SCV: Submitted on 02-01-2018 16:18:49 EST for filing on 02-01-2018

IN THE

Supreme Court of Virginia

RECORD NO. 171428

CITY OF ALEXANDRIA, *et al.*,

Appellants,

v.

STATE CORPORATION COMMISSION, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANTS

Andrew R. McRoberts, Esquire (VSB 31882)
Nicole S. Cheuk, Esquire (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

James L. Banks, Jr., Esquire (VSB 28052)
Karen Snow, Esquire (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

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

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iv

Statement of the Case 1

I. Nature of the Case and Material Proceedings Below 1

II. Statement of the Facts 2

Assignments of Error 6

Standard of Review 6

Argument 8

I. The State Corporation Commission erred in establishing a three-year pilot Water and Wastewater Infrastructure Surcharge program in the City of Alexandria without statutory authority. (Assignment of Error 1) 8

A. There is no authority pursuant to which the Commission may establish the requested WWISC where aggregate rates are prescribed by law. 13

B. Virginia's statute authorizing natural gas companies to seek recovery for infrastructure costs outside of a rate case does not apply to other public utilities and evidences the General

Assembly's intent that such cost recoveries are not authorized for other types of utilities. 17

II. 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 2) 22

A. The Company already has the ability to successfully invest in infrastructure replacement while commensurately achieving appropriate returns through its current ratemaking abilities. 23

B. Expert testimony, as well as the Company's own testimony, are inconsistent with the Commission's adoption/approval of the pilot WWISC program. 26

Conclusion 30

Certificate of Parties and Service 32

TABLE OF AUTHORITIES

CASES Page(s)

