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September 29, 2022

BY ELECTRONIC DELIVERY

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

Dear Mr. Logan:

Please find enclosed for electronic filing in the above-captioned *Virginia Electric and Power Company's Reply in Support of its Petition for Limited Reconsideration.*

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

Very truly yours,

/s/ Joseph K. Reid, III

Joseph K. Reid, III

Enclosures

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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

APPLICATION OF VIRGINIA ELECTRIC AND POWER COMPANY For approval and certification of the Coastal Virginia Offshore Wind Commercial Project and Rider Offshore Wind, pursuant to § 56-585.1:11, § 56-46.1, § 56-265.1 *et seq.*, and § 56-585.1 A 6 of the Code of Virginia	))))))))	Case No. PUR-2021-00142

VIRGINIA ELECTRIC AND POWER COMPANY'S REPLY IN SUPPORT OF ITS PETITION FOR LIMITED RECONSIDERATION

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VIRGINIA ELECTRIC AND POWER COMPANY'S
REPLY IN SUPPORT OF ITS PETITION FOR LIMITED RECONSIDERATION

Following the State Corporation Commission's ("Commission") Final Order in this proceeding, Virginia Electric and Power Company ("Dominion Energy Virginia" or the "Company") filed a Petition for Limited Reconsideration ("Petition") pursuant to Rule 220 of the Commission's Rules of Practice and Procedure with respect to the Commission's imposition of an involuntary operating performance guarantee for the Coastal Virginia Offshore Wind Commercial Project ("CVOW Project" or "Project"). On August 24, 2022, the Commission issued an Order Granting Reconsideration, which continued its jurisdiction over the matter, suspended the Final Order, and established a briefing schedule to receive responses to the Company's Petition and provide the Company an opportunity to reply to those responses. On September 12, 2022, the Company, the Office of the Attorney General – Division of Consumer Counsel ("Consumer Counsel"), Sierra Club, the Virginia Committee for Fair Utility Rates (the "Committee"), and Walmart, Inc. ("Walmart") filed an Unopposed Joint Motion to Extend the Briefing Schedule on

Reconsideration, which sought a one-week extension of the Commission's briefing schedule."[1] The Commission granted the request.

In accordance with the extended briefing schedule, Appalachian Voices, Clean Virginia, Consumer Counsel, the Committee, Sierra Club, and Walmart (collectively, the "Respondents") filed responses to the Petition on September 20, 2022. As permitted by the Commission's Order Granting Reconsideration, the Company now files this Reply in support of its Petition.

I. Introduction

The fundamental issues before the Commission with respect to the Company's Petition are clear: for a qualifying offshore wind project, such as the CVOW Project, (1) does the plain language of Va. Code § 56-585.1:11 ("Section 1:11") clearly prescribe the parameters for such a project's cost recovery by the utility; and, (2) does the Commission's imposition of an involuntary operating performance guarantee for the Project, requiring Dominion Energy Virginia to hold its customers economically harmless against an unlimited range of performance circumstances, conflict with those parameters and exceed the Commission's statutory authority? The answer to both questions is yes.

The Final Order maintains that this enabling statute is silent as to such authority, stating that there is no specific directive limiting the Commission's ability to require a performance guarantee. Tellingly, no Respondent even tries to support this proposition. Instead, they offer unsupportable, attempted end runs around Section 1:11, including: the false notion that potentially hundreds of millions, or even billions, of dollars of "hold harmless" guarantee obligations on Dominion Energy Virginia would not amount to denying the Company the ability to recover fully its reasonable and prudent costs of building and operating the Project; that voluntary performance

[1] Unopposed Joint Motion to Extent Briefing Schedule on Reconsideration at 2.

commitments in the past are binding precedent on the Company; and that other provisions of the Code supersede the mandate of Section 1:11.

Respectfully, these Respondents, like the Final Order's findings, are ignoring the proverbial "elephant in the room"—the plain and clear language of the statute. Section 1:11 could not articulate more clearly that there is a single standard for cost disallowance with respect to projects that meet its presumption criteria: "only if [the costs] are otherwise unreasonably or imprudently incurred." This express limitation by the General Assembly is unique, unquestionably prescriptive, and not rebuttable. Its purpose is transparent and evident: in order to facilitate the nation-leading development of offshore wind generation to meet the Commonwealth's clean energy requirements, policymakers intended to provide security and certainty of cost recovery for a utility that develops such a project in a reasonable and prudent manner. There is no other reasonable interpretation or presumable motive, and the Final Order's performance guarantee requirement turns this purpose on its head.

As stated previously, the Company shares the Commission's concerns over potential risks attendant to the construction and operation of the Project, and has methodically and prudently taken all reasonable measures to mitigate against those risks. Neither it, nor its investors that will fund this multi-billion dollar project, however, can concede to an upending of the regulatory compact. Utilities like Dominion Energy Virginia must act reasonably and prudently to deliver safe, reliable, cost-effective, and environmentally responsible electric service, consistent with any public policy directives, and the Company is proud of its long record of doing so. If this standard is met, the utility is entitled to recover its cost of service. It cannot be forced into a position of guaranteeing that cost of service, or of holding harmless against slack wind, cloudy days, ice storms, earthquakes, terrorist attacks, changes in law, transmission congestion or interruptions, animals short-circuiting the power supply, or the endless host of other circumstances that could affect *any* of the utility's infrastructure and its performance.

Respectfully, in ordering this performance guarantee requirement, the Commission has created for itself a power which does not exist in this context, and which is directly at odds with the limited authority delegated to it by the General Assembly in evaluating requests for cost recovery under Section 1:11. The Commission should reconsider its finding and strictly follow the words of the statute.

