IN THE

SUPREME COURT OF VIRGINIA

Record No. 161519

OLD DOMINION COMMITTEE FOR FAIR UTILITY RATES, Appellant,

-v.-

STATE CORPORATION COMMISSION, ET AL., Appellees.

Record No. 161520

VML/VACO APCO STEERING COMMITTEE, Appellant,

-v.-

STATE CORPORATION COMMISSION, ET AL., Appellees.

Record No. 161521

KAREN E. TORRENT, Appellant,

-v.-

STATE CORPORATION COMMISSION, ET AL., Appellees.

BRIEF AMICI CURIAE OF THE VIRGINIA POVERTY LAW CENTER, AND THE VIRGINIA CITIZENS CONSUMER COUNCIL IN SUPPORT OF APPELLANTS

Kenneth T. Cuccinelli, II* (VSB No. 39490)
Andrew P. Miller**
13881 Jordan Meadows Lane
Nokesville, Virginia 20181
(804) 286-2550 – Telephone
Ktc21968@gmail.com

Brian R. Greene* (VSB No. 38215)
Eric J. Wallace (VSB No. 86400)
GreeneHurlocker, PLC
1807 Libbie Avenue, Suite 102
Richmond, Virginia 23226
(804) 672-4542 – Telephone
(804) 672-4540 – Facsimile
bgreene@greenehurlocker.com

**Counsel of record for Amici Curiae*

*** Motion pro hac vice pending*

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, the Virginia Poverty Law Center and the Virginia Citizens Consumer Council ("Amici") submit the following brief *amici curiae*.

STATEMENT OF THE CASE AND STANDARD OF REVIEW

This case is an appeal as of right under Article IX, § 4 of the Virginia Constitution from the July 1, 2016 Final Order of the State Corporation Commission ("SCC" or "Commission") in Case No. PUE-2016-00010, in which the SCC dismissed the petition of the Old Dominion Committee for Fair Utility Rates ("ODCFUR") for declaratory judgment that 2015 Senate Bill 1349, Chapter 6 of the 2015 Acts of Assembly ("SB 1349") violates Article IX, § 2 of Virginia's Constitution. In a split decision, the SCC held that SB 1349, fell within the "criteria and other requirements" of Article IX, § 2 of Virginia's Constitution. JA at 386. It is this conclusion that Amici contest as having been in error.

This case involves matters of constitutional and statutory interpretation. Such cases are reviewed *de novo*. *CVAS 2, LLC v. City of Fredericksburg*, 289 Va. 100, 108, 766 S.E.2d 912, 914 (2015).

INTEREST OF AMICI

Amici are two Virginia non-profit organizations who collectively represent the interests of the Commonwealth's residential and low-income

customers. The resolution of this case will determine whether the Commission retains the power and duty to regulate the rates of monopoly utility companies, as expressly mandated by Article IX, § 2 of the Constitution of Virginia. It is critical that the Commission retain its power and duty to regulate utility rates so that citizens – *especially* the most vulnerable Virginians – are not charged unreasonably high electric rates and are protected from monopoly market power.

ARGUMENT

A. The structure of the Virginia Constitution forbids SB 1349.

1. SB 1349 violates the separation of powers by pre-empting the SCC's constitutional authority to set electric rates.

One of the most basic lessons of government and law that every child in Virginia learns is about the "checks and balances" built into our national constitution. Integral to the checks and balances in our federal system is the division of power into the three traditional branches of the federal government: the executive branch, the legislative branch and the judicial branch. As children we also learned that this division of powers is called the "separation of powers." In the federal constitution, the separation of powers is not explicit, but rather it is inherent in the structure of the federal government. In Virginia's Constitution, by contrast, such separation of powers has been explicitly included in the language of our constitutions in

much the same form since our first Constitution in 1776. *See* Va. Const. of 1971 art. I, § 5, and art. III; Va. Const. of 1776 art. I, § 5 and text.

The 1902 Virginia Constitution established the State Corporation Commission ("SCC") as a new fourth branch of government, separate from the executive, legislative and judicial branches. Va. Const. of 1902 art. XII, § 155; *see also* 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* at 970 (1974) [hereinafter *Commentaries*]. The framers' aim in passing Article XII, § 156(b) of the 1902 Constitution was to circumscribe the growing monopolistic power of the railroads.

The Chairman of the 1902 Convention Committee on Corporations later described the SCC as "a new machine or instrumentality of government, specially designed and constructed to meet the peculiar requirements of the service for which it was intended and to deal with the new conditions which the modern railroad situation presents." A. Caperton Braxton, *The Virginia State Corporation Commission*, Virginia Law Register 10 at 17 (1904) [hereinafter *Braxton*].

Given the similar position of electric utilities in 1971 to railroad companies at the turn of the twentieth century, Chairman Braxton's expressed need still exists today as strongly as ever, but for a different kind of monopoly: electric utilities instead of railroad companies.

The SCC has characteristics and powers of the three original branches of government[1] but it is constitutionally distinct. And "[w]ithin the limits of those matters which pertain to such regulation and control, this Commission is a miniature government, complete within itself." *Braxton* at 17.

In 1971, the Constitution was amended once again to rein in another monopolistic utility: the electric power sector. With the passage of the 1971 Virginia Constitution, the people of Virginia elevated the power of the SCC to regulate electric rates to constitutional status and imposed an affirmative duty on the SCC to fix such electric rates. Va. Const. art. IX, § 2; *see* John Dinan, *The Virginia State Constitution* 186 (2006). The SCC's authority to regulate electric rates was thus no longer derived from the General Assembly, but has thenceforth been derived directly from the people themselves.

SB 1349 purports to block the constitutional power and duty of the SCC to set electric rates; therefore, apart from violating Article IX, § 2 of the Virginia Constitution, SB 1349 is also an unconstitutional violation of the

[1] For example, the SCC's ratemaking and issuing of corporate charters were traditionally legislative functions, *Commentaries* at 970; it has judicial powers of a court of record, Va. Const. art. IX, § 3; and executive powers to ensure compliance with the law. *See Commentaries* at 970 (using the word "administrative" to describe some executive powers).

separation of powers. The General Assembly and the Governor have assumed the authority to regulate electric rates via the passage of SB 1349, setting them until at least 2021 for Appalachian Power Company ("APCo") and 2023 for Virginia Electric and Power Company ("Dominion"). *See* JA at 405.

The General Assembly and Governor have now set electric rates by freezing in place rates already found by the SCC to be too high and thus subject to being reduced. As Commissioner Dimitri noted, SB 1349 restricts the SCC's authority to reduce base rates "even when those rates have been found to produce hundreds of millions of dollars in excess revenues each year." JA at 172. There can be no reasonable doubt that this is why SB 1349 was passed, namely, to protect APCo and Dominion from impending rate reductions at the independent hands of the Commission. There can also be no reasonable doubt that avoiding such exercises of political and economic power is precisely why the Commission was created.

In addition to violating the separation of powers, the practical result of SB 1349 is to shift hundreds of millions of dollars from Virginia citizens – without regard for their poverty – to Virginia's two largest monopoly electric companies. This is because, as Commissioner Dimitri noted, the SCC has

found that the rates of both APCo and Dominion are currently "designed to over collect" from customers hundreds of millions of dollars. JA at 409-10, 415. The need to protect consumers from such outcomes was exactly why the SCC was established in 1902 as a constitutionally independent body, and it was why the regulation of electric rates was constitutionally assigned to the SCC in the 1971 revision of Virginia's Constitution.

