UNIVERSITY of VIRGINIA

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March 15, 2019

VIA ELECTRONIC FILING

Mr. Joel H. Peck, Clerk
c/o Document Control Center
State Corporation Commission
Tyler Building – First Floor
1300 East Main Street
Richmond, Virginia 23219

RE: Application of Virginia Electric and Power Company for approval to implement new, demand-side management programs and for approval of two updated rate adjustment clauses pursuant to § 56-585.1 A 5 of the Code of Virginia

Case No. PUR-2018-00168

Dear Mr. Peck:

Enclosed for filing in the above-captioned proceeding is the **Legal Memorandum of the Virginia Energy Efficiency Council**.

This filing is being made on behalf of Respondent, the Virginia Energy Efficiency Council, and is being made electronically on the Commission's Electronic Document Filing system. If you should have any questions regarding this filing, please contact me at (434) 924-4776, or via email at cjaffe@law.virginia.edu.

Regards,

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cc: Parties on Service List
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CERTIFICATE OF SERVICE

I hereby certify that the following have been served with a true and accurate copy of the attached filing by U.S. mail, postage prepaid, and by electronic mail.

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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

APPLICATION OF VIRGINIA ELECTRIC AND POWER COMPANY For approval to implement new demand-side management programs and for approval of two updated rate adjustment clauses pursuant to § 56-585.1 A 5 of the Code of Virginia	)	Case No. PUR-2018-00168

LEGAL MEMORANDUM OF THE VIRGINIA ENERGY EFFICIENCY COUNCIL

Pursuant to the Commission's Order of March 6, 2019, and pursuant to 5 VAC 5-20-200, the Virginia Energy Efficiency Council ("VAEEC"), by counsel, files this Legal Memorandum addressing the statutory constraints governing the treatment of lost revenues. The ineluctable fact is that applicable canons of statutory construction and Supreme Court precedent prohibit inclusion of lost revenues in the calculation of progress toward the $870 million target found in Enactment Clause 15 of the Grid Transformation and Security Act ("GTSA"), 2018 Va. Acts (Ch. 296). While the Commission has historically exercised its discretion in how it accounts for lost revenues under Va. Code § 56-585.1 A 5 c, the General Assembly has not granted the Commission the same latitude under Enactment Clause 15. Respectfully, any inclusion of lost revenues toward the $870 million target would be a clear, reversible error.

I. Introduction.

At the outset, it is critical to distinguish between two legal constraints: (1) the "proposal statute" directing the Company to develop energy efficiency programs, and (2) the "approval statute" that guides the Commission's review of such programs.

Enactment Clause 15 of the GTSA serves as the "proposal statute" and mandates that Dominion Energy must "develop a proposed program of energy conservation measures" with aggregate, projected costs totaling $870 million. *See* 2018 Va. Acts (Ch. 296). Section 56-585.1 A 5 c of the Virginia Code operates as the "approval statute" and provides that the Commission "shall only approve such a petition if it finds that the program is in the public interest." The two statutes operate independently. Thus, the Company is required to propose programs, but the Commission retains discretion to approve or reject the Company's proposals, subject to the constraints in Section A 5 c.

The proposal statute of the GTSA lists four projected costs that must be quantified in assessing the Company's progress towards the $870 million target: "projected costs for the utility to [1] design, [2] implement, and [3] operate such energy efficiency programs, including [4] a margin to be recovered on operating expenses." Contrasting with the GTSA is the approval statute of § 56-585.1 A 5 c, which delineates five projected and actual costs that the Commission may consider in determining whether to approve or reject programs: "Projected and actual costs for the utility to [1] design, [2] implement, and [3] operate energy efficiency programs, including [4] a margin to be recovered on operating expenses .... As part of such cost recovery, the Commission, if requested by the utility, shall allow for [5] the recovery of revenue reductions related to energy efficiency programs."

There is no mention whatsoever in Enactment Clause 15 of Section A 5 c's fifth category—"revenue reductions." This exclusion is dispositive. While the Commission has considered lost revenues when evaluating programs under the approval statute, it is barred from taking them into account under the proposal statute.

II. The General Assembly's Use of the Term "revenue reductions" in Section A 5 c, and the Omission of that Language in Enactment Clause 15, Is Presumed to be Intentional.

