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spilman thomas & battle

Carrie H. Grundmann
Direct Dial (336) 631-1051
cgrundmann@spilmanlaw.com

September 20, 2022

VIA ELECTRONIC FILING

Mr. Bernard Logan, Clerk
c/o Document Control Center
State Corporation Commission
1300 East Main Street, 1st Floor
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:

Please find enclosed for filing with the State Corporation Commission ("Commission") the Response of Walmart Inc. to the Petition of Virginia Electric and Power Company for Limited Reconsideration, in the above-referenced case.

Pursuant to the Commission's Rules of Practice and Procedure, 5 VAC 5-20-140, and the Commission's *Order Requiring Electronic Service* entered on April 1, 2020, Case No. CLK-2020-00007, Walmart will be providing service of documents to parties in this case via email only unless a party requests otherwise.

Please contact me if you have any questions.

Sincerely,

SPILMAN THOMAS & BATTLE, PLLC

By _____
Carrie H. Grundmann
(VA Bar No. 76817)

Counsel to Walmart Inc.

CMH:sds
Attachments
cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Response of Walmart Inc. to the Petition of Virginia Electric and Power Company for Limited Reconsideration upon the following parties to this proceeding.

VIA E-MAIL

Frederick D. Ochsenhirt, Esquire
K. B. Clowers, Esquire
State Corporation Commission
Office of General Counsel
P.O. Box 1197
Richmond, VA 23218-1197
frederick.ochsenhirt@scc.virginia.gov
beth.clowers@scc.virginia.gov

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

Vishwa B. Link, Esquire
Joseph K. Reid, III, Esquire
Timothy D. Patterson, Esquire
Jennifer D. Valaika, Esquire
Benjamin A. Shute, Esquire
McGuireWoods LLP
800 East Canal Street
Richmond, VA 23219-3916
vlink@mcguirewoods.com
jreid@mcguirewoods.com
tpatterson@mcguirewoods.com
jvalaika@mcguirewoods.com
bashute@mcguirewoods.com

C. Meade Browder, Jr., Esquire
C. Mitch Burton, Jr., Esquire
R. Scott Herbert, Esquire
John E. Farmer, Jr., Esquire
Division of Consumer Counsel
Office of Attorney General
202 N. Ninth Street
Richmond, VA 23219
mbrowder@oag.state.va.us
cburtonjr@oag.state.va.us
sherbert@oag.state.va.us
jfarmer@oag.state.va.us

William Cleveland, Esquire
Claire Horan, Esquire
Southern Environmental Law Center
201 West Main St., Suite 14
Charlottesville, VA 22902-5065
wcleveland@selcva.org
choran@selcva.org

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

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

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

Cale Jaffe, Esquire
Stephen Wald
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1738
cjaffe@law.virginia.edu
SW2DP@virginia.edu

Carrie H. Grundmann

Dated: September 20, 2022

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 WALMART INC. TO THE PETITION OF VIRGINIA ELECTRIC AND POWER COMPANY FOR LIMITED RECONSIDERATION

Pursuant to the Orders issued by the Virginia State Corporation Commission ("Commission") on August 24, 2022, and September 13, 2022, Walmart Inc. ("Walmart") files this Response to the Petition of Virginia Electric and Power Company ("Dominion" or "Company") for Limited Reconsideration ("Petition").

INTRODUCTION

Before turning to the merits of Dominion's argument, three points bear mention. First, throughout its Petition, the Company complains that the performance guarantee imposed as a condition of the Commission's approval of the Coastal Virginia Offshore Wind Commercial Project ("CVOW," "CVOW Project," or "Project") is "asymmetric in application[1]" and implies that shareholders are being asked to bear an unfair level of risk. Lest it have gone unnoticed, the Commission's Final Order recognized that of the $21.7 billion in total project costs, "**$7.22 *billion*** represents the Company's equity return on its investment in the Project based on its current 9.35

[1] Petition, p. 6.

percent return on equity."[2] As such, the Company's shareholders will see significant returns from the Company's investment in CVOW Project and should therefore bear an appropriate share of risk.

