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ARTICLES

COVID-19 AND ENERGY JUSTICE: UTILITY BILL RELIEF IN VIRGINIA

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ABSTRACT

Energy justice has captured national attention as scholars have spotlighted inequities in energy production and distribution activities, energy and utility regulation, and the clean energy transition. Within this broader context, this Article reflects on the successes and setbacks for the movement toward energy justice through a case study focusing on legislative, executive, and regulatory attempts between 2020 and 2022 to provide relief for Virginia utility customers harmed by the COVID-19 pandemic. The Article begins by defining the problem of energy insecurity and demonstrating that the pandemic exacerbated existing energy insecurity for vulnerable citizens of Virginia. It then traces the efforts over this two-year period of the General Assembly, Governor Northam and the Virginia State Corporation Commission to address the challenge, through temporary moratoria on utility bill payments and other means, including proposals to provide direct relief to utility customers and more sweeping proposals to reform Virginia's public utility law to comprehensively address energy insecurity concerns. Ultimately, even though only modest relief was made available, advocates could also claim success with the enactment of a new state law that adopted and subsequently modified a new Percentage of Income Payment Program that is to be further refined and implemented by agency actions.

* Professor of Law, University of Richmond School of Law. Many thanks to Sanya Carley, Shalanda Baker, Shelley Welton, Mary Finley-Brook, and others for their pioneering work on energy justice that informs this Article. Thanks also to Alexis Laundry and Caroline Jaques for research assistance.

Looking more broadly at these actions, one may draw encouragement from the fact that issues of energy insecurity have featured more prominently than ever before in Virginia's energy policymaking discussions and that activists at all levels have created advocacy networks that may prove durable in the long run. Still, the Article concludes, much more remains to be done to address energy justice during the upcoming multi-decade clean energy transition put in motion by the Virginia Clean Economy Act.

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INTRODUCTION

This Article examines the intersection of public utility law in Virginia and energy insecurity concerns during the COVID-19 pandemic within the broader context of "energy justice." It focuses on the efforts during General Assembly sessions in 2020 and 2021 and in state agencies in 2021 and 2022 (and beyond, as required by a new law) directed specifically to providing relief for Virginia utility customers who find themselves unable to pay their bills as a result of the pandemic and ongoing energy insecurity.

A 2019 article by Professor Shelley Welton and the author of this Article developed a wide-ranging agenda for advancing energy justice, summarizing and framing advocates' many different goals.[1] One common objective is increased attention to the economic hardships associated with unaffordable utility bills, which scholars call "energy insecurity" (or energy poverty). Energy insecurity is generally defined as challenges to affordability that lower income people and people of color face through increasing energy prices and a high energy burden, which is the inability to adequately meet basic household energy needs.[2] This can result in loss of access to energy, which is a central need in modern society, and other negative consequences (difficulties obtaining credit, for example).[3]

The COVID-19 pandemic exacerbated energy insecurity and redoubled the need to address it. Millions throughout the nation either lost their utility service or were in danger of having their service disconnected, due to the pandemic's economic fallout in which many lost their jobs or experienced reduced income. Virginia, like many other states, established a disconnection moratorium to prevent utilities from shutting off service. By August, it had been nearly six months after the pandemic had fully sprung on the

1. Shelley Welton & Joel B. Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV'T L. REV. 307, 308, 310–12, 320–21, 346, 350, 364 (2019).

2. *See infra* Part I.

3. *See infra* Part I. Besides the types of reforms described in this Article, scholars have called for attention to energy insecurity throughout the process of developing new clean energy programs. For example, they call for ensuring that clean energy programs such as net metering do not increase rates for lower-income ratepayers who do not participate in them. Scholars have also advocated for procedural reforms to ensure that those who have previously not had an opportunity to participate in byzantine legislative and administrative agency processes could do so, and thereby have a voice in clean energy's future. *See generally* Welton & Eisen, *supra* note 1, at 353–54.

American landscape. However, state regulators did not extend the state's moratorium beyond the fall of 2020. Thus, Virginia's legislators were well aware of the need to provide relief to those most severely affected by the pandemic. A wide-ranging special session resulted in language being added to the state's budget law that helped some of those most at risk for energy insecurity after the state's disconnection moratorium ended,[4] although more ambitious proposals failed to become law.

Throughout 2021 and into 2022, service losses and disruption remained a concern for vulnerable populations. In Virginia, there have been other efforts to create bill relief, notably the enactment, refinement, and forthcoming implementation of the Percentage of Income Payment Program ("PIPP").[5] This program, modeled after those in other states, was first enacted in the Virginia Clean Economy Act ("VCEA"), the landmark 2020 law which committed Virginia to a sweeping clean energy transition. It was later amended and expanded in the 2021 legislative session.[6] The PIPP limits the percentage of utility bills paid by qualifying low-income consumers to six percent or ten percent of their annual household income, depending on their household heating source, with the shortfall being made up through imposition of a universal service fee paid by all utility customers that creates a fund to support the PIPP. The VCEA tasked the Commonwealth of Virginia State Corporation Commission ("SCC"), the state's public utility regulator, with the details of administering the program. The amended VCEA expanded eligibility criteria and, in addition to SCC responsibilities, assigned the Virginia Department of Social Services ("DSS") in consultation with the Department of Housing and Community Development ("DHCD") to establish rules and guidelines for adoption, implementation, and general administration of the program and the fund created through the universal service fee. As of mid-2022, the rulemaking effort had not yet been completed.[7]

After discussing the concept of energy justice and its relevance to developments in Virginia public utility law and policy, the Article concludes that these efforts to alleviate lower-income

4. The special session was called for a variety of reasons, including the need to provide other forms of COVID-19 relief, to address criminal justice concerns, and to revisit the state's recently adopted budget, due to projected declining revenues. *See infra* Part II.

5. *See infra* Part IV.

6. *See infra* Part IV.

7. *See infra* Part IV.

Virginians' energy burden have been partially successful, but by no means completely so. Virginia's utility law remains skewed in favor of the state's large utilities and against the interests of lower-income consumers. All is not lost, however, as legislative and administrative agency work has led to partial relief from crushing utility bills and featured continued coalition building among advocacy groups. Poverty law advocates, advocates for utility reform, and environmental groups have worked together and shaped their message to fit quickly-changing events. While there is more work to do, their efforts have built a solid foundation for future work to advance energy justice concerns. Additionally, while it is not a focus of this Article, Virginia's new environmental justice statute may further impact the state government's response to the problem of energy affordability.[8]

Part I begins the discussion by discussing energy justice and defining energy insecurity, and the scope of the problem in Virginia and around the nation during the pandemic. It continues with a discussion of the disconnection moratoria in Virginia and other states. Part II examines the legislative effort to provide targeted relief to those most affected by utility bills during the pandemic. As this Part explains, these legislative proposals proceeded on two distinctly different tracks. The first included standalone bills and budgetary amendments that attempted to create repayment plan structures for those in arrears on their utility bills by streching out repayments over as long as two years. The second was an attempt in the special session to correct a long-standing problem in Virginia utility law: the ability of the state's largest investor-owned utilities to reap excess profits and keep overcharges without having to refund them to ratepayers. As Part II explains, legislative proposals aimed to use refunded overcharges to fund targeted COVID-19 relief. Part III explains how Virginia's then-Governor, Ralph Northam, offered his own legislative proposal to do this, and how the eventual outcome was more modest: the continuation of the moratorium on disconnections until the end of the pandemic, and the approval of a repayment plan structure that allows utilities to offer those in arrears on their bills to stretch repayments out over two years. Part IV explains the ongoing development of the PIPP. Part V concludes with observations about energy justice in Virginia in the aftermath of these events.

8. VA. CODE ANN. §§ 2.2-234 to -235 (Cum. Supp. 2022).

I. ENERGY JUSTICE, ENERGY INSECURITY IN VIRGINIA DURING THE PANDEMIC, AND THE SCC MORATORIUM ON SERVICE DISCONNECTION

Many scholars have called for energy law to incorporate concerns of fairness and equity. At the moment, however, energy justice is "nascent" and lacks a comprehensive definition.[9] Scholars are developing a wide-ranging agenda that tackles everything from diversity and inclusion concerns in employment within the growing clean energy sector, inequities in siting of energy production facilities,[10] procedural concerns in the proceedings of state public utility commissions ("PUCs"),[11] and the energy affordability issues discussed in this Article.[12] University of Richmond professor Mary Finley-Brook and her co-authors describe a new "critical energy justice" that "encompasses *recognition*, *environmental*, *distributive*, and *procedural* justices as transformative sets of inter-relations."[13] Professor Shalanda Baker has stated that, "[i]n order to facilitate the transition and incentivize clean technology without replicating the harms of the old system, successor policies must grapple with the distributive impacts of the existing system and center the concerns of the poor and people of color in policy design."[14] Accomplishing this is no overnight proposition. This author's own article with Professor Shelley Welton, who has written extensively on this subject herself, developed an "emerging agenda,"[15] recognizing that it may be years before substantial progress on clean energy justice is achieved.

In the near term, one consistent focus of energy justice advocates is on energy insecurity: the disproportionate extent to which energy bills impact lower-income utility customers and people of

9. Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 7 (2019).

10. *Id.* at 43; Welton & Eisen, *supra* note 1, at 308, 357–59, 362; Mary Finley-Brook, Travis L. Williams, Judi Anne Caron-Sheppard & Mary Kathleen Jaromin, *Critical Energy Justice in US Natural Gas Infrastructuring*, 41 ENERGY RSCH. & SOC. SCI. 176, 176, 179–80, 183 (2019) (discussing energy justice issues in the siting of natural gas pipelines).

11. *See* Shelley Welton, *Decarbonization in Democracy*, 67 UCLA L. REV. 56 (2020); Welton & Eisen, *supra* note 1; Felix Mormann, *Clean Energy Equity*, 2019 UTAH L. REV. 335 (2019).

12. Sanya Carley & David M. Konisky, *The Justice and Equity Implications of the Clean Energy Transition*, 5 NATURE ENERGY 569 (2020), https://doi.org/10.1038/s41560-020-0641-6 [https://perma.cc/4S3U-T5VR].

13. Finley-Brook et al., *supra* note 10, at 179.

14. Baker, *supra* note 9, at 30.

15. Welton & Eisen, *supra* note 1, at 307.

color, and the adverse economic and health impacts of these bills and households' inability to pay them. This Part describes the problem of energy insecurity and how the pandemic exacerbated it. It then discusses the nationwide response during the pandemic through moratoria on disconnections of utility service, explaining Virginia's moratorium ordered by the SCC. As that discussion concludes, by the beginning of the special legislative session, it was apparent that the SCC would not extend the moratorium, leaving further action for the General Assembly.

A. *Energy Insecurity and the Pandemic's Impact*

A basic definition of energy insecurity is "the uncertainty that a household can pay its energy bills."[16] Researchers have focused on "energy burden," or the percentage of gross household income spent on energy.[17] According to the U.S. Department of Energy, low-income households face an average energy burden of 8.6%, nearly triple that of other households.[18] There are many reasons for this. For example, lower-income households often live in older houses that lack insulation and consume more energy, and have fewer opportunities to access technologies that help make energy more affordable, such as improving energy efficiency or installing solar energy systems.[19]

Energy insecurity in the United States did not start with the pandemic.[20] Data from a 2015 study by the Energy Information Administration ("EIA") shows that most U.S. households at or near the federal poverty line are significantly burdened by energy costs, with roughly one in three U.S. households struggling to pay their

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16. Michelle Graff & Sanya Carley, *COVID-19 Assistance Needs to Target Energy Insecurity*, 5 NATURE ENERGY 352, 352 (2020), https://doi.org/10.1038/s41560-020-0620-y [https://perma.cc/UJS2-WKCD].

17. *Low-Income Community Energy Solutions,* U.S. DEP'T OF ENERGY, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/slsc/low-income-community-energy-solutions [https://perma.cc/A4VF-EAWP].

18. *Id.*

19. *Id.*; *see generally* Carley & Konisky, *supra* note 12, at 569.

