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September 20, 2022

VIA ELECTRONIC FILING

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

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

Dear Mr. Logan:

Pursuant to the Commission's September 13, 2022, Order, please find the attached Response of respondent Clean Virginia in the above-captioned matter (Public Version). This pleading is also being filed by hand Extraordinarily Sensitive Version pursuant to Rule 170 of the Commission's Rules of Practice and Procedure.

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

Sincerely,

/s/ William T. Reisinger

William T. Reisinger

cc: Certificate of Service (via email)

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUR-2021-00142

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

**RESPONSE OF CLEAN VIRGINIA TO
DOMINION PETITION FOR LIMITED RECONSIDERATION**

Respondent Clean Virginia (“Clean Virginia”),¹ by counsel, hereby submits its Response to the August 22, 2022, Petition for Limited Reconsideration (“Petition”) of Virginia Electric and Power Company, doing business as Dominion Energy Virginia (“Dominion” or “Company”).

INTRODUCTION

On August 5, 2022, the Commission approved Dominion’s application to construct and operate the Coastal Virginia Offshore Wind Project (“CVOW Project” or “Project”). In its Petition, Dominion sought reconsideration of the capacity factor performance standard included in the Commission’s Final Order. While seeking reconsideration of this part of the Final Order, however, Dominion did not ask the Commission to suspend the effectiveness of its order granting approval of the Project. Instead, the Company requested approval to implement the

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

Rider OSW rate increase, which the Company represented “[was] in the process of being implemented and is set to go into effect on September 1,2022.”²

In its Post-Hearing Brief, Clean Virginia supported the performance standard recommended by Consumer Counsel Witness Norwood, which was ultimately adopted by the Commission. The CVOW Project presents additional risks based on Dominion’s decision to own 100% of the equity of the completed facility.³ The capacity factor performance standard is the most significant consumer protection adopted by the Commission. By holding customers harmless for lower-than-projected performance, it would mitigate some of the risks faced by customers.

Clean Virginia continues to support the Commission’s performance requirement, which is a lawful and reasonable exercise of the Commission’s discretion. Moreover, the evidence shows that the performance standard, if it is ever triggered, would have a limited financial impact on the Company. The financial impact of the performance standard should also be considered in light of the approximately \$7 billion in shareholder profits that Dominion is projected to recover through Rider OSW of the life of the Project.⁴

RESPONSE

A. The Commission’s Performance Standard is lawful, reasonable, and consistent with precedent.

Dominion calls the Commission’s performance requirement “unreasonable,” “unlawful,” “untenable,” and “fundamentally inconsistent with the utility regulatory construct.”⁵ The performance requirement is none of those things. The Commission’s decision to adopt a

² Petition at 2, note 7.

³ See Clean Virginia Post-Hearing Brief at 5.

⁴ See Ex. 41 (Welsh) at 7 (projecting a lifetime return on equity of \$7.22 billion).

⁵ See Petition at 3-4, 7.

performance standard to protect consumers is a lawful and appropriate exercise of the Commission's discretion. It is also consistent with Virginia and national utility commission precedent.

As a preliminary matter, Dominion's legal position is premised on its view that the performance standard acts a "condition for future cost recovery."⁶ Dominion believes the replacement power costs that may be required by the performance standard should be considered costs of the Project.⁷ This is not so. The Petition does not explain how Dominion's obligation to replace power not produced by the CVOW Project prevents the Company from recovering any prudently incurred cost. The Commission's order authorizes the Company to recover all prudently incurred CVOW Project costs – including shareholder profits – through Rider OSW.

