APPLICATION OF

MASSANUTTEN PUBLIC SERVICE CORPORATION

CASE NO. PUR-2024-00017

For an increase in water and sewer rates

HEARING EXAMINER'S RULING

July 3, 2024

On January 31, 2024, Massanutten Public Service Corporation ("Massanutten" or "Company") filed with the State Corporation Commission ("Commission") an application pursuant to Chapter 10 of Title 56 of the Code of Virginia, and Rule 20 VAC 5-201-10 *et seq.*, requesting authority for a general increase in rates ("Application"). The Company requested that the proposed rate increase become effective, subject to refund, pending a final order in this matter, no later than 180 days after the Company's Application is deemed complete. The requested increases constitute a 25.3% increase in water revenues and an 18.92% increase in wastewater revenues, for a combined increase of 21.74%.[1]

On February 15, 2024, the Commission issued an Order for Notice and Hearing that, among other things, directed Massanutten to provide notice of its Application; scheduled a public hearing to receive testimony and evidence on the Application as well as public witness testimony; allowed interested persons an opportunity to file comments on the Application or participate as respondents; directed the Commission's Staff ("Staff") to investigate the Application and present testimony of its findings and recommendations; and appointed a Hearing Examiner to conduct further proceedings in this matter on behalf of the Commission.

On May 13, 2024, Rockingham County (the "County"), Massanutten Water and Sewer Authority (the "Authority") and the Massanutten Resort Customers (collectively "Joint Respondents"), filed a Joint Motion to Dismiss and Request for Expedited Consideration ("Joint Motion"). The Joint Motion requested that Massanutten's Application be dismissed prior to the implementation of interim rates. In the alternative, the Joint Motion requested that Massanutten's current rates should be adopted as the interim rates, pending final Commission action on the Application.

On May 15, 2024, I issued a ruling directing that Massanutten and Staff file a response on or before May 29, 2024, and directing that the Joint Respondents file a reply on or before June 6, 2024. Both Massanutten and Staff filed a response on May 29, 2024, and the Joint Respondents filed a reply on June 6, 2024.

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[1] Application at 1-2.

Background

The Joint Motion

The Joint Motion provided background for the requested relief. Massanutten is a public utility with a certificated monopoly to provide water and sewer services to customers within its service territory, wholly located in Rockingham County, Virginia.[2] On April 26, 2023, the County initiated a condemnation proceeding for the Massanutten water and sewer systems, which is currently being litigated in the Circuit Court of Rockingham County.[3] The Joint Motion stated that the parties are currently completing an associated inventory as required by § 15.2-1906, and that the only remaining step is to determine the amount of just compensation.[4] The County and the Authority expect that the condemnation proceedings will be concluded, or very nearly concluded, prior to the issuance of a final order in this rate case proceeding.[5]

With respect to Massanutten's request to increase its water and sewer rates, the Joint Motion stated that the proposed increases "are unsupportable on their face and would impose an impermissible level of rate shock on [] customers."[6] Moreover, the Joint Motion asserted that the requested rate increase does "not reflect a bona fide effort to establish fair and reasonable rates on a going-forward basis given that the County is in the process of condemning and taking over the [Massanutten] Systems."[7]

Assuming that the condemnation proceeding is not concluded before the conclusion of the instant proceeding, the Joint Motion pointed out that any final rates may go into effect for a short duration – less than a year – based on the outcome of the condemnation proceedings currently pending in the Circuit Court of Rockingham County.[8] In addition, the Joint Motion discussed how a rate increase resulting from "the outcome of this rate case" could impact the valuation relevant to the condemnation proceeding.[9] The Joint Motion asserted the "Commission's broad authority and general regulatory power permit it to dismiss [Massanutten's] rate Application."[10]

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[2] Joint Motion at 2.

[3] *Id.* at 3.

[4] *Id.*

[5] *Id.* at 8; *But cf.*, Joint Respondents Reply at 7-8 ("County's experienced condemnation counsel expects the trial to be concluded no later than Spring 2025 . . . .").

[6] Joint Motion at 9.

[7] *Id.*

[8] *Id.* at 10.

