Before the
State Corporation Commission of Virginia

Case No. PUR-2026-00112

Joint Petition of
Dominion Energy, Inc.,
Virginia Electric and Power Company,
OSW Project LLC,
WG Development Corp.,
CS HoldCo, LLC, and
NextEra Energy, Inc.,

For approval of a disposition and acquisition of control of a public utility under Title 56 of the Code of Virginia

Direct Testimony of
Scott Hempling

on behalf of
Clean Virginia

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Exhibit SH-1: CV of Scott Hempling (attached to this file)

Exhibit SH-2: NextEra's Investor Presentation (May 18, 2026) (separate file)

Exhibit SH-3: Discovery responses cited in this testimony (separate file)

Executive Summary

Under section 56-90, the Petitioners must prove that their transaction "will not impair or jeopardize adequate service at just and reasonable rates." Section 56-90 is not a run-of-the-mill regulatory statute. It does not grant the Commission discretion to allow some "reasonable" impairment or jeopardy. Nor does it allow impairment and jeopardy as long as those harms are accompanied by unrelated inducements proposed to win approval. The "will not" standard establishes a bright line between permissible transactions and impermissible transactions.

This transaction has a single purpose: to monetize VEPCO's franchise at the expense of VEPCO's customers. When the transaction's purpose so clearly conflicts with a utility's customer-service duties, the Commission cannot find no plausible possibility of impairment or jeopardy. The companies' purpose, and their plans to carry out that purpose, cause impairment or jeopardy in five distinct ways.

Cause of impairment or jeopardy #1: Dominion and NextEra treated VEPCO's government-granted monopoly franchise as a private asset to be sold and monetized for private gain. Dominion is selling control of VEPCO's government-granted franchise to get gain for Dominion's shareholders. NextEra is buying control of that government-granted privilege to increase earnings for its shareholders. Dominion wanted the highest acquisition price; NextEra wanted new earnings available from VEPCO's rate-basing, at customers' expense, of future capital expenditures. For the negotiators on both sides, tangible, enforceable customer benefits were never discussed and thus were never the reason for the transaction.

Cause of impairment or jeopardy #2: NextEra will have the power to control VEPCO. That power extends to everything that VEPCO does, including but not limited to budgets, rate increase strategy, tradeoffs between quality and cost, relationships with competitive service providers, capital expenditures, and dividend payments. NextEra has refused to relinquish any of that power. By transferring control of these decisions to NextEra, the transaction deprives VEPCO of the power to fulfill its public-utility service obligations—the obligations to provide adequate service and just and reasonable rates that it took on in return for receiving the franchise. Worse, the transfer of power is to an entity over which the Commission has no control.

Cause of impairment or jeopardy #3: NextEra's business activities—current and future, known and unknown—create new risks for Dominion, VEPCO, and VEPCO's customers. This acquisition subjects Dominion and VEPCO to all of NextEra's corporate complexity—literally "thousands of individual project entities." Worse, once it buys Dominion, NextEra can acquire more companies of any type, industry, location, amount, or risk—all without the Commission's permission and knowledge. *An approval of this acquisition is effectively an approval of all those future NextEra acquisitions—and thus an approval of all the impairments and jeopardies that will result from those acquisitions.* NextEra touts its size as a positive. It is not. In 2025, VEPCO represented 71.6% of the Dominion holding company system's consolidated revenue. If the Commission allows this transaction, VEPCO's 71.6% role in Dominion's holding company system will drop to 26.9% in NextEra's system.

Cause of impairment or jeopardy #4: In seeking, and intending to keep for itself, the $12.5 billion, 23.1% control premium, Dominion acted inconsistently with VEPCO's obligations to its customers. NextEra is paying that amount—on top of the normal stock price—to get control of VEPCO's monopoly franchise—that government-granted privilege to provide essential electric service for profit. The value of that privilege comes largely from the Virginia government's decision to (a) grant VEPCO a monopoly, and (b) compel electric customers to support VEPCO financially by paying Commission-set rates. There is, therefore, no logic to giving the entire $12.5 billion value to Dominion's shareholders.

Cause of impairment or jeopardy #5: Given the investor expectations that they created, the Petitioners will seek to rate-base all new capital expenditures to the exclusion of other possible investors in the new assets. NextEra will have incentive and opportunity to cause VEPCO to exploit unearned advantages in its competition with competitive service providers—advantages arising from its dual status as monopoly and competitor in the large-load market, assisted by VEPCO's competition-weakening GS-5 generation demand charge.

Given the transaction's purpose—selling control of a government privilege for gain, to a risk-causing, rate-base-expanding holding company that refuses to limit future acquisitions—no set of conditions can prevent all impairment and jeopardy. Under the statute's "will not" standard, NextEra would need to cease all activities that plausibly cause impairment or jeopardy. Moreover, no condition can correct a transaction whose origin lies in Dominion's selecting its new owner based on price rather than performance. That origin, by itself, causes this transaction to impair or jeopardize adequate service at just-and-reasonable rates because it precludes acquisitions by better performers.

The Petitioners' efforts to present their transaction as public-spirited all fail. In seeking approval, Petitioners have constructed a story out of inaccuracies and oversimplifications. This story, accompanied by nonfactual buzzwords like "size," "scale," "leading," "innovation," and "best practices," refers to possible improvements in utility financing and operations. But the companies' own official history of their negotiations shows that better performance was never part of the contractual give-and-take.

Then there are the inducements—bill credits, charitable contributions, an office tower, NextEra-controlled professional development organizations. They are a product not of the transaction but of transaction strategy. Under the "will not" standard, offsets to impairment and jeopardy are irrelevant because they eliminate neither the impairment nor the jeopardy.

I. Qualifications and terminology

A. Qualifications

Q. State your name and address.

A. Scott Hempling, 29 Philadelphia Ave., Takoma Park MD 20912.

Q. On whose behalf are you testifying?

A. I am testifying on behalf of Clean Virginia.

Q. **Describe your employment background, education, and experience.**

A. Since 1984, I have worked for every sector of the electric industry, with a concentration on advising or appearing before state utility regulatory commissions. From 1984 to 1990, I worked for a private law firm and then a public interest organization. From 1990 to 2006, I had my own law practice, representing or advising primarily state commissions but also consumer advocacy agencies, independent power producers, and a few utilities. From October 2006 through August 2011, I was Executive Director of the National Regulatory Research Institute (NRRI).[1] In August 2011 I returned to my law practice, focusing on expert witness work and book-writing. From June 2021 through June 2024, I was an Administrative Law Judge at the Federal Energy Regulatory Commission. In June 2024, I returned to my private practice.

I have written three books on utility regulation: *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (Amer. Bar Assoc. 2d ed. 2021); *Preside or Lead? The Attributes and Actions of Effective Regulators* (2013); and *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry*

[1] Founded by the National Association of Regulatory Utility Commissioners (NARUC), NRRI was a Section 501(c)(3) organization, funded primarily by state utility regulatory commissions to provide research to regulatory decisionmakers.

Concentration and Corporate Complication (Edward Elgar Publishing 2020). I have written several dozen articles or chapters on utility regulation for publication in law journals, trade journals, and books.

Since 1997, I have taught the law and policy of utility regulation to thousands of students through in-person and web courses. I have taught public utility law at Georgetown University Law Center for 15 years. In 2025 I added a course at Georgetown Law on justice in the regulation of infrastructural industries. I also teach a 12-week course on public utility law—for several years under the auspices of NARUC's Regulatory Training Institute—to hundreds of attendees now via my own commercial platform.

I received a B.A. cum laude from Yale University in 1978, where I had two majors: Economics and Political Science, and Music. I received a J.D. magna cum laude from Georgetown University Law Center in 1984. I am a member of the Bars of the District of Columbia and Maryland. My CV is attached to this testimony as Exhibit SH-1. All writings listed in my CV for which I still have copies are available from my website, www.scotthemplinglaw.com. Two of my books are available from the publisher (the merger book now for free download); the third is available for free download from my website.

Q. Before what bodies have you presented testimony?

A. I have presented testimony to the state commissions of California, Connecticut, District of Columbia, Hawai`i, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Vermont, Virginia, and Wisconsin. I have also submitted testimony to

federal district courts in Florida, Minnesota, Montana, and Wisconsin. I have testified six times each before committees of the U.S. Senate and the U.S. House of Representatives, and before the state legislatures of Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia.

In the late 1990s and early 2000s I was an external advisor to the Virginia State Corporation Commission on matters relating to the introduction of retail competition, and possibly other matters that I no longer recall. As a Commission advisor on retail competition, I appeared multiple times, along with Commission staff, before the relevant legislative committee headed by then-Senator Norment. During that period, I also presented one or more internal educational seminars to the Commission staff.

Q. Describe your experience with mergers, acquisitions, and inter-corporate transactions.

A. Since 1985, I have been involved as a litigating attorney, a member of a negotiating team, an advisor to a state commission, or an expert witness, in merger, acquisition, or inter-corporate transaction proposals, involving these companies:

- Toledo Edison and Cleveland Electric Illuminating (1985)
- PacifiCorp and Utah Power & Light (1987-88)
- Northeast Utilities and Public Service of New Hampshire (1990-91)
- Kansas Power & Light and Kansas Gas & Electric (1990-91)
- Northern States Power and Wisconsin Electric Power (1992)
- Entergy and Gulf States (1995)
- Potomac Electric Power and Baltimore Gas & Electric (1997-98)
- Carolina Power & Light and Florida Power (1999)
- Sierra Pacific Power and Nevada Power (1998-99)
- American Electric Power and Central and Southwest (2001)
- Union Electric and Central Illinois Light Company (2001)
- Exelon and Constellation (2011-12)
- Entergy and International Transmission Company (2013)
- Exelon and PHI Holdings (2014-15)
- Iberdrola and United Illuminating (2015)
- Central Louisiana Electric and Macquarie (2015)

- NextEra and Hawaiian Electric Industries (2015-16)
- Kansas City Power & Light and Westar (2016)
- AltaGas and Washington Gas Light (2017)
- Santee Cooper (South Carolina) (2019)
- Avangrid and Public Service Company of New Mexico (2021)
- Central Maine Power, Maine Natural Gas, and Avangrid (2024)
- Minnesota Power, ALLETE, Canada Pension Plan Investment Board, Global Infrastructure Partners (2025)

B. Terminology and exhibits

Q. Describe your choices of terminology in this testimony.

A. To avoid confusion among multiple uses of the word "Dominion," I will refer to the franchised Virginia utility within the Dominion Energy, Inc. holding company system as "VEPCO." I will refer to VEPCO's current ultimate holding company (officially "Dominion Energy, Inc.") as "Dominion." Doing so is consistent with the Petition, particularly Exhibit C. I will refer to NextEra's ultimate holding company as "NextEra."

When I discuss acquisitions generally, I refer to the acquiring company as the acquirer, and the to-be-acquired company as the target. In this proposed transaction, which makes Dominion and VEPCO lower-level subsidiaries of NextEra, I refer to Dominion as the target.

One can, not incorrectly, call the transaction a "merger" because it results from an exchange of stock—Dominion's shareholders are exchanging their shares for shares in NextEra. But in practical terms, it is an acquisition of Dominion and VEPCO by NextEra. If the transaction closes, the two companies will not be equal. NextEra will have acquired, and will control, Dominion and VEPCO.

Q. Do you include any exhibits with this Direct Testimony?

A. Yes. As stated above, Exhibit SH-1 is my CV. Exhibit SH-2 is NextEra's Investor Presentation (May 18, 2026). Exhibit SH-3 has all of the discovery responses that I cite.

II. The statute's bright-line standard—*will not impair or jeopardize adequate service at just-and-reasonable rates*—requires consistency among three things: the transaction's purpose, the post-transaction entity's corporate and financial structure, and the Commission's expectations for performance

Q. Explain the purpose of this Part II.

A. Section 56-90 of the Virginia Code provides:

> If and when the Commission, with or without hearing, shall be satisfied that adequate service to the public at just and reasonable rates will not be impaired or jeopardized by granting the prayer of the petition, the Commission shall make such order in the premises as it may deem proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order.

Per section 56-88.1, this standard applies to the direct or indirect acquisition of a public utility.

In this Part II, I explain that this standard draws a bright line between permissible acquisitions and impermissible acquisitions. To apply the standard to any acquisition, the Commission must understand the acquisition's purposes. It must identify whether and how those purposes will lead to actions that impair or jeopardize the acquired utility's obligation to provide adequate service at just and reasonable rates. I recommend that the Commission, in carrying out those tasks, consider and apply the following propositions:

- All utility regulation is based on an assumption that absent regulation, the utility has opportunity and incentive to take actions that impair or jeopardize its customers' interests.
- To distinguish between permissible and impermissible acquisitions, the Commission must apply the statutory phrases to prevent impairment and jeopardy to utility performance.
- To avoid creating impairment and jeopardy, an acquisition's central purpose cannot be monetization, and the post-transaction entity must have certain characteristics and not others.

I then offer conclusions on the statute's bright-line standard.

A. All utility regulation is based on an assumption that absent regulation, the utility has opportunity and incentive to take actions that impair or jeopardize its customers' interests

Q. Why is regulating the actions of public utilities, and their acquisitions by holding companies, necessary?

A. Common to all public regulation of private business actors is this two-part premise: (a) for the service or product involved, the actor's private interests can cause it to act adversely to the customers' interests; and (b) market conditions do not sufficiently mitigate that reality.

When a customer can easily choose among competing sellers, the supplier-customer relationship is not inherently conflicted. The supplier's earnings depend on keeping the customer satisfied; the customer's satisfaction depends on there being multiple suppliers motivated by sufficiently high prices to sell the service at issue. The sellers' and customers' interests are aligned. But when a customer has no choice among sellers, thus is captive to a monopoly seller, the seller's and customers' interests are not aligned. The seller has incentive and opportunity to raise prices above competitive levels, or lower quality (and therefore its own costs) below normal competitive levels, so as to increase earnings above normal competitive levels. To address this inherent conflict between private interest and public interest, we need regulation.

The purpose of regulation, therefore, is to produce performance comparable to what we would see in a competitive market. To produce that performance, regulation has to identify and address the customer-harming seller actions that effective competition would normally constrain.

Q. What does the inherent conflict between a monopoly utility and its customers tell us about a commission's necessary posture?

A. Because of the inherent potential for customer-harming conduct by the utility, commissions may not treat a utility's proposal deferentially. They may not treat the proposal as customer-benefitting just because the utility says it is. Instead, commissions must identify the potential for customer-harming conduct and prevent it. For acquisitions of utilities, a commission needs policies that ensure that the interests of prospective acquirers—before the transaction, during the hearing procedure, and after the transaction—are not misaligned with the interests of those who depend on "adequate service at just and reasonable rates."

As with all regulation, therefore, assessing an acquisition transaction means determining whether it leads to, or increases, situations in which the utility can act adversely to its customers. This Part II next describes the two necessary steps by which a commission makes those determinations. First, to distinguish between permissible and impermissible acquisitions, the Commission must apply the statutory phrases to prevent impairment and jeopardy to utility performance. Second, to avoid creating impairment and jeopardy, the Commission must ensure that the acquisition's central purpose is not monetization, and that the post-transaction entity's characteristics do not cause it to take actions that impair or jeopardize the utility's performance.

B. To distinguish between permissible and impermissible acquisitions, the Commission must apply the statutory phrases to prevent impairment and jeopardy to utility performance

Q. What is the purpose of this subpart?

A. Section 56-90 draws a bright line between acquisitions that "will not" "impair or jeopardize," and transactions that will or might impair or jeopardize, "adequate service

at just and reasonable rates." These statutory phrases are general phrases. They require application by expert administrative agencies—application that will produce the desired utility performance. Without expert application, the statutory phrases risk becoming mere labels that private actors opportunistically attach to their private-interest proposals—as if they were boxes in a checklist that the petitioners check off. A checklist is not actual performance; it is a means of assessing ability to produce performance. A car repair shop has a checklist—brakes, steering, transmission, emissions, air conditioning. The shop uses that checklist to assess whether the customer's car will satisfy the customer's expectations for performance—in terms of, for example, safety, efficiency, and comfort.

Nowhere does the Petition, or the testimony of any of the Petitioners' four witnesses, promise performance. The witnesses merely repeat the statutory phrases as if repetition were outcomes. The Commission has no such luxury. In this subpart of my testimony I therefore connect each of the statutory phrases with an expectation for performance. With these connections, the Commission can assess whether this transaction could impair or jeopardize the Commission's own expectations for performance—in terms of adequacy of service and justness and reasonableness of rates.

1. "Just and reasonable rates"

Q. What is the connection between utility performance and the statutory phrase "just and reasonable rates"?

A. Rates are just and reasonable when they induce a utility to perform in a manner, and reflect utility performance, that is economically efficient and of a quality reflective of competitive market pressures. Rates that satisfy those criteria align the utility's legitimate interests with the legitimate interests of its customers.

1 **Q. What do you mean by "economically efficient"?**

2 **A.** Economic efficiency means biggest bang for the buck. It means no wasted opportunities
3 for performance improvement. Investors seek the highest return for a given level of risk.
4 Business managers seek the highest possible output for a given level of input.
5 Consumers seek the lowest price for a given quality of product; and conversely, the
6 highest quality for a given price. Economic efficiency means allocating rewards to those
7 who bear the burdens, while allocating costs to those who cause or benefit from those
8 burdens.

9 **Q. What do you mean by "a quality reflective of competitive market pressures"?**

10 **A.** Economic regulation seeks to replicate the outcomes of effective competition.[2] This goal
11 is necessarily aspirational, because competitive markets have imperfections—among
12 them, entry barriers, externalities, oligopolistic and monopolistic conduct, and
13 insufficient customer knowledge. Regulation aims to replicate effective competition
14 because effective competition is objective. It ranks competitors objectively, based solely
15 on merit. Effective regulation must do the same.

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[2] As the Maryland Court of Appeals (now called the Maryland Supreme Court) has stated:

> [T]he state through its [public utility] commission takes the place of competition and furnishes the regulation which competition cannot give, and at the same time avoids the expense of duplication in the investment and operation of competing municipal public utilities.

Delmarva Power & Light Co. v. Public Service Com'n of Maryland, 370 Md. 1, 6 (2002) (quoting Oscar L. Pond, *A Treatise on the Law of Public Utilities*, 29-31 § 901 (3d ed. 1925)). *See also* Alfred Kahn, *The Economics of Regulation: Principles and Institutions*, Vol. 2 at 112 (1971, 1988) (stressing the importance of making regulation more intelligent and more effective in those circumstances in which competition is infeasible).

Q. What do you mean by "align the utility's legitimate interests with the legitimate interests of its customers"?

A. Utility regulation is effective when it causes the utility to pursue its shareholders' interests by advancing its customers' interests. That is how effective competition works: The most successful businesses have the most satisfied customers. In both competition and regulation, customers expect service at the quality justified by the price they pay, while shareholders expect returns commensurate with the risks they take. Customers have no legitimate expectation of superlative service at bargain-basement prices; investors have no legitimate expectation of superlative returns at below-average risks. Legitimate expectations, for both the utility and its customers, are supported by the just-and-reasonable standard.

2. "Adequate service"

Q. What is the connection between utility performance and the statutory phrase "adequate service"?

A. Any discussion of utility performance, including how an acquisition might affect that performance, must take into account our unique context: a government-appointed, government-protected monopoly privileged to provide, and obligated to provide, a service essential for modern life and economic activity.

In that context, we must take care with the term "adequate." "Adequate service" can't mean "barely adequate service." It can't mean "passable," "minimal," or "bearable" service. In this life-dependent and economy-dependent context, adequate service must be service that meets the growing needs of a diverse population that ranges from infants to data centers, at a level of reliability and quality that this diverse population needs for comfortable and productive human life and economic life.

1 **3. "Will not impair"**

2 **a. "Will not"**

3 **Q. What is the connection between utility performance and the statutory phrase "will**
4 **not"?**

5 **A.** Regulation is replete with statutory phrases that grant regulators discretion. Phrases like
6 "consistent with the public interest" and "reasonably minimize" authorize the regulator
7 to compromise and balance various interests. Section 56-90 is different. Its "will not"
8 phrase stands out as unique among Virginia statutes, for instead of authorizing
9 compromises, it imposes a ban. Compare section 56-90's "will not" standard with
10 standards in two other Virginia regulatory statutes.

11 **Section 56-46.1** requires the Commission to determine, before approval, that the
12 route of a proposed overhead transmission line will "reasonably minimize adverse
13 impact on scenic assets, historic districts, and environment of the area concerned." This
14 language grants the Commission two layers of discretion: First, the Commission need
15 only "minimize," not prevent, adverse environmental effects. Second, the minimization
16 must be "reasonable," meaning, necessarily, that the minimization doesn't have to be
17 literal, complete, airtight minimization. So the Commission can actually allow adverse
18 effects, if those adverse effects are offset by other values, such as economic
19 development.[3] Notice also the term "reasonably." It allows for tradeoffs. Section 56-90
20 doesn't use the term "reasonably."

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[3] *BASF Corp. v. State Corp. Comm'n, 289 Va. 375, 399-400* (2015). *See also id.* at 394-95:

> When presented with an application for transmission line construction, the Commission must "balance" adverse impacts along with other "factors" and "traditional considerations." Board of Supervisors, 216 Va. at 100, 215 S.E.2d at 923-24. . . . We conclude that the use of the word "reasonably"

1 **Section 56-265.4:4(B)(1)** requires the Commission, before granting a certificate

2 to provide local exchange telephone service, to

> 3 (i) consider whether such action reasonably protects the affordability of
> 4 basic local exchange telephone service . . . and reasonably assures the
> 5 continuation of quality local exchange telephone service; and (ii) find
> 6 that such action will not unreasonably prejudice or disadvantage any
> 7 class of telephone company customers or telephone service providers,
> 8 including the new entrant and any incumbent local exchange telephone
> 9 company, and is in the public interest.[4]

10

11 In this provision, the term "reasonably" limits the verb "assure." There is, therefore, no

12 true assurance of continued quality service. Then the term "unreasonably" actually

13 allows for "prejudice" and "disadvantage"—if those adverse effects are reasonable—

14 presumably in light of other advantages.

15 "The act of choosing carefully some words necessarily implies others are

16 omitted with equal care."[5] In section 56-90, the General Assembly could have used

17 language authorizing Commission discretion to allow some impairment and some

18 jeopardy, if those harms were balanced with other things. The General Assembly

19 explicitly chose differently.

> demonstrates the General Assembly's recognition of the multifactorial balancing that goes into such an investigation, and we find that the Commission did not err.

[4] Discussed in *Level 3 Communs. of Va. v. State Corp. Comm'n*, 268 Va. 471 (2004).

[5] *Rickman v. Commonwealth*, 294 Va. 531, 540 n.3, 808 S.E.2d 395 (2017). *See also Jordan v. Commonwealth*, 295 Va. 70, 75, 809 S.E.2d 622 (2018) ("When the General Assembly employs a specific word [shall] in one section of a statute, and chooses a different term [may] in another section of the statute, we must presume the difference in language was intentional.").

In sum: Section 56-90 is not a run-of-the-mill regulatory statute. It does not have adjectives that authorize departures from the explicit prohibition. It does not grant the Commission discretion to allow some "reasonable" impairment or jeopardy; it does not allow adverse effects if they are balanced against positive effects. It is an absolute, concrete, no-exceptions standard. Its "will not" does not mean "may not." It does not create a presumption of nonimpairment, requiring the Commission or an intervenor to prove impairment. It does not allow for impairment-netted-against-an-offset. It does not allow minor impairment, insignificant impairment, unlikelihood of impairment, or impairment-followed-by-penalty. "Will not" requires an advance finding of no plausible possibility of impairment. "Will not" does not allow Petitioners merely to say that no impairment "is expected."[6] "Will not" requires certainty. The standard thus draws a bright line between transactions that are permissible and transactions that are impermissible. To find a transaction permissible, the Commission must find, with certainty, no impairment and no jeopardy.

Q. Does the statute's "will not" phrase prevent all acquisitions?

A. No. Once one understands what section 56-90 prohibits—any and all impairment and any and all jeopardy—it is not difficult to see what the statute allows. Here are features of transactions that "will not" impair or jeopardize adequate service at just and reasonable rates:

- The acquirer has no business interests—current or future—that have higher risks than the utility business.

[6] In Petitioners' prefiled direct testimony, this passive-voice phrase appears—with no identification of who is doing the "expecting"—at least 15 times. In discovery responses, dozens of times.

- The acquirer either agrees not to control the utility; or alternatively, subjects itself to Commission jurisdiction, so that there is full, independent oversight not only over the Virginia utility, but over all entities with the power to control the utility.

- The acquirer is legally bound not to make any additional acquisitions or mergers without the Commission's permission—permission that can be granted only if the acquisition satisfies the same "will not" standard.

- The transaction's purpose is not acquisition-for-profit but rather acquisition-for-efficiencies; and where that purpose is supported by technical evidence, not loose aspirations about what "is expected." Technical evidence is evidence based on facts and expertise from those who will actually do the work. It is evidence prepared for the transaction negotiations, not talking points constructed by regulatory strategists after the negotiations have produced the deal. It is evidence that demonstrates accountable plans for improving service or lowering its cost.

- The two entities are not competitors in the same product and geographic market, where their combination would reduce competition that the legislative body has authorized.

- The target utility did not use the negotiations to get a premium over the trading stock price. Using the negotiations that way reveals a purpose of selling one company for a profit rather than combining two companies to improve service.

Each of these six factors—each distinguishing the permissible from the impermissible—shows the wisdom, clarity, and logic of the Virginia General Assembly's unique "will not" standard. It is a standard that distinguishes, sharply, the harmful from the helpful. Presented with a transaction having the above six features, the Commission would likely have no basis for finding any plausible possibility of impairment or jeopardy to adequate service at just and reasonable rates.

1 **b. "Impair"**

2 **Q. What is the connection between utility performance and the statutory phrase "will**
3 **not impair"?**

4 **A.** To impair is to lower the quality, to obstruct progress toward a goal, to weaken,
5 compromise, undermine, or harm. The Commission must find that the transaction "will
6 not" do any of those things to what VEPCO owes its customers: adequate service at just
7 and reasonable rates. To find that the transaction will not impair, the Commission must
8 find no plausible possibility of impairment.

9 **Q. In the context of public utility regulation, what is the meaning of "impairment"?**

10 **A.** In the context of public utility regulation, impairment occurs when the incumbent utility
11 fails to satisfy its franchise obligation to provide adequate service at just and reasonable
12 rates, including its long-term obligation to plan to provide that service. If the
13 government grants a utility protection from competition, the utility must perform as if
14 subject to competition. It must make all feasible, cost-effective efforts to reduce costs
15 and increase quality, as would a seller in an effectively competitive market.

16 When a merger or acquisition interferes with that obligation, it can cause two
17 distinct types of harm: status quo harm and opportunity cost harm. I discuss each type
18 next.

19 **Q. Explain what you mean by status quo harm.**

20 **A.** Status quo harm occurs if the transaction diminishes the value to customers of what they
21 are paying for, given the pre-transaction array of assets and ownership. An acquisition
22 involving a public utility can create at least four kinds of status quo harm.

23 *Attention diversion:* Leadership attention is a scarce resource. As the holding
24 company's acquisitions grow, the attention paid to each utility by the holding company's

leadership—the CEO, executive team, and board—unavoidably diminishes. As those individuals become responsible for more businesses and more assets, a utility's specific needs fall in priority.

Change in investor portrait: As the corporate family invests in ventures less financially secure than state-regulated monopoly service, the investor portrait can change. Conservative investors—those who buy-and-hold patiently, content with stable dividends and stable share value or modest growth—no longer can treat the more complex corporate system as a predictable place to put their money. A different type of investor enters: one seeking higher-risk, higher-return investments—like NextEra. These new investors can bring pressures on the holding company system leadership for more risk-adding investments. The additional risks can draw the leadership's attention away from the core utility business. Also, bond rating agencies can no longer give consistently stable ratings based on the utility's operational performance and regulatory treatment, even if both are positive. Those positive factors are diluted by the less predictable, higher-risk factors. I will discuss this issue further in Part V.

Employee diversion: To the extent the holding company is acquiring nonutility businesses, utility employees may believe that the best path to advancement is not through the traditional utility activities, but instead through nonutility activities and holding company strategy. As a result, the utility can lose utility professionals—people whose professional development was funded by customers' rate payments—to nonutility ventures. Indeed, the Petitioners make this precise point—as if it were a positive:

> One of the real benefits of this combination is expanded career opportunity. A larger, faster-growing company means more paths forward for our people, not fewer.[7]

These "expanded career opportunities" are actually opportunities for NextEra to take employees groomed with Virginia customers' rate payments and move them to nonutility or non-Virginia positions. There is no evidence that these "expanded career opportunities" will not result in VEPCO losing employees who are essential to ensuring that VEPCO fulfills its duty to provide adequate service at just-and-reasonable rates.

As well, craftspeople—women and men who make things work—face more job risk because failures in the nonutility businesses can cause the utility to reduce or defer maintenance and modernization. That greater job risk can make recruitment more difficult. It also can deprive the state of the embedded expertise it needs to attract more businesses.

These situations are all plausible possibilities. Under the "will not" standard, the Petitioners must disprove them. Neither I nor the Commission has any obligation to prove them. Nothing in the Petition or in the four witnesses' testimony even acknowledges these possibilities, let alone disproves them.

Entry barriers to new competitors: Where the acquisition gives the incumbent utility a financial incentive to make entry difficult for its competitors, there is harm to competition—the force that our economy relies on to improve and diversify service at reasonable prices. The harm can be direct (by allowing incumbents to raise prices, reduce quality, or slow innovation without fear of losing sales to competitors) or indirect

[7] OAG1-72(b).

(by discouraging prospective entrants, who will view the jurisdiction as uncommitted to competition on the merits).

Q. Explain what you mean by opportunity cost harm.

A. In the context of utility acquisitions, opportunity cost harm occurs if the proposed transaction displaces some other action by the jurisdictional utility that assists the utility in providing adequate service at just and reasonable rates. As stated above, a utility is obligated to provide service at a quality and cost comparable to what competition would produce. A transaction fails this test if it diverts or displaces resources from more productive uses, thereby incurring what economists call "opportunity cost."[8]

In competitive markets, transactions that involve opportunity cost have less success than transactions that do not, all else equal. In the utility acquisition context, disregarding this type of harm violates the principle that regulation should induce performance comparable to what competition would produce.

Q. How does the concept of opportunity cost harm apply to utility acquisitions—where a target utility is considering alternative acquirers and alternatives to an acquisition?

A. A utility acquisition proposal arises, directly or indirectly, explicitly or implicitly, from a competition for control: acquirers competing for control of a target. The target has a fiduciary obligation to pick the acquirer that offers the most to the target's shareholders. But if the target pursues that fiduciary obligation to its shareholders while ignoring its service obligation to its customers, it will choose the acquirer offering the highest price rather than the acquirer promising the best service.

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[8] "[T]he opportunity cost of an item—what you must give up in order to get it—is its true cost." Krugman, P. R., and R. Wells, *Microeconomics:* Third Edition (Macmillan 2012).

Selecting the wrong acquirer necessarily precludes selecting the right acquirer (from the customers' perspective). The resulting loss of economies is opportunity cost. And opportunity cost is impairment, because it deprives customers of the economies that they would have received in a competitive market, where no competitor can afford to substitute a second-best option for the best option. To see it otherwise, to ignore opportunity cost, is to allow the acquirer's and target's interests to prevail over the customers' interest.

Q. How will you apply the concepts of status quo harm and opportunity cost harm to the proposed transaction?

A. In later parts of this testimony, I will describe multiple sources of harm, including these:

- The parties' shared purpose was to monetize Dominion's state-protected status, rather than to achieve the economies that a public-spirited transaction would produce.
- For the negotiators on both sides, true customer benefits were irrelevant to the transaction.
- The negotiations were not disciplined by competitive-market forces.
- NextEra will gain, and refuses to explain how it will use, complete legal control over every aspect of Dominion's future: finances, capital expenditures, management, and operations.
- NextEra's current business activities create new risks for VEPCO and its customers.
- The acquisition brings additional but unknown risks because after acquiring Dominion, NextEra can acquire more companies of any type, industry, location, or amount, without the Commission's permission or knowledge.
- In seeking, and intending to keep for itself, the $12.5 billion, 23.1% control premium, Dominion has acted inconsistently with VEPCO's obligations to its customers.
- To meet the investor expectations that they created, the Petitioners aim to rate-base all new capital expenditures, thereby weakening retail competition and exposing nonshopping customers to the risk of stranded costs—outcomes inconsistent with just-and-reasonable rates.

Each of these features creates a risk of status quo harm (by reducing the efficiency of current operations) and opportunity cost harm (by precluding other structural options that could increase VEPCO's ability to improve its utility performance, including operational efficiency and cost management). These harms should not surprise, because as I will explain in Part III, in choosing NextEra, Dominion acted on motivations that conflicted with VEPCO's duty to provide, and not to impair or jeopardize, adequate service at just and reasonable rates.

4. "Will not jeopardize"

Q. What is the connection between utility performance and the statutory phrase "will not jeopardize"?

A. Everything I stated under "will not impair" applies to the phrase "will not jeopardize," with one crucial addition: Whereas to impair is to cause actual harm, to jeopardize is to create uncertainty. As applied to a desired outcome, "jeopardize" means to make the outcome uncertain, to create a risk of nonachievement. To find that this transaction "will not jeopardize" adequate service at just and reasonable rates, the Commission must find that it does not make that outcome uncertain. The factors listed in the discussion about the phrase "will not impair" therefore apply to the phrase "will not jeopardize." In fact they apply with greater force, because by definition, the probability of causing jeopardy is greater than the probability of causing impairment.

C. To avoid creating impairment and jeopardy, an acquisition's central purpose cannot be monetization, and the post-transaction entity must have certain characteristics and not others

Q. In the context of public utilities, discuss the relationship between (a) adequate service at just and reasonable rates, and (b) the purpose of an acquisition transaction.

A. In any acquisition of a utility, either the transaction's purpose serves the customers, or the customers serve the transaction's purpose. Consider these three questions:

- Which transaction is more likely to be certain not to impair or jeopardize adequate service at just and reasonable rates—(a) a transaction in which the acquirer's dominant purpose is to buy rate-base opportunities funded by customers, and where the transaction's designers and negotiators had no intention and no plan for the transaction to make customers better off; or (b) a transaction whose central purpose is to make customers better off?

- Where state government has granted a utility the monopoly franchise privilege for free, which transaction is certain not to impair or jeopardize adequate service at just and reasonable rates—(a) a transaction in which the target utility's shareholders sell control of that franchise for a gain equaling 5.6 times what customers receive;[9] or (b) a transaction whose designers share the gain between shareholders and customers based on the value each has contributed to that gain?[10]

- When evaluating claims of customer-benefit purpose, which policy serves the public interest—(a) counting as purposes generic statements that lack any technical plans and any enforceable commitments, or (b) counting only purposes backed by technical plans and enforceable commitments?

Q. In the context of public utilities, discuss the relationship between (a) adequate service at just-and-reasonable rates and (b) the characteristics of an acquiring entity.

A. Understanding an acquirer's business activities, corporate structure, and financial structure, and an acquisition's effects on market structure, provides insight into whether

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[9] Dominion's shareholders will receive a control premium of $12.5 billion (as explained in Part VI). The Petitioners are offering the customers $2.25 billion. 12.5/2.25 = 5.56. This calculation is based on the original proposal.

[10] For a discussion of how to assess shareholder and customer contributions to the $12.5 billion gain, see Part VI.D below.

the acquirer's interests would lead it to cause the target utility to act adversely to its customers' right to adequate service at just-and-reasonable rates.

I have already discussed how the statutory phrases "adequate service" and "just and reasonable rates" require a utility to use the most cost-effective practices available, and to provide service at a quality that is comparable to what the pressures of effective competition would produce. But also necessary are these things: a corporate culture and corporate characteristics that align the motivations and incentives of the acquirer's investors, executives, and workers with its regulator's vision and priorities for services and rates.

A commission can best determine if that alignment exists if it has articulated clear policies in four key areas: (a) the permissible business activities within the utility's affiliated corporate system; (b) the types of corporate entities that may own, and the governance structures that may control or influence, the utility; (c) the permissible financial relationships that connect the utility's affiliates within the corporate system; and (d) the market structures affected by the acquisition. Common to these four areas is the need to avoid situations where the holding company's business priorities would lead it to cause its utility subsidiary to act inconsistently with its public-service obligations. I now will discuss each of these areas in turn.

1. Business activities

Q. What considerations do you recommend that the Commission give to the potential for adverse effects on customers resulting from the post-acquisition entity's business activities?

A. In any utility holding company, adverse effects on customers—impairment and jeopardy—can come from the holding company's unrelated business activities. A standalone utility—one affiliated with no other business, serving a single local

territory—experiences no risks of adverse effects from nonutility businesses. The risk of adverse effects grows as the holding company's business activities expand, in terms of either geography or type of business, beyond its home customer base. Geographic expansion (acquiring other utilities in other locations) can benefit customers if there are true increasing economies of scale; but it can hurt customers if operations are impaired by managerial remoteness or diseconomies of scale. Type-of-business expansion (acquiring companies that sell other services, to third parties or to the utility itself) is a two-edged sword: nonutility affiliates can support a utility (as might a subsidiary experienced in acquiring land or buying fuel); or distract it (like affiliates investing in higher-risk competitive businesses).

Q. How can the Commission prevent those adverse effects?

A. A commission can prevent those adverse effects only by identifying and forbidding their sources. The first step is to understand how impairment and jeopardy can arise from corporate complexity. There are three main examples.

The first example is management distraction stemming from affiliated nonutility investments. Competitive challenges, and competitive failures, force management to spend time saving or selling the losers; successes spur management to find more winners.

The second example is affiliate abuse, of two types: (a) the utility affiliate overpaying the nonutility affiliate for services, and (b) the nonutility affiliate underpaying the utility affiliate for services. Besides harming consumers, these

arrangements harm competition by giving affiliates unearned advantages, thereby undermining competition on the merits.[11]

The third example is a financially weakened utility. Each and every month, customers pay the utility for service, usually in cash. When nonutility affiliates fail, or suffer cash shortages, the utility's predictable cash flow tempts the holding company to help the failing businesses—by drawing dividends from the utility or by reducing equity flows to the utility (the holding company being the utility's sole source of equity). And because utilities are capital-intensive, their assets, or even the holding company's stock in the utility, are attractive collateral for third-party loans to the failing affiliates.

2. Corporate and governance structures

Q. What considerations do you recommend that the Commission give to the potential for impairment and jeopardy arising from the post-acquisition entity's corporate and governance structures?

A. In a utility holding company system, there should be at all levels, from the holding company CEO to the substation repair team, a single focus: the utility's performance for its customers. When presented with a proposed acquisition, a commission should ask: Will ultimate control be exercised by individuals whose full focus and professional priority is on service to utility customers? Or will control be exercised by companies and executives having other objectives—objectives like competing to supply nonutility services or planning acquisitions of utility and nonutility businesses—that distract from, or conflict with, the existing utility customers' interests?

[11] I discuss interaffiliate relations in more detail at Parts VIII.B.1.b.v and VIII.C.1.c below.

3. Financial structures

Q. What considerations do you recommend that the Commission give to the potential for impairment and jeopardy arising from the post-acquisition entity's financial structure?

A. Financial structure involves the mix of equity and debt, who holds or controls that equity and debt, and which business activities get priority when financial capital is scarce. How these financial features can affect the utility subsidiary is illustrated by two simple examples:

- If the utility's holding company pays for acquisitions with debt, it becomes contractually bound to make its lenders whole. But the holding company has no contract obligation to supply the utility with sufficient equity or to limit its access to the utility's retained earnings through dividends. In other words, the holding company's contractual need to avoid defaulting on its loan agreements has to take precedence over its noncontractual aspiration to supply the utility with capital. That is an inarguable financial reality.

  This reality applies to this transaction despite there being no new debt associated with it. That is because NextEra is an acquisitive company. It has tried other acquisitions—including acquisitions that would have required new debt—and it has refused to limit or subject to Commission jurisdiction its future acquisitions—which also could involve debt.

- When a nonutility affiliate fails, or faces financial or competitive difficulty, investors view the holding company as more risky, raising its finance costs. The utility affiliate's future capital needs, both equity and debt, become more expensive.

4. Market structures

Q. What factors do you recommend that the Commission consider in assessing how this acquisition can affect the markets in which the many affiliates of the post-acquisition entity will sell services?

A. An acquisition can make a market more competitive or less competitive, thereby increasing or decreasing efficiency, cost, quality, customer service, and innovation. Before addressing an acquisition, therefore, a commission should envision the type of market structure most likely to produce, cost-effectively, those goods and services the

commission wants to be available. Only by envisioning that desirable market structure can a commission assess whether a proposed acquisition impairs or jeopardizes progress toward that market structure.

The Virginia General Assembly has decided that there should be retail competition for High-Load customers. In Part VII below, I address how this acquisition will worsen an existing market structure problem; specifically, VEPCO's incentives and opportunities to favor rate-basing new infrastructure, over having that infrastructure be provided by competitive retail suppliers or the new High-Load customers. The resulting diminution in the competitiveness of the retail market will impair or jeopardize customers' rights to adequate service at just and reasonable rates.

Q. How do you recommend that the Commission apply its policies on business activities, corporate and governance structure, financial structure, and market structure to a proposed acquisition?

A. With a conscientious study of business activities, corporate structure and culture, financial structure, and market structure, the Commission can determine if the post-acquisition entity will have motivations, opportunities, and powers that impair or jeopardize VEPCO's ability to provide adequate service at just and reasonable rates. If the post-acquisition entity will have motivations, opportunities, and powers that can cause it to act adversely to the customers' interests, the Commission then must determine whether it is feasible to design conditions that will, without plausible exception (remember the statutory phrase "will not"), prevent the post-acquisition entity from using its powers to act on those motivations and opportunities—actions that can impair or jeopardize adequate service at just-and-reasonable rates. If those conditions are feasible, then the Commission also must find that it has the legal authority to impose those conditions.

1 The Commission also must determine whether it has the resources, authority,
2 and practical ability to enforce the conditions. By "practical ability," I mean the ability
3 to impose consequences proportionate to the violation—including the ability to require
4 an unwinding of the original transaction, or a revocation of the utility's privilege to
5 serve. Practical ability does not exist if those proportionate financial consequences
6 would have to be moderated by the regulator because of the public's dependence on the
7 wrongdoer and the absence of alternative providers.[12] A transaction that puts the
8 regulator in this position of moral dilemma—a position of weakness—conflicts with
9 customers' right to adequate service at just-and-reasonable rates.
10 On these four major areas—business activities, corporate structure, financial
11 structure, and market structure—I am unaware that the Commission has an express
12 policy. The Commission needs such a policy to address this transaction, because
13 NextEra's acquisition of Dominion would change Dominion, literally overnight.
14 Owning and controlling Dominion would be a NextEra with literally thousands of
15 affiliated businesses, one with a major utility monopoly in Florida and competitively
16 risky generation companies throughout the U.S., one with nuclear generation whose
17 future waste storage plans and costs remain unknown, one with captive insurance

[12] *See, e.g., Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm'n*, 578 So.2d 71 (La. 1991) (upholding commission decision to allow imprudent costs in rates because of concern over the utility's solvency); *Decision on Fines and Remedies to be Imposed on Pacific Gas and Electric Company for Specific Violations in Connection with the Operation and Practices of its Natural Gas Transmission System Pipelines*, Decision 15-04-024 at sec. 5.3.3 (Calif. Pub. Utils. Comm'n Apr. 9, 2015) ("There is no dispute that the Commission must consider PG&E's financial resources in setting the penalty amount").

companies, one that has tried multiple times to buy other utilities and now insists on the unreviewed ability to keep trying.

These many concerns all arise from a utility holding company's central conflict between its shareholders and its utility subsidiary's customers. That conflict is not inherent in a standalone utility business, because there the legitimate interests of shareholders and customers are aligned. But once we introduce additional businesses, the shareholder interest in the profitability of the whole unavoidably conflicts with the customer interest in the performance of their local utility.

D. Conclusion on the relationship between transactional purpose and the prohibition against impairment and jeopardy

Q. On the principles applicable to this transaction, summarize your recommendations to the Commission.

A. I recommend that the Commission assess the Petitioners' direct submission by asking this question: Does it show that NextEra's presence and control of Dominion and VEPCO will never, under any and all plausible circumstances, impair or jeopardize VEPCO's ability to provide, and the Commission's ability to ensure that VEPCO provides, adequate service at just-and-reasonable rates?

The Petitioners cannot meet that test. In pursuing the transaction's true purposes, the NextEra-controlled, combined company will have motivation and opportunity to act adversely to the VEPCO customers' right to receive adequate service at just-and-reasonable rates. The Petitioners' purpose, and their plans to carry out that purpose, cause impairment and jeopardy in these five ways:

- This transaction converts a government-granted, public-interest franchise into a private asset sold for private gain.