Appalachian Power Co. v. State Corp. Commission,

284 Va. 695, 733 S.E.2d 250 (2012)..... 6, 7, 10

BASF Corp. v. State Corp. Commission,

289 Va. 375, 770 S.E.2d 458 (2015)..... 7, 10

Board of Supervisors v. Appalachian Power Co.,

216 Va. 93, 215 S.E.2d 918 (1975)..... 8, 9

Chase v. DaimlerChrysler Corp.,

266 Va. 544, 587 S.E.2d 521 (2003)..... 16

Commonwealth v. Appalachian Elec. Power Co.,

193 Va. 37, 68 S.E.2d 122 (1951)..... 7

Cuccinelli v. Rector & Visitors of the University of Va.,

283 Va. 420, 722 S.E.2d 626 (2012)..... 7

Elizabeth River Crossings v. Meeks,

286 Va. 286, 749 S.E.2d 176 (2013)..... 11

Finnerty v. Thornton Hall, Inc.,

42 Va. App. 628, 593 S.E.2d 568 (2004) 16

First Virginia Bank v. Commonwealth,

213 Va. 349, 193 S.E.2d 4 (1972)..... 10

Holsapple v. Commonwealth,

266 Va. 593, 587 S.E.2d 561 (2003)..... 21

Jackson v. Fidelity & Deposit Co. of Md.,

269 Va. 303, 608 S.E.2d 901 (2005)..... 21

Johnston-Willis, Ltd. v. Kenley,

6 Va. App. 231, 369 S.E.2d 1 (1988) 16

Lampkins v. Commonwealth,

4 Va. App. 709, 607 S.E.2d 722 (2005) 20

Marbury v. Madison,

5 U.S. (1Cranch) 137 (1830)..... 16

Office of the AG v. State Corp. Commission,

288 Va. 183, 762 S.E.2d 774 (2014).....6-7

Old Dominion Comm. For Fair Util. Rates v. State Corp. Commission,

294 Va. 168, 803 S.E.2d 758 (2017).....9-10

Piedmont Envtl. Council v. Virginia Elec. & Power Co.,

278 Va. 37, 45, 68 S.E.2d 122, 127 (2009).....7

PEPCO v. State Corporation Commission,

221 Va. 632, 272 S.E.2d 214 (1980).....9

Red Ash Coal Corp. v. Absher,

153 Va. 332, 149 S.E. 541 (1929).....19

So. R. Co. v. Commonwealth,

107 Va. 771, 60 S.E. 70 (1908) 12

Virginia Elec. & Power Co. v. State Corp. Commission,

284 Va. 726, 736, 735 S.E. 2d 684, 688 (2012).....7-8

Virginia Marine Resources Commission v. Chincoteague Inn,

287 Va. 371, 757 S.E.2d 1 (2014).....21

Virginian-Pilot Media Cos. v. Dow Jones & Co.,

280 Va. 464, 698 S.E.2d 900 (2010).....21

VYVX of Va., Inc. v. Cassell,

258 Va. 276, 519 S.E.2d 124 (1999).....11

Williams v. Commonwealth,

190 Va. 280, 56 S.E.2d 537 (1949).....20

CONSTITUTIONS AND STATUTES

Va. Const., Art. IX, Section 2 ..... 9, 17, 18, 20

Section 12.1-12 ..... 12, 13, 23

Section 56-232 ..... 15, 16

Section 56-235 11

Section 56-235.2 ..... 3, 8, 14, 18, 22

Section 56-235.2, *et seq* 18

Section 56-235.2A 14

Section 56-585.1(A)(5) 10

Section 56-603 et seq. 18

Title 56, Chapter 10 of the *Code of Virginia*, 1950 ..... 13, 16

Title 56, Chapter 26 of the *Code of Virginia*, 1950 ..... 18, 19, 20, 21

OTHER AUTHORITIES

Petition of Virginia-American Water Company, Aqua Virginia, Inc. and Massanutten Public Service Corporation, For Rulemaking to establish a Water and Wastewater Infrastructure Service Charge, Case No. PUE-2014-00066, Hearing Examiner's Report at 52 (June 29, 2015) 23

STATEMENT OF THE CASE

I. Nature of the Case and Material Proceedings Below

This appeal by the City of Alexandria, Virginia, and the City of Hopewell, Virginia (the "Cities" or the "Appellants") arises out of an Application for a General Increase in Rates ("Application") filed on October 30, 2015, by Virginia-American Water Company ("Virginia-American" or "Company") before the State Corporation Commission ("Commission") pursuant to Article 2 of Chapter 10 of Title 56 of the *Code of Virginia*, 1950, as amended ("Va. Code"), and the provisions for general rate increases set forth in the Commission's Order Adopting Regulations of December 16, 2008, in Case No. PUE-2008-00001 (VAC 5-201-10, *et seq*.). JA at 1-10.

The Commission's Hearing Examiner held a hearing on the Application in Richmond on June 21-23, 2016 (the "Hearing"). JA at 17. At the conclusion of the hearing, the Hearing Examiner directed that post-hearing briefs be filed by September 1, 2016. On November 29, 2016, the Hearing Examiner submitted his report ("Hearing Examiner's Report" or "Report"). JA at 395-523. The parties submitted comments in response to the Hearing Examiner's Report. JA at 524-644.

On May 24, 2017, the Commission issued a final order that, among other things, authorized the Company to file an application to implement a three-year pilot water and wastewater infrastructure surcharge ("WWISC") in the Company's Alexandria District. JA at 651-652. The Cities filed a Notice of Appeal, Petition for Appeal, and Assignments of Error with this Court. JA at 672-674, 680-687.

On December 13, 2017, the Court certified the appeal. Accordingly, this appeal is properly before the Court.

II. Statement of the Facts

The Company's Application states that the requested increase in rates is due to increased capital investments, decreased water sales, and a diminished rate of return on equity. JA at 1-9H. The Application sought a rate increase that would produce additional annual jurisdictional water sales revenues of $8.69 million, or an 18.42% increase in test year revenues, based on a 10.75% return on common equity. JA at 4. In addition, the Company seeks approval of: an annual WWISC rider that would allow for accelerated recovery of costs for non-revenue producing infrastructure replacement. JA at 9-9B.

The Company proposed to establish a WWISC in order to plan for and begin recovery of its infrastructure investment on an annual basis. The Cities agreed with all other intervenors in the proceeding below that the Commission should not adopt the WWISC plan and rider, and with SCC staff below that the WWISC program was not needed. The Commission's final order below must be reversed, in part, in that it imposed a WWISC program without statutory authority to do so and was plainly wrong and without evidence of public interest and need.

First, the Cities assert that the Commission does not have the statutory authority to authorize a water utility to impose a WWISC because Va. Code § 56-235.2 requires that a public 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 reasonably can be predicted to occur during the rate year, and a fair return on the public utility's rate base.

As stated in its Comments to the Hearing Examiner's Report, the Cities assert that by enacting this section of the Code, the legislature requires that accounting for future infrastructure improvements be included **as one of many components** for the Commission to consider in approving

a public utility company's proposed rates. JA at 530. The direct pre-filed testimony of the City of Alexandria ("City") established various concerns with the WWISC, beginning with a brief history of the 2014 rulemaking on the issue of the WWISC. JA 1393-1395. Mr. Carl Eger, the Energy Manager for the City of Alexandria, also confirmed the City's position during the hearing that the WWISC is not the appropriate mechanism to invest in infrastructure. JA at 814.

