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STATE CORPORATION COMMISSION

April 9, 2024

VIA ELECTRONIC FILING

Hon. Bernard Logan, Clerk
State Corporation Commission
c/o Document Control Center
Tyler Building, First Floor
1300 East Main Street
Richmond, Virginia 23219

RE: *Application of Virginia Electric and Power Company, For approval of its 2023 DSM Update pursuant to § 56-585.1 A 5 of the Code of Virginia*,
Case No. PUR-2023-00217

Dear Mr. Logan:

Please file in the above-captioned proceeding the enclosed "Commission Staff Response to the Company's Legal Memorandum."

Thank you for your assistance.

Sincerely,

/s/ Anna Dimitri
Anna Dimitri

AD:lw
Enclosure

cc: Document Control Center
Service List

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY CASE NO. PUR-2023-00217

For approval of its 2023 DSM Update
pursuant to § 56-585.1 A 5 of the Code of Virginia

COMMISSION STAFF RESPONSE TO THE COMPANY'S LEGAL MEMORANDUM

INTRODUCTION

On December 11, 2023, Virginia Electric and Power Company ("Dominion" or "Company") filed with the Commission an application requesting, among other things: (1) approval to implement new demand-side management programs ("DSM program(s)")[1] as Phase XII, and (2) approval of an annual update to continue the rate adjustment clauses designated Riders C1A, C2A, and C4A ("Application").[2] In conjunction with the filing of its Application, the Company filed a legal memorandum ("Legal Memorandum") seeking Commission approval of the use of the gross savings metric to measure the Company's actual and projected compliance or noncompliance with the total energy savings requirements of § 56-596.2 of the Code of Virginia ("Code").

On January 10, 2024, the Commission issued its Order for Notice and Hearing in this case, which directed Commission Staff ("Staff") to file a response to Dominion's Legal Memorandum on or before April 9, 2024.[3] In accordance with the Commission's directive, Staff

[1] The DSM programs are collectively referred to as the "DSM Portfolio."

[2] *Application of Virginia Electric and Power Company, For approval of its 2023 DSM Update pursuant to § 56-585.1 A 5 of the Code of Virginia*, Case No. PUR-2023-00217, Application (filed Dec. 11, 2023). Case No. PUR-2023-00217 is referred to herein as the "2023 DSM Proceeding."

[3] The Order for Notice and Hearing also provided that any respondent may file a response to the Legal Memorandum on or before April 9, 2024.

hereby files this response to Dominion's Legal Memorandum. As discussed in detail below, Staff asserts that the Commission should approve the use of the net savings metric by which to measure Dominion's compliance with the energy savings targets set forth in § 56-596.2 of the Code and, in turn, its eligibility to recover a margin and additional basis point adder as described in § 56-585.1 A 5 c of the Code.

APPLICABLE LAW

Savings Targets

Section 56-596.2 of the Code provides:

> B. Notwithstanding any other provision of law, each investor-owned incumbent electric utility shall implement energy efficiency programs and measures to achieve the following total annual energy savings:
>
> 2. For Phase II electric utilities:
>
> a. In calendar year 2022, at least 1.25 percent of the average annual energy jurisdictional retail sales by that utility in 2019;
>
> b. In calendar year 2023, at least 2.5 percent of the average annual energy jurisdictional retail sales by that utility in 2019;
>
> c. In calendar year 2024, at least 3.75 percent of the average annual energy jurisdictional retail sales by that utility in 2019; and
>
> d. In calendar year 2025, at least 5.0 percent of the average annual energy jurisdictional retail sales by that utility in 2019....

Incentives

Section 56-585.1 A 5 c of the Code provides:

> Prior to January 1, 2022, the Commission shall award a margin for recovery on operating expenses for energy efficiency programs and pilot programs, which margin shall be equal to the general rate of return on common equity determined as described in subdivision 2. Beginning January 1, 2022, and thereafter, if the Commission determines that the utility meets in any year the annual energy efficiency standards set forth in § 56-596.2, in the following year, the Commission shall award a margin on energy efficiency program operating expenses in that year, to be recovered through a rate

adjustment clause, which margin shall be equal to the general rate of return on common equity determined as described in subdivision 2. If the Commission does not approve energy efficiency programs that, in the aggregate, can achieve the annual energy efficiency standards, the Commission shall award a margin on energy efficiency operating expenses in that year for any programs the Commission has approved, to be recovered through a rate adjustment clause under this subdivision, which margin shall equal the general rate of return on common equity determined as described in subdivision 2. Any margin awarded pursuant to this subdivision shall be applied as part of the utility's next rate adjustment clause true-up proceeding. The Commission shall also award an additional 20 basis points for each additional incremental 0.1 percent in annual savings in any year achieved by the utility's energy efficiency programs approved by the Commission pursuant to this subdivision, beyond the annual requirements set forth in § 56-596.2, provided that the total performance incentive awarded in any year shall not exceed 10 percent of that utility's total energy efficiency program spending in that same year.

The Commission shall annually monitor and report to the General Assembly the performance of all programs approved pursuant to this subdivision, including each utility's compliance with the total annual savings required by § 56-596.2, as well as the annual and lifecycle net and gross energy and capacity savings, related emissions reductions, and other quantifiable benefits of each program; total customer bill savings that the programs produce; utility spending on each program, including any associated administrative costs; and each utility's avoided costs and cost-effectiveness results.

Notwithstanding any other provision of law, unless the Commission finds in its discretion and after consideration of all in-state and regional transmission entity resources that there is a threat to the reliability or security of electric service to the utility's customers, the Commission shall not approve construction of any new utility-owned generating facilities that emit carbon dioxide as a by-product of combusting fuel to generate electricity unless the utility has already met the energy savings goals identified in § 56-596.2 and the Commission finds that supply-side resources are more cost-effective than demand-side or energy storage resources.

