IN THE

Supreme Court of Virginia

RECORD NO. 171428

CITY OF ALEXANDRIA, *et al.*,

Appellants,

v.

STATE CORPORATION COMMISSION, *et al.*,

Appellees.

BRIEF OF APPELLEE
STATE CORPORATION COMMISSION

John F. Dudley (VSB No. 38280)
K. Beth Clowers (VSB No. 72911)
State Corporation Commission
P.O. Box 1197
Richmond, Virginia 23218
Telephone: 804-371-9608
Facsimile: 804-371-9376
John.Dudley@scc.virginia.gov
Beth.Clowers@scc.virginia.gov

Counsel for Appellee State Corporation Commission

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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STATEMENT OF THE CASE

This is an appeal of a traditional rate case. The law in this area is well settled. The General Assembly has delegated to the State Corporation Commission ("Commission") the authority to determine how, and from what sources, a utility collects its approved revenues. Any limitation on this discretionary authority must be clearly expressed in the statute.

Under this ratemaking authority, the Commission approved a rate adjustment clause as part of Virginia-American Water Company's ("Company") rates, charges and schedules for collecting its approved revenues. This adjustment clause recovers accelerated infrastructure replacement costs that are not included in base rates. The City of Alexandria and the City of Hopewell ("Cities") object to this rate schedule.

The Commission has been approving adjustment clauses for almost a century. There is nothing in the statute that limits the Commission's discretion to approve an adjustment clause as part of a water company's rates, charges and schedules.

Alexandria has the greatest need for pipe replacement in the Company's territory. By implementing the adjustment clause in this case, the Commission will have ongoing oversight as the Company accelerates pipe replacement in Alexandria in order to meet its public service obligation

and provide a vital public need to its Alexandria customers.

The adjustment clause also ensures that the Company neither over- nor under-collects for these accelerated infrastructure replacement projects. This particular adjustment clause also guarantees that the Company's aggregate revenues will not exceed its aggregate actual costs because of accelerated infrastructure replacement. These protections would not exist without the rate adjustment clause.

This Court has already affirmed the Commission's ratemaking discretion to approve or reject an adjustment clause as part of a utility's rates, charges and schedules. And because there is support in the record for how the Commission exercised its discretion, the Court has also explained that it will not substitute its judgment for that of the Commission.

STATEMENT OF FACTS

The Company filed a rate case that included all of its service districts. It requested, among other things: (1) an increase in fixed and volumetric base rate charges to recover additional annual revenues of $8.69 million; and (2) a rate adjustment clause to recover additional annual revenues for accelerated infrastructure replacement costs that are not included in base rates. JA 3-9E, 1197-1204, 1223-1228. The rate adjustment clause in this

case is referred to as the Water and Wastewater Infrastructure Service Charge ("WWISC").

Commission Hearing Examiner Howard P. Anderson, Jr., convened an evidentiary hearing, received evidence and legal briefs, and submitted a detailed 128-page Report to the Commission. The Hearing Examiner summarized the record and made findings and recommendations. JA 395-523. After receiving written comments on the Hearing Examiner's Report, the Commission issued its Final Order.

The Commission approved, among other things: (1) an increase in fixed and volumetric base rate charges to recover additional annual revenues of $5.18 million; and (2) the WWISC rate adjustment clause to recover annual revenues for accelerated infrastructure replacement costs that are not included in base rates. JA 645-658. As recommended by the Hearing Examiner, the Commission only approved the WWISC rate schedule for the Company's Alexandria service territory, because the Alexandria district has the greatest need for infrastructure replacement. JA 518-520, 651, 1298-1299, 1333-1335, 1660-1662. Thus, the WWISC only applies to Alexandria district customers.

For the Alexandria district specifically, the Commission approved total annual revenues comprised of: (1) $16.34 million recovered through base

rates; and (2) dollar-for-dollar recovery, through the WWISC, of accelerated infrastructure replacement costs to be approved by the Commission. JA 651-652, 656; R. at 7036. The infrastructure replacement costs recovered through the WWISC are not included in the costs recovered through base rates. JA 518. Accordingly, the rates, charges and schedules approved by the Commission include fixed charges, volumetric rates, and the WWISC rate schedule.

