IN THE

SUPREME COURT OF VIRGINIA

Record No. 171151
(SCC Case No. PUE-2016-00094)

VIRGINIA ELECTRIC AND POWER COMPANY,

Appellant,

v.

STATE CORPORATION COMMISSION, ET AL.

Appellee.

BRIEF OF APPELLEE

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Pursuant to Rules 5:26 and 5:28 of the Rules of the Supreme Court of Virginia, Appellee Appalachian Voices, ("Environmental Respondents") hereby submits its brief.

STATEMENT OF THE CASE

This is a response to the Opening Brief of Appellant Virginia Electric and Power Company d/b/a Dominion Energy Virginia ("Dominion"). Dominion appealed orders from the State Corporation Commission (the "Commission") in a declaratory judgment action that correctly interpreted the plain language of Section 56-577(A) of the Code of Virginia (the "Code").

This case, at its heart, concerns the interplay of the three discrete ways in which Virginia electricity customers may buy power from a supplier other than their local utility. The electric utilities in the Commonwealth of Virginia are public service corporations subject to the Commission's regulation under both the Utility Facilities Act, Va. Code §§ 56-265.1, *et seq*. ("Facilities Act"), and the Electric Utility Regulation Act, Va. Code §§ 56-576, *et seq*. ("Regulation Act"). In general, each electric utility is the exclusive provider of electricity to customers within a specific geographic area. *See* Facilities Act, Va. Code § 56-265.4. However, customers within a

utility's territory may purchase power directly from a third party (*i.e.*, shop for cheaper power) in three specific ways.

First, under Section 56-577(A)(3) of the Virginia Code ("Section A3"), customers whose peak electricity demand exceeds five megawatts may buy electricity from licensed competitive service providers ("CSPs"). Va. Code § 56-577(A)(3). Second, under Section 56-577(A)(4) of the Virginia Code ("Section A4"), customers whose individual demand does not exceed five megawatts may petition the Commission for permission to aggregate their loads so as to meet the five megawatts minimum threshold of Section A3. Va. Code § 56-577(A)(4). Third, under Section 56-577(A)(5) ("Section A5"), any customer of any size may shop for cheaper power, provided that the power is 100 percent renewable and provided the customer's incumbent utility does not already offer a voluntary tariff for 100 percent renewable energy. Va. Code § 56-577(A)(5).

In this proceeding, the Commission correctly ruled that Sections A3, A4, and A5 are three discrete avenues by which customers may purchase power from a supplier of electric energy other than their incumbent utility. (JA 130-31, 153-54). Of relevance here, the Commission correctly ruled that customers of any size – even those whose demand exceeds five megawatts – may purchase 100 percent renewable energy from a CSP

pursuant to Section A5. (JA 129-31, 153). The Commission further ruled that large customers purchasing power under Section A5 are not bound by Section A3's requirement that such customers provide five years' notice before returning to the utility's customer base. (JA 130-31, 153).

Dominion, which operates as a utility, claims in its appeal that the Commission incorrectly "ignored the clear intent of the General Assembly and instead read into the statute a broad exemption for large customers that effectively nullifies the substantive conditions imposed on those large customers." Opening Brief of Appellant ("Dominion Brief") at 2. The Commission's ruling, Dominion further argues, "erroneously allows large customers to shift the risk of their choice onto the incumbent utility and all other utility customers . . . ." Dominion Brief at 16.

Dominion is wrong. There is no risk to Dominion because in all three scenarios, the Code contains express provisions to protect utilities' franchise territories.[1] Customers who shop because their demand – or aggregate demand – exceeds five megawatts may not return to their

[1] Despite Dominion's claims to the contrary (*see* Dominion Brief at 32-33), the Commission's correct ruling does not shift any risk to non-switching customers because Dominion can supply all necessary power through its participation in PJM, as discussed in detail below.

utility's customer base before giving five years' notice to the utility.[2] Va. Code §§ 56-577(A)(3)-(4). For customers purchasing 100 percent renewable energy under Section A5, on the other hand, the option only exists until the incumbent utility offers a Commission-approved tariff to provide 100 percent renewable energy. Va. Code § 56-577(A)(5). After that time, no customer of any size or class may purchase 100 percent renewable energy from a CSP in that incumbent utility's territory. Va. Code § 56-577(A)(5). In fact, the Commission confirmed this exact reading of the statute in this very proceeding. (JA 125) ("[I]f the incumbent utility offers a 100 percent renewable tariff, the retail customers are not permitted to purchase energy from a CSP under Section A 5 a."). Although Dominion does not currently offer such a tariff, it has petitioned the Commission for approval of one which, if approved, would prevent any non-residential customer with peak demand greater than one megawatt from purchasing 100 percent renewable energy from a CSP.[3]

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[2] For the avoidance of doubt, reference here to the five year notice provision in Section A3 does not implicate the 12-month minimum stay requirements set forth in 20 VAC 5-312-80(Q), which require a customer returning to their incumbent utility to continue to purchase power from such incumbent utility for at least 12-months. (*See* JA 154).

[3] *Application of Virginia Electric and Power Company for approval of 100 percent renewable energy tariffs pursuant to §§ 56-577 A 5 and 56-234 of the Code of Virginia*, Case No. PUR-2017-00060 (May 9, 2017).

