Virginia State Corporation Commission
eFiling CASE Document Cover Sheet

Case Number (if already assigned)	PUR-2021-00142
Case Name (if known)	Application of Virginia Electric and Power Company, For approval and certification of the Coastal Virginia Offshore Wind Commercial Project and Rider Offshore Wind
Document Type	EXBR
Document Description Summary	Post-Hearing Brief of Clean Virginia
Total Number of Pages	25
Submission ID	25126
eFiling Date Stamp	6/24/2022 3:26:57PM

REISINGERGOOCH
ATTORNEYS AT LAW

William T. Reisinger
REISINGERGOOCH, PLC
1108 E. Main Street, Suite 1102
Richmond, Virginia 23219
(804) 223-6391
Will@ReisingerGooch.com

June 24, 2022

VIA ELECTRONIC FILING

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

Re: *Application of Virginia Electric and Power Company, For approval and certification of 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 June 2, 2022, Order on Post-Hearing Filings, please find the attached Post-Hearing Brief and Statement of Issues of respondent Clean Virginia in the above-captioned matter.

Should you have any questions about this filing, please do not hesitate to contact me.

Sincerely,

/s/ William T. Reisinger

William T. Reisinger

cc: Certificate of Service (via email)

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUR-2021-00142

For approval and certification of 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

POST-HEARING BRIEF OF
CLEAN VIRGINIA

Respondent Clean Virginia ("Clean Virginia"),[1] by counsel, hereby submits its Post-Hearing Brief and Statement of Issues regarding the Petition of Virginia Electric and Power Company, doing business as Dominion Energy Virginia ("Dominion" or "Company"), for approval and certification of the approximately 2,600 megawatt ("MW") Coastal Virginia Offshore Wind Commercial Project ("CVOW Project" or "Project") and Rider Offshore Wind ("Rider OSW"). Clean Virginia's Statement of Issues (i.e., "Issue Matrix") is attached hereto as Attachment A.

INTRODUCTION

No party opposes approval of the CVOW Project. For its part, Clean Virginia recognizes the value wind energy can play in a diverse portfolio of carbon-free generation. Clean Virginia supported the 2020 Virginia Clean Economy Act ("VCEA"),[2] which included a legislative

[1] Clean Virginia is a public interest organization that advocates for clean energy and fair utility rates. The organization supports projects that allow Virginia's electric utilities to reduce carbon emissions in a manner that is cost-effective and fair to customers. See Clean Virginia February 2, 2022, Notice of Participation at 2-3.

[2] Chapters 1193 and 1194 of the 2020 Acts of Assembly.

preference for utilities to develop facilities or purchase wind energy located off the coast of the Commonwealth. Dominion's proposed CVOW Project, however, presents significant risks to customers based on its size and complexity. The CVOW Project will likely be one of the largest and costliest construction projects in the Company's history. The CVOW Project presents additional risks based on Dominion's decision to act as its own engineering, procurement, and design contractor, to own 100% of the equity of the completed facility, and to pass 100% of the risk of cost overruns to ratepayers.

While recognizing the environmental benefits that the CVOW Project will provide, Clean Virginia urges the Commission, should it approve the project, to adopt several common-sense consumer protections. Each of the consumer protections proposed by Clean Virginia is (1) legally permissible and (2) consistent with the Commission's precedent in similar proceedings, including generation facility cases where the General Assembly had expressed a preference for a particular facility or technology.[3]

DISCUSSION

A. The CVOW Project will be one of the most expensive, complex, and risky projects ever undertaken by the Company.

There appeared to be little dispute at the hearing that the CVOW project, if constructed, would be one of the most complex and expensive generation projects ever undertaken by Dominion – or any other regulated utility in the country. No other utility or independent developer has undertaken an offshore wind project of this size in the United States.[4]

---

[3] Clean Virginia is aware that Dominion filed a proposed stipulation signed by the Commission Staff and two respondents: the Sierra Club and the Nansemond Nation. Ex. 3. These respondents addressed environmental justice and equity issues in pre-filed testimony, not consumer protection. See Sierra Club Post-Hearing Brief at 2 ("The Sierra Club did not analyze the consumer protection, cost recovery, and rate-making questions that have been the focus of other participants in this proceeding.") No customer or customer advocate is supporting the proposed stipulation.

[4] See Ex. 36 (Chang) at 6-8; Tr. 110 (May 18, 2022).