Relevant Statutory Definitions

Section 56-576 of the Code defines "Demand response," "Energy efficiency program," and "Total annual energy savings" as follows:

> "Demand response" means measures aimed at shifting time of use of electricity from peak-use periods to times of lower demand by inducing retail customers to curtail electricity usage during periods of congestion and higher prices in the electrical grid.
>
> "Energy efficiency program" means a program that reduces the total amount of electricity that is required for the same process or activity implemented after the expiration of capped rates. Energy efficiency programs include equipment, physical, or program change designed to produce measured and verified reductions in the amount of electricity required to perform the same function and produce the same or a similar outcome. Energy efficiency programs may include, but are not limited to, (i) programs that result in improvements in lighting design, heating, ventilation, and air conditioning systems, appliances, building envelopes, and industrial and commercial processes; (ii) measures, such as but not limited to the installation of advanced meters, implemented or installed by utilities, that reduce fuel use or losses of electricity and otherwise improve internal operating efficiency in generation, transmission, and distribution systems; and (iii) customer engagement programs that result in measurable and verifiable energy savings that lead to efficient use patterns and practices. Energy efficiency programs include demand response, combined heat and power and waste heat recovery, curtailment, or other programs that are designed to reduce electricity consumption so long as they reduce the total amount of electricity that is required for the same process or activity. Utilities shall be authorized to install and operate such advanced metering technology and equipment on a customer's premises; however, nothing in this chapter establishes a requirement that an energy efficiency program be implemented on a customer's premises and be connected to a customer's wiring on the customer's side of the inter-connection without the customer's expressed consent.
>
> "Total annual energy savings" means (i) the total combined kilowatt-hour savings achieved by electric utility energy efficiency and demand response programs and measures installed in that program year, as well as savings still being achieved by measures and programs implemented in prior years, or (ii) savings attributable

> to newly installed combined heat and power facilities, including waste heat-to-power facilities, and any associated reduction in transmission line losses, provided that biomass is not a fuel and the total efficiency, including the use of thermal energy, for eligible combined heat and power facilitates must meet or exceed 65 percent and have a nameplate capacity rating of less than 25 megawatts.

BACKGROUND

As amended by the Virginia Clean Economy Act ("VCEA"), Code § 56-596.2 B sets forth precise total annual energy savings targets for Dominion to achieve in calendar years 2022 through 2025. These total annual energy savings targets are based on a percentage of the Company's average annual energy jurisdictional retail sales in 2019. After 2025, § 56-596.2 of the Code requires the Commission to establish new energy efficiency savings targets. Section 56-576 of the Code defines "total annual energy savings" as "the total combined kilowatt-hour savings achieved by electric utility energy efficiency and demand response programs and measures installed in that program year, as well as savings still being achieved by measures and programs implemented in prior years...."

The VCEA modified § 56-585.1 A 5 c of the Code to provide for a margin on operating expenses of energy efficiency programs if Dominion is successful in meeting the energy efficiency targets set forth in § 56-596.2 of the Code.[4] In addition, Code § 56-585.1 A 5 c was further modified to provide that the Commission shall also award an additional 20 basis points for each additional incremental 0.1 percent in annual savings "achieved by [Dominion's] energy efficiency programs approved by the Commission ...beyond the annual requirements set forth in § 56-596.2, provided that the total performance incentive awarded in any year shall not exceed 10 percent of [Dominion's] total energy efficiency program spending in that same year." In other

[4] Such margin shall be equal to the general rate of return on common equity. Code § 56-585.1 A 5 c.

words, § 56-585.1 A 5 c of the Code was amended to provide incentives for Dominion to meet the energy savings targets found in § 56-596.2 of the Code.

Notably, § 56-585.1 A 5 c of the Code precludes the Commission from approving construction of any new utility-owned generating facilities that emit carbon dioxide as a by-product of combusting fuel to generate electricity unless the utility has already met the energy savings goals identified in § 56-596.2 of the Code and the Commission finds that supply-side resources are more cost-effective than demand-side or energy storage resources.[5]

RECENT DSM CASE HISTORY

I. <u>Case No. PUR-2020-00274 ("2020 DSM Case")</u>[6]

In Case No. PUR-2020-00274, the issue of whether the energy savings targets found in § 56-596.2 of the Code should be evaluated using a net savings, or gross savings, metric was raised. The Senior Hearing Examiner found that, because the issue was not directly before the Commission at that time, it did not need to be addressed in that case.[7] However, the Senior Hearing Examiner concluded that, should the Commission find it appropriate to approve a particular savings metric in that case, Appalachian Voices' interpretation of the statutory target provisions and use of net savings was persuasive.[8] Further, the Senior Hearing Examiner found that, because the relevant statutory provisions focus on the development of DSM Programs "to achieve" energy savings and the level of savings "achieved" by energy efficiency and demand

[5] The Commission can nonetheless approve such construction if in its discretion it finds that there is a threat to the reliability or security of electric service to the utility's customers. Code § 56-585.1 A 5 c.

[6] *Petition of Virginia Electric and Power Company, For approval of its 2020 DSM Update pursuant to § 56-585.1 A 5 of the Code of Virginia*, Case No. PUR-2020-00274, Final Order (Sept. 7, 2021) ("2020 DSM Final Order").

[7] 2020 DSM Case, Report of A, Ann Berkebile. Senior Hearing Examiner at 67 (July 20, 2021).

