COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, SEPTEMBER 19, 2017

SIERRA CLUB,
Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,

VIRGINIA POWER SERVICES ENERGY CORPORATION,

and

ATLANTIC COAST PIPELINE, LLC,
Respondents

CASE NO. PUR-2017-00061

For a declaratory judgment and an order requiring a filing pursuant to Sections 56-77 and 56-84 of the Code of Virginia

FINAL ORDER

On May 8, 2017, Sierra Club, by counsel, filed with the State Corporation Commission ("Commission") a Petition for Declaratory Judgment ("Petition"). In its Petition, Sierra Club specifically requests that the Commission:

(a) declare that the fuel arrangement between the Virginia Electric and Power Company [("VEPCO")], the Virginia Power Services Energy Corporation [("VPSE")], and Atlantic Coast Pipeline, LLC [("ACP")], is an "arrangement ... made or entered into between a public service company and any affiliated interest" that "provid[es] for the furnishing of ... services" and/or "for the purchase, sale, lease or exchange of any property, right or thing" and is therefore subject to Commission approval under Virginia Code § 56-77;

(b) order [VEPCO, VPSE, and ACP] to file a verified application or petition under Virginia Code § 56-84 for the approval of the fuel procurement arrangement between those three entities;

(c) issue a summary order under Virginia Code § 56-81 prohibiting [VEPCO] from treating any payments made under the terms of the [VEPCO]-VPSE-ACP arrangement as operating expenses or

capital expenditures for rate or valuation purposes unless and until such payments have received the approval of the Commission; and

(d) grant any additional relief that the Commission deems appropriate.[1]

Sierra Club states that it has filed its Petition pursuant to Rules 100 B and C of the Commission's Rules of Practice and Procedure, 5 VAC 5-20-100 B, C.[2] Sierra Club asserts, among other things, that an actual controversy exists for which Sierra Club has no adequate remedy other than a declaration from the Commission as requested in Sierra Club's Petition.[3]

On May 25, 2017, VEPCO and VPSE filed a motion to dismiss Sierra Club's Petition. Also on May 25, 2017, ACP filed a separate motion to dismiss Sierra Club's Petition. On June 15, 2017, Sierra Club filed a response to the motions to dismiss. On June 20, 2017, VEPCO and VPSE filed a reply to Sierra Club's response.

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds that the motions to dismiss shall be granted.

On September 29, 2014, the Commission approved – subject to specific requirements – the current fuel management agreement ("Fuel Agreement") between VEPCO and VPSE pursuant to Chapter 4 of Title 56 of the Code of Virginia, Code § 56-76 *et seq.* ("Affiliates Act").[4] Under this approved agreement, among other things: VPSE provides fuel and risk

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[1] Petition at 21-22. The Petition describes: VEPCO as a Virginia public service company; VPSE as a wholly-owned, indirect subsidiary of VEPCO formed to manage VEPCO's fuel-related activities; and ACP as a Delaware limited liability company and joint venture involving among others, Dominion Energy, Inc., that was organized to develop, own, and operate an interstate natural gas pipeline and associated facilities in West Virginia, Virginia, and North Carolina. *Id.* at 1-3.

[2] *Id.* at 1.

[3] *Id.* at 17-21.

[4] *Application of Virginia Electric and Power Company, Virginia Power Services Energy Corp., Inc., and Virginia Power Energy Marketing, Inc., For approval of new and revised affiliate fuel agreements pursuant to Chapter 4 of Title 56 of the Code of Virginia, Va. Code § 56-76 et seq.*, Case No. PUE-2014-00062 2014 SCC Ann. Rept. 454 (*"2014 Affiliates Case"*).

management services to VEPCO, including the purchase, sale, storage, and transportation of natural gas, oil, gasoline, diesel fuel, and miscellaneous fuel; VPSE maintains ownership of certain oil and natural gas transportation and storage contracts on behalf of VEPCO; and VEPCO pays to VPSE an amount equal to the actual costs incurred by VPSE thereunder, including storage and transportation costs, commodity costs, and service charges.[5]

Next, the Petition states that "[i]n furtherance of the [Fuel Agreement], VPSE has entered into a Precedent Agreement for Firm Transportation Services with [Atlantic Coast Pipeline, LLC ('ACP')], reserving 300,000 dekatherms per day of natural gas capacity on ACP's pipeline at a negotiated rate for a twenty-year term" ("VPSE-ACP Agreement").[6] The Petition further states that, like VPSE, ACP is an "affiliated interest" of VEPCO under the Affiliates Act.[7]

In order to provide fuel service to VEPCO under the Fuel Agreement, VPSE may enter into additional contracts with affiliated (such as ACP) and non-affiliated companies. In approving the Fuel Agreement, the Commission concluded that it was not necessary – in order to find the Fuel Agreement in the public interest under the Affiliates Act – for the Commission also to approve contracts VPSE may enter into with other affiliates (other than VEPCO). Specifically, the Commission explained that under Code § 56-80, the Commission retains continuing supervisory control over the terms and conditions of the Fuel Agreement in order to protect and promote the public interest.[8] Thus, pursuant to this continuing supervisory control and authority, the Commission required VEPCO to file with the Commission's Staff all agreements between VEPCO's affiliates (such as the VPSE-ACP Agreement) that are entered

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[5] *See id.*, Staff Report at 5-6 and Attachment B (filed Sept. 29, 2014); *see also* Petition at 10.

