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September 20, 2022

<u>VIA ELECTRONIC FILING</u>

Mr. Bernard Logan, Clerk
c/o Document Control Center
State Corporation Commission
Tyler Building – First Floor
1300 East Main Street
Richmond, Virginia 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:

As directed by the Commission's Order Granting Motion of September 13, 2022, please find attached the objections to the Petition of Virginia Electric and Power Company for Limited Reconsideration being filed on behalf of Appalachian Voices ("Environmental Respondent"). This notice is being filed electronically, pursuant to the Commission's Electronic Document Filing system.

As authorized by Rule 140 of the Commission's Rules of Practice and Procedure, Environmental Respondent is providing, and agrees to accept, service of documents in this case exclusively via email unless parties request otherwise. Please let me know if you do not agree to electronic service and would like to receive hard copies of documents.

If you should have any questions regarding this filing, please do not hesitate to contact me at (434) 977-4090.

Regards,

William C. Cleveland

cc: Parties on Service List
Commission Staff

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	))))	

ENVIRONMENTAL RESPONDENT'S OBJECTIONS TO PETITION OF VIRGINIA ELECTRIC AND POWER COMPANY FOR LIMITED RECONSIDERATION

Pursuant to the Commission's Order Granting Reconsideration entered in this docket on August 24, 2022, Appalachian Voices submits the following objections to the Petition for Limited Reconsideration submitted by Virginia Electric and Power Company ("Dominion").

INTRODUCTION

Appalachian Voices (the "Environmental Respondent") strongly supports the Commission's decision to impose a performance standard on Dominion's proposed offshore wind project. Despite Dominion's claims, the Commission is not barred by statute from imposing performance standards on offshore wind projects. To the contrary, the Commission has validly imposed performance guarantees on Dominion solar projects, and it is permitted to do so for the Coastal Virginia Offshore Wind Commercial Project ("CVOW") as well. Dominion agreed that the Commission could impose performance standards in those earlier cases, yet it now asserts that authority does not exist. Nothing about the CVOW Project or the Virginia Clean Economy Act ("VCEA") alters the Commission's inherent authority to impose a performance guarantee as part of its general regulatory oversight powers.

Additionally, Environmental Respondent does not object to the specific performance standard the Commission imposed—*i.e.*, an average net capacity factor of 42% over a rolling three-year window for the facility's useful life. However, because a performance guarantee is fundamentally an exercise of the Commission's regulatory discretion, the Commission may set the standard at whatever level it deems appropriate based upon the record. As such, if the Commission decides on reconsideration to provide additional clarity or adjust the performance guarantee in a matter consistent with the record, Environmental Respondent defers to the Commission's reasoned judgment and expertise about specific metrics.

ARGUMENT

The Commission appropriately imposed a performance guarantee on Dominion's CVOW project. The Commission has imposed such guarantees on other generating facilities that involved new and complicated activities for the company, such as Dominion's US-3 and US-4 solar projects—and it continues to retain that authority even after the passage of the VCEA. Performance standards can and should be utilized for projects with performance risks, such as CVOW. Doing so will not diminish Dominion's ability to recover reasonably and prudently incurred construction and operating costs for such projects, but it will ensure that ratepayers are not penalized if the projects underperform.

I. THE COMMISSION HAS THE AUTHORITY TO IMPOSE A PERFORMANCE STANDARD ON DOMINION'S OFFSHORE WIND PROJECT.

Dominion claims that the Commission lacks the authority to impose a performance guarantee in this case, even though the Commission has legitimately done so in prior cases. Contrary to Dominion's claims, no change in subsequent law justifies this argument. The Commission had the authority to impose the earlier performance standards, and none of the provisions that Dominion points to limit the Commission's authority to do so going forward, for this or any other project.

