Virginia State Corporation Commission
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1307101143

Case Number (if already assigned)	PUE-2012-00128
Case Name (if known)	Application of Virginia Electric and Power Company For Approval and certification of the proposed Brunswick County Power Station, etc.
Document Type	REEX
Document Description Summary	Comments on Hearing Examiner's Report of the Office of the Attorney General's Division of Consumer Counsel
Total Number of Pages	24
Submission ID	7128
eFiling Date Stamp	7/3/2013 4:17:58PM

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July 3, 2013

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Joel H. Peck, Clerk
c/o Document Control Center
State Corporation Commission
1300 E. Main Street
Richmond, VA 23219

Re: Application of Virginia Electric and Power Company For Approval and certification of the proposed Brunswick County Power Station electric generation and related transmission facilities under §§ 56-580 D, 56-265.2 and 56-46.1 of the Code of Virginia and for approval of a rate adjustment clause, designated Rider BW, under § 56-585.1 A 6 of the Code of Virginia
Case No. PUE-2012-00128

Dear Mr. Peck:

Please find the enclosed Comments on Hearing Examiner's Report of the Office of the Attorney General's Division of Consumer Counsel in the above-captioned matter.

Sincerely,

/s/ C. Meade Browder Jr.

C. Meade Browder Jr.
Senior Assistant Attorney General

cc: Service List

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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

APPLICATION OF

VIRGINIA ELECTRIC AND POWER COMPANY

CASE NO. PUE-2012-00128

For approval and certification of the Proposed Brunswick County Power Station and related transmission facilities

COMMENTS ON HEARING EXAMINER'S REPORT OF OFFICE OF THE ATTORNEY GENERAL, DIVISION OF CONSUMER COUNSEL

The Office of the Attorney General's Division of Consumer Counsel ("Consumer Counsel") hereby submits its Comments on the Report of A. Ann Berkebile, Hearing Examiner, filed in this case on June 13, 2013 ("Report"). The central issue in this case is whether the Applicant, Virginia Electric and Power Company ("Virginia Power" or "Company"), adequately considered third-party market alternatives to its proposed Brunswick electric generating facility. The Commission's finding on this issue will determine whether its past pronouncements on the relevance of considering third-party market alternatives to utility self-build generation facilities will be given meaning and effect.

After hearing the evidence, the Hearing Examiner properly found that Virginia Power has not adequately considered third-party market alternatives to its proposed $1.3 billion Brunswick County Power Station project, and thus failed to follow the directives of this Commission. Because the Company has not adequately considered third-party market alternatives to the Brunswick project, it has not established the prudence or reasonableness of its self-build proposal.

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Accordingly, the project cannot be found at this time to be required by the public convenience and necessity and not otherwise contrary to the public interest. The Report's recommendation that the application be denied and dismissed without prejudice is proper, and should be adopted.

COMMENTS

I. The Report's Finding that Virginia Power Did Not Adequately Consider Third-Party Market Alternatives to the Proposed Brunswick Plant Should be Accepted.

A. Virginia Power was required to consider third-party capacity resources as an alternative to construction of the Brunswick plant.

The Hearing Examiner found that before Virginia Power's application could be approved, the Company was required to establish that it had adequately considered third-party alternatives to the Brunswick Plant.[1] There should be no disputing this point. In 2009, the Commission put Virginia Power on notice that "evidence from a competitive bid process may be relevant in supporting a utility's claim that its application to construct and operate a new generating facility satisfies statutory requirements that the Commission must apply thereto."[2] In a Virginia Power proceeding one year later, the Commission stated that, "evidence relating to the costs and other attributes of competitive alternatives – such as other technologies for self-build options, contracts for purchased power, or other alternatives – may be relevant in determining the reasonableness or prudence of any self-build proposal."[3] And then last year, in its Final Order in Virginia Power's Integrated Resource Plan ("IRP") case, the Commission reiterated and expanded upon these two

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[1] Report at 79.

[2] *Application of Virginia Electric and Power Company, For a certificate to construct and operate a generating facility for certificates of public convenience and necessity for a transmission line: Bear Garden Generating Station and Bear Garden-Bremo 230 kV Transmission Interconnection Line*, Case No. PUE-2008-00014, Final Order at 17 (Mar. 27, 2009) ("*Bear Garden*").

