COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 31, 2008

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APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUE-2007-00066

For a certificate of public convenience and necessity to construct and operate an electric generation facility in Wise County, Virginia, and for approval of a rate adjustment clause under §§ 56-585.1, 56-580 D, and 56-46.1 of the Code of Virginia

FINAL ORDER

On July 13, 2007, Virginia Electric and Power Company ("Virginia Power" or "Company") filed an application with the State Corporation Commission ("Commission") for a certificate of public convenience and necessity to construct and to operate an electric generation facility in Wise County, Virginia, and for approval of a rate adjustment clause, "pursuant to §§ 56-585.1.A.6, 56-580.D, and 56-46.1" of the Code of Virginia ("Code") ("Application").[1] Virginia Power stated that the proposed facility "will be a carbon capture compatible, clean-coal powered 585 megawatt (nominal) coal-fueled generating plant" and "will use circulating fluidized bed ('CFB') technology..." ("Coal Plant").[2]

On August 9, 2007, the Commission issued an Order for Notice and Hearing that, among other things, required the Company to publish notice of its Application, established a procedural schedule for this matter, permitted the filing of written and electronic public comments, and scheduled a public hearing to commence on January 8, 2008 to receive testimony of public witnesses and evidence on the Application.

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[1] Application at 3.

[2] *Id.* at 4 (internal quotations omitted).

The Commission received over 700 written or electronic public comments on the Application. In addition, the following filed notices of participation in this matter: Virginia Committee For Fair Utility Rates ("Committee"); Appalachian Voices; Chesapeake Climate Action Network ("CCAN"); Southern Environmental Law Center ("SELC"); Sierra Club; Southern Appalachian Mountain Stewards ("SAMS"); Competitive Bidding Group;[3] Apartment and Office Building Association of Metropolitan Washington; MeadWestvaco Corporation; and the Office of the Attorney General's Division of Consumer Counsel ("Consumer Counsel").

On December 20, 2007, Virginia Power filed a motion to delay the evidentiary hearing. On December 21, 2007, the Commission issued an Order that (1) retained the January 8, 2008 hearing for purposes of receiving testimony from public witnesses, and (2) scheduled a hearing to begin on February 5, 2008 to receive evidence on the Application.

On January 8, 2008, the Commission held a public hearing in which it received testimony from 121 public witnesses.

The hearing re-convened on February 5, 2008 and continued daily through February 8, 2008. The following participated at the hearing: Virginia Power; Committee; SELC, Appalachian Voices, CCAN, Sierra Club, and SAMS (jointly) ("SELC Group"); Competitive Bidding Group; Consumer Counsel; and the Commission's Staff ("Staff"). At the conclusion of the hearing on February 8, 2008, the Commission directed that post-hearing briefs be filed on or before March 10, 2008.

On March 4, 2008, a Joint Motion ("Motion") and Proposed Stipulation and Recommendation ("Stipulation") was filed on behalf of the following participants in this case: Virginia Power; Consumer Counsel; and Staff. On March 4, 2008, the Commission entered an

[3] The Competitive Bidding Group is composed of: Virginia Independent Power Producers, Inc; Virginia Energy Providers Association; and Electric Power Supply Association.

order that extended the due date for post-hearing briefs to March 14, 2008, and provided that post-hearing briefs also include any response to and/or comments in support of, or in opposition to, the Motion and Stipulation.

On March 14, 2008, the following filed post-hearing briefs: Virginia Power; Committee; SELC Group; Competitive Bidding Group; Consumer Counsel; and Staff.[4]

NOW THE COMMISSION, having considered the record, the pleadings, and the applicable law, is of the opinion and finds that the Application is approved subject to the requirements set forth below.

Code of Virginia

Section 56-585.1.A.6 of the Code states in part as follows:

> To ensure a reliable and adequate supply of electricity, to meet the utility's projected native load obligations and to promote economic development, a utility may at any time, after the expiration or termination of capped rates, petition the Commission for approval of a rate adjustment clause for recovery on a timely and current basis from customers of the costs of (i) a coal-fueled generation facility that utilizes Virginia coal and is located in the coalfield region of the Commonwealth, as described in § 15.2-6002, regardless of whether such facility is located within or without the utility's service territory, ... however, such a petition concerning ... facilities described in clause (i) may also be filed before the expiration or termination of capped rates.

Section 56-585.1.A.6 of the Code further includes a public interest declaration, to wit:

> The construction of any facility described in clause (i) is in the public interest, and in determining whether to approve such facility, the Commission shall liberally construe the provisions of this title.

Section 56-585.1.A.6 of the Code also provides for cost recovery during construction and

[4] On March 17, 2008, SELC Group filed a Motion for Leave to File Corrected Brief. SELC Group explained that the only corrections are the form of certain citations and affirmed that no new citations, argument, or materials were added to the corrected brief. We will grant such motion, and we find that no party is prejudiced thereby.

for an enhanced rate of return:

> A utility that constructs any such facility shall have the right to recover the costs of the facility, as accrued against income, through its rates, including projected construction work in progress, and any associated allowance for funds used during construction, planning, development and construction costs, life-cycle costs, and costs of infrastructure associated therewith, plus, as an incentive to undertake such projects, an enhanced rate of return on common equity calculated as specified below. ... The basis points to be added to the utility's general rate of return to calculate the enhanced rate of return on common equity, and the first portion of that facility's service life to which such enhanced rate of return shall be applied, shall vary by type of facility, as specified in the following table:

Type of Generation Facility	Basis Points	First Portion of Service Life
Nuclear-powered	200	Between 12 and 25 years
Carbon capture compatible, clean-coal powered	200	Between 10 and 20 years
Renewable powered	200	Between 5 and 15 years
Conventional coal or combined-cycle combustion turbine	100	Between 10 and 20 years

In addition, § 56-585.1.D of the Code preserves the Commission's authority to determine the reasonableness and prudence of any cost incurred or projected to be incurred:

> Nothing in this section shall preclude the Commission from determining, during any proceeding authorized or required by this section, the reasonableness or prudence of any cost incurred or projected to be incurred, by a utility in connection with the subject of the proceeding. A determination of the Commission regarding the reasonableness or prudence of any such cost shall be consistent with the Commission's authority to determine the reasonableness or prudence of costs in proceedings pursuant to the provisions of Chapter 10 (§ 56-232 et seq.) of this title.

