

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, OCTOBER 2, 2024

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PETITION OF

RAPPAHANNOCK ELECTRIC
COOPERATIVE

HYPERSCALE ENERGY SERVICES, LLC

CASE NO. PUR-2024-00015

and

HYPERSCALE ENERGY 1, LLC

For a declaratory judgment and, if necessary,
a partial waiver of the requirements of
20 VAC 5-312-20 E

FINAL ORDER

On January 23, 2024, Rappahannock Electric Cooperative ("REC" or "Rappahannock"),
Hyperscale Energy Services, LLC ("HES"), and Hyperscale Energy 1, LLC ("Hyperscale")
(collectively, "Petitioners") filed with the State Corporation Commission ("Commission") a
Petition for Declaratory Judgment ("Petition").

On February 7, 2024, the Commission entered an Order for Notice and Comment
("Order") in this docket that, among other things, directed Petitioners to respond to certain
questions; provided an opportunity for interested parties to file comments; and directed
Commission Staff ("Staff") to file comments. In addition, the Order directed Petitioners to file a
response to comments filed in this proceeding by interested persons and Staff.¹

¹ Order at 6.

On February 27, 2024, the Petitioners filed responses to the Order's questions. On March 22, 2024, Staff filed its comments on the Petition.² On May 3, 2024, Petitioners filed their response ("Response") to Staff's comments.

On May 30, 2024, the Commission issued an Order Scheduling Oral Argument wherein it scheduled a hearing for June 18, 2024, to receive oral argument on the Petition and the questions contained in the Order Scheduling Oral Argument. On June 18, 2024, the Commission convened the hearing as scheduled.

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds as follows.

Declaratory Judgment

The Petitioners request as follows:

. . . the Commission issue an order confirming (1) Hyperscale may make unregulated sales of electric energy to Rappahannock's members within Rappahannock's certificated service territory and (2) Rappahannock can comply with any obligation under 20 VAC 5-312-20 E, as it applies to certain large loads, by establishing and maintaining the existence of Hyperscale and Hyperscale's readiness to provide electric supply to customers. Should the Commission determine that 20 VAC 5-312-20 E does not on its face permit compliance with its requirement through an arrangement with a cooperative's affiliate, Rappahannock requests that the Commission grant it a waiver of this regulation to permit Rappahannock to meet certain large customers' electric supply requirements through the arrangement with Hyperscale discussed in this Petition.³

² No other comments on the Petition were filed.

³ Petition at 1-2.

Proposed Affiliate Arrangement

Petitioners state that REC is currently working with customers that intend to build facilities in its service territory that, when fully operational, will exceed REC's current peak load requirements to serve its members.⁴ REC states that it created Hyperscale and HES as wholly owned subsidiaries⁵ to allow REC to meet the power supply requirements of these large "hyperscale" data center customers while at the same time protecting its existing membership from the potential risks that could accompany REC's service to these new customers.⁶ These large load customers would be members of REC.⁷

REC indicates that it is currently preparing an application to be filed with the Commission at a later date for approval of a new tariff, Schedule LP-DF, which it intends to offer to large, high load factor customers served by dedicated distribution facilities.⁸ Through this tariff, REC will provide these very large customers with distribution service, and either Hyperscale or a competitive service provider ("CSP") will provide generation service⁹ when the customer is eligible for such service.

Under the proposed arrangement, Hyperscale will be the load serving entity in the PJM Interconnection, LLC ("PJM") market and procure energy and capacity on behalf of the

⁴ *Id.* at 3.

⁵ Specifically, HES is a wholly owned subsidiary of REC, and Hyperscale is a wholly owned subsidiary of HES. *Id.* at 2.

⁶ *Id.* at 3.

⁷ Tr. 25-26.

⁸ Petition at 4.

