VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 9th day of August, 2018.

Present: Justices Mims, McClanahan, Powell, Kelsey, McCullough, and Senior Justices Russell and Lacy.

Sierra Club, Appellant,

against Record No. 171550
S.C.C. Case No. PUR-2017-00061

State Corporation Commission, et al., Appellees.

Upon an appeal of right from an order entered by the State Corporation Commission.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no error in the order that is the subject of this appeal.

I. BACKGROUND

Sierra Club filed a petition for declaratory judgment with the Commission against Virginia Electric and Power Company ("VEPCO"), Virginia Power Services Corporation ("VPSE"), and Atlantic Coast Pipeline, LLC ("ACP"). Sierra Club argued that the Affiliates Act required VEPCO to file a fuel procurement agreement between affiliates VPSE and ACP ("VPSE and ACP Agreement") with the Commission for approval because such agreement, combined with another fuel management agreement between VEPCO and VPSE ("VEPCO and VPSE Fuel Agreement"), constitutes an "arrangement" under Code § 56-77(A).[1]

[1] Code § 56-77(A) provides:

> No contract or arrangement providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, and no contract or arrangement for the purchase, sale, lease or exchange of any property, right or thing, other than those above enumerated, or for the purchase or sale of treasury bonds or treasury capital stock 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

Under the VEPCO and VPSE Fuel Agreement, VPSE provides:

> [F]uel and risk 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.

In furtherance of this agreement to provide fuel service to VEPCO, VPSE entered into the VPSE and ACP Agreement to support VEPCO's fleet of natural gas-fired generation resources by reserving a certain capacity of natural gas on ACP's pipeline for VEPCO's use for 20 years.

Sierra Club argued that because the Affiliates Act requires the Commission to approve such agreements before they are made, it and its members, who are VEPCO ratepayers, have been deprived of an opportunity to participate in a review process as respondents or public witnesses to make their concerns for the public interest with regard to the VPSE and ACP Agreement known to the Commission, as required by Code § 56-84.[2] Sierra Club also alleged

---

> with and approved by the Commission. The Commission shall, after the filing of such a contract or arrangement, approve or disapprove the contract or arrangement within sixty days. The sixty-day period may be extended by Commission order for an additional period not to exceed thirty days. The contract or arrangement shall be deemed approved if the Commission fails to act within sixty days or any extended period ordered by the Commission. It shall be the duty of every public service company to file with the Commission a verified copy of any such contract or arrangement, regardless of the amount involved, and the general rule herein referred to shall remain in full force and effect as to all other public service companies.

[2] Code § 56-84 provides, in pertinent part,

> In every case wherein the approval of the Commission is required of any contract, arrangement, loan, extension or renewal thereof, assumption of obligation or liability, renewal or extension thereof, or any transaction or act, an application or petition, duly executed and verified by any such public service company and by each and every corporation, partnership, association or person constituting an affiliated interest, who are parties to such transaction or act,

that the VEPCO, VPSE, and ACP Arrangement will negatively impact VEPCO's retail rates as well as VEPCO's long-term resource decisions, such as fostering "unnecessary or uneconomical reliance on natural gas resources at the expense of renewable and efficiency investments." Sierra Club asked the Commission to:

> (a) declare that the [VEPCO and VPSE Fuel Agreement] and the [VPSE and ACP Agreement] 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 under the terms of the [VEPCO, VPSE, and ACP] arrangement as operating expenses or capital expenditures for rate or valuation purposes unless and until such payments shall have received the approval of the Commission; and
>
> (d) grant any additional relief that the Commission deems appropriate.

ACP, by special appearance, filed a motion to dismiss Sierra Club's petition. ACP asserted that it is neither a Virginia public service corporation nor a public utility within the meaning of the Code. ACP argued that Sierra Club's petition was based on the VPSE and ACP

> shall be presented to and filed with the Commission which, upon hearing, either formal or informal, as may be determined by the Commission, may, in addition to passing upon the propriety of the proposed transaction or act subject to approval under this chapter, pass upon all questions of jurisdiction of the Commission and upon whether any party is, as a matter of fact and law, an affiliated interest. And in any such proceeding the Commission may require, as a condition precedent to an approval or action upon the proposed transaction or act, any other corporation, partnership, association or person which it appears to the Commission, prima facie, is or might be an affiliated interest, to join, or to be joined, as a party to the proceeding. . . .