The purpose of an adjustment clause is to modify a specific rate, outside of a base rate case, to track dollar-for-dollar recovery of specifically identified costs. JA 515, 1223-1228. The rate adjustment in such a schedule can either (i) be made by the utility and then audited by the Commission at a later date, or (ii) require prior approval from the Commission. The WWISC is the latter. JA 519, 651. The Commission will ensure that the WWISC rate adjustment clause is limited to dollar-for-dollar recovery of approved infrastructure replacement costs, and that it does not include costs recovered through base rates.[1]

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[1] The proceeding to approve the initial WWISC rate is currently pending at the Commission. Application of Virginia-American Water Co., No. PUR-2017-00149, 2017 WL 5624317, Doc. Con. Cen. No. 171130099, Order for Notice and Hearing (Nov. 17, 2017).

The Commission also included an additional, significant consumer protection as part of its approval of the WWISC rate adjustment clause. The WWISC adjustment must include an Earnings Test. JA 652. Under the Earnings Test, the Commission looks at *all* of the Alexandria district revenues – from both base rates and the WWISC rate schedule – to see if the Company earned above its authorized rate of return for the Alexandria district. Any overearnings are refunded to Alexandria district customers, up to the total amount of revenues that had been recovered through the WWISC. JA 652,1826-1829. The Earnings Test is not symmetrical; the WWISC rate is not increased if the Earnings Test shows the Company earned below its authorized rate of return. JA 1003-1004, 1030, 1826-1829.

Finally, the Commission also placed other limitations on the WWISC rate schedule. It is only approved for three years. JA 651. Thus, in order to continue, the Company will need to file an application seeking new approval from the Commission. JA 515, 519, 651. The WWISC also cannot represent more than 7.5% of the Alexandria district's aggregate revenues. JA 470, 519, 651-652, 1818-1820.

STANDARD OF REVIEW

In a recent appeal assigning errors of law and fact to a Commission rate case, the Court set forth the standard of review as follows:

> A. Standard of Review
>
> We are guided in our review of the Commission's decision by well settled principles. " 'The Commission is a specialized body with broad discretion in regulating public utilities.' " *Virginia Elec. & Power Co. v. State Corp. Comm'n*, 284 Va. 726, 741, 735 S.E.2d 684, 691 (2012) (quoting *Level 3 Commc'ns of Va. v. State Corp. Comm'n*, 268 Va. 471, 474, 604 S.E.2d 71, 72 (2004)). As the Commission applied its expertise in deciding this case, the decision is " 'entitled to the respect due judgments of a tribunal informed by experience,' " *BASF Corp. v. State Corp. Comm'n*, 289 Va. 375, 391, 770 S.E.2d 458, 467 (2015) (quoting *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 516, 675 S.E.2d 458, 461 (2009)), and thus it comes to us with " 'a presumption of correctness.' " *Id*. (quoting *Office of Attorney Gen. v. State Corp. Comm'n*, 288 Va. 183, 191, 762 S.E.2d 774, 778 (2014)). Accordingly, " '[w]e will not substitute our judgment in matters within the province of the Commission and will not overrule the Commission's findings of fact unless they are contrary to the evidence or without evidentiary support.' " *Id.* (quoting *Level 3 Commc'ns of Va., Inc.*, 268 Va. at 474, 604 S.E.2d at 72). Furthermore, while we review issues of law de novo, " 'we will not disturb the Commission's analysis when it is based upon the application of correct principles of law.' " *Id.* (quoting *Appalachian Voices*, 277 Va. at 516, 675 S.E.2d at 461).[2]

[2] *Board of Supervisors of Loudoun County v. State Corp. Comm'n*, 292 Va. 444, 452 (2016).

SUMMARY OF ARGUMENT

This is an appeal of a traditional rate case. The Commission approved rates, charges and schedules, which included fixed charges, volumetric rates, and an adjustment clause. The Commission found that the combination of fixed and volumetric base rates, along with an *additional rate schedule* that adjusts to recover (on a dollar-for-dollar basis) specifically identified actual costs not included in base rates, results in aggregate revenues that do not exceed aggregate actual costs.

The purpose of the particular adjustment clause in this case (i.e., the WWISC) is to recover accelerated infrastructure replacement costs that are approved by the Commission, but are not included in base rates. This adjustment clause ensures that the Company only collects its *actual* costs, on a dollar-for-dollar basis, for approved accelerated infrastructure replacement. This adjustment clause also requires refunds of overearnings, which ensures that the Company's aggregate revenues will not exceed its aggregate actual costs because of accelerated infrastructure replacement. These protections would not exist without the WWISC rate adjustment clause.