Section 56-580.D of the Code states in part as follows:

> The Commission shall permit the construction and operation of electrical generating facilities upon a finding that such generating

> facility and associated facilities (i) will have no material adverse effect upon reliability of electric service provided by any regulated public utility, (ii) are required by the public convenience and necessity, if a petition for such permit is filed after July 1, 2007, and if they are to be constructed and operated by any regulated utility whose rates are regulated pursuant to § 56-585.1, and (iii) are not otherwise contrary to the public interest. In review of a petition for a certificate to construct and operate a generating facility described in this subsection, the Commission shall give consideration to the effect of the facility and associated facilities on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § 56-46.1.

Section 56-46.1.A of the Code states in part as follows:

> Whenever the Commission is required to approve the construction of any electrical utility facility, it shall give consideration to the effect of that facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact. . . . In every proceeding under this subsection, the Commission shall receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection; and if requested by any county or municipality in which the facility is proposed to be built, to local comprehensive plans that have been adopted pursuant to Article 3 (§ 15.2-2223 et seq.) of Chapter 22 of Title 15.2. Additionally, the Commission (i) shall consider the effect of the proposed facility on economic development within the Commonwealth and (ii) shall consider any improvements in service reliability that may result from the construction of such facility.

Sections 56-46.1.A and 56-580.D of the Code also contain nearly identical language explicitly limiting the Commission's authority:

> In order to avoid duplication of governmental activities, any valid permit or approval required for an electric generating plant and associated facilities issued or granted by a federal, state or local governmental entity charged by law with responsibility for issuing permits or approvals regulating environmental impact and mitigation of adverse environmental impact or for other specific public interest issues such as building codes, transportation plans, and public safety, whether such permit or approval is granted prior to or after the Commission's decision, shall be deemed to satisfy

> the requirements of this section with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, and the Commission shall impose no additional conditions with respect to such matters. Nothing in this section shall affect the ability of the Commission to keep the record of a case open. Nothing in this section shall affect any right to appeal such permits or approvals in accordance with applicable law.

Finally, § 56-596.A of the Code states in part that "[i]n all relevant proceedings pursuant to [the Virginia Electric Utility Restructuring Act], the Commission shall take into consideration, among other things, the goals of advancement of competition and economic development in the Commonwealth."

United States Constitution

SELC Group asserts that § 56-585.1.A.6 of the Code is *per se* unconstitutional because it violates the Commerce Clause of the Constitution of the United States, U.S. CONST. art. I, § 8, cl. 3.[5] Specifically, SELC Group states as follows:

> [T]o gain the benefit of early filing (before the expiration of capped rates) and to bypass the public interest analysis, a utility is required to use in-state, Virginia coal, to the detriment of out-of-state and foreign coal markets. This requirement is unconstitutional and the statute is therefore void.[6]

No other party addressed this constitutional question in its post-hearing brief. We will not, however, dismiss the Application on constitutional grounds. The statute does not require that the Coal Plant use *only* Virginia coal, and the Commission's approval of the Application herein is not subject to such an exclusive requirement. We have not found § 56-585.1.A.6 of the Code to be unconstitutionally discriminatory under the *City of Philadelphia v. New Jersey* line of

[5] *See* SELC Group's March 14, 2008 post-hearing brief at 2-9.

[6] *Id.* at 3.

cases.[7] In addition, the Virginia statute is factually distinct from the Oklahoma statute found unconstitutional in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

Public Interest

The General Assembly has made a policy decision that the construction of "a coal-fueled generation facility that utilizes Virginia coal and is located in the coalfield region of the Commonwealth ... is in the public interest."[8] The proposed Coal Plant fits this description. Thus, the Commission has no discretion to make a separate public interest determination; by statute, the proposed facility is "not otherwise contrary to the public interest" under § 56-580.D of the Code.

Bidding Rules

The "Company requests that the Commission find that the Competitive Bidding Rules, 20 VAC 5-301-10 *et seq.* ('Bidding Rules' or 'Rules'), have no application to this proceeding, or in the alternative, that it grant exemptions from certain aspects of those Rules."[9]

This facility has a unique statutory posture – *i.e.*, the General Assembly has statutorily determined that the construction of "a coal-fueled generation facility that utilizes Virginia coal and is located in the coalfield region of the Commonwealth ... is in the public interest" and that a "utility that constructs any such facility" shall be entitled to specifically-defined cost recovery mechanisms.[10] The Committee, however, asserts that bidding should be required. In this regard, the Committee points out that the "statute does not, however, require that such a plant be owned and operated by such a utility ... and nowhere does § 56-585.1 A 6 state or imply that only a

[7] *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

[8] Va. Code § 56-585.1.A.6.

[9] Application at 7.