This brief first provides background on electricity de-regulation and regulation of the electric utility industry in the Commonwealth of Virginia. It then explains electric utility planning and how Dominion operates within PJM (as defined below) to serve its customers. Finally, the brief recounts the proceedings before the Commission, the Commission's decisions on these matters, and Dominion's actions in response.

STATEMENT OF THE FACTS

I. Section A5 in the Context of Virginia's Re-Regulation of the Electric Utility Industry.

In the late 1990s many state legislatures passed statutes to de-regulate the electric utility industry and introduce competition among providers of electric generation.[4] The Commonwealth of Virginia was no exception, and the General Assembly enacted the Virginia Electric Utility Restructuring Act in 1999 to introduce competition and to begin deregulation of the Virginia electric utility industry. *See* Virginia Electric Utility Restructuring Act, 1999 Va. Acts, ch. 411 (codified as Va. Code §§ 56-576 – 56-595) (amended 2007); *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 699, 733 S.E.2d 250, 252 (2012); *Potomac Edison Co. v. State Corp. Comm'n*, 276 Va. 577, 580, 667 S.E.2d 772, 773 (2008).

[4] *See* Brian R. Greene & Katharine A. Hart, *Public Utility Law*, 43 U. RICH. L. REV. 295, 296 (2008).

However, when retail competition failed to develop,[5] the Virginia General Assembly passed the Regulation Act in 2007 to end deregulation and prescribe a new regulatory regime. *See* Electric Utility Regulation Act, 2007 Va. Acts, ch. 888 (codified as Va. Code §§ 56-576 – 56-596); *Appalachian Power Co.*, 284 Va. at 700, 733 S.E.2d at 252 .

Although the Regulation Act ended deregulation and re-created the electric utility's monopoly, the new regulatory regime carved out certain exceptions to promote competition for retail customers. As originally drafted and passed, the Regulation Act only allowed customers to shop for energy from CSPs if their demand – or aggregated demand – exceeded five megawatts. *See* H.B. 3068, 2007 Gen. Assemb., Reg. Sess. (Va. 2007) (as passed by the House and Senate Mar. 12, 2007). The original bill did not contain Section A5. *Id.* Section A5 exists because Governor Kaine added it to create an entirely separate mechanism by which customers of any size or class could shop for a specific type of energy: 100 percent renewable energy. *See* H.B. 3068, 2007 Gen. Assemb., Reconvened Sess. (Va. 2007) (an amend. in the nature of a sub. as proposed by the Gov. Mar. 26, 2007). The General Assembly adopted Governor Kaine's amendments. *See* H.B. 3068, 2007 Gen. Assemb., Reconvened Sess. (Va. 2007) (enacted) . Upon

[5] *See* Greene & Hart, *supra* note 4, at 296-97.

passage of the Regulation Act, Governor Kaine stated that his goals "were to ensure that appropriate consumer protection measures were in place to keep Virginians' electric rates among the lowest in the country, and to ensure that electric companies have incentives to conserve energy, produce cleaner energy, and take other steps to protect the environment."[6] The General Assembly approved these exceptions as proposed by Governor Kaine because retaining limited competition for large customers and for customers of renewable energy benefits the citizens of Virginia by promoting the development of renewable energy options.[7]

II. Virginia Participates in Interstate Wholesale Markets to Protect Prices and Ensure Reliability.

As part of the de-regulation of the electricity market in the 1990s, the Virginia Electric Utility Restructuring Act required Dominion and Appalachian Power Company ("APCo") to join regional transmission entities. *See* Virginia Electric Utility Restructuring Act, 1999 Va. Acts, ch.

[6] Gov. Tim Kaine, Press Release, (March 27, 2007), *available at* https://votesmart.org/public-statement/249844/governor-kaine-announces-action-on-general-assembly-legislation#.WhMEBFWnG71 ("Kaine 2007 Press Release").

[7] *See id*.

411. As a result, Dominion applied to join PJM Interconnection, L.L.C. ("PJM") in 2003 and completed interconnection in 2005.[8]

As part of PJM, Dominion sells all of the electricity it generates into the PJM interstate market and then separately purchases back from PJM all of the electricity it needs to meet its customers' needs.[9] In Dominion's press release announcing its application to join PJM, Dominion stated that "PJM's broader region means increased generation resources to meet unexpected shifts in demand or supply leading to a higher degree of reliability."[10]

Dominion's participation in PJM moots almost all of Dominion's concerns about reliability planning, particularly with regards to large customers returning to Dominion's customer base with fewer than five years' notice. Although Dominion, as an electric utility, is responsible for

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[8] *See* Press Release, Dominion Energy, Dominion Successfully Integrates Into PJM Interconnection (May 1, 2005) (*available a*t http://dominionenergy.mediaroom.com/news?item=71193); Press Release, Dominion Energy, Dominion Applies to Join PJM Interconnection (Jun. 27, 2003) (*available at* http://dominionenergy.mediaroom.com/news?item= 71364).

[9] *See* Virginia Electric and Power Company's Report of Its Integrated Resource Plan, Case No. PUR-2017-00051, at 32 (May 1, 2017) (hereinafter 2017 Dominion IRP).

