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September 20, 2022

BY ELECTRONIC FILING

Mr. Bernard Logan, Clerk
c/o Document Control Center
State Corporation Commission
P.O. Box 2118
Richmond, Virginia 23218

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:

Please find attached for filing in the above-referenced matter, the Response of the Office of the Attorney General's Division of Consumer Counsel to Dominion's Petition for Limited Reconsideration.

Yours truly,

/s/ C. Mitch Burton Jr.

C. Mitch Burton Jr.
Assistant Attorney General

Enclosure

cc: Service List

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUR-2021-00142

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

RESPONSE OF OFFICE OF THE ATTORNEY GENERAL, DIVISION OF CONSUMER COUNSEL TO PETITION FOR LIMITED RECONSIDERATION

September 20, 2022

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RESPONSE OF
OFFICE OF THE ATTORNEY GENERAL,
DIVISION OF CONSUMER COUNSEL TO
PETITION FOR LIMITED RECONSIDERATION

On August 5, 2022, the Commission entered a Final Order that largely granted Virginia Electric and Power Company d/b/a Dominion Energy Virginia's ("Dominion" or "Company") Application seeking approval for the $9.8 billion Coastal Virginia Offshore Wind Project ("CVOW Project" or "CVOW"). With approval now granted by the Commission, Dominion's investors stand to reap $7.22 billion in equity profit from CVOW's $21.7 billion lifetime revenue requirement funded by the Company's captive customers. But after receiving approval of the CVOW Project, which would deliver billions of dollars in rewards to investors, Dominion is now threatening to cancel the Project, simply because it has been ordered to take on a minimum level of risk equal to its own representations for how the Project will operate.[1]

The Company's post-hearing threat that it would cancel the Project if the Commission's Final Order stands is made despite the fact that at no time during the nine-month schedule set for this case did Dominion once assert that a performance standard would represent something akin

[1] Final Order at 16 ("[C]ustomers 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.").

to "a mortal threat to the Project."[2] Dominion filed over 410 pages of rebuttal testimony. Dominion participated in a three-day evidentiary hearing. Dominion's lead witness was asked several times at that evidentiary hearing if a performance standard would mean that Dominion would forego the Project.[3] Despite a performance standard being recommended by the expert testimonies submitted by Consumer Counsel and Staff, not once did Dominion state that it would cancel the Project if required by the Commission to assume any risk of project underperformance.

Dominion's lead witness was asked several times at the hearing if "Dominion [would] still move forward with the project or will it not, and forego $7 billion in guaranteed profit[.]"[4] The Company witness evaded answering the question, eventually stating that the Company would "not speak to hypotheticals."[5] The proposed performance standard was not a "hypothetical," it was something actually proposed in the case as a critical feature of two expert witnesses' testimonies. Now the Commission and other case participants are in the position where, after the Commission has ordered a performance standard, the Company is threatening to cancel a Project that no participant opposed and the Commission approved.

Dominion filed its Petition for Limited Reconsideration on August 22, 2022. The Company complains that "[t]he performance guarantee requirement the Commission has imposed would require the Company and its shareholders to '[hold] customers harmless' against an open-ended set of operating circumstances"[6] and that "[t]he Commission also declined to

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[2] Dominion Petition for Reconsideration at 16.

[3] May 18, 2022 Tr. at 279-280.

[4] May 18, 2022 Tr. at 279.

[5] May 18, 2022 Tr. at 280-281.

[6] Dominion Petition for Reconsideration at 4.

determine what the 'hold harmless' obligation would specifically entail in terms of operating performance penalties or financial exposure for a Project . . . ."[7] At bottom, the Company objects based upon its understanding that the "open-ended performance guarantee improperly would require Dominion [] to insure against events which are beyond its control as a utility operator."[8] Dominion selectively focuses on its role as operator of CVOW. Dominion ignores the fact that it has voluntarily opted, for this Project, to assume the unique role of lead developer as well. Dominion does not want to be held accountable for its own projections and cost estimates, which it has used to develop and justify the CVOW Project. Indeed, as testified by the Company, "the Company controls what investments it makes on behalf of its customers and where those investments go[;]"[9] in this case, the success of a $10 billion investment is dependent upon infrastructure that is being located in the Atlantic Ocean.

Consumer Counsel understands that the Company's threat is connected to the performance standard "[a]s ordered[.]"[10] Consumer Counsel remains committed to the customer protections of the performance standard ordered by the Commission. The performance standard should not be perceived as an asymmetrical burden on the Company or its investors. Again, approval of the CVOW Project carries with it the projection that equity investors stand to earn more than $7 billion in profit over the life of the Project. Using the forward price projections in this case, a 1% shortfall in the net capacity factor (i.e., 41%) would equal approximately $9.1

[7] *Id.*

[8] *Id.* at 5.

[9] May 19, 2022 Tr. at 62.

[10] Dominion Petition for Reconsideration at 3.

million dollars in year 2032.[11] Such an amount pales in comparison to the $7-plus billion-dollar profit that will flow to Dominion's investors from captive customers.

