

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, JULY 1, 2016

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PETITION OF

THE OLD DOMINION COMMITTEE
FOR FAIR UTILITY RATES

CASE NO. PUE-2016-00010

v.

APPALACHIAN POWER COMPANY

For a declaratory judgment and an order
requiring biennial review filings

FINAL ORDER

On February 3, 2016, the Old Dominion Committee for Fair Utility Rates ("Old Dominion Committee" or "Petitioner"), by counsel, filed with the State Corporation Commission ("Commission") a Petition pursuant to 5 VAC 5-20-100 B and C of the Commission's Rules of Practice and Procedure ("Rules of Practice").¹ In its Petition, the Old Dominion Committee seeks:

(a) a declaratory judgment that certain provisions of § 56-585.1:1 of the Code of Virginia ... violate Article IX, Section 2 of the Constitution of Virginia and, accordingly, that Appalachian Power Company ("APCo" or "Company") is required under § 56-585.1 of the Code of Virginia ("Code") to make biennial review filings by March 31, 2016, and by March 31, 2018; and

(b) an order directing APCo to make such filings by such dates.²

The Petition states that, prior to the enactment of Chapter 6 of the 2015 Acts of Assembly ("SB 1349"),³ the Code required APCo to submit a biennial review filing to the Commission by

¹ 5 VAC 5-20-10 *et seq.*

² Petition at 1.

³ 2015 Va. Acts Ch. 6 (approved February 24, 2015; effective July 1, 2015) (codified in part as Code § 56-585.1:1).

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March 31, 2016, and every two years thereafter.⁴ According to the Petition, SB 1349 "prohibits the Commission from conducting biennial reviews for APCo until . . . 2020," and "prohibits the Commission from [adjusting] APCo's existing base rates (except for possible temporary, emergency increases requested by APCo), until the biennial review process resumes."⁵ The Old Dominion Committee asserts – and seeks a Commission order declaring – that "the provisions of [SB] 1349 that suspend the biennial reviews and fix the base rates of APCo are unconstitutional."⁶ Based on this assertion, the Old Dominion Committee asks that the Commission order APCo to submit the requested biennial review filings.⁷

On February 5, 2016, the Commission issued an Order Docketing Petition that, among other things, provided APCo, the Office of the Attorney General ("Attorney General"), other interested parties, and the Commission's Staff ("Staff") the opportunity to respond, on or before February 26, 2016, to the Petition, and scheduled oral argument on the Petition for March 17, 2016.

On February 16, 2016, pursuant to Rule 5 VAC 5-20-110 of the Commission's Rules of Practice, APCo filed a Motion to Stay. APCo requests that the Commission grant a stay and delay consideration of the Old Dominion Committee's Petition until the final outcome of an appeal noticed by the Virginia Committee for Fair Utility Rates ("Virginia Committee") of Commission orders issued in Case No. PUE-2015-00027, the 2015 biennial review proceeding

⁴ Petition at 2 (citing Code § 56-585.1 A 3).

⁵ *Id.* (citing Code § 56-585.1:1 A).

⁶ *Id.* at 16.

⁷ *Id.* at 16-17.

for Dominion Virginia Power ("Dominion").⁸ In its Motion to Stay, APCo asserts that the constitutionality of SB 1349 – the issue raised by the Old Dominion Committee's Petition in the instant case – is also currently pending before the Supreme Court in the Virginia Committee's appeal.⁹ According to the Motion to Stay, good cause exists for granting a stay of the instant Commission proceeding.

On February 17, 2016, the Commission issued an Order directing that responses to the Motion to Stay be filed on or before February 26, 2016, and that APCo may reply thereto at the oral argument scheduled for March 17, 2016.

On or before February 26, 2016, responses to the Motion to Stay and/or Petition were filed by the following: Old Dominion Committee; APCo; Attorney General; Virginia Committee; Dominion; Virginia Municipal League/Virginia Association of Counties APCo Steering Committee ("VML/VACo APCo Steering Committee"); Karen E. Torrent, Esq. ("Torrent"); Apartment and Office Building Association of Metropolitan Washington ("AOBA"); Virginia Energy Purchasing Governmental Association ("VEPGA"); The Kroger Co. ("Kroger"); and Staff.

On March 17, 2016, beginning at 10:00 a.m. and concluding at 4:47 p.m., the Commission heard oral argument from the following: Old Dominion Committee; APCo; Attorney General; Virginia Committee; Dominion; VML/VACo APCo Steering Committee; and the Staff.¹⁰

⁸ Motion to Stay at 8.

⁹ *Id.* at 2-5. On May 20, 2016, the Virginia Committee filed with the Supreme Court notice to withdraw this appeal. On May 31, 2016, the Supreme Court issued an order granting the Virginia Committee leave to withdraw the appeal.

¹⁰ Torrent, AOBA, VEPGA, and Kroger notified the Commission that they would not participate at oral argument.

NOW THE COMMISSION, having considered this matter, is of the opinion and finds that the Petition is denied.

Initially, it is important to emphasize what this case is about and not about. We agree with the Attorney General's assertion that, ". . . the question presented in this case is not whether SB 1349 represents good policy; it is whether SB 1349 violates the Constitution."¹¹ Petitioner also agrees.¹² Questions on whether SB 1349 is good or bad public policy, whether it will result in APCo's (or Dominion's) customers paying more than they should, or whether its effects are contrary to the public interest,¹³ are important in other contexts, but such questions of policy are different from the legal question whether SB 1349 is constitutional. That is the only question we can and must decide in this proceeding.

Petitioner's Burden Under Virginia Law

The Supreme Court of Virginia has ruled repeatedly that the single most compelling presumption in Virginia law is the presumption in favor of the constitutionality of statutes enacted by the General Assembly.¹⁴ The Court has described the Commonwealth's presumption in favor of constitutionality as so strong that it requires a challenger to show that the alleged unconstitutionality is "so plain as to leave *no doubt* on the subject. *To doubt is to affirm [the statute's] constitutionality.* There is no such thing as a doubtful constitutional statute. Every

¹¹ Attorney General's Response at 16. *See also* Tr. at 142.

¹² Tr. at 53.

¹³ Commission Staff explained in considerable detail the likely operational effects of SB 1349 when it was considered during the Regular Session of the 2015 General Assembly. Tr. at 51-52. *See also infra* note 46.

¹⁴ *See, e.g.*, Attorney General's Response at 2-4 (citing *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 301, 749 S.E.2d 176, 183 (2013) ("[i]here is ... no stronger presumption known to the law") (quoting *Montgomery Cty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 435, 719 S.E.2d 294, 300 (2011)); *Jamerson v. Womack*, 244 Va. 506, 510, 423 S.E.2d 180,182 (1992) ("strong presumption of validity"); *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959) ("one of the strongest known to the law"); *Reynolds v. Milk Comm'n of Virginia*, 163 Va. 957, 966, 179 S.E.2d 507, 510 (1935) ("no stronger presumption known to the law"))).

presumption is in its favor, and there is no stronger presumption known to the law."¹⁵

Furthermore, the unconstitutionality of a statute must be "clear and palpable,"¹⁶ and, thus, the "Court must resolve *any reasonable doubt regarding a statute's constitutionality in favor of its validity.*"¹⁷

As the Supreme Court has repeatedly made clear, *any* reasonable doubts – any close calls, in the vernacular – *must* be resolved in favor of a statute's constitutionality. The Old Dominion Committee carries the burden of overcoming the Commonwealth's strongest of legal presumptions.

Constitution of Virginia

Article IX, § 2 of the Constitution of Virginia reads (emphasis added):

Subject to the provisions of this Constitution and to such requirements as may be prescribed by law, the Commission shall be the department of government through which shall be issued all charters, and amendments or extensions thereof, of domestic corporations and all licenses of foreign corporations to do business in this Commonwealth.

