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State Corporation Commission
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1300 East Main Street
Richmond, Virginia 23219

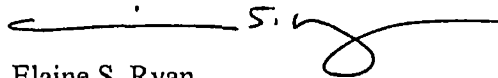
Application of Virginia Electric and Power Company For approval of a rate adjustment clause designated Rider E, for the recovery costs incurred to comply with state and federal environmental regulations pursuant to § 56-585.1 A 5 e of the Code of Virginia
Case No. PUR-2018-00195

Dear Mr. Peck:

Please find enclosed for electronic filing in the above-captioned proceeding, *Virginia Electric and Power Company's Limited Petition for Reconsideration.*

Thank you for your attention to this matter.

Very truly yours,



Elaine S. Ryan

Enclosures

cc: David J. DePippo, Esq.
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Timothy D. Patterson, Esq.
Service List

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

PETITION OF)
)
VIRGINIA ELECTRIC AND POWER COMPANY)
) Case No. PUR-2018-00195
For approval of a rate adjustment clause, designated)
Rider E, for the recovery of costs incurred to comply)
with state and federal environmental regulations pursuant)
to § 56-585.1 A 5 e of the Code of Virginia)

VIRGINIA ELECTRIC AND POWER COMPANY'S
LIMITED PETITION FOR RECONSIDERATION

Pursuant to Rule 220 of the Rules of Practice and Procedure of the State Corporation Commission of Virginia (the "Commission"), 5 VAC 5-20-220, Virginia Electric and Power Company ("Dominion Energy Virginia" or the "Company"), by counsel, respectfully petitions the Commission to suspend its Final Order issued on August 5, 2019 ("Final Order") in this case for the limited purpose of reconsidering its finding that "Dominion has failed to establish in the instant proceeding that it was reasonable and prudent to incur [the Wet-to-Dry Conversion] cost for [Chesterfield Power Station's] Units 3 and 4 based on the circumstances existing at such time.,[1] and that the Company "has not established that such cost was 'necessary' under Code § 56-585.1 A 5 e."[2] ("Limited Petition").

In support thereof, the Company respectfully states as follows:

I. SUMMARY OF ARGUMENT

The Company's Petition was filed under § 56-585.1 A 5 ("Subsection A 5 e") of the Code of Virginia ("Va. Code"), which directs that such a petition "shall" be approved if the Commission finds that costs for which recovery is sought are "necessary" to comply with applicable environmental laws or regulations. The Final Order did not address the relevant

[1] Final Order at 6.
[2] Final Order at 9.

environmental regulations, let alone make a finding that the environmental projects at issue in this Limited Petition for which the Company sought recovery were or were not "necessary" to comply with such environmental regulations at the time those costs were incurred. Instead, it conducted a "prudence" analysis under Va. Code § 585.1 D. The Commission's subsequent finding of imprudence ("Prudence Finding") is against the great weight of the evidence in this proceeding, discussed in detail herein, which clearly establishes that the costs for which the Company seeks recovery in this proceeding were both necessary and prudent. The Commission's Prudence Finding to the contrary is inconsistent with the historic application of any prudence standard and otherwise contrary to the principle of reasonable discretion being afforded to utility decision-making, which is consistent with the public interest.

Accordingly, the Company has filed this Limited Petition asking the Commission to reconsider its Prudence Finding for the reasons discussed below.

II. BACKGROUND AND EVIDENCE.

On December 14, 2018, the Company filed with the Commission its Petition for approval of a rate adjustment clause ("RAC"), designated Rider E, to recover the costs of compliance with state and environmental laws and regulations applicable to generation facilities used to serve the Company's native load obligations pursuant to Subsection A 5 e. Specifically, Subsection A 5 e provides:

> A utility may at any time, after the expiration or termination of capped rates, but not more than once in any 12-month period, petition the Commission for approval of one or more rate adjustment clauses for the timely and current recovery from customers of . . . [p]rojected and actual costs of projects that the Commission finds to be necessary to comply with state or federal environmental laws or regulations applicable to generation facilities used to serve the utility's native load obligations. The Commission *shall approve* such petition if it finds that such costs are necessary to comply with such laws or regulations . . . . The Commission shall have the authority to determine the duration or amortization period for any adjustment clause approved under this subdivision.

(emphasis added.) The Company's Petition was supported by the direct testimony and exhibits of Cathy C. Taylor, which was later adopted by Lisa C. Messinger in her rebuttal testimony, Mark D. Mitchell, Rick D. Boyd, C. Alan Givens, and J. Clayton Crouch.

A. The Company's Direct Evidence.

The Company's Petition seeks to recover three general categories of costs that were incurred to comply with state and federal environmental laws and regulations: 1) asset retirement obligation ("ARO") expenses associated with existing assets that must be closed; 2) newly constructed assets and associated expenses; and 3) ARO expenses associated with the newly constructed assets. The costs requested for recovery are for certain environmental projects located at the Company's Chesterfield Power Station ("Chesterfield Environmental Project"); Clover Power Station ("Clover Environmental Project"); and Mt. Storm Power Station (the "Mt. Storm Environmental Project") (as applied to the Chesterfield, Clover, and Mt. Storm Power Stations, the "Power Stations;" and as to the respective or collective environmental projects at those Power Stations, the "Environmental Projects" or "Projects").[3]

As Ms. Taylor explained in her direct testimony, as adopted by Ms. Messinger, the Environmental Projects are required for the Company to comply with the United States Environmental Protection Agency's ("EPA") "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule," 80 Fed. Reg. 20,301 (Apr. 17, 2015) (codified at 40 CFR Parts 257 and 261) ("CCR Rule"). The CCR Rule was incorporated in Virginia's Solid Waste Management Regulations ("SWMR") by the Virginia Waste Management Board on December 28, 2015. 9 VAC 20-81-800 to -820. On August 5, 2016, the EPA published a direct final rule that extended certain compliance deadlines for certain inactive CCR surface impoundments under the CCR Rule. 81 Fed. Reg. 51,802 (Aug. 5, 2016).