A. The Commission Has Imposed Performance Standards on Similarly Risky Operations in the Past.

Imposing a performance guarantee on CVOW is consistent with the Commission's past decisions. The Commission has imposed performance guarantees on two prior Dominion projects—the US-3 and US-4 solar projects.[1] Both cases involved facilities that, like CVOW, carried some degree of performance and financial risk because Dominion had decided to pursue a self-build option rather than obtaining power through a power purchasing agreement ("PPA").[2] The Commission found it appropriate to impose performance guarantees in those cases to protect Dominion's customers, who would otherwise "bear essentially all of the risk that the Projects do not meet the performance targets upon which Dominion has based its projected costs and benefits."[3] Those same concerns obviously are present with CVOW, given it also involves Dominion building the project itself, rather than utilizing a PPA.

Even though there is no specific statutory provision expressly authorizing (or prohibiting) the Commission from imposing such a guarantee, Dominion never asserted that the Commission

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[1] *See* Order Granting Certificates, *Petition of Virginia Electric & Power Company for approval & 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 (Jan. 23, 2019) ("US-3 Order") at 16–19; Order Granting Certificate, *Petition of Virginia Electric and Power Company for approval and certification of the proposed US-4 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-4, under § 56-585.1 A 6 of the Code of Virginia*, Case No. PUR-2019-00105 (Jan. 22, 2020) ("US-4 Order") at 12–14.

[2] US-3 Order at 13–16; US-4 Order at 11–12.

[3] US-3 Order at 15.

lacked authority to impose performance standards on those projects. Nor could it, since the Commission's authority derives from its inherent powers relating to regulatory oversight.[4] In fact, Dominion actively accepted that the Commission had that authority and even proposed particular performance standards for the Commission to adopt.[5] Dominion also did not contest the Commission's decision to impose stricter performance standards than Dominion had proposed, and has not opposed the Commission's subsequent decision to enforce the standard with respect to US-3.[6] Dominion has not explained why it supported the Commission's authority to impose a performance standard in those cases and rejects it outright in this case.[7]

B. Section 56-585.1:11 Does Not Bar the Commission from Imposing a Performance Standard.

Dominion erroneously claims that Subsection C of § 56-585.1:11 ("Subsection 1:11 C") bars the Commission from imposing a performance standard on CVOW. Subsection 1:11 C

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[4] *See Appalachian Power Co. v. State Corp. Comm'n*, 876 S.E.2d 349, 366 (Va. 2022) ("We thus 'presume that where the General Assembly has not placed an express limitation in a statutory grant of authority, it intended for the Commission, as an expert body, to exercise sound discretion.'") *(citing City of Alexandria v. State Corp. Comm'n*, 296 Va. 79, 93–94 (2018)).

[5] US-3 Order at 17; US-4 Order at 11.

[6] *See* Rebuttal Testimony of William A. Coyle, *Petition of Virginia Electric & Power Company for revision of rate adjustment clause: Rider US-3, Colonial Trail West and Spring Grove 1 Solar Projects, for the rate year commencing June 1, 2022*, Case No. PUR-2021-00118 (Mar. 24, 2022) (noting that "the Company does not oppose incorporating a performance guarantee adjustment in Rider US-3 (for RECs) and the fuel factor (for energy) based on the performance of CTW Solar in 2020").

[7] Dominion's petition refers to the US-3 and US-4 performance standards as "voluntary performance guarantees" and the CVOW performance standard as an "involuntary performance guarantee." *See, e.g.*, Petition for Limited Reconsideration, *Application of Virginia Electric & Power Company for approval & 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 § 56-5.85.1 A 6 of the Code of Virginia*, Case No. PUR-2021-00142 (Aug. 22, 2022) ("Petition") at 3, 25. This is a distinction without meaning. The Commission's authority to impose performance guarantees is part of its general authority to conduct regulatory oversight and is not contingent on whether Dominion, or any other utility, approves of the decision to impose the guarantee. It is limited only to the extent that it is forbidden by statute, which, as discussed below, is not the case here.

mandates that the Commission scrutinize the reasonableness and prudence of certain offshore wind costs.[8] The Commission also has the discretion to go further and specifically determine whether the evidence satisfies the three prongs of the rebuttable presumption set forth in Subsection 1:11 C.[9]

