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Via E-File

August 16, 2019

Joel H. Peck, Clerk  
c/o Document Control Center  
State Corporation Commission  
Tyler Building, First Floor  
1300 East Main Street  
Richmond, VA 23219

Re: *Petition of Virginia Electric and Power Company for Declaratory Judgment,*  
Case No. PUR-2019-00118

Dear Mr. Peck:

Please find attached the BRIEF OF THE KROGER CO. e-filed today in the above referenced matter.

Please place this document of file.

Very truly yours

/s/ Kurt J. Boehm

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KJBkew  
Enclosure

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

PETITION OF: :  
: Case No. PUR-2019-00118  
VIRGINIA ELECTRIC AND POWER COMPANY :  
: For A Declaratory Judgment :  
:

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BRIEF OF  
THE KROGER CO.

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Pursuant to the Commission's August 8, 2019 Scheduling Order, The Kroger Co. ("Kroger") submits this Brief in Support of Calpine Energy Solutions, L.L.C.'s ("Calpine") Motion for Temporary Injunctive Relief and for Expedited Action.

I. BACKGROUND

On July 16, 2019, Virginia Electric and Power Company ("Dominion" or "Company") filed a Petition ("Petition") for a Declaratory Judgment with the State Corporation Commission ("Commission") seeking a determination that: (i) a competitive service provider ("CSP") must have control of sufficient renewable generation resources, including renewable capacity and associated renewable energy, to enable it to provide the full load requirements of the customers it intends to serve pursuant to Code § 56-577 A5 ("Section A5"); and (ii) Calpine, a CSP seeking to serve customers in Dominion's service territory, has not satisfactorily demonstrated that it can provide "electric energy provided 100 percent from renewable energy" as required by Section A5. Dominion states:

"Until the Commission rules on this Petition and confirms the requirements for serving customers under Section A5 so that the Company can make a final determination regarding the validity of the enrollment requests, Dominion Energy Virginia does not intend to continue the enrollment process for the customers that Calpine Solutions is currently seeking to enroll or any other enrollment requests that the Company receives from Calpine Solutions under Section A5."<sup>1</sup>

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<sup>1</sup> Petition p. 4.

On July 22, 2019, Calpine filed a Motion for Temporary Injunctive Relief and for Expedited Action ("Motion"). In its Motion, Calpine claims that Dominion has no basis for failing to continue the enrollment process for the customers that Calpine is currently seeking to enroll and that any further delay in the enrollment process will put Calpine's contracts and relationships with those customers, as well as its possible relationship with future customers, at risk.<sup>2</sup> Calpine requested that the Commission direct Dominion to immediately process all of Calpine's pending enrollment requests and to timely process any future enrollment requests until the Commission has ruled on the Petition.<sup>3</sup>

This proceeding will impact Kroger because Kroger is currently finalizing a contract for 100% renewable energy with Calpine for stores and facilities located in Dominion's service territory. Kroger filed its Notice of Participation on July 31, 2019 and submits this Brief in Support of Calpine's Motion.

## II. ARGUMENT

### A. Calpine Is In Compliance With The Plain Language Of Virginia Code § 56-577(A)(5).

This case is a simple matter of applying a clear and unambiguous statute. Section A5 states that any individual retail customer can purchase renewable energy from a competitive electric supplier if: 1) the electric supplier is licensed to sell retail energy in Virginia; 2) the customers' incumbent utility does not offer an approved 100 percent renewable energy tariff; and 3) the energy purchased is 100 percent renewable.<sup>4</sup> Each of these conditions are met with respect to Calpine's sale of renewable energy to customers in Dominion's service territory.

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<sup>2</sup> See Motion at 3, 7-11, 18.

<sup>3</sup> *Id.* at 19.