[6] Petition at 10 (footnote omitted).

[7] *Id.* at 3.

[8] *2014 Affiliates Case*, Order Granting Approval at 5.

into for the benefit of VEPCO, because "[t]hese agreements may be relevant to whether continuation of the [Fuel Agreement] approved herein remain[s] in the public interest under the Affiliates Act."[9]

In addition, the Commission approved the Fuel Agreement for a limited five-year term, directed that such approval shall have no ratemaking implications, and further ordered that such approval "shall not guarantee the recovery of any costs directly or indirectly related to" the Fuel Agreement.[10] Indeed, the Commission relied on these requirements – including the requirement for all of VPSE's other affiliate contracts to be filed with the Commission's Staff – in finding that we need not address questions related to whether VPSE's other affiliate contracts are subject to approval under the Affiliates Act.[11] Rather, based on the requirements of the Commission's approval and our continuing supervisory control over the terms and conditions of the Fuel Agreement, the Commission found the Fuel Agreement to be in the public interest.

As a result, for purposes of Affiliates Act approval of the Fuel Agreement, the Commission has already taken into consideration the type of contract that VPSE has entered into with ACP. That consideration, as noted above, is separate and distinct from VEPCO's recovery of costs paid to VPSE under the Fuel Agreement. For example, if the VPSE-ACP Agreement results in VPSE overcharging VEPCO for fuel costs, that issue would be relevant for purposes of a future fuel factor proceeding under Code § 56-249.6. Indeed, there can be no dispute that the Commission's approval of the Fuel Agreement in no manner guarantees recovery of costs charged to VEPCO by VPSE. To the contrary, the Affiliates Act expressly directs as follows:

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[9] *Id.* at 5-6.

[10] *Id.* at 6-7.

[11] *Id.* at 6 n.13.

> The fact that the Commission shall have approved entry into any such contract or arrangement shall not preclude disallowance or disapproval of payments made pursuant thereto in the future, if upon actual experience under such contract or arrangement, it appears that the payments provided for, or made, were, or are, unreasonable.[12]

Sierra Club, however, asserts that it is harmed due to the potential impact on retail rates resulting from the VPSE-ACP Agreement.[13] Such potential harm is not ripe for adjudication in the instant proceeding. Not only does Affiliates Act approval of the Fuel Agreement not preclude disallowance of payments made thereunder, such approval also does not absolve VEPCO from its obligation to show that the fuel costs it pays to VPSE are just and reasonable. Specifically, in a fuel factor proceeding, Code § 56-249.6 requires the following:

> The Commission shall disallow recovery of any fuel costs that it finds without just cause to be the result of failure of the utility to make every reasonable effort to minimize fuel costs or any decision of the utility resulting in unreasonable fuel costs, giving due regard to reliability of service and the need to maintain reliable sources of supply, economical generation mix, generating experience of comparable facilities, and minimization of the total cost of providing service.

Thus, if the VPSE-ACP Agreement results in unreasonable fuel costs paid by VEPCO, the remedy for such harm is to deny VEPCO recovery for overcharges in a fuel factor proceeding under Code § 56-249.6. VEPCO likewise acknowledges that "[t]o the extent [VEPCO] seeks to recover costs associated with the firm transportation services procured by VPSE under [the VPSE-ACP Agreement] in a future fuel factor proceeding, it will carry the burden to demonstrate that such costs were reasonably and prudently incurred."[14] The present proceeding

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[12] Code § 56-80.

[13] *See, e.g.*, Petition at 17-18.

[14] VEPCO's Motion to Dismiss at 5-6.

is not a fuel factor case, and VEPCO has not sought recovery for fuel costs related to a pipeline that does not presently exist.

Sierra Club also asserts that it is harmed because the VPSE-ACP Agreement could potentially "influence [VEPCO's] resource planning process – including, for example, its potential to foster unnecessary or uneconomical reliance on natural gas resources at the expense of renewable and efficiency investments."[15] Such potential harm is also not ripe for adjudication in the instant proceeding. VEPCO's potential future resource decisions (*e.g.*, to build a natural gas-fired electric generating facility) would be adjudicated in formal proceedings in which VEPCO seeks a certificate of public convenience and necessity ("CPCN") from the Commission for such resource; as in any CPCN case, Sierra Club and other interested parties would have an opportunity to participate therein and to support or oppose such resource decision. The present proceeding, however, is not a CPCN case for approval of any generating resource, nor is it a rate case to recover costs attendant to any yet-to-be-proposed generating facility.

Accordingly, IT IS SO ORDERED, and this case is DISMISSED.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Evan D. Johns, Esquire, Appalachian Mountain Advocates, 415 Seventh Street Northeast, Charlottesville, Virginia 22902; Andres Restrepo, Esquire, Sierra Club, 50 F Street Northwest, Eighth Floor, Washington D.C. 20001; Lisa S. Booth, Esquire, William H. Baxter, II, Esquire, and Sharon L. Burr, Dominion Energy Services, Inc., 120 Tredegar Street, Riverside 2, Richmond, Virginia 23219; and Joseph K. Reid, III, Esquire, and Elaine S. Ryan, Esquire, McGuireWoods LLP, Gateway Plaza, 800 East Canal Street, Richmond, Virginia 23219. A copy also shall be

[15] *See, e.g.*, Petition at 20.

delivered to the Commission's Office of General Counsel and Divisions of Public Utility Regulation and Utility Accounting and Finance.