- NextEra will have—and refuses to relinquish—total legal control over every aspect of Dominion's finances, capital expenditures, management, and operations.

- NextEra's business activities—current and future, known and unknown—create new risks for VEPCO and its customers.

- In seeking, and intending to keep, a 23.1%, $12.5 billion control premium, Dominion has acted inconsistently with VEPCO's obligations to its customers.

- To meet the investor expectations that they created, the Petitioners must favor rate-based transmission and generation over competitively tested alternatives, weakening competition and subjecting customers to the risk of stranded costs.

Q. Does your approach rule out all mergers and acquisitions?

A. No. I identified above characteristics of acquisitions that would cause them to satisfy the statute's "will not" standard. The above-described understanding of that standard distinguishes transactions whose central purpose is utility service from transactions whose central purpose is something else. It screens out acquisitions that impair or jeopardize adequate service at just and reasonable rates, and screens in those that don't. It allows the transacting companies to demonstrate—with facts, not with advertising—that their purpose is to improve performance. And by preventing adverse acquisitions, this understanding of the standard makes more room for, and invites utility boards and executives to look for, acquisitions that improve service or lower its cost. True performance-enhancing acquisitions should not have to compete for scarce capital and scarce regulatory attention with acquisitions that seek only private gain for the transacting companies.

Q. What if the Commission views the "will not impair or jeopardize" standard as allowing for some risk of harm, on the grounds that all business—even a pure-play, local utility business—involves some risk?

A. The direct answer is this: The Commission would be disregarding the General Assembly's words and its explicit purpose. The Commission would be arrogating a power that the citizenry's elected representatives kept for themselves—to exclude acquisitions that impair or jeopardize.

As for the notion that all business—even a utility business—involves risk, that statement is true. But VEPCO and NextEra conduct very different businesses, thus incur very different risks. That difference, between a utility company and a holding company, undermines the argument posed by the question.

For a pure-play utility business like VEPCO, the risks arise from capital expenditures and operating expenses necessary to create and operate the complex machinery that produces and delivers electricity. The utility conducts those activities solely to serve its utility customers. Because customer service is the sole reason for those risks, the logical, standard practice is to make the local utility customers compensate investors for those risks—such as through the revenue requirement's components for cost of debt and cost of equity. The customer then gets the benefits of the service. There is symmetry between the benefits that customers receive and the risks and costs that they bear.

With NextEra's acquisition, the new risks arise not from VEPCO's utility business but from NextEra's Florida utility and U.S. nonutility businesses. The symmetry thus disappears: Because of what financial analysts call "contagion," risks associated with the cost of capital can fall on the utility's customers, while the benefits that flow from those risks go entirely to NextEra. As well, the nonutility businesses

receive indirect financial support from VEPCO's captive customers, but those customers receive no compensation for that support from NextEra's investors.

To ignore this difference, between (a) the symmetry embedded in proper utility ratemaking and (b) the asymmetry caused by exposing utility customers to nonutility business risks, is to misapply a general concept of risk to this specific situation.

Q. What if the Commission views the "will not" standard as allowing minor harm, as long as that harm is offset by benefits?

A. The Commission would have, again, erroneously converted an explicit prohibition against harm into a permission of harm. The Commission then would be making two additional errors.

First, as I will explain in Part IX.B, the Commission would be crediting as benefits inducements that come from outside the NextEra-Dominion transaction. Section 56-90 aims its prohibition of harm at harm from granting "the petition." Any benefits that the Commission could use to offset the harm must also come from granting "the petition." Under section 56-90, the "petition" to be approved is the request for approval of the transaction that section 56-89 says requires a petition: a transaction to acquire control of a public utility. The Petitioners' proposed benefits don't come from the transaction; they come from NextEra's internal treasury—an asset having no connection to the transaction, which is the combining of two holding companies. The proposed benefits don't make the status quo service more "adequate" or lower cost, because they do not affect cost. They are no different than sending checks in the mail, the only difference being that for the $10 a month, NextEra will be commandeering VEPCO's billing procedures to send the money. The proposed tangible benefits—$10 a

month for a few years, office tower, charitable contributions—are all remote from the transaction because they come from NextEra funds that pre-exist the transaction.

Second, the nontangible, aspirational claims—the "better access to capital" and "best practices" and "scale" and "size"—these are the same tired advertisements that accompany most utility M&A proposals in other states. They have no evidentiary backing—not in this proceeding; and Petitioners cite no evidence from the dozens of mergers and acquisitions that have occurred in other states.

I turn now, in Parts III–VII, to the acquisition's five distinct causes of impairment and jeopardy.

III. Cause of impairment or jeopardy #1: Dominion and NextEra treated Dominion's control of a government-granted, public-interest monopoly franchise as a private asset to be sold for private gain

Q. Are there risks to customers in the way Dominion and NextEra became signatories to their Merger Agreement?

A. Yes. To see why, it is necessary first to understand this transaction's essence. Dominion is selling control of its government-granted franchise privilege for its own private gain. NextEra is buying control of that privilege for its own private gain. Dominion sought the highest acquisition price. NextEra sought to buy future rate-base opportunities. Their shared purpose, their central purpose, was to monetize VEPCO's state-granted, state-protected control over VEPCO's captive customers. The transaction negotiations had nothing to do with improving performance for utility customers.

By placing their private-interest goals above public-interest performance, the two companies produced a transaction that is inconsistent with VEPCO's obligation to take no action that would impair or jeopardize adequate service at just-and-reasonable rates. I explain why in these five subsections:

- Dominion's purpose: Sell its government privilege at the highest possible price.
- NextEra's purpose: Buy rate-base opportunities to be funded by VEPCO's captive customers.
- For the negotiators on both sides, true customer benefits were irrelevant to the transaction.
- The negotiations were not disciplined by competitive-market forces.
- By focusing primarily on gain, Dominion acted inconsistently with VEPCO's duty to serve its customers at just-and-reasonable rates.

A. Dominion's purpose: Sell VEPCO's government-granted privilege at the highest possible price

Q. Explain the nature of this transaction, from VEPCO's perspective.

A. For decades, VEPCO has been the beneficiary of a government-granted franchise: the exclusive right and privilege to provide electric service to captive customers within a state-assigned territory that, for all customers except High-Load customers, no competitor may enter. VEPCO also enjoys rates set by this Commission under legal principles that promise the utility a reasonable opportunity to recover, and to earn a fair return on, the used-and-useful investments that it prudently made to serve those captive customers.

VEPCO's franchise is a valuable privilege. It has enabled Dominion's shareholders to earn reasonable profits from Dominion's activities at relatively low risk. Mechanically speaking, Dominion's shareholders are selling to NextEra their Dominion stock; but practically speaking, they are selling to NextEra—which is not a public utility and therefore has no obligation to serve—complete control of this privilege.

Understood for what it is—selling control of a public privilege for private gain—this transaction cannot satisfy the statute's "will not" standard. Dominion was not seeking the best provider of service for its customers; it was seeking the greatest financial gain from the sale of its stock. The transaction was not the product of a thorough Dominion process designed to identify the option that would best protect or improve service for customers—or even the option certain to cause no impairment or jeopardy. Rather, the transaction arose from a financial opportunity to monetize Dominion's regulated utility business. Because the transaction's fundamental purpose was not to secure or improve adequate service at just and reasonable rates, and because

1 Dominion made no effort to determine whether VEPCO's control by NextEra might
2 cause impairment or jeopardy, there is no basis for finding that the transaction "will not
3 impair or jeopardize adequate service at just and reasonable rates."

4 **Q. Explain why Dominion selected NextEra.**

5 **A.** As made clear in the S-4 Proxy Statement's narrative,[13] Dominion wasn't looking for
6 any acquirer, let alone an acquirer that could improve service or lower cost or an
7 acquirer whose control would definitely not cause impairment or jeopardy. Initially,
8 Dominion wasn't looking for anyone to improve its access to capital, or to improve its
9 operations, or to increase "scale," or to improve its bond ratings, or to lower its
10 operating costs, or to increase its profits, or to help it prepare for new demand, or to give
11 its customers bill credits. Dominion was busy working on its annual plans based on its
12 standalone status. It was only when NextEra's CEO Ketchum offered a premium that
13 Dominion decided, on Nov. 14, 2025, to consider an acquisition—and to consider it
14 seriously enough to sign a mutual nondisclosure and standstill agreement.[14]

15 Dominion continued to work on its standalone plans, while also comparing the
16 profitability of those plans to the profitability associated with NextEra's offer. There is
17 no evidence that Dominion looked into, or even thought about, whether NextEra had
18 characteristics that could expose VEPCO to impairment or jeopardy. Dominion's

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[13] The S-4 Proxy Statement (July 9, 2026) is available at https://www.sec.gov/Archives/edgar/data/753308/000110465926082301/tm2614888-13_s4.htm. The accession number is 0001104659-26-082301. NextEra's SEC identifier (CIK) is 753308.

[14] S-4 Proxy Statement at 70-71.

management did recognize that there were "risks" associated with NextEra's proposal.[15] But there is no evidence that those "risks" related to VEPCO's ability to provide adequate service at just and reasonable rates. Dominion's advisor J.P. Morgan also looked at alternative counterparties, focusing on "their likely ability to pay a premium, their growth potential and selected other key considerations."[16]

Starting in January 2026, Dominion's Board focused more on NextEra, "instruct[ing] management to request a meaningful increase in the premium" along with more clarity on regulatory commitments. Dominion also was sufficiently concerned about the financial condition of NextEra's nonutility businesses to "engage outside consultants" on that topic.[17]

At Dominion's repeated insistence, NextEra raised the control premium from 20.2% (October 2025) to 22.3% (March 2026) to a final 23.1% (all measured against the May 15, 2026 closing price, and excluding the $360 million cash payment to address Dominion stock dilution).[18]

On March 6, 2026, Dominion received interest from a "Party A" (not identified in the Proxy Statement). If NextEra were truly the partner with whom Dominion could create the most customer benefits (or any customer benefits), Dominion would have rejected Party A immediately, for that reason alone. Instead, Dominion's Board engaged

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[15] *Id.* at 71-72 ("Management of Dominion Energy also discussed risks and regulatory considerations in NextEra Energy's preliminary proposal.").

[16] *Id.* at 73.

[17] *Id.* at 73.

[18] *Id.* at 73-80.

with "Party A," even after March 25, 2026. Why did Dominion not then reject Party A? Answer: "Dominion continued discussions with the goal of seeking improved terms from Party A."[19] Dominion eventually rejected Party A—because, in part, Party A's premium was "materially below" NextEra's offer.[20]

Once Dominion received, from NextEra and from Party A, these signals that it was a desirable acquisition target, Dominion could have put the word out for acquirers whose central purpose would be to improve service or lower its customers' cost. Dominion never did so. Dominion focused only on the two companies that were offering, or might offer, a good price.

These facts, taken together, contradict Mr. Blue's under-oath insistence that "we entered into this combination because it will allow us to serve our customers, our communities, and our shareholders even better than our already strong performance as a stand-alone company today."[21] If the purpose of this transaction were to "serve our customers," it would not have been necessary to insist on NextEra's raising its offer, or to delay agreement with NextEra in hopes of getting more from Party A, or to limit the effort to only the two entities that appeared. And there would be extensive evidence of Dominion pressing NextEra for specific commitments to improve VEPCO's service and lower its costs. There is no such evidence—no strong evidence, no weak evidence, no evidence.

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[19] Petitioners' Response to CV1-80.

[20] S-4 Proxy Statement at 80.

[21] Blue Direct at 5:21.

B. NextEra's purpose: Buy rate-base opportunities, to be funded by VEPCO's captive customers

Q. What do you recommend that the Commission understand about NextEra's transactional purpose?

A. NextEra is buying opportunities to grow VEPCO's rate base. Doing so gets for NextEra's shareholders a portion of Virginia-related earnings, paid for by VEPCO's customers, that would otherwise go solely to Dominion's shareholders.[22]

We know that paying the premium to get new earnings is NextEra's central purpose, because the transaction's foundational documents state no accountable, enforceable customer-benefit purpose. Nowhere in the Proxy Statement, or in the Investor Presentation, is there mention of a NextEra plan—a real plan—to provide Virginia electric service at a higher quality or lower cost than VEPCO's status quo service. NextEra has produced no document indicating that customer benefit was ever even a minor reason for this acquisition. The company witnesses' under-oath assertions about a customer-benefit purpose are all post-hoc assertions. They are not factual evidence of contemporaneous negotiating purpose.

Under the just-and-reasonable standard, VEPCO has a duty to provide service at the highest cost-effective quality, and at a price no higher than necessary. If customer benefit were Dominion's true reason for this transaction, VEPCO's duty would have prevented it from insisting on a premium, to avoid NextEra's walking away. The only reason for NextEra to offer a premium, therefore, and the only reason for Dominion to

[22] See Investor Presentation (May 18, 2026) at 30 ("Largest regulated capital investment opportunity in the industry by wide margin"; "Unmatched large load opportunity"). *Id.* at 40 ("~11% regulatory capital employed CAGR through 2032"). Indeed, one reason why Dominion insisted on a premium was to compensate for those forgone earnings.

insist on one, is if each party's real priority was money: NextEra paying something for the opportunity to increase its future earnings, and Dominion getting the highest possible price in return for shifting to NextEra's shareholders a portion of its future earnings. And that is exactly what this transaction is: a financial arrangement.

NextEra's CEO Ketchum says that "NextEra's experience will complement and bolster Dominion's capabilities" in meeting Virginia's growing demand.[23] This is self-praise substituting for facts. He points to no deficiency in VEPCO's capability that would require "bolstering." His term "complement," used properly, applies when different things are meshed to produce new value, as when a sandwich emerges from bread and baloney. But he describes neither bread nor sandwich. Offering self-praise as evidence—implicitly expecting the Commission to copy those phrases into an approval order—is an invitation to the Commission to undermine its institutional legitimacy.

C. For the negotiators on both sides, tangible, enforceable customer benefits were irrelevant to their transaction

1. The Proxy Statement shows that the negotiators mainly cared about transaction price and regulatory approval

Q. In the negotiations over the transaction, on what subjects did Dominion and NextEra focus?

A. The Proxy Statement makes clear that the negotiations focused on these items:[24]

- growth in earnings from rate-basing more capital expenditures,
- the size of the purchase price,
- the form of the purchase price (cash vs. all stock vs. mix of cash and stock),

[23] Ketchum Direct at 4:20-5:6.

[24] S-4 Proxy Statement at 70-83.

- the penalty Dominion would pay NextEra if Dominion backed out to take a higher offer from a different acquirer,
- the fee NextEra would pay Dominion if NextEra backed out to take an offer from an acquirer,
- tax considerations,
- whether and which Dominion individuals would have seats on NextEra's Board,
- regulatory diversification,
- "enhanced balance sheet and credit profile," and
- dividend policy.

None of these terms has any connection to customer benefits.

The Proxy Statement's list of "Reasons for the Merger" does include these vague categories of customer benefits: "increased scale and scope," and "complementary strengths and combined expertise." But as with the testimony that recites those same points, in often the same words, these items are too generic to count as evidence.

Despite extensive discovery by the intervenors, the Petitioners have provided no internal documents demonstrating any factual support for their generic assertions that the transactional purpose was to improve service or lower costs for Virginia customers. There is no evidence of pre-negotiations or mid-negotiations documents specifying performance outcomes; no documents showing plans to produce performance outcomes. Given Petitioners' failure to provide factual support, the Commission must assume that there is none. With no document of a purpose to benefit customers, the Commission must conclude that the central purpose was to benefit shareholders. The real reason for the transaction—the reason that mattered to the voting shareholders, the rating agencies,

and the authors of the fairness opinions—is the private financial benefit to Dominion and NextEra.

Q. Is there other evidence from the negotiations that customer benefit was not Dominion's purpose?

A. Yes. According to the Proxy Statement narrative, at no point did Dominion's executives and advisors demand, or even ask, that prospective acquirers offer any operational or cost improvements that would benefit the customers. There is no evidence that any Dominion Board member directed Dominion management to say to NextEra, "Show us what VEPCO is doing now that you can do better, as a result of our selling you control of our franchise, so that we can assess your offer from the perspective of our customers." During the Dominion Board's deliberations, no one gathered or presented any serious information, conducted serious analyses, or made any serious plans, about how the transaction would affect VEPCO's performance for its customers. Customer benefits were beside the point.

Q. What about the bill credits?

A. As I explain in Part IX.B below, the funds to support the bill credits will come from NextEra's treasury, not from transaction savings. They are the product of regulatory strategy to induce support, not transactional design to produce savings. They were not the reason why the Dominion Board voted for the acquisition. For Dominion and NextEra, this transaction was purely a financial transaction—a sale of franchise control to increase earnings for both.

Q. What if Dominion argues that the Proxy Statement never mentioned true customer benefits because the chief purpose of a Proxy Statement is to discuss shareholder benefits?

A. The premise is correct but the reasoning is wrong. Yes, the chief purpose of a Proxy Statement is to explain to shareholders why the transaction is good for them. But had Dominion insisted on serious customer benefits and had NextEra committed to provide them, the commitment would have been a cost and risk to NextEra shareholders—the cost of implementation and the risk of penalties if implementation failed. The Proxy Statement would have had to disclose those costs and risks.

Q. Didn't each of NextEra and Dominion obtain a fairness opinion from its respective financial advisor?

A. Yes, but the purpose of a fairness opinion is to verify that the price is fair to shareholders; it tells us nothing about fairness to customers.

Q. On this subject of transaction purpose, what conclusion do you recommend that the Commission draw about the Petitioners' candor?

A. On candor, I recommend that the Commission draw a negative conclusion. The main reason is the extent to which the Petitioners' four witnesses insist, wrongly, that the transaction's purpose was customer benefit when the true purpose was shareholder benefit. Consider also how Petitioners responded to Staff's straightforward question 3-112:

> Please refer to Blue Direct at 6-7. Please explain in detail the extent to which the "historic challenges associated with unprecedented load growth and resource adequacy challenges" and the fact that the DOM Zone in PJM is "home to the largest concentration of data centers in the world" drove DEI's decision to merge with NextEra.

Key is Staff's phrase "the extent to which." Staff was obviously seeking evidence about the transaction's purpose. A question about the extent to which needs an answer that refers to extent—as in wholly, partially, minimally, not at all, 51%, 2%. The response to

Staff 3-112 is a complete nonanswer, a mere repetition of the generic, formulaic advertising that appears throughout the Petitioners' commentaries:

> As the referenced testimony, which continues through page 8, notes, the Merger will bring greater scale, financial strength, and operational breadth and experience to both Dominion and NextEra that will be beneficial as utility operators face the historic challenges associated with unprecedented load growth, including from data centers. The ability to manage that load growth here in Virginia responsibly, effectively, fairly, and efficiently—which DEV is currently successfully doing—will be further enhanced by the Merger. As the referenced testimony further notes, though, data center load growth is not the sole driver for the Merger from either DEV's or DEI's perspective. Load growth and economic development are occurring across the states which the Dominion and NextEra utilities serve for other reasons as well. And even without that load growth, there are customer benefits associated with being able to buy, build, finance, and operate more efficiently and effectively as a utility. The benefits of the Merger are holistic in that regard.

2. Confirmation of the irrelevance of customer benefits: Both companies reserved the right to walk if a more profitable proposal appeared

Q. Is there other information showing that customer benefit was not the transaction's purpose?

A. Yes. Customer benefit—or at least guaranteeing that the transaction "will not impair or jeopardize adequate service at just and reasonable rates"—could not have been a transaction purpose because each company granted to the other the right to walk if a "Superior Proposal" appeared. The Merger Agreement defines a Superior Proposal as one that is more profitable, not one that is better for the customers. Relevant details follow.

Merger Agreement sec. 4.02(d) provides this right to Dominion:

> (d) Notwithstanding anything to the contrary contained in Section 4.02(a) or Section 4.02(b), prior to the Company Requisite Vote, in response to a bona fide written Company Acquisition Proposal that did not result from a breach of this Section 4.02, if the Company Board determines in good faith (x) after consultation with the Company's financial advisors and outside legal counsel, that such Company Acquisition Proposal is, or

> could reasonably be expected to lead to, a Company Superior Proposal and (y) after consultation with the Company's outside legal counsel, that the failure to take any of the following actions would be, or would reasonably be expected to be, inconsistent with its fiduciary duties under applicable Law, the Company may (i) furnish or provide information (including non-public information or data) regarding, and afford access to, the business, properties, assets, books, records and personnel of, the Company and its Subsidiaries, to the Person making such Company Acquisition Proposal and its Representatives; provided, however, that the Company shall as promptly as is reasonably practicable make available to Parent any non-public information concerning the Company or its Subsidiaries that is provided to any Person pursuant to this clause (i) to the extent such information was not previously made available to Parent and (ii) engage in discussions and negotiations with such Person and its Representatives with respect to such Company Acquisition Proposal; provided, further, that, prior to taking any of the actions set forth in the foregoing clauses (i) or (ii), the Person making such Company Acquisition Proposal has entered into an Acceptable Company Confidentiality Agreement (it being understood that the negotiation of such Acceptable Company Confidentiality Agreement shall not be deemed to be a breach of Section 4.02(a) or Section 4.02(b)).

Translated: If after the signing of the Merger Agreement but before closing, a different prospective acquirer (meaning, not NextEra) offers Dominion a transaction that, compared to the transaction with NextEra, is more beneficial to Dominion's shareholders, where Dominion's rejection of that alternative transaction would violate its fiduciary duty to its shareholders, Dominion has reserved the right to accept that transaction in place of its transaction with NextEra.

Merger Agreement sec. 4.03(d) provides a comparable right to NextEra:

> (d) Notwithstanding anything to the contrary contained in Section 4.03(a) or Section 4.03(b), prior to the Parent Shareholder Approval, in response to a bona fide written Parent Acquisition Proposal that did not result from a breach of this Section 4.03, if the Parent Board determines in good faith (x) after consultation with Parent's financial advisors and outside legal counsel, that such Parent Acquisition Proposal is, or could reasonably be expected to lead to, a Parent Superior Proposal and (y) after consultation with Parent's outside legal counsel, that the failure to take any of the following actions would be, or would reasonably be expected to be, inconsistent with its fiduciary duties under applicable Law, Parent may, (i) furnish or provide information (including non-public information or

> data) regarding, and afford access to, the business, properties, assets, books, records and personnel of, Parent and its Subsidiaries, to the Person making such Parent Acquisition Proposal and its Representatives; provided, however, that Parent shall as promptly as is reasonably practicable make available to the Company any non-public information concerning Parent or its Subsidiaries that is provided to any Person pursuant to this clause (i) to the extent such information was not previously made available to the Company and (ii) engage in discussions and negotiations with such Person and its Representatives with respect to such Parent Acquisition Proposal; provided, further, that, prior to taking any of the actions set forth in the foregoing clauses (i) or (ii), the Person making such Parent Acquisition Proposal has entered into an Acceptable Parent Confidentiality Agreement (it being understood that the negotiation of such Acceptable Parent Confidentiality Agreement shall not be deemed to be a breach of Section 4.03(a) or Section 4.03(b)).

Translated: If after the signing of the Merger Agreement but before closing, NextEra receives an offer to have a defined portion of its business acquired by an entity other than a Dominion affiliate, where that offer is more beneficial to NextEra's shareholders than NextEra's proposed transaction with Dominion, and where NextEra's rejection of that more favorable agreement would violate NextEra's fiduciary duty to its shareholders, NextEra has reserved the right to accept that transaction in place of its transaction with Dominion.

These provisions underscore how remote was the two companies' transactional purpose from VEPCO's duty to provide adequate service at just and reasonable rates. Worse than remote, the transactional purpose was literally indifferent to how NextEra's characteristics and plans would expose VEPCO to impairment and jeopardy. Dominion could reject NextEra in favor of another acquirer, even one less likely to produce customer benefits, as long as the alternative offered the Dominion shareholders more money—and regardless of whether that alternative would bring impairment and jeopardy.

1 I recognize that provisions like these are commonplace in merger agreements for
2 publicly traded companies. They protect a target's board from shareholder lawsuits for
3 breach of fiduciary duty to seek the highest price. But fiduciary duty to shareholders
4 under state corporate law doesn't change VEPCO's duty to customers under state
5 public-utility law. Otherwise, routine limits on the authorized return on equity, or safety
6 standards with penalties, would be superseded by the fiduciary duty to get the highest
7 possible profit. The question that the Commission must answer is whether this
8 transaction "will not" "impair or jeopardize" "adequate service" at "just and reasonable
9 rates." That standard does not allow a government-protected, government-privileged
10 utility to sell control of its franchise, its assets, its operations, and its decisionmaking on
11 terms that maximize its gain while making customer benefits an afterthought.

12 **D. The negotiations were not disciplined by competitive-market forces**

13 **Q. Is there a reason why this transaction deserves skepticism rather than deference?**

14 **A.** Yes, because the transaction was not disciplined by the forces of effective competition.
15 In markets characterized by effective competition, competitive success depends largely
16 on merit. In the mergers-and-acquisitions context, the target's desire for a high price is
17 disciplined by the acquirer's need to retain the target's former customers. Consider the
18 sale of an apartment building, in a city with plenty of apartment vacancies—and
19 therefore effective competition among building owners. The building seller will demand
20 the highest possible price, but the buyer will resist paying a price above what she
21 predicts she can recover as she competes for tenants. So the building buyer will pay a
22 premium no greater than the new economic value she believes she can create as the new
23 owner. The new owner can create new value by increasing quality, allowing her to raise
24 the rent; or by lowering costs, allowing her to increase earnings. That new economic

value is a customer benefit. Competitive pressures discipline the acquisition price. The interests of building seller, building buyer, and current and future tenants are all aligned. With that competitive discipline in place, an acquisition contest run by the seller, based on highest possible price, can produce a public-interest result. In a merger or acquisition involving a monopoly, where there is no competitive process, that discipline is missing.

E. By focusing primarily on gain, Dominion acted inconsistently with VEPCO's duty to serve its customers at just-and-reasonable rates

Q. What is a public utility's obligation to its customers?

A. A utility receives from its state government the privilege of selling an essential service, free of the pressures of competition. In return, the utility must serve all its customers using the most cost-effective practices, charging just-and-reasonable rates reflecting the lowest feasible cost. Consider these precedents:

- A utility must operate with "all reasonable economies."[25]
- A utility must use "all available cost savings opportunities...as well as general economies of management."[26]
- A utility has an obligation to serve at "lowest feasible cost."[27]

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[25] *El Paso Natural Gas Co. v. Federal Power Commission*, 281 F.2d 567, 573 (5th Cir. 1960).

[26] *Midwestern Gas Transmission Co. v. E. Tenn. Natural Gas Co.*, 36 FPC 61 (1966), *aff'd sub nom. Midwestern Gas Transmission Co. v. Federal Power Commission*, 388 F.2d 444 (7th Cir. 1968).

[27] *Potomac Elec. Power Co. v. Pub. Serv. Comm'n of D.C.*, 661 A.2d 131, 137 (D.C. 1995).

These regulatory standards replicate the pressures of competition.[28] In effectively competitive markets, a firm that fails to operate with all reasonable economies, or that fails to serve at lowest feasible cost, or that fails to achieve all available savings, loses its customers to companies that perform better. If VEPCO is not subject to this discipline, it will not be providing adequate service at just-and-reasonable rates.

Q. Did Dominion's selection process square with VEPCO's obligation to its customers?

A. No. Dominion focused primarily on its shareholders' gain—as evidenced by its insistence on a premium and on reserving the right to walk if a more shareholder-friendly proposal arrived. By focusing primarily on its shareholders' gain, it subordinated its duty to maximize customer benefit—a requirement of just-and-reasonable rates. Dominion thus impaired—by not maximizing—VEPCO's customers' right to adequate service at just-and-reasonable rates.

Q. Does your view of a utility's responsibility preclude all acquisitions of utilities?

A. No, only acquisitions that create opportunity and incentive for the combined company to impair or jeopardize the utility customers' interests. Had Dominion acted consistently with VEPCO's obligation to make rates just and reasonable, its process for selecting acquirers would have placed customers first. It would have started with a list of performance improvements or cost reductions that it wanted to achieve, then searched for the acquirer most likely to make those performance improvements and cost

[28] As required by *Delmarva Power & Light Co. v. Public Service Comm'n of Maryland*, 370 Md. 1, 6 (2002).

reductions happen. Dominion had no such list, so it made no search. It had no interest in performance-improving acquisitions.

Q. Isn't seeking the highest price what profit-maximizing acquisition targets routinely do?

A. In effectively competitive markets, yes; but as I explained in Part III.D above, using the apartment building sale as an example, effective competition imposes a constraint. In competitive markets, the target's desire for a high price is disciplined by the acquirer's need for the target to keep its customers.

Q. Didn't the Dominion Board have a fiduciary duty under state corporate law to maximize its shareholders' wealth?

A. I assume so. But a corporate board's fiduciary duty is subject to its other legal duties, like its duties under utility law. Otherwise companies could, without legal consequence, evade taxes, trade with forbidden countries, or subject workers to health hazards, all to carry out their fiduciary duty to maximize shareholder wealth.

The analogy between competition and regulation works here as well. As I have discussed, in competitive markets the fiduciary responsibility to get the highest price is constrained by market reality: If the acquisition target demands too high a price, the acquirer will be unable to serve its customers without raising prices or cutting quality, thereby losing customers. In effectively competitive markets, the fiduciary pursuit is constrained by competition; in utility monopoly markets, the fiduciary pursuit must be constrained by this Commission's regulatory decisions.

Applying that reasoning here: Whatever corporate law duty the Dominion Board had to maximize shareholders' wealth is constrained by VEPCO's state-law duty to serve its customers cost-effectively, charging rates no higher than just-and-reasonable levels. Choosing NextEra based on price instead of performance violated VEPCO's

public-utility duty. That is why utility holding companies are inherently problematic—they have no public-utility duty. The Commission can prevent this misbehavior by confirming that the franchise is a privilege to be earned through performance, not an asset to be sold for gain.

Q. What if Petitioners argue that the purchase price was comparable to that paid in other acquisitions of utilities?

A. If those other transactions were, like this one, undisciplined by competition for the customers' benefit, the argument is circular. The $12.5 billion, 23.1% control premium at issue here has no objective connection to VEPCO's obligation to make its rates just and reasonable. The control premium's sole characteristic is that it is the highest price Dominion could get NextEra to pay.

IV. Cause of impairment or jeopardy #2: NextEra will gain—and refuses to relinquish—complete legal control over every aspect of Dominion's future: finances, capital expenditures, management, and operations

Q. Explain the purpose of this Part IV.

A. Dominion seeks to sell to NextEra control of a Commonwealth-created, Commonwealth-protected privilege. That privilege has unique value because it comes from the Commonwealth's decision to make electric service a monopoly service, for all but High-Load customers. This Part IV now explains what control means in reality—an explanation made difficult by NextEra's inability or refusal to reveal anything about its control plans. This Part has these subparts:

- Complete ownership means complete control.
- Asked to cede control over VEPCO, NextEra refused.
- NextEra's references to Virginia-based decisionmaking are nonbinding, unenforceable distractions from the facts.
- Given the inconsistencies between NextEra's and VEPCO's business purposes, NextEra's control of VEPCO means that there will always be plausible possibilities of harm.
- NextEra's refusal to say how it will influence or control VEPCO's decisions is a distinct source of jeopardy.
- Rearranging NextEra Board memberships doesn't diminish NextEra's control over VEPCO.
- Dominion's transfer of total control violates VEPCO's public-service obligations.

A. Complete ownership means complete control

Q. Which VEPCO decisions will NextEra have the power to control?

A. Complete ownership means complete control. NextEra says as much: It "will assume the same rights, role, and authority currently and historically held by Dominion Energy,

Inc."[29] What NextEra calls its "governance role" includes "oversight of enterprise-level strategy, compliance and risk management, capital investment and financing as well as other industry-standard roles and responsibilities."[30] NextEra therefore will have the power to control all of the following decisions, because each affects NextEra's financial condition. And each is integral to VEPCO's public-service obligations:

- if and when VEPCO seeks rate increases or decreases;
- how to make the tradeoff between reliability and cost, e.g., when to invest in distribution, transmission, generation, demand management, or energy efficiency;
- how to make the tradeoff between increasing earnings or moderating rates, such as whether to satisfy load by adding to rate base vs. purchasing from third parties, or encouraging demand management or energy efficiency;
- whether, when, and how much to spend on cybersecurity and storm response;
- whether to fund public-service investment by using retained earnings vs. accessing capital markets (and in the latter case, whether to issue equity or debt, and from whom to borrow and under what terms);
- when to pay dividends to the parent, in what amounts (Asked whether there is "any decision about such dividends that will be, as a legal matter, exclusively a decision by Dominion, free of any influence or control by NextEra," NextEra answered "no."[31]); and
- what to say to bond rating agencies when they request information on the utilities' earnings potential, cash flow, and the "regulatory environment."

Q. Does NextEra's power to control VEPCO's decisions include decisions about employees?

A. Yes. Merger Agreement sec. 5.06(a) states:

> Following the Effective Time and until the eighteen-month anniversary of the Effective Time, Parent shall not terminate the employment of the

[29] Response to CV1-97.

[30] Response to Staff 1-50.

[31] Response to CV1-39.a.

> individuals who are employed by the Company or any of its Subsidiaries[.]

That Dominion felt a need to restrain NextEra's termination power for 18 months makes clear that NextEra will have that power—the power to reach into Dominion's employee files and terminate whomever NextEra wants—after 18 months. NextEra doesn't disagree. It said:

> Parent's [i.e., NextEra's] authority with respect to Dominion employees would arise through its [i.e., NextEra's] ownership and governance rights over the Company [i.e., Dominion] and its subsidiaries, not because those individuals would become direct employees of Parent.[32]

Since the employees would be employees of Dominion, not NextEra, how could NextEra effect terminations? NextEra's answer:

> NextEra would not itself become the direct employer of Dominion utility employees solely by virtue of the combination of entities. Any employment action would be implemented through the applicable Dominion employing entity and in accordance with applicable law, corporate governance requirements, and the commitments in the Merger Agreement.[33]

In other words, NextEra's corporate control of Dominion ("corporate governance requirements") allows it to interfere, as it wishes, in VEPCO's relationships with its employees. As for "the commitments in the Merger Agreement," other than the 18-month moratorium NextEra has no restraint on its power to interfere. NextEra acknowledges that it has the power to "direct the Dominion CEO to terminate an

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[32] Response to CV1-52.

[33] *Id*.

individual's employment . . . as may be consistent with applicable law, corporate governance processes, and the Merger Agreement."[34]

On the surface, "all employment decisions regarding employees of Dominion will continue to be made by the local Dominion management team subject to applicable law"; but in reality, the "governing corporate documents" give NextEra total control.[35] And, it turns out, NextEra will exercise that control even if it wastes customers' money. Consider this dialogue:[36]

> **Questions**
>
> Please refer to NextEra's commitment to provide job protection for Dominion Energy Virginia employees for 18 months following closing:
>
> a. Does the commitment apply to Dominion Energy Virginia employees whose positions are determined by Dominion Energy Virginia management to be no longer necessary? Please explain.
>
> b. If the answer to subpart (a) is yes, please explain the rationale for applying the commitment to positions that Dominion Energy Virginia management has determined are no longer necessary.
>
> **Responses**
>
> a. Yes. Merger Commitment No. 12 applies to Dominion Employees through the eighteen-month anniversary of the Effective Time, subject to the exceptions stated in the commitment. The commitment provides that NextEra shall not terminate the employment of covered Dominion Employees during that period except for cause or material failure to satisfactorily perform assigned duties. Thus, a determination that a particular position is no longer necessary, standing alone, would not provide an independent basis for termination during the 18-month period unless the circumstances also fall within one of the stated exceptions. See Exhibit C to the Joint Petition, Merger Commitment No. 12.
>
> b. The 18-month job-protection commitment is a transition-related protection intended to provide stability to employees following closing

[34] *Id*.

[35] *Id*.

[36] CV4-2.

> and to preserve the experience and expertise necessary to maintain safe, reliable, and affordable electric service. The commitment establishes a temporary protection against merger-related employment disruption, subject to the exceptions expressly identified in the commitment. See Joint Petitioners' Response to Clean Virginia Interrogatory Nos. 1-52 and 1-75(b).

This dialogue makes clear that NextEra's control over VEPCO's operations can extend all the way, at customers' expense, to keeping individual people employed even if the need for their jobs disappears—just so NextEra can say in this proceeding that it is "protecting employees." An acquirer that makes customers pay for such wastefulness cannot prove that its acquisition "will not impair or jeopardize adequate service at just and reasonable rates."

Q. In what ways can NextEra exercise control over VEPCO?

A. NextEra can exercise control by having the NextEra Board order actions by the Dominion Board, and on to VEPCO. NextEra can also direct Dominion's Board to select as VEPCO executives individuals likely to absorb and carry out NextEra's priorities—such as maximum rate-basing of new capital expenditures.

Another method is through career ladders. Since NextEra is larger than Dominion, VEPCO's employees will have opportunities for advancement within NextEra. Managers and executives aspire to higher positions. They get those higher positions in part by pleasing their superiors. Within an independent Dominion, the top managers can go only so far; if they want to advance in their field they would have to leave Dominion. That means creating a record of excellence that prospective outside employers will value. The risk here is that VEPCO employees with ambition will focus on pleasing NextEra superiors based on NextEra's financial factors, rather than achieving performance excellence based on VEPCO customer satisfaction. (Remember,

as explained in Part III, that NextEra's transactional purpose is purely financial.) And with NextEra continuously considering more acquisitions, there is a risk that managers who want to rise will be thinking about growth through acquisitions—a goal unrelated to, and a distraction from, serving their Virginia customers.

Q. On how NextEra will exercise control, has NextEra been forthcoming?

A. No. When asked, "[w]ithin the post-transaction holding company structure, who will have what power over which Dominion decisions?" the companies objected to the request as

> overly broad, unduly burdensome, and potentially voluminous and cumulative to the extent it seeks "all decisions." Joint Petitioners further object to the extent the request requires original work to respond. Joint Petitioners object to the premise of this request, which is hypothetical in nature and calls for a speculative response on future events.[37]

The question is not "overly" broad; it is merely as broad as the scope of NextEra's power over VEPCO's decisions. It is not "unduly" burdensome, because whatever the "burden" is, it is essential for the Commission to know who at NextEra, with what experience and what motivations, will be making decisions that affect Virginia. Indeed, for NextEra to view an essential Commission need as "burdensome" to NextEra is additional evidence that NextEra's transactional purpose is not to make Virginia customers better off or this Commission's job easier. And if the response would be "voluminous," then there must be many forms of NextEra control that the company now would have to catalogue to make the response truthful and complete. Finally, that answering this straightforward question would take "original work" signals that NextEra is so focused on acquiring control of Dominion's future rate-basing opportunities that it

[37] Response to CV1-38.a.

has not given much thought to how it will use that control. All these factors add risk to Virginia's electricity future—risk that the statute's "will not" standard does not allow.

Q. Comment specifically on NextEra's control over Dominion's debt issuances.

A. NextEra concedes that all Dominion issuances of long-term debt, and of hedging of debt instruments, will be subject to review by NextEra's CFO.[38] The NextEra CFO's responsibility is, of course, responsibility for the financial condition of the entire NextEra system. As an employee of NextEra, not a public utility, that CFO has no legal responsibility for public-utility finance.

It is impossible to interpret NextEra's words on this subject in any way other than skeptically. Staff Question 5-164 asked the correct question: "Will NextEra's Chief Financial Officer have the final decision-making authority over DEV [i.e., VEPCO] financing decisions with respect to long-term debt and any hedging of debt instruments?" NextEra answered "No." But following that "no" came this caveat:

> Final decision making with respect to DEV long-term debt and hedging of debt instruments resides, and will continue to reside, with the DEV board with appropriate and customary corporate oversight provided in the future by the NextEra Energy, Inc. Board. . . .

The term "oversight," and the corporate reality (NextEra owns and therefore controls Dominion), unavoidably mean that the "No" answer is incorrect. The only way to guarantee that NextEra will not control Dominion's financing decisions is through an intercorporate agreement that (a) states without caveat that final financing decisions remain with Dominion, unobstructed by NextEra; (b) commits NextEra not to

[38] Response to Staff 4-125.

"oversee," but merely to "observe" Dominion decisions; and (c) permits no change to that language without Commission approval.[39]

B. Asked to cede control over VEPCO, NextEra refused

Q. Has NextEra shown willingness, post-closing, to cede control over VEPCO to Dominion?

A. No. NextEra has refused to forgo control over any particular category. Clean Virginia posed to NextEra this question: "Please state whether NextEra will agree never to direct any decisions that affect in any way, directly or indirectly Dominion's rates or quality of service. Please explain." NextEra answered:

> NextEra does not agree. . . . Joint Petitioner Witness [NextEra CEO] Ketchum will have overall leadership responsibility for the combined company, and it is illogical to suggest that one or more of his leadership decisions could not have an indirect effect on Dominion's rates or quality of service. Post closing, Joint Petitioner witness Blue will have responsibilities over the combined regulated utilities and will report to Mr. Ketchum. . . .[40]

In other words, NextEra will control VEPCO, because while Mr. Blue will oversee the regulated utilities, Mr. Ketchum controls Mr. Blue. Any other way to view the corporate and executive relationships is, NextEra says, "illogical."

Q. Concerning the term "illogical," is there a logical inconsistency in NextEra's responses to questions on control?

A. Yes. Either Mr. Baine is contradicting Mr. Ketchum, or NextEra is hoping to make the issue go away by having it both ways. CV1-74 asked as follows:

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[39] See also Response to Staff 5-178(b) (containing similar "oversight" language in the context of VEPCO capital expenditures, referring to "appropriate and customary corporate oversight [of capital investment and financing] provided by the NextEra Energy, Inc. Board of Directors, which may include approval of certain capital investment and financing decisions made by DEV").

[40] Response to CV1-50.

> Please refer to Baine Direct at page 4. How can you guarantee that day-to-day operations will not change, when NextEra has control of Dominion? Please cite all commitments that NextEra and its leadership have made never to influence Dominion's day-to-day operations, or any other Dominion decisions.

Petitioners gave this answer:

> The extent of the Joint Petitioners' voluntary merger commitments in this proceeding are contained in their Joint Petition and related testimony, exhibits, and schedules.

The "Petition and related testimony" says that VEPCO's decisions will be made by VEPCO's local management. But NextEra's Mr. Ketchum will have the power to control Mr. Blue. Both things cannot be true.

From this dialogue, the Commission must assume that NextEra's view—that ownership means control—has not changed since 2017. That year, the Texas Commission had insisted that, to win the Commission's approval of NextEra's bid to acquire the utility Oncor, the Oncor Board had to operate independently of NextEra. Here was the reaction of NextEra's then-CEO:

> Obviously we can't pay $18.7 billion for a utility that we can't run, and we can't control the board and we can't have access to dividends, . . .[41]

Here, NextEra is paying a $12.5 billion premium to get control. Unless Mr. Ketchum disagrees with Mr. Robo, he is not paying that premium (plus the billions reflected in the trading price) if he can't "run" the utility, "control [the utility's] board," and "have access to [the utility's] dividends."

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[41] "Texas regulators unlikely to reverse rejection of NextEra-Oncor deal," *Utility Dive* (May 19, 2017) (quoting from an earnings call in April 2017), available at https://www.utilitydive.com/news/texas-regulators-unlikely-to-reverse-rejection-of-nextera-oncor-deal/443123/.

C. NextEra's references to Virginia-based decisionmaking are nonbinding, unenforceable distractions from the facts

Q. Has NextEra made a commitment to local control?

A. Not if one defines "commitment" correctly. A "commitment" is "a promise to do or give something."[42] The quoted definition is the dictionary's first—and thus primary—definition. The dictionary's third definition is "the attitude of someone who works very hard to do or support something." Regulators cannot rely on "attitude" because attitude is not enforceable. Regulators of monopolies must create obligations and enforce them, because if "attitude" becomes variable, customers still have no alternative to the utility. In any event, attitude requires actions, not just words—especially not words that (a) between Mr. Ketchum and Mr. Baine, contradict each other; but (b) between Mr. Ketchum and Mr. Robo, support each other. On VEPCO-level control, NextEra has made no "commitment" because it has made no "promise" in a legal sense—no commitment or promise the breach of which by NextEra causes a negative consequence to NextEra. This transaction, by statutory language, is a transfer of control. The transaction is transferring control to NextEra.

Q. What about what NextEra calls its "commitments" that Dominion will manage its own business?

A. The statements are not commitments. Consider Commitment 8:

> Dominion Energy Virginia shall manage its operations as a separate regional business and will retain local responsibility for making decisions to achieve Company objectives.