[10] Press Release, Dominion Applies to Join PJM Interconnection, *supra* note 8.

ensuring sufficient electric generation capacity for its customers, Dominion actually already purchases more energy from PJM than it generates and sells to PJM.[11] Therefore, large customers returning to Dominion do not pose a threat to reliability, as Dominion claims. *See* Dominion Brief 6-7. The arrival or departure of a large customer with over five megawatts of demand would not require Dominion to drastically change its planning because Dominion has several options to obtain the necessary energy from PJM. For example, Dominion could purchase the energy from PJM's capacity market with three years' notice, from PJM's Day-Ahead Market with one days' notice, or from PJM's Real-Time Market with five minutes' notice.[12] The logical conclusion of Dominion's argument is that if a *new* customer required more than five megawatts of electricity, Dominion would need five years' notice to plan for such an increase in generation. *See* Dominion Brief 6-7. It is well-documented by Dominion's most recent deals with Amazon and Facebook that this is not the case.[13]

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[11] *See* 2017 Dominion IRP at 32, 53-55.

[12] *See id.* at 2, 53; *see also* Buying and Selling Energy. PJM: Learning Center, *available at* http://learn.pjm.com/three-priorities/buying-and-selling-energy.aspx (last visited Nov. 26, 2017).

[13] *See* Press Release, Dominion Energy, Dominion Energy Virginia to Power New Facebook Data Center with Renewable Energy (Oct. 5, 2017) (*available at* http://dominionenergy.mediaroom.com/2017-10-05-Dominion-

III. Procedural History.

On August 22, 2016, Direct Energy filed an application with the Commission to be licensed as an electricity CSP, stating that it intended to provide "100 percent renewable energy product offerings" to residential customers located in the Dominion service territory. (JA 3).

On August 26, 2016, Direct Energy filed its Petition for a declaratory judgment. (JA 2-10).

On September 20, 2016, the Commission issued an Order for Comment, which among other things, determined that APCo and Dominion were necessary parties to the Declaratory Judgment proceeding and directed them to file responses. (JA12-15).

On October 6, 2016, the Commission granted Direct Energy a license to conduct business as an electricity CSP to serve residential customers throughout the Commonwealth of Virginia. (JA 21).

Energy-Virginia-to-Power-New-Facebook-Data-Center-with-Renewable-Energy) (announcing an agreement to power a new 1 million square foot data center with solar energy, but not disclosing the required generation capacity); Press Release, Dominion Energy, Dominion Announces Significant Expansion of Solar Energy in Virginia in Collaboration with Amazon (Nov. 17, 2016) (*available at* http://dominionenergy.mediaroom.com/2016-11-17-Dominion-Announces-Significant-Expansion-of-Solar-Energy-in-Virginia-in-Collaboration-With-Amazon) (announcing an agreement to begin construction in 2016, complete construction and bring into service 180 megawatts (AC) of solar in Virginia before the end of 2017).

On October 11, 2016, APCo and Dominion each filed responses in opposition to the rulings requested in Direct Energy's Petition. (JA 20-30, 33-55).

On December 1, 2016, the Commission issued an Order permitting Environmental Respondents to file a late pleading responsive to Direct Energy's Petition. (JA 58-62).

On January 12, 2017, APCo and Dominion each filed responses to the Environmental Respondents' filing. (JA 81-86, 90-100).

On March 15, 2017, the Commission issued its Final Order on Direct Energy's Petition for Declaratory Judgment ("Final Order") finding: (1) a CSP would not be able to continue to market to and serve an incumbent utility's customer base after the incumbent utility begins offering a 100 percent renewable energy tariff in its service territory; (2) a CSP may offer a 100 percent renewable energy product to commercial and industrial customers whose demand for the previous calendar year exceeded five megawatts; and (3) that the five-year notice requirement in Section A3 does not apply to those customers purchasing a 100 percent renewable energy product from a CSP under Section A5. (JA 121-32).

On April 4, 2017, Dominion filed a Petition for Limited Reconsideration seeking to clarify the second and third parts of the

Commission's Final Order. (JA 134-47). Dominion specifically requested confirmation that the Commission ruled that: (1) a CSP may offer a 100 percent renewable energy product pursuant to Section A5 to customers with a demand exceeding five megawatts, and (2) such customers are not subject to the five year advance notice requirement set forth in Section A3. (JA 134-47).

On April 5, 2017, the Commission granted Dominion's request for reconsideration and suspended the Final Order. (JA 149-50).

On April 26, 2017, the Commission issued its Order on Reconsideration ("Order on Reconsideration"). (JA 152-55). The Commission found that (1) Section A5 applies to all retail customers regardless of customer class and allows these customers to purchase from a CSP if the electric energy is provided 100 percent from renewable energy, and (2) customers purchasing 100 percent renewable energy from a CSP pursuant to Section A5 are not subject to the five years' advance notice requirement in Section A3. (JA 152-55).

On May 25, 2017, Dominion filed its Notice of Appeal. (JA 156-59).

On November 3, 2017, Dominion submitted its Opening Brief, to which this is a response.

ASSIGNMENTS OF CROSS-ERROR

1. The Commission was correct in its Final Order when it found that customers that are permitted to purchase energy from a CSP under Va. Code Section 56-577(A)(3), including 100 percent renewable energy, may also choose to purchase energy from a CSP under Va. Code Section 56-577(A)(5). (JA 131).

2. The Commission was correct in its Order of Reconsideration when it found that customers that are permitted to purchase energy from a CSP under Va. Code Section 56-577(A)(3), including 100 percent renewable energy, may also choose to purchase energy from a CSP under Va. Code Section 56-577(A)(5). (JA 153).

