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June 26, 2015

VIA ELECTRONIC FILING

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c/o Document Control Center
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RE: 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 Number: PUE-2014-00066

Dear Mr. Peck:

I enclose the City of Alexandria's Response to Senior Hearing Examiner Alexander F. Skirpan, Jr.'s Report to the Commission on behalf of the City of Alexandria.

Thank you for your assistance in this matter.

Sincerely,

Karen S. Snow
Assistant City Attorney

Enclosure

cc: Certificate of Service

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

APPLICATION OF)
)
VIRGINIA-AMERICAN WATER CO.)
AQUA VIRGINIA, INC., AND) CASE NO. PUE-2014-00066
MASSANUTTEN PUBLIC SERVICE CORP.)
)
For Rulemaking to Establish a Water and)
Wastewater Infrastructure Service Charge)

**THE CITY OF ALEXANDRIA’S RESPONSE TO SENIOR
HEARING EXAMINER, ALEXANDER F. SKIRPAN, JR.’S
REPORT TO THE COMMISSION**

The City of Alexandria, a municipal corporation of the Commonwealth of Virginia (“Alexandria”), in accordance with Commission Rule 5 VAC 5-20-120 (C) of the Commission’s Rules of Practice and Procedure, submits the following comments to the Commission regarding Senior Hearing Examiner, Alexander F. Skirpan, Jr.’s Report to the Commission dated June 8, 2015 (“Report”).

Petitioners have requested that the Commission adopt a set of rules by which water and wastewater utilities may establish a rate surcharge (“WWISC”) which Petitioners propose as their preferred method to recover costs associated with the replacement of aging infrastructure (“Proposed Rules”). After extensive written public comments objecting to the Proposed Rules, followed by a full day hearing and opportunity for all parties to file post-hearing briefs, Hearing Examiner Skirpan filed a well-reasoned and exhaustive Report recommending the following to the Commission:

- (1) As to the threshold issue regarding the Commission's authority to adopt rules implementing a rate surcharge or WWISC rider, the Commission has the statutory authority to adopt rules (*Report* at 1, 23-28);
- (2) Whether the Commission should adopt the Proposed Rules, Hearing Examiner Skirpan found "the Petitioners failed to prove the need for the proposed rules" and, accordingly, he recommends that the Commission dismiss the Petition (*Report* at 1, 49-52); and
- (3) If the Commission decides to adopt the Proposed Rules, the rules should include all revisions proposed by Staff along with the additional safeguards identified by Hearing Examiner Skirpan, addressing provisions related to limits or caps, notice and hearing, prudent and reasonable standard, rate design, and earnings test. (*Report* at 1, 29-49).

Alexandria fully supports Hearing Examiner Skirpan's recommendation that the Petition be dismissed by the Commission because Petitioners have failed to justify the need for implementing a WWISC rider. As discussed more fully below, however, Alexandria respectfully disagrees with Hearing Examiner Skirpan's ruling on the threshold issue that the Commission has the authority to issue rules that establish a rider for the recovery of investments to replace portions of the infrastructure of water and wastewater utilities. Accordingly, the Commission should dismiss the Petition for lack of statutory authority to implement the proposed WWISC. In the event that the Commission adopts the Hearing Examiner's finding with respect to its authority, but rejects his finding that the proposed rules are not justified, Alexandria supports and respectfully requests that any rule adopted by the Commission be those as proposed by Staff with the further safeguards proposed by Hearing Examiner Skirpan.

I. THE HEARING EXAMINER IS CORRECT THAT PETITIONERS HAVE FAILED TO PROVE THE NEED FOR THE PROPOSED RULES

After a full day hearing and extensive briefing on this issue of whether water and wastewater utilities need a rate surcharge to recover costs associated with the replacement of aging wastewater utilities, Hearing Examiner Skirpan issued an exhaustive fifty-three page Report finding that the Petitioners have failed to meet their burden to prove sufficient need for the Rules. *Report* at 51. Hearing Examiner Skirpan is correct that Petitioners have failed to proffer *any* persuasive evidence to justify the adoption of the Proposed Rules. Moreover, the record reflects numerous ways in which the WWISC rider could be abused to the detriment of ratepayers. Accordingly, the City respectfully requests that the Commission adopt the finding of Hearing Examiner Skirpan and dismiss the Petition.

II. THE COMMISSION SHOULD REJECT THE HEARING EXAMINER'S FINDING THAT THE COMMISSION HAS THE AUTHORITY TO ADOPT THE PROPOSED RULES

As noted by Hearing Examiner Skirpan, he tabled the threshold issue of the Commission's authority to issue the Proposed Rules until the conclusion of the hearing and the filing of post-hearing briefs by all participants. This issue was directed by the Commission to any person commenting on the Proposed Rules. *Report* at 23. The Petitioners, Staff, and Consumer Counsel argued that the Commission has the authority to adopt the Proposed Rules. Alexandria, together with Caroline County, Frederick County, Concerned Ratepayers in the Eastern District, and the Massanutten Property Association argued that the Commission lacks the authority to adopt the Proposed Rules.