This sentence merely describes any local utility's preexisting, formal responsibilities under state utility law. It does not change the "governance" (NextEra's word) reality that

[42] See http://www.merriam-webster.com/dictionary/commitment.

NextEra will own and control Dominion. The Commonwealth has granted to VEPCO, not NextEra, the right and responsibility to provide electric service. Commitment 8 does not remove or reduce NextEra's power to dictate VEPCO's "objectives" or to direct VEPCO's actions. If, for example, NextEra directs VEPCO to "maximize rate-basing of capital expenditures for High-Load customers and take all possible actions to prevent competitive suppliers from supplying those customers," VEPCO's executives—if they want to keep their jobs—will have to comply.

Indeed, Commitment 11 makes NextEra's control plain:

> From and after the Effective Time [i.e., per Merger Agreement section 1.03, when the Commission issues a certificate of merger, or later if the parties agree] until December 31, 2029, NextEra shall maintain Dominion Energy Services, Inc. and shall cause it to continue to provide the same or substantially similar services to Dominion Energy Virginia [i.e., VEPCO] at no less than the level, scope, quality, and frequency of such services as provided immediately before the Effective Time.

The only commitment here is to leave DES in place until the stated date. If NextEra did not have complete power over this service affiliate's future, there would be no reason for NextEra to commit to refrain from making changes until December 31, 2029. This small example applies not only to the allocation of responsibility for corporate services at Dominion, but to all other features of corporate structure, service responsibility, and lines of authority.

Q. Doesn't NextEra promise a Richmond headquarters?

A. Yes. The Merger Agreement at section 5.16(a) provides that NextEra "shall maintain dual headquarters in Juno Beach, Florida and in Richmond, Virginia and operating headquarters in Cayce, South Carolina[.]" But a physical Richmond headquarters doesn't diminish NextEra's legal control over Dominion. "Dual" doesn't mean "equal," it doesn't mean "standalone," and it doesn't mean "deferential." A headquarters is a

place where executives work. Executives make plans and give orders. From the Richmond headquarters, Dominion executives will make plans and give orders about service in Virginia. From the Juno Beach headquarters, NextEra executives will give orders to Dominion's executives. NextEra's executives will do so because they work for NextEra's Board, which controls NextEra, which in turn owns and controls Dominion. NextEra's top executives will have complete power over Dominion's executives, no matter how many headquarters exist.

Q. Are you surprised by NextEra's failure to respond clearly to questions about control of VEPCO?

A. No. The gap between words and commitment is unsurprising, because hierarchical control is inherent in the holding company form. As the Supreme Court famously stated about the parent holding company Copperweld:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.[43]

The Supreme Court is describing corporate reality. Corporate reality applies to NextEra just as it applied to Copperweld. This corporate reality conflicts with what NextEra wants the Commission and Virginians to believe—that control of VEPCO will remain with VEPCO. Reality is otherwise.

[43] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (holding that "Copperweld and its wholly owned subsidiary Regal are incapable of conspiring with each other for purposes of sec. 1 of the Sherman Act").

Q. Are there ways for the Commission to address NextEra's insistence on control over VEPCO and its decisions?

A. Yes, there are several ways to address NextEra's insistence on control over VEPCO and its decisions. One way would be for the Commission to attach a condition addressing control. The condition could take several different forms. It could, for example,

- forbid any control,
- create a limited list of decisions that NextEra could control without Commission review,
- require advance Commission permission for specific NextEra exercises of control, or
- contain some combination of these ideas, where different options apply to different categories of decisions.

The problems with this type of condition are obvious. First, the Commission does not have clear statutory jurisdiction, post-transaction, to give orders to NextEra, or to penalize NextEra for noncompliance, short of unwinding the acquisition. Second, this type of condition enmeshes the Commission in the details of operations—a problem arising not from the Commission's desire to do so but from the central fact that VEPCO will be subject to the control of a holding company that has no public-utility responsibility, but that does have a mission of using its control of VEPCO to increase rate base and offset NextEra's other risks.

Another regulatory approach would be to condition any approval on the Virginia General Assembly's making NextEra, post-transaction, subject to this Commission's jurisdiction for any of its activities that affect or could affect VEPCO's performance. With that authority, the Commission then could directly guide NextEra's control

1 decisions. Asked to support that logical response to the corporate-governance "illogic"

2 that NextEra cited, NextEra refused.[44]

3 **D. Given the inconsistencies between NextEra's and VEPCO's business**
4 **purposes, NextEra's control of VEPCO means that there will always be**
5 **jeopardy**

6 **Q. Are there concerns that arise from the combination of two facts—NextEra's**
7 **control of VEPCO, and NextEra's corporate purposes being different from**
8 **VEPCO's?[45]**

9 **A.** Yes. In a utility holding company system, the utility's board must fulfill two main legal

10 duties: (a) its utility-law duty to provide reliable service to its customers at just-and-

11 reasonable rates, and (b) its corporate-law duty to maximize value for its holding

12 company shareholder. Focusing on the utility's board alone, these two duties present no

13 inherent conflict, because the utility's corporate-law duty to its holding company

14 shareholder is always constrained by other laws: child labor law, hazardous waste law,

15 tax law, minimum wage law—and utility law.

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[44] CV1-73.b: Would you commit to seek passage of legislation in Virginia that would make NextEra, as a corporate entity, subject to the Commission's jurisdiction for any of its activities that affect or could affect Dominion Energy Virginia?

Response: No. Please see Joint Petitioners' response to subpart (a).

The response to subpart (a) has nothing to do with the issue:

> The referenced statement from Mr. Ketchum is straightforward and consistent with Joint Petitioners' Merger Commitments, including local leadership of Dominion Energy Virginia and its continued operation as a regulated entity subject to Commission jurisdiction, just as exists today under the corporate structure with Dominion Energy, Inc. as Dominion Energy Virginia's corporate parent.

[45] This subsection is drawn from my book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* (Edward Elgar Publishing 2020), at Chapter 7.1.

While the utility has no inherent conflict, its holding company owner does. Unlike its utility subsidiaries, the holding company has no utility-law duty to utility customers. Nor has it any statutory obligation to provide the utility with equity and debt at reasonable cost. Free of statutory obligations, its goals can conflict with the utility's obligations. And with the power to control VEPCO, it can take actions that conflict with the utility's obligations.

One example of conflict concerns the destination of the utility's profits: By selling service at commission-set rates, a prudently performing utility earns a reasonable profit. The utility's holding company parent decides that profit's destination. The parent holding company can order the utility to—

- keep the profit within the utility as retained earnings, ready to finance utility capital expenditures that earn more profit;
- send dividends to the parent, so that the parent can invest them in other businesses, use them to retire debt, or pay them out to the ultimate shareholders—leaving the utility dependent on the parent for future equity; or
- use the profit to provide financial support to other holding company affiliates—leaving the utility not only dependent on the parent for more equity, but also vulnerable to those affiliates' losses.

The holding company will choose among these options based on its strategic goals, not necessarily on the utility customers' needs. That is the source of the conflict.[46]

[46] See, e.g., *Order Instituting Rulemaking Concerning Relationship Between California Energy Utilities and Their Holding Companies and Non-Regulated Affiliates*, 2006 Cal. PUC LEXIS 241, at *4-5, *7 (finding that (1) "circumstances which create conflicts for the utilities between serving their customers or helping their holding companies and other affiliates are becoming more widespread;" and (2) PUHCA 1935's repeal in 2005, entry of utility holding companies into competitive businesses, and the close ties between competitive and monopoly affiliates, all "call[] into question the ability or willingness of the utility holding companies to fulfill their obligations to make the utility's capital requirements a first priority").

I am not saying that a utility's ultimate holding company is inherently indifferent to its utility subsidiary's financial condition and ability to perform. I am emphasizing the practical reality that a holding company with many subsidiaries seeks to maximize the value of its portfolio, not the cost-effectiveness of any one member. And capital, like any economic resource, is scarce. So the risk of conflict exists—between the utility's service obligation to its customers, and the holding company's portfolio-maximization obligation to its shareholders. As the D.C. Commission found: The utility Pepco, after its acquisition by the holding company Exelon, "will face competition for shareholder capital from a larger number of regulated affiliates as well as a number of unregulated affiliates who may need resources to stem losses."[47]

E. NextEra's refusal to say how it will influence or control VEPCO's decisions is a distinct source of jeopardy

Q. Given NextEra's failure to provide facts on how it will go about influencing and controlling VEPCO's decisions, what concerns arise?

A. Nowhere does the Petition, testimony, Merger Agreement, or discovery material identify who at NextEra will control which Dominion decisions, when, or for how long. Nowhere does NextEra identify any Dominion decision that NextEra commits not to control. The Commission therefore must assume that NextEra's discretion to determine what to control, and when, literally has no clarity and no practical limit.

The Commission thus remains uninformed about the central question presented by this transfer-of-control transaction: Who will be in charge of what, and how will the individuals with control exercise that control, with what procedures and with what level of competence? Without this information, the Commission has no evidentiary basis on

[47] *Exelon-PHI Merger*, 2015 D.C. PUC LEXIS 203, at *173-174 ¶ 142.

which to determine that the transaction "will not impair or jeopardize adequate service at just-and-reasonable rates." That fact by itself makes approval impossible.

That same fact becomes a distinct risk—the risk that NextEra's executives and witnesses will continue to deprive the Commission of information it needs to understand the influences on VEPCO's decisions, and the extent of conflicts between NextEra's holding company investment priorities and VEPCO's franchise obligation to serve. That risk does not exist today; it is a result of this proposed transaction. That risk is a distinct reason why the Commission cannot find the transaction "will not" impair or jeopardize.

Suppose Mr. Blue retired from leading VEPCO and Dominion, and NextEra executives were interviewing candidates to replace him. The interviewers would surely ask candidates to describe their plans for overseeing the utility's many departments, specifically in terms of the extent to which they will control details vs. defer to the expertise and knowledge of existing sub-executives who will be reporting to them. *Suppose Candidate X responded this way: "I have no idea." or "I don't know." or "To answer that question is unduly burdensome." No rational NextEra decisionmaker would take this candidate seriously.* But that is precisely how NextEra has answered the same question about its plans for Dominion. The Commission's only rational response is to reject this candidate; specifically, this transaction.

Q. Is there a distinct concern about the effect on VEPCO's customers of NextEra's control over VEPCO's decisions about electric service and rates?

A. Yes. The witnesses list hypothetical improvements but don't back the list with enforceable metrics. Moreover, even if there were enforceable metrics, NextEra cannot make these things happen without interaffiliate contracts that make NextEra accountable. Yet the Petition contains no specific interaffiliate arrangements, leaving the

1 Commission unable in future rate cases either to reflect the improvements in cost
2 reductions or to protect against undocumented interaffiliate charges. That gap makes
3 this Petition deserving of rejection because there are post-transaction risks of
4 impairment and jeopardy that the Commission cannot identify or quantify. Perhaps the
5 Petitioners think that the Commission's inability to quantify a risk means the risk is
6 zero. That is not how rational reasoning, and the burden of proof, work.[48]

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[48] *See*, *e.g.*, *Lynchburg Gas Co. v. State Corp. Comm.*, 217 Va. 855, 859-60 (1977) (upholding Commission's disapproval of Lynchburg Gas's proposal to acquire shares in its nonutility affiliate Lynco, in part because Lynchburg failed to provide, with respect to the interaffiliate relationship, evidence on which the Commission could "ascertain how Lynchburg would allocate common costs[; also] no evidence was provided to suggest that compensation would be forthcoming to the utility for services it renders to the expanded operations of Lynco"; as a result, the application had not "sufficiently detailed the proposed arrangements to enable the Commission in any later rate proceeding to determine the cost of service for [Lynchburg's natural gas] customers" (quoting Commission brief)).

See also Roanoke Gas Co. v. State Corp. Comm., 217 Va. 850 (1977). There the Virginia Supreme Court upheld the Commission's disapproval of Roanoke Gas Company's acquisition of stock to form and own a new propane subsidiary. The proposed acquisition was "intertwined with other proposed [interaffiliate] transactions." But Roanoke told the Commission that "it is not contemplated or proposed" that the interaffiliate arrangements "be made the basis of a written agreement or agreements." The Court held that Roanoke could not escape its obligation under section 56-77 "to file with the Commission a verified copy of any such contract or arrangement, regardless of the amount involved." Thus "[no] evidence was provided . . . upon which the Commission could ascertain how Roanoke would allocate the costs of the various services provided to Diversified; no evidence was provided to suggest that a return would be forthcoming to Roanoke for the services proposed to be rendered, other than the return Roanoke contends it would receive on leased tanks and other equipment" (Court quoting Commission's brief). As a result, "[neither] Roanoke's application, nor its evidence, sufficiently detailed the proposed arrangements so as to enable the Commission in any later rate proceeding to determine the cost of service for [Roanoke's natural gas] customers" (Court quoting Commission's brief). Roanoke had provided "no basis for determining whether the proposed arrangements were in the public interest" (Court quoting Commission's brief).

F. Rearranging NextEra Board memberships doesn't diminish NextEra's control

Q. Comment on the Petitioners' proposal to put Dominion Board members on the post-transaction NextEra Board.

A. Merger Agreement sec. 5.16(c) provides that NextEra

> shall take all necessary action as soon as practical after the Effective Time to cause Parent's [i.e., NextEra's] board of directors at the Effective Time to consist of fourteen (14) members and appoint four (4) mutually agreeable current members of the Company Board or the Company's [i.e., Dominion's] executive management, one of which shall be Robert M. Blue, as directors to serve on Parent's board of directors.

This measure solves none of the problems that I've raised. In fact, it exemplifies the main one—NextEra's control. First, it limits the number of Dominion Board members on the NextEra Board to a 29% minority. Second, it gives NextEra veto power over each of the four Dominion Board members offered.

As a separate matter, each of the four will be individuals who voted to sell control of VEPCO's government-granted privilege to NextEra, based on price instead of performance, for a $12.5 billion control premium that shareholders would keep all for themselves (as explained in Part VI below). They cast this vote without seeking, let alone obtaining, any truly tangible transaction value for VEPCO's customers. (See Part IX.B for an explanation of why the bill credits are inappropriate because they have no connection to the transaction.)

Q. Aren't most of NextEra's directors independent directors?

A. Yes, but that fact does not affect the problems that I have raised.

NextEra says that all directors of NextEra and Dominion, except for Mr. Blue and Mr. Ketchum, are independent directors.[49] But independent directors don't remove

[49] Response to CV1-37.

parent-utility conflict; along with the internal directors, they are the decisionmakers that cause the conflict. A utility board's independent directors are independent only of the utility's management; they are not independent of the company on whose board they sit. Indeed, the reason why independent directors are independent of management is so that their sole allegiance will be to the company. As explained in Part III above, the relevant company, NextEra, has a transactional purpose—profit through making acquisitions and managing the holding company's portfolio of companies. That purpose impairs and jeopardizes VEPCO's ability to carry out its electric-service purpose.

Again: Independent directors are not "independent" like this Commission's members are independent. A commission's members are independent of the utility so that they can serve the public as defined by their statutory jurisdiction. In a corporation, independent directors are independent of the utility's management so that they can serve the holding company's shareholders' interests. If the independent director sees a conflict between the holding company's interests and the utility customers' interests, the holding company prevails.

If a utility board member were truly independent of the holding company, she could veto any holding company instruction that conflicted with the utility's obligation to its customers. No typical independent director has that power—and NextEra hasn't proposed an independent director who does.

G. Dominion's transfer of total control to NextEra violates VEPCO's public-service obligations

Q. What other concerns arise from Dominion's transfer of control over VEPCO to NextEra?

A. A franchised utility may not contract away any powers that it needs to carry out its obligation to serve. As I explain in my textbook, "[a] utility that contracts away either its

managerial powers or control of its essential assets violates its franchise."[50] Consider these four examples:

- A utility contracted to its affiliate "the power to control (1) the prices at which [Penn Water] may sell its product; (2) the extent to which [Penn Water] may extend its plant; (3) the territory in which [Penn Water] may sell its product; and (4) the amount of back feed energy which [Penn Water] must purchase from Consolidated."[51]

- A utility agreed with its competitor to forgo installing more gas pipe. The Court held that "a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests."[52]

- A franchised railroad company leased to another entity "its roads, buildings and rolling stock," giving that company control of all the assets necessary to provide the railroad company's franchised service.[53]

- A utility transferred all its employees to an unregulated affiliate.[54]

In each of these four situations, a court or commission found the utility's action to be an unlawful transfer of the powers it needed to carry out its public-utility duties.

Dominion has agreed to be acquired by NextEra, under a contract which gives NextEra control over Dominion and VEPCO, and where NextEra refuses to relinquish

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[50] *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* at Chapter 2.B.5, p. 48 (Amer. Bar Assoc. 2d ed. 2021).

[51] *Pa. Water & Power Co. v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 184 F.2d 552, 567 (4th Cir. 1950).

[52] *Gibbs v. Baltimore Gas Co.*, 130 U.S. 396, 410 (1889).

[53] *Thomas v. R.R. Co.,* 101 U.S. 71, 83 (1879).

[54] *Application of Liberty Utilities (CalPeco Electric) LLC (U-933-E) for Exemption from the Affiliate Transaction Rules for Its Transactions with Liberty Utilities Service Corp., or, in the Alternative, for a Waiver from Affiliate Transaction Rules V.C, V.G.1, and V.G.2.c* (Cal. Pub. Utils. Comm'n, 2017 Cal. PUC LEXIS 432 (Sept. 28, 2017)).

any of that control. Dominion has thus acted inconsistently with VEPCO's franchise duty. It has granted NextEra the power to do all these things and more:

- limit VEPCO's spending,
- dictate when to seek rate increases,
- determine when to invest in utility-oriented capital expenditures as opposed to inviting or allowing retail competitors to do so,
- decide when Dominion should issue debt and when Dominion should pay dividends, and
- determine employment policies, including whom to promote to managerial and executive positions, and when.

For reasons discussed above, this transfer of control is not reconcilable with the statute's "will not impair or jeopardize" language.

V. Cause of impairment or jeopardy #3: NextEra's business activities—current and future, known and unknown—create new risks for VEPCO and its customers

Q. Explain the purpose of this Part V.

A. In this Part V, I discuss the impairments and jeopardies arising from the undisputed and indisputable fact that NextEra's business activities—current and future, known and unknown—create new risks for VEPCO and its customers. I will cover the following five points:

- The acquisition subjects VEPCO to NextEra's corporate complexity.
- NextEra's existing investments in higher-risk, nonutility businesses exceed Dominion's in amount and type.
- The acquisition brings additional but unknown risks because NextEra can acquire more companies of any type, industry, location, or amount—all without the Commission's permission and advance knowledge.
- Experience, logic, and economic theory confirm that the risks to VEPCO and its customers are not "speculative."
- NextEra is unprepared to identify, and unprepared to take responsibility for protecting customers from, the risks that it brings to VEPCO and its customers.

Acquisition advocates typically argue that all these concerns are unproven. But under the statute, intervenors have no burden of proof. Under the statute's strict "will not impair or jeopardize" standard, it is the Petitioners' burden to prove that there is no plausible possibility of harm or risk. For the reasons discussed next, this transaction fails that standard.

A. The acquisition subjects VEPCO to NextEra's corporate complexity

Q. Provide a picture of NextEra's corporate complexity.

A. Providing a single picture is impossible. NextEra has so many affiliates and subsidiaries, including "thousands of individual project entities," that it confesses to being unable to

display them on a single organizational chart, either pre- or post-merger.[55] Consider these facts:

- "The total number of subsidiaries under NextEra Energy Transmission, LLC is 64 with a total capitalization of $4.929 B. Individual wind, solar, and storage projects are primarily held under ESI Energy, LLC ("ESI")."[56]

- "The total number of subsidiaries under ESI is 2,563 with a total capitalization of $69.0 B as of December 31, 2025."[57]

- "The total number of subsidiaries under FPL Group International, Inc. is 433. Total Capitalization [is] $0.2 B as of December 31, 2025."[58]

- "The total number of subsidiaries under USG Energy Gas Producer Holdings, LLC is 56. Total capitalization [is] $7.5 B as of December 31, 2025."[59]

And these facts about three specific NextEra subsidiaries:[60]

- "DCRBN was created to pursue renewable-powered digital infrastructure, principally crypto mining and data centers, and was repurposed to a passive holding company that holds the equity interests in Residential Energy Holdings, LLC, which is the direct parent company of EverBright, LLC. EverBright operates as a specialized financing marketplace and software platform, including leases, loans, and Power Purchase Agreements, for the residential solar and energy storage sector."

- "NEER is an energy infrastructure development company, with a diverse portfolio of renewables, nuclear, natural gas, and battery storage systems which collectively accounts for more than 42 GW of total generating

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[55] Response to CV1-36 ("NextEra's affiliates and subsidiaries include thousands of individual project entities and are not conducive to being reduced to a corporate organizational chart pre- or post-merger. See FPL's Diversification Report provided in response to Clean Virginia Set 01-46 for a listing of all NextEra subsidiaries and affiliates.").

[56] Response to CV1-61.

[57] *Id.*

[58] Response to CV1-62.

[59] Response to CV1-63.

[60] Response to CV1-66.

capacity in 41 states, as of the end of 2024. NEER has multiple subsidiaries which include, but are not limited [to], subsidiaries that offer wholesale energy products, that serve retail customers directly, that offer utility planning services, and that focus on providing solar and battery solutions for residential customers."

- "GEXA/NES are competitive energy supply businesses that serve retail customers directly. GEXA serves residential and small business electric customers in Texas, and through its subsidiaries, in New Jersey and Illinois. NES serves residential and business electric customers and provides natural gas supply to business customers. NES operates in sixteen (16) U.S. markets."

B. NextEra's existing investments in higher-risk, nonutility businesses exceed Dominion's in amount and type

Q. Explain the purpose of this Part V.B.

A. This Part V.B describes the new risks that Dominion, VEPCO, and VEPCO's customers will face, and the regulatory workload that the Commission will have to take on, as a result of NextEra's buying control of Dominion. I cover the following three topics:

- Overnight, the acquisition will make Dominion's corporate family more risky.
- The acquisition will immediately diminish VEPCO's importance to its holding company owner, from 72% to 27%.
- Given its many other investments, NextEra has incentive and opportunity to take actions that raise VEPCO's costs and reduce its access to equity.

Clean Virginia witness Albert Lin provides examples of, and technical detail about, the types of risk that NextEra will bring.

1. Overnight, the acquisition will make Dominion's corporate family more risky

Q. On the subject of risk, describe the contrast between how NextEra talks to investors and how NextEra talks to this Commission.

A. Dominion's ratio of utility-to-nonutility businesses is higher than NextEra's, making Dominion less risky than NextEra. The utility business is less risky because for the

utility, regulators are required by state statute and the U.S. Constitution to set rates that give the utility a reasonable opportunity to earn a fair return on prudently incurred, used-and-useful investment. In contrast, nonutility businesses' earnings depend on their performance merits and on market conditions. Thus when talking to investors, NextEra praises the transaction for making NextEra less risky by increasing *NextEra's* ratio of utility-to-nonutility businesses, from 70% to 80%.[61] But when talking to the Commission, NextEra's witnesses not only omit that fact; they also omit its implication: VEPCO will become part of a NextEra-controlled holding company that has more risk than Dominion had.

For all of NextEra's thousands of higher-risk businesses, their future financial condition is necessarily uncertain. I discuss next the general reasons for that uncertainty, including regulatory risks and operating risks. NextEra's witnesses say nothing about these risks, as if they don't exist. They do exist.

Q. Describe NextEra's regulatory risks.

A. NextEra talks about the benefits of a larger size. But that larger size necessarily means exposing VEPCO's customers to larger risks. NextEra's acquisition will enlarge every category of risks to which VEPCO's customers are already subject. Here is a reminder of those categories:

Risks in the monopoly businesses: Across NextEra's U.S. businesses, policymakers are seeking to diversify energy options, including giving customers the quality and cost benefits of competition and more choices of supplies and suppliers. NextEra's Florida utility business thus risks losing value and facing lower credit ratings,

[61] Investor Presentation at 11.

making NextEra's own financial condition less secure. Virginia's Commission has no influence over those risks.

Transmission risks: NextEra owns monopoly transmission assets, both as part of its Florida vertically integrated utility and as unbundled transmission businesses elsewhere. Affecting those assets' value are FERC decisions on cost recovery, cost allocation, and return on equity—all subjects that regularly involve controversy at the state level, at FERC, and in the U.S. courts of appeals. Also, to the extent NextEra owns or controls generation and transmission in the same geographic market, it risks being charged with vertical market power (the ability and opportunity to exploit its control of the transmission highways to damage its generation competitors), with the enforcement results ranging from penalties to divestiture. Virginia's Commission has no influence over those risks.

Generation risks: NextEra's ownership of generating facilities throughout the U.S. subjects it to environmental and land use regulations, all involving the risks of litigation and delay. Virginia's Commission has no influence over those risks.

Renewable generation: NextEra's renewable energy success depends in part on federal and state legislative actions, such as tax credits, renewable portfolio standard mandates, and the avoidance or satisfaction of independent monitoring when it seeks to have its controlled utilities buy renewable power from affiliates. Divisive politics around renewable energy means that none of these benefits is certain. Virginia's Commission has no influence over the associated risks.

Reliability regulation: Separate from economic and environmental regulation is reliability regulation. NextEra's businesses, both competitive and monopoly, are subject

to regulation by the North American Electric Reliability Corporation, as overseen by FERC. NextEra and its affiliates can incur penalties for failure to comply with reliability standards, including cybersecurity standards. Virginia's Commission has no power over this risk.

Nuclear power regulation: NextEra's subsidiaries have ownership interests in eight nuclear units. Florida Power & Light operates two at St. Lucie and two at Turkey Point. NextEra's subsidiary NextEra Energy Resources owns the two Point Beach units in Wisconsin. NextEra also has the largest share of the Seabrook plant in New Hampshire, and a 70% interest in Duane Arnold, a nuclear facility located in Iowa. Nuclear investments involve unique risks. Virginia's Commission has no authority over these risks.

Q. Describe NextEra's operating risks.

A. Distinct from regulatory risks are operating risks, including—

- losing money in competitive markets, where subsidiaries without long-term contracts face competitive risks and performance risks while subsidiaries with contracts face performance risks;
- reductions in credit ratings, which affect the subsidiaries' (and possibly NextEra's) interest rates;
- disruptions, outages, and failures to NextEra's electricity and natural gas transmission, transportation, and distribution systems, whether due to human error, weather, cyber-breaches, or terrorist attack;
- financial market disruptions, which can affect NextEra's ability to fund operations, capital expenditures, and pension obligations; and
- volatility in fuel costs.

Q. What about NextEra's legal risks?

A. NextEra has legal risks. An example: The Oklahoma Attorney General has sued NextEra's subsidiary NextEra Energy Marketing (NEM). Filed in January 2025, the

1 lawsuit alleges that in sales to the utility Oklahoma Natural Gas, the defendants, which
2 include NEM, overcharged Oklahoma families and businesses during the February 2021
3 winter storm Uri. According to the lawsuit, the prices charged violated, by multiples, the
4 state's Emergency Price Stabilization Act. The Act prohibits sellers from charging prices
5 exceeding by more than ten percent their last pre-emergency price. The lawsuit also
6 cites the Oklahoma Consumer Protection Act.[62]

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[62] "Oklahoma Attorney General to sue natural gas marketers over 2021 winter storm gas costs," *OK Energy Today* (July 18, 2023); "AG wants summary judgment in price manipulation case," *OK Energy Today* (Mar. 21, 2026) (discussing *Gentner Drummond, Attorney General of Oklahoma vs. Symmetry Energy Solutions, LLC, et al.*, No. CJ-2025-00006). Here is NextEra's summary of the lawsuit, as provided in response to Staff 6-195:

> The State alleges that the defendants manipulated Oklahoma's natural gas market during Winter Storm Uri by, among other things, using force majeure declarations to reduce pipeline deliveries to customers under existing contracts, thereby enabling defendants to sell natural gas on the higher-priced spot market, and by reporting and engaging in inflated trades to drive up prices. The petition alleges that natural gas prices at the ONEOK Gas Transportation Pool rose from historical averages of approximately $2.55/MMBtu to over $1,230.65/MMBtu during the storm.
>
> The State asserts three causes of action: (1) violation of the Oklahoma Antitrust Reform Act, 79 O.S. sec. 201 et seq., alleging unreasonable restraint of trade and anti-competitive price manipulation; (2) unjust enrichment, seeking disgorgement of profits derived from the alleged market manipulation; and (3) violation of the Oklahoma Consumer Protection Act, 15 O.S. sec. 751 et seq., and the Emergency Price Stabilization Act, 15 O.S. sec. 777.1 et seq., alleging that defendants sold natural gas at prices exceeding the ten-percent statutory ceiling during the declared state of emergency. The State seeks damages in excess of $75,000, treble damages, disgorgement, punitive damages, attorney fees, costs, and injunctive relief.

According to Oklahoma media, a trial court has ruled against NextEra. *See* "Judge finds NextEra illegally hiked Oklahoma gas prices," *The Journal Record* (Sept. 30, 2026), available at https://journalrecord.com/2026/09/30/judge-finds-nextera-illegally-hiked-oklahoma-gas-prices/.

Q. How does NextEra describe its various risks?

A. In its 2025 10-K report[63] (at 23-36), NextEra provides numerous examples of risks in four general categories:

- Regulatory, Legislative and Legal Risks
- Development and Operational Risks
- Nuclear Generation Risks
- Liquidity, Capital Requirements and Common Stock Risks

Q. What about this transaction's integration risks?

A. On the transaction's integration risks, the Petitioners have no idea. They say that they chose this transaction because combined they will perform better than they would separately. But besides signing a Merger Agreement without learning about or planning improvements to Dominion's operations (see Part III.C above), they also learned nothing and planned nothing about the risks of combining. Staff 1-16 asked:

> Please refer to Form S-4 at page 86. Please separately identify and discuss in detail the "significant risks inherent in integrating the operations of Dominion Energy with NextEra Energy."

Petitioners responded:

> This statement [in Form S-4] is a generic reference to the general and inherent risk associated with a business transaction of the scope and scale of this proposed Merger. It is not intended to and does not identify any particular concern or risk factor associated with the transaction.

This response is typical of the numerous Petitioner evasions of legitimate questions. Staff didn't ask about whether the S-4 statement was a "generic reference," or about

[63] https://www.sec.gov/Archives/edgar/data/753308/000075330826000015/nee-20251231.htm.

what the statement was "intended to do." Staff asked for detail on integration risks. The Petitioners gave none.

Q. Is there another way to understand the risks that NextEra brings?

A. Yes. Consider the situation in layers.

- If this transaction were merely a merger of equals between FPL and VEPCO, it would jeopardize VEPCO to the extent that Florida's weather is worse than Virginia's weather, making FPL alone an investment with higher risks—risks to which VEPCO would be exposed.

- The transaction is not a merger of equals, because FPL's ultimate leadership—NextEra—will control VEPCO's leadership, where NextEra has refused to explain, or limit, how it will exercise that control.

- This transaction is exposing VEPCO not only to the risks of Florida's weather; it is adding the risks of NextEra's "thousands" [NextEra's word] of unregulated affiliates.

Q. Dominion's shareholders also bear these risks; yet they supported the acquisition. Why then shouldn't customers support the acquisition?

A. Dominion's shareholders accepted the risk because they got a $12.5 billion, 23.1% premium. Also, when investors bear risk they benefit from the upside of the risk—the potential for higher earnings. VEPCO's customers don't get higher earnings. Unlike the shareholders, they bear risks without upside.

As for abuse of interaffiliate transactions, shareholders bear no risk because the very purpose of the abuse—making the monopoly business bear costs associated with the competitive business—is to increase shareholder earnings. On interaffiliate transactions, captive customers bear all the risk and get no benefit.

2. The acquisition will immediately diminish VEPCO's importance to its holding company owner, from 72% to 27%

Q. How does this transaction affect VEPCO's importance to its holding company owner?

A. In 2025, VEPCO represented 71.6% of the Dominion holding company system's consolidated revenue. If Dominion is acquired by NextEra, that percentage will drop to 26.9%.[64]

Q. How will VEPCO's diminished role in NextEra-controlled Dominion affect the Commission's ability to regulate VEPCO's performance?

A. As Virginia's relative contribution to revenue and earnings declines, so will NextEra's stake in what the Commission thinks. NextEra will, literally, care less about Virginia than Dominion does today. That is a mathematical inevitability. When a company cares less about its regulator's priorities, internal accountability necessarily diminishes. Then the regulator must work harder to induce the utility to perform at the regulator's required level of performance.

Q. What is the solution to this problem?

A. The correct solution is to reject the transaction—a solution made necessary by the many other factors I discuss in this testimony. Were the Commission to ignore these many factors and consider approval, the starting point for conditions should be requiring

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[64] These percentages come from the following 2025 revenue information shown in each company's 2025 10-K, under Consolidated Statements of Income:

Virginia Power (Dominion Energy Virginia)	$11.812 billion
Dominion Energy, Inc. (consolidated)	$16.506 billion
NextEra Energy, Inc. (consolidated)	$27.412 billion
Post-acquisition combined (NEE + Dominion)	$43.918 billion

Dividing 11.812 by 16.506 yields 71.6%. Dividing 11.812 by 43.918 (the sum of 16.506 and 27.412) yields 26.9%. The actual numbers on closing will reflect then-current revenue figures.

NextEra's binding commitment that there will be no more reduction in VEPCO's revenue-importance to its holding company owner. I discuss that condition and others in Part VIII below.

3. Given its many other investments, NextEra has incentive and opportunity to take actions that raise VEPCO's costs and reduce its access to equity

Q. What actions could NextEra take with its affiliates, specifically actions that cause risk to VEPCO and its customers?

A. After the acquisition, the Commission will have no indisputable power to prevent NextEra from engaging, directly or through its subsidiaries, in the following activities relating to its thousands of affiliates and projects:

- make direct loans to subsidiaries, whether they are succeeding or failing;
- inject equity into subsidiaries, whether they are succeeding or failing;
- guarantee external debt incurred by the subsidiaries;
- assume liability for external debt incurred by the subsidiaries; and
- lend to or borrow funds from the subsidiaries.

NextEra says that it will cause VEPCO "no harm." But it has preserved, and refuses to limit, these options, all of which put VEPCO at risk. NextEra wants it both ways: the ability to do what it wants, and the ability to tell this Commission something nonfactual—that doing what it wants will never harm VEPCO or its customers.

Q. Is there a risk that NextEra's actions will reduce VEPCO's access to equity?

A. Yes. Today, VEPCO's source of equity is the Dominion holding company. If VEPCO needs equity for capital expenditures, or as support for new debt, there should be no question that the Dominion holding company will raise the necessary amount. Remember that in 2025 VEPCO represented 72% of Dominion's revenues. If NextEra

buys Dominion, VEPCO's sole source of equity will be NextEra. VEPCO then will be but one of thousands of NextEra's businesses—representing only 27% (using 2025 figures) of NextEra's revenues. NextEra's ability and willingness to inject equity into Dominion's Virginia utility will depend on these things: NextEra's financial health (given its many risks); the priority that NextEra places on VEPCO relative to its many other ventures, current and future; and this Commission's power, ability, and willingness to hold NextEra accountable to the Commission—a problem given the uncertainty about the Commission's enforcement power—legal and practical—over NextEra. NextEra's financial health, in turn, will depend on the success or failure of its thousands of other business ventures.

As already explained, NextEra has no duty to provide high-quality electric service in Virginia. Its duty is to maximize its systemwide earnings. Where in that priority fits VEPCO's need for equity, the Commission doesn't know because NextEra refuses to commit—legally, that is, as opposed to rhetorically and aspirationally—to follow this Commission's orders about equity sufficiency at the NextEra holding company level and equity infusion into the VEPCO level.

The result: Today, the main influence on VEPCO's financial health, and its access to capital, is the decisionmaking by this Commission. After the acquisition, the main influence on VEPCO's financial health will come not only from this Commission but also from NextEra's decisions—decisions over which the Commission has no indisputable control and over which NextEra resists enabling the Commission to have legal and practical control.

1 **Q. Hasn't NextEra committed to providing Dominion with sufficient equity?**

2 **A.** NextEra's witnesses say so, but NextEra has not made these words an enforceable legal
3 commitment, with the means of enforcement clear and practical. NextEra has done
4 nothing to eliminate the following uncertainties about whether the commitment is
5 legally binding and how the Commission would enforce it:

6 First, if NextEra fails to provide Dominion sufficient equity, Dominion cannot
7 sue NextEra for any breach of contract because a wholly owned subsidiary does not sue
8 its parent.

9 Second, if the Commission made this purported commitment a condition of
10 approving the acquisition, then NextEra's breach of the condition would necessarily
11 mean that the Commission has to de-approve the acquisition, i.e., require NextEra to
12 divest Dominion. But NextEra has neither agreed that divestiture would be the
13 necessary result, nor explained how divestiture would work practically. The
14 responsibility for making these points clear is NextEra's responsibility, not the
15 intervenors' and not the Commission's, because the risk of insufficient equity is a result
16 of NextEra's action in acquiring Dominion, not any action of any intervenor or the
17 Commission. If the Commission does not assure itself of its legal power to order
18 divestiture, and of its practical ability to do so, it cannot depend on a condition whose
19 breach would require divestiture. And if the Commission cannot depend on a condition
20 that is necessary to ensure that the transaction "will not" impair or jeopardize, the
21 Commission cannot approve this transaction. That is precisely where things stand now.

Q. Is there an example of uncertainty about NextEra's providing Dominion with sufficient equity?

A. Yes. NextEra refused to answer straightforwardly this obvious, legitimate question:[65]

> Question: Has NextEra committed to Dominion that, if NextEra had insufficient capital for both its non-utility businesses overall and Dominion Energy Virginia, it will always prioritize the equity needs of Dominion Energy Virginia?
>
> Response: Joint Petitioners are not making any commitments with respect to future hypothetical circumstances. . . .

The "circumstances" faced by the Commission are not "hypothetical." The very commitment that NextEra purports to make—to supply equity should VEPCO need it—is rooted in the real-world situation that VEPCO will need equity from NextEra (as opposed to relying entirely on VEPCO's own retained earnings and proceeds from debt). Like all financial resources, equity is scarce. Scarcity requires planning, and a commitment to planning.

This resistance to answering a simple but vital question requires the Commission to assume that the answer is adverse to NextEra's goals in this case. NextEra wants the Commission to accept as true and enforceable NextEra's "commitment" to provide sufficient equity to VEPCO, while at the same time not making a "commitment" that if NextEra has insufficient equity for both VEPCO and NextEra's nonutility businesses, NextEra's priority would be VEPCO. Such self-contradicting conduct does not deserve the Commission's deference or trust.

[65] CV1-114.

C. The acquisition brings additional but unknown risks because NextEra can acquire more companies of any type, industry, location, or amount—all without the Commission's permission and advance knowledge

Q. Explain the purpose of this Part V.C.

A. In this Part V.C, I explain that NextEra, after this acquisition, plans expansion in multiple areas. I also explain that if the Commission approves the current acquisition, it has no way afterwards to limit that expansion. This acquisition is merely NextEra's latest move in a multi-year, multi-effort acquisition strategy that will continue for as long as NextEra wants it to. Yet NextEra refuses to discuss, limit, or subject to Commission review its specific future acquisition plans. Those refusals make Commission approval, under the statute's "will not" standard, logically impossible.

1. NextEra plans expansion in multiple areas

Q. What information exists about NextEra's plans for future investments outside of Virginia?

A. NextEra says that it expects expansion in these eight areas:[66]

- Electric Transmission: NextEra Energy Transmission (NEET) plans to expand regulated transmission infrastructure needed to connect new generation, relieve congestion, and support growing electricity demand across the U.S.

- Gas Transmission: Energy Resources expects to expand its regulated natural-gas pipeline portfolio as additional gas-fired generation and large loads increase demand for firm fuel transportation across the U.S.

- Renewables: Energy Resources expects continued demand for renewables as utilities, corporations and large load customers seek low-cost generation and clean-energy solutions.

- Battery Storage: Battery storage is positioned as a fast-to-deploy resource that can provide capacity, improve reliability, reduce congestion and firm renewable generation across the U.S.

[66] The next eight bullets are quoted from response to Staff 1-15.

- Gas Generation: New gas-fired generation is expected to provide reliable, dispatchable power for large-load customers and support "bring your own generation" solutions.

- Nuclear: Nuclear growth includes recommissioning Duane Arnold and evaluating advanced nuclear technologies.

- NextEra Energy Resources Large Load: Energy Resources plans to develop large-scale power and data-center hubs with all forms of energy by combining generation, transmission, pipelines, storage and customer-supply capabilities.

- Recontracting PPAs: Higher market power prices create an opportunity to renew expiring renewable and nuclear contracts at rates above the portfolio's existing contract prices.

Each area has risk. VEPCO's customers get nothing positive from this extracurricular activity; what they get is the risk of increases in VEPCO's cost of capital because these business risks and financial risks are greater than those experienced by VEPCO. Customers also risk paying for nonutility costs misallocated to VEPCO's cost structure. For NextEra shareholders, those risks are balanced by the prospect of higher earnings. For VEPCO's customers, there is no prospect of higher earnings.

2. Dominion is NextEra's latest move in a multi-year, multi-effort acquisition strategy

Q. What has been NextEra's history of acquiring other monopoly utilities?

A. In terms of utilities alone, NextEra told Staff that in the last 20 years, NextEra sought to buy each of the following entities:[67]

- Hawaiian Electric Industries (which owned four islands' utilities plus American Savings Bank)

- Oncor Electric Delivery Co., LLC (a Texas monopoly utility)

- Constellation (which then owned Baltimore Gas & Electric among other companies)

[67] Staff 1-39.

- Santee Cooper (South Carolina's state-owned utility)
- Gulf Power Company
- Florida City Gas

NextEra completed the last two acquisitions. The first two failed—the Hawai`i and Texas commissions rejected the Hawaiian Electric and Oncor proposals in complex orders containing details and reasoning omitted from NextEra's terse explanations to Staff. (In the Hawai`i proceeding I was a witness for the Governor, opposing the transaction.) In the Santee Cooper matter, the state chose not to go forward with a sale. (I was an advisor to the state's Department of Administration, which ran the process.) The Constellation merger was terminated by the parties before a Maryland decision.

This list of course does not include NextEra's acquisitions of or investments in nonutility businesses. Also unmentioned by NextEra in its response to Staff was its 2019 bid to acquire the City of Jacksonville's utility.

Q. Should the Commission be concerned about how NextEra, in its Petition to the Commission, has treated its acquisition history?

A. Yes. The Petition and accompanying testimony provide no information on or explanation of an obviously relevant question: Why has NextEra made so many attempts at acquisitions, what is the unifying purpose of these attempts, and how does this proposal to acquire Dominion and VEPCO fit within that purpose?

This information is essential to understanding two things: (a) the motivations underlying the current transaction, e.g., whether NextEra's real goal is merely to own more utilities rather than—as the witnesses claim—to benefit Virginia customers; and (b) what ingredients in NextEra's choice, design, and regulatory practices have caused

these attempts to fail. Without this information, the Commission cannot assess either NextEra's customer-service sincerity or its investment judgment.

The question is so obvious, and the answer so relevant to the statute's "will not" standard, that the Commission should view the answer's absence as a distinct reason to reject this transaction. Subjecting VEPCO to the control of a company that fails to share the full story is no way to ensure that a transaction "will not" impair or jeopardize adequate service at just and reasonable rates.

3. NextEra refuses to discuss, limit, or subject to Commission review its specific future acquisition plans—making approval logically impossible

Q. Have the Petitioners described the post-transaction corporate structure accurately?

A. No. In Exhibit D, and in their verbal descriptions, Petitioners present the post-transaction structure as the mere sum of the status quo Dominion and NextEra structures. This description of the present omits what will occur in the future—as a result of NextEra's unlimited, unreviewable future acquisitions. Exhibit D's static picture therefore fails the truth test, because NextEra is not static; its risk picture will change as NextEra changes.

Those changes know no limit because, as I will explain in Part VIII.A, Congress's 2005 repeal of the federal Public Utility Holding Company Act of 1935 leaves NextEra free to acquire additional companies without geographic or type-of-business limit. Because NextEra's future structure will differ from its present one, the Commission literally has no idea what NextEra is asking it to approve.

Q. What has NextEra said about its future acquisitions?

A. NextEra is not willing to limit its future acquisitions. Nor is NextEra willing to subject its future acquisitions to this Commission's review, regardless of any risks caused to VEPCO's electricity customers or the oversight costs to this Commission.

Clean Virginia asked whether NextEra would "commit that this acquisition of Dominion will be its last acquisition." NextEra refused: "[I]t would be unreasonable for NextEra to make any such commitments."[68] NextEra said nothing about why it would be "unreasonable," or from whose perspective it would be unreasonable, or what are the reasons for future acquisitions that make advance review unreasonable. Its uninformative, evasive answer focuses only on its own desires, not on the clarity that the Commission and the customers need and deserve.