Certain respondents suggest that the Commission could, or should, reconsider issues, including: (1) carving out circumstances that are excludable from the performance requirement; (2) the appropriate threshold capacity factor; (3) how it is applied; (4) the lifetime nature of the design performance; and, (5) the pricing parameters to value any performance shortfall.[2] And Respondent Clean Virginia demonstrates, particularly when incorrectly framed, how an unchecked performance guarantee presents unfair and unacceptable risk to the Company and its investors.[3]

The Company continues to maintain that any performance standard must be based on factors within its control as a reasonable and prudent operator of the Project, and that the Commission should, consistent with ample precedent, decline to pre-judge future performance circumstances. It remains willing to accept Stipulation Term 6 as a reasonable performance standard.[4]

Finally, certain Respondents complain that the Company did not adequately express the gravity of the impact of tethering the Project to a performance guarantee during the course of the

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[2] Clean Virginia Response at 6; Sierra Club Response at 6; Walmart Response at 4, 9-10; Appalachian Voices at 12-13.

[3] Clean Virginia Response at 7, 9.

[4] Ex. 3 at 3-4 (Stipulation filed May 11, 2022).

evidentiary hearing.[5] To the contrary, the Company has vigorously opposed this potential requirement, both legally and factually, throughout the course of this proceeding. And, like the Commission, the Company does not deal in hypotheticals and can only react to facts and circumstances before it. As now ordered, the performance guarantee is untenable and will prevent the Project from moving forward. That is not a "threat," as Consumer Counsel alleges.[6] It is a mere reality based on the open-ended, unlimited, and unconventional risks which the performance guarantee imposes.

The Project is at a crossroads. To date, approximately $839 million has been prudently invested in the Project on behalf of customers in order to timely and cost-effectively meet their needs for renewable energy and the requirements of Virginia's Clean Economy Act. The pace of investment will increase in the very near term to the extent the Project remains viable. Those investments are at risk of becoming stranded if any operating performance standard remains inconsistent with the law and unreasonable in application.

The Company remains committed to the Project's goals and implores the Commission to reconsider its decision in a way that will allow them to be achieved.

[5] Consumer Counsel Response at 2; Walmart Response at 2.
[6] Consumer Counsel Response at 1.

II. Argument

1. The Code forbids the involuntary imposition of the performance guarantee.

a. Section 1:11 bars the Commission from imposing any performance guarantee that disallows reasonable and prudent Project-associated costs.

The Final Order imposed a performance guarantee on the premise that "the statute simply does not speak directly to this legal question" of the Commission's authority to do so.[7] No Respondent defends that faulty premise.

Rather, as the Company showed, Section 1:11 speaks directly to the propriety of the performance guarantee.[8] Section 1:11 forbids disallowance of "costs associated with [the Project]" except under a single condition: when those costs are "unreasonably and imprudently incurred."[9] Yet, the performance guarantee disallows costs when the Project does not "meet[] an annual net capacity factor of 42%, as measured on a three-year rolling average."[10] Because the reasonable and prudent costs disallowed by the performance guarantee are costs protected from disallowance by Section 1:11,[11] the statute speaks directly to—and forbids—this performance guarantee.[12]

Some Respondents nevertheless insist that the Company has agreed to other performance standards, so the Commission must have authority to impose this performance guarantee.[13]

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[7] Final Order at 14.
[8] Petition for Reconsideration at 11-13.
[9] Va. Code § 56-585.1:11 C 1.
[10] Final Order at 16.
[11] *See* Section A.3 *infra*.
[12] *See Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 707 (2012) (forbidding the Commission from "effectively add[ing] a[nother] condition" to a statutorily exclusive list of cost recovery conditions). Appalachian Voices hypothesizes that the Commission has freestanding authority to impose a performance guarantee that "derives from its inherent powers relating to regulatory oversight." Appalachian Voices at 4. Tellingly, Appalachian Voices debunks its own hypothesis by recognizing that the Commission's discretion yields to "'an express limitation in a statutory grant of authority.'" *Id.* (quoting *Appalachian Power Co. v. State Corp. Comm'n*, 876 S.E.2d 349, 366 (Va. 2022) (hereinafter, "*Appalachian Power Co. 2022*")).
[13] *See* Appalachian Voices Response at 3-4; Clean Virginia Response at 3-6; Sierra Club

Respondents are mistaken. None of those previous cases addressed offshore wind projects governed by Section 1:11 C 1, so none of those past agreements even implicitly interpret that provision. In any event, the Company's voluntary agreement to take on more risk than it may be required to does not expand the Commission's power to *impose* performance guarantees on the unwilling.

Only Sierra Club contends that Section 1:11 actually supports a performance guarantee, though it also submits that any performance requirement which prevents the Project from being completed, which this one will, is contrary to law.[14] Regardless, its threshold contention is a *non sequitur*. Sierra Club observes that one of the statutory prerequisites for the presumption that Project costs were reasonably and prudently incurred—the Project's anticipated levelized cost of energy ("LCOE")—is "linked with capacity factor" and from there leaps to the conclusion that the statute must support the imposition of performance guarantees because, according to Sierra Club, "the Commission was acting within its explicit authority to determine when 'projected total levelized cost of energy... [might] exceed 1.4 times the comparable cost, on an unweighted average basis, of a conventional simple cycle combustion turbine.'"[15] That does not follow logically, and the facts belie the contention: the Commission made no such explicit determination, never linked its LCOE review (let alone the capacity factor piece thereof) to its imposed performance guarantee, and did not interpret Section 1:11 to allow it to do so.[16] So, Sierra Club is left with the position that Section 1:11 supports a performance guarantee because it claims that it would be "helpful in articulating the point at which the LCOE becomes unreasonable and

Response at 2-6; Walmart Response at 3.

[14] Sierra Club at 4-5.

[15] *Id.* at 4 (quoting Section 1:11 C.1(i)).

[16] Final Order at 14 (claiming the statute is "simply silent" on the point).

imprudent.[17] Here again, the Commission made no such statement when imposing the performance guarantee and contrary to Sierra Club's position, determined that the projected LCOE *satisfied* the statutory prerequisite as part of its determination that the Project must be presumed reasonable and prudent without any qualification.[18] Whether a capacity factor threshold might be "helpful" to the Commission in determining whether any specific costs were unreasonably and imprudently incurred is irrelevant when interpreting the statutory language. Respondents identify no support in Section 1:11 for the Final Order's performance guarantee, or any other statutory basis for it.

