IN THE

SUPREME COURT OF VIRGINIA

Record No. 171550

SIERRA CLUB,

Appellant

v.

STATE CORPORATION COMMISSION, et al.,

Appellees

On Appeal from the
Virginia State Corporation Commission

OPENING BRIEF OF THE APPELLANT

Evan D. Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 529 – 6787
Facsimile: (304) 645 – 9008
E-Mail: *ejohns@appalmad.org*

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

REGULATIONS

CONSTITUTIONAL PROVISIONS

SECONDARY SOURCES

ADMINISTRATIVE ADJUDICATIONS

ADMINISTRATIVE FILINGS

The Sierra Club appeals a September 19, 2017 decision of the State Corporation Commission declining to review a fuel procurement arrangement between Virginia's largest electric utility and two of its corporate affiliates under Virginia's Affiliates Act[1] (the Act). Because the plain language of Virginia's Affiliates Act requires that public utilities submit arrangements of this kind to the Commission for its formal approval, and because Sierra Club's request for enforcement of this requirement presented an actual controversy ripe for adjudication, the Commission erred.

STATEMENT OF THE CASE

Legislative Framework

The Affiliates Act is Virginia's answer to a perennial concern in utility regulation. In modern practice, most public service companies operate as one of several subsidiaries of a larger holding company.[2] This structure has its benefits—as a member of a larger corporate family, a

1 Virginia Code §§ 56-76 – 56-87.

2 *See* Norman S. Buchanan, *The Public Utility Holding Company Problem*, 25 Cal. L. Rev. 517, 517 (1937).

utility may have access to additional financial opportunities[3] or benefit from the economies of scale that a holding company structure allows.[4]

But there is a dark side to this model. Holding companies "provide the occasion for deceptive financing practices, nondisclosure of important corporate accounts, and the manipulation of various 'service charges' . . . which increase the utility's costs and the ultimate charge to the consumer."[5] Inherent in transactions between public utilities and their affiliates is the concern that, because the parties do not deal at arm's length, the utility's captive ratepayers will be saddled with one-sided deals.[6] As one court has observed, a holding company that controls both regulated and unregulated enterprises "will have the

---

3 *See* Joan G. Fickinger, *Jurisdiction of State Regulatory Commissions Over Public Utility Holding Company Diversification*, 15 Loyola U. L.J. 87, 92 n.30 (1983).

4 *See* Legislation Note, *The Servicing Function of Public Utility Holding Companies*, 49 Harv. L. Rev. 957, 993 (1936) (hereinafter *Servicing Function*).

5 *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1425–26 (4th Cir. 1985).

6 *See* Judy Sheldrew, *Shutting the Barn Door Before the Horse is Stolen: How and Why State Public Utility Commissions Should Regulate Transactions Between a Public Utility and its Affiliates*, 4 Nev. L.J. 164, 164 (2003) (quoting Staff of Senate Comm. on Gov't Affairs, 107th Cong., Committee Staff Investigation of the Federal Energy Regulatory Commission's Oversight of Enron, 26 & n.75 (Nov. 12, 2002)).

incentive as well as the ability to 'milk' the rate-of-return regulated monopoly affiliate to subsidize its [other] ventures."[7]

Initially, state utility regulators attempted to curb these abuses indirectly through their general ratemaking authority.[8] In Virginia and elsewhere, that authority includes an implied duty to more closely scrutinize inter-affiliate transactions that result in rate increases—even when the operative statutes do not expressly address such transactions—and to disallow recovery from ratepayers of payments made under unfair transactions.[9] But merely disallowing recovery of affiliate payments can ultimately harm ratepayers as well by, for example, impairing a utility's credit quality[10] or encouraging it to make

---

7 *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309, 1320 & n.26 (Okla. 1988) (quoting *United States v. Western Electric Co.*, 592 F.Supp. 846, 853 (D.D.C. 1984)).

8 *See Servicing Function*, *supra*, at 982.

9 *See*, *e.g.*, *Commonwealth Gas Services v. Reynolds Metals Co.*, 236 Va. 362, 368–69 (1988) (affirming Commission's increased scrutiny of inter-affiliate transaction even though it did not technically fall under the Affiliates Act); *General Telephone Co. of Upstate N.Y. v. Lundy*, 218 N.E.2d 274, 278 (N.Y. 1966) (given inherent dangers in inter-affiliate transactions, general ratemaking authority includes "not only the right but the duty to scrutinize [those] transactions closely").

10 *See*, *e.g.*, *Attorney General v. Department of Public Utilities*, 455 N.E.2d 414, 425–26 (Mass. 1983) (affirming utility regulator's

up losses by cutting costs elsewhere and, consequently, providing inferior service.[11] State legislatures, including Virginia's General Assembly, were understandably dissatisfied with this form of "indirect" regulation,[12] and decided to take matters into their own hands.

Virginia's Affiliates Act is one of several so-called "affiliated interest statutes" granting regulators direct authority over transactions between utilities and their affiliates.[13] Specifically, Virginia's Affiliates Act requires Commission review and approval of, among other things, any "contract or arrangement for the purchase, sale, lease or exchange of any property, right or thing . . . made or entered into between a public service company and any affiliated interest," and provides that no such contract or arrangement "shall be valid or effective unless and until it shall have been filed with and approved by the Commission."[14]

---

decision to allow pass-through of costs in part because disallowance "would be a serious threat to the [utility's] financial integrity, and indirectly to its customers").