[10] Va. Code § 56-585.1.A.6.

utility may build, own, and operate a coalfield plant."[11] Though this may be so, the statute also does not obviate the Commission's discretion to waive its own Bidding Rules. Based on the particular statutory nature of this facility, in conjunction with the specific complexities associated with developing, permitting, and implementing this statutorily favored facility, we find that it is reasonable to grant certain exemptions from the Bidding Rules.

Accordingly, as requested by the Company, pursuant to 20 VAC 5-301-10 the Commission grants an exemption "from those parts of the Rules contemplating that a [Request for Proposals] be issued, bids be accepted from other suppliers, bids be evaluated, and an award be made in connection with building the Coal Plant," which includes the following Bidding Rules: 20 VAC 5-301-30, -40, -50, -80, and -110.[12]

We emphasize, however, that the exemption granted herein is specifically limited as set forth above. For example, the Company explains that its requested exemptions do not apply to matters such as the development of cost benchmarks (20 VAC 5-301-60) or evaluations based on other factors (20 VAC 5-301-70).[13] In addition, § 56-233.1 of the Code requires, in part, that the Company "use competitive bidding to the extent practicable in its purchasing and construction practices," and the Company shall comply with this statutory mandate in its procurement and related activities attendant to the Coal Plant approved herein.

Finally, the Committee and the Competitive Bidding Group also assert that § 56-233.1 of the Code requires competitive bidding, separate and apart from the Bidding Rules, on the

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[11] Committee's March 14, 2008 post-hearing brief at 14-15.

[12] Application at 11.

[13] *Id.*

threshold question of whether to construct the Coal Plant.[14] The Competitive Bidding Group further states that "the Commission has never issued a written interpretation of § 56-233.1."[15] In addition, Virginia Power notes that the Bidding Rules "were based on Va. Code § 56-234.3, as well as other statutes, but not on Va. Code § 56-233.1, although it predated the Rules by about twelve years."[16] Under § 56-233.1 of the Code, whether competitive bidding is "practicable" is to be determined by this Commission. In this instance, the reasons supporting our decision to grant certain exemptions to the Bidding Rules also support a finding that competitive bidding – for the threshold decision to construct this particular facility – is not "practicable" under § 56-233.1 of the Code.[17]

Electricity Supply and Native Load

Pursuant to § 56-585.1.A.6 of the Code, we find the proposed Coal Plant will serve "to ensure a reliable and adequate supply of electricity" and "to meet the [Company's] projected native load obligations."[18]

Reasonableness or Prudence

As noted above, § 56-585.1.D of the Code preserves the Commission's authority to determine the reasonableness or prudence of any cost incurred or projected to be incurred in

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[14] *See* Committee's March 14, 2008 post-hearing brief at 17-18; Competitive Bidding Group's March 14, 2008 post-hearing brief at 11, 19.

[15] Competitive Bidding Group's March 14, 2008 post-hearing brief at 10-11.

[16] Virginia Power's March 14, 2008 post-hearing brief at 91.

[17] Having made this finding, we need not reach the following legal question posed by the Competitive Bidding Group: "[Does] § 56-233.1 require[] utilities subject to its provisions, such as Virginia Power, to use competitive bidding in connection with the threshold decision whether to build a power plant or purchase capacity from a non-utility, unless the utility can affirmatively show that the use of competitive bidding would not be practicable in a particular case." Competitive Bidding Group's March 14, 2008 post-hearing brief at 11.

[18] *See, e.g.,* Exh. 55 (Morgan Rebuttal) at 1-6; Exh. 13 (Martin Direct) at 11; Exh. 56P (Martin Rebuttal) at 23; Exh. 46 (Stevens Direct) at 12-14; Virginia Power's March 14, 2008 post-hearing brief at 13-16 (citations omitted).

connection with the Coal Plant:

> Nothing in this section shall preclude the Commission from determining, during any proceeding authorized or required by this section, the *reasonableness or prudence of any cost incurred or projected to be incurred*, by a utility in connection with the subject of the proceeding. A determination of the Commission regarding the reasonableness or prudence of any such cost shall be consistent with the Commission's authority to determine the reasonableness or prudence of costs in proceedings pursuant to the provisions of Chapter 10 (§ 56-232 et seq.) of this title. (Emphasis added.)[19]

We find that the construction costs projected by the Company to be incurred in connection with the proposed Coal Plant are reasonable and prudent at Virginia Power's currently projected level of $1.8 billion.[20] We conclude that Virginia Power's projected level of costs are reasonable and prudent as applied to this particular facility.[21] The Company testified that it has secured a fixed-price contract that will cover 86% of the construction costs of this facility.[22] In addition, a CFB facility is not a novel construct but, rather, represents a proven technology that has been, and continues to be, used in commercial power plants of appreciable

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[19] We further note that the Commission has additional authority over public utilities under various other provisions of Chapter 10 of Title 56. For example, § 56-234.3 of the Code contains specific provisions related to construction projects such as the one approved herein, including the requirement that "the Commission shall investigate and monitor the major construction projects of any public utility to assure that such projects are being conducted in an economical, expeditious, and efficient manner."

[20] *See* Exh. 51 (Bolton Rebuttal) at 24. *See also* Exh. 56C (Martin Rebuttal) at Attach. JKM-10; Tr. at 1342 (Staff witness John A. Stevens) ("[W]e concluded that the ... costs of [the Coal Plant] appear reasonable."). Financing costs approved below are not included in the $1.8 billion cost projection.