This case demonstrates the wisdom of the people in placing the power and duty to set electric rates with the Commission, which was created to deal with the conditions presented by then-modern railroad companies and which carried over to electric utilities in 1971. It is just this sort of situation that was sought to be averted by charging the SCC with the duty to set electric rates rather than the General Assembly and the Governor.

2. SB 1349 thwarts the purpose of Art. IX, § 2.

a. The purpose of Art. IX, § 2 is to protect consumers.

Former SCC Commissioner Preston C. Shannon wrote that "[a] review of the Debates of the 1902 Constitutional Convention illustrates that the *sole reason* for the creation of the three-member commission was to protect the people of Virginia." 14 Wm. & Mary L. Rev. 523, 533 (1973) (emphasis added) [hereinafter *Shannon*]. During the 1901-02

Constitutional Convention, A. Caperton Braxton, Chairman of the Committee on Corporations of that Convention, argued that "[i]f consumers … are to be protected from the rapacity of the common carriers of the country, it must be accomplished by a body organized by the government for the purpose, with due authority to administer equal justice between the two opposite interests." 2 Debates of the Constitutional Convention of 1901-02, Virginia 2142-43 [hereinafter *Debates*]. At the time of the 1902 Convention, the railroads had reached a level of political and economic power that it was determined could not be resisted within the ordinary political process; thus, an independent body was needed to fairly set railroad rates.

As explained by Professor Howard,

> The Convention's response to the railroad problem was to create the [SCC]. Some delegates thought that the matter ought to be left to the General Assembly, but Braxton argued that "when the railroads fight a measure vigorously in the Legislature, it is a more or less hopeless thing to get it through." [Braxton] concluded, "I say to you now, that we have joined issue on this question once for all, as to whether the people or the railroads will run the State of Virginia." Braxton's views prevailed, and the Convention voted to create a Commission "clothed with all the legislative, judicial, and administrative powers necessary for the vigorous and complete execution of its duty to regulate and control the operation of railroads."

Commentaries at 969 (quoting *Debates* at 2168; A. Caperton Braxton, *The Virginia State Corporation Commission*, 38 Am. L. Rev. 483, 498 (1904)); *see also Clifton Forge-Waynesboro Tel. Co. v.* Commonwealth, 165 Va. 38, 47, 181 S.E. 439 (1935) (citations omitted) ("The State Corporation Commission, created by constitutional authority, is the instrumentality through which the State exercises its governmental power for the regulation and control of public service corporations. For that purpose it has been clothed with legislative, judicial and executive powers.")

In the 1902 Convention, Mr. Braxton quoted a recent writer in the North American Review who described the all-pervasive importance of the railroads at that time to the everyday life of every Virginian:

> There is no element in the economic world that is so pervasive as the cost of transportation. It constitutes an integral part of the cost of every article of food and clothing used by every man, woman and child, and of all materials that enter into the construction and furnishing of a habitation for man, and the heating and lighting of such habitation; and, in fact, of everything that is employed for the sustenance and comfort and gratification of man.

Debates at 2142. The word "transportation" could easily be replaced with the word "electricity" today and the power and accuracy of Chairman Braxton's argument would be unchanged.

At the time of the 1902 Convention, the railroads had reached a level of economic power that ordinary free market competition could not adequately restrain. As electricity came to be a necessity for most citizens, the same concerns arose about electric utilities as railroad companies had inspired at the end of the nineteenth century. The inability of market competition to ensure against abuse of power by railroad companies, and now by electric utilities, demanded a new and unique alternative to reliance on competition. Thus the Commission was born. *See Commentaries* at 967-69; *see also Shannon* at 533.

b. The 1971 Constitution ensured that consumers would be represented before the Commission.

The third paragraph of Article IX, § 2 was a new addition to the 1971 Constitution. It reads: "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 various draft versions of this new provision caused some confusion in debate. This confusion arose out of language charging the Commission to "protect" consumers, as the apparent presumption among the delegates and senators was that the SCC was already undertaking to protect consumers – in fact that was its very purpose. "The [SCC] has been set up for the very purpose of

protecting the citizens of Virginia." *Proceedings and Debates of the Virginia Senate Pertaining to Amendment of the Constitution, Extra Session 1969, Regular Session 1970* at 300 (Charles K. Woltz, ed. 1971) [hereinafter *Senate Debates*] (quoting Senator Pearson). Thus, why bother with new constitutional language charging the SCC to do that which it was already doing? As Delegate Schlitz put it: "Whose interests were they looking out for if it was not the consumer's?" *Proceedings and Debates of the Virginia House of Delegates Pertaining to Amendment of the Constitution, Extra Session 1969, Regular Session 1970* (Charles K. Woltz ed.1973) [hereinafter *House Debates*] at 682; *see also Commentaries* at 985-86.

Ultimately, the legislators settled on use of the word "represented," which was generally understood to refer to ratemaking cases which are conducted as adversarial proceedings. *See House Debates* at 710-11 (Delegate Mann stated that "[i]t was generally believed and assumed that we were all talking about those cases which involved rate-making…. [And] 'representation' means that there should be an adversary situation."). The evolution of the new third paragraph of Article IX, § 2 further indicates that the understood and expressed purpose of the establishment of rate-making authority in the SCC was for the protection of Virginia's consumers.

Further contemporaneous evidence of the intent of the delegates and senators who passed the proposed 1971 Constitution to protect consumers is the fact that those same delegates and senators passed a statute in 1970 establishing a new Division of Consumer Counsel in the Office of the Attorney General. Then Va. Code § 2.1-133.1-3, now § 2.2-517. Such Consumer Counsel was charged with representing the interests of Virginia's consumers before the SCC, among other governmental bodies. § 2.2-517.B.1.

c. Commission regulation is necessary to temper monopoly companies that are afforded the power of eminent domain.

When the founding of the SCC was being debated in 1901-02, there was philosophical objection voiced to the government's setting the rates for any business. Chairman Braxton responded by distinguishing railroads, saying:

> No private man and no private corporation has the right either to build or to operate a railroad. They cannot condemn property. They cannot run their trains across the public highways. It is only because of one of the Highest rights and privileges of sovereignty, the right of eminent domain, that railroads are enabled to carry on this business.

Debates at 2144. Electric utilities under the 1971 Constitution are in the same position regarding eminent domain power as railroads under the 1902 Constitution.

The power of eminent domain is one of the greatest powers that our government bestows on companies. Those companies which have been granted the power of eminent domain are not in a position equal to all other businesses. Such companies are called "public service companies" because they have been granted governmental powers in exchange for the authority and obligation to serve specific needs of the public. At the 1902 Convention, Chairman Braxton noted that Virginia's consumers, who were the intended beneficiaries of the establishment of the Commission in the first place, could justly demand the right to set rates for a company which had been granted the extraordinary power of eminent domain, without which the company could not exist or function.