11 Sheldrew, *supra*, at 176–77; *Servicing Function*, *supra*, at 986.

12 *See General Telephone*, 218 N.E.2d at 277 (acknowledging that statutory regulation of inter-affiliate transactions arose out of state legislatures' dissatisfaction with regulators' "indirect control" through ratemaking).

13 *See* Sheldrew, *supra*, at 177; *Servicing Function*, *supra*, at 986–87.

14 Virginia Code § 56-77(A).

The Act defines "affiliated interest" so as to include a parent company owning at least a ten-percent interest in a utility company, as well as any other subsidiaries in which that parent company owns a ten-percent interest.[15]

Section 56-84 outlines the procedure for Affiliates Act review. It requires the utility and its affiliates file a verified application or petition for approval of any inter-affiliate transaction. [16] The Commission is then required to convene a hearing and pass upon the propriety of the transaction.[17] Ultimately, the Commission can approve the transaction only if it determines that the transaction is "consistent with the public interest." [18] This Court has recognized that, in the context of the Affiliates Act, an "important aspect of public interest is assurance 'that an affiliate[ ] . . . does not receive unjust benefits to the detriment of the utility's customers.'" [19] And to that end, the

15 *Id.* § 56-76.

16 *Id.* § 56-84.

17 *Id.*

18 *Id.* § 56-78.

19 *Roanoke Gas Co. v. State Corporation Commission*, 217 Va. 850, 854 (1977) (quoting Evans B. Brasfield, *Regulation of Electric Utilities by the State Corporation Commission*, 14 Wm. & Mary L. Rev. 589, 599 (1973)).

Commission's authority over affiliated transactions includes not only the power to approve or reject, but to "revise and amend the terms and conditions thereof, if, when and as necessary to protect and promote the public interest."[20]

Notably, the Act is clear that this preliminary public interest review does not displace subsequent review by the Commission in generally-applicable ratemaking proceedings. Section 56-80 states that prior approval of an inter-affiliate transaction under the Act "shall not preclude disallowance or disapproval of payments made pursuant thereto in [a] future" proceeding. Indeed, this Court has previously recognized that one purpose of preliminary review under the Act is to provide sufficient detail of the transaction "so as to enable the Commission in any later rate proceeding to determine the cost of service for [the utility's] customers."[21]

Although similar to affiliated interest statutes in other states, commentators recognize that the Act is more stringent than many of its

20 Virginia Code § 56-80.

21 *Roanoke Gas Co.*, 217 Va. at 854.

counterparts.[22] Notably, while other statutes "merely authoriz[e] disapproval of contracts" submitted for review, Virginia's Act *requires* the Commission review each inter-affiliate transaction and affirmatively approve the transaction as a condition-precedent to its validity.[23]

Dominion's Fuel Procurement Arrangement[24]

Doing business as Dominion Energy Virginia, the Virginia Electric and Power Company (VEPCO) is the Commonwealth's largest electric utility, with more than 2.5 million residential, commercial, and industrial customers.[25] Its generation fleet includes more than a dozen

---

22 *Servicing Function*, *supra*, at 987 (describing statutes like Virginia's as "more drastic" than their analogs in other states).

23 *Id.* (comparing Virginia's law to New York's less stringent counterpart).

24 Because the Commission ruled below upon the pleadings alone, "settled principles of appellate review" assume as true the facts alleged in Sierra Club's petition below and all reasonable inferences from those facts. *Mattaponi Indian Tribe v. Commonwealth ex rel. State Water Control Board*, 261 Va. 366, 370 (2001).

25 Joint Appendix at 4; Virginia Electric and Power Company's Report of its Integrated Resource Plan at 4, *Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, No. PUR-2017-00051 (Va. SCC May 1, 2017), available at *http://www.scc.virginia.gov/docketsearch#caseDocs/137173.*

natural gas-fired power plants in Virginia,[26] each of which is currently supplied by an existing natural gas pipeline.[27]

Dominion Energy relies on a wholly-owned subsidiary, Virginia Power Services Energy Corp. (VPSE), to purchase fuel and arrange for pipeline transportation to its power plants.[28] A Fuel Management Agreement between the two companies provides that, in return for those services, VEPCO will reimburse VPSE for all actual costs—including, as relevant here, transportation costs—VPSE incurs in supplying the utility's power plants.[29] Ultimately, however, those costs fall on VEPCO's ratepayers through a "fuel factor" rider included on their electricity bills.[30]

VEPCO and VPSE are both wholly-owned subsidiaries of Dominion Resources, Inc. (DRI), a holding company with a portfolio of regulated and unregulated gas and electricity companies.[31] In addition to owning VEPCO and VPSE, DRI is also the leading shareholder in

---

26 *See id.* at 168–169.

27 *See id.* at 72; Joint Appendix at 11–12.

28 Joint Appendix at 5.

29 *Id.* at 12.

30 *Id.* at 13, 63–64.

31 *Id.* at 4.