<sup>4</sup> Virginia Code § 56-577(A)(5) states: Individual retail customers of electric energy within the Commonwealth, regardless of customer class, shall be permitted: a. To purchase electric energy provided 100 percent from renewable energy from any supplier of electric energy licensed to sell retail electric energy within the Commonwealth, other than any incumbent electric utility that is not the incumbent electric utility serving the exclusive service territory in which such a customer is located, if the incumbent electric utility serving the exclusive service territory does not offer an approved tariff for electric energy provided 100 percent from renewable energy;

**1. Calpine Is A Licensed Electric Energy Supplier.**

Calpine meets the definition of a “supplier of electric energy licensed to sell retail electric energy within the Commonwealth,” per Section A5. Calpine is a licensed electric competitive service provider in good standing in the Commonwealth of Virginia.<sup>5</sup>

**2. Dominion Does Not Offer An Approved, 100% Renewable Tariff.**

Per Section A5, individual customers can purchase renewable energy from CSPs “if the incumbent electric utility serving the exclusive service territory does not offer an approved tariff for electric energy provided 100 percent from renewable energy.” Dominion does not offer an approved 100% renewable tariff. The only option for customers seeking 100% renewable energy is to contract with a CSP.

**3. The Energy Sold By Calpine Is 100 Percent Renewable In Compliance With Section A5.**

Dominion argues in its Petition that Calpine’s renewable contracts violate Section A5 because Calpine has failed to show that it has “sufficient renewable capacity such that its service will meet the requirements of Section A5...”<sup>6</sup> As explained below, although Dominion’s justification for denying Calpine’s renewable customers enrollment under Section A5 appears to have changed since Dominion filed its Petition, none of the justifications offered by Dominion establish that Calpine is in violation of Section A5.

**i. There Is No Renewable Capacity Requirement for Compliance With Section A5.**

Dominion’s stated rationale for denying enrollment of Calpine’s customers is that, in Dominion’s view, Calpine’s renewable contracts violate Section A5 because Calpine does not own or control “sufficient renewable capacity” to provide electric service provided 100 percent from renewable energy to customers in Virginia.

Dominion states:

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<sup>5</sup> See Order Granting License, Case No. PUE-2016-00093 (Oct. 6, 2016), in which the Commission issued License No. E-37 to Noble Americas Energy Solutions LLC (“Noble”) authorizing Noble to conduct business as a competitive service provider of electricity to residential, commercial, and industrial customers throughout service territories open to competition in the Commonwealth of Virginia. On December 20, 2016, the Commission issued an Order Reissuing License in which it cancelled License E37 and awarded License E-37A to Calpine Energy Solutions LLC (f/k/a Noble Energy Solutions, LLC) pursuant to the same terms and condition set forth in the Commission’s October 6, 2016 Order Granting License to Noble.

<sup>6</sup> Petition p. 4.

"In light of Calpine Solutions' refusal to show it has sufficient renewable capacity such that its service will meet the requirements of Section A5, the Company has been unable to validate, in accordance with the provisions of its CSP Coordination Tariff, certain enrollment requests submitted by Calpine Solutions. Therefore, the Company has not proceeded with the enrollment process at this time for those customers that Calpine Solutions is currently seeking to enroll."<sup>7</sup>

This rationale for denying a renewable customer's enrollment is baseless. First, it is uncontested that there is no "renewable capacity" requirement in Section A5. Section A5 gives customers the right to "purchase electric energy provided 100 percent from renewable energy." The Legislature used the terms "electric energy" and "renewable energy." The Legislature, perhaps aware of market realities, did not impose a requirement that CSPs own or control "renewable capacity" in order to sell renewable energy under Section A5. There is no mention of capacity, renewable or otherwise, in Section A5.