The remaining questions on this topic revealed a NextEra that has given no thought to this most serious question of future acquisitions. Consider:[69]

- Clean Virginia asked: "Is there any type of acquisition that NextEra will be willing to commit, in this proceeding, never to make—such as an acquisition in a particular industry or country or type of company?" NextEra responded:

  > NextEra would have to evaluate any such condition with the full context, facts, and circumstances that the Commission presented such a requirement under.

- Clean Virginia asked: "If the Commission were to require that NextEra get Commission approval before each future acquisition above a particular dollar level, would NextEra withdraw from this present proposed transaction? Please explain." NextEra responded the same:

  > NextEra would have to evaluate any such condition with the full context, facts, and circumstances that the Commission presented such a requirement under.

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[68] Response to CV1-166.

[69] See CV1-166.

- Clean Virginia asked: "Does NextEra believe that no matter what future acquisition it might make, there is no possibility of harm or risk of harm to Dominion's customers from that acquisition?" NextEra responded with a non sequitur:

> NextEra does not plan to make acquisitions that would be expected to harm Dominion.

There is no way that NextEra can truthfully say that with total freedom to make any future acquisition it wants, there is no possibility of impairment or jeopardy. But that was the question asked. Instead of giving a forthright answer, NextEra avoided the question. This lack of candor, this evasion of a legitimate, central question, makes it impossible for the Petitioners to meet their burden of satisfying the statute's "will not" standard.

Q. Should the Commission be concerned about the wisdom of NextEra's future acquisitions?

A. Yes. I have already given one reason: that future acquisitions could be of companies having higher risks than a traditional utility business. This likelihood is a direct result of NextEra's acquisition strategy—which is to use its lower-risk monopoly holdings as portfolio balancers against its higher-risk acquisitions. Portfolio-balancing benefits NextEra, but conversely it creates risks for utility customers.

But there is another reason. An acquisition is not merely a 150-page Merger Agreement. It is a purchase, like the purchase of a truck or an apartment building. A business purchase is an investment. For the investment decision to be prudent, there must be a clear basis for expecting a positive return on the investment. But NextEra has acknowledged that it paid a $12.5 billion premium to get control of Dominion without

making a specific calculation of what return it will earn on that investment. That is the only possible conclusion from this dialogue:[70]

> CV question: What portion of that future infrastructure have the applicants assumed will go into rate base? Please explain fully the bases for that assumption.
>
> NextEra response: Joint Petitioners object to this request as it is vague and ambiguous with respect to the undefined reference to "that future infrastructure." Joint Petitioners further object to this request as not relevant to the subject matter of this proceeding or reasonably calculated to lead to the discovery of admissible evidence in this proceeding, to the extent it seeks information about future infrastructure costs in the rate base.

There was nothing ambiguous about "future infrastructure"; the context was clear that the phrase referred to future infrastructure that would go into rate base to serve growing demand—the very reason for NextEra's desire to purchase Dominion and VEPCO.

It is the relevance objection that should cause the Commission concern. A NextEra projection of the actual portion of future demand that NextEra expects to serve through rate-based infrastructure would reveal something about what return NextEra will earn on the $12.5 billion premium (along with the rest of the purchase price). That fact would tell us something about the prudence, from NextEra's own business perspective, of its multibillion-dollar decision. The Commission must infer from this factless answer that NextEra has no answer—that NextEra has made a $12.5 billion investment without knowing what would be the return on that investment. The Commission then must assume that with unlimited ability to make future acquisitions of any business in any state or country—all outside the Commission's powers to

[70] CV1-34.

1 approve—NextEra will behave similarly casually—thus adding to the risks of NextEra-
2 controlled Dominion.
3 **Q. Is NextEra asking the Commission to make an error of logic?**
4 **A.** Yes. Virginia has no law, and the Commission has no rule, limiting the complexity of a
5 holding company that controls a Virginia utility. NextEra's approach to this proceeding
6 nowhere mentions this unfortunate fact. Its Petition describes only its present holdings
7 and its present risks. The Petitioners then assign themselves high grades, assessing their
8 holdings as successful and low-risk. This subjective description, even if accurate today,
9 is necessarily stuck in the present. It tells us nothing about the future. NextEra wants the
10 Commission to make a judgment about the future by looking only at the present. That is
11 an error of logic, which the Commission may not commit.
12 Again: This transaction is not merely NextEra's acquisition of Dominion. By
13 approving this transaction, the Commission will not only be granting NextEra the right
14 to acquire Dominion. The Commission implicitly will be approving in advance, without
15 facts, what it cannot prevent in the future: NextEra's acquisition of any and every other
16 company it wants, regardless of the risks to VEPCO and its electricity customers. This
17 transaction, therefore, is the classic pig-in-a-poke. As a matter of logic and facts, the
18 Commission cannot find that this transaction "will not" impair or jeopardize utility
19 service and rates if future events that might affect service and rates are outside the
20 Commission's current knowledge and outside its future control.
21 Here's another way to understand the situation. Suppose that after NextEra
22 acquired Dominion, the Commission did actually have the authority and duty to review
23 each future major NextEra acquisition. Suppose that NextEra then asked for blanket
24 permission to acquire anything anywhere, at any time, with no notice to the Commission

and no review by the Commission—all regardless of location, size, financial leveraging, or business risk. The Commission would of course reject such an audacious request. But that is exactly what NextEra is asking for here, and what the Commission would be approving if it grants that request.

In sum: It is impossible—factually and logically—to find that there is no single future NextEra acquisition, and no combination of future NextEra acquisitions, of any type of company, at any time, in any country in the world, that could ever result in a situation, such as a business failure or loan default, that would impair or jeopardize adequate service to the public at just and reasonable rates.

D. Experience, logic, and economic theory confirm that the risks to VEPCO and its customers are not "speculative"

Q. In prior acquisition cases, petitioners have labeled concerns about affiliate business risk "speculative." Are they?

A. No. Adjectives don't change facts. Here are four facts:

- The geographic reach and type-of-business scope of NextEra's future acquisitions have no legal limit. Post-transaction NextEra will have detailed acquisition strategies that it will keep to itself, leaving the Commission with no idea what risks VEPCO and its customers will face. That is not speculation; it is a fact.

- The Commission does not know, and will have no power to control, how small Dominion will become relative to NextEra. Nor does the Commission know how small is too small, or how many NextEra affiliates are too many NextEra affiliates, before VEPCO's welfare begins to slide downwards in importance to NextEra's leadership, and before the Commission finds itself unable to monitor and detect abuses or risks. Those are not speculations; those are facts.

- NextEra's acquisition aspirations conflict with VEPCO's public-service obligations, because if equity becomes scarce for NextEra, the Commission has no enforceable guarantee that NextEra will put VEPCO before any of its other ventures. NextEra cannot, at least not under oath, tell each of the commissions in Virginia, North Carolina, South Carolina, and Florida that their state's utility will be NextEra's top priority, any more than every parent can say that their child is above average. That is not speculation; it is a fact.

- NextEra's future acquisitions, and the activities of the acquired companies, will occur outside the Commission's jurisdiction and control. That is not speculation; it is a fact.

Those who call these concerns speculative are the ones who speculate. They speculate that

- shrinking a utility's contribution to its holding company's wealth will never reduce the holding company's commitment to the utility's well-being;
- NextEra's nonutility investment goals will never adversely affect VEPCO's service obligations;
- business failures within the NextEra corporate family will not occur—and if they do occur, they will never have any adverse effect on VEPCO; and
- magnifying the complexity of the regulatory task will not strain the Commission's limited regulatory resources.

NextEra cannot disprove these negatives. Under the statute's "will not" standard, and given that the burden of proof lies with the Petitioners, there is no path to approval.

The attack of "speculation" is actually a misuse of the term. A projection is not "speculative" if it is plausible. Any credible regulatory professional knows that (a) competitive entry involves more business risk than monopoly status; (b) business risk by definition means the risk of adverse outcomes; (c) adverse outcomes in one place in a corporate system can raise costs for other places in the corporate system; and (d) there is no certain, consensus, fixed methodology by which a regulator can, with certainty, zero out the effect of nonutility risk on the utility's authorized cost of capital. Any credible regulatory professional also knows that NextEra's risk-taking is well beyond minimal. So the possibility that NextEra's risks will hurt VEPCO's customers is well past plausible. What is not plausible is NextEra's implicit view that there is no possibility of adverse outcomes in NextEra's corporate system ever adversely affecting VEPCO's customers.

The cost of a risk is the dollar damage caused by an adverse event multiplied by the probability of that event. The response to quantification uncertainty is not to assign a damage value of zero. That is the "speculation" argument's error.

Q. Why do you refer to NextEra's insistence on no possible impairment or jeopardy as an "implicit view"?

A. I say "implicit view" because no NextEra witness has said explicitly that there is no possibility of adverse outcomes in NextEra's corporate system ever adversely affecting VEPCO's customers. To say so, under oath, would be to violate that oath. But to say, under oath, the truth—that there is a possibility of adverse outcomes in NextEra's corporate system adversely affecting VEPCO's customers—would be to admit that this transaction cannot pass the statute's strict "will not" standard. So all four of the Petitioners' witnesses, and the attorneys who either wrote or oversaw NextEra's discovery responses, avoid the question.

The Commission can get to the truth easily. It need only ask each of the Petitioners' four witnesses, when they get on the witness stand and take the oath, this simple question: *Is there a plausible possibility of adverse outcomes in NextEra's corporate system ever adversely affecting VEPCO's customers, yes or no?* Remind the witnesses that both companies' 10-K reports list dozens of risks. The witnesses can avoid the question in their self-written, attorney-reviewed prefiled testimony and discovery responses. They can't avoid the question when a Commission member asks it live.

Q. Would NextEra's dismissal of business risk when raised by intervenor witnesses conflict with its own positions?

A. Yes. Section 4.01(a)(vi) of the Merger Agreement prohibits Dominion and its subsidiaries, before the closing of the transaction and subject to certain exceptions, from

> acquir[ing] (whether by merger, consolidation, purchase of property or assets (including equity interests) or otherwise) any corporation, partnership or other business organization or division thereof or any material assets of or interests in any Person, with an aggregate value in excess of One Billion Dollars. . . .

Why would NextEra have to prohibit Dominion from investing in new businesses? Because Dominion's investing in new businesses would increase the risks that NextEra is taking on. NextEra protects itself from Dominion's risk-taking while insisting that the Commission allow NextEra's unlimited risk-taking. That inconsistency, that elevation of private interest over public interest, makes it impossible for the Commission to find that the transaction will not impair or jeopardize.

Q. What if the Petitioners assert that eliminating all risk is not practical?

A. They would be right. Eliminating all risk is not practical—not where NextEra brings so much risk to the table on Day 1, and then insists on the unreviewed, unlimited right to engage in conduct that causes more risk. And that is the point. To make a defense out of "we cannot eliminate all risk" implies a right to cause risk. Under a statute requiring the Commission to disapprove an acquisition unless it "will not" impair or jeopardize, NextEra does not have that option.

E. NextEra is unprepared to identify, and unprepared to take responsibility for protecting customers from, the risks that it brings to VEPCO and its customers

Q. Has NextEra adequately identified and addressed the potential for harm to VEPCO customers arising from NextEra's risks?

A. No. Here is one example of the problem. CV1-116 asked the following:

> For each NextEra affiliate, including but not limited to FP&L:
>
> a. Describe its business activities;
>
> b. Provide the income statements and balance sheets starting with 2021; and

> c. Describe all material risks to customers, including but not limited to all material risks you have disclosed to shareholders.

NextEra failed to answer 116(c), because its answer referred only to risks from the transaction, not risks from the affiliates.

NextEra's response to CV1-117 was more informative—in terms of its preparedness to address the affiliates' risks. Question 117 asked NextEra to answer three questions about each risk identified in the response to Question 116(c). Here are the three questions and NextEra's answers:

> a. Please describe the specific events that would convert the risk into harm to the Dominion or its customers.

NextEra answered: "Unknown as to any specific facts that could or could not take place in the future."

> b. Please state the probability that each event would occur (from 0 to 100%—and explain the chosen percentage), and the types of harms it could cause.

NextEra answered: "Unknown."

> c. For each risk, describe the actions you are committing to take to eliminate the risk and thus to eliminate the possibility of harm.

NextEra answered: "Any unified risk mitigation measures to post-merger Dominion individually or the combined company collectively will have to be evaluated once the transaction is completed."

NextEra is saying that as to risks from affiliates—risks that professional financial analysts and bond rating agencies, and NextEra itself, recognize exist (recall NextEra emphasizing in its Investor Presentation that lowering the percentage of nonutility businesses in the consolidated company was a good thing)—it doesn't know

anything about specific events that could cause harm, and doesn't know anything about the probability that harm will occur. Worse, despite making what it calls "commitments" not to let these risks fall on VEPCO customers, NextEra is now saying that it won't even evaluate risk-protection measures until after the closing—meaning after Commission approval followed by closing. NextEra wants the Commission to find that the transaction "will not" "impair or jeopardize" without NextEra having to prove that its unknown "risk mitigation measures" will actually exist, let alone work. There is no logic to this position.

Q. Do you have another example of the problem?

A. Yes. Equally worrisome was the Petitioners' formulaic objection to the above-quoted set of questions:

> Joint Petitioners object to the premise of this request, which is hypothetical in nature and calls for a speculative response. Joint Petitioners object to this request as overly broad, unduly burdensome, and potentially voluminous and cumulative to the extent it seeks "specific events." Further, Joint Petitioners object to the extent the request requires original work to respond.

There is nothing "hypothetical" about the question. Damage to a utility and its customers from a utility's affiliated nonutility risk is not a hypothesis, i.e., an idea that needs to be tested with experiments. Everyone knows that damage can occur—which is why everyone agrees that protections are necessary, though not everyone agrees that the typical protections are sufficient. And requiring an assessment of probabilities does not involve "speculation," any more than does assessing whether it will rain tomorrow. It requires a description of facts, known and unknown, and a logical extrapolation from those facts. As for "unduly burdensome": Some "burden" is inherent in discovery. The difference between due and undue burden depends on a consideration of value relative

to cost. NextEra's failure to give an ounce of consideration, in favor of rote repetition, is discovery failure, therefore burden-of-proof failure. Most importantly, if the result of producing a serious professional answer to a question about risk is "voluminous," there must be a lot of potential and actual risk. And that is the point.

Q. Has NextEra prepared, and is NextEra prepared, to take responsibility for eliminating the risk that its competitive affiliates will harm VEPCO's customers?

A. No. Clean Virginia asked another straightforward question, No. 118:

> Please refer to Va. Code sec. 56-90, stating the Commission "shall be satisfied that adequate service to the public at just and reasonable rates will not be impaired or jeopardized".
>
> a. Identify the specific company officials who will testify that there is zero possibility of harm.
> b. Who will be responsible for ensuring that there is zero possibility of harm—not zero harm, but zero possibility of harm?

Petitioners responded:

> Joint Petitioners object to the premise of this request, which assumes that Va. Code sec. 56-90 imposes the requirement, standard, or obligation on which the request is based; it does not. Further, Joint Petitioners object to this request as argumentative; rather than seeking discoverable facts, it calls upon Joint Petitioners to adopt Clean Virginia's characterization, interpretation, or conclusion, and it improperly assumes disputed facts not established in the record.

This answer presents resistance because a truthful response would be uncomfortable. If the Petitioners had "specific company officials who will testify that there is zero possibility of harm," they would have said so. And if there were specific company officials "[w]ho will be responsible for ensuring that there is zero possibility of harm—not zero harm, but zero possibility of harm," NextEra would have said so.

From these facts, one must conclude that NextEra has no officials who have identified the harms, no officials who have any idea of the probability of those harms,

and no officials who have any plan for protecting customers from those harms. All that Petitioners offer is a nonbinding, nonenforceable commitment to do what the law requires (i.e., a first-year contract-law illusory promise), but no serious plan or intent to back it up.

Q. What is your conclusion about Petitioners' preparedness to guarantee that the risks in their holding company "will not" "impair or jeopardize" "adequate service at just and reasonable rates"?

A. Petitioners present no description of the risks, no quantification of the risks, and no solution to the risks. They only repeat the mantra that they will not reflect those risks in rates. That mantra is circular, because it amounts to this: There will be no risk in rates because we say there will be no risk in rates. Circularity is not evidence.

Petitioners say nothing about what methodology they will use to guarantee the insulation of rates from risk. They do not acknowledge that there is no methodology that, by professional consensus, is foolproof. They have failed, therefore, to give the Commission the information necessary to make the required statutory findings that the increased exposure of VEPCO's customers to nonutility businesses "will not" impair or jeopardize service and rates.

VI. Cause of impairment or jeopardy #4: In seeking, and intending to keep for itself, a $12.5 billion, 23.1% control premium, Dominion has acted inconsistently with VEPCO's obligations to its customers

Q. Explain the purpose of this Part VI.

A. NextEra has agreed to pay Dominion shareholders a 23.1%, $12.5 billion control premium, in the form of post-transaction company stock in NextEra. Dominion wants its shareholders to keep that entire value for themselves.

That feature of the transaction, in and of itself, impairs just-and-reasonable rates. After clarifying terminology, I explain why the entire amount should not go automatically to the Dominion shareholders. NextEra is paying most of that amount to get control of VEPCO's monopoly franchise—that government-created, government-protected, exclusive privilege of providing essential electric service for profit. The value that NextEra sees in that privilege was not likely created by Dominion's shareholders; it flows largely from regulatory actions—actions that compel VEPCO's captive customers to support VEPCO financially by paying Commission-set rates. Since those rates have already provided the Dominion shareholders fair compensation for VEPCO's investment in public-utility assets, giving them the entire control premium is overcompensation. To allow Dominion's shareholders to keep all that overcompensation means treating the franchise as a shareholder-owned asset rather than what it is—a government-created privilege.

Given these facts, allowing Dominion's shareholders to keep the full control premium is illogical. The logical solution, backed by a century of regulatory principle, is to allocate the premium between customers and shareholders based on each group's

contribution to its value—most of which is the value that NextEra places on controlling VEPCO's exclusive franchise.

A. The control premium is the price paid for control of the government-granted franchise

Q. In the context of corporate acquisitions, what is the control premium?

A. The control premium is the excess of the purchase price over the unaffected market price of the target's stock. Unaffected market price is the market price for the target's stock before that price was affected by news of a possible acquisition.

In this transaction, the control premium, as of May 15, 2026 (the last trading day before the companies announced their agreement on May 18), is 23.1%, or $12.5 billion, above Dominion's market price. Those numbers come from the following calculation:

- NextEra's closing price: $93.35.
- NextEra's offer for a Dominion share: 0.8138 x NextEra share = 0.8138 x $93.35 = $75.97.
- Dominion's trading price: $61.73.
- Premium per share: $75.97 minus $61.73 = $14.24.
- Dominion shares outstanding: 879,512,484 (Dominion's Form 425).
- Total premium: $14.24 x 879,512,484 = $12,524,257,772.[71]

[71] "The merger agreement fixes an exchange ratio of 0.831 [the correct number is 0.8138] and total cash consideration of $360M." Response to CV1-19. To clarify: What is fixed is the exchange ratio, not the premium itself. The premium, i.e., the percentage and the amount, on the day of closing will vary from the premium on the day of agreement "based on the performance of the underlying stock prices of NextEra and Dominion Energy." Response to CV1-20. *See also* Response to CV1-21 ("[T]he premium relative to the last market close immediately preceding announcement is a customary premium to reference with respect to a merger.").

The figures just stated reflect only the 0.8138 exchange ratio of NextEra stock for Dominion stock; they do not reflect the $360 million cash payment. As I understand it, the purpose of the $360 million cash payment is not to buy control but to compensate Dominion shareholders for stock dilution.

Q. Why would an acquirer of a target pay a price exceeding the target market price?

A. When buying 100 percent of a company, the acquirer gains control of that company. The acquirer assumes that by gaining control it can increase its earnings by more than if it were a stockholder without control. Compare an ordinary purchaser of stock. An ordinary purchaser of stock tells her broker, "Buy me some shares at the market price," because she has no reason to pay more than the market price. She controls only her stock, which entitles her to a sliver of the company's future earnings and value. She is a passive owner. The acquirer of all the stock, in contrast, pays more than the market price because it is buying more than merely stock; it is buying control. That is why we call this premium the control premium.

Q. Why would an acquirer of control expect to produce higher earnings than an ordinary buyer of stock would experience?

A. With control, the acquirer can determine the future direction of the company. The acquirer will have control over—

- the Board and top management;
- the timing and size of proposed rate increases;
- the types and timing of cost reductions, such as through layoffs or refinancings;
- whether and when to withhold from customers any savings from reducing cost;
- whether, when, and how to influence government policy on the allocation of risk between shareholders and customers;

- the nature and timing of infrastructure spending;
- decisions about the mix of debt and equity (including the ability to increase earnings by using holding company debt to buy equity, and then persuading the commission to award equity-level returns on equity bought with lower-cost debt);
- the company's relations with regulators and the political sector (including decisions about whether to allow or suppress opportunities for other businesses to perform functions normally performed by the utility); and
- decisions about how to use the existing utility franchise to create more business opportunities (such as renewable energy sales to the controlled utility affiliate).

An ordinary stock buyer has no such influence.

Q. In understanding the value of control, is it useful to distinguish acquisitions in competitive markets from acquisitions in utility monopoly markets?

A. Yes. For acquisitions in competitive markets (i.e., acquisitions not involving a franchised monopoly utility), the acquirer might project that it can use its control to increase the quality of the products or lower the cost, so as to, with increased quality, generate more sales or the same sales at a higher price; or, with lower cost, earn more profit-per-sale.

But in the narrative in the S-4 Proxy Statement, and in its Investor Presentation, NextEra has made clear that increasing quality or lowering costs at VEPCO is not why it is buying Dominion. So NextEra must have some other reason for paying the control premium. That reason, I will explain, is the government-protected franchise. Recall from Part V.B.2 that VEPCO's 2025 revenues were 71.6% of Dominion's total revenues. NextEra is paying this 23.1%, $12.5 billion control premium largely because as a rational investor, it has determined that controlling VEPCO's franchise will enable it to

increase VEPCO's future earnings from VEPCO's captive customers by at least the cost of the control premium plus a reasonable return on that premium.[72]

B. The premium that NextEra paid is largely attributable not to VEPCO's operational performance or the Dominion shareholders' risk-taking, but rather to VEPCO's government-protected privilege to serve captive customers

Q. Explain the purpose of this Part VI.B.

A. I have explained that the control premium reflects the acquirer's view of the value of control. In this transaction, it appears that the main value that NextEra sees is the value of rate-basing the future capital expenditures needed to serve growing load. I discuss that point first. I then discuss two other possibilities that NextEra—and in fact any acquirer of a franchised retail utility monopoly—might see: the opportunity to charge rates that produce (a) actual returns exceeding NextEra's "required" return and (b) actual returns exceeding VEPCO's Commission-authorized return.

In each of these situations, the value underlying the premium has nothing to do with Dominion's executives' pre-transaction decisionmaking or its shareholders' pre-transaction risk-taking. The value is largely attributable to the Commonwealth's decision to prohibit competition for retail customers other than High-Load customers.

[72] This general statement requires some polishing. NextEra can also be assuming that it will increase earnings from Dominion's non-VEPCO businesses, and perhaps from VEPCO's noncaptive customers. The general nature of my statement is unavoidable because NextEra has not explained the reasoning—if there was reasoning—supporting its decision to pay what it did.

1. NextEra's primary reason for buying Dominion is to rate-base future capital expenditures

Q. Why is NextEra paying the premium?

A. NextEra appears to be assuming that some large portion, maybe all, of the capital expenditure opportunities necessary to serve new VEPCO load will go to VEPCO, not to the new High-Load customers themselves and not to competitive retail suppliers. Those capital expenditures would then go into VEPCO's rate base to produce earnings for NextEra.

This assumption, repeated by NextEra to investor analysts, conflicts with VEPCO's duty to minimize customer costs by ensuring that capital expenditure opportunities go to the most cost-effective actors, rather than automatically to VEPCO. This fact alone makes the very design of this transaction—meaning, the existence of a control premium—inconsistent with the just-and-reasonable standard.

There is a larger point. In competitive markets there is an unobjectionable expectation: that executives who create earnings opportunities, and shareholders who take risks in anticipation of those earnings opportunities, will be rewarded for making their company more attractive to prospective acquirers. In the acquisition context, that reward includes the control premium. But the acquisition of a government-protected monopoly electric utility does not occur in a competitive electricity market. The rate-basing opportunities that NextEra hopes to capture exist not because Dominion's executives and shareholders did anything special, such as guiding the company into a dominant market position. VEPCO's market position is dominant because the Commonwealth granted VEPCO an exclusive franchise (except for the competition authorized for High-Load customers). So the rate-basing opportunities that NextEra is

buying exist because the Commonwealth government granted VEPCO an exclusive franchise, one whose economic value depends in large part on the captivity of VEPCO's customers.

Given these facts, the Petitioners' intent to award 100% of the control premium to Dominion's shareholders has no basis in logic. This feature of the transaction—what is actually the foundation of the transaction—is inconsistent with the just-and-reasonable standard and therefore is impairment.

Here is another way to understand the point: By buying 100 percent of Dominion, NextEra is actually buying, with respect to VEPCO, two things: indirect ownership and control of the utility's assets and business operations, and indirect control of the utility's franchise. Today, VEPCO's utility assets sit on VEPCO's ratesetting books at book value. After the acquisition, those same assets will sit on the same books at the same book value (a necessary result of not putting the control premium explicitly into VEPCO's rate base). Because Virginia's electricity rates are based on book value, we can assume that the value to NextEra of these assets (i.e., the assets separated from the franchise) is book value—the net present value of the future stream of earnings made possible by charging rates based on book value. By offering a price exceeding that level, NextEra must be paying for more than just the assets. NextEra is paying for control of the franchise.

2. NextEra's possible secondary reasons: the opportunity to charge customers for returns exceeding NextEra's "required" return, and/or returns exceeding VEPCO's Commission-authorized return

Q. Explain the difference between actual return and required return, and why that difference might explain a portion of the acquisition premium.

A. For any prospective acquisition, the acquirer has a "required" return, sometimes called its "hurdle rate" or its "opportunity cost of equity." It is the expected return on a prospective investment below which the acquirer would not make that investment, because the acquirer has alternative investment opportunities that are more attractive. It is the level of return sufficient to attract the to-be-invested funds.

Here's a simple example: Assume that the target company is a single-state, utility-only entity (often called pure-play). Assume also that based on the returns on equity recently authorized by the target's state commission, the prospective acquirer expects to earn an equity return of 9.00%. If the acquirer would be satisfied with 7.00% (its required return), the acquirer would willingly pay a premium to get the opportunity to earn two percentage points more. (Of course, if the acquirer pays the premium, its actual return on full investment will be less than 9.00%, but as long as the actual return (taking the premium into account) exceeds 7.00%, the premium was worth paying.)

Where the target includes a regulated utility, as it does here, the acquirer's expectation that actual return will exceed its required return is influenced by a third number: the Commission-authorized return. The authorized return itself could exceed the acquirer's required return. I discuss that possibility next.

Q. Explain the difference between actual return and authorized return, and why that difference might explain a portion of the acquisition premium.

A. For any given year, a utility's actual return on equity can exceed its commission-authorized return, for several reasons. The main (and obvious) reasons are if either (a)

the utility's actual costs for the year are less than the projected costs underlying its approved revenue requirement; or (b) its actual sales exceed the projected sales used by the commission to set the approved rates. (The reverse can also be true.) Actuals always deviate from projections because real events always deviate from projected events. If the actual return exceeds the authorized return, the excess will last until the Commission sets new rates. Because those new rates will go into effect prospectively only (because of the prohibition against retroactive ratemaking), the utility's shareholders keep the excess earnings (except where specific costs or revenues are subject to true-up procedures).

For a target utility, investors' expectations that a utility's actual return will exceed its authorized return might already be reflected in that utility's market price. In those situations, the acquirer's expectation would not affect the premium it offers. But the acquirer might expect to use its control of the utility to grow that difference—to increase the gap between actual returns and authorized return beyond the market's expectations—such as by using rate case strategies that cause the Commission to approve cost levels higher than appropriate (or to project sales levels lower than appropriate), and then increasing the lag in time between rate cases. Under those circumstances, an acquirer would be willing to pay a premium to receive those extra returns. The issue here is not whether the Commission has the power and duty to prevent VEPCO from charging rates based on over-projected costs or under-projected sales. The Commission has that power and duty. The issue is whether NextEra is paying the premium in hopes of succeeding in that strategy.

To the extent that NextEra's premium reflects any of these possibilities, then once again the reason is not any reward-worthy action taken by Dominion, its shareholders, or its executives. The expectation instead flows from regulation's inherent imperfections. Rates are supposed to reflect reasonable costs based on prudent utility decisions. In a competitive market, when a seller's prices exceed reasonable levels, price correction occurs as competitors lure, or threaten to lure, that seller's customers away. In utility regulation, price correction occurs only if the regulator discovers or is informed of the excess and corrects it—again, with the correction being prospective only. In the meantime, regulatory lag allows the utility to profit from the imperfection (unless the rate can be corrected retroactively back to the date of the discovery or initiation of the rate case—which occurs in unusual, pre-approved situations). This imperfection is not a result of Dominion shareholders' risk-taking or Dominion executives' decisionmaking.

It is true that lowering costs or raising sales between rate cases can result from management skill; when it does, there is a legitimate argument that Dominion shareholders deserve a portion of the premium—again, unless the earnings expectation associated with such actions is already reflected in the market price. To the extent NextEra's expectation is based on this possibility, its payment of a premium to the Dominion shareholders, and those shareholders' desire to keep the premium, would have some justification.

Q. Didn't the Dominion shareholders provide the investment and hire the executive team that created the utility's value—a fact that would entitle the shareholders to keep all of the premium?

A. To answer this question, one must take care with the term "value." Looking only at the market value before the acquisition, that market price might exceed book value. That

excess could reflect the market's expectation that future earnings will exceed authorized earnings, as I have already discussed. That value ordinarily belongs to shareholders, because they risked their dollars hoping to get earnings exceeding those associated with book value; and we do not hold customers responsible when market price falls below book value.

But the control premium at issue here—the excess of the acquirer's purchase price over market price—is a different story, for the reasons that I have already discussed in this subsection and those that I will discuss in the next subsection. The acquisition premium is not necessarily attributable to shareholder risk-taking or the target management's skill. Customers already compensate shareholders for their risk, through the return on equity element in the capital-cost portion of the revenue requirement equation. And customers already compensate the shareholders for management effectiveness when they pay rates that reflect management costs. Good utility performance is the quid pro quo for the state's granting of the monopoly privilege, and of the regulator's commitment (imposed by statute and Constitution) to base rates on reasonable cost and a fair rate of return. There is no logical basis for extra compensation in the form of a control premium.

Q. Summarize your point that the control premium—the value NextEra sees in controlling VEPCO's franchise—was not likely created by Dominion's shareholders.

A. I have described two possible sources of value, from NextEra's perspective: (1) the new capital expenditures will be incurred and rate-based by VEPCO, rather than incurred by competitive suppliers or by the new loads; and (2) NextEra-controlled VEPCO might persuade the Commission to set rates that produce actual returns exceeding NextEra's required return, and/or exceeding VEPCO's authorized returns.

Q. Has NextEra provided any information about whether, and the extent to which, any of these factors influenced the level of control premium that it offered Dominion?

A. No. NextEra says that it "did not complete an analysis that breaks down the value of Dominion into the categories referenced in the above question."[73]

C. VEPCO's government-granted privilege is not Dominion's private asset to sell for gain

Q. Explain the purpose of this Part VI.C.

A. Dominion is likely to argue that its shareholders deserve to receive the full control premium because Dominion is their company to sell, just like any company is its shareholders' to sell. This argument misapplies competitive market practice to a regulated monopoly market context. The necessary explanation has four parts:

- VEPCO's valuable market position derives from its government-granted franchise.
- The state-created franchise is a public privilege, not a private asset.
- Because Commission-set rates are the utility shareholders' appropriate compensation, gain from selling control of the franchise is overcompensation.
- Mere legal ownership of Dominion stock does not entitle the stock owner to the control premium.

[73] Response to CV1-26. The specific question that NextEra was answering was about the premium value that NextEra attributed to having legal control over Dominion's exclusive retail electricity franchise, as well as future rate-basing opportunities. I have assumed that the same answer would apply to analysis of the potential for the actual return on equity to vary from the required return and the authorized return. If I am wrong, I invite correction.

1. VEPCO's valuable market position derives from its government-granted franchise

Q. Explain the relationship among three things: control premium, market position, and the government-granted utility franchise.

A. In a competitive market as in a utility monopoly market, the acquirer pays a control premium to get control of the target's market position. The fundamental difference between a competitive market target and a utility monopoly market target lies in how the target gets its market position. In an effectively competitive market, the target company has earned its market position through performance merit—by taking investment risks and displaying managerial skill. (Luck can also play a role.) In the utility monopoly context, the utility gets its market position not from performance merit but from the government—many decades ago for reasons no one can remember. That is mostly what NextEra is buying with the control premium: control of VEPCO's monopoly market position—a position granted by the government, not earned through merit.

One more way to understand the point: Suppose that prior to NextEra's negotiations with Dominion, Virginia had passed a law like its original retail competition law enacted around 1999—a law that opened up Virginia's retail electricity market to competitors. Assume also that there were in fact many retail competitors and much vigorous retail competition. The exclusive market position that VEPCO has today would not be exclusive; it would be less than 100%, perhaps far less, and it would be continuously uncertain. In that situation, VEPCO's value to NextEra would be lower, so the acquisition price that NextEra would offer would be lower. The difference in price between that competition-lowered price and the price that NextEra has actually

offered—a price that includes the $12.5 billion control premium—is a difference attributable to the Commonwealth-granted monopoly franchise.

2. The state-created franchise is a public privilege, not a private asset

Q. Explain the concept of a utility franchise.

A. A utility's franchise consists of rights and responsibilities: rights granted by government to the utility, and responsibilities imposed by the government on, and accepted by, the utility. The rights include the right to provide legally defined services to a largely captive customer base, and to receive in return compensation that satisfies statutory and constitutional standards. The responsibilities include the obligation to provide service that satisfies commission-set standards, and to charge only the rates authorized by the commission.

The franchise is thus a conditional privilege. The privilege of receiving a reasonable profit for providing an essential service is conditioned on complying with the standards attached to that service. This privilege is not an asset that can be sold and resold, like a McDonald's franchise or a New York City taxi medallion. It is not like corporate stock, or buildings, or trucks, or power plants. The franchise privilege is not a commodity, to be sold to the highest bidder. The franchise is not bought and sold by anyone. It remains with the government, to be granted conditionally to whichever company the government chooses.

Because the franchise is a privilege created by government, it cannot have been created by the shareholders; nor was it purchased by shareholders. The franchise does have value, because the right to provide compensable service largely free of head-to-head competition has value. But that specific value does not derive from actions by shareholders or executives; it derives from actions by government—actions limiting

competition for the defined utility service and compelling customers to pay government-set rates for that service. The franchise is not a private asset because it never loses its public character. NextEra views VEPCO's franchise privilege as something worth paying for; but that fact does not entitle Dominion to sell control of the privilege for gain.

3. Because Commission-set rates are the utility shareholders' appropriate compensation, gain from selling control of the franchise is overcompensation

Q. Explain the connection between the compensation that Dominion's shareholders receive through VEPCO's rates, and the gain that they would receive from the control premium.

A. A utility has a legal right to fair compensation—specifically, fair compensation for providing electric service. That right comes from two sources: the statutory requirement that rates be just and reasonable; and the constitutional standard, inscribed in the Fifth Amendment's Takings Clause (as applied to the states through the Fourteenth Amendment's Due Process Clause), stating: "nor shall private property be taken for public use, without just compensation."

In conventional cost-based ratemaking, the utility's annual revenue requirement reflects reasonable operating and maintenance expenses, capital expenditures (via depreciation expense), interest on debt, and an authorized return on equity. From that revenue requirement, regulators derive rate levels that will produce that fair return on equity if actual sales equal reasonably projected sales and if actual costs reflect the reasonably projected costs. The authorized return on equity is applied to a rate base that reflects assets used and useful in providing utility service. As Justice Brandeis famously explained:

> The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return.[74]

Justice Brandeis's analysis is the basis for our modern understanding of how the Constitution applies to ratemaking.

The phrase "capital embarked in the enterprise," Justice Brandeis explained, is the money invested in assets that serve the public, i.e., book value, otherwise known as rate base:

> The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion. It would not fluctuate with the market price of labor, or materials, or money.[75]

When this Commission lawfully sets cost-based rates, utility shareholders receive their legally required compensation.

Q. You have just explained how Commission-set rates provide shareholders their legally required compensation. What is the relationship between that compensation and the control premium?

A. If lawfully set rates give shareholders sufficient compensation for providing service, then the control premium is necessarily overcompensation because it is not compensation for providing service; it has no connection to the utility's obligation to provide service. The control premium is instead attributable to NextEra's desire to own and control, and Dominion's shareholders' willingness to sell control of, VEPCO's

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[74] *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 290 (1923) (Brandeis, J., concurring).

[75] *Id.*, 262 U.S. at 307-08.

government-granted franchise. Applying Justice Brandeis's wording, the control premium does not represent compensation for "capital embarked in the [public utility] enterprise."

Because the control premium doesn't represent investment in utility service assets, Dominion shareholders have no constitutionally protected expectation of receiving it. Any expectation of receiving a premium arises from shareholders betting in the stock market, not from utilities investing in public service assets. Ratemaking does not compensate shareholders for their bets on stock prices. Rate base is where government honors its obligations; stock value is where shareholders bet their money. The dollars shareholders spend to buy stock are therefore analytically distinct from the dollars that a utility spends to acquire utility assets. Only the latter dollars—dollars associated with utility service rather than shareholders'—deserve compensation.

Here is another way to understand the point. When Virginia granted VEPCO the franchise privilege, the utility undertook an obligation to serve. To fulfill that obligation, the utility invests in utility assets. In imposing this obligation to invest, Virginia has, in the language of the Constitution's Fifth Amendment, "taken" private property for which the Constitution requires just compensation. That just compensation takes the form of rates designed to provide the utility an opportunity to earn a fair return on prudently incurred, used-and-useful investment.

From this logic, we see that the constitutionally required just compensation relates solely to the utility's obligatory investment in utility assets. A shareholder's decision to buy stock is not an obligation imposed by government to serve the public; it is a voluntary act made by the stock buyer to increase her wealth. In the utility

regulatory context, shareholders do not receive any government protection of that wealth—let alone a promise to keep gain arising solely from an acquirer's desire to control the franchise.

Q. Companies in competitive markets routinely sell their businesses at a premium, with their shareholders keeping the gain. What's the difference?

A. As I explained in Part III.D above, in an effectively competitive market the acquirer's willingness to pay the premium, and the target's expectation of a premium, are both disciplined by competition in the market for the target's product. In that product market, the target company receives neither government protection from competition nor government assurance of reasonable prices. So if the acquirer pays a control premium for the target, we can logically attribute the premium to the acquirer's expectation that its acquisition will create real economic value that will flow back to the acquirer—value that competitive pressures will force the acquirer to share with customers, either through better service or lower prices.

The discipline imposed by effective competition in the product market will discipline the size of the premium, leaving no logical reason to question either its appropriateness or the target shareholders' expectation of keeping the gain. In a regulated utility market, that key fact—competition in the ultimate product market to discipline the premium—is absent.

4. Mere legal ownership of Dominion stock does not entitle the stock owner to the control premium

Q. Aren't Dominion stockholders entitled to the premium because they're the legal owners of Dominion's stock?

A. No. That argument is circular, because it assumes the answer to the question being asked. The question is: Are the owners of stock entitled to the premium? The answer

cannot be: Yes, because they are owners of the stock. In the utility regulatory context, the value of utility stock is always affected by regulatory decisions, which can raise or lower that value depending on how those decisions affect earnings. When utility shareholders volunteer to invest in a government-regulated market, they impliedly accept that regulation can reduce the value of their holdings. That has been the law since medieval times, memorialized in the landmark case of *Munn v. Illinois*, 94 U.S. 113, 126 (1877):

> [When someone] devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Recall also that with its purchase price, NextEra is buying two things: ownership of stock (which is what ordinary stock purchasers buy) and control of the franchise. The portion of the purchase price equal to the market price of the stock pays for that stock. If that market price is higher than what the shareholder originally paid for the stock, she of course keeps that gain: payment for the stock's market price goes to the owner of the stock. The control premium, in contrast, pays for control of the franchise. Because that franchise is a conditional privilege granted to the utility, not an asset owned by its shareholders, those shareholders have no necessary right to the portion of the purchase price associated with the franchise.

Dominion's shareholders may have hopes of selling the franchise for a gain. They may feel disappointment when they don't get that gain. But hopes and disappointment associated with purchases of regulated utility stock are not what the

Constitution protects. What the Constitution protects is the utility's opportunity to recover, and earn a fair return on, prudently incurred capital expenditures.

Q. Where does your reasoning leave the Commission?

A. Because the Dominion shareholders have no legally protected expectation of receiving a control premium, the Commission is free to condition the transaction (if the Commission approves the transaction—an outcome this testimony recommends against) on a reasonable portion of that premium being shared with the customers. I discuss principles for that sharing next.

D. Longstanding regulatory principles require that Dominion's shareholders and customers share the control premium based on each group's contribution to its value

Q. Explain the purpose of this subpart VI.D.

A. Because Dominion's value to NextEra owes much to its government-granted, exclusive franchise rather than to Dominion shareholder decisions, there is no logical basis for Dominion's shareholders to receive, automatically, all of the control premium. Instead, the Commission should apply a longstanding, accepted regulatory principle: benefits go to the benefit-creators and burden-bearers. The Commission therefore should allocate the control premium to the shareholders and the customers in proportion to the value that they contributed to the premium. Depriving VEPCO's customers of their contribution-backed share of the premium impairs their right to just-and-reasonable rates.

1. The public-interest principle: Benefits go to the benefit-creators and risk-bearers

Q. In determining how to share the control premium between shareholders and customers, what regulatory principles should apply?

A. The preceding subpart explained why Dominion's shareholders have no automatic entitlement to the control premium. The Commission therefore has discretion to allocate it according to some principle. The regulatory principle applicable here is the principle of nondiscrimination. Commissions follow that principle by allocating costs to the cost-causers, rewards to the risk-takers, and benefits to the benefit-creators. Customers are charged the costs that they cause, utilities are compensated for the costs that they prudently incur and the risks that they prudently take, and benefits are allocated to those who create them.

A well-known use of this principle occurs when commissions allocate the gain from a utility's sale of an asset previously used for utility service. If that asset had been in the utility's rate base (which means that the cost was borne by the customers), and if the utility then sells that asset for a price exceeding the asset's net book value, the gain typically goes to the customers. The customers bore the cost, so they get the gain. If the asset had not been in rate base, the gain normally goes to shareholders because they bore the economic burden. Benefit goes to the burden-bearer.[76]

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[76] On this topic, the frequently cited precedent is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission.* The court there stated:

> It is well settled that utility investors are entitled to recoup from consumers the full amount of their investment in depreciable assets devoted to public service. This entitlement extends, not only to reductions in investment attributable to physical wear and tear (ordinary depreciation) but also to those occasioned by functional deterioration (obsolescence) and by exhaustion (depletion). . . .[Since customers] have

Under this principle, the Commission must allocate the control premium between Dominion's shareholders and VEPCO's customers according to each group's relative contribution to the premium's value. To the burden-bearers and benefit-creators goes the benefit. For the control premium, the question is: Who are the burden-bearers and the benefit-creators? Who took the actions or bore the costs that produced the franchise value that caused Dominion to insist on, and NextEra to agree to, a $12.5 billion control premium? I turn to that question next.

2. The public-interest solution: Allocate the control premium to the shareholders and the customers in proportion to the value they created and risks they bore

Q. Given the principle that requires allocating the control premium to the burden-bearers and value-creators in proportion to the burden that they bore or the value that they created, are you presently recommending a specific allocation?

A. No. To determine the relative contribution made by shareholders and customers, the Commission will need more evidence.

> shouldered these burdens, . . . it is eminently just that consumers, whose payments for service reimburse investors for the ravages of wear and waste occurring in service, should benefit in instances where gain eventuates—to the full extent of the gain.