On August 25, 2022, the Commission entered an Order on Reconsideration. The Order on Reconsideration suspended the Final Order pending the Commission's reconsideration. In addition, the Commission directed that each respondent in this proceeding that objects to Dominion's Petition is to file a response on or before September 13, 2022. In addition, the Commission directed that pleadings address the extent to which the presumption in Code § 56-585.1:11 C 1 may be rebutted. On September 13, 2022, the Commission entered an order extending the response date by one week. Accordingly, Consumer Counsel submits this Response.

There are fatal gaps in Dominion's legal analysis, which attempts to contort various sections of the Code as a prohibition on the Final Order's performance standard. The traditional "regulatory construct" concept appealed to by Dominion is altered by Virginia law in a manner that justifies the equity of the performance standard. Post-hearing comments submitted to the Commission indicate public support for a performance standard. And Consumer Counsel addresses, as requested by the Commission, Virginia legal standards applicable to presumptions and how those standards apply to this case.

RESPONSE

I. The Commission should be wary of isolated claims that the performance standard violates some sense of a traditional "regulatory construct."

The Company summarizes its argument against the performance standard by describing it as "fundamentally inconsistent with the utility regulatory construct that provides for the recovery

[11] This hypothetical assumes a 228,000 megawatt-hour ("MWh") shortfall and a total $40 per MWh all-in price (including both renewable energy certificates ("RECs") and energy).

of reasonably and prudently incurred costs to serve customers."[12] The Company further states that the performance standard is "inconsistent with the risk profile of a utility and the fundamental premise of the regulatory construct."[13]

At no point in the Petition for Limited Reconsideration does the Company define the term "regulatory construct." There is of course a long history of regulating public utilities in the United States and a series of principles have emerged from courts reviewing actions governing rates charged, and services provided, by monopoly utilities to captive customers. But the rules of any "regulatory construct" existing for state-regulated electric utilities are necessarily governed by applicable laws enacted by duly elected lawmakers.[14]

Under traditional principles of the "regulatory construct," for example, Dominion would not be able to recover a single cent associated with the CVOW Project until it was "used and useful" in providing electric utility service to customers. If that were the case, then Dominion would retain all risk associated with developing and constructing this megaproject until the day it became commercially operational and began providing electricity to customers. If Dominion were not able, for reasons within or outside its control, to bring the CVOW Project to completion, then Dominion and its investors would be at risk of not recovering the costs of the CVOW Project. This traditional allocation of risk had appeal; it sent a strong signal to the utility to manage projects responsibly to completion. Success meant that investors' capital at risk during that construction process would be returned and rewarded with an equity-based return. Shouldering the risk of bringing projects to market is a risk accepted by the vast majority of

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[12] Dominion Petition for Reconsideration at 7.

[13] *Id.* at 19-20.

[14] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989) ("The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.").

American enterprises subject to the rules of capitalism. Efficient capital flows to companies that investors believe can succeed in managing projects – including megaprojects – to completion. In fact, other non-monopoly companies, without captive customers, are currently developing offshore wind projects while shouldering this very risk.

But the traditional "regulatory construct" which included a "used and useful" standard does not generally apply to Dominion in Virginia, and it does not apply to the CVOW Project. Rather than shouldering the risk of cost recovery pending successful development and construction, Dominion is enabled by statute to seek early recovery of its CVOW-related costs.[15] In fact, Dominion has now already begun its recovery through electric rates of millions of dollars per year associated with CVOW, which is not forecasted to be completed until February 4, 2027.[16] This is only one example of how Virginia law has shifted the allocation of risk (from electric utilities to their customers) that once existed under traditional principles of the "regulatory construct."

The Commission should be wary of isolated claims that the performance standard violates a historical sense of the "regulatory construct." The regulatory construct in Virginia is governed by the laws existing in Virginia. As explained in the Final Order, the performance standard is in accord with those laws.

II. There are significant gaps in the Company's contention that Code § 56-585.1:11 prohibits the performance standard.

The Company asserts that the "Final Order adopts a form-over-substance approach to suggest that the 'performance standard does not prevent the Company from collecting its

[15] Va. Code § 56-585.1 A 6.

[16] Despite threatening to cancel the Project, the Company requested that the Commission allow the Company to begin charging customers for the Project with service rendered as of September 1, 2022. Petition for Limited Reconsideration at 2, n.7.

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.'"[17] The Company argues that the performance standard is illegal because it implicates costs that are "associated Project costs,"[18] something which the Company claims is forbidden by § 56-585.1:11.

A. Holding customers harmless from "replacement costs" does not put Dominion's recovery of the CVOW Project costs at risk, and the "replacement costs" at issue are not "directly" costs of the CVOW Project.

The Company does not cite to any record evidence to support the position that costs subject to the performance standard are costs of the Project protected by § 56-585.1:11. Recognizing the fact that "replacement costs" are separate from the costs of the Project is based both on record evidence and common sense. First, if a cost is incurred to "replace" the CVOW Project, it is not a cost of the CVOW Project. As a parallel, illustrating why a replacement cost is not a cost of the CVOW Project as argued by Dominion, if the CVOW Project does not go forward, the Company will likely need to replace it with other proposals for new renewable projects (e.g., solar or onshore wind) to comply with Virginia's RPS Program. But the costs of these other potential replacement projects could not be described as a cost of the CVOW Project, certainly as costs are described in Subdivision A 6.[19]

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[17] Dominion Petition for Reconsideration at 17 (quoting Final Order at 16).