Second, the evidence below established that the Company, through its current ratemaking abilities, already has the capability of successfully investing in infrastructure replacement while commensurately achieving appropriate returns. The Cities agree with Wayne Trimble – the witness for the Counties of Westmoreland, Northumberland, and Prince George – that the WWISC program is unnecessary because the Company clearly has access to capital such that customers should not be forced to provide risk-free capital to the Company. JA at 821-822. In addition, the Company did not prove that it is unable to plan for and control the infrastructure replacement costs without a WWISC program. JA at 1415. Further, the expert witness for the Hopewell Committee for Fair Water Rates, Michael Gorman, explained that the WWISC is not as efficient at adjusting rates as

a base rate case and will be more expensive to customers. JA at 863. The Company's infrastructure needs have been known for years and will take years to address. The costs of these infrastructure projects can be recovered over years in the course of regular ratemaking, which can take into account savings from all sources, such as less loss through leakage.

Although Commission Staff neither supported nor opposed the WWISC, it agreed with all the respondents that the WWIS was **not necessary** and proposed more than 15 customer safeguards that the Commission should establish if it decides to approve the WWISC. JA at 1678-1679. The number and extent of the proposed safeguards underscores the downsides to the Company's approach. Further, Commission Staff acknowledged that the types of infrastructure investment that the Company wants to recover through a WWISC could be done through a regular rate case. JA at 850.

The WWISC has not been proven to be necessary to serve the public interest as evidenced through the expert testimony of Wayne Trimble, Michael P. Gorman, Ralph Smith, and Wayne Trimble. JA at 863, 943, 821-822. Further, the Company's ability to recover in a traditional rate making proceeding the very same infrastructure costs is not disputed by

the Company. JA at 1039. The Company acknowledges that it is already moving toward accelerated levels of infrastructure replacement and that it simply prefers having a dedicated funding mechanism to address infrastructure. JA at 1039-1040.

ASSIGNMENTS OF ERROR

1. 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. This error was preserved in the JA at 530-534; 632.

2. 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. This error was preserved in the JA at 534-536 .

STANDARD OF REVIEW

The Commission's construction and application of a statute is a question of law subject to *de novo* review. *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 703, 733 S.E.2d 250, 254 (2012). Although "the standard of review applied to a Commission decision 'will depend on the nature of the decision under review,'" where called upon to review the Commission's interpretation of a statute, "the Court reviews such questions of statutory interpretation de novo." *Office of the AG v. State Corp.*

Comm'n, 288 Va. 183, 190, 762 S.E.2d 774, 778 (2014), (quoting *Appalachian Power Co.*, 284 Va. at 703, 733 S.E.2d at 254).

The Court in construing a statute first ascertains and gives "effect to legislative intent, as *expressed by the language used in the statute*." *BASF Corp. v. State Corp. Comm'n*, 289 Va. 375, 403, 770 S.E.2d 458, 473 (2015) (quoting *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E. 2d 626, 629 (2012)) (emphasis added). This is especially true when, as here, the statutory language is plain. *See Appalachian Power Co.,* 284 Va. at 703-04, 733 S.E.2d at 254-255 (*distinguishing Piedmont Envtl. Council v. Virginia Elec. & Power Co*., 278 Va. 37, 45, 68 S.E.2d 122, 127 (2009)). Further, in reviewing the Commission's interpretation of a statute, the Court has stated that "although it gives 'great weight' to 'the practical construction given to a statute by public officials charged with its enforcement,' it is not inextricably bound to that construction." *BASF Corp.*, 289 Va. at 403, 770 S.E.2d at 473 (*quoting Commonwealth v. Appalachian Elec. Power Co.*, 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951)). Indeed, the "Court will not hesitate to reverse the decision of public officials charged with the enforcement of the statute." See *id*. (*citing Virginia Elec.*

& Power Co. v. State Corp. Comm'n, 284 Va. 726, 736, 735 S.E. 2d 684, 688 (2012)). The Commission's application of Section 56-235.2 as it relates to Assignment 1 is therefore subject to *de novo* review.

Although an order of the Commission applying the evidence to the law generally has a presumption of correctness, it can be overruled if it is "contrary to the evidence or without evidence to support it." *See Bd. of Supervisors v. Appalachian Power Co.*, 216 Va. 93, 105, 215 S.E.2d 918, 926 (1975). The Commission's determination of facts as they relate to Assignment 2 should be reviewed to determine if the Commission's order is contrary to the evidence, or without evidence to support it.

ARGUMENT

I. The State Corporation Commission erred in establishing a three-year pilot Water and Wastewater Infrastructure Surcharge program in the City of Alexandria without statutory authority. (Assignment of Error 1)

In this case, the Commission erred in adopting a Water and Wastewater Infrastructure Surcharge (WWISC) program as a pilot in the Company's Alexandria service district. The Commission has no authority to adopt a WWISC at all, pilot or not. Lacking statutory authority for a

WWISC, the final order of the Commission below must be overturned, in part, in that it approved a WWISC program and rider.