[21] In addition, the Company explains that its "review of other coal-fueled generation projects around the country confirms that the [Coal] Plant's costs are in line with other projects, and that the combination of price, terms, and conditions for the [Coal] Plant is at, if not better than, market." Virginia Power's March 14, 2008 post-hearing brief at 65 (citing Exh. 56P (Martin Rebuttal) at 22; Exh. 14P (Martin Supp. Direct) at 5).

[22] *See, e.g.,* Tr. at 1471 (Company witness James K. Martin) ("Concerning the fixed price of this project, 86 percent of the price of [the Coal Plant] has now been fixed. As explained in my direct testimony, Shaw has contractually accepted the risk of overruns and has locked in their price at $1.4 billion.").

size.[23] The reasonableness and prudence of the total cost estimate, in conjunction with the proven track record in commercial use of this type of facility, has been sufficiently established by the record.[24] This type of facility in this location is statutorily favored as discussed above, and it also represents a reasonable coal-fired addition to Virginia Power's generation fleet.[25]

The Committee, however, asserts that the Commission should not approve full cost recovery because the Company has failed to prove that "its proposed ownership and operation of the coalfield plant is a prudent and reasonable investment for the benefit of its Virginia jurisdictional customers."[26] In support thereof, the Committee discusses the Company's cost estimates, congestion and transmission costs, and comparisons with other options.[27] The Committee further asserts that the Company "has not even attempted to show that its unit is its least cost resource."[28] The Committee also concludes as follows: "What Virginia Power is not entitled to do is sacrifice its customers for the greater good of the Commonwealth by having only its ratepayers subsidize economic development in the coalfield region."[29]

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[23] *See, e.g.,* Exh. 56C (Martin Rebuttal) at 6-7 ("CFB technology is fully mature, with over 500 operating units worldwide, with some units in service for over 28 years. Units up to 300 MW are currently in service and larger units are under construction (as described below, the [Coal] Plant at 585 MW (nominal) consists of 2 units)."); Tr. at 1472 (Company witness James K. Martin); Exh. 46 (Stevens Direct) at 25-26. Indeed, CFB combustion technology "has been in use domestically and abroad since the early 1980s." Virginia Power's March 14, 2008 post-hearing brief at 55 (footnote omitted).

[24] *See also* Exh. 56C (Martin Rebuttal) at 21-32; Tr. at 1327 (Staff witness John A. Stevens).

[25] *See also* Exh. 56C (Martin Rebuttal) at 2-6; Exh. 55 (Morgan Rebuttal) at 4-6; Tr. at 1448 (Company witness Gregory J. Morgan); Virginia Power's March 14, 2008 post-hearing brief at 13-24.

[26] Committee's March 14, 2008 post-hearing brief at 23.

[27] *See, e.g., id.* at 27-40.

[28] *Id.* at 28 (footnote omitted).

[29] *Id.* at 26.

First, as noted above, we find that the Company's cost estimates are reasonable. Virginia Power has provided extensive evidence on the reasonableness and prudence of its costs, including project cost reports, bid comparison report, fixed-price contract, and operations update.[30] The Company estimates that "the all-in or life cycle cost of power will average, in nominal terms, about $93/MWh over the [Coal] Plant's useful life" and explains that this "cost is reasonable, especially when one considers that the Company will be adding a baseload plant with proven reliability."[31] In addition, the Company explains why the assumptions comprising its estimated all-in costs are reasonable, addressing issues related to future carbon costs, fuel costs, capacity factor, market comparisons, and integrated resource plans.[32]

Next, we agree with Virginia Power that the statute does not require the Commission to find that the Coal Plant is the Company's least cost option.[33] That is, the Company does not need to establish that the Coal Plant is the least cost option in order for us to conclude that the total level of currently projected costs is reasonable or prudent as required by § 56-585.1.A.6 of the Code. As further explained by Virginia Power, "the General Assembly has determined such a facility is in the public interest – not at any cost, but so far as costs are reasonable and prudent."[34] The Company concludes that "[g]iven that Va. Code § 56-585.1.A.6 states a need for the [Coal] Plant, declares such a facility is in the public interest, and includes numerous incentives in order to have such a facility actually constructed, it would be improper to read Title 56 generally as somehow authorizing disallowance of otherwise reasonable and prudent costs incurred in

[30] *See, e.g.,* Virginia Power's March 14, 2008 post-hearing brief at 70-71.

[31] *Id.* at 72.

[32] *Id.* at 72-80.

[33] *See id.* at 64, 67.

[34] *Id.* at 67.

furtherance of the [legislation's] objectives."[35] Contrary to the Committee's assertion, Virginia Power has also established that additional market purchases do not effectively meet the needs served by the Coal Plant such that the Company's projected cost level for this project becomes unreasonable or imprudent.[36]

The Committee also argues that this investment is not reasonable and prudent because (i) of the significant congestion and transmission costs that will be incurred by locating the facility outside of the Company's service territory, and (ii) the Company fails to compare the costs of the Coal Plant to new coal-fired generation in another location.[37] We agree with the Company, however, that the statute does not permit us to find that the proposed facility is unreasonable or imprudent due to such factors. Specifically, the General Assembly has directed that a coal-fueled facility in the coalfield region of the Commonwealth utilizing Virginia coal is in the public interest, "regardless of whether such facility is located within or without the utility's service territory."[38] Thus, if the proposed facility could be rejected on reasonableness or prudence grounds because (i) of congestion costs incurred due to the facility's location outside of Virginia Power's service territory, or (ii) of comparisons to a hypothetical facility in another location, the specific statutory public interest finding would be effectively nullified.