[18] *Id.*

[19] Va. Code § 56-585.1 A 6 ("[A] utility may at any time, after the expiration or termination of capped rates, petition the Commission for approval of a rate adjustment clause for recovery on a timely and current basis from customers of the costs of . . . one or more other generation facilities[.] . . . A utility that constructs . . . any such facility, . . . shall have the right to recover the costs of the facility, as accrued against income, through its rates, including projected construction work in progress, and any associated allowance for funds used during construction, planning, development and construction or acquisition costs, life-cycle costs, costs related to assessing the feasibility of potential sites for new underground facilities, and costs of infrastructure associated therewith . . . .").

As to the record evidence, the Company's own witness testified that "[p]erformance in isolation is not a risk to the capital cost" of the CVOW Project.[20] In other words, any protection against replacement costs cannot put cost recovery of CVOW's reasonable and prudent Project costs recoverable under Subdivision A 6 at "risk." According to the Company, any replacement costs that would be subject to the performance standard are not "directly"[21] costs related to the CVOW Project that are requested for approval in this case under Subdivision A 6. This testimony is consistent with that of Staff Witness Kuleshova. Ms. Kuleshova agreed that the imposition of a performance guarantee would not "threaten[] the Company's recovery of its actual construction costs of CVOW."[22]

B. The Supreme Court of Virginia has already rejected Dominion's overbroad and impracticable interpretation of Subdivision A 7.

If Subdivision A 7 were read to prevent the mere "link[ing]"[23] of a Subdivision A 6 petition to consideration of things that are associated with "other costs, revenues, investments, or earnings of the utility," then that interpretation would invalidate dozens of actions taken in previous Dominion cases involving subdivisions A 4, 5, and 6. For example:

- Dominion proposed, and the Commission has approved, Rider CE in a manner that considers and links cost recovery of the Rider CE Company-owned facilities to "other costs, revenues, investments, or earnings of the utility." Rider CE has been approved as a Subdivision A 6 rate adjustment clause ("RAC") to recover clean energy investments.[24]

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[20] May 8, 2022 Tr. at 278.

[21] *Id.*

[22] May 18, 2022 Tr. at 165.

[23] Dominion Petition for Reconsideration at 18.

[24] *Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Establishing 2020 RPS Proceeding for Virginia Electric and Power Company*, Case No. PUR-2020-00134, Final Order (Apr. 30, 2021), https://scc.virginia.gov/docketsearch/DOCS/4%254p01!.PDF. In approving Rider CE, the Commission considered the testimony of Company witness Kelly who described an economic "analytical process for evaluating the CE-1 Solar Projects consisted of comparing the Projects' costs (*i.e., capital and operation and maintenance ("O&M")*) with the Projects' benefits (e.g., capacity and energy)." *Id.* at 19 n.58 (emphasis added).

In doing so, the Commission has approved three distinct riders to recover the costs of Company-owned investments. Rider CE is set using the full "cost" of the generating units, a number analogous to the $9.8 billion investment project in CVOW. Beyond this, the Company has proposed identifying a proxy "capacity value" of those Rider CE investments and would charge that capacity cost to customers in base rates. Under the rider framework of the Virginia Clean Economy Act ("VCEA"), this capacity charge would be "passed along to customers through the [Rider CE revenue requirements], *whereby in the past it would have been in base rates to net against Dominion capacity system expenses*."[25] In addition, the Company has proposed identifying a proxy "REC value" of those Rider CE investments that would charge that REC value to customers in a separate Subdivision A 5 Rider RPS, and serve to credit the Subdivision A 6 Rider CE.[26] In other words, future Rider CE petitions will be considered on a basis that considers these other costs and revenues associated with different cost recovery mechanisms. If the Subdivision A 6 petitions were required to be considered on a strict stand-alone basis, in the manner suggested by the Company, the rider framework established for VCEA would need to be revisited.

- Dominion proposed, and the Commission has approved, the costs underlying Rider PPA in a manner that considers and links costs related to clean energy PPAs to "other costs, revenues, investments, or earnings of the utility." Rider PPA has been approved as a Subdivision A 5 RAC to recover costs associated with clean energy power purchase agreements. The Company recently requested approval for its first revenue requirement of ($5,472,000) which considered "projected energy and capacity costs and benefits (including energy revenues from the PJM wholesale market and credits attributed to the Rider PPA facilities representing the avoided capacity costs of the previously approved CE-1 Solar PPAs and the CE-2 PPAs) . . . ."[27] It is difficult to conceive how a revenue requirement could be negative unless the RAC were linked to or considering "other costs, revenues, investments, or earnings of the utility." If the Subdivision A 5 petition must be considered on a stand-alone basis, in the form and manner suggested by the Company, this aspect of the rider framework established for VCEA would need to be revisited.

- Dominion proposed, and the Commission has approved, Rider BW in a manner that considers and links Rider BW to "other costs, revenues, investments, or earnings of the utility." Rider BW has been approved as a Subdivision A 6 RAC to recover the costs of the Company's natural gas fired generation facility located in Brunswick County.

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[25] Final Order at 21 (emphasis added).

[26] *See, e.g.*, Direct Testimony of Elizabeth B. Lecky on behalf of Virginia Electric and Power Company, Before the State Corporation Commission, Case No. PUR-2021-00146 (filed Sept. 15, 2021), https://scc.virginia.gov/docketsearch/DOCS/5mmk01!.PDF.