The law in this area is well settled. The General Assembly has delegated ratemaking authority to the Commission. That includes the

authority to determine how, and from what sources, a utility collects its approved revenues. Any limitation on this discretionary authority must be clearly expressed in the statute. There is nothing in the statute that limits the Commission's discretion to approve an adjustment clause as part of a water company's rates, charges and schedules.

The Court and General Assembly have already confirmed that the Commission has the discretion to approve rate adjustment clauses. The Commission has been exercising its ratemaking discretion to approve adjustment clauses for almost a century.

The General Assembly has also passed legislation establishing express requirements for the approval and operation of specific rate adjustment clauses for specific purposes. Those statutes are not grants of new authority. Rather, they are examples of express limitations on the ratemaking discretion delegated to the Commission. There is no statute that limits the Commission's ratemaking discretion to approve an adjustment clause for a water company.

Finally, contrary to the Cities' argument, the question before the Court is not whether it would have been reasonable for the Commission to do something else. The question is whether there is support in the record for the Commission's exercise of its sound discretion to implement this specific

rate schedule. There is. Among other things: (1) there is a need for accelerated infrastructure replacement; (2) Alexandria has the greatest need; (3) the WWISC provides stability, and promotes efficiency and cost control, by accelerating replacement on a deliberate basis with continuing Commission oversight; (4) the WWISC ensures that the Company only recovers its actual costs; and (5) the WWISC provides refunds to customers for any overearnings attributable to accelerated replacement. The WWISC provides consumer protections that do not exist with base rates alone.

ARGUMENT

I. The Commission has the discretion to approve rates, charges and schedules that include a rate adjustment clause such as the WWISC. (Assignment 1)

The WWISC is a rate schedule that adjusts to recover specifically identified costs on a dollar-for-dollar basis. The discretion to approve such a rate schedule falls within the Commission's traditional ratemaking authority, which includes:

- "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, services, and facilities of all public service companies…." Code § 12.1-12.

- "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…." Code § 56-35.

- "If 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 [Commission] shall have power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable." Code § 56-235.

- "Any rate, toll, charge or schedule of any public utility operating in this Commonwealth shall be considered to be just and reasonable only if: (1) the public utility has 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, and a fair return on the public utility's rate base…." Code § 56-235.2 A.

When the Commission approved the WWISC rate schedule, it exercised this ratemaking authority delegated to it by the General Assembly. There is nothing in that delegated authority that prohibits the Commission from approving a rate adjustment clause – such as the WWISC – as part of the rates, charges and schedules for water companies. Because there is no such limitation, the Commission exercised its sound

discretion in designing the Company's rates, charges and schedules for collecting aggregate revenues that do not exceed aggregate actual costs.

A. The Court and General Assembly have already confirmed that the Commission has the discretion to approve rate adjustment clauses such as the WWISC.

The Court has long held that the Commission has the discretion to determine the specific rates, charges and schedules used by a utility to collect its approved revenues: "Where, how and from what precise source or sources the increased revenue awarded is to be obtained, is primarily an administrative duty and undertaking to be exercised by the Commission."[3]

The Court has also held that those specific rates, charges and schedules can include an adjustment clause. In 1955, the Court affirmed the Commission's approval of a rate adjustment clause for a natural gas

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[3] Board of Supervisors of Arlington County v. Virginia Elec. and Power Co., 196 Va. 1102, 1125 (1955) (quoting Norfolk v. Chesapeake & Potomac Tel. Co., 192 Va. 292, 320 (1951)). See also Anheuser-Busch Cos. v. Virginia Natural Gas, 244 Va. 44, 47 (1992) (In affirming the revenue apportionment and rate design approved by the Commission, the Court explained that "the Commission exercises primarily an administrative duty in deciding where, how, and from what source or sources the increased revenue awarded is to be obtained.") (citing Secretary of Defense v. Chesapeake & Potomac Tel. Co., 217 Va. 149, 152 (1976)); Apartment House Council of Metropolitan Washington, Inc. v. Potomac Elec. Power Co., 215 Va. 291, 294 (1974) (In affirming the rate design approved by the Commission, the Court explained that "the determination of the sources from which increased revenues are to be derived is peculiarly a responsibility of the Commission.") (citation omitted).

