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August 22, 2022

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c/o Document Control Center
State Corporation Commission
1300 East Main Street
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Richmond, Virginia 23219

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:

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

Please do not hesitate to call if you have any questions in regard to the enclosed.

Very truly yours,

/s/ Joseph K. Reid, III

Joseph K. Reid, III

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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	)	

PETITION OF VIRGINIA ELECTRIC AND POWER COMPANY
FOR LIMITED RECONSIDERATION

August 22, 2022

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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

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

PETITION FOR LIMITED RECONSIDERATION
OF VIRGINIA ELECTRIC AND POWER COMPANY

In this proceeding, Virginia Electric and Power Company ("Dominion Energy Virginia" or the "Company") presented a comprehensive application for approval of: (i) the Coastal Virginia Offshore Wind Commercial Project ("CVOW Project" or "Project") pursuant to Va. Code § 56-585.1:11 of the Code of Virginia; (ii) a CPCN for the Virginia Facilities pursuant to Va. Code §§ 56-46.1 and 56-265.1 *et seq.*; and, (iii) a RAC, designated Rider OSW, to recover the costs incurred to construct, own, and operate the Project and related Virginia Facilities pursuant to Va. Code § 56-585.1 A 6.[1] In its Final Order dated August 5, 2022 ("Final Order"), the Commission found the construction of the Project to be in the public interest, approved a CPCN for the Virginia Facilities, and approved Rider OSW, including a revenue requirement of $78.702 million for the rate year of September 1, 2022 through August 31, 2023. The Commission recognized the fuel, capacity, renewable energy certificate ("REC"), and tax benefits the Project will provide and its economic development opportunities that will benefit the Commonwealth.[2]

[1] Capitalized terms not defined have the same meaning as defined in the Company's Post-Hearing Brief.
[2] Final Order at 20-22; Final Order at 40 (Jagdmann, J., concurring).

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As a condition of its approvals, however, the Commission implemented a performance "standard."[3] The Commission directed that "beginning with commercial operation and extending for the life of the Project, customers shall be held harmless for any shortfall in energy production below an annual net capacity factor of 42%, as measured on a three-year rolling average."[4] The details of how the performance guarantee will be implemented will be determined in a "future proceeding."[5]

Dominion Energy Virginia petitions the Commission for limited reconsideration of its Final Order as it relates to the performance guarantee under Rule 220 of the Commission's Rules of Practice and Procedure ("Petition").[6] Pursuant to Rule 220, the Company respectfully requests that the Commission enter an Order Granting Reconsideration which retains jurisdiction over this proceeding for purposes of considering the Company's Petition.[7]

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[3] While the Commission termed its condition a performance "standard," it is, as ordered, an unqualified guarantee of future performance of the Project by the Company.

[4] Final Order at 16.

[5] Final Order at 16 n.66.

[6] 5 VAC 5-20-220.

[7] Pursuant to Rule 220, the Company is requesting modification of the Commission's Final Order to allow consideration of the limited issues raised in this Petition. In doing so, the Company respectfully asks that the Commission *not* suspend the Final Order, including its approval of Rider OSW, which is in the process of being implemented and is set to go into effect on September 1, 2022, subject to true-up. While the performance guarantee issue is critical for resolution, its requirements (which would go into effect three years following the Project's commercial operations date (*i.e.*, late 2029 or early 2030, with the issue first being considered in the Company's 2031 Rider OSW update)) do not impact the near-term revenue requirement under Rider OSW. Ex. 29 at 3-5, Schedule 1 (Lee Direct) (the revenue requirement for the Rate Year will recover financing costs on capital expenditures during the rate year as well as allowance for funds used during construction on the Company's books). The Commission has previously issued orders granting a petition for reconsideration and retaining jurisdiction over a matter without suspending the final order. *See Application of Virginia Electric and Power Company, For approval and certification of the proposed Brunswick County Power Station and related transmission facilities pursuant to §§ 56-580 D, 56-265.2, and 56-46.1 of the Code of Virginia, and for approval of a rate adjustment clause, designated Rider BW, pursuant to § 56-585.1 A 6 of the Code of Virginia,* Case No. PUE-2012-00128, Order Granting Reconsideration (Aug. 22, 2013); *Application of Virginia Electric and Power Company, For approval and*

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I. Executive Summary

The Coastal Virginia Offshore Wind Commercial Project is a critical element of Dominion Energy Virginia's transition to a carbon-free electric generation future, providing significant customer, economic, and societal benefits.[8] As recognized by the Commission, the Project is favored by the General Assembly's support for offshore wind generation as a cornerstone of the Commonwealth's plan for a clean and reliable energy future, as embodied in the Virginia Clean Economy Act of 2020 ("VCEA").[9] No party to this proceeding opposed these concepts.

Along those lines, the Company appreciates the Commission's consideration of the evidence in granting necessary approvals for the construction of the Project and its initial cost recovery. And the Company shares the Commission's concern, as expressed in the Final Order, that the Project be constructed and operated in a way that reasonably mitigates risk for its customers. The Commission's unprecedented imposition of an involuntary performance guarantee condition on its approvals, however, is untenable. As ordered, it will prevent the Project from moving forward, and the Company will be forced to terminate all development and construction activities.