Alexandria has fully briefed this issue in its Objection to Petition (Sub. ID 8718) and a Motion to Dismiss (Sub ID 9025). In these filings, Alexandria argued that the Petition must be dismissed because the Commission lacks the authority under Virginia Code § 56.234.3 to authorize regulated utilities to layer WWISC riders on top of their existing rates outside the statutorily mandated ratemaking process. *See Report at 26.*

While Hearing Examiner Skirpan acknowledged that the positions of all the parties and Staff on the threshold issue “intersect on a requirement that any WWISC Plan or Rider adopted by the Commission must be consistent with the provisions of Title 56, Chapter 10 of the Code, especially § 56-235.2,” he disregards Alexandria and other participants’ argument that the “SAVE Act [Steps to Advance Virginia Energy Plan, Virginia Code § 56-603 et seq.] was a grant of authority to the Commission that it did not otherwise possess because if it possessed such power, adoption of the SAVE Act would be superfluous and unnecessary.” *Id.* at 26.

Hearing Examiner Skirpan asserts that the enactment of the SAVE Act did not signify that the Commission lacked authority, but rather that the General Assembly intended to address “policy questions.” Specifically, he argues that:

By providing **policy answers** to these questions concerning the replacement of specified natural gas infrastructure, the SAVE Act has purpose and meaning. If anything, by providing answers to these **policy questions**, the SAVE Act limits the Commission’s authority in its decisions regarding the replacement programs of the specified natural gas infrastructure. On the other hand the General Assembly is not constrained or limited by the requirements of Title 56, Chapter 10. Thus, I find that the adoption of or comparisons to the SAVE Act provide little, of any guidance for determining if the WWISC Plan or Rider is consistent with the provisions of Title 56, Chapter 10 of the Code.

Report at 26 (emphasis added).

The adoption of the SAVE Act is not the result of providing a legislative “policy answer” to natural gas utilities. Hearing Examiner Skirpan’s finding is plainly wrong. 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 services of “railroads, telephone, gas and electric companies.” *See Alexandria’s Motion to Dismiss* (Sub. ID 9025 at p. 6). The natural gas companies are clearly defined and set forth in Article IX, § 2. Therefore, with regard to other utilities not enumerated in this constitutional provision – i.e., water and wastewater – the Commission’s authority to regulate these companies limited to “such powers and duties not inconsistent with this Constitution as may be prescribed by law.” Virginia Constitution Article IX, § 2.

Notwithstanding that the Commission has a broad grant of constitutional authority over natural gas company charges, the natural gas companies saw a need to lobby for, and the General Assembly chose to enact, legislation to authorize natural gas companies to implement an infrastructure replacement fee. The SAVE Act strongly suggests that the General Assembly did not believe the Commission to have 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 promulgate 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. Conversely, however, if the SAVE Act was merely the General Assembly’s attempt to provide legislative “policy answers” regarding how the Commission utilizes its broad authority over natural gas company charges – as the Hearing Examiner suggests – the fact remains that this authority derives from Virginia Constitution Article IX, § 2. Again, the Commission has no comparable constitutionally granted authority over water and wastewater companies. Thus, no matter how the SAVE Act is viewed, it

represents persuasive evidence of the fact that the Commission cannot implement the proposed WWISC rider without an express grant of statutory authority.

Alexandria incorporates herein the arguments set forth in its previous filings and respectfully requests that the Commission review this issue and find that, as a matter of law it does not have the authority to implement the WWISC rider. This would provide a second basis to dismiss the Petition, in addition to the Hearing Officer's compelling conclusion that Petitioners have not demonstrated that a WWISC rider is necessary. In the alternative, Alexandria suggests that the Commission decline to accept or reject the Hearing Examiner's conclusion that the Commission has authority to implement the proposed WWISC.

III. IF THE COMMISSION ADOPTS THE PETITION OVER THE HEARING EXAMINER'S REPORT, THE SUBSTANTIVE REVISIONS TO THE RULES RECOMMENDED BY THE HEARING EXAMINER ARE NECESSARY.

In the event that the Commission decides to adopt the Petition over the recommendations of Hearing Examiner Skirpan and the opposition of local governments and ratepayers who have opposed the Proposed Rules, the extensive substantive revisions to the Proposed Rules as set forth in the Report provide essential public safeguards, *See Report* at 29-49, which must be included any rules adopted by the Commission.

Hearing Examiner Skirpan analyzed and summarized all the participants' comments to the Proposed Rules and has revised some of the Proposed Rules to incorporate essential public safeguards in response to the participants' concerns. Accordingly, Alexandria respectfully requests that if the Commission disregards Hearing Examiner Skirpan's recommendation to dismiss the Petition and, instead, adopts the Proposed Rules, such rules must be adopted as revised in the Report.

CONCLUSION

For the reasons set forth herein, as well as those set forth in its previously filed Objection to Petition (Sub. ID 8718) and Motion to Dismiss (Sub. ID 9025), Alexandria respectfully requests that the Commission review the issue of its authority and dismiss the Petition for lack of statutory authority and/or for Petitioners failure to prove the need for the Proposed Rules. In the event the Commission decides to adopt the Petition, Alexandria respectfully requests that the substantive revisions to the Rules as recommended by Hearing Examiner be adopted.

Respectfully submitted,

The City of Alexandria,
a municipal corporation of
the Commonwealth of Virginia



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CERTIFICATE OF SERVICE

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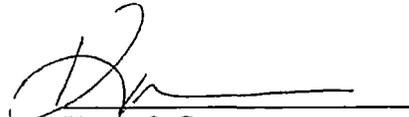
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