

**Virginia State Corporation Commission
eFiling CASE Document Cover Sheet**

220650011

Case Number (if already assigned)	PUR-2021-00142
Case Name (if known)	Application of Virginia Electric and Power Company, For approval and certification for the Coastal Virginia Offshore Wind Commercial Project and Rider Offshore Wind, pursuant to § 56-585.1:11, § 56-46.1, § 56-265.1 et seq., and § 56-585.1 A 6...
Document Type	EXBR
Document Description Summary	Post-Hearing Brief of the Office of the Attorney General, Division of Consumer Counsel, pursuant to the Order on Post-Hearing Filings issued June 2, 2022
Total Number of Pages	12
Submission ID	25129
eFiling Date Stamp	6/24/2022 4:13:55PM



COMMONWEALTH of VIRGINIA
Office of the Attorney General

Jason S. Miyares
Attorney General

June 24, 2022

202 N. Ninth St.
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

VIA ELECTRONIC FILING

Mr. Bernard Logan, Clerk
c/o Document Control Center
State Corporation Commission
1300 E. Main Street
Richmond, Virginia 23219

Re: *Application of Virginia Electric and Power Company, For approval and certification for the Coastal Virginia Offshore Wind Commercial Project and Rider Offshore Wind, pursuant to § 56-585.1:11, § 56-46.1, § 56-265.1 et seq., and § 56-585.1 A 6 of the Code of Virginia, Case No. PUR-2021-00142*

Dear Mr. Logan:

Pursuant to the Commission's Order on Post-Hearing Filings issued in this case on June 2, 2022, the Office of the Attorney General, Division of Consumer Counsel hereby files this Post-Hearing Brief.

Thank you for your assistance in this matter.

Sincerely,

/s/ C. Mitch Burton Jr.

C. Mitch Burton Jr.
Assistant Attorney General

cc: Service List

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUR-2021-00142

For approval and certification for the Coastal Virginia Offshore Wind Commercial Project and Rider Offshore Wind, pursuant to § 56-585.1:11, § 56-46.1, § 56-265.1 et seq., and § 56-585.1 A 6 of the Code of Virginia

**OFFICE OF THE ATTORNEY GENERAL,
DIVISION OF CONSUMER COUNSEL
POST-HEARING BRIEF**

On May 16, 2022, the State Corporation Commission (“Commission”) convened an evidentiary hearing on Virginia Electric and Power Company’s (“VEPCO” or “Company”) Application for approvals related to the Coastal Virginia Offshore Wind Commercial Project (“CVOW Project”). On June 2, 2022, the Commission entered an Order on Post-Hearing Filings that instructed the parties and the Commission’s Staff to address the following four issues in a post-hearing brief. Accordingly, the Office of the Attorney General, Division of Consumer Counsel submits this Post-Hearing Brief.

I. What are the limits, if any, of the Commission’s legal authority to adopt consumer protections in this case, including cost caps or a performance guarantee?

The Company filed its application for approval of the CVOW Project pursuant to Va. Code §§ 56-585.1:11, -46.1, and -585.1 A 6. Section 56-585.1:11 pertains to the development of offshore wind facilities and it is applicable to the proposed CVOW Project. Section 56-46.1 pertains to electric interconnection and transmission facilities and it is applicable to certain portions of the CVOW Project. Section 56-585.1 A 6 pertains to cost recovery of generating units and it is applicable to cost recovery of certain portions of the CVOW Project. Nothing in

these relevant provisions expressly speaks to limiting the Commission's legal authority to adopt consumer protections in this case, whether such protections are in the form of cost caps or a performance guarantee. As the "General Assembly has not placed an express limitation" on the Commission's legal authority to adopt consumer protections in this case, it is presumed that the General Assembly intended "for the Commission, as an expert body, to exercise sound discretion."¹

If the CVOW Project is approved, beyond statutory limitations, the Commission must ensure that the Company has an *opportunity* to recover its reasonable and prudent project costs plus a fair rate of return.² The rate adjustment clause framework governed by § 56-585.1 A 6 effectively guarantees cost recovery of reasonable and prudent costs actually incurred by VEPCO in connection with the construction of the CVOW Project.