Atlantic Coast Pipeline, LLC (ACP)—a joint venture with several other utility companies to construct and operate a 600-mile interstate natural gas pipeline from mid-central West Virginia, through Virginia, and into North Carolina.[32] Once that pipeline is operable, ACP will charge its customers a rate designed to recover the entire cost of the project plus a 14% return on equity.[33]

In furtherance of its Fuel Management Agreement with VEPCO, VPSE has entered into a twenty-year Precedent Agreement for transportation services on ACP's pipeline.[34] The Precedent Agreement binds VPSE to pay for 300,000 dekatherms-per-day of pipeline capacity—about 20% of the pipeline's total capacity[35]—for twenty years.[36] Because VPSE reserved this capacity solely for VEPCO's generation fleet,[37] the transportation costs will ultimately be passed

---

32 *Id.* at 5.

33 *See Atlantic Coast Pipeline, LLC*, 161 FERC 61,042 at ¶ 102 (Oct. 13, 2017).

34 Joint Appendix at 12–13.

35 *See Atlantic Coast Pipeline*, 161 FERC 61,042 at ¶ 1 (describing pipeline's capacity as 1.5 million dekatherms-per-day).

36 Joint Appendix at 12.

37 *Id.* at 13.

along to VEPCO under the Fuel Management Agreement.[38] In VEPCO's most recent fuel factor proceeding,[39] its Director of Generation System Planning confirmed that the utility will seek recovery of those costs through the fuel factor charged to its customers—even if VEPCO's power plants do not end up consuming gas from ACP's pipeline.[40]

Although both VPSE and ACP are "affiliated interests" of VEPCO under the Act, VEPCO has maintained in multiple proceedings that the arrangement for fuel transportation on ACP's pipeline is not subject to the Affiliates Act.[41] This is so, it argues, because the Commission approved its Fuel Management Agreement with VPSE in an earlier proceeding.[42]

---

38 *Id.* at 12.

39 Although not a part of the record of this case, judicial notice of testimony transcribed in an official Commission transcript is appropriate under this Court's Rule 2:203.

40 *See* Transcript of Proceedings at 49:6-25, *Application of Virginia Electric and Power Co. to revise its fuel factor*, No. PUR-2017-00058, (June 14, 2017), available at *http://www.scc.virginia.gov/docketsearch/DOCS/3f%25%2401!.pdf* (testimony of Glen A. Kelly).

41 Joint Appendix at 21.

42 *Id.* at 21, 44–46.

VEPCO did in fact file an application for Commission approval of its Fuel Management Agreement in 2014.[43] That application did not, however, seek approval of—or even disclose the existence of—the Precedent Agreement between VPSE and ACP.[44] In fact, VEPCO's application admitted that VPSE performed under the Fuel Management Agreement by contracting with two *other* VEPCO affiliates,[45] but argued that VPSE's contracts with those entities were not subject to the Act.[46]

The Commission's staff responded to VEPCO's 2014 application, arguing that these tripartite transactions between VEPCO, VPSE, and other VEPCO affiliates constituted arrangements under the Act and recommending the Commission direct VEPCO to file them for formal approval.[47] Staff also submitted a separate legal memorandum explaining why the plain language of the Act required submission and

---

43 *Id.* at 14. VEPCO's application was docketed as Commission Case No. PUE-2014-00062.

44 *Id.*

45 Those two affiliates—Dominion Transmission Inc. and Dominion Cove Point LNG LP—are not involved in this proceeding.

46 *Id.*

47 *Id.* at 14–15.

approval of the tripartite arrangements.[48]

Shortly thereafter, the Commission entered an order formally approving the DVP–VPSE Fuel Management Agreement, but acknowledging that VPSE's contracts with other affiliates may be relevant to the propriety of that Agreement.[49] It therefore directed VEPCO to provide Commission staff with copies of "any other arrangements among [VEPCO] affiliates for the benefit of DVP."[50] Anticipating further review and audit by its staff, the Commission expressly declined to decide at that time whether the tripartite arrangements were themselves subject to the Act.[51]

VEPCO submitted copies of the requested agreements—including the Precedent Agreement between VPSE and ACP—to the Commission staff "on an informational basis" only.[52] After reviewing the Precedent Agreement, staff reported that it continued to believe the arrangement

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 15–16.

between VEPCO, VPSE, and ACP was subject to the Act.[53] The Commission, however, never revisited the question, and VEPCO never filed for approval of its arrangement with VPSE and ACP.[54]

Material Proceedings Below

Concerned about the effect of the fuel procurement arrangement on the utility's retail rates and its long-term resource decisions, the Sierra Club filed a petition under Rule 100(C) of the Commission's Rules of Practice and Procedure,[55] seeking a declaration that the fuel arrangement between VEPCO and its affiliates was subject to the Affiliate Act's filing and review requirements.[56] Relying on Commission precedent and the plain language of the Act, the Club argued that both VPSE and ACP were "affiliated interests" of VEPCO under Section 55-76 of the Act and that the tripartite fuel procurement arrangement between VEPCO, VPSE, and ACP was therefore subject to the Act as an "arrangement . . . made or entered into between a public service company and any affiliated interest" that "provid[es] for the

53 *Id.* at 16.

54 *Id.*

55 5 Virginia Administrative Code § 5-20-100(C).