⁹ *Id.*

customers it has been established to serve.¹⁰ HES, as an agent for Hyperscale, will handle Hyperscale's duties and responsibilities for wholesale power market access including scheduling and settlement with PJM's markets.¹¹ "Hyperscale will be operated as a for-profit subsidiary of Rappahannock, allowing it to generate margins and thereby producing additional funds to allow it to better protect Rappahannock and Cooperative members from the risks associated with Hyperscale's business activities."¹² Under the Proposed Affiliate Arrangement, the large load customers would not have an option to take energy supply service from REC at a Commission-regulated rate.¹³

Petitioners state that in addition to seeking an arrangement to safely serve a specific customer that currently seeks to establish service from REC, it has garnered significant interest from other data center operators and developers throughout its service territory that would present similar issues and similar supply risks.¹⁴ REC states that it intends for these additional projects to be served under the same affiliate structure through additional dedicated service affiliates of HES to minimize the risk to REC's existing members.¹⁵ The proposed affiliate structure will be referred to herein as the "Proposed Affiliate Arrangement."

¹⁰ *Id.* at 8.

¹¹ *Id.*

¹² Petition at 9.

¹³ Tr. 63.

¹⁴ Petition at 5.

¹⁵ *Id.*; Tr. 16-17.

For-Profit Sales of Electric Power

The primary statutory authority for the creation of electric cooperatives lies within Code § 56-231.16 A. That provision states, in pertinent part, that persons may form a "cooperative . . . *not organized for pecuniary profit*, for the principal purpose of making energy, energy services, and other utility services available" ¹⁶

Code § 56-231.16 B further provides in part (emphases added):

Nothing in this article shall be construed to authorize a cooperative formed pursuant to this article, or any affiliate thereof, to engage, on a *not-for-profit basis*, within either the cooperative's certificated service territory or in the certificated service territory of another public service company, in the sale of products, the provision of services, or other business activity, except for regulated electric utility services, unregulated sales of electric power to its members within its certificated service territory, and traditional cooperative activities.

This sentence prohibits REC, and its affiliate Hyperscale, from engaging in certain "not-for-profit" business activities. The plain language of this provision does not state that REC or an affiliate may make unregulated sales of electric power on a *for-profit* basis.

The Petitioners, however, assert that Code § 56-231.36 provides authority for the Proposed Affiliate Arrangement. Code § 56-231.36 provides in pertinent part (emphases added):

This article is to be liberally construed and the enumeration of any object, purpose, power, manner, method or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods or things, and any provisions of other laws in conflict with the provisions of this article shall not apply to cooperatives operating hereunder. Any object, purpose, power, manner, method or thing *which is not specifically prohibited is permitted*.

¹⁶ Code § 56-231.16 A (emphases added).

Petitioners assert that because Code § 56-231.16 B (quoted above) does not specifically prohibit for-profit sales of electric power, such sales are necessarily permitted under Code § 56-231.36.

We disagree. Code § 56-231.36 cannot be read in a vacuum such that it would possess no limiting principle but, rather, must be considered in *pari materia* with other relevant statutory provisions.¹⁷ As noted above, an essential element of a cooperative is that it is "not organized for pecuniary profit, for the principal purpose of making energy, energy services, and other utility services available" to its members.¹⁸ While Code § 56-231.16 B lists the not-for-profit activities in which a cooperative can engage, that list cannot support the additional interpretation that a cooperative must be permitted to provide the same utility services – for which the cooperative was created – to any or all of its members on a *for-profit* basis through an affiliate. To conclude otherwise would be to render the "not organized for pecuniary profit" language in Code § 56-231.16 A a nullity.