Article IX, Section 2 of the Constitution of Virginia sets forth the Commission's powers and duties. With respect to certain utilities, 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." Constitution of Virginia, Article IX, Section 2. Further, "the Commission shall have such other powers and duties not inconsistent with this Constitution as may be prescribed by law." *See id*.

However, the Commission's authority is still subordinate to that of the General Assembly. *PEPCO v. State Corporation Commission*, 221 Va. 632, 633, 272 S.E.2d 214 (1980). Indeed, in upholding the constitutionality of a statute suspending base rate reviews for certain electric utilities, this Court recently advised that "[t]he prefatory phrase in Article IX, § 2, clause 3 plainly makes the Commission's authority to regulate rates 'subject to such criteria and other requirements as may be prescribed by law'. *Old Dominion Comm. for Fair Util. Rates v. State Corp. Comm'n*, 294 Va. 168,

179, 803 S.E.2d 758, 764 (2017). Although the Commission's constitutional authority to regulate water utilities stems from clause 5, instead of clause 3 as described above, the language used is even clearer that the Commission's authority derives from the General Assembly in all other matters.

This Court has overturned the Commission on a number of occasions when the Commission has overstepped its legal authority and misinterpreted a Virginia statute. *See, e.g., BASF Corp. v. State Corp. Comm'n*, 289 Va. 375, 770 S.E.2d 458 (2015) (Supreme Court held Commission erred in interpreting statutory preemption of local zoning powers too broadly); *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 733 S.E.2d 250 (2012) (Supreme Court overturned Commission's denial of a utilities cost recovery connected with base rates, held that the Commission's interpretation of Va. Code § 56-585.1(A)(5) was not decisive because not long-standing, nor had the legislature had a chance to consider it, and that denying the utility's rate adjustment clause conflicted with legislative intent and effectively added a fourth statutory condition); *First Virginia Bank v. Commonwealth*, 213 Va. 349, 350, 193 S.E.2d 4, 5 (1972) (Supreme Court held that the Commission erred in construing

applicable law and reversed a Commission's denial of an application for a branch bank in that case solely because it tended to promote a monopoly).

"It is well established 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 which do not contravene that document.'" *Elizabeth River Crossings v. Meeks*, 286 Va. 286, 307, 749 S.E.2d 176 (2013), *quoting VYVX of Va., Inc. v. Cassell*, 258 Va. 276, 290, 519 S.E.2d 124, 131 (1999) (internal quotation marks omitted). This Court serves an important function to restrain the power of the Commission to its lawful bounds. And this Court, not the Commission, must ultimately interpet the laws of the Commonwealth.

In this case, the Commission overstepped its authority by adopting a WWISC following the recommendations of Hearing Examiner Anderson. Incorrectly, Mr. Anderson had suggested to the Commission that "there is substantial statutory support for the Commission's authority to implement a WWISC under Chapter 10 of Title 56 of the Code" and specifically § 56-235. JA at 518. However, Hearing Examiner Anderson cited only to a Supreme Court of Virginia case from 1955 as support, long before any utility proposed a surcharge such as a WWISC. Without further support,

Mr. Anderson then suggested that the Commission adopt a three-year pilot WWISC program with a 7.5% cap for the Alexandria District, subject to the limitations and safeguards set forth in the Report. JA 519-520. The Commission adopted the WWISC program as recommended without expressly considering or ruling on its authority or lack thereof, but rather proceeded to adopt a WWISC program without statutory authority. Such an unauthorized act is ultra vires and void. *See So. R. Co. v. Commonwealth*, 107 Va. 771, 60 S.E. 70 (1908).

The Cities vehemently disagree with Hearing Examiner Anderson's analysis on the legal authority of the Commission (the Commission itself had no analysis). Although Va. Code § 12.1-12 gives the Commission the authority to fix just and reasonable "rates, tolls, charges or schedules," the statute only authorizes action after the Commission investigates "the rates, tolls, charges, schedules, or joint rates of any public utility operating in this Commonwealth," and finds them "to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of law." A WWISC program does not allow this to be done, but rather is a direct recoupment of infrastructure costs without all the considerations mandated by statute. Indeed, the Company's application

and testimony reflect its desire to quickly recoup the costs for infrastructure upfront as opposed to a base rate case with all attendant customer safeguards.

The Commission erred. The judiciary, not the Commission sitting in a legislative capacity or its appointed Hearing Examiner, must interpret this statute and determine the Commission's authority. For the reasons stated below, the Commission's adoption of a WWISC was unauthorized by statute and its implicit interpretation contrary to sound principles of statutory construction.