2. The statutory presumption in Va. Code § 56-585.1:11 C 1 ("Section C 1") that costs are "reasonably and prudently" incurred is not rebuttable.

Section C 1's pronouncement that Project costs "shall be presumed to be reasonably and prudently incurred if the Commission determines that [statutorily specified criteria are met]" does not include a silent "unless the Commission determines the evidence dictates otherwise" proviso. Nevertheless, in its Order Granting Reconsideration, the Commission invited Respondents to argue that it does.[19] Only three of six respondents—Consumer Counsel, Appalachian Voices, and the Committee—attempted to do so. Strikingly, none of these parties contend that anything about the language of Section C 1 itself makes the presumption rebuttable; all of them had to go hunting elsewhere to support that view. The Committee argues, directly contrary to the Supreme Court of Virginia's recent holding in *Appalachian Power Co. 2022*[20] and accepted canons of statutory

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[17] Sierra Club at 4.

[18] Final Order at 13.

[19] Order Granting Reconsideration at Ordering Paragraph (6) ("In addition to addressing the other issues raised in the Petition, the parties' pleadings shall also address the extent to which the presumption in Code § 56-585.1:11 C 1 ('provided that such costs shall be presumed to be reasonably and prudently incurred') may be rebutted.").

[20] *Appalachian Power Co. 2022*, 876 S.E.2d at 363.

construction, that a different, more general statute supersedes the specific directives of Section C 1, thereby making its presumption rebuttable. Appalachian Voices repeatedly *refers* to Section C 1 as rebuttable and broadly asserts that the presumption can be rebutted based on the "totality of the evidence," but offers no argument for that position other than a cite to a prior case, which, as discussed below, was governed by an *expressly* rebuttable statutory presumption, unlike this case. Consumer Counsel, meanwhile, attempts to provide a treatise on what a rebuttable presumption *is*, but offers virtually no argument that Section C 1 contains one.

a. Commission precedent demonstrates that the presumption in Section C 1 is not rebuttable.

The language of the presumption in Section C 1 itself should control the analysis on this issue, and the Commission's own precedent for interpreting similar statutory language provides the best guidance for this exercise. Some statutes—unlike this one—include statutory presumptions that are *expressly* rebuttable. In those cases, the Commission has assigned specific and significant weight to the inclusion of the term "rebuttable." In 2017, for example, the Virginia General Assembly enacted Senate Bill 1473, which stated, in part, "[t]here shall be a *rebuttable* presumption that the conversion of such [underground] facilities will provide local and system-wide benefits, that such new underground facilities are cost beneficial, and that the costs associated with such new underground facilities are reasonably and prudently incurred."[21] In the Company's ensuing initial Rider U case, the Commission found that the presumption had been rebutted. Justifying that decision, the Commission emphasized the General Assembly's choice to explicitly qualify the presumption as rebuttable: "a rebuttable presumption is fundamentally different from

[21] Chapter 583 of the 2017 Virginia Acts of Assembly. (emphasis added)

a *per se* rule, which is why the term 'rebuttable' is included."[22] The Commission went on to explain:

> The General Assembly [] could have but did not mandate approval of a SUP at any cost, in any manner of implementation, and no matter how burdensome to customers in relation to the benefits received. Rather, the statute permits the Commission to find—upon sufficient evidence—that presumed facts have been rebutted."[23]

This case happens to be Appalachian Voices's sole support for its argument that the Commission can always consider the "totality of the evidence" when deciding whether a presumption applies. Of course, its characterization of the case dodges the essential point—the Commission found that the presumption in Rider U could be rebutted precisely because the statute included the term "rebuttable." As the Commission stated, it was because "the *statute permits the Commission to find* . . . that presumed facts have been rebutted" that it was empowered to do so in that case.

This point is underscored by the Commission's response to what happened next. Following the 2017 Rider U proceeding, the General Assembly amended the relevant statute to remove the critical "rebuttable" statutory language the Commission previously relied on for its finding. Senate Bill 966, much like Section C 1, dictated a Commission finding, provided certain enumerated statutory criteria were satisfied.[24] In a subsequent Rider U proceeding, this time without the critical "rebuttable" language in the statute, the Commission did not find an unspoken rebuttable presumption empowering it to depart from the statutory text; instead, it acknowledged that circumstances had changed, observing that "the General Assembly has removed the Commission's

[22] *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 7 (Sep. 1, 2017) ("2017 Rider U Order").
[23] 2017 Rider U Order at 7.
[24] 2018 Va. Acts Ch. 296.

discretion to make such findings based on the actual evidence admitted into the record."[25] In that case, as in this one, parties nonetheless urged the Commission to consider facts beyond the statutory criteria, but the Commission acknowledged that the General Assembly had restricted that option. In its rejection of parties' urging to look past the statute, the Commission stated:

> Dominion asserts [] that the statute has removed any Commission discretion to use such facts or to make findings contrary to those mandated by the statute. Dominion is correct. The statute explicitly directs this Commission to find that Dominion's Rider U proposal is cost-beneficial to customers without regard to contrary evidence in the record.[26]

The General Assembly similarly has limited the Commission's discretion in this case. Much like in Senate Bill 966 as applied to Rider U, the General Assembly here has recognized the importance of providing certainty around cost recovery associated with a significant project for the Commonwealth, and established an absolute presumption of reasonableness that shall apply—regardless of other evidence in the case—provided three defined criteria are satisfied. As the words of the statute and the Commission's precedent illustrate, that presumption is not rebuttable.

The General Assembly similarly has limited the Commission's discretion to "disallow costs, but . . . only if they are *otherwise* unreasonable and imprudently incurred."[27] As the Company has acknowledged, the presumption does not result in a blank check to build the Project at any cost.[28] If, for example, the Company decided to "gold plate" the wind turbine blades contrary to earlier plans, or if it bought the proverbial $500 hammer for the Project, the Commission could review those costs and determine whether they were reasonably and prudently

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[25] *Application of Virginia Electric and Power Company For revision of rate adjustment cause: Rider U, new underground distribution facilities, for the rate year commencing February 1, 2019*, Case No. PUR-2018-00042, Final Order at 9 (Dec. 19, 2018) ("2018 Rider U Order").
[26] 2018 Rider U Order at 13.
[27] Va. Code § 56-585.1:11 C 1. (emphasis added)
[28] Company Post-Hearing Brief at 41-42.

incurred. But that discretion to disallow obviously unreasonable and imprudent costs does not make the statutory presumption rebuttable.