[3] Ex. 2 (Petition).

That rule became effective on October 4, 2016, and was incorporated into the SWMR on April 3, 2017.[4]

To comply with the CCR Rule, the Company is required to close or retrofit certain coal ash ponds and certain water treatment basins and flue gas desulfurization ("FGD") sludge ponds that contain coal ash (individually or collectively "CCR ponds") at its coal-fired power stations. Closing or retrofitting existing CCR ponds necessitates the construction of new ponds and other facilities so that the respective generation facilities may continue to operate and provide power (energy and capacity) to the Company's customers. To operate, the Chesterfield, Clover, and Mt. Storm Power Stations must be in compliance with federal and state environmental laws, regulations, and permits, including water discharge and solid waste permits. Therefore, in 2015, the Environmental Projects were necessary for the Power Stations to continue to provide energy and capacity to Dominion Energy Virginia's customers.[5]

In addition to, and operating in close connection with, the CCR Rule, EPA's Steam Electric Power Generating Effluent Guidelines (40 CFR Part 423) ("Effluent Guidelines"), promulgated under the Clean Water Act ("CWA"), were amended in 2015 to prohibit the discharge of fly ash and bottom ash transport waters. 80 Fed. Reg. 67,893 (Nov. 3, 2015). EPA's Effluent Guidelines have been incorporated into the Virginia State Water Control Board's Virginia Pollutant Discharge Elimination System ("VPDES") Permit regulations. 9 VAC 25-31-30. Compliance with this prohibition also is a driver of certain of the Environmental Projects.[6]

Company Witness Mitchell explained that the Chesterfield Environmental Project included three components: (i) a conversion from a sluiced (wet) ash system to a dry-ash system ("Wet-to-Dry Conversion"); (ii) the creation of a Fossil Fuel Combustion Products ("FFCP")

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[4] Ex. 3 at 3:21-4:8 (Taylor Direct).
[5] Ex. 3 at 4:9-19 (Taylor Direct).
[6] Ex. 3 at 4:20-5:4 (Taylor Direct).

Management Facility, referred to as the Reymet Road Landfill; and (iii) the creation of the Low Volume Waste Water Treatment System ("LVWWTS"). These components are referred to collectively as the "CHIA Project." The total estimated costs for the CHIA Project are $246.8 million.[7]

B. Summary of Staff and Respondent Testimony.

Timely notices of participation were filed by the Virginia Committee for Fair Utility Rates ("VCFUR"), the Sierra Club, and the Office of the Attorney General, Division of Consumer Counsel ("Consumer Counsel"). On April 23, 2019, the Sierra Club filed the direct testimony of Devi Glick and Dr. Jeremy Fisher, and Consumer Counsel filed the direct testimony of Scott Norwood.[8] Though no party took issue with the costs of the environmental projects at the Mt. Storm and Clover Power Stations,[9] Mr. Norwood testified that it was imprudent for the Company to have undertaken the CHIA Project with respect to Chesterfield Units 3 and 4 "when these units were already very old and had been determined to be likely candidates for either early retirement or conversion to gas in all CPP-compliant scenarios of the 2015 IRP."[10] He also suggested that the Company may have been able to delay implementation of the CHIA Project by 9-12 months.[11] Sierra Club Witness Glick testified that the Company did not have to make all of the capital expenditures in the CHIA Project when it did in order to comply with the relevant environmental regulations and suggested that the Company should have retired Units 3 and 4 in 2015, when work on the CHIA Project began.[12] Sierra Club Witness Fisher further recommended that the Commission disallow costs associated with the Wet-to-Dry Conversion

[7] Ex. 4 at 2:8-14 (Mitchell Direct).
[8] VCFUR did not file any testimony.
[9] Final Order at 4.
[10] Ex. 15 at 17:17-23 (Norwood Direct); *see also* Ex. 15 at 12:17-22.
[11] Ex. 15 at 10:2-5 (Norwood Direct).
[12] Ex. 8 at 6-9 (Glick Direct).

component of the CHIA Project that are attributable to Units 3 and 4.[13]

On May 14, 2019, Staff filed the testimony of Gregory L. Abbott, Carol B. Meyers, Estafia M. Davis, Allison F. Samuel, and Phillip M. Gereaux. While Mr. Abbott indicated that Staff did not take a position regarding whether the CHIA Project was prudent with respect to Units 3 and 4,[14] he criticized the Company's May 2015 internal retirement analysis ("May 2015 Analysis"), produced in discovery, one of several analyses the Company relied on in determining to proceed with the CHIA Project, as being inconsistent with the Company's 2015 IRP Plan.[15]

C. The Company's Rebuttal Evidence Regarding Necessity and Prudence.

The Company filed the rebuttal testimony and exhibits of Mark D. Mitchell, Joshua J. Bennett, Glenn A. Kelly, Lisa C. Messinger, C. Alan Givens, and J. Clayton Crouch on May 28, 2019.

1. Messinger and Bennett Rebuttal: In 2015, the Company correctly determined that Chesterfield needed to be in compliance with the CCR Rule by October 2018.