Importantly, Subsection 1:11 C is focused solely on requests for recovery of the costs to build and operate offshore wind projects (*i.e.*, construction and O&M costs). It states that "construction" of an offshore wind facility is deemed to be "in the public interest," and the rebuttable presumption prongs all relate to the construction and planned operation of such a facility (*i.e.*, timing, compliance with competitive solicitation requirements, and projected LCOE), rather than its actual performance.[10] Nothing in that subsection, or in Section 1:11 more generally, indicates that the costs to be recovered under that subsection relate to those facilities' performance

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[8] *See* Va. Code § 56-585.1:11 C 1 (stating that "[i]n 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 . . .") (emphasis added).

[9] *See id.* If the Commission chooses to make such an affirmative finding, then the costs are presumed to be reasonable and prudent, a presumption that can be rebutted based upon a consideration of the totality of the evidence, as the Commission has done in other cases. *See id.*; *see also* Final Order, *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 (Sept. 1, 2017) at 9 (after having "found these presumptions rebutted, the Commission has also considered the evidence and arguments presented by Dominion and, taking the record as a whole, concludes that the Company's proposed [undergrounding program] is not cost beneficial or just and reasonable"). No party disputes that the specific costs that Dominion currently seeks to be included in Rider OSW are reasonable and prudent. However, any future requests to include additional costs in Rider OSW would need to be evaluated on their own against the reasonable and prudent standard. *See* Final Order, *Application of Virginia Electric & Power Company for approval & 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 § 56-5.85.1 A 6 of the Code of Virginia*, Case No. PUR-2021-00142 (Aug. 5, 2022) ("Final Order") at 13. In those future cases, if the Commission finds the presumption prongs have been satisfied, it also can and should consider whether that presumption has been rebutted by the totality of the evidence.

[10] *See* Va. Code § 56-585.1:11 C 1.

or output.[11] Dominion acknowledges as much in its petition, noting that Section 1:11 permits recovery of "all *capital and operating* costs associated with the Project which are 'reasonably and prudently incurred'" and requires recovery of those costs if the rebuttable presumption prongs are met (and not rebutted).[12]

By contrast, the performance guarantee is focused exclusively on performance-related costs. It does not affect Dominion's ability to recover costs relating to constructing, operating, and maintaining CVOW, provided they are reasonably and prudently incurred, nor does it apply to Dominion's recovery under Rider OSW of its authorized rate of return.[13] Instead, it merely provides that Dominion customers will be held harmless if CVOW's energy production falls below a particular net capacity factor (42%, measured over a rolling three-year average), in which case Dominion would be responsible for the costs of acquiring additional replacement energy.[14]

Given all of this, Dominion is simply incorrect in claiming that "the Final Order's performance guarantee would result in cost disallowance *even if* the costs are reasonably and prudently incurred."[15] The performance guarantee in no way impinges on Dominion's ability to recover costs under Subsection 1:11 C, nor does it "disallow" any costs. It simply ensures that once the facility is in operation—and well after Dominion has recouped its reasonable and prudent

[11] Because the text of Section 1:11 simply does not apply to the costs implicated by the performance guarantee, this is a quite distinct situation from the recent *Appalachian Power Co.* case, where the amended statutory provision directly applied to the costs at issue. *See generally Appalachian Power Co. v. State Corp. Comm'n*, 876 S.E.2d 349 (Va. 2022).

[12] Petition at 12 (emphasis added).

[13] Final Order at 16.

[14] *Id.*

[15] Petition at 12.

capital costs—consumers will not be responsible if the actual performance of the facility does not live up to Dominion's promises. In practice, this means that if CVOW does not meet the performance standard, then Dominion will have to provide a credit to customers to replicate the energy revenue and RECs that would have been generated and credited had CVOW performed as promised.[16] However, Dominion will still recover all of the capital and O&M costs of CVOW (plus its expected ROE) via Rider OSW.