Indeed, the Company further explains this as follows:

> Such a disallowance would be particularly unsupportable if based on a theoretical comparison ... to what a utility might endeavor to build that is not a coal-fueled generation facility utilizing Virginia

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[35] *Id.*

[36] *See* Committee's March 14, 2008 post-hearing brief at 36-37; Virginia Power's March 14, 2008 post-hearing brief at 14-16. We likewise do not find that demand-side alternatives effectively meet the needs served by the Coal Plant such that the Company's projected cost level for this project becomes unreasonable or imprudent.

[37] *See* Committee's March 14, 2008 post-hearing brief at 28-31, 37-39.

[38] Va. Code § 56-585.1.A.6.

> coal and is not located in the coalfield region of the Commonwealth. ... [T]he Commission is to examine whether the costs for this particular [Coal] Plant, utilizing Virginia coal, in the coalfield region of Virginia, are reasonable and prudent under those circumstances, not whether its costs are equal to or lower than another generation facility anywhere else in Virginia.... [U]sing such a comparison to decide the reasonableness and prudence of costs in relation to a hypothetical facility in another location, that would not use Virginia coal, and would not provide the same economic benefits, would effectively nullify a specific provision of the law by application of a general provision. ... It is an 'established principle of statutory construction that when certain statutes address a subject in a general manner and other statutes address part of the same subject in a more specific manner, the differing statutes should be harmonized, if possible, and when they conflict, the more specific statutes prevail.'[39]

Notwithstanding the Committee's current protestations to this Commission, the General Assembly has previously determined that it is in the public interest for a utility to construct a coal-fired facility outside of its service territory to benefit economic development in the coalfield region.

Cost Overruns

Pursuant to § 56-585.1.D of the Code and based on the record before us, we do not find that it is reasonable or prudent for the Company to incur *any* amount of costs above the cost estimates that comprise the projected level of $1.8 billion.[40] We cannot approve in essence a blank check for Virginia Power to build the Coal Plant at *any* cost above the amount represented by the Company in this proceeding. While we recognize that construction cost overruns may occur for reasons that are both unforeseeable and outside the control of Virginia Power, any costs of constructing the Coal Plant that exceed the cost estimates comprising the $1.8 billion level

[39] Virginia Power's March 14, 2008 post-hearing brief at 67-68 (citations omitted).

[40] *See* Exh. 56C (Martin Rebuttal) at Attach. JKM-10.

must be proven by Virginia Power in a future proceeding to be reasonable or prudent under § 56-585.1.D of the Code before any recovery thereof from ratepayers shall be permitted.

As discussed further below, we approve the Company's proposed Rider S for cost recovery for the Coal Plant. Rider S will be set to recover the Company's projected costs for the upcoming year and is subject to annual cost true-ups beginning in 2010; that is, there will be an annual proceeding in which the Commission will set the rate for Rider S. In order to recover any costs that *exceed* cost projections approved herein or hereinafter by the Commission (including new costs not included in the projections), Virginia Power shall be required to prove that such costs are reasonable or prudent as part of the annual Rider S proceeding *immediately following* the incurrence of any such cost overrun, unless good cause is shown for recovery in a later Rider S proceeding.[41]

Accordingly, our approval herein is subject to the following requirements: (1) there shall be no recovery, without prior approval of the Commission, of any costs above the projections (including new costs not included in the projections) that comprise the $1.8 billion projected level found reasonable and prudent herein; and (2) in order to recover any costs that exceed the cost projections found reasonable and prudent herein or hereinafter by the Commission (including new costs not included in the projections), Virginia Power shall be required to prove that such costs are reasonable or prudent as part of the annual Rider S proceeding immediately following the incurrence of any such cost overrun, unless good cause is shown for recovery in a later Rider S proceeding.[42]

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[41] For example, the Company, which shall have the burden of proving good cause, may assert good cause for this purpose by establishing that quantification of such incurred costs was not possible for inclusion in the Rider S case immediately following cost incurrence.

[42] If any actual cost incurred is lower than the projections herein, such benefit shall be credited to ratepayers as part of the Rider S proceedings.

Retrofitting and Other Future Plant Modifications

The finding of reasonableness and prudence herein does not extend to any costs associated with retrofitting, or other modifications to, the Coal Plant to make it carbon capture compatible.[43] Accordingly, our approval herein is subject to the requirement that there shall be no recovery of any costs associated with future retrofitting, or other future modifications to, the Coal Plant to make it carbon capture compatible without prior approval by the Commission upon a properly filed application by the Company.

Ratepayer Credits

Our finding of reasonableness and prudence herein is also subject to the following additional cost requirements. Specifically, Virginia Power may possibly obtain: (1) emission control credits or other value from the Coal Plant as a result of future federal or state "cap and trade" or similar-type programs; and (2) federal, state, or local tax credits related to the Coal Plant's emissions-control technology (*e.g.*, including but not limited to clean-coal or carbon capture technology). In this regard, our approval herein is subject to the requirement that the Virginia jurisdictional portion of any credits or other value resulting from (1) or (2), immediately above, shall inure to the benefit of the Company's ratepayers; such benefits shall be reflected in the Company's proposed Rider S.

Rate of Return on Common Equity

Under traditional ratemaking principles, we find that the return on common equity for the Coal Plant that is consistent with the public interest is 10.00% as set forth by Staff and the Committee; this is the midpoint of the range of 9.50% - 10.50% as testified to and recommended

[43] The Committee likewise asserts that the Commission "should put Virginia Power on notice that it has in no way preapproved as reasonable and prudent any cost of carbon capture and storage and, therefore, any such expenditures by Virginia Power would be at its risk of disallowance." Committee's March 14, 2008 post-hearing brief at 64.

by Staff witness Oliver and Committee witness Gorman.[44] Prior to the 2007 statutory amendments, this actual cost of equity capital would be used by the Commission to determine just and reasonable rates, tolls, and charges.[45] The statute, however, now restricts the Commission's authority in this regard and places a floor on the general return on common equity that we may approve for this facility.

