new or additional revenue for the Company." (*Id*.). In any event, the WWISC, as approved, includes a return on equity ("ROE") component (*see* J.A. 652). Importantly, it also incorporates an Earnings Test. Among the conditions proposed by Staff and adopted by the Hearing Examiner is the requirement that an Earnings Test accompany the annual WWISC review. Under this provision, to the extent that WWISC collections result in annual earnings above the mid-point of the Company's authorized ROE range, the Company will be required to refund of such over-earnings to customers, with interest. (J.A. 519). As the Hearing Examiner found, with these safeguards and limitations, Virginia-American's recovery of infrastructure replacement costs through the WWISC mechanism instead of through base rate cases will not deprive the Commission of appropriate oversight or, particularly, the ability to properly

review the Company's aggregate revenues as compared to total cost of service as required by § 56-235.2 (A).

B. Code § 56-603 Cannot Restrict the SCC's Ratemaking Authority by Implication or Omission.

Notwithstanding the Commission's broad ratemaking authority under § 56-235, the Cities argue that the General Assembly, by enacting Code §§ 56-603, *et seq.* (the Steps to Advance Virginia's Energy Plan ("SAVE Act")), authorized a mechanism for natural gas utilities to recover infrastructure replacement costs through a mechanism distinct from general base rate cases and thereby excluded other utilities from doing so wholly by omission. (Op. Br. 17-22). This argument misapprehends the nature of the Commission's ratemaking authority as well as the effect of the SAVE Act.

In exercising its ratemaking authority the SCC performs a legislative function; for this reason, this Court has long stated that the Commission's action may not be set aside unless it clearly appears that such action contravenes the Constitution or statutes of the United States, the Constitution of Virginia or the statutes by which the General Assembly has delegated that legislative power. Virginia Elec. & Power Co., 197 Va. at 514, 90 S.E.2d at 147, *citing*, Norfolk v. C. & P. Tel. Co., 192 Va. 292, 64 S.E.2d 772 (1945); *see also* Commonwealth, *ex. rel*. Appalachia v. Old Dominion Power Co., 184 Va. 6, 34 S.E.2d 364 (1945).

"[I]t is manifest that the Commission has the power, upon investigation and due notice to the public, to change, fix and order substituted for any filed schedule, rate rule or regulation found to be 'unjust, unreasonable, insufficient or unjustly discriminatory etc.,' any other schedules, rates, rules or regulations that in any manner affect the rates charged or to be charged." Further, "this power of the Commission is in no wise limited or restricted by reason of additional powers granted it in other sections of the Code." 197 Va. at 515-16, 90 S.E. 2d at 147-48.

Guided by these principles, although the Commission's ratemaking authority is subordinate to the plenary power of the Virginia General Assembly, its discretion to authorize a WWISC for a water or wastewater utility was not and cannot be restricted by the omission of water or wastewater utilities from mention in the SAVE Act or the fact that such act establishes an infrastructure replacement mechanism specifically for gas utilities but does not encompass, in that particular enactment, all other utilities. Indeed, as discussed above, the SAVE Act only belatedly follows approval of a such a mechanism for gas companies under Code § 56-235. Further, although the SAVE Act specifically authorizes a WWISC-like mechanism for gas utilities, Code § 56-235.2 expressly provides that the Commission may create this kind of experimental rate for all utilities subject to its

authority under § 56-235.[3] For these reasons, the SAVE Act does not and cannot restrict the Commission's authority to approve a WWISC under § 56-235.

III. THE COMMISSION'S DECISION WAS NOT PLAINLY WRONG OR WITHOUT SUPPORTING EVIDENCE (Assignment of Error No. 2)

The Cities second assignment of error, that the State Corporation Commission erred by finding that the facts of the warranted authorization of the WWISC (Op. Br. 22), is likewise meritless.