3. The Commission was correct in its Final Order when it found that any commercial or industrial customer, regardless of the size of the customer, may purchase energy from a CSP under Va. Code Section 56-577(A)(5) without being subject to any of the conditions imposed on certain customers taking services from a CSP under Va. Code Section 56-577(A)(3). (JA 131).

4. The Commission was correct in its Order of Reconsideration when it found that any commercial or industrial customer, regardless of the size of the customer, may purchase energy from a CSP under Va. Code Section 56-577(A)(5) without being subject to any of the conditions imposed on certain customers taking services from a CSP under Va. Code Section 56-577(A)(3). (JA 153-54).

ARGUMENT

The plain language of Section 56-577(A) of the Code is unambiguous and confirms the Commission's ruling. Moreover, even if there were ambiguity in the statute's language, based upon legislative history and the rules of statutory construction, the Commission's ruling fulfills the legislature's intention. Section A5 clearly allows *all* retail customers to purchase electric energy provided 100 percent renewable energy from a

CSP if the incumbent utility does not have an approved tariff for 100 percent renewable energy. There are no qualifications or exceptions in Section A5 that limit the provision and, as a result, it should apply to all retail customers uniformly regardless of their size. *See* Va. Code § 56-577(A)(5) . Furthermore, there is no indication in Section 56-577(A) of the Code as a whole that the notice requirements set forth in Section A3 should apply to purchasers of 100 percent renewable energy under Section A5.

I. Standard of Review.

The Constitution of Virginia and statutes enacted by the General Assembly provide the Commission broad and extensive powers in the control and regulation of public service corporations and charge the Commission with administrative, judicial and legislative functions. *See* Va. Const. art. IX, § 2; *Va. Elec. & Power Co. v. State Corp. Comm'n,* 284 Va. 726, 735, 735 S.E.2d 684, 688 (2012); *Level 3 Commc'ns, LLC v. State Corp. Comm'n*, 282 Va. 41, 47, 710 S.E.2d 474, 477-78 (2011); *Potomac Edison Co.*, 276 Va. at 586, 667 S.E.2d at 777. As a result, when determining the appropriate standard of review for the Commission's decisions, the Court begins by according the Commission a "presumption of correctness." *Appalachian Power Co.*, 284 Va. at 703, 733 S.E.2d at 254; *Potomac Edison Co.*, 276 Va. at 586, 667 S.E.2d at 777; *N. Va. Elec.*

Coop. v. Va. Elec. & Power Co., 265 Va. 363, 368, 576 S.E.2d 741, 743 (2003) (quoting *Bd. of Supervisors of Campbell Cnty. v. Appalachian Power Co.*, 216 Va. 93, 105, 215 S.E.2d 918, 927 (1975).

The Court reviews questions of statutory construction and law de novo. *Office of Atty. Gen., Div. of Consumer Counsel v. State Corp. Comm'n*, 288 Va. 183, 191, 762 S.E.2d 774, 778 (2014); *Level 3 Commc'ns, LLC*, 282 Va. 46, 710 S.E.2d at 477; *Christian v. State Corp. Comm'n*, 282 Va. 392, 396, 718 S.E.2d 767, 769 (2011). However, although questions of statutory construction and law receive de novo review, the Court "will not disturb the Commission's analysis when it is based upon the application of correct principles of law." *Office of Att'y Gen*, 288 Va. at 191, 762 S.E.2d at 778 (quoting *Va. Elec. & Power Co.,* 284 Va. at 735, 735 S.E.2d at 688).

II. The Commission's Ruling Achieves the General Assembly's Intention.

This Court has declared many times that the "primary objective in statutory construction is to determine and give effect to the intent of the legislature . . . ." *Appalachian Power Co.*, 284 Va. at 706, 733 S.E.2d at 256 (citing *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 99–100, 546 S.E.2d 696, 702 (2001). As with any legal question, the inquiry begins with the statute's actual language. *Appalachian Power Co*., 284 Va. at 705, 733

S.E.2d at 255) ("In any case involving statutory construction we begin with the language of the statute."). When, as here, a statute's language is unambiguous, the Court "must apply the plain meaning of that language." *Appalachian Power Co.*, 284 Va. at 706, 733 S.E.2d at 256. In fact, the Court must "presume that the General Assembly, in framing a statute, chose its words with care." *Smith v. Commonwealth*, 282 Va. 449, 454, 718 S.E.2d 452, 455 (2011) (citing *Halifax Corp.*, 262 Va. at 100, 546 S.E.2d at 702).

If, however, a statute's language is ambiguous, the Court "must apply the interpretation that carries out the legislative intent." *Appalachian Power Co.*, 284 Va. at 706, 733 S.E.2d at 256. The rules of statutory construction "prohibit adding language to or deleting language from a statute." *Id*. Under either a plain language reading or a reading to resolve ambiguity to achieve legislative intent, Dominion's arguments fail. Section A5 is open to any customer of any size and does not impose a five year notice provision.

a. The plain language of Section A5 clearly and unambiguously confirms the Commission's ruling.