Ms. Messinger's rebuttal testimony addressed the Respondents' suggestion that the Company chose to accelerate compliance with the relevant environmental regulations. With respect to the CHIA Project, she explained that "[b]ecause the Company's Chesterfield VPDES permit was in an active permit renewal process when the ELG Rule was promulgated, it was not only reasonable for the Company to expect that Chesterfield would have the earliest possible compliance date, but altogether likely...."[16] Ms. Messinger also noted that the Sierra Club submitted comments on the Company's draft permit in 2014. Contrary to its position here, the Sierra Club did not argue that any units at Chesterfield should be retired, but rather, urged the Company to comply with the ELG Rule *early*, before the final ELG Rule was even promulgated.

[13] Ex. 9 at 7:4-19 (Fisher Direct).
[14] Ex. 23 at 10:11-16 (Abbott Direct).
[15] Ex. 23 at 6:11-7:4 (Abbott Direct).
[16] Ex. 38 at 3:1-4:7 (Messinger Rebuttal).

As Ms. Messinger noted, the Sierra Club's position in 2014 "is directly contrary to Ms. Glick's suggestion [in this proceeding] that the Company somehow sought an early compliance date through the process of applying for a new permit."[17]

Ms. Messinger also discussed the Company's efforts to comply with the CCR Rule. She explained that the CCR Rule was proposed on June 21, 2010, signed by the EPA Administrator on December 19, 2014, published in the Federal Register on April 17, 2015, and was to be effective on October 19, 2015. The CCR Rule established a series of operational and documentation requirements that started on October 19, 2015, with further deadlines that occurred in October 2016, 2017, and 2018. As relevant, the CCR Rule identified several events that would trigger the closure of coal ash ponds. For example, the CCR Rule required that "the base of an existing surface impoundment must be at least 5 feet above the uppermost aquifer." According to Ms. Messinger, the "Company recognized that, at a minimum, closure for the Chesterfield ash ponds would be triggered by the October 17, 2018, location restriction for aquifer distance based on groundwater elevation data from previously installed groundwater wells at Chesterfield," and therefore, the Company reasonably concluded that compliance was required by October 17, 2018.[18] Notably, no other party took issue with the Company's conclusion regarding when compliance was required.[19]

In addition, Ms. Messinger explained why it was prudent to start compliance efforts early:

> Importantly, however, it is neither practical nor prudent to wait until the date of a triggering event that the Company anticipated would be met to being planning and permitting an alternative facility to ensure compliance with the CCR Rule. As such, the Company developed the plan to allow for compliance expeditiously. The prudence of those decisions is reinforced by the fact that, as discussed, the ELG Rule, as incorporated into the Company's VPDES permit required, compliance by November 1, 2018 –

[17] Ex. 38 at 5:4-6:15 (Messinger Rebuttal).
[18] Ex. 38 at 6:16-7:23 (Messinger Rebuttal).
[19] *Compare* Ex. 15 at 7:4, 9:32, 10:4-5 (Norwood Direct) *with supra* note 18 and related text.

> compliance which necessitated the cessation of using the ash ponds to handle CCR from the four coal[] units. Thus, the ELG or CCR Rule, together or on their own, prohibited the Chesterfield surface impoundments to support further operations, and drove the need to convert to dry ash and to develop a place for disposal, as well as an alternative place to manage non-CCR plant waste waters such as yard sumps, floor drains, coal pile run off, and other facility related waters.[20]

Company Witness Bennett discussed compliance with these environmental regulations from his perspective as Regional Director of Chesterfield and Bellemeade Power Stations. He explained that, when the Company began the planning process to ensure compliance, the coal units at Chesterfield were "fully operational. Units 4, 5, and 6 were operating as base load units (capacity factor greater than 50%), and Unit 3 was serving as an intermediate or peaking unit. Therefore, 1163 MW of the 1262 MW capacity of the Chesterfield coal units were at base load operation, providing significant value to customers."[21] He testified further that during the "Polar Vortex" event in January 2014, "[t]he ability to run the coal units at Chesterfield at full output was vital to maintaining reliable service to customers."[22]

2. Kelly Rebuttal: The Company properly evaluated the Chesterfield coal units in an uncertain regulatory environment and reasonably determined that they would continue to provide value to customers through the Company's October 2018 compliance deadline.

Mr. Kelly's rebuttal testimony identified and described the three key analyses undertaken by the Company in connection with the CHIA Project: (1) the March 2015 co-fire analysis ("March 2015 Analysis"); (2) the May 2015 Analysis; and (3) the December 2015 retirement analysis ("December 2015 Analysis").[23]

The March 2015 Analysis was "a high level analysis to evaluate whether providing natural gas optionality at Chesterfield would improve the economics of the coal units." As Mr.

[20] Ex. 38 at 8:1-12 (Messinger Rebuttal).
[21] Ex. 28 at 3:1-21 (Bennett Rebuttal).
[22] Ex. 28 at 4:4-12 (Bennett Rebuttal).
[23] Ex. 30 at 2:15-3:7; 9:1-16:15 (Kelly Rebuttal).

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Kelly testified, it was immediately apparent that, due to the forecasted high natural gas price in 2015, "converting the units to natural gas would have been pointless" and "would have significantly lowered capacity factors and subsequently reduced the units' value to customers."[24]

The Company undertook the May 2015 Analysis when it had to determine, in May 2015, whether to move forward with the CHIA Project. Because the Company's modeling for the 2015 IRP Plan was not complete concerning the Clean Power Plan ("CPP") at that time, the Company decided to use a commodity price forecast based on what it believed was the worst market case for coal units to determine if Chesterfield Units 3, 4, 5, and 6, as well as the other fossil units in its fleet, should retire. At the time, the Company thought that the worst case scenario was a market case based on a fundamental-based forecast of fuel and energy prices assuming a national CO_2 tax on all fossil units (the "ICF Reference Case"). In the ICF Reference Case, CO_2 regulation assumptions represented a probability-weighted outcome of multiple legislative and regulatory initiatives. The ICF Reference Case assumed a charge on CO_2 emissions to begin in 2020. Using the ICF Reference Case, the May 2015 Analysis indicated that Chesterfield Unit 3 was marginally beneficial to customers, while Units 4, 5 and 6 were very beneficial to customers.[25]