The Company requests limited reconsideration of the Final Order because, respectfully, the Commission lacks authority to impose a performance guarantee on this Project of the nature

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certification of electric facilities: Surry-Skiffes Creek 500 kV Transmission Line Skiffes Creek-Whealton 230 kV Transmission Line Skiffes Creek 500-230-115 kV Switching Station, Case No. PUE-2012-00029, Order Granting Reconsideration (Dec. 17, 2013) (hereinafter "*Skiffes Creek*"); *Skiffes Creek*, Order Granting Reconsideration (Mar. 21, 2014); *Application of Virginia Electric and Power Company, For a 2011 biennial review of the rates, terms, and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Order Granting Reconsideration (Dec. 16, 2011).

[8] *See* Ex. 10 at 3-11 (Kelly Direct) (explaining the need for, and benefits of, the Project); Ex. 50 at 12-23 (Kelly Rebuttal) (same); *see also* Tr. (Day 2) 273:15-18, 291:6-293:6, 294:19-21 (Kelly) (explaining that under the 2022 PJM load forecast, the Company will not have sufficient RECs to meet the VCEA requirements and will have to purchase RECs).

[9] Final Order at 40.

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directed and it is unreasonably broad in scope and unreasonable and improper in application. Any performance standard imposed upon the Company and Project in this proceeding should be limited to the nature described in Term 6 of the previously filed Stipulation and Recommendation ("Stipulation") among the Company, Commission Staff, the Sierra Club, and the Nansemond Indian Nation ("Term 6").[10]

As a threshold matter, in the enabling statute for the Project, Va. Code § 56-585.1:11 ("Section 1:11"), the General Assembly very directly provided criteria for the Commission to consider in determining whether its costs are reasonable, prudent, and recoverable. The Commission has found that these criteria have been met in this case.[11] Beyond that, the legislature directed that costs can be disallowed from recovery *only if* they have been unreasonably and imprudently incurred.[12]

The performance guarantee requirement the Commission has imposed would require the Company and its shareholders to "[hold] customers harmless"[13] against an open-ended set of operating circumstances far beyond the statutory requirement of reasonable and prudent operation. The Commission also declined to determine what the "hold harmless" obligation would specifically entail in terms of operating performance penalties or financial exposure for a Project which, over its life, is projected to provide billions of dollars of customer benefits.[14]

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[10] Ex. 3 at ¶ (6) (Stipulation).

[11] Final Order at 11, 13.

[12] Va. Code § 56-585.1:11 C 1. *See also Appalachian Power Co. v. State Corp. Comm'n*, Record Nos. 210391 & 210634, Slip Opinion at 13-28 (Aug. 18, 2022) (hereinafter "*Appalachian Power Co. 2022*").

[13] *See* Final Order at 16.

[14] Final Order at 16 n.66; Ex. 50 at 25 Rebuttal Figure 10 (Kelly Rebuttal); *see also* Tr. (Day 4) 30:13-19, 35:9-24 (Kelly).

That new and unprecedented obligation would effectively disallow reasonably and prudently incurred costs for any number of unspecified reasons—none of which fall within the exclusive condition for cost disallowance in Section 1:11.[15] The Company requests reconsideration of the Commission's finding that Section 1:11 is "silent" on the Commission's ability to force the Company to insure against circumstances it cannot control, because it is not silent.

In addition to exceeding the Commission's legal authority, by adopting the performance guarantee recommendation of the Office of the Attorney General's Witness Norwood—contained in a mere five lines of pre-filed testimony—for a 42% capacity factor threshold measured on a rolling three-year average, the Commission has imposed a requirement that is contrary to the factual support it purports to rely upon, improper in scope, and unreasonably vague in application.

The open-ended performance guarantee improperly would require Dominion Energy Virginia to insure against events which are beyond its control as a utility operator. As currently framed, this would hold the Company responsible for events or circumstances like acts of war or terror, catastrophic weather events or changes in weather patterns, system operating constraints unrelated to the generator, such as curtailments from the grid operator or economic curtailments, and a host of other circumstances that are unrelated to whether the Company is operating the Project in a reasonable and prudent manner. Any performance standard should be limited to that fundamental obligation of reasonable and prudent operation in order to align with the clear requirements of Section 1:11.

[15] The performance guarantee would also contravene the Company's "right to recover" the costs of the Project under Va. Code § 56-585.1 A 6 ("Subsection A 6").

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Term 6 also set a reasonable threshold and allowed the Company a reasonable opportunity to address year-to-year deviations in the Project's capacity and availability factors. The performance guarantee directed in the Final Order improperly imposes a 42% capacity factor over a short-term measurement period. That requirement improperly transforms projections of aggregate performance over the Project's 30-year lifetime into a requirement for each three-year period. The Company's evidence was clear and uncontroverted that the 42% net capacity factor used to support the assumptions for the Project were based on the *lifetime* of the project.[16] There will be natural performance variation over those short periods. There is no evidence that it is reasonable to require all such snapshots of performance to meet the lifetime expectation, and this is inconsistent with the Commission's prior rulings on voluntary performance guarantees. There is also no evidence that it is reasonable to require those performance snapshots to continue to meet the project lifetime average performance decades into the Project's existence, and such a requirement could have significant, adverse unintended consequences.

Relatedly, and perhaps unwittingly given the absence of evidence in the record to support it, the Final Order's performance guarantee would be improperly and unfairly asymmetric in its application. The performance guarantee implies a penalty for what the Commission defines as "underperformance" in a measurement period,[17] but does not address how such a period could be

[16] *See* Ex. 40 at 91:5-7 (Kuleshova) (citing the Company's response to Staff Set 14-128, included as Attachment KK-35); *see also* Ex. 40 at Attachment KK-33 (Kuleshova) (Company's response to Staff Set 1-8 calculating the average capacity factor for the Project with no annual adjustment to inputs over the lifetime of the Project); Ex. 40 at Attachment KK-34 (Kuleshova) (Company's response to Staff Set 14-128 noting that the capacity factor calculation inputs are not adjusted annually because the values used in the calculation represent the long-term average over the life of the facility).