Section A5's plain language is clear: after re-regulation, "individual retail customers of electric energy within the Commonwealth, regardless of customer class, shall be permitted" to shop for 100 percent renewable energy from a CSP. Va. Code § 56-577(A)(5) . Section A5 does not contain

any language limiting participation; it is open to *all* "retail customers, regardless of customer class." Va. Code § 56-577(A)(5). Dominion does not, and cannot, identify a single word or phrase *in Section A5* precluding large customers from purchasing 100 percent renewable energy from a CSP.

Likewise, Section A5 does not impose notice requirements. Dominion does not, and cannot, identify a single word or phrase *in Section A5* that imposes a notice of return. The section does, however, contain other limitations. No customer of *any* size may purchase 100 percent renewable energy from a CSP after the Commission approves a utility tariff from the incumbent utility to offer that exact product. Va. Code § 56-577(A)(5). To the extent the General Assembly intended to "protect both the utility and its non-switching customers" (Dominion Brief at 15), it did so by empowering Dominion to terminate all customers' rights to shop under Section A5 by offering a tariff for 100 percent renewable energy. Until that time, the plain language of Section A5 allows all customers to shop for 100 percent renewable energy without the burden of a return notice provision.

b. The plain language of Section A3 confirms the Commission's ruling.

Nothing in Section A3's plain language supports Dominion's arguments. Section A3 states, in relevant part:

> [S]ubject to the provisions of subdivisions 4 and 5, only individual retail customers of electric energy within the Commonwealth, regardless of customer class, whose demand during the most recent calendar year exceeded five megawatts but did not exceed one percent of the customer's incumbent electric utility's peak load during the most recent calendar year . . . shall be permitted to purchase electric energy from any supplier of electric energy licensed to sell retail electric energy within the Commonwealth . . . .

Va. Code § 56-577(A)(3).

The Commission correctly ruled that Va. Code 56-577(A) creates three routes to shopping. (JA 129-30, 153). Section A3 is the first. By its plain and unambiguous language, Section A3 allows one particular customer type (*i.e.*, large customers) to shop, and that right is unconstrained. Large customers may shop for *any* kind of power from "*any* supplier of electric energy licensed to sell retail electric energy within the Commonwealth." Va. Code § 56-577(A)(3) (emphasis added).

Section A3 does, however, impose certain obligations on large customers shopping pursuant to that section:

> If such customer does purchase electric energy from licensed suppliers after the expiration or termination of capped rates, it shall not thereafter be entitled to purchase electric energy from the incumbent electric utility without giving five year' advance written notice of such intention to such utility . . . .

Va. Code § 56-577(A)(3)(c).

The language could not be clearer. Although large customers may buy any kind of power from any licensed CSP, "such customer" (*i.e.*, a

customer shopping under Section A3) may not return to the utility without giving five years' notice. Va. Code § 56-577(A)(3); *see also* JA 131, 153. Dominion has not, and cannot, identify any language in Section A3 that textually transposes the size and notice limitations in Section A3 onto Section A5. As the Commission correctly ruled, Section A3 and Section A5 are different paths to shopping, each with its own rights and limitations. (JA 153).

c. The Commission's order is correct, even when reading Sections A3 and A5 as part of a statutory whole.

As the Commission found, the plain and unambiguous reading of Section 56-577(A) provides three discrete paths for customers to purchase energy from CSPs. (*See* JA 129-30, 153). Dominion actually concedes this essential point. Dominion Brief at 27-28 (Section A3 "clarifies that not only are large customers eligible to purchase electric energy from a CSP under Section A3 after the expiration or termination of capped rates, but also that other customers may qualify to procure service from CSPs if they fit within the requirements of Section A4 and Section A5."). Dominion, however, incorrectly identifies what makes a customer "fit within" Section A5. When viewed as whole, it is clear that all it takes to "fit within" Section A5 is to purchase 100 percent renewable energy.

Dominion argues, however, that Section A3 is the only avenue for large customers to purchase from CSPs. *See* Dominion Brief at 24-26. To support this argument, Dominion cites the proper law but misapplies it. Dominion correctly notes that the Court should "look at the entire statute" (Dominion Brief at 19) to determine the legislature's intent, but Dominion then reaches the wrong conclusion about that legislative intent.

When searching for legislative intent, context is key. *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (the Court must evaluate "the entire statute . . . to place its terms in *context* to ascertain their plain meaning . . . .") (quoting *Eberhardt v. Fairfax Cnty. Employees' Retirement System Bd. of Trustees*, 283 Va. 190, 194-95, 721 S.E.2d 524, 526 (2012)) (emphasis added). That context is this: Sections A3 and A4 create a limited right for large consumers to shop for *any kind of energy*, while simultaneously protecting the utilities by imposing a five year notice provision. In contrast, Section A5 creates a limited right for every customer to shop for *a specific kind of energy*, while simultaneously protecting the utilities by eliminating that option once the utility offers *that specific kind of energy.* Nothing about this interpretation creates internal conflict, nor is the statute as a whole ambiguous, which the Commission correctly concluded. (*See* JA 152-54).

In Virginia, "when one statue addresses a subject in a general manner and another addresses a part of the same subject in a more specific manner, the two statutes should be harmonized, if possible, and when they have a conflict, the more specific statute prevails." *Lynchburg Div. of Social Services v. Cook*, 276 Va. 465, 481, 666 S.E.2d 361, 369 (2008) (quoting *Alliance to Save the Mattaponi v. Commonwealth, Dept. of Envtl. Quality*, 270 Va. 423, 439-40, 621 S.E.2d 78, 87 (2005)).