A. Virginia-American Did Not Have to Prove That it Could not Recover infrastructure Costs Through a Base Rates Case.

The Cities argue that the SCC erred in authorizing the WWISC because "the Commission's finding that the WWISC was just and reasonable and in the public interest was contrary to the evidence." (Op. Br. 22). They support this position solely by contending that the evidence failed to show that Virginia-American could not recover infrastructure replacement costs through an ordinary base rate proceeding. (Op. Br. 23-30). However, this argument misconstrues the evidentiary standard applicable to a ratemaking proceeding under § 56-235 and

[3] If it were not otherwise clear from the SCC's broad authority under § 56-235, Code § 56-235.2 (A) expressly states that, "[n]otwithstanding § 56-234, the Commission may approve, either in the context of or apart from a rate proceeding after notice to all affected parties and hearing, special rates, contracts or incentives to individual customers or classes of customers where it finds such measures are in the public interest."

must be rejected. In authorizing a WWISC pursuant to § 56-235, the Commission need only demonstrate that such rate is "just" and "reasonable" as stated in Code § 56-235 and as those terms are explained in § 56-235.2, and "in the public interest" according to the exercise of the Commission's legislative discretion; there exists no requirement in §§ 56-235, 56-235.2 or any other statute or regulation - and the Cities never identify one - that the Commission must find that the applicant cannot recover the costs in question through a general base-rate proceeding.

B. The Evidence Supported the Finding that the WWISC Rate was Fair, Reasonable and in the Public Interest.

Here, the evidence in the record clearly shows that the WWISC, as approved, is just, reasonable and in the public interest.

As the Hearing Examiner emphasized, the unrefuted evidence demonstrated the need for water and wastewater utilities to accelerate the replacement of aging system infrastructure. "No one denied the need for infrastructure replacement," (J.A. 518), and Staff testified that Virginia-American's proposed rate of acceleration of infrastructure replacement was reasonable. (J.A. 518, 1026 (Tr. at 587)). With regard to the replacement of water mains to be provided by the WWISC, the evidence convincingly demonstrated that this equipment was substantially outdated, well past its useful life, and the foremost cause of system failures and service interruptions. (J.A. 518-19, 1074-76 (Tr. at 763-65)). The

evidence also showed that Virginia-American's Alexandria District, which is the focus of the WWISC, has the highest degree of infrastructure in need of replacement within the Company's operating systems." (J.A. 518). Yet, at the current rate of replacement, it would take 430 years to completely replace the City's water mains and, in fact, the rate at which existing infrastructure is reaching the end of its useful life continues to outpace the current level of work to replace it. (J.A. 520, 1292).

Moreover, even though he was not required to do so, the Hearing Examiner found, that general base rate proceedings were an inefficient mechanism for accomplishing much-needed infrastructure replacement. (J.A. 518). Due to the nature of cost-recovery via a base rate proceeding, infrastructure repairs/replacement are currently done on a periodic and/or as-needed basis, even though the evidence indicates that planned replacements as provided for by the WWISC are much less expensive on a per-unit basis, than the cost of increasingly frequent pipe breaks, service disruptions and accompanying property damage. (J.A. 520, 2102). Conversely, the evidence showed that the WWISC would provide a dedicated, ongoing revenue stream to address the accelerating need for infrastructure replacement much more efficient than the start-stop regime that currently exists. Pursuant to a WWISC, construction crews and material suppliers could be maintained on an ongoing basis; furthermore, because the WWISC would

allow the Company to recover a significant level of its infrastructure replacement costs outside of a base rate case, it could potentially extend the time between such cases, reducing the substantial expense that base rate proceedings present not only for the utility, but also for the Commission and ratepayers. (*Id*.). For these reasons, the Hearing Examiner found, and the Commission agreed, that the need to accelerate the rebuilding of the Company's distribution structure "is essential to meet the ongoing needs of the community and customers to maintain system reliability," (J.A. 520), and that the WWISC, as approved, is just, reasonable and in the public interest. (J.A. 519-20, 651-52). This conclusion is amply supported by the evidence in the record and should not be disturbed on appeal.

CONCLUSION

For the foregoing reasons, Aqua Virginia submits that the authorization of the WWISC should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2018, three true and accurate copies of the foregoing Brief were hand-filed with the Supreme Court of Virginia, and true copies have been served, via email, upon the following:

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