Consumer Counsel has not recommended a hard cost cap for the CVOW Project. Consumer Counsel does not believe that the \$9.65 billion cost estimate identified in the Proposed Stipulation is a cost cap of any kind. If the CVOW Project were to be constructed at a cost of less than \$9.65 billion, the Company is not entitled to keep the incremental amount – the RAC true-up process provides dollar-for-dollar recovery of actual costs. Similarly, the \$9.65 billion estimate does not prevent the Company from recovering more than \$9.65 billion in the event that the cost of the CVOW Project increases. Of course, the Company would need to show that any amounts spent over \$9.65 billion are reasonable and prudent – but as discussed below – this is a preexisting feature of the law.

¹ *Va. Elec. & Power Co. v. State Corp. Comm'n*, 284 Va. 726, 741, 735 S.E.2d 684, 691 (2012).

² See e.g., *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n.*, 262 U.S. 679 (1923).

A. Consumer Counsel recommends that the Commission adopt a performance guarantee once the CVOW Project is expected to be in full commercial operation.³

Consumer Counsel recommends that for the life of the CVOW Project's commercial operation and beginning three years after February 4, 2027, customers be held harmless from any incremental cost and diminished benefit incurred due to any shortfall in energy production (and associated tax credits and renewable energy certificates) below an annual net capacity factor of 42% based on the CVOW Project's combined nominal capacity rating of 2,587 MW (AC), with reasonable adjustment for energy losses, and as calculated on a three-year rolling average basis. The performance guarantee does not impact the Company's opportunity to recover its reasonable and prudent capital costs for the CVOW Project.⁴ The performance guarantee rather protects against the risk that the CVOW Project does not perform up to the level represented by the Company in its Application and witness testimony.

There is significant testimony in the record addressing the operational risks of the CVOW Project – and how that risk may harm ratepayers.⁵ The “construction of an offshore wind facility as an in-house asset developed by a regulated utility is unique to Virginia; every other state that has chosen to require offshore wind development does so through a power purchase agreement

³ Ex. 33 (Norwood) at 26-27.

⁴ Tr. (May 18, 2022) at 165 (Kuleshova) (agreeing that a performance guarantee does not impact the Company's recovery of actual construction costs of the CVOW Project since customers would still pay for the actual costs of the CVOW Project)

⁵ Ex 33 (Norwood) at 27; Ex. 40/40ES (Kuleshova) at 79 (“Staff reiterates the importance of the Commission's consideration of ratepayer protections suggested by Staff for the CVOW Project, including protections against cost overruns and a performance guarantee”); *id.* at 83 (“Staff emphasizes the inherent risks of offshore wind technology, as it is only just emerging on the U.S. Atlantic shoreline.”); *id.* at 62-63 (describing key risks and challenges identified in a Moody's report addressing the nascent offshore wind sector in the U.S. which suggests key protective provisions in contracting including “[m]inimum performance thresholds, such as capacity or power curve”); *id.* at 64 (describing projects that, like the CVOW Project, “rel[y] on a collection of subcontracts [as] weaker arrangement[s] because [they] typically would provide contractual protection only at the equipment level such as a turbine's power curve but not the overall plant performance nor overall construction delays”); *id.* at 70 (stating that additional operation risk mitigation measures, such as a performance guarantee, are desirable).