20. Shalanda H. Baker, *How To Create Anti-Racist Energy Policies*, WBUR COGNOSCENTI (Sept. 23, 2020), https://www.wbur.org/cognoscenti/2020/09/23/utility-bills-energy-climate-change-covid-environmental-justice-shalanda-h-baker [https://perma.cc/Q364-2DLS]; Joseph Daniel, *Electricity Shut-Offs in a Pandemic: How COVID-19 Leads to Energy Insecurity, Burdensome Bills*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Apr. 20, 2020, 12:21 PM), https://blog.ucsusa.org/joseph-daniel/how-covid-19-leads-to-energy-in-security/ [https://perma.cc/Z326-BB6T] (terming it "like a pre-existing condition for many Americans").

energy bills, and one in five either reducing or eliminating spending on other necessities to pay utility bills.[21] Lower-income people and people of color face these burdens more than others. Households headed by people of color are less likely to be able to pay electric bills than white households.[22] A 2021 study by the Lawrence Berkeley National Laboratory found that lower-income households have five times more utility service disruptions than higher-income households, and service losses by households of color are "far more likely" than for households headed by whites.[23] Higher energy burdens affect residents most in places where economic conditions were weak even before the pandemic. By one estimate, residents in some Appalachian counties spend as much as thirty percent of their income on electric bills.[24] This can have drastic consequences. As one observer put it, "[i]n this country, without a basic level of electricity and heating service, your home is uninhabitable . . . [a]nd you're not able to participate effectively in society at all."[25]

The pandemic exacerbated this situation. As people were asked or ordered to stay home, there was a dramatic increase in residential energy use and energy bills.[26] Millions of Americans lost their jobs and their ability to pay these bills. By the summer of 2020, a

21. Chip Berry, Carolyn Hronis & Maggie Woodward, *One in Three U.S. Households Faces a Challenge in Meeting Energy Needs*, U.S. ENERGY INFO. ADMIN. (Sept. 19, 2018), https://www.eia.gov/todayinenergy/detail.php?id=37072 [https://perma.cc/DTQ8-KH5U] (discussing findings of the EIA's 2015 Residential Energy Consumption Survey).

22. Megan Leonhardt, *Nearly 35 Million Households will Lose their Utility Shutoff Protections Over the Next Month*, CNBC (Aug. 27, 2020, 5:30 AM), https://www.cnbc.com/2020/08/27/millions-of-households-will-lose-their-utility-shutoff-protections-in-the-next-month.html [https://perma.cc/8ZW8-X43K] (citing John Howat, senior energy analyst at the National Consumer Law Center).

23. CHANDRA FARLEY ET AL., GRID MODERNIZATION LAB'Y CONSORTIUM, U.S. DEP'T OF ENERGY, FUTURE ELEC. UTIL. REGUL. REP. NO. 12, ADVANCING EQUITY IN UTILITY REGULATION 20–21 (Lisa Schwartz ed., 2021), https://eta-publications.lbl.gov/sites/default/files/feur_12_-_advancing_equity_in_utility_regulation.pdf [https://perma.cc/Y252-UYK3]; Herman K. Trabish, *Utility Regulators Eye New Tools to Ensure Equity Efforts Don't Impinge on Other Policy Goals*, UTIL. DIVE (Feb. 21, 2022), https://www.utilitydive.com/news/utility-regulators-eye-new-tools-to-ensure-equity-efforts-dont-impinge-on/618384/ [https://perma.cc/9RED-CZ3K] (citing the report and discussing utility programs aimed at increasing equity).

24. Daniel, *supra* note 20.

25. Rachel M. Cohen, *Organizers Push For Stronger COVID-19 Utility Shut-off Protections As Winter Nears*, THE INTERCEPT (Oct. 22, 2020, 1:57 PM), https://theintercept.com/2020/10/22/covid-utility-shut-off-moratorium/ [https://perma.cc/Z7LV-3MWF] (quoting John Howat, senior energy analyst at the National Consumer Law Center).

26. Joel B. Eisen, *COVID-19's Impact on Renewable Energy Development*, 69 KAN. L. REV. 775, 786–87 (2021) (discussing EIA data showing higher residential use, but lower commercial and industrial use of electricity during the pandemic).

survey conducted by Professors Sanya Carley and David Konisky of Indiana University found that "13% of respondents had been unable to pay an energy bill during the prior month, 9% had received an electricity utility shutoff notice and 4% had had their electric utility service disconnected."[27] By September, when Professors Carley and Konisky reported updated findings, each of these figures had approximately doubled. Through extrapolation, this meant that as many as "3.8 million Americans could not pay an energy bill in at least one month since May, 2.8 million received a shutoff notice, and 1.2 million had their electricity disconnected."[28] During the pandemic, when so many work, school, and recreational activities centered on the home, utility shut-offs could be disastrous; they could "prevent children from participating in virtual learning, make it difficult for adults to find jobs, and make it even harder to keep hands clean and take showers."[29]

As one assessment put it, the combination of the pandemic and increasing energy insecurity was an "insidious crisis."[30] According to the DSS, nearly 450,000 low-income households in Virginia qualified for state energy assistance programs in 2019.[31] As the pandemic continued on, the SCC staff conducted a preliminary survey, estimating that as of July 1, Virginians owed more than $184 million in past-due utility bills.[32] A letter sent by a coalition of groups to the members of the General Assembly in August described the situation quite starkly. In its letter, the coalition stated:

27. Sanya Carley & David Konisky, *Energy Is a Basic Need, and Many Americans are Struggling to Afford it in the COVID-19 Recession*, THE CONVERSATION (July 30, 2020, 8:19 AM), https://theconversation.com/energy-is-a-basic-need-and-many-americans-are-struggl ing-to-afford-it-in-the-covid-19-recession-140416 [https://perma.cc/YC9H-2VDQ] .

28. ENV'T RESILIENCE INST., *Survey of Household Energy Insecurity in Time of COVID, Preliminary Results of Wave-2, and Wave-1 and Wave-2 Combined*, IND. UNIV. 1 (Sept. 22, 2020), https://eri.iu.edu/documents/09232020-wave-2.pdf [https://perma.cc/USD9-9WUC].

29. Cohen, *supra* note 25.

30. Michelle Graff & Trevor Memmott, *Coronavirus is Creating a Crisis of Energy Insecurity*, ENV'T HEALTH NEWS (July 1, 2020), https://www.ehn.org/coronavirus-and-en ergy-2646296578/particle-7 [https://perma.cc/MA9H-EMHD] (citing ENV'T RESILIENCE INST., SURVEY OF HOUSEHOLD ENERGY INSECURITY IN TIME OF COVID, PRELIMINARY RESULTS OF WAVE-1, IND. UNIV. 1 (June 10, 2020), https://oneill.indiana.edu/doc/research/ energy-insecurity-survey-june-2020.pdf [https://perma.cc/USD9-9WUC]).

31. Press Release, Appalachian Voices, Va Should Expand Utility Shutoff Ban During Covid-19 Crisis (June 5, 2020, 4:23 PM), https://appvoices.org/2020/06/05/va-should-expand-utility-shutoff-ban-during-covid-19-crisis/ [https://perma.cc/MMP3-5CRM].

32. Letter from Kimberly B. Pate, Div. of Util. Accy. & Fin. Dir., Va. State Corp. Comm'n, to Sen. L. Louise Lucas & Del. Eileen Filler-Corn, Va. Gen. Assemb. 2 (Aug. 14, 2020) (on file with author).

> The objective of the 2020 special session of the General Assembly is to provide immediate relief and long-term recovery solutions for Virginians struggling under the weight of combined economic and public health crises. Virginians—particularly Black and Brown communities—were already facing rising electricity bills before the COVID-19 crisis and economic fallout. Now they face mounting debt from unpaid electricity bills when disconnection moratoriums end.[33]

B. *Disconnection Moratoria and the Virginia SCC's Actions*

As noted above, a common form of assistance during the early stage of the pandemic was freezes (moratoria) on disconnection of service for non-payment of utility bills.[34] These were mostly imposed by state PUCs under their statutory authorities to address energy insecurity.[35] PUCs are states' utility regulators. They typically have powers of "capping bills, waiving late payment fees, automating payment plans or [adopting] other protective measures."[36] A resolution adopted by the National Association of State Utility Consumer Advocates in May listed other possible PUC actions, such as communicating with customers about low income bill payment assistance from state and federal programs, and publicizing weatherization or other energy efficiency programs.[37] Beyond the scope of this Article, but important as well, are actions by PUCs to establish clean energy programs that can help protect consumers affected by energy insecurity.[38]

33. *See* Letter from 350 Fairfax et al. to Members of Va. Gen. Assembly (Aug. 24, 2020), http://www.vcnva.org/wp-content/uploads/2020/08/HB-5088_-Coalition-Sign-on-Letter-resigned.pdf [https://perma.cc/4XHK-9R73] (urging support for House Bill 5088, which would steer funds from Dominion's overcharges for utility bill relief); *see infra* Part II.

34. *Map of Disconnection Moratoria*, NAT'L ASS'N REGUL. UTIL. COMM'RS, https://www.naruc.org/compilation-of-covid-19-news-resources/map-of-disconnection-moratoria/ [https://perma.cc/YP9W-VU9E] (last updated Sept. 9, 2021).

35. Deron Lovaas, *Public Utility Commissions: Swiss Army Knives of Protection*, NAT. RES. DEF. COUNCIL: EXPERT BLOG (Aug. 6, 2020), https://www.nrdc.org/experts/deron-lovaas/public-utility-commissions-swiss-army-knives-protection [https://perma.cc/H94Q-W9MG].

36. Daniel, *supra* note 20.

37. NAT'L ASS'N OF STATE UTIL. CONS. ADVOCATES, RES. 2020-01, NASUCA RECOMMENDATIONS CONCERNING THE EFFECTS OF THE PUBLIC HEALTH AND ECONOMIC CRISES RESULTING FROM COVID-19 UPON UTILITY RATES AND SERVICES PROVIDED TO CONSUMERS BY PUBLIC UTILITIES (May 12, 2020), https://nasuca.org/wp-content/uploads/ 20 20/05/2020-01-NASUCA-COVID-19-Policy-Resolution-Final-5-12-20-.pdf [https://perma.cc/EN2E-9U54].

38. Daniel, *supra* note 20; *see generally* Welton & Eisen, *supra* note 1; Baker, *supra* note 9.

By the summer, a majority of states had established disconnection moratoria, mostly by PUC action, although some states used executive orders and legislation.[39] Protections ranged from full moratoriums to more narrow protections.[40] Some states only protected those customers who could demonstrate that the pandemic had directly affected them, while others protected all customers who were behind on their utility bills.[41] By August, many moratoria were set to expire, and with the pandemic's second wave predicted to arrive, millions of utility customers faced a loss of service.[42] The Health and Economic Recovery Omnibus Emergency Solutions Act ("HEROES Act"), the COVID relief bill that passed the U.S. House of Representatives in May, included a provision establishing a national ban on utility disconnections, but that bill did not advance in the Republican-controlled U.S. Senate.[43]

Preventing shutoffs was important to avoid the most tragic results, but hardly sufficient to reduce the added economic pressure on lower-income families from unpaid energy bills. A shut-off moratorium stops immediate loss of essential utility service, but does not address pervasive economic hardship.[44] Most states did not couple their moratoria with plans to tackle the serious and growing problem of customer indebtedness to utilities during the pandemic.[45] The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") provided $900 million through supplemental funding for the existing federal program that offers assistance for lower-income utility customers, but "this only scratche[d] the surface of what [was] needed."[46] Even with half the states having moratoria in place, one study estimated that by the summer as many as 800,000 lower-income households might already have been disconnected.[47]

39. NAT'L ASS'N REGUL. UTIL. COMM'RS, *supra* note 34.

40. *Id.*

41. *Id.*; Daniel, *supra* note 20.

42. Leonhardt, *supra* note 22.

43. H.R. 6800, 116th Cong. § 190701 (2020).

44. Taylor Moore, *Utility Bill Deferments are Ending. Here's a State-by-State List of Programs That Can Help*, NEXTADVISOR (Aug. 30, 2021), https://time.com/nextadvisor/in-the-news/utility-bill-deferment-ending/ [https://perma.cc/S87Z-4CH2].

45. Ariel Drehobl, *A Perfect Storm? COVID-19 Cuts Incomes and Hikes Home Energy Bills*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON. (May 15, 2020), https://www.aceee.org/blog-post/2020/05/perfect-storm-covid-19-cuts-incomes-and-hikes-home-energy-bills [https://perma.cc/6E66-ZNVV].