56 *See* Joint Appendix at 3–28.

furnishing of services" or the "purchase, sale, lease or exchange of any property, right or thing."[57]

The Petition noted that, although the Commission had previously reviewed the VEPCO–VPSE Fuel Management Agreement,[58] and although the Commission's staff had received a sealed copy of the VPSE–ACP Precedent Agreement "on an informational basis only,"[59] VEPCO had never submitted the larger arrangement for Commission review and approval—nor had the Commission convened a hearing on or formally approved the arrangement, as the Act requires.[60] The Petition also noted that VEPCO had on multiple occasions, and in multiple proceedings, denied that the arrangement was subject to the Act's filing and pre-approval requirements.[61] As such, the Club asked the Commission to declare otherwise and order VEPCO, VPSE, and ACP to file a petition for review and approval of the arrangement

57 *Id.* at 16–17.

58 *Id.* at 15.

59 *Id.*

60 *Id.* at 16–17.

61 *Id.* at 14, 21.

accordingly.[62]

The Petition also explained the Club's interests in ensuring the Act's requirements were honored. It explained that both the Club and many of its members are retail customers of VEPCO and therefore have a direct pecuniary interest in ensuring the utility does not enter into inter-affiliate transactions that will increase rates.[63] And in that respect, the Petition noted that the publicly-disclosed rates for service on ACP's pipeline were more than three times higher than the rates VEPCO currently pays the owners of existing pipelines that supply its power plants.[64]

Furthermore, the Club argued that the twenty-year fuel arrangement represents a long-term commitment by VEPCO to a particular fuel source—one with well-documented environmental and public health impacts.[65] Because the Club's members live in and rely on the airsheds, watersheds, and other areas that would be adversely impacted by increased natural gas-fired power and infrastructure, the

62 *Id.* at 23–24.

63 *Id.* at 19.

64 *Id.* at 13–14.

65 *Id.* at 19.

Club argued it had an interest in ensuring the Commission reviewed the arrangement to verify it served the public interest.[66]

VEPCO and VPSE moved to dismiss the Petition,[67] arguing that no real controversy existed among the parties.[68] The companies did not deny that the arrangement would impact retail rates or influence its resource decisions. Rather, as relevant to this appeal, they argued that because any such impact would not be felt until the future, Sierra Club's request for Affiliates Act review was unripe.[69] The companies also argued that Affiliates Act review would be unnecessary because the Club would have an opportunity to challenge any rate increase or final resource decision by participating in a future ratemaking or resource planning proceeding.[70] According to the companies, those proceedings represented "another adequate remedy to seek relief" and therefore

66 *Id.* at 19–20.

67 ACP also filed by special appearance a separate motion to dismiss, Joint Appendix at 31–34, arguing that the Commission lacked jurisdiction over the transaction because ACP never contracted directly with VEPCO, the public utility, *id.* at 32. Although VEPCO and VPSE echoed this argument in their motion, *id.* at 49, the Commission's Final Order did not address it.

68 Joint Appendix at 37–50.

69 *Id.* at 38–39.

70 *Id.* at 41–42, 44.

barred Sierra Club's request for Affiliates Act review.[71]

The Sierra Club responded to these arguments,[72] arguing that the companies' duty to submit the agreement—and the Commission's concomitant duty to review and pass upon it—ripened once the arrangement was entered into.[73] The Club also pointed out that neither Virginia law nor Commission precedent required that it wait until rates were actually raised before seeking declaratory relief; rather, as long as the fuel arrangement posed a credible "threat of harm and potential loss" to its concrete and pecuniary interests, the Club argued it had standing to enforce procedural safeguards designed to protect those interests.[74]

Finally, the Club explained that future ratemaking or resource planning cases were no substitute for Affiliates Act review, because the General Assembly plainly intended that public interest review occur both *before* and *in addition to* review in a general ratemaking proceeding.[75] Moreover, unlike in an Affiliates Act proceeding, the

71 *Id.* at 47–48.

72 *See id.* at 55–72.

73 *Id.* at 57–58.

74 *Id.* at 59–64.

75 *Id.* at 67.

Commission would lack the authority in those proceedings to modify the terms of the transaction or altogether nullify it.[76] Finally, the Club noted that twenty years' worth of piecemeal rate and planning litigation was not "equally as convenient, beneficial, and effective" at addressing the potential mischief in inter-affiliate dealings as a single, "focused proceeding" under the Act, wherein the Commission could neutralize an improper transaction before any damage is done or modify an otherwise acceptable agreement to further mitigate risks to ratepayers.[77]

The Commission entered a Final Order dismissing the Club's petition and declining to subject the fuel procurement arrangement to Affiliates Act review.[78] The Commission reasoned that—because it had already approved the VEPCO–VPSE portion of the arrangement and because it required that copies of VPSE's other affiliate contracts be provided to the Commission's staff—it had "already taken into consideration the type of contract that VPSE has entered into with

76 *Id.* at 69.

77 *Id.* at 59, 69–70 (quoting *Howell v. McAuliffe*, 292 Va. 320, 351 n.17 (2016)).

78 *See* Joint Appendix at 91–97.

