

133 FERC ¶ 61,009
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Old Dominion Electric Cooperative and
North Carolina Electric Membership Corporation

Docket No. EL10-49-000

v.

Virginia Electric and Power Company

ORDER ON COMPLAINT AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued October 4, 2010)

1. On March 17, 2010, pursuant to section 206 of the Federal Power Act (FPA),¹ Old Dominion Electric Cooperative (ODEC) and North Carolina Electric Membership Corporation (NCEMC) (collectively, Complainants) filed a complaint against Virginia Electric and Power Company (Dominion) alleging that certain costs are improperly included in Dominion's 2010 Annual Transmission Revenue Requirement (2010 ATRR) (Complaint).² Complainants request that the Commission: (1) determine that these costs are unjust, unreasonable, and unduly discriminatory or preferential; (2) direct Dominion to remove the subject costs from its 2010 ATRR and all future Annual Updates of its ATRR; and (3) to the extent necessary, establish hearing procedures to determine the precise amount of costs that should be excluded from Dominion's transmission rates. As discussed below, the Commission will dismiss the Complaint in part, and because we

¹ 16 U.S.C. § 824e (2006).

² On January 15, 2010, Dominion submitted its 2010 Annual Update to its ATRR as an informational filing in Docket No. ER09-545-000, in accordance with Section 1 of Attachment H-16B in PJM's Open Access Transmission Tariff (PJM Tariff) as approved by Commission orders dated April 29, 2008 in Docket Nos. ER08-92-000, *et al.*, and December 15, 2008 in Docket Nos. ER08-92-004, *et al.*

find there are genuine issues of material fact with respect to certain of Complainants' claims that cannot be resolved on the basis of the written record,³ establish a trial-type evidentiary hearing and settlement judge procedures. The Commission also sets a refund effective date of March 17, 2010, the date the complaint was filed.

I. Background

2. Dominion is a wholly-owned, indirect subsidiary of Dominion Resources, Inc., a holding company that integrated its facilities into PJM Interconnection, L.L.C. (PJM) on May 1, 2005.⁴ Dominion states that, as a load serving entity, it takes network integration transmission service (NITS) from PJM on behalf of retail and wholesale customers it serves in PJM's Dominion zone. Dominion's NITS rate is a formula rate that has been in effect since January 1, 2008.⁵

3. ODEC's eleven electric distribution cooperative members, to whom it supplies capacity and energy, are all located within the PJM control area. ODEC is a network transmission customer and member of PJM. ODEC purchases NITS from PJM over Dominion-owned transmission facilities to deliver the output of its own generation facilities and purchased power to its member systems' load.

4. NCEMC is a generation and transmission cooperative responsible for the full or partial requirements power supply of 25 North Carolina electric distribution cooperative members. To serve the loads of 6 members, NCEMC purchases NITS service from PJM over Dominion's transmission facilities.

5. In a related filing, Dominion filed proposed tariff sheets on March 24, 2010 in Docket No. ER10-931-000 to serve as notice that if the Complaint proceeding results in the exclusion of any facilities from Dominion's 2010 ATRR, Dominion will directly assign the costs of those facilities to the customers who benefit from the facilities and will seek to recover the cost of such facilities through direct assignment charges, effective on the date as of which they are excluded. The Commission issued an order on May 20, 2010 rejecting the proposed tariff sheets as unnecessary because the effective

³ *E.g., Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994) (citing *Vermont Dept. of Pub. Serv. v. FERC*, 817 F.2d 127, 140 (D.C. Cir. 1987); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993)).

⁴ *PJM Interconnection, L.L.C., et al.*, 109 FERC ¶ 61,012 (2004), *order on reh'g*, 110 FERC ¶ 61,234 (2005); *PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,257 (2005).

⁵ *Virginia Elec. and Power Co.*, 123 FERC ¶ 61,098 (2008).

date for a change in the allocation of costs would be determined in the Complaint proceeding.⁶

II. Complaint

6. Complainants request that the Commission direct Dominion to remove three categories of costs from its ATRR: (1) the costs for generator interconnection facilities included in Dominion's Bear Garden second 230 kV Line (Project s0167) (Bear Garden)⁷, (2) the costs related to delivery point facilities included in six Supplemental Projects⁸, and (3) the incremental costs associated with undergrounding the Pleasant View-Hamilton, Garrisonville, and DuPont Fabros projects, if the Commission does not exclude all costs related to the delivery point facilities for these projects.