[3] *Application of Virginia Electric and Power Company, Notification to the Commission of election to abandon the Company's bidding program and application to revise its cogeneration tariff pursuant to PURPA Section 210,* Case No. PUE-2008-00078, Final Order at 8-9 (May 18, 2010).

earlier pronouncements:

> [Virginia Power] should adequately consider third-party market alternatives as capacity resources. ... [W]e find that market alternatives are appropriate for consideration in cases where [Virginia Power] seeks a certificate of public convenience and necessity for specific investments. Indeed, the Commission has previously explained that third-party alternatives, including purchased power and new construction, "would likely be relevant evidence in an application proceeding [for a self-build option for new generation]."[4]

This language followed Virginia Power's revelation in its September 2011 IRP filing that the Company planned to eliminate virtually all third-party non-utility generation ("NUG") from its mix of supply side resources by 2020.[5]

The Brunswick proposal is Virginia Power's first application for a certificate to construct new Company-owned base load generation subsequent to the 2011 IRP filing,[6] and at an estimated $1.3 billion (plus financing costs) and over $8.2 billion in total forecasted revenue requirement,[7] it would represent one of the largest capital investments ever made by Virginia Power.[8] For these reasons, the relevance in this case of Virginia's Power's obligation to adequately consider third-party alternatives cannot be overstated. It is time for the Commission's past pronouncements on this issue to be given force and effect.

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[4] *In re: Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq.*, Case No. PUE-2011-00092, Final Order at 4-5 (Oct. 5, 2012) ("IRP Order") (quoting *Bear Garden*) (alteration in original).

[5] Ex. 27, Figure 1.4.2 2011, "Integrated Resource Plan – Capacity;" Ex 44 (Norwood Direct) at 17.

[6] Virginia Power's plan to eliminate NUG purchases had not been made known at the time of the earlier Bear Garden and Bidding Program cases, or the Warren certificate case in PUE-2011-00042.

[7] Ex. 44 (Norwood Direct) at 7-8.

[8] Tr. 1280.

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B. Virginia Power's "test" of the market was an inadequate consideration of potential third-party market alternatives to the Brunswick project.

The Hearing Examiner found that Virginias Power's failure to affirmatively explore actual third-party alternatives to the Brunswick facility sufficient to meet its expected capacity deficiency calls into question the necessity and prudence of the project.[9] After reciting the Commission's precedent noted above, the Report concludes that the Commission expected the Company "to fully investigate the possibility of actual third-party alternatives as part of its process of establishing that a particular self-build option is necessary and prudent."[10]

Virginia Power contends that it adequately considered market alternatives by virtue of undertaking two exercises: (1) comparing Brunswick to a single forecast of PJM market prices of capacity and energy provided by a consultant, ICF International ("ICF"); and (2) contacting three of its existing NUG suppliers and inviting those generators to submit bids to extend their contracts with the Company.[11] The evidence shows that Virginia Power did not adequately or meaningfully consider alternatives to its self-build plan. The evaluation process was flawed in numerous respects, and the application should be denied for that reason.

1. The Company did not broadly test the competitive power market before deciding to build the Brunswick facility.

Virginia Power and all parties appear to be in agreement that the Company did not conduct a broad-based solicitation or market test prior to making a decision to seek Commission

[9] Report at 79.

[10] Report at 80.

[11] Ex. 14 (Kelly Direct) at 18; Tr. 633.

approval to build the Brunswick facility.[12] The Company stated numerous times during the hearing that a broad-based solicitation or market test was not necessary.[13] Company witness Kelly further testified that the Company did not need to undertake any effort to test the market beyond approaching three NUGs and examining the ICF market forecast because "everyone in the generation business understands the market."

> Q: Are you aware, Mr. Kelly, of any discussions within the Company to test the market in any other fashion besides approaching the NUGs?
>
> A: All of us in the generation business understand the market. We're always looking at various forecasts. The market is very transparent when you're in a big market like PJM. Did we do any kind of formal or informal test of the market? No, if that's what your question was, besides the market – or the NUG extension solicitation in [the ICF] forecast, if that's where you're – we did not.[14]

Virginia Power's position is that it adequately considered market alternatives by virtue of its consideration of extending three NUG contracts and by utilizing ICF's market price forecast. After undertaking these actions, Mr. Morgan testified, the Company "made a decision that [it] had done market alternative comparisons to satisfy the burden of proof in this case."[15]

But the evidence presented in this case demonstrates that the Company's efforts were not enough to meet its burden. The Company should have – and very easily could have – conducted a broad test of the competitive power market. As described below, Virginia Power's NUG

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[12] Tr. 229 (counsel for Virginia Power stating that a "broad-based market solicitation...[was] neither required nor necessary"); Tr. 1289 (Company witness Morgan agreeing that "the Company felt that it did not need to ... undertake a broad-based test of the market in order to determine that the Brunswick self-build plan was the preferable plan for customers.").