[8] *Id.* at 67 n.584.

response programs, it would be appropriate for the Commission to adopt Appalachian Voices' recommendation regarding the use of the net savings metric.[9]

While the Commission did not issue a decision on whether gross or net savings was the appropriate metric, it did direct Dominion to include an exhibit measuring the Company's actual and projected compliance or noncompliance with the total energy savings requirements in § 56-596.2 of the Code, using both metrics, in its next annual DSM filing.[10]

II. Case No. PUR-2021-00247 ("2021 DSM Case")[11]

In Case No. PUR-2021-00247, Dominion filed its long term plan ("LTP"), created by Cadmus, as directed by the Commission in the 2020 DSM Case.[12] The LTP provided that achieving VCEA targets using net savings would require substantially greater investment than achieving compliance with gross savings across all sectors, requiring higher customer investment and driving higher acquisition costs.[13] The Company sought Commission approval to use only the gross savings metric to measure the Company's actual and projected compliance or noncompliance with the total energy savings requirements in Code § 56-596.2, as recommended in its LTP.[14]

[9] *Id.*

[10] 2020 DSM Final Order at 11-12.

[11] *Petition of Virginia Electric and Power Company, For approval of its 2021 DSM Update pursuant to § 56-585.1 A 5 of the Code of Virginia*, Case No. PUR-2021-00247, Final Order (Aug. 10, 2022) ("2021 DSM Final Order").

[12] In the LTP, the Company analyzed two savings paths to achieve the VCEA savings targets by the end of 2025—using both gross and net savings.

[13] 2021 DSM Case, Ex. 6 (Fry Direct) at Schedule 1 at 18-19.

[14] 2021 DSM Case, Ex. 2 (Petition) at 13.

In contrast, Staff recommended that the Commission approve the use of net savings, rather than gross savings, as the metric by which to measure Dominion's compliance with the total energy savings requirements.[15] In support of its recommendation, Staff asserted that energy savings that would have occurred regardless of Dominion's energy efficiency and demand response programs are not "achieved by" such programs as provided in the definition of "total annual energy savings" found in Code § 56-576.[16]

In the 2021 DSM Case, the Senior Hearing Examiner found that, because the Code does not specify the metric to be used in evaluating compliance with statutory energy standards, the Commission has the discretion and authority to utilize either the gross or net savings metric.[17] The Senior Hearing Examiner discussed the Company's position that the total annual energy saving requirements of the Code should be determined based upon gross savings, and also noted that four other participants in the case[18] maintained that such determination should be based on net savings instead.[19]

The Senior Hearing Examiner found that the use of the gross savings metric would be more appropriate than net savings when evaluating Dominion's compliance with the statutory targets going forward, and found that the Commission should approve the Company's request for the use of the gross savings metric.[20] The Senior Hearing Examiner reached such conclusion

[15] *See* 2021 DSM Case, Ex. 17 (Dalton Direct) at 54.

[16] 2021 DSM Case, Post-Hearing Brief of the Staff of the State Corporation Commission ("2021 DSM Staff Brief") at 15.

[17] 2021 DSM Case, Report of A. Ann Berkebile, Senior Hearing Examiner at 81 (June 24, 2022).

[18] Appalachian Voices, National Resources Defense Council, Consumer Counsel, and Staff.

[19] 2021 DSM Case, Report of A. Ann Berkebile, Senior Hearing Examiner at 78 (June 24, 2022).

[20] *Id.* at 82, 85. The Senior Hearing Examiner discussed the interpretation of the definition of "measures" as used in §§ 56-576 and 56-596.2 of the Code, the practical effects of using either gross savings or net savings, as well as the

"primarily, based upon the higher levels of complexity and ambiguity involved when determining net savings, as compared to when determining gross savings."[21] The Senior Hearing Examiner also recognized that the Commission could weigh the effects of using gross versus net savings differently and could conclude that the use of net savings is more appropriate.[22]

In its Final Order, the Commission found that the determination of "whether the Company has achieved the 2022 total annual savings percentage in Code § 56-596.2 B will require a factual analysis based on a separate record, which has yet to be developed and which is not yet before us for such purpose."[23] The Commission further found that Dominion has the burden to establish, on a factual basis, the "total combined kilowatt-hour savings achieved by" its energy efficiency and demand response programs and measures.[24] The Commission stated that, "[i]n this regard, the definition of 'achieved' is: 1 a : to bring to a successful conclusion : carry out successfully : ACCOMPLISH ... 2 : to get as the result of exertion : succeed in obtaining or gaining : WIN, REACH, ATTAIN .'"[25] The Commission found, based on the plain language thereof, that when Dominion seeks findings on the savings achieved for purposes of this statute, the Company must factually establish the amount of savings that occurred *as the result* of its programs and measures.[26] The Commission noted that, "to the extent the term 'free riders'

suggestion that meeting statutory savings targets on a net savings basis would be more costly in the near term than on a gross savings basis. *Id.* at 81-82.

[21] *Id.* at 82.

[22] *Id.*

[23] 2021 DSM Final Order at 8-9.

[24] *Id.* at 9.

[25] *Id.* (citing Webster's Third New International Dictionary 16 (2002)).

[26] *Id.* at 9 (Commission's emphasis).

factually represents specific savings that can be reasonably identified, and that were *not* achieved as a result of Dominion's programs and measures, such savings do not fall within the plain language of this statute."[27]

III. <u>Case No. PUR-2022-00210 ("2022 DSM Case")</u>[28]

In Case No. PUR-2022-00210, the Senior Hearing Examiner found that "evidentiary issues regarding free riders, spillover, market effects, and snapback should be decided in a case where the issues are fully developed in an evidentiary record."[29] Accordingly, the Senior Hearing Examiner recommended that the Commission defer any further ruling on the issue of net and gross savings until the next year's DSM case.[30]

In its Final Order, the Commission stated that it "continues to be mindful of the total energy savings targets set forth in the [VCEA] and that under current projections, Dominion does not anticipate achieving such targets as soon as 2023-2025 if measured on a net basis."[31] The Commission referred back to its Final Order in the 2021 DSM Case, where it found that "'to the extent the term 'free riders' factually represents specific savings that can be reasonably identified, and that were *not* achieved as a result of Dominion's programs and measures, such savings do not fall within the plain language of [Code § 56-596.2 B].'"[32] The Commission agreed with the

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[27] *Id.* at 9 n.33 (Commission's emphasis).