[17] The Company respectfully disagrees that achieving a net capacity factor less than 42% in any particular year is "underperformance." As noted, the projected 42% capacity factor is a lifetime average for the facility, over 30 years, which necessarily means that in some years the facility will perform above 42% and in some years it will perform below.

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balanced against other periods that exceed the projected performance, unlike the provisions of Term 6 which allow the Commission the discretion to address such issues on a case-by-case basis based on the facts and circumstances present at the time. As currently framed, the Commission has directed a one-sided structure that no party could accept—incur a penalty in any deficient years, but recoup no benefit in any excess years.

In sum, the Commission's performance guarantee requirement is both unlawful and fundamentally inconsistent with the utility regulatory construct that provides for the recovery of reasonably and prudently incurred costs to serve customers. There is no precedent in the record of *any* utility being forced to take on an obligation of this nature to guarantee a capacity factor for its generating units over their entire life or, equally importantly, to insure against the risk of events beyond the utility's control and its reasonable or unreasonable conduct—whether that be a hurricane, a cyber-attack, climate change effects, or any other number of examples. In this instance, Section 1:11 confirms explicitly that the General Assembly has not directed that the Company commit to a landmark, multi-billion dollar investment and then be at risk to not recover its reasonably and prudently incurred costs because of such a required insurance policy. The exact opposite is true. The plain terms and intent of Section 1:11 do not allow for a performance guarantee, and the imposition of a performance guarantee undermines what the General Assembly expressly authorized—that costs cannot be disallowed from recovery unless they have been shown to be unreasonably and imprudently incurred.

The Company stands by its conviction that this Project can be built on time and on budget and that its performance once operational will meet expectations and provide substantial benefits to customers. Consistent with the unaccepted Stipulation Term 6, it respects the authority of the Commission to review this operation and take reasonable action if the Company is not meeting its

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obligations as a prudent operator, and remains willing to accept such a performance standard. Beyond that, and while again acknowledging the Commission's stated intention of customer protection, the Company respectfully asks that it reconsider whether its performance guarantee condition is within the Commission's legal authority, consistent with factual evidence provided, reasonable in scope and application, and reasonably well-defined.

II. Background

After a three-day hearing in which no participant opposed the Project, the Commission found that the construction of the Project was in the public interest, approved a CPCN for the Virginia Facilities, and approved a RAC designated Rider OSW for the Company to recover its reasonably and prudently incurred costs for the Project.[18]

The Commission nevertheless ordered a "required performance standard."[19] "Specifically, beginning with commercial operation and extending for the life of the Project, customers shall be held harmless for any shortfall in energy production below an annual net capacity factor of 42%, as measured *on a three-year rolling average*."[20] The Final Order states that the performance guarantee "protects consumers from the risk of additional costs for procuring replacement energy if the average 42% net capacity factor *upon which the Company bases this Project* is not met."[21]

On whether the Commission has statutory authority to adopt such a performance guarantee, the Final Order states that "the plain language of the statute simply does not speak directly to this legal question."[22] Rather, the Commission ordered that performance guarantee "[a]bsent a specific directive from the General Assembly limiting the Commission's authority to require reasonable

[18] Final Order at 11-12, 26, 39, Ordering Paragraphs (1), (3) through (5); Final Order at 40 (Jagdmann, J., concurring) (the Project is "legislatively favored").
[19] Final Order at 16.
[20] Final Order at 16 (emphasis added).
[21] Final Order at 16 (emphasis added).
[22] Final Order at 14.

consumer protections within the confines of the statutory structure for a Project of this magnitude, and based on the record herein."[23] Yet, the Commission recognized that the performance guarantee "may be subsequently clarified by either the Supreme Court of Virginia or the General Assembly."[24]

Although there was significant discussion at the hearing on the prospect of establishing a performance guarantee, the only non-Stipulating party to provide a suggestion for a performance guarantee was Consumer Counsel. Witness Norwood offered five lines in pre-filed testimony suggesting that the Commission adopt a minimum 42% capacity factor threshold, but he offered no factual basis to support the recommendation in that testimony.[25] Further, no witness provided any supporting factual evidence to justify why a three-year rolling average was the appropriate measurement timeframe for a performance guarantee. Further, no witness supported why it was appropriate to use the 42% capacity factor threshold — the projected *lifetime* average capacity factor (a 30-year period)—as the appropriate capacity factor for a performance guarantee for any particular rolling three-year period.[26]

[23] Final Order at 14; *see also* Final Order at 43 (Jagdmann, J. concurring) (stating that the possibility of cost overruns or abandonment "provide the support for including consumer protections in the Final Order, which protect ratepayers from replacement power costs if the Project doesn't produce the quantity of power upon which the Company bases its analysis").
[24] Final Order at 14 n.58.
[25] Ex. 33 at 27:1-5 (Norwood) ("...and that the capital investment, O&M costs and operating performance of the CVOW facility be subject to minimum standards that reasonably reflect the assumed costs and performance level (42% capacity factor) reflected in the Company's CBA for the Project, as measured on a rolling three-year average basis."). Appalachian Voices also advocated for a performance guarantee, but only in the context of its opening statement at the hearing, with no supporting testifying expert. Tr. (Day 2) 67:11-14. Clean Virginia and Walmart similarly advocated for a performance guarantee in their post-hearing briefs, without the support of a testifying expert. Clean Virginia Post-hearing Brief at 9; Walmart Post-hearing Brief at 6, 15-17. Staff suggested in its testimony that the Commission could consider a performance guarantee, but Staff now supports Stipulation Term 6 on this issue.
[26] *See supra* note 16 and accompanying text.