1. The CVOW Project would likely be the largest capital investment in the history of the Company.

The capital costs of the CVOW Project, when considered in real or nominal dollars, will likely exceed any other recent investment made by the Company. The facility, if approved, will likely be "the largest capital investment in the history of this Company" and "the most costly single project being undertaken by any regulated utility in the country, with the exception of Southern Company's ongoing Vogtle nuclear project."[5]

The CVOW Project will also result in one of the largest single rate increases in the history of the Company. According to Dominion, Rider OSW in 2027 will result in a peak monthly bill increase of $14.21 for a residential customer using 1,000 kWh per month.[6] Dominion estimates Rider OSW will result in an average bill impact, over the life of the project, of $4.72.[7] This is several times the rate impact of any other currently approved generation rider.[8] Any cost overruns, construction delays, damage from extreme weather, or other performance issues could increase capital costs and consumer rate impacts.

2. The CVOW Project contains novel elements and is far more complex than the Company's 12 MW CVOW Pilot Project.

In its application and supporting testimony, Dominion cites the experience it obtained developing the 12 MW CVOW Pilot Project.[9] Dominion also notes that the capital costs for the Pilot Project totaled $294 million – slightly below the Company's $300 million capital cost projection.[10] But there are significant differences in cost, size, complexity, and business risk between the 12 MW Pilot Project and the approximately 2,600 MW CVOW Project:

---

[5] Tr. 78 (May 17, 2022).
[6] See Ex. 41 (Welsh) at 5-6.
[7] Id.
[8] See Tr. 65-66 (May 18, 2022).
[9] Application at 6.
[10] Tr. 161 (May 17, 2022).

- The CVOW Project requires 176 turbines. The Pilot Project only required 2 turbines.
- The CVOW Project requires Dominion to construct and maintain an offshore substation. The Pilot Project did not.
- The CVOW Project turbines are over twice the size (14.6 MW) of the Pilot Project turbines (6 MW).
- The turbine model planned for the CVOW Project has not been utilized in any other offshore wind development;[11]
- Dominion's turbine supplier, Siemens Gamesa, has been "hit hard" by supply chain disruptions, raising the possibility of delays in receiving the 176 turbines necessary to complete the project.[12] Additionally, there are currently two projects ahead of the CVOW Project that will be receiving the same turbine designed by Siemens Gamesa.[13]
- The CVOW Project is contingent on the availability of the installation vessel the *Charybdis*. The vessel is contracted to serve two other offshore wind developments prior to use by the Company.[14] Any delays associated with these other projects could delay the in-service date for the CVOW Project.
- Dominion is acting as its own engineering, procurement, and construction ("EPC") contractor for the CVOW Project. For its Pilot Project, Dominion had EPC agreements with experienced developers Orsted and L.E. Myers that fixed approximately 87% of the capital costs.[15]

Due to the size and complexity of the CVOW Project, and the current challenges facing offshore wind manufacturers, there is risk that the project will experience delays or component cost increases. Consumer Counsel Witness Norwood testified that any delays in the in-service date for the CVOW Project will likely result in cost overruns, interest expenses, and replacement power costs.[16]

---

[11] See Tr. 122 (May 18, 2022).
[12] See Ex. 8; Tr. 212 (May 17, 2022).
[13] Tr. 247 (May 17, 2022).
[14] Tr. 116, 118 (May 18, 2022).
[15] Pilot Project Order at 4.
[16] Ex. 33 (Norwood) at 27; Tr. 44, 46 (May 18, 2022).

3. Dominion proposes to own 100% of the equity in the CVOW Project, meaning that "[c]ustomers bear almost all of the risks."[17]

The ownership structure for the CVOW Project presents additional risks for ratepayers. As Clean Virginia witness Chang testified, all other states pursuing large-scale offshore wind are doing so through power purchase agreements ("PPAs") or other third-party financing mechanisms.[18] In each of the major offshore wind projects to date, the developer owns the project and therefore bears the risk. The Commission noted the risks associated with utility ownership when approving the CVOW Pilot Project. In that case, the Commission explained that "other utilities involved in offshore wind have done so through a [PPA] model, which generally places all or some of the risk on the developer."[19] The Commission noted, however, that under the Company's self-build ownership model "[c]ustomers bear almost all of the risks," including "the risk of potential cost overruns."

4. Dominion's decision to operate as its own EPC contractor for the CVOW Project results in additional risks for customers.