The Commission has adopted similar performance standards for other intermittent, utility-owned renewable facilities. In the past, Dominion *itself* has proposed capacity factor performance standards for its solar facilities similar to the standard adopted by the Commission in the present case. In Case No. PUR-2018-00101, for example, as explained by the Commission, "the Company proposed a performance guarantee that would hold customers harmless for performance below a collective 25% capacity factor for the Projects." Under Dominion's proposal in that case, "the Company proposed to credit customers for lost REC revenues and replacement power costs" if, during any calendar year, the performance of the subject solar facilities did not achieve a 25% capacity factor. The Commission ultimately imposed a more stringent capacity factor "performance guarantee."⁸ The Commission also

⁶ Petition at 16.

⁷ Petition at 17.

⁸ *Petition of Virginia Electric and Company, For approval and certification of the proposed US-3 Solar Projects*, Case No. PUR-2018-00101, January 24, 2019, Final Order at 16-19.

imposed a similar performance standard when approving a separate solar facility in the following year.⁹

The evidence in this case showed that the performance standard concept has been approved by other state utility commissions for large-scale wind projects. At the hearing, Consumer Counsel witness Norwood described performance requirements adopted by utility commissions in Texas, Arkansas, Louisiana, and Oklahoma.¹⁰ These performance standards generally require regulated utilities to meet certain capacity factor targets. Mr. Norwood described the performance standards as conceptually similar to the standard adopted by the Commission in this case.¹¹

The Commission's performance standard requirement is not only consistent with precedent, but it remains squarely within the Commission's authority to control the activities of regulated public utilities. In its Post-Hearing Brief, Clean Virginia cited the Commission's "broad, general and extensive powers" to control, direct, and oversee the activities of public utilities.¹² This inherent authority is found in Chapter 10 and 23 of Title 56 of the Code of Virginia and in Article IX of the Constitution of Virginia.¹³ The Virginia Supreme Court has held that where the General Assembly has not placed an "express limitation" on the Commission's authority, the Commission has the power to exercise "sound discretion."¹⁴ Should

⁹ See *Petition of Virginia Electric and Power Company, For approval and certification of the proposed US-4 Solar Project*, Case No. PUR-2019-00105, January 22, 2020, Final Order at 12.

¹⁰ See Ex. 34, 35; Tr. 28-32.

¹¹ See Tr. 28.

¹² See Clean Virginia Post-Hearing Brief at 15-18 (citing *Va. Elec. & Power Co. v. State Corp.*, 284 Va. 726, 735 (2012)).

¹³ See, e.g., Va. Code §§ 56-35, 56-234.3, and 56-234.4.

¹⁴ *Va. Elec. & Power Co. v. State Corp.*, 284 Va. 726, 741 (2012)).

the General Assembly wish to limit the Commission's discretionary authority, such limitations must be "clearly expressed in the language of the statute."¹⁵

The General Assembly has never enacted a law prohibiting the Commission from adopting a capacity factor performance standard when approving energy projects, as the Commission has done in Case Nos. PUR-2018-00101, PUR-2019-00105, and in the present case.¹⁶

The 42% capacity factor performance standard requirement is reasonable based on the evidence Dominion used to justify the CVOW Project. As noted by the Commission, "[i]n choosing to construct the Project and seek recovery of the costs requested herein, the Company based its cost-benefit analysis and [levelized cost of energy] proposal on an average net capacity factor of 42%, and Dominion continued to affirm its high level of confidence in relying upon a 42% capacity factor to undertake this Project."¹⁷ Dominion Witness Bennett reaffirmed the Company's capacity factor projections at the hearing, testifying that "on average we expect [a] 42 percent capacity factor based on all of the calculations that we have done and all the performance data that we have."¹⁸ And in its Petition, the Company affirmed that it is "not retreating from this expectation."¹⁹ As Clean Virginia noted in its Post-Hearing Brief, the Commission's performance standard also assumes capacity factor performance that is

¹⁵ *Id.*

¹⁶ The General Assembly can be presumed to be aware of the Commission's prior decisions to adopt capacity factor performance standards when approving renewable energy projects. *See Jones v. State Farm Mut. Auto. Ins. Co.*, 268 Va. 396, 401, 601 S.E.2d 645, 647 (2004) (quoting *Miller v. Commonwealth*, 180 Va. 36, 43, 21 S.E.2d 721, 724 (1942)). ("Where a statute has been construed by the courts, and is then re-enacted by the legislature, the construction given to it is presumed to be sanctioned by the legislature, and thenceforth becomes obligatory upon the courts.")