7. In addition, Complainants request that the Commission: (1) determine that costs related to specific projects that Dominion has included in its 2010 ATRR are unjust, unreasonable, and unduly discriminatory or preferential; (2) direct Dominion to remove the subject costs from its 2010 ATRR and all future Annual Updates of its ATRR; and (3) to the extent necessary, establish hearing procedures to determine the precise amount of costs that should be excluded from Dominion's transmission rates.⁹ Complainants

⁶ *Virginia Elec. and Power Co.*, 131 FERC ¶ 61,171 (2010).

⁷ The Bear Garden facility is a 580 MW (nominal) combined cycle electric generating facility in Buckingham County, Virginia. Dominion's ATRR includes approximately \$5.9 million for facilities related to the interconnection of the Bear Garden facility.

⁸ The six Supplemental Projects are: Reddfield 230 kV DP (Project s0134) (Reddfield); Nokesville 230 kV Delivery (Project s0129) (Nokesville); Ft. Belvoir Expansion (Project s0135) (Ft. Belvoir); Du Pont Fabros 230 kV Line and Substation (Project s0126) (DuPont Fabros); Pleasant View-Hamilton 230 kV Line (Project s0133) (Pleasant View-Hamilton); and Garrisonville 230 kV Underground Line (Project s0124) (Garrisonville).

"Supplemental Projects" are defined in section 1.42A.02 of the PJM Operating Agreement as: "Regional Transmission Expansion Plan (RTEP) Project(s) or Subregional RTEP Project(s), which is not required for compliance with the following PJM criteria: System reliability, operational performance or economic criteria, pursuant to a determination by the Office of Interconnection."

⁹ NCUC and CVEC agree with Complainants the Commission should exclude the three categories of costs identified in the Complaint from Dominion's ATRR and establish hearing procedures as necessary.

request that the Commission establish the earliest possible refund effective date. Complainants emphasize that they are not alleging that Dominion's formula rate itself is unjust and unreasonable—rather, they are alleging that Dominion's application of the formula rate is unjust and unreasonable.

A. Costs of Generator Interconnection Facilities

8. Complainants argue that the costs for generator interconnection facilities included in the Bear Garden project should be excluded because Dominion is responsible for these facilities as the generator Interconnection Customer and therefore cannot include them in transmission rates. Complainants state that PJM required construction of a new overhead single-circuit 230 kV transmission line to connect the Bear Garden generating facility to the Dominion transmission system. Complainants state that the Virginia State Corporation Commission (Virginia Commission) determined that a second double-circuit line at a cost of approximately \$5 million was necessary to address the issue of generation reliability. Complainants argue that the costs related to the second, state-required line are not properly included in Dominion's transmission rates because the facilities are generation interconnection facilities that are not necessary for transmission reliability. Complainants cite section 217 of the PJM Tariff¹⁰ as support for their assertion that, as the Interconnection Customer and a New Service Customer, Dominion is obligated to pay for 100 percent of the costs of the facilities. Complainants also argue that Dominion should seek cost recovery at the retail level for the second line, as Dominion did with the first line.

B. Costs of Six Supplemental Projects and Legacy Facilities

9. Complainants argue that, by including the costs of six Supplemental Projects in its transmission rates, Dominion has unduly preferred its distribution function (Dominion Distribution) by treating the costs for these facilities differently from the costs of facilities requested by third parties.¹¹ Complainants state that Dominion directly assigns to transmission customers the costs associated with transmission facilities constructed to connect third party customers' loads to Dominion's transmission system, whereas the costs of the facilities used to connect Dominion Distribution's retail load to Dominion's transmission facilities are rolled into Dominion's transmission rates. Complainants assert that the costs associated with these projects should be excluded from Dominion's ATRR

¹⁰ PJM Interconnection, L.L.C., FERC Electric Tariff, Sixth Revised Volume No. 1, Second Revised Sheet No. 224LL.

¹¹ Complainants state that Dominion's response to a data request they sent shows that the six projects have been included in the plant additions for Supplemental Projects in the 2010 Annual Update.

because they are local delivery facilities that should be directly assigned to Dominion Distribution. Complainants also argue that Dominion similarly rolls in the costs of legacy retail delivery tap facilities and these costs should be excluded from transmission rates.