Agreement, and not an agreement between any Virginia public service corporation. Thus, in the absence of an affiliate transaction between ACP and a Virginia public service corporation there was no basis for the Commission to assert jurisdiction over ACP and Sierra Club's petition must be dismissed.[3]

VEPCO and VPSE filed a joint motion to dismiss arguing that no actual controversy existed between the parties. The motion to dismiss argued that the petition sought an advisory opinion based on speculative facts and matters of policy that were beyond the scope of a declaratory judgment. To seek a declaratory judgment from the Commission under its State Corp. R. 5-20-100(C), there must be no other adequate remedy. VEPCO and VPSE argued that any future impact the VPSE and ACP Agreement may have on retail rates could be addressed in a future fuel factor proceeding, which Sierra Club could participate in, governed by Code § 56-249.6. VEPCO and VPSE asserted that Sierra Club participated in the prior proceedings to obtain the necessary certificates of public convenience and necessity ("CPCN") for VEPCO's existing gas-fired generation facilities (i.e., the Brunswick and Greensville generation facilities) and it raised many of the concerns it raises here, which the Commission expressly rejected. Thus, the time to oppose the development of these specific resource options had passed. VEPCO added that an Affiliates Act proceeding was not an appropriate forum to address future resource planning decisions as those issues are properly covered in an Integrated Resource Plan ("IRP") proceeding under Code § 56-597, *et seq.*

VEPCO and VPSE further argued that whether the VPSE and ACP Agreement requires approval under the Affiliates Act was already raised and considered in prior Commission proceedings, including the *2014 Affiliates Case*.[4] In that proceeding, the Commission directed

---

[3] VEPCO and VPSE assert in their brief on appeal that the Commission was correct to grant ACP's separate motion to dismiss, that ACP "is not participating further in this proceeding," and because Sierra Club has not assigned error to the Commission's ruling regarding ACP, it is now the law of the case. Although ACP filed a Notice of Participation with this Court as an Appellee, it later notified the Clerk of Court by letter that it would not be filing a brief.

[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 2-14 SCC Ann. Rept. 454, available at http://bit.ly/2pxrmlt ("*2014 Affiliates Case*").

VEPCO to file the VPSE and ACP Agreement (and others like it) for audit and review. VEPCO maintained it had complied with the Commission's directive and at no time since then has the Commission directed VEPCO to seek Affiliates Act approval of the VPSE and ACP Agreement or any other agreement between VEPCO affiliates, to which VEPCO is not a party. Thus, argued VEPCO and VPSE, VEPCO was in compliance with the Affiliates Act.

Sierra Club responded to the motions to dismiss arguing that because there was still an opportunity for an Affiliates Act review before the Appellees carried out any further obligations under the Arrangement, a declaratory judgment would ensure the concrete and pecuniary interests of Sierra Club's members were protected in the manner the General Assembly ordained. Sierra Club asserted it need not wait until its interests were actually invaded before seeking declaratory relief and that the Affiliates Act provides for review before damage is done and to revise the Arrangement if necessary. Sierra Club maintained that it was seeking review of the Arrangement that would influence VEPCO's decision-making on generation resources over the twenty-year period provided for in the VPSE and ACP Agreement. Sierra Club argued it had no other adequate remedy and its petition was narrowly tailored to address its asserted legitimate harms.

In response, VEPCO and VPSE argued that the plain language of Code § 56-77(A) applies to a "contract or arrangement . . . made or entered into between a public service company and an affiliated interest" and because VEPCO is not a party to the VPSE and ACP Agreement, VPSE and ACP are not required under the Affiliates Act to file a petition and seek approval. It reiterated its arguments that Sierra Club has other remedies available (fuel factor, CPCN, and IRF proceedings) and added that Sierra Club incorrectly states that the Commission must convene a hearing upon receiving an Affiliates Act application because Code § 56-84 does not require a formal hearing. Rather, it is within the Commission's discretion to determine whether an informal or formal hearing is needed.

By final order entered September 19, 2017, the Commission granted the motions to dismiss the petition for declaratory judgment. The Commission recounted the 2014 Affiliates Case wherein it approved the VEPCO and VPSE Fuel Agreement, acknowledging that for VPSE to provide fuel service to VEPCO under that agreement, VPSE may enter into additional contracts with affiliates, such as ACP. It explained that in approving the VEPCO and VPSE Fuel Agreement, it had concluded that it was not necessary for the Commission to approve additional

contracts VPSE may enter into with other affiliates because the Commission retained continuing supervisory control over the terms and conditions of the VEPCO and VPSE Fuel Agreement under Code § 56-80. It was pursuant to its supervisory control and authority, noted the Commission, that it had required VEPCO to file all agreements between VEPCO's affiliates.