[28] *Application of Virginia Electric and Power, For approval of its 2022 DSM Update pursuant to § 56-585.1 A 5 of the Code of Virginia*, Case No. PUR-2022-00210, Final Order (Aug. 4, 2023) ("2022 DSM Final Order").

[29] 2022 DSM Case, Report of Michael D. Thomas, Senior Hearing Examiner at 87 (June 16, 2023).

[30] *Id.* at 87, 94.

[31] 2022 DSM Final Order at 10. The Commission noted that, according to the Company, "gross savings account for all energy efficiency savings achieved by all program participants; whereas net savings are gross savings adjusted for market effects, including reductions for any energy efficiency savings that are attributed to 'free riders,' who would have achieved the energy savings regardless of the DSM Program." *Id.* at 10 n.35 (internal citations omitted).

[32] *Id.* at 10 n. 35 (Commission's emphasis).

Senior Hearing Examiner that a detailed progress report on the Company's implementation of the LTP would be beneficial, and directed Dominion to provide a Project Management Report as part of its annual DSM filing.[33]

ARGUMENT

As discussed in detail below, the Commission has already approved the methodology used by the Company in its annual Evaluation, Measurement, and Verification ("EM&V") report filings to calculate the net and gross savings of the DSM programs.[34] The question, in this case, is which metric should be used to measure compliance with the VCEA requirements. Staff continues to recommend that the Commission approve the use of the net savings metric to measure the Company's compliance with the energy savings targets set forth in Code § 56-596.2 and, in turn, its eligibility for the incentives provided in Code § 56-585.1 A 5 c. Based on the plain language of the Code, and a practical approach to the purpose of the DSM programs, net savings is the appropriate metric by which to measure Dominion's compliance. Staff believes that the Company's already-presented net savings numbers, which account for free riders, are a clearly better and more appropriate option for measuring savings than the gross metric which fails to address free ridership at all.

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[33] *Id.* at 11. The Commission directed that the Project Management Report should detail which tasks were completed in the last twelve months, which tasks would be completed in the next twelve months, and which tasks remain to be completed to fully implement the LTP. *Id.*

[34] *See Commonwealth of Virginia, ex. rel. State Corporation Commission, Ex Parte: In the matter of baseline determination, methodologies for evaluation, measurement, and verification of existing demand-side management programs and the consideration of a standardized presentation of summary data for Virginia Electric and Power Company,* Case No. PUR-2020-00156, Final Order (Oct. 27, 2021) ("EM&V Case"). In the EM&V Case, the Commission considered, among other things, the determination of baselines and the measurement of savings for Dominion's current DSM programs. Once DSM programs have been approved, Dominion is required to submit annual EM&V reports of the approved programs to the Commission. These EM&V reports must include evidence of actual energy savings achieved as a result of each specific program along with revised cost-benefit test results that incorporated actual Virginia energy savings and cost data.

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I. <u>The plain language of the Code provides that total annual energy savings should be measured using a net savings metric.</u>

A plain reading of the relevant statutes and definitions indicates that savings must be measured using a net metric.[35] Section 56-596.2 B of the Code provides that the Company "shall implement energy efficiency programs and measures *to achieve* the following total annual energy savings...." (emphasis added). Code § 56-576 defines the term "total annual energy savings" as "the total combined kilowatt-hour savings *achieved by* electric utility energy efficiency and demand response programs and measures installed in that program year, as well as savings still being *achieved by* measures and programs implemented in prior years...." (emphasis added). In order to determine the appropriate metric by which to measure the savings "achieved by" energy efficiency and demand response programs and measures, one must consider industry accepted definitions of "gross savings" and "net savings."[36]

The Company has cited the definitions of "gross savings" and "net savings" used in its EM&V Background and Information Report ("EM&V Background Report") filed in in the EM&V Case.[37] In the EM&V Background Report, "gross savings" is defined as "the difference in the amount of energy consumption with particular energy-efficiency measures are [sic] in place versus what consumption would have been without these measures in place." "Net savings" or "program-attributable savings" is defined as "the difference in the amount of energy consumption with the program in place versus what consumption would have been without the

[35] *See* 2021 DSM Staff Brief at 13.

[36] *Id.* at 13-14.

[37] Dominion Legal Memorandum at 5, citing EM&V Case, EM&V Background and Information Report at 5 (Nov. 6, 2020) (citing Violette, Daniel M. and Pamela Rathbun, Chapter 21: Estimating Net Savings: Common Practices, The Uniform Methods Project: Methods for Determining Energy Efficiency Savings for Specific Measures, National Renewable Energy Laboratory, 2017 at 3).

program in place." "Free riders" are "program participants who would have implemented a program measure or practice in the absence of the program."[38]

Though the definitions of "net savings" and "gross savings" can vary nominally, what the terms encompass do not. Simply put, "net savings" counts such savings that were induced, or "achieved by," an energy efficiency program, and are induced by the program itself and/or its incentives.[39] In contrast, "gross savings" additionally includes savings attributable to free riders[40]—participants who would have installed energy-efficiency equipment or undertaken energy savings behaviors regardless of any program offering.[41] To measure the total annual energy savings actually "achieved by" the energy efficiency and demand response programs and measures, savings that would have occurred regardless of such programs and measures—free