¹⁷ Final Order at 15, citing, *inter alia*, Ex. 9 (Bennett Direct) at 16, 19 and Ex. 4 (Mitchell Direct) at 9-10.

¹⁸ Tr. 237 (May 17, 2022).

¹⁹ Petition at 21.

meaningfully lower than the 47% capacity factor reported by the Company for its existing offshore wind turbines approved pursuant to Case No. PUR-2018-00121.²⁰

Finally, the performance standard is appropriate based on Dominion's decision to develop the CVOW Project as a 100% utility-owned facility. Both Staff Witness Kuleshova and Clean Virginia Witness Chang testified that all other states pursuing large-scale offshore wind are doing so through power purchase agreements or other third-party financing mechanisms.²¹ In each of the major offshore wind projects to date, the third-party developer – not a regulated utility or its customers – bears the operational and performance risks. Dominion, however, made the choice to deploy its own capital and develop the CVOW Project as a 100% utility-owned facility.

B. Clean Virginia would not oppose establishing *force majeure* provisions in this case, provided they are limited to events that are truly extraordinary and unforeseen.

In its Petition, Dominion complains that “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.”²² Clean Virginia assumes that discussion of *force majeure* events would be part of the “specific implementation” of the performance standard that the Commission stated would be developed in a “future proceeding.”²³ Nonetheless, Clean Virginia would not oppose defining such parameters in the present case.²⁴ Should the Commission wish to define this issue in the present case, Clean Virginia urges the Commission to ensure that *force majeure* events – that is, those events which may relieve the Company of its obligation to credit

²⁰ See Tr. 84 (May 17, 2022).

²¹ See Ex. 36 (Chang) at 8-9; Ex. 40 (Kuleshova) at 79.

²² Petition at 20.

²³ Final Order at 16, note 68.

²⁴ Final Order at 16, note 66.

customers for replacement energy and RECs – are truly extraordinary and unforeseen. For example, if an act of war, such as a terrorist attack on the Project, caused the Project’s performance to fall below the three-year capacity factor target, such an attack could certainly qualify as a *force majeure* event. On the other hand, damage to the turbines or floating substation caused by a foreseeable weather event – such as a hurricane, tropical storm, or high seas – should not.²⁵

C. The Company overstates the potential financial harm to shareholders if the performance standard is triggered in a future year.

In its Petition, Dominion calls the Commission’s performance standard “untenable” and threatens to cancel the CVOW Project if it is not rescinded.²⁶ When considering the theoretical impacts of the performance standard, the Commission should first consider Dominion’s guaranteed profits. As the Commission recognized, “[t]he Project will likely be the largest capital investment . . . in the history of the Company.”²⁷ As Dominion’s largest single capital investment to date, the CVOW project will also likely be the most profitable project ever undertaken by the Company.

The total lifetime costs of the CVOW project are estimated to be \$21.5 billion.²⁸ The Commission approved Dominion’s application to recover the costs of the Project through a rate adjustment clause (“RAC”). RAC recovery essentially guarantees that all project costs will be

²⁵ Clean Virginia would not oppose a *force majeure* provision similar to that adopted by the Commission in Case No. PUR-2018-00101, but tailored for the CVOW Project (e.g., *force majeure* would be limited to unforeseeable events that are “truly sudden, catastrophic, and extraordinary” but not to events “such as vagaries in weather, equipment failures, design problems, or operation and maintenance issues.”) See Case No. PUR-2018-00101, Final Order at 18.

²⁶ See Petition at 3. Dominion alleges that the performance requirement as ordered “will prevent the Project from moving forward, and the Company will be forced to terminate all development and construction activities.”