The Commission further held that its consideration of the VPSE and ACP Agreement was "separate and distinct from VEPCO's recovery of costs" paid to VPSE under the VEPCO and VPSE Fuel Agreement, but if the VPSE and ACP Agreement results in VPSE overcharging VEPCO for fuel costs, that issue would be relevant for purposes of a fuel factor proceeding under Code § 56-249.6. Thus, Sierra Club's claim of harm caused by the VPSE and ACP Agreement's potential impact on retail rates was not ripe for adjudication.

The Commission also held that Sierra Club's asserted harm that the VPSE and ACP Agreement could influence VEPCO's resource planning process was not ripe for adjudication because potential future resources decisions would be adjudicated in a CPCN proceeding.

Sierra Club appealed the decision of the Commission as a matter of right, pursuant to Code § 12.1-39, on the following 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 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."
>
> 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.

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.

II. ANALYSIS

A. Standard of Review

"We are guided by well-settled principles in our review of the Commission's decision. The Constitution of Virginia and statutes enacted by the General Assembly give the Commission 'broad, general and extensive powers' in regulating public utilities." *BASF Corp v. State Corp. Comm'n*, 289 Va. 375, 391, 770 S.E.2d 458, 466 (2015) (quoting *Office of Attorney Gen. v. State Corp. Comm'n*, 288 Va. 183, 190, 762 S.E.2d 774, 778 (2014) (citation and quotation marks omitted). When an appeal is from the Commission's interpretation of a statute, we review the decision *de novo*. *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 703, 733 S.E.2d 250, 254 (2012). "'When construing a statute, our primary objective is to ascertain and give effect to legislative intent, as expressed by the language used in the statute.'" *Virginia Electric & Power Co. v. State Corp. Comm'n*, 295 Va. 256, 262-63, 810 S.E.2d 880, 883 (2018) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)). "When the language of a statute is unambiguous, we are bound by the plain meaning of that language." *Id.* (quoting *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)).

"We have 'frequently said that the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive.'" *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 516, 675 S.E.2d 458, 461 (2009) (quoting *Commonwealth v. Appalachian Electric Power Co.*, 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951)). "[T]he Commission's decision 'is entitled to the respect due judgments of a tribunal informed by experience,' and we will not disturb the Commission's analysis when it is 'based upon the application of correct principles of law.'" *Id.* (quoting *Lawyers Title Ins. Corp. v. Norwest Corp.*, 254 Va. 388, 390-91, 493 S.E.2d 114, 115

(1997)). *Accord Virginia Electric & Power Co. v. State Corp. Comm'n*, 288 Va. 183, 190, 762 S.E.2d 774, 778 (2012); *Piedmont Envtl. Council v. Virginia Electric & Power Co.*, 278 Va. 553, 563, 684 S.E.2d 805, 810 (2009).

B. Application of Code § 56-84

On appeal, Sierra Club focuses on the Commission's interpretation and application of Code § 56-84. Code § 56-84 provides, in pertinent part,

> In every case wherein the approval of the Commission is required of any contract, arrangement, loan, extension or renewal thereof, assumption of obligation or liability, renewal or extension thereof, or any transaction or act, an application or petition, duly executed and verified by any such public service company and by each and every corporation, partnership, association or person constituting an affiliated interest, who are parties to such transaction or act, shall be presented to and filed with the Commission which, upon hearing, either formal or informal, as may be determined by the Commission, may, in addition to passing upon the propriety of the proposed transaction or act subject to approval under this chapter, pass upon all questions of jurisdiction of the Commission and upon whether any party is, as a matter of fact and law, an affiliated interest. And in any such proceeding the Commission may require, as a condition precedent to an approval or action upon the proposed transaction or act, any other corporation, partnership, association or person which it appears to the Commission, prima facie, is or might be an affiliated interest, to join, or to be joined, as a party to the proceeding. . . .

Sierra Club asserts that by focusing on retail rates and resources, the Commission misidentified the relevant "harm" alleged for purposes of its request for declaratory relief. Sierra Club states that the petition describes the potential for impacts to retail rates or resources only to establish that Sierra Club has actual concrete interests that could be affected if the Affiliates Act's statutory procedures of Code § 56-84 are not followed. Sierra Club argues that its real argument is that it was deprived of procedural rights, afforded it by the Affiliates Act, when the Appellees failed to seek the required review of the VPSE and ACP Agreement under Code § 56-84 and to allow Sierra Club to participate in that hearing. Therefore, it argues the Commission erred in dismissing its claims as unripe.