utility to recover its cost of fuel. In that case, the Court held that "the Commission had the authority to approve the escalator [rate adjustment] clause now before us and to authorize its insertion in the schedules of rates, charges, rules and regulations of the Company…."[4] Indeed, the Court noted that the Commission had been using rate adjustment clauses since the 1920s.[5] To this day, the Commission continues to exercise rate adjustment clause discretion as affirmed by the Court.[6]

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[4] City of Norfolk v. Virginia Elec. & Power Co., 197 Va. 505, 519 (1955).

[5] Id. at 517 (" 'Electric rates with fuel clauses were considered and accepted by this Commission more than thirty years ago. [Citing In re Virginia Railway and Power Co., 1921 S.C.C. 60, 70; In re Lynchburg Traction and Light Co., 1921 S.C.C. 137, 146.]' ") (quoting Commissioner Hooker).

[6] See, e.g., Application of Washington Gas Light Co., No. PUE-2016-00001, 2017 WL 4308376, Doc. Con. Cen. No. 170920162, Final Order (Sept. 25, 2017) (approving changes to the utility's rate adjustment clause for the cost of gas); Application of Columbia Gas of Virginia, No. PUE-2011-00122, 2012 WL 234911, 2012 S.C.C. Ann. Rept. 337, Order on Application (Jan. 23, 2012) (rejecting the utility's request for partial waiver of its rate adjustment clause); Application of Atmos Energy Corp., No. PUE-2003-00507, 2005 WL 8132249, 2005 S.C.C. Ann. Rept. 322, Final Order (Jan. 7, 2005) (approving changes to the utility's gas cost rate adjustment clause); Application of Shenandoah Gas Co., No. PUE960131, 1996 WL 34905057, 1996 S.C.C. Ann. Rept. 318, Order Granting Request for Suspension of Tariff (Aug. 26, 1996) (approving changes to the utility's rate adjustment clause for gas costs); Ex rel. State Corp. Comm'n, No. PUE880031, 1988 WL 167161, 1988 S.C.C. Ann. Rept. 333, Order Adopting Policy Governing Gas Purchasing Practices and Gas Cost Recovery Mechanism (Dec. 29, 1988) (adopting revised rate adjustment clause policies and directing that such clauses shall be implemented as

In 1984, the Court again confirmed that the Commission has the ratemaking discretion to approve or reject rate schedules with an adjustment clause. In that case, the Commission had rejected an electric utility's request to recover purchased power costs through a rate adjustment clause. In affirming, the Court explained that the Commission has the discretion to approve or reject such a clause: "[The public utility] concedes that the decision whether to grant it an automatic adjustment clause, covering future changes in the price its parent charges it for purchased power, falls within the Commission's discretion."[7]

In 1999, the Commission again exercised its discretion and, this time, approved a new rate adjustment clause requested by a natural gas utility. The purpose of that particular rate schedule was to replace aging natural gas infrastructure. And similar to the WWISC, the Commission limited that rate adjustment clause to three years and required an Earnings Test.[8]

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part of each natural gas utility's rate application); Ex rel. State Corp. Comm'n v. Roanoke Gas Co., No. PUE820015, 1982 WL 994823, 1982 S.C.C. Ann. Rept. 568, Opinion (Sept. 13, 1982) (ordering the utility to make refunds of overcharges collected through its rate adjustment clause).

[7] Old Dominion Power Co. v. State Corp. Comm'n, 228 Va. 528, 532 (1984).

[8] Application of Roanoke Gas Co., No. PUE980626, 1999 Va. PUC LEXIS 284, 1999 S.C.C. Ann. Rept. 440, 442, Final Order (Sept. 15, 1999).