485 F.2d 786, 808-11, 822 (D.C. Cir. 1973) (footnotes omitted). *See also id*. at 808 ("[I]f the land no longer useful in utility operations is sold at a profit, those who shouldered the risk of loss are entitled to benefit from the gain."). *See also Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, 2 FCC Rcd. 6283, 6295 ¶¶ 113-14 (Sept. 17, 1987) (order on reconsideration) (observing that "[t]he equitable principles identified in [*Democratic Central Committee*] have direct application to a transfer of assets out of regulation that produces gains to be distributed, and requiring that customers receive the gains on assets when the market value of the assets exceeds net book cost"); N*.Y. Water Serv. Corp. v. Pub. Serv. Comm'n of N.Y.*, 12 A.D.2d 122, 129 (N.Y. App. Div. 1960) (allocating gain on sale to customers when customers bore the risk of a loss in value of the assets); *N.Y. State Elec. & Gas, Case* No. 96-M-0375, 1996 N.Y. PUC LEXIS 671, at *8 (N.Y. Pub. Serv. Comm'n Nov. 19, 1996) (memorandum opinion) (reserving the net gains on the sale of land for customers is equitable and reasonable); *N.Y. Tel. Co. v. N.Y. Pub. Serv. Comm'n*, 530 N.E.2d 843 (N.Y. 1988) (customers entitled to benefits on sale of yellow pages advertisements).

1 **Q. What is the evidence for customers?**

2 **A.** As Part VI.C detailed, the support for allocating the control premium to customers lies
3 in two main facts. First, the value that NextEra sees—opportunities to win and control
4 VEPCO's rate-basing opportunities—is not largely based on VEPCO's business merits.
5 Second, the low-risk, stable VEPCO earnings that flow from those rate-base
6 opportunities result from the Commonwealth government's decision to make VEPCO's
7 customers captive customers.

8 The Petitioners might argue that the customers' decades-long history of
9 compelled payments doesn't entitle them to the control premium because they got what
10 they paid for: electric service. That is a fair argument. It tells us that customers don't
11 automatically get the entire control premium. But it doesn't tell us that they get zero,
12 because getting zero would mean that the shareholders get 100%. As explained above,
13 there is no obvious rationale for the shareholders getting 100%.

14 **Q. What are the arguments for shareholders?**

15 **A.** Dominion might argue that but for its shareholders' investment, there would be no
16 service for customers to pay for; therefore, the source of the value underlying the
17 control premium is the shareholders. This argument fails because, as explained in Part
18 VI.C.3 above, the shareholders already have received compensation for their
19 investment, through the depreciation expense (by which the original investment in
20 utility plant gets recovered) and the authorized return included in Commission-set rates
21 (which provides the return on the original investment). Given that the customers paid
22 rates reflecting all costs and a fair return, one cannot say that the customers'
23 contribution to utility service was any less than the shareholders' contribution.

Also unavailable to the shareholders is their version of the gain-on-sale reasoning. I explained above that if a utility sells an asset that was not in rate base, the utility gets the full gain because the utility bore the full cost. Applying that principle to the franchise: Unless Dominion shows otherwise, the Commission should assume that Dominion never paid for the franchise. The franchise to serve is a public privilege; it is not something Dominion paid money for. (Dominion might pay annual franchise fees, but those fees are payments not for buying the franchise but for operating it. In any event, I assume that VEPCO recovers those costs through its rates.) There being no financial burden borne by VEPCO to receive the franchise, there is no burden that justifies its shareholders receiving a gain from selling it.

Q. On this question of entitlement to the control premium, you've provided for-and-against reasoning for both shareholders and customers. What if the reasoning for each is either equally persuasive, equally non-persuasive, or equally unclear?

A. Looking at the various arguments, the Commission might decide that they are of equal weight or weightlessness. Or that the control premium is technically a windfall—a lucky value to which no one actually contributed. In that situation, I recommend that the Commission use a default of 50-50. If two friends simultaneously discovered a $100 bill and couldn't find the owner, and if they behaved reasonably, they would split it in half. Absent evidence demonstrating a relative contribution, the logical result is 50-50.

I am not suggesting that the correct evidentiary result is likely to be 50-50. I am saying that if the evidence is inconclusive or equal in weight, there is no logic to granting 100% to the shareholders, any more than there is logic to granting 0% to the shareholders. In that context, a 50-50 sharing recognizes that both shareholders and customers have played a role, or that neither played a role; and so in that situation, reasonableness requires a default to equality. This approach contrasts with the

Petitioners' proposal, which is a conclusive presumption, lacking any evidence, logic, or law—or even explanation—that Dominion's shareholders should receive 100 percent.

Q. On the subject of allocating the control premium between customers and shareholders, is there any case law addressing your position?

A. I know of only one case dealing with the general subject of control premium in the context of a utility acquisition. But that case did not address the merits of my position. Specifically, Maryland's courts reviewed the Maryland Public Service Commission's order approving the holding company Exelon's acquisition of the holding company Pepco Holdings, Inc. (PHI—the holding company for Potomac Electric Power, Atlantic City Electric, and Delmarva Power & Light).[77] In the case before the Commission, I appeared as an expert witness and offered the above-described reasoning on behalf of the Maryland Office of People's Counsel (MD OPC). The Commission's Order approving the acquisition did not address my arguments, leaving the premium in the departing shareholders' hands. The MD OPC petitioned for judicial review.

The Maryland Court of Appeals (the state's highest court, now called the Maryland Supreme Court) affirmed the Commission's decision—a Commission decision which, again, didn't address my position. It is not clear to me that the Court fully grasped the issues that I raised. The Court held that the Maryland Commission was not "required to regard [the] acquisition premium . . . as a harm to consumers or as inconsistent with the public interest." (The question I raised was not whether the premium caused harm; the question was whether denying the customers any portion of the premium was unlawful.) As I explained in my book on electric utility mergers, the

[77] *In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.*, Order No. 86990 (May 15, 2015).

Court applied to the Maryland Commission's decision a deferential standard of review, holding as follows:

- Because the statute made no explicit mention of the control premium, the Commission had discretion over whether and how to address it.

- In not finding the premium harmful, the Commission had not deviated from its prior treatment of mergers—treatment which included both comparing the premium to that paid in prior mergers and prohibiting rate recovery.

- Given that the Commission had no statutory obligation to consider the issue, its decision to disregard concerns about the premium was not an abuse of discretion. The Court stated (emphasis in original): "It is difficult to see how consumers are *necessarily* worse off as a result of the payment of a premium, or would *necessarily* be better off if an acquiring company paid a smaller premium."

- The gain-on-sale precedent did not apply, because unlike utility property, the control premium was not in rate base and therefore was not a cost borne by ratepayers.

These points do not address any of the reasoning I presented to the Commission, or that I present here. The Court also did not address my constitutional arguments. The Court also cautioned that nothing in its reasoning "suggest[s] that an acquisition premium can never be considered by the Commission, either as a potential harm or as contrary to the public interest. The Commission could find, for example, that the premium could harm consumers if it were so large as to cause the layoff of essential employees, or if it were based on unrealistic expectations about future profits that risk consumer harm."[78]

As this summary shows, the Maryland Supreme Court did not address the reasoning and conclusion presented here: that the transfer of 100% of the control

[78] *Md. Off. of People's Counsel v. Md. Pub. Serv. Comm'n*, 192 A.3d 744, 754, 758 (Md. 2018). The text above, accompanying this footnote, comes from my book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* at 131-32 (Edward Elgar Publishing 2020).

premium to the target's shareholders, and none to the customers, is inconsistent with the public interest.

Q. In determining how to allocate the control premium between Dominion shareholders and VEPCO's retail customers, what portion of the premium is relevant for purposes of this transaction?

A. NextEra is buying all of Dominion, not just the portion of Dominion that provides electric service in Virginia. The control premium to be shared between shareholders and VEPCO's retail customers should include only the portion attributable to VEPCO's business of serving monopoly retail customers.

Q. What procedure do you recommend that the Commission follow to determine who gets which portion of the premium?

A. The Petitioners' failure to say anything about the premium, and their failure to offer any justification for the premium's lopsided allocation solely to the Dominion shareholders, make it impossible for the companies to show, and for the Commission to find, that the transaction "will not" impair or jeopardize the customers' right to adequate service at just and reasonable rates. The Commission therefore has no choice but to reject the transaction.

If the Commission instead prefers to consider what allocation of the premium could save the transaction (despite the disqualifying features that I discuss throughout this testimony), it will need supplemental evidence. The Commission has not considered the allocation question in its prior acquisition cases, and the Petitioners have ignored it in this case. To create the necessary evidence, the Commission would direct all parties to provide limited, supplemental testimony on two questions:

- Of the total $12.5 billion, what portion is allocable to VEPCO's monopoly retail electric business? That is a technical question that can be answered by allocating revenue or net earnings among Dominion's various business segments.

- Of the portion of the $12.5 billion allocable to VEPCO's monopoly retail electric business, what are the shareholders' and customers' relative contributions to its value as seen by NextEra? On the second question, the Commission could start with a rebuttable presumption of 50-50, placing an equal burden on Dominion and the customers to show that their contribution exceeds 50 percent.

3. The Petitioners' proposed bill credit is inducement, not premium-sharing

Q. What if the Petitioners argue that their proposed bill credit satisfies any requirement of premium-sharing?

A. The bill credit cannot count as premium-sharing because the same dollars cannot logically serve two analytically distinct purposes.

The Petitioners have made clear that the bill credit comes not from efficiencies produced by their combination; it comes from NextEra's cash reserve which NextEra intends to use to carry out a regulatory persuasion strategy. That conclusion flows unavoidably from this Petitioner-acknowledged fact: the funds do not emerge from the transaction. We must define the transaction as the Merger Agreement defines it and the statute defines it: a legal agreement that combines two independent holding company systems into a single holding company system as a result of the two entities exchanging something of value: Dominion stock for NextEra stock. The bill credits are not in the Merger Agreement for a simple reason: They are not part of the value exchanged by the parties to reach agreement.

The transaction is what the Merger Agreement describes; the transaction is not some general, loose context consisting of the Merger Agreement plus the various financial inducements that the Petitioners think are necessary to win approval. To make that argument is to reason in a circle.

1 Having explained what the bill credits are not, it is now necessary to explain
2 what they are. The bill credits are an inducement, proposed to persuade the Commission
3 that the transaction is a good thing because customers will get something from it. But
4 this very statement is a logical impossibility because the money is not part of the
5 transaction, any more than an apple for the teacher, offered along with the homework, is
6 part of the homework.
7 Understanding the bill credits as inducement strategy is essential to
8 understanding why using them as premium-sharing is a double-count. Boards of
9 corporations cannot just give shareholder money away; they must have a fiduciary
10 reason. The only possible fiduciary reason is that the Petitioners viewed the transaction
11 as lacking the statutory necessities to win approval.[79] They acknowledged no tangible,
12 evidence-based operational benefit; and they could not hide the fact that Dominion and
13 VEPCO would be exposed to more nonutility risk (a fact that NextEra described to
14 investors as a benefit to NextEra because adding Dominion reduced NextEra's
15 exposure). Those facts created enough uncertainty to make fiduciarily defensible the
16 decision to give away shareholder money.
17 So there are two different needs here: The need for premium-sharing for reasons
18 I have given before; and the need to pay customers something to overcome possible
19 regulatory skepticism about a transaction that has cost and risk. The same dollars cannot
20 double-count to satisfy both needs.

[79] The only other possibility is that the Petitioners viewed the bill credits as necessary to build political support outside the evidentiary hearing, which outside political support they hoped would persuade Judges who are legally bound to consider only what they learn from the evidentiary hearing. That possibility is too remote from the law to warrant any comment.

VII. Cause of impairment or jeopardy #5: To meet investor expectations that NextEra will increase earnings by rate-basing new capital expenditures, the combined company will have incentive and opportunity to weaken retail competition in Virginia and increase the risk of stranded cost

Q. Explain the purpose of this Part VII.

A. This transaction will impair or jeopardize customers' right to pay no more than just-and-reasonable rates for adequate service. The transaction has that effect because its central purpose is to rate-base capital expenditures even if entities other than VEPCO—specifically, the combined company's retail competitors or the new loads themselves—can make those expenditures more cost-effectively. I explain this problem in these four subparts:

- NextEra expects, and has caused investors to expect, that VEPCO will install and profit from new infrastructure needed to serve growing load, with no apparent investment role for its retail competitors or its large-load customers.
- To make the Petitioners' rate base expectations a reality, VEPCO will have opportunity and incentive to exploit unearned advantages gained from its dual status as monopoly and competitor.
- VEPCO's GS-5 generation demand charge increases VEPCO's ability to act on its unearned advantages.
- Besides discriminating against shopping customers, the Petitioners' plans, if approved, will subject VEPCO's captive customers to stranded-cost risk.

Caution: My purpose is not to relitigate the lawfulness of the GS-5 charge, which I testified about in the 2025 biennial rate case, and which is now before the Virginia Supreme Court. My purpose is to show that the pressure on NextEra to meet its earnings projections will cause NextEra to put pressure on VEPCO to make more aggressive use of its unearned competitive advantages. These advantages come not from VEPCO's merits, but from its dual status as monopoly provider to all and competitive

provider to High-Load customers. With these advantages, VEPCO has incentive and opportunity to undermine retail competition on the merits, thus creating impairment of and jeopardy to all customers' right to adequate service at just and reasonable rates.

A. NextEra expects, and has caused investors to expect, that VEPCO will install and profit from new infrastructure needed to serve growing load, with no apparent investment role for VEPCO's retail competitors or its large-load customers

Q. In this transaction's stated purpose, what role does rate-basing future investments play?

A. The opportunity to rate-base new infrastructure is the centerpiece of this transaction. NextEra is paying the 23.1%, $12.5 billion premium to Dominion's shareholders, and Dominion's shareholders are agreeing to become NextEra's shareholders, on the assumption that the combined company will have higher earnings than would the two companies remaining separate. The premise for those higher earnings appears to be that VEPCO, and no one else, will invest in, own, and profit from all new infrastructure necessary to serve increases in VEPCO's load.

The support for this conclusion comes from NextEra's Investor Presentation (May 18, 2026). No fewer than 15 times, NextEra cited its intent to grow rate base:

- "Power demand is expected to grow six times faster over the next 20 years."[80]
- "The combined company expects ~11% regulatory capital employed growth."[81]

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[80] Investor Presentation at 6.

[81] *Id.* at 8, 23, 32, 44. This 11% is not Dominion alone. The footnote to the statement at p. 8 says: "From 2025-2032; includes Dominion Energy, Florida Power & Light and NextEra Energy electric and gas transmission regulatory capital employed and invested capital."

- "The combined company would have one of the highest Adjusted EPS growth rate expectations and one of the strongest balance sheets in the industry."[82]

- "Combined large-load customer pipeline of 130+ GW. . . . Service territories experiencing population and economic growth."[83]

- In Virginia, "2x growth in electricity sales vs. nat'l avg."[84]

- "U.S. power demand is coming from every sector, driving the need for more generation," with 53% of growth in 2026-2032 coming from the large-load sector.[85]

- "Projects needed to serve new load demands are growing significantly in size and complexity."[86]

- "Since 2021, NextEra Energy and Dominion Energy have built more generation than the next 25 largest utilities combined. . . . The combined company would have the scale, experience and buying power to build more efficiently."[87]

- "Combined, we see the need and opportunity to develop 115+ GW of new generation over the next decade."[88]

- For 2025-2032, the combined company will achieve rate base growth of 11%, as compared to 10% for NextEra alone.[89]

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[82] *Id.* at 11.

[83] *Id*. at 12, 44.

[84] *Id.* at 14.

[85] *Id.* at 18.

[86] *Id.* at 19.

[87] *Id.* at 21.

[88] *Id.* at 24.

[89] *Id.* at 30.

- "Combined company expects one of the industry's highest regulatory capital employed growth rates by making smart investments that benefit customers."[90]

- "Combined, NextEra Energy and Dominion Energy have unmatched large load opportunities across the United States."[91]

- "The combined company has an opportunity to more than double the U.S.'s largest generation fleet."[92]

- "Execute against the development expectations, which includes 15 GW of large load hubs by 2035. . . . FPL and Dominion Energy's large-load opportunities expand & accelerate. . . . Increased CapEx at Dominion Energy Virginia to meet storage goals and reduce capacity and reserve margin deficits to enhance reliability while keeping bills affordable."[93]

- "Strongest large load opportunity set in the country (FL, VA, NC, SC and across America)."[94]

Q. Have Petitioners shared their rate-basing expectation with investors?

A. Yes. Besides the 15 mentions in their PowerPoint Investor Presentation, the Petitioners' representatives have repeated the point in earnings calls with investor advisors. Here is an example:

> The combined company would become what we believe is an unmatched industry leader position to capture an opportunities set that has never been larger. Our rate base of $138 billion would be the highest in the industry.[95]

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[90] *Id.* at 33, referring to an 80% "Increase in Regulatory Capital Employed."

[91] *Id.* at 34 (though noting commitment to "ensuring large load customers pay their fair share"—a statement that I assume refers to their paying their fair share through rates, not through displacing the combined company as the investor).

[92] *Id.* at 35.

[93] *Id.* at 40.

[94] *Id.* at 44.

[95] Transcript of May 18, 2026 investor call at p. 6.

Q. What are the consequences of the Petitioners having created and disseminated these expectations of future rate-basing?

A. With NextEra having created, emphasized, repeated, and disseminated these expectations, the NextEra-controlled VEPCO will have a bias against any alternative to increasing its own rate base. NextEra-controlled VEPCO will do whatever is possible to discourage High-Load customers from either (a) building and owning their own generation, or (b) buying their energy and capacity needs from competitive retail suppliers (who under Virginia law have a statutory right to compete with VEPCO to serve High-Load customers). A separate consequence of that bias, to the extent it results in rate-basing of new capital expenditures, is that VEPCO's captive customers will be more at risk of bearing stranded cost if the new load does not appear, or appears and then goes away. I discuss that problem in Part VII.D below.

As discussed next, the combined company will be able to act on its bias immediately after the closing, for two reasons. First, VEPCO will have unearned advantages from its dual status as monopoly and competitor. Second, VEPCO's GS-5 generation demand charge enables VEPCO to act on those advantages.

Without full information on how the Petitioners intend to guard against VEPCO's bias, and on what Commission monitoring will be necessary to detect and penalize VEPCO discrimination against competing sources of supply, the Commission will lack a basis for finding that the transaction will not impair or jeopardize the customers' right to adequate service at just and reasonable rates.

B. To make NextEra's rate base expectations a reality, VEPCO will have opportunity and incentive to exploit unearned advantages gained from its dual status as monopoly and competitor

Q. Explain the purpose of this Part VII.B.

A. In this Part VII.B, I explain that VEPCO's ability to make the NextEra-projected earnings happen depends on its exploiting its unearned competitive advantages. First I explain how having just-and-reasonable rates for all customers depends in part on Virginia's having effective competition for the shopping customers. I then explain that in Virginia, effective competition is not possible as long as VEPCO acts simultaneously as monopoly and competitor. This problem is worsened by the acquisition-produced pressure to increase earnings.

1. Having just-and-reasonable rates in Virginia requires effective competition—competition that favors merits, not incumbency

Q. Explain the relationship between just-and-reasonable rates and effective competition.

A. As stated above, NextEra's Investor Presentation stresses, more than any other factor (15 repetitions), the combined company's opportunity to serve increased load. But NextEra says nothing about doing so cost-effectively—meaning, consistent with just-and-reasonable rates. With respect to increased load, cost-effective service and just-and-reasonable rates require at least these two things:

- *Shopping customers should be able to choose the most economical power source available from multiple viable, cost-effective suppliers.* They should bear no penalty if they choose a competitive service provider (CSP) over VEPCO. Conversely, CSPs should bear no penalty for beating VEPCO in the competition to serve shopping customers. Competition among all suppliers—CSPs and utility—should be based solely on merit, with no unearned advantage to the NextEra-controlled VEPCO.

- *To prevent stranded-cost risk to captive customers, all costs attributable to any retail transaction must be borne only by the beneficiaries of the transaction.* A supplier hoping to profit from serving new load must bear the

> full risk of investing to serve that load. If the load doesn't appear, the unrecovered costs must fall on the supplier. A shopping customer expecting to be served must pay for the supplier's investment in that service, even if the customer's business declines. And if the customer with the declining business cannot pay for the supplier's investment, the supplier and its shareholders must absorb the cost. Neither party should be able to shift its risks or costs to nonshopping or other shopping customers. This principle applies whether the seller is a competitive service provider or VEPCO.

VEPCO's unearned advantages violate each of these principles. After summarizing relevant background facts, I explain why.

2. When VEPCO acts simultaneously as monopoly and competitor, its unearned advantages impair and jeopardize competition on the merits

Q. Explain VEPCO's dual status as retail monopoly and retail competitor in the same market, and why that dual status affects this transaction.

A. Central to economic theory, and to decades of regulatory decisions, are these principles: Risks must lie with the risk-causers, costs must lie with the cost-causers, and benefits must go to the cost-bearers and benefit-creators. A market structure in which VEPCO acts as both monopoly and competitive provider risks violating all three principles.

In VEPCO's service territory, the retail electricity market actually consists of two overlapping markets. In one market, CSPs compete, with each other and with VEPCO, to serve those retail customers permitted by statute to shop for electricity. In the other market, VEPCO serves as monopoly provider to captive customers—customers prohibited by statute from shopping for electricity. In these two markets, VEPCO has an obligation to serve three categories of customers: (a) all captive customers, (b) all shopping-eligible customers that choose not to shop, and (c) all shopping-eligible customers that had purchased from CSPs but return to VEPCO.

On those points, here are the statutory specifics:

1 • VEPCO has an obligation to serve, and to plan and stand ready to serve, all
2 customers of any size that do not buy from competitive service providers.[96]

3 • Large customers have a right to buy their electricity from competitive service
4 providers.[97]

5 • Customers that buy from a competitive service provider have a statutory
6 right to return to the utility, subject to certain pricing conditions.[98]

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[96] Va. Code sec. 56-234 A ("It shall be the duty of every public utility to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring the same.").

[97] Va. Code sec. 56-577 A 3 provides:

> Subject to the provisions of subdivisions 4 and 5, only individual retail customers of electric energy within the Commonwealth, regardless of customer class, whose demand during the most recent calendar year exceeded five megawatts but did not exceed one percent of the customer's incumbent electric utility's peak load during the most recent calendar year unless such customer had noncoincident peak demand in excess of 90 megawatts in calendar year 2006 or any year thereafter, shall be permitted to purchase electric energy from any supplier of electric energy licensed to sell retail electric energy within the Commonwealth, except for any incumbent electric utility other than the incumbent electric utility serving the exclusive service territory in which such a customer is located, subject to [various] conditions. . . .

[98] Va. Code Section 56-577 A 3 c provides:

> If such customer does purchase electric energy from licensed suppliers after the expiration or termination of capped rates, it shall not thereafter be entitled to purchase electric energy from the incumbent electric utility without giving five years' advance written notice of such intention to such utility, except where such customer demonstrates to the Commission, after notice and opportunity for hearing, through clear and convincing evidence that its supplier has failed to perform, or has anticipatorily breached its duty to perform, or otherwise is about to fail to perform, through no fault of the customer, and that such customer is unable to obtain service at reasonable rates from an alternative supplier. If, as a result of such proceeding, the Commission finds it in the public interest to grant an exemption from the five-year notice requirement, such customer may thereafter purchase electric energy at the costs of such utility, as determined by the Commission pursuant to subdivision 3 d hereof, for the remainder of the five-year notice period, after which point the customer may purchase electric energy from the utility under

1 VEPCO thus has two roles. It is a state-protected monopoly with an obligation to
2 serve all load. It is also an active rival of CSPs in the competition to attract and retain
3 shopping-eligible load. VEPCO is a monopoly and a competitor in the same geographic
4 and product market.[99]

> rates, terms and conditions determined pursuant to § 56-585.1. However, such customer shall be allowed to individually purchase electric energy from the utility under rates, terms, and conditions determined pursuant to sec. 56-585.1 if, upon application by such customer, the Commission finds that neither such customer's incumbent electric utility nor retail customers of such utility that do not choose to obtain electric energy from alternate suppliers will be adversely affected in a manner contrary to the public interest by granting such petition. In making such determination, the Commission shall take into consideration, without limitation, the impact and effect of any and all other previously approved petitions of like type with respect to such incumbent electric utility. Any customer that returns to purchase electric energy from its incumbent electric utility, before or after expiration of the five-year notice period, shall be subject to minimum stay periods equal to those prescribed by the Commission pursuant to subdivision C 1.

Section 56-577 A 3 d then provides that customers exempt from the five-year requirement pay the incumbent utility for electricity at a price reflecting

> the market-based costs of the utility, including (i) the actual expenses of procuring such electric energy from the market, (ii) additional administrative and transaction costs associated with procuring such energy, including, but not limited to, costs of transmission, transmission line losses, and ancillary services, and (iii) a reasonable margin as determined pursuant to the provisions of subdivision A 2 of § 56-585.1. The methodology established by the Commission for determining such costs shall ensure that neither utilities nor other retail customers are adversely affected in a manner contrary to the public interest.

[99] Companies that offer reasonably substitutable services to the same customers in the same geographic market are, by definition, competitors of each other. *See Sunshine Cellular v. Vanguard Cellular Sys.*, Inc., 810 F. Supp. 486, 493 (S.D.N.Y. 1992) (explaining that the product dimension includes "those commodities or services that are reasonably interchangeable by consumers for the same purposes"); *FTC v. Staples, Inc*., 970 F. Supp. 1066, 1074 (D.D.C. 1997) ("The general rule when determining a relevant product market is that '[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it.'" (quoting

Q. Is there a problem with VEPCO's playing both roles in the same geographic and product market?

A. Yes. The problem with VEPCO playing both a competitive role and a monopoly role in the same geographic and product market is that the utility can use its franchised monopoly status, with all the associated protections and resources, as a competitive tool. A typical franchised utility has the following competitive advantages, none arising from its own merits:

- the ability to raise capital for its competitive activities at a cost below its competitors' costs, if providers of capital view the utility's exclusive franchise as a balance-sheet strengthener and its captive-customer base as a risk-reducer;

- the ability to offer favorable nonprice terms (such as shorter contract durations), because its captive customers will be available to absorb capacity costs not recovered when the contract ends;

- immediately available supply, offered at prices based on the utility's average cost rather than its marginal cost, because (a) the utility's franchise responsibility includes an obligation to acquire resources for reasonably forecasted load before that load appears, and (b) captive customers are symmetrically obligated to bear that reasonable anticipatory cost if the load doesn't appear; and

- ready access to captive-customer-funded resources (e.g., legal services, accounting, headquarters space, employee expertise and time, and human resources staff) with that access available at cost rather than at market prices.

These advantages undermine competition on the merits because they don't arise from merits; they arise from the utility's government-appointed, government-protected status. Making matters worse is this fact: VEPCO conducts its two activities—

Brown Shoe v. United States, 370 U.S. 294, 325 (1962))); *Order No. 642, Revised Filing Requirements Under Part 33 of the Commission's Regulations*, F.E.R.C. Stats. & Regs. ¶ 31,111, 65 Fed. Reg. 70,984, 70,991 (2000) [hereinafter Order No. 642] ("[I]t is important to define relevant products from the perspective of the consumer, i.e., including in a product group those products considered by the consumer to be good substitutes."), *order on reh'g*, *Order No. 642-A*, 94 F.E.R.C. ¶ 61,289, 66 Fed. Reg. 16,121 (2001).

monopoly supplier to captive customers and competitive supplier to shopping-eligible customers—with no arm's-length relationship between them because both activities occur within the same corporate entity.[100] As a competitor, VEPCO profits from the upside; as the monopoly provider it has captive customers to cover the downside. VEPCO's CSP competitors have no comparable advantage.

C. VEPCO's GS-5 generation demand charge increases VEPCO's ability to use its unearned advantages to carry out NextEra's plan

Q. Explain the purpose of this Part VII.C.

A. This Part VII.C explains how NextEra's rate-base-adding purpose—a purpose that undermines the General Assembly's vision for retail competition in the market for High-Load customers and a purpose that is the central reason for this acquisition—will be assisted by the unearned competitive advantage that VEPCO gets through its GS-5 generation demand charge.[101] The charge forces CSP customers to make duplicative payments that subsidize the rates charged to nonshopping customers. That flaw increases the likelihood that NextEra will be able to use VEPCO's unearned

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[100] Contrast the conditions imposed by the Commission on the relationship between Rappahannock Electric Cooperative (REC) and the subsidiaries it created to purchase wholesale power that REC will use to serve data centers at retail. The order approving the arrangement required that nonelectric services provided by REC to its subsidiaries be priced at the higher of cost or market, while nonelectric services received by REC from its subsidiaries be provided at the lower of cost or market. "Order Granting Approval," at *Application of Rappahannock Electric Cooperative, et al.*, Case No. PUR-2024-00213, Appendix at Condition 5.

[101] According to the GS-5 tariff, High Load customers are nonresidential customers with (a) contract demand of at least 25 MW, or maximum measured demand of at least 25 MW in at least 3 of the current and previous 11 billing months; and (b) a load factor of at least 75% during at least 3 of the current and previous 11 billing months. The approved tariff language requires, among other things, that each High Load Customer pay to VEPCO a generation demand charge equal to 60% of the customer's contracted electricity demand. The charge applies even if the customer buys all its generation from a competitive service provider and none from VEPCO.

advantage—at the expense of competition-on-the-merits—to meet the earnings projections that are its reason for undertaking this transaction. The resulting damage—fewer High-Load customers buying from competitive service providers, fewer competitive service providers entering the Virginia retail market, thus less pressure on VEPCO to keep its rates reasonable—creates impairment of and jeopardy to all retail customers' right to adequate service at just-and-reasonable rates.

Q. Compare the capacity-and-energy experience of VEPCO and its nonshopping GS-5 customers with the experience of a CSP and its customers.

A. VEPCO bears the full capacity-and-energy cost of serving each nonshopping GS-5 customer. Each such customer pays for all of VEPCO's energy costs, and for some of VEPCO's capacity cost, through a kWh charge and through the fuel factor (which, as I understand it, recovers both fuel cost and the cost of power purchased by VEPCO under a PPA—which PPA could have an energy component and a capacity component). The nonshopping GS-5 customer pays for the rest of VEPCO's capacity cost through the GS-5 generation demand charge.

Like VEPCO, the CSP bears the full capacity-and-energy cost of serving each customer. The CSP's GS-5 customer pays the CSP for all of the CSP's energy and capacity costs, through the CSP's contractual charges. But on top of that full payment for all of the CSP's energy and capacity costs, the CSP customer pays to VEPCO the GS-5 generation demand charge.

This comparison makes clear that the CSP customer pays duplicatively for generation capacity—once fully to the CSP via the CSP's contractual charge, and again partially to VEPCO via the GS-5 generation demand charge. The CSP customer pays for capacity more than once, while the similarly situated VEPCO customer pays for

capacity only once (or less than once, to the extent that VEPCO, through the GS-5 generation demand charge, is collecting revenue exceeding its actual cost of capacity).

While each of the two customers pays VEPCO the same demand charge, the cost that they impose on VEPCO (if any), and the benefit that they get from paying the demand charge (if any), are different, qualitatively and quantitatively:

- *As to cost:* The demand charge that the nonshopping customer pays reflects that customer's contribution to VEPCO's peak. In contrast, the demand charge that the CSP customer pays doesn't reflect that customer's contribution to VEPCO's peak—because a CSP customer doesn't contribute to VEPCO's peak; it contributes to the CSP's peak.

- *As to benefit:* By paying the generation demand charge, the VEPCO customer gets a lower kWh charge. (VEPCO's revenue requirement, to which both its demand charge and its kWh charge contribute, recovers only 100% of its costs; so whatever capacity costs get recovered through the demand charge don't have to get recovered through the kWh charge.) In contrast, the CSP customer's demand-charge payment to VEPCO doesn't reduce the kWh charge that the customer pays to its CSP.

Q. Is there another way to explain the problem?

A. Yes. For the nonshopping customer, the demand charge allocates among demand-causing customers a portion of their pro rata responsibility for the capacity costs that VEPCO has incurred to meet their demand. VEPCO recovers 100% of its capacity costs (ignoring capacity costs recovered by third-party providers through the fuel rider) from the combination of its kWh charge and the demand charge. Because VEPCO's revenue requirement is designed to recover 100% of its capacity cost and no more, the portion of the capacity cost recovered through the demand charge reduces the amount of capacity cost that gets recovered from the kWh charge.

The CSP, like VEPCO, recovers from its customer 100% of the capacity cost needed to serve that customer. Unlike the nonshopping VEPCO customer, whose payment of the demand charge to VEPCO reduces the per-kWh charge that it pays to

1 VEPCO, the CSP customer's payment of the demand charge doesn't reduce the charge
2 that the CSP customer pays to the CSP. The CSP customer's payment of VEPCO's
3 demand charge is on top of, rather than a substitute for, the payments that the customer
4 makes to the CSP. So by paying the demand charge to VEPCO while also paying for
5 capacity to the CSP, the CSP customer is paying for more than 100% of the capacity
6 needed to serve its demand. Even if the CSP's and VEPCO's capacity and energy costs
7 are identical, the CSP customer's total charge for capacity (CSP charges plus the GS-5
8 demand charge) will exceed the nonshopping customer's total charge for capacity
9 (VEPCO's kWh charge plus the GS-5 demand charge).
10 The CSP customer's payment of the demand charge in fact subsidizes the
11 nonshopping VEPCO customer's capacity cost, because the amount paid to VEPCO by
12 the CSP customer reduces what VEPCO has to recover from the nonshopping customers
13 (assuming that VEPCO is recovering no more than 100% of its capacity costs). The CSP
14 customer is picking up a portion of capacity costs that VEPCO has incurred to support
15 the nonshopping customers.
16 Back to NextEra's acquisition: NextEra has projected increased earnings from
17 the acquisition—earnings that will happen only if VEPCO, not its CSP competitors,
18 serves growing load. VEPCO's dual status as monopoly provider and competitor,
19 assisted by the GS-5 demand charge, gives VEPCO incentive and opportunity to
20 undermine competition in the market to serve that growing load. This acquisition
21 increases the pressure on VEPCO to act anticompetitively, therefore increases the
22 probability that VEPCO will do so. That fact makes it impossible for the Commission to

find that the acquisition "will not" impair or jeopardize customers' right to adequate service at just-and-reasonable rates.

D. The pressure on VEPCO to serve new load will subject VEPCO's captive customers to stranded-cost risk

Q. Explain the relationship among this transaction, the GS-5 generation demand charge, and stranded cost.

A. As already explained, the Petitioners entered this transaction so that NextEra, through VEPCO, could increase its earnings and balance its higher-risk portfolio by rate-basing new capital expenditures needed to serve new VEPCO load. The resulting pressure on VEPCO to make those new capital expenditures increases the stranded-cost risk to VEPCO's nonshopping customers.

Unlike a utility's rate-based generation, a CSP arrangement causes no stranded-cost risk to VEPCO's nonshopping customers. A CSP contract does involve the risk that the seller will build or buy more capacity than its customer uses. But that risk is borne entirely by the CSP—with the CSP laying some of that risk onto its customer via the CSP's contract terms. None of the CSP generation development risk falls on VEPCO's nonshopping customers.

The risk of excess generating capacity does fall on VEPCO's nonshopping customers to the extent that VEPCO discourages High-Load customers from accepting CSP offers (because these customers won't want to pay duplicative capacity costs arising from the GS-5 demand charge). CSPs then will leave the Virginia retail market. That means more rate-based generation, which means more customer exposure to stranded-cost risk.

That risk already exists without the transaction. What the transaction adds is the extra pressure that NextEra will put on VEPCO, because of the $12.5 billion acquisition premium, to put capital expenditures into VEPCO's rate base.

Q. Doesn't Schedule GS-5 establish a minimum term of years for High-Load customers?

A. Yes, Schedule GS-5 requires the High-Load customer to commit to a minimum term of 14 years for "Electric Service."[102] (For the first 4 years, customers can choose 100% of their desired capacity, or ramp up 20% per year.[103]) But this minimum term will not cover stranded costs if the capacity paid for by VEPCO to serve the customer has a life exceeding 14 years and not matched by proportional depreciation charges. That is a real possibility because VEPCO's actual generation demand charge has no clear relation to the cost of any specific capacity that VEPCO might build or buy to serve the customer, or any depreciation charge that VEPCO would include in rates applied to the customer.

Q. Summarize your conclusions on the connection between VEPCO's GS-5 generation demand charge and NextEra's proposed acquisition of Dominion.

A. Having promised the investment community higher earnings from rate-basing new assets to serve increased load, NextEra will use every power it has to make those earnings happen. One power it will have is the power to direct VEPCO to favor, for

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[102] Defined in the tariff as "[t]he provision, by the Company to the Customer, of Electric Delivery Service and, to the extent provided by the Company, Electricity Supply Service and utility services. Electric Service also means, where applicable, the interconnection of electric generators with the Company." This 14-year requirement does not preclude the High-Load customer from shopping with a CSP, because once the customer does so, the "extent provided" phrase means that VEPCO would no longer be providing the customer with "Electricity Supply Service." The shopping customer then would be buying only Electric Delivery Service. But that shopping customer still has to pay the GS-5 generation demand charge.

[103] *See* the GS-5 tariff at section XXVII(E)(1).

those new assets, VEPCO's own capital expenditures over those offered by competitive service providers or by the new loads themselves. In this effort, we can expect VEPCO, as directed by NextEra, to make full use of its dual role as monopoly and competitor, assisted by VEPCO's GS-5 demand charge. That charge undermines competition on the merits because it forces potentially shopping customers to bear costs that they don't cause—unlike nonshopping customers, who bear only the costs that they cause. The combined company will have a larger incentive to pursue this anticompetitive strategy than VEPCO does today, because the transaction's central purpose—and its selling point to investors—is the increased earnings made possible by the likelihood of new data center loads—the very loads that CSPs will have a desire, and a legal right, to pursue.

Because the transaction will undermine retail competition, and because retail competition is necessary to ensure that retail rates are just and reasonable, the Commission cannot find that the transaction "will not" impair or jeopardize adequate service at just and reasonable rates.

Q. You have just addressed the risks to retail competition and retail rates in Virginia. What about risks to wholesale competition and wholesale rates in the PJM energy and capacity markets?

A. I will leave that topic's specifics to witnesses having more expertise and more recent experience in those markets. But I do offer some general thoughts.

I have explained that by approving this acquisition of VEPCO, the Commission automatically approves every future NextEra acquisition, regardless of type or risk. See Part V.C above. Similarly, the Commission also will be automatically approving every future action that every NextEra-controlled entity takes within PJM. Those future actions can include some that would harm VEPCO's customers, but that fall outside this

1 Commission's power to prevent. The result is more asymmetry—where the harm falls
2 on VEPCO's customers but the benefits go to NextEra's owners.
3 Specifically: Besides owning FPL, NextEra has affiliates that invest in
4 transmission and generation. By acquiring VEPCO, NextEra will have control of
5 VEPCO's generation. (For a discussion of NextEra's refusal to relinquish any control,
6 see Part IV above.) If there is transmission congestion in PJM, causing prices to exceed
7 normal competitive levels, those conditions will make it attractive for NextEra to invest
8 in transmission and generation to serve PJM's capacity and energy markets. NextEra
9 could locate generation and transmission in places that don't serve Virginia but instead
10 take advantage of high generation prices. NextEra also could locate transmission in
11 places that benefit VEPCO's data-center and other large-load customers—then order
12 VEPCO to favor those large-load customers with low-cost power supplies that might
13 otherwise go to VEPCO's captive customers—creating another unearned and
14 anticompetitive advantage that VEPCO would have over competitive service providers.
15 (That favoritism is made possible by the fact that in Virginia, the right to shop for
16 electricity exists only for large-load customers. Residential and small commercial
17 customers have no choice but to buy from VEPCO.)
18 Because the transmission and wholesale portions of this activity will occur under
19 FERC's exclusive jurisdiction, the Commission by approving NextEra's acquisition will
20 have exposed VEPCO customers to new risks without having any authority to prevent
21 those risks. In terms of influencing outcomes, the Commission will have downgraded
22 itself from being the sole regulator of VEPCO's performance to being a mere
23 supplicant—one of several dozen—before a federal agency whose decisions about PJM

are subject to continuing dispute at the agency and in the courts of appeals. Under these circumstances, the Commission cannot conclude that its approval "will not" impair or jeopardize adequate service at just and reasonable rates.

VIII. Given this transaction's purpose—selling control of a government privilege for gain, to a risk-causing, rate-basing holding company that refuses to limit future acquisitions—no set of conditions can prevent all plausible possibility of impairment and jeopardy

Q. Are there conditions that the Commission could adopt to ensure that this transaction "will not impair or jeopardize adequate service at just and reasonable rates"?

A. No. This transaction brings all the risks and costs that I describe in Parts III–VII above, including the risks from NextEra's current and unknown future holdings, and including the costs of adding Commission staff to monitor those holdings (which costs NextEra thus far has failed to address), along with the risks associated with VEPCO's shrinkage in size and importance relative to its new holding company owner. VEPCO will face intrasystem conflicts over capital access and cost allocation that it does not face today. And Dominion's transfer of control of VEPCO's obligation to serve to an entity not controlled by VEPCO is a violation of that obligation.

Under these circumstances, there is no possible set of conditions that eliminates all plausible possibilities of impairment or jeopardy, other than conditions that transform NextEra into an entity that brings no such possibilities. To explain these points, this Part VIII covers the following four topics:

- Protecting customers from risk-causing acquisitions requires recognizing and filling a regulatory gap.
- The typical regulatory conditions used in other proceedings don't remove this acquisition's unique risks.
- To prevent impairment and jeopardy—as required by the "will not" standard—NextEra would need to cease all activities that plausibly cause impairment or jeopardy.
- Even Petitioners' insufficient conditions require regulatory resources and enforcement options—obvious needs that Petitioners ignore.

A. Protecting customers from risk-causing acquisitions requires recognizing and filling a regulatory gap

Q. In the area of holding company oversight, is there a regulatory gap that the Commission needs to fill?

A. Yes. Until its repeal in 2005, the federal Public Utility Holding Company Act of 1935 (PUHCA) prohibited acquisitions like that sought by NextEra. The Act required, subject to certain exceptions, that each utility holding company constitute a "single integrated public-utility system."[104] The purpose of this "single integrated public-utility system" mandate was to align each utility's corporate form with its public-service obligations. While the Act had many provisions, the key regulatory tools—all tools designed to protect electricity and gas customers from the risks caused by holding companies whose business purposes undermined the utilities' duties—were these:

- Section 11(b)(1) required the U.S. Securities and Exchange Commission (SEC) to break up holding company systems that owned scattered utility companies and unrelated businesses, so that after the break-ups, each system would be confined to a single "integrated public-utility system," subject to certain exceptions.

- Section 10(b)(1) required the SEC to disapprove any acquisition by a utility holding company that "tend[s] towards ... concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors, or consumers."

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[104] Section 2(a)(29)(A) of PUHCA defined "integrated public-utility system," as applied to electric utility companies, to mean

> a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more states, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation.

- Section 10(c)(2) allowed only those acquisitions that "tend[ed] towards the economical and efficient development of an integrated public-utility system."

- Section 7(d) prohibited utility holding companies from issuing securities that, among other things, involved an "improper risk" or were "detrimental to the public interest or the interest of investors or consumers."

For 70 years, these provisions caused electric and gas utilities to devote their executive attention and financial resources to their reason for being: providing essential utility service, locally. The "single integrated public-utility system" mandate eliminated or limited those features of holding company structure and behavior that cause harm and risk to investors, consumers, and the public interest: geographic dispersion of utility properties, arbitrary (from a utility customer perspective) mixtures of utility and nonutility businesses, excess layers of corporate affiliates, excess use of debt financing, utility financial support of nonutility businesses, and interaffiliate transactions priced unfairly to utility customers. In a sentence, the "integrated system" principle prevented acquisitions for the sake of acquiring—acquisitions motivated by company strategy rather than customer welfare.

To enforce the "integrated system" principle, the SEC, beginning in 1935, broke up the then-existing 13 holding companies into several hundred relatively local systems. (Some multistate systems remained, in a form called "registered holding companies" that were subject to extra regulatory oversight.) Once the SEC completed this work, utility mergers and acquisitions in the electric and gas industries were relatively rare until the mid-1980s.

Beginning in the mid-1980s, a mergers-and-acquisitions trend began. The early transactions involved the joining of utilities with adjacent or near-adjacent service

territories. In these transactions, still bound by PUHCA's "integrated system" requirement, the main regulatory challenges were these:

- prevent transactions that gave the combined companies horizontal or vertical market power (some mergers aimed for both);
- identify and allocate costs and benefits associated with savings likely to arise from real operational economies of scale and scope;
- prevent interaffiliate transaction pricing that caused the customers of the monopoly utility to subsidize the combined company's competitive businesses;
- prevent draining of the local utility's equity to support other utility or nonutility businesses in the holding company system;
- prevent "contagion"—where the risks of the nonutility businesses lead to higher costs of debt capital and equity capital for the utility; and
- ensure that the executives of the larger, more complex post-transaction entity devoted the necessary attention to local quality of service.