[38] EM&V Case, Ex. 2 (EM&V Background Report) at 5, 8. Staff notes that DNV GL ("DNV"), the Company's EM&V contractor, uses slightly modified definitions of gross and net savings in the Company's 2023 EM&V Report. The 2023 EM&V Report contains information through December 31, 2022, and was filed June 15, 2023, in Case No. PUR-2021-00247 and amended on July 11, 2023. The Company provides its 2023 EM&V Report electronically in the 2023 DSM Proceeding. *See* 2023 DSM Proceeding, Direct Testimony of Dan Feng ("Feng Direct") at 4. In its 2023 EM&V Report, "gross savings" is defined as "the change in energy consumption and/or demand that results directly from program-*related* actions taken by participants in an efficiency program, regardless of why they participated." "Net savings" is defined as "the total change in load that is *attributable* to an energy efficiency program. This change in load may include, implicitly or explicitly, the effects of free drivers, free-riders, energy efficiency standards, changes in the level of energy service, and other causes of changes in energy consumption or demand." (emphasis added). 2023 DSM Proceeding, Feng Direct at Appendix C, 2023 EM&V Report at Appendix C. In the 2023 EM&V Report, DNV also discusses the terms "net" and "gross," stating that "[t]he amount of energy savings and demand reductions that can be attributed to the program is referred to as net savings, which is the magnitude of the impact of the program's intended outcomes." *Id.* at Appendix D at 16.

[39] *See* 2021 DSM Case, Ex. 17 (Dalton Direct) at 52.

[40] Staff has previously explained how free riders work using a real world example. In the 2021 DSM Case, Staff offered the examples of two customers who need to replace their water heaters. The first customer chooses to install an Energy Star-rated water heater without knowledge of any incentive to do so. When the water heater is being installed, the customer learns that a rebate is available for the installation. The customer takes advantage of this rebate, but her decision to purchase the Energy Star-rated water heater was not a result of the availability of the program and would have occurred regardless. This customer represents a "free rider." In contrast, the second customer intends to install the cheapest water heater which is not energy efficient. Upon learning that there is a rebate available for installing an Energy Star-rated version, the customer choses this energy efficient water heater because of the incentive offered by the program. The second customer's choice directly results from the availability of the program, and arguably was "achieved" by the program as provided in Code § 56-596.2. 2021 DSM Case, Tr. 152-153 (Dalton).

[41] 2021 DSM Case, Tr. 152 (Dalton).

riders—should be excluded.[42] Energy savings that would have occurred regardless of the Company's energy efficiency and demand response programs are not "achieved by" such programs, nor are they the result of the Company's spending on such programs.[43] The Commission has found that, based on the plain language of Code § 56-596.2, the Company must establish the amount of savings that occurred *as the result* of its programs and measures.[44]

The Company argues that a distinction should be made between the terms "programs" and "measures" used in the definition of "total annual energy savings" found in Code § 56-576, and that such distinction makes the gross savings metric appropriate.[45] Dominion states that effect must be given to the General Assembly's inclusion of the word "measures" in the definition of "total annual energy savings," asserting that "utilizing net savings would render the word 'measures' superfluous, as it would focus solely on the purported causative relationship between the Company's programs and savings and ignore the fact that the statutory definition also addresses savings *achieved* by *measures*."[46]

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[42] *Id.* at 153; 2021 DSM Staff Brief at 14.

[43] 2021 DSM Staff Brief at 15. Staff continues to agree with Environmental Respondent witness Grevatt's analysis presented in the 2021 DSM Case. Witness Grevatt asserted that the Company's use of net savings to conduct its cost/benefit analyses supports the approval of the net savings metric for calculating compliance with the VCEA targets. He stated:

> Net, rather than gross, savings measure the benefits created by the Company's investments because in these calculations the Company is not given credit for the savings it does not cause to occur. Any other approach—such as using gross savings in benefit cost analysis—would provide a false and misleading picture of what the Company achieves through the programs and the value it provides.
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> 2021 DSM Case, Ex. 15 (Grevatt Direct) at 21-22.

[44] 2021 DSM Final Order at 9 (Commission's emphasis).

[45] Dominion Legal Memorandum at 6-7.

[46] *Id.* at 7-8 (Company's emphasis). In discovery, Staff referred Dominion to its own discussion of programs and measures in its Legal Memorandum and asked the Company to identify an energy efficiency measure that is not currently offered through a Company-sponsored DSM program. Dominion objected to such request "on the ground

Code § 56-576 defines "total annual energy savings" in relevant part as:

> the total combined kilowatt-hour savings achieved by electric utility *energy efficiency and demand response programs and measures* installed in that program year, as well as savings still being *achieved by measures and programs* implemented in prior years....[47]

The crux of Dominion's argument in favor of the gross savings metric appears to be that "[g]ross savings are the savings achieved by the measures and net savings are the savings achieved by the program" and that "net is a subset of gross."[48] However, Staff notes that the Commission has already found that savings from free riders should be excluded from programs and measures (i.e., the net savings approach).[49] In the 2021 DSM Final Order, the Commission found that, "to the extent the term 'free riders' factually represents specific savings that can be reasonably identified, and that were not achieved as a result of Dominion's programs *and measures*, such savings do not fall within the plain language of this statute."[50]

Staff also notes that all "measures" within the Company's DSM Portfolio are contained within "programs." In fact, the Company explains that "all the Company's current programs and pilot include at least one measure."[51] Therefore, the Company's assertion that savings achieved

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that term 'measure' is vague and undefined." *See* Company Response to Staff Interrogatory 3-20 attached to the Direct Testimony of Andrew T. Boehnlein filed in this proceeding ("Boehnlein Direct") at Attachment ATB-1.

[47] Emphasis added.