> [I]t never would have entered the mind of any sane man or of any government, originally to have parted with these great [eminent domain] powers without taking, at the same time, adequate means, which we are now trying to take, to see that it got the consideration for which alone it parted with them, and to see that the powers were not abused; but at that time, under conditions as they then existed, it was supposed that competition amongst these carriers would keep them within bounds, and would prevent their abuse of this great power conferred upon them, and that that was all the

> protection the people wanted – the protection they would get from competition amongst the carriers; that all the assurance the people wanted, that the power given the railroads would be used for the advancement of the public welfare, would result from competition. In other words, the only thing that stood between the public and a misuse of these powers by the corporation was the supposed effect of competition as it existed at that day.
>
> Mr. Chairman, as we all know, railroad competition is today an iridescent dream…. As was practically conceded before our committee by some distinguished gentlemen representing the railroad interests, nearly every trunk line in this State, with one or two exceptions, is under the domination and control of the interests which control the Pennsylvania railroad system. There is no longer competition.

Debates at 2144-45.

d. The purpose of Article IX, § 2 matters.

This Court has spoken in powerful language as to how it should proceed when the purpose of a constitutional provision is clear. "The purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective." *Dean v. Paolicelli*, 194 Va. 219, 226 (1952); *see also Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 338, 645 S.E.2d 439, 442 (2007); *Stanley v. Tomlin*, 143 Va. 187, 195, 129 S.E.379, 382 (1925).

The "purpose and object sought to be attained by the framers" when creating the Commission under Article IX, § 2 is inarguably the protection of Virginia's consumers against the political and economic power of electric utilities. Given the clarity of that purpose, it is the obligation of this Court to do what the Commission itself failed to do, namely, to make effective the will and intent of the people who ratified Article IX, § 2 by striking down SB 1349 as an unconstitutional violation of Article IX, § 2 and the separation of powers.

e. Amendments to statutes and constitutional provisions must be given effect.

Every amendment to the law – whether to the constitution or statute – must be given legal significance unless that cannot be accomplished without an absurd result. *Cape Henry Towers, Inc. v. National Gypsum* Co., 229 Va. 596, 600-01, 331 S.E.2d 476, 479 (1985). The elevation of the Commission's role in regulating electric rates from mere statutory to constitutional duty must have a core significance that cannot be rescinded by a statute passed by the General Assembly. Otherwise, the elevation to constitutional status is meaningless – and that cannot be. "[W]hen current and prior versions of a statute are at issue, there is a presumption that the General Assembly, in amending a statute, intended to effect a substantive change in the law." *Virginia-American Water Co. v. Prince*

William County Serv. Auth., 246 Va. 509, 517, 436 S.E.2d 618, 622-23 (1993); *Dale v. City of Newport News*, 243 Va. 48, 51, 412 S.E.2d 701, 702 (1992). Further, courts will assume that "amendments to a statute are purposeful, rather than unnecessary." *AAA Disposal Servs. v. Eckert*, 267 Va. 442, 446, 593 S.E.2d 260, 263 (2004).

The power of the SCC to perform rate setting was moved beyond the reach of the General Assembly by the 1971 amendments to our Constitution. The General Assembly retained the right to set criteria and other requirements related to the SCC's performance of its duty to regulate electric rates, but, according to Professor Howard, "the 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 SCC and confer it upon some other agency or body." *The Constitution of Virginia: Report of the Commission on Constitutional Revision to His Excellency, Mills E. Godwin, Jr., Governor of Virginia, the General Assembly of Virginia, and the People of Virginia, Jan. 1, 1969* at 285 [hereinafter *CCR*]; *Commentaries* at 983. But that is exactly what has happened – the General Assembly and the Governor have taken electricity rate setting away from the SCC and assumed that power to themselves for a period of years. This situation can

now only be corrected by this Court holding that SB 1349 violates Virginia's Constitution.

While the Commission's authority to regulate electric rates from 1914-1971 was derived from the General Assembly,[2] when the people of Virginia decided to constitutionally assign the duty of electricity rate setting to the SCC in 1971, the law changed and the General Assembly was thereby stripped of its power to set electric rates.

B. The SCC has not only the power but the *duty* to set electric rates for consumers.

1. The duty to regulate electric rates was assigned by *the people* exclusively to the Commission.

Because the assignment of the SCC's duty to set electric rates is in the Constitution, it is a grant of power from *the people*, not the General Assembly. After 1971, the SCC's power to be the final arbiter of electric rates was no longer delegated by the General Assembly to the SCC; instead, such power was assigned by the people to the SCC, with the General Assembly only able to provide guidelines as to what factors should be considered in rate determinations (criteria), what conditions or circumstances might trigger SCC action (other requirements), and

---

[2] 1914 Va. Acts, Ch. 340.

procedures for the conduct of such determinations. *See* Va. Const. art. IX, § 3.

Comparing Article IX, § 2 to the 1902 Constitution, Professor Howard noted that "[Section 2] preserves the basic regulatory and chartering functions of the SCC, while making it possible for the General Assembly to have a greater voice in the jurisdiction and work of the SCC than was true under the 1902 Constitution." *Commentaries* at 980. That "greater voice" is reflected in the language of Section 2 that reads "[s]ubject to such criteria and other requirements." But Professor Howard noted that even with the General Assembly's "greater voice," "the SCC retains constitutional jurisdiction that the General Assembly may not take away – specifically, the … regulation of the rates, charges, and services of … electric companies." *Id*.

The "subject to such criteria and other requirements" clause was added by the General Assembly prior to submission of the 1971 Constitution to the people of Virginia for ratification. According to Senator Breeden, Chairman of the Senate Committee on Insurance and Banking responsible for reviewing the language in question, the language was added with "the intention being to give legislative control over the general aspects of rate-making," not so that the General Assembly could set actual

rates. *Senate Debates* at 269. The vote of the senate adopting the language was unanimous with Senator Breeden's explanation of the purpose of the language. *Id.* at 268-69, 271.

Comparing the "subject to such criteria and other requirements" language regarding the setting of rates to the language of the second half of the same sentence addressed to facilities, wherein the General Assembly clearly retains final authority, further buttresses the interpretation advanced herein.

So long as the General Assembly cannot remove rate determination authority from the SCC, the "power and duty" residing with the SCC can only be exercised if the SCC is the sole agency exercising such authority. There cannot be more than one rate making body over a territorial monopoly. Thus, the General Assembly could not ever eliminate the SCC's authority related to consumer ratemaking.

The Commission on Constitutional Revision recommended adding electric and gas companies to the SCC's constitutional jurisdiction because their services had long since become vital to all life in Virginia. Furthermore, the four types of companies subject to Commission regulation "were singled out on the philosophy that whatever regulatory system might be set up for other utilities (e.g., bus companies), these four utilities provide

basic services of a nature and extent that effective regulation is possible *only through a central agency*." *Commentaries* at 983 (emphasis added).

There can only be a single "central agency," a fact which is evident when the issue is considered in the real world. In a monopoly situation in which only one electric company can deliver electricity to a home, there can only be one final authority for setting the cost of such electricity. That central agency was established by the people in the Constitution to be the SCC. SB 1349 displaces the SCC from that position and must be found unconstitutional in order to return Virginia's government to the constitutional structure established by the people by their ratification of the 1971 Constitution.

2. The SCC's duty to regulate electric utilities is mandatory, not permissive.

The SCC's constitutional authority is pronounced in uniquely powerful language: "…the Commission *shall have the power* and be *charged with the duty* of regulating the rates, charges, and services … [of electric companies]." Va. Const. art. IX, § 2. And as the dissent at the SCC below correctly noted, "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." JA at 413. The General Assembly in SB 1349, and the SCC in its majority opinion dismissing the ODCFUR's petition, have ignored this affirmative constitutional duty bestowed by the people upon the SCC.