Second, the Company failed to develop a robust factual record during the evidentiary hearing in this case related to its position on the performance guarantee. Although a performance guarantee was raised in the Direct Testimony of Staff witness Kuleshova and Office of Attorney General ("OAG") witness Norwood, the Company never testified, in rebuttal testimony or at the hearing, that it would cancel the project if a performance guarantee were imposed. In fact, during the hearing, Company witness Mitchell was asked specifically how the Company would respond if a performance guarantee (such as the one recommended by Staff witness Kuleshova) was imposed by the Commission. Rather than indicating that a performance guarantee would cause the Company to terminate the Project (as it now claims[3]), Company witness Mitchell testified only that "we think we've come to a good resolution in the stipulation, and hypotheticals beyond the stipulation I can't speak to."[4]

The Commission's Final Order was issued in the late afternoon on Friday, August 5, 2022. The following Monday, August 8, 2022, Dominion Energy's Chairman, Robert Blue, described the performance guarantee as "untenable" in an earnings call with shareholders.[5] With such an immediate response from the Company's corporate parent, it seems highly unlikely that the Company had no position on its likely response should the Commission adopt a performance

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[2] Final Order, p. 5 (*citing* Ex. 41, Direct Testimony of Staff witness Welsh, pp. 4, 6) (emphasis added).

[3] Petition, p. 3.

[4] Hearing Transcript ("Tr."), Day 3, p. 279, line 15 to p. 280, line 1.

[5] *See* Ethan Howland, *Dominion Energy mulls appeal of 'untenable' performance standard for $9.8B offshore wind project*, Utility Dive (Aug. 8, 2022), available at https://www.utilitydive.com/news/dominion-energy-offshore-wind-data-centers-appeal-performance-standard/629134/.

guarantee. The Commission, Walmart, and other parties must now respond to Dominion's threat to terminate the CVOW Project solely as a result of Dominion's failure to properly develop the evidentiary record.

Finally, there is no statute prohibiting the Commission from imposing the performance guarantee set forth in the Final Order in this proceeding. Recognizing the significant risks being placed on ratepayers, which were exacerbated by the Company's unilateral decision to act as the developer of the Project, the Commission acted within its delegated authority when it imposed a performance guarantee on the CVOW Project proposed by Dominion. The Commission's imposition of a performance guarantee, among other protections[6], properly sought to protect ratepayers from operating risks for the single largest capital project ever undertaken by the Company. Walmart is appreciative of the Commission's diligence and effort to protect customers. Nothing in the Company's Petition mandates any alteration to the performance guarantee adopted by the Commission.

Notwithstanding the foregoing, because the Commission exercised its properly delegated discretion in imposing the performance guarantee, it likewise can exercise that same discretion to alter or amend the performance guarantee should it so choose. As the Commission recognized, Walmart was a party that urged the Commission to adopt a performance guarantee.[7] Walmart continues to believe that the CVOW Project imposes substantial risks on ratepayers, exacerbated by the Company's decision to construct the Project itself, that must be mitigated to the extent reasonably possible. Walmart is, however, equally mindful that Dominion has threatened to "terminate all development and construction activities"[8] if the performance guarantee remains

[6] The Company's Petition did not contest the other protections adopted by the Commission's Final Order.

[7] Final Order, p. 16.

[8] Petition, p. 3.

unaltered. As such, Walmart would not oppose the Commission again exercising its discretion to make reasonable alterations to the terms of the performance guarantee (*e.g.*, extending the three-year rolling average to a five-year rolling average, potentially reducing the capacity factor to approximately 40 percent, and limiting the performance guarantee to the 30-year useful life of the Project), provided those alterations are consistent with the evidentiary record developed in this proceeding. Walmart is also supportive of the Commission providing guidance to the Company regarding the meaning of "hold harmless," including what, if any, circumstances may qualify as a force majeure event, and how the Commission would intend to set the price of energy and renewable energy credits ("RECs") if the performance penalty is ever triggered.

RESPONSE

A. "Costs" under Virginia Code § 56-585.1:11 C ("Section 1:11 C") Relate to Construction.

Dominion argues that the Commission must reconsider the performance guarantee because "Section 1:11 names one exclusive condition under which the Commission can disallow costs: '*only if they are otherwise unreasonable or imprudently incurred.*'"[9] Dominion has quoted only selectively from Section 1:11 C. When the Section is read as a whole, it is quite clear that Section 1:11 C deals with costs related to construction of an offshore wind project, not its operation. Because the performance guarantee imposed by the Commission does not concern the disallowance of any construction costs, Dominion's argument must be rejected.

Section 1:11 C states in its introductory sentence that:

> Pursuant to subsection B, construction 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

[9] Petition, pp. 10-11 (emphasis added).