Except as may be otherwise prescribed by this Constitution or by law, the Commission shall be charged with the duty of administering the laws made in pursuance of this Constitution for the regulation and control of corporations doing business in this Commonwealth. *Subject to such criteria and other requirements as may be prescribed by law, the Commission shall have the power and be charged with the duty of regulating the rates, charges, and services and, except as may be otherwise authorized by this Constitution or by general law, the facilities of railroad, telephone, gas, and electric companies.*

¹⁵ *Reynolds*, 163 Va. at 966, 179 S.E.2d at 510 (quoting "fundamental principles . . . enumerated by the chancellor") (emphases added).

¹⁶ *Gallagher v. Commonwealth*, 284 Va. 444, 452, 732 S.E.2d 22, 26 (2012) (quoting *Whitlock v. Hawkins*, 105 Va. 242, 248, 53 S.E. 401, 403 (1906)). See also *FFW Enters. v. Fairfax Cty.*, 280 Va. 583, 593, 701 S.E.2d 795, 802 (2010) ("the legislative usurpation must be very clear and palpable") (quoting *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 428, 657 S.E.2d 71, 76 (2008)).

¹⁷ *Montgomery Cty.*, 282 Va. at 435, 719 S.E.2d at 300 (citation and quotation marks omitted) (emphases added).

The Commission shall in proceedings before it ensure that the interests of the consumers of the Commonwealth are represented, unless the General Assembly otherwise provides for representation of such interests.

The Commission shall have such other powers and duties not inconsistent with this Constitution as may be prescribed by law.

Challenged Provision – SB 1349

The Old Dominion Committee alleges that the provisions of SB 1349 that postpone the year of APCo's next biennial review from 2016 to 2020 violate Article IX, § 2. Specifically, Petitioner cites the following language from SB 1349:

No biennial reviews of the rates, terms, and conditions for any service of a Phase I [U]tility, as defined in § 56-585.1, shall be conducted at any time by the State Corporation Commission for the four successive 12-month test periods beginning January 1, 2014, and ending December 31, 2017.[. . .] Such test periods beginning January 1, 2014, and ending December 31, 2017, for a Phase I Utility, . . . are collectively referred to herein as the "Transitional Rate Period."

* * *

After the conclusion of the Transitional Rate Period, biennial reviews shall resume for a Phase I [U]tility in 2020, with the first such proceeding utilizing the two successive 12-month test periods beginning January 1, 2018, and ending December 31, 2019.

* * *

[N]o adjustment to an investor-owned incumbent electric utility's existing tariff rates, including any rates adopted pursuant to § 56-235.2, shall be made between the beginning of the Transitional Rate Period and the conclusion of the first biennial review after the conclusion of the Transitional Rate Period, except as may be provided pursuant to §§ 56-245 or 56-249.6 or subdivisions A 4, 5, or 6 of § 56-585.1.¹⁸

¹⁸ Petition at 8-9 (quoting Code § 56-585.1:1 A and noting that "Phase I Utility" refers to APCo and "Phase II Utility" refers to Dominion).

According to Petitioner, "[w]ith this language, the General Assembly thus terminated biennial reviews for APCo until 2020 and, with the exception of possible temporary, emergency increases requested by APCo pursuant to § 56-245, fixed APCo's base rates for at least the next five years, and possibly longer, while prohibiting the Commission from reducing those rates under any circumstances."¹⁹ The Old Dominion Committee concludes that "[u]ndoubtedly, the General Assembly simply fixed the base rates of a particular company."²⁰

Petitioner acknowledges that Article IX, § 2 gives the General Assembly the authority to prescribe by law "criteria and other requirements" that circumscribe the Commission's rate-setting authority,²¹ but Petitioner alleges that this particular directive, by postponing APCo's next base rate review, is outside the scope of "criteria and other requirements" because it amounts to the General Assembly "setting" or "fixing" a rate.²² As the Old Dominion Committee puts it, "Thus, no matter where the line between permissible and impermissible 'criteria' and 'requirements' might be drawn, [SB] 1349 falls on the wrong side."²³

The Attorney General, however, disagrees with Petitioner that SB 1349 "sets" or "fixes" rates, asserting that:

[I]t's apparent that this statute [SB 1349] does not set the rate; it *freezes* the rate that you-all have already set . . . it's not fixing the rate; it's *postponing* the changing of a rate that you have set."²⁴

¹⁹ *Id.* at 9.

²⁰ *Id.* The question whether the challenged language in SB 1349 represents a special or private law in violation of Article IV, §§ 14 or 15 of the Virginia Constitution has not been presented in this case.

²¹ Tr. at 59-60.

²² *See, e.g.*, Petition at 3, 9, 15; Tr. at 61.

²³ Petition at 13.

²⁴ Tr. at 139-40 (emphases added).

We agree that the operational effect of postponing APCo's next biennial review leaves in place APCo's current base rates, which were established by this Commission in APCo's 2011 biennial review²⁵ (just as a similar provision in SB 1349 leaves in place Dominion's current base rates, established in Dominion's 2009 "going-in" base rate case²⁶ under the 2007 Regulation Act²⁷). Petitioner also agrees that the operational effect of the challenged provision is to leave in place the rates already set by the Commission, effectively freezing the base rates determined by the Commission prior to the legislation.²⁸ We see, therefore, in terms of the constitutional analysis of the challenged provisions of SB 1349, no legal significance to the different wording used by the Petitioner in characterizing the challenged provision as "fixing" the rate or the Attorney General's characterization as "freezing" the rate. On the facts of this case, they are effectively the same from a constitutional standpoint. SB 1349 postpones APCo's next biennial earnings review from 2016 to 2020, thus also postponing any potential base rate adjustment. This postponement effectively freezes temporarily the base rates this Commission had previously set. As explained below, this temporary base rate freeze can reasonably be considered as falling

²⁵ *Application of Appalachian Power Company, For a 2011 biennial review of the rates, terms and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2011-00037, 2011 S.C.C. Ann. Rept. 477, Final Order (Nov. 30, 2011). In addition, in APCo's 2014 biennial review, the Commission approved limited changes to base rates that did not affect APCo's aggregate revenue requirement. *Application of Appalachian Power Company, For a 2014 biennial review of the rates, terms and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2014-00026, 2014 S.C.C. Ann. Rept. 392, Final Order (Nov. 26, 2014).

²⁶ *Application of Virginia Electric and Power Company, For a 2009 statutory review of rates, terms and conditions for the provision of generation, distribution, and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2009-00019, 2010 S.C.C. Ann. Rept. 301, Order Approving Stipulation and Addendum (Mar. 11, 2010).

²⁷ 2007 Va. Acts Chs. 888 and 933.

²⁸ See, e.g., Tr. at 78 ("Q: Which leaves in place the rates that had been set before; effective, it was – A: [SB 1349] – effectively, it freezes the rates.").

within the "criteria and other requirements" that may be prescribed by the General Assembly under Article IX, § 2.

Functionally and legally, the SB 1349 language that Petitioner challenges is indistinguishable from a myriad of other statutory provisions that represent "criteria and other requirements" under Article IX of the Constitution, found throughout Title 56 of the Code, that circumscribe or limit the Commission's rate-setting authority in various circumstances including, notably, through previous rate freezes. Many of these provisions go significantly beyond the challenged provisions of SB 1349 in the scope and duration of their restrictions on the Commission's rate-setting authority. Petitioner cannot distinguish SB 1349's postponement of APCo's next biennial review as uniquely restrictive of the Commission's authority or *sui generis* in any significant way compared to many other statutes, which include numerous quite specific restrictions on both how and when the Commission conducts biennial reviews. For example, in the 2007 Regulation Act the General Assembly mandated that the Commission conduct earnings reviews every two years, but prohibited conducting base rate *cases* for the purpose of reducing base rates unless certain criteria and other requirements were met.²⁹ These include a mandatory finding that APCo (or Dominion) has earned above certain statutorily prescribed earnings bands for two consecutive biennial review periods.³⁰ The functional effect of these statutory requirements is that this Commission can only *review* base rate earnings every *two* years and can only *reduce* base rates every *four* years, and only after certain other statutory requirements are met. These requirements are far more restrictive of the Commission's authority to conduct base

²⁹ 2007 Va. Acts Chs. 888 and 933.