46. Carley & Konisky, *supra* note 27.

47. *Id.*

The SCC established Virginia's disconnection moratorium. On March 16, 2020, the SCC ordered an immediate moratorium on service disconnections for sixty days, through May 15, for non-payment caused by the pandemic for electric utilities and other utilities over which it has jurisdiction.[48] On April 9, the SCC ordered a thirty-day extension to June 15.[49] In this order, it warned for the first time that a moratorium could not be extended indefinitely without the prospect of financial risk to the state's utilities, and without some costs of non-payment being shifted to other customers of utilities if unpaid bills were never paid.[50] On May 26, it sought comment on whether to extend the moratorium further.[51] The SCC subsequently issued orders on June 12 and August 24, extending the moratorium through September 15, stating in August that it intended "to provide an opportunity for the General Assembly to choose whether to address legislatively the effects of the COVID-19 crisis on utility customers and utilities" during the special session.[52]

As the special session began, the SCC extended the moratorium to October 5, at Governor Northam's request, to allow the General Assembly more time to complete its work.[53] It was readily apparent that more relief would be necessary. The August SCC staff report noted that as of June 30, past due amounts owed by customers during the pandemic totaled $116.6 million for Dominion Energy alone.[54] Yet after extending the moratorium for a total of six months, the SCC was done. It stated:

> Since we first imposed the moratorium on March 16, 2020, we have warned repeatedly that this moratorium is not sustainable indefinitely. The mounting costs of unpaid bills must eventually be paid,

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48. Temp. Suspension Tariff Req., PUR-2020-00048, 2020 Va. PUC LEXIS 785, at *1 (Commonwealth of Va. State Corp. Comm'n Mar. 16, 2020) (order suspending disconnection of service and suspending tariff provisions regarding utility disconnections of service).

49. *See* Temp. Suspension Tariff Req., PUR-2020-00048, 2020 Va. PUC LEXIS 762, at *5 (Commonwealth of Va. State Corp. Comm'n Apr. 9, 2020) (order extending suspensions of service disconnections).

50. *Id.* at *2–3.

51. *See* Temp. Suspension Tariff Req., PUR-2020-00048, 2020 Va. PUC LEXIS 779, at *3–4 (Commonwealth of Va. State Corp. Comm'n May 26, 2020) (order seeking comment on suspension of service disconnections).

52. Temp. Suspension Tariff Req., PUR-2020-00048, 2020 Va. PUC LEXIS 1156, at *2–3 (Commonwealth of Va. State Corp. Comm'n, Aug. 24, 2020) (order on moratorium).

53. Temp. Suspension Tariff Req., PUR-2020-00048, 2020 Va. PUC LEXIS 1158, at *1 (Commonwealth of Va. State Corp. Comm'n, Sept. 15, 2020) (additional order on moratorium).

54. Letter from Kimberly B. Pate, *supra* note 32, at 2.

> either by the customers in arrears or by other customers who themselves may be struggling to pay their bills. Unless the General Assembly explicitly directs that a utility's own shareholders must bear the cost of unpaid bills, those costs will almost certainly be shifted to other paying customers.[55]

Because no more relief was forthcoming from the SCC, any further action would have to come from the General Assembly. "The SCC tried to be very clear when they extended the moratorium to [October] 5 that they would not extend it again. They needed a policy decision," said Dana Wiggins, Executive Director of the Virginia Poverty Law Center.[56] "There is relief to be had. People deserve it now, especially as we're about to head into the colder months."[57]

II. THE SPECIAL SESSION AND PROPOSALS FOR TARGETED RELIEF FOR UTILITY BILLS

The looming end of the disconnection moratorium shifted responsibility to the General Assembly. The legislature convened for a special session in August 2020 to address the state's growing financial challenges as a result of the pandemic and to tackle a broader agenda, particularly as the nation was galvanized during the summer by protests and calls for criminal justice reform.[58] During this special session, legislators proposed solutions to help those who were at risk of being disconnected from their utilities during the pandemic due to economic hardship. The legislative efforts moved forward on multiple tracks. In the budget process itself, members of the House and Senate proposed amendments to address bill relief. In addition, standalone legislation was proposed to provide targeted relief for utility consumers during the pandemic. This legislation took two basic forms: proposals to create extended debt repayment plans, and proposals to use overcharges by Dominion Energy for a combination of direct refunds and debt

55. Temp. Suspension Tariff Req., 2020 Va. PUC LEXIS 1158, at *2.

56. Mel Leonor, *SCC Won't Extend Moratorium on Utility Disconnections; Lawmakers Split on Plans for Relief*, RICH. TIMES-DISPATCH (Oct. 1, 2020), https://richmond.com/news/state-and-regional/govt-and-politics/scc-wont-extend-moratorium-on-utility-disconnections-lawmakers-split-on-plans-for-relief/article_e4fef752-a99d-55e1-ba09-2664fad060df.html [https://perma.cc/DZ33-8RU2].

57. *Id.*

58. Gregory S. Schneider & Laura Vozzella, *Lawmakers Return to Richmond with High-Stakes Agenda of Coronavirus, Criminal Justice Issues*, WASH. POST (Aug. 17, 2020, 2:06 PM), https://www.washingtonpost.com/local/virginia-politics/lawmakers-return-to-richmond-with-high-stakes-agenda-of-covid-criminal-justice-issues/2020/08/17/2625391a-dd92-11ea-809e-b8be57ba616e_story.html [https://perma.cc/82FY-C7KZ].

forgiveness. Eventually, Governor Northam weighed in with his own proposal for budget language, as described in Part III.

A. *The Special Session*

Virginia's General Assembly is a part-time legislature that normally meets for sixty days in January through March in even-numbered years, and thirty days in odd years.[59] The 2020 regular session convened on January 8 and adjourned on March 12. Using his authority under state law,[60] Governor Northam called a special session which convened on August 18, 2020.[61] The session intended to address a projected deficit of $2.7 billion in the state's budget due to lower projected revenues during the pandemic.[62] Even though the General Assembly had just approved the state's next two-year budget,[63] the stark realities of the stay-at-home orders and reduced economic activity brought on by the pandemic meant revisions would be necessary to deal with an anticipated shortfall in state revenues. Northam acted on this in April by ordering a freeze on billions of dollars in new discretionary spending.[64]

The General Assembly's Democratic leadership developed a wide-ranging agenda for the special session. That agenda included: dealing with the budget shortfall; and considering high-profile legislation on criminal justice reform after the unrest, nationwide, and the demonstrations in Richmond—sparked by the killing of George Floyd in Minneapolis on May 25, 2020—captured national attention.[65] Legislators eventually tackled proposals to address

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59. VA. CONST. art. IV, § 6.

60. *Id.*

61. Hannah Eason, *Northam: Virginia General Assembly to Hold August Special Session*, NBC12 (July 19, 2020, 5:09 PM), https://www.nbc12.com/2020/07/19/northam-virginia-general-assembly-holds-august-special-session/ [https://perma.cc/PR26-W94Q].

62. Schneider & Vozzella, *supra* note 58.

63. 2020 Va. Acts ch. 1289.

64. Michael Martz, *Governor to Call 'Timeout' on Budget, Suspend All New Spending, Use Cash for Essential Services*, RICH. TIMES-DISPATCH (Apr. 6, 2020), https://richmond.com/news/virginia/governor-to-call-timeout-on-budget-suspend-all-new-spending-use-cash-for-essential-services/article_8c606f58-eacc-5517-96ea-8718e6f748ba.html [https://perma.cc/99X5-C38N].

65. Richmond's role in the discussion over criminal justice reform attracted worldwide attention. Zach Joachim, *Cover of National Geographic's 'The Year in Pictures' Features Image of Richmond's Lee Monument*, RICH. TIMES-DISPATCH (Dec. 9, 2020), https://richmond.com/news/state-and-regional/cover-of-national-geographics-the-year-in-pictures-features-image-of-richmonds-lee-monument/article_b99c848c-b488-54d6-9d26-a917b5141f27.html [https://perma.cc/GAT7-VUQD] (National Geographic magazine's year-end review cover features the art that reimagined the Robert E. Lee statue on Richmond's Monument Avenue).

these issues and a wide variety of pandemic-related matters.[66] In the end, the special session lasted longer than the regular session.[67] Virginia's final budget was adopted after the Presidential election in November, in part due to disagreements between Democrats in the House and Senate about how to implement a proposed state constitutional amendment on the ballot in November to establish a bipartisan Congressional redistricting commission.[68] The expanded agenda and lengthy nature of the special session gave legislators considerable opportunities to focus on pandemic-related matters.

As the situation evolved, the state's revenue situation turned out not to be quite as dire as forecasted. In August, before the special session began, Governor Northam proposed a revised budget that kept most budget freezes while adding back spending on a limited number of new priorities on matters such as education, rural broadband internet, and voter protection in the upcoming election.[69] Some measures intended to help Virginians suffering because of the pandemic eventually found their way into the final revised budget. These included a measure aimed at eviction prevention, which the Governor's August budget proposal had included.[70] In the interim, the federal government had acted as well, steering funds to the states under the CARES Act.[71] As a result, the House and Senate had some limited ability to amend the budget to spend money on new programs to deal with the

66. *See, e.g.*, *Special Session Update*, VA. POVERTY L. CTR. (Aug. 21, 2020), https://vplc.org/special-session-update/ [https://perma.cc/F98C-3D8K].

67. Gregory S. Schneider, *Yes, They're Still in Session: Virginia Lawmakers Meet, but No Deal Yet on a State Budget*, WASH. POST (Oct. 9, 2020, 3:46 PM), https://www.washingtonpost.com/local/virginia-politics/virgina-general-assembly-special-session-continues/2020/10/09/74084ba6-08c4-11eb-a166-dc429b380d10_story.html [https://perma.cc/H7LW-7UBZ].

68. Gregory S. Schneider & Laura Vozzella, *Virginia General Assembly Wraps Up Marathon Session with Votes on Budget, Police Oversight Bills,* WASH. POST (Oct. 16, 2020, 9:22 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-special-session-ending/2020/10/16/940e14c4-0f29-11eb-b1e8-16b59b92b36d_story.html [https://perma.cc/ER6A-MYF3].

69. *Governor Northam Proposes Voter Protection Measures Ahead of November General Election*, VA. OFF. OF THE GOVERNOR (Aug. 18, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/august/headline-859958-en.html [https://perma.cc/L39Q-TSW B].

70. COMMONWEALTH OF VA., GEN. ASSEMB., EVICTION MORATORIUM LANGUAGE, Spec. Sess. I, at 1–3 (2020) (Conf. Rep.).

71. The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 5001, 134 Stat. 281, 501 (2020) (codified as amended at 42 U.S.C. §§ 801–805) (establishing the Coronavirus Relief Fund for assisting state, local, and tribal governments).

pandemic, including utility bill relief.[72] But these programs would largely have to use federal funds, which had to be spent under the CARES Act's terms by the end of the year, or some other source.[73] Legislators would have to be both creative and frugal.

B. *Repayment Plan Proposals for Utility Bill Relief*

As the special legislative session began, many Virginians were concerned about worsening energy insecurity and the unequal distribution of this burden on lower-income residents and people of color. Legislators advanced proposals to address the harm that would befall many in Virginia after the disconnection moratorium expired. One standalone legislative effort that attracted considerable attention from a broad range of stakeholders aimed to create no-interest debt repayment plans for those who could not pay their utility bills. Senator Jennifer McClellan, a high-profile member of the Senate who had previously announced that she would be a candidate for Governor,[74] introduced Senate Bill 5118 in August.[75] This bill aimed to offer consumers the ability to repay arrearages through an "Emergency Debt Repayment Plan" that would allow them to spread repayments out for up to twenty-four months with no penalties, late fees, finance charges, or application fees.[76] It would also extend the utility disconnection moratorium as long as

72. *See* U.S. DEP'T OF THE TREASURY, *Assistance for State, Local, and Tribal Governments*, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments [https://perma.cc/6CDL-VBYS].

73. *See* The Coronavirus Aid, Relief, and Economic Security (CARES) Act § 5001(d)(3) (codified as amended at 42 U.S.C. § 801(d)(3)).