In December 2015, the Company performed another retirement analysis to confirm that the Company should proceed with constructing the Reymet Road Landfill. The December 2015 Analysis indicated that large coal units like Chesterfield Units 5 and 6 were providing significant energy value to customers and were forecasted to continue to add value even under a possible CPP scenario. The December 2015 Analysis further indicated that smaller coal units like Chesterfield Units 3 and 4 were at greater risk given the pending CPP rules, but still showed marginal value in the short term for customers, even when the cost of environmental compliance

[24] Ex. 30 at 9:1-11:13 (Kelly Rebuttal).
[25] Ex. 30 at 12:1-13:2 (Kelly Rebuttal).

was factored in. Therefore, the recommendation for those units was continued operation in the short term, while avoiding long-term life extension capital expenses because of the future risk of CPP regulation.[26]

Mr. Kelly also provided background on the regulatory environment, commodity markets, and extreme weather events in 2015 that factored into the Company's decision-making process. First, he explained that the CPP was proposed by the EPA in 2014, and was a "federal regulation designed to regulate carbon dioxide emissions from fossil electric generation on a national scale."[27] Mr. Kelly testified that "the proposed CPP was extremely complicated with three compliance options: two were mass-based regulations and one was intensity-based regulations. The final CPP was even more complicated with six options: three mass-based regulations and three intensity-based regulations."[28]

Mr. Kelly then described the reaction of the local regulatory community to the CPP. Shortly after it was published, Staff filed comments with the EPA raising concerns about implementation of the CPP causing reliability issues and rate increases in the Commonwealth.[29] In addition, the 2015 General Assembly enacted Senate Bill 1349 ("SB 1349"), which contained elements arguably designed to prevent rushes to judgment concerning retirement of existing power generation units, particularly coal units, including a prohibition on a utility's ability to retire an electric power generation facility without prior Commission approval.[30]

Mr. Kelly also testified that "most coal units were very profitable" in 2015 because the

[26] Ex. 30 at 15:6-16:5 (Kelly Rebuttal); see also Ex. 28 at 9:1-10:20 (Bennett Rebuttal) (explaining that the December 2015 Analysis recommended that no life-extension projects be undertaken for Chesterfield Units 3 and 4, and that accordingly, the Company "undertook only those expenditures that were necessary to maintain compliant operations for the foreseeable future, which for station planning purposes was through 2031.")
[27] Ex. 30 at 3:16-4:1 (Kelly Rebuttal).
[28] Ex. 30 at 4:1-4 (Kelly Rebuttal).
[29] Ex. 30 at 4:11-5:9 (Kelly Rebuttal) (citing Comments of the Staff of the Virginia State Corporation Commission on the Proposed Clean Power Plan, U.S. Environmental Protection Agency Docket ID No. EPA-HQ-OAR-2013-0602, October 14, 2014).
[30] Ex. 30 at 4:11-5:17 (Kelly Rebuttal).

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coal unit energy margins were high, and the forward-looking 2018/2019 capacity market cleared at $165 per MW per day. Additionally, as shown in Figure 2 of Mr. Kelly's rebuttal, at that time, future coal energy margins "were projected to increase over time, meaning coal unit values would be increasing as well." Collectively, this data led the Company reasonably to conclude in 2015 that coal units would "continue to provide significant fuel savings for customers."[31] Though Ms. Glick criticized the Company's reliance on the ICF International, Inc. ("ICF") commodity price forecast used by the Company, Mr. Kelly noted that Staff Witness David R. Eichenlaub specifically approved of this forecast in the 2015 IRP.[32]

Finally, Mr. Kelly responded to Mr. Abbott's suggestion that the 2015 IRP was inconsistent with the Company's May 2015 Analysis, explaining that while the 2015 Plan did show the retirement of Chesterfield Units 3 and 4 in some plans, those plans were not optimized and were shown for purposes of compliance with the CPP. As the 2015 Plan also showed, these units still had market value in 2015. The capacity factors for the Chesterfield coal units at the time of the 2015 Plan were robust and were forecasted to continue on a robust trajectory.[33]

Additionally, Mr. Kelly explained that 2015 was not a normal year of IRP modeling, as Mr. Abbott alluded in his testimony. Not only did the Company have less time to produce its IRP, the CPP environmental regulation was unlike any previous regulation. Further, as the Commission noted in its Final Order in the 2015 Plan proceeding, the CPP was only a proposed regulation at the time the Company filed its 2015 Plan. In the 2015 Plan, the Company ended up producing four different CPP compliant plans and a plan that assumed no carbon tax was implemented (referred to as the "No CO_2" plan). As shown in Mr. Kelly's Rebuttal Schedule 4, the Company determined that the best CPP compliance option for customers was a CO_2 intensity

[31] Ex. 30 at 6:5-7:6 (Kelly Rebuttal).
[32] Ex. 30 at 7:7-8:7 (Kelly Rebuttal).
[33] Ex. 30 at 3:16-8:19; 13:7-14:13; 16:17-18:9 (Kelly Rebuttal).

option. The four CPP compliant plans then analyzed four different ways to meet the CPP regulation using four different resources: solar, co-firing with gas, nuclear, and wind. Because of the uncertainty and controversy surrounding the CPP, the Company did not select a preferred plan for the first time in its history.[34]