[27] *Petition of Virginia Electric and Power Company, For approval of a rate adjustment clause, designated Rider PPA, under § 56-585.1 A 5 d of the Code of Virginia for the Rate Year commencing September 1, 2022*, Case No. PUR-2021-00248, Hearing Examiner's Report at 11 (June 21, 2022), https://scc.virginia.gov/docketsearch/DOCS/7dj101!.PDF.

Almost all of the customer benefits cited by the Company in support of the Rider BW costs were linked to other costs, revenues, and investments of the utility.[28] For example, the "customer benefits" identified by the Company were cost savings to be flowed through either the fuel factor (energy) or base rates (capacity). Still, the Company asked that the Commission consider these cost savings in its request for approval of Rider BW. In fact, the Company went so far as to testify in that case that the "Company's fuel factor would have been reduced by approximately $112 million had the Brunswick Plant been in operation in 2011 (because the Company's purchased power costs would have been lower)."[29] This is a plain example of the Company asking the Commission to consider other costs and revenues in considering approval of a new Subdivision A 6 rider.

- Dominion proposed, and the Commission has approved, Riders B, S, R, and GV in a manner that considers and links to "other costs, revenues, investments, or earnings of the utility." Riders B, S, R, and GV have been approved as Subdivision A 6 RACs to recover the costs of specific generation facilities. In those initial RAC proceedings, the Company requested that the Commission consider the fact that the Company's PJM-related capacity costs, at the time recovered through base rates, would be decreased – a benefit to customers. Under the Company's new theory of the meaning of "stand-alone" in Subdivision A 7, it would have been improper to "consider" such a reduction of capacity costs recovered beyond the Subdivision A 6 RAC. Under the Company's current theory, the Commission should have considered those generating units on their own merits, "without regard to the other costs" of capacity that were being recovered through base rates.

- Dominion proposed, and the Commission has approved, Rider T1 in a manner that considers and links Rider T1 to "other costs, revenues, investments, or earnings of the utility." The Company has sought annual approval for a Subdivision A 4 rider related to the costs of transmission investment. The Company's Subdivision A 4 Rider T1 is set by considering the amount of transmission costs and investment that is included and recovered in base rates.[30] That is, Rider T1 is set with regard to other costs and investments that are included and recovered in base rates.

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[28] Direct Testimony of Glenn A Kelly on behalf of Virginia Electric and Power Company Before the State Corporation Commission at 22, Case No. PUE-2012-00128 (filed Nov. 2, 2012), https://scc.virginia.gov/docketsearch/DOCS/46%23%2401!.PDF.

[29] *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, Hearing Examiner's Report at 16 (June 13, 2013), https://scc.virginia.gov/docketsearch/DOCS/2srb01!.PDF.

[30] *Application of Virginia Electric and Power Company for approval of a rate adjustment clause pursuant to § 56-585.1 A 4 of the Code of Virginia, Case No. PUR-2022-00065*, Application at P 8 (filed May 5, 2022) ("Consistent with the methodology approved in the 2021 Rider T1 Case, in order to recover its Subsection A 4 Costs on a timely and current basis from customers, as required by Subsection A 4, the Company seeks Commission approval in this Application of a Subsection A 4 revenue requirement for the Rate Year to be recovered through a combination of

- Dominion proposed, and the Commission has approved, cost allocation methodologies in its Subdivision A 6 RAC petitions in a manner that considers and links to "other costs, revenues, investments, or earnings of the utility." The Company's cost allocation for revenue requirements that are set in Subdivision A 6 riders have been based on a method, the average and excess method, that necessarily considers all of the other generation investments made by the Company to serve its customers, including those that have cost recovery through base rates and other Subdivision A 6 riders. That is, cost allocation in Subdivision A 6 revenue requirements considers all other generation "investments" made by the Company used to serve customers' generation needs.[31]

- Dominion proposed, and the Commission has approved, Rider US-2 in a manner that considers and links to "other costs, revenues, investments, or earnings of the utility." The customer benefits cited by the Company in support of the Rider US-2 costs were linked to other costs, revenues, and investments of the utility.[32] For example, Dominion cited to benefits linked to an environmental regulation that would have affected other carbon-emitting generation investments owned by the Company.

- Dominion proposed, and the Commission has approved, Rider US-3 in a manner that considers and links Rider US-3 to "other costs, revenues, investments, or earnings of the utility." For example, the Company requested that the Commission consider other revenues it would receive under a third-party contract to purchase renewable energy certificates.[33]

- Dominion proposed, and the Commission has approved, Rider U in a manner that considers and links Rider U to "other costs, revenues, investments, or earnings of the utility." In seeking approval of undergrounding of certain distribution lines, to be recovered through a Subdivision A 6 rider, the Company requested that the Commission

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base rates and a revised Rider T1 designed to recover the increment/decrement between the revenues produced from the Subsection A 4 component of base rates and the new revenue requirement developed from the Company's Subsection A 4 costs for the Rate Year"), https://scc.virginia.gov/docketsearch/DOCS/73cz01!.PDF.