In short, the credit customers might receive against their energy or REC costs is not a "cost of CVOW," and is therefore simply not a cost covered by Subsection 1:11 C. As such, there is nothing in any part of § 56-585.1:11 (or any other section of Code for that matter) that prohibits a performance guarantee in this case.

C. Section 56-585.1 A 7 Also Does Not Bar the Commission from Imposing a Performance Standard.

Dominion also claims that the Commission is precluded from issuing a performance standard by § 56-585.1 A 7 ("Subsection A 7"), which requires the Commission to consider specific cost recovery requests—those filed pursuant to Subsections 56-568.1 A 4, A 5, and A 6—

[16] This is the same methodology that the Commission adopted for the US-3 performance standard. There, the Commission required Dominion to provide a "credit" against the fuel factor to make customers whole for the revenue they would lose if US-3 was unable to sell as much energy into the wholesale markets as it was supposed to. *See* US-3 Order at 15–18. The Commission has since decided to credit the estimated value of missing RECs to Rider US-3 and the estimated value of missing energy sales against the fuel factor. *See* Pre-Filed Testimony of Staff Witness Chris Harris, *Petition of Virginia Electric & Power Company for revision of rate adjustment clause: Rider US-3, Colonial Trail West and Spring Grove 1 Solar Projects, for the rate year commencing June 1, 2022*, Case No. PUR-2021-00118 (Jan. 31, 2022) at 7 (recommending changes); Final Order, *Petition of Virginia Electric & Power Company for revision of rate adjustment clause: Rider US-3, Colonial Trail West and Spring Grove 1 Solar Projects, for the rate year commencing June 1, 2022*, Case No. PUR-2021-00118 (Mar. 24, 2022) (adopting staff recommendations).

"on a stand-alone basis without regard to the other costs, revenues, investments, or earnings of the utility."[17] That claim is simply wrong.

In fact, the Commission may impose a performance guarantee without violating Subsection A 7. The Commission has not expressly said how it will implement the performance guarantee in this case, but using the US-3 and US-4 guarantees as guideposts, the Commission could structure the performance guarantee to require Dominion to provide a credit for any replacement energy and RECs needed due to CVOW's underperformance. Those costs (both replacement energy and replacement RECs) could be credited against the fuel factor without running afoul of Subsection A 7.[18] Alternately, because "Rider OSW includes the OSW energy benefit (PJM credit),"[19] if the guarantee is triggered, any credit for replacement energy could also appear in Rider OSW itself, which obviously does not implicate cost recovery of any "other" A 4, A 5, or A 6 RAC.

It is also worth noting that all of this depends upon the rigid interpretation of A 7 that neither Dominion nor the Commission have followed in prior cases. In fact, Dominion's petitions for A 4, A 5, or A 6 RACs frequently reference "other costs, revenues, investments, or earnings of the utility" as relevant evidence.[20] For example, when Dominion proposed Rider BW (an A 6

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[17] Va. Code § 56-585.1 A 7.

[18] Dominion currently recovers costs of RECs for RPS compliance via Rider RPS. Assuming, without conceding, that crediting Rider RPS to hold customers harmless for CVOW's under-generation of RECs might violate A 7 the Commission can avoid those concerns by simply applying the replacement REC credit to the fuel factor instead, which is entirely within its discretion. *See* Va. Code § 56-249.6 D 1. Since these replacement REC credits are—by definition—not "recovered" from customers, applying the credit to the fuel factor does not violate § 56-585.5 C, which gives the utility the option to recover REC costs either through fuel or through an A 5 d RAC. *See* Va. Code § 56-585.5 C.

[19] Final Order at 21.

[20] Va. Code § 56-585.1 A 7.