74. Gregory S. Schneider, *State Sen. Jennifer McClellan Announces She'll Run for Virginia Governor in 2021*, WASH. POST (June 18, 2020, 7:00 AM), https://www.washingtonpost.com/local/virginia-politics/mcclellan-virginia-governor/2020/06/17/e4c1a0e2-b0cf-11ea-8758-bfd1d045525a_story.html [https://perma.cc/PE8Y-SQ5N]. McClellan was eventually defeated in the primary by Terry McAuliffe, who then lost the general election to Republican Glenn Youngkin. *See* Gregory S. Schneider, Laura Vozzella & Antonio Olivo, *Terry McAuliffe Wins Democratic Nomination for Virginia Governor*, WASH. POST (June 9, 2021, 12:20 AM), https://www.washingtonpost.com/local/virginia-politics/virginia-primary-election-results/2021/06/07/7167c92a-c4ae-11eb-9a8d-f95d7724967c_story.html [https://perma.cc/X7QN-6DSL]; Gregory S. Schneider & Laura Vozzella, *Republican Glenn Youngkin Wins Virginia Governor's Race*, WASH. POST (Nov. 3, 2021, 10:37 AM), https://www.washingtonpost.com/local/virginia-politics/virginia-governor/2021/11/02/ba9c3ccc-36b2-11ec-91dc-551d44733e2d_story.html [https://perma.cc/4JKL-4736].

75. S.B. 5118, Va. Gen. Assembly (Spec. Sess. 2020) (as introduced, Aug. 19, 2020). The companion bill in the House of Delegates was House Bill 5117, introduced by Delegate Lashrecse Aird. H.B. 5117, Va. Gen. Assembly (Spec. Sess. 2020) (as introduced, Aug. 24, 2020).

76. S.B. 5118.

a customer's debt repayment plan was in good standing. Under the bill as introduced, repayments would be capped at $45.50/month above the customer's regular bill.[77] Senate Bill 5118 did not mention and neither required nor precluded debt forgiveness, continuation of the moratorium, or any other relief options.[78]

Several advocacy groups supported Senate Bill 5118, including environmental groups, groups representing lower-income Virginians, groups advocating for reform of Dominion's monopoly power, and faith-based groups.[79] This coalition argued that repayment plans would "allow utility customers to recover at a pace that will give more room to pay all their utility and other obligations during COVID-19 economic recovery."[80] During the session, Senator McClellan proposed a substitute to her bill that, among other provisions, would reduce the repayment plan term to twelve months from twenty-four and remove the minimum monthly payment cap on emergency debt repayment plans. One other change specified that utilities would be allowed to recover costs related to the plans through a rate adjustment clause (rider imposing a specific charge on utility bills) or through base rate increases.[81] The Senate approved the bill, as amended, on September 16,[82] but neither it nor its companion measure advanced in the House.[83]

On a second legislative track, the House and Senate proposed a utility disconnection moratorium and the development of twelve-month repayment plans as amendments to the omnibus budget bill.[84] Unlike Senate Bill 5118, the House language specified that participating in a repayment plan would require proof of hardship by the customer.[85] Both budget bills included identical language

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Support SB5118/HB5117*, VA. CONSERVATION NETWORK (Aug. 2020), http://www.vcnva.org/wp-content/uploads/2020/08/SB5118-HB5117.pdf[https://perma.cc/HWD5-JVT9].

81. *See* S.B. 5118, Va. Gen. Assembly (Spec. Sess. 2020) (as approved by Senate, Sept. 16, 2020). This provision eventually became part of the final budget bill. *See infra* Part III.

82. Sarah Vogelsong, *Senate Approves 12-Month Utility Debt Repayment Plans with Bipartisan Support*, VA. MERCURY (Sept. 16, 2020, 6:57 PM), https://www.virginiamercury.com/blog-va/senate-approves-12-month-utility-debt-repayment-plans-with-bipartisan-support/ [https://perma.cc/BR4T-3XNM].

83. S.B. 5118; H.B. 5117, Va. Gen. Assembly (Spec. Sess. 2020).

84. The House's budget bill was House Bill 5005; the Senate's was Senate Bill 5015. H.B. 5005, Va. Gen. Assembly (Spec. Sess. 2020) (enacted as 2020 Va. Acts, Spec. Sess. I, ch. 56); S.B. 5015, Va. Gen. Assembly (Spec. Sess. 2020).

85. H.B. 5005.

banning utility disconnections, but differed from each other in significant respects. The House budget amendments, but not the Senate's, appropriated $100 million of CARES Act funding to satisfy the debts of some customers who were in arrears.[86] While they disagreed on this, the House and Senate proposals both incorporated the language allowing utilities to recover their costs through rate adjustment clauses or rate increases that had also been added to Senate Bill 5118. Part III discusses how these proposals were eventually embodied in the budget bill instead of Governor Northam's proposal.[87]

C. *Refunds for Utility Overcharges; Proposals For COVID-19 Relief*

At the same time that legislators aimed to extend the disconnection moratorium and create repayment plans, a different legislative effort was underway to provide utility bill relief. This proposal had its roots in a bill that narrowly failed to pass during the regular legislative session. That proposal, and its successor in the special session, aimed to modify the unusual provision of Virginia utility law that constrains the SCC's ability to order refunds to state utility ratepayers of overcharges by the state's two largest investor-owned utilities—Dominion Energy Virginia ("Dominion")[88] and Appalachian Power Company ("Appalachian Power"). This provision is part of a state utility law that is vastly more complex and prescriptive than other states' laws and had allowed Dominion, in particular, to retain hundreds of millions of dollars in overcharges in recent years. In the special session, the legislative proposal aimed to change this outcome and attempted to steer some refund amounts toward relief for those who could not pay their utility bills during the pandemic.

86. *Id.*

87. *See infra* Part III.

88. Dominion Energy Virginia is part of Dominion Energy, a Fortune 500 company headquartered in Richmond, Virginia, that serves nearly seven million customers in thirteen states. *Our Company*, DOMINION ENERGY, https://www.dominionenergy.com/our-company [https://perma.cc/WJ2B-9VEQ].

1. *Code of Virginia Section 56-585.1: A Rube Goldberg Contraption of State Utility Law*

To understand the refund provision bills, it is essential to have a grounding in the central principles of a single lengthy section of Virginia's utility law, the Code of Virginia section 56-585.1, that governs the setting of Virginia electric utilities' rates and other matters.[89] In regulating electric utilities subject to its jurisdiction, the SCC performs classic core functions of a PUC: reviewing utilities' rate applications and setting rates, making decisions about new infrastructure, and determining how much of a utility's costs can be passed on to ratepayers.[90] However, the section 56-585.1 framework has severely constrained its ratemaking discretion and ability to order utility refunds.[91]

Section 56-585.1 modifies traditional rate regulation principles with detailed prescriptions that apply to electric utilities that do business in the state.[92] The 2007's "re-regulation" act, which ended most retail electricity competition in Virginia, added this provision.[93] In the transitional period between 1998 and 2007, utilities in the state were not allowed to raise their rates—they were "capped." During this transitional period, Virginia and other states attempted to switch to a system of retail competition in which customers could select a company other than their utility to supply them electricity.[94] But this is only of historical interest today, as the 2007 law ended that transition.[95]

Section 56-585.1's individual provisions govern numerous specific aspects of rate regulation in excruciating detail. For example,

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89. VA. CODE ANN. § 56-585.1 (2022).

90. The SCC regulates three investor-owned utilities and thirteen member-owned electric cooperatives, but not municipal utilities. *See* COMMONWEALTH OF VA. STATE CORP. COMM'N, STATUS REPORT: IMPLEMENTATION OF THE VIRGINIA ELECTRIC UTILITY REGULATION ACT PURSUANT TO § 56-596 B OF THE CODE OF VIRGINIA 2, 23, 28, 30 (2021), https://scc.virginia.gov/getattachment/0252ae1d-43cc-480b-a26e-e8bcd42f4658/2021-VEUR.pdf [https://perma.cc/95ZY-2WUA].

91. *See generally* GREENEHURLOCKER, GUIDE TO ELECTRIC UTILITY REGULATION IN VIRGINIA 4 (2d ed. 2018), https://www.greenehurlocker.com/wp-content/uploads/2018/04/GreeneHurlocker-Guide-to-Electric-Regulation-in-Va-2018.pdf [https://perma.cc/26G8-A4CT].

92. VA. CODE ANN. § 56-585.1 (2022).

93. William T. Reisinger, *Annual Survey of Virginia Law: Public Utilities Law*, 49 U. RICH. L. REV. 137, 137–43 (2014) (comprehensively explaining the evolution from the transitional period to the 2007 law).

94. *Id.* at 139–41.

95. *Id.* at 141–42.

the first two paragraphs constrain the SCC's normal role in setting how much profit a utility can earn. The law specifies:

> [T]he [SCC] may use any methodology to determine such [*utility's rate of*] return it finds consistent with the public interest, but such return shall not be set lower than the average of the returns on common equity reported to the Securities and Exchange Commission for the three most recent annual periods for which such data are available by not less than a majority, selected by the Commission as specified in subdivision 2 b, of other investor-owned electric utilities in the peer group of the utility, nor shall the Commission set such return more than 300 basis points higher than such average.[96]

In other words, the SCC is instructed that there is a lower bound to a utility's profit at no less than average in its utility "peer group." Given that even a change of one-tenth of one percent can make many millions in difference in a utility's profit, this is a massive change in state law. The application of this provision has led to returns for the state's utilities that are above average compared to other utilities in the nation.[97]

This Rube Goldberg contraption[98] of statutory law is cumbersome and exceedingly challenging to read and interpret, so much so that simply finding relevant language is a chore. Part of what makes section 56-585.1 difficult to parse through is that when the General Assembly has substantially amended it in the past (as it did in 2018 and 2020), new, often lengthy text is simply added on. When parts of it are no longer relevant or necessary, they are not taken out, but remain like Banquo's ghost to haunt the reader.[99] This is obvious right from the outset: the section's title includes "after capped rates terminate or expire."[100] "Capped rates" refers to the transitional period described above, which ended in the

96. § 56-585.1(A) (2022).

97. In 2017 and 2018, the SCC found that Dominion had over earned by $301 million and $278 million, amounting to returns on equity of 13.84% and 13.47%, respectively. COMMONWEALTH OF VA. STATE CORP. COMM'N, STATUS REPORT: IMPLEMENTATION OF THE VIRGINIA ELECTRIC UTILITY REGULATION ACT PURSUANT TO § 56-596 B OF THE CODE OF VIRGINIA, at iii (2020), https://scc.virginia.gov/getattachment/bef130f2-2e42-4c45-b128-f796ab2fa444/2020veur.pdf [https://perma.cc/2DLM-YALV].

98. A Rube Goldberg contraption is an "overly complicated machine[]: using things like pulleys, levers, birds, and rockets to fix simple problems." Emily Wilson, *The Story Behind Rube Goldberg's Complicated Contraptions*, SMITHSONIAN MAG. (May 1, 2018), https://www.smithsonianmag.com/history/story-behind-rube-goldbergs-complicated-contraptions-180968928/ [https://perma.cc/2CEL-R9YU].

99. WILLIAM SHAKESPEARE, MACBETH act 3, sc. 4, l. 41.

100. VA. CODE ANN. § 56-585.1 (2022).

George W. Bush administration.[101] And as if to punctuate this, the very first sentence states, "[d]uring the first six months of 2009, the Commission shall, after notice and opportunity for hearing, initiate proceedings to review the rates, terms and conditions for the provision of generation, distribution and transmission services of each investor-owned incumbent electric utility."[102]

Little of section 56-585.1 resembles other states' utility codes. Those laws are typically much shorter and much less prescriptive, providing more discretion to PUCs.[103] In other states, PUCs normally set "just and reasonable" rates for utilities under venerated principles established decades ago in Supreme Court precedents.[104] These decisions require PUCs to consider the utility's reasonable and prudent cost of property used and whether it is useful for providing adequate, safe, and reliable service to ratepayers; and to set a rate of return on the utility's rate base that is both fair to ratepayers and provides an opportunity for the utility, through sound management, to attract sufficient capital to maintain its financial strength.[105] State utility codes typically contain some variant of this language,[106] which provides considerable latitude to regulators in rate cases. This is not the case in Virginia.

2. *The Refund Provision and Proposed Use of Refunded Overcharges for Pandemic-Related Utility Bill Relief*

One complex provision in Code of Virginia section 56-585.1—and, again, one that differs considerably from its counterparts in other states—is central to understanding the legislative proposals to steer utility refund amounts to provide for bill relief.[107] This provision governs how refunds are made to ratepayers in the case of utility overcharges when a utility subject to the SCC's jurisdiction makes excess profit during the time between rate cases.[108] In

101. Reisinger, *supra* note 93, at 140.

102. § 56-585.1(A) (2022).