When presented with similarly prescriptive statutes in previous cases, the Commission has acknowledged and abided by the legislative limitations placed on its discretion. At root, these cases demonstrate that the Commission's own understanding of its discretion in particular cases has been driven by the governing statutory language, as it must, and not certain parties' desired outcomes. Respectfully, the Commission should follow its own precedent here and not accept the invitation to invent a rebuttable presumption as an escape from the clear statutory directives of Section C 1.

b. Respondents' arguments fail to support an unspoken rebuttable presumption in Section C 1.

While the Commission's analysis of its discretion in the Rider U cases cleaved to the statutory text, Respondents here studiously steer clear of it. Despite the Commission's directive that "the parties' pleadings *shall* also address the extent to which the presumption in Code § 56-585.1:11 C 1 . . . may be rebutted,"[29] only half of respondents even attempted an argument. Those that did offered limited—if any—analysis, with support that, on closer look, often cuts against their arguments.

Appalachian Voices is sure to *call* the presumption "rebuttable" at every opportunity in its brief, but makes little effort to demonstrate that it actually is. The closest it comes is in a footnote that offers the conclusory assertion that "a presumption can be rebutted based upon a consideration of the totality of the evidence, as the Commission has done in other cases."[30] The only example it cites of what "the Commission has done in other cases" is the original Rider U case which, as

[29] Order Granting Reconsideration at Ordering Paragraph (6). (emphasis added)
[30] Appalachian Voices Response at 5, n. 9.

discussed above, involves an expressly rebuttable presumption and a Commission decision emphasizing the significance of the term "rebuttable" appearing in the statutory language. If Appalachian Voices's point in its footnote is that presumptions are rebuttable only where the relevant statute says they are, then the Company agrees. Otherwise, the cited authority solidly undercuts its argument.

The Committee takes a different approach, arguing that Section C 1 is subservient to another statute—Va. Code § 56-585.1 D ("Subsection D")—which gives the Commission general authority to review costs for reasonableness.[31] As a starting point, the Committee asserts that "the language of Code § 56-585.1:11 reflects the General Assembly's intent merely to create a rebuttable presumption of reasonableness in cases where the record evidence is sufficient to establish certain requisite facts."[32] The Committee does not identify "the language of Code § 56-585.1:11" it believes "reflects the General Assembly's intent merely to create a rebuttable presumption of reasonableness" – it simply asserts that the language so reflects.

The Committee then pivots to its primary argument, which is that "[t]here is no indication . . . that the General Assembly intended for Section 1:11 to be wholly exempt from the Commission's Subsection D authority in any circumstance."[33] It is the Commission's "broad authority" under Subsection D and the "breadth" of that provision's language that the Committee contends makes the specific statutory presumption in Section C 1 rebuttable.[34] Yet, Section C 1 does not allow Project costs to "evade Commission review for reasonableness in any circumstance;" it only defines a more specific framework in which that reasonableness review

[31] Committee Response at 2.
[32] Committee Response at 2.
[33] Committee Response at 2.
[34] Committee Response at 3.

should take place and prescribes particular criteria to qualify for a statutory presumption. The Committee's argument that the more specific rule should be controlled or altered by the broad, general statute—precisely *because* it is more broad and general—turns on its head the established principle of statutory construction which says that "when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized if possible, and where they conflict, the latter prevails."[35]

Moreover, the Committee's argument is completely gutted by the Supreme Court of Virginia's recent decision in *Appalachian Power Co. 2022*.[36] There, the Supreme Court found that the general language of Va. Code § 56-585.1 D did not provide discretion to deviate from the more prescriptive language of Va. Code § 56-585.1 A 8 ("Section A 8"). In its decision, the Supreme Court emphasized that Section A 8—like Section C 1—"wholly supplants the regulatory discretion authorized by subsection D" because of the "express statement" of that statute on a particular cost issue not otherwise addressed in the Code.[37]

Just as the General Assembly enacted Section A 8 to effectuate a particular accounting result irrespective of what analysis under other statutes might dictate, so here, the General Assembly has determined that a specific category of costs (costs associated with the offshore wind facility) should be subject to a presumption that they are reasonable and prudent if they satisfy three defined criteria, regardless of what analysis under Section D or any other statute might suggest. The Committee contends that under Section C 1, the Commission "must evaluate the

[35] *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 294 (1990) (quoting *Virginia Nat. Bank v. Harris*, 2210 Va. 336, 340 (1979)). Additionally, and relatedly, when statutes address similar subject matter and appear to conflict, the latter enacted statute, here Section C 1, controls. *Wertz v. Grubbs*, 245 Va. 67, 72 (1993).
[36] *Appalachian Power Co. 2022*, 876 S.E.2d at 358-363.
[37] *Id.* at 360, n. 7.

reasonableness of Section 1:11 costs in the context of at least three specific considerations," which it claims are "not conditional."[38] The Committee is fashioning its own test here, contrary to Supreme Court of Virginia precedent.[39] Section C 1 is simple—it says that the presumption applies *if* three conditions are satisfied. It does not invite an assessment "in the context of at least three specific considerations;" it establishes a presumption that applies when three exact criteria are met.

The Commission's general ability to review the reasonableness and prudence of costs should not be interpreted in a way that allows it to undo the legislative directive in Section C 1. That is to say, Section D does not bestow the Commission with veto power over specific legislative determinations when, in its full view of the evidence, it believes the outcome should be different. In the Committee's view, the Section C 1 presumption, "when it is duly triggered, is strong enough to make out a *prima facie* showing of reasonableness—but not so strong as to extinguish the Commission's regulatory authority and duty to consider contrary evidence offered in rebuttal."[40] This is entirely wrong. It is untethered to the language in Section C 1 and would effectively write it out of the Code by substituting the Commission's judgment for the General Assembly's on a topic for which the General Assembly has set specific review parameters. In doing so, it would also violate *Appalachian Power 2022's* admonition not to herald Section D over a more specific and prescriptive statute. The Commission should decline the Committee's invitation to commit that error.