(‘PPA’) or offshore renewable energy certificate (‘OREC’) contracts.”⁶ The PPA/OREC structure “necessarily limit[s] the risks to ratepayers by shifting construction, operational, and market risks from ratepayers to project owners.”⁷ Under the PPA/OREC structure that exists in “every other state” that is developing offshore wind, “utility customers, therefore, will pay only for the actual produced energy and RECs, and will not have to bear the performance risks of the respective offshore wind facilities.” Virginia customers should not be treated as an outlier to the extent that customers could be exposed unnecessarily to performance risk. A broad and diverse mix of stakeholders, including the Attorney General through the Office’s Division of Consumer Counsel, the Governor through the Administration’s Department of Energy, Walmart, Clean Virginia, and Appalachian Voices, all agree that a performance guarantee should exist to protect Virginia customers.⁸

It was ultimately Company management’s decision to deploy capital to construct and operate the CVOW Project.⁹ It goes without saying that the Company’s management is and was responsible for the development structure of the CVOW Project. In the Company’s assessment, it is “confident [that it] ha[s] assembled a world-class team dedicated to this Project’s success.”¹⁰ This necessarily includes responsibility for obtaining assurances that the CVOW Project will operate as advertised. The performance guarantee is not set at an arbitrary level¹¹ – it is directly taken from the *Company’s representation* that it is confident that the CVOW Project will have a

⁶ Ex. 40/40ES (Kuleshova) at 78.

⁷ *Id.*

⁸ Tr. (May 18, 2022) at 296-297 (Mitchell).

⁹ Tr. (May 19, 2022) at 61-62 (Kelly).

¹⁰ Ex. 4/4ES (Mitchell Direct) at 19.

¹¹ Tr. (May 18, 2022) at 25 (Norwood).

net capacity factor of 42 percent.¹² The performance guarantee simply provides for financial accountability related to the Company's sworn testimony regarding the CVOW Project's performance.

II. Address the interplay of Code §§ 56-585.1 A 6, 56-585.1 D, 56-585.1:11, and 56-585.5, particularly § 56-585.5 F.

Section 56-585.1:11 C requires that, “[i]n acting upon *any* request for cost recovery by a Phase II Utility for costs associated with such a facility, the Commission shall determine the reasonableness and prudence of any such costs” (emphasis added). Section 56-585.1:11 further provides for a presumption of reasonableness and prudence if three factual conditions are satisfied. Beyond developing offshore wind facilities, it is § 56-585.1 A 6 that is the statutory vehicle providing for rate adjustment clause (“RAC”) cost recovery through Rider OSW in the upcoming rate year. The Rider OSW RAC provides for dollar-for-dollar recovery of actual costs which would be accomplished through the use of “true-up” factors in future Rider OSW update proceedings. Section 56-585.5 F has special implications for Rider OSW. First, it provides that Rider OSW, as a cost of compliance pursuant to § 56-585.1:11, “shall be recovered from all retail customers in the service territory . . . as a non-bypassable charge.” Second, as Rider OSW exists as a § 56-585.5 F non-bypassable charge, it “shall be updated and trued up by the utility on an annual basis, subject to continuing review and approval by the Commission.”

The fact that Rider OSW charges remain under the Commission's “continuing review and approval” is not atypical, and it is consistent with the preexisting provisions of § 56-585.1 D. Every time that a utility files a request under § 56-585.1 A 6 for initial cost recovery, or to update a revenue requirement for a previously established RAC, the “Commission may

¹² Tr. (May 17, 2022) at 235 (Bennett).

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.”

III. Address specifically what amount of cost recovery Virginia Electric and Power Company is asking the Commission to approve under Code § 56-585.1 A 6. When the Company comes in each year to increase the Rider OSW rate adjustment clause, does it have to show reasonableness and prudence under Code § 56-585.1 D? And when the Company comes in each year to increase the Rider OSW rate adjustment clause, does it have to show that the Levelized Cost of Energy standard in Code § 56-585.1:11 is met?