These 1980s and early 1990s transactions did not, for the most part, involve the joining of remote electric facilities, or the mixing of large amounts of nonutility businesses with traditional utilities. Unlike NextEra in its proposed transaction, acquirers were not treating utility targets as portfolio-balancers or means of increasing earnings by growing rate base.

The single integrated system requirement meant that transactions like NextEra's acquisition of Dominion—the joining of remote utilities solely for purposes of profit—were per se prohibited for the 70 years from the 1935 Act's enactment until its repeal in 2005. In terms of the risks it aimed to prevent, the 1935 Act's single integrated system standard was similar to section 56-90's "will not impair or jeopardize" standard. Virginia enacted that standard in the 1940s, at a time when the SEC would have been in the midst of breaking up the systems that looked like what NextEra is now trying to

1 recreate: systems consisting of remote physical facilities and high-risk mixing of utility
2 businesses with nonutility businesses.

3 **Q. What changes did the 2005 repeal of PUHCA 1935 bring?**

4 **A.** The Energy Policy Act of 2005 repealed the entire 1935 Act—all its limits on, and
5 standards for review of, acquisitions of utilities. As a result, there is no longer any
6 federal limit on holding company arrangements involving geographically dispersed
7 utilities, mixtures of utility and nonutility businesses, debt-leveraging, or complex
8 corporate family structures.[105] Corporate system structures prohibited for 70 years are
9 now possible, unless states act on their own—state law in this area not being preempted
10 by federal law. No longer does federal law require acquisition strategy and corporate
11 structure to align with the utilities' public-service obligations.

12 As a result of the repeal, acquisitions of dispersed utility companies can occur
13 for reasons other than operational efficiencies—as the S-4 Proxy Statement makes clear
14 is true of NextEra's proposed acquisition of Dominion. What our grandparents
15 understood as "utilities"—the traditional safe investment—has changed its character.

16 **Q. Why is PUHCA 1935's repeal relevant to this Commission's analysis of NextEra's**
17 **proposal to acquire control of Dominion and VEPCO?**

18 **A.** While PUHCA 1935 was in place, and enforced properly by the SEC, a state
19 commission evaluating a holding company's acquisition of its local utility could be
20 relatively certain about the current and future business activities within the post-merger

[105] There remains some review by the Federal Energy Regulatory Commission under Section 203 of the Federal Power Act, 16 U.S.C. sec. 824b, and under a vestige of PUHCA 1935 now called PUHCA 2005. But there no longer is an integrated public-utility system requirement; thus no longer any federal statutory pre-acquisition limits or reviews concerning geographic dispersion or type-of-business mixing.

family. The Commission would know that VEPCO, if it were to be acquired by some other entity, would not become—

- affiliated with, and exposed to the risks of, utility businesses that were not part of the same integrated public utility system;
- affiliated with, and exposed to the risks of, substantial nonutility businesses—at least not without federal regulatory review that limited those businesses;
- part of a corporate system in which interaffiliate transactions (including transactions anywhere in the family, not just transactions involving the local utility) were unbounded by interaffiliate pricing rules aimed at preventing cross-subsidies;
- part of a corporate system in which the holding company affiliates' financial structures and financial conditions went unreviewed by regulators obligated to protect consumers; or
- part of a holding company system that can, after the first transaction, acquire any kind of company, anywhere, in any industry, without advance review by some regulator for the effects on investors, consumers, and the public interest.

While PUHCA 1935's restrictions were in place, a state commission could reasonably expect that the holding company now controlling its utility would make local utility service its dominant purpose. That is no longer the case. Acquisitions are no longer confined to local, integrating acquisitions—acquisitions that must "tend[] towards the economical and efficient development of an integrated public-utility system" (from old PUHCA Section 10(c)(2)). This proceeding therefore needs to ask and answer this central question*: Does NextEra have characteristics, plans for VEPCO, and plans for future acquisitions and investments, that could impair or jeopardize Virginia customers' right to adequate service at just-and-reasonable rates?*

The answer is yes. NextEra's characteristics include acquisitiveness (six major attempts), risk-taking (investments in "thousands" of higher-risk businesses), and

emphasis on earnings over performance (as revealed by the S-4 Proxy Statement and the testimony—neither making any mention of tangible, expertise-based, legally binding commitments to improve performance). NextEra's plans for VEPCO center on adding rate base. NextEra's plans for future acquisitions and investments are unknown; what is known is that NextEra insists on having no limit on those acquisitions and investments, and that the Commission has no clear power to review or limit them. Under these circumstances, the Commission cannot find that the acquisition "will not" impair or jeopardize.

B. The typical regulatory conditions don't remove this acquisition's unique risks

Q. Will the Petitioners' proposed conditions remove the possibility of impairment and jeopardy?

A. No. In terms of concrete, enforceable commitment to protecting VEPCO's customers from risks, the Petitioners' proposed conditions are without value. Merely repeating the phrase "we will not harm" has no value. Merely promising not to violate the law has no value. But that is all that NextEra's witnesses have said. These statements have no more value than a teenage driver's promises not to speed. Why then have speed limits, police and camera detectors, and fines?

I address in this subpart two arguments that acquisition applicants typically make about holding company risks and the possible protections against those risks. I explain that—

- "ring-fencing"—a misnomer—is insufficient to protect VEPCO's customers with the certainty required by the statute; and
- post-harm penalties are not certain to succeed in preventing impairment and jeopardy.

1. "Ring-fencing"—a misnomer—is insufficient to protect VEPCO's customers with the certainty required by the "will not" standard

a. Ring-fencing's typical features

Q. What is ring-fencing?

A. The commonly asserted purpose of ring-fencing is to protect the local utility from the risks arising from its holding company owner's other business ventures—ventures more complex and risky than a traditional utility business. Ring-fencing measures typically fall into these four categories:

- prohibitions against the utility paying dividends to the holding company if the payment reduces the utility's equity level below some specified level;
- corporate separation measures that (a) prevent the utility from being pulled into the bankruptcy filing of its parent or affiliate, and (b) protect the utility's credit ratings from business risks elsewhere in the corporate family;
- prohibitions against the utility loaning money to, or guaranteeing loans to or otherwise supporting the debt of, or otherwise investing in, any holding company affiliate; and
- limits on internal reorganizations that would weaken the above-mentioned measures.

Typically missing from applicant-proposed measures is the most important one: recognition of, and preservation of, the regulator's authority to order the utility divested from the holding company should any conditions on the approval be violated or become inadequate.

Because the Petitioners have proposed none of these just-listed items (except for what seems to be a commitment that VEPCO will not provide direct financial support to nonutility affiliates), their Petition presents risks without enforceable protections, thus facially failing the "will not" standard. Perhaps the Petitioners think they can add these items during the hearing process in response to intervenor opposition. But that

intentional withholding of necessary (but not sufficient, as discussed shortly) measures until it appears necessary to reduce opposition is inconsistent with fair play and with presenting the full case in the direct testimony.

b. Five risks that "ring-fencing" does not eliminate

Q. Is ring-fencing sufficient to protect utility customers from the risks of holding company activities?

A. No. Ring-fencing does not purport to remove, and does not remove, five risks NextEra brings to Dominion's utilities: holding company-imposed limits on VEPCO's access to equity capital, increases in the utilities' cost of equity and debt capital, certain bankruptcy risks, NextEra's interference in VEPCO's business decisions, and interaffiliate transaction abuse. I discuss each of these five problems next. Nor does ring-fencing add the extra staff that the Commission will need to ensure that NextEra complies with the ring-fencing measures—a distinct problem that I also address below.

i. Limits on the utilities' access to equity capital

Q. Does ring-fencing prevent the acquisition from reducing the utilities' access to equity capital?

A. No. Today, VEPCO's source of equity capital is Dominion. Dominion accesses the equity markets directly. NextEra's acquisition removes Dominion and VEPCO from equity markets, making VEPCO completely dependent on NextEra for equity (other than preferred stock, which typically occupies only a limited role in a utility's capital structure). NextEra will be taking on more business risk (such as by investing in states and countries whose business conditions and regulatory rules the Commission cannot influence). NextEra's business risks can cause it financial troubles, leaving it unable to provide VEPCO the equity it needs.

1 **Q. But doesn't ring-fencing protect the utilities from NextEra's business troubles?**

2 **A.** Ring-fencing can prevent VEPCO from being pulled into NextEra's bankruptcy, but that
3 is not the concern. The concern is that NextEra will be VEPCO's sole source of equity
4 capital. If NextEra or any of its many higher-risk businesses experiences financial
5 distress, NextEra would have reason, and ability, to limit or delay equity contributions to
6 VEPCO, making it more difficult for VEPCO to finance necessary investment. Worse,
7 NextEra could have an incentive to constrain VEPCO's spending or take for itself,
8 through dividends, more of VEPCO's earnings so as to redirect capital to other parts of
9 the NextEra system or address its own financial needs. If VEPCO needs that equity—
10 such as to balance out its debt, to fund expansion of its transmission system to
11 accommodate new renewables, to install smart meters or invest in other features of
12 advanced metering infrastructure—and NextEra's equity is not available, VEPCO will
13 be unable to fulfill its franchise responsibilities. Adequate service at just and reasonable
14 rates will be impaired.

15 **Q. Can't VEPCO get the equity it needs by issuing preferred stock or using retained**
16 **earnings?**

17 **A.** These possibilities are theoretical only. Preferred stock (which has characteristics of
18 both equity and debt) usually makes up only a small part of a utility's capital structure.
19 And its availability and price depend on the market's willingness to risk the investment.
20 Any normal willingness will be diminished by NextEra's financial troubles, because
21 these new investors will have no idea whether and when conventional equity will arrive
22 from a parent tied up in bankruptcy court or otherwise financially imperiled. As for
23 VEPCO's retained earnings, there is no reason to assume that they would be sufficient
24 to fund fully any major new capital expenditures. Retained earnings are not some

insurance reserve maintained by a utility for all situations in which equity investment is necessary. If that were true, utilities would never need to access external equity markets; they would fund all capital expenditures internally.

ii. Increases in the utilities' cost of debt

Q. Does ring-fencing protect against increases in VEPCO's cost of debt arising from its affiliation with NextEra?

A. Not fully. VEPCO's credit reputation will be influenced by NextEra's financial condition. To the extent that some of VEPCO's equity capital comes from NextEra debt, a downgrade of that debt can increase the cost of VEPCO's equity. Also, VEPCO's own debt ratings can be affected by downgrades of NextEra's debt ratings. Ring-fencing doesn't address this problem. Since the Commission will have no power to prevent the actions that cause these risks, the Commission will have to sort out all the various influences on VEPCO's cost of capital and exclude the ones that conflict with just-and-reasonable rates. I am not aware of any consensus, mistake-proof methodology that the Commission can use to do so.

Q. Won't VEPCO have its own access to debt capital?

A. Yes, VEPCO can borrow money in its own name, but only with NextEra's permission—unless NextEra commits not to interfere with VEPCO's financial decisions, which NextEra has refused to do. Also, VEPCO's lenders will care about the availability and cost of its equity capital—which comes from NextEra. They will care because VEPCO's access to equity gives lenders confidence that VEPCO will repay its loans. Rational lenders will worry that NextEra's own risks and needs for capital will reduce its willingness or ability to supply equity to VEPCO. That worry will cause those lenders to raise VEPCO's interest cost on their loans. Nothing about ring-fencing prevents this

natural lender reaction. Similarly, while VEPCO will have its own credit ratings, those ratings can still be influenced by NextEra's access to and cost of capital, since VEPCO's ability to pay off its loans depends in part on the availability of NextEra's capital. NextEra's financial stresses will not be a matter of indifference to VEPCO or its lenders.

iii. Bankruptcy risk

Q. Would ring-fencing remove the risk that NextEra's business failures push VEPCO into bankruptcy?

A. No. If NextEra fails, a typical ring-fencing measure would prevent NextEra from using its control of Dominion to bring VEPCO into bankruptcy. Ring-fencing sometimes achieves this protection by interposing between the holding company and the utility a "special purpose entity" (SPE). The SPE is controlled by an independent director whose affirmative vote is required for the utility to enter bankruptcy. But this measure would do nothing to protect VEPCO from its own bankruptcy, should it suffer a capital shortage because of NextEra's financial stresses. If NextEra is in bankruptcy, the bankruptcy court could limit NextEra's capital flows, thereby leaving VEPCO without financial support and thus endangering its ability to pay its lenders. The SPE cannot prevent that result.

In summary: NextEra's stresses can lead to VEPCO's stresses, resulting in VEPCO bankruptcy. Ring-fencing does not prevent this result, because it does not alter VEPCO's financial dependency on NextEra. It is that dependency on NextEra that makes this transaction risky for VEPCO and its customers.

Q. Have the Petitioners agreed to use a Special Purpose Entity?

A. No. The Petitioners have declined to use an SPE; they think that VEPCO will be better off without one:

> The Joint Petitioners submit that use of a SPE to further ring-fence and isolate DEV is unnecessary and, moreover, could eliminate the improved credit metrics of Dominion Energy Virginia that are a direct result of the combined company as further discussed on page 12 of the direct testimony of Joint Petitioner witness Dunne.[106]

Before this transaction, no one at Dominion or at the Commission suggested that Dominion needed "improved credit metrics." Those improved metrics—if they occur—come with risks, like the risk of being pulled into bankruptcy because of NextEra's business failures associated with the unlimited new risks it can take on after closing this transaction. (I said *if* they occur; in the quote, note the false phrase "are a direct result," the "are" being false because we have only advertising, no guarantee.) And Petitioners make no measurable, enforceable promises about the improved metrics. Thus customers get this no-guarantee aspiration, along with a real risk of bankruptcy. Also, Petitioners don't explain why having the SPE necessarily prevents the better credit result.

iv. NextEra's interference in VEPCO's business decisions

Q. Does ring-fencing prevent NextEra from controlling or otherwise interfering with VEPCO's activities in carrying out its utility franchise obligation to serve?

A. No. No typical ring-fencing provision limits a holding company's power to control a utility's decisions, including but not limited to decisions on hiring, promotions, operations, capital expenditures, budgets, and rate-case strategies. No typical ring-fencing provision prevents the holding company from diverting funds and management attention from utility service to the competitive goals and strategies of nonutility affiliates, or directing its utility to favor rate-basing of new capital expenditures and

[106] Response to Staff 1-23.

discriminating against competitive service providers that represent an alternative to customer-risking rate-basing.

v. Interaffiliate transaction abuse

Q. Does ring-fencing ensure arm's-length relationships between VEPCO and NextEra's affiliates?

A. No. When two companies are in a real arm's-length relationship, they behave as if unrelated. That means that each company (a) has no economic need to deal with any other affiliate because each one has alternative trading partners, and (b) has no legal obligation to deal with any other affiliate because it is free to choose its own trading partners. Another feature of an arm's-length relationship is that each affiliate is itself subject to effective competition—so it must act efficiently or risk losing customers to its competitors.

The NextEra-VEPCO relationship will not be arm's-length. If it were, NextEra could not do any of these things:

- impose spending limits on VEPCO,
- determine unilaterally (based on various business objectives conflicting with the utilities' public-service obligations) how much equity NextEra should inject into VEPCO,
- dictate who sits on the Dominion and VEPCO boards,
- choose the top utility executives, or
- dictate VEPCO's positions on regulatory issues.

With 100% ownership, NextEra will have the power to do all these things. Nothing about ring-fencing changes these facts.

Pricing principles for interaffiliate transactions, discussed in Part VIII.C.1 below, are well-known. But principles work only if heeded, and only to the extent

1 noncompliance is detected and consequences imposed. NextEra's acquisition of
2 Dominion multiplies the number and types of interaffiliate transactions involving or
3 affecting VEPCO, including transactions where one or both affiliates have an interest
4 adverse to VEPCO's customers. More transactions mean more opportunity for breaking
5 the rules. When motivation and opportunity combine with low risk of detection, people
6 run red lights, text while driving, and break regulatory rules.
7 Yet NextEra has provided no evidence on how it will deal with internal rule-
8 breakers: what internal enforcement staff it will use; how that staff will be trained,
9 compensated, and promoted; what will be the consequences for violators; and who on
10 the executive team will be held accountable for errors of underlings. Nor has NextEra
11 offered to fund the extra Commission staff that its acquisition will make necessary. On
12 NextEra's omissions, ring-fencing offers nothing.
13 **Q. Given your discussion of ring-fencing's typical features and the risks that it does**
14 **not eliminate, what is your conclusion about the concept?**
15 **A.** The phrase "ring-fencing" is a misnomer because the term overstates the effects. "Ring"
16 implies that the protections surround the utility fully; "fence" implies that the
17 protections have no holes. In holding company acquisitions of public utilities, ring-
18 fencing, such as it is, is essential for consumer protection, but it is not sufficient.
19 **2. Post-harm penalties are not certain to succeed**
20 **Q. Can the Commission protect the utility customers sufficiently from NextEra-**
21 **caused harm and risks by excluding from VEPCO's rates any cost increases caused**
22 **by its affiliation with NextEra, or by imposing penalties?**
23 **A.** Only if the cure—if there is one—is not worse than the disease. The more serious the
24 problem caused by NextEra or its affiliates, the fewer options the Commission has to
25 address it. A rate disallowance removes from the utility's revenue requirement costs that

should not be charged to customers. A fine takes away the wrongdoer's improper gains and imposes a penalty sufficient to deter the conduct. But both types of financial penalties share a weakness: The larger the problem, the larger the penalty, the weaker the post-penalty company; and so the greater the regulatory hesitance to impose the penalty proportionate to the problem. Unless there is some alternative company ready, willing, and able to replace the weakened utility, the public's need for a viable utility competes with the public's need to assign full financial consequences for misbehavior.

Furthermore, regulatory resources must keep up with regulatory complexity. Yet VEPCO, Dominion, and NextEra make no promise to increase, or to support Commission efforts to increase, the Commission's resources. That increase will be necessary as NextEra adds complexity (with this acquisition and with future acquisitions) that increases the staff's and Judges' workload. Relying on financial penalties for structural risk and abuse is less effective than preventing abuse-prone and risk-prone structures to begin with.

C. To prevent impairment and jeopardy—as required by the "will not" standard—NextEra would need to cease all activities that plausibly cause impairment or jeopardy

Q. Is it possible to design conditions that will ensure that this transaction "will not" "impair or jeopardize" "adequate service at just and reasonable rates"?

A. No, for at least two reasons.

First, no condition can correct a transaction whose origin lies in Dominion's selecting its new owner based on price rather than performance. That origin, by itself, causes this transaction to impair or jeopardize adequate service at just-and-reasonable rates because it precludes acquisitions by better performers. It puts shareholders ahead of customers. I explained this reasoning in Part III.

Second, because NextEra has thousands of nonutility subsidiaries, all facing business risk greater than typical utility risk, the acquisition adds risk to the risk that VEPCO customers already face because of their exposure to Dominion's own nonutility activities. That additional NextEra risk independently causes this transaction to violate the statutory prohibition against impairment and jeopardy.

The only logical way to prevent these risks is to prevent the activities that cause the risks. But preventing all the activities that cause the risks would mean preventing activities that are NextEra's very reasons for wanting this transaction. Those reasons are (a) to add VEPCO's lower-risk monopoly franchise to NextEra's higher-risk portfolio so that post-acquisition NextEra has a higher ratio of regulated businesses to total businesses—thus making it easier for NextEra to acquire more higher-risk businesses; and (b) to rate-base new capital expenditures rather than having competitive service providers and new load compete to provide alternatives to VEPCO-owned, rate-based assets. As a result, there is no logical way to design conditions that save this transaction—in the form that NextEra desires it—from the statutory prohibition.

Q. What then is the purpose of this Part VIII.C?

A. In this Part VIII.C, I discuss possible conditions in the following areas:

- affiliate risk
- sufficient capital resources for VEPCO
- NextEra's control of VEPCO
- control premium
- unearned competitive advantage
- VEPCO's franchise privilege

In these categories, I explain why for NextEra's acquisition, conditions that commissions typically attach to mergers and acquisitions still leave NextEra unable to satisfy the "will not" standard. I then offer conditions that do eliminate all risk. Readers will see that conditions that eliminate all risk effectively preclude the transaction that NextEra and Dominion want—which is the correct result because what they want is not what the plain statutory language allows.

Q. Do you have a caution for readers of this Part VIII.C?

A. Yes. I caution readers against viewing conditions as a way to save this transaction, then critiquing my conditions as precluding this transaction. The statute does not direct the Commission to facilitate acquisitions; it establishes a standard that prohibits acquisitions that would jeopardize or impair the interests that the statute protects. The Commission's task in this proceeding is to apply the statute as it exists. If NextEra wants to acquire VEPCO under a different standard, it must persuade the General Assembly to change the law.

1. Affiliate risk

Q. Concerning affiliate risk, what problems will you address?

A. On affiliate risk, I will address three problems: (a) the need to prevent NextEra's subsidiaries' financial risks from affecting VEPCO's service and rates, (b) the need to prevent NextEra from making future acquisitions that subject VEPCO to risk, and (c) the need to prohibit inappropriate interaffiliate transactions.

Q. Is it possible to design a condition that will prevent NextEra's subsidiaries' financial risks from affecting VEPCO's service and rates?

A. No. The Commission should not accept as a condition a set of words that merely prohibits what is already unlawful. What is already unlawful is including in the cost-of-

capital component of the utility revenue requirement any effect of the operational or financial risks associated with any of the utility's affiliates.

What is necessary is not mere words promising not to include nonutility risks in the utility's cost of capital. What is necessary is a methodology that is certain to deliver that result. But there is no expert consensus on a methodology that, with certainty, can measure the specific costs to the utility associated with the holding company's specific risks. There is, therefore, no way to exclude with certainty those costs from the utility customers' rates.

There are methodologies, but they are disputed. An expert might develop a proxy group—other companies whose risks purportedly resemble those of the target utility, where that utility is considered on a standalone basis. But true proxies for standalone utilities are difficult to find. The reason is this: As a result of the many acquisitions since the mid-1980s, nearly every utility is affiliated with some higher-risk business. So experts disagree over proxy groups. And no proxy utility, even if standalone, faces precisely the same economic and financial conditions faced by the target utility. Utilities differ in generation mix, fuel mix, customer types, exposure to weather and labor shortages, and regulatory policies, to name only a partial list of likely differences. The absence of consensus on methodologies for holding those factors constant necessarily defeats the possibility of certainty of protection.

A separate problem is that even if there were agreement among experts on proxy groups, if the proxy members are regulated utilities (which they should be if they are proxies), their existing cost of capital will have been established or influenced by

regulatory commission decisions. So the results become circular, rather than established by independent analysis.

To avoid disputes over proxies and the problem of circularity, one possibility is to take a low-risk investment like a Treasury security of some length; then add a risk factor to its nominal interest rate. Here again, there will be differences of opinion over the length of the Treasury security (e.g., 1 year vs. 10 years vs. 30 years) and the risk factor—the extent to which the utility's compensable risks exceed the Treasury security's risks. If there is no methodological consensus, there is no certainty of protection.

Q. What is the necessary solution to the risk that NextEra's affiliates will affect VEPCO adversely?

A. The most direct solution would be for NextEra to sell off all nonutility businesses that exceed a level that the Commission determined was the boundary between no plausible possibility of impairment or jeopardy, and some plausible possibility. To have the certainty required by the "will not" standard, the Commission would have to find that all reputable experts involved in the case agreed that below that boundary there was no risk. NextEra then would have to remain at that level, such that any new acquisition would have to receive specific permission from the Commission, and would have to be offset by a divestiture of comparable size and risk. This approach illustrates the practical difficulty of using conditions to manage the risks of a conglomerate holding company. The Commission would be involved in overseeing and adjusting the numerous nonjurisdictional business decisions of a conglomerate holding company, when the Commission needs to be focused on the performance of its jurisdictional utility.

Here is language that, verbally but not necessarily practically, could carry out my recommendation:

> *No member of the NextEra corporate system shall own any interest in any business, other than businesses that Dominion owns today, where such interest exceeds a dollar and risk level established by the Commission to eliminate any plausible possibility of impairment or jeopardy to VEPCO's provision of adequate service at just-and-reasonable rates.*
>
> *The Commission will make such determinations using a procedure to be developed in a separate Commission rulemaking, before the completion of which neither NextEra nor Dominion, nor any affiliate of either company, shall make any additional acquisition. Such procedure may include a combination of safe harbors (no Commission review necessary), advance notice (after which the transaction may proceed unless the Commission determines that review is necessary), and express decisions granting or denying approval, all as necessary to distinguish, expeditiously, acquisitions that pose a plausible possibility of impairment or jeopardy from those that do not.*
>
> *The Commission shall have access, in Virginia, to the books and records of any NextEra affiliate whose business activities the Commission reasonably believes could affect Dominion adversely.*

Q. Is it possible to design a condition that will prevent NextEra from making future acquisitions that subject VEPCO to risks?

A. Yes, but NextEra would never agree to it because it would have to change its corporate strategy and corporate character so that its mission and activities align fully with VEPCO's franchise duties.

As I explained in Part V.C, a commission that fails to attach to an acquisition approval a required review of future acquisitions is effectively approving not only the specific acquisition officially presented to the commission, but every future possible acquisition, by that acquirer, of anything of any type, location, or size, except for acquisitions of utilities within the state. For this problem, I presented the necessary solution in the immediately preceding subsection.

Q. Is it possible to design a condition that would, with certainty, eliminate the possibility of inappropriate interaffiliate transactions?

A. It is theoretically possible, but it would take much regulatory effort and resources—a fact that NextEra has failed to recognize and plan for.

The typical condition is merely words requiring the holding company to comply with whatever are the commission's current rules on interaffiliate pricing. This type of condition leaves the controlling holding company free to compel the target utility to enter into all manner of transactions, without advance commission review and without regard to whether the utility might have better ways to achieve a particular objective. Also, the traditional condition ignores the likelihood that a commission is already fully using its existing resources to regulate the pre-acquisition utility. No commission maintains a reserve staff, like a baseball team's relief pitchers, paid to sit in the bullpen and do nothing until needed. So a commission will not have the additional resources needed to address the new interaffiliate relationships that the new combined system could create—relationships whose number and complexity have no limit other than that chosen by the holding company.

The necessary solution would guarantee that the Commission reviews new transactions before they occur, and audits them after they occur for compliance with interaffiliate pricing rules and other requirements for reasonableness. Also there should be no regulatory deference to or presumption of prudence associated with such transactions, because the opportunity to self-deal is an opportunity to abuse. The following conditions seek to achieve some of these objectives. Other conditions elsewhere address resources.

VEPCO shall not undertake any obligation to make any payment to any affiliate for any service, or to sell to any affiliate any service, unless the Commission first has determined, by advance rule or transaction-specific review, that such

transaction produces the maximum cost-effective benefit to VEPCO's customers relative to all feasible alternatives.

VEPCO shall not become a party to any interaffiliate agreement, including agreements for the allocation of overhead costs, unless the Commission first has found that such agreement is in the best interest of VEPCO's customers and is otherwise consistent with the Commission's requirements.

In any sale of a service or product by VEPCO to an affiliate, or use by an affiliate of a VEPCO resource, the interaffiliate price shall be the higher of cost or market. In any purchase of a service or product by VEPCO from an affiliate, or use by VEPCO of an affiliate's resource, the price shall be the lower of cost or market.

In any Commission rate proceeding, VEPCO shall have the burden of proving by clear and convincing evidence (including the burden of producing evidence supporting such proof) that any payment made or received by VEPCO under any interaffiliate agreement was reasonable.

Any VEPCO decision to use its own employees or services, rather than using corporate shared services, shall not be overruled or influenced by any NextEra official other than a VEPCO official.

2. Sufficient capital resources for VEPCO

Q. Concerning sufficient capital resources for VEPCO, what problems will you address?

A. I will address three problems: (a) the need to require that NextEra have equity sufficient for VEPCO's needs, and to provide sufficient equity to VEPCO; (b) the need to prevent inappropriate movement of capital away from VEPCO; and (c) the need to have NextEra back VEPCO's debt.

Q. Is it possible to design a condition that would require NextEra to have equity sufficient for VEPCO's needs, and to provide sufficient equity to VEPCO?

A. Theoretically, yes. The typical condition is merely words prohibiting the utility from making, and prohibiting the acquirer from ordering the utility to make, dividend payments that drain the utility's equity below some stated level. What is missing from

this approach is a requirement that the acquirer affirmatively make sufficient equity available to the utility in the first place.

A commission cannot merely take on faith the holding company's pre-acquisition statements that it will support the utility. If good faith were sufficient as a legal tool, we would not need 100-plus-page Merger Agreements like the one executed by NextEra and Dominion. The same goes for regulatory decisions. And good faith is not a reliable standard when the holding company has multiple demands on its capital—demands that become conflicting demands if capital is insufficient to cover all the demands.

NextEra has emphasized—15 times in the Investor Presentation, see Part VII.A above—future demand growth as a profit opportunity. But that demand growth is also, potentially, a capital expenditure obligation, to the extent the necessary expenditures are not made by the new loads themselves or by competitive service providers. To think and talk only of the profit side and not the responsibility side is no way to plan for a complicated future.

Q. What is the necessary solution to assuring that VEPCO has sufficient equity?

A. The necessary solution is as follows:

> *Before approving this acquisition, the Commission will determine a level of funding that NextEra must always have readily available that will be sufficient to fund the maximum possible equity needs that the Commission expects VEPCO to have. On receiving this information from the Commission, NextEra shall explain, consistent with a deadline set by the Commission, how it will raise that amount and make it continuously available to VEPCO, free of demands from other parts of the NextEra system.*
>
> *If NextEra's nonutility affiliates have capital needs that require equity beyond what NextEra has available, NextEra may not draw from the equity set-aside established by the immediately preceding requirement.*

Before paying any dividends to shareholders, paying cash for any acquisition, or incurring any debt for any acquisition, NextEra shall submit to the Commission a report demonstrating that these actions will in no way diminish, or create any risk of diminishing, the amount of readily available equity required by the Commission.

Q. Has NextEra indicated how it would view this type of condition?

A. Yes. Asked to address concerns about sufficient equity for VEPCO in light of NextEra's many existing investments and unknown future investments, the Petitioners objected to the premise and avoided the question, without good reason. Consider:

> **CV1-41:** Please indicate your commitment to, or explain your disagreement with, the proposition that if NextEra ever has insufficient financial resources to cover Dominion's needs along with the needs of NextEra and its other affiliates, Dominion's needs will always have top priority over NextEra's other affiliates.
>
> **Response:** Joint Petitioners object to the premise of this request, which is hypothetical in nature and calls for a speculative response on future events. Subject to and without waiving the foregoing objections, Joint Petitioners provide the following response: NextEra does not agree with the proposition as stated. There is insufficient information to evaluate the hypothetical scenario presented, and any such determination would depend on the specific facts and circumstances at the time.

Of course the premise is "hypothetical," as is any question testing NextEra's preparedness for the future. But testing NextEra's preparedness for the future is a necessary step in determining whether this acquisition "will not" impair or jeopardize adequate service at just-and-reasonable rates in the future.

Worse, NextEra seems to be saying that its willingness to stand ready to supply Dominion's equity needs "depend[s] on the specific facts and circumstances at the time." A reasonable inference from this response is that no one at NextEra has given any thought to the question. That fact by itself causes this Petition to fail the statute's "will not" standard.

Q. Is it possible to design a condition that prevents inappropriate movement of capital away from VEPCO?

A. Theoretically, yes. Some commissions have limited the holding company's ability to extract dividends from the utility. Sometimes those limits are based on the utility's bond ratings. Placing limits on dividends is necessary. It is not sufficient, however, because other actions within the holding company system can cause business failures that in turn cause the holding company to have insufficient equity to fund the utility.

Q. What is the necessary solution to the need to prevent inappropriate movement of capital away from VEPCO?

A. The necessary solution is as follows:

> *NextEra shall maintain the elements of VEPCO's capital structure within the ranges established by the Commission.*
>
> *NextEra shall inject equity into VEPCO or Dominion consistent with the Commission's policies and directives.*
>
> *Neither VEPCO nor Dominion shall pay dividends except when granted permission by the Commission.*
>
> *Neither VEPCO nor Dominion shall incur debt except when granted permission by the Commission.*
>
> *Neither VEPCO nor Dominion shall provide financial support of any type to any NextEra business venture, other than as an incident of VEPCO's purchase or sale of goods or services consistent with the Commission's rules, orders, and conditions on interaffiliate transactions.*

Q. Is it possible to design a condition requiring NextEra to formally back all future VEPCO debt?

A. Yes, but the fact that neither of NextEra's two witnesses offered to do so suggests that they view this necessary protection as inconsistent with their monetizing mission.

NextEra's Investor Presentation projects success from its acquisition of Dominion. Part VI.B of my testimony explained that this success, if it happens, is attributable at least in part to the Commonwealth's decision to protect VEPCO from

competition, thus making most of VEPCO's customers captive. At the same time that NextEra would be getting these benefits from VEPCO's customers, it is subjecting them to risk.

Symmetry requires that NextEra give something back—in return for the benefits and to reduce the risk. The logical solution—especially given NextEra's repeated claims about its future success—is this:

> *For all future debt that VEPCO (or Dominion, for VEPCO's benefit) has to incur, NextEra must legally back it. Doing so will lower Dominion's cost of debt.*

This condition will make true Petitioners' assertions that the transaction will produce financial savings for Dominion and VEPCO.

3. NextEra's control of VEPCO

Q. Concerning NextEra's control of VEPCO, what problems will you address?

A. I will address two problems: (a) the need to prevent NextEra from interfering with VEPCO's budgets and operations; and (b) the need to prevent NextEra from bargaining to sell off VEPCO.

Q. Is it possible to design a condition that would prevent NextEra from interfering with VEPCO's budgets and operations?

A. Yes, but the condition would be inconsistent with NextEra's very purpose in making this acquisition—to control VEPCO's rate-basing decisions so as to meet the earnings projections that caused the investor community to support this transaction—earnings projections that come at the expense of VEPCO customers and NextEra's retail competitors.

Here is the necessary condition:

> *Subject to the next paragraph, NextEra shall guarantee that (a) VEPCO utility management will create its own budgets unconstrained by NextEra (directly or indirectly through Dominion) and (b) such budgets will either not be subject to*

approval by NextEra or will always be approved as submitted by VEPCO to NextEra. NextEra shall provide VEPCO with any funds that VEPCO needs to carry out its budget. Executives of VEPCO, Dominion, and NextEra shall certify, according to a form and schedule established by the Commission, that NextEra has taken no action to constrain VEPCO's budget or to constrain VEPCO from raising or receiving the funds necessary to carry out that budget.

In the event that NextEra wishes to modify a budget originally submitted to it by VEPCO, NextEra shall submit to the Commission the original VEPCO budget and NextEra's proposed modifications, with full explanation of the original budget, the desired modifications, and the reasons for the modifications. This paragraph shall not apply to modifications below any dollar threshold established by the Commission.

NextEra shall guarantee that if the Commission orders VEPCO to make any expenditure that causes VEPCO to exceed its budget, no NextEra entity or official will prevent VEPCO from carrying out such order. This condition does not preclude such utility from acting on its own to contest such Commission order, or to contest any Commission rate decision.

Before consummating this acquisition, NextEra's CEO shall certify, under penalty of perjury, that no one within the NextEra corporate system and outside VEPCO has authority to overrule any decision made by a VEPCO employee. On December 31 of each year, the CEOs of NextEra, VEPCO, and Dominion shall certify, under penalty of perjury, that in the preceding year no one within the NextEra corporate system and outside VEPCO has overruled any decision made by a VEPCO employee.

Without advance Commission approval, NextEra shall make no corporate governance rules affecting VEPCO's decisionmaking autonomy.

Q. Is it possible to design a condition that prevents NextEra from bargaining to sell off Dominion or VEPCO in a transaction that is adverse to VEPCO's customers?

A. Yes. Here is the necessary condition:

NextEra shall not begin any effort to sell VEPCO or Dominion without the Commission's knowledge and permission, and without (a) the Commission determining that NextEra's purpose is not to sell for gain but is solely to improve VEPCO's service or lower its costs and (b) complying with competitive procedures that the Commission has determined will result in the selection of that acquirer able and willing to provide the most cost-effective, responsive, and innovative service for VEPCO's customers.

4. Other concerns (control premium, unearned competitive advantage, VEPCO's franchise privilege)

Q. Is it possible to design a condition to ensure that VEPCO's customers receive their appropriate share of the control premium?

A. Yes, but Dominion would never agree to it because receiving the entire premium was why Dominion's Board and its shareholders agreed to sell control of the company. Part VI explained why Dominion's decision to keep 100% of the control premium, sharing none of it with VEPCO's customers, causes this transaction to deny customers rates that are just and reasonable. The solution, Part VI.D explained, is for the Commission to determine what is the appropriate customer share through a separate phase of this proceeding. That separate phase would occur only if the Commission found that no other feature of the transaction violated the statute—a finding that is not possible for the reasons I explained throughout this testimony. The Commission would also need to determine how to allocate the customers' share over time, because allocating it only to early-years' customers discriminates against later-years' customers.

The Petitioners might say that the six-month limit for this proceeding won't allow time for such a proceeding. That statement is true, but irrelevant to the merits of the issue. If by the end of the sixth month the Petitioners have not corrected their failure to share the premium, the only solution is nonapproval.

Q. Is it possible to design a condition that would eliminate the combined entity's unearned competitive advantages in the Virginia retail market to serve High-Load customers?

A. No, because those advantages arise from two facts that this proceeding cannot change: VEPCO's dual role as monopoly provider and competitive provider, and VEPCO's discriminatory GS-5 demand charge—each of which I explained in Part VII.

The best I can do is this condition:

No NextEra affiliate providing competitive retail service in Virginia may receive from any other NextEra affiliate any form of support without the Commission's advance permission. The Commission will grant that permission only if NextEra proves that (a) the support does not give the competitive affiliate any unearned competitive advantage as defined by the Commission; and (b) if the source of support is a resource whose cost was at any time borne by captive customers of a NextEra utility affiliate, that the competitive affiliate has compensated those customers for the support at the higher of cost or market price.

No NextEra affiliate shall deny to any unaffiliated provider of retail electric service any service, or any access to any facility, if the Commission determines that without that service or access granted to the unaffiliated provider, a NextEra affiliate will have an unearned competitive advantage. The Commission shall ensure reasonable compensation to NextEra or its affiliate for providing any such service or access.

No later than six months before any NextEra affiliate makes, or commits to making, any capital expenditure for purposes of serving new retail load in Virginia, that affiliate shall submit to the Commission a description of the expenditure's purpose, design, and cost. The Commission will notify the public of the proposal, seek public input, and then determine whether there are alternatives to the expenditure, or alternative providers of the asset associated with the expenditure, that are more cost-effective than the NextEra affiliate's proposal. Only if and after the Commission has determined that there are no such alternatives may the NextEra affiliate make or commit to making the capital expenditure.

Q. Is it possible to design a condition that clarifies the transaction's effects on VEPCO's right to its franchise?

A. Yes. Here is the condition:

Approval of this transaction creates no expectation that VEPCO has any right, beyond whatever right it had prior to this transaction, to provide any service within Virginia for any time period.

5. Conclusions on conditions

Q. What if NextEra or Dominion refuses to accept these conditions?

A. Each of these conditions is independently necessary to prevent, as required by the statute, any plausible possibility of impairment or jeopardy to VEPCO's ability to provide adequate service at just-and-reasonable rates. The Petitioners' nonacceptance would signal that they do not want to combine their companies under conditions

necessary to prevent harm to the customers that VEPCO is privileged and obligated to serve. With that signal, the Commission will have no choice but to reject the Petition.

D. Even Petitioners' insufficient conditions require regulatory resources and enforcement options—obvious needs that Petitioners ignore

Q. Describe the insufficiency of the Petition's conditions, in terms of their enforceability.

A. Conditions are sufficient only if compliance is certain. For compliance to be certain, actors must expect that noncompliance will be detected swiftly and penalized proportionally. Detection and penalties require sufficient Commission resources and undisputed Commission authority. On these essential topics, the Petitioners have said nothing. Their silence reflects their misplaced priorities and their Petition's inadequacy.

In this Part VIII.D, I address the following needs:

- Internal procedures and penalties must be sufficient to ensure compliance.
- The Commission must have resources sufficient to anticipate and detect violations.
- The Commission must have authority to order penalties and divestiture for noncompliance.
- The Commission must have authority to enforce the conditions against all NextEra affiliates.

1. Internal procedures and penalties must be sufficient to ensure compliance

Q. What should be the Commission's concerns about the clarity and sufficiency of consequences for noncompliance with any conditions on this transaction?

A. The Petitioners have given the Commission no details about their internal procedures for ensuring compliance with Commission conditions, and no details about the consequences to employees of noncompliance. Merely saying procedures exist is not the

same thing as proving their effectiveness; it is a version of "just trust us" lacking any policy or evidentiary value.

The following condition seeks to address the Petitioners' incompleteness:

NextEra shall not consummate this transaction until it has submitted to the Commission, and the Commission has approved, internal procedures designed to ensure that all employees of all NextEra affiliates will comply with the Commission's rules and conditions. These procedures shall include not merely rules and training, but procedures for monitoring, detecting, and penalizing inappropriate employee actions. NextEra also shall demonstrate that no employee or Board member of NextEra or any affiliate has any incentive to violate these conditions. The creation of these procedures shall be subject to oversight by an independent monitor selected by the Commission and paid for by NextEra, with the associated cost not recoverable in rates because the cost is not a cost of providing electric service.

2. The Commission must have resources sufficient to anticipate and detect violations

Q. What should be the Commission's concerns about its ability to anticipate and detect impropriety in interaffiliate relationships?

A. NextEra brings thousands of affiliates to the already complex Dominion holding company system. That number will grow without Commission approval, unless the Commission adopts my proposed condition about future NextEra acquisitions. The more affiliates, the more possible financial risk and the more interaffiliate transactions. How this situation will affect VEPCO customers, the Petitioners cannot say and therefore the Commission cannot determine. And the more possible transactions, the greater the regulatory effort required to track transactions and detect impropriety.

If the Petitioners are assuming that NextEra's structural complexity poses no risk because the Commission can correct problems through ratemaking, Petitioners are wrong. In ratemaking, experts find problems by auditing. Auditing is not like a trip to

the dentist, who checks every tooth. Auditing is sampling. It cannot promise 100% coverage, especially with limited regulatory resources.

If the Commission needs more resources to address NextEra's complexity, the Commission is on its own, because NextEra has offered nothing. Inducements to win approval, in the form of small bill reductions to favored customers and contributions to favored charities, yes; resources for the Commission to detect violations of conditions and rules, no.

Q. Do you have a solution to the resource insufficiency?

A. Yes. Here is the necessary condition:

> *NextEra shall pay to the Commission an annual fee, not recoverable from VEPCO customers, to cover the Commission's reasonable incremental cost, as determined reasonably by the Commission, required to ensure that no impairment or jeopardy to adequate service at just-and-reasonable rates, and no diminution in the competition in the supply of retail or wholesale electricity, results from VEPCO's affiliation with NextEra. NextEra may contest the magnitude of the fee but agrees not to contest the Commission's power to impose it. The fee is not recoverable in rates, because its purpose is to prevent all plausible impairment and jeopardy arising from the acquisition.*

3. The Commission must have authority to order penalties and divestiture for noncompliance

Q. Are other conditions necessary to prevent noncompliance with the Commission's conditions?

A. Yes. The Commission needs the indisputable and undisputed authority to impose penalties and to order disaffiliation of VEPCO from NextEra. The Commission also needs disaffiliation power if a condition turns out to be unenforceable or too difficult to enforce. Disaffiliation is the only logical response to NextEra's violation of a condition of its affiliation.

Disaffiliation would take the form of divestiture of VEPCO from NextEra, either through a spinoff to NextEra's existing shareholders or through a sale of VEPCO via a

competitive process by which the Commission selects the most suitable acquirer. Here is the necessary language:

> *By completing the proposed acquisition, NextEra agrees that the Commission has the power, on discovering any violation of any condition, or on finding any reasonable possibility that VEPCO's affiliation with NextEra will impair or jeopardize VEPCO's ability to provide adequate service at just-and-reasonable rates, to take either of the following actions after an evidentiary hearing: (a) impose against NextEra or any of its affiliates any financial penalty that the Commission deems appropriate, or (b) make VEPCO's continuing privilege to provide electric service in Virginia dependent on its disaffiliating from NextEra no later than one year after a Commission order requiring such disaffiliation.*

The logic supporting this condition is straightforward. The Commission has the power to condition a transaction only if without the condition, the transaction would impair or jeopardize. The existence of a condition therefore means that the transaction without the condition is unlawful. If a condition becomes unenforceable or impractical, it necessarily means that a transaction deemed unlawful without the condition has become unlawful. The only solution to an unlawful transaction is to unwind it. There is no way around this reasoning.