Article IX, § 2 constitutes some of the most powerful, action-oriented language in the entire Constitution. The only part of Virginia's Constitution that contains a compulsion even approaching the force of the language of Article IX, § 2 is found in Article XII, § 1 – the language relating to the General Assembly's obligation to put proposed constitutional amendments before the electorate for ratification. That language reads: "[once the House and Senate have properly passed a proposed amendment twice], then it *shall* be the *duty* of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe…" Va. Const. art. XII, § 1 (emphasis added).

The General Assembly has never failed to fulfill the duty imposed on it in Article XII, § 1, despite the fact that the language of its duty is put in far less compelling terms than that imposed upon the SCC in Article IX, § 2.

As if anticipating that a debate might one day arise over whether any body of Virginia's government other than the SCC could regulate the rates

of electric utilities, Article IX, § 2 expressly states that: "the Commission shall have the power [to set electric rates.]" Depositing that power with the SCC necessarily and completely prohibits its exercise by any other entity in Virginia's government, including the General Assembly. *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 311, 749 S.E.2d 176, 188 (2013) (explaining that the General Assembly's powers are restricted "by express or necessarily implied prohibitions arising from the Constitution of Virginia or the United States Constitution").

Demonstrating that no other entity of Virginia's government aside from the Commission may exercise the final setting of electric rates only goes so far. Specifically, the deposit by the people of the exclusive power to be the final decider of electric rates with the SCC means that that power cannot be exercised by another agency of government, including the General Assembly. But that still leaves open the question of whether it is constitutional for the General Assembly to adopt legislation that purports to block – if even just for a set period of time – the SCC from exercising its constitutionally-protected power to regulate electric rates.

The answer to that final question is found in the language "the Commission shall be … *charged with the duty* of regulating the rates [of]… electric companies." Va. Const. art. IX, § 2. This powerful language

answers the question of whether the SCC can be blocked by a mere statute from performing its constitutional duty to regulate the rates of electric utilities in the negative. The General Assembly's passage of a law foreclosing the SCC's ability to set electric rates – particularly if such foreclosure also blocked the SCC from refunding excess earnings during the period of foreclosure – would completely thwart the people's will in charging the SCC with the duty of regulating electric rates. Logic dictates that the SCC's authority to set electric rates was elevated to constitutional status in 1971 so that such power could not be foreclosed by the General Assembly.

Furthermore, no legislation on the part of the General Assembly is needed for the SCC to undertake its duty to set electric rates, as that power is self-executing. "If a constitutional provision is self-executing, no further legislation is required to make it operative." *Gray v. Virginia Sect. of Trans*., 276 Va. 93, 662 S.E.2d 66, 71 (2008). A constitutional provision is self-executing "if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the

force of law." *Robb v. Shockoe Slip Found.*, 228 Va. 678, 682, 324 S.E.2d 674, 677 (1985).

The SCC's power to regulate electric rates may be implemented based on nothing more than what is found in Article IX, §§ 2-3, and there are no generic statements of principles that are the hallmark of non-self-executing provisions.

Section 2 grants the SCC the power and the duty to set electric rates. The General Assembly may provide criteria and other requirements if it chooses to do so, but that is a limited power that does not impair "the express, fundamental power and duty to regulate [electric rates.]" July 2, 2015, Op. Atty Gen., p. 3 (Wagner); *see also Commentaries* at 980, 983.

Section 3 grants the SCC the power to establish its own rules of procedure, which the General Assembly may amend or abolish after the fact if it chooses to do so. Section 3 also provides all of the powers of a court of record that would normally be considered inherent within the judicial branch, but which must be affirmatively granted to the SCC in order that it may conduct the investigations and hearings needed to accomplish its assigned task of regulating electric companies.

Every aspect of the powers needed to actually regulate electric rates is granted initially to the SCC in Sections 2 and 3 of Article IX. The SCC's

authority to regulate electric rates is the very model of a self-executing constitutional provision outside the context of a bill of rights.

If the SCC could not execute its power to regulate electric rates without some level of intervention by the General Assembly, the position that such power may never be foreclosed by the General Assembly and that it has been unconstitutionally foreclosed by SB 1349 would be considerably weaker. An SCC that was dependent on its power being delegated by the General Assembly would present a poor constitutional case for a regulatory body with a core of power that can never be impaired by the General Assembly.

In support of holding SB 1349 unconstitutional, this Court should hold the SCC's power to regulate electric rates to be self-executing under the provisions of Article IX, §§ 2-3. Furthermore, this Court should hold that the core power of the SCC to regulate electric rates may not be foreclosed by the General Assembly, and that SB 1349 does in fact foreclose such regulation by the SCC and is therefore unconstitutional.

The majority opinion below characterized the blocking of the SCC's constitutional power and duty to regulate electric rates in SB 1349 as "temporary" and referenced the "postponing" and "rescheduling" of the

otherwise-required biennial review of APCo's base rates until 2020. JA at 392.

In the absence of SB 1349, APCo would have had biennial reviews in 2016, 2018, 2020, and every two years thereafter. If SB 1349 is upheld, APCo will have biennial reviews in 2020 and every two years thereafter.[3] The majority asserts that APCo's 2016 biennial review has been "postponed" or "rescheduled" to 2020 by SB 1349.[4] JA at 398, 404. However, there is already a 2020 biennial review scheduled; therefore, the proper verb to use would be "cancel" to describe the effect on the 2016 and 2018 biennial reviews. The words "postponed" and "rescheduled" indicate that the event in question will still happen;[5] however, there will only be one base rate review in 2020 for APCo, not two or three (including 2016 and 2018). It is misleading to use words such as "postpone" or "reschedule" to describe what SB 1349 does to APCo's 2016 and 2018 biennial reviews.

---

[3] Assuming, of course, that the electric utilities do not succeed *again* in getting the General Assembly to absolve them from SCC regulation of their base rates for some new and perhaps indefinite period into the future.

[4] Other parties use other similar terms. For example, the Attorney General referenced "delaying" the 2016 biennial review until 2020. JA at 5.

[5] Both words are verbs used with an object, with nearly identical meanings. The object of each verb is the 2016 and/or 2018 biennial base rate reviews. "Postpone" means to put something off to a later time, in this case putting off the 2016 and 2018 biennial reviews, and "reschedule" means to schedule something for another time, in this case, 2020. *See, e.g.*, Merriam Webster Dictionary, *available at* www.merriam-webster.com.

SB 1349 purports to *cancel* APCo's 2016 and 2018 biennial reviews, and it purports to *revoke* the SCC's power and duty to regulate APCo's electric rates for the period from its last biennial review in 2014 until its next, currently scheduled for 2020. The SCC's power has not been "postponed" or "rescheduled."

The implementing legislation supports this view, as it explicitly states that:

> No biennial reviews of the rates, terms, and conditions for [APCo] 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. No biennial reviews of the rates, terms, and conditions for [Dominion] shall be conducted at any time by the State Corporation Commission for the five successive 12-month test periods beginning January 1, 2015, and ending December 31, 2019.

2015 Va. Acts 6. The law by its own terms orders the SCC not to conduct base rate reviews. The law does not "postpone" or "reschedule", the law purports to "revoke" or "cancel" biennial reviews for many years.