As explained above, the statute that the Commission considers when approving or rejecting programs, Va. Code § 56-585.1 A 5 c, delineates five factors that might be labeled as "costs" related to DSM measures, including "the recovery of revenue reductions." Enactment Clause 15 of the GTSA, however, is the statute that binds the Company to propose $870 million in energy efficiency programs between 2018 and 2028, and that statute *excludes* any mention of lost revenues or revenue reductions. Long-established canons of statutory construction make this exclusion authoritative when interpreting the GTSA. The "maxim *expressio unius est exclusio alterius* … provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute." *Turner v. Sheldon D. Wexler, D.P.M. P.C,* 244 Va. 124, 128 (1992); *see also Miller & Rhoads Building, L.L.C. v. City of Richmond,* 292 Va. 537, 543-44 (2016) ("'In interpreting statutory language, we have consistently applied the time-honored principle *expressio unius est exclusio alterius*,' because this maxim 'recognizes the competence of the legislature to choose its words with care.' … Stated another way, 'the mention of specific items in a statute implies that all items omitted were not intended to be included.'") (internal citations omitted).

The General Assembly understands the concept of lost revenues. As the Company notes, the legislature references "revenue reductions" in the approval statute of Section A 5 c, and defines the term in Section 56-576. *See* Legal Mem. of Va. Elec. & Power Co., at 4-5. It is therefore especially significant that the General Assembly declined to include any mention of "revenue reductions" in Enactment Clause 15.

The Supreme Court of Virginia has held *repeatedly*, "[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional." *See City of Richmond v. Va. Elec. & Power Co.*, 292 Va. 70, 75 (2016) (quoting *Zinone v. Lee's Crossing Homewoners Ass'n.,* 282 Va. 330, 337 (2011)); *see also Halifax Corp. v. First Union National Bank,* 262 Va. 91, 100 (2001) ("[w]hen the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional."); *Hollingsworth v. Norfolk Southern Ry. Co.*, 279 Va. 360, 366 (2010). In sum, Supreme Court precedent and the language of the statute bars the Commission from accounting for lost revenues under Enactment Clause 15 of the GTSA.

The Company alleges that the proposal statute of Enactment Clause 15 uses "the same words" as found in the approval statute of Section A 5 c, and that therefore lost revenues should be treated as "costs" of efficiency programs in both contexts. *See* Legal Mem. of Va. Elec. & Power Co., at 6. This argument glosses over obvious and material distinctions between the two statutes. Enactment Clause 15 uses *some* of the same words as Section A 5 c, but not all of them. What matters here is that the General Assembly declined to use *any of the words* for lost revenues in Enactment Clause 15, while at the same time retaining the other four cost categories from Section A 5 c. This targeted exclusion of any reference to "revenue reductions" must be presumed to be intentional.

As Justice Lacy explained in *Appalachian Power Co. v. State Corp. Commission,* 284 Va. 695, 706 (2012), "Rules of statutory construction prohibit adding language to or deleting language from a statute." There, the Court struck down a ratemaking methodology because "it effectively add[ed] a fourth condition to the statue," which had delineated just three conditions for approval of a rate adjustment clause. *Id.* at 707. Adding an unwritten fifth condition—for lost revenues—is precisely what the Company proposes to do with Enactment Clause 15. Supreme Court precedent prohibits this result. "Adding words to a statute in this manner violates a well-established tenet of statutory construction." *Appalachian Power,* 284 Va. at 707. *See also Level 3 Communications v. State Corp. Commission,* 282 Va. 41, 47-48 (2011) ("The SCC is bound by the plain meaning of [the statute] ... The SCC does not have the authority to create additional categories" not listed in the specific statute at issue).

Ultimately, the Company errs in its analysis in wholly ignoring Virginia Supreme Court precedent on statutory construction. *See* Legal Mem. of Va. Elec. & Power Co., at 4-8. When the Supreme Court hears an appeal of a Commission decision, it extends a "presumption of correctness" to the Commission's findings of fact and the exercise of its judgment; but a "statutory construction issue is a question of law reviewed by th[e] Court *de novo.*" *Appalachian Power Co.,* 284 Va. at 703. The Commission is being asked to interpret a new statute and thus "the presumption of legislative acquiescence [to prior Commission decisions] does not apply." *Id.* at 704. This is a question of law and the unambiguous text of the statute controls—not prior Commission rulings under Section A 5 c, which were issued before the GTSA was enacted. The General Assembly listed only four categories of costs that can be quantified to determine if the Company has met its obligation to "develop a proposed program of energy conservation measures" totaling

$870 million. *See* Enactment Clause 15. It did not include lost revenues among those categories.