10. Complainants request that, at a minimum, the Commission set for evidentiary hearing the matter of Dominion's allegedly unduly discriminatory treatment of affiliated and third party customers.

C. Incremental Costs of Undergrounding the Pleasant View-Hamilton, Garrisonville, and DuPont Fabros Projects

11. Complainants argue that, in any event, the incremental costs associated with undergrounding the Pleasant View-Hamilton, Garrisonville and DuPont Fabros projects should be excluded from Dominion's transmission rates, or the matter should be set for hearing, because Dominion either decided by itself to underground these projects or was directed to do so by state legislators or regulators, and the undergrounding was not performed to solve any problem identified by PJM or the North American Electric Reliability Corporation (NERC).¹² Complainants assert that these projects were developed outside the PJM RTEP process, the costs of the projects increased substantially because of the undergrounding, and the state has provided for local recovery of the incremental project costs resulting from state efforts to address local concerns like undergrounding.

III. Notice and Responsive Pleadings

12. Notice of the Complaint was published in the *Federal Register*, 75 Fed. Reg. 15,704 (2010), with protests and interventions due on or before April 6, 2010. On March 23, 2010, Dominion filed a motion for extension of time to file an answer and for expedited action on the motion. On March 24, 2010, Complainants filed an answer to

¹² Complainants state that the Pleasant View-Hamilton and DuPont Fabros lines were approved as underground pilot projects pursuant to Virginia House Bill 1319 (HB 1319), which requires the Virginia Commission to approve HB 1319 underground pilot projects as long as they meet the statute's criteria. Complainants also state that HB 1319 authorized the Virginia Commission to approve a rate adjustment clause that would provide for recovery of costs not recoverable under FERC rates from Virginia jurisdictional customers. In addition, Complainants state that Virginia House Bill 1647 (HB 1647) provides a vehicle for local communities affected by the Garrisonville and Pleasant View-Hamilton Projects to fund underground construction for aesthetic purposes.

Dominion's request for an extension of time. On March 30, 2010, the Commission issued a notice granting an extension of time for filing motions to intervene and answers to the Complaint.

13. The Virginia Commission filed a notice of intervention. Virginia Municipal Electric Association No. 1, PJM, and Northern Virginia Electric Cooperative, Inc. each filed a timely motion to intervene. Central Virginia Electric Cooperative (CVEC) filed a timely motion to intervene and comments in support of the Complaint. The North Carolina Utilities Commission and the Public Staff of the North Carolina Utilities Commission (collectively, NCUC) filed a joint motion to intervene and comments in support of the Complaint.

14. On April 22, 2010, Dominion filed an answer to the Complaint. On April 27, 2010, Complainants filed a joint request for an extension of time to reply to Dominion's answer. On May 7, 2010, Complainants filed an answer to Dominion's answer. On May 14, 2010, Dominion filed an answer to Complainants' May 7, 2010 answer.

A. Dominion's Answers

15. Dominion argues that the Commission should summarily dismiss Complainants' assertion that the second Bear Garden transmission line should be excluded from Dominion's ATRR because sections 217.1 and 217.3 of the PJM Tariff, on which Complainants rely to assert that Dominion must pay 100 percent of the costs of the second Bear Garden line as the Interconnection Customer, are inapplicable.

16. Dominion also asserts that Complainants' challenge to the costs of the Garrisonville and Pleasant View-Hamilton Projects are an impermissible collateral attack on the Commission's order granting Dominion incentive rates in Docket No. ER08-1207-000 because, in that order, the Commission found that the two projects are networked facilities that provide regional reliability benefits and are not local delivery point facilities.¹³

17. In response to Complainants' argument that Dominion is unduly preferring Dominion Distribution, Dominion states that whether the costs of a transmission facility should be rolled in or directly assigned depends on the characteristics of the lines in

¹³ *Virginia Elec. & Power Co.*, 124 FERC ¶ 61,207, at P 27 (2008) (Incentive Rate Order).

question, not how other facilities are treated.¹⁴ Dominion also argues it does not discriminate between wholesale and retail loads in determining whether to construct networked connections to substations, but merely treats projects differently because of characteristics of the load and engineering factors. Dominion contends that each of the six projects is integrated with Dominion's transmission network.