Later, SB 1349 addresses the re-commencement of biennial reviews: "After the [time period covered by SB 1349], biennial reviews shall *resume* for [APCo] in 2020." And it goes on to state that "…biennial reviews shall *resume* for [Dominion] in 2022." *Id.* (emphasis added). The word "resume" indicates that biennial reviews were halted for the time period affected by

SB 1349, not "postponed" or "rescheduled."[6] Unlike "postpone" and "reschedule", "resume" was actually used in the enactment of SB 1349 – it is not an element of the argument of lawyers or the explanation of judges, rather it is from the text of the law itself. The law itself explicitly demonstrates the inaccuracy of the majority's characterization of the consequences of SB 1349.

The majority's opinion below would be more defensible if, when APCo's 2020 biennial review were to take place, SB 1349 provided that the SCC could reach back over the entire period effected, calculate the massive level of over-earning that will have occurred by then, and refund any such over-earnings to APCo's consumers. This is a glaring indication that the SCC's power and duty to regulate APCo's electric rates have not been "postponed" or "rescheduled" until 2020, but have in fact been unconstitutionally revoked and this Court should so hold.

[6] "Resume" is a verb used with an object. The object of the verb is the 2016 and/or 2018 biennial base rate reviews. "Resume" means to return to or begin again after interruption, in this case after the interruption of the 2016 and 2018 biennial reviews. *See, e.g.*, Merriam Webster Dictionary, *available at* www.merriam-webster.com.

C. *VEPCO*[7] need not be overruled to find SB 1349 unconstitutional.

Shortly after the 1971 Constitution was ratified, this Court addressed the question of whether a previously-existing statutory exemption for governmental entities from the jurisdiction of the SCC's rate-setting authority was constitutional under Article IX, § 2 in *VEPCO*. The Court found that the long-standing exemption for governmental entities from the electricity rate setting jurisdiction of the SCC did not violate newly amended Article IX, § 2. The Court's opinion, however, left numerous aspects of the SCC's role under Article IX, § 2 unaddressed. SB 1349 may be held to violate Article IX, § 2 and the separation of powers without contradicting the *VEPCO* holding.

The *VEPCO* Court noted that from the commencement of the SCC's electric rate setting authority in 1914 until the time of the *VEPCO* case (commenced in 1972), "the rates charged [] governmental entities had never been regulated." *VEPCO*, 214 Va. at 459. The Court further noted that the General Assembly conducted a contemporaneous review of statutes to identify and eliminate statutes that contradicted any part of the newly adopted 1971 Constitution, and that such review resulted in keeping

[7] *Commonwealth v. Va. Elec. and Power Co.*, 214 Va. 457, 201 S.E.2d 771 (1974). Given the centrality of the case, it is referred to as "VEPCO" throughout this brief.

the statute providing for the exemption. *Id*. at 466 ("The General Assembly discerned no conflict between the statute and the new constitution. Nor do we find such conflict."). Thus, the *VEPCO* Court ruled that the exemption of governmental entities from the SCC's electricity rate setting authority did not violate Article IX, § 2 of the Constitution. *Id.*

Given the contemporaneous analysis by the same General Assembly that proposed Article IX, § 2 to the people of Virginia, combined with the recognized purpose of Article IX, § 2 of protecting consumers, the exemption may reasonably be characterized as having been presumed to be unaffected by then-proposed Article IX, § 2 by both the General Assembly and the people.[8]

The *VEPCO* Court focused on the language of Article IX, § 2 that reads: "Subject to such criteria and other requirements as may be prescribed by law, the [SCC] shall have the power and be charged with the

[8] The exclusion of SCC jurisdiction over the electric rates charged by governmental entities is explicit in Article IX, § 7, wherein jurisdiction over all governmental corporations is foreclosed absent General Assembly action to the contrary. Thus, municipal utilities cannot be regulated by the SCC without legislation; moreover, the language of Article IX, § 7 is clearly consistent with the outcome in *VEPCO*. The underlying rationale is that governmental entities are both responsible for protecting their citizens' interests (municipal utility rates) and capable of protecting their own interests (rates of public service utilities).

duty of regulating the rates, charges, and services … of railroad, telephone, gas, and electric companies."

In *dicta*, the Court implicitly adopted an interpretation of "subject to such criteria … as may be prescribed by law" found in the *Commentaries*, namely, that the General Assembly may prescribe what elements may enter into the SCC's rate making, *e.g.*, what rate of return is desirable, what will serve as the basis for determining the rate of return, and other similar factors. *VEPCO*, 214 Va. at 463-66; *Commentaries* at 983.

In distinguishing between "such criteria" and "other requirements," the Court explicitly upheld the exemption of governmental entities based upon the "other requirements" language of Article IX, § 2. *VEPCO*, 214 Va. at 465-66. The Court did not suggest that any exemption, other than the continuation of the exemption of governmental entities, fell within that provision.

It is important to recognize that the government exemption at issue in *VEPCO* did not impair the constitutional purpose of protecting consumers. Thus, upholding the exemption as being non-violative of Article IX, § 2 in *VEPCO* did no harm to the purpose for which the SCC was established and for which constitutional jurisdiction over electricity rate setting was extended in 1971, namely, the protection of consumers.

D. Failure to void SB 1349 will result in unconstitutional takings from captive ratepayers.

Based on SCC findings, SB 1349 will result in a transfer of wealth of billions of dollars from captive ratepayers to utility shareholders during the rate freeze period. Commissioner Dimitri noted that Dominion's rates alone, which are frozen until at least 2023, are currently producing "annual excess revenues of hundreds of millions of dollars." JA at 409. The rates of both utilities also include costs associated with expired power purchase contracts. JA at 409.Moreover, there is little, if any, chance that customers could recoup these costs – let alone receive rate relief – if SB 1349 stands. Thus, failure to void SB 1349 will result in significant unconstitutional takings from captive ratepayers.

If the suspension of the rate and earnings reviews mandated by SB 1349 is permitted to proceed, not only will ratepayers lose the opportunity for rate relief, but they will also lose the opportunity to recoup any revenue excesses they provide to the utilities during the rate freeze. Such a scenario would vitiate the "regulatory compact" between monopolies and captive ratepayers, a fundamental cannon of American law that has been protecting consumers for over a century.

1. The rates of both APCo and Dominion are excessive.

a. APCo's rates are excessive by approximately $83 million per year.

Factual findings by the SCC indicate that APCo's base rates are designed to produce excess revenues and would have been reduced but for SB 1349. In its last biennial review of APCo's base rates, the SCC found that the company's rates resulted in overearnings during the 2012-2013 review period of $24 million.[9] Therefore, the SCC ordered APCo to disgorge to customers approximately $6 million of excess profits retained by the company during the 2013-2014 period. *Application of Appalachian Power Company, For a 2014 biennial review of rates*, SCC Case No. PUE-2014-00026, Final Order at 22 (Nov. 26, 2014). Moreover, in APCo's last biennial review rate case, all parties – *including APCo* – agreed that APCo's base rates were designed to produce excess profits going forward.

At that time, APCo admitted that its going forward base rates were designed to produce excess profits of $41.7 million annually. *See, e.g.*, JA at 8. The SCC Staff, meanwhile, estimated that APCo's current rates would produce excess profits of approximately $83 million per year, and the Attorney General estimated the annual revenue excess to be approximately

[9] In comparing over-earning levels of APCo and Dominion, it is important to keep in mind that Dominion has over four times as many customers as APCo.

$122 million.)[10] These rates are frozen by SB 1349 until at least 2021. SB 1349 prohibits any base rate decreases and any further refunds until the conclusion of APCo's 2020 biennial review proceeding; furthermore, SB 1349 would foreclose refunds to consumers for APCo's over-earning during the rate freeze period.