³⁰ Code § 56-585.1 A 8 c.

rate cases and adjust base rates than was contained historically in Chapter 10 of Title 56 of the Code ("Chapter 10").

There are also many other provisions in the 2007 Regulation Act that impose criteria and other requirements on the Commission that produce quite specific rate outcomes. These include restrictions affecting both rate adjustment clause ("RAC") and base rate proceedings, such as, among others: (i) mandatory adders for rate of return on common equity ("ROE");³¹ (ii) restrictions on the Commission's authority to allocate costs of demand-side management programs,³² vegetation management,³³ underground distribution,³⁴ and renewable energy portfolio programs³⁵ to certain large customers; and (iii) a requirement that a "floor" based on the earnings of other "peer" utilities must be used in setting ROEs.³⁶

Going further back in recent history, the provisions of SB 1349 that Petitioner challenges are operationally less restrictive of the Commission's rate-setting authority than the provisions of the 1999 Restructuring Act,³⁷ which froze in place the then-existing base rates for Dominion for a period longer than the legislative base rate freeze at issue herein and removed the Commission's authority to set rates for electricity generation services.³⁸ The provisions of the

³¹ Code § 56-585.1 A 6.

³² Code § 56-585.1 A 5 c.

³³ Code § 56-585.1 A 5 f.

³⁴ Code § 56-585.1 A 6.

³⁵ Code § 56-585.2 E.

³⁶ Code § 56-585.1 A 2 a, b.

³⁷ 1999 Va. Acts Ch. 411.

³⁸ *See, e.g.* §§ 56-577 A, 56-581 A, 56-582 A (1999) (all subsequently amended). Pursuant to legislation enacted in 2004, Dominion's fuel factor rate was also frozen from 2004 to 2007. *See* Code § 56-249.6 B.

1999 Restructuring Act restricting and removing the Commission's rate-setting authority were never alleged by any party, including the Virginia Committee (which APCo describes as a "sister organization" to Petitioner, comprised of large industrial customers of Dominion),³⁹ to violate Article IX, § 2.

While Petitioner repeatedly stated that it is only challenging this single discrete requirement of SB 1349,⁴⁰ the lack of a limiting principle in Petitioner's position undermines the very relief it requests.⁴¹ Under Petitioner's logic, many of the recent legislative enactments that diminished the Commission's historical rate-setting authority under "old" Chapter 10, as it existed before 1999, would be unconstitutional, including the aforementioned 1999 Restructuring Act, the 2007 Regulation Act, and current statutes requiring local telephone service rates to be set by the market, not by the Commission in Chapter 10 rate cases.⁴² To Petitioner's credit, it acknowledged that under its logic many of these statutory provisions may well be unconstitutional.⁴³ Yet, the relief Petitioner seeks is not only for us to declare unconstitutional the provisions of SB 1349 that postpone APCo's next biennial review until 2020, but also to order that a 2016 biennial review of APCo under Code § 56-585.1 be conducted.⁴⁴ Because, under Petitioner's own logic, many of the provisions of Code § 56-585.1 governing biennial

³⁹ Motion to Stay at 3.

⁴⁰ Tr. at 32, 61, 63-64, 76, 182, 185.

⁴¹ The Attorney General asserts: "We don't think that the Petitioner has identified a limiting principle. It's not good enough to simply say, [t]hat's not this case, or, [w]e don't have to consider other statutes, because if the Commission were to adopt the rule that is being advocated here, it would lead to a slew of constitutional challenges to a number of other statutes." Tr. at 138.

⁴² See Code §§ 56-54.2 *et seq.* (Chapter 2.1 of Title 56), 56-235.5, and 56-235.5:1.

⁴³ Tr. at 33, 46, 61, 63-65, 82-83.

⁴⁴ Petition at 16-17.

reviews – which Petitioner asks us to enforce – may also be unconstitutional, the Petition would have us return to ground that the Petitioner's own argument, if accepted, would render infirm.

Considering the lack of a limiting principle and the effect of a ruling in Petitioner's favor on other statutory provisions is not just an academic exercise in hypotheticals, it is relevant to the legal issue in front of us. The sweeping impact that would result from the application of Petitioner's logic to numerous statutory provisions throughout Title 56 of the Code simply cannot be reconciled with the Supreme Court's repeated directive that the strongest presumption in Virginia law is that statutes enacted by the General Assembly are constitutional.

Petitioner states that its opponents have not offered a limiting principle either and offers several hypothetical actions of the General Assembly as illustrations of what could happen if the temporary base rate freeze that Petitioner challenges is upheld as constitutional.⁴⁵ It is the Petitioner, however, who bears the heavy burden of overcoming the Supreme Court's unequivocal presumption in favor of constitutionality, not the opponents. Moreover, the real-world application of Petitioner's position means that numerous *actual* statutes, not hypothetical ones, become presumptively unconstitutional.

Further, as noted above, whether the challenged language in SB 1349 is characterized as a "fixing" or a "freezing" of base rates, on the facts of this case effectively there is no difference, and for purposes of the constitutional analysis, we find no legal significance to the different terms. Operationally, SB 1349 postpones APCo's 2016 biennial earnings review until 2020, effectively postponing any potential base rate adjustment, and thus leaving in place for a temporary period the base rates previously set by this Commission. Such a temporary rate freeze prescribed by statute is not unprecedented and must be considered in light of the Supreme

⁴⁵ Tr. at 33.

Court's unequivocal instruction that any alleged unconstitutionality must be clear and palpable and that any reasonable doubt renders the statute constitutionally valid. Accordingly, we find that the language in SB 1349 that postpones APCo's next biennial review from 2016 to 2020 can reasonably be considered within the "criteria and other requirements" of Article IX, § 2 and thus does not violate the Constitution.

Although not necessary to our finding of constitutionality, as a factual matter, while SB 1349 temporarily suspends APCo's next biennial review for four years, the legislation leaves in place several statutory provisions under which the Commission retains the duty to regulate APCo's rates. For example, SB 1349 does not eliminate the Commission's authority to conduct, among other rate proceedings, RAC cases under Code §§ 56-585.1 A 4, A 5 and A 6 during SB 1349's Transitional Rate Period, emergency rate cases under Code § 56-245 at any time, and fuel factor rate cases annually under Code § 56-249.6.⁴⁶ SB 1349 also requires the Commission to conduct multiple proceedings during the Transitional Rate Period to establish the ROE for RAC rates that continue to be set by the Commission.⁴⁷ Further, we note that various statutes unchanged by SB 1349, along with new requirements in SB 1349 itself,⁴⁸ enable the Commission to monitor and report generally on APCo's base rate, and other, revenues and estimated earnings.

⁴⁶ Code § 56-585.1:1 A. As referenced above, Commission Staff explained in considerable detail the likely operational effects of SB 1349 when it was under consideration during the Regular Session of the 2015 General Assembly. For example, RAC rates under Code §§ 56-585.1 A 5 and A 6 are likely to go up as the costs recoverable under those sections continue to increase. In addition, while there is no current approved state plan for compliance with the Environmental Protection Agency's Clean Power Plan, it is likely that many of the costs of such a plan will be eligible for recovery through Code §§ 56-585.1 A 5 or A 6 RACs, rather than being absorbed in frozen base rates, thus resulting in rate increases to customers. Further, any potential reductions in expenses recoverable through base rates during this period will remain in frozen base rates for the benefit of utility stockholders.