A. <u>There is no authority pursuant to which the Commission may establish the requested WWISC where aggregate rates are prescribed by law.</u>

The State Corporation Commission has been charged by the Virginia General Assembly "with the duty of regulating the rates, charges, services, and facilities of all public service companies." Va. Code § 12.1-12. However, the Commission must do so "*subject to such criteria and other requirements as may be prescribed by law*." *Id.* The requirements and procedures that control how public utilities in Virginia establish rates are set forth generally in Title 56, Chapter 10 [Heat, Light, Power, Water and Other Utility Companies Generally], of the *Code of Virginia*. Specifically, Va.

Code § 56-235.2 establishes the criteria pursuant to which a utility company's rates, tolls, charge and schedules may be considered "just and reasonable" by the Commission. This section requires that the public 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 reasonably can be predicted to occur during the rate year, and a fair return on investment. *See* Va. Code § 56-235.2A. It requires, for example, consideration not only of costs, but a company's operating costs, profits, growth of revenues, return on investment and many other factors.

By enacting this section of the Code, the General Assembly requires that accounting for necessary future improvements to infrastructure be included **as a component** considered by the Commission in approving a public utility company's proposed rates. To the contrary, a WWISC program only considers infrastructure costs and does not consider returns on investment or profit to be derived from system improvements. This is inconsistent with the statute and its purpose. A WWISC, by definition, cannot be determined to be a reasonable rate considering all of the components mandated by the statute because it lacks consideration of

other factors which are considered in a normal rate case. 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.

Public utilities subject to this section include, by definition, all of the following: every corporation (other than a municipality), company, individual, or association of individuals or cooperative, their lessees, trustees, or receivers, appointed by any court whatsoever, that now or hereafter may own, manage or control any plant or equipment or any part of a plant or equipment within the Commonwealth for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, chilled air, chilled water, light, power, or water, or sewerage facilities, either directly or indirectly, to or for the public. *See* Va. Code § 56-232.

Unless expressly exempt from or subject to separate and specific statutory requirements, the rates for <u>all</u> public utilities (as defined by the Code) are subject to the requirements of this section. This includes, but is

not limited to, water companies (such as the Company), sewer companies, natural gas companies, etc. While the General Assembly has carved out alternative procedures for the Commission to establish and/or modify the rates, charges, schedules etc., for some specifically enumerated types of public utilities in various other sections of Chapter 10 of Title 56, and elsewhere in the *Code of Virginia*. However, Va. Code § 56-232 controls the setting of rates for public utilities in Virginia where, as here, no such amendment otherwise exists.

The Court has held that when a question involves a statutory interpretation issue, "little deference is required to be accorded the agency decision" because the issue falls outside the agency's specialized competence. *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 246, 369 S.E.2d 1, 28 (1988). "It is emphatically the province and duty of the judicial department to say what the law is." *Finnerty v. Thornton Hall, Inc.*, 42 Va. App. 628, 635, 593 S.E.2d 568, 571 (2004) (quoting *Marbury v. Madison*, 5 U.S. (1Cranch) 137, 177 (1830)). And in such a determination, the judiciary is to "ascertain and give effect to the intention of the legislature." *Chase v. DaimlerChrysler Corp.*, 266 Va. 544, 547, 587 S.E.2d 521, 522 (2003).

Since the statute applicable to the Commission's decision to grant a WWISC program here does not consider all the statutory components required, a WWISC program rate cannot be considered reasonable or authorized by the statute. Without statutory authority for this infrastructure cost recovery program outside of a regular rate case, it is unauthorized and in excess of the authority of the Commission. The Commission's order is void ab initio and must be overturned.

B. Virginia's statute authorizing natural gas companies to seek recovery for infrastructure costs outside of a rate case does not apply to other public utilities and evidences the General Assembly's intent that such cost recoveries are not authorized for other types of utilities.

Pursuant to Article IX, § 2 of the Virginia Constitution, the Commission only has the authority (without further action of the General Assembly) over the rates, charges, and service of "railroads, telephone, gas and electric companies." The natural gas companies are clearly set forth in this constitution provision. Therefore, with regard to other utilities not enumerated in this provision, *e.g.*, water and wastewater, the Commission's authority to regulate these companies is only by having "such other powers and duties not inconsistent with this Constitution as may be prescribed by law." Virginia Constitution, Article IX, § 2.

As explained more fully below, if the natural gas utilities sought legislation to implement the SAVE Act and the natural gas companies are explicitly included in the above constitutional provision, in order for water and wastewater companies – which are not set forth in the Virginia Constitution, Article IX, § 2 – to implement a WWISC, legislation is certainly required. A WWISC simply cannot be unilaterally ordered by the Commission.