[9] *Id.*

[10] *Id.*

The Responses to the Joint Motion

In response, Massanutten argued that the Motion should be denied "because Massanutten has a constitutional and statutory right to request an increase in rates to ensure that it earns sufficient revenue to cover its cost of service and to earn a fair rate of return."[11] In support of that argument, Massanutten pointed to §§ 56-234 and 56-235.2.[12] Among other things, § 56-234 provides that "[i]t shall be the duty of every public utility to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring same . . . ." And § 56-235.2 defines a reasonable and just rate as a rate that will provide "revenues not in excess of the aggregate actual costs incurred by the public utility in serving customers within the jurisdiction of the Commission, including such normalization for nonrecurring costs and annualized adjustments for future costs as the Commission finds reasonably can be predicted to occur during the rate year, and a fair return on the public utility's rate base used to serve those jurisdictional customers . . . ."

Massanutten asserted that "there are no statutory limitations on when a rate change may be sought [by a water utility] and therefore the Company is entitled to request a rate increase at any time to enforce its right to earn a fair rate of return."[13] Massanutten relied on court precedent to point out that "the outcome of the condemnation proceeding, like any other litigation, is uncertain until it occurs."[14] Massanutten claimed that "the pending condemnation proceeding is entirely unrelated to the issues that will be determined in this rate case[,]" and that "these proceedings can and should be allowed to proceed independently, without impacting each other."[15]

Massanutten opposed the Joint Motion's request to make current rates the interim rates, citing to § 56-238 in support thereof. Massanutten noted that it has filed a bond with the Commission, as required by the Order for Notice and Hearing, and that with this assurance, "customers are not at risk of being overcharged and Massanutten is protected from under-recovering its costs by allowing collection of new rates as soon as practicable."[16]

Without taking a position on the Motion to Dismiss, Staff observed that "the Company has the right to an opportunity to recover its reasonably incurred costs . . . ." and to a rate that "allow[s] the opportunity to earn a fair rate of return."[17] Staff noted that it could find no relevant precedent in which the Commission considered a motion to dismiss a rate increase application during the pendency of a condemnation proceeding.[18] Staff suggested two considerations that

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[11] Massanutten Response at 2.

[12] *Id.* at 2, n.2.

[13] *Id.* at 3.

[14] *Id.* at 4.

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

[16] *Id.* at 8.

[17] Staff Response at 3 (citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"); *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 692-93 1923) ("*Bluefield*")).

[18] Staff Response at 3.

could support a delay in the finalization of any rate increase or decrease resulting from this rate case. First, "the Commission may consider showing deference to a court with an active controversy." Second, "for the purposes of consumer protection, it may be appropriate to have the condemnation proceedings completed before implementing a rate increase on Massanutten's customers."[19] Finally, in response to the request that the Commission change interim rates to a rate other than the proposed rate, Staff observed the statutory requirement that "[i]f the proceeding has not been concluded and an order made at the expiration of the suspension period . . . the proposed rates, . . . shall go into effect."[20] Staff concluded that the Commission does not have the discretion to further suspend the implementation of interim rates beyond the period prescribed by law.[21]

Joint Respondents' Reply

The Joint Respondents' Reply noted that the Massanutten Property Owners Association ("MPOA") recently noticed its participation in the case, and that MPOA authorized the Joint Respondents to inform the Commission of the MPOA's support for the Joint Motion. The Joint Respondent's argument began by noting that Massanutten has not disputed the underlying reasons that the County is currently undergoing the condemnation process to acquire Massanutten's water and wastewater systems.[22]

The Joint Respondents asserted that the pending condemnation proceeding is grounds for the dismissal of the Application. The Joint Respondents explained the connection between the instant rate case and the condemnation proceeding.[23] If the condemnation is completed, Massanutten will then have zero going-forward costs of providing service, which could occur at some point during the applicable rate year.[24] The Joint Respondents concurred with Staff's assessment that the goal of consumer protection could support the delay of any rate increase until after the condemnation proceedings have been completed.[25] The Joint Respondents disputed Massanutten's claim that the outcome of the condemnation proceeding currently before Rockingham County Circuit Court is speculative.[26] The legal filing represented that the County's condemnation counsel expects that the Circuit Court's trial will be concluded no later

[19] *Id.* If interim rates take effect, and the proposed interim rates are later demonstrated to be excessive compared to what would have resulted from a just and reasonable rate, § 56-238 requires that the Commission order the Company to refund, with interest at a rate set by the Commission, the portion of such increased rates, tolls or charges by its decision found not justified. The Commission will need to have jurisdiction to order the prompt refund of excessive revenues collected during the interim rate period, if so found. The timely execution of the current procedural schedule is thus imperative to ensure customers are protected against the risk of excessive interim rates.