[13] *See, e.g.*, Tr. 226.

[14] Tr. 473.

[15] Tr. 1296.

solicitation exercise, which consisted of telephone calls and follow up emails,[16] was wholly inadequate as a test of the competitive power market for multiple reasons. Likewise, the market price forecast provided by ICF is unreliable, and cannot be presented as evidence that the Company considered alternatives to its self-build plan.

a. The NUG solicitation was not designed to elicit alternatives to Virginia Power's self-build plan.

Virginia Power's market solicitation was flawed in numerous respects and cannot credibly be offered as evidence of a meaningful consideration of alternatives to construction of the Brunswick plant. The Hearing Examiner concluded that the Company's solicitation did not – and could not – constitute consideration of actual third-party alternatives to the Brunswick project because the decision to solicit offers from three NUGs was made independently from the Company's consideration of the Brunswick plant. And the total capacity available from the solicited NUGs of approximately 1,000 MW could not have replaced the 1,358 MW capacity of Brunswick.[17] To truly evaluate alternatives to a 1,358 MW self-build plan, the Company would have to solicit at least the same amount of capacity from the market. Indeed, as P3[18] witness Schnitzer testified, "rule one in a competitive type of solicitation ... is to get offers whose quantity exceed the quantity of what your alternative is."[19] But Virginia Power did not do this. The "competitive solicitation," which was purportedly designed to elicit alternatives to Brunswick, could have yielded at most 26% *less* capacity than the Company's self-build plan. For this reason, Virginia Power's NUG solicitation exercise cannot be held out as evidence that

[16] Ex. 52 (Abbott Direct) at 14.

[17] Report at 81.

[18] "P3" collectively refers to respondents Electric Power Supply Association and PJM Power Providers Group.

[19] Tr. 786.

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the Company undertook a meaningful consideration of market alternatives. Having reached this conclusion, the Report did not make a finding on the sufficiency of other aspects of the process followed by the Company when conducting the solicitation.[20] However, as detailed below, the insufficiency of the process presents additional grounds for finding that Virginia Power inadequately considered third-party alternatives.

b. The NUG solicitation process was a *pro forma* exercise, undertaken only after the Company had already committed itself – both publically and contractually – to seek approval to construct the Brunswick plant.

Although Virginia Power concedes that it did not broadly test the power generation market, the Company claims that its limited NUG solicitation process represented a serious and adequate consideration of alternatives to construction of the Brunswick plant.[21] The Company also represents that, had the NUG offers been more favorable, the Company might not have decided to go forward with its self-build plan.[22] The evidence suggests otherwise, as these claims are undercut by the fact that the Company had already committed itself to the facility in at least two respects before even beginning the *pro forma* NUG solicitation exercise. First, on February 28, 2012, the Company held a press conference attended by Governor McDonnell and members of his cabinet, Dominion Resources' chairman and CEO Farrell, and local representatives from Brunswick County to announce the Company's decision to move forward to seek approval for the construction of the Brunswick plant.[23] While the press conference was

[20] Report at 81, n.116.

[21] *See., e.g.*, Ex. 14 (Kelly Direct) at 18; Tr. 633.

[22] *See* Tr. 1105 (Mr. Wood testifying that "[i]f the solicitation results had been different and it provided a different path forward that was in the best interest of our customers, we wouldn't be filing the case in the manner we are right now.").

[23] *See* Ex. 12.

held on February 28, 2012, the NUG solicitation process did not begin until early March of 2012, and the NUG evaluation period extended through July of 2012.[24] Mr. Wood attempted to downplay the importance of the press event at the hearing, contending that the public announcement indicated Virginia Power had merely "proposed" to build the Brunswick plant, but had not "committed" to do so.[25] Mr. Wood also testified that although "the *plans* to move forward [with the Brunswick certificate application]" were made before the NUG solicitation process began, those plans did not represent a final decision by the Company.[26] Despite these representations, it is hard to fathom that Virginia Power would have invited the Governor, other state officials, and representatives from Brunswick County to join the parent company's chairman and CEO at a press conference announcing the intent to construct the Brunswick plant if, at that time, the project represented merely one potential option under consideration, and if the Company still planned to seriously consider third-party market alternatives to Brunswick. Indeed, the *only* contingency mentioned in the text of the Company's news release is that the project will require Commission approval.[27]

Additionally, Virginia Power had contractually committed itself to a key construction component before beginning its NUG solicitation exercise. The Company executed a Turbine Supply Agreement ("TSA") with Mitsubishi Heavy Industries on February 23, 2012, prior to beginning the NUG solicitation process in early March of 2012.[28] Although Mr. Wood stated that the agreement did not bind Virginia Power, and that the Company maintained "considerable

[24] Ex. 52 (Abbott) at Attachment GLA-2; Tr. 352, Tr. 1111.