There is no conflict in Section 56-577(A), but even if conflict did exist, Dominion misunderstands the law by claiming that "Section A3 is the more specific statute." Dominion Brief at 38. Clearly, Section A5 is the more specific statute as it mandates not only the type of energy a customer must purchase (*i.e.*, renewable), but the type of renewable energy – *only* 100 percent renewable energy. Va. Code § 56-577(A)(5). The mere fact that Section A3 allows customers above a certain size to purchase from a CSP does not preclude large customers from purchasing a very specific type of energy pursuant to Section A5. *See Lynchburg Div. of Social Services*, 276 Va. at 481, 666 S.E.2d at 369 (holding that the Court of Appeals erred in applying the statutory requirements from general custody statutes instead of the more specific statutory requirements of certain foster care statutes); *Peerless Ins. Co. v. Cty. of Fairfax*, 274 Va. 236, 244, 645 S.E.2d 478, 483

(2007) (holding that the fact that a multitude of other statutes address storm water detention ponds does not preclude the application of a specific statute addressing the same matter).

Additionally, Section A5 is more specific because it is not open-ended like Section A3. As long as a large customer provides notice, that customer may shop for cheaper power forever under Section A3. Dominion can do nothing to stop it. On the other hand, Dominion has the authority to absolutely terminate the right to shop under Section A5 by offering its own tariff for 100 percent renewable energy.

In fact, if this Court considers legislative history when construing the statute as a whole, it is clear that Section A5 is more specific and is open to large customers. As proposed in the General Assembly, the Regulation Act did not include Section A5. *See* H.B. 3068, 2007 Gen. Assemb., Reg. Sess. (Va. 2007) (as passed by the House and Senate Mar. 12, 2007). Governor Kaine added it, and in his press release observed that the addition of Section A5 provided "additional flexibility for industrial and commercial consumers to use competitive electricity providers" and also "continued green-power tariffs for Virginia's consumers and strengthened

provisions for renewable energy . . . ."[14] Section A5, which Governor Kaine added to the Regulation Act, is narrower than Section A3 in that it advances renewable energy and promotes industrial and commercial customers' access to renewable energy. *See* H.B. 3068, 2007 Gen. Assemb., Reconvened Sess. (Va. 2007) (an amend. in the nature of a sub. as proposed by the Gov. Mar. 26, 2007).

Read as a whole and in the proper context, the statute provides customer flexibility in procuring energy from CSPs while simultaneously protecting utilities. The Commission's ruling does not create any conflict, but even if the Court were to find that Section A3 and A5 do conflict, Section A5 is more specific than Section A3, and the Commission's ultimate holding would still be correct. The Court should affirm the Commission's Final Order and Order of Reconsideration.

d. Failing to find any actual statutory text supporting its arguments, Dominion attempts to use principles of statutory construction to rewrite the statute, which also fail.

The Commission correctly ruled that the plain language of Section A5 grants all customers the right to shop for a particular type of renewable energy. (JA 131, 153). The Commission also correctly ruled that the plain

[14] Kaine 2007 Press Release.

language of Section A5 does not in any way curtail customer rights under Section A3. (JA 130-31, 153). Yet despite the statute's plain language, Dominion attempts to employ principles of statutory construction to rewrite Section 56-577. These attempts fail.

i. According to Dominion, the intended meaning of "subject to the provisions of subdivisions 4 and 5" is the opposite of its plain meaning.

Section A3 contains no language limiting Section A5. On the contrary, Section A5 actually limits Section A3 because large customers' exclusive right to shop for energy under Section A3 is "subject to the provisions of subdivisions 4 and 5." Va. Code § 56-577(A)(3). At times, Dominion pretends this qualifying language in Section A3 does not exist at all. Dominion Brief at 25 ("There is *no* qualification or exception written into [Section A3] . . . .") (emphasis in original). At other times, Dominion acknowledges the qualification language in Section A3 but interprets it to mean the exact opposite of its plain meaning – *i.e.*, that Sections A4 and A5 are actually somehow subject to the provisions of Section A3. Dominion Brief at 28 ("The 'subject to' clause cannot be read either syntactically or logically to mean the requirements in Section A4 and A5 somehow supersede those in Section A3").

Dominion's argument would result in a construction counter to the plain and rational meaning of the term "subject to." *See e.g.*, *Cuccinelli*, 283 Va. at 425, 722 S.E.2d at 629 (reaffirming that "when the language of a statute is unambiguous, we are bound by the plain meaning of that language" (quoting *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)); *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983) (stating that the "plain, obvious, and rational meaning of a statute is always to be preferred"). Moreover, "[w]here the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed." *Turner v. Wexler,* 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)). Here, the legislature expressly said that Section A3's limited right to shop for large customers is subject to Section A4 (which allows small customers to aggregate and shop) and subject to Section A5 (which allows *all* customers of *every* size to shop for a particular product: 100 percent renewable energy). Dominion is wrong. The statute's language is clear, and the restraints on large customers under Section A3 are inapplicable to large customers

purchasing energy under Section A5. Section A5 has its own rights and constraints that apply in that narrow, special context.

ii. An omission in Section A5 is indicative that the General Assembly intended to exclude such language.