⁴⁷ See Code § 56-585.1:1 C.

⁴⁸ See Code § 56-585.1:1 B, F.

Dissent

The dissent makes several points that deserve a response because they involve the essence of our duty to follow the Constitution of Virginia in this case.

Public Policy – The dissent implies that this Commission has a "*duty*" under Article IX to find SB 1349 unconstitutional as contrary to the "public interest," by conflating public-policy arguments with legal analysis.⁴⁹ The dissent herein, like the dissent in Dominion's 2015 biennial review,⁵⁰ discusses extensively what it views as the negative public-policy outcomes of SB 1349.⁵¹ As noted above, we are aware of the likely operational effects of SB 1349,⁵² but whether we agree with the dissents' opinion on the public-policy aspects of this legislation, our opinion on such issues is immaterial to the purely legal question of whether SB 1349 is constitutional. The Commission's duty in this case is to decide the legal question of constitutionality without regard to our public-policy preferences and not to conflate the two. As discussed further below, there is no support in the Constitution of Virginia or relevant Supreme Court cases for a theory that the Commission has both the duty and power under Article IX to strike down as unconstitutional a statute because the Commission considers it to be contrary to the public interest.

Precedent and History – Both the Biennial Review Dissent and the dissent herein devote substantial attention to the historical context in which this constitutional challenge arises,

⁴⁹ See, e.g., *infra* pp. 32-33 ("SB 1349 *eliminates* the Commission's ability to perform its *assigned duty* and undermines key elements for determining the *public interest*." (emphases added)).

⁵⁰ *Application of Virginia Electric and Power Company, For a 2015 biennial review of the rates, terms and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2015-00027, 2015 S.C.C. Ann. Rept. 299, 307, Final Order at 24 (Nov. 23, 2015) (Dimitri dissenting) ("Biennial Review Dissent").

⁵¹ See *infra* pp. 20, 23-25, 28-30, 33; Biennial Review Dissent at 25, 28-30.

⁵² See *supra* notes 13 and 46.

obviously considering that history important to this proceeding and the issue in front of us.⁵³

The former portrays SB 1349 as a unique and unprecedented encroachment by the General Assembly on the Commission's authority, the final act in a history of gradually increasing but constitutional⁵⁴ legislative restrictions on Commission authority that crossed a constitutional line when "The 2015 General Assembly took the *final step ending* the Commission's rate-setting authority . . . with the passage of SB 1349."⁵⁵ The Biennial Review Dissent and the dissent herein contain a history of rate regulation in Virginia that specifically includes descriptions of statutes such as Code § 56-235.2, with its broad grant of authority, and the Regulation Act of 2007, which imposed many restrictions on the Commission's authority,⁵⁶ but both dissents notably omit any specific mention of the 1999 Restructuring Act,⁵⁷ which (i) effectively froze base rates just as SB 1349 does,⁵⁸ (ii) froze them for a longer period of time than SB 1349 does,⁵⁹ and (iii) removed the Commission's authority to fix rates for electricity generation services.⁶⁰

⁵³ See *infra* pp. 22-23, 32-33; Biennial Review Dissent at 26-30.

⁵⁴ See, e.g., Biennial Review Dissent at 26, n.80.

⁵⁵ Biennial Review Dissent at 29. See also *id.* at 30. The dissent herein describes SB 1349 as ". . . ending the Commission's rate-setting authority . . ." *Infra* p. 25. *But cf. supra* p. 13 (discussion of Commission authority).

⁵⁶ See *infra* pp. 22-23; Biennial Review Dissent at 26-30.

⁵⁷ 1999 Va. Acts Ch. 411. See, e.g., *Application of Virginia Electric and Power Company. For approval of a Functional Separation Plan under the Virginia Electric Utility Restructuring Act*, Case No. PUE-2000-00584, 2001 S.C.C. Ann. Rept. 467, 472, Order on Functional Separation (Dec. 18, 2001) (In that Order, the Commission described the 1999 Restructuring Act as "a marked departure from the traditional manner in which electric public utility service has both been provided and regulated in Virginia No longer will customers be able to look to agencies of the state to determine the fair, just and reasonable rates for this service.").

⁵⁸ *Id.*; Code § 56-582.

⁵⁹ *Id.* Subsequent to the 1999 legislation, Chapter 827 of the 2004 Acts of Assembly extended the base rate freeze for three additional years for Dominion. Code § 56-582 F (2004) (amended in 2007). The 2004 legislation also froze Dominion's fuel factor rate for three years. Code § 56-249.6 B.

⁶⁰ 1999 Va. Acts Ch. 411; Code §§ 56-577 A and 56-581 A (1999) (both subsequently amended).

The Commission's authority to set the rates for local telephone services has also been removed through legislative enactments that have never been challenged as unconstitutional, as noted above.⁶¹

To support its assertion that SB 1349 should be struck down despite the Supreme Court's unequivocal directive that statutes are presumed to be constitutional, the dissent describes SB 1349 as "*facially* unconstitutional."⁶² Yet if SB 1349 is "facially unconstitutional," then unquestionably so was, among other statutes cited herein, the 1999 Restructuring Act.⁶³ Given the importance attached to historical context in both the Biennial Review Dissent and the dissent herein, accuracy requires noting that the restrictions of SB 1349 are far from unprecedented as the historical record and statutes past and present demonstrate.

Constitutional Theory – The dissent states as follows:

. . . [A] statute may create "criteria and other requirements" that "prescribe" standards or factors the Commission is to utilize in the exercise of its constitutional power and duty, but a statute may not *remove* such power and duty altogether. Furthermore, Article IX, § 2 grants the Commission the power and duty to regulate electric rates – even if the General Assembly does nothing. That is, the Commission's constitutional authority to regulate electric rates is self-executing . . . it is not contingent upon, or triggered by, prior legislative action [T]he Commission's rate-setting authority is

⁶¹ See *supra* p. 11 and note 42.

⁶² *Infra* p. 33 (emphasis added).

⁶³ Contrary to the portrayal of SB 1349 as an unprecedented encroachment on Commission authority in the Biennial Review Dissent, the dissent herein now appears to adopt Petitioner's argument that other statutes such as the 1999 Restructuring Act may well have been unconstitutional, but were just never challenged (*see infra* note 91), an argument we address above (*see supra* pp. 10-12). Indeed, the dissent alleges that the "majority *scolds* Petitioner here for not having brought challenges to past statutes. . ." (*infra* note 91 (emphasis added)), presumably for noting the fact that there were no challenges from *any* party, including Petitioner, to the 1999 Restructuring Act (*see supra* pp. 10-11). We agree that parties may choose not to initiate constitutional challenges for reasons other than the legal merits (*see infra* note 91), but challenges to a law's constitutionality are not limited only to those initiated by outside parties. For example, Commissioner Dimitri opined *sua sponte* that SB 1349 is unconstitutional in the Biennial Review Dissent.

not *conferred* by the General Assembly but, rather, is *subject to* legislative criteria and other requirements.⁶⁴

This case is about legislation the General Assembly has enacted (and the Governor has signed), so the hypothetical question as to what the Commission's power would be in the complete absence of any legislation is not presented. The dissent appears to advocate a theory that the Constitution of Virginia grants the Commission a plenary power to legislate that is both *exclusive of*, and *superior to*, that of the General Assembly. Under this theory, the General Assembly apparently can enact purely *procedural*, but *not substantive*, criteria and requirements, or it can enact some substantive criteria and requirements as long as they don't cross a line, which is neither clearly located nor defined. The dissent says that the General Assembly can "prescribe" how the Commission regulates rates but cannot "remove" the rate-setting authority. If that is the constitutional bright-line test, then many legislative enactments prior to SB 1349 also would have been unconstitutional, unquestionably including the 1999 Restructuring Act and legislation removing the Commission's authority to set rates for local telephone service.⁶⁵

Further, under the dissent's theory, which has no limiting principle, the General Assembly could never make the *public policy* decision to deregulate services of the types of companies listed in Article IX, § 2 by removing the Commission's authority to set the rates for such services and thereby allowing prices to be set by the market. There is no historical evidence that those who adopted the 1971 Constitution intended such a grant of plenary policy-making power to the Commission, as described in the Supreme Court's *VEPCO*⁶⁶ decision issued shortly after the 1971 Constitution had gone into effect. On the contrary, the dissent's theory finds no support in

⁶⁴ *Infra* pp. 27-28 (emphases in original).