RAC), it cited the potential fuel factor savings from the proposed operation of the Brunswick Plant, as well as the "financial benefit" to customers (*i.e.*, reduced fuel charges) from other entities' use of the pipeline that would supply gas to the facility.[21] Both of those are "other costs, revenues, investments, or earnings of the utility" that should not be considered under Dominion's reading of A 7.[22]

Similarly, in the US-4 solar case, Dominion proposed that it recover of all of the project's costs through Rider US-4, but that capacity revenues be booked to base rates.[23] Booking capacity revenues to base rates fundamentally requires the Commission to consider base rate revenues. Of course, in the final order, the Commission "considered" those revenues and decided to deviate from Dominion's proposal, holding instead that Dominion "shall credit capacity revenues received for the US-4 Project, including any performance bonuses, directly to Rider US-4."[24] This is yet one more example where Dominion did not advance, and the Commission did not follow, the rigid interpretation of A 7 that Dominion presents now. If Dominion now thinks that A 7 precludes consideration of other costs, revenues, investments, or earnings, then it should also be arguing for

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[21] Hearing Examiner's Report, *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 (June 13, 2013) at 14, 16.

[22] Va. Code § 56-585.1 A 7.

[23] *See* Pre-Filed Testimony of Staff Witness Gregory L. Abbott, *Petition of Virginia Electric and Power Company, For approval and certification of the proposed US-4 Solar Project pursuant to §§ 56-580 D and 56-46.1 of the Code of Virginia, and for approval of a rate adjustment clause, designated Rider US-4, under § 56-585.1 A 6 of the Code of Virginia*, Case No. PUR-2019-00105 (Nov. 19, 2019) at 11.

[24] US-4 Order at 14.

the withdrawal of Rider BW, Rider US-4, and many other RACs adopted based on such considerations. It cannot have it both ways.

D. The Commission Is Not Required To Use Section 56-585.1 A 2 c To Implement a Performance Standard.

Dominion also incorrectly argues that any performance standards the Commission issues should be done pursuant to the terms of § 56-585.1 A 2 c ("Subsection A 2 c").[25] That provision does permit the Commission to "increase or decrease [a] utility's combined rate of return based on the Commission's consideration of the utility's performance"; however, there is no indication that it is the exclusive means for imposing performance standards. Just because the statute identifies one option for how the Commission can protect consumers from utility underperformance does not mean that other options are unavailable. Subsection A 2 c thus serves to complement the existing authority the Commission has to implement performance guarantees by adjusting the value of the fuel factor or a particular RAC. As a general matter, the Commission's discretion to regulate Dominion is very broad and only limited by express statutory language,[26] which is not present here. There simply is nothing in the Code to suggest that Subsection A 2 c is the *sole* mechanism the Commission has to address utility performance issues.

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[25] Dominion's petition incorrectly refers to this requirement as coming from § 56-585.1 A 1 c 2, a provision that does not exist. *See* Petition at 18–19. The correct citation is § 56-585.1 A 2 c.

[26] *Appalachian Power Co.*, 876 S.E.2d at 366.

E. A Performance Guarantee Is a Useful Tool for the Commission To Use to Protect Ratepayers That Should Be Deployed in the Future and Should Have Been Deployed More Often in the Past.

To the extent the Commission is concerned about protecting ratepayers from operational risks, a performance guarantee is a useful tool, and the Commission should not hesitate to impose performance guarantees on future investments, even when such investments are not "renewable." In fact, a performance guarantee would have been an incredibly useful ratepayer protection tool in prior generation cases. When Dominion first proposed the Virginia City Hybrid Energy Center ("VCHEC") in 2007, it "assumed that its proposed unit [would] operate at a 90% capacity factor over the entire 50 year service life . . . ."[27] According to Attorney General Witness Norwood, even back then evidence showed that it was "unreasonable to rely upon such an unsupported and optimistic performance assumption as justification for an investment of this magnitude."[28]

Mr. Norwood's predictions have come true. In its 2020 Integrated Resource Plan (only 8 years after VCHEC entered service in 2012), Dominion projected that between 2021 and 2035, the facility's capacity factor would never exceed 10.8% and would fall as low as 3.2% by 2035.[29] Such a dramatic miscalculation in VCHEC's actual capacity factor has unquestionably caused Dominion customers to incur untold dollars in replacement energy costs, none of which have been paid for

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[27] Pre-filed Testimony of Scott Norwood, *Application of Virginia Electric and Power Company for a certificate of public convenience and necessity to construct and operate an electric generation facility in Wise County, Virginia, and for approval of a rate adjustment clause under §§ 56-585.1, 56-580.13, and 56-46.1 of the Code of Virginia,* Case No. PUE-2007-00066 (Nov. 2, 2007) at 20.