Unlike its other construction projects, Dominion is operating as its own EPC contractor for the CVOW Project. Dominion Witness Mitchell explained that most of the Company's prior construction agreements were "wrap" EPC contracts.[20] In other words, the EPC contractors were responsible for all aspects of project development. In Dominion's offshore wind Pilot Project, for example, the Commission found that the risks to customers were mitigated to some extent

[17] Pilot Project Order at 8.
[18] Ex. 36 (Chang) at 8-9.
[19] *Petition of Virginia Electric and Power Company, For a prudency determination with respect to the Coastal Virginia Offshore Wind Project pursuant to Virginia Code § 56-585.1:4 F* ("Offshore Wind Pilot"), Case No. PUR-2018-00121, Final Order at 8-9 (November 2, 2018).
[20] See Tr. 157-159 (May 17, 2022).

because Dominion was *not* acting as its own EPC contractor.[21] Mr. Mitchell agreed that EPC contracts mitigate risks such as materials, labor, and schedule risk.[22] But according to Dominion Witness Mitchell, the Company determined the CVOW Project will be so large that no single EPC contractor could provide adequate financial assurance.[23]

B. The Commission should adopt several common-sense consumer protections, as it has done with other novel energy projects favored by the General Assembly.

1. The Commission should impose a firm capital cost cap stating that Dominion is at risk for any cost overruns above the approved capital amount.

As Mr. Chang testified, the VCEA does not include an explicit mechanism that limits Dominion's ability to recover project overruns. For that reason, "Dominion may not have a strong inclination to control project costs and may be inclined to incur project overruns knowing that the Company may be able to recover overruns."[24] Capital cost overruns, whether they amount to millions or billions of dollars, result in an increased rate base for the CVOW project, which in turn results in higher rates paid by customers. Mr. Chang recommended that the Commission establish a maximum cost cap of $9.3 billion, excluding contingency amounts, and "set clear guidance that Dominion would be at risk for recovery of excess costs."[25]

Clean Virginia recommends that the Commission adopt a cost cap similar to that imposed for costs associated with the Virginia City Hybrid Energy Center (the "Wise County Coal Plant.") In its final order in that case, the Commission explicitly stated that its approval was not

---

[21] Under Dominion's ownership model, "ratepayers bear almost all the risk of a project design failure except for a limited amount of risk retained by the EPC contractor during the limited warranty period." Offshore Wind Pilot, Final Order at 8-9.
[22] Tr. 195-196 (May 17, 2022).
[23] Ex. 4 (Mitchell Direct) at 18-19.
[24] Ex. 36 (Chang) at 16.
[25] Id. at 26.

"a blank check" and that Dominion must demonstrate the reasonableness and prudence of any costs incurred above the approved $1.8 billion amount:

> 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. We cannot approve in essence a blank check for [Dominion] 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 [Dominion], **any costs of constructing the Coal Plant that exceed the cost estimates comprising the $1.8 billion level must be proven by [Dominion] 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.[26]

Clean Virginia urges the Commission, should it approve the CVOW Project, to include similar language in its final order. Like the CVOW Project, the Wise County Coal Plant was a novel technology for Virginia – the plant was designed to be both carbon-capture compatible and "clean coal powered," – and the facility's approval resulted in a large customer rate increase via a rate adjustment clause."[27] Like the CVOW Project, Dominion sought recovery of the costs of the Wise County Coal Plant pursuant to Va. Code 56-585.1 A 6. And like the CVOW Project, the Wise County Coal Plant was declared to be "in the public interest" pursuant to the same statute.[28]

2. *The Commission should direct Dominion to provide regular reports regarding the CVOW Project's status. Dominion should be directed to retain an independent monitor to oversee such reporting during the construction phase of the CVOW project.*

---

[26] Emphasis added.

[27] *Application of Virginia Electric and Power Company, 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,* Case No. PUE-2008-00066, Final Order at 1(March 31, 2008) ("Wise County Coal Plant Order").

[28] Id. at 7.

Clean Virginia is pleased that Dominion proposes to provide regular reports, or status updates, to the Commission during the construction phase of the project. Dominion proposes to submit these reports on a bi-annual basis, in a format that would "mirror the content of the reports the Company provided" for the Wise County Coal Plant.[29] While bi-annual updates would be useful, Mr. Chang explained that such bi-annual reporting – prepared by the Company alone – would not be sufficient. First, the Wise County Coal Plant reports were provided on a quarterly, not a bi-annual basis.[30] Reporting on the CVOW Project should be maintained at least at the same frequency as the reporting on the Wise County Coal Plant. Second, under Dominion's proposal, the Company itself would decide what developments or cost overruns are "material" and should be disclosed to the Commission.[31] To increase oversight and avoid the potential for bias, Mr. Chang recommends that the Commission direct Dominion to retain an independent monitor to oversee the development and construction phases of the project. The independent monitor, not Dominion, would be responsible for providing regular impartial updates to the Commission during the construction phase of the project. Mr. Chang testified that he has been involved with multiple utility projects subject to oversight by an independent monitor.[32] Those independent monitors were assigned at the outset of large capital spending programs and resulted in on-time and on-budget projects.[33]

3. The Commission should impose a performance guarantee as recommended by Consumer Counsel Witness Norwood.

[29] Ex. 47 (Bennett Rebuttal) at 16.
[30] Ex. 37C; Tr. 115 (May 18, 2022).
[31] Tr. 286 (May 18, 2022).
[32] Tr. 110-112 (May 18, 2022).
[33] Id.