ACP."[79] Furthermore, the Commission concluded that the potential rate and resource impacts of the arrangement were not ripe for adjudication.[80] It reasoned that "if the VPSE–ACP Agreement results in unreasonable fuel costs [to] VEPCO, the remedy for such harm is to deny VEPCO recovery . . . in a fuel factor proceeding."[81] The Commission similarly concluded that the potential impact of the arrangement on VEPCO's resource decisions could be adjudicated when VEPCO actually proposed a new capital project.[82]

The Club filed a timely notice of appeal from that decision[83] and a petition assigning the following errors to the Commission's decision.[84]

ASSIGNMENTS OF ERROR

1. The State Corporation Commission erred in its Final Order by ruling that the Virginia Electric and Power Company (VEPCO) need not seek or receive approval under Virginia's Affiliates Act, Virginia Code §§ 56-76–56-87, for its arrangement to obtain natural gas transportation capacity from Atlantic Coast Pipeline, LLC—an "affiliated interest" of VEPCO under Virginia Code § 56-76—in

79 *Id.* at 94.

80 *Id.* at 95.

81 *Id.*

82 *Id.* at 96.

83 *Id.* at 98–99.

84 *Id.* at 101–104.

contravention of the plain language of Virginia Code § 56-77 that "no . . . arrangement for the purchase, sale, lease or exchange of any property, right or thing made or entered into between a public service company and any affiliated interest shall be valid or effective unless and until it shall have been filed with and approved by the Commission."

Preserved at: Joint Appendix at 16–19, 70–72, 92–96.

2. The State Corporation Commission erred in its Final Order by concluding that the harms Sierra Club and its members will suffer in the absence of the requested relief are "not ripe for adjudication in th[at] proceeding." Sierra Club and its members are already harmed by the deprivation of the procedural rights and protections afforded them by the Affiliates Act, including the requirement for Commission review and approval of transactions between utilities and their affiliates both before those transactions take effect and independent of any later proceeding involving those transactions.

Preserved at: Joint Appendix at 19–22, 57–64, 95–96.

3. The State Corporation Commission erred in its Final Order by dismissing Sierra Club's Petition requesting that the Commission enter an order declaring that Respondents' arrangement for natural gas transportation capacity is subject to the Affiliates Act, directing Respondents to file for review and approval of the arrangement under Virginia Code § 56-84, and prohibiting Respondents from treating any payments made under the terms of the arrangement as operating expenses or capital expenditures for rate or valuation purposes unless and until such payments have received the Commission's approval under the Act.

Preserved at: Joint Appendix at 23–24, 57–64, 66–70, 91–92, 96.

STANDARD OF REVIEW

The Constitution of Virginia grants the Commission authority to regulate the rates and practices of public utilities "[s]ubject to such criteria and other requirements" as the General Assembly may prescribe by statute.[85] The construction and application of those statutory requirements is a question of law reviewed by this Court *de novo*.[86] Furthermore, "[e]ven where the Commission has reached the right result for the wrong reason, its decision, unlike that of a trial court, will not be permitted to stand."[87]

AUTHORITIES AND ARGUMENT

I. The Affiliates Act requires formal review and approval of the fuel procurement arrangement between VEPCO, VPSE, and ACP.

The companies' fuel procurement arrangement is a discrete inter-affiliate arrangement subject to the filing, review, and approval requirements of the Affiliates Act. In dismissing the Club's petition, the

---

85 Virginia Constitution, Article IX, § 2. *See also*, *generally*, *Old Dominion Committee for Fair Utility Rates v. State Corporation Commission*, 294 Va. 168 (2017).

86 *Appalachian Power Co. v. State Corporation Commission*, 284 Va. 695, 703 (2012).

87 *First Virginia Bank v. Commonwealth*, 213 Va. 349, 351 (1972).

Commission reasoned that its approval of the Fuel Management Agreement between VEPCO and VPSE had "already taken into consideration the *type* of contract that VPSE has entered into with ACP" such that additional review under the Act was not required.[88] However, because the fuel procurement arrangement constituted a single, discrete "arrangement" under the Act, and because the statute is unequivocal in requiring the Commission consider and pass on *each* such arrangement, the Commission erred in failing to grant the Club the relief requested in its petition.

A. *The companies' fuel procurement arrangement is a discrete arrangement subject to the Act's mandatory filing, review, and approval requirements.*

The Act's mandatory review provisions apply only to transactions that constitute a "contract or arrangement . . . between a public service company and any affiliated interest."[89] Although the companies argued below that this language did not extend to the tripartite arrangement for transportation services on ACP's pipeline, [90] the term "arrangements"—particularly when juxtaposed with the narrower term

88 Joint Appendix at 94 (emphasis added).

89 Virginia Code § 56-77(A).

90 Joint Appendix at 32, 49.

"contracts"—plainly encompasses a collection of individual agreements that, taken together, accomplish a single purpose or carry out a particular activity.[91]

When the term appears in other statutes directed at anti-competitive conduct, courts have construed "arrangement" as broader than the term "contract," and as "contemplating a reciprocal relationship of commitment between two *or more* legal or economic entities."[92] Similarly, courts have used the term "vertical arrangement" to describe a series of individual agreements between "persons at different levels of the market structure"—starting, for example, "with the manufacturer and extend[ing] down the line through distributor to

---

91 The Commission's staff has noted that dictionaries define the term "arrangement" broadly as including (1) a "collection of things that have been arranged;" (2) a "provision or plan made in preparation for an undertaking;" (3) the "way that things are organized for a particular purpose or activity;" or (4) "something that is done to prepare or plan for something in the future." *See* Staff's Action Brief, Appendix D at 3, *Application of Virginia Electric and Power Company, et al., for approval of new and revised affiliate fuel agreements*, No. PUE-2014-00062 (Sept. 11, 2014), available at *http://www.scc.virginia.gov/docketsearch/DOCS/2z%40t01!.PDF* (citing *Merriam-Webster Online Dictionary* and *Webster's II New College Dictionary* (2d ed. 1999)).