103. Jonas J. Monast, *Maximizing Utility in Electric Utility Regulation*, 43 FLA. STATE U. L. REV. 135, 144–45 (2015).

104. JIM LAZAR, REGUL. ASSIS. PROJ., ELECTRICITY REGULATION IN THE US: A GUIDE 53 (2d ed. 2016), https://www.raponline.org/wp-content/uploads/2016/07/rap-lazar-electricity-regulation-US-june-2016.pdf [https://perma.cc/B7JV-98UC].

105. *Id.*

106. *See, e.g.*, N.C. GEN. STAT. §§ 62-130 to -133 (2021).

107. This provision also factored into the SCC's calculation of refunds for ratepayers in Dominion's 2021 triennial rate case, settled in November 2021. *See infra* Part III.

108. VA. CODE ANN. § 56-585.1 (2022).

normal cost-of-service ("COS") rate regulation, a PUC fixes a utility's rates by setting a revenue requirement which is the total amount of revenue to which a utility is entitled to recover its costs with an allowed rate of return.[109] The revenue requirement is based on a detailed calculation that incorporates such factors as a utility's projected sales over the period of years for which the rate is set. In the period between one rate case and the next, the utility may earn more than forecasted if, for example, it sells more electricity than anticipated.[110] In a subsequent rate case, the PUC may decide to order the utility to refund these overcharges to its customers.[111]

Virginia law governing refunds changes the normal calculus, with statutory language that is about as tortured as it gets.[112] The SCC has some limited ability to order refunds, but the statute ties the regulators' hands. It provides that a utility only has to return some over earnings to ratepayers and gets to keep the rest.[113] The utilities can keep any excess earnings up to seventy basis points (0.7%) above authorized earnings.[114] If the SCC finds that base rate earnings during the three-year period leading to a triennial review were more than that, the utilities get to keep even thirty percent of those amounts with refunds of the remaining seventy percent (that is, seventy percent of the amount over seventy basis points above authorized earnings) due to ratepayers.[115] After the 2018 amendments, even these limited refunds may be partially or completely offset by "customer credit reinvestment offsets" which involves plowing back refunds otherwise due into new capital investments in grid transformation projects or renewable energy facilities.[116] In addition, there was a $50 million cap on rate reductions for the 2021 triennial review for reasons not explained in the statute.[117]

109. LAZAR, *supra* note 104, at 30.

110. *Id.* at 88.

111. *Id.*

112. VA. CODE ANN. § 56-585.1(A)(8)(c)–(d) (2022).

113. *Id.*

114. *Id.*

115. *Id.*

116. VA. CODE ANN. § 56-585.1(A)(8)(d) (Cum. Supp. 2018). As of June 30, 2020, Dominion had identified nearly $200 million in projects it believed were eligible for use as offsets in this fashion. COMMONWEALTH OF VA. STATE CORP. COMM'N, *supra* note 907, at iii.

117. § 56-585.1(A)(8)(c) (Cum. Supp. 2018).

After considerable research, the author found no comparable provision in any other state that prescribes in detail how much of a utility's overcharges could be refunded to ratepayers. Nor does any other state's law cap refund amounts or allow utilities to plow overcharges back into capital projects, bypassing refunds altogether.[118] Generally, PUCs have broad latitude to decide whether utilities have over-earned profits, and to order refunds as one part of its rate orders, without limitations.[119] The relevant language in state utility codes is normally much shorter and not prescriptive, if there is any at all. Often, there is not. As an example, in 2018, the North Carolina Utilities Commission ordered the utility Duke Energy to refund $60 million to ratepayers as part of a rate case.[120] Its discussion of the relevant law mentioned only the typical broad standards for rate setting.[121]

The Virginia utility refund provision has led to unjust results. In the SCC's final order in the 2015 rate case, for example, Dominion was allowed to keep over $100 million while only being ordered to return $19.7 million to its customers.[122] The problem loomed large as the next rate case approached in 2021. Virginia law constrains when a rate case may be held: the SCC can only hold rate cases every three years, in a "triennial review" proceeding[123] and not whenever a utility asks for one, as would be the case under traditional rate regulation principles.[124] For Dominion, the next triennial review would take place in 2021.[125] According to an SCC report, Dominion's overearnings totaled more than $500 million

118. Patrick Wilson, *Power Play: Inside the Dominion Lobbying Blitz That's Going to Raise Your Electric Bills*, RICH. TIMES-DISPATCH (Oct. 10, 2020), https://richmond.com/news/state-and-regional/power-play-inside-the-dominion-lobbying-blitz-thats-going-to-raise-your-electric-bills/article_febc3bc7-37cd-5ff8-90d6-fd303849765d.html [https://perma.cc/YDZ6-FNZ7] (quoting the author as being "unaware of any comparable provision elsewhere in the nation that allows a utility to take money that a commission would otherwise decide it has to give back to ratepayers and allow the utility to plow that into new projects").

119. LAZAR, *supra* note 104, at 103.

120. Application of Duke Energy Carolinas, LLC, Docket No. E-7, Sub. 1146, at 15 (N.C. Util. Comm'n June 22, 2018), https://starw1.ncuc.gov/NCUC/ViewFile.aspx?Id=80a5a760-f3e8-4c9a-a7a6-282d791f3f23 [https://perma.cc/8JS9-NW79] (order accepting stipulation, deciding contested issues, and requiring revenue reduction).

121. *Id.* (relying on North Carolina General Statute section 62-133 and ordering the refund as part of the findings).

122. Va. Elec. & Power Co., PUE-2015-00027, 2015 Va. PUC LEXIS 944, at *28 (Commonwealth of Va. State Corp. Comm'n Nov. 23, 2015) (final order).

123. VA. CODE ANN. § 56-585.1(A)(1) (2022).

124. *See generally* JOEL B. EISEN, EMILY HAMMOND, JIM ROSSI, DAVID B. SPENCE & HANNAH J. WISEMAN, ENERGY, ECONOMICS AND THE ENVIRONMENT 479–574 (5th ed. 2020).

125. VA. CODE ANN. § 56-585.1(A)(1) (Cum. Supp. 2020).

between 2017 and 2019.[126] Whether any or all of this amount would be refunded to customers in the 2021 proceeding (or at any other time, if the law were changed) became a major political issue in Virginia that attracted much attention.[127]

To address the refund provision and Dominion's overcharges in the 2017-2019 period, Delegates R. Lee Ware, a Republican, and Jerrauld C. "Jay" Jones, a Democrat, introduced the Fair Energy Bills Act ("FEBA") in the regular 2020 legislative session.[128] This proposal had three core elements. First, it changed the regulatory standards for the 2021 triennial review (and only that one, not future ones).[129] It authorized the SCC to use familiar COS principles to determine Dominion's rate of return rather than the prescriptive framework of section 56-585.1.[130] Second, it specified that in the 2021 triennial review, the SCC would order whatever refunds it deemed necessary, bypassing the section 56-585.1 refund provision and the restrictive $50 million revenue reduction cap.[131] Finally, it precluded Dominion from using the customer credit reinvestment

126. COMMONWEALTH OF VA. STATE CORP. COMM'N, *supra* note 97, at iii.

127. Wilson, *supra* note 118. Eventually, a settlement was reached that resulted in some refunds. *See infra* notes 171–75 and accompanying text.

128. H.B. 1132, Va. Gen. Assembly (Reg. Sess. 2020) (as amended in the nature of a substitute, Feb. 6, 2020); Kate Andrews, *SCC: Dominion Overcharged Customers by $502M in 2017–19*, VA. BUS. (Aug. 18, 2020), https://www.virginiabusiness.com/article/scc-report-dominion-overcharged-customers-by-502m-in-2017-19/ [https://perma.cc/0ZLM-PM DP].

129. Interestingly, Virginia law actually still contains the statutory framework for traditional cost of service ratemaking, and it exists in parallel to section 56-585.1. *See* VA. CODE ANN. §§ 56-232 to -245.1:2 (2022). The 2007 re-regulation law that created section 56-585.1 specified that this section governed in place of the traditional law, while leaving those provisions intact in the Code. VA. CODE ANN. § 56-585.1(A) (2007) (stating that "[s]uch proceedings shall be governed by the provisions of Chapter 10 (§ 56-232 et seq.), except as modified herein"). So, to return the 2021 triennial review to traditional rate regulation standards, House Bill 1132 provided that such "initial triennial review . . . shall consist of a generation and distribution rate case conducted solely pursuant to (i) Chapter 10 (§ 56-232 et seq.) of Title 56 of the Code of Virginia [that is, the pre-2007 framework]; (ii) the rules of the State Corporation Commission . . . ; and (iii) this act." H.B. 1132. Because it applied cost of service standards to the "initial triennial review," House Bill 1132 would only have affected the 2021 rate case. *See id.*

130. House Bill 1132 authorized the SCC to "order any rate adjustments . . . and to use any methodology to determine the fair rate of return on common equity that it finds consistent with the public interest, provided that such return shall be set at a level that is (a) sufficient to assure confidence in the utility's financial integrity; (b) adequate to maintain and support the utility's credit and its ability to attract capital; and (c) comparable to returns that . . . investors in securities would expect to earn on investments of similar risk." H.B. 1132.

131. House Bill 1132 directed the SCC to "review the earnings during the utility's test periods . . . [and] order credits to customers in amounts equal to any earnings during the combined test periods that are above the . . . Utility's authorized rate of return in effect on July 1, 2020" as determined in the initial triennial review. *Id.*

offset mechanism in the 2021 triennial review to avoid making refunds to its customers.[132]

The FEBA was "one of the most significant pieces of energy legislation"[133] in the regular session, along with the VCEA, which revolutionized the state's approach to promoting clean and renewable energy.[134] The FEBA's co-patrons argued that it was crucial to change the standards that would apply in the 2021 review, because that proceeding would set base rates for years to come.[135] Indeed, using traditional rate regulation instead of the section 56-585.1 framework would have had "major impacts on the electric bills Dominion Energy customers pay."[136] Despite this, and even though the FEBA had strong bipartisan support, it faced an uphill battle from the start because it was directed solely at Dominion.[137] Nonetheless, it passed the House by an overwhelming 77-23 margin, only to subsequently fail in a dramatic Senate committee meeting by one vote after what was described as "intense" pressure by Dominion.[138]

Undeterred, the FEBA's patrons brought forth a similar but narrower bill in the special session, House Bill 5088.[139] This time, instead of aiming to change the criteria by which the 2021 triennial review would be conducted, they focused solely on the refund provision. The co-patrons made another important change. Instead of simply lifting the cap and allowing the SCC to make whatever refund it deemed necessary, House Bill 5088 specified that Domin-

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132. *See id.*

133. Sarah Vogelsong, *Is the Bipartisan Fair Energy Bills Act Facing Its Demise in the Senate?*, VA. MERCURY (Feb. 21, 2020, 3:56 PM), https://www.virginiamercury.com/2020/02/21/bipartisan-fair-energy-bills-act-facing-headwinds-in-senate/ [https://perma.cc/NC9Y-7L2H].

134. 2020 Va. Acts ch. 1193 (codified at VA. CODE ANN. §§ 56-585.1:11, -585.5, -585.6 (Cum. Supp. 2020)); *see* Sarah Vogelsong, *Virginia's Clean Energy Transition: A Special Series by the Virginia Mercury*, VA. MERCURY (Nov. 30, 2020, 12:02 AM), https://www.virginiamercury.com/2020/11/30/virginias-clean-energy-transition-a-special-series-by-the-virginia-mercury/ [https://perma.cc/6HZP-MJKL] (five-part series describing the VCEA and its significance for the state's clean energy transition).

135. Vogelsong, *supra* note 133.

136. *Id.*

137. *Id.*; *see generally* Wilson, *supra* note 118.

138. Sarah Vogelsong, *After Intense Dominion Lobbying, Senate Panel Kills Bipartisan Fair Energy Bills Act*, VA. MERCURY (Mar. 2, 2020, 10:09 PM), https://www.virginiamercury.com/2020/03/02/after-intense-dominion-lobbying-senate-panel-kills-bipartisan-fair-energy-bills-act/ [https://perma.cc/XY6Z-49UB].