[48] Dominion Legal Memorandum at 6.

[49] 2021 DSM Final Order at 9 n.33.

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

[51] Company's Response to Staff Interrogatory No. 3-20(b), included in Attachment ATB-1 to Boehnlein Direct.

by its measures would be greater than savings achieved by its programs (when the measures are within the programs) seems to disregard the basic organization of its own DSM Portfolio.[52]

Throughout the relevant Code sections, the General Assembly uses the terms "programs" and "measures" in various contexts, and at times somewhat interchangeably.[53] However, there is no evidence that the varied use of these terms implies that the General Assembly intended to allow Dominion to receive credit for energy savings that its DSM programs did not achieve. For example, and as discussed in greater detail in Section II below, Code § 56-585.1 A 5 c only refers to savings achieved by energy efficiency programs, making no mention of measures, when providing for Dominion's eligibility for the basis point adder.

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[52] DNV defines "free rider" in relevant part as "[a] program participant who would have implemented the *program measure* or practice in the absence of the program." EM&V Case, Ex. 2 (EM&V Background Report) at 8. The Company's own definition of "free rider" does not provide for the distinction between programs and measures that the Company suggests merit separate savings calculations.

[53] The Company appears not to consider the definitions of "demand response" and "energy efficiency program" also found in Code § 56-576.

"Demand response" is defined as:

> *measures* aimed at shifting time of use of electricity from peak-use periods to times of lower demand by inducing retail customers to curtail electricity usage during periods of congestion and higher prices in the electrical grid.

"Energy efficiency program" includes "measures" within its definition. "Energy efficiency program" is defined as:

> a program that reduces the total amount of electricity that is required for the same process or activity implemented after the expiration of capped rates...Energy efficiency programs may include, but are not limited to....(ii) *measures*, such as but not limited to the installation of advanced meters, implemented or installed by utilities.... Energy efficiency programs include demand response....

Notably, the definition of "demand response" refers only to "measures" while the term "energy efficiency" is defined with "program" in Code § 56-576. In contrast to the Company's argument that the General Assembly intended "total annual energy savings" to include program savings *combined* with measures (which are within programs) savings, an alternative reading suggests that "programs" relates to "energy efficiency" and "measures" relates to "demand response." Therefore, "total annual energy savings" can be read as meaning the total combined kilowatt-hour savings achieved by electric utility energy efficiency programs and demand response measures.

II. Dominion should not be rewarded for energy savings that have occurred, or would occur, regardless of its DSM programs.

In establishing the entire DSM framework, the General Assembly enacted requirements for stakeholder participation, formal proceedings, Commission review, cost benefit testing, evaluation, measurement, and verification analyses, and set savings targets—all with the intent to require utilities to create programs that directly result in energy savings.[54] By asking the Commission to apply the gross savings metric, Dominion is asking to be rewarded for savings it did not achieve.

As explained by the Commission in its Order Initiating Proceeding for the EM&V Case, the Commission found:

> The purpose of DSM programs is to reduce energy usage, either at peak times...or year-round. *The true test of any DSM program is whether it is the proximate cause of a verifiable reduction in energy usage.* Once DSM programs have been approved, the Company is required to submit annual [EM&V] reports of the approved programs to the Commission including evidence of actual energy savings achieved as a result of each specific program along with revised cost-benefit test results that incorporate actual Virginia energy savings and cost data.[55]

Staff has previously argued that not reaching the energy efficiency goals means the Company has fallen short of one of the policy goals of the broader VCEA. Staff notes that hundreds of millions of dollars are spent by the Company on these programs—spending the Company is authorized to recover from customers. Surely the General Assembly did not intend for hundreds of millions of dollars to be spent on programs to which savings cannot be

[54] 2023 DSM Proceeding, Boehnlein Direct at 6.

[55] EM&V Case, Order Initiating Proceeding at 1-2 (emphasis added) (internal citations omitted).

attributed, or for the Company to also be *rewarded* for savings not attributable to its DSM programs.

In the 2021 DSM Case, the focus of the net savings versus gross savings discussion was on whether the Company would be able to meet the total annual energy savings targets provided in Code § 56-596.2. Consumer Counsel noted that its "primary concern regarding Company's request to measure its progress through gross savings is that the Company may also seek to judge its overachievement, for purposes of § 56-585.1 A 5 c, through gross savings."[56] The Company has attempted to do just that in the current proceeding.

In its Application in this case, the Company states that it has achieved 1.9% of energy savings on a *gross basis*, in excess of the savings target of 1.25% for 2022.[57] However, on a net basis, the energy savings achieved by the Company are below the 2022 target at 1.23%.[58] Because the Company exceeded the energy savings target of 1.25% on a gross basis, Dominion states that it is entitled to a margin on energy efficiency operating expenses for 2022 pursuant to § 56-585.1 of the Code.[59] Further, the Company asserts that it has added an additional 20 basis points for each additional incremental 0.1 percent in annual savings, resulting in a 1.2% adder for the True-Up.[60] Because the Company has failed to meet its energy savings target on a net basis for 2022, Staff asserts that the Company is not entitled to the margin or additional basis point adder provided for in Code § 56-585.1 A 5 c.

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[56] 2021 DSM Case, Post-Hearing Brief of the Office of the Attorney General, Division of Consumer Counsel at 17.

[57] 2023 DSM Proceeding, Direct Testimony of David F. Walker ("Walker Direct") at 14 (emphasis added).

[58] *Id.* at 13.

[59] *Id.*

[60] *Id.* at 13-14.