While *Virginia Code* § 56-235.2, *et seq.*, establishes the general criteria pursuant to which a public utility company's rates and charges must considered by the Commission, including treatment of infrastructure costs, the General Assembly has authorized specialized treatment for certain infrastructure costs **solely *and exclusively*** for natural gas companies. Chapter 26 of Title 56, entitled the "Steps to Advance Virginia's Energy Plan (SAVE) Act", specifically authorizes a natural gas utility to file – and the Commission to consider and approve – a SAVE plan and SAVE rider to provide for the recovery of eligible infrastructure replacement costs through a separate mechanism from customer rates established in a rate case. Va. Code § 56-603, *et seq*. This statute authorizes natural gas companies to recover eligible infrastructure costs outside of a regular rate case, just

like the WWISC program approved here allows the Company to recover its eligible infrastructure costs outside of a regular rate case. Unlike the Company here, however, such charges are authorized by specific statute. Absolutely no statutory authority exists for the Commission to approve a WWISC for a water company.

Had the General Assembly intended to allow public utilities ***other than natural gas companies*** to seek Commission approval of infrastructure costs outside a general rate case when it enacted the SAVE Act in 2010, it could have done so. It did not. Indeed, it is clear that but for the passing of the SAVE Act, the Commission would not have had the authority to allow natural gas companies to seek Commission approval of infrastructure costs outside a general rate case. The statute was enacted for that very purpose. Had the Commission already possessed such power, the SAVE Act would not have been needed.

A fundamental rule of statutory construction requires that "every part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary." *Red Ash Coal Corp. v. Absher*, 153 Va. 332, 335, 149 S.E. 541, 543 (1929). A statute must mean something or it would not have been enacted. The Commission "must

assume that the legislature did not intend to do a vain and useless thing." *Williams v. Commonwealth*, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949); see also *Lampkins v. Commonwealth*, 4 Va. App. 709, 607 S.E.2d 722 (2005)(explaining "[i]t is a well-established rule of construction that a statute ought to be interpreted in such a manner that it may have effect, and not found to be vain and elusive.").

Therefore, the very existence of the SAVE Act confirms that the General Assembly did not believe that the Commission had authority under Virginia Constitution Article IX, § 2 or existing statutes to implement a natural gas infrastructure replacement charge. The Commission's existing authority over water and wastewater companies is even more limited. If the Commission needed the SAVE Act to establish an infrastructure fee program for natural gas companies, surely it needs a grant of statutory authority to implement a similar program for water and wastewater companies.

To date, the General Assembly has not adopted legislation allowing public utilities (other than natural gas companies) to seek Commission approval of infrastructure costs outside a general rate case. Under the maxim "*expressio unius est exclusio alterius*" the mention of a specific item

in a statute implies that the "omitted items were not intended to be included." *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 468-69, 698 S.E.2d 900, 902 (2010); *see also Va. Marine Res. Comm'n v. Chincoteague Inn*, 287 Va. 371, 395-396, 757 S.E.2d 1, 39 (2014)(finding that VMRC lacked the authority to approve permits for encroachments over state-owned subaqueous bottomlands where such encroachments were omitted from the agency's permitting jurisdiction.)

As such, the Commission is not permitted "to add language to a statute that the General Assembly has not seen fit to include." *See, e.g., Jackson v. Fidelity & Deposit Co. of Md.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005); *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003). The General Assembly's omitting all other utility companies from the SAVE Act demonstrates as a matter of law that the General Assembly did not intend to give any other type of utility company, including water utilities, the right to seek recovery for infrastructure costs outside of a general rate case.

Accordingly, unless and until the General Assembly enacts legislation that includes water and wastewater utilities within the scope of the SAVE Act, or that establishes a separate statutory scheme providing for

the recovery of costs by water companies using some other statutory mechanism, the Commission is without authority to authorize such a scheme, even in a general rate case.

II. 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 2)

In addition to the error in its interpretation of Va. Code § 56-235.2, the Commission's finding that the WWISC was just and reasonable and in the public interest was contrary to the evidence. There was simply no evidence showing that the WWISC program was needed to serve the public interest. The evidence of the Company's current ability to account for and plan for the costs of infrastructure replacement was overwhelming. However, despite the Company's own admissions regarding its already-existing ability to recover infrastructure costs, the Commission adopted the Hearing Examiner's recommendation and conclusions that the WWISC mechanism is in the public interest and the resulting rates will be just and reasonable. JA at 651-652.

The Commission, following the Hearing Examiner's lead in giving little weight to Company's ability to plan for and recover infrastructure costs, did

not address that point in the Report, only finding that the WWISC should be approved, effectively dismissing substantial expert testimony regarding the lack of necessity for the WWISC. This finding was contrary to the evidence and should be reversed.

A. The Company already has the ability to successfully invest in infrastructure replacement while commensurately achieving appropriate returns through its current ratemaking abilities.