139. H.B. 5088, Va. Gen. Assembly (Spec. Sess. 2020). The identical bill in the Senate was Senate Bill 5085, whose patron was Senator John J. Bell. S.B. 5085, Va. Gen. Assembly (Spec Sess. 2020).

ion's overcharges from recent years would be used for three different purposes. The first seventy percent of overearnings would be issued as emergency refunds to customers impacted by the pandemic.[140] The remaining thirty percent would go into a new fund administered by the SCC that would provide electricity bill relief for customers who were in arrears to Dominion as of August 31, 2020.[141] As noted above, the SCC had already reported that customers were behind in their payments to Dominion by over $100 million. This new fund would go a long way toward alleviating the problem. The remaining funds, if any, would also go to help struggling, lower-income consumers.[142]

This bill was appealing. It had almost thirty co-sponsors in the House,[143] and a broad-based coalition of twenty-seven organizations—including environmental advocates, the Virginia Poverty Law Center and other advocates for lower-income Virginians, and others—urged the General Assembly to pass it.[144] They claimed that Dominion was merely returning money to its customers that it was not entitled to keep.[145] They also argued that these millions of dollars in refunds would make an immediate difference to those in Virginia who were most affected by utility bills during the pandemic.[146] Because the bill would use Dominion's funds, it would not have a budgetary impact, leaving other available state and federal funding to be directed elsewhere. Unfortunately, the coalition support and the advocacy by the bill's patrons did little to move House Bill 5088 forward. It failed to advance in the Senate committee and was never docketed for a hearing by the relevant House committee.[147]

140. H.B. 5088.
141. *Id.*
142. *Id.*
143. *Id.*
144. Letter from 350 Fairfax et al. to Members of Va. Gen. Assembly, *supra* note 33.
145. *Id.*
146. *Id.*
147. H.B. 5088.

III. GOVERNOR NORTHAM'S PROPOSAL—OUTCOME OF THE LEGISLATIVE SESSION

On September 3, Governor Northam announced a proposal for budget language[148] that effectively married the best features of the two different legislative efforts: Senate Bill 5118's provisions that allowed consumers affected by utility bills during the pandemic to stretch out repayment over a number of months, and House Bill 5088's proposal to provide bill relief without new state spending by using Dominion's millions of dollars in overcharges for this purpose. With the disconnection moratorium about to end, Governor Northam called on the General Assembly to extend the moratorium to address the looming catastrophe of an upcoming winter with a pandemic raging and utility customers facing continued hardship. As noted below, this effort largely did not succeed, but the final budget bill did provide some relief for those suffering from high energy burdens.

A. *Governor Northam's Proposal and Utility Bill Relief in the Final Budget Bill*

In September 2020, Governor Northam proposed to extend the disconnection moratorium for as long as the pandemic continued, and then some, until sixty days after the termination of Virginia's state of emergency declaration.[149] His proposal also aimed to direct $320 million of Dominion's overearnings toward the forgiveness of unpaid utility bills. Customers' bills more than sixty days overdue as of September 30 would be forgiven, and funds would be set aside to cover bills ninety days past due at the point in time when the moratorium eventually ended.[150] Under Virginia's budget process, this proposal could not be adopted on its own, but required action by the House and Senate. Dozens of advocacy groups banded together to support the proposal, taking out a full-page newspaper ad.[151] Virginia's Attorney General, Mark Herring, wrote in support

148. Alan Suderman, *Northam Wants Dominion Energy to Forgive Overdue Electric Bills Using $320M in Over-Earnings*, VIRGINIAN-PILOT, (Sept. 3, 2020, 8:25 PM), https://www.pilotonline.com/business/consumer/vp-nw-northam-dominion-electric-bill-forgiveness-20200904-weqj5kf2bvcnrbexwvicy7dtoq-story.html [https://perma.cc/KB7U-HN5L].

149. *Id.*

150. *Id.*

151. *In Full-Page Richmond Times-Dispatch Ad, Organizations Call on Lawmakers to Force Dominion Energy Refunds*, CLEAN VA. (Oct. 5, 2020), https://www.cleanvirginia.org/

to members of the General Assembly, pointing out that the House's proposed language would only offer an estimated $74 million in relief, far less than Governor Northam had sought.[152]

Following the Governor's announcement, however, the House and Senate did not act on its central call to use Dominion's overcharges for utility bill relief.[153] The bill adopted the House's version of the budget language that directed utilities to use CARES Act funding for this purpose.[154] The final budget language extended the moratorium on utility disconnections "until the Governor determines that the economic and public health conditions have improved such that the prohibition does not need to be in place, or until at least 60 days after such declared state of emergency ends, whichever is sooner."[155] This applied to both investor-owned and municipal utilities, unlike previous moratoria by the SCC, which had no jurisdiction to impose one on the latter.[156] Governor Northam ended Virginia's state of emergency on June 30, 2021,[157] so the moratorium ended in August 2021.[158] Customers who were thirty days in arrears to their utility could take advan- tage of a "COVID-19 Relief Repayment Plan," under which utilities were required to offer payment plans extending from six to twenty-four

in-full-page-richmond-times-dispatch-ad-organizations-call-on-lawmakers-to-force-domini on-energy-refunds/ [https://perma.cc/5D9F-ZRVA].

152. Mark R. Herring, Att'y Gen., *Re: Budget Bill—Utility Disconnection Moratorium,* COMMONWEALTH OF VA. OFF. OF THE ATT'Y GEN. (Sept. 29, 2020), https://www.oag.state.v a.us/media-center/news-releases/1836-september-29-2020-herring-supports-governornorth am-s-budget-proposal-to-utilize-dominion-overearnings-toward-utility-relief-for-virginians [https://perma.cc/6U72-YM58].

153. Kelly Roache, *Virginia Budget Amendments May Allow Dominion Energy to Pass COVID Debt Forgiveness Costs on to Ratepayers Later*, ENERGY & POL'Y INST. (Sept. 29, 2020), [https://www.energyandpolicy.org/va-budget-dominion-covid-debt/ [https://perma.cc /47ZF-6WYG].

154. COMMONWEALTH OF VA., GEN. ASSEMB., UTILITY DISCONNECTION MORATORIUM LANGUAGE, Spec. Sess. I, at 2 (2020) (Conf. Rep.).

155. *Id.* at 1. The state of emergency was originally established by the Governor's Executive Order 51 (2020) on March 12, 2020, which provided that the state of emergency "shall remain in full force and in effect until June 10, 2020 unless sooner amended or rescinded by further executive order." Va. Exec. Order No. 51 (Mar. 12, 2020), http://rosetta.virginiamem ory.com:1801/delivery/DeliveryManagerServlet?dps_pid=IE3440368 [https://perma.cc/Z4M 5-7BUE].

156. COMMONWEALTH OF VA. STATE CORP. COMM'N, *supra* note 90, at 1–2.

157. Sarah Vogelsong, *Budget Includes $120 Million in Additional Utility Assistance*, VA. MERCURY (Aug. 9, 2021, 4:20 PM), https://www.virginiamercury.com/2021/08/09/amid-budget-debates-120-million-utility-assistance-proposal-sparks-little-controversy/ [https://p erma.cc/8VSV-GFQ2].

158. *Id.*

months.[159] Utilities are not allowed to report to credit agencies that customers have fallen behind on their bills, and some bills would be forgiven in their entirety. "Within 60 days after the enactment of this act," the relevant language provided that "[Dominion] shall forgive all such utility's jurisdictional customer balances more than 30 days in arrears as of September 30, 2020."[160]

B. *Impact on Virginia's Utilities*

Going forward, as both versions of the budget bill and Senate Bill 5118 had provided, utilities could recover costs resulting from administration of the Repayment Plan program from their ratepayers. This could be done either through a rate adjustment clause (rider) or through base rate increases.[161] As for the amounts spent to forgive debt, the utilities would not be on the hook for those, either. The final budget bill did not require Dominion to use overcharges to forgive this debt. Instead, it did the opposite: in the next rate case, Dominion could recover amounts it spent from its ratepayers.[162] It would take a master wordsmith with a sophisticated understanding of the section 56-585.1 framework to understand this dense language that immediately follows the requirement that Dominion forgive its customers' debts:

> In the utility's 2021 triennial review, any forgiven amounts shall be excluded from the utility's cost of service for purposes of determining any test period earnings and determining any future rates of the utility. In determining any customer bill credits, in the utility's 2021 triennial review, the Commission shall first offset any forgiven amounts against the total earnings for the 2017 through 2020 test periods that are determined to be above the utility's authorized earnings band. Such offset shall be made prior to any offset to customer bill credits by customer credit reinvestment offsets.[163]

Because the legislative proposals to change it were unsuccessful, section 56-585.1's convoluted refund provision continued to apply to the 2021 triennial review proceeding.[164] Dominion would be able to keep a large portion of whatever the SCC deemed it had over

159. COMMONWEALTH OF VA., GEN. ASSEMB., UTILITY DISCONNECTION MORATORIUM LANGUAGE, Spec. Sess. I, at 1 (2020) (Conf. Rep.).

160. *Id.* at 3.

161. *Id.* at 2.

162. VA. CODE. ANN. § 56-585.1(A)(8) (Cum. Supp. 2020).

163. H.B. 5005.

164. VA. CODE. ANN. § 56-585.1(A)(8)(1) (Cum. Supp. 2020).

earned—as noted above, it could legally keep all excess earnings up to seventy basis points (0.7%) above authorized earnings. Amounts spent to forgive customer debt would then be "offset . . . against the total earnings . . . that are determined to be above the utility's authorized earnings band" (that is, the already high amounts of earnings that Dominion is allowed).[165] This might reduce overearnings enough so that Dominion would get to keep all of them. And, as the last sentence provides, it could still claim the "customer credit reinvestment offsets" for new capital projects to reduce refunds still further.[166]

Stephen Haner, an author of the *Bacon's Rebellion* blog and a long-time observer of the General Assembly's comings and goings on energy laws and policies, called this provision "clever and complicated."[167] As he pointed out, "Dominion and its customers are getting special treatment . . . hav[ing] been promised that they will eventually be made whole, and their unpaid and uncollectible bills will be covered by rate hikes on their remaining customers."[168] As Haner put it, no other business in Virginia was allowed by statute to pass off its pandemic-related costs onto consumers.[169] Others were even more critical, charging that Dominion was "exploiting the emergency special session and the current crisis for its own economic benefit."[170]

In the end, a settlement was reached among the parties in the 2021 triennial review proceeding.[171] The SCC approved customer refunds totaling $330 million ($75 million of which was deemed a

165. H.B. 5005.

166. *Id.*

167. Steve Haner, *Dominion [Heart] New Utility Bill Payment Plan*, BACON'S REBELLION (Sept. 29. 2020), https://www.baconsrebellion.com/wp/dominion-%E2%9D%A4-new-utility-bill-payment-plan/ [https://perma.cc/2SLE-24Z2].

168. Tyler Arnold, *Virginia Looks to Forgive Customer Utility Debt with COVID-19 Funds, Excess Dominion Profits*, THE CTR. SQUARE (Oct. 19. 2020), https://www.thecentersquare.com/virginia/virginia-looks-to-forgive-customer-utility-debt-with-covid-19-funds-excess-dominion-profits/article_70c67848-1321-11eb-a52c-47a44bb38ad9.html [https://perma.cc/67QH-5RVP].

169. *Id.*

170. *Virginia House and Senate Fail to Refund Any of the $500 Million Dominion Energy Has Overcharged Virginians*, CLEAN VA. (Sept. 25, 2020), https://www.cleanvirginia.org/virginia-house-and-senate-fail-to-refund-any-of-the-500-million-dominion-energy-has-overcharged-virginians/ [https://perma.cc/DR9E-ZJSD].

171. *See generally* Va. Elec. & Power Co., PUR-2021-00058 (Commonwealth of Va. State Corp. Comm'n Nov. 18, 2021), https://scc.virginia.gov/docketsearch/DOCS/618m01!.PDF [https://perma.cc/9PQ7-QNB7] (order modifying stipulation).

"voluntary" refund) and a revenue reduction of $50 million.[172] This would give a decrease of about $0.90 per month to a typical residential customer using 1,000 kilowatt hours ("kWh") per month.[173] Some believe the refunds were inadequate,[174] but under the existing law with its limits on rate reductions, many acknowledged that this was as much as could have been done.[175] However, this leaves substantial overcharges largely unaccounted for, and lower-income Virginians will continue to overpay for a basic service.