⁶⁵ *See also supra* pp. 10-12.

⁶⁶ *Commonwealth v. Va. Elec. & Power Co.*, 214 Va. 457, 201 S.E.2d 771 (1974) ("*VEPCO*").

either of the Supreme Court holdings in *VEPCO* ("... [T]he authority of the SCC... is *subordinate* to the power of the General Assembly to command otherwise.")⁶⁷ or *PEPCO* ("The SCC's regulatory jurisdiction is *not* plenary.").⁶⁸

Whether we may believe that a grant of plenary legislative power to this Commission in the highly complex field of public-utility regulation may serve the public interest, such belief does not override our duty to apply and follow the Code and Constitution of Virginia in cases before us, as we have done in the instant proceeding and other proceedings in which concerns about SB 1349 have been raised in dissent.

Conclusion

Because we find that the challenged provisions of SB 1349 fall within the "criteria and other requirements" of Article IX, § 2, we do not need to rule on whether SB 1349 crosses some hypothetical line between the General Assembly's legislative power and the Commission's, or where that line may be, or whether such a line exists. Nor do we need to rule on the assertions by the Attorney General,⁶⁹ APCo,⁷⁰ and Dominion⁷¹ that the Supreme Court has already settled those questions definitively in its *VEPCO* and *PEPCO* opinions, by resolving any perceived conflicts between the General Assembly's legislative powers and the Commission's in favor of the General Assembly.

⁶⁷ *Id.*, 214 Va. at 465, 201 S.E.2d at 777 (emphasis added).

⁶⁸ *Potomac Elec. Power Co. v. State Corp. Comm'n*, 221 Va. 632, 636, 272 S.E.2d 214, 216 (1980) (emphasis added) ("*PEPCO*").

⁶⁹ Tr. at 134-38, 143-44; Attorney General's Response at 5-12.

⁷⁰ Tr. at 166-74; APCo's Response at 5-6, 12-14.

⁷¹ Tr. at 125; Dominion's Response at 6-7, 9.

Accordingly, we need not – and do not herein – delineate and detail the full scope of the Commission's ratemaking authority under Article IX, § 2, relative to the General Assembly's legislative powers under Article IV.⁷² We need only find – and we do herein – that the provisions of SB 1349 that reschedule APCo's next biennial review from 2016 to 2020 can reasonably be considered as falling within the "criteria and other requirements" that the General Assembly may prescribe as authorized by Article IX, § 2. Furthermore, this finding is consistent with the Supreme Court's repeated and unequivocal admonition that any reasonable doubt about a statute's constitutionality must be resolved in favor of constitutionality and that, if a statute reasonably can be, it must be construed in a manner that upholds its constitutionality.⁷³

Accordingly, IT IS SO ORDERED and this matter is dismissed.

DIMITRI, Commissioner, dissents:

The Old Dominion Committee for Fair Utility Rates, a group of large industrial customers of Appalachian Power Company ("APCo"), challenges the constitutionality of a recently enacted statute which prohibits the State Corporation Commission from setting the base rates that customers of APCo are required to pay for electric service.⁷⁴

⁷² Other purposes and effects of Article IX of the Constitution of Virginia were discussed at length at oral argument. Relative thereto, it is clear that, at a minimum, Article IX guarantees that the Commission's existence as an independent department of government is protected against any legislative or executive action that purports otherwise, and that the General Assembly may neither assign nor delegate the rate-setting power to any executive-branch or independent agency of Virginia government other than the Commission.

⁷³ Having herein ruled on the Petition, we find that APCo's Motion to Stay is moot.

⁷⁴ Those participants supporting the Old Dominion Committee's petition include: the Virginia Committee for Fair Utility Rates (comprised of large industrial customers of Dominion Virginia Power ("Dominion")); the Virginia Municipal League/Virginia Association of Counties APCo Steering Committee (comprised of municipalities and counties that are customers of APCo); the Apartment and Office Building Association of Metropolitan Washington; the Virginia Energy Purchasing Governmental Association (comprised of local government customers of Dominion); Karen E. Torrent, Esq.; and The Kroger Co. Supporting a finding of constitutionality are APCo and Dominion (the two largest investor-owned electric utilities in Virginia) and the Attorney General.

SB 1349 (which was passed in 2015 by the General Assembly and signed by the Governor) fixes APCo's and Dominion's base rates at the current level for each company and prohibits the Commission from conducting further biennial reviews until 2020 (APCo) and 2022 (Dominion). Since biennial reviews under Code § 56-585.1 have been presumed to be the only legislatively-sanctioned basis for setting or lowering customers' base rates, SB 1349 has foreclosed all avenues for reasonable base rate reductions, if warranted, by the Commission. Thus, unless the utility seeks an emergency rate increase, SB 1349 fixes base rates until at least 2021 (APCo) and 2023 (Dominion). The majority opinion does not, and cannot, dispute these facts. The Commission's authority to set base rates, affecting billions of dollars of utility costs and revenues and affecting millions of customers of the utilities, has been prohibited by the General Assembly. By doing so, SB 1349 violates Article IX, § 2, of the Constitution of Virginia.

As I discussed in Dominion's 2015 biennial review order, for its authority and duties the Commission looks to the law, which includes both the Code and Constitution of Virginia. Article IX, § 2, of the Constitution of Virginia, adopted in 1971, elevated to a constitutional level the Commission's rate-setting authority and duty in certain areas, providing in pertinent part as follows (emphasis added):

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

The italicized language grants the Commission the power and the duty to regulate the rates of electric companies. The Commission's constitutional grant of authority as to rates is explicitly "[s]ubject to such criteria and other requirements as may be prescribed by law." As discussed by

Professor A.E. Dick Howard in his *Commentaries on the Constitution of Virginia*, although this language gives the General Assembly wide latitude to determine rules or standards that must be used by the Commission in regulating rates, the Constitution grants the Commission jurisdiction "that the General Assembly may not take away."⁷⁵ The Constitution gives the General Assembly authority to set rules and standards, but, contrary to the majority's position, there are limits.⁷⁶

Of particular relevance here, Professor Howard further explains as follows: "[T]he Assembly may not itself fix the rates of a particular company. Nor would it seem that the Legislature could take this function away from the [Commission] and confer it upon some other agency or body."⁷⁷ Thus, there is a distinction, or a line, between the establishment of legislative criteria and requirements for rate regulation, versus the reservation in the Constitution of rate-setting power and duty in the Commission. The location of this line, between establishing criteria or requirements and actually setting rates, may be subject to differing views.⁷⁸ SB 1349, however, does not fall in a grey area. It does not establish criteria that the Commission must apply in regulating an electric utility's base rates. Rather, it unequivocally fixes those rates by statute for both companies – for years – and takes the base rate-setting function away from the Commission entirely. This is a legislative prohibition, rather than a criteria or requirement.

⁷⁵ 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 980 (1974).