Consumer Counsel, for its part, tries a third approach to making the statutory presumption rebuttable. It first properly asserts that "[i]f the Commission were to determine that the Company

[38] Committee Response at 2.

[39] *Supra note* 12.

[40] Committee Response at 4.

has sufficiently proven [the prongs in Section C 1], then the statute gives rise to a presumption in law that the Project costs are 'reasonably and prudently incurred.'"[41] It then baldly asserts that "[t]he statute at issue must then operate to give rise to a rebuttal presumption."[42] Consumer Counsel's argument appears to be the proposition that all presumptions are rebuttable by their very existence. That does not follow, and is contradicted by the Rider U discussion above and Commission decision related thereto. Consumer Counsel does not offer any argument in support of its pseudo syllogism other than to cite a 30-year old case which it asserts "conclude[s] that for a presumption to be valid, it 'must be rebuttable.'"[43] In fact, that case does not remotely support Consumer Counsel's proposition and the quoted phrase is taken dramatically out of context.

The line Consumer Counsel plucks—"must be rebuttable"—as used in the cited case, is part of a two-prong constitutional due process test for determining the validity of an employment law statute that makes the proof of one fact presumptive evidence of another fact.[44] For context, that test holds that "[f]or such a statute to be upheld as constitutional, (1) a natural and rational evidentiary nexus must exist between the fact proved and the fact presumed, and (2) the presumption must be rebuttable."[45] The case is clearly not applicable, but even if it were, the very implication of the second prong of that test—the language Consumer Counsel chiefly relies on—is that *presumptions are not always rebuttable* – the exact opposite of what Consumer Counsel asserts here. Because that is the sole support offered for Consumer Counsel's argument, the analysis need go no further. The remainder of Consumer Counsel's academic discourse, including

[41] Consumer Counsel Response at 16-17.
[42] Consumer Counsel Response at 17.
[43] Consumer Counsel Response at n. 47.
[44] *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)).
[45] *Id.* (internal citations omitted)

the extended discussion of the "Thayer Theory," the "Morgan Theory," and the "bursting bubble" theory of rebuttable presumptions, is irrelevant to this proceeding.

In short, the presumption in Section C 1 is not rebuttable because the statute does not make it rebuttable. That simple analysis is what has guided the Commission in previous cases, and there is no reason—aside from any wish to change the result—to complicate the approach here. Three Respondents say that they think the presumption should be rebuttable, but fail to do much more than simply assert that they think it is so. It is instructive that none of the six Respondents in this proceeding could dispute the Company's argument regarding the plain meaning of the Section C 1 text. The Commission should abide by its precedent with respect to statutory presumptions and apply the one in this case based on the criteria set forth in the text of the statute.

3. The Final Order's performance guarantee would violate Section 1:11 by withholding recovery of reasonable and prudent costs associated with the Project.

The proposed penalties under the performance guarantee would disallow recovery of costs "associated with" the Project in violation of Section 1:11. The Final Order's performance guarantee would create penalties based on "shortfalls in energy production, shortfalls in [RECs], and loss of any tax credits contingent on energy production."[46] The Company explained that such penalties for Project performance violate Section 1:11 by offsetting costs that are "associated with" the Project—under any definition of "associated with."[47]

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[46] Final Order at 16 n.66.

[47] Petition for Reconsideration 17. Section 1:11 C 1 provides, in relevant part: "In acting upon any request for cost recovery by a Phase II Utility for *costs associated with* [a qualified offshore wind] *facility*, the Commission shall determine the reasonableness and prudence of *any such costs* . . . . The Commission shall disallow costs, or any portion thereof, only if they are otherwise unreasonable and imprudently incurred" (emphases added).

Respondents scarcely address the relevant statutory question: whether those performance penalties effectively disallow costs that are "associated with" the Project. Respondents instead seek to narrow the scope of the statutory protection, but disagree among themselves on how. Consumer Counsel asserts that the protected "costs of the CVOW Project" are costs as "described in Subdivision A 6"—a restriction absent from Section 1:11.[48] Appalachian Voices likewise contends that the protection is limited to "costs to build and operate offshore wind projects."[49] Walmart would read Section 1:11 more narrowly still, by constricting its protection to costs "related to *construction* of an offshore wind project, *not its operation*."[50] Nothing in the statute supports these arguments; the plain text of the statute extends to all costs "associated with" the Project, without limitations for costs arising under other provisions, building and operating costs, or construction costs alone. Costs for shortfalls in Project energy production, RECs, and energy production tax credits are protected under the only relevant standard—the one set by Section 1:11.

Divorcing penalties for CVOW replacement energy costs from CVOW construction costs does not disassociate them from the Project when those replacement costs are incurred solely as a result of the Project's operational performance. Providing Project cost recovery with one hand and taking it back with another is still a cost disallowance, even if it is a two-step disallowance. Respondents play a merely semantic game when they suggest that the Company is recovering Project costs even as those costs are stripped away by a separate Project-specific mechanism.

[48] Consumer Counsel 7. Consumer Counsel also suggests that the statutory protection is confined to costs "'directly' . . . related to the CVOW Project." *Id.* at 8. Section 1:11, however, merely asks whether the costs are "associated with" the Project without any heightened threshold of directness. Indeed, the use of the term "associated with" embraces a large swath of costs that a directness inquiry would not.

[49] Appalachian Voices Response at 5.

[50] Walmart Response at 4 (emphasis added).

Penalties which are inextricably linked to the Project's performance indisputably, financially prohibit full cost recovery. No parsing of words or accounting sophistry changes that reality.