IV. PERCENTAGE OF INCOME PAYMENT PROGRAM ("PIPP")

The PIPP, another recent effort designed to help Virginia's lower-income customers with their utility bills, is based on similar programs in other states. These programs are collectively known as "ratepayer funded" because funding to assist lower-income utility customers comes from other utility customers (ratepayers).[176] The central feature of Virginia's PIPP, like those of other states, is that participating utility customers pay no more than a set percentage of their household income for utility service. That percentage is deemed to be affordable. Virginia's PIPP was created by statute (the VCEA and subsequent legislation in 2021),[177] with Ohio's long-standing program cited as a model. Responsibility for developing and implementing the program has been divided between the SCC and the DSS in consultation with the DHCD. As of the date of this Article, many details are still being worked out in regulations to be promulgated by the DSS, and the program will not

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172. *Id.* at 3 n.8.

173. *Id.*

174. Diana Williams, *Dominion Energy Virginia Customers Should Receive Refunds Soon, No Thanks to the Monopoly*, CLEAN VA. (Feb. 25, 2022), https://www.cleanvirginia.org/dominion-energy-virginia-customers-should-receive-refunds-soon-no-thanks-to-the-monopoly/ [https://perma.cc/M8ZF-RQ25] (noting that "Dominion is getting away with only refunding a fraction of the $1.1 billion it overcharged customers").

175. Press Release, S. Env't. L. Ctr., SELC Statement on Settlement Agreement in Dominion Energy Rate Case (Oct. 18, 2021), https://www.southernenvironment.org/press-release/selc-statement-on-settlement-agreement-in-dominion-energy-rate-case/ [https://perma.cc/975V-PD8S].

176. FARLEY ET AL., *supra* note 23, at 29.

177. VA. CODE ANN. § 56-585.6 (Cum. Supp. 2021). In some other states, it has been unclear whether PUCs can create PIPPs under their existing statutory authorities. APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, RATEPAYER-FUNDED LOW-INCOME ENERGY PROGRAMS: PERFORMANCE AND POSSIBILITIES 22 (2007), http://www.appriseinc.org/reports/NLIEC%20Multi-Sponsor%20Study.pdf [https://perma.cc/GB6G-Q8EP]. Because Virginia's program was expressly created by statute, that is not an issue here.

begin until one year after the issuance of these implementing regulations.

This Part begins by discussing the types of ratepayer-funded support programs that states have established to make utility bill assistance available for lower-income customers. It will then explain the basic structure of PIPPs and some important design variables which policymakers must consider in establishing a PIPP. Finally, it explains how some issues were addressed in Virginia's statutory enactments, some have been the subject of SCC orders, and some await the development of DSS regulations.

A. *Percentage of Income Payment Program—Definition and Features*

A 2021 report from the Lawrence Berkeley National Laboratory found that at least thirty states have ratepayer-funded programs of some sort that are designed to assist utility customers with paying their bills.[178] Many programs have been in place for decades. A 2007 study commissioned by a broad range of sponsors including utilities, public interest groups, and state agencies, examined programs underway in thirteen states, some of which had been in place for years at that point.[179] One caveat is that not all programs offer comprehensive electric and gas bill relief, and "[p]rograms vary widely in funding and benefit levels, eligibility criteria, administrative structures, and number of customers served."[180]

There are three basic types of ratepayer-funded bill assistance programs: (1) PIPP, (2) programs offering qualifying customers flat percentage discounts on their utility bills, and (3) programs offering tiered discounts (a hybrid of the first two types).[181] Generally speaking, these programs share three common features: (1) assistance for qualifying low-income ratepayers with their utility bills; (2) ratepayer funding through imposition of a "universal service fee" (a small charge on other customers of the utility) to fund the program; and (3) administration by PUCs, sometimes in conjunction with other state agencies.[182]

178. FARLEY ET AL., *supra* note 23, at 29.
179. APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, *supra* note 177, at i.
180. FARLEY ET AL., *supra* note 23, at 29.
181. *Id.* at 32.
182. *See* FARLEY ET AL., *supra* note 23, at 32.

In 1983, Ohio became the first state to institute a PIPP,[183] and the program, currently the nation's largest, was subsequently updated in 1996 and 2010.[184] As a well-known, long-standing program, Ohio's PIPP served as a template for development of Virginia's PIPP.[185] Ohio's current program, called "PIPP Plus," requires participating households that heat with natural gas to pay five percent of their monthly income or ten dollars per month to their gas or electric company, whichever is greater.[186] Customers using only electricity pay ten percent of their income or ten dollars, whichever is greater, as their monthly payment.[187] This program has been robust for quite some time; for example, in 2005 Ohio's PIPP was already funded at over $200 million annually.[188] Today, in addition to Ohio, Colorado, Illinois, Maine, Nevada, New Jersey, and Pennsylvania have PIPPs.[189]

Each PIPP must address a number of different issues. This Section discusses several of the most important (although certainly not all), beginning with decisions about who qualifies for the program and what constitutes an affordability goal. Because a PIPP limits the amount of utility bill payments to a specific percentage of household income, policymakers must establish income eligibility requirements and bill payment percentage targets.[190] A 2021 report from the Lawrence Berkeley National Laboratory recommended that income eligibility be determined with reference to the guidelines set for assistance under the federal Low-Income Home

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183. Investigation into Long-Term Solution Concerning Disconnection of Gas and Electric Service in Winter Emergencies, No. 83-303-GE-COI (Pub. Util. Comm'n of Ohio, Nov. 23, 1983), https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A15F09B15148B63761 [https://perma.cc/4GWG-B4D4] (opinion & order); Janine Migden-Ostrander, *Use Less, Save More: Adding a Conservation Incentive to Percentage of Income Payment Programs*, REGUL. ASSISTANCE PROJECT (Apr. 13, 2021), https://www.raponline.org/blog/use-less-save-more-adding-a-conservation-incentive-to-percentage-of-income-payment-programs/ [https://perma.cc/84M9-JLWN].

184. *PIPP Plus*, OHIO PUB. UTIL. COMM'N, https://puco.ohio.gov/utilities/gas/resources/pipp-plus [https://perma.cc/UMZ3-N4U2]; *see* Tamara S. Turkenton, OHIO PUB. UTIL. COMM'N, *Ohio's Low-Income Programs,* NAT'L ASS'N REGUL. UTILITY COMM'RS (June 17–21, 2013), https://pubs.naruc.org/pub.cfm?id=536FA396-2354-D714-5125-ED065311D09B [https://perma.cc/FB4L-954M].

185. For example, one group called Ohio's PIPP an "excellent model" for Virginia to follow. *About*, Va. Energy Reform Coalition, https://www.virginiaenergyreform.org/about/ [https://perma.cc/4J4D-LUUE].

186. OHIO PUB. UTIL. COMM'N, *supra* note 183.

187. *Id.*

188. APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, STATE REPORT—OHIO 16, http://www.appriseinc.org/reports/MSS_OH.pdf [https://perma.cc/EAA5-5RJ2].

189. FARLEY ET AL., *supra* note 23, at 33.

190. *Id.*

Energy Assistance Program ("LIHEAP").[191] LIHEAP is an existing federal program that provides energy assistance to qualified households,[192] although observers note that more help is needed because it serves only a small proportion of those eligible for benefits.[193] States set LIHEAP income eligibility standards in accordance with federal law, which determines that a household must have an income that does not exceed more than 150% of the federal poverty guideline or sixty percent of the state median income to be eligible.[194] In addition to setting PIPP income guidelines to harmonize with these limits, consumer advocates have recommended that eligible PIPP customers be automatically enrolled in the program to ensure its maximum reach.[195]

A second series of decisions about a PIPP relates to program funding, where two types of considerations are important. The overall amount of funding must be sufficient to alleviate the energy insecurity of eligible utility customers, with a funding stream that is adequate to meet this goal and made available through appropriate design of the universal service fee.[196] Also, the program must be designed to provide effective administration, with funding via the fee covering administrative costs. By one estimate, five to seven

191. *Id.* at 30.

192. The LIHEAP, established in 1981, provides block grant funds and emergency funds to states, territories and tribes to assist low-income households with heating and cooling expenses and home weatherizing. The LIHEAP program is headquartered in the federal Department of Health & Human Services, which awards funds to state agencies that supervise their distribution. U.S. DEP'T. OF HEALTH & HUM. SERVS., OFF. OF CMTY. SERVS., *Low Income Home Energy Assistance Program* (LIHEAP), https://www.acf.hhs.gov/ocs/low-income-home-energy-assistance-program-liheap [https://perma.cc/3QF7-GKP9]; U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF CMTY. SERVS., *LIHEAP's 40th Anniversary*, https://www.acf.hhs.gov/ocs/liheaps-40th-anniversary [https://perma.cc/3KBA-LQ9S]. Virginia's regulations implementing the program are found in the Virginia Administrative Code. 22 VA. ADMIN. CODE § 40-680-10-70 (2022).

193. Scott Bechler, *How a Decades-Old Federal Energy Assistance Program Functions in Practice: A Deep Dive into LIHEAP,* NICHOLAS INST. FOR ENV'TL POL'Y SOLS. 4 (Apr. 2021), https://nicholasinstitute.duke.edu/sites/default/files/publications/How-a-Decades-Old-Federal-Energy-Assistance-Program-Functions-in-Practice-A-Deep-Dive-into-LIHEAP.pdf [https://perma.cc/SBT7-4VWJ] (noting that the program only serves fifteen percent of eligible households).

194. 42 U.S.C. § 8624(b)(2)(B).

195. *See, e.g.*, APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, *supra* note 188, at 18, 21.

196. John Howat, *Electric Service Discount and Arrearage Management Program Design Template,* NAT'L CONSUMER L. CTR. 5–6 (Apr. 2020), https://www.nclc.org/images/pdf/special_projects/covid-19/WP_Program_Design_Template.pdf [https://perma.cc/7ZDD-KB MX].

percent of total funding is necessary to cover these costs, but this varies with the program structure.[197]

Another issue that has arisen is the relationship between a PIPP and other programs designed to reduce customer usage of electricity (collectively known as "demand-side management" or "DSM").[198] With a cap on a utility bill set at a percentage of household income, the eligible customer enrolled in the PIPP pays the same bill regardless of the amount of electricity they consume, so there is no incentive for them to use less.[199] Without some mechanism to account for this, this could potentially increase consumption, the amount of funding necessary to offset the difference, and the fee that other customers pay.[200] On the other hand, a solution such as requiring participants in the PIPP to also take part in a DSM program could serve as an effective barrier to their participation and make it more difficult to aid struggling utility customers.[201] With this in mind, some have proposed other potential ways of handling the concern about reducing energy usage, such as creating a "conservation incentive" that would reward participants who reduce their electricity consumption.[202]

B. *Development and Implementation of the Virginia PIPP*

Virginia's PIPP was established in a provision of the VCEA, which, as noted above, is the landmark 2020 law that commits Virginia to a sweeping clean energy transition.[203] Similar to Ohio, the Virginia PIPP aims to limit the percentage of utility bills paid by qualifying low-income consumers to six percent or ten percent of their annual household income, depending on their household heating source, with the shortfall being made up through imposition of a universal service fee that creates a "Percentage of Income

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197. *Id.* at 5.

198. *See* Joel B. Eisen, *Demand Response's Three Generations: Market Pathways and Challenges in the Modern Electric Grid*, 18 N.C. J.L. & TECH. 351, 369 (2017).

199. Janine Migden-Ostrander, *Use Less, Save More: Adding a Conservation Incentive to Percentage of Income Payment Programs*, REGUL. ASSISTANCE PROJECT (Apr. 13, 2021), https://www.raponline.org/blog/use-less-save-more-adding-a-conservation-incentive-to-percentage-of-income-payment-programs/ [https://perma.cc/84M9-JLWN].

200. *Id.*

201. *Id.*

202. *Id.*

203. 2020 Va. Acts ch. 1193 (codified at VA. CODE ANN. § 56-585.6 (Cum. Supp. 2020)); *see* Vogelsong, *supra* note 133.