In determining that the harms alleged by Sierra Club were unripe for adjudication, the Commission's analysis rested on the assumption that the Affiliates Act applied to the VPSE and

ACP Agreement. The Commission concluded it had "already taken into consideration the type of contract that VPSE has entered into with ACP." In essence, the Commission found that to the extent that the VPSE and ACP Agreement is subject to the Affiliates Act, the required review had been accomplished. As such the relief Sierra Club sought had been accomplished. We agree.

1. Affiliates Act Review Satisfied

For purposes of our analysis, like the Commission, we will assume without deciding that the Affiliates Act applies to this specific proceeding. In its 2014 Order, the Commission approved the VEPCO and VPSE Fuel Agreement subject to the "Commission Staff's review of agreements between [VEPCO's] affiliates." *2014 Affiliates Case*, Order Granting Approval at 5. The stated reason for such review was that the agreements between VEPCO's affiliates might be relevant to whether continuing approval of the VEPCO and VPSE Fuel Agreement remained in the public interest pursuant to the Commission's "continuing supervisory control over the terms and conditions of the Fuel Agreement in order to protect and promote the public interest."[5] Specifically, the Commission's order states:

> Accordingly, in order to ensure the Umbrella Agreement and Revised Affiliate Fuel Agreements remain in the public interest, we find that the agreements between [VEPCO's] affiliates described in the Staff's Action Brief should be filed with the Commission by October 6, 2014. We further find that the Commission Staff should be directed to review and audit the individual agreements . . . and their associated costs.

2014 Affiliates Case, Order Granting Approval at 5-6. As a result, the Commission concluded it had "already taken into consideration the type of contract that VPSE has entered into with ACP."

Further, VEPCO was to identify any other arrangements and agreements among its affiliates and file the same with the Commission. The Commission also reserved "the right to examine the books, records, and other related documents of any affiliate in connection with the approval granted" in the Order. *2014 Affiliates Case*, Order Granting Approval at 7. Therefore,

---

[5] The second assignment of error is dispositive of this case and is the best and narrowest ground on which to resolve the matter before the Court. Therefore, we will only address this issue and assume without deciding that the Affiliates Act applies to the VPSE and ACP Agreement.

we hold that to the extent Code § 56-84 provides for Commission review of the VPSE and ACP Agreement, that review has been accomplished by the procedure established by the Commission in its review of the VEPCO and VPSE Fuel Agreement.

2. No Requirement for a Formal Hearing

Moreover, we agree with the Commission that it is not required to hold a formal hearing at which evidence is taken and interested parties, such as Sierra Club, are entitled to participate. Indeed, the plain language of Code § 56-84 allows the Commission to hold a "hearing, either formal or informal as may be determined by the Commission." The Commission is empowered by the General Assembly to hold an informal hearing for the approval of the structure of a utility's fuel arrangements; as such, Sierra Club was not denied any right to appear before the Commission in a formal hearing procedure. Therefore, Sierra Club has suffered no procedural harm because it did not have a right to participate in the Code § 56-84 procedure in this case.[6]

Finally, Sierra Club disavows the arguments of the appellees and the findings of the Commission that it asserts that it has been harmed due to the potential impact on retail rates resulting from the VPSE and ACP Agreement and the extent to which the Agreement could "potentially influence VEPCO's research planning process." Instead it reiterates that its allegation of harm is based on the lack of a procedural process to which it was entitled. Having found that even if a procedural process was required under the Affiliates Act, those requirements have been met and further having found that Sierra Club was not entitled to participate in a hearing we need not address an argument Sierra Club denies making.[7]

---

[6] To the extent that Sierra Club argues that the Supreme Court's holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992), supports the finding of an actual controversy under the facts of this case, Sierra Club conflates the requirement for "a hearing" with its alleged right to participate.

[7] We agree with the Commission that its consideration of the VPSE and ACP Agreement was "separate and distinct from VEPCO's recovery of costs" paid to VPSE under the VEPCO and VPSE Fuel Agreement, but if the VPSE and ACP Agreement did result 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. Thus, Sierra Club's claim of harm caused by the VPSE and ACP Agreement's potential impact on retail rates was not ripe for adjudication as there are other adequate remedies for the alleged harm. Likewise, any claim of harm because the agreement could "potentially influence [VEPCO's] resource planning process" would be adjudicated if and when VEPCO seeks a certificate of public convenience and necessity, in

For the reasons stated, we will affirm the order of the Commission. The appellant shall pay to the appellees two hundred and fifty dollars damages.

This order shall be certified to the State Corporation Commission.

A Copy,

Teste: Patti L Harrington

Clerk

---

which Sierra Club would have an opportunity to participate. This potential claim is also not ripe for adjudication in this proceeding.