Thus, SB 1349 cancels the biennial review process for APCo until 2020 and prohibits any adjustments to existing base rates during the interim. APCo's captive ratepayers will have no opportunity to receive a refund of the excess profits obtained by the company.

b. Dominion's rates are excessive by approximately $300 million per year.

The SCC has consistently found that Dominion's rates are designed to produce excess profits.

Beginning with Dominion's 2011 biennial review, the SCC determined that Dominion's rates resulted in earnings that exceeded the top end of the company's authorized earnings band. As a result, the SCC ordered $78.3 million to be refunded to customers. *Application of Virginia Electric and Power Company, For a 2011 Biennial Review of Rates*, SCC Ann. Rpt. at

[10] See *Application of Appalachian Power Company, For a Biennial Review of Rates*, SCC Case No. PUE-2014-00026, Post-Hearing Brief of Old Dominion Committee for Fair Utility Rates at 5 (Oct. 24, 2014), *available at* http://www.scc.virginia.gov/docketsearch/DOCS/2zm301!.PDF.

461 (Nov. 26, 2013). The SCC, however, was not able to reduce Dominion's rates because the statute requires that a utility's rates must exceed the top end of its authorized return on equity range for two consecutive biennial review periods before rates may be reduced. Va. Code § 56-585.1(A)(8)(c).

In Dominion's 2013 biennial review proceeding, the SCC again found that Dominion's rates were too high and producing excess revenues of approximately $280 million per year. *See Application of Virginia Electric and Power Company, For a 2013 Biennial Review of Rates*, 2013 SCC Ann. Rpt. at 378. The SCC, however, was unable to reduce Dominion's rates because the General Assembly, in 2013, amended the Regulation Act to require the SCC, in its calculation of Dominion's earnings, to recognize approximately $400 million in specific costs (costs associated with storm response and the early retirement of certain generation facilities) as a credit against Dominion's earnings for that biennial review period. *See* 2013 Biennial Review Order, 2013 SCC Ann. Rpt. at 373-74. As a result of the legislatively mandated $400 million charge against its earnings, Dominion was found to have *not* over-earned and the SCC was not able to reduce the company's rates or order the company to provide refunds. *Id*.

In 2014, the General Assembly amended the Regulation Act again to require further changes to the way the SCC must calculate Dominion's earnings. The 2014 amendment required the SCC, when assessing Dominion's earnings in its 2015 biennial review, to include $320 million in costs incurred by Dominion related to its construction of the proposed North Anna 3 nuclear facility as a charge against earnings during the biennial review period. Va. Code § 56-585.1(A)(6). Even after accounting for the legislatively mandated $320 million write off against earnings, the SCC *still found* Dominion to be in an over-earning position and directed that the Company refund $19.7 million of overearnings to customers. *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 of the Code of Virginia*, SCC Case No. PUE-2015-00027, Final Order at 15 (Nov. 23, 2015).

In Dominion's 2015 biennial review, the SCC Staff determined that Dominion's current rates are designed to produce excess profits of $310 million in 2015 and $299 million in 2016. *See* JA at 170, 408. SB 1349 prohibits any rate decreases or further refunds until the conclusion of Dominion's 2022 biennial review proceeding.

Under SB 1349, Dominion's base rates could not be reduced until 2023, at the earliest, even though, as Commissioner Dimitri stated, Dominion's current rates "are designed to produce and have been producing annual excess revenues of hundreds of millions of dollars" and "are now fixed … at a level which is designed to over-collect from customers." JA at 408-409.

2. APCo's and Dominion's frozen rates will charge customers hundreds of millions of dollars for things that customers will not receive.

APCo's and Dominion's base rates currently charge customers for hundreds of millions of dollars in third-party power purchase costs that the utilities no longer incur. Specifically, third-party power purchases include costs for both "energy" and "capacity." The costs for the energy portion of a power contract are recovered through a utility's fuel factor rider pursuant to Va. Code § 56-249.6. The costs for the capacity portion of a power purchase contract, however, are recovered through the utility's base rates. With regard to APCo, Commissioner Dimitri noted that its existing base rates, "which were established in 2011, reflect significant capacity costs" which APCo no longer incurs. JA at 410. Likewise, as to Dominion, Commissioner Dimitri correctly noted that between 2016 and "the end of 2019, Dominion will have recovered over $243 million from its customers

for [non-utility generator] capacity costs that it no longer incurs." JA at 409. Therefore, SB 1349 would force APCo's and Dominion's residential customers – their captive ratepayers – to pay excessively high rates for contract "costs" the utilities no longer incur.

E. SB 1349 upends the "regulatory compact" between monopolies and captive ratepayers.

1. The concept of the regulatory compact is integral to utility regulation.

Public utilities such as APCo and Dominion are allowed to operate as monopolies. Because public utility service often requires significant infrastructure and capital investment, it is not efficient for multiple firms to compete for customers. By their nature, utilities possess "technical characteristics leading almost inevitably to monopoly." Evans B. Brasfield, *Regulation of Electric Utilities by the State Corporation Commission*, 14 Wm. & Mary L. Rev. 589, 591 (1973). Indeed, "public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595-96 (1976).

While utilities are allowed to function as monopolies, they are always regulated to ensure the protection of consumers. Regulation is intended – and is necessary – to simulate competition in industries where none exists.

The U.S. Supreme Court has long recognized that public utilities operating as natural monopolies must be regulated to protect the interests of consumers. *See Munn v. Illinois*, 94 U.S. 113, 127-28 (1877).

The regulation of public utility rates is particularly important to protect consumers from monopoly market power. Public utilities provide services – such as natural gas, water, and electric distribution – that are essential to modern consumers. Citizens living in APCo's or Dominion's service territories are captive customers in that they may only purchase their electricity distribution service from these utilities. As Commissioner Dimitri explained, "[t]he basic reason that [public utility] rates are regulated in this manner … is because the utility is a state-created public utility monopoly and electricity is a necessity." JA at 407.

The arrangement whereby public utilities are granted protected monopoly status by the state in exchange for rate regulation is often referred to as the "regulatory compact." Under this compact, utilities receive the benefits of a monopoly on the sale of essential services, and in exchange agree to rate and profit regulation by the state.[11] State regulation

---

[11] The utility business represents a compact of sorts; a monopoly on service in a particular geographical area (coupled with state-conferred rights of eminent domain or condemnation) is granted to the utility in exchange for a regime of intensive regulation,

of utility rates is intended to provide a proxy for competition – to ensure both that customers are not overcharged for essential utility services and that utilities are given an opportunity to recover their full costs of service plus a fair rate of return. That balance is destroyed by SB 1349.

2. Captive ratepayers will have no opportunity to be made whole for the billions of dollars in excess revenue that will be paid to the monopoly utilities under SB 1349.

When determining whether customers have any reasonable opportunity to be made whole for the revenue excesses delivered to the utilities during the rate freeze, it is worth examining the one clause in SB 1349 that ostensibly places *some* financial risk on the monopolies. The statute provides that the monopolies will be able to recover the following costs "only through its existing rates for generation or distribution services":

> including price regulation, quite alien to the free market…Each party to the compact gets something in the bargain. As a general rule, utility investors are provided a level of stability in earnings and value less likely to be attained in the unregulated or moderately regulated sector; in turn, ratepayers are afforded universal, non-discriminatory service and protection from monopolistic profits through political control over an economic enterprise.

Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring) (citations omitted).

> (i) costs associated with asset impairments related to early retirement determinations for utility generation facilities resulting from the implementation of carbon emission guidelines for existing electric power generation facilities that the U.S. Environmental Protection Agency has issued pursuant to § 111(d) of the Clean Air Act; (ii) costs associated with severe weather events; and (iii) costs associated with natural disasters.

Va. Code § 56-585.1:1(E).

These categories, if incurred by the utility during the rate freeze, would presumably be absorbed by the utility's shareholders and would not be charged to customers.

a. The utilities are unlikely to incur any near-term costs associated with regulations promulgated pursuant Clean Air Act § 111(d).

The first category of costs for which the utilities may *not* seek recovery from customers during the rate freeze is costs resulting from the early retirement of generation facilities due to § 111(d) of the Clean Air Act, a regulation commonly known as the federal Clean Power Plan ("CPP"), 80 Fed. Reg. 64,662 (Oct. 23, 2015). First, Amici note that this regulation was stayed by the United States Supreme Court on February 9, 2016. *See*

West Virginia v. EPA, 136 S. Ct. 998.[12] Moreover, it appears unlikely the administration of President-Elect Trump will ultimately implement the CPP.

Second, the SCC has previously recognized that CPP compliance costs – to extent there are any – would not likely be recovered through base rates for at least two reasons: (1) because the utilities are permitted to recover environmental compliance costs outside of base rates and (2) because the compliance period for the CPP does not begin until 2022! As the SCC explained in its Final Order in Dominion's most recent Integrated Resource Plan review proceeding:

> The SCC has previously recognized that many CPP compliance costs would likely be eligible for recovery through RACs, rather than being absorbed in the Company's currently frozen base rates. The record in the instant proceeding is consistent with this expectation. Across all four compliance scenario alternatives presented by Dominion, information provided by the Company identifies a material impact to base rates in only one plan, and for only two of the 26 years for that plan. The Company's modeling results also identify relatively few costs to comply with the CPP that would be incurred during the period when base rates are frozen. These results are also expected, as the CPP compliance period does not begin until 2022, the same year the next biennial review of

[12] The CPP was stayed until the D.C. Circuit Court of Appeals rules on a challenge to the CPP brought by 23 states. *State of West Virginia, et al. v. EPA*, U.S. Court of Appeals for the D.C. Circuit, No. 15-1363. Oral argument before an en banc panel was held on September 27, 2016. The parties are awaiting a ruling from the D.C. Circuit.

> Dominion's base rates is scheduled to occur. Dominion's IRP thus corroborates this Commission's prior conclusion that the currently effective base-rate freeze is highly unlikely to protect Virginia ratepayers from the bulk of CPP compliance costs.

In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq., SCC Case No. PUE-2016-00049, Final Order at 5-6 (Dec. 14, 2016).

For these reasons, the utilities are highly unlikely to incur any costs associated with the federal CPP during the rate freeze period.

b. It would be historically unprecedented for costs associated with "severe weather events" or "natural disasters" to approach the revenue excesses that SB 1349 deposits with the utilities during the rate freeze period.

The revenue excesses projected to be generated by utilities during the rate freeze period are significant and could easily exceed $2 billion for Dominion alone based on the SCC's prior findings. It is inconceivable that costs associated with "severe weather events" or "natural disasters" during the rate freeze would even approach that figure. For context, in its 2013 biennial review, Dominion reported to the SCC that it had incurred approximately $107 million in costs associated with its response to Hurricane Irene. *See Application of Virginia Electric and Power Company, for a 2013 Biennial Review of Rates*, SCC Case No. PUE-2013-00020,

Direct Testimony of Paul D. Koonce at 7, *available at* http: //www.scc.virginia.gov/docketsearch/DOCS/2rf101!.PDF. Dominion has also stated that Hurricane Irene was the second largest storm response expense ever incurred in the history of the company.[13]

Therefore, the Commonwealth would likely have to be hit by a series of unprecedented and unrelenting natural disasters for the excess profits retained by the utilities during the rate freeze period to be meaningfully reduced by costs incurred by the utilities to respond to storms and natural disasters.

SB 1349 contains no mechanism whereby the revenue excesses will be transferred back to the ratepayers in the event that the utilities do not incur significant CPP compliance costs or costs associated with storms or natural disasters during the rate freeze period. Thus, there is no plausible scenario under which customers could recoup the excess revenues that will be paid to the utilities during that period.

For these reasons, if the biennial review process is not restored, allowing citizens regular rate reviews and the potential to recoup some of

[13] News Release, *Dominion Assessing Damage, Beginning Recovery From Hurricane Irene's Impact in Virginia, North Carolina* (Aug. 28, 2011), *available at* http://dom.mediaroom.com/news?item=71828.

the excess profits that would be transferred to the utilities under SB 1349, there will be ongoing unconstitutional takings perpetrated on Virginia's captive ratepayers.

3. SB 1349 would prohibit the SCC from reducing base rates it has previously determined to be excessive, thereby effectuating a taking from captive ratepayers.

Regulated public utilities are entitled to rates set at a level that will allow them to recover their reasonable operating costs plus a fair rate of return. *See Fed. Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591 (1944). A rate set *below* this level is confiscatory to public utilities, and such a rate constitutes an unconstitutional taking from the utility. *See Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W.Va.*, 262 U.S. 679, 683, 690 (1923).

Rates are unconstitutionally low and confiscatory to utilities if they do not allow the utility the ability to recover its costs plus a fair rate of return. But monopoly utility rates may also be confiscatory to *ratepayers* if they are set at excessively high levels or if such rates include charges for things not actually provided to ratepayers. On this point, the U.S. Supreme Court has noted that "while under the guise of … regulation [a utility's property] may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable." *Minnesota*

Rate Cases, 230 U.S. 352, 454 (1913). The U.S. Supreme Court also observed that:

> [W]hether a particular rate is "unjust" or "unreasonable" will depend to some extent on what is a fair rate of return given the risks under a particular rate setting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins, *these questions have constitutional overtones*.

Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989) (emphasis added).

Other courts have also recognized a property interest in a customer's right to just and reasonable rates. *See Miss. Power Co. v. Miss. Pub. Serv. Comm'n*, 168 So.3d 905, 913 (Miss. 2015) (describing ratepayers' right to a proper rate as a "protected property interest"). The Nebraska Supreme Court has held that "[a] ratepayer's right to a fair and reasonable rate, a right which has emerged from the decisions of this court, is properly classified as a 'property' entitlement protected by the due process clauses of the U.S. and Nebraska Constitutions" and "[t]hus, the state is not entitled to set a rate for telephone service which effectuates a taking of property without just compensation, whether the property taken belongs to a telephone company *or to a subscriber*." *State ex rel. Spire v. Northwestern Bell Tel. Co*., 233 Neb. 262, 283 (1989) (emphasis added). The Nebraska

Supreme Court has held that "[t]he commission can no more permit the utility to have confiscatory rates for the service it performs than it can compel a utility to provide service without just and equitable compensation. As a matter of elemental justice, *consumers of utility services are entitled to the same protection against confiscation of property or arbitrary action on the part of the utility as are the utilities*." *In re Joseph C. Myers v. Blair Tel. Co.,* 194 Neb. 55, 57, 230 N.W.2d 190, 193 (1975) (emphasis added).