Second, in addressing this precise issue in PUR-2018-00134 the Commission found that there is no "renewable capacity" requirement for service under Section A5. In that case Appalachian Power requested that the Commission suspend or revoke the CSP license of Collegiate Clean Energy, LLC ("Collegiate") because Appalachian Power alleged that Collegiate was impermissibly providing non-renewable capacity to serve its customers. As articulated by the Hearing Examiner, "Appalachian argued that Collegiate is not complying with Section A5 because it is not meeting the needs of its customers with both renewable electrons and renewable capacity."<sup>8</sup>

In ruling against Appalachian Power, the Commission found that there is no "renewable capacity" requirement in Section A5 and declined to impose such a requirement on CSPs. The Commission stated:

"In this instance, the term "renewable capacity" is not specifically defined or mentioned in Code § 56-576, Section A5 or the Retail Access Rules. Thus, the extent of the capacity obligation attendant to Section A5 is within the Commission's discretion to decide. The Commission finds that based on the facts and circumstances presented in this case, Appalachian has not established that Collegiate violated Section A5 or the Retail Access Rules. The Commission also finds that Appalachian has not established that the adoption of a renewable capacity standard based on PJM's wholesale reliability requirements is reasonable in this case.

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<sup>7</sup> Petition p. 4.

<sup>8</sup> PUR-2018-00134, Order (June 11, 2019) pp. 3-4.

Further in this regard, the Commission does not find it necessary at this time to adopt a specific renewable capacity standard to be applicable to CSPs providing competitive service under Section A5.”<sup>9</sup>

There is plainly no justification for denying enrollment of Calpine’s customers due to a lack of “renewable capacity” as no such requirement is imposed by the Legislature or the Commission.

**ii. Dominion Did Not Object To The Monthly Balancing Provision In Calpine’s Renewable Energy Contract In Dominion’s Petition For Declaratory Judgment.**

As explained above, the stated rationale for denying enrollment to Calpine’s customers in Dominion’s Petition for Declaratory Judgment is that Calpine does not own or control “sufficient renewable capacity” and is therefore in violation of Section A5. However, during the Direct Energy (PUR-2019-00117) and Calpine evidentiary hearings Dominion appeared to change its argument. Dominion’s “renewable capacity” argument took a back seat to a completely new argument that Calpine’s renewable contracts violate Section A5 because Calpine proposes a monthly balancing in order to match renewable energy with renewable supply.<sup>10</sup> Dominion argued that Section A5 requires a CSP to instead provide renewable energy on a 100% continuous basis. Counsel for Dominion explained this eleventh hour change of legal theories at the evidentiary hearing:

“There was a moment of epiphany in the Direct Energy case, crystallizing Dominion’s concern that the CSPs at issue in both cases, Calpine here, are not selling electrons from renewable energy 24/7/365 or anything close to that. And thus, not meeting the legal standard in A5, which we read to say they must serve the customers’ full load with electric energy purchased a hundred percent from renewable energy.”<sup>11</sup>

So after denying customers enrollment under the theory that Calpine is violating a renewable *capacity* requirement, Dominion changed tactics during the hearing and now contends that it a deficiency in Calpine’s provision of renewable *energy* that is the basis for denying enrollment to customers under Section A5. During cross-examination, Dominion witness Greg Morgan, conceded that these are two distinct bases for objecting to Calpine’s contract:

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<sup>9</sup> PUR-2018-00134, (Order of June 11, 2019), pp. 5-6.

<sup>10</sup> Transcript of Hearing Conducted August 7, 2019, Volume I, p. 28.

<sup>11</sup> Transcript of Hearing Conducted August 7, 2019, Volume I, p. 27.

**Q.** Do you need to have capacity in order to satisfy whatever hourly or monthly standard you're talking about?

**A.** Those are different things. An energy balancing standard is different than the rights to a certain amount of firm power on demand. Energy balancing, whether that's monthly or hourly, how that works is a different thing. I think we're – no, I don't think capacity is the same topic as monthly energy balancing.<sup>12</sup>

Mr. Morgan acknowledges that Dominion denied customers their statutory ability to buy renewable energy based on one legal premise, and that Dominion is now asking the Commission to deny these customers their rights under Section A5 under a completely new premise that was not stated in its Petition for Declaratory Judgement. If Dominion objects to the monthly balancing that Calpine and its customers agreed to in their renewable contracts it should have stated that objection clearly and accurately in its Petition. Customers that are denied their rights to purchase renewable energy under Section A5 are entitled to be notified of the specific reasons why their enrollment is being held up by Dominion. Dominion failed to provide such notice and failed to state a clear basis for granting its Petition for Declaratory Judgement. Kroger believes that it would be appropriate for the Commission to deny Dominion's Petition for Declaratory Judgement and grant Calpine's Motion for Temporary Injunction on this basis alone.