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As noted in the evidence, capacity factors (defined as the percentage of hours in the year of actual generation by the Project) for a wind or solar facility are influenced significantly by the weather. While the Company believes that the projected capacity factor for the Project is well-grounded and reasonable, future weather patterns, as well as certain other operational factors, are beyond the Company's control and the average capacity factor projection is on a "life of facility" basis. It will vary annually and it is not appropriate to be benchmarked annually. Availability (defined as the percentage of hours in the year the Project is available for generation), however, is largely within the control of the Company and/or its Project partners, and the Company targets a 97% availability factor for the Project once operational.[27]

In addition, no witness offered any evidence justifying an involuntary and unqualified performance guarantee as appropriate for any reason other than the general notion of protecting customers from operational risk. Finally, the Commission deferred any consideration of the details surrounding the performance guarantee to an undefined "future proceeding."[28]

III. The Commission should reconsider the performance guarantee.

A. The performance guarantee should be reconsidered because it exceeds the Commission's authority.

The premise of the Final Order's performance guarantee is that "the plain language of the statute simply does not speak directly to this legal question" of whether the Commission has statutory authority to adopt it.[29] That premise is mistaken and warrants reconsideration, for three reasons. First, for this legislatively favored offshore wind project, Section 1:11 names one exclusive condition under which the Commission can disallow costs: "*only if* they are otherwise

[27] *See* Ex. 9ES at 16:12-17:2 (Bennett Direct) for the description and source of the availability factor.
[28] Final Order at 16 n.66.
[29] Final Order at 14.

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unreasonable and imprudently incurred." The exclusivity of that condition speaks directly to whether the Commission may add others. Second, the Final Order's performance guarantee violates that exclusive condition by penalizing the Company with nonrecovery of costs associated with the performance of the Project. It is contrary to Section 1:11 C 1's command that if three conditions are met, which the Commission found they were,[30] the Project costs "shall be presumed reasonable and prudent," and hence, recoverable. Third, if the penalized costs are unrelated to Project performance, then conditioning them on Project performance violates the requirement for "stand-alone" consideration in Va. Code § 56-585.1 A 7 ("Subsection A 7").

1. The Code forbids the Commission to withhold reasonable and prudent costs associated with the Project based on a performance guarantee.

The Final Order's performance guarantee conditions the Company's full recovery of its costs of unit operations on the Project "meeting an annual net capacity factor of 42%, as measured on a three-year rolling average."[31] For qualifying offshore wind facilities, however, Section 1:11 states the *exclusive* condition under which the Commission can withhold cost recovery: "The Commission shall disallow costs, or any portion thereof, *only if* they are otherwise unreasonable and imprudently incurred."[32] The Final Order repeats the error at issue in *Appalachian Power Co.*

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[30] Final Order at 13; Final Order at 40 (Jagdmann, J., concurring) (same).

[31] Final Order at 16.

[32] Va. Code § 56-585.1:11 C 1. Section 1:11 C 1 states, in relevant part:

> [C]onstruction by a Phase II Utility of 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. In 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, provided that such costs shall be presumed to be reasonably and prudently incurred if the Commission [makes certain determinations] . . . . *The Commission shall*

v. State Corporation Commission: "it effectively adds a[nother] condition" for cost recovery."[33] "Adding words to a statute in this manner violates a well-established tenet of statutory construction."[34]

Section 1:11 (like other governing provisions of the Code) ensures that if the Commission finds all statutory criteria have been met, the Company may recover all capital and operating costs associated with the Project which are "reasonably and prudently incurred."[35] That provision directs that the Commission, in the context of this proceeding requesting cost recovery for the Project, "shall determine the reasonableness and prudence of any such costs [of the Project]." The statute then provides that "such costs shall be presumed to be reasonably and prudently incurred" if three criteria have been satisfied on competitive procurement, the Project's anticipated levelized cost of energy ("LCOE"), and its construction timeline. If they have, then Section 1:11 requires that "[t]he Commission shall disallow costs, or any portion thereof, only if they are otherwise unreasonably or imprudently incurred."

Contrary to the plain language of the statute, the Final Order's performance guarantee would result in cost disallowance *even if* the costs are reasonably and prudently incurred. In this case, the Commission determined that the costs associated with the Project were reasonable and prudent in the initial rate year recovery request.[36] It went on to state correctly that "every time

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disallow costs, or any portion thereof, only if they are otherwise unreasonably and imprudently incurred. (emphasis added).

[33] *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 707 (2012) (hereinafter "*Appalachian Power Co. 2012*").
[34] *Id.*
[35] Va. Code § 56-585.1:11 C 1. Subsection A 6, which provides the vehicle for cost recovery for the Project through a rate adjustment clause, likewise directs that the utility "shall have the right to recover the costs of the facility."
[36] Final Order at 11.

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Dominion requests additional costs to be included in Rider OSW . . . the statute mandates that the Commission determine the reasonableness and prudence of such costs," and noted that the statute's presumption of cost reasonableness and prudence applies.[37] Such future determinations of reasonableness and prudence control cost recovery under the statute, and exclude other grounds for disallowance by enumerating a single basis,[38] and *explicitly* permits disallowance "only if" that enumerated basis is present. The Final Order's performance guarantee, however, adds a condition that: (1) finds no support in the statutory text; (2) is implicitly excluded by the enumeration of a single different condition for disallowance; and, (3) operates without respect to whether any costs are reasonably and prudently incurred—the twin touchstones of cost recovery under Section 1:11 and Subsection A 6.