Q. Have the Petitioners sufficiently addressed the practicalities of enforcement?

A. No. Their prefiled testimony ignored this issue. Their subsequent discovery responses then resisted answering the question. CV1-123 asked what steps NextEra would have to take to divest VEPCO if the Commission found a condition violated. CV1-125 asked Petitioners to describe what should be the consequences if they violated the conditions. Petitioners resisted both questions with their stock objections of "hypothetical" and "calling for speculation." The possibility of Petitioners violating a condition is no more hypothetical or speculative than the possibility of a driver's exceeding a speed limit. Acquisition conditions and speed limits exist because of an assumption that is both

indisputable and universal: Without guardrails, a person's self-interest can lead them to break rules that protect the public interest.

A condition is necessary if without the condition, the transaction violates the statute. If a necessary condition is not enforceable or is not practical, then the transaction features that make the condition necessary remain unconditioned. If those features remain unconditioned, the transaction violates the statute. Therefore, certainty about enforceability is a prerequisite to approval. The same burden of proof that Petitioners carry to show that their transaction "will not" impair or jeopardize adequate service at just and reasonable rates therefore applies not only to the conditions' sufficiency but also to their enforceability. It is the responsibility of the Petitioners, not of the intervenors or the Commission, to prove enforceability. On that item, the Petitioners have failed.

Q. Under what circumstances should the Commission consider using the divestiture option?

A. The Commission should consider the divestiture option if and when it determines that VEPCO's affiliation with or control by NextEra impairs or jeopardizes customers' statutory right to receive adequate service at just-and-reasonable rates—service at a cost and quality level that meets the Commission's standards. A non-exhaustive list of such situations would include the following:

- NextEra has blocked VEPCO's initiatives required or approved by the Commission.
- NextEra has failed to provide VEPCO capital in amounts and types that the Commission deems necessary.
- VEPCO's cost of equity or debt is higher than it would be absent its affiliation with and subordination to NextEra.

- The magnitude or nature of NextEra's business activities has exceeded some level determined by the Commission to cause a plausible risk of harm to VEPCO.

- A rating agency has downgraded, or has indicated the possibility of downgrading, VEPCO's debt because of its affiliation with NextEra.

- The Commission discovers an interaffiliate transaction whose terms violate the Commission's standards.

- NextEra or any of its affiliates resists reasonable requests, by the Commission or others, for information about business activities that could affect VEPCO's ability to provide adequate service at just-and-reasonable rates.

- NextEra or any of its affiliates has intervened in VEPCO's decisionmaking in a manner that conflicts with Commission policies or otherwise impairs or jeopardizes VEPCO's ability to provide adequate service at just and reasonable rates.

- The Commission finds that it lacks the resources to monitor compliance with and enforce the conditions.

If one of these events occurred, the Commission would have the option of initiating a proceeding to determine whether divestiture in some form is necessary. In that proceeding, the Commission would take into account any possible advantages accruing to VEPCO from the affiliation that would be lost from divestiture. I am not suggesting that divestiture is a practically necessary response to a violation of a condition. Penalties must be proportionate to violations. I am saying that because there can be violations that justify divestiture, it is necessary for the Commission to have this option available and be ready to use it when necessary.

One caution: By proposing this condition, I do not mean to imply that the Commission does not already have divestiture authority under existing statutes. I mean to ensure that the authority is attached to any approval of the acquisition, so that the

Petitioners and investors, existing and future, have clear notice of it, and so that there is no argument later about the Commission's authority.

Q. Do you have concerns about the feasibility of the divestiture option?

A. Yes. Even if NextEra accepts such a condition now, some interested party (e.g., a NextEra shareholder, bondholder, vendor, or contract partner) could later challenge the Commission's authority to order the divestiture. Also, despite the Commission's finding that divestiture is necessary, there is no certainty that an appropriate acquirer would be available; or that financial, economic, and practical circumstances will support a spinoff of VEPCO to NextEra's shareholders or a sale to some entity that would replace NextEra.

This uncertainty about whether there will be an appropriate exit strategy is another reason why this transaction, which brings no benefits to VEPCO's customers, cannot satisfy the requirement that the transaction "will not" impair or jeopardize adequate service at just-and-reasonable rates. A plane without sufficient, working landing gear should not be allowed to leave the runway.

4. The Commission must have authority to enforce the conditions against all NextEra affiliates

Q. Do you have concerns about the Commission's enforcement authority?

A. Yes. Some of the necessary (but not sufficient) conditions apply to NextEra and its non-Virginia affiliates. NextEra, or one of its shareholders, creditors, or other allies, might argue that attaching and enforcing these conditions is outside the Commission's current legal powers. That argument, if accepted, leads necessarily to rejecting this transaction. The Commission cannot approve a transaction if a necessary condition is outside the Commission's jurisdiction to enforce.

If NextEra accepts a condition that envisions the Commission enforcing against NextEra's non-Virginia affiliates, a different problem arises: It is not clear whether NextEra's acceptance of a condition can vest in the Commission a power that the Commission would not otherwise have. If the Commission lacks the power to enforce a condition necessary to statutory compliance, the transaction cannot proceed. The Petitioners would need to get a statutory amendment.

Q. To address this concern, what additional condition is necessary?

A. The best that the Commission could do is this:

> *NextEra shall confirm, by letter from its Chief Executive Officer and General Counsel binding the company and all its affiliates, that the Commission has jurisdiction under Virginia law to enforce each condition. The letter also shall confirm that neither NextEra nor any of its affiliates will challenge that jurisdiction. This latter confirmation does not preclude NextEra from asserting that the Commission has exercised its jurisdiction without sufficient facts or fair procedure.*

But again, even a Chief Executive Officer and General Counsel cannot create authority that the Commission doesn't have.

IX. The Petitioners' efforts to present their transaction as public-spirited all fail

Q. Explain the purpose of this Part IX.

A. In Parts III through VII, I explained this transaction's true purposes, along with the many opportunities it creates for NextEra to act adversely to VEPCO's customers' interests. In this Part IX, I explain that Petitioners seek to divert attention from their solely monetizing purpose by offering inaccuracies and oversimplifications. Their additional strategy is to offer what they call "commitments." But this category consists solely of illusory promises to obey the law, and invitations to involve the Commission in ultra vires actions that discriminate against nonbeneficiaries.

A. To divert attention from their transaction's risks and harms, the Petitioners offer inaccuracies and oversimplifications

Q. Explain the purpose of this Part IX.A.

A. This Part IX.A addresses the loose, generic, nonfactual claims that Petitioners make about their transaction. I recommend that the Commission not allow this persuasion effort to succeed, but instead make clear to Petitioners and all future supplicants that the Commission will not tolerate such material or accept it for filing. As I discuss next, Petitioners' practice of substituting loose talk for technical testimony stretches across at least the following six categories:

- "Size": Petitioners fail to document any relationship between size and performance.
- "Scale": Petitioners fail to document any relationship between size and cost.
- "Innovation": Petitioners fail to document any relationship between size and innovation.
- "Leading": Petitioners offer no facts to distinguish this claim from factless advertising.

- "Best practices": Mr. Ketchum's substance-less claim contradicts Dominion's insistence that VEPCO's performance needs no improvement.

- Optimistic outcomes: Petitioners talk of what "is expected" but never of what is guaranteed—and they suppress the negatives.

This subpart closes with a section showing that Petitioners' claims of "benefits" are only advocacy, lacking expertise.

1. "Size": Petitioners fail to document any relationship between size and performance

Q. The Petitioners say that VEPCO's customers will benefit from the combined company's larger size. What is your response?

A. The size argument is only argument. It has no evidentiary value because it lacks definition and data. It is of course possible that for a specific set of activities, there is some size range within which cost-effective performance is more likely to occur, compared to sizes outside (i.e., below and above) that range. But the Petitioners' witnesses who talk of size provide no evidence about, for any specific service, what that size range is or how it relates to VEPCO specifically. The Petitioners could have offered statistical studies to prove their point, but they didn't. They at least could have offered anecdotal evidence comparing small utilities like Madison [Wisconsin] Gas & Electric with large utilities like Pacific Gas & Electric, but they didn't. The Petitioners' size argument is mere advertising—possibly true, possibly false. But it is not factual.

The argument also ignores precisely one-half of the relevant considerations. The post-acquisition entity will have a larger size in terms of its capitalization. But it will also have a larger size in terms of its obligations. Adding one more mouth to feed makes the family larger, but it does not necessarily increase the odds for the pre-existing mouths—especially if the acquirer wants even more mouths later, without getting permission from those pre-existing mouths. (See Part V.C above, explaining that by

approving this acquisition the Commission would in effect be approving all of NextEra's future acquisitions.) "Size," as NextEra uses the concept, is literally a half-truth, the uncomfortable obligation-half of which NextEra suppresses in this nontechnical, nonfactual, nonprofessional effort to persuade the Commission.

In substituting advertising for evidence, NextEra is not alone. Acquisition petitioners have routinely made the same claim, in the same generic, fact-avoiding manner. Despite nearly 100 mergers or acquisitions since the mid-1980s, these petitioners, like NextEra, offer no evidence that above some undefined size (no one has determined that size), a combined company will operate at a lower average cost (e.g., a lower cost per unit of sales) than either of the two companies standing alone. Take Dominion's 2019 acquisition of SCANA, the holding company that owns South Carolina Electric & Gas. I am unaware of any evidence technically showing that the coupling of those two companies has lowered either VEPCO's or SCE&G's average cost of buying, building, financing, or operating electric service. If there were such evidence, I would have expected the Petitioners to produce it rather than rely on nonfactual self-praise and nonintellectual, automatic associations of size with performance.

2. "Scale": Petitioners fail to document any relationship between size and cost

Q. The Petitioners say that VEPCO's customers will benefit from the combined company's "scale." What is your response?

A. I explained just above that any benefit of larger size is offset by the burden of larger obligations. Given those larger obligations, the combined company's larger size can benefit VEPCO's customers only if there are, for the particular actions that VEPCO

performs, proven economies of scale and VEPCO's current size has not already exhausted those economies of scale.

The correct term, by the way, is not "scale" but "economies of scale." And if in repeating the term "scale" Mr. Ketchum meant economies of scale, he defines it incorrectly. He says: "Scale means the ability to buy, build, finance, and operate more efficiently over time."[107] This language is more rhetorical than technical. To be at all useful in an adjudicative proceeding, where the tribunal makes decisions based on technical evidence and logical reasoning rather than applicant self-praise, a claim of economies of scale must be company-specific, cost-specific, activity-specific, and time-specific. When applied to an activity with those parameters, economies of scale exist when long-run average cost per unit declines as the firm's output increases.[108] For any particular business activity, much about economies of scale depends on the relative roles within total cost played by fixed cost and variable cost, as well as the relationship between total fixed cost and total demand (since a business operates "more efficiently," to use Mr. Ketchum's phrase, when its fixed costs are spread over a larger demand).

This highly technical concept, whose factual support requires detailed cost information compiled by trained accountants, does not lend itself to factless generalizing and PowerPoint bold-letter advertising (such as in NextEra's Investor Presentation repetitions at 12, 13, 17, 19, 20, 21, 44). For all we know, VEPCO already operates at "scale"—meaning that any increase in size would produce no decrease in per-unit cost for any particular activity. In fact, a company's large size could cause

[107] Ketchum Direct at 5:9.

[108] Paul Krugman and Robin Wells, *Microeconomics* 348 (4th ed. 2015).

1 "diseconomies of scale"—per-unit costs rising above the efficient level because the
2 increase in size leads to communications problems, duplication of effort, more
3 vulnerability to hacking, and too many meetings to coordinate too many people.
4 There have been nearly a hundred acquisitions of electric utilities since the
5 1980s.[109] But no NextEra witness has identified a single objective study describing the
6 specific economies of scale for the various activities carried out by a utility, let alone for
7 the various activities carried out by the owner of multiple monopoly utilities. Industry
8 participants assume that the physical distribution function remains largely a local, i.e.,
9 single-state-level, service. It is getting more local with customer self-supply and other
10 forms of distributed energy resources. The industry has achieved some economies of
11 scale, specifically in regional generation supply, by having multiple companies
12 participate in organized wholesale capacity and energy markets run by regional
13 transmission organizations. But those wholesale economies of scale owe nothing to
14 holding company acquisitions of multiple utilities; in fact they make unnecessary those
15 corporate combinations that, in the pre-RTO era, were sometimes justified by their
16 proponents as allowing the efficient sharing and deployment of diverse generating units
17 previously owned independently. The Petitioners talk about "scale" like laypeople
18 browsing in an airport bookstore, not like expert witnesses helping this Commission
19 make technical decisions that affect millions of people and thousands of businesses.

[109] I list acquisitions, from 1986 to 2020, in my *book Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* (Edward Elgar Publishing 2020), Table 3.1 at pp. 38-40. More acquisitions have occurred since the book was published. The book is now available from the publisher as a free download under Open Access protocols.

Q. Does Mr. Ketchum show his misunderstanding and misuse of the term "scale" in a separate statement?

A. Yes. He says: "[A]n enterprise-wide technology system will be more efficient in terms of individual customer costs when its fixed and variable costs are spread over a larger customer base."[110] As a definitional statement, this sentence is unobjectionable as to fixed costs. But for variable costs, the statement is wrong. If variable costs vary linearly with the number of units produced, the cost per unit is the same regardless of the number of units—so size does not affect efficiency. And in electric generation, variable costs do not vary linearly with output. In fact, a generating unit's variable costs can rise after a particular level of output because of increases in the generating unit's heat rate. Mr. Ketchum omits this fundamental fact.

Even if one forgives Mr. Ketchum's definitional errors, his statement literally makes no sense, for two analytically distinct reasons.

- First, for a company's "technology system" to have economies of scale, its per-unit cost function (the relationship of total cost to total output) has to decline over the system's entire output. A cost function for a service can decline over part of the output, then rise for the remainder of the output.

- Second, Dominion and NextEra don't have a single "enterprise-wide technology system"—whatever that is; they have two. For there to be a single "enterprise-wide technology system," one or possibly both of the two companies would have to retire their separate systems and replace them with a single system; or retire one system and then expand the other system. Either of those actions will waste existing resources unless the sum of the new single system's new capital expenditures and operating costs is less than the sum of the operating costs (only) of the two existing systems. (In making the comparison, we must ignore sunk costs.) Mr. Ketchum has again ignored elementary economic reasoning—revealing his words as purely advocacy rather than expertise, therefore of negative value to the Commission.

[110] Ketchum Direct at 6.

Q. Have the Petitioners in any way translated their claimed benefits from "size" and "scale" into any actual plans?

A. No. Asked about attention given by the two companies to operational improvements arising from the transaction, Petitioners gave these answers:

> No specific practices have been identified for improvement.[111]

> [In the process of considering and fashioning this transaction], [a]nalyses to identify specific cost savings and/or management improvements were not performed. In considering and fashioning this transaction, NextEra did not conduct any formal analysis of cost savings and management improvements. Instead, NextEra considered the information described in the forthcoming response to OAG Set 01-81.[112]

The response to OAG Set 01-81 is a repeat of the generic possible areas of cost savings, with no technical backup. And it has these admissions:

> While these efficiencies are expected [no identification of which qualified individuals are doing the "expecting"] to develop over time, the Joint Petitioners have not quantified them as specific annual dollar savings and have not prepared a standalone study assigning individual monetary values to each anticipated efficiency.

> The Joint Petitioners have not identified a finite period during which those anticipated efficiencies will cease, nor have they prepared a schedule allocating such anticipated efficiencies or benefits by year.

> The Joint Petitioners have not made a commitment guaranteeing a specified amount of quantified operational efficiencies or cost savings resulting from the optimization of the combined business.

> The Joint Petitioners have not prepared a year-by-year schedule identifying when any such efficiencies would be reflected in rates.

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[111] CV1-129.

[112] CV1-130.

3. "Innovation": Petitioners fail to document any relationship between size and innovation

Q. The Petitioners say that VEPCO's customers will benefit from the combined company's additional innovation. What is your response?

A. NextEra has argued to investors and this Commission that the combined company's larger size will increase "innovation."[113] More words lacking facts. To automatically associate a monopoly with "innovation" is counterintuitive. As the Nobel laureate economist Sir John Hicks wrote, "[t]he best of all monopoly profits is a quiet life."[114] Again, we have no evidence that any utility acquisition, including the nearly 100 acquisitions of electric utilities since the mid-1980s, and including Dominion's more recent acquisition of SCANA and SCE&G, has increased innovation.[115]

And we have no evidence about VEPCO's level of innovation, including whether it is stuck at some suboptimal level that only an acquisition will improve; or whether instead, as Dominion has insisted, there are no improvements that VEPCO needs NextEra to help it make. Indeed, in discovery the claim of increased innovation collapsed. Consider this dialogue from CV1-16, referring to Slide 12 of the May 18,

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[113] Investor Presentation at 12; Ketchum Direct at 9:16-10:2.

[114] "Annual Survey of Economic Theory: The Theory of Monopoly," 3 *Econometrica* 1, 8 (1935).

[115] In my book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* (Edward Elgar Publishing 2020), at Chapter 6.4.3 (entitled Mergers and Innovation: Bidirectional Effects), I summarize some legal and economic scholarship addressing whether and how mergers generally could increase or decrease innovation. There are theoretical arguments, and some data, going both ways. Mr. Ketchum fails even to reference this readily available scholarship, let alone apply any of it to his transaction.

2026 Investor Presentation. Slide 12 stated that the companies' combined size will increase "innovation." Following each Response is my comment.

a. **Question:** What is the empirical basis for associating size with innovation, given the size that Dominion currently has?

a. **Response:** The empirical basis for associating size with innovation is based on the generally applicable concept that more people devoting thought to a particular topic tends to yield more robust and diverse thought than less people thinking about that same topic.

Comment: This "generally applicable concept" has limits. Two might be better than one, but ten might not be better than nine. We have no evidence of, for a given problem, what is the optimal number of participants. And we have no evidence that Dominion lacks enough people to produce innovative thinking. We do know that four witnesses, i.e., three more than one, gave us no evidence on innovation.

b. **Question:** Is Dominion's size too small to achieve the innovation that the May 18 statement references?

b. **Response:** The language of the slide speaks for itself.

Comment: A nonanswer.

c. **Question:** What are the specific areas of innovation presently lacking at Dominion?

c. **Response:** None.

Comment: An admission that the claim of increased innovation has no evidentiary value.

d. Question: Identify all ways in which Dominion's acquisition of SCANA increased innovation at SCANA.

d. Response: The Dominion and SCANA transaction is a prior event which is not referenced in the aforementioned slide presentation. Notwithstanding this fact, see Joint Petitioners' response to Clean Virginia Set 01-162 for reference material associated with this prior transaction.

Comment: Another nonanswer, because the "reference material" says nothing about innovation.

4. "Leading": Petitioners offer no facts to distinguish this claim from factless advertising

Q. Comment on NextEra's statements that the post-acquisition entity will be a "leading" company.

A. NextEra's Investor Presentation repeats, at least four times, a description of the NextEra-Dominion combination as "America's leading utility business and energy infrastructure company" (Presentation at 1, 7, 27, 44). More advertising, cleansed of facts and therefore of meaning. "Leading" in what respect? There is no evidence that the combination will "lead" in terms of what matters to customers—efficiency and innovation in buying, building, operating, or financing the production and delivery of electricity in Virginia.

In NextEra's uses of the term "leading," it appears that "leading" means "largest." I have already addressed the lack of connection between size and quality. What works in wrestling and basketball does not automatically work in electricity production and delivery. For electric utilities, a key influence on corporate size is the state government's decision to grant the utility an exclusive service territory. The larger the utility's service territory, the larger the utility's size; there is no obvious connection between existing size and existing performance. Any claim that large market capitalization makes a company a "leader," with leadership implying merit, needs evidence to be credible. The Petitioners offer no evidence.

The companies associate "leading" with NextEra's presence in 49 states.[116] What matters to local utility service is the quality of local utility performance—reliability,

[116] Investor Presentation at 7.

cost, responsiveness. Those things all depend on local attention, local effort, local skill, local management, and local workers. In the electric industry, there is no evidence associating Virginia-specific performance with an expansion to 49 states. The opposite is equally plausible—that a company preoccupied with maximizing earnings from operations in 49 states will not give appropriate attention to Virginia. Perhaps the investors—the main audience for NextEra's claim of "leading"—value a company's presence in 49 states. But in the only state that matters to this proceeding, "leading" has no evidentiary value.

5. "Best practices": Mr. Ketchum's substance-less claim contradicts Dominion's insistence that VEPCO's performance needs no improvement

Q. Comment on NextEra's assertion that the combination will bring to VEPCO "best practices."[117]

A. The assertion has a hole at its center. Best practices are not some secret formula; they are available to any prudent manager. If best practices are already known to NextEra, they should be known to VEPCO. If not, VEPCO's officials can call up their FPL counterparts and learn them, or contract with FPL to teach them. There is no need to make VEPCO a minor subordinate in the NextEra system just to learn the latest in best practices. And if VEPCO did want to learn NextEra's best practices, Dominion acted inconsistently with that desire by insisting on a $12.5 billion premium for the opportunity to learn about them. There is a direct contradiction in the Petitioners' using "best practices" to support a transaction in which Dominion chose NextEra for its price rather than its practices.

[117] Ketchum Direct at 17.

A competitive company has no choice but to use best practices. The same goes for a monopoly utility. Because best practices—whatever those practices are, because the witnesses offer no specifics—are available without this transaction, they are not logically attributable to the transaction.

Q. Are there other problems with this claim about "best practices"?

A. Yes, the best-practices claim has two more problems. First, it contradicts VEPCO's insistence that it has no need to improve.

> **Question:** What are the specific areas of innovation presently lacking at Dominion?
>
> **Response:** None.[118]

Second, it lacks evidentiary value because Mr. Ketchum identifies no specific practice that NextEra will provide to VEPCO, let alone how that practice will improve VEPCO's performance. Nor has NextEra identified any executives who will be responsible for making best practices happen, or any consequences for any executives if they fail to achieve improvements from those best practices.

Best practices could count if they are unique, backed by specific metrics, connected to a plan for achieving those metrics, and accompanied by a list of responsible individuals along with the career consequences for not succeeding. NextEra offers none of these things.

The "best practices" claim is thus an empty one. It is a diversion of attention from the transaction's impairments and jeopardies. A customer can't take Mr. Ketchum's claim to the bank—unlike the Dominion shareholders, who can sell their premium-

[118] CV1-16(c).

enhanced NextEra shares and put the proceeds in the bank. As the Maryland Commission held:

> "[P]rojections of benefits through synergies, shared services or best practices are inherently speculative and, to the extent they materialize, will likely benefit customers only as forgone requests for rate relief, which we have previously held to be too intangible to qualify as a benefit under [Maryland utility statutes, PUA sec. 6-105]."[119]

Q. Is there another example of the lack of substance behind the Petitioners' claims of improvements through "practices"?

A. Yes. Staff 4-142 asked:

> Will NextEra centralize operations for the DEI nuclear fleet (including DEV, Dominion Energy South Carolina, and Millstone Nuclear) with NextEra's existing nuclear fleet in Juno Beach, Florida or elsewhere post-merger? Please discuss any centralization plans post-merger, including beyond the 18-month staffing freeze commitment, and implications to staffing levels at DEI's nuclear power stations.

NextEra responded:

> NextEra has not determined the post-combination operating model for the DEI nuclear fleet, where any particular DEI nuclear function would be performed, or any related organizational changes at this time.

And Staff 4-143 asked:

> Will NextEra seek to add the DEI nuclear fleet to its Common Emergency Site plan approved by the Nuclear Regulatory Commission ("NRC") in 2024? Please explain in detail.

NextEra responded:

> NextEra has not evaluated this option.

And Staff 4-147 asked:

> Will NextEra seek to lower the cost of operating and maintaining DEI's nuclear fleet in any way post-merger? Please explain in detail.

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[119] *Order No. 84698*, *In the Matter of the Merger of Exelon Corporation and Constellation Energy Group* (Feb. 17, 2012), 2012 Md. PSC LEXIS 12 at text accompanying note 356.

NextEra responded:

> NextEra has not identified or made any specific plans on this topic.

Indeed, NextEra doesn't even know who will be in charge of all nuclear operations. Here is Staff's 4-151:

> Will Robert M. Blue be responsible for nuclear operations for NextEra and DEI post-merger? If not, please explain which NextEra executive leader will be responsible for nuclear operations post-merger.

And NextEra's response:

> Not all reporting structures have been finalized. However, the expectation is that Robert M. Blue, as head of regulated utility operations for the combined company, would have substantial oversight of all regulated utility asset operations, including regulated nuclear operations.

NextEra wants this Commission to adopt as evidence nonfactual "commitments" to make things better, but has not "determined," or planned, or committed to anything.

6. Optimistic outcomes: Petitioners talk of what "is expected" but never of what is guaranteed—and they suppress the negatives

Q. How do you recommend that the Commission view the Petitioners' assertions of positive outcomes from NextEra's acquiring and exercising control over Dominion and VEPCO?

A. I recommend that the Commission not only discount, but view negatively, the Petitioners' manner of discussing the future.

Repeatedly, the companies talk of future outcomes in the passive voice: X "is expected," Y "is expected," Z "is expected."[120] The asserted upgraded credit ratings, customer benefits, cash flow growth, funding plan, balance sheet improvement, business mix, and leadership in multiple financial metrics—all are "expected." Expected by whom? Anyone objective and neutral—or just the two companies themselves, speaking

[120] *See* Investor Presentation at pp. 4, 7, 10, 11 (seven separate times), 22 (twice), 24, 26, 31, 37 (five times), 38, 39, 46, 48.

in documents designed to win support? Where is the expecting entity's guarantee? Expected when and for how long? And what are the consequences, to whom, if the actuals vary from what is "expected"? Even if these "expected" features truly exist on closing day, there is neither expectation nor guarantee for how long all these claims will continue to be true.

This vagueness is an invalid form of persuasion, in a technical proceeding held by a technical regulator to assess a two-monopoly combination that diminishes VEPCO's role in the holding company system from 71.6% to 26.9%.[121] I recommend that the Commission not excuse this conduct as customary regulatory advocacy. It is advocacy, surely. If it is customary, it is customary only because investment advisors and other regulatory agencies tolerate it. I urge the Commission to express appropriate intolerance of these nonfactual methods of persuasion.

Q. Comment on the Petitioners' specific expectation of higher bond ratings.

A. Petitioners cite the prospect of higher bond ratings as if these ratings were necessarily a benefit to VEPCO's customers. Missing from this sentiment is the possibility of lower ratings for companies that compete with VEPCO—specifically, competitors in the large-customer retail market that the General Assembly has determined is good for customers. If those companies fail, or face higher capital costs, not because they lack competitive merit but because the post-transaction company has unearned competitive advantages (such as the advantages that support bond ratings), Virginia will be worse off, not better off. The Petitioners' regard for only their own ratings, and their indifference to those of

[121] As explained in Part V.B.2.

their competitors, implicitly asks this Commission to choose sides in a competition whose deciding factor must be merit, not incumbency.

Q. What should be the Commission's concerns about the Petitioners' claim that improved access to capital "is expected"?

A. Thanks to Commission-set rates paid monthly by captive customers, VEPCO has successfully financed its capital expenditures for decades. This Commission is obligated, by state statute and by the U.S. Constitution, to set rates sufficient to finance expenditures required to serve VEPCO's customers efficiently. There is no evidence that this Commission has ever failed to do so. Consider these acknowledgements:

> **Question:** State whether it is Mr. Dunne's position that rates established by the Commission under existing ratemaking standards are insufficient to enable Dominion to attract the capital necessary to meet its obligation to serve. If so, explain the basis for that position and identify all supporting facts, analyses, and documents.
>
> **Response:** This is not Mr. Dunne's position.[122]
>
> **Question:** State whether it is your position that, absent the transaction, Dominion Energy Virginia would have insufficient financial capacity or access to capital markets to fund the investments necessary to meet its obligation to serve. If so, explain the basis for that position.
>
> **Response:** That is not Mr. Dunne's position.[123]

In a supplement, NextEra admitted as follows:

> The Joint Petitioners have not identified any anticipated capital investment that DEV would be unable to finance absent the Merger, or that DEV could finance only on materially less favorable terms.[124]

And Dominion told Staff:

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[122] CV1-106.b.

[123] CV1-107.a.

[124] Supplement to response to CV1-107(c).

> "DEV has the ability to fund the $54.8 billion capital spending plan without the merger. . . ." And Dominion does not expect any downgrade "as the standalone capital and financing plans were developed in a manner to preserve the current single-A credit ratings as though the company were operating in a standalone manner."[125]

As well, asked to identify all statements from anyone in the financial community in the last five years, indicating concern that Dominion would not have access to sufficient capital to address its future infrastructure needs in light of increasing demand, NextEra acknowledged that it is "not aware of any such statements made to Dominion."[126] Indeed, during the negotiations, there were no documents and discussions associated with the Dominion internal standalone analysis that preceded the merger announcement, in which concern was expressed about Dominion's ability to raise capital.[127]

And also this:

> Based on Mr. Dunne's direct testimony, there is no identified instance in the past 15 years in which Dominion Energy Virginia's credit ratings or access to capital caused concern to him personally. Mr. Dunne's testimony discusses the prospective benefits of the Merger, including improved credit considerations, access to a larger enterprise with demonstrated capital-market access, and potential lower prospective utility debt financing costs over time, but it does not state that Dominion Energy Virginia has historically failed to access capital or that its credit ratings have caused him concern.[128]

Petitioners offer no evidence that Dominion needs capital-raising help from NextEra. NextEra has provided no technical information showing that financing will be

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[125] Staff 6-223(a).

[126] Response to CV1-112 (Aug. 20 supplement).

[127] Response to CV1-113 (Aug. 20 supplement).

[128] CV1-8.

available faster or at lower cost; nor has NextEra put its own funds at risk by promising to fund directly any difference between Dominion's actual capital cost and the lower cost that NextEra says will occur—a lower cost that NextEra has not quantified. Subordinating VEPCO to a complicated NextEra—a company with higher risks and its own capital-raising obligations—is an unproven way to solve a problem that neither Dominion nor anyone else has ever said existed.

Q. On Petitioners' claim of improved access to capital, is there a potential contradiction?

A. Yes. As with their other claims, Petitioners give words without commitments. NextEra has made no legal commitment to support VEPCO or Dominion financially—no legal commitment to back debt that VEPCO or Dominion incurs directly, no legal commitment to raise equity and debt and put those funds into Dominion. What we do have is NextEra's refusal to limit its own future acquisitions. A limit is necessary so that NextEra does not impair or jeopardize its ability to raise capital for VEPCO when VEPCO needs capital. NextEra thus is trying to have it both ways: It argues that its capital availability will be a major benefit from this transaction, while insisting on the unrestricted ability to make that very capital available for non-VEPCO destinations.

As with "best practices": If Dominion did have an access-to-capital problem, and if that problem were the true reason for this acquisition, it would have made no sense for Dominion to complicate the negotiations by insisting on a premium. Offered an opportunity to address this anomaly, Petitioners refused to answer:

- **Question:** If NextEra Energy's assistance in raising capital was important or essential to Dominion Energy Virginia, explain why Dominion sought a premium in the transaction, notwithstanding the risk that doing so could cause NextEra Energy to terminate negotiations or decline to proceed with the transaction.

- **Response:** Joint Petitioners object to this request as argumentative; rather than seeking discoverable facts, it calls upon Joint Petitioners to adopt Clean Virginia's characterization, interpretation, or conclusion, and it improperly assumes facts not established in the record.[129]

Q. Is there a concern about the selectivity of Petitioners' information-sharing?

A. Yes. NextEra witness Dunne cited rating agency views that were positive about NextEra's business risk.[130] But he omitted from his testimony other information directly relevant to his cited statements. That information appears in the confidential response to CV1-99, *S&P Rating Evaluation Service* (May 11, 2026) at pp. 5, 7.

7. The nature of the "benefits" testimony: Advocacy instead of expertise

Q. What facts should the Commission notice about Petitioners' testimony on benefits?

A. Every statement about size, scale, innovation, and practices comes from a company official with a personal and professional stake in getting this transaction approved. None of these statements comes from an objective expert on size, scale, innovation, or practices. Clean Virginia invited Petitioners to support their self-interested generalizations with expertise:[131]

> **Question:** Please refer to Paragraph 41 of the Petition. Please provide all evidence, including academic or industry studies, showing that an increase in size from existing Dominion to Dominion plus NextEra will reduce any purchasing costs, increase any supply-chain leverage, or increase capital efficiency.
>
> **Response:** Joint Petitioners object to this request as it is overly broad and unduly burdensome to the extent that it seeks "all evidence, including academic or industry studies" with respect to multiple topics. Joint Petitioners further object to this request to the extent it seeks information

[129] CV1-110.

[130] Dunne Direct at 7:6-10; 11:19-12:20.

[131] CV1-134.

> that is not in Joint Petitioners custody, possession or control and is equally available to Clean Virginia.
>
> Subject to and without waiving the foregoing objections, Joint Petitioners provide the following response:
>
> See the Direct Testimony of John W. Ketchum.

Petitioners are saying that to have to support generalizations with expertise is "overly broad and unduly burdensome." But providing the Commission with objective expertise for its use in decisionmaking is the purpose of direct testimony—and the legal responsibility of the party bearing the burden of proof.

From these facts, it is logical and necessary for the Commission to infer that the Petitioners know of no objective expert who could testify, with sufficient confidence to constitute a preponderance of the evidence, that this transaction will achieve any of the values that the Petitioners' four advocacy witnesses attempt to describe.

I will leave it to counsel to explain why generic advertisement cannot satisfy the legal standard for probative evidence, including evidence that justifies judicial deference. What I can address, as an expert on the quality of regulation and a longstanding advisor to diverse regulatory commissions, is the effect that this type of submission has on the quality of regulation. In submitting such nonfactual, nonexpert material as their direct case (which would be the totality of the evidence if intervenors produced no evidence), the Petitioners expected the Commission to make this submission its evidentiary basis for approving the transaction. Stated more bluntly, the Petitioners expected the Commission literally to copy these generalities into an approval order, then present that order to the public and to the Virginia Supreme Court as the work of an independent, expert agency. But the order would reflect neither independence nor expertise.

This treatment of the Commission, of the adjudicative process, of the purpose of regulation, and of a General Assembly whose statute was explicitly designed and drafted to remove all doubt of impairment and jeopardy, is most politely described as unhelpful. A pair of petitioners who so confidently expected approval of so lacking a presentation is not a pair that the Commission can trust to act in ways that allow the Commission to ensure, over the decades during which VEPCO will be a minor member of the acquisitive NextEra's holding company system, that the customers' statutory right to adequate service at just and reasonable rates "will not" be impaired or jeopardized.

B. The Petitioners' "commitments" consist solely of illusory promises to obey the law, and invitations to the Commission to perform ultra vires acts that discriminate against nonbeneficiaries

Q. Introduce this Part IX.B.

A. The Petitioners have made clear, via their Proxy Statement and their Investor Presentation, that their purpose in combining is not to produce operational savings, capital expenditure savings, tangible benefits from "size" or "scale," innovation, or anything else that would improve VEPCO's performance. Dominion wants the $12.5 billion premium. NextEra wants the opportunity to increase VEPCO's rate base, along with the automatic, overnight reduction in overall risk to NextEra associated with Dominion's higher utility-to-nonutility ratio. That is why they are combining.

The Petitioners recognize, however, that a transaction so completely and obviously based on their private interests needs some pretense of public interest. So they have pulled from the standard merger-approval playbook a series of what they call "commitments." By doing so, they hope to persuade a Commission majority that selling a public privilege for gain, denying customers all of that gain, and subjecting their utility to an unknown future of more acquisitions and more risks is a good thing.

This Part addresses each of these Petition efforts, in four subparts:

- A "benefit" should count only if attributable to the acquisition rather than merger strategy, and only if backed by binding commitments and enforceable consequences.
- A promise not to break the law is not a transaction commitment.
- The benefit-value of NextEra's and Dominion's promises not to break the law, already at zero, goes below zero because on many occasions both have violated legal requirements.
- Bill credits, charitable contributions, office tower, jobs—obvious inducements to win approval—are not attributable to the transaction, therefore irrelevant.

1. A "benefit" should count only if attributable to the corporate acquisition rather than the regulatory strategy, and only if backed by commitments and enforceable consequences

Q. In determining whether this acquisition "will not" impair or jeopardize, how should the Commission evaluate the Petitioners' assertions of benefits?

A. I have a two-part answer. First, section 56-90's "will not"—a predictive absolute—bans all plausible possibility of impairment and jeopardy arising from the transaction. The Petitioners cannot use nontransactional benefits to compensate for impairments and jeopardies, because the impairments and jeopardies—unlawful by definition—remain unaffected. We don't avoid a speeding ticket by offering to wash the police officer's car. Conditions that remove the impairment or jeopardy—such as (a) NextEra's selling off all its nonutility businesses, or (b) NextEra's agreeing to have an independent monitor oversee all VEPCO efforts, in competition with competitive service providers, to rate-base new capital expenditures—deserve consideration. But conditions that leave harm and risk in place, then seek to placate the victim with unrelated inducements—they violate the statute. Selling someone a car without seatbelts creates jeopardy; throwing into the deal $10 a month for two years doesn't remove the jeopardy.

Second, because what triggers section 56-90 is the acquisition, the only relevant benefits—logically and legally—are ones produced by the actual acquisition—the combining of two companies. Any other claimed "benefit" comes from corporate strategy, not company combination. No commission approves a rate increase because the utility promises to donate to charity; nor can this Commission approve this transaction because NextEra promises customers $10 a month for two or four years.

Q. Do other jurisdictions reject merger benefits not uniquely attributable to the merger?

A. Some don't, some do. It is true that state commissions approving utility mergers and acquisitions have counted unrelated benefits. I respectfully disagree with those decisions. I have expressed that disagreement in prior testimony and in my book on mergers (see, e.g., Chapters 9.3.3 and 10.4).

In contrast to those state commissions, the Federal Communications Commission, applying the Communications Act of 1934, has rejected non-transaction benefits repeatedly: "[T]he claimed benefit must be transaction- or merger-specific. This means that the claimed benefit 'must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.'"[132] That principle was applied by the FCC Staff to the proposed merger of AT&T and T-Mobile. The Staff rejected benefits that the applicants claimed would result from "the adoption of each company's best business practices, including customer

[132] *AT&T, Inc. & Bellsouth Corp.*, 22 FCC Rcd 5662, 5761 (2007) (*quoting EchoStar/DirecTV Order*, 17 FCC Rcd 20,559, 20,630 (2002) (*citing Ameritech Corp. & SBC Communications Inc.*, 14 FCC Rcd 14,712, 14,825 (1999) ("Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger"))); *Comcast Corp.*, 17 FCC Rcd 23,246 (2002) (Commission considers whether benefits are "merger-specific").

1 service best practices . . . because the improvement of specific business functions by
2 either AT&T or T-Mobile could be achieved absent the proposed transaction."[133]
3 In the antitrust context, the Department of Justice and the Federal Trade
4 Commission have disregarded benefits achievable without a merger. The *Horizontal*
5 *Merger Guidelines* (2010) states (at Section 10): "The Agencies credit only those
6 efficiencies likely to be accomplished with the proposed merger and unlikely to be
7 accomplished in the absence of either the proposed merger or another means having
8 comparable anticompetitive effects." See also id. at n.13: "The Agencies will not deem
9 efficiencies to be merger-specific if they could be attained by practical alternatives that
10 mitigate competitive concerns, such as divestiture or licensing."[134]

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[133] *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Staff Analysis and Findings ¶ 241 (2011), available at http://www.wirelessestimator.com/publicdocs/ATT-TMO-FCC.pdf. The FCC Staff's document is not an official Commission document; nor was it part of the official record in the named docket. It was a draft report prepared by the Staff and released to the public by the FCC Chairman. No FCC order was issued in this proceeding, because the merger petitioners withdrew their proposal.

[134] The 2010 Guidelines were superseded by the 2023 Guidelines. On the question of benefits, the 2023 Guidelines at section 3.3 make points similar to the material quoted above from the 2010 Guidelines. *See*, *e.g.*, the following:

- 2023 Guidelines at 32 ("the Agencies will not credit vague or speculative claims [of merger efficiencies]"); *id.* (Agencies will consider whether "[t]he merger will produce substantial competitive benefits that could not be achieved without the merger under review");

- *id.* n.69 ("evidence related to efficiencies developed prior to the merger challenge is much more probative than evidence developed during the Agencies' investigation or litigation");

- *id.* n.70 ("If inter-firm collaborations are achievable by contract, they are not merger specific. The Agencies will credit the merger specificity of efficiencies

1 In the proposed Southern California Edison-San Diego Gas & Electric merger,
2 the California Commission rejected the applicants' claimed labor savings. Given the
3 smaller utility's (SDG&E's) growth, "some of the efficiencies SDG&E might realize by
4 merger into Edison may be achieved if SDG&E remains independent and becomes
5 larger."[135] And when a merger applicant offered ratepayers 90 percent of the net
6 proceeds from divesting a fossil fuel plant, the New York Commission disregarded this
7 claimed benefit because the Commission had full authority to determine the proceeds'
8 disposition without any merger.[136]

9 **Q. Do the Petitioners ever commit to a transaction-specific benefit?**

10 **A.** No, not if we define "commit" in the necessary sense of undertaking a legal obligation
11 and bearing a financial risk of noncompliance. Given that normal, non-rhetorical, fact-

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only in the presence of evidence that a contract to achieve the asserted efficiencies would not be practical.");

- *id.* at 33 (Agencies will consider whether the claimed "benefits are verifiable, and have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents. Procompetitive efficiencies are often speculative and difficult to verify and quantify, and efficiencies projected by the merging firms often are not realized. If reliable methodology for verifying efficiencies does not exist or is otherwise not presented by the merging parties, the Agencies are unable to credit those efficiencies.").

[135] *SCEcorp, Southern California Edison Co. & San Diego Gas & Electric Co.*, Decision No. 91-05-028, 1991 Cal. PUC Lexis 253, at *25.

[136] *Iberdrola, S.A., Energy East Corp., New York State Electric & Gas Corp. & Rochester Gas & Electric Corp.*, Case 07-M-0906, 2008 N.Y. PUC Lexis 448, at *10. *See also Exelon-Constellation Merger*, Order No. 84698, 2012 Md. PSC Lexis 12, at *162-163 (finding the possibility of BGE adopting its post-merger affiliates' business practices "too intangible to qualify as a benefit").

based understanding of "commit," the Petitioners have committed to no benefit that arises from the transaction.

The absence of any accountability for these claims is clear from this evasion of Staff question 2-95:

> **Question:** Please refer to the following statement in the Transaction Summary at page 12: "Any net savings achieved over time that are allocable to the Company resulting from the Merger will be passed through to customers in the normal course of the ratemaking process." Please explain how "any net savings that are allocable to the Company" will be determined.
>
> **Response:** The resulting company will continue to make reasonable investments to provide safe and reliable service while pursuing efficiencies and lower costs that may result from the combination of the companies. To the extent net savings are achieved and allocable to the Company, those savings would be reflected in the Company's cost of service subject to regulatory review, including operation and maintenance expenses and capital-related costs. Customers would receive the benefit of any such savings through the normal ratemaking process subject to regulatory review and approval, which ultimately will flow through their bills.

Staff asked how the savings—from the transaction—"will be determined." Nothing in this answer specifies a mode of determining—including any way to distinguish normal course-of-business improvements from improvements caused by the combining of the two holding company systems. No planning of "integration" occurred until after the negotiations.[137] So customer benefit commitments—in a binding sense, not in a rhetorical sense—were not part of the quid pro quos between NextEra and Dominion that produced the Merger Agreement. There is no evidence that at any point in the dealmaking process, a Dominion negotiator insisted on a legal commitment to reduce costs or improve service.

[137] As is made clear by Mr. Ketchum's letter, cited in the next footnote.

On July 24, 2026, Mr. Ketchum sent a letter to NextEra employees announcing the filing of regulatory applications. He said that this filing "allows both companies *to start t*houghtfully planning how we would bring our organizations together. . . ." (emphasis added). The letter described the formation of an "integration management office (IMO) to lead the integration planning process."[138] In other words, integration planning was not part of the negotiations—which means there could not have been any negotiated "commitments" about best practices or about performance generally.