[25] Tr. 354.

[26] Tr. 1109 (emphasis added).

[27] Ex. 12.

[28] Ex. 52 (Abbott) at 16.

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flexibility" with regard to the termination of the TSA, the Company would have incurred substantial penalties in the event it decided to terminate the agreement after receiving favorable bids from its solicitation process.[29] The TSA contains a damages provision which outlines the penalty Virginia Power must pay in the event it no longer wishes to take delivery of the turbines.[30] As Mr. McKinley testified, had the Company elected to terminate the TSA in March of 2012, the Company would have been subject to a termination penalty, which is specified in the confidential record.[31] But if the Company had elected to terminate the agreement in August of 2012, after all NUG bids had been received, the Company would have been subject to a much larger termination penalty.[32]

The Company's decision to enter into a binding TSA prior to beginning its evaluation of alternatives to the Brunswick facility raises doubt as to whether the Company intended to seriously consider such alternatives. The Company claims that it chose to execute the agreement when it did in order to ensure favorable terms.[33] However, the Company has not provided any evidence that the turbine market was volatile or that there was any reason the Company needed to enter into the TSA prior to considering NUG alternatives. In fact, it appears that the turbine market is not volatile. Mr. McKinley testified that the Company chose to re-engage the same suppliers who provided bids to construct the turbines for the Warren County plant due to "stable

[29] Ex. 62 (Wood Rebuttal) at 16.

[30] Extraordinarily Sensitive Filing Schedule 46B, Statement 3, p.646 and Exhibit E, p.1503 (showing TSA termination penalty curve by month).

[31] Tr. 1324; Ex. 68-ES (McKinley Rebuttal) at 8-9.

[32] Extraordinarily Sensitive Filing Schedule 46B, p.1503, Exhibit E (showing TSA termination penalty curve by month). See Consumer Counsel Post-Hearing Brief at 11-12.

[33] Ex. 62 (Wood Rebuttal) at 15.

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market conditions" during this time period.[34]

c. The solicitation process was flawed and inconsistent with normal business practice.

Virginia Power's NUG solicitation process itself was flawed and inconsistent with normal competitive power procurement practices. First, the solicitation was limited to only three NUGs with which the Company already had existing purchased power agreements ("PPAs") that would be expiring within the next three to five years.[35] Even though the Company had issued formal RFPs prior to constructing generating facilities in the past – and as Mr. Morgan testified, "RFP documents are not difficult to prepare"[36] – the Company chose not to do so in this proceeding.[37] The Company did not even issue a general solicitation, such as an announcement on its website, indicating to market participants that it was seeking base load generating capacity. Mr. Norwood testified that "a broadly distributed e-mail or even a press release would have no doubt encouraged contacts which could have been documented and provided in testimony as evidence that there wasn't anything else out there."[38] But Virginia Power targeted only three generating stations, and according to Doswell witness Hanson, the Company was not willing to accept proposals from other facilities.[39] Had Virginia Power been willing to accept bids from other units, the Company would likely have received numerous offers from competitive generators. The Old Dominion Electric Cooperative ("ODEC") conducted an RFP in connection

[34] Tr. 684; Ex. (McKinley Direct) at 7.

[35] Ex. 14 (Kelly Direct) at 18.

[36] Tr. 1261.

[37] For example, Mr. Morgan testified that the Company issued RFP documents prior to deciding to construct the Ladysmith and Bear Garden natural gas generation facilities. Tr. 1279-1280.

[38] Tr. 912-913.

[39] Tr. 980.

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with its consideration of a new combined cycle gas facility, and it received approximately 80 bids.[40] Mr. Hanson also testified that if the Company had allowed other entities to place bids, other affiliates of the LS Power Group would have responded to the solicitation.[41] And, as P3 witness Schnitzer stated, Virginia Power is "a participant in what may be the world's largest wholesale electricity market [and could] instead rely on actual market offers."[42] There was simply no reason to limit the solicitation to three generators apart from this candid explanation of Virginia Power witness Kelly: "We don't like to go out and ask folks for bids when we understand what the market is."[43]

The structure of the solicitation process was also inconsistent with normal utility practice.[44] The Company did not provide any guidance to the three NUGs regarding what type of product the Company was seeking. For example, the Company did not indicate the number of MWs it was seeking or whether it preferred base load or peaking resources.[45] The Company also did not provide any guidance as to whether the Company wished to receive a long or short-term offer.[46] Had the Company truly wished to compare the Brunswick project against alternatives, it would have requested that NUGs offer "a long-term product comparable to what Virginia Power is proposing in this proceeding (*i.e.*, construction of the Brunswick Facility)."[47] Virginia Power

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[40] Tr. 1033.