Specifically, § 56-585.1.A.2 of the Code prescribes how the Commission must determine the lowest allowed rate of return on common equity in this proceeding:

> a. The Commission may use any methodology to determine such 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 2b, of other investor-owned electric utilities in the peer group of the utility subject to such biennial review, nor shall the Commission set such return more than 300 basis points higher than such average.
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> b. In selecting such majority of peer group investor-owned electric utilities, the Commission shall first remove from such group the two utilities within such group that have the lowest reported returns of the group, as well as the two utilities within such group that have the highest reported returns of the group, and the Commission shall then select a majority of the utilities remaining in such peer group. In its final order regarding such biennial review, the Commission shall identify the utilities in such peer group it selected for the calculation of such limitation. For purposes of this subdivision, an investor-owned electric utility shall be deemed part of such peer group if (i) its principal operations are conducted in the southeastern United States east of the Mississippi River in either the states of West Virginia or Kentucky or in those states south of Virginia, excluding the state of Tennessee, (ii) it is a vertically-integrated electric utility providing generation, transmission and distribution services whose facilities and operations are subject to state public utility regulation in the

[44] *See* Exh. 39 (Oliver Direct) at 1-8 and Schedule 15; Exh. 37P (Gorman Direct) at 8.

[45] *See, e.g.,* Va. Code § 56-235.

> state where its principal operations are conducted, (iii) it had a long-term bond rating assigned by Moody's Investors Service of at least Baa at the end of the most recent test period subject to such biennial review, and (iv) it is not an affiliate of the utility subject to such biennial review.

In determining the "peer group" in this case, fifteen investor-owned electric utilities satisfied the general criteria required above.[46] After removing the "two utilities within such group that have the lowest reported returns of the group, as well as the two utilities within such group that have the highest reported returns of the group," eleven utilities remained.[47] Next, under the statute above, the Commission must select a "majority" of these eleven to determine the lowest allowed rate of return on common equity for the Coal Plant.

In this regard, the Stipulation requests that the Commission select a "majority" consisting of the following eight utilities (with each utility's three-year average return on common equity shown in parenthesis): Duke Energy Carolinas (9.86%); Tampa Electric Company (10.30%); South Carolina Electric and Gas (10.40%); Entergy Mississippi (10.75%); Louisville Gas and Electric (11.12%); Florida Power & Light (11.72%); Gulf Power (12.24%); and Progress Energy Florida (12.59%).[48] Thus, after identifying the eleven utilities as explained above, the Stipulation in effect recommends that the Commission further remove Alabama Power (13.49%), Georgia Power (13.92%), and Appalachian Power (9.50%).[49] We find that it is reasonable to utilize the remaining eight utilities as the "majority" for purposes of establishing the lowest allowed rate of return on common equity for the Coal Plant as required by the statute. We

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[46] *See* Exh. 39 (Oliver Direct) at Schedules 17 and 18.

[47] *See id.*

[48] Stipulation at 2.

[49] *See* Exh. 39 (Oliver Direct) at Schedule 18.

further note that the average return for these eight utilities is near (*i.e.*, ten basis points lower than) the midpoint of the range calculated by Staff witness Oliver for this purpose.[50]

The average of the returns on common equity of the eight remaining utilities listed above is 11.12%, and, as explained above, the statute prohibits the Commission from adopting a return lower than the "majority" selected herein. Accordingly, we find that the general rate of return on common equity for the Coal Plant shall be 11.12%.

Finally, we note that other parties in this proceeding, including the parties to the Stipulation, presented other various methods by which the Commission could select a "majority" of the peer utilities to determine the lowest allowed rate of return. We emphasize that our finding herein in no manner limits the methodology or rationale that may be applied in other proceedings – involving the Company or other electric utilities – to "select a majority of the utilities remaining in such peer group" as required by § 56-585.1.A.2.b of the Code.

Enhanced Rate of Return on Common Equity

As noted above, § 56-585.1.A.6 of the Code further requires specific enhanced rates of return on common equity for different types of generation facilities. The parties to the Stipulation request the Commission to find that the Coal Plant is a coal-fired plant that qualifies for the 100 basis point adder provided for in § 56-585.1.A.6.[51] Further, the parties to the Stipulation agree that the Commission should find that the Coal Plant is "clean-coal powered" under § 56-585.1.A.6 of the Code, but that it is "unresolved at this time whether the [Coal Plant] is 'compatible' with carbon capture."[52]

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[50] *See id.* at 2.

[51] Stipulation at 2.

[52] *Id.* at 2-3.