Dominion, in its cost-benefit analysis used to justify the prudence of the CVOW Project, estimates an average capacity factor of approximately 42%.[34] Recognizing the variability of weather, Clean Virginia would support a 42% performance guarantee based on a three-year rolling average, as proposed by Consumer Counsel Witness Norwood. At the hearing, Dominion Witness Bennett affirmed the capacity factor expectations contained in the Company's application, testifying that "on average we expect [a] 42 percent capacity factor based on all of the calculations that we have done and all the performance data that we have."[35] This proposal is reasonable, as it would be set at a capacity factor that is approximately 10% lower than the 47% capacity factor Dominion reports for its CVOW Pilot Project.[36]

Staff Witness Kuleshova proposes an even more modest performance guarantee based on a 36.86% net capacity factor. This proposal is based on the *absolute lowest* potential capacity factor modeled by Dominion in its levelized cost of energy analysis (38%), discounted further based on the estimated turbine availability factor.[37]

Clean Virginia supports Mr. Norwood's performance guarantee proposal. This proposal is reasonable, as it incorporates Dominion's own capacity factor projections; includes a capacity factor target (42%) that is higher than the performance to date of the CVOW Pilot Project (47%); and is measured on a three-year rolling basis, thereby taking into account the variability of weather. In the alternative, Clean Virginia urges the Commission to, at a minimum, adopt Staff Witness Kuleshova's performance guarantee proposal.

The Commission has approved performance guarantees for other novel renewable energy investments favored by the General Assembly. Staff Witness Kuleshova notes that the

[34] See Ex. 4 (Mitchell Direct) at 9.
[35] Tr. 237 (May 17, 2022).
[36] Tr. 84 (May 17, 2022).
[37] Ex. 40 (Kuleshova) at 84, note 142.

Commission approved a 25% capacity factor performance guarantee with regard to new solar facilities in Case No. PUR-2018-00101.[38] At that time, Dominion had limited experience operating large-scale solar facilities in the Commonwealth and limited performance data. In Case No. PUR-2019-00105, the Commission authorized a 22% capacity factor performance guarantee for other solar projects.[39] In these cases, the Commission, citing uncertainty surrounding the facilities' capacity factor, imposed performance guarantees of 20 years. The Commission found that customers should be "held harmless" for capacity factor performance below this threshold, meaning that the Company would credit customers for the lost renewable energy certificate revenues and replacement power costs associated with that deficit."[40]

In these cases, as with the CVOW Project, the Company had chosen to construct and own the solar facilities instead of purchasing the power via a PPA. The Commission recognized the risks associated with this ownership structure: "[a]s we found in [Case No. PUR-2018-00101], the Company's decision to pursue a self-build option rather than a PPA imposes on its customers financial and performance risks should the Project fail to meet the performance targets upon which Dominion has based its projected costs and benefits."[41]

Finally, as with the CVOW Project, the solar facilities approved in Case Nos. PUR-2018-00101 and PUR-2019-00105 were favored by the General Assembly. The solar projects were declared to be "in the public interest" pursuant to Va. Code §§ 56-585.1:4 A and 56-585.1 A 6.[42]

C. If the CVOW Project is approved, the Commission should conduct an assessment to evaluate if the current utility-owned model is the most appropriate mechanism for the second 2,600 MW tranche of offshore wind.

[38] See *Petition of Virginia Electric and Power Company, for approval of the US-3 solar projects,* Case No. PUR-2018-00101, Order Granting Certificates at 18 (January 24, 2019).
[39] *Petition of Virginia Electric and Power Company, for approval of the US-4 solar project,* Case No. PUR-2019-00105, Order Granting Certificate at 12-13 (January 22, 2020).
[40] Id. at 11.
[41] Id. at 9.
[42] Id. at 7.