[20] *Id.* at 4; Section 56-238.

[21] Staff Response at 4.

[22] Joint Respondents Reply at 2-4.

[23] *Id.* at 4-6.

[24] *Id.* at 5.

[25] *Id.* at 6.

[26] *Id.* at 6-8.

than Spring 2025.[27] The Joint Respondents expressed little surprise that there is no precedent for a public utility rate case being dismissed due to an ongoing and related condemnation proceeding because "it is not appropriate to file a rate case in such circumstances[,]" and characterized the Application as unprecedented.[28]

The Joint Respondents asserted that the Commission has broad discretion to dismiss the Application or to adjust the interim rates that are scheduled to go into effect on July 29, 2024.[29] The Joint Respondents disputed the suggestion that § 56-238 constitutes a limitation on the Commission's broad regulatory power and discussed eight various points of authority to support its view of the Commission's discretion in this matter.[30]

Finally, the Joint Respondents argued that Massanutten's legal pleading went too far to suggest that it has a legal "right to recover its costs immediately."[31] The Joint Respondents provided an interpretation of the seminal cases of *Hope* and *Bluefield*.[32]

> *Hope* and *Bluefield*, however, do not create any right for a public utility to recover "in this moment" costs that were incurred in the past but that are not reasonably expected to be incurred in the future. As noted above, it is well established th[at] retroactive rate-making is improper. Public utility rates are designed to recover the costs of providing service in the future. It is true that they are established based on costs incurred in a test year, but test year costs are intended and adjusted in order to forecast future costs to be reflected in rates charged on a going forward basis. As the Virginia Supreme Court has recognized, "[t]he power to regulate rates of public utilities is a continuing power to meet changing conditions of the future. It may be exercised in adjusting rates for the future, from time to time, as may be fair and reasonable in the interest of the public as a result of changing conditions."
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> The rate-making process under *Hope* and *Bluefield* has always involved looking ahead, and it is based on a regulatory methodology that requires a determination that rates will be just and reasonable going forward. Clearly, *Hope* and *Bluefield* can not be relied upon in order to insist, as [Massanutten] does, that it must be permitted to implement unexamined rates – anything the utility wants – on an interim basis.

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[27] *Id.* at 8.

[28] *Id.*

[29] *Id.* at 8-12.

[30] *Id.* at 9-12.

[31] *Id.* at 13.

[32] *Id.* at 13.

Discussion

Motion to Dismiss

The extent to which Massanutten's proposed rate increase will result in just, reasonable, and lawful rates, relative to its cost of providing service (including the issue of what a condemnation would mean for Massanutten's cost of service), is largely an issue of fact. As such, I find that it would be premature to dismiss the Application at this time.

This case is governed by, among other things, § 56-235.2's requirement that Massanutten demonstrate, through the course of this proceeding, that the proposed rate increase will not result in "revenues [] in excess of the aggregate actual costs incurred by the public utility in serving customers within the jurisdiction of the Commission, including such normalization for nonrecurring costs and annualized adjustments for future costs as the Commission finds reasonably can be predicted to occur during the rate year, and a fair return on the public utility's rate base used to serve those jurisdictional customers . . . ." Generally, that standard underpins utility rate cases with respect to the setting of just and reasonable rates.[33]