92 *State v. Mobil Oil Corp.*, 344 N.E.2d 357, 359 (N.Y. 1976) (emphasis added).

retailer."[93]

The contrary interpretation pressed by the companies would render the term "arrangement" superfluous in violation of the "settled principle of statutory construction"[94] that no statutory language be considered useless or redundant.[95] More importantly, any other interpretation would eviscerate the purpose and proper functioning of the Act. This Court has held that every "statute is to be read so as to promote the ability of the enactment to remedy the mischief at which it is directed."[96] Interpreting the Act's mandates as applying to anything short of an entire, multi-part arrangement would allow utilities to structure inter-affiliate transactions such that major aspects would evade scrutiny. That result would be inconsistent with the Court's prior recognition that the Commission's jurisdiction under the Act is not

93 *Service Merchandise Co. v. Boyd Corp.*, 722 F.2d 945, 950 (1st Cir. 1983).

94 *Baker v. Commonwealth*, 277 Va. 656, 661 (2009) (quoting *Elliott v. Commonwealth*, 277 Va. 457, 463 (2009)).

95 *Owens v. DRS Automotive Fantomworks, Inc.*, 288 Va. 489, 497 (2014).

96 *Simpson v. Roberts*, 287 Va. 34, 44 (2014) (quoting *Bulala v. Boyd*, 239 Va. 218, 227 (1990)).

dependent on contractual formalities.[97]

B. *Because the companies' arrangement is subject to the Act, plain statutory language requires the Commission review and pass on it individually—regardless of whether it has previously considered a similar "type" of transaction.*

Section 56-77(A) of the Act provides in no uncertain terms that "*no* contract or arrangement for the purchase, sale or exchange of any property, right or thing . . . between a public service company and any affiliated interest shall be valid or effective *unless and until* it [is] filed with and approved by the Commission."[98] It further states that the Commission "*shall* . . . approve or disapprove" each such contract or arrangement.[99] The language of Section 56-84 is no less categorical, requiring that "any public service company and . . . each and every" affiliate that is party to an inter-affiliate transaction "*shall*" file a verified application or petition "in *every* case wherein the approval of the Commission is required" under Section 56-77(A).[100]

Nothing in the statute suggests this procedure may be bypassed if

---

97 *See Roanoke Gas*, 217 Va. at 854 (holding that Act applied to transaction despite utility's objection that it was never "made the basis of a written agreement or agreements").

98 Virginia Code § 56-77(A) (emphasis added).

99 *Id.* (emphasis added).

100 *Id.* § 56-84.

the Commission has previously considered a similar "type" of transaction. Rather, because the Act considers the entire arrangement to be the appropriate subject for review, it is immaterial that the Commission considered contracts of a similar "type" to the VPSE–ACP Precedent Agreement when it approved the VEPCO–VPSE Fuel Management Agreement.

Furthermore, even accepting that the Commission understood that the Agreement contemplated additional contracts between VPSE and other VEPCO affiliates, the ACP Precedent Agreement was not provided to the Commission's staff until *after* the Commission approved the Fuel Management Agreement.[101] Without knowing the specific terms of the Precedent Agreement, the Commission lacked any "assurance that [ACP would] not receive unjust benefits, to the detriment of [VEPCO's] customers."[102] Its approval of the Fuel Management Agreement therefore cannot be interpreted as a determination that the larger arrangement aligns with the public

101 *See* Joint Appendix at 15–16.

102 *Roanoke Gas*, 217 Va. at 854 (internal citations omitted).

interest.[103]

This is precisely why the Act requires utilities seek approval of the entire arrangement, and not just the most proximate link in the transactional chain. VEPCO's submission of the VPSE–ACP Precedent Agreement to Commission staff on a solely "informational basis" does not satisfy its obligation under Section 56-84 to submit a verified petition for approval of its fuel procurement arrangement. Nor does the Commission's earlier review of the Fuel Management Agreement satisfy its obligation to convene a hearing and formally pass on the larger arrangement once submitted. Even if its earlier review considered arrangements of a similar "type," the statute is plain that the Commission "shall" review each arrangement on its own terms. Its failure to review the companies' fuel procurement arrangement was therefore erroneous.

II. The companies' failure to seek review under the Act is a procedural injury that threatens the Club's concrete interests; thus, the Commission erred in finding its claims unripe.

The Club and many of its members are captive ratepayers of VEPCO and therefore have a direct and concrete interest in the utility's

103 *Id.*

retail rates.[104] Given that ACP's posted shipping rate far exceeds the rates of the pipelines already serving VEPCO's power plants,[105] any arrangement to procure fuel from ACP's pipeline is certain to invade that interest. Although the Act provides a procedural mechanism for reviewing this sort of arrangement before any damage is done, the Commission concluded that it was powerless to do anything but disallow recovery of already-incurred costs in a future fuel factor case.

The Commission was wrong. The text, structure, and history of the Act reflect the General Assembly's judgment that inter-affiliate transactions must be reviewed *before* and *in addition to* any review in a rate-fixing proceeding. And because this prior review procedure is designed to protect the concrete interests of the Club and its members, its Petition sought to remedy a procedural injury already ripe for adjudication.