Staff would note, however, that the Company's distinction between "measures" and "programs," discussed above, also undermines its argument that it is eligible for the additional basis point adder provided in Code § 56-585.1 A 5 c. If the Company's interpretation that gross savings are the savings achieved by measures and net savings are the savings achieved by the program is valid, the Company would still not be entitled to the additional basis point adder under § 56-585.1 A 5 c of the Code. Section 56-585.1 A 5 c of the Code provides that the Commission shall "award an additional 20 basis points for each additional incremental 0.1 percent in annual savings in any year achieved by the utility's energy efficiency programs...." Notably, only programs, not measures, are not included in Code § 56-585.1 A 5 c for purposes of calculating savings achieved by the utility. If the Company's argument is to be accepted, the General Assembly purposefully chose to exclude savings achieved by "measures" from the total savings needed to be eligible for the basis point award. Therefore, the Company would not be entitled to the additional basis point adder pursuant to Code § 56-585.1 A 5 c.

III. <u>The Company's cited additional considerations, that it argues weigh in favor of using a gross savings metric, do not change the requirements of the VCEA.</u>

Dominion cites reasons, in addition to the plain language of the Code, that it argues warrant the use of gross savings instead of net savings.[61] The Company first cites cost as weighing in favor of using gross savings.[62] Specifically, the Company argues that customers would pay for more DSM programs and measures over the next several years under a net savings scenario, and that those "incremental dollars will be going towards measures and programs that

[61] Dominion Legal Memorandum at 8-12.

[62] *Id.* at 8.

ultimately may not be cost-effective."[63] In addition, the Company states that it "is cognizant of the increases in costs to its customers."[64] Further, the Company states that "incremental savings of 21% cost 63% more than earlier savings."[65] While Staff agrees that meeting net savings targets may require greater investment by the Company,[66] Staff does not accept outright that the Company must invest almost $132 million dollars more to meet such targets.[67] While greater investment in programs may be one option to reach the net savings targets, Staff does not believe increased costs are the only means of increasing energy savings.[68]

Staff, along with other participants in the Company's DSM cases, has noted concerns for years with the Company's program offerings and whether such offerings will enable the Company to reach the goals of the VCEA. In the 2020 DSM Case, Staff found that "offering a diverse set of programs that provide variety, not similar alternatives, may be of some use in helping the Company reach the goals of the VCEA."[69] Staff also raised the concern that "given the goals of the VCEA...the Company needs to achieve higher participation in its DSM offerings."[70] Specifically, Staff asserted that "the Company should be making a more concerted

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[63] *Id.*

[64] *Id.*. As noted by Appalachian Voices' Witness Grevatt in the current proceeding regarding the Company's request for incentives pursuant to Code § 56-585.1 A 5 c, "[t]he Company apparently has no problem asking for customers to pay this bonus even though the bonus will not benefit customers—but when customers do stand to benefit from increased investment in cost-effective programs, Dominion is opposed." 2023 DSM Proceeding, Direct Testimony of Jim Grevatt at 21.

[65] Dominion Legal Memorandum at 9.

[66] *See* 2021 DSM Case, Tr. 180 (Dalton).

[67] Dominion Legal Memorandum at 9.

[68] 2021 DSM Case, Tr. 180 (Dalton).

[69] 2020 DSM Case, Ex. 13 (Boehnlein Direct) at 42.

[70] *Id.* at 43.

effort to market its DSM offerings to customers in order to drive participation."[71] Staff offered alternatives in the 2021 DSM Case to the Company's assertion that it would need to spend almost $132 million to meet net savings targets, stating that programs could be designed to minimize free ridership and, therefore, bring the net and gross numbers more closely into alignment.[72] In the 2022 DSM Case, Staff recognized that the Company's projections indicated it would be falling short of its 2023, 2024, and 2025 net savings targets.[73] In order to address these shortfalls, Staff noted that the Company would have to rely on the strategies in its LTP, such as program bundling and marketing, to generate additional savings as there was no more time to develop programming for 2024.[74] Staff also asserted that energy efficiency programs cannot, and will not, achieve any actual energy or bill savings without active participation by customers.[75]

In this proceeding, the Company projects meeting the energy savings requirement for 2023 under Code § 56-596.2 B on a gross basis only.[76] More concerning, however, is that the Company projects being unable to reach the energy savings requirements for 2024 and 2025 on either net or gross basis.[77] The future projections appear to be inapposite to Dominion's

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[71] *Id.* In addition to flagging concerns that the Company was not on track to meet the goals of the VCEA, Staff offered possible solutions, such as marketing opportunities.

[72] 2021 DSM Case, Tr. 197 (Dalton).

[73] 2022 DSM Case, Ex. 18 (Boehnlein Direct) at 5-7. Staff noted that the Company did project to meet the 2022 target on a net basis. *Id.* at 4.

[74] *Id.* at 8.

[75] *Id.* at 25; 2023 DSM Proceeding, Direct Testimony of Steven E. Smith ("Smith Direct") at 12-13.

[76] 2023 DSM Proceeding, Walker Direct at 13; Smith Direct at 11.

[77] *Id.* Staff notes that the Company has already completed all program activity for 2022 and 2023, and 2024 will be more than half over by the time the Commission issues a final order in this case. 2023 DSM Proceeding, Boehnlein Direct at 15-16.

assertions that gross savings was the appropriate metric as it "makes the targets attainable," and "it would stand to reason that the General Assembly would have set attainable but ambitious goals, rather than goals that are unlikely attainable."[78] Staff submits that the shortfalls in meeting the VCEA's requirements are due in large part to the Company's consistent failure to reach its own projected participation numbers, a concern raised by Staff in the 2020 DSM Case.[79] In sum, these shortfalls are due in large part to the cumulative impacts of continued participation failures, which are ongoing.[80] Additionally, Staff notes that, according to the Company, most of the DSM programs will likely continue until their budgets are depleted regardless of participation levels, effectiveness in reducing energy usage, or contribution towards reaching VCEA goals.[81]

The Company also argues that using net savings to measure its compliance with the energy savings targets "shifts the focus of future proceedings away from actual program performance to the determination of net savings."[82] The Company states that net savings are more challenging to measure and more subjective, which drives up costs.[83] Staff notes, however, that the Company already presents its net savings calculations to the Commission in its annual EM&V report filings.[84] In the EM&V Case, the Commission found that "deemed input values

[78] 2021 DSM Proceeding, Post-Hearing Brief of Virginia Electric and Power Company at 24; *See also* 2023 DSM Proceeding, Direct Testimony of Terry M. Fry at 5-6.