The Joint Respondents are correct, in my view, that a public utility generally does not have a right to recover costs that are not reasonably expected to be incurred in a future rate year.[34] Nor is Massanutten guaranteed a "right to earn a fair rate of return."[35] And strictly speaking, it is not the "Commission's job in a rate case to ensure public utilities earn reasonable revenues[,]"[36] to the extent that "ensure" is understood to mean "guarantee." Rather, the evidence in this rate case will be used to establish a cost of service, including annualized adjustments for future costs as can be reasonably predicted to occur in the rate year, and a going forward rate will be designed to provide Massanutten with an *opportunity* to recover its cost of service and to earn a fair rate of return.[37] In filing its Application, Massanutten has presented its case that its current rates are insufficient to provide it with an opportunity to recover its costs and earn a fair rate of return.[38] This request includes ratemaking adjustments, among other items, proposed by the Company, which have not yet been fully vetted or subjected to cross-examination (for example, the Company's proposed rate increase assumes a 10.75 percent return on equity, which is 150 basis points more than the currently approved 9.25 percent).[39]

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[33] *Commonwealth Gas Pipeline Corp. v. Anheuser-Busch Cos., Inc.*, 233 Va. 396, 403, 355 S.E.2d 605, 608 (1987) (finding that § 56–235.2 "essentially defines just and reasonable rates.").

[34] Joint Respondents Reply at 12-14.

[35] Massanutten Response at 3.

[36] *Id.* at 7.

[37] *Old Dominion Power Co., Inc., of Va. v. State Corp. Comm'n*, 228 Va. 528, 532, 323 S.E.2d 123, 125 (1984) ("It is the duty of the Commission to set rates which are reasonable and fair both to the public and to the utility. A major component in the ratemaking process is the decision as to a reasonable return on equity—a return which will afford the utility a reasonable opportunity to earn a fair return on its investment.").

[38] *See e.g.*, Application at Sch. 19; *id.* at Sch. 21.

[39] Application at 2; *id.* at Sch. 8.

The pending condemnation litigation described above does present a unique situation. Mainly, the facts that "the County has an absolute right to acquire [Massanutten's] water and sewer systems through condemnation[;] [t]he condemnation process is proceeding . . . well along[;] [and t]here is no pending challenge to the County's right to condemn."[40] The Joint Respondents' legal filing expressed that the "County's experienced condemnation counsel expects the trial to be concluded no later than Spring 2025 and there has been nothing to suggest any uncertainty as to its outcome."[41]

Based on the procedural posture of this case, there is no evidence yet to be accepted, and subjected to all parties' participation rights, regarding the "hypothetical scenario in which"[42] a condemnation does or does not happen – or the likelihood thereof. The Joint Respondents argued that the outcome of the "condemnation proceeding" is not in question, observing that in most litigation contexts there are at least two results – win or lose – but here the County has an absolute right to condemnation.[43] This is different from stating that it is an absolute certainty that a condemnation will happen. Although the County may have an "absolute right to acquire [Massanutten's] water and sewer systems through condemnation[,]"[44] I am unaware of any authority that requires the County to complete the condemnation process by virtue of its initiating the legal process. In other words, although the County may be proceeding with appropriate urgency, commitment, and good faith, nothing legally prevents relevant policymakers from changing their mind.[45] Simply stated, the extent to which a condemnation will impact the rate year cost of service will be an issue of fact subject to the Commission's consideration of the evidentiary record. The facts, as of yet, are not fully known and should become clearer over time. I find that it would be premature, given that the "Company has the right to an opportunity to recover its reasonably incurred costs [and] is allowed to file for rate increases[,]"[46] to dismiss the Application at this time.

The Joint Respondents' assertion that Massanutten's proposed increases "are unsupportable on their face,"[47] – which may or may not prove true – is a question of fact that is the subject of this docketed rate case, the hearing for which has been noticed to the public. The Commission has directed its Staff to investigate Massanutten's requested rate increase, and the results of that investigation are to be filed on August 21, 2024. The Commission has provided the individual Joint Respondents with an opportunity to participate in the rate case. The Joint Respondents have party rights, which include, among other things, the right to conduct discovery

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[40] Joint Respondents Reply at 7.

[41] *Id.* at 8.

[42] *Id.* at 14.

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

[44] *Id.* at 7.