[28] *Id.*

[29] *In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, Case No. PUR-2020-00035 (May 1, 2020) at App'x 5D.

by shareholders. A performance guarantee in the original VCHEC case could have spared customers so much unnecessary cost.

Operational risk, then, is clearly cause for concern in fossil-fuel facilities, and the Commission should not hesitate to impose one in future cases, regardless of the type of facility or investment proposed.

II. THE COMMISSION HAS DISCRETION TO DECIDE WHAT CRITERIA TO INCLUDE IN A PERFORMANCE STANDARD.

The record in this case supports the specific performance guarantee laid out in the Commission's order, which requires CVOW to achieve an average net capacity factor of 42% over a rolling three-year window. As the Commission noted, Dominion "based its cost-benefit analysis and LCOE proposal on an average net capacity factor of 42%," and "continue[s] to affirm its high level of confidence" in that figure.[30] Holding Dominion to those projections seems entirely appropriate, particularly given that Dominion will be able to recover its reasonably and prudently-incurred capital and O&M costs regardless of how well CVOW performs.

However, the Commission has considerable discretion in deciding what criteria to include in the performance standard, and Environmental Respondent will defer to the Commission about whether to revise the specific criteria here, so long as there is a reasonable basis for such changes. For example, a reasonable tribunal could have looked at the totality of the evidence and chosen a

[30] Final Order at 15.

different capacity factor standard, *i.e.*, a higher/lower percentage over a shorter/longer interval.[31] Additionally, the Commission could choose to explicitly carve out exceptions for force majeure events, as it did for the US-3 and US-4 performance guarantees.[32] Should the Commission, based on its expertise and on the record in this case, decide that such changes are necessary, Environmental Respondent will not oppose such revisions. In short, it is imperative the Commission impose *some* performance guarantee to properly balance ratepayer interests, provided that the record evidence supports the specific metrics chosen. What those specific metrics are, however, is up to the Commission, and Environmental Respondent relies on the Commission's sound discretion to choose the best metrics that protect customers while allowing the project to proceed.

CONCLUSION

Environmental Respondent strongly supports the Commission's decision to impose a performance standard on Dominion's proposed offshore wind project. The Commission clearly has authority to enter a performance guarantee, none of Dominion's arguments against the performance guarantee are correct, and the specific standard selected for CVOW is justified based

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[31] For example, although Dominion expects average net capacity to be 42% over the 30-year life of the project, it looked at a range of possible capacity factors from 38% to 46%, and staff witness Kuleshova recommended the performance guarantee be based on a 36.86% net capacity factor. *See* Petition at 20–21; Pre-Filed Testimony of Staff Witness Katya Kuleshova, *Application of Virginia Electric & Power Company for approval & 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 § 56-5.85.1 A 6 of the Code of Virginia*, Case No. PUR-2021-00142 (May 18, 2022) at 83–84.

[32] *See* US-3 Order at 18; US-4 Order at 13. The Commission's order arguably does this already because the Commission will have discretion to modify the standard when conditions warrant. *See* Final Order at 16 n.66 (noting that "[t]he specific implementation of this performance standard . . . will be determined based on the record of any future proceeding").

on the record in this case. Of course, the Commission has discretion to revise or clarify how the performance guarantee will work, and Environmental Respondent will defer to the Commission about whether any changes are warranted based upon the Commission's reconsideration of the record in this case and of the potential risks of underperformance.

September 20, 2022

Respectfully submitted,

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DATED: September 20, 2022