Noting the high capital costs of the CVOW Project, Mr. Chang recommended that the Commission should require Dominion to consider other procurement options for any future offshore wind development to ensure that costs to ratepayers are minimized.[43] Mr. Chang testified that Dominion is already contemplating constructing and owning a second tranche of offshore wind resources.[44] As the Commission has recognized, utility ownership imposes additional risks, whereas with power procured via PPAs, most risk is borne by the third-party owner.[45]

The Code contemplates alternative ownership structures for projects beyond the CVOW Project. Virginia Code § 56-585.1:11 C states that it is in the public interest for "a Phase II Utility" (i.e., Dominion) to construct "a utility-owned and utility-operated" facility between 2,500 MW and 3,000 MW. This provision further states that the costs associated with this facility shall be presumed to be reasonable and prudent, provided certain criteria are satisfied, including that the utility has commenced construction "for U.S. income taxation purposes prior to January 1, 2024, or has a plan for such facility or facilities to be in service prior to January 1, 2028." Therefore, Va. Code § 56-585.1:11 C contemplates that it is in the public interest for Dominion to construct and operate offshore wind facilities between 2,500 and 3,000 MW in the near term, so that such facilities are operational prior to January 1, 2028.

But the Code also contemplates that offshore wind construction beyond the CVOW Project, by Dominion or another utility, could be owned by a third party. Virginia Code § 56-

---

[43] Ex. 36 (Chang) at 24-26.
[44] See Ex. 36 (Chang) at 24 (citing Dominion Q4 investor presentation).
[45] "[R]atepayers bear almost all the risk of a project design failure except for a limited amount of risk retained by the EPC contractor during the limited warranty period." Offshore Wind Pilot, Final Order at 8-9.

585.1:11 C recited above applies to facilities that become operational in the near term and are constructed by, owned by, and operated by Dominion. But Virginia Code § 56-585.1:11 B contains a different policy goal for projects developed prior to December 31, 2034. This subsection provides that, "prior to December 31, 2034, *the construction or purchase* by a public utility of one or more offshore wind generation facilities located off the Commonwealth's Atlantic shoreline or in federal waters and interconnected directly into the Commonwealth, with an aggregate capacity of up to 5,200 megawatts, is in the public interest."[46] This language would allow utility ownership or a purchase via a PPA with a third-party developer. This provision also specifies that "no customers of the utility shall be responsible for costs of any such [offshore wind generation] facility in a proportion greater than the utility's share of the facility," another explicit indication that a future offshore wind development could be owned, in whole or in part, by third-party developers.

Additionally, the General Assembly has directed utilities to consider market alternatives to self-build generation projects. Virginia Code § 56-585.1 A 6 provides that a utility – when proposing new generation facilities under this Code section – "shall demonstrate that it has considered and weighed alternative options, including third-party market alternatives, in its selection process." In Case No. PUE-2015-00006, the Commission applied this provision to deny cost recovery for a solar project that the General Assembly had declared to be "in the public interest." In so doing, the Commission stated that:

> The statutory requirement that an applicant must demonstrate that "third-party market alternatives" have been considered and weighed during the applicant's selection process expresses the General Assembly's clear intent that serious and credible efforts must be made to determine whether there are third-party market options available to provide this renewable power at prices less burdensome to consumers than the applicant's self-build option. The plain

[46] Emphasis added.

> language of Code § 56-585.1 A 6 does not exempt renewable facilities (or any facilities deemed to be in the public interest) from this demonstration required for our approval of a proposed generation facility.[47]

Considering the risks expressed by the Commission related to utility ownership of renewable energy facilities, Clean Virginia urges the Commission to conduct an assessment regarding whether it is prudent for Dominion to own and operate a future 2,600 MW tranche of offshore wind. This assessment could be initiated through an *ex parte* order, allow comments from interested parties, and conclude with findings and directives regarding the most appropriate ownership structure for any future offshore wind development. Clean Virginia recommends that this assessment should be initiated before Dominion's next offshore wind filing, drawing on experience and data obtained from Dominion's CVOW Project. This process would be consistent with the "serious and credible efforts" to consider market alternatives that the Commission has previously required.

LEGAL ISSUES

In its June 2, 2022, Order, the Commission directed the parties and Commission Staff to address several legal issues. Clean Virginia addresses herein the legal issues relevant to its recommendations in this case.[48]

A. The Commission has the legal authority to adopt the consumer protections recommended by Staff and respondents, including a cost cap, monitoring and reporting requirements, and a performance guarantee.

[47] *Application of Virginia Electric and Power Company, For approval and certification for the proposed Remington Solar Facility pursuant to §§ 56-46.1 and 56-580 D of the Code of Virginia, and for approval of a rate adjustment clause pursuant to § 56-585.1 A 6 of the Code of Virginia*, Final Order at 6 (October 20, 2015).

[48] The following section addresses the first and second legal issues in the Commission's June 2, 2022, Order on Post-Hearing Filings.