A. *The Act requires preliminary review of inter-affiliate transactions both before and in addition to later review in a rate-fixing proceeding*.

While the Commission incorrectly assumed that disallowance in a fuel factor proceeding represented the only remedy for any harms that

104 Joint Appendix at 19.

105 *Id.* at 13, 19.

may flow from the fuel procurement arrangement, the text and structure of the Act reflect the General Assembly's judgment that the dangers inherent in inter-affiliate dealings require an additional layer of oversight—both *before* and *in addition to* any other review required by law. Section 56-80, for example, states that the Commission's approval of an inter-affiliate transaction under the Act "shall not preclude disallowance or disapproval of payments made pursuant thereto in the future." This Court has also recognized that one of the purposes of Affiliates Act review is to elicit information that will aid the Commission in future rate proceedings.[106] The regulatory scheme therefore contemplates future review of payments made under an inter-affiliate arrangement, but nonetheless requires a separate proceeding before the utility incurs those costs in the first place.

This intent is reflected not only in the Act's text and structure, but also its legislative history. In enacting the statute, the General Assembly joined other "state legislatures [that were] not satisfied that

106 *See Roanoke Gas*, 217 Va. at 854 (Commission properly rejected Affiliates Act application that failed to "sufficiently detail[ ] the proposed arrangements so as to enable the Commission in any later proceeding to determine the cost of service for [utility] customers.").

the indirect control of payments between affiliated utility corporations through rate regulation was adequate to protect the consumer and investor from the possible abuses that could arise out of [inter-affiliate] contracts."[107] Like other "affiliated interest" statutes, the Act requires review under "overlapping provisions, more than one of which may serve ultimately to control" affiliate abuses.[108] Courts have approved similar schemes in other states, recognizing that legislatures can protect consumers *both* "by requiring commission approval of rate increases" *and* "by controlling certain investments and attempts at diversification by the utility."[109] Under the Commission's ruling, however, customers would be protected from the inherent dangers of affiliate transactions only through indirect regulation in ratemaking proceedings—the very form of regulation that the General Assembly found inadequate and sought to supplement with the Act's mandate for prior review.

---

107 *Pacific Telephone & Telegraph Co. v. California Public Utilities Commission*, 215 P.2d 441, 34 Cal.2d 822, 826 (Cal. 1950).

108 *See Baltimore Gas & Electric*, 760 F.2d at 1425.

109 *Id.*

B. *Review of fuel costs in a later proceeding is not an adequate alternative to Affiliates Act review.*

No party has disputed that preliminary review of affiliate transactions under the Act protects the interests of VEPCO ratepayers—including the Club and its members. If the Commission disapproves of an arrangement because it will, for example, "result in unreasonable fuel costs," [110] the transaction is null and void. [111] Furthermore, the Act *automatically* prohibits recovery of any costs incurred pursuant to a disapproved transaction.[112]

A fuel factor proceeding, on the other hand, provides only for retroactive disallowance of already-incurred costs and, therefore, does not represent an adequate alternative to Affiliates Act review. This Court recently affirmed that an alternate remedy is "adequate" only if it proves "equally as convenient, beneficial, and effective" and "reach[es] the whole mischief, and secure[s] the whole right of the party in a perfect manner, at the present time."[113] As discussed above, however, disallowance of already-incurred costs can have detrimental impacts on

110 *Id.* at 95.

111 Virginia Code § 56-77(A).

112 *Id.* § 56-81.

113 *Howell*, 292 Va. at 351 n.17 (internal citations omitted).

both the utility and its customers, potentially impairing the utility's credit quality and increasing the cost of capital[114] or encouraging utilities to implement cost-saving measures that result in inferior service.[115] In either case, the ratepayer is left paying more for the same level of service. Unsurprisingly, "regulatory commissions have generally been reluctant to disallow" cost recovery, and instead rely on "prior approval mechanisms" to counter that dilemma.[116]

More important still, the Act provides the Commission with more options for protecting ratepayers. In a fuel factor proceeding, the Commission's only option is to disallow the recovery of unreasonable fuel costs.[117] The Affiliates Act, by contrast, allows the Commission to affirmatively "revise and amend the terms and conditions" of an affiliate arrangement "if, when and as necessary to protect and promote

---

114 *See*, *e.g.*, *Attorney General v. Department of Public Utilities*, 455 N.E.2d at 425–26.

115 Sheldrew, *supra*, at 176–77; *Servicing Function* at 986.

116 *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 77 F.C.C.2d 308, 343 (1979). *See also State ex rel. Cass County v. Public Service Commission*, 259 S.W.3d 544, 549–50 (Mo. Ct. App. 2008) ("Although the PSC always has the power to disallow capitol improvements in a utility's rate base, that *post hoc* authority is toothless if a major disallowance would jeopardize the interests of either ratepayers or investors.").

117 Virginia Code § 56-249.6(D)(2).

the public interest."[118] The Commission can therefore impose additional safeguards on affiliate transactions or mold arrangements to more fairly allocate risk between a utility and its customers.[119] No such relief is available in a fuel factor proceeding, and it cannot therefore be considered "equally as . . . effective." In short, even if a fuel factor case *could* substitute for Affiliates Act review, it would fail to "reach the whole mischief" the Club seeks to avoid.[120]

C. *The Commission misidentified the "harm" relevant for purposes of the request for declaratory relief and therefore erred in dismissing the Club's claims as unripe.*

In dismissing Sierra Club's request for declaratory relief, the Commission stated that the fuel procurement arrangement's potential impact on retail rates and its ability to influence resource decisions

---

118 *Id.* § 56-80.