[31] *See, e.g.*, Direct Testimony of Robert E. Miller on behalf of Virginia Electric and Power Company, Before the State Corporation Commission at 5, Case No. PUR-2021-00156 (filed Dec. 22, 2021) ("The A&E method takes into consideration the generation needed to serve the Company's 'average load,' as well as its 'peak load,' in allocating the costs of these resources to the various jurisdictions and customer classes. Thus, it considers the load factor or average use of the resources by each jurisdiction, and those resources and facilities required to generate the maximum amount of power required by each jurisdiction."), https://scc.virginia.gov/docketsearch/DOCS/68ft01!.PDF.

[32] Direct Testimony of Ted Fasca on behalf of Virginia Electric and Power Company, Before the State Corporation Commission at 15, Case No. PUE-2015-00104 (filed Oct. 1, 2015), https://scc.virginia.gov/docketsearch/DOCS/34lv01!.PDF.

[33] Direct Testimony of Glenn A. Kelly on behalf of Virginia Electric and Power Company, Before the State Corporation Commission at 25, Case No. PUR-2018-00101 (filed July, 24 2018), https://scc.virginia.gov/docketsearch/DOCS/3mqf01!.PDF.

consider "reductions over time in the Company's O&M expenses due to lower storm restoration costs and lower vegetation management costs . . . ."[34] O&M expense and vegetation management costs are "other costs" of Dominion that are recovered through base rates.

Finally, Dominion's interpretation of Subdivision A 7 would invalidate the Company's own cost recovery proposal for Rider OSW that it has advanced in this case. Similar to Rider CE, Rider OSW will be set using the full "cost" of CVOW, which currently includes the $9.8 billion estimated capital investment in CVOW. Beyond this, the Company has proposed identifying a proxy "capacity value" of the Rider OSW investment and would charge that capacity cost to customers in base rates. Under the VCEA rider framework, this capacity charge would then be "passed along to customers through the [Rider OSW revenue requirements], whereby in the past it would have been in base rates to net against Dominion capacity system expenses."[35] In addition, the Company has proposed identifying a proxy "REC value" for CVOW that would charge future REC values produced by CVOW to customers in a separate Subdivision A 5 Rider RPS. The Company would then use that Rider RPS revenue to credit the Subdivision A 6 Rider OSW.[36] In other words, future Rider OSW petitions will be considered on a basis that considers these other costs and revenues associated with different cost recovery mechanisms. Moreover, the Company proposes that other revenues be used as an offset to the amount of future Rider OSW charges. If Subdivision A 6 petitions were required to be

[34] Post-Hearing Brief of Virginia Electric and Power Company at 35, Case. No. PUE-2016-00136 (filed July 28, 2017), https://scc.virginia.gov/docketsearch/DOCS/3g%24z01!.PDF.

[35] Final Order at 21.

[36] Final Order at 22 ("Pursuant to the revised RAC Framework, Rider OSW 'sells' the RECs related to CVOW's energy production to Dominion's Rider RPS, creating a charge to Rider RPS and a benefit to Rider OSW. The lifetime revenue requirement of Rider OSW as calculated by Staff includes a credit of $2.63 billion for the value of the RECs produced by CVOW. This credit will reduce the lifetime revenue requirement of Rider OSW, though the Commission notes customers will pay an equal amount through Rider RPS for the CVOW RECs that are retired for compliance with the RPS Program and not sold.").

considered on a strict stand-alone basis, in the manner suggested by the Company, the rider framework supported by the Company for VCEA costs would need to be revisited.

As demonstrated above, Dominion has proposed, and the Commission has considered other costs, revenues, and investments in implementing other Subdivision A 4, 5, and 6 petitions. This was necessary to make the provisions of Chapter 23 of Title 56 practicable. Consumer Counsel reads Subdivision A 7 to limit the ability of the Commission to consider any excessive earnings[37] recovered through a utility's base rates as a means to offset the amount of incremental rate increases sought under Subdivision A 4, 5, or 6 RACs. This is consistent with the Supreme Court of Virginia's interpretation of Subdivision A 7's connection to base rates: "the 'stand-alone' language in subdivision (7) of subsection (A) of the statute means that the utility's costs, revenues, investments or earnings should not be considered when determining the amount of the rate adjustment clause."[38]

C. Even under Dominion's legal theory of Subdivision A 7, the performance standard can be implemented in a manner that does not run afoul of the stand-alone requirement.

The Commission's performance standard can be implemented in a manner that has no bearing on the amount of future cost recoveries sought pursuant to Subdivision A 6. Future Rider OSW revenue requirements established in annual updates under Subdivision A 6 can be set to recover the CVOW Project's costs "on a stand-alone" basis without regard to replacement costs. If the Commission determines that any hold harmless provision cannot be flowed through the relevant VCEA rider, as seems to be the Company's position in this particular instance, then

[37] As determined by the utility's other costs, revenues, and investments.

[38] *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 708, 733 S.E.2d 250, 257 (2012) (emphasis added).

the Commission could order implementation of the performance standard through a credit in the fuel factor.

