Pumped Storage/Retail Choice Program: Supreme Court of Virginia Addresses Scope of the Term Renewable Energy

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The Supreme Court of Virginia ("Court") addressed in a July 15, 2021, an issue arising under the Virginia Retail Choice Program. See *Virginia Electric & Power Company v. State Corporation Commission*, 2021 WL 2964026.

The issue considered was whether the statutory term "renewable energy" included a pumped storage hydroelectric facility.

A Virginia statute permits individual customers to purchase electric energy provided it is solely derived from renewable energy from licensed suppliers if the competing electric company does not offer renewable energy. Virginia Code Ann. § 56-576 (2019).

Constellation NewEnergy, Inc. ("Constellation") began contracting with customers as a licensed supplier pursuant to this statutory provision in December 2019. The company intended to supply customers with energy from pumped-storage hydroelectric facilities which generate electricity from falling water.

The Virginia General Assembly enacted the Virginia Clean Economy Act during the 2020 session. 2020 Acts chs. 1193, 1194. This Act amended the definition of renewable energy found in § 56-576. The amended definition of "renewable energy" explicitly excludes electricity generated from pumped storage . However, this exclusion is not applicable to a combined pumped-storage and run-of-river facility.

Virginia Electric and Power Company ("VEPCO") communicated in April 2020 to Constellation that their pumped-storage scheme did not meet the statutory definition of renewable energy. Constellation subsequently petitioned the State Corporation Commission ("Commission") for a declaratory judgment that electricity generated from a pumped-storage hydroelectric facility qualified as renewable energy under the definition in place at the time the company entered into its contracts. Constellation further sought a declaration that the revised definition applies prospectively.

The Commission found that the plain language of the original statute included electricity generated from a pumped storage hydroelectric facility. It, therefore, granted Constellation's petition.

VEPCO raised two arguments in its appeal of the Commission's decision:

1. The Commission erred in finding that the facility met the definition of renewable energy under the former statute; and

2. The Commission erred in refusing to apply the amended definition retroactively.

The Court looked to the plain language of the statute to resolve the first issue.

The original statute includes energy "derived from. . . falling water" in its definition of "renewable energy." Vir. Code Ann. § 56-576. "Derived from" refers generally to "a thing that comes from something else."

One of the enumerated sources is falling water. However, no language in the 2019 statute qualified the type of water source. Falling water therefore includes water which "falls from a higher reservoir to a lower reservoir" as in the case of Constellation's pumped-storage hydroelectric facility.

The Court determined that electricity generated by a pumped-storage hydroelectric facility meets the pre-amendment statutory definition.

The Court then addressed VEPCO's second argument that the amendment should apply retroactively. Virginia statutes generally apply prospectively. An exception is if the legislature specifically intended retroactive application.

The amendment to Code § 56-576 contains no express intent of the Virginia legislature to apply the statute retroactively. Nor does it contain any declaration that performance of existing obligations must comply with the amended definition.

Although contracts are subject to the police power of the State, the Court found that the General Assembly did not intend for the amendment to conflict with pre-existing contractual rights acquired under the prior statute. Consequently, the Court found that the amendment did not apply retroactively to contracts executed under the prior version of the statute.

The Court affirmed the Commission's findings that electricity generated from pumped storage hydroelectric facilities satisfy the original statutory definition, and that the 2020 amendment did not apply retroactively to contracts executed under the prior statute.

Three Justices filed an Opinion concurring with the judgment but dissenting with the Court's interpretation of prospective application. They found that the amendment should apply after its effective date.

A copy of the Opinion can be downloaded[here.]