Because of forecasted high load growth, the new units under construction, and the low CO_2 intensity of existing units, the Company determined that the best compliance option for customers was following the CPP intensity option. Even though Units 3 and 4 had market value, the 2015 Plan identified them as potential retirements in three of the five plans in order to meet the CPP regulations. But importantly, the 2015 Plan included statements throughout that reinforced the uncertain regulatory environment and its impact on the Company's ability to accurately model contingencies, especially concerning potential unit retirements. The Commission also acknowledged this uncertainty its Final Order on the 2015 Plan in Case No. PUE-2015-00035, noting that "the record in the current proceeding demonstrates that significant uncertainty regarding Clean Power Plan compliance existed at the time the Company filed its IRP and will likely continue for some time."[35]

D. Evidentiary Hearing and Final Order.

The evidentiary hearing before the Commission took place on June 11, 2019, and the Commission issued its Final Order on August 5, 2019. The Final Order approved the Company's requested cost recovery in connection with the Mt. Storm and Clover Projects, but denied recovery for the portion of the Wet-to-Dry Conversion costs that were attributable to Chesterfield Units 3 and 4, finding that the Company "failed to establish in the instant proceeding that it was reasonable and prudent to incur this environmental capital cost for Units 3

[34] Ex. 30 at 18:10-19:6 (Kelly Rebuttal).
[35] Ex. 30 at 19:7-21:14.

and 4 based on the circumstances existing at the time."[36] The Final Order did not address the relevant environmental regulations, and did not otherwise make a finding that the Environmental Projects generally, or the CHIA Project in particular, were or were not "necessary to comply with state or federal environmental laws or regulations" under Subsection A 5 e at the time those costs were incurred. Nor did the Final Order retrospectively acknowledge the uncertain regulatory environment in 2015, as the Commission did contemporaneously in its Final Order in the 2015 IRP Plan proceeding.

The Company has filed this Limited Petition asking the Commission to reconsider its Prudence Finding for the reasons discussed below.

III. ARGUMENT

The Commission's Prudence Finding is contrary to statutory directives and the weight of the evidence in this proceeding,[37] which showed that the CHIA Project, including the Wet-to-Dry Conversion component, was necessary to comply with state and federal environmental regulations under Subsection A 5 e, and that the Company's decision to proceed with the CHIA Project in 2015 was reasonable and prudent with respect to Units 3 and 4, which incrementally represented only approximately 8% of the total CHIA Project costs. The Commission should also, respectfully, reconsider whether the Prudence Finding is consistent with the public interest, against the goal of fostering an environment in which utilities are able, in the context of a very dynamic market and complex and uncertain regulatory compliance regimes, to make reasonable decisions based on the best available contemporaneous information that are, in the utility's best professional judgment in the best interests of its customers, without undue concern that its actions will be subsequently second-guessed and overruled by the Commission.

[36] Final Order at 4, 6.

[37] The Commission's findings are subject to reversal if they are "contrary to the evidence or without evidentiary support." *Level 3 Commc'ns of Va., Inc. v. State Corp. Comm'n*, 268 Va. 471, 474 (2004) (citing *Virginia Gas Distrib. Corp. v. Washington Gas Light Co.*, 201 Va. 370, 375 (1959)).

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A. The Company is entitled to recover all costs associated with the CHIA Project for Units 3 and 4 under Subsection A 5 e.

Va. Code 56-585.1 A 5 e provides that the Commission "shall" approve a petition under A 5 if it finds that costs are necessary to comply with [state or federal] environmental laws or regulations applicable to generation facilities used to serve the utility's native load obligations." This language is not permissive. It is mandatory. In 2012, the Virginia Supreme Court explained that Subsection A 5 e:

> clearly states the intent of the legislature. It states that the Commission "shall" approve a utility's petition for a rate adjustment clause filed pursuant to Code § 56-585.1(A)(5)(e) if the three conditions set out in the statute are met: (1) only one petition for a rate adjustment clause seeking recovery under the section is filed in any 12-month period; (2) the costs are actual or projected costs; and (3) the Commission finds that the costs were necessary to comply with state or federal environmental laws or regulations.

Appalachian Power Co. v. State Corp. Comm'n, 284 Va. 695, 706 (2012). There is no dispute that the Company has complied with the first and second provisions, and the Final Order makes no finding with respect to the third.

The analysis of whether these costs were necessary for compliance must be made at the time the costs were incurred in light of the environmental regulations in place at that time, as acknowledged by the Commission in its Final Order on pages 6 and 9. But other than to briefly identify the environmental regulations under which the Company sought recovery,[38] the Final Order does not discuss those regulations, and does not discuss the Company's evidence with respect to its efforts to comply with those regulations, as discussed in detail in Ms. Messinger's rebuttal testimony. In fact, the Final Order does not provide even a single citation to Ms. Messinger's rebuttal. Subsection A 5 e requires more.

[38] *See* Final Order at 1-2, identifying the CCR Rule and ELG Rule.

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As written, Subsection A 5 e contemplates a stand-alone analysis of the pertinent environmental regulations and the evidence in the record regarding compliance with those regulations, including relevant costs, followed by a determination that those costs were or were not "necessary to comply" at the time they were incurred. *See* Subsection A 5 e. Moreover, it is logical that the Commission would only be able to begin any applicable "prudence" analysis *after* finding that such costs were necessary under Subsection A 5 e. But instead of conducting a proper evaluation of whether the CHIA Project was necessary in order to comply with the CCR Rule and ELG Rule, assuming Units 3 and 4 remained operational, the Commission simply relied on the fact that Units 3 and 4 are not operating today, and its prudence analysis of the Company's decision in 2015 not to retire Units 3 and 4.