The General Assembly has never expressed a contrary intention to that implemented by the Court and the Commission; i.e., unless expressly limited by the General Assembly, the Commission has the discretion to approve an adjustment clause. For example, while the General Assembly has repeatedly passed legislation regarding the adjustment clause for an *electric* utility's cost of fuel,[9] it has never disagreed that the Commission has discretion to create its own adjustment clause for a *natural gas* utility's cost of fuel.[10] Indeed, in 2008 the General Assembly explicitly recognized that the Commission has exercised its discretion in this regard, when it directed the Commission to allow natural gas utilities to recover "energy efficiency benefits … in the utility's respective purchased gas *adjustment mechanism*."[11]

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[9] See Code § 56-249.6 and amendments thereto (1978 Acts ch. 636; 1979 Acts ch. 492; 1980 Acts ch. 384; 1982 Acts ch. 584; 1984 Acts chs. 716, 725; 1989 Acts ch. 666; 2004 Acts ch. 827; 2006 Acts ch. 939; 2007 Acts chs. 888, 933; 2009 Acts ch. 244).

[10] See, e.g., McGrath v. Dockendorf, 292 Va. 834, 840 (2016) ("The General Assembly is presumed to be aware of the decisions of this Court when enacting legislation."); Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 428 n.11 (2012) ("The fact that the legislature chose to amend the statute but declined to supersede [the Court's prior holding] while doing so further attests that we correctly ascertained its intention.").

[11] Code § 56-602 F (emphasis added).

In sum, the General Assembly has never superseded the Court's and Commission's conclusion that – unless expressly limited otherwise – the Commission has the discretionary authority to approve an adjustment clause as part of a utility's rates, charges and schedules.[12]

B. There is nothing in the statute that limits the Commission's discretionary authority to include an adjustment clause in the rates, charges and schedules for a water utility.

Any limitation on the Commission's ratemaking discretion must be clearly expressed in the statute:

> [W]hen the Commission is conducting a ratemaking procedure, it is exercising a legislative function delegated to it by the General Assembly. Thus, 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. Rather, we presume that where the General Assembly has not placed an express limitation in

[12] See also Manchester Oaks Homeowners Ass'n, 284 Va. at 428 (2012) ("The General Assembly is presumed to be aware of our interpretation. Its failure to express a contrary intention by enacting appropriate legislation is not only acquiescence but approval.") (citing Barson v. Commonwealth, 284 Va. 67, 74 (2012)); Tazewell County School Bd. v. Brown, 267 Va. 150, 163–64 (2004) ("We presume that the General Assembly is cognizant of the construction of the term 'teacher' adopted by the Board of Education and, since that construction has continued for a long period without any change by the General Assembly, we further presume that it has acquiesced in the particular construction of that term.") (citing Commonwealth v. American Radiator & Standard Sanitary Corp., 202 Va. 13, 19 (1960)).

> a statutory grant of authority, it intended for the Commission, as an expert body, to exercise sound discretion.[13]

The General Assembly has not limited the Commission's discretionary authority to approve rate adjustment clauses for water utilities. The Commission exercised its sound discretion in approving the WWISC rate schedule and the specific conditions required for its implementation.

The absence of any adjustment clause limitation for water companies is also in stark contrast to other, clearly expressed statutory limitations on the Commission's discretionary authority as it relates to other potential rate adjustment clauses. The General Assembly has expressly limited the Commission's ratemaking discretion by establishing specific requirements for the approval and operation of adjustment clauses related to such things as: new generation facilities (Code § 56-585.1 A 6); energy efficiency programs (Code § 56-585.1 A 5 c); environmental compliance (Code § 56-585.1 A 5 e); electric utility fuel costs (Code § 56-249.6); accelerated vegetation management of rights-of-way (Code § 56-585.1 A 5 f); and natural gas infrastructure (Code §§ 56-603 and 56-604).

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[13] Virginia Elec. & Power Co. v. State Corp. Comm'n, 284 Va. 726, 741 (2012) (internal citations and quotation marks omitted).

Contrary to the Cities' claim, statutes such as these – which establish express requirements for approval and operation of specific rate adjustment clauses – are not *grants* of new authority. Rather, they serve as *limitations* on the Commission's general ratemaking authority set forth above. Simply put, if a utility seeks an adjustment clause under one of the above statutes, the Commission must comply with the approval and operational requirements of that statute; the Commission's discretion in that regard has been expressly limited by the General Assembly.

For example, as noted above, in 1999 the Commission approved a rate adjustment clause for natural gas infrastructure. Just like the WWISC, the 1999 adjustment clause approved by the Commission had an overall Earnings Test, which considers revenues from base rates.[14] There is now a statute, however, that establishes specific requirements for a natural gas infrastructure adjustment clause, and those requirements prohibit the Commission from looking at base rate revenues.[15] Because an adjustment

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[14] Application of Roanoke Gas Co., No. PUE980626, 1999 Va. PUC LEXIS 284, 1999 S.C.C. Ann. Rept. 440, 442, Final Order (Sept. 15, 1999).