[45] The Joint Respondents seem to acknowledge this possibility, however, in remote terms, in stating that "[d]ue to the high level of public dissatisfaction with [Massanutten's] performance and the County's dedication of significant time and effort towards the condemnation, it is highly unlikely that the County will elect not to take the system at the conclusion of the trial to determine just compensation." Joint Respondents Reply at 7.

[46] Staff Response at 3.

[47] Joint Motion at 9.

on Massanutten's proposal, file testimony opposing the proposed rate increase, and cross-examine Massanutten's claims that the proposed rate increase is supported by the facts and will result in just and reasonable rates. All of this is to say, if the proposed rate increase is unjustified by the factual record, as is asserted in the Joint Motion, the Commission will fix the rates to a just and reasonable level. Not only that, but the Commission has stated that it will order a refund of any excessive amounts collected after July 29, 2024 (the latest interim dates can be suspended under the law), with interest, which is intended to make customers whole for any overcharges.[48]

Request to Adjust the Level of Interim Rates

If the Application is not dismissed, the Joint Respondents "request[ed] that the Commission determine that [Massanutten's] current rates should be adopted as the interim rates, pending final Commission action on the Application."[49]

The Supreme Court of Virginia has explained that the "legislature knows how to place procedural and substantive limitations on the Commission and this 'presupposes' that the Commission has 'an underlying general regulatory power.'"[50] It is also correct that "the Commission has 'broad discretion in regulating public utilities' . . . [and] [w]here the legislature 'has not placed an express limitation in a statutory grant of authority, [it is presumed] it intended for the Commission, as an expert body, to exercise sound discretion.'"[51] But the Commission's "broad discretion in regulating public utilities" is not unbounded.[52] I concur with Staff's conclusion that the Commission, under the current circumstances and record, does not have the discretion to change or further suspend the implementation of the Company's proposed interim rates beyond the period prescribed by law.[53] The General Assembly has enacted a law addressing the effectiveness of rates pending a Commission investigation. The law permits the Commission to suspend Massanutten's proposed rate increase, for a maximum period of 180 days, and then "[if] the proceeding has not been concluded and an order made at the expiration of

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[48] I have considered that the Commission's Order for Notice and Hearing, Ordering Paragraph (6), required that Massanutten file a bond with the Commission. On May 6, 2024, Massanutten filed said bond with the condition "that, if the Company, or its successors, shall well and truly pay or credit to its customers, in such manner as the Commission may direct, any or all amounts which the Company shall collect or receive pursuant to the revised rates and charges that have been authorized to be collected subject to refund by the Commission in Case No. PUR-2024-00017, in excess of those rates and charges, finally fixed and determined by the Commission as provided by law in Case No. PUR-2024-00017, together with interest on any such excess of those rates and charges at an interest rate prescribed by the Order for Notice and Hearing, entered on February 15, 2024, then this obligation is void; otherwise, to remain in full force."

[49] Joint Motion at 12; *see also,* Joint Respondents Reply at 8-11.

[50] Joint Motion at 10 (quoting *Alexandria v. State Corp. Comm'n.*, 296 Va. 79, 100-101, 818 S.E.2d 33, 44 (2018)).

[51] Joint Motion at 9 (quoting *Va. Electric and Power Co. v. State Corp. Comm'n., et al.*, 284 Va. 726, 741, 735 S.E.2d 684, 691 (2012)).

[52] *See, e.g., VYVX of Va., Inc. v. Cassell,* 258 Va. 276, 290, 519 S.E.2d 124, 131 (1999) (The "Commission has no inherent power simply because it was created by the Virginia Constitution; and therefore its jurisdiction must be found either in constitutional grants or in statutes which do not contravene that document.").

[53] This is not to suggest that there is no situation in which the Commission could work towards substituting a proposed interim rate.

the suspension period . . .the proposed rates . . . shall go into effect."[54] This is an express instruction, and it includes safeguards against excessive interim rates, i.e., bond requirements and refunds with interest.[55] These safeguards have been established in the instant case.