The legality of such action cannot seriously be questioned by Dominion. In the initial Rider US-3 case, which was filed pursuant to Subdivision A 6, "the Company proposed a performance guarantee that would hold customers harmless for performance below a collective 25% capacity factor for the" Rider US-3 solar facilities.[39] The Company proposed that "[t]o the extent the actual capacity factor for the Projects falls below 25% for an annual calendar-year period," it would credit customers for replacement power costs associated with that deficit through the annual fuel factor proceeding.[40] That was *the Company's* proposal in the initial Rider US-3 proceeding. And, as a matter of practice, the Company has already applied credits to the fuel factor with replacement power costs associated with the subpar generation performance of the Rider US-3 facilities.[41] If those replacement costs were costs linked to the US-3 solar facilities, in the manner that the Company now argues for CVOW replacement costs, then it would have been illegal for the Company to have proposed a performance guarantee for Rider US-3. But just as the performance guarantees for replacement power costs associated with the Rider US-3 solar facilities did not run afoul of Subdivision A 7, the performance standard ordered for CVOW does not run afoul of Subdivision A 7.

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[39] *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-2018-00101, Order Granting Certificates at 15 (Jan. 24, 2019), https://scc.virginia.gov/docketsearch/DOCS/4%230c01!.PDF.

[40] *Id.* at 15-16.

[41] *Application of Virginia Electric and Power Company, To revise its fuel factor pursuant to § 56-249.6 of the Code of Virginia*, Case No. PUR-2022-00064, Report of Alexander F. Skirpan, Jr., Chief Hearing Examiner at 14 (Aug. 11, 2022) (reporting that "Dominion Energy has credited the fuel factor in the amount of $254,611 related to the performance guarantee for the US-3 Solar Facilities, as directed by the Commission in its US-3 Order"), https://scc.virginia.gov/docketsearch/DOCS/7n5q01!.PDF.

With this context, Dominion is estopped from advancing the legal argument that the performance standard is *ultra vires* and that disallowing unrelated costs because of Project performance would violate the "stand-alone" consideration rule of Subsection A 7. As the Supreme Court of Virginia has stated in its review of a prior Commission proceeding, "a litigant may not take 'successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory.'"[42] And when a party takes such successive inconsistent positions, the court refuses to consider the merits of the position.[43] The doctrine prohibiting what is known as approbation and reprobation "applies both to assertions of fact and law, and precludes litigants from 'playing fast and loose' with the courts, or 'blowing hot and cold' depending on their perceived self-interests[.]"[44]

III. The legal presumption that the CVOW Project's costs will be "prudently and reasonably incurred" is rebuttable.

A. Prompted by Dominion's Petition, the Commission has suspended and is reconsidering its Final Order, which, in part, affirmed the existence of the basic facts giving rise to a presumption that the CVOW Project costs will be "prudently and reasonably incurred."

Where a presumption exists in law, the demonstration of a basic or foundational fact acts to compel the trier of fact to accept a presumed fact "only if no sufficient evidence is offered by the opponent to rebut the existence" of the presumed fact.[45] In this case, the presumption in law is that the costs of the CVOW Project are "reasonably and prudently incurred." The basic facts – or the foundational facts – required to give rise to the presumption are that (i) the utility has

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[42] *Bd. of Supervisors* v. *State Corp. Comm'n*, 292 Va. at 455 n.11, 790 S.E.2d at 466 (quoting *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 204, 788 S.E.2d 237, 258 (2016)).

[43] *Id.*

[44] *Babcock & Wilcox Co* 292 Va. 165, 204-04, 788 S.E.2d 237, 258-59 (citations omitted).

[45] Charles E. Friend & Kent Sinclair, *The Law of Evidence in Virginia* 213 (7th Edition 2012).

complied with the competitive solicitation and procurement requirements pursuant to Subsection E; (ii) the project's projected total levelized cost of energy ("LCOE"), including any tax credit, on a cost per MWh basis, inclusive of the costs of transmission and distribution facilities associated with the facility's interconnection, does not exceed 1.4 times the comparable cost, on an unweighted average basis, of a conventional simple cycle combustion turbine generating facility as estimated by the U.S. Energy Information Administration in its Annual Energy Outlook 2019; and (iii) the utility has commenced construction of such facilities 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. No party to this case has disputed prongs (i) and (iii).

There is evidence in the record that both supports and contradicts a finding that the CVOW Project's total levelized cost of energy does not exceed 1.4 times the comparable cost, on an unweighted average basis, of a conventional simple cycle combustion turbine generating facility as estimated by the U.S. Energy Information Administration in its Annual Energy Outlook 2019.[46] If upon reconsideration the Commission were to determine that the Company has not sufficiently proven prong (ii), then the CVOW Project would *not be* entitled to a presumption of reasonableness and prudence. This does not mean that the Commission could not ultimately determine the Project to be reasonable and prudent, only that the presumption does not apply.