Consumer Counsel also relies on a faulty analogy to argue that "a replacement cost is not a cost of the CVOW Project."[51] According to Consumer Counsel, "if the CVOW Project does not go forward" at all, then "the Company will likely need to replace it with other proposals for new renewable projects," but the costs of replacing a never-built CVOW Project "could not be described as a cost of the CVOW Project.[52] Indeed not. That is because the CVOW Project would have *no costs at all* if it is abandoned. Just as the *in-service* CVOW Project would have protected operating costs "associated with" the Project (as Consumer Counsel and Appalachian Voices, at least, admit), the costs of various shortfalls from an in-service Project also would be "associated with" the Project at that point—as Section 1.11 embraces.

4. If the costs disallowed under the performance guarantee were not Project-associated, then the performance guarantee would violate Subsection A 7.

The performance guarantee would still exceed the Commission's authority if Respondents were right about Section 1:11. If the penalties for replacement energy and other costs imposed by the performance guarantee somehow were *not* "associated with" the Project for purposes of Section 1:11, then that guarantee would violate the stand-alone rule of Subsection A 7 by impermissibly tethering the Project petition to those "other costs [and] investments."[53] Neither the Final Order nor any Response disputes that the proposed tethering flouts the plain meaning of Subsection A 7. Because the performance guarantee thus violates Subsection A 7 on its face, that

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[51] Consumer Counsel Response at 7.
[52] *Id.*
[53] *See* Petition for Reconsideration at 18. Subsection A 7 says: "Any petition filed pursuant to subdivision 4, 5, or 6 shall be considered by the Commission on a stand-alone basis without regard to the other costs, revenues, investments, or earnings of the utility."

is the end of the analysis.[54]

Respondents make much of the fact that different categories of costs are sometimes recovered through different approved cost recovery vehicles.[55] Those examples are red herrings. None allow what Subsection A 7 forbids—depriving RAC-qualified projects of full cost recovery through non-RAC penalties. It does not follow from the fact that the Company sometimes realizes *full* dollar-for-dollar cost recovery through multiple mechanisms that such outside mechanisms may be used to *deny or reduce* RAC recovery.

Respondents also suggest that the Commission could circumvent the stand-alone requirement of Subsection A 7 by creatively structuring the "hold harmless" penalty.[56] Those suggestions run into the same Subsection A 7 problem of preventing full cost recovery for this RAC-qualifying Project based on penalties purportedly applied elsewhere. So, rather than devise an improper end-around for Subsection A 7, the Commission should limit any consumer protections, under appropriate circumstances, to those allowed by statute, such as a rate-of-return adjustment under Subsection A 2 c.[57]

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[54] *Appalachian Power Co. 2022*, 876 S.E.2d at 358 ("'[I]t is our duty to interpret the statute as written and when this is done our responsibility ceases." (quoting *City of Lynchburg v. Suttenfield*, 177 Va. 212, 221, 13 S.E.2d 323 (1941)). Consumer Counsel also asserts that "[t]he Supreme Court of Virginia has already rejected Dominion's . . . interpretation of Subdivision A 7." Consumer Counsel at 8. Consumer Counsel offers no support for that assertion.

[55] *See* Consumer Counsel Response at 8-13; Walmart Response at 7; Appalachian Voices Response at 7-10.

[56] Consumer Counsel Response at 12; Appalachian Voices Response at 8-9.

[57] *See* Petition for Reconsideration at 18-19; *see also* Appalachian Voices Response at 10 (agreeing that an adjustment under Subsection A 2 c would be an appropriate mechanism for accounting for Project performance).

5. **The performance guarantee imposed by the Final Order will prevent the Project from proceeding and should be reconsidered.**

a. **The Final Order's performance guarantee shifts unacceptable risk to the Company.**

Several Respondents attempt to justify the Commission-ordered performance guarantee, or to minimize its impact, by reference to the Company's anticipated return on investment for the Project. Respondent Walmart posits that "...the Company's shareholders will see significant returns from the Company's investment in CVOW Project and should therefore bear an appropriate share of the risk."[58] They, along with Respondents Consumer Counsel and Clean Virginia, harp upon an alleged $7 billion equity return associated with the Project, and compare that figure to their view of potential obligations under the performance guarantee.[59] All of these suggestions miss the mark, conceptually and factually.

As a threshold matter, Section 1:11 makes clear that, with respect to the CVOW Project, there is to be no disruption of the fundamental regulatory bargain which allows public utilities to fulfill their obligations to serve customers. If the utility acts reasonably and prudently, it is entitled to recover its cost of service, along with a fair rate of return to its investors who provide the necessary capital for the infrastructure required to serve. Utilities are not required to guarantee that cost of service, or to insure against events which are beyond their control as a reasonable and prudent operator. It is that simple. There is no qualifier in the Code, or otherwise, to suggest that if a utility project is large enough, a new risk-sharing model should spring to life and, *ex ante,* intervene. Investors in utilities seek certainty and predictability of returns in exchange for their equity contributions. It should go without saying that a regulatory model which forces the utility into a position of guaranteeing a financial result for customers

[58] Walmart Response at 2.
[59] Clean Virginia Response at 7; Consumer Counsel Response at 3; Walmart Response at 1.

against an unlimited array of uncontrollable events, weather-related or otherwise, introduces an unconventional and unacceptable level of risk for these investors. This is particularly so for an investment of the scale of the CVOW Project, with a performance guarantee requirement that is entirely open-ended.

The return on investment in the CVOW Project also should be placed in its proper perspective. No Respondent acknowledges that a $7 billion estimated lifetime return includes a significant "gross-up" for taxes, which of course flow to the government and not to investors. At the end of the day, investors funding this $9.8 billion Project over more than three decades will receive a modeled 9.35% return on the equity portion of this investment. That is a "fair" rate of return as determined under the law and by this Commission, and one which is not to be arbitrarily reduced by an operational performance guarantee.

Consumer Counsel and Clean Virginia contend that, return on equity considerations aside, the likely actual costs of replacement energy would have a limited financial impact on the Company.[60] Consumer Counsel, for example, estimates that a 1% shortfall in capacity factor would have a $9.1 million total impact, as applied in 2032.[61] Clean Virginia states that "if [the performance standard] is ever triggered in the future, [it] would likely have a limited financial impact on Dominion," and provides a table which purports to show the potential impact of 1% and 5% generation shortfalls over time.[62] These estimates significantly understate the financial harm that would result from even modest and periodic capacity shortfalls, and underscore the asymmetric nature of the Commission's performance guarantee as ordered.