I have considered all the points of authority offered by the Joint Respondents on this issue.[56] I find it warranted to provide a discussion differentiating the procedural posture of this proceeding as compared to *Comm. Gas Pipeline Corp. v. Anheuser-Busch Cos., Inc.*[57] In *Comm. Gas*, like this case, the utility, Commonwealth Gas Pipeline Corporation ("Pipeline"), filed a general rate case application. Unlike this case, Pipeline's own application stated that the revised tariffs "were designed to develop a decrease in annual operating revenues in the amount of $755,000."[58] That is, Pipeline's own application demonstrated that it was earning excessive revenues and would continue to earn excessive revenues. Nonetheless, Pipeline requested that its proposed tariff rates (and thus reduced revenues) be suspended pursuant to § 56-238.

In response to the application's acknowledgement of Pipeline's excessive revenues, the Office of Attorney General's Division of Consumer Counsel moved to have the proposed rates implemented, and not suspended, subject to refund with interest pending the Commission's final order. The utility and other participants opposed immediate implementation of the proposed tariff. In resolving the issue, the Commission, based on the facts and circumstances of that case, provided for neither the "immediate implementation of the proposed tariffs nor suspension of those tariffs."[59] Facially similar to the Joint Respondents' request in this proceeding, the Commission "ordered that [Pipeline's] 'presently effective tariff rates, terms, and conditions shall be continued as interim rates for service rendered on and after the date hereof, and that such interim rates shall remain subject to refund pending final determination of this case.'"[60] Pipeline appealed arguing, among other things, that "the Commission had no power to convert Pipeline's existing rates to interim rates subject to refund as it purported to do . . . ."[61] The Supreme Court of Virginia analyzed the *interplay* of several statutes, including §§ 56-235, -234, -235, and -235.2, to determine that the Commission had the authority to make Pipeline's current rates interim and subject to refund. A linchpin in the court's analysis was Pipeline's admission that its current rates were excessive.

> In our opinion, when the Commission considered Pipeline's application and discovered therein a request for a reduction in revenues based on Pipeline's having received, in the test year, revenues in excess of its cost of providing service and a fair return

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[54] Section 56-238.

[55] *Id.*

[56] *See e.g.*, Joint Respondents Reply at 9.

[57] *Comm. Gas Pipeline Corp. v. Anheuser-Busch Cos., Inc.*, 233 Va. 396, 355 S.E.2d 605 (1987) ("*Comm. Gas*").

[58] *Id.* at 396, 355 S.E.2d at 606.

[59] *Id.* at 400, 355 S.E.2d at 607.

[60] *Id.*

[61] *Id.* at 401, 355 S.E.2d at 608.

> on rate base, the Commission had before it an admission of unjust and unreasonable rates. The Commission was entitled to rely upon the representations made by Pipeline in its application. No further investigation was necessary to permit the Commission to invoke Code § 56–235. We hold that the Commission's consideration of Pipeline's application was a sufficient investigation for the purposes of Code § 56–235.[62]

In my view, the facts present in *Comm. Gas* – mainly the admitted overearnings presented by Pipeline in its application – make *Comm. Gas* distinguishable from the present situation.

Conclusion

This Ruling, and the laws which inform it, are underlined by the fact that interim rates are *not* final, and that the Company has *no* vested right to the continuation of the proposed interim rates. The Company carries a liability over this interim period that it may have to refund back to customers excessive revenues recovered as compared to what would have been recovered by the final rate. By their very nature, interim rates are temporary and, if excessive, refundable. The interim rates are not rates that will necessarily result from the outcome of this case. Finally, I recognize that the Company has the option to forego placing interim rates into effect at the conclusion of the suspension period,[63] but such a voluntary action would be for the Company to elect.

Accordingly, **IT IS DIRECTED THAT**:

(1) The Joint Motion's request that the Commission dismiss the Application prior to the scheduled implementation of interim rates on July 29, 2024, is **DENIED**; and

(2) The Joint Motion's alternative request that the Commission revise Massanutten's interim rates to reflect Massanutten's rates currently in effect is **DENIED**.

C. Mitch Burton Jr.
Hearing Examiner

The Clerk of the Commission is requested to send a copy of this Ruling to all persons on the official Service List in this matter. The Service List is available from the Clerk of the Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, VA 23219.

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[62] *Id.* at 404, 355 S.E.2d at 609.

[63] Staff Response at 4.