If the Commission were to determine that the Company has sufficiently proven prong (ii), then the statute gives rise to a presumption in law that the Project costs are "reasonably and

[46] Ex. 40 (Kuleshova) at 42-43 (providing a table demonstrating "that simultaneous changes in multiple assumptions push the Project's LCOE close to or above $125/MWh as highlighted, especially if LCOE is not adjusted for REC value and incorporates future investments in battery storage or CAPEX overruns. Several moderate and aggressive scenarios in which 38% capacity factor is combined with higher cost of capital result in the CVOW's LCOE exceeding $125/MWh.").

prudently incurred." The statute at issue must then operate to give rise to a rebuttable presumption.[47] The rule applicable to presumptions under the Virginia Rules of Evidence is as follows:

> Rule 2:301. Presumptions in General in Civil Actions and Proceedings.
>
> Unless otherwise provided by Virginia common law or statute, in a civil action a rebuttable presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof, which remains throughout the trial upon the party on whom it originally rested.[48]

On presumptions, the Supreme Court of Virginia has instructed that:

> [a] presumption is a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts. The primary significance of a presumption is that it operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption. No presumption, however, can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast.[49]

The *Martin* decision cited above is consistent with concepts discussed in Professors Friend's and Sinclair's treatise *The Law of Evidence in Virginia*. Professors Friend and Sinclair observe that although a rebuttable presumption imposes a burden of producing countervailing evidence on the party against whom it is directed, the general principal is that no presumption can shift the ultimate burden of persuasion, from the party on whom it originally rested (i.e., Dominion) unless there is "a more specific doctrine governing the particular cause of action at bar."[50] This

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[47] *Fairfax Cty. Fire & Rescue Servs. v. Newman*, 222 Va. 535, 539-40, 281 S.E.2d 897, 900 (1981) (citing *Crenshaw v. Commonwealth*, 219 Va. 38, 245 S.E.2d 243 (1978)) (concluding that for a presumption to be valid, it "must be rebuttable").

[48] Va. R. of Evidence 2:301 (emphasis added).

[49] *Martin v. Phillips*, 235 Va. 523, 526, 369 S.E.2d 397, 399 (1988).

[50] Friend & Sinclair at 222 (citing "the 'Source Notes' which accompanied the promulgation of the Virginia Rules of Evidence . . . .").

general principal is embodied in the language of Va. R. of Evidence 2:301, unless a *specific* doctrine or a statute provides otherwise with regard to the burden of persuasion.[51] Under the presumption of § 56-585.1:11, there can be no different effect on the burden of proof apart from the general rule expressed in Rule 2:301 as there is no established presumption doctrine in the Commission's utility ratemaking precedents, and nothing in § 56-585.1:11 goes beyond stating the existence of the presumption.

It is clear that the Commission found evidence[52] in the record that tends to draw into question the presumption that the CVOW Project costs are to be "reasonably and prudently incurred." Under Virginia's general approach to the operation of rebuttable presumptions, such evidence (which represents the burden of going forward) can operate to "extinguish" the presumption.[53] At the same time, Va. R. of Evidence 2:301 maintains the ultimate burden of proof on Dominion.[54] This approach to the operation of rebuttable presumptions follows what is called the "'Thayer theory' or 'bursting bubble theory,' which states that the only effect of a presumption is to shift the burden of production with regard to the presumed fact."[55] Under the bursting bubble theory, "once the party against whom the presumption operates introduces countervailing evidence, the presumption 'disappears like a bursting bubble and no longer has any impact on the trial.' The party who initially benefitted from this presumption still retains the

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[51] Friend & Sinclair at 220.

[52] Final Order at 6-9 (recognizing and detailing significant concerns that "were raised throughout this proceeding regarding affordability and the financial risk to ratepayers").

[53] *See Va. Birth-Related Neurological Injury Comp. Program v. Young*, 34 Va. App. 306, 310-11, 541 S.E.2d 298, 300 (2001) (citations omitted) (decided prior to adoption of Va. R. of Evidence).

[54] Va. Code § 56-235.3 provides that "[a]t any hearing on the application of a public utility for a change in a rate, toll, charge or schedule, the burden of proof to show that the proposed change is just and reasonable, shall be upon the public utility."

[55] *City of Hopewell v. Tirpak*, 28 Va. App. 100, 116, 502 S.E.2d 161, 169 (1998) (citations omitted).

burden of persuasion on the factual issue in question."[56] Professors Friend and Sinclair note that in light of Va. R. of Evidence 2:301, the "bursting bubble theory" is the general approach in Virginia.[57]

There is a competing theory as to the operation of rebuttable presumptions. This follows what is called the "Morgan theory," which has the "effect of shifting both the burden of production and the burden of persuasion on the factual issue in question to the party against whom the presumption operates."[58] In *City of Hopewell*, the Virginia Court of Appeals recognized that the Virginia Supreme Court, in *Martin,* had made reference to the "Thayer theory."[59] The Court of Appeals also recognized that there were, at that time, only three instances of "Morgan theory" presumptions in Virginia law compared to "numerous presumptions of the 'bursting bubble' variety whose effect is merely to shift the burden of production on the factual issue in question." Such specific instances would be consistent with Va. R. of Evidence 2:301's directive that "unless otherwise provided by Virginia common law or statute," the general approach does not "shift the burden of proof, which remains through the trial on the party on whom it originally rested." Virginia's evidentiary rule allows for discrete "Morgan theory" exceptions to the general "bursting bubble theory" as is provided by Virginia common law or statute.[60] To overcome the shifting burden of persuasion, the party against

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[56] *Parson v. Miller*, 296 Va. 509, 525, 822 S.E.2d 169, 178 (2018)

[57] Friend & Sinclair at 226 ("[I]f evidence 'sufficient' to rebut the presumption is introduced, the presumption "disappears," and the matter goes to the jury. This principle is reflected in Virginia Rule of Evidence 2:301, which makes all presumptions of this 'bursting bubble' variety, unless established case law or a statute has erected a more significant burden." (citations omitted)).