The Commission has the legal authority to adopt each consumer protection supported by Clean Virginia, Staff, and the other respondents in this case.

1. The VCEA expresses a legislative preference for offshore wind, not a mandate for approval or any restriction on the Commission's discretionary authority.

The General Assembly has expressed policy support for wind energy projects off the coast of the Commonwealth. But the General Assembly *has not* directed the Commission to approve any particular project, nor has the General Assembly limited the Commission's ability to impose cost caps or adopt other consumer protections for such projects.

The General Assembly has expressed its preference for offshore wind development primarily through three provisions of the VCEA, Va. Code §§ 56-585.1 A 6 and 56-585.1:11 B and C.

Virginia Code Section 56-585.1 A 6 provides that "a utility-owned and utility-operated generating facility or facilities utilizing energy derived from offshore wind with an aggregate capacity of not more than 3,000 megawatts [is] in the public interest."

Virginia Code Section 56-585.1:11 B provides that "prior to December 31, 2034, the construction or purchase by a public utility of one or more offshore wind generation facilities located off the Commonwealth's Atlantic shoreline or in federal waters and interconnected directly into the Commonwealth, with an aggregate capacity of up to 5,200 megawatts, is in the public interest."

Virginia Code Section 56-585.1:11 C provides that "one or more new utility-owned and utility-operated generating facilities utilizing energy derived from offshore wind and located off the Commonwealth's Atlantic shoreline, with an aggregate rated capacity of not less than 2,500 megawatts and not more than 3,000 megawatts, along with electrical transmission or distribution

facilities associated therewith for interconnection is in the public interest." This Code section also provides that the "costs associated with such a facility ... shall be presumed to be reasonably and prudently incurred," provided certain criteria are satisfied.

These Code provisions represent policy preferences of the General Assembly. As discussed below, none of these Code provisions restricts the Commission's ability to oversee and control public utility activities or adopt customer protection measures, including those advanced by Clean Virginia.

2. The Commission has broad authority to oversee and control the activities of public utilities.

The Virginia Supreme Court has held that "[t]he Constitution of Virginia and statutes enacted by the General Assembly thereunder give the Commission broad, general and extensive powers in the control and regulation of a public service corporation."[49] Article IX, Section 2 of the Virginia Constitution states that the Commission shall have the "power and duty" to regulate public utilities. This power is subject only to "requirements and other criteria as may be prescribed by [the legislature]." The Court has further held that any limitations on the Commission's discretionary authority by the General Assembly must be explicit. They must be "clearly expressed in the language of the statute."[50]

Virginia Code Section 56-585.1 D ("Subsection D") provides the Commission with additional overriding authority with regard to any proceeding filed pursuant to the ratemaking provisions of the Virginia Electric Utility Regulation Act,[51] including the VCEA amendments. Subsection D provides that:

> The Commission may determine, during any proceeding authorized or required by this section, the reasonableness or

[49] *Va. Elec. & Power Co. v. State Corp.*, 284 Va. 726, 735 S.E.2d 684 (2012).
[50] Id.
[51] Va. Code §§ 56-576 – 56-596.3.

> 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.).

The Commission has previously cited Subsection D as support for adopting consumer protections such as the ones proposed by Staff and the respondents. In the Wise County Coal Plant case – as in the instant matter – the General Assembly had stated a preference for a certain type of generation technology. But in that case, the Commission cited Subsection D as support for its authority to consider the reasonableness and prudence of the costs of the facility. According to the Commission, Subsection D "preserves the Commission's authority to determine the reasonableness or prudence of any cost incurred or projected to be incurred in connection with the Coal Plant."[52] Likewise, Subsection D also preserves the Commission's authority to determine the reasonableness and prudence of any cost associated with the CVOW Project.

The VCEA amendments did not abrogate the Commission's overriding authority under Subsection D. There is no indication that Subsection D is subordinate to any VCEA provision. Where the General Assembly intends an amendment to override another section of the Code, the legislature frequently uses a "notwithstanding" clause. Notwithstanding is defined as "without prevention or obstruction from or by" and "not limited by other incongruous laws."[53] "[T]the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."[54] When drafting the VCEA, the General Assembly used numerous notwithstanding clauses to override other

[52] Wise County Coal Plant Order at 9-10.
[53] *Green v. Commonwealth*, 28 Va. App. 567, 569–70 (1998).
[54] *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10,18 (1993).

provisions of the Regulation Act.[55] As with the Wise County Coal Plant, there is no indication that the Commission's authority under Subsection D has been diminished by the legislative preferences for offshore wind.