18. Dominion also asserts that the Commission should dismiss the portion of the complaint concerning legacy retail delivery point facilities as failing to meet the Commission's minimum standards for specificity because the Complaint does not state which delivery point facilities should be excluded from Dominion's transmission rate.

19. Dominion contends that the Commission should summarily dismiss Complainants' request that the costs of undergrounding three networked transmission facilities be directly assigned to Dominion's retail customers. Dominion argues that there is no Commission precedent supporting Complainants' request and that the Commission's policy is to roll in the costs of undergrounding new transmission facilities if they are integrated with the transmission system.¹⁵ Dominion also argues that the Virginia Commission's orders authorizing undergrounding the facilities were based on the interests of all persons in Virginia and not just Dominion's retail customers. Dominion further contends that whether Dominion can recover the costs of undergrounding facilities from retail customers is irrelevant to the decision to directly assign the cost of those facilities.

20. Finally, Dominion requests that the Commission clarify that if any of the challenged facilities are directly assigned, Dominion should credit against its transmission revenue requirement the revenues it receives from the direct assignment of those facilities, as provided by the formula rate. Dominion requests that if the Commission sets for hearing whether to exclude the cost of any of the facilities from its ATRR, it also set for hearing the issue of which NITS customers should be directly assigned the costs of any facilities that are excluded from Dominion's ATRR and the

¹⁴ Dominion cites *Mansfield Municipal Elec. Dept. v. New England Power Co.*, 97 FERC ¶ 61,134, at 61,613 (2001), *reh'g denied*, 98 FERC ¶ 61,115 (2002), and *Northeast Texas Elec. Coop., Inc.*, 108 FERC ¶ 61,084, at P 48, 51 (2004).

¹⁵ Dominion cites *Northeast Utilities Service Co.*, 116 FERC ¶ 61,094 (2006) (*Northeast Utilities I*), *reh'g denied*, 117 FERC ¶ 61,337 (2006), *petition for review dismissed sub nom. United Illuminating Co. v. FERC*, 2008 WL 43550 (D.C. Cir. Jan. 29, 2008); *Northeast Utilities Service Co.*, 123 FERC ¶ 61,324 (2008) (*Northeast Utilities II*); *Duquesne Light Co.*, 125 FERC ¶ 61,028 (2008); and *NSTAR Electric Co.*, 125 FERC ¶ 61,313 (2008), *order on reh'g*, 127 FERC ¶ 61,052 (2009).

amount of such charges. Dominion also requests that the Commission make the effective date of any exclusion of costs simultaneous with the direct assignment of those costs.

B. Complainants' Answer

21. In their answer to Dominion's answer, Complainants assert that Dominion's collateral attack argument is without merit because the Incentive Rate Order remains pending before the Commission on rehearing and the Incentive Rate Order addressed the narrow question of whether the proposed projects were eligible for incentives.
22. Complainants assert that the descriptions of the six challenged projects contained in Dominion's and Complainants' affidavits differ and therefore require an evidentiary hearing to determine the proper cost allocation for the facilities.
23. Complainants respond to Dominion's assertion that the Commission should dismiss the portion of the Complaint concerning legacy retail delivery point facilities due to a lack of specificity by arguing that where a complaint provides specificity sufficient to warrant a hearing on certain claims regarding the reasonableness of a formula rate, a claim that is not as well-defined in the complaint can proceed.¹⁶
24. Complainants attempt to distinguish the precedent Dominion cites for the proposition that the Commission has previously approved the regional allocation of costs of undergrounding a line. Complainants assert that, unlike these cases, PJM does not have a tariff that explicitly allows for rolling in the incremental costs of undergrounding transmission lines; Complainants also note that PJM never reviewed the projects being challenged through its RTEP process.¹⁷ In addition, Complainants contend that, unlike the cited cases, none of the undergrounding costs associated with these projects provides benefits to a metropolitan-wide or interstate geographic area or to transmission customers outside Virginia. Complainants also assert that whether the Virginia Commission considered the interests of all persons in Virginia in approving the projects is irrelevant to whether it is appropriate to include the incremental costs of undergrounding these projects in transmission rates.