[15] See Code § 56-604 D ("No other revenue requirement or ratemaking issues may be examined in consideration of the application filed pursuant to the provisions of this chapter."); and Code § 56-604 G ("Costs recovered pursuant to this chapter shall be in addition to all other costs that the natural gas utility is permitted to recover, shall not be considered an offset to other Commission-approved costs of service or revenue requirements,

clause under this statute cannot contain an Earnings Test as the Commission did in 1999, the statute serves to limit ratemaking discretion previously exercised by the Commission.

The Cities also argue that a rate adjustment clause is, by definition, unreasonable "because it lacks consideration of other factors which are considered in a normal rate case." Op.Br. 14-15. This is not correct. A rate adjustment clause is not a rate case. Rather, the update in an adjustment clause is part of the operation of a previously approved rate schedule. It is part of the rates, charges and schedules designed by the Commission to recover aggregate revenues that do not exceed aggregate actual costs. That is, the Commission has found that the combination of fixed and volumetric base rates, along with an *additional rate schedule* that adjusts to recover (on a dollar-for-dollar basis) specifically identified actual costs not included in base rates, results in aggregate revenues that do not exceed aggregate actual costs.

Factually, the Cities are also incorrect when they claim that this specific adjustment clause, the WWISC, "only considers infrastructure costs and does not consider returns on investment or profit to be derived

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and shall not be included in any computation relative to a performance-based regulation plan revenue-sharing mechanism.").

from system improvements." Op.Br. 14. As discussed above, the WWISC includes an Earnings Test that encompasses *all* of the Company's costs and revenues for the Alexandria district. If accelerated infrastructure replacement increases profits above the authorized return, that will show up in the Earnings Test. Any portion of WWISC revenues that put the Company over its authorized rate of return will be refunded to Alexandria district customers through the WWISC rate schedule. JA 1003-1004, 1826-2829.

In conclusion, the statutory and regulatory history adheres to the Court's explanation of how Virginia's ratemaking statutes work. The General Assembly has delegated ratemaking authority to the Commission. Any limitation on the Commission's discretionary authority must be clearly expressed in the statute.[16] The General Assembly has, indeed, expressly limited the Commission's ratemaking discretion in many areas,[17] and it has

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[16] Virginia Elec. & Power Co., 284 Va. at 741.

[17] See also Old Dominion Committee For Fair Util. Rates v. State Corp. Comm'n, 294 Va. 168 (2017) (upholding the General Assembly's constitutional authority to suspend rate reviews by the Commission); Appalachian Power Co. v. State Corp. Comm'n, 284 Va. 695 (2012) (holding that the Commission failed to comply with a rate adjustment clause statute enacted by the General Assembly for environmental compliance costs, which limited the Commission's discretion to consider such costs in base rates).

not in others. As related to the instant case, the General Assembly has not limited the Commission's discretionary authority to use an adjustment clause as part of the rates, charges and schedules for a water utility.

II. There is support in the record for the Commission's decision to approve the WWISC rate schedule. (Assignment 2)

The Cities argue that the Commission could have set just and reasonable rates for the Alexandria district without a rate adjustment clause. Op.Br. 23 ("The Company already has the ability to successfully invest in infrastructure replacement while commensurately achieving appropriate returns through its current ratemaking abilities"); Op.Br. 26-27 ("[T]he [r]ecord fails to provide any evidence that the Company is unable to address aging infrastructure concerns through the existing ratemaking process such that the WWISC is in the public interest.").