Specifically, even after acknowledging that it is required to analyze the relevant facts "based on the circumstances at the time Dominion made [its] investment decision,"[39] the Commission nonetheless concluded that the Company acted imprudently with respect to that investment because today "the Wet-to-Dry Conversion for Units 3 and 4 is not being used to serve customers."[40] Given that the Company did not decide to retire Units 3 and 4 until March of 2019, it is unclear how the Commission could have come to this conclusion unless it was judging the Company's investment decision in hindsight, and contrary to the controlling language in the law.

The Company urges the Commission to reconsider the evidence in the record relating to need, and to make a specific finding that all costs associated with the Wet-to-Dry Conversion for Units 3 and 4, were necessary in 2015 in order to comply with the CCR Rule, the ELG Rule, the CWA, and the VPDES regulation, among others.

[39] Final Order at 6.
[40] Final Order at 9.

B. **The Company's decision to proceed with the CHIA Project in 2015 was reasonable and prudent with respect to Units 3 and 4.**

Va. Code § 585.1 D, as cited in the Final Order, provides:

> The Commission may determine, 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.

As a preliminary matter, the scope of the Commission's authority under § 56-585.1 D in a Subsection A 5 e RAC proceeding such as this one is an open legal question. Given the clear, prescriptive directive in the latter statutory provision that costs *shall* be approved if necessary to comply with governing environmental regulations, one could conclude that the determination by the utility of *whether* to incur the costs is not subject to the same scrutiny under § 56-585.1 D as the reasonableness of the costs themselves (*e.g.*, was the project properly bid, sized, and were the costs otherwise exorbitant or wasteful, *etc.*) In fact, this is not a strained interpretation of legislative purpose to allow incremental cost recovery for expenses necessary to keep generation units running in compliance with changing environmental regulations.

Regardless of this question concerning the scope of the Commission's inquiry, its finding that "Dominion has failed to establish . . . that it was reasonable and prudent to incur [the Wet-to-Dry Conversion] cost for Units 3 and 4 based on the circumstances existing at the time"[41] is contrary to the evidence in the case, which shows that the Company made an informed, documented decision to move forward with all aspects of the CHIA Project in 2015 in the best interest of its customers, and that it did so prudently in the face of a regulatory environment that was evolving and uncertain. While the Commission offered a substantive analysis of Respondents' and Staff's evidence regarding the Company's purported imprudence in deciding

[41] Final Order at 6.

not to retire Units 3 and 4 in 2015, the Commission's analysis of the Company's rebuttal evidence in that regard is truncated and strained.[42]

1. <u>The Company's retirement analyses contemporaneously documented the Company's prudent decision-making process.</u>

Though Mr. Kelly discussed three analyses performed by the Company in his rebuttal testimony – the March 2015 Co-Fire Analysis, the May 2015 Analysis, and the December 2015 Analysis – only the May 2015 Analysis, which the Commission minimizes by referring to it as a retirement "summary," is discussed in any meaningful way in the Commission's Final Order.

With respect to the December 2015 Analysis, the Commission failed to even mention its conclusion that Units 3 and 4 still showed marginal customer value when *including CPP compliance,*[43] instead choosing to focus on the recommendation that the units be retired before any *life-extension* capital was expended.[44] In other words, in December 2015, Units 3 and 4 were still expected to provide positive benefits to customers even with the costs of the CHIA Project factored in, which the Company reasonably believed was necessary to comply with the relevant environmental regulations.[45]

The Commission's discussion of the March 2015 Co-Fire Analysis, as it relates to Units 3 and 4, simply notes that the Company "also presented a March 2015 analysis examining whether to co-fire Units 3 through 6 on natural gas," and then concludes, without any discussion whatsoever, that the "co-fire analysis is not a substitute for detailed retirement or cold storage analyses for Units 3 and 4 that are not in the record."[46] This analysis, particularly when considered in conjunction with the May 2015 and December 2015 Analyses, was an important piece of evidence for the Commission to evaluate in determining whether the Company acted

[42] Final Order at 6-9.
[43] Ex. 30 at 16:1-5 (Kelly Rebuttal); Confidential GAK Rebuttal Schedule 3.
[44] Final Order at 8; *see also* Ex. 28 at 9:1-10:20 (Bennett Rebuttal) (explaining the difference between discretionary life extension costs and mandatory environmental costs).
[45] Ex. 30 at 15-16 (Kelly Rebuttal).
[46] Final Order at 8, n. 37.

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reasonably and prudently with respect to Units 3 and 4 in the face of a shifting regulatory landscape.

The Commission also neglected to discuss the conclusion of the March 2015 Co-Fire Analysis – that "based on the forecasted natural gas and coal prices at the time, the units would not have benefitted from the option to burn natural gas . . . [because] the dispatch price of the units on natural gas would have always been higher than the dispatch price for coal."[47] This conclusion further reinforces the importance of coal in the Company's generating fleet in 2015.

It is also worth noting that the Commission did rely upon the March 2015 Co-Fire Analysis as support for its conclusion that "[b]ased on the specific facts in this record attendant to Units *5 and 6*, the Commission also finds that it was reasonable and prudent not to decide at that time to retrofit these units for natural gas."[48] It is unclear how the Commission could rely on this analysis to support this prudence finding with respect to Units 5 and 6, on the one hand, but then claim that same analysis was inadequate with respect to Units 3 and 4.

2. <u>The Commission's analysis of the regulatory landscape and commodity markets in 2015 is inadequate.</u>

The Commission devotes a total of four sentences to the CPP and its impact on the Company's 2015 IRP,[49] completely omitting any mention of Mr. Kelly's extensive discussion of that topic in his rebuttal testimony. To highlight some of the facts discussed in Section II.C. above, the CPP was merely a proposed rule in 2015 when the Company was deciding whether to proceed with the CHIA Project and developing its 2015 IRP Plan. The final text of the rule was not yet available and there was uncertainty regarding whether it would even be implemented. The Company struggled with how to model the CPP in the 2015 IRP Plan, but ultimately determined that the best CPP compliance option for customers was the CPP intensity option.