¹⁶ Complainants' Answer at 43, citing *Louisiana Public Service Comm. v. System Energy Resources, Inc.*, 51 FERC ¶ 61,218 (1990) (*Louisiana Public Service Comm.*).

¹⁷ Complainants state that Dominion circumvented PJM's RTEP stakeholder planning process by labeling the projects as Supplemental Projects, which are outside RTEP.

25. Finally, Complainants argue that Dominion's request for credits commensurate with excluded costs unreasonably broadens this proceeding beyond the scope of the Complaint.

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁸ the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁹ prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Dominion and ODEC/NCEMC's answers because they have aided us in our decision-making.

B. Substantive Matters

1. Costs of Generator Interconnection Facilities

28. Complainants argue that the cost of the second transmission line for the Bear Garden project should be excluded because Dominion is responsible for these facilities as the Interconnection Customer. Order No. 2003 sets forth the steps that must be followed when an Interconnection Customer requests interconnection of a new Generating Facility or expansion of an existing Generating Facility with the Transmission Provider's transmission system.²⁰ The process begins with the prospective Interconnection Customer submitting an interconnection request and culminates in an Interconnection Service Agreement (ISA) signed by the parties specifying the Interconnection Customer's cost responsibility as determined by extensive studies. The Order No. 2003 procedures provide certainty for the Interconnection Customer by allowing it to rely on the cost

¹⁸ 18 C.F.R. § 385.214 (2010).

¹⁹ 18 C.F.R. § 385.213(a)(2) (2010).

²⁰ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

responsibility set forth in the ISA as the final determination of cost responsibility with minimal exceptions. The Commission has stated that the “ISA is designed to establish the generation interconnection customer’s final cost responsibility, subject to some potential changes, for example, as a result of an earlier queued generator’s withdrawal.”²¹ Furthermore, the Commission has recognized the importance of this process in protecting the Interconnection Customer from costs incurred subsequent to certain stages in the process: “the cost allocation system insulates an interconnection customer from costs arising from events occurring after its System Impact Study is completed.”²² In addition, the Commission has stated that “the numerous studies leading to the ISA are designed to establish the facility responsibility and costs for a particular upgrade....The interconnection process cannot work efficiently if the determinations made in these studies were under continual review with the potential for never-ending reallocations of costs related to numerous other projects.”²³ Thus, the ISA represents the completion of an extensive process for determining the Interconnection Customer’s cost responsibility, which is not subject to adjustment to accommodate a RTO or state requirement that arises after completion of this process.

29. In the instant case, the second Bear Garden line was ordered to be constructed after completion of the Order No. 2003 process, and therefore the costs of the project cannot be assigned to Dominion as Interconnection Customer. The Commission accepted the ISA among PJM, Dominion as the Interconnection Customer, and Dominion as the Transmission Owner²⁴ on May 15, 2008.²⁵ Nearly a year later, on March 27, 2009, the Virginia Commission ordered Dominion to build the second line in its Final Order approving Dominion’s application to build and operate the Bear Garden generating

²¹ *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 118 FERC ¶ 61,169, at P 14 (2007).

²² *Neptune Regional Transmission System*, 110 FERC ¶ 61,098, at P 23 (2005).

²³ *FPL Energy Marcus Hook*, 118 FERC ¶ 61,169 at P 17.

²⁴ Dominion is a vertically-integrated utility and therefore entered into the ISA as both Interconnection Customer and Transmission Owner.

²⁵ *PJM Interconnection, L.L.C.*, Docket No. ER08-827-000 (May 15, 2008) (unpublished letter order). The Commission accepted an amended ISA filed by PJM on January 28, 2010. *PJM Interconnection, L.L.C.*, Docket Nos. ER10-417-000 and ER10-417-001 (January 28, 2010) (unpublished letter order).

facility.²⁶ This Virginia state requirement arose after completion of the Order No. 2003 process which determined which costs are borne by the Interconnection Customer and thus the costs were not incorporated into the ISA.

30. Complainants cite section 217.1 and 217.3 of the PJM Tariff for the assertion that, as the Interconnection Customer, Dominion is obligated to pay for 100 percent of the costs of the facilities that would not have been necessary but for its interconnection request, in this case the second Bear Garden line.²⁷ However, these provisions of the PJM Tariff refer to the Order No. 2003 process discussed above, and only apply to facilities that undergo this process and are specified in the ISA. These provisions do not apply to the second Bear Garden line because the requirement to construct the line was imposed after the ISA was submitted to and accepted by the Commission.