Thus, in the Stipulation, the Company has withdrawn its request for a finding that the Coal Plant is entitled to a 200 basis point adder as a "carbon capture compatible, clean-coal powered" generation facility under § 56-585.1.A.6 of the Code. Accordingly, we make no finding herein as to whether the Coal Plant is a "carbon capture compatible, clean-coal powered" generation facility. However, we find that there is evidence in this proceeding to establish that the Coal Plant is "clean-coal powered."[53]

Since we do not determine herein whether the Coal Plant is "carbon capture compatible," we find that this coal-fired facility qualifies, at a minimum, as a "conventional coal" facility under § 56-585.1.A.6 of the Code. As noted above, CFB combustion technology has been used for coal-fired electric generation facilities since the early 1980s, and there currently are over 500 CFB stations in operation worldwide.[54] We find that "clean-coal" and "conventional coal" are not mutually exclusive under § 56-585.1.A.6 of the Code. Although a facility cannot be both (1) "carbon capture compatible, clean-coal powered" and (2) "conventional coal" under the statute, a facility that is "conventional coal" may – or may not – also be "clean-coal." That is, the fact that the facility is "clean-coal" does not prohibit a finding, as made herein, that it is also "conventional coal." As stated by the Company: "In other words, the [Coal] Plant is not simply a conventional coal plant, since it meets the 'clean-coal' definition; however, this does not mean for statutory application purposes that it ceases to be a conventional coal technology, albeit an advanced one."[55] Accordingly, the Coal Plant shall receive an enhanced return of 100 basis

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[53] *See, e.g.,* Exh. 56C (Martin Rebuttal) at 14; Exh. 46 (Stevens Direct) at 30-31.

[54] *See, e.g.,* Exh. 56P (Martin Rebuttal) at 6-9; Virginia Power's March 14, 2008 post-hearing brief at 55-56.

[55] Virginia Power's March 14, 2008 post-hearing brief at 56 (footnote omitted).

points as prescribed for a "conventional coal" plant by § 56-585.1.A.6 of the Code. As a result, the total allowed rate of return on common equity for the Coal Plant shall be 12.12%.

Next, § 56-585.1.A.6 of the Code also provides that the enhanced rate of return – for both a "carbon capture compatible, clean-coal powered" and a "conventional coal or combined-cycle combustion turbine" facility – shall apply to between ten and twenty years of the first portion of the facility's service life. In determining a specific duration within this range, the statute requires that such determination:

> shall be consistent with the public interest and shall reflect the Commission's determinations regarding how critical the facility may be in meeting the energy needs of the citizens of the Commonwealth and the risks involved in the development of the facility.[56]

Thus, we must consider the public interest, how critical the facility may be, and the development risks. We agree with Consumer Counsel that, based on the evidence in this case, approving a duration for this purpose somewhere in the "low end of the statutory range ... is consistent with the statutory criteria and the public interest" as set forth above.[57] Accordingly, we find that it is reasonable to apply the enhanced return, as requested by the parties to the Stipulation, to the first twelve years of the Coal Plant's service life.[58]

Finally, the Company is not precluded from filing a new application at some point in the future requesting the Commission to find that the Coal Plant is "carbon capture compatible, clean-coal powered" pursuant to § 56-585.1.A.6 of the Code. In this regard, although the twelve years approved herein is clearly below the allowed maximum of twenty years, we further find

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[56] Va. Code § 56-585.1.A.6.

[57] *See* Consumer Counsel's March 14, 2008 post-hearing brief at 21-23.

[58] Stipulation at 2.

(consistent with the Stipulation) that if the enhanced return is increased to 200 basis points upon a subsequent finding by the Commission that the Coal Plant is "carbon capture compatible, clean-coal powered," the 200 basis point adder shall only apply to the remainder of the first twelve years of the Coal Plant's service life following such finding.

Economic Benefits, Reliability, and Competition

The proposed facility will provide economic benefits and will have no material adverse effect upon the reliability of electric service provided by any regulated public utility.[59]

As required by § 56-596.A of the Code, we also have taken into consideration the goal of advancement of competition in the Commonwealth. We note that the General Assembly changed the Commonwealth's policy related to retail electric competition when it passed significant amendments to the Virginia Electric Utility Restructuring Act in 2007, and, furthermore, the advancement of competition is not a statutory prerequisite for approval of the Application.

Environmental Impact

We must consider environmental impact. The statute, however, does not require the Commission to find any particular level of environmental benefit, or an absence of environmental harm, as a precondition to approval. Rather, the statute directs that the Commission "shall give consideration to the effect of the facility and associated facilities on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact."[60]

[59] *See, e.g.,* Exh. 2 (Hilton Direct) at 18-19; Exh. 13 (Martin Direct) at 9-10.

[60] Va. Code § 56-580.D.

Exhibit 45 is a report prepared by the Department of Environmental Quality ("DEQ") ("DEQ Report"), in which DEQ coordinated a review of the proposed Coal Plant by a number of governmental agencies, including: DEQ; Department of Conservation and Recreation ("DCR"); Department of Game and Inland Fisheries ("DGIF"); Marine Resources Commission; Department of Agriculture and Consumer Services; Department of Health; Department of Forestry ("Forestry"); Department of Mines, Minerals and Energy ("DMME"); Department of Historic Resources; Department of Transportation ("DOT"); and Wise County.[61]

Permitting and Approval Requirements

The DEQ Report lists permits or approvals that are likely to be necessary as a prerequisite to project construction.[62] As a requirement of our approval herein, Virginia Power shall acquire all environmental and other approvals and permits necessary to construct and to operate the proposed Coal Plant and shall provide a complete list of said approvals and permits to the Director of the Commission's Division of Energy Regulation prior to operation of the facility. We find that such requirement is "desirable or necessary to minimize adverse environmental impact."[63] This requirement, however, does not direct the Company to obtain specific permits or approvals if it is not otherwise legally obligated to do so.

Air and Water Impacts

Virginia Power is required to obtain air and water permits for the Coal Plant.[64] As noted above, §§ 56-46.1.A and 56-580.D of the Code contain nearly identical language that explicitly limits the Commission's authority over matters attendant to such permits. Specifically, "any

[61] *See* Exh. 45 (DEQ Report) at 1.

[62] *See id.* at 4-6.

[63] Va. Code § 56-580.D.