[41] Tr. 981.

[42] Tr. 783-784.

[43] Kelly (Tr. 1206).

[44] Ex. 54 (Hanson) at 5.

[45] *Id.* at 6-7.

[46] *Id.*

[47] *Id.* at 7.

also chose not to make any counter-offers or enter into negotiations with the NUGs after receiving initial offers.[48]

While the Company defends its decisions as an exercise of its "business judgment,"[49] they were inconsistent with normal business practice. Mr. Hanson testified that he was confident that the Doswell facility could have beaten Virginia Power's self-build price, but that the Company provided little or no feedback regarding Doswell's various bids and buyout offers.[50] Consumer Counsel witness Norwood testified that he was aware of RFPs for capacity and energy which did not contain *any* restrictions on post-offer negotiations between the parties.[51] In fact, the two RFPs conducted by American Electric Power Service Corporation and Duke Energy Carolinas explicitly allowed for a negotiation period during which the utility could make counter offers.[52] Likewise, Virginia Power could have undertaken a more substantive process that allowed for post-bid negotiations. And at the very least, the Company could have made counter-offers to the NUGs at price points that would have beaten its self-build price.

2. ICF's market price forecast is not an adequate substitute for actual market offers.

In addition to its limited NUG solicitation, Virginia Power used Strategist modeling, updated from its 2011 IRP case, for its consideration of market alternatives to the Brunswick proposal.[53] The Report correctly notes that Virginia Power's use of the Strategist model "did

[48] Ex. 44 (Norwood Direct) at 18-19.

[49] Tr. 902; Ex. 67 (Morgan Rebuttal) at 5.

[50] Tr. 978; Ex. 54 (Hanson) at 14 ("Doswell believes that it can provide energy can capacity at a lower price than Virginia Power's self-build options, including the Brunswick facility.").

[51] Tr. 913; Exhibits 45 and 46.

[52] Exhibits 45 and 46.

[53] Application at 7; Ex. 14 (Kelly Direct) at 18.

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not, however, compare *actual* third-party alternatives to the Company's self-build option."[54] Instead, the Company "employed in this case the same type of forecasting methodology found by the Commission to be sufficient for long-term planning but different than the type of analysis that should be conducted when seeking a CPCN."[55] The Commission has made clear that its "finding that an IRP is reasonable and in the public interest under § 56-599 E [(the IRP section)] of the Code in no manner represents – *and should not be characterized as representing* – explicit or implicit approval for construction or cost recovery of any specific resource option contained in the IRP."[56] Yet the Company touts its IRP in support of its Brunswick application.[57] The flaws in Virginia Power's reliance on Strategist are indicative of why this IRP modeling is not sufficient – nor proper – to support a CPCN application. Not surprisingly then, as the Report states, "most participants in the case . . . challenge the forecasted assumptions that the Company used in the model."[58]

The Company used a forecast of wholesale prices for energy and capacity within PJM provided by ICF and modeled this as a market option using the Strategist forecasting software.[59] This approach provided the Company with its stated $1.3 billion in NPV benefits from Brunswick compared to market options. This figure must be taken with a grain of salt. As Mr. Norwood explained, the Company's market forecast was not used in an optimal manner by Strategist. The Strategist model was run in such a way so as to force the selection of a generic

[54] Report at 80 (emphasis in original).

[55] *Id.*

[56] IRP Order at 3 (emphasis original) (internal citation omitted).

[57] Company Post-Hearing Brief at 5, 29.

[58] Report at 80.

[59] Ex. 14 (Kelly Direct) at 18.