The Final Order's expansion of the conditions on cost recovery for Section 1:11 projects thus echoes the error in *Appalachian Power Co. 2012.* At issue there was a provision for recovery of environmental compliance costs, which "state[d] 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."[39] There, the Commission disallowed costs meeting those

[37] Final Order at 13.
[38] *See Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 543–44, 790 S.E.2d 484, 487 (2016) ("In interpreting statutory language, we have consistently applied the time-honored principle *expressio unius est exclusio alterius*, because this maxim recognizes the competence of the legislature to choose its words with care. Under this maxim, '[w]hen a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.'" (quoting *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982)).
[39] *Appalachian Power Co. 2012*, 284 Va. at 707.

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criteria because "it effectively add[ed] a fourth condition to the statute: the costs sought were not costs that could have been recovered in the Company's base rates."[40] The Supreme Court reversed that disallowance because "'courts, in construing a statute, must apply its plain meaning, and 'we are not free to add [to] language, nor to ignore language, contained in statutes.'"[41] That same holding forbids an interpretation that would add another condition to Section 1:11 C 1, and one which operates irrespective of whether any Company actions are reasonable and prudent pursuant to that provision's exclusive condition on cost recovery.

Last week's decision from the Supreme Court of Virginia in *Appalachian Power Co. 2022* is further instructive. There, in finding that the Commission erred in holding that the general language of Va. Code § 56-585.1 D provided discretion to deviate from more prescriptive language of Va. Code § 56-585.1 A 8 with regard to the regulatory accounting treatment of certain asset impairment costs in Appalachian Power Company's ("Appalachian") triennial review, the Supreme Court emphasized the significance of adherence to the plain language of statutes in interpreting and applying Code provisions relating to utility regulation. Specifically, the majority held:

> The first issue involves a debate over the textual and contextual meaning of various statutory provisions. Well-established principles guide our interpretative task. Virginia tradition has always been to ask "not what the legislature intended to enact, but what is the meaning of that which it did enact. We must determine the legislative intent by what the statute says and not by what we think it should have said." *Carter v. Nelms*, 204 Va. 338, 346 (1963). We thus do not inquire as to "what the legislature meant; we ask only what the statute means." *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 277 n.7 (2016) (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899)).

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[40] *Id.*

[41] *Id.* (quoting *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331 (2007)).

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> Following this tradition, "[i]t is our duty to interpret the statute as written and when this is done our responsibility ceases." *City of Lynchburg v. Suttenfield*, 177 Va. 212, 221 (1941); *see also Continental Baking Co. v. City of Charlottesville*, 202 Va. 798, 805 (1961). Because "[w]e can only administer the law as it is written," *Coalter v. Bargamin*, 99 Va. 65, 71 (1901), the interpretative principle that precedes all others is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted).[42]

The Supreme Court further cited to the proscription on judicial questioning of policy goals evinced in the language of governing statutes:

> In this case, as in most cases involving statutory interpretation, litigants argue the competing policy virtues of their proffered interpretations. In Virginia, however, judicial review does not evaluate "the propriety, wisdom, necessity and expediency of legislation." *Willis v. Mullett*, 263 Va. 653, 658 (2002) (alteration omitted) (quoting *City of Richmond v. Fary*, 210 Va. 338, 346 (1969)). When a statutory text speaks clearly on a subject, "effect must be given to it regardless of what courts think of its wisdom or policy." *Temple v. City of Petersburg*, 182 Va. 418, 423 (1944). Courts committed to neutral principles of interpretation "are not 'free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal.'" *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792 (2022) (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019)). Divinations of "the spirit or reason of the law," *Saville v. Virginia Ry. & Power Co.*, 114 Va. 444, 452 (1913), and "vague invocations of statutory purpose," *Southwest Airlines Co.*, 142 S. Ct. at 1792-93, cannot take precedence over a clearly worded statutory text.[43]

The Commission has not referred to any authority under Va. Code § 58-585.1 D for it to impose a performance guarantee with respect to the Project, instead maintaining that the language of Section 1:11 is "silent" as to such authority. The most recent *Appalachian Power Co.* decision from the Supreme Court, though, provides counsel for the proposition that the specific prohibition on disallowance of reasonably and prudently incurred Project costs contained in the plain language

[42] *Appalachian Power Co. 2022*, Slip Op. at 13 (footnote omitted).
[43] *Appalachian Power Co. 2022*, Slip Op. at 14.

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of the Project's enabling statute should not, and cannot, be ignored. The General Assembly was, contrary to the Commission's interpretation here, loud and clear on this issue. Respectfully, the Commission should reconsider and align with this authority regardless of whether the Commission believes that it should do more in the name of consumer protection than the statute prescribes. With respect to Section 1:11, as the Supreme Court just made clear, "effect must be given to it regardless of what courts [or the Commission] think of its wisdom or policy."[44]

In its Final Order the Commission entertained "clarification" on the propriety of its performance guarantee condition from either the Supreme Court or the General Assembly.[45] While the Company does not take the position that the *Appalachian Power Co. 2022* decision directly controls this question as presently framed, it does submit that it is highly instructive on relevant canons of judicial interpretation that should be applied here. The Commission's determination to impose its own conditions for future cost recovery for circumstances not currently before it and well beyond those directed by the General Assembly poses an immediate and mortal threat to the Project, and the Company asks for its reconsideration without the need for any further external clarification.