[60] Consumer Counsel Response at 3; Clean Virginia at 7-9.
[61] Consumer Counsel Response at 3.
[62] Clean Virginia Response at 9.

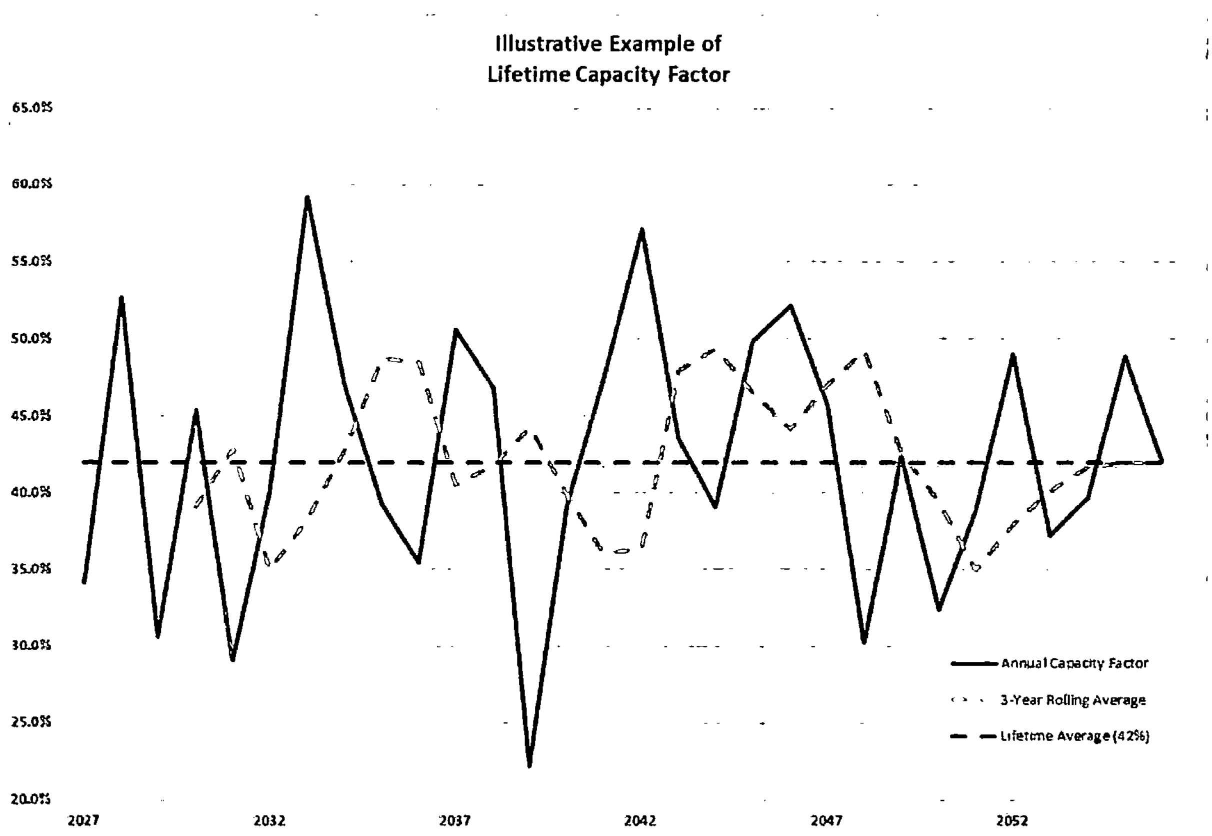
In fact, Clean Virginia's own table demonstrates the unreasonableness of the performance guarantee as currently constructed. It shows levelized penalties over the Project's life and compares them to a cumulative return on equity over the life, which obviously is not an apples-to-apples comparison.[63] Using their own numbers, properly framed as annual penalty totals, Clean Virginia shows cumulative penalties of close to $500 million with a 1% difference in capacity factor and a $2 billion penalty if a 5% difference.[64] As noted above, and in the Company's petition, that is significant and untenable.

In further response to these allegations, the table below demonstrates a potential outcome of annual capacity factors for the Project over its 30-year life. It shows that if the Project meets a 42% lifetime average capacity factor, by the very definition of a lifetime average, half the years are above 42% and half are below 42% *And even under a 3-year rolling average, penalties will be assessed in half the years.* Said another way, there is a still a 50/50 chance in any given 3-year measurement period that the capacity factor will be below the lifetime average of 42%. And *of those years* where penalties are assessed, the average capacity factor is expected to be approximately 38%. Of course, the converse is true as well. In years where the three-year rolling average is above 42% threshold, the average is 46% and customers benefit from the increased energy production. Yet, while customers will benefit when the Project performs above average capacity factor and overall at the lifetime average of 42%, the Company would still pay penalties in half the years when the capacity factor is below average. This shows the "heads I win, tails you lose" proposition implied in the 3-year average performance standard.

[63] Clean Virginia Response at 9.
[64] Clean Virginia Response at 9.

In other words, the expected result is that penalties will be assessed in half the years at an average of a 38% capacity factor – while over the life the project is at a 42% capacity factor. The scenario below, using the forecasted prices for energy and RECs in the case, would result in unjust penalties over the life of the Project in excess of $500 million. This despite the project performing *exactly* as the Company stated it would and *achieving a 42% lifetime capacity factor*. These penalties are effectively mandated by the Commission's performance standard simply by the expected year-to-year volatility of the wind, notwithstanding the project operating precisely as intended.

Table One



As illustrated above, a minimum of $500 million in penalties are essentially "baked into the math" by the very nature of the wind volatility, and these penalties could be far higher based on other factors beyond the utiltiy's control, without even taking into account the variability in annual power and REC prices. From the very start, the Commission's performance standard will prevent the Company from an having an opportunity to earn its authorized rate of return. The performance standard significantly increases risk to investors while simultaneously lowering the effective rate of return on the project. This is exactly counter to the goals of utility investors, making it infeasible to responsibly raise the capital necessary to construct and operate the Project.

b. The Commission should entertain Respondents' suggestion to revise the performance standard.