That is not the standard. The question before the Court is not whether it would have been reasonable for the Commission to do something else. Rather, as repeatedly set forth by this Court, the question is whether there is support in the record for the Commission's exercise of its sound discretion to implement this specific rate schedule.[18]

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[18] See, e.g., Board of Supervisors of Loudoun County, 292 Va. at 456 ("The record provides evidentiary support for the Commission's findings, which fall squarely within the province of its expertise."); BASF Corp. v. State Corp. Comm'n, 289 Va. 375, 380, 397 (2015) ("[T]he record is not

As observed by the Hearing Examiner: "No one denied the need for infrastructure replacement." JA 518. Both the Company and the Commission's Staff testified that an accelerated infrastructure replacement plan is reasonable. JA 1025-1027, 1296-1297, 1324-1327. The Company's current water mains are reaching the end of their useful life quicker than they are being replaced. JA 520, 1294-1296, 2097. Planned pipe replacements are typically less costly on a per unit basis than the costs of increased pipe breaks, service disruptions, health risks, and property damage. JA 520, 1301, 2104.

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without evidence to support [the Commission's] findings. … While vigorously contested, we cannot say that the Commission's [decision] was without evidence to support it."); AME Financial Corp. v. Kiritsis, 281 Va. 384, 393 (2011) ("In evaluating whether a trial court abused its discretion, we do not substitute our judgment for that of the trial court. Rather, we consider only whether the record fairly supports the trial court's action.") (internal quotation marks and citations omitted); Virginia Alcoholic Beverage Control Comm'n v. York St. Inn, Inc., 220 Va. 310, 315 (1979) ("The reviewing judicial authority may not exercise anew the jurisdiction of the administrative agency and merely substitute its own independent judgment for that of the body entrusted by the legislature with the administrative function.") (internal quotation marks and citations omitted); Board of Supervisors of Arlington County, 196 Va. at 1125 ("Where, how and from what precise source or sources the increased revenue awarded is to be obtained, is primarily an administrative duty and undertaking to be exercised by the Commission. Obviously, we are not entitled to substitute our judgment in the premises for that of the Commission unless their discretion in that respect has been definitely and clearly abused.") (internal quotation marks and citation omitted).

The Company's Alexandria service territory has the highest average main break frequency and the greatest need for infrastructure replacement in the Company's system. JA 1298-1299, 1333-1335, 1660-1662. Sixty-three percent of the water mains in the Alexandria district are cast iron, which account for 94% of the water main breaks in that district. JA 1298, 1661. At the current rate of replacement, however, it will take 430 years to replace the Company's water mains. JA 1296, 2103. Thus, in order to maintain system reliability and meet the needs of customers, the pace at which the Company is rebuilding this distribution infrastructure needs to be accelerated. JA 520, 1296-1297, 2097-2104.

By addressing this through an adjustment clause, both customers and the Company can benefit as infrastructure replacement is accelerated on a deliberate, controlled basis, and with continuing Commission oversight to ensure that Alexandria customers receive a vital public need. JA 518-519, 651-652. This provides a level of certainty and stability for both the Company and its customers.

The WWISC rate adjustment clause ensures that customers are not overcharged for planned infrastructure replacement projects, and it likewise ensures that the Company is not underpaid for the same. JA 515, 1223-1229. The WWISC has a true-up so that customers do not pay more,

or less, than the actual costs incurred by the Company for accelerated infrastructure replacement that has been approved by the Commission. JA 1223-1229, 1798-1799, 1804-1805. Again, this provides protection for both the Company and its customers.

The WWISC also supports an efficient implementation of accelerated infrastructure replacement. Labor, materials, and overall project management can be planned in a structured, ongoing manner, without the potential start-stops between and during base rate cases. JA 518. Better planning should also facilitate better cost control. JA 520, 2102-2104.

Addressing these infrastructure replacement costs in a separate adjustment clause also has the potential to extend the time between rate cases. JA 518. This saves customers' money as well, because rate case expenses are typically included in base rates. For example, the cost of the instant rate case below was approximately $600,000. JA 518.

The WWISC is further supported by the fact that it is not open-ended (a) temporally, (b) geographically, or (c) monetarily. The WWISC (a) is restricted to three years, (b) is limited to the Company's worst-performing district in terms of needed infrastructure replacement, and (c) cannot be more than 7.5% of the Alexandria district's aggregate revenues. JA 470, 516-520, 651-652, 1298-1299, 1333-1335, 1818-1820. The Company

needs separate approval to extend the WWISC beyond three years, to apply it to other districts, or to increase infrastructure replacements above the 7.5% cap. In addition, the information and experience gained through this limited approval should help inform any subsequent request, or opposition, to continue or modify the WWISC, or to expand it to other service districts in the Company's system. JA 515.