The Company already has the ability to successfully invest in infrastructure replacement while commensurately achieving appropriate returns through its current ratemaking abilities. Indeed, as the Hopewell Committee for Fair Water Rates ("Committee") explained in its post-hearing brief, the Company "not only has the ability to accelerate infrastructure replacement under the existing regulatory process, it also has already begun to do so." JA at 370. Company witness Akmentins' admission that the Company is already accelerating infrastructure replacement mirrors his testimony in a prior rulemaking case during which the Hearing Examiner, and ultimately the Commission, determined that a WWISC was not needed. JA at 1039. *See Petition of Virginia-American Water Company, Aqua Virginia, Inc. and Massanutten Public Service Corporation, For Rulemaking to establish a Water and Wastewater Infrastructure Service Charge*, Case

No. PUE-2014-00066, Hearing Examiner's Report at 52 (June 29, 2015). Further, that determination is consistent with the position of the Committee's expert in this proceeding; specifically, that current ratemaking practices, such as using a forecasted test year, will allow the Company to "adjust rates to reflect its cost of service during periods of significant investment." JA at 1488.

The Record also includes testimony of Wayne Trimble, the expert witness on behalf of Prince George, Westmoreland, and Northumberland Counties, that the WWISC is unnecessary because (1) the Company clearly has access to capital, and (2) customers should not be forced to provide risk-free capital to the Company. JA 821-822. In addition, the Record demonstrates that the Company has not sufficiently explained why it is unable to plan for and control the infrastructure replacement costs. JA at 1415. Further, the Hearing Examiner dismisses the testimony of the Committee's expert witness Michael Gorman that the WWISC is not as efficient at adjusting rates as a base rate case could, and that the WWISC would be more expensive to customers. JA at 863. The infrastructure needs of the Company have been known for years and will take years to address. The costs of these infrastructure projects can be recovered over

years in regular ratemaking, which can take into account savings from all sources. JA at 863.

Notably, Commission Staff pointed out the lack of need for the WWISC and proposed more than 15 customer safeguards for the Commission to consider establishing if it decided to approve the WWISC. JA at 850. The number and extent of these safeguards underscore the downsides to, and justifiable concerns with, the WWISC approach. The Commission adopted the Hearing Examiner's inclusion of some safeguards in his Report; however, those safeguards will not provide adequate protection to the customers of Alexandria. Specifically, the Hearing Examiner approved the pilot for "three years, at which time it may be ended, expanded, or otherwise modified," but did not provide a process for making that determination and does not provide for automatic termination. JA at 519.

Furthermore, the Commission adopted the Hearing Officer's recommendation for a 7.5% cap as opposed to the 5% cap recommended by Staff, and above the 5-7% estimate provided by the *Company's own witness* Akmentins in the Company's proposed rulemaking proceeding, Case No. PUE-2014-00066 (Rulemaking). JA at 2007. While the Hearing

Examiner estimates that the WWISC will only amount to an increase of $0.32 on each bill, the Appellants assert that a 7.5% cap strikes a balance that disproportionately favors the interests of the Company over the interests of the customers in Alexandria, particularly for those ratepayers living in areas that do not experience frequent water main breaks. JA at 519.

B. Expert testimony, as well as the Company's own testimony, are inconsistent with the Commission's adoption/approval of the pilot WWISC program.

In recommending approval of the WWISC, the Hearing Examiner cited to a previous rulemaking case, of which the Company was an applicant. JA at 517. Specifically, the Hearing Examiner references Senior Hearing Examiner Skirpan's acknowledgement 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 rate mechanism is in the public interest and the resulting rates are just and reasonable." However, in applying that standard, Hearing Examiner Anderson's Report ignores the fact that the Record 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. JA at 517.

For instance, the Hearing Examiner does not address that when asked whether the Company was claiming that under the existing ratemaking process the Company would not be able to accelerate replacement of infrastructure, the Company's own witness testified "[c]orrect. We are moving to accelerated levels right now." JA at 1039. 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. To the contrary, the experts in the proceeding provided an opposite view.

The expert for the Counties of Westmoreland, Northumberland, and Prince George, Wayne Trimble, testified that the current ratemaking process permits infrastructure replacement through the depreciation of existing plant in service, incorporation of projected rate-year investments, amortization, deferred tax, and interest on debt. JA at 1416-1417.

The Division of Consumer Counsel's expert, Ralph Smith, described the Company's need for the WWISC as "not necessary for VAWC's planned infrastructure replacement expenditures" and testified to

Consumer Counsel's preference for a denial of the WWISC. JA at 1678. Moreover, Mr. Smith explained that the WWISC is not needed due to the frequency of the Company's base rate cases, which have been filed every 2.5 years since 2000. JA at 1678.