Moreover, a public interest declaration expresses a legislative preference, but is not a mandate. When the General Assembly wishes to mandate approval of a particular project or cost, the General Assembly uses mandatory language. The General Assembly, for example, mandated approval of certain costs related to underground distribution investments, stating that such costs "are deemed to be reasonably and prudently incurred and, notwithstanding the provisions of subsection C or D, shall be approved for recovery by the Commission." Here the General Assembly both directed the Commission to authorize cost recovery *and* stated that this directive shall apply "notwithstanding" Subsection D.

In contrast to its directive regarding underground facilities, the General Assembly *did not* restrict the applicability of Subsection D to the instant matter.

Subsection D ensures that the Commission retains its significant authority to regulate public utilities under Chapter 10 of Title 56 of the Code. For example, Va. Code § 56-35 provides that the Commission "shall have the power, and be charged with the duty, of supervising, regulating and controlling all public service companies doing business in this Commonwealth, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies." Virginia Code Section 56-36 states that the Commission has, "at all times," the power to inspect the books and records of

[55] Among other instances, the General Assembly used a "notwithstanding" clauses to limit the Commission's authority to approve to fossil fuel generation facilities; to prohibit the Commission from granting an enhanced rate of return for an offshore wind project; and to require each investor-owned utility operating in the Commonwealth to implement energy savings programs. See Va. Code §§ 56-585.1 A 5 c, 56-585.1:11 C 2, 56-596.2

public utilities and to "require from such companies, from time to time, special reports and statements, under oath, concerning their business." Virginia Code Section 56-249 provides that the Commission "may require any public utility to furnish to it ... accounts, reports and other information of whatsoever kind or character as it may deem proper ... in order to show completely the entire operation of the public utility in furnishing the unit of its product or service to the public."

And Virginia Code Section 56-234.4 gives the Commission "the authority to investigate public utilities for the purpose of determining efficiency and economy of operations." The Commission noted this authority as support for its findings in the Wise County Coal Plant case, stating that "the Commission has additional authority over public utilities under various other provisions of Chapter 10 of Title 56" and that "§ 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.'"[56]

3. The General Assembly has not imposed any limitations on the Commission's authority to adopt the consumer protections recommended in this case. Instead, the General Assembly has preserved them.

The Virginia Supreme Court "presume[s] that any limitation on the Commission's discretionary authority by the General Assembly will be clearly expressed in the language of the statute" and "[i]n the absence of an express limitation, we will not add language to the statute by inference."[57] The Court will "presume that where the General Assembly has not placed an

[56] Wise County Coal Plant Order at 10, note 19.
[57] *Va. Elec. & Power Co. v. State Corp.*, 284 Va. 726, 735 S.E.2d 684 (2012).

express limitation in a statutory grant of authority, it intended for the Commission, as an expert body, to exercise sound discretion."[58]

Instead of *expressly limiting* the Commission's authority to control and oversee the CVOW Project, the VCEA *expressly preserves* the Commission's authority to do so. In addition to its authority under Subsection D and the provisions of Chapter 10, the Commission has authority to control and oversee the CVOW Project based on the terms of the VCEA amendments. While Va. Code §56-585.1:11 C directs the Commission to "presume" that costs associated with the CVOW Project are reasonable – provided certain criteria are satisfied – this Code section still provides that the Commission "shall determine the reasonableness and prudence of any [costs]" associated with the project. This Code section also states that the Commission shall – not "may" – disallow costs associated with the project it finds to be "unreasonably and imprudently incurred."

4. The Commission has adopted significant consumer protections when approving other projects for which there was a legislative preference.

As discussed above, the Commission has adopted similar consumer protections when approving generation facilities for which there was a legislative preference. The General Assembly determined the Wise County Coal Plant to be "in the public interest" because it qualified as a generation facility, located in the coalfields region of the Commonwealth, that utilized Virginia coal.[59] In its approval of the Wise County Coal Plant, the Commission cited Subsection D and Va. Code § 56-234.3, noting that these Code sections permitted to Commission to judge the reasonableness and prudence of the project, despite the legislative preference for the facility.[60] Likewise, as discussed above, the solar facilities approved in Case

[58] Id.
[59] Wise County Coal Plant Order at 7.
[60] Id. at 10, note 19.

No. PUR-2018-00101 and PUR-2019-00105 were deemed to be "in the public interest." In both instances, the Commission adopted a capacity factor performance guarantee to protect consumers.

CONCLUSION

The evidence showed that, while the CVOW Project will provide valuable carbon-free energy to Dominion's system, the costs and risks to customers are significant. Accordingly, Clean Virginia urges the Commission to adopt several common-sense consumer protections, each of which is consistent with the Commission's precedent in prior energy cases.