31. Since the costs of the second Bear Garden line were not included in the ISA, these costs cannot be assigned to Dominion as the Interconnection Customer, and the Commission dismisses this portion of the Complaint.

2. Costs of Six Supplemental Projects and Legacy Facilities

32. Complainants argue that the costs associated with the Garrisonville, Pleasant View-Hamilton, Ft. Belvoir, Nokesville, DuPont Fabros, and Reddfield Projects should be excluded from Dominion's ATRR because they represent local delivery facilities that should be directly assigned to Dominion Distribution. Complainants also indicate that there may be legacy retail delivery tap facilities that should be directly assigned to Dominion Distribution. Upon review of the complaint and other pleadings, we find that

²⁶ Dominion Answer at 32, n. 77, citing: Application of Virginia Electric and Power Company for a certificate to construct and operate a generating facility; for certificate of public convenience and necessity for a transmission line: Bear Garden Generating Station and Bear Garden-Bremo 230 kV Transmission Interconnection Line; Virginia Commission Case No. PUE-2008-00014, Final Order, at pp. 28-31 (Mar. 27, 2009) (Final Order) (Complaint Exh. No. 5, pp. 198-201).

²⁷ Section 217.1, Attachment Facilities, of the PJM Tariff states: "An Interconnection Customer shall be obligated to pay for 100 percent of the costs of the Attachment Facilities necessary to accommodate its Interconnection Request."

Section 217.3 states: "Each New Service Customer shall be obligated to pay for 100 percent of the costs of the minimum amount of Local Upgrades and Network Upgrades necessary to accommodate its new Service Request that would not have been incurred under the Regional Transmission Expansion Plan but for such New Service Request...."

Complainants' claims regarding the cost allocation for the six projects and legacy retail delivery tap facilities raise genuine issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Specifically, we set this portion of the Complaint for hearing to determine whether the costs of any of these projects should be excluded from Dominion's ATRR, and, if so, which NITS customers should be directly assigned the costs and the amount of such charges.

33. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²⁸ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²⁹ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

3. Incremental Costs of Undergrounding the Garrisonville, Pleasant View-Hamilton, and DuPont Fabros Projects

34. Complainants assert that, as an alternative argument related to the Garrisonville, Pleasant View-Hamilton, and DuPont Fabros Projects discussed above, should the Commission not direct Dominion to exclude the costs of these projects from the ATRR, then the Commission should at a minimum direct Dominion to remove the incremental costs of undergrounding these projects from its ATRR. Complainants maintain that the decisions to underground were made to address local concerns and therefore should be directly assigned to the relevant local load serving entity.

35. We find that the issue of whether to exclude the incremental costs of undergrounding the Garrisonville, Pleasant View-Hamilton, and DuPont Fabros Projects cannot be resolved based on the record before us, but is an issue that does not raise material issues of disputed fact. Thus, the undergrounding issue will not be set for

²⁸ 18 C.F.R. § 385.603 (2010).

²⁹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

hearing, but will be reserved for Commission determination should the parties be unable to settle this proceeding. In the event that the parties are unable to settle and an initial decision is issued on the matters set for hearing, parties should brief the undergrounding issue in their Briefs on and Opposing Exceptions.

4. Refund Effective Date

36. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b)³⁰ requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,³¹ we will set the refund effective date at the earliest date possible, i.e., the date of the filing of the complaint, which is March 17, 2010.

37. Section 206(b) of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. This case has been set for hearing and settlement judge procedures. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within 12 months of the commencement of hearing procedures or, if this case were to go to hearing immediately, by October 30, 2011. We estimate that, if the case were to go to hearing immediately, we would be able to issue our decision within approximately seven months of the filing of briefs on and opposing exceptions, or by July 31, 2012.

The Commission orders:

(A) The Complaint is hereby dismissed in part, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and

³⁰ 16 U.S.C. § 824e(b) (2006).

³¹ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the issues identified as being set for hearing in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) The refund effective date established pursuant to section 206(b) is March 17, 2010.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.