The total annual revenue requirement requested for recovery in the Rider OSW rate year, beginning September 1, 2022, is \$78.7 million.¹³ As stated above, when a utility makes a “true up” filing to update a RAC revenue requirement, which is anticipated for Rider OSW, 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.”¹⁴ In addition, § 56-585.5 F requires that charges established in such true-up proceedings remain “subject to continuing review and approval by the Commission.” The determination of what is reasonable and prudent cost is largely a factual determination for the Commission subject to its discretion. In this case, the General Assembly has layered a presumption of prudence for the CVOW Project if certain conditions are satisfied, including a Levelized Cost of Energy standard.¹⁵ If and when the Commission needs to consider the reasonableness and prudence of costs in connection with a future Rider OSW cost recovery proceeding, it appears that the presumption of prudence, and the attendant conditions, would be relevant to that determination.

¹³ Ex. 2/2ES (Application) at 21.

¹⁴ Section 56-585.1 D.

¹⁵ Section 56-585.1:11.

IV. Please identify all costs and recovery mechanisms associated with the Coastal Virginia Offshore Wind Commercial Project including, but not limited to, the fuel factor, base rates, and any other recovery mechanism(s). Include a discussion of associated charges from PJM. Also explain how those recovery mechanisms will be impacted.

For the customer paying a monthly electric bill, the costs associated with the CVOW Project will not be limited to Rider OSW. This is why stating a projected monthly bill impact based only on the projected Rider OSW revenue requirements misrepresents the true cost of the CVOW Project as it will be charged to customers.¹⁶

For example, once a REC proxy value is established for RPS compliance purposes (on a per megawatt hour basis), future Rider OSW revenue requirements will be reduced by that proxy value for every megawatt hour of generation produced. This reduction to the Rider OSW revenue requirement does not mean, however, that a customer's total monthly bill is reduced by that same amount. Rather, the amount associated with the REC proxy value will simply be shifted to another line item on the customer bill, Rider RPS. This convoluted ratemaking treatment was driven by the need to follow the Virginia Clean Economy Act's provisions applicable to non-bypassable charges in § 56-585.5 F. But this does not mean that the REC proxy value reduces the CVOW Project cost that will be charged to customers. Customers, and not some third-party, will fund the REC proxy value when they pay Rider RPS on the same monthly bill.

This same issue pertains to whatever capacity value, if any, is assigned for the CVOW Project. Once a capacity proxy value is established for Rider OSW, the Rider OSW charge will be reduced by that proxy value for every qualifying megawatt of generation (which will be less than nameplate). But again, this does not mean that a total monthly bill is reduced by that same

¹⁶ See, e.g., Tr. (May 18, 2022) at 223-225 (Welsh).

amount. This proxy value will also shift to another line item on the monthly bill, base rates. The proxy capacity value will not actually serve to reduce the CVOW Project's costs that will be charged to customers. It is customers, and not some third-party, that will fund the capacity proxy value when they pay the base rate.

The Company must meet its energy requirements and it does so with a combination of company-owned facilities, bilateral contracts, and spot market energy purchases. There is virtually always a delta between the Company's energy requirement and the amount of energy it has available through its owned and contracted facilities. When that delta is negative, the Company is able to fill that gap with PJM spot market purchases. And when the delta is positive, the Company is able to make an off-system sale of energy into PJM. Off-system sales are typically netted against the cost of any needed purchases and the remaining amount is flowed through the fuel factor. The Company's overall system energy dispatch should increase with the addition of the CVOW Project, as the CVOW Project is a zero-cost fuel resource. All things equal, this should narrow the times in which spot market purchases are needed and increase the times in which the Company can make an off-system sale of energy. The extent to which this results in monthly bill impacts will depend on the CVOW Project producing energy as advertised and forward wholesale energy prices.

Staff provided evidence that the energy produced by the CVOW Project will serve to cannibalize energy sales from other generation facilities owned by the Company.¹⁷ The Company did not disagree with this assertion, suggesting it was a feature of the CVOW Project.¹⁸ From a rates perspective, less energy produced from other generation facilities will

¹⁷ Ex. 40/40ES (Kuleshova) at 90.

¹⁸ Ex. 50 (Kelly Rebuttal) at 37.

mean two things. First, the Company's overall volume of fuel purchases should decrease, which should lower the impact of the fuel factor rate adjustment clause. Second, there will be fewer sales of energy from the cannibalized generating units, and therefore less energy revenue available from those resources to net against the Company's energy purchases. This would increase the fuel factor rate adjustment clause.