2. The Final Order's performance guarantee would violate Section 1:11 by pre-judging and withholding recovery of reasonable and prudent Project-associated costs.

The costs that would be disallowed in the future under the Final Order's performance guarantee are the same costs that Section 1:11 protects. That provision covers any "costs associated with [a qualifying offshore wind] facility," and provides that "[t]he Commission shall disallow [such] costs, or any portion thereof, only if they are otherwise unreasonably and

[44] *Appalachian Power Co. 2022*, Slip. Op. at 14 (quoting *Temple v. City of Petersburg*, 182 Va. 418, 423 (1944)).
[45] Final Order at 14 n.58.

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imprudently incurred." The Final Order specifies that "[e]xamples of costs from which customers may need to be held harmless [under the performance guarantee] include additional costs resulting from shortfalls in energy production, shortfalls in [RECs], and loss of any tax credits contingent on energy production, as applicable."[46] Those costs are "associated with" the Project under any definition.

Elsewhere, the Final Order adopts a form-over-substance approach to suggest that the "performance standard does not prevent the Company from collecting its reasonably and prudently incurred costs. Rather, it protects consumers from the risk of additional costs for procuring replacement energy if the average 42% net capacity factor upon which the Company bases this Project is not met."[47]

That assertion does not rescue the performance guarantee from Section 1:11. While the Final Order purports to leave reasonable and prudent Project costs undisturbed, in substance it will pre-judge and penalize the Company with nonrecovery for associated Project costs. It is irrelevant whether the performance guarantee purports to deduct those replacement energy costs from a future Project RAC, or to address those replacement energy costs in separate proceedings. If such costs are not recovered from customers, then the Company is not recovering its full costs of the Project. The substance is the same regardless of the form: the Company's costs would be disallowed because of the performance of the Project. Those disallowed costs are "associated with" the Project either way, and Section 1:11 forbids that disallowance.

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[46] Final Order at 16 n.66.
[47] Final Order at 16.

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3. **If the performance guarantee bars recovery of costs that are *not* Project-associated, then it would violate the "stand-alone" consideration rule of Subsection A 7.**

The performance guarantee would be *ultra vires* even if the costs it disallowed were *not* "associated with" the Project for purposes of Section 1:11. Disallowing *unrelated* costs because of Project performance would violate the "stand-alone" consideration rule of Subsection A 7: "Any petition filed pursuant to subdivision 4, 5, or 6 shall be considered by the Commission on a stand-alone basis without regard to the other costs, revenues, investments, or earnings of the utility."[48]

The performance guarantee stumbles on Subsection A 7 because it impermissibly links the Project petition to the Company's "other costs [and] investments" in the form of potential replacement energy costs. Subsection A 7, however, expressly requires the Company's petition be "consider[ed] by the Commission on a stand-alone basis." Thus, the Final Order should have considered the Project petition on its own merits, "without regard to the other costs" that may be incurred in the future for replacement energy.

4. **The legislature specified a different mechanism for taking utility performance into account.**

Although the General Assembly's statutory scheme bars the Final Order's performance guarantee, the legislature channeled the Commission's consumer protection power through a different mechanism: the performance adjustment under Va. Code § 56-585.1 A 1 c 2 ("Subsection A 1 c 2"). That provision provides that "[t]he Commission may, consistent with its precedent for incumbent electric utilities prior to the enactment of Chapters 888 and 933 of the Acts of Assembly of 2007, increase or decrease the utility's combined rate of return based on the Commission's consideration of the utility's performance." By that provision, "[t]he General Assembly has given

[48] The Company's petition for a rate adjustment for "one or more other generation facilities" arises under subsection 6.

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the Commission the discretion: (1) to apply, or not to apply, this performance adjustment; and (2) to decrease, as well as to increase, the otherwise fair rate of return on common equity."[49]

That statutorily appropriate performance adjustment already allows the Commission to address "any shortfall in energy production."[50] If the Project does not meet expectations over an appropriate period,[51] the Commission could, if reasonable based on the facts and circumstances and in the context of overall performance, "decrease . . . the otherwise fair rate of return on common equity."[52] Conversely, should the Project's performance meet or exceed expectations, the Commission could reflect that in a higher return on equity. There is no need or justification for other statutorily unauthorized innovations when the Code has already spoken.[53]

B. The Commission should reconsider its performance guarantee because it is improper in scope and application.

In addition to being contrary to law, the Commission's performance guarantee is fatally overbroad and undefined, to such an extent that it threatens the viability of the Project and frustrates clear legislative directive and intent to support utility offshore wind development.

In the first instance, the performance guarantee is not limited to conduct by the utility and events and circumstances within its control as a prudent operator. As it currently stands, the performance guarantee places all of the risk of operational impacts to the Project on the Company, even for events that it cannot control. Such a requirement is inconsistent with the risk profile of a

[49] *Application of Virginia Elec. & Power Co., For a 2013 biennial review of the rates, terms and conditions for the provision of generation, distribution and transmission services pursuant to § 56-585.1 A of the Code of Virginia*, Case No. PUE-2013-00020, Final Order at 14 (Nov. 26, 2013) (hereinafter "2013 Biennial Final Order").
[50] Final Order at 16.
[51] *See infra* Sections III.B, III.C.
[52] 2013 Biennial Final Order at 14.
[53] *See Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 544, 790 S.E.2d 484, 487 (2016) ("[W]hen a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.").

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utility and the fundamental premise of the regulatory construct. Any performance "standard" should properly be limited to events or circumstances arising from the unreasonable or imprudent actions of the Company as the operator of the Project, such as that contained in Term 6.