²⁷ Final Order at 6.

²⁸ See Ex. 41 (Welsh) at 4.

recovered on a timely basis. Cost recovery through a RAC also guarantees recovery of Dominion's Commission-approved rate of return on common equity ("ROE") of 9.35%.

Out of the \$21.5 billion to be recovered through Rider OSW, \$9.4 billion is attributable to financing costs, including debt and equity costs. \$7.22 billion of the financing costs is attributable to the equity return for shareholders.²⁹ In other words, shareholders are virtually guaranteed to receive profits of \$7.22 billion over the life of the project. And if Dominion's authorized ROE or capital costs rise, shareholder profits will also increase.

Based on the evidence in this case, the Commission can evaluate how the performance standard, if it is ever triggered, might impact Dominion's bottom line. That is, if the CVOW Project does not achieve the projected 42% capacity factor during a three-year period, what is the financial impact to Dominion? Using available record evidence in this case, Clean Virginia has quantified the potential impact of the performance standard in terms of purchased energy and purchased RECs.³⁰ The following table illustrates how a 1% or 5% shortfall in energy production from the Project could impact Dominion. The energy prices used to calculate the table below are based on the forecasted energy prices presented in Staff Witness Kuleshova's Attachment KK-30. The REC price forecast is the base case REC price provided in Extraordinarily Sensitive Appendix D to the testimony of Staff Witness Welsh.³¹

[EXTRAORDINARILY SENSITIVE INFORMATION REDACTED]

²⁹ Id. at 7.

³⁰ Petition at 17.

³¹ The projected REC prices were admitted into evidence as "Extraordinarily Sensitive" information; therefore, the price calculations in Table 1 are redacted. For simplifying and illustrative purposes, the calculation assumes that every MWh of energy purchased also requires a corresponding REC purchase. This calculation assumes the same discount rate used by Dominion in its levelized cost of energy analysis provided in Confidential Attachment Staff 1-12.

**Table 1 Illustrative Potential Impact at Different Generation Percentages Based on Staff Testimony
(Forecasted Energy and REC Prices)**

Calculated Revenue Associated with One and Five Percent Change in Energy Production from CVOW Project					
	Estimated Energy Price	Dominion Estimated REC Price	Energy and REC	1% Change in Energy Generation	5% Change in Energy Generation
2027					
2028					
2029					
2030					
2031					
2032					
2033					
2034					
2035					
2036					
2037					
2038					
2039					
2040					
2041					
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2047					
2048					
2049					
2050					
2051					
2052					
2053					
2054					
2055					
2056					

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[END EXTRAORDINARILY SENSITIVE INFORMATION]

Table 1 shows that the performance standard, if it is ever triggered in the future, would likely have a limited financial impact on Dominion. The Commission should consider this potential financial impact in light of the \$7.22 billion in guaranteed profits that will be recovered through Rider OSW.

CONCLUSION

The capacity factor performance standard is the most meaningful consumer protection adopted by the Commission in its Final Order. Clean Virginia opposes weakening this consumer protection. The performance standard is a lawful and reasonable exercise of the Commission's discretion in light of the risks associated with the CVOW Project. Clean Virginia therefore urges the Commission to deny Dominion's Petition.

Respectfully submitted,

CLEAN VIRGINIA

By counsel

/s/ William T. Reisinger

Matthew L. Gooch
William T. Reisinger
ReisingerGooch PLC
1108 East Main Street, Suite 1102
Richmond, Virginia 23219
matt@reisingergooch.com
will@reisingergooch.com
(804) 223-6391

September 20, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served this 20th day of September, 2022, by e-mail to:

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

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

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

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

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

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

Timothy G. McCormick, Esquire
Dannieka N. McClean, Esquire
Christian & Barton LLP
tmccormick@cblaw.com
[dmclean@cblaw.com](mailto:dmcclean@cblaw.com)

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

/s/ William T. Reisinger