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1,358 MW 36-year "market purchase" option as an alternative to Brunswick.[60] The "market purchase option" was not a long-term PPA, or a mix of long and short-term power purchases and market purchases. Instead, the market purchase alternative forced into the ICF model merely quantifies the forecasted costs of a 36-year generic purchase of capacity through PJM:

> And what this market price case is is nothing more than a case that considers that instead of building Brunswick, the Company would purchase 1,358 megawatts of capacity from PJM for the next 36 years at a forecasted price. So you don't have to have a model to run that. It's a non-optimized result of a scenario that in my view is not [realistic] because the price forecast I think as Mr. Schnitzer mentioned is inflated relative to certain market indices and by definition would be higher than the cost of this plant. It doesn't represent the least cost option.
>
> . . . .
>
> [T]he point . . . about the $1.3 billion [in benefits] is that for this market run, they essentially assumed a 36-year market purchase at the equivalent capacity of the plant, and that's clearly not an attempt to be an optimal result, given the forecast.
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> So rather than entering resource options [in] the model and let model select short-term, long-term, the different types of resources based on economics, some kind of present value logic and capacity need, for these runs that are presented in Mr. Kelly's testimony that are talked about here as being the evidence of the benefits of the units, they essentially at least for the market option forced them to select market purchases, and I don't think that's appropriate.[61]

It is critical to understand that Virginia Power's repeated references to the project's $1.3 billion in benefits, as compared to alternatives, reflects this non-optimized and unrealistic market purchase scenario modeled by the Company, and it must be considered in this light.

It is also not reasonable for Virginia Power to consider market alternatives by comparing the proposed Brunswick project to a single forecast. Forecasts are inherently unreliable. Mr.

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[60] Tr. 684.

[61] Tr. 862-863. See also Ex. 44 (Norwood Direct) at 21.

Kelly acknowledged ,"[m]ost forecasts are wrong. They're either high or low, from my history of modeling."[62] Indeed, because most forecasts are wrong, the only way to obtain actual prices is to test the market. In Mr. Schnitzer's words, using legal parlance, an actual test of the competitive power market would yield "the best evidence" of the market alternatives, while a forecast of market prices is simply not "the best evidence."[63]

In addition to the inherent flaws in relying on forecasts, the ICF forecast does not appear to be reliable, and Mr. Schnitzer explained why "the limited market evidence that's available in this proceeding actually undermines the market price forecast relied upon by the Company[:]"[64]

> There is a limited amount of actual market evidence in the record from the few market offers that Dominion did receive from certain NUGs. And when one checks those market offers against the market price forecast to see if one corroborates the other, the answer is that it does not.
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> . . . .
>
> [O]ne long-term market offer would provide a certain amount of capacity and energy $400 million to $600 million more cheaply than buying that same amount of capacity and energy at the assumed market price forecast. . . . . [W]what that means is that all the analysis that is predicated on that market is forecast, all Strategist analysis and the like is also undermined by the limited market evidence that's available.
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> So under those circumstances, I think it would be impossible to conclude that that modeling exercise incorporates adequately an assessment of market alternatives.[65]

Mr. Schnitzer noted, "I think in this instance what it indicates is that market participants don't believe the ICF forecast."[66]

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[62] Tr. 460.

[63] Tr. 784.

[64] Tr. 785.

[65] Tr. 784-85. See also Ex. 38-ES (Schnitzer) at 24; Tr. 1210-12.

[66] Tr. 796.

II. Adoption of the Report Is Necessary to Preserve the Commission's Ability to Ensure that Virginia Power's $1.3 Billion Investment in New Generation is Reasonable, Prudent, and in the Public Interest.

A. The Commission's prior orders requiring Virginia Power to adequately consider third-party market alternatives as capacity resources must be given meaning and effect.

This case represents a critical test of the Commission's authority over a utility's acquisition of new generation resources, and its decision will establish an exceptionally important precedent in the regulation of electric utilities in the Commonwealth. If in this case Virginia Power will not be required to meaningfully consider third-party capacity resources as a true alternative to its own self-build proposal, it is difficult to imagine how the Commission's IRP Order will be of consequence in the future. Were the Commission to approve Virginia Power's self-build plan for the Brunswick project based on the record in this case, it would be validating and endorsing the *pro forma* process employed by the Company to consider third-party alternatives. The Commission would be sending a signal to utilities that the directives contained in the IRP Order (and now in Chapter 2 of the 2013 Acts of Assembly)[67] are of little substance and may be satisfied by a perfunctory effort or by representations that the utility did not need to undertake a more formal evaluation of alternatives so long as the utility "understands the market."[68] Such a precedent would not be in the public interest. As Mr. Norwood explained:

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[67] The 2013 General Assembly codified the Commission's pronouncements on the need for consideration of third-party alternatives to utility-constructed generation. The legislature amended Va. Code § 56-585.1(A)(6) to require that a utility "seeking approval to construct a generating facility shall demonstrate that it has considered and weighed alternative options, including third-party market alternatives, in its selection process." This Act also eliminated incentive adder returns for utility-owned generation except for new nuclear and offshore wind facilities. Although the new legislation does not extend to this case because the application was filed before January 1, 2013, Consumer Counsel believes the Commission should be aware of these policy decisions of the Legislature, especially to the extent that its decision here will likely set precedent for how the new statutory requirement to consider third-party market alternatives is to be applied.