[47] Ex. 30 at 9:15-10:5 (Kelly Rebuttal).
[48] Final Order at 11, n. 44 (emphasis added).
[49] Final Order at 7.

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Even though the Company had determined that Units 3 and 4 had market value, the 2015 Plan identified them as potential retirements in three of the five plans solely to comply with the proposed CPP regulations. Because of the uncertainty and controversy surrounding the CPP, however, the Company did not select a preferred plan for the first time in its history, and included numerous statements in the 2015 Plan cautioning that any potential retirements discussed in the Plan were to be considered preliminary, and would be revisited after the CPP Rule was finalized.[50]

The Commission's discussion of the 2015 IRP completely ignores this context and uncertainty in hindsight, even though the Commission was well aware of these facts in 2015. The Commission acknowledged in its Final Order in the 2015 IRP that the "record in the current proceeding demonstrates that significant uncertainty regarding Clean Power Plant compliance existed at the time the Company filed its IRP and will likely continue for some time."[51] The 2015 IRP Final Order further found: "The lack of a preferred plan is reasonable in this case given the substantial regulatory and planning uncertainty regarding the Clean Power Plan . . . ."[52]

The Company's decision to proceed with the CHIA Project in 2015 also was reinforced by the commodity markets, which "indicated that future coal energy margins were projected to increase over time" and that coal units such as Chesterfield Units 3 and 4 "were expected to continue to provide significant fuel savings for customers."[53] In the 2015 IRP Plan, the capacity factors for Units 3 and 4 were forecasted to be between 27% and 45%, which is "consistent with an intermediate load unit."[54]

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[50] Ex. 30 at 18:10-19:6; 20:12-21:6 (Kelly Rebuttal).

[51] *In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, Case No. PUE-2015-00035, Final Order (Dec. 30, 2015) at 5.

[52] *Id.* at 6.

[53] Ex. 30 at 6:5-7:6 (Kelly Rebuttal).

[54] Ex. 30 at 17:7-9 (Kelly Rebuttal).

Finally, with respect to the Commission's reference to the Company's support of Senate Bill 1349,[55] which was grounded in concern surrounding the CPP, it bears repeating that it was not the CPP that ultimately forced the retirement of these plants. Rather, the Company's March 2019 decision to retire Chesterfield Units 3 and 4 was in fact based on shifting market dynamics that were not predicted in 2015, as discussed in Mr. Kelly's rebuttal testimony. Specifically, it was not until the summer of 2017 that the forecasted capacity factors for the Chesterfield coal units began to show signs of a downward trend.[56] This development, in conjunction with falling prices in the PJM capacity market, which also were not foreseen in 2015 or 2016, led the Company to place Units 3 and 4 into cold storage in 2018.[57]

3. <u>The Prudence Finding is at odds with longstanding Commission precedent.</u>

The Company is not aware of any other instance where the Commission has made a determination of this magnitude that this utility's past actions were imprudent. The only known analogous scenario arose with the timing of Virginia Power's cancellation of proposed North Anna Units 3 and 4 in the mid-1980s. *Commonwealth of Virginia, ex. Rel. State Corporation Commission v. Virginia Electric and Power Company*, Case No. PUE-1983-00041, 1984 S.C.C. Ann. Rept. 418, Final Order (Mar. 27, 1984) ("1984 Final Order"). In that case, the Commission determined that there were "shortcomings" in the Company's decision-making process in 1980 when the Company was considering whether to proceed with the construction of North Anna Unit 3:

> In determining the total amount of the investment in North Anna Unit 3 which Vepco is entitled to recover from the ratepayers, it is necessary to pass judgment on Company's prudence relevant to the timing of the cancellation decision. Although no one disputed the correctness of the decision to cancel the plant in November, 1982, there was a question as to whether the plant should have been cancelled sooner. In particular, the Attorney General and Staff

[55] *See* Final Order at 8, n. 35.
[56] Ex. 30 at 23:1-11 (Kelly Rebuttal).
[57] Ex. 30 at 24:1-8 (Kelly Rebuttal).

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> counsel extensively examined, both at the hearing and on brief, Company's conduct of, and results of, a North Anna Feasibility Study which Vepco performed in 1979 and 1980. This Study culminated in November, 1980, with the decision to cancel North Anna Unit 4, and to proceed cautiously with North Anna Unit 3 while continuing to evaluate the situation before beginning major construction of Unit 3 in 1983.
>
> It is clear from the voluminous record in this proceeding that there were shortcomings in Company's decision-making process in 1980. Among other things, Vepco's "base case estimate" of the completion costs of North Anna 3 in 1989 was unrealistically optimistic. Some potential substitutes for the capacity of North Anna 3 also were not studied to the maximum potential. Vepco's analysis of the effect on its cost of capital and financing ability of attempting to build the unit also suffered from deficiencies. Deficiencies were again evident in Company's projection of the probable course of federal regulation of the nuclear industry in general, and of North Anna 3 in particular, especially in the wake of the accident at Three Mile Island. Additionally, there was some evidence that Vepco's "high cost estimate" in 1980 may have been somewhat conservative.