Dominion incorrectly argues that the General Assembly should have written the statute differently if it intended to allow large customers to purchase energy under Section A5. Dominion Brief at 25. Dominion further argues that – absent such additional language from the General Assembly – the Commission's ruling in this case is wrong. Dominion Brief at 26. One could just as easily argue, however, that the General Assembly *could* have written Section A3 to expressly exclude any customer eligible to shop pursuant to Section A5. The General Assembly also *could* have written Section A5 to impose a five year notice provision on any customer consuming five megawatts or more. Yet Section A5 contains no such language, and the language the General Assembly omits in a statute is just as indicative of legislative intent as the language it employs. *See, e.g., Belton v. Crudup,* 273 Va. 368, 373, 641 S.E.2d 74, 77 (2007) (holding that where the General Assembly specifies several exceptions to a rule, no others exist); *Jackson v. Fid. & Deposit Co.,* 269 Va. 303, 313, 608 S.E.2d

901, 906 (2005) (holding that "because the statute specifically lists exceptions . . . those exceptions are the only ones allowed by law").

Quite simply, Section A5 does not impose size or notice restrictions because Section A5 has no such limiting language, and Dominion's request that the Court write such limitations into Section A5 are improper. *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. at 100, 546 S.E.2d at 702 ("[W]hen the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional."). Dominion's appeal, when boiled down, simply asks the Court to write Section A3 limitations into Section A5 where none currently exist. Dominion Brief 16 ("[A] large customer has a right to take service from a CSP *if and only if the conditions of Section A3 are satisfied.*") (emphasis in original). To do as Dominion asks would directly conflict with principles of judicial deference. *Jackson,* 269 Va. at 313, 608 S.E.2d at 906 ("Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning."). This Court should not grant Dominion's request to rewrite Section 56-577(A).

III. Even if the Court looks beyond the statute's plain language, the Commission correctly concluded large customers may purchase 100 percent renewable energy under Section A5 without the imposition of a return notice provision.

The plain language of Section 56-577(A) is clear and unambiguous, but even if the Court looks beyond the statute's text, the conclusion is the same: the Commission ruled correctly. Where a statute's language "is subject to more than one interpretation, [the Court] must apply the interpretation that carries out the legislative intent." *Appalachian Power Co.*, 284 Va. at 706, 733 S.E.2d at 256. To the extent the Court examines evidence other than statutory text, the legislative history as well as contemporaneous writings regarding the legislation and the legislative intent further support the Commission's ruling.

a. The Commission correctly concluded that renewable energy enjoys a "special status" in the Code, which legislative history confirms.

In its order below, the Commission correctly concluded that renewable energy enjoys a "special status" in Virginia. (JA 153) ("In enacting Section A 5, the General Assembly has given special status to electric energy provided 100 percent from renewable energy."). Dominion, however, disputes this "special status." Dominion Brief at 39-40. Seemingly, Dominion simultaneously demands that this Court look beyond

the statute's text while ignoring the extra-statutory evidence supporting the Commission's conclusion. In reality, legislative history shows that Section A5 post-dates Section A3 and was added as a means for customers to access a special type of energy (*i.e.*, 100 percent renewable energy), regardless of customer class or size.

On March 12, 2007, the House and Senate of Virginia voted and passed House Bill 3068. H.B. No. 3068, 2007 Gen. Assemb., Reg. Sess. (Va. 2007). At this time House Bill 3068 contained Sections A3 and A4, but did not contain Section A5. *See id*. On March 26, 2007, Governor Kaine sent proposed amendments to the House for consideration. *See* H.B. 3068, 2007 Gen. Assemb., Reconvened Sess. (Va. 2007) (an amend. in the nature of a sub. as proposed by the Gov. Mar. 26, 2007). Governor Kaine's amendments added Section A5 to the bill, the reference that Sections A3 is subject to Section A5 (instead of only subject to Section A4), as well as a few additional changes. *Id*. On April 4, 2007 at a reconvened session of the General Assembly of Virginia, the General Assembly voted and passed House Bill 3068, as amended by the Governor. H.B. 3068, 2007 Gen. Assemb., Reconvened Sess. (Va. 2007) (enacted).

Governor Kaine added Section A5 to promote renewable energy in the Commonwealth. *See* H.B. 3068, 2007 Gen. Assemb., Reconvened

Sess. (Va. 2007) (an amend. in the nature of a sub. as proposed by the Gov. Mar. 26, 2007). Upon the passage of the Regulation Act, Governor Kaine stated that one of his primary goals in amending the bill was "to ensure that electric companies have incentives to conserve energy, produce cleaner energy, and take other steps to protect the environment."[15] The legislative history of the Regulation Act and Governor Kaine's remarks underscore the importance of renewable energy promotion in the Commonwealth. *See id.*; H.B. 3068, 2007 Gen. Assemb., Reconvened Sess. (Va. 2007) (an amend. in the nature of a sub. as proposed by the Gov. Mar. 26, 2007). Section A5 was added in a deliberate manner as an exception to the exclusive utility franchise in order to promote competition for a specific type of renewable energy and make it available to all customers. *See* H.B. 3068, 2007 Gen. Assemb., Reconvened Sess. (Va. 2007) (an amend. in the nature of a sub. as proposed by the Gov. Mar. 26, 2007).

b. Contemporaneous summaries of the Regulation Act prove that Sections A3 and A5 are equally available to large customers.