[68] Tr. 473.

> Without seeking actual bids or negotiating with the existing NUG suppliers who did submit bids, it's not possible for the Company to know whether the Brunswick project is the lowest reasonable cost alternative. Moreover, it would set a bad precedent to allow the Company to move forward with the project of this magnitude. We're talking about approximately $1.5 billion total capital when construction interest is considered and about $8.2 billion in revenue requirements on present value basis. So this is a very significant investment. And in my view, to allow them to proceed with this project with not full information on what the market alternatives were would be a bad thing, a very bad precedent.[69]
>
> [T]his ultimately might be a good project, but you don't know what's out there unless you solicit, and if you just limit it to a few suppliers, that's not enough evidence in my view to demonstrate a project is least cost, and that ought to be the goal of these processes, and I think allowing this to go by would just set a real bad precedent for the future which we'd not recommend.[70]

The Company believes it can meet its burden by merely representing to the Commission that – even though it did not undertake a broad or formal evaluation of market alternatives – there would not have been any better offers than a self-build plan. Mr. Kelly testified that the Company did not need to perform any such market tests because everyone "in the generation business understand[s] the market."[71] The Company also repeatedly suggested that its decision not to undertake a broad evaluation of market alternatives was a decision of "business judgment" that should not be questioned.[72] Consumer Counsel is certainly not suggesting that the Commission should substitute its business judgment for the Company's. But Virginia Power expects an extraordinary level of deference from the Commission. The Company's business

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[69] Tr. at 833-34.

[70] Tr. 841-42.

[71] Tr. 473.

[72] Tr. 902, 904 (counsel for the Company stating "[w]ell, fair enough, but, Mr. Norwood, when the Company testifies in our informed judgment [that] this was the best way to do it and we're confident that we have sufficiently tested the market and we're confident this is the best result for our customers, in fairness you're second-guessing that now?).

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judgment should not be accepted as infallible, especially when it seeks approval of a ratepayer-funded investment of $1.3 billion and when there is testimony in the record indicating that market offers might have beaten the self-build price. Even if everyone at the Company "understand[s] the market" and even if the Company is supremely confident that no third-party offer – or combination of offers – could beat the Brunswick plant, the Company still must respect the directives of the Commission. As stated by Doswell in its post-hearing brief, the Commission's IRP Order did not direct Virginia Power to explain why it believed its self-build proposal is better than potential, unidentified market alternatives – it directed the Company to actually consider such alternatives.[73] Virginia Power must provide a satisfactory justification for its self-build proposal that includes evidence of a meaningful and adequate consideration of third-party market alternatives. Such evidence has simply not been presented in this proceeding.

B. The Commission should require Virginia Power to conduct – and evaluate the results of – a broad-based market solicitation, after which the Company may re-file its application.

Virginia Power's failure to establish in this case that there are not superior third-party market alternatives to meeting the capacity to be supplied by Brunswick does not mean that the Commission could not later find that construction of the Brunswick facility is reasonable, prudent, and in the public interest. But Virginia Power has not carried its burden based on the record in *this application*; therefore the application should be denied without prejudice. The Commission should direct Virginia Power to present evidence that it conducted a fully competitive and transparent test of market alternatives. This would allow the Company to re-file its application in the event that a competitive market test confirms the results of its modeling analysis that Brunswick represents the most prudent option for customers. As noted by the

[73] Doswell Post-Hearing Brief at 15.

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Hearing Examiner, the Company acknowledged there is no physical reliability need for additional capacity in the PJM DOM Zone by 2016,[74] and deferring the construction of a new generation facility would allow Virginia Power to take advantage of current historically low PJM capacity prices.[75]

Virginia Power may argue that delaying approval of the Brunswick plant for *any* amount of time would unreasonably increase costs to customers. These arguments are unpersuasive for at least three reasons. First, the reason a solicitation process should be required is to give assurance to the Commission that Brunswick is the most prudent option to secure necessary capacity and energy, and there is evidence in record indicating that some third-parties may have been able to offer such resources at a lower cost than Brunswick. Virginia Power may find that there are better options out there. Second, a meaningful market solicitation could be conducted by the Company in a matter of months, and even if Brunswick is ultimately proven to be the optimal resource, any short-term delay in its construction should not be problematic due to normal planning reserves in PJM. And, as noted above, there are no near-term reliability concerns and capacity is available in the market at low prices. Finally, as mentioned previously, if the Commission were to accept the record in this case as evidence that the utility adequately considered alternatives to new construction, it would set a damaging precedent for the future. Consumer Counsel believes that ratepayers will benefit from a meaningful solicitation process, even if the Company is ultimately able to prove that construction of the Brunswick plant is the optimal choice for customers.