III. There are Compelling Reasons to Exclude Lost Revenues from the Cost of Energy Efficiency Programs.

There are sound, public policy reasons to support the legislature's decision to exclude lost revenues from Enactment Clause 15. The GTSA requires Virginia utilities to propose a suite of energy efficiency programs over the next ten years. This mandate is inherently forward-looking, which is why Enactment Clause 15 speaks only to "projected costs" of energy efficiency programs. Section A 5 c, in contrast, accounts for "projected and actual costs" of efficiency programs. It also provides a mechanism for recovery of lost revenues after programs have been in operation. *See* Va. Code § 56-585.1 A 5 c ("As part of such cost recovery, the Commission, if requested by the utility, shall allow for the recovery of revenue reductions related to energy efficiency programs. The Commission shall only allow such recovery to the extent that the Commission determines such revenue has not been recovered through margins from incremental off-system sales as defined in § 56-249.6 that are directly attributable to energy efficiency programs."). Thus, the General Assembly allows for the recovery of lost revenues *post hoc* under Section A 5 c—after programs have been implemented, the "actual costs" are known, and verified energy savings have accrued. Enactment Clause 15 excludes lost revenues, in part, because it focuses on the proposal stage, when the Company's "projected costs" are used to measure progress on energy efficiency.

The VAEEC also opposes inclusion of lost revenues under Enactment Clause 15—and under spending caps established pursuant to Va. Code § 56-585.1. A 5 c—because lost revenues are not properly accounted for as "program costs." The VAEEC acknowledges that the Commission enjoys some discretion in how it establishes cost caps under Section A 5 c, and that the Commission has included lost revenues in prior cost caps that preceded the GTSA. *See* Pre-Filed Testimony of Britton Ellis, at 4, lines 3-4 (filed Feb. 15, 2019). The VAEEC recommends that the Commission exercise its discretion to exclude lost revenues from the A 5 c cost caps going forward, because the calculation of lost revenues is an issue relating to the allocation and collection of already sunk costs from previously approved Company expenses.

As VAEEC Witness Rachel Gold explains in her pre-filed testimony:

> Lost revenue is not a cost of energy efficiency for the simple reason that these revenues still exist and are recovered by the utility from customers, even without any efficiency programs at all. Without efficiency programs, lost revenues are simply the calculated revenues that the utility collects through sales of electricity. Virginia's approach is unusual. Five states have cost caps a part of their energy efficiency savings targets; of those, no state includes lost revenue as a part of the accounting towards those savings caps.

See Direct Testimony of Rachel Gold. at 19, lines 7-13 (Unsealed and Corrected Version Filed March 5, 2019) (footnote omitted).

VAEEC Witness Gold further finds that over five years, lost revenues would make up 42.9% of the Company's proposed Phase VII spending cap. *See id.* at 18, lines 10-12. *See also* Pre-Filed Testimony of Matthew Drumheller, at 12, line 18 (filed Feb. 15, 2019) (summary chart for Phase VII programs). The GTSA directs the Company to propose $870 million in energy efficiency programs over the next ten years. Needless to say, if lost revenues are included in that calculation, the General Assembly's target would be dramatically curtailed, contrary to the intent of the legislature.

IV. Conclusion.

For the foregoing reasons, the VAEEC respectfully requests that the Commission find that Enactment Clause 15 lists four categories of costs that must be quantified in assessing the Company's progress towards the $870 million target: "projected costs for the utility to [1] design, [2] implement, and [3] operate such energy efficiency programs, including [4] a margin to be recovered on operating expenses;" and further, that the Commission find that lost revenues or "revenue reductions" are not included among these four categories.

Finally, the VAEEC reiterates its support for the Company's proposed Phase VII programs, and recommends that the Commission exclude lost revenues from any cost caps established for new programs that are subject to approval in this proceeding under Section A 5 c.

Respectfully Submitted,

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