⁷⁶ The majority erroneously asserts that the arguments contained herein are based on a claim that the Commission's authority is plenary. *See supra* pp. 17-18. This "claim" or assertion is made only in the majority opinion. As repeatedly recognized in this Dissent, Article IX, § 2, gives the Commission the authority and the duty to set electric rates. This section also recognizes the authority of the General Assembly to set criteria. At bottom, it is the majority that treats the General Assembly's role as plenary, as it agrees that the General Assembly can remove all Commission authority granted in the Constitution.

⁷⁷ 2 Howard, *supra* note 75, at 983.

⁷⁸ Examples of where the General Assembly has established "criteria and other requirements" include provisions of Code § 56-235.2 (traditional standards for setting base rates), § 56-249.6 (recovery of fuel costs incurred by electric utilities), and § 56-585.1 (the biennial review process).

Thus, SB 1349 is a prohibition on the Commission's exercise of its constitutional authority to regulate rates, and there is no basis in the Constitution for such legislation which purports to nullify the Commission's grant of jurisdiction in this regard.

Rate regulation in Virginia and in most other jurisdictions traditionally has been accomplished through a process that reviews a utility's cost structure and allows into base rates the prudently incurred costs of operation, such as employee costs, depreciation of assets used to provide service (such as generation facilities) and taxes, coupled with a reasonable return, or profit (determined based on market rates of equity, cost of debt and similar funding sources), on its investments – generation plants, distribution facilities, office buildings, etc. Absent imprudent action by the utility, if costs of providing service go up, base rates are adjusted upward, and if costs go down base rates are reduced to reflect that fact.⁷⁹

Consistent with the provisions of Article IX, § 2, for decades Virginia law protected customers from monopoly pricing and excessive rates while allowing utilities to recover their prudently incurred costs plus a reasonable return on investment through statutes such as Code § 56-235.2, which required the Commission to establish rates that provided the utility with revenues "not in excess" of the utility's "actual costs" plus a "fair return."⁸⁰ This allowed the Commission to consider both upward and downward adjustments to base rates, which it did based on a fully developed record that analyzed the utility's costs and financing and gave all

⁷⁹ The basic reason that rates are regulated in this manner – protecting the utility financially to maintain a reliable electric system and earn a fair return, and protecting customers by charging no more than the utility's costs plus a reasonable return – is because the utility is a state-created public utility monopoly and electricity is a necessity. *See, e.g.,* Evans B. Brasfield, *Regulation of Electric Utilities by the State Corporation Commission*, 14 Wm. & Mary L. Rev. 589, 589-93 (1973); Michael J. Ileo and David C. Parcell, *Economic Objectives of Regulation – The Trend in Virginia*, 14 Wm. & Mary L. Rev. 547, 547-50 (1973).

⁸⁰ This statute, which reflects fundamental rate-setting criteria and requirements as established by the General Assembly, is still applied by the Commission in, among other proceedings, the rate reviews and rate cases for natural gas distribution and water companies in Virginia.

interested parties, including the utility, an opportunity to present evidence on costs, revenues and a fair return and legal argument. In 2007, the General Assembly passed Code § 56-585.1, which largely supplanted the fundamental principles of § 56-235.2 identified above and instituted the biennial review process, placing newly crafted limitations on the Commission's authority to regulate the rates of APCo and Dominion.⁸¹

Based upon the record in Dominion's most recent biennial review (prior to the prohibition on such cases), the trend of Dominion's current base rates producing revenues over cost and a fair return has been continuing and demonstrates the potential impacts of prohibiting regulation of base rates by the Commission. The Commission's Staff projected that Dominion's revenues over a fair return would be \$310 million in 2015 and \$299 million in 2016.⁸² The Attorney General similarly stated that Dominion's base rates are designed to produce excess annual revenues of \$229 million, or \$299 million if based upon the Staff's recommended return on equity.⁸³ The point here is not the determination of the precise amount of earnings in excess of a fair return in a given year, but rather that the utility's current base rate levels, which the Commission is now prohibited from setting or adjusting, are designed to produce and have been

⁸¹ Code § 56-585.1, among other things, established requirements on how the Commission determines a fair return on investment and restricted the circumstances under which the Commission can decrease base rates. This statute has been applied to allow the utility to seek base rate increases if its costs increase, while allowing the Commission to reduce base rates only if the utility earns more than a fair return for two consecutive bienniums (during which time the utility might have to refund a portion of its excess revenues, but otherwise base rates remain at the same higher level). In addition, the General Assembly subsequently established specific criteria that required the Commission to include extraordinary costs, which would not have been recognized as directed in the biennial review under conventional rate-setting standards, as part of Dominion's biennial reviews in 2013 and 2015; the effect thereof was to reduce Dominion's regulatory earnings as calculated in the biennial review and reduce or eliminate refunds to customers and reduce or eliminate the possibility of base rate reductions on a going-forward basis.

⁸² *Application of Virginia Electric and Power Company, For a 2015 biennial review of the rates, terms and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2015-00027, 2015 S.C.C. Ann. Rept. 299, 309, Final Order at 29 (Nov. 23, 2015) (Dimitri dissenting).

⁸³ *Id.*

producing annual excess revenues of hundreds of millions of dollars. Moreover, it shows that there always will be variables that affect the amount of actual costs and revenues in a given year but, for Dominion, its current base rates are now fixed by the General Assembly at a level which is designed to overcollect from customers based on current analysis and historical results. As a result, if base rates are fixed at current levels for at least the next seven years, Dominion's earnings over and above its cost of service and a fair return have the potential to reach well over a billion dollars, at customer expense.⁸⁴

Indeed, a current illustration of this can be found in a recently-concluded proceeding for Dominion. Evidence in that case showed that Dominion plans to allow certain contracts with non-utility generators ("NUGs"), currently providing power to customers, to expire while base rates are frozen by SB 1349. The capacity costs associated with these contracts, however, are currently included in those base rates. Thus, as explained by the Attorney General in that proceeding, this means that Dominion's "base rates will remain inflated" because it (i) will no longer be paying these NUG capacity costs, but (ii) will continue to recover such costs from its customers since base rates are frozen under SB 1349.⁸⁵

To be sure, such potential effects are not limited to Dominion. The most recent biennial review for APCo also showed that it earned greater than a fair rate of return, and, as a result,

⁸⁴ *Id.*

⁸⁵ *Application of Virginia Electric and Power Company, For approval and certification of the proposed Greenville County Power Station and related transmission facilities pursuant to §§ 56-580 D, 56-265.2, and 56-46.1 of the Code of Virginia, and for approval of a rate adjustment clause, designated Rider GV, pursuant to § 56-585.1 A 6 of the Code of Virginia, Case No. PUE-2015-00075, Doc. Con. Cen. No. 160340035, Final Order at 20 (Mar. 29, 2016) (Dimitri concurring).* For example, based on Dominion's cost estimates in that proceeding, between now and the end of 2019, Dominion will have recovered over \$243 million from its customers for NUG capacity costs that it no longer incurs. *Id.* at 20-21.

customers received refunds.⁸⁶ Like Dominion, to the extent that APCo's current base rates are fixed at a level which is designed to overcollect from customers based on historical results, APCo will retain millions of dollars over and above its cost of service at customer expense. In addition, APCo's existing base rates, which were established in 2011, reflect significant capacity costs previously imposed on APCo under federal regulatory agreements.⁸⁷ Those specific regulatory agreements, however, have been replaced by APCo with new capacity arrangements.⁸⁸ Since SB 1349 freezes APCo's base rates and cancels the Commission's authority to regulate those rates, APCo will continue to recover those significant capacity costs from its customers – regardless if such costs appreciably *decrease* during the period when the Commission's constitutional authority has been removed by statute. The majority misconstrues the foregoing as an argument about "public policy." In reality, it is setting forth real world examples of potential impacts of SB 1349's prohibition of Commission rate-setting authority, much of which is set out in Commission orders.