CONCLUSION

Consumer Counsel offers the foregoing response to the Commission's Order on Post-Hearing Filings and reiterates its recommendation and support for a performance guarantee to protect Virginia ratepayers from CVOW Project risks.

Respectfully submitted,

DIVISION OF CONSUMER COUNSEL
OFFICE OF THE ATTORNEY GENERAL

/s/ C. Mitch Burton Jr.

Jason S. Miyares
Attorney General

Steven G. Popps
Deputy Attorney General

C. Meade Browder, Jr.
Senior Assistant Attorney General

C. Mitch Burton, Jr.
John E. Farmer, Jr.
R. Scott Herbert
Assistant Attorneys General

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071

June 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on June 24, 2022, by electronic service to:

Kati K. Dean, Esquire
 Frederick D. Ochsenhirt, Esquire
 William H. Harrison, IV, Esquire
 K. Beth Clowers, Esquire
 State Corporation Commission
 Office of General Counsel
 P. O. Box 1197
 Richmond, VA 23218
 Kati.Dean@scc.virginia.gov
 Frederick.Ochsenhirt@scc.virginia.gov
 William.Harrison@scc.virginia.gov
 Beth.Clowers@scc.virginia.gov

David J. DePippo, Esquire
 Paul E. Pfeffer, Esquire
 Lisa R. Crabtree, Esquire
 Dominion Energy Services, Inc.
 120 Tredegar Street
 Richmond, VA 23219
 david.j.depippo@dominionenergy.com
 paul.e.pfeffer@dominionenergy.com
 lisa.r.crabtree@dominionenergy.com

S. Perry Coburn, Esquire
 Timothy G. McCormick, Esquire
 Danniaka N. McLean, Esquire
 Christian & Barton, L.L.P.
 901 East Cary Street, Suite 1800
 Richmond, VA 23219-4037
 pcoburn@cblaw.com
 tmccormick@cblaw.com
 dmclean@cblaw.com

William C. Cleveland, Esquire
 Claire Horan, Esquire
 Southern Environmental Law Center
 120 Garrett Street, Suite 400
 Charlottesville, VA 22902
 wcleveland@selcva.org
 choran@selcva.org

Vishwa B. Link, Esquire
 Joseph K. Reid, III, Esquire
 Jennifer D. Valaika, Esquire
 Timothy D. Patterson, Esquire
 Benjamin A. Shute, Esquire
 McGuire Woods, LLP
 Gateway Plaza
 800 East Canal Street
 Richmond, VA 23219
 vlink@mcguirewoods.com
 jreid@mcguirewoods.com
 jvalaika@mcguirewoods.com
 tpatterson@mcguirewoods.com
 bashute@mcguirewoods.com

Carrie H. Grundmann, Esquire
 Spilman Thomas & Battle, PLLC
 110 Oakwood Drive, Suite 500
 Winston-Salem, NC 27103
 cgrundmann@spilmanlaw.com

Barry A. Naum, Esquire
 Spilman Thomas & Battle, PLLC
 1100 Bent Creek Boulevard, Suite 101
 Mechanicsburg, PA 17050
 bnaum@spilmanlaw.com

Matthew L. Gooch, Esquire
 William T. Reisinger, Esquire
 ReisingerGooch PLC
 1108 East Main Street, Suite 1102
 Richmond, VA 23219
 matt@reisingergooch.com
 will@reisingergooch.com

Cale Jaffe, Esquire
 Environmental Law & Community
 Engagement Clinic
 University of Virginia School of Law
 cjaffe@law.virginia.edu

Marion Werkheiser, Esquire
Cultural Heritage Partners, PLLC
1811 East Grace Street, Suite A
Richmond, VA 23223
marion@culturalheritagepartners.com

/s/ C. Mitch Burton Jr.
Counsel

220650011