1984 Final Order at 3-4.

Arguably, these facts are significantly more extreme than those before the Commission in the instant proceeding. Nonetheless, the Commission there reached a significantly different decision. In the North Anna proceeding, the Commission found that it could not reach the threshold of an imprudence finding and cost disallowance, and allowed a recovery of some $240 million (nearly $500 million in 2018 dollars) in project costs, notwithstanding the fact that the units were never constructed:

> [T]he question of Vepco's prudence with regard to the timing of the cancellation of North Anna Unit 3 is an extremely close one. We concur with the Hearing Examiner in that we are unable to find that Company's actions were imprudent for the purpose of disallowing any incurred expenses. Thus, we find that Vepco is entitled to recover the $ 240,169,000 in project cancellation costs which had been incurred as of May 31, 1983. Vepco's 1980 Feasibility Study was sufficiently flawed, however, to affect the length of the amortization period for the recovery of the investment in North Anna 3.[58]

[58] In that case, the Commission did deny recovery of a return on investment over and above the capital recovery. 1984 Final Order at 5-6. In the current proceeding, Staff presented similar options for partial or limited cost

1984 Final Order at 4-5. The facts here do not support an unprecedented cost disallowance finding, and the Company respectfully requests that the Commission reconsider this decision based on the evidentiary record and arguments cited and presented herein.

C. Reconsideration of the Prudence Finding is in the public interest.

"In passing upon the reasonableness and allowability of items claimed to be proper operating expenses, the Commission may not assume the duties or usurp the powers of the management." *Norfolk v. Chesapeake & Potomac Tel. Co.*, 192 Va. 292, 311 (1951). In the current environment of dynamic markets and regulations, especially environmental regulations, the Company submits that it is particularly important that a utility's management has the discretion to make informed decisions, based on the best information available at the time, that are not premature or otherwise contrary to customers' ultimate interests.

A first-of-its-kind decision denying the Company cost recovery in this instance for the incremental improvements to Units 3 and 4 may create tension around this decision-making process, for both Dominion Energy Virginia and similarly situated utilities, including in circumstances when the decision may be a relatively "close call." This utility has always maintained the highest respect for the Commission's authority and oversight over its public service obligations, and nothing in this Petition alters that respect. But at the same time, as a matter of the public interest, as well as the law, the Company must be able to make reasonable operational decisions that it believes in good faith and based on considerable expertise meet the customer interest standard, without concern that its actions will be discounted down the road based on subsequent, unforeseen events.

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recovery with respect to the Wet-to-Dry Conversion costs for Units 3 and 4. While the Company questioned the basis for such a result under current law, it does not appear from the Final Order that the Commission even considered alternatives such as those offered by Staff short of the extreme position of total cost disallowance in this scenario. In addition, the Company did not oppose Staff's option to shorten the recovery period for the costs of the Wet-to-Dry Conversion allocable to Units 3 and 4. Ex. 25 at 6:3-7:5 (Givens Rebuttal).

In this regard, the Commission's determination that the Company should have retired Units 3 and 4 in 2015 is particularly concerning where the Commission gave a seemingly conflicting directive regarding unit retirements just six weeks before issuing its Final Order in this proceeding. In its Final Order in the 2018 IRP, the Commission chastised the Company for "clos[ing] several generating plants much earlier than it indicated in prior IRP filings," citing the "negative impacts on the communities in which these plants are located, such as lost jobs and local property tax revenues," as well as a "substantial impact on customers," including the lost "access to the capacity and energy provided by the shuttered plants," which "creates a need for new generating resources" that "will be paid by the Company's customers . . . ."[59] Likewise, the Company would also note that in 2014, the Commission Staff filed comments with the EPA noting that retirements being projected in connection with the CPP were "of grave concern because the power plants involved are used today to ensure reliable service to Virginia customers, have years of useful life remaining, and cannot be replaced overnight or without regard for impacts on the electric system."[60] The Commission certainly appreciates that the Company is tasked with making generation planning decisions that have significant financial and operational consequences that affect the reliability of its system, its 2.5 million customers, and the Commonwealth generally. And hopefully, the Commission also will appreciate the difficulty of doing so in an uncertain regulatory environment.

IV. CONCLUSION

The Company made a decision informed by multiple levels of analysis at several different times to include Units 3 and 4 in the CHIA Project in 2015 to preserve their economic

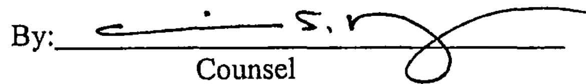
[59] *In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, Case No. PUR-2018-00065, Final Order at 9 (Jun. 27, 2019).
[60] Ex. 30 at 4:11-5:9 (Kelly Rebuttal) (citing Comments of the Staff of the Virginia State Corporation Commission on the Proposed Clean Power Plan, U.S. Environmental Protection Agency Docket ID No. EPA-HQ-OAR-2013-0602 (Oct. 14, 2014)).

value for customers. The requirement to invest an incremental $18.4 million in the total project cost of $246.8 million to comply with environmental regulations is not reasonably in question. Unfortunately, the subsequent unforeseen market conditions (and not environmental regulations) forced these units to retire. Both of these decisions – to invest in environmental upgrades and, ultimately, to retire the units – were reasonable when made. With the benefit of knowing future events, the "right" decision may have been to retire in 2015. But the utility does not have to be "right" to be reasonable.

Imprudence and cost disallowance is a drastic and improper finding in these circumstances, against the backdrop of the language of Subsection A 5 e, based on the considerable evidentiary record, the guide of historic precedent, and otherwise as a matter of public policy. Reconsideration of this determination is appropriate.

WHEREFORE, the Company respectfully requests that the Commission (1) suspend its Final Order, (2) grant this Limited Petition for Reconsideration, and (3) grant such other relief as deemed appropriate and necessary.

Respectfully submitted,

By: 
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August 23, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August 2019, a true and accurate copy of the foregoing filed in Case No. PUR-2018-00195 was delivered by hand, email or mail first class postage pre-paid to the following:

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