REC's Duty to Serve at Reasonable and Just Rates

Code §§ 56-231.16 and 56-231.36 must likewise be read in *pari materia* with relevant statutory provisions that establish specific obligations on electric cooperatives. In this regard, Code § 56-234 A requires as follows: "It 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." The definition of "public utility" for this purpose includes "cooperatives."¹⁹ In addition, Code § 56-231.34 further provides that "[t]he regulated

¹⁷ See, e.g., *Heald v. Rappahannock Elec. Coop.*, 80 Va. App. 53, 70-71, 897 S.E.2d 242, 251 (2024) (noting that Code § 56-231.36 cannot be read in a manner that "would impose virtually no limiting principle," that courts "must avoid any literal interpretation of a statute that would lead to absurd results," and that Code § 56-231.36 must be considered in *pari materia* with other relevant statutory provisions) (citations and internal quotes omitted).

¹⁸ Code § 56-231.16 A.

¹⁹ Code § 56-232 A 1.

utility services of a cooperative shall be subject to the jurisdiction of the Commission in the same manner and to the same extent as are regulated utility services provided by other persons under the laws of this Commonwealth." Accordingly, the statutory obligation to serve under Code § 56-234 A applies to REC, and the Cooperative did not assert otherwise.²⁰

In this regard, the Cooperative requests approval to "meet its obligation to serve exceptionally large data center customers through the [P]roposed Affiliate Arrangement," wherein Hyperscale – and only Hyperscale – will have the obligation to provide power supply to these customers.²¹ Thus, under the Proposed Affiliate Arrangement, these data center customers would have no alternative but to purchase power supply service from Hyperscale, at *unregulated negotiated rates*, as the customers' provider of last resort.²²

The Commission does not find statutory authority for this arrangement. Specifically, we do not find authority to permit a cooperative, or any public utility, to relinquish its statutory obligation to provide retail power supply to its customers at reasonable and just rates established by the Commission.²³ Indeed, if the Commission has the statutory authority to permit this arrangement, then the Commission similarly could possess the discretion to allow all public utilities to relinquish this duty to serve – at reasonable and just rates regulated by the Commission – for *all* of their customers, regardless of size. We find nothing in the Code that gives the Commission such plenary discretion to upend the extensive and detailed statutory

²⁰ See, e.g., Tr. 30-31.

²¹ Petitioners' Response at 3.

²² See, e.g., Petition at 9, 14; Tr. 43, 63, 133.

²³ Having so found, REC's requests regarding fulfillment or waiver of its obligations as the provider of last resort under Rule 20 VAC 5-312-20 E of the Commission's Retail Access Rules are hereby denied. See, e.g., Petition at 14-15.

framework developed by the General Assembly to govern a public utility's obligations in serving its customers.²⁴

New Proceeding

Finally, as discussed by Staff, this is not the first Commission proceeding that has addressed a public utility's request for approval of new tariffs or arrangements designed to serve data center customers, and the Commission has previously approved such for both electric cooperatives and investor-owned utilities.²⁵ In the instant case, however, REC has discussed its views as to why such previously-approved arrangements are unworkable for the Cooperative under current circumstances.²⁶

The Commission is cognizant of the projected load growth resulting from the increased deployment of large, hyperscale retail customers. As acutely illustrated by the instant proceeding, this new load could easily surpass a provider's current peak load requirements for its entire system, creating issues and risks for utilities and their customers that have not heretofore been encountered.

In view of such, the Commission will forthwith initiate a separate proceeding, open to all interested persons, to explore the identification of one or more potential frameworks that could be utilized by electric utilities, including electric cooperatives, to serve this new projected load.

Accordingly, IT IS ORDERED that the declaratory judgment is DENIED, and this case is DISMISSED.

²⁴ The decision herein is limited to the specific arrangement requested by Rappahannock. Thus, the Commission does not reach related questions as to whether, and if so how, the duty to serve at reasonable and just rates under Code § 56-234 A may otherwise be complied with through an affiliate or other arrangement under different circumstances (*see, e.g.*, Tr. 31-32, 66-67).

²⁵ Staff's Comments at 4-6.

²⁶ *See, e.g.*, Petitioners' Response at 12.

A COPY hereof shall be sent electronically by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the Commission.

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