[79] *See* 2023 DSM Proceeding, Smith Direct at 13.

[80] *Id.*

[81] 2023 DSM Proceeding, Smith Direct at 18; Company's Response to Staff Interrogatory No. 2-18, attached as Attachment SES-2 to Smith Direct.

[82] Dominion Legal Memorandum at 10.

[83] *Id.*

[84] Staff witness Boehnlein provides a high level description of how the Company designs its DSM programs and conducts EM&V in his testimony in this proceeding. *See* 2023 DSM Proceeding, Boehnlein Direct at 2-3.

meet the measured and verified standard for determining compliance with the energy savings requirements of the VCEA."[85] The Commission also adopted a framework for EM&V activities and required the Company to produce net savings in its annual EM&V reports.[86] The "net" savings numbers, as presented by the Company in its annual EM&V reports, reflect the intended outcome (programs that directly result in energy savings) by removing the primary *unintended* outcome—free ridership, or "program participants who would have implemented a program measure or practice in the absence of the program," from the calculation of gross savings.[87] Since the EM&V Case, Dominion has provided EM&V reports annually which include both gross and net savings calculations.[88] Staff has determined that the methodologies used in these EM&V reports appear to comply with both the Commission's Rules Governing the Evaluation, Measurement, and Verification of the Effects of Utility-Sponsored Demand-Side Management Programs[89] and the Commission's Final Order in the EM&V Case.[90] Therefore, the Company's net savings calculations found in its EM&V reports are appropriate to be used to determine whether the VCEA savings targets have been met.[91]

[85] EM&V Case, Final Order at 12. In the EM&V Background Report, the Company explained that "[f]or some types of programs, it is possible to determine the program-attributable or net savings directly, More commonly, we must first determine gross savings and then determine a net-to-gross ratio (NTGR), also called an attribution factor, which allows us to calculate net savings." EM&V Case, Ex. 2 (EM&V Background Report) at 5.

[86] EM&V Case, Final Order at 13, Attachment A.

[87] 2023 DSM Proceeding, Boehnlein Direct at 6.

[88] *Id.* at 12.

[89] 20 VAC 5-318-10 *et seq.*

[90] 2023 DSM Proceeding, Boehnlein Direct at 12.

[91] *Id.*

In sum, Staff asserts that the net energy savings, as described by Dominion and measured by its contractor, DNV, in the 2023 EM&V Report,[92] represents specific savings that can be reasonably identified, are a verified reduction in energy usage, and thus are appropriate for determining the Company's compliance, or lack thereof, with the energy savings targets in Code § 56-596.2.[93] Staff submits that the Company's already calculated net savings numbers, which account for free ridership, are surely preferable to the gross savings metric that does not factor in free ridership at all.

CONCLUSION

For the foregoing reasons, Staff recommends that the Commission reject Dominion's request to use the gross savings metric to measure its compliance with the energy savings targets in § 56-596.2 of the Code and, in turn, its eligibility for the incentives found in § 56-585.1 A 5 c of the Code. Staff submits that net savings—savings actually achieved by the Company's DSM programs—is the appropriate metric.

[92] The 2023 EM&V Report contains information through December 31, 2022.

[93] *See* 2021 DSM Final Order at 9 n.33.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April 2024, a true copy of the foregoing was electronically mailed to: Jontille D, Ray, Esquire, Vishwa B. Link, Esquire, Briana M. Jackson, Esquire, McGuireWoods LLP, Gateway Plaza, 800 East Canal Street, Richmond, Virginia 23219, jray@mcguirewoods.com, vlink@mcguirewoods.com, bmjackson@mcguirewoods.com; Paul E. Pfeffer, Esquire, Lisa R. Crabtree, Esquire, Dominion Energy Services, Inc., Riverside 2, 120 Tredegar Street, Richmond, Virginia 23219, paul.e.pfeffer@dominionenergy.com, lisa.r.crabtree@dominionenergy.com; Nathaniel H. Benforado, Esquire, Grayson E. Holmes, Esquire, Josephus Allmond, Esquire, Rachel M. James, Esquire, Tyler D. Demetriou, Esquire, Southern Environmental Law Center, 120 Garrett Street, Suite 400, Charlottesville, Virginia 22902, nbenforado@selcva.org, gholmes@selcva.org, jallmond@selcva.org, rjames@selcva.org, tdemetriou@selcva.org; Cale A. Jaffe, Associate Professor of Law, Director of Environmental and Reg Law Clinic, and Sebastian Van Bastelaer, University of Virginia School of Law, 580 Massie Road., Charlottesville, Virginia 22903, cjaffe@law.virginia.edu and NXY5TD@virginia.edu; and C. Meade Browder, Jr., Senior Assistant Attorney General, John E. Farmer, Jr., Assistant Attorney General, and Carew S. Bartley, Assistant Attorney General, Office of the Attorney General, Division of Consumer Counsel, 202 North 9th Street, 8th Floor, Richmond, Virginia 23219, Mbrowder@oag.state.va.us, jfarmer@oag.state.va.us, and cbartley@oag.state.va.us.

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