[64] *See* Exh. 45 (DEQ Report) at 4-6.

valid permit or approval ... whether such permit or approval is granted prior to or after the Commission's decision, shall be deemed to satisfy the requirements of this section with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, *and the Commission shall impose no additional conditions with respect to such matters.*"[65] Accordingly, the air and water permits required for the Coal Plant "shall be deemed to satisfy the requirements of [§§ 56-46.1.A and 56-580.D] . . . and the Commission shall impose no additional conditions with respect to such matters."[66]

DEQ Recommendations

The DEQ Report contains the following recommendations:[67]

1. Follow the DEQ recommendations to avoid wetlands and streams, and minimize indirect and temporary impacts to wetlands;

2. Continue coordination with the Town of St. Paul to receive an industrial user permit for discharges to the wastewater treatment plant to minimize possible impacts to water quality in the area;

3. Coordinate with DEQ-Office of Solid Waste regarding the siting regulations for Coal Combustion Byproduct and Solid Waste Management facilities;

4. Reduce solid waste at the source, re-use it and recycle it to the maximum extent practicable;

5. Coordinate impacts to karst terrain with DCR;

6. Contact DCR's Division of Natural Heritage for updates to their Biotics database if a significant amount of time passes

[65] Va. Code § 56-46.1.A (emphasis added).

[66] Va. Code §§ 56-46.1.A and 56-580.D.

[67] *See* Exh. 45 (DEQ Report) at 7-8.

before the project is implemented;

7. Work closely with DGIF to develop adequate measures which avoid and minimize potential adverse impacts to aquatic resources and wildlife and follow appropriate recommendations;

8. Coordinate with Forestry to develop appropriate mitigation measures for the loss of forestry resources and to protect trees that are not identified for removal from the adverse effects of construction activities to the extent practicable;

9. Coordinate with DMME if questions arise during planning or construction regarding active or inactive mine workings, or gas wells or pipelines;

10. Coordinate road and transportation impacts with Wise County and the DOT Wise Residency;

11. Follow the principles and practices of pollution prevention to the maximum extent practicable;

12. Limit the use of pesticides and herbicides to the extent practicable; and

13. Consider Wise County recommendations pertaining to the use of rail transportation.

In its post-hearing brief, Virginia Power did not object to any of the above recommendations, nor does the Company assert that any of these recommendations are governed by any other required permits or approvals. Thus, based on the record in this case, we find that requiring Virginia Power to comply with the DEQ recommendations is "desirable or necessary to minimize adverse environmental impact."[68] As a requirement of our approval herein, the Company shall comply with the thirteen DEQ recommendations set forth above.[69]

[68] Va. Code § 56-580.D.

[69] The Company shall coordinate with DEQ its implementation of these thirteen conditions.

Quarterly Reports

Exhibit 49 provides quarterly reporting requirements for Virginia Power, as jointly proposed by Staff, Consumer Counsel, and the Company.[70] As a requirement of our approval herein, Virginia Power shall provide quarterly reports as set forth in Exhibit 49.

Rider S

Based on the findings in this Final Order, we approve the Company's proposed rate adjustment clause as set forth in the Stipulation – *i.e.*, Rider S – which also reflects Virginia Power's proposed cost allocation, rate design, and accounting treatment. Rider S shall be based on the 12.12% return on common equity approved herein.[71] Rider S shall become effective for service rendered on and after January 1, 2009 and shall be subject to annual cost true-up proceedings beginning in 2010. Virginia Power shall file its annual Rider S application on or before March 15 of every year.

Sunset Provision

As a requirement of our approval herein, we find that the authority granted by this Final Order shall expire two (2) years from the date hereof if construction of the Coal Plant has not commenced, and that Virginia Power may subsequently petition the Commission for an extension of this sunset provision for good cause shown.

Public Convenience and Necessity

As noted above, § 56-580.D of the Code states in part as follows:

> The Commission shall permit the construction and operation of electrical generating facilities upon a finding that such generating facility and associated facilities ... (ii) are required by the *public convenience and necessity*, if a petition for such permit is filed

[70] Exh. 49 is also attached to the Stipulation.

[71] *See* Stipulation at 3.

> after July 1, 2007, and if they are to be constructed and operated by any regulated utility whose rates are regulated pursuant to § 56-585.1.... (Emphasis added.)

We agree with SELC Group that this requirement is separate and distinct from other statutory criteria that we must apply and as set forth in this Final Order.[72] The evidence and analyses relevant to the public convenience and necessity, however, need not be separate and distinct from the other statutory criteria. Based on the findings and requirements set forth in this Final Order, along with the record developed in this case, we find that the Coal Plant is required by the public convenience and necessity.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) Pursuant to §§ 56-46.1, 56-580.D, and 56-585.1 of the Code of Virginia, and subject to the findings and requirements set forth in this Final Order, Virginia Power is granted approval for a rate adjustment clause and is granted approval and a certificate of public convenience and necessity to construct and to operate the Coal Plant in Wise County as described in this proceeding.

(2) Within thirty (30) days from the date of this Final Order, the Company shall file with the Commission's Division of Energy Regulation a revised Rider S, consistent with the findings set forth in this Final Order, effective for service rendered on and after January 1, 2009.

(3) The March 4, 2008 Joint Motion submitted by Virginia Power, Consumer Counsel, and Staff is granted consistent with the requirements set forth in this Final Order.

(4) The March 17, 2008 Motion for Leave to File Corrected Brief, jointly filed by Appalachian Voices, CCAN, SELC, Sierra Club, and SAMS, is granted.

(5) This case is dismissed.

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[72] *See* SELC Group's post-hearing brief at 21.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.