Finally, as explained above, the WWISC contains another significant protection: the Earnings Test. The Earnings Test looks to see whether revenues from this accelerated infrastructure replacement rate schedule, when combined with revenues from base rates, have placed the Company above its authorized return on equity. JA 1002-1006. If so, customers will receive refunds of the WWISC collections above the authorized return. JA 1003-1004. Conversely, if base rates were increased for these anticipated projects instead of using the WWISC, and the Company spent less than the amount built into base rates, the Company would get to keep the excess revenues. Neither the dollar-for-dollar true-up, nor the refunds for overearnings, would be possible without the WWISC adjustment clause.[19]

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[19] The Earnings Test is not a vehicle for retroactively changing base rates, but rather a safeguard to ensure the Company does not retain WWISC collections while it is earning returns that are above those authorized by the Commission. The Commission does not have the authority to re-determine rates for a past period that are different from the rate schedules on file

In sum, there is support in the record for the Commission's exercise of its sound discretion to approve the WWISC rate adjustment clause for accelerated infrastructure replacement in the Company's Alexandria service district.

CONCLUSION

The Commission respectfully requests that the Court affirm the Commission's Final Order.

Respectfully submitted,

VIRGINIA STATE CORPORATION COMMISSION

By: John F. Dudley /s/
Counsel

John F. Dudley, Counsel to the Commission (VSB 38280)
K. Beth Clowers, Associate General Counsel (VSB 72911)
State Corporation Commission
P.O. Box 1197

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during that period. See, e.g., Commonwealth Gas Pipeline Corp. v. Anheuser-Busch Cos., 233 Va. 396, 402 (1987) (The Commission cannot "order refunds of revenues collected under rates that were legally in effect at the time the revenues were collected."); City of Norfolk, 197 Va. at 516 ("The Commission does not have the power to redetermine rates for a past period at a different level from those actually charged in accordance with filed schedules because that would be to make retroactive rates."). Thus, in order to effectuate a dollar-for-dollar true-up, or to provide refunds for overearnings, the rate schedules on file during the prior period must contemplate such action. See, e.g., id. ("In approving the escalator [rate adjustment] clause the Commission did not fix rates retroactively, ….").

Richmond, Virginia 23218
804-371-9608
804-371-9376 (Fax)
John.Dudley@scc.virginia.gov
Beth.Clowers@scc.virginia.gov

Certificate

I, K. Beth Clowers, certify that in compliance with Rule 5:26 of the Rules of the Supreme Court of Virginia, one electronic version of the Brief of the Virginia State Corporation Commission in Adobe Acrobat Portable Document Format (PDF/A) format, was filed with the Clerk of the Supreme Court via the Virginia Appellate Courts eBrief System (VACES) in the manner prescribed by the VACES Guidelines and User's Manual, and that three (3) printed copies were filed in the office of the Clerk of the Supreme Court via hand delivery on February 26, 2018. I further certify that on February 26, 2018, one electronic copy of the brief was sent by email to the following:

Andrew R. McRoberts, Esq. (VSB 31882)
Nicole S. Cheuk, Esq. (VSB 71437)
SANDS ANDERSON PC
1111 East Main Street, 24th Floor (23219)
Post Office Box 1998
Richmond, Virginia 23218-1988
(804) 783-7236
(804) 783-7291 (Fax)
amcroberts@sandsanderson.com
ncheuk@sandsanderson.com
Counsel for City of Alexandria and City of Hopewell, Virginia

James L. Banks, Jr., Esq. (VSB 28052)
Karen Snow, Esq. (VSB 34106)
ALEXANDRIA CITY ATTORNEY'S OFFICE
301 King Street, Suite 1300 Alexandria, Virginia 22314
(703) 746-3750
(703) 838-4810 (Fax)
karen.snow@alexandriava.gov
Counsel for the City of Alexandria

Lonnie D. Nunley, III, Esq. (VSB 25366)
Timothy E. Biller, Esq. (VSB 80136)
Hunton & Williams LLP
Riverfront Plaza, E. Tower
951 E. Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8330
(804) 788-8756
(804) 788-8218 (Fax)
(804) 343-4597 (Fax)
cnunley@hunton.com
tbiller@hunton.com
Counsel for Appellee Virginia-American Water Company

K. Beth Clowers /s/

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Counsel for Appellee
Virginia State Corporation Commission

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