Should it approve the CVOW Project, Clean Virginia urges the Commission to:

- ***Adopt*** a firm cost cap for the project, excluding Dominion's financial hedges and contingency, that is consistent with the Commission's precedent in Case No. PUE-2007-00066.
- ***Require*** Dominion to retain an independent monitor to oversee the construction phase of the CVOW Project and provide quarterly updates consistent with the Commission's precedent in Case No. PUE-2007-00066;
- ***Approve*** the CVOW Project subject to an appropriate performance guarantee, consistent with the Commission's precedent in Case Nos. PUR-2018-00101 and PUR-2019-00105; and
- ***Conduct further analysis regarding*** the most appropriate procurement mechanism for any further offshore wind development.

Respectfully submitted,

CLEAN VIRGINIA

By counsel

/s/ William T. Reisinger

Matthew L. Gooch
William T. Reisinger
ReisingerGooch PLC

1108 East Main Street, Suite 1102
Richmond, Virginia 23219
matt@reisingergooch.com
will@reisingergooch.com
(804) 223-6391

June 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served this 24th day of June, 2022, by e-mail to:

Lisa R. Crabtree, Esquire
David J. DePippo, Esquire
Dominion Energy Virginia
lisa.crabtree@dominionenergy.com
david.depippo@dominionenergy.com

Vishwa B. Link, Esquire
Timothy Patterson, Esquire
Joseph K. Reid, III, Esquire
McGuireWoods LLP
vlink@mcguirewoods.com
tpatterson@mcguirewoods.com
jreid@mcguirewoods.com

Beth Clowers, Esquire
Fred Ochsenhirt, Esquire
State Corporation Commission
beth.clowers@scc.virginia.gov
frederick.ochsenhirt@scc.virginia.gov

C. Meade Browder, Jr., Esquire
Office of the Attorney General
mbrowder@oag.state.va.us

William C. Cleveland, Esquire
Claire Horan, Esquire
Southern Environmental Law Center
nbenforado@selcva.org
choran@selcva.org

Carrie H. Grundmann, Esquire
Spilman Thomas & Battle PLLC
cgrundmann@spilmanlaw.com

Timothy G. McCormick, Esquire
Dannieka N. McClean, Esquire
Christian & Barton LLP
tmccormick@cblaw.com
dmcclean@cblaw.com

Cale Jaffe, Esquire
University of Virginia School of Law
cjaffe@law.virginia.edu

/s/ William T. Reisinger

Attachment A

Statement of Issues Identified by Clean Virginia

Issue	Position of Clean Virginia	Support in the Record
Should the Commission adopt a firm capital cost cap for CVOW Project, excluding contingency amounts?	Yes. The Commission should adopt a firm cost cap, consistent with its precedent in Case No. PUE-2007-00066 and the recommendations of Clean Virginia witness Chang in this case.	Ex. 36 (Chang) at 26; Ex. 33 (Norwood) at 26-27.
Should the Commission require Dominion to retain an independent monitor to oversee the construction phase of the CVOW Project and provide quarterly updates?	Yes. The Commission should require Dominion to retain an independent monitor to oversee the construction phase of the project. The independent monitor should be charged with developing periodic, not less than quarterly, reports for the Commission.	Ex. 36 (Chang) at 24; Tr. 110-112 (May 18, 2022).
If the Commission approves the CVOW Project, should the Commission adopt a capacity factor performance guarantee?	Yes. The Commission should only approve the CVOW Project with a performance guarantee, consistent with the recommendations of Consumer Counsel witness Norwood and the Commission's precent in Case Nos. PUR-2018-00101 and PUR-2019-00105. This protection would hold customers harmless in the event that Dominion's CVOW Project does not achieve the forecasted capacity factor of 42%.	Ex. 33 (Norwood) at 27; Ex. 40 (Kuleshova) at 84; Tr. 84 (May 17, 2022).
Should the Commission conduct an assessment of the most appropriate ownership structure for any future offshore wind development by Dominion?	Yes. This assessment is appropriate considering the risks associated with utility ownership of new generation facilities expressed by the Commission in	Ex. 36 (Chang) at 24.

	various cases, including Case Nos. PUR-2018-00101 and PUR-2018-00121. This assessment could be initiated through an *ex parte* order, allow comments from interested parties, and conclude with findings and directives regarding the most appropriate ownership structure for any future offshore wind development. Such an assessment would be consistent with the Commission's interpretation of Va. Code § 56-585.1 A 6 and its finding that utilities must undertake a "serious and credible" evaluation of alternatives to self-build projects.	