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[74] Report at 81.

[75] See Ex. 44-ES (Norwood Direct) at 21 (comparing Company's forecasted PJM capacity prices over 2016-2020 period to cost of capacity from proposed Brunswick project); Consumer Counsel's Post-Hearing Brief at 23.

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III. The Report's Findings with Respect to Other Statutory Requirements are Generally Reasonable, with Limited Exceptions.

The Hearing Examiner addressed other statutory requirements governing the application in the event the Commission disagreed with the Report's finding that Virginia Power failed to adequately consider third-party market alternatives to the Brunswick proposal.[76] Consumer Counsel concurs in those findings except as noted below.

A. Economic Development

The Hearing Examiner concluded that, if approved, the project will generate significant economic benefits for Brunswick County.[77] She further found that the project would provide economic benefits "for the Commonwealth as a whole – provided that [it] is found to be the prudent, economic choice for addressing the Company's capacity needs."[78] In support of this finding of economic benefits in the Commonwealth, the Report cites to a study of Chmura Economics and Analytics. The citation, however, is to the pre-filed testimony of Company witness Wood and Staff witness Eichenlaub, which reference the study.[79] The Chmura study itself, which was commissioned by Virginia Power, is not in the record, and no one from Chmura Economics and Analytics testified in this case to support the firm's findings. Accordingly, if the Commission reaches the issue of economic develop, it should give little, if any, weight to this purely hearsay evidence.

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[76] Report at 82-87.

[77] Report at 82.

[78] Report at 82.

[79] Report at 82, n. 124.

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B. Enhanced Return

In the event that Virginia Power's application is approved, Consumer Counsel agrees with the Hearing Examiner's recommendation that the 100 basis points ROE adder prescribed by Va. Code § 56-585.1 A 6 should apply only for the first 10 years of the service life of the Brunswick facility.[80] The Company seeks to apply the enhanced rate of return on both the investment in the generation facility itself, as well as the investment of at least $89.1 million in associated transmission related infrastructure. The Staff filed a Motion for Ruling on April 4, 2013 wherein it contends the 100 basis points adder should be applied only to the costs of the generation facility itself, but not to costs of associated infrastructure. The Hearing Examiner recommends denial of the Staff motion.[81] Consumer Counsel continues to support the Staff motion, in the event a certificate is granted in this case, for the reasons stated in our Response to Staff filed Motion April 4, 2013.[82]

CONCLUSION

The central issue in this proceeding is whether Virginia Power has adequately considered alternatives to its self-build plan. The Hearing Examiner weighed the evidence and correctly determined the Company had not done so. Consumer Counsel believes the evidence is clear that Virginia Power wanted to add the Brunswick facility to its generation fleet, made the business decision to do so, and then – in an after-the-fact effort to show that it did in fact consider alternatives – the Company undertook a cursory evaluation of alternative sources of capacity.

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[80] In addressing the applicable statutory provision, § 56-585.1 A 6, in the context of the enhanced return to be applied if the application is approved, the Report cites to Consumer Counsel's post-hearing brief and finds that the General Assembly's 2013 amendments to Subsection A 6 are not relevant in this case. Report at 84, n. 133. Consumer Counsel points out that its post-hearing brief did not dispute the applicability of the A 6 ROE adder to this application, as it was filed before January 1, 2013.

[81] Report at 85-86.

[82] Due to Chapter 2, 2013 Acts of Assembly, this issue becomes moot for applications filed after January 1, 2013.

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The Company did not broadly solicit offers third parties or adequately consider actual alternatives to construction of the Brunswick facility. Without undertaking more than a cursory evaluation of alternatives, the Company cannot demonstrate that it complied with the directives of the Commission to adequately consider and weigh third-party generation sources as a pre-requisite to approval of a CPCN application.

The only appropriate remedy here is an order from the Commission directing Virginia Power to broadly solicit and appropriately consider market alternatives to the Brunswick proposal, after which the Company should be afforded the option of re-filing its application for certification of this facility. The application should be dismissed without prejudice.

Respectfully submitted,

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July 3, 2013

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