> 3,000 megawatts, along with electrical transmission or distribution facilities associated therewith for interconnection is in the public interest.[10]

This first sentence is the frame of reference for the remaining sentences in Section 1:11 C, including the sentence selectively cited by Dominion in its Petition. Section 1:11 C goes on to state that:

> 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 determines that [the rebuttable presumption has been met]. The Commission shall disallow costs, or any portion thereof, only if they are otherwise unreasonably and imprudently incurred.[11]

The second sentence references specifically the "costs associated with such facility," and must be read in light of the first sentence, which clearly concerns *construction* of an offshore wind project. The same is true for the third sentence in Section 1:11 C, cited by Dominion.

Dominion claims that Section 1:11 C means that the "Company can recover all capital *and operating costs*;"[12] however, Section 1:11 C makes no mention of the project's operation following construction. To the contrary, a plain reading of Section 1:11 C confirms that any limits on the Commission's authority to disallow costs is limited to those associated with construction of CVOW and not its operation post-construction. Because the performance guarantee adopted by the Commission does not implicate construction costs, Dominion's argument must be rejected.

B. <u>Dominion has Conceded that the Performance Guarantee Does Not Impact Its Recovery of Capital Costs of CVOW</u>.

At the hearing, Company witness Mitchell was asked:

> Q: [D]oes the Company perceive that the performance guarantee imposes a risk, that the Company will not recover it capital costs associated with the CVOW project? That's the question.

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[10] Va. Code § 56-585.1:11 C.

[11] *Id.* (emphasis added).

[12] Petition, p. 12 (emphasis added).

A: Performance in isolation is not a risk to capital cost. Capital costs are judged one way; performance is not capital costs, directly.[13]

Company witness Mitchell acknowledged that Dominion will recover its costs of capital – including its return on equity – regardless of the "actual output" of CVOW.[14] This admission during the hearing forecloses any argument by Dominion that the performance guarantee results in disallowance of any reasonably and prudently incurred costs within the meaning of Section 1:11 C.

C. Replacement Energy Costs Do Not Violate the "Stand-Alone" Requirement of Va. Code § 56-585.1 A 7 ("Subsection A 7").

Contrary to Dominion's assertions, Subsection A 7 does not operate as a bar to the imposition of the performance guarantee[15] because it is not implicated when dealing with replacement energy costs. Due to unique requirements of the Virginia Clean Economy Act ("VCEA"), an entire cost allocation methodology has been adopted to ensure that "costs, net of benefits," are recovered from both shopping and non-shopping customer alike. In the event the performance guarantee is triggered and the Company needs to produce replacement energy, such costs would be borne exclusively by retail ratepayers, not shopping customers, because the Company is not serving the energy needs of shopping customers. Those costs – as is true for all purchased power costs – would be recovered from customers through the fuel factor. In this way, the Commission will consider any petitions related to CVOW "on a stand-alone basis."

[13] Hearing Tr., Day 3, p. 277, line 23 to p. 278, line 6.

[14] *Id.*, p. 279, lines 6-15.

[15] *See* Petition, p. 18.

D. The Commission Must Reject Dominion's Arguments Regarding Subsection A 7.

In its Petition, Dominion argues that Subsection A 7 limits the Commission to considering CVOW – a rider proposed pursuant to Va. Code § 56-585.1 A 6 ("Subsection A 6")[16] – "on a stand-alone basis without regard to the other costs, revenues, investments, or earnings of the utility."[17] In making this argument, the Company goes so far as to claim that the Commission's actions were *ultra vires*; *i.e.*, something done without legal power or authority. Such an interpretation would invalidate numerous prior Commission actions, and Dominion requests, that considered "costs, revenues, [and] investments" that were not strictly within the specific rider at issue.

A perfect example of the deficiencies in the Company's argument is exemplified by the Rider US-3 proceedings. Rider US-3 was a Subsection A 6 proceeding, which is the same Subsection implicated by the Company's arguments herein. There, the Company voluntarily proposed a performance guarantee "that would hold customers harmless for performance below a collective 25% capacity factor."[18] Importantly, that performance guarantee would credit customers with replacement power costs in the annual fuel factor proceeding.[19] Clearly, the Company did not think that the Commission's consideration and adoption of a performance guarantee in the Rider US-3 context was *ultra vires*. For similar reasons, the Commission's adoption of a performance guarantee applicable to the CVOW Project also is not an *ultra vires* act, and it does not run afoul of Subsection A 7.