After the passage of the Regulation Act, the Act was summarized and presented in several texts. For example, Virginia's Legislative Information

[15] Kaine 2007 Press Release.

System prepared a summary of the final HB 3068, describing Sections A3 and A4 in great detail, including the applicable size requirements and the five-year notice requirement. *See* Va. Legislative Info. System, Summary of HB 3068 Electric Utility Service (2007). The summary separately mentions that the bill allows "competitive service providers to offer 100% renewable power to retail customers in any area of the Commonwealth where the customer's incumbent utility does not offer such a tariff." *Id.* Similar to the plain language of the statute, the summary does not mention any restrictions, qualifications, or exceptions to Section A5. *See id.* If the restrictions set forth in Section A3 were meant to apply to Section A5, as Dominion contends, the contemporaneous summary prepared by the Virginia Legislative Information System would reflect that intent. *Id.*; *see also* Dominion Brief 24-26.

In addition, the Virginia Department of Mines, Minerals, and Energy summarized the Regulation Act in the Virginia Energy Plan of 2007 (the "2007 Energy Plan"). *See generally*, Commonwealth of Va. Dept. of Mines, Minerals, and Energy, The Virginia Energy Plan (2007). The 2007 Energy Plan states that pursuant to the Regulation Act, "customers with an electrical demand of more than 5 megawatts, but less than 1 percent of the utility's load, may shop for power…" and "[n]onresidential customers may

aggregate their demand to meet the 5-megawatt threshold." *Id*. at 49. In an entirely separate section, the 2007 Energy Plan adds that the Regulation Act contains a provision providing that "[i]f a utility does not offer a 100 percent renewable energy retail product to its customers by the end of the rate-cap period, a licensed retailer can offer such a product to all classes of customers." *Id*. at 88. As with the other secondary materials, the 2007 Energy Plan supports the plain language of the statute and the proposition that Section A3 does not limit Section A5. *See id.* at 49, 88. The legislative history of the Regulation Act demonstrates that Section A5 is a discrete exception added by Governor Kaine available to all customers, regardless of size.

IV. The Commission properly rejected Dominion's "bad policy" arguments, which are not even factually accurate.

The Commission properly rejected Dominion's "bad policy" arguments (which are not even factually accurate), and this Court should reject them as well. Dominion claims that the notice provisions in Section A3 "protect both the utility and its non-switching customers from the risks associated with large customers leaving and returning to the utility's system." Dominion Brief at 15. Without five years' prior notice, Dominion argues, a "large customer's unanticipated return impacts the Company's statutory duty to plan to serve its customers with 'reasonably adequate

service and facilities at reasonable and just rates.'" Dominion Brief at 41. This argument ignores both recent history and the realities of PJM.

Dominion does not, as it claims, need five years' notice to ensure customer service. As a member of PJM, Dominion has access to the entire PJM wholesale market.[16] In the event Dominion's service obligations increase (*i.e.*, if a large customer returns), Dominion can purchase adequate additional power from the PJM wholesale market to meet those needs.[17] Nothing in its brief or the record below suggests otherwise. In addition, Dominion quietly ignores the fact that it does not require five years' advance notice from *new* customers to ensure reliability at reasonable rates. For example, Dominion's recent deals with new customers, such as Facebook and Amazon, indicate that it takes much less than five years to meet five megawatts of increased demand through new renewable generation.[18]

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[16] *See* 2017 Dominion IRP at 32, 53-55.

[17] *Id.* at 2, 53; s*ee also* Buying and Selling Energy. PJM: Learning Center, *supra* note 13.

[18] *See* Press Release, Dominion Energy, Dominion Energy Virginia to Power New Facebook Data Center with Renewable Energy (Oct. 5, 2017), *supra* note 14 (although the peak demand requirements have not been disclosed, every indication points to the one million square foot data center requiring significantly more than five megawatts); Press Release, Dominion Energy, Dominion Announces Significant Expansion of Solar Energy in

Dominion's argument on policy also wholly ignores another utility protection in the Code. While the General Assembly omits the return notice provision in Section A5, that section does contain an express limitation on customers' ability to shop for renewable energy. The moment that the Commission approves a Dominion tariff to offer 100 percent renewable energy, no customer of any size or class may shop under Section A5. Va. Code. § 56-577(A)(5); JA 125. The General Assembly did not need to add in the notice provision because Section A5 already has sufficient utility safeguards.

Virginia in Collaboration with Amazon (Nov. 17, 2016) *supra* note 14 (announcing plans to construct and put into service an additional 180 megawatts (AC) of solar in Virginia within thirteen months from the announcement).

CONCLUSION

For the reasons stated above, the Court should affirm the Commission's Final Order and Order on Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(h) this Brief complies with Rule 5:26(b) by containing a total of less than 50 pages and fewer than 8,750 words.

Counsel for Appellee hereby certifies that on this 28th day of November 2017, three bound copies of the foregoing Brief of Apellee were hand-filed with the Clerk of the Supreme Court of Virginia, and one electronic version of the Brief of Appellee was submitted via the Virginia Appellate Court eBrief System (VACES), pursuant to Rules 5:26 and 5:32(a)3(i) of the Rules of the Supreme Court of Virginia.

I further certify that, on this same day, one bound copy of the Brief of Appellee and Appendix were served via U.S. first-class mail, and one electronic copy was served via email on each of the following:

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