**iii. Calpine Should Not Be Held To A Higher Standard Than Appalachian Power And Dominion With Respect To Renewable Energy Balancing.**

Regardless of the fact that Dominion failed to raise an objection to the monthly balancing provision of Calpine's renewable energy contract in its Petition, Dominion's new argument that Calpine's contracts violate Section A5 because they will balance renewable energy with renewable supply on a monthly basis, also fails on its merits. As Costco Global Energy Buyer, Shay Reed testified there is no seller that can realistically supply renewable power on a continuous basis, every hour of every day:

"It's unrealistic for anyone to believe that, in the existing marketplace..., that green energy can be 24 by 7 by 365. And similar to Kroger, we're getting as close as we possibly can, realistically understanding that the wind is not going to blow sometimes, the waves aren't going to move at some point, solar is, you know, not going at night, and there has to be some reasonable balancing that indicates that we know 24/7 is not realistic. I mean, we're 20-plus years away from being 24/7. And Dominion cannot provide that. And them holding any other utility or retailer or anyone to that standard is just an impossibility at this point."<sup>13</sup>

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<sup>12</sup> Transcript of Hearing Conducted August 7, 2019, Volume II, p. 100.

<sup>13</sup> Transcript of Hearing Conducted August 7, 2019, Volume II, pp. 73-74.





"In addition, the Commission finds that it is reasonable, for purposes of supplying 100 percent renewable energy under this statute, to match renewable generation with a participating customer's load on a monthly basis."<sup>17</sup>

It is a reality of the electric grid that no supplier can provide 100 percent renewable power, in real-time, every hour of every day. Utilities like Dominion and APCo, and retail suppliers like Calpine and Direct Energy use monthly or annual balancing to ensure that, from a financial perspective, renewable customers are buying only renewable power. Calpine should not be held to a different, perhaps impossible, standard of having to physically supply renewable energy in every hour of every day in order to comply with Section A5, while Dominion proposes that it be allowed to use monthly balancing for its proposed renewable TRG Rider. Dominion's proposal to deny Calpine the ability to use monthly balancing to supply renewable energy should be denied.

**B. The Renewable Product Purchased By Costco Appears To Be Consistent With 100 Percent Renewable Products Purchased By Consumers In Other Jurisdictions.**

The monthly balancing provision contained in Calpine's contract with Costco is consistent with contracts for 100 percent renewable energy in other jurisdictions. In fact, most renewable contracts in other jurisdictions provide for annual, rather than monthly matching and are supplied through RECs. Therefore, the product at issue in this case is more stringent and more green than what you typically see in other jurisdictions. Kroger agrees with Ms. Reed's observation that there is no product in the market that provides renewables every hour of every day.<sup>18</sup> For a product to come close to the standard that Dominion proposes Calpine to meet it would need to include a very large and very diverse portfolio of generation facilities. Kroger is not aware of any such product on the market.

For these reasons, Kroger recommends that the Commission approve a minimum standard for compliance under Section A5 that allows monthly and annual balancing consistent with renewable products in other jurisdictions.

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<sup>17</sup> PUR-2017-00179, Order Approving Tariff (January 7, 2019) pp. 5-6.

<sup>18</sup> Transcript of Hearing Conducted August 7, 2019, Volume II, p. 74.

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III. CONCLUSION

For the reasons stated above, Kroger respectfully requests that the Commission deny Dominion's Petition for Declaratory Judgment and grant Calpine's Motion for Temporary Injunctive Relief and for Expedited Action.

Respectfully submitted,

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**COUNSEL FOR THE KROGER CO.**

August 16, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served this 16<sup>th</sup> day of August, 2019, via electronic mail (when available) or by first-class mail, postage prepaid, to the parties listed below.

/s/ Kurt J. Boehm

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