Although the Responses filed in this case express support for a performance requirement, every Respondent which advocated for a performance standard during the proceeding, except for Consumer Counsel, also expresses support for, or lack of opposition to reconsideration of key aspects of the performance guarantee as ordered. For example, the Sierra Club noted that the Commission is statutorily directed to find the construction or purchase of offshore wind generation facilities to be "in the public interest" in order to "meet the Commonwealth's clean energy goals," and that "a performance guarantee cannot be unduly onerous or burdensome so as to frustrate other statutory prescriptions."[65] As Sierra Club explains it:

> Accordingly, a performance guarantee needs to account for force majeure events, including acts of war or terror. It also needs to account for the natural variation in energy production over time: through a true-up process, a longer rolling average period, use of a 37% capacity factor as included in Term 6 of Exhibit 3, or other means."[66]

[65] Sierra Club Response at 5-6.
[66] Sierra Club Response at 6.

The current performance guarantee in the Commission's Final Order contains none of these provisions.

Clean Virginia similarly supports inclusion of certain force majeure provisions, and stated that it is not opposed to the Commission defining those details in this proceeding.[67] Walmart acknowledges that the Commission has discretion to make reasonable alterations to its performance guarantee. It contemplates that the Commission could "alter the three-year rolling average or the capacity factor upon which the performance guarantee is based," and Walmart would not oppose such changes.[68] It also would not oppose limiting the performance guarantee to the projected 30-year useful life of the Project or reducing the capacity factor to a number lower than 42%.[69] Moreover, Walmart would support the Commission incorporating reasonable force majeure provisions and providing guidance regarding how the price of energy and RECs may be set when the performance guarantee is triggered.[70] Appalachian Voices likewise acknowledges that the Commission "has considerable discretion in deciding what criteria to include in the performance standard."[71] By way of example, it contemplates that the Commission could select a different capacity factor standard or incorporate force majeure exceptions, and indicates that it would not oppose any reasonable decision the Commission makes in this regard.[72]

Respondents appear to be open to amendments to the performance guarantee that would render the Project viable. To that end, the Company remains willing to accept Term 6 of the

[67] Clean Virginia Response at 6-7.
[68] Walmart Response at 9.
[69] Walmart Response at 9-10.
[70] Walmart Response at 4, 9.
[71] Appalachian Voices Response at 12.
[72] Appalachian Voices Response at 13.

Stipulation filed in this proceeding – which is properly limited to events within the utility's control and preserves Commission discretion to determine remedies based on known facts before it – as a lawful and reasonable alternative to the performance guarantee contained in the Final Order.[73]

6. The Company has consistently opposed the performance guarantee included in the Final Order.

Consumer Counsel and Walmart claim that the Company did not object strenuously enough to the proposed performance guarantee during the evidentiary hearing.[74] This is not accurate. First, the Company has made clear throughout this proceeding that it opposes the performance guarantee proposed by Consumer Counsel Witness Norwood and adopted by the Commission's Final Order. The Company virogorously opposed it at every opportunity afforded to it by the procedural rules—in its rebuttal testimony,[75] during cross-examination of Mr. Norwood at the evidentiary hearing, at multiple other points during the hearing, and in its post-Hearing Brief.[76] It was arguably the most litigated issue in the case. In addition, Company Witness Mitchell properly declined to respond to hypothetical scenarios about the Project's future when presented with them on the witness stand.[77] The Company can only react to the facts and circumstances before it, and since the Commission adopted Mr. Norwood's performance guarantee, the Company has made it clear that, as ordered, it is untenable. It will prevent the Project from moving forward, and the Company will be forced to terminate all

[73] Ex. 3 at 3-4 (Stipulation filed May 11, 2022).
[74] Consumer Counsel Response at 2; Walmart Response at 2.
[75] Ex. 46 at 3:15-7:21 (Mitchell Rebuttal).
[76] *See, e.g.*, Tr. (Day 3) 71:16-100:16 (Norwood Cross); Ex. 43 at 3:15-7:21 (Mitchell Rebuttal); Company Post-Hearing Brief at 7, 25-30.
[77] Tr. (Day 3) 279:15-280:1 (Mitchell Cross).

development and construction activities.[78]

7. **Late-filed comments from non-parties are procedurally improper and should not be considered.**

After the Company filed its Petition, a small number of non-parties submitted unsolicited written comments, many of which express support for the Commission's performance guarantee. In support of its argument to preserve the Final Order, Consumer Counsel asks the Commission to take note of the "abnormal number of [such] public comments."[79] The comments certainly are abnormal, both because they are not contemplated by 5 VAC 5-20-220 and because they were not directed by the Commission's Order Granting Reconsideration. As a procedural matter, the comments should not be considered. Substantively, Consumer Counsel's observation notwithstanding, the fact that a few non-parties to the case suggest—out of procedural turn—that the Commission should do something contrary to law or that would end the Project does not mean that it should.

III. Conclusion

As noted in the Introduction, the Project is at a crossroads. To date, approximately $839 million has been prudently invested in the Project on behalf of customers in order to timely and cost-effectively meet their needs for renewable energy and the requirements of Virginia's Clean Economy Act, and the pace of investment will increase in the very near term to the extent the Project remains viable. Those investments are at risk of becoming stranded if any operating performance standard remains inconsistent with the law and unreasonable in application.

Dominion Energy Virginia respectfully requests that the Commission grant reconsideration of the Final Order and amend it to exclude its performance guarantee condition,

[78] Petition at 3.
[79] Consumer Counsel Response at 21-22.

as required by Section 1:11 and other authority, and for all the reasons set forth herein and in its Petition. The Company remains willing to accept adoption of Stipulation Term 6 (Performance Provisions) as a lawful and reasonable alternative to the performance guarantee condition in the Final Order.

Respectfully submitted by:

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September 29, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2022, a true and accurate copy of the foregoing filed in Case No. PUR-2021-00142 was hand delivered, electronically mailed, and/or mailed first class postage pre-paid to the following:

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