119 Acting under West Virginia's analogous prior review requirement, the West Virginia Public Service Commission recently approved a transaction between an electric utility and its unregulated affiliate, subject to certain additional terms and conditions the Commission deemed necessary to insulate ratepayers from the risks of the transaction. *See Monongahela Power Co.*, No. 17-0296-E-PC, slip op. at 70 (W. Va. P.S.C. Jan. 26, 2018), available at *http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=489060&NotType=%27WebDocket%27.*

120 *Howell*, 292 Va. at 351 n.17 (internal citations omitted).

were "harm[s] . . . not ripe for adjudication" in that proceeding.[121]

The Club's Petition, however, did not request adjudication of the harms identified by the Commission. Rather, the Petition sought to redress a *procedural* injury: the denial of Commission review of the arrangement under the Act, as well as any opportunity to participate as a respondent or public witness in such a proceeding.[122] The relief sought—a declaration that the arrangement was subject to the Act and the initiation of a proceeding for its review[123]—was tailored to that specific, procedural injury.[124]

The Petition describes the potential for rate or resource impacts only to establish that the Club has actual, concrete interests that could be affected if the Act's statutory procedures are not followed. The Commission has long recognized that ratepayers may enforce procedural requirements tied to their concrete, pecuniary interest in retail rates.[125] This accords with the general principle that litigants

---

121 Joint Appendix at 95

122 *Id.* at 20.

123 *Id.* at 23–24.

124 *Id.* at 23.

125 *See, e.g.*, *Commonwealth ex rel. Mid-Atlantic Petroleum Distributors Association v. Division of Energy Regulation*, No.

may enforce procedural requirements that are designed to protect their concrete interests, and the disregard of which could in fact impair those interests.[126]

By explaining its concrete and pecuniary stakes in ensuring the Act was enforced, the Club established "a real interest" in the controversy—a prerequisite for declaratory relief.[127] But as the Club explained in its response to VEPCO's motion to dismiss, the Petition did not seek a judgment as to the propriety of the utility's decision to enter into the fuel procurement arrangement or the propriety of any particular resource decision.[128] Rather, the Petition discussed the harm associated with the arrangement only to ground the Club's request for procedural relief.[129]

Unlike the "potential harms" identified in the Commission's order,

---

PUE830010, 1983 WL 911011 (Feb. 15, 1983) (recognizing that ratepayers are within the "zone of interests" protected by ratemaking statutes and may therefore enforce procedural requirements contained in those statutes).

126 *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, 574 n.8 (1992).

127 *See Patterson v. Patterson*, 144 Va. 113, 120 (1926).

128 Joint Appendix at 65.

129 *Id.*

the Club's request for procedural relief *was* ripe. The fuel procurement arrangement already existed, and VEPCO and its affiliates were therefore required to file the transaction for review under Section 56-84. Because their failure to do so represented a procedural injury, and because the required procedures were sufficient to protect the Club's concrete interests, the Commission erred in dismissing the Club's claim as unripe.

CONCLUSION AND RELIEF SOUGHT

The Commission erred in concluding that VEPCO need not submit for Commission review its fuel procurement arrangement with VPSE and ACP. The plain language of that Act requires that the companies submit this arrangement for review and the Commission pass on its propriety. As such, this Court should reverse the Commission's decision and remand for further proceedings in accordance with Chapter 4 of Title 56 of the Code of Virginia.

Dated: March 23, 2018

Respectfully submitted,

/s/ Evan D. Johns

Evan D. Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 529 – 6787
ejohns@appalmad.org

Counsel for Appellant Sierra Club

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this brief complies with Rule 5:26(e) of the Rules of the Supreme Court of Virginia, and pursuant to that Rule, a PDF version of this brief has been filed through the Virginia Appellate Courts Electronic System (VACES) and three paper copies delivered to the Clerk's Office on March 23, 2018. On that same day, I also served an electronic version via electronic mail to:

Lisa S. Booth
lisa.s.booth@dominionenergy.com

Joseph K. Reid III
jreid@mcguirewoods.com

William H. Baxter II
william.h.baxter@dominionenergy.com

Elaine S. Ryan
eryan@mcguirewoods.com

Sharon L. Burr
sharon.l.burr@dominionenergy.com

Robert W. Loftin
rloftin@mcguirewoods.com

Frederick Ochsenhirt
Frederick.Ochsenhirt@scc.virginia.gov

John F. Dudley
John.Dudley@scc.virginia.gov

I also certify that this brief—exclusive of those parts identified in Rules 5:6(a)(2) and 5:26(b) of the Rules of the Supreme Court of Virginia—contains 6,706 words and does not exceed 50 pages. It therefore complies with Rule 5:26(b).

/s/ Evan D. Johns

Evan D. Johns
(Virginia State Bar No. 89285)
APPALACHIAN MOUNTAIN ADVOCATES
415 Seventh Street Northeast
Charlottesville, Virginia 22902
Telephone: (434) 738 – 1863
Facsimile: (304) 645 – 9008
ejohns@appalmad.org