Similarly, the Hopewell Committee for Fair Water Rate's expert, Michael P. Gorman, opined that the WWISC should be denied. JA 1488-1489. He supported that position by reasoning that the Company failed to prove it is needed because it failed to prove current ratemaking cases are not adequate to support the Company's infrastructure and modernization costs. *See id*.

As explained by the Counties of Northumberland and Westmoreland in their post-hearing brief, the WWISC is not appropriate as a "rare and exceptional" situation in which the Company is facing costs of infrastructure replacement that are volatile and outside of its control. JA at 345. To the contrary, although the Company alleged a 100-year infrastructure replacement cycle, it did not provide evidence that it is unable to plan for and control the replacement of infrastructure to accelerate their current replacement rate. In fact, when asked how long it had known it has 150 year old pipes, Company witness Akmentins only noted that the Company

has been looking at the age of the pipes for "the last couple of years." JA at 787.

Ultimately, the Commission’s decision to approve the WWISC and dismiss the testimony of all experts, except for the Company's, was not warranted by the evidence in the record, and should be reversed. Every single witness, with the exception of the Company's opposed the WWISC completely or found that it was not necessary. Even the Company's witness admitted that the Company was proceeding with accelerating infrastructure replacement, with or without the WWISC program. The costs in question can be recovered by the Company through a regular rate case. Thus, even if there were legal authority for a WWISC program (there is not), the WWISC has not been shown to be needed to serve the public interest. The Commission's final order must be reversed in part to deny the WWISC program requested by the Company below.

CONCLUSION

For the foregoing reasons, the City of Alexandria, Virginia and the City of Hopewell, Virginia respectfully request that this Court:

1. Find that the Commission erred in establishing a three-year pilot Water and Wastewater Infrastructure Surcharge program in the City of Alexandria without statutory authority; and therefore, as a matter of law, the Company may not implement the three-year pilot WWISC program and rider in the Company's Alexandria District.
2. Find that the Commission was plainly wrong in finding that the evidence in this case showed the pilot Water and Wastewater Infrastructure Surcharge program in the Alexandria district served the public interest; and therefore, the Company may not implement the three-year pilot WWISC program and rider in the Company's Alexandria District.
3. Reverse the final order of the Commission below to extent contrary to the forgoing.

Respectfully Submitted,

CITY OF ALEXANDRIA, VIRGINIA

CITY OF HOPEWELL, VIRGINIA

By Counsel

Andrew R. McRoberts, Esquire /s/
Andrew R. McRoberts, Esquire (VSB # 31882)
Nicole S. Cheuk, Esquire (VSB# 71437)
1111 East Main Street, 24th Floor (23219)
Sands Anderson PC
Post Office Box 1998
Richmond, Virginia 23218-1988
Telephone: (804) 783-7236
Facsimile: (804) 783-729I
amcroberts@sandsanderson.com
ncheuk@sandsanderson.com
Counsel for City of Alexandria, Virginia and City of Hopewell, Virginia

CERTIFICATE OF PARTIES AND SERVICE

I hereby certify that on this 1st day of February, 2018, a true copy of the foregoing Opening Brief of Appellants City of Alexandria, Virginia and City of Hopewell, Virginia was sent by email to all parties in this appeal:

Lonnie D. Nunley, III, Esq.
VSB No. 25366
Timothy E. Biller, Esq.
VSB No. 80136
Hunton & Williams
Riverfront Plaza, E. Tower
951 E. Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8330
Telephone: (804) 788-8756
Facsimile: (804) 788-8218
Facsimile: (804) 343-4597
cnunley@hunton.com
tbiller@hunton.com
Counsel for Appellee Virginia American Water Company

John F. Dudley, General Counsel
VSB No. 38280
Frederick D. Ochsenhirt, Esq.
VSB No. 37645
K. Beth Clowers, Esq.
VSB No. 72911
William H. Harrison, IV, Esq.
VSB No. 90081
Office of General Counsel
State Corporation Commission
Post Office Box 1197
Richmond, Virginia 23218-1197

Telephone: (804) 371-9671
Facsimile: (804) 371-9240
william.chambliss@scc.virginia.gov
Frederick.Ochsenhirt@scc.virginia.gov
Beth.Clowers@scc.virginia.gov
William.harrison@scc.virginia.gov
Counsel for Appellee State Corporation Commission of Virginia

James L. Banks, Jr., Esq.
VSB No. 28052
Karen Snow, Esq.
VSB No. 34106
Alexandria City Attorney's Office
301 King Street, Suite 1300
Alexandria, Virginia 22314
Telephone: (703) 746-3750
Facsimile: (703) 838-4810
karen.snow@alexandriava.gov
Counsel for the City of Alexandria

Andrew R. McRoberts, Esquire /s/
Andrew R. McRoberts, Esquire