By failing to adopt a "prudence" standard, the performance guarantee in the Final Order does not even exclude from its requirements insuring against "force majeure" events or other circumstances clearly controlled by outside parties or events. These could include, without limitation, acts of war, terrorist or cyber-attacks, significant or catastrophic weather events or deviations from historical weather patterns, law changes restricting the Project's operations, or third party damage to Project facilities. They could include forced curtailments of all or part of the Project's energy production by the grid operator, or economic curtailments because it is financially not in the best interests of customers to generate during times of negative locational marginal pricing. It is unacceptable and objectively unreasonable to require the Company to hold customers harmless against such risks.

While the Company consistently takes reasonable efforts to protect its customers against potential impacts to its facilities, it has never been required to hold them harmless from events such as acts of God or nature. When, for example, an unforeseen earthquake in 2011 caused a prolonged outage at the Company's North Anna Nuclear Power Station, the low cost energy from those units had to be replaced. In that instance, the Company's obligation was to act reasonably and prudently and with due diligence to restore the units' operation, which it did. It was not required that the Company's shareholders bear the cost of replacement energy in that context. No party even suggested it, and no reasonable utility could accept such a burden.

The Commission should reconsider the scope of events which should be includable in any properly defined performance standard and limit them to a "prudent operator" standard.

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C. The performance guarantee requirement to meet a 42% net capacity factor on a three-year rolling average basis for the life of the facility should be reconsidered.

1. The Commission should reconsider the rolling average 42% net capacity factor threshold in favor of a more reasonable and flexible standard.

The Commission's decision to set the threshold net capacity factor for the performance guarantee at 42%, without any further qualification, is unreasonable.

To be clear, the Company projects that the Project will achieve an *average* annual net capacity factor of 42% *over the 30-year life of the Project.*[54] It is not retreating from this expectation. For purposes of measuring performance, however, it must be recognized that some years are likely to outperform the average and some are likely to underperform it. Therefore, when the Commission relies on the 42% net capacity factor that the Company has used to "justify and support"[55] the Project, the Commission also should rely on the period over which that net capacity factor is projected. The 42% net capacity factor is based on a 30-year average, as reflected in the Company's own evidence that was uncontested. There is no evidence in this case, let alone in the Company's proffered evidence, that Project performance will be at a 42% capacity factor every single year or on a rolling three-year basis.

The Company reiterates the evidence in the record that, while it expects the net capacity factor to average 42% over the Project's lifetime, its economic analyses were based on a range of capacity factors between 38% and 46%. Even at a 38% net capacity factor, the Project still provides benefits to customers and the LCOE is well within the statutory threshold of $125/MWh for the costs of the Project to be presumed reasonable and prudent.[56] Without factoring in REC

[54] *See* Ex. 40 at 91:5-7, Attachment KK-33, Attachment KK-34 (Kuleshova); *see also* Ex. 10 at 13:3-5 (Kelly Direct).

[55] Final Order at 16.

[56] *See* Va. Code § 56-585.1:11 C 1; Ex. 50 at 3:1-13 (Kelly Rebuttal); Ex. 40 at 26 (Kuleshova); Ex. 33 at 9 (Norwood).

benefits, the LCOE if the Project achieves a 38% net capacity factor is $92/MWh; with REC benefits, the LCOE is $84/MWh.[57]

Before Staff joined the Stipulation, Staff Witness Kuleshova suggested that the Commission consider a performance guarantee. Even Staff did not recommend 42% for a capacity factor threshold. Staff Witness Kuleshova instead recommended 38%, or 36.86% when adjusted for the availability factor, because it was the lowest capacity factor used by the Company for purposes of the LCOE sensitivity analysis.[58] In the Stipulation, the Company, Staff, the Sierra Club, and the Nansemond Indian Nation, agreed that a net capacity factor of 37% on a three-year rolling average basis was reasonable and appropriate as a threshold event to lead to a detailed reporting requirement. Pursuant to Term 6, the Company agreed to provide a detailed explanation of the factors contributing to any three-year average capacity factor less than 37% in order for the Commission to evaluate the Company's actions as operator. If the Commission determined the deficiency resulted from the Company's unreasonable or imprudent actions, the Commission could determine any appropriate remedy at that time.[59]

Consumer Counsel Witness Norwood is the only witness to have provided any words to urge a performance guarantee with a capacity factor threshold of 42%. His words consisted of a mere five lines of pre-filed testimony that should not rise to the level of meaningful evidence because they were not supported by any analysis to support utilizing 42% as the threshold, did not provide any further detail on how such a threshold would be applied beyond a three-year rolling average basis, or provide any explanation, analysis or reasoning as to how the Project could be

[57] Ex. 50 at 5 Rebuttal Figure 1 (Kelly Rebuttal).
[58] Ex. 40 at 84:1-6 (Kuleshova); *see also* Ex. 40ES at 39 n.78 (Kuleshova).
[59] Ex. 3 at ¶ (6) (Stipulation).

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expected to achieve a 42% capacity factor on a rolling three-year average.[60] The exhibits offered by Consumer Counsel at the hearing also do not support using 42%, without qualification, for any performance standard. Those exhibits consisted of *voluntary* settlements entered into by the utility in a foreign jurisdiction under an entirely different regulatory and statutory construct.