These examples demonstrate factually the potential financial implications of ending the Commission's rate-setting authority and any ability to review and, if warranted, reset an electric

⁸⁶ *Application of Appalachian Power Company, For a 2014 biennial review of the rates, terms and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2014-00026, 2014 S.C.C. Ann. Rept. 392, 398, Final Order (Nov. 26, 2014).

⁸⁷ *Application of Appalachian Power Company, For a 2011 biennial review of the rates, terms and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2011-00037, 2011 S.C.C. Ann. Rept. 477, 481-82, Final Order (Nov. 30, 2011).

⁸⁸ The federal agreements under which APCo had previously made significant capacity payments were terminated by APCo and its affiliates effective January 1, 2014. *See, e.g., Commonwealth of Virginia, ex rel. State Corporation Commission, In re: Appalachian Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, Case No. PUE-2013-00097, 2014 S.C.C. Ann. Rept. 305, 305, Final Order (Nov. 26, 2014).

utility's base rates, with the passage of SB 1349. Under this law, major categories of rising costs can be passed along to customers, but lower costs or savings cannot.⁸⁹

Moreover, there may be differing views as to the point at which particular "criteria and other requirements" become so proscriptive that they effectively remove the Commission's constitutional authority to regulate rates. SB 1349, however, requires no such line drawing analysis. Rather, SB 1349 draws a bright line for regulating base rates: the legislation has fixed the level of base rates for APCo and Dominion, respectively, and prohibited the Commission from reducing them under any circumstances. Again, as Professor Howard has analyzed, the Constitution grants jurisdiction to the Commission "that the General Assembly may not take away," and, as a result, "the Assembly may not itself fix the rates of a particular company."⁹⁰ Yet in SB 1349 it has done both.

To this the majority opinion takes the leap that, to maintain its position, it must – *i.e.*, that the General Assembly's absolute prohibition on the Commission's authority to set base rates is simply a "criteria" within the meaning of Article IX, § 2, and the length of the prohibition can simply be set by statute. In taking this position, an act of proscription is rendered indistinguishable from one of prescription. The majority embraces plenary power of the General Assembly in all rate regulation matters, by stretching "criteria" to mean complete regulation of rates, including prohibition of Commission regulation of rates. With this reasoning, Article IX,

⁸⁹ That is, for virtually any significant infrastructure or related costs (such as new power plants, demand-side management investment, or transmission lines), separate rate increases are mandated through rider provisions in Code § 56-585.1, which effectively guarantee recovery of those costs to the utility, plus a profit and, in some cases, a rate of return bonus. *See* Code §§ 56-585.1 A 4, 5, and 6. Conversely, SB 1349 fixes base rates (and any excess revenues currently built therein) at existing levels; base rates cannot be lowered by the Commission.

⁹⁰ 2 Howard, *supra* note 75, at 980, 983.

§ 2 can effectively be read out of the Constitution. Setting rules for rate-setting means you can cancel all Commission rate-setting and legislate rates by statute.

To the contrary, the Virginia Constitution does not allow the Commission's power and duty to regulate the rates of electric companies to be removed by statute as the majority opinion defends.⁹¹ Specifically, as noted above, this case is about the explicitly identified constitutional authority contained in Article IX, § 2, which warrants repeating (emphasis added):

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

The plain language of this constitutional provision gives the Commission "the power and . . . the duty of regulating the rates, charges, and services" of electric companies. This constitutional grant of authority cannot be removed by statute. Rather, under this provision, the Commission's power and duty to regulate rates is expressly "[s]ubject to such criteria and other requirements as may be prescribed by law." This is the only constitutional limitation thereon. Accordingly, a statute may create "criteria and other requirements" that "prescribe" standards or factors the

⁹¹ The majority's defense of the constitutionality of the General Assembly's legislation eliminating the Commission's constitutional rate-setting authority relies heavily on a legal argument that because, in the majority's view, past statutes have removed Commission jurisdiction and challenges were not brought, then an additional instance must somehow be legal. Indeed, the majority scolds the Petitioner here for not having brought challenges to past statutes as if the lack of challenge to other statutes somehow provides binding precedent for the constitutionality of SB 1349. As counsel for Petitioner noted in questioning during oral argument, perhaps other statutory provisions, raised by the majority, might have been successfully challenged, but the issues raised by the majority have not been litigated and the Petition does not raise such hypothetical issues, and SB 1349 must stand or fall on the application of the Constitution to this particular statute. That electric customers, like other potential litigants, weigh the issues and their potential financial and other impacts in considering whether to appeal past statutory enactments does not resolve the constitutional question presented in this proceeding. The majority has no basis to assume, as it does extensively, the constitutionality or unconstitutionality of other statutes where such issues have never been litigated and many of which have long been suspended, and its sweeping claims of "presumptive unconstitutionality" of other statutes are hypothetical and highly speculative.

Commission is to utilize in the exercise of its constitutional power and duty, but a statute may not *remove* such power and duty altogether.

Furthermore, Article IX, § 2 grants the Commission the power and duty to regulate electric rates – even if the General Assembly does nothing. That is, the Commission's constitutional authority to regulate electric rates is self-executing under Article IX, § 2; it is not contingent upon, or triggered by, prior legislative action. Under the plain language of this constitutional provision, the Commission's rate-setting authority is not *conferred* by the General Assembly but, rather, is *subject to* legislative criteria and other requirements.

For purposes of the instant inquiry, Code § 56-585.1 establishes the criteria and other requirements for the Commission's regulation of base rates as part of the biennial review process set forth in that statute. SB 1349, however, takes away the Commission's authority to apply the criteria and other requirements in Code § 56-585.1 and, thus, the Commission's authority to regulate those base rates. In this manner, SB 1349 violates Article IX, § 2 because, rather than prescribing criteria and other requirements that the Commission must apply in setting base rates, it *removes* the Commission's constitutional power and duty to regulate those rates.

While the rate-setting function can border on the esoteric, what is sought to be imposed under SB 1349 is quite clear, and the majority opinion in upholding the constitutionality of SB 1349 acquiesces to the proposition that the General Assembly has the unfettered ability to prohibit the Commission from exercising its constitutional authority and duty to set electric rates. Period. In an apparent attempt to temper in some way the ceding of the Commission's authority and responsibility, the opinion resorts to a fiction of grand proportion – that the General Assembly's prohibition is only "postponing" the exercise of the Commission's rate-setting

authority, that it is only "temporary."⁹² My colleagues well know that in APCo's case, SB 1349 permanently bars, totally prohibits, any rate review, rate change or refund of base rates for a period of years set by statute, and if customers pay excessively during that period, the excess payments for those years must be absorbed by customers. Nothing is temporary, nothing is postponed, for those years. The same is true with respect to Dominion's base rates. The only thing that is "postponed" under SB 1349 is the Commission's ability to regulate rates under the Constitution, and under the rationale advanced in the majority opinion the Commission's authority and duty could be "postponed" *ad infinitum* simply with the passage of legislation extending the prohibition on the Commission.

Similar to the majority opinion, the Attorney General attempts to reconcile the Commission's loss of constitutional authority by asserting that SB 1349 only "delays" – but does not remove – the Commission's power of regulating rates.⁹³ Indeed, the Attorney General does *not* ultimately assert that the Commission's constitutional rate-setting authority can be removed by statute, much as the majority opinion talks of merely "postponing."⁹⁴ The Attorney General's two positions, however, cannot coexist based on the facts herein. That is, SB 1349 is only valid if the Commission's constitutional "power . . . of regulating . . . rates" is subordinate to a statute that takes away that power. SB 1349 removes the Commission's constitutional authority to establish APCo's base rates for at least five years, and Dominion's base rates for at least seven years; this is more than a simple "delay."