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[16] *See id*, n. 48.

[17] *See* Subsection A 7.

[18] *See 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 (issued Jan. 24, 2019), p. 15.

[19] *Id.*, pp. 15-16.

E. The Commission May Consider the Scope and Application of the Performance Guarantee.

After disputing the validity of the performance guarantee, Dominion pivots to address the scope of the performance guarantee imposed by the Commission.[20] In this regard, Walmart would not oppose the Commission providing guidance as to the "scope of events which should be includable in any properly defined performance standard" as requested by the Company.[21] Walmart also would not oppose the Commission providing guidance on how it would calculate energy or REC prices if the performance guarantee was triggered.

The Commission has previously acknowledged that "[t]he specific implementation of this performance standard, however, will be determined based on the record of any future proceeding thereon."[22] Walmart believes that a future proceeding is the appropriate venue to litigate whether the performance standard has been triggered, but it is not opposed to the Commission attempting to define in an earlier proceeding whether certain acts clearly would/would not trigger the performance guarantee. In providing such clarification, the Commission should be wary of setting a prudence standard that serves to limit the Company's liability such that it is as if no performance standard existed.

Walmart also does not oppose the Commission providing guidance on the price of energy or RECs upon which the performance guarantee would be based. The Commission could base it on actual, historical, or forecast energy and/or REC prices. For RECs, the Commission may alternatively signal that it will impose a performance penalty based on the deficiency payment prescribed by the VCEA. Walmart does not take a position on what specific metric should be

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[20] *See* Petition, p. 19.

[21] *Id.*, p. 20.

[22] Final Order, p. 16, n. 66.

adopted. Rather, Walmart's position in this Petition is merely to support the concept of the Commission providing guidance to the Company on these issues as they do not appear to have been addressed in the August 5, 2022, Final Order.

F. Walmart Does Not Oppose the Commission Revising the Performance Guarantee, but It Does Oppose Providing Any Further Benefit to Dominion.

Walmart did not offer testimony in support of a performance guarantee, but it supported its imposition as an important customer protection, in part, because the protections set forth in Term 6[23] of the Stipulation simply were insufficient. With that context, Walmart believes that the Commission has the discretion to alter the three-year rolling average or the capacity factor upon which the performance guarantee is based. Were the Commission to make reasonable alterations to either of these terms (extending to a five-year rolling average or reducing the capacity factor to approximately 40 percent) consistent with the evidentiary record, Walmart would not oppose these changes. Walmart believes any such alteration rests entirely within the Commission's discretion.

Similarly, Walmart would not oppose the Commission limiting the performance guarantee to the projected 30-year useful life of CVOW rather than the "life of the Project."[24] By contrast, Walmart would not support the Commission adopting the 10-year performance standard set forth in the Stipulation as it does not provide sufficient customer protections.

Walmart disputes the Company's claim that it receives no benefit when it performs in excess of the 42 percent and that the performance guarantee is a "heads I win, tails you lose" proposition.[25] Dominion stands to recover a $7.22 *billion* return on its investment – a more than sufficient benefit to compensate the Company for its share of risk. Dominion should not receive

[23] *See* Petition, p. 18, n. 48.

[24] *Id.*, p. 25.

[25] *Id.*, p. 23.

further benefit via the terms of the performance guarantee, which is solely intended to operate as a backstop for customer risk.

CONCLUSION

As it did at the hearing, Walmart does not oppose the CVOW Project. It continues to support customer protections to the greatest extent possible. Walmart believes that the Commission acted within its statutory authority when imposing the performance guarantee. The Commission would also be acting within its statutory authority should it choose to amend any of the terms upon which the performance guarantee is based consistent with the underlying evidentiary record developed in this proceeding.

Respectfully submitted,

SPILMAN THOMAS & BATTLE, PLLC

By _____

Carrie Harris Grundmann (VA Bar No. 76817)
110 Oakwood Drive, Suite 500
Winston-Salem, NC 27103
Phone: (336) 631-1051
Fax: (336) 725-4476
E-mail: cgrundmann@spilmanlaw.com

Barry A. Naum
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
Phone: (717) 795-2742
Fax: (717) 795-2743
E-mail: bnaum@spilmanlaw.com

Counsel for Walmart Inc.

Dated this 20th day of September, 2022.