In particular, when the rates of a monopoly utility can be *proven* to include charges for things not being delivered, customers have a cause of action for a taking. The Nebraska Supreme Court, for example, addressed this issue when evaluating the viability of a claim that a cable provider's rates included charges for products which were not available to customers. That court concluded that, when utility rates include "a charge for something that is not being delivered," the rate may be determined to be "arbitrary and unreasonable such as to be confiscatory and therefore in violation of the due process clauses of the [Nebraska] and federal Constitutions." *Bard v. Cox Cable of Omaha, Inc*., 226 Neb. 880, 889 (1987); *see also Myers*, 194 Neb. at 63. Additionally, the Mississippi Supreme Court said, in a case adjudging improper an electric rate increase to set aside monies to fund the construction of a power facility that *may*

come on line in the future, "[t]here is no question that the taking of private funds [of ratepayers] is a transfer of the property and results in the deprivation of that property." *Miss. Power Co. v. Miss. PSC*, 168 So.3d 905, 914 (2015).

SB 1349, if not struck by this court, will result in the following violations of citizens' due process and property rights:

(1) captive ratepayers will be required to pay electric rates set by the General Assembly and Governor that the SCC has determined to be excessive;

(2) captive ratepayers will be compelled to pay hundreds of millions of dollars for things (such as the capacity from expired power contracts) that they do not receive; and

(3) captive ratepayers will be deprived of the right to pay rates that have been determined to be just and reasonable by the SCC.

CONCLUSION

For the foregoing reasons, Amici respectfully urge the Court to rule that the SCC's July 1, 2016 Final Order in Case No. PUE-2016-00010 is in error and to make at least the following holdings:

1. That Art. IX, § 2 of the Constitution assigns to the SCC the exclusive and ultimate power and duty to set electric rates;

2. That SB 1349 blocks the SCC from exercising the aforementioned duty and therefore violates the Constitution;
3. That the General Assembly and Governor have assumed the role of setting electric rates during the period of years affected by SB 1349 in violation of the Constitution;
4. That SB 1349 is unconstitutional and thus null and void;
5. That the SCC should commence biennial review base rate cases immediately for APCo and as soon as possible for Dominion and to set what rates the SCC deems just and reasonable under the law; and
6. That the SCC has authority to provide refunds to return monies improperly received by the electric utilities to the customers who were overcharged as a result of the passage of SB 1349.

RESPECTFULLY SUBMITTED,

VIRGINIA POVERTY LAW CENTER
VIRGINIA CITIZENS CONSUMER COUNCIL

/s/ Kenneth T. Cuccinelli, II
Kenneth T. Cuccinelli, II
Andrew P. Miller

/s/ Brian R. Greene
Brian R. Greene
Eric J. Wallace

Kenneth T. Cuccinelli, II*(VSB No. 39490)
Andrew P. Miller**
13881 Jordan Meadows Lane
Nokesville, Virginia 20181
(804) 286-2550
Ktc21968@gmail.com
Counsel for the Virginia Poverty Law Center

Brian R. Greene* (VSB No. 38215)
Eric J. Wallace (VSB No. 86400)
GreeneHurlocker, PLC
1807 Libbie Avenue, Suite 102
Richmond, Virginia 23226
(804) 672-4542 – Telephone
(804) 672-4540 – Facsimile
BGreene@GreeneHurlocker.com
Counsel for the Virginia Citizens Consumer Council

**Counsel of record for Amici Curiae*

*** Motion pro hac vice pending*

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on this 19th day of January, 2017, an electronic copy of the foregoing was filed, via VACES, and ten paper copies were hand delivered to the Supreme Court of Virginia. In addition, I caused copies of the foregoing brief to be served by electronic mail and U.S. Mail on the following:

Appellant Old Dominion Committee for Fair Utility Rates:

Louis R. Monacell (VSB No. 16050)
Edward L. Petrini (VSB No. 30883)
James G. Ritter (VSB No. 82572)
Christian & Barton, LLP
909 E. Main Street, Suite 1200
Richmond, Virginia 23219
(804) 697-4100 (telephone)
(804) 697-6112 (facsimile)
lmonacell@cblaw.com
epetrini@cblaw.com
jritter@cblaw.com

Appellant VML/VACO APCo Steering Committee:

Robert Perrow (VSB No. 14766)
John L. Walker (VSB No. 30055)
Joseph R. Pope (VSB No. 71371)
Williams Mullen, PC
P.O. Box 1320
200 South 10th Street, Suite 1600
Richmond, Virginia 23218
bperrow@williamsmullen.com
jwalker@williamsmullen.com
jpope@williamsmullen.com

Appellant *pro se* Ms. Karen E. Torrent:

Ms. Karen E. Torrent
2547 Hillsman Street
Falls Church, Virginia 22043
Facsimile Not Available
(703) 282-9940
karentorrent@gmail.com

Appellee State Corporation Commission of Virginia:

William H. Chambliss (VSB No. 31327)
D. Mathias Roussy, Jr. (VSB No. 51118)
Office of General Counsel
State Corporation Commission
P.O. Box 1197
Richmond, VA 23218-1197
(804) 371-9671 (Telephone)
(804) 371-9240 (facsimile)
william.chambliss@scc.virginia.gov
matt.roussy@scc.virginia.gov

Appellee Hon. Mark R. Herring, Attorney General of Virginia:

Stuart A. Raphael (VSB No. 30380)
Solicitor General
Trevor S. Cox (VSB No. 78396)
Deputy Solicitor General
Matthew R. McGuire (VSB No. 84194)
Assistant Attorney General
Office of the Attorney General
202 N. Ninth Street
Richmond, Virginia 23219
(804) 786-7240 (telephone)
(804) 371-0200 (facsimile)
sraphael@oag.state.va.us
tcox@oag.state.va.us
mmguire@oag.state.va.us

Appellee Virginia Electric and Power Company:

Lisa S. Booth (VSB No. 48112)
Charlotte P. McAfee (VSB No. 68412)
Dominion Resources Services, Inc.
120 Tredegar Street
Richmond, VA 23219
(804) 819-2288 (telephone)
(804) 819-2277 (facsimile)
lisa.s.booth@dom.com
charlotte.p.mcafee@dom.com

and

Joseph K. Reid, III (VSB No. 35724)
Elaine S. Ryan (VSB No. 79009)
McGuireWoods, LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804) 775-4730 (telephone)
(804) 775-4357 (facsimile)
jreid@mcguirewoods.com
eryan@mcguirewoods.com

Appellee Appalachian Power Company:

James R. Bacha (VSB No. 74536)
American Electric Power Services Corp.
1 Riverside Plaza
Columbus, Ohio 43215
(614) 716-3410 (telephone)
(614) 716-1687 (facsimile)
jrbacha@aep.com

Noelle J. Coates (VSB No. 73578)
American Electric Power Services Corp.
1051 East Cary Street, Suite 1100
Richmond, Virginia 23219
(804) 698-5541 (telephone)

(804) 698-5526 (facsimile)
njcoates@aep.com

Robert M. Rolfe (VSB No. 15779)
Timothy E. Biller (VSB No. 80136)
Jonathan L. Caulder (VSB No. 89062)
Hunton& Williams LLP
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200 (telephone)
(804) 343-4568 (facsimile)
rrolfe@hunton.com
tbiller@hunton.com
jcaulder@hunton.com

/s/ Kenneth T. Cuccinelli, II
Kenneth T. Cuccinelli, II