Payment Fund" ("Fund") to support the PIPP.[204] The VCEA provision required the SCC to set the level of the universal service fee for the state's two largest investor-owned utilities (Dominion and Appalachian Power) to be paid by all utility customers not participating in the program.[205] In June 2020, the SCC issued orders directing the two utilities to file proposals to establish universal service fees.[206] That December, the SCC entered final orders in both dockets, fixing the utilities' PIPP fees.[207] Anticipating that the law might be revised in the next General Assembly session, the SCC also ordered the utilities to file for review and revision of the fees if the law were changed.[208]

In the 2021 legislative session, the General Assembly amended and expanded the PIPP.[209] The new law expanded the definition of "[PIPP] eligible utility customer" by removing language from the 2020 law that made customers eligible if they participated in specific public assistance programs.[210] The definition now provides that any person or household whose income does not exceed 150% of the federal poverty level is eligible.[211] In addition to expanding and refining the program eligibility criteria, the revised 2021 law changed program administration by bifurcating responsibility between the SCC and the DSS.[212] The SCC is responsible for setting the universal service fee at a level designed to meet program objectives, setting the administrative costs of the program, ensuring that funds collected are directed to the Fund, and providing for cost recovery by Appalachian Power and Dominion for all reasonable

204. VA. CODE ANN. § 56-585.6 (2022).

205. 2020 Va. Acts ch. 1193.

206. Appalachian Power Co., PUR-2020-00117, at 1, 3 (Commonwealth of Va. State Corp. Comm'n June 12, 2020), https://scc.virginia.gov/docketsearch/DOCS/4ngl01!.PDF [https://perma.cc/SYY9-K563] (order establishing proceeding); Va. Elec. & Power Co., PUR-2020-00109, at 1, 3 (Commonwealth of Va. State Corp. Comm'n June 11, 2020), https://scc.virginia.gov/docketsearch/DOCS/4ngc01!.PDF [https://perma.cc/5R4U-DPJM] (order establishing proceeding).

207. Appalachian Power Co., PUR-2020-00117, 2020 Va. PUC LEXIS 936, at *15 (Commonwealth of Va. State Corp. Comm'n Dec. 23, 2020) (order); Va. Elec. & Power Co., PUR-2020-00109, 2020 Va. PUC LEXIS 920, at *15 (Commonwealth of Va. State Corp. Comm'n Dec. 23, 2020) (order).

208. Appalachian Power Co., 2020 Va. PUC LEXIS 936, at *15; Va. Elec. & Power Co., 2020 Va. PUC LEXIS 920, at *15.

209. 2021 Va. Acts, Spec. Sess. I, ch. 308 (codified as amended at VA. CODE ANN. §§ 56-576, -585.6) (Cum. Supp. 2021)).

210. *Id.*

211. VA. CODE ANN. § 56-576 (Cum. Supp. 2021). This harmonizes the Code of Virginia's definition with that of the LIHEAP.

212. 2021 Va. Acts, Spec. Sess. I, ch. 308.

PIPP costs from the Fund, including bill credits for PIPP-eligible customers.[213] The law directed the DSS to establish rules and guidelines for adoption, implementation, and general administration of the program and the Fund.[214]

The 2021 revisions to the law settled some other issues discussed above. It set caps on the annual cost of PIPP-related programs, including administrative costs, at $25 million for Appalachian Power and $100 million for Dominion.[215] The 2020 law had no specific provision determining whether eligible participants could be required to take part in energy reduction programs. In 2020, participants in the SCC universal service fee dockets disagreed about this issue,[216] but the SCC order eventually read the law to require participation in energy reduction programs.[217] The revised law changed this, leaving the resolution of this issue to the sole discretion of the DSS. The current law provides that the DSS's "rules or guidelines shall include exemptions for terms of program participation or energy use reduction as the [DSS] deems appropriate"[218] and expressly states that "PIPP-eligible customers may, to the extent reasonably possible, utilize existing energy efficiency or related [utility] programs."[219]

In April 2021, responding to the new law and in particular its expansion of eligibility criteria, the SCC directed Appalachian Power and Dominion to file updated proposals for establishing the level of the universal service fee.[220] In response, both utilities made filings that stated the expanded eligibility requirements would

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213. VA. CODE ANN. § 56-585.6(A)–(C) (Cum. Supp. 2021).

214. *Id.* § 56-585.6(C) (Cum. Supp. 2021).

215. *Id.* § 56-585.6(A) (Cum. Supp. 2021).

216. Appalachian Power Co., PUR-2020-00117, at 4–5 (Commonwealth of Va. State Corp. Comm'n May 28, 2021), https://scc.virginia.gov/docketsearch/DOCS/4z%24%2501!.PDF [https://perma.cc/QU56-SJYM] (comments of Sierra Club in response to order).

217. Appalachian Power Co., PUR-2020-00117, 2020 Va. PUC LEXIS 936, at *12 (Commonwealth of Va. State Corp. Comm'n Dec. 23, 2020) (order) (directed against both Appalachian and Dominion). As noted above, the SCC anticipated new legislation in the 2021 General Assembly session, so its order took this position on participation in energy reduction programs "unless and until another way is apparent to accomplish the objectives of the PIPP fee as set forth in Code § 56-585.6(A)." *Id.* at *13.

218. VA. CODE. ANN. § 56-585.6(C) (Cum. Supp. 2021).

219. *Id.* § 56-585.6(D) (Cum. Supp. 2021).

220. *See* Appalachian Power Co., PUR-2020-00117, 2021 Va. PUC LEXIS 681, at *3–4, *16–17 (Commonwealth of Va. State Corp. Comm'n Apr. 21, 2021) (order on additional proceedings); Va. Elec. & Power Co., PUR-2020-00109, 2021 Va. PUC LEXIS 678, at *3–4, *16–17 (Commonwealth of Va. State Corp. Comm'n Apr. 21, 2021) (order on additional proceedings).

increase the number of customers taking part and the overall program costs.[221] Later in 2021, after further proceedings, the SCC limited the fee level to the amounts necessary to provide for the estimated start-up costs for DSS to establish the PIPP,[222] leaving the dockets open to consider setting a different fee after the DSS regulations determine the program's scope. As of mid-2022, the DSS had not completed the rulemaking effort to establish the program's details.[223] The rules may address such issues as synchronization with other public assistance programs and enrollment mechanisms, as discussed above. Because the General Assembly did not specify a start date for the program—but instead provided that it would start one year after the DSS promulgated regulations—there is no official program start date as yet.[224]

While the exact contours of the Virginia PIPP are therefore yet to be determined, the state will now have a mechanism to alleviate some of the energy burden from qualifying households. Without the new rules in place, it is not known how much of the actual problem might be addressed. Further assessment of this may come in the DSS gap analysis report due in November 2022.[225] If the caps do not provide for enough relief, particularly given the exigencies of the pandemic for lower income households, the General Assembly might need to revisit them.

V. ENERGY JUSTICE IN VIRGINIA IN 2022

The General Assembly's efforts throughout 2020 to provide for utility bill relief and the settlement of the 2021 triennial rate case were only partially successful to help those in the most need, and did not satisfy those who wanted more to be done. But the 2020 budget bill provision did, at least, shield some customers from the harshest consequences of disconnection. "The good news," one

221. Appalachian Power Co., PUR-2020-00117, at 3–4 (Commonwealth of Va. State Corp. Comm'n May 12, 2021), https://scc.virginia.gov/docketsearch/DOCS/4wlb01!.PDF [https://perma.cc/F2R5-NUW7] (supplemental filing of Appalachian Power Company).

222. Appalachian Power Co., PUR-2020-00117 (Commonwealth of Va. State Corp. Comm'n July 29, 2021), https://scc.virginia.gov/docketsearch/DOCS/5%40z501!.PDF [https://perma.cc/RC4J-FJYS] (order); Va. Elec. & Power Co., PUR-2020-00109, 2021 Va. PUC LEXIS 686, at *5, *8 (Commonwealth of Va. State Corp. Comm'n July 29, 2021) (order).

223. *Regulatory Activity*, VA. REG. TOWN HALL (2022), https://townhall.virginia.gov/L/nowinprogress.cfm [https://perma.cc/SG4Y-ZBBG] (DSS PIPP regulations not listed as promulgated).

224. VA. CODE ANN. § 56-585.6(C) (2022).

225. *Id.* § 56-585.6(D) (2022).

group observed, "is that lawmakers just passed a budget that seeks to protect Virginians from electricity disconnections due to overdue bills."[226] And the recent advent of the PIPP, as noted above, will help many in need. Still, there is much more to be done.

These partial victories for advocates of attention to energy insecurity of vulnerable populations during the pandemic reflect a hard truth. Policies to ensure that customers at risk did not lose their vital utility service became critically important during the pandemic as they had to decide whether to pay their utility bills or allocate funds toward other necessities. Yet the fact that considerable need will still exist in 2022 shows that there are still pervasive inequities in the current utility regulatory system. These stem from long-established legal principles that prioritize ratemaking based on the cost of providing service utility regulation and that as a result are too "often disconnected from the societal outcomes of regulatory decisions."[227] However, building on the explicit recognition of the need to address energy insecurity to date, it is still possible that more can eventually be accomplished in Virginia. The DSS's forthcoming analysis of gaps to reduce customers' energy burden that are not already served by existing and available federal, state, local, or nonprofit programs may serve as a catalyst for progress, although the recent Republican takeover of the House of Delegates militates in favor of caution.[228]

Issues of energy insecurity have featured more prominently than ever before in Virginia, as numerous actors expressed a willingness to assist those impacted by the pandemic. This is important in another way. Professor Baker has written that energy justice requires an "explicitly transformative politics that completely upends the features of the energy system that perpetuate injustice and inequality."[229] When one is attempting to transform existing political dynamics, countering the interests of deeply entrenched actors whose influence has dominated the system for

226. *Has Your Electricity Been Disconnected?*, CLEAN VA. (Nov. 12, 2020), https://www.cleanvirginia.org/has-your-electricity-been-disconnected/ [https://perma.cc/G8JJ-NLBU] (website providing information to consumers).

227. FARLEY ET AL., *supra* note 23, at 18.

228. Meagan Flynn, *Republicans End Democratic Control of Virginia House of Delegates*, WASH. POST (Nov. 3, 2021, 4:30 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-house/2021/11/02/44bbab6c-36b4-11ec-91dc-551d44733e2d_story.html [https://perma.cc/Y76P-PHCR].

229. Baker, *supra* note 9, at 24.

decades,[230] immediate full success is not to be expected. Yet the focused attention to the issues in recent years can be a foundation for subsequent action. From acorns, eventually mighty trees grow.

As Professor Finley-Brook has written about energy justice, "Grassroots movements deepen and grow where people directly experience injustices and support each other in shared struggle (i.e., collective engagement), either in place-based collaboration or through networks across space."[231] This type of shared experience is necessary for increased attention to energy justice issues, both to achieve substantive results and to strengthen the connections that eventually form powerful and resilient grassroots movements. The continued coalition building among advocacy groups is an example of how this evolution can work. Poverty law advocates, advocates for utility reform, and environmental groups have worked together productively to promote energy affordability in Virginia. Developing this sort of infrastructure on the ground is the sort of effort that can pay off later in further understanding the needs of energy customers and advancing their concerns in the General Assembly and elsewhere. Awareness of energy justice issues and collaboration by advocacy groups can prompt action by the highest levels of state government.

The discussion about energy burden has had another salutary effect: it has shone the spotlight on the substantial political power of the state's utilities, and how they have overcharged their ratepayers and been able to get away with it, even in the face of mounting evidence that their customers are suffering during the pandemic. In progress toward energy justice, "oppositional encounters" of this sort serve an extremely important function: they "publicize demands for recognition and procedural justice."[232] That advocates have not fully succeeded hardly portends failure for the future, as continued attention to the situation may eventually lead to more concrete action.

The discussion in this Article focuses largely on one aspect of energy justice: attention to energy affordability. As a result, any conclusions to be drawn from the events that have transpired in the General Assembly and state agencies from the beginning of the pandemic until now to reshape the state's utility law and policy do

230. Wilson, *supra* note 118.

231. Finley-Brook et al., *supra* note 10, at 187.

232. *Id.*

not necessarily translate directly to other efforts to promote energy justice in Virginia. Yet there is one important lesson to be learned from recent events that will be relevant throughout the clean energy transition, at which Virginia is now at an inflection point. With the enactment of the VCEA, numerous clean energy policies will be designed in the next several years by the SCC and other actors through multiple rulemaking proceedings and other actions. How energy justice concerns will be accounted for in these proceedings is yet to be determined, of course. But attention to energy justice during the pandemic shows that policymakers can pay attention to equity during the transition to clean energy. Promoting a clean energy system and making it more equitable are not mutually exclusive objectives, nor should they be.