2. A promise not to break the law is not a transaction commitment

Q. Comment on the Petitioners' statements about their willingness to obey the law.

A. Of the 20 "commitments" in Exhibit C to the Petition, seven are merely promises to obey the law:

- Commitment 2 (hold customers harmless from out-of-pocket costs incurred to create and carry out the transaction)
- Commitment 3 (maintain customer service quality)
- Commitment 16 (maintain Dominion's books and records separately)
- Commitment 17 (Dominion will not take on debt responsibility of any NextEra affiliate)
- Commitment 19 (Commission will continue to have its current regulatory authority)
- Commitment 20 (VEPCO will obey interaffiliate pricing rules)

These items all carry no benefit value because the law, in some form, already requires the stated behavior. And they carry no persuasive value because they are not

[138] "A Message from John Ketchum," filed by NextEra Energy, Inc. Pursuant to Rule 425 under the Securities Act of 1933 and deemed filed pursuant to Rule 14a-12 under the Securities Exchange Act of 1934. Subject Company: Dominion Energy, Inc. Commission File No. 001-08489.

backed by (a) a commitment to get the Commission sufficient resources to monitor compliance, (b) evidence of specific internal NextEra procedures to ensure compliance, and (c) proposed methodologies that with certainty enable the Commission to measure compliance.

3. The benefit-value of NextEra's and Dominion's promises not to break the law, already at zero, goes below zero because on dozens of occasions both have violated legal requirements

Q. On NextEra's promises not to violate the law, what facts do you recommend that the Commission consider?

A. I recommend that the Commission consider the facts that we know about. In response to Staff 1-52, NextEra acknowledged findings of violations, and settlements of allegations of violations, in all of these areas:[139]

- Reliability (FERC)
- Accounting (FERC)
- Tariff (FERC)
- Nuclear operations (NRC)
- Environmental (EPA)
- Labor generally (NLRB)
- Labor safety (OSHA, California)

Also, according to NextEra's Form 10-Q for the quarter ended March 31, 2026:

> NextEra, FP&L, and certain current and former executives entered into a settlement by which NextEra would pay a total of $150 million to settle all claims asserted in a securities class action lawsuit filed in the U.S. District Court for the Southern District of Florida in 2023. The allegation is that NextEra failed to disclose allegedly material information that allegations concerning campaign finance and other political activities expose the company to legal and reputational risk, and that the company made

[139] As summarized in NextEra's response to Staff 1-52.

allegedly material misstatements when denying that those allegations exposed the company to that risk.[140]

Dominion and/or VEPCO have a similar string of violations and settlements:[141]

- Reliability (FERC)
- Nuclear (NRC)
- Environmental (EPA)
- Labor generally (NLRB)
- Labor safety (OSHA)
- Mine Safety and Health Administration

These facts tell us that Dominion and VEPCO are unable to manage their own regulatory risks, to which this acquisition will add NextEra's risks. For both companies, these numerous deviations from legally required performance expose their customers to higher capital costs arising from finance sources worried about penalties. They also expose citizens to the various harms arising directly from the penalties. A company that self-inflicts this quantity of risks has no business exposing itself and its customers to more risks.

4. Bill credits, charitable contributions, office tower, jobs—obvious inducements to win approval—are not attributable to the transaction, therefore irrelevant

Q. Comment on the Petitioners' original offers of bill credits and charitable contributions.

A. These offers, along with any consideration of them, are wrong for three main reasons:

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[140] As summarized in NextEra's response to Staff 1-54.

[141] As detailed in their response to Staff 6-183.

- The bill credits and charitable contributions—both inducements to get approval—are a product not of the transaction, but of transaction strategy.
- Under the "will not" standard, nontransaction offers are irrelevant because they don't eliminate the harm and risk.
- The inducements discriminate against later customers, members of the public, and other acquirers.

I discuss each of these points next.

a. The bill credits and charitable contributions—both inducements to get approval—are a product not of the transaction, but of transaction strategy

Q. Comment on the appropriateness of the bill credits and charitable contributions.

A. Under section 56-90, what the Commission must find "will not impair or jeopardize adequate service at just and reasonable rates" is "the petition." The statute also makes clear that the petition is a petition for approval of a specific type of transaction. The transaction that triggers the statute is, literally and officially, what is described in the Merger Agreement: a sale by Dominion shareholders of 100% of their shares to NextEra, in exchange for shares of NextEra stock. It is that transaction that the Commission must find "will not impair or jeopardize."

The funds involved in the bill credits and charitable contributions are not part of an exchange between the two companies. They are, therefore, not part of the transaction that triggers the statute. They are, rather, shareholder contributions to a regulatory strategy designed to win approval of the transaction. (The Petitioners explain that Dominion will treat the credits as a reduction to revenues, which means that they are paid for by the shareholders, whose return on equity will be lower than it would be absent the reduction to revenues. The charitable contributions will be a corporate cost that also lowers the shareholders' return on equity.) Because the source of funds is

shareholder contributions independent of the official Dominion-NextEra exchange of stock, the funds are not the result of efficiencies caused by the contractual combining of two holding companies. The funds have nothing to do with the contractual combining of two companies.

The Commission is a body of defined, limited authority—the authority to cause utilities to provide adequate service at just and reasonable rates, and the authority to approve or disapprove acquisitions of control like the proposed transaction. The Commission has no authority in this transaction proceeding to make rates lower than their current approved level, or to make charitable contributions higher than the current donated level. The Commission is not a legislature. It has no authority to mix, match, compromise, or offset components of the public interest that have nothing to do with "adequate service at just and reasonable rates." Yet that is precisely what the Petitioners want the Commission to do—to act outside its authority.

I am unaware of any legal bar to NextEra's unilaterally sending checks to Virginia electric customers or to Virginia charities—outside of a Commission proceeding. Here we have something different. NextEra is asking the Commission to view these actions as relevant to the lawfulness of a transaction whose applicable law does not allow the Commission to consider these actions.

Law aside, I hope the Commission understands where such applicant behavior leads. Consider these questions:

- What if two prospective acquirers were competing to acquire Dominion, and to win the Commission's approval to do so? Would the Commission then be judging that competition in terms of how much cash each contestant was offering to current ratepayers and local charities?

- Back to NextEra: What if the Commission wanted the amount offered to Virginia charities to be higher, and thus approved the transaction subject to NextEra's tripling that amount? What authority would the Commission have to do so? The Commission could not logically say that the transaction failed the "will not impair or jeopardize" test unless the charitables were tripled. And so, in effect, the Commission is stuck with charitables of whatever size NextEra chose—clear evidence that the charitables have nothing to do with the transaction, and clear evidence that the entity deciding the terms of the Commission's approval order is not the Commission but NextEra.

- What if the Commission did not agree with the group of charities chosen by NextEra, and so imposed on NextEra the Commission's favorites? How would the Commission choose those favorites—based on what statutory criteria and what statutory authority? Again, the Commission would be stuck with whatever choices NextEra made. Being stuck with what a regulated utility wants to do is the precise opposite of what the regulator of that utility is supposed to do.

Mr. Blue talks about "affordability."[142] The value of this word diminishes each time a high-paid executive professes concern about it but then does nothing about it. Like here. This proceeding has nothing to do with affordability because the statute makes no mention of affordability and because nothing about this transaction, based on actual evidence to date (as opposed to what the witnesses say generically "is expected"), will make electricity more "affordable."[143] That is why the Petitioners have gone to EnergyShare, which is remote from this transaction, to win this Commission's approval of the transaction. The Commission must ignore this effort.

[142] Blue Supp. at 3:14.

[143] The very concept of "affordability" has no clear connection to utility cost-of-service regulation because utility cost-of-service regulation is based on the utility's cost of service. Affordability of any specific product is based on a person's wealth and income, and on the cost of other products needed by that person.

b. Under the "will not" standard, nontransaction offers are irrelevant because they don't eliminate the harm and risk

Q. What if Petitioners argue that the bill credits and charitable contributions offset any impairment or jeopardy?

A. The argument is a logical impossibility. Bill credits and charitable contributions don't change the transactional characteristics that cause impairment or jeopardy. The phrase "will not" allows no offsets. If there is any impairment or jeopardy, the inquiry ends.

c. The inducements discriminate against later customers, members of the public, and other acquirers

Q. In considering the bill credits and charitables, should the Commission be concerned about discrimination?

A. Yes, because the Petitioners' offer discriminates against later customers, against members of the public, and against other potential acquirers of Dominion.

Later customers: The original proposed bill credits last only two years, while NextEra-controlled Dominion—and the impairments and jeopardies it causes—will last as long as NextEra remains Dominion's owner and controller. There is thus a mismatch between two time periods: the time period in which the bill credits benefit customers, and the time period in which NextEra's negatives affect customers. That mismatch discriminates against the later customers, without any rationale. Discrimination without rationale is undue discrimination.

Members of the public: By making contributions to Petitioner-chosen charities, the Petitioners necessarily discriminate against the nonrecipients. Contributions will more likely go to the well-connected, the agreeable, the mainstream, and the transaction-supporting, to the exclusion of all others. If they agree to support or not oppose the transaction, microgrid intervenors get microgrids, renewable energy intervenors get renewable energy, and low-income housing intervenors will get aid for

low-income housing. But unless they intervene, or have connections, the blind won't get their bills in Braille, and the Ethiopian immigrants won't get customer service representatives who speak Amharic.

As a corporate entity, NextEra is free to fund whatever organizations it wants—outside this proceeding. But when it petitions this Commission for approval of a request, it may not base that request on, and the Commission may not grant the request based on, a plan to discriminate.

Other acquirers: As explained above, financial offers using funds not produced by the transaction arise from acquisition strategy rather than acquisition implementation. The funds become available not because two companies have combined to make operations more efficient, but because NextEra's shareholders are willing to pay money to fund inducements designed to win approval. Treating these financial offers as relevant to the transaction's merits favors acquirers who have extraneous resources, i.e., resources extraneous to the transaction. Doing so discriminates against other acquirers who don't have extraneous resources but could make a better fit—such as by bringing less risk. Doing so replaces performance merit with pay-to-play. That result undermines the very purpose of regulation—to induce the level of performance required by the franchisee's duty to serve.

Q. Does the Petitioners' supplemental testimony reduce the concerns that you express?

A. No. The Petitioners' supplemental testimony, submitted September 14, 2026, adds seven items to those that I just discussed. In adding these items, the Petitioners are asking the Commission to commit more errors. I provide here reasons specific to each of the seven items, followed by the flaws that these seven items have in common.

(i) build, at shareholder expense, a new office tower in Richmond adjacent to the existing Dominion Energy headquarters

If NextEra's shareholders want to donate an office tower to Richmond, they can do so—on their own. If the General Assembly wants to enact a statute that authorizes or directs the Commission to base acquisition approvals on how many new buildings an acquirer offers to build for free, rather than on how competently and responsively the acquirer will serve customers, the General Assembly can do so. But under section 56-90, the Commission must disregard this inducement because the new office tower has nothing to do with this transaction. That transaction—the sole event triggering the Commission's jurisdiction under section 56-90—is the exchange of stock between the two companies. That jurisdiction does not include authority to count office towers in determining whether an acquisition that exposes customers to unlimited and unknown future risks (see Part V above) "will not impair or jeopardize adequate service at just and reasonable rates."

(ii) provide additional bill credits for residential customers

Doubling the amount of bill credits doubles the inappropriateness, doubles the discrimination against future customers, and doubles the error that the Commission will make if it treats this money as relevant. As stated above, NextEra is free to write checks to all of VEPCO's customers, using retained earnings that otherwise would go to shareholder dividends or profit-producing investments. But NextEra must do so independently of this proceeding. Here NextEra is doing the opposite. It is making the offer contingent on the outcome of this proceeding—the regulatory and moral equivalent of a congressional candidate promising voters $5,000 each if he wins. Worse, by making the offer part of its official application, NextEra is asking the Commission

not only to bless this conduct, but to treat as technically part of and relevant to the transaction an event that is not part of the transaction. This transaction, the event that triggers the Commission's jurisdiction, is solely the Dominion-NextEra agreement to exchange Dominion stock for NextEra stock.

NextEra says that some of this outcome-contingent payoff will come from "reallocating credits currently earmarked for certain large load customers to residential customers." Unless NextEra is writing these checks directly to the customers, the credits and their reallocation will occur via ratemaking. But jiggering rates to move credits from data centers to others, merely to increase the funds to the others and without any basis in cost causation, is undue discrimination on its face. A candidate acquirer that knowingly violates that fundamental regulatory principle, pandering to the public's concerns about data centers to win regulatory favor in an adjudicatory setting, is unqualified to ensure that this transaction "will not" impair or jeopardize adequate service at just and reasonable rates.

Mr. Blue says that "this proposal [to add to and reallocate the bill credits] also allows more time to bridge to the longer-term benefits of the combination that I and other witnesses have discussed at length."[144] Incorrect. No Petitioner witness discussed any specific, tangible "benefits," and definitely not "at length," because the witnesses did no more than list obvious categories like finance, operations, and capital expenditures. Worse, attached to each category was the passive-voice "is expected"—the Petitioners' mantra used when they have no information on, or no desire to reveal, who is doing the expecting, what specifically they are expecting, and who would be

[144] Blue Supp. at 4:20-21.

held accountable, with what consequences, if the realities do not meet the expectations. In the Petitioners' testimony on "benefits," what was "at length," after the listing of each category, was an infinite silence.

(iii) maintain a Virginia employee headcount level for the combined company of at least 10,431 employees for five years and bring approximately 600 additional enterprise positions to Virginia

If the 10,431 employees are needed for VEPCO's operations, they are needed regardless of the transaction. No Petitioner witness has said that combining these two companies requires any particular number of employees to stay for any particular amount of time. And if these employees are not needed for VEPCO's operations, then keeping them employed longer than necessary, and charging customers for their cost, violates the just-and-reasonable standard. Moreover, the Commission has no jurisdiction over employee job-protection, except to the extent VEPCO's employment policies affect the quality or cost of electric service. There is no evidence that this item has any effect on the quality or cost of electric service.

As for "enterprise" positions, again they have nothing to do with electric service; they are "associated with expanding the combined company's national operations in Virginia."[145] Because they are irrelevant to whether the transaction will impair or jeopardize adequate service at just and reasonable rates, they cannot become a Commission-adopted, Commission-enforced condition on this transaction.

(iv) hold combined company Board of Directors' meetings in both Virginia and Florida

[145] Ketchum Supp. at 6:6-7.

This item is nonuseful because it is impossible to understand. What exactly are "combined company Board of Directors' meetings"? NextEra and Dominion are separate corporate entities, each with its own Board. How can there be a combined meeting of two Boards—unless the intent is for the subordinate Boards, i.e., Dominion's and VEPCO's, to parrot everything that NextEra's Board decides? And how does this combined Board meet in two places at the same time? Or is every meeting conducted twice? Presumably the quality of the Dominion and VEPCO Boards' decisions does not depend on the Boards' meeting location. This item offers no benefit and eliminates no harm.

(v) establish a $100 million shareholder-funded workforce development organization dedicated to preparing Virginians for careers in the growing energy economy

The Commission has no jurisdiction over the "growing energy economy." In this proceeding, it has jurisdiction over only whether the transaction to combine two holding companies satisfies section 56-90. Nothing about the growing energy economy—except the two companies' transactional intent to control all rate-base opportunities for VEPCO by creating barriers to competitive electricity suppliers (see Part VII above)—is relevant to this proceeding.

Workforce development is, of course, a good idea. It is a good idea for the General Assembly to consider. The General Assembly's consideration, if performed rationally and not in service to NextEra's persuasion effort, presumably will take into account existing organizations, such as Virginia's fine university and community college system, before creating a new organization. And with the General Assembly in charge, the new entity's mission, structure, and activities will be the work of elected

representatives and their delegatees, not NextEra—who surely will insist on having a say over how its $100 million gets spent.

> *(vi) create a Virginia supplier program under which the combined company expects to spend up to $1 billion annually over a minimum of five years with cost competitive contractors, suppliers, and service providers doing business in Virginia*

The supplier program, if part of a Commission order, would explicitly discriminate against non-Virginia suppliers. Such discrimination, practiced by a business, is lawful. But included by a state agency in an order, it is unconstitutional on its face. The Petitioners' willingness to violate our nation's most sacred text merely to buy favor with the public and with this Commission, or their joint ignorance about that text, means that we cannot trust them to prevent the combined company from impairing and jeopardizing adequate service at just and reasonable rates.

> *(vii) expansion of the EnergyShare program*

As already explained, charitable contributions are for the company or its shareholders to make outside of a proceeding. The Commission has no authority to require any charitable contributions for any reason, including as a condition of an acquisition.

* * *

In sum: With these proposals, NextEra is not only asking the Commission to commit ultra vires acts; NextEra is seeking to lure the Commission into a set of political considerations remote from the Commission's statute-defined jurisdiction. The Commission must reject this strategy, emphatically.

X. Conclusions

Q. Do the Petitioners support their proposal with sufficient facts?

A. No. Since the mid-1980s, there have been nearly a hundred acquisitions or mergers involving electric utilities. These transactions provide a large data set from which the Petitioners could have drawn evidence to back up their many unsupported claims. Instead of data, logic, and conclusions—the foundations of serious policymaking—the Petitioners offer vagueness, self-praise, and the same adjectival formulas that appear in many acquisition proposals.

Words cannot offset risks. Each of the violations discussed in Parts III through VII above involves a plausible possibility of impairment or jeopardy. How much is unknowable. One can try to quantify the costs of the risks we know about, by identifying cost-causing scenarios, then estimating the costs of each scenario and the probability of its occurrence. NextEra has made no effort to do so; implicitly it treats the probability and level of impairment and jeopardy as "zero." But treating the impairment and jeopardy as "zero" does not make them "zero."

There is, therefore, an absence of proof for the very issue on which the statute requires proof. Even if NextEra had made the effort, and done so properly, that effort would have addressed only the harms and risks that are known. There still would be the unknown: all future acquisitions that NextEra will make—all without the Commission's approval, all without geographic or type-of-business limit, all without any customer-benefitting rationale. NextEra's Petition, like its future, is too indefinite to deserve the Commission's approval.

Q. You are recommending that the Commission reject this acquisition when the Commission has previously approved acquisitions. Are you "changing the rules midgame"?

A. The quoted phrase misunderstands the concepts of "rules" and "game." Approving in advance a utility plant investment as prudent, then later finding the investment imprudent, is changing the rules midgame because the "game" is building the plant, and the "rule" is "the plant is prudent." Approving an acquisition as reasonable, and then later penalizing the company for doing the deal, is changing the rules midgame because the game is the acquisition and the rule is approval.

That is not what is happening here. I am not recommending that the Commission change the treatment of a transaction that it has already approved. I am recommending that the Commission address this transaction by carrying out utility regulation's central purpose: to produce industry performance in the utility monopoly setting that as closely as possible resembles the performance that customers enjoy in a competitive setting. In an effectively competitive market, mergers and acquisitions are the product of, naturally, effective competition: the striving by each competing company to display that mix of quality and cost-effectiveness that attracts and retains customers because the mix is superior to that provided by other companies available to those customers. In those transactions, the customers' interests, the target company's interest, and the acquirer's interest are all aligned.

It is likely true that Dominion and NextEra were expecting the Commission to treat this acquisition as it has treated prior acquisitions. With the Commission's rejection of this transaction, Dominion's shareholders will be disappointed. That disappointment falls outside this Commission's jurisdictional concern, because no statute and no Commission order promised an approval; and Dominion made no capital expenditure

contingent on a Commission promise to approve this transaction. There is here no changing rules midgame, because the real game is the Commission always doing its best to align utility performance with the statutory requirements of adequate service at just-and-reasonable rates.

Q. Will there be any harm to VEPCO or its customers if the Commission rejects this transaction?

A. None that I can think of. Based on the facts that I have seen, no one at VEPCO responsible for providing electric service ever said that they wanted or needed an acquisition to carry out their duties cost-effectively. And I am unaware of any negative effects in Hawai`i or Texas arising from those states' commissions rejecting NextEra's proposals. The harm was in the distraction and resources wasted to examine transactions that had no customer-service purpose.

Q. Your testimony cites statutory language and case law. Do those citations make your testimony inappropriate legal testimony?

A. No. In regulatory adjudication, a witness must testify within the boundaries of applicable statutes, as the case law has interpreted those statutes. Witnesses addressing operational expenses routinely cite the statutory just-and-reasonable requirement, along with its case-law applications under the standards of prudence and used-and-usefulness. Cost-of-equity witnesses routinely cite the Supreme Court's *Hope* and *Bluefield* decisions to show adherence to the Constitution's requirement of just compensation.[146] I have shown here the same respect for statutory and constitutional boundaries.

[146] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679* (1923).

Every decision in utility regulation is a combination of law and policy. All regulatory policy derives from law. To discuss policy without discussing law is to substitute mere policy preference for what a witness should do: Recommend to the Commissioners what actions they should take—or in this situation have no choice but to take—under the legal authority that they have.

I therefore have presented to the Commission recommendations for the policy considerations that it should have in mind when applying the statutory phrase "will not impair or jeopardize adequate service at just-and-reasonable rates." That is what expert witnesses do—they describe policies that fit with the statute. Implicit in all prefiled testimony is the witness offering recommendations confined by and guided by the statutory language. What I have done is make the connections more explicit.

To discard references to law, to separate legal expertise from other types of expertise, is to misunderstand the nature of regulation and regulatory decisionmaking, as well as the role of an expert witness. Regulatory decisionmaking is the result of combining all technical input: law, engineering, economics, finance, accounting, management, communications. It does not help the decisionmaking process to confine each expert to a single profession. Policymaking requires simultaneous attention to, and synthesis of, all forms of technical input.

The solution, therefore, is not to exclude evidence but to assess its weight. If a financial witness, explaining her recommendation for a return on equity, refers to *Bluefield*'s mention of "financial integrity," we don't exclude her reference because she is not a lawyer. We ask her, from a financial perspective, what financial integrity is. But ultimately she is testifying about whether "compensation" is "just," under the Fifth

Amendment. So she will opine on the term "just." She is applying a constitutional term to the facts that she has, using professional judgment. The Commission will make the legal decision. But it will not exclude her judgment on what is "just" merely because that term appears in a legal document. The line between interpreting and applying is permeable; to make it impermeable is to exclude the very expertise that the Commission needs to make the best possible decision.

Q. Provide your final comments.

A. My testimony is complex because this transaction is complex. The choice for the Commission is not complex. NextEra wants to control Dominion to gain a foothold and a platform; Dominion wants to sell control of VEPCO's public franchise for private gain. Nothing about the two companies' private purposes suggests that customers will be better off; much about this transaction would make them worse off. The Commission never asked for this transaction. There are no reasons to approve it; many reasons to reject it.

Q. Does this conclude your Direct Testimony?

A. Yes.

Exhibit SH-1
Scott Hempling, Attorney at Law

Scott Hempling has assisted clients throughout the electric industry: regulators, utilities, consumer organizations, independent competitors, environmental organizations, and labor unions. As an expert witness, he has testified before numerous state commissions; also before United States congressional committees and the legislatures of Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia. He has taught public utility law and policy to a generation of regulators and practitioners, throughout the United States and in Australia, Belgium, Canada, Central America, England, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Norway, Peru, and Vanuatu.

Hempling's legal treatise, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (Amer. Bar Assn. 2d ed. 2021), has been described as a "comprehensive regulatory treatise [that] warrants comparison with Kahn and Phillips." It is used in law school and public policy courses at Stanford, University of California–Berkeley, Vermont Law School, Georgetown, George Washington, and Washburn Law, among other graduate schools. His book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* (Edward Elgar Publishing 2020) was described by an *Energy Law Journal* reviewer as "powerful and persuasive . . . a terrific book." His book of essays, *Preside or Lead? The Attributes and Actions of Effective Regulators*, has been described as "matchless" and "timeless"; a Spanish translation has circulated throughout Latin America through the auspices of the Asociación Iberoamericana de Entidades Reguladoras de la Energía (an association of energy regulators from Europe and Latin America) and the World Energy Forum.

His articles have appeared in the *Energy Law Journal*, the *Electricity Journal*, *Energy Regulation Quarterly, Public Utilities Fortnightly*, *ElectricityPolicy.com*, publications of the American Bar Association, and other professional publications. These articles cover such topics as mergers and acquisitions, the introduction of competition into formerly monopolistic markets, corporate restructuring, ratemaking, utility investments in nonutility businesses, transmission planning, renewable energy, and state–federal jurisdictional issues. From 2006 to 2011, he was Executive Director of the National Regulatory Research Institute. From 2021 to 2024, he was an Administrative Law Judge at the U.S. Federal Energy Regulatory Commission.

Hempling is an adjunct professor at the Georgetown University Law Center, where he teaches a Fall course on public utility law and a Spring course on justice in the regulation of infrastructural industries. At Georgetown Law he has also taught regulatory litigation. He received a B.A. *cum laude* in (1) Economics and Political Science and (2) Music from Yale University, where he was awarded a Continental Grain Fellowship and a Patterson research grant. He received a J.D. *magna cum laude* from Georgetown University Law Center, where he was the recipient of an *American Jurisprudence* award for Constitutional Law. He is a member of the District of Columbia and Maryland Bars. A cellist, Hempling performs at the Jewish High Holy Day services held at the Riderwood Retirement Community.

Education

B.A. *cum laude*, Yale University (1978). Two majors: Economics and Political Science, Music. Recipient of a Continental Grain Fellowship and a Patterson Research grant.

J.D. *magna cum laude*, Georgetown University Law Center (1984). Recipient of *American Jurisprudence* award for Constitutional Law; editor of *Law and Policy in International Business*; instructor, legal research and writing.

Professional Experience

President, Scott Hempling, Attorney at Law LLC (2024–present).

Administrative Law Judge, Federal Energy Regulatory Commission (2021–2024).

President, Scott Hempling, Attorney at Law LLC (2011–2021).

Adjunct Professor, Georgetown University Law Center (2011–present).

Executive Director, National Regulatory Research Institute (2006–2011).

Founder and President, Law Offices of Scott Hempling, P.C. (1990–2006).

Attorney, Environmental Action Foundation (1987–1990).

Associate, Spiegel and McDiarmid (1984–1987).

Past Clients

Independent Power Producers and Marketers

California Wind Energy Association, Cannon Power Company, Electric Power Supply Association, Enitran Technology Company, National Independent Power Producers, SmartEnergy.com, U.S. Wind Force.

Investor-Owned Utilities

Madison Gas & Electric, Oklahoma Gas & Electric.

Legislative Bodies and Executive Departments

South Carolina Department of Administration, South Carolina Senate, Vermont Legislature.

Municipalities and Counties

American Public Power Association; Connecticut Municipal Electric Energy Cooperative; Iowa Association of Municipal Utilities; City of Jacksonville, Florida; Montgomery County, Maryland; Texas Cities; City of Winter Park, Florida.

International Governmental Bodies

Comisión Reguladora de Energía (Mexico) (2012) (report on measurements for effective regulation).

Central Electric Regulatory Commission of India (2000) (week-long training session on regulation of electric utilities).

Public Interest Organizations

Alliance for Affordable Energy, American Association of Retired Persons, Consumer Federation of America, D.C. Consumer Utility Board, Energy Foundation, Environmental Action Foundation, Environmental Defense Fund, GRID2.0 (Washington, D.C.), Illinois Citizens Utility Board, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, Wisconsin Citizens Utility Board.

Unions

Laborers' International Union of North America.

Regulatory Commissions and Consumer Agencies

Arkansas Attorney General, Arkansas Public Service Commission, Arizona Corporation Commission, Australia Energy Regulator, British Columbia Office of the Auditor General, British Columbia Utility Commission, California Public Advocates Office, Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, Delaware Public Service Commission, Hawai`i Public Utilities Commission, Hawai`i Office of Planning, Indiana Utility Regulatory Commission, Indiana Office of Utility Consumer Counsel, Kansas Corporation Commission, State of Maryland, Maryland Energy Administration, Maryland Attorney General, Maryland Office of People's Counsel, Massachusetts Attorney General, Massachusetts Department of Public Utilities, Mexico's Comisión Reguladora de Energía, Minnesota Public Utilities Commission, Mississippi Public Service Commission, Mississippi Public Utilities Staff, Missouri Public Service Commission, Montana Public Service Commission, National Association of Regulatory Utility Commissioners, Nevada Consumer Advocate, Nevada Public Service Commission, New Hampshire Public Utilities Commission, New Jersey Division of Ratepayer Advocate, New Mexico Attorney General, North Carolina Utilities Commission, Ohio Public Utilities Commission, Oklahoma Corporation Commission, Pennsylvania Office of Consumer Advocate, Puerto Rico Energy Commission, Rhode Island Public Utilities Commission, Rhode Island Division of Public Utilities, South Carolina Department of Administration, South Carolina Department of Consumer Affairs, South

Carolina Public Service Commission, Texas Office of Public Utility Counsel, Vermont Department of Public Service, Virginia State Corporation Commission, Wisconsin Attorney General.

Testimony Before Legislative Bodies

United States Senate

Committee on Energy and Natural Resources, May 2008 (addressing the adequacy of state and federal regulation of electric utility holding company structures).

Committee on Energy and Natural Resources, Feb. 2002 (analyzing bill to amend the Public Utility Holding Company Act).

Committee on Energy and Natural Resources, May 1993 (analyzing bill to transfer PUHCA functions from SEC to FERC).

Committee on Banking and Urban Affairs, Sept. 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, March 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, Nov. 1989 (analyzing proposed amendment to PUHCA).

United States House of Representatives

Subcommittees on Energy and Power and Telecommunications and Finance, Commerce Committee, Oct. 1995 (regulation of public utility holding companies).

Subcommittee on Energy and Power, Energy and Commerce Committee, July 1994 (analyzing future of the electric industry).

Subcommittee on Energy and Power, Energy and Commerce Committee, May 1991 (analyzing proposed amendment to PUHCA).

Subcommittee on Environment, Energy and Natural Resources, Government Operations Committee, Oct. 1990 (assessing electric utility policies of FERC).

Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, Apr. 1989 (discussing proposals to increase staff administering PUHCA).

Subcommittee on Energy and Power, Sept. 1988 (discussing “independent power producers” and PUHCA).

State Legislatures

Commission on Electric Utility Regulation, Virginia Legislature (2026) (discussing mergers and acquisitions of electric utilities).

Judiciary Committee, South Carolina Senate (2000) (discussing options for introducing retail electricity competition).

Commerce Committee, Arkansas General Assembly (1999) (discussing legislation to introduce retail electricity competition).

Health Access Oversight Committee, Vermont General Assembly (1999) (discussing options for state regulation of prescription drug pricing).

Electricity Restructuring Task Force, Virginia General Assembly (1999) (discussing options for introducing retail electricity competition).

Study Committee, North Carolina Legislature (1999) (discussing legislation to introduce retail electricity competition).

Committees on General Affairs, Finance, Vermont Senate (February-March 1997) (discussing options for structuring the electric industry).

Task Force to Study Retail Electric Competition, Maryland General Assembly (1997) (discussing options for introducing retail electricity competition).

Interim Committee on Electric Restructuring, Nevada Legislature (1995-97) (discussing options for structuring the electric industry).

Committee on Energy and Public Utilities, California Senate (December 1989) (discussing relationships between electric utilities and their non-regulated affiliates).

Testimony before Commissions, Courts and Arbitration Panels

Virginia State Corporation Commission: Effects of proposed acquisition by NextEra of Dominion Energy, Inc., the holding company for Virginia Electric and Power Company (2026).

Virginia State Corporation Commission: Effect of a utility's proposed generation demand charge on the effectiveness of retail competition for large customers (2025).

Maine Public Utilities Commission: Spanish holding company's acquisition of all minority stock in U.S. holding company owning utilities in Maine and New York (2024).

New Mexico Public Regulatory Commission: Spanish holding company's acquisition of state-franchised electric company (2021).

South Carolina Public Service Commission: Principles relating to prudence and to executives' incentive compensation (2020).

District of Columbia Public Service Commission: Sufficiency of utility's oversight of its contractors' treatment of workers (2020).

Wisconsin Public Service Commission: Principles relating to prudence and used-and-usefulness in the context of possible coal plant closures (2019).

Oklahoma Corporation Commission: Principles relating to prudence and used-and-usefulness in the context of a scrubber investment (2019).

Louisiana Public Service Commission: Utility holding company's acquisition of merchant generation company (2018).

District of Columbia Public Service Commission: Canadian holding company acquisition of retail natural gas company (2017).

Maryland Public Service Commission: Canadian holding company acquisition of retail natural gas company (2017).

Kansas Corporation Commission: Utility holding company acquisition of utility holding company (2016-2017).

U.S. District Court for Middle District of Florida: Effect of disaffiliation, mandated by Public Utility Holding Company Act, on corporation's liability under the Comprehensive Environmental Response, Compensation, and Liability Act (2016).

New Jersey Board of Public Utilities: Transfer of utility transmission assets to holding company affiliate (2015-2016) (application withdrawn).

Hawaii Public Utilities Commission: Holding company acquisition of utility holding company (2015-2016).

Louisiana Public Service Commission: Holding company acquisition of utility holding company (2015).

Connecticut Public Utilities Regulatory Authority: Holding company acquisition of utility holding company (2015).

District of Columbia Public Service Commission: Holding company acquisition of utility holding company (2014-15).

Maryland Public Service Commission: Holding company acquisition of utility holding company (2014-15).

Mississippi Public Service Commission: Utility holding company's divestiture of its utility subsidiaries' transmission assets to an independent transmission company (2013).

U.S. District Court for Minnesota: Effects of Minnesota statute limiting reliance on fossil fuels (2013).

Tobacco Arbitration Panel: Principles for regulating cigarette manufacturers (on behalf of State of Maryland) (2012).

Illinois Commerce Commission: Performance-based ratemaking (2012).

Maryland Public Service Commission: Holding company acquisition of utility holding company (2011).

California Public Utilities Commission: Performance-based ratemaking (2011).

Superior Court of Justice, Ontario, Canada: Renewable energy contractual relations under the Public Utility Regulatory Policies Act (2007).

Florida arbitration panel: Financial responsibility for stranded investment arising from municipalization (2003).

Minnesota Public Utilities Commission: Transmission expansion for renewable power producers (2002).

U.S. District Court for Wisconsin: State corporate structure regulation in relation to the Commerce Clause of the U.S. Constitution (2002).

New Jersey Board of Public Utilities: Conditions for provider of last resort service (2001).

Indiana Utility Regulatory Commission: Risks of overcharging ratepayers using "fair value" rate base (2001).

North Carolina Utilities Commission: Effect of merger on state regulatory powers (2000).

Wisconsin Public Service Commission: Effect of merger on state regulatory powers (2000).

New Jersey Board of Public Utilities: Affiliate relations in telecommunications sector (1999).

Illinois Commerce Commission: Affiliate relations and mixing of utility and non-utility businesses (1998).

Texas Public Utilities Commission: "Incentive" ratemaking, introduction of competition (1996).

Rhode Island Attorney General: Market structure changes in the electric industry (1996).

Vermont Public Service Board: Cost allocation and interaffiliate pricing between service company and utility affiliates (1990).

Publications

Books

Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication (Edward Elgar Publishing 2020).

Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction (2d edition American Bar Association 2021).

Preside or Lead? The Attributes and Actions of Effective Regulators (2d edition 2013).

Articles, Papers and Book Chapters

"Is Utility Law Neutral?" *Energy Regulation Quarterly* (Fall 2026).

"Electricity Formula Rate Plans and Multi-year Rate Plans: Can They Serve the Public Interest, and How?" in Hunter, Herrera Anchustegui, Crossley, and Álvarez, *Routledge Handbook of Energy Law* (2020).

"Inconsistent with the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation," *Energy Law Journal* (Fall 2018), available at https://www.eba-net.org/felj/elj-39-2.

"Maryland's Supreme Court Loss: A Win for Consumers, Competition and States," *ElectricityPolicy.com* (June 2016).

"Certifying Regulatory Professionals: Why Not?", *ElectricityPolicy.com* (June 2015).

"Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers," *Energy Law Journal* (Spring 2015), available at https://www.eba-net.org/felj/elj-36-1.

"Pricing in Organized Wholesale Electricity Markets: Can We Make the Bright Line any Brighter?", *Infrastructure* (American Bar Association, Spring 2015).

"From Streetcars to Solar Panels: Stranded Investment Law and Policy in the United States," *Energy Regulation Quarterly* (Vol. 3, Issue 3 2015).

"Regulatory Capture: Sources and Solutions," *Emory Corporate Governance and Accountability Review* Vol. 1, Issue 1 (August 2014), available at http://law.emory.edu/ecgar/content/volume-1/issue-1/essays/regulatory-capture.html.

"When Technology Gives Customers Choices, What Happens to Traditional Monopolies?" *Trends* (American Bar Association, Section of Environment, Energy and Resources July/August 2014).

"Democratizing Demand and Diversifying Supply: Legal and Economic Principles for the Microgrid Era," *ElectricityPolicy.com* (March 2014).

"Non-Transmission Alternatives: FERC's 'Comparable Consideration' Needs Correction," *ElectricityPolicy.com* (June 2013).

"Broadband's Role in Smart Grid's Success," in Noam, Pupillo, and Kranz, *Broadband Networks, Smart Grids and Climate Change* (Springer 2013).

"How Order 1000's Regional Transmission Planning Can Accommodate State Policies and Planning," *ElectricityPolicy.com* (September 2012).

"Renewable Energy: Can States Influence Federal Power Act Prices Without Being Preempted?" *Energy and Natural Resources Market Regulation Committee Newsletter* (American Bar Association, June 2012).

"Can We Make Order 1000's Transmission Providers' Obligations Effective and Enforceable?" *ElectricityPolicy.com* (May 2012).

"Riders, Trackers, Surcharges, Pre-Approvals, and Decoupling: How Do They Affect the Cost of Equity?" *ElectricityPolicy.com* (March 2012).

"Regulatory Support for Renewable Energy and Carbon Reduction: Can We Resolve the Tensions Among Our Overlapping Policies and Roles?" (National Regulatory Research Institute 2011).

"Infrastructure, Market Structure, and Utility Performance: Is the Law of Regulation Ready?" (National Regulatory Research Institute 2011).

"Cost-Effective Demand Response Requires Coordinated State-Federal Actions" (National Regulatory Research Institute 2011).

"Effective Regulation: Do Today's Regulators Have What It Takes?" in Kaiser and Heggie, *Energy Law and Policy* (Carswell 2011).

Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions (lead author, with C. Elefant, K. Cory, and K. Porter), Technical Report NREL/TP-6A2-47408 (January 2010).

Pre-Approval Commitments: When and Under What Conditions Should Regulators Commit Ratepayer Dollars to Utility-Proposed Capital Projects? (National Regulatory Research Institute 2008) (with Scott Strauss).

"Joint Demonstration Projects: Options for Regulatory Treatment," *The Electricity Journal* (June 2008).

"Corporate Structure Events Involving Regulated Utilities: The Need for a Multidisciplinary, Multijurisdictional Approach," *The Electricity Journal* (Aug./Sept. 2006).

"Reassessing Retail Competition: A Chance to Modify the Mix," *The Electricity Journal* (Jan./Feb. 2002).

The Renewables Portfolio Standard: A Practical Guide (National Association of Regulatory Utility Commissioners, Feb. 2001) (with N. Rader).

Promoting Competitive Electricity Markets Through Community Purchasing: The Role of Municipal Aggregation (American Public Power Association, Jan. 2000) (with N. Rader).

"Electric Utility Holding Companies: The New Regulatory Challenges," *Land Economics*, Vol. 71, No. 3 (Aug. 1995).

Is Competition Here? An Evaluation of Defects in the Market for Generation (National Independent Energy Producers 1995) (co-author).

The Regulatory Treatment of Embedded Costs Exceeding Market Prices: Transition to a Competitive Electric Generation Market (1994) (with Ken Rose and Robert Burns).

"Depolarizing the Debate: Can Retail Wheeling Coexist with Integrated Resource Planning?" *The Electricity Journal* (Apr. 1994).

Reducing Ratepayer Risk: State Regulation of Electric Utility Expansion (American Association of Retired Persons 1993).

"'Incentives' for Purchased Power: Compensation for Risk or Reward for Inefficiency?" *The Electricity Journal* (Sept. 1993).

"Making Competition Work," *The Electricity Journal* (June 1993).

"Confusing 'Competitors' With 'Competition,'" *Public Utilities Fortnightly* (March 15, 1991).

"The Retail Ratepayer's Stake in Wholesale Transmission Access," *Public Utilities Fortnightly* (July 19, 1990).

"Preserving Fair Competition: The Case for the Public Utility Holding Company Act," *The Electricity Journal* (Jan./Feb. 1990).

"Opportunity Cost Pricing," *Wheeling and Transmission Monthly* (Oct. 1989).

"Corporate Restructuring and Consumer Risk: Is the SEC Enforcing the Public Utility Holding Company Act?" *The Electricity Journal* (July 1988).

"The Legal Standard of 'Prudent Utility Practices' in the Context of Joint Construction Projects," *NRECA/APPA Newsletter Legal Reporting Service* (Dec. 1984/Jan. 1985) (co-author).

Selected FERC Administrative Law Judge Issuances

Basin Electric Power Cooperative, Initial Decision, 187 FERC ¶ 63,021 (2024).

Basin Electric Power Cooperative, "Order Denying Motion and Amending Procedural Schedule," 180 FERC ¶ 63,035 (2022).

Fern Solar LLC, Initial Decision, 183 FERC ¶ 63,004 (2023).

Fern Solar LLC, "Order Denying Motion for Partial Summary Disposition and Motion to Strike," 180 FERC ¶ 63,024 (2022).

Tri-State Generation and Transmission Association, Inc., Initial Decision, 179 FERC ¶ 63,019 (2022).

Speaker and Lecturer

United States: American Antitrust Institute; American Association of Retired Persons; American Bar Association; American Power Conference; American Public Power Association; American Wind Energy Association; Chicago Bar Association (Energy Section); Columbia University Institute for Tele-Information; Electric Cooperatives of South Carolina; Electric Power Research Institute; *Electric Utility Week;* Electricity Consumers Resource Council; Energy Bureau; *Energy Daily;* Executive Enterprises; Federal Energy Bar Association; Harvard Electricity Policy Group; Indiana State Bar Association; Infocast; King Abdullah Petroleum Studies and Research Center; Louisiana Energy Bar; Management Exchange; Maryland Resiliency Through Microgrids Task Force; MIT Energy Initiative; Michigan State University Public Utilities Institute; Mid-America Association of Regulatory Commissioners; MidAtlantic Demand Resources Initiative; Mid-Atlantic Conference of Regulatory Utility Commissioners; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Conference of Regulatory Attorneys; National

Governors Association; National Independent Energy Producers; New England Conference of Public Utility Commissioners; New England Public Power Association; New Mexico State University Regulatory Studies Program; New York Bar Association (Energy Section); North Carolina Electric Membership Corporation; Pennsylvania Bar Institute; Puerto Rico Energy Center; Puerto Rico Institute of Public Policy; Regulatory Studies programs at Michigan State University, New Mexico State University and University of Idaho; Society of American Military Engineers; Society of Utility and Regulatory Financial Analysts; Southeastern Association of Regulatory Utility Commissioners; Universidad del Turabo (Puerto Rico); United Nations Association at Georgetown Law; U.S. Department of Energy Forum on Electricity Issues; U.S. Department of Energy Solar Energy Technologies Office; U.S. Environmental Protection Agency; Western Interstate Energy Board; Wisconsin Public Utilities Institute; Wisconsin Bar—Public Utilities Section; Yale Alumni in Energy; Yale School of Forestry and Environmental Studies.

International: Australian Competition and Consumer Commission; Australian Energy Regulator; Bergen Center for Competition Law & Economics, University of Bergen (Norway); British Columbia Utilities Commission; Canadian Association of Members of Utility Tribunals; Canadian Energy Law Forum; Central Electric Regulatory Commission (India); Comisión Reguladora de Energía (Mexico); The Energy and Resources Institute (India); Government & Policy Think Tank, Sharif University of Technology (Iran); Independent Power Producers Association of India; Indian Institute of Technology at Kanpur; Ludwig-Maximilians-Universität (Munich, Germany); Management Development Institute (Gurgaon, India); National Association of Water Utility Regulators (Rome, Italy); New Zealand Electricity Authority; New Zealand Commerce Commission; Nigerian Electricity Regulatory Commission; Office of Utility Regulation of Jamaica; OSIPTEL (the Peruvian Telecom Regulator) Training Program on Regulation for University Students; Petroleum and Natural Gas Regulatory Board (India); Regulatel (an international forum of telecommunications regulators); Regulatory Policy Institute (Cambridge, England); Utilities Regulatory Authority of Vanuatu; World Regulatory Forum.

Community Activities

Member, PEPCO Work Group, appointed by County Executive of Montgomery County, Maryland (2010–2011).

Sunday School teacher, Temple Emanuel, Kensington, Maryland (2002–2006, 2008).

Board of Trustees, Temple Emanuel (2005–2006).

Musical performer (cello): Riderwood Village Retirement Community (2003-present); St. Paul Episcopal Church (Centreville, MD).