[58] *City of Hopewell*, 28 Va. App. at 116, 502 S.E.2d at 169.

[59] *Id.* at 117, 502 S.E.2d at 169 (noting the Virginia Supreme Court's "Thayerian reference" in *Martin* that "no presumption . . . can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast.").

[60] *See, e.g.*, *White v. Llewellyn*, 299 Va. 658, 669, 857 S.E.2d 388, 393 (2021) ("[I]n requiring defendants to 'prove' and 'establish' the bona fides of a transaction by strong and clear evidence once the presumption of a fraudulent

whom the presumption applies is required to present "substantial evidence showing the true fact[] to be to the contrary" to the presumed fact. [61] In terms of standard of proof, this would seem to require proof by at least a preponderance of the evidence as "[a] presumption of law cannot be said to be rebutted where the [credible] evidence . . . for and against the presumption is equally balanced. The rebutter has not carried the burden imposed upon him by law. Where the evidence for and against the presumption are equal the presumption will prevail.'"[62] More recently the Court observed that it would require "strong and clear evidence"[63] to overcome a "Morgan theory" presumption applicable to fraudulent conveyance.

The Commission has recently considered a case involving a rebuttable presumption. In that case, unlike the instant case, there was no evidence in the record contrary to the fundamental facts giving rise to the presumption. The issue then became whether "sufficient evidence" existed to extinguish the presumptions. In weighing the evidence in the record, the Commission indeed found that there was "sufficient evidence" showing that the presumptions had been rebutted.[64]

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conveyance is established, our precedent has required the shifting of the burden of persuasion as well as the burden of production to the defendant, in fraudulent conveyance cases.")

[61] *Kavanaugh v. Wheeling*, 175 Va. 105, 113, 7 S.E.2d 125, 128 (1940).

[62] *Lambert v. Lambert*, 6 Va. App. 94, 367 S.E.2d 184 (1988) (citing *Rowe v. Rowe*, 144 Va. 816, 822, 130 S.E. 771, 772 (1925)).

[63] *White v. Llewellyn*, 299 Va. 658, 668, 857 S.E.2d 388, 392 (2021)

[64] *Application of Virginia Electric and Power Company, For revision of a rate adjustment clause: Rider U, new underground distribution facilities, for the rate year commencing September 1, 2017*, Case No. PUE-2016-00136, Final Order at 9 (Sept. 1, 2017), https://scc.virginia.gov/docketsearch/DOCS/3hbv01!.PDF.

IV. Post-hearing Comments filed with the Commission indicate public support for the performance standard.

There has been an abnormal number of public comments sent to the Commission in the period following issuance of the Final Order and the Company's Petition for Reconsideration. Consumer Counsel understands that the vast majority of those public comments demonstrate public support for the performance standard. Excepts from those public comments include:

- As a lifelong tax paying citizen of Virginia, I am writing in strong opposition to any changes to the performance clause in the recently approved offshore Dominion Energy windmill proposal. Dominion Energy MUST provide guarantees to the taxpayers that we will not have to subsidize nor pay for additional energy should the project fail to provide as Dominion has stated.[65]

- I strongly support your plan to apply these performance standards to the project going forward. If Dominion Energy is convinced that this is a good solid project to meet future energy needs, then they should be willing to accept the risks of executing this project and stand behind it. To socialize the risks while they keep the all profits is not right. The Commission needs to do its job, which I think is mandated in the VA Constitution, and protect consumer interest. These are huge dollars over decades on a project that carries significant risk and significant cost. If Dominion does not have the confidence to execute the project in light of the risks, why should consumers be expected to have the confidence to accept those same risks?[66]

- I am very concerned that the risks will result in huge unplanned costs in the project and therefore cause increased energy costs for me and all the other customers of Dominion Energy. Dealing with inflation is risky enough for most of us, causing us economic pain; therefore, we must require that Dominion Energy shoulder the risk for this project, not pass it on to us.[67]

- SCC's "ratepayer protection" clause should be retained in the approval of Dominion's CVOW Project. No commercial enterprise is entitled to entirely exclude its investment burden it incurs for its plant development, construction, and operation by placing that

[65] https://scc.virginia.gov/docketsearch/DOCS/7ngz01!.PDF.

[66] https://scc.virginia.gov/docketsearch/DOCS/7nhz01!.PDF.

[67] https://scc.virginia.gov/docketsearch/DOCS/7nks01!.PDF.

burden entirely and immediately on the consumer who in this instance has no alternative source from which to obtain electrical energy.[68]

- Dominion Energy attempts to have it both ways: to obtain the revenue associated with ownership of the project assets in its rate base, and at the same time burden consumers with the costs of the risks associated with that ownership, including diminished electricity production when the wind doesn't blow, or blows too hard. It can't have it both ways. It would be unconscionable for the Commission to allow such double-dipping to exist without exercising its inherent Constitutional authority to protect consumer interests.[69]

CONCLUSION

For the foregoing reasons, Consumer Counsel opposes Dominion's Petition for Limited Reconsideration.

Respectfully submitted,

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[68] https://scc.virginia.gov/docketsearch/DOCS/7nlq01!.PDF.

[69] https://scc.virginia.gov/docketsearch/DOCS/7nmv01!.PDF.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on September 20, 2022, by electronic service to:

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