⁹² The majority opinion uses terms such as "postponing" or "temporary" no fewer than 16 times. The Attorney General uses the term "delay" to the same purpose.

⁹³ Attorney General's Response at 5.

⁹⁴ Tr. at 155-56 ("Well, just to be clear, though, you believe the General Assembly can take away all of the rate-setting authority of the Commission? MR. RAPHAEL: I don't need to go as far as you're asking me to go, and I don't think it would be prudent to go that far.").

As previously stated, the Attorney General has identified what he has represented are hundreds of millions of dollars of excess revenues in Dominion's case, which are lost permanently to customers. To now claim that funds permanently lost to ratepayers during these years somehow equate to only a "delay" contradicts the Attorney General's position on his previously stated harm to the public in Dominion's last case. The Attorney General's position herein also contradicts his previous legal opinion, issued just last year, in which the Attorney General concluded that "the General Assembly has the power to enact laws that augment or supplement the [Commission's] jurisdiction *provided that such laws do not contravene the [Commission's] fundamental power and duty to regulate the 'rates, charges, and services . . . of railroad, telephone, gas, and electric companies.*"⁹⁵ Even more striking, under the Attorney General's theory posited in this case and, unfortunately, the majority's opinion, a new "delay" or "postponement" statute could presumably be passed every few years without, under the Attorney General's and majority's view, having the legal effect of removing the Commission's constitutional power and duty of regulating base rates. This is both a factually, and legally, indefensible outcome.

The Attorney General, however, apparently recognizes, to some undefined, limited degree, the plain language limitations in Article IX, § 2 (as discussed above), suggesting that this "might be a harder case if you didn't have the 1974 *VEPCO* decision, but that decision is dispositive."⁹⁶ Contrary to this conclusion, the 1974 *VEPCO* case does not preclude the Attorney General (or this Commission, or the Supreme Court) from applying the constitutional plain language to the facts in the instant proceeding. As explained by the Committee, the

⁹⁵ Office of the Attorney General, Commonwealth of Virginia, Opinion No. 15-005, 2015 WL 4153042 (July 2, 2015) (emphasis added).

⁹⁶ Tr. 134.

VEPCO Court found that a 1914 statute exempting municipal corporations from regulation – which the General Assembly *specifically retained* in the Code when Article IX, § 2 was adopted in 1971 – remained valid.⁹⁷ The instant case, however, does not involve such a pre-existing exemption, nor does it involve matters that could infringe on the existing legal authority and autonomy of local governments.⁹⁸

Furthermore, the *VEPCO* decision did not involve a situation, as here, where a *new* statute removes the Commission's pre-existing constitutional rate-setting authority and fixes electric utilities' base rates at specifically-defined levels. The 1974 *VEPCO* decision does not preclude the Supreme Court from recognizing that SB 1349 fails to establish criteria or other requirements but, rather, *removes* the Commission's rate-setting authority over electric companies and fixes base rates itself. It is precisely this statutory removal of the Commission's constitutional authority that renders SB 1349 invalid.

Indeed, the Supreme Court recently explained that the General Assembly's legislative powers, including rate authority, may be restricted "by express or necessarily implied prohibitions arising from the Constitution of Virginia or the United States Constitution."⁹⁹ In *Elizabeth River Crossings*, an appellee argued that setting toll rates was a constitutional duty of the State Corporation Commission and that the General Assembly could not vest such authority in the Virginia Department of Transportation. The Court, however, determined that the constitutional authority over rates for *transportation* companies is vested with the General

⁹⁷ See, e.g., Petition at 13-14. The 1980 *PEPCO* case, which applied the same pre-existing exemption to the State government, is equally inapplicable to the instant case. *Potomac Elec. Power Co. v. State Corp. Comm'n*, 221 Va. 632, 272 S.E.2d 214 (1980).

⁹⁸ See, e.g., *BASF Corp. v. State Corp. Comm'n*, 289 Va. 375, 403, 770 S.E.2d 458, 473 (2015); *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 422, 281 S.E.2d 836, 840 (1981).

⁹⁹ *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 311, 749 S.E.2d 176, 188 (2013).

Assembly, not with the Commission, and the Court's reasoning is highly instructive for purposes of the instant case. The Court explained that it reached its conclusion because transportation companies are not included in the "exclusive" list of companies in Article IX, § 2, which "delegates jurisdiction over rates, charges, and services of railroad, telephone, gas and electric facilities to the [Commission]."¹⁰⁰

Since "transportation" companies are not included in this list, the Court concluded that the constitutional plain language was not "doubtful" and that, as a result, constitutional authority over rates for "transportation" companies is not vested with the Commission.¹⁰¹ Similarly, the plain language also is not doubtful that "electric" companies *are* included in this exclusive constitutional list of companies over which the Commission has rate authority. Thus, applying the Court's plain language analysis to the instant case, the General Assembly's legislative powers are restricted by the express constitutional provision that vests with the Commission the power and duty of regulating rates for "electric" companies.

The issue here is not just about the Commission's *authority* to regulate rates. There is another term in Article IX, § 2, left largely undiscussed in this proceeding, which also points to infringement on the Constitution by SB 1349's prohibition on changes in base rates. As discussed, the Constitution gives the Commission the *authority* to regulate rates, but it goes further – it assigns the Commission the *duty* to regulate rates, and, unlike a power, a duty is something that we *must* do.¹⁰² For whose benefit does this duty arise? The Constitution is silent to this specific question, but it surely includes those who adopted the Constitution, *i.e.*, the

¹⁰⁰ *Id.*, 286 Va. at 308, 749 S.E.2d at 187.

¹⁰¹ *Id.*

¹⁰² The majority incorrectly advances a "conflation" argument based upon an implied claim by the Dissent. That is not an argument presented by this Dissent. *See, e.g., supra* p. 14.

public. The Commission has historically carried out the performance of its duty by determining, on a case-by-case basis, what is in the overall public interest, weighing the interests of utilities and customers through an open and transparent process consistent with the law that allows utilities to propose rates, customers to challenge rates, and all interested parties to present evidence and argument in a forum where due process rights for all are protected through public notice and an opportunity to be heard. These are hallmarks of the Commission's performance of its duty under the Constitution. Indeed, the Commission's duty, and the rights of utilities and the public to participate in the process through which we fulfill such duty, was of such significant import that those who framed and adopted the Constitution gave any party aggrieved by a final Commission decision a direct appeal of right to the Supreme Court.¹⁰³

Against this constitutional backdrop of the Commission's duty, SB 1349 eliminates the Commission's ability to perform its assigned duty and undermines key elements for determining the public interest. The new statutory framework cuts off the ability of the public to petition, be heard and have an opportunity to present evidence as to what their rates should be. Gone is the due process afforded all interests, including the ability to protect those interests through the constitutionally-guaranteed appeal of right to the Supreme Court.

Finally, like the majority opinion and the Attorney General, I recognize that the Supreme Court applies a strong presumption of the constitutional validity of a statute. Unlike the majority opinion and the Attorney General, however, I do not further elevate this presumption to a level necessary to save a facially unconstitutional statutory provision. SB 1349 removes the Commission's power and duty to regulate base rates, which no one disputes. This is not permitted under Article IX, § 2, and no level of presumption can make it so. SB 1349 violates

¹⁰³ Va. Const. art. IX, § 4.

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the plain language of Article IX, § 2, because it removes the Commission's constitutional "power and . . . duty" to regulate the base rates of electric companies. Accordingly, I dissent from the instant order.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219. A copy shall also be sent to the Commission's Office of General Counsel and Divisions of Energy Regulation and Utility Accounting and Finance.