In addition to the threshold itself and its inflexibility, as it is currently written, the performance guarantee is fundamentally unbalanced because it would require the Company to hold customers harmless for any energy production shortfall during a discrete measurement period, but does not provide any benefit if the Project achieves a capacity factor greater than 42% during other periods. This is essentially a "heads I win, tails you lose" proposition—a one-way street to the sole detriment of the Company. As discussed above, the 42% net capacity factor is an expected average *over the lifetime of the facility*. Again, the definition of "average" means that some years will be above 42% and some years will be below. Customers will still receive the projected benefits of the Project if, over its lifetime, it achieves an average net capacity factor of 42%.

The three-year rolling average provision in the performance guarantee does not address this issue. A reasonable performance standard, such as Term 6, should provide for flexibility for the Commission to determine future remedies based on specific facts and circumstances presented at a future time. This would include potential consideration of periods of performance above a threshold that may offset periods of performance below a threshold. There is evidence in the record to support the notion of recapture or banking of "excess" performance value, such as in the example performance guarantee settlement from Texas that Consumer Counsel Witness Norwood offered at the evidentiary hearing.[61] At bottom, consistent with the Stipulation, the Commission

[60] *See supra* note 25.
[61] Ex. 34 at 8 (Texas settlement).

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should recognize that the rigid nature of its performance guarantee is unreasonable, and it should decline to pre-judge a remedy for varying circumstances that could present themselves over the Project's operational life.

In conjunction with this concept, any performance standard capacity factor threshold should be set at the lower end of a reasonable range to reflect the lifetime average nature of the operating performance projection. This would be consistent with the Staff recommendations in this case and terms of the proffered Stipulation. It would be further consistent with the findings of the Commission in the US-3 and US-4 solar projects voluntary performance guarantee contexts. In both of those cases, the Commission did not set the capacity factor threshold at the lifetime design capacity factor of the solar facilities (28% for the US-3 facilities and 24.6% for the US-4 facility over their 35-year life) used in the Company's economic analysis of the facilities. Rather, the Commission determined that a threshold capacity factor of 25% and 22% for US-3 and US-4, respectively, was more appropriate because that was the "break even" point at which the solar projects would still be beneficial to customers.[62] In this case, the evidence shows that at a 37% capacity factor, holding all other things equal, the Project still benefits customers, and is well below the statutory LCOE threshold of $125/MWh to be entitled to the presumption that the costs are

[62] *Petition of Virginia Electric and Power Company, For approval and certification of the proposed US-3 Solar Projects pursuant to §§ 56-580 D and 56-46.1 of the Code of Virginia, and for approval of a rate adjustment clause, designated Rider US-3, under § 56-585.1 A 6 of the Code of Virginia*, Case No. PUR-2021-00101, Order Granting Certificates at 16-17 (Jan. 24, 2019) (hereinafter "US-3 Order"); *Petition of Virginia Electric and Power Company, For approval and certification of the proposed US-4 Solar Project pursuant to §§ 56-580 D and 56-46.1 of the Code of Virginia, and for approval of a rate adjustment clause, designated Rider US-4, under § 56-585.1 A 6 of the Code of Virginia*, Case No. PUR-2019-00105, Order Granting Certificate at 12-13 (Jan. 22, 2020) (hereinafter "US-4 Order"). While a "break even" point was not calculated for the Project, it is valuable to evaluate the statutory LCOE threshold as it relates to the capacity factor.

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reasonable and prudent.[63] Thus, based on the evidence, if a performance standard measured on an incremental basis against a lifetime average is to be imposed, then a more reasonable and appropriate threshold for such performance would be at the lower end of an expected range, in line Term 6 and with prior Commission precedent.[64]

2. The Commission should reconsider the performance guarantee requirement for the life of the facility.

The Commission's imposition of a performance guarantee for the life of the Project is similarly unreasonable and should be reconsidered. No party specifically advocated for a lifetime performance guarantee. Such a requirement would be inconsistent with Commission precedent in the voluntary performance guarantee context.[65] Further, it is natural to expect that a generation facility's performance, despite prudent operation and maintenance, may degrade over time.[66] It is possible, if feasible and cost-effective for customers, that the Project's service life could extend beyond the presently projected thirty years. A lifetime performance guarantee requirement could frustrate such an outcome and/or drive investment decisions that are unduly focused on the directive of the Commission to achieve a certain level of performance in perpetuity. The Commission should reconsider this term in favor of the ten-year performance standard provisions of Term 6.

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[63] In fact, the Company's analysis concluded that the Project's annual capacity factor would have to be as low as 26%, holding all other things equal, for the costs of the Project to exceed the $125/MWh threshold presumed reasonable and prudent. Ex. 14 (Company response to OAG 7-136); Tr. (Day 2) 288:17-289:17 (Kelly).

[64] At the hearing, Consumer Counsel Witness Norwood seemed to suggest that any performance guarantee should be modeled after the US-3 and US-4 performance guarantees. Tr. (Day 3) at 27:21-28:1 (Norwood).

[65] US-3 Order at 17-19 (imposing a 20-year performance guarantee for a facility with an expected 35-year life); US-4 Order at 14 (same).

[66] *See* Ex. 40ES at 39:1-2, Attachment KK-33 (Kuleshova).

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IV. Conclusion

Dominion Energy Virginia requests that the Commission grant reconsideration of the Final Order and amend it to exclude its performance guarantee condition, as required by Section 1:11 and other authority, and for all the reasons set forth herein. The Company remains willing to accept adoption of Stipulation Term 6 (Performance Provisions) as a lawful and reasonable alternative to the performance guarantee condition in the Final Order.

Respectfully submitted by:

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August 22, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August 2022, a true and accurate copy of the foregoing filed in Case No. PUR-2021-00142 was hand delivered, electronically mailed, and/or mailed first class postage pre-paid to the following:

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