

131 FERC ¶ 61,171  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Virginia Electric and Power Company

Docket No. ER10-931-000

ORDER REJECTING PROPOSED TARIFF SHEETS

(Issued May 20, 2010)

1. On March 24, 2010, Virginia Electric and Power Company (Dominion) submitted proposed tariff sheets<sup>1</sup> as Attachment H-16D to the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (OATT). Dominion requests that the Commission waive its 60-day prior notice requirement<sup>2</sup> to permit a March 25, 2010 effective date. For the reasons discussed below, we reject Dominion's tariff sheets.

**I. Background**

2. Dominion is a wholly-owned, indirect subsidiary of Dominion Resources, Inc., a holding company that integrated its facilities into PJM on May 1, 2005.<sup>3</sup> Dominion states that, as a load serving entity, it takes network integration transmission service (Network Service) from PJM on behalf of retail and wholesale customers it serves in the Dominion zone. Dominion's Network Service rate is a formula rate that has been in effect since January 1, 2008.<sup>4</sup>

3. Old Dominion Electric Cooperative's (ODEC) 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. As a

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<sup>1</sup> PJM Interconnection, L.L.C., FERC Electric Tariff, Sixth Revised Volume No. 1, Sixth Revised Sheet No. 314G.01 and First Revised Sheet No. 314G.02.

<sup>2</sup> 18 C.F.R. § 35.3 (2009).

<sup>3</sup> *PJM Interconnection, L.L.C.*, 109 FERC ¶ 61,012 (2004), *order on reh'g*, 110 FERC ¶ 61,234 (2005); *PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,257 (2005).

<sup>4</sup> *Virginia Electric and Power Company*, 123 FERC ¶ 61,098 (2008).

generation-owning utility, to deliver the output of ODEC's generation facilities located within PJM and to deliver periodic power purchases from third-party sellers to its member systems' load in PJM's footprint, ODEC is dependent upon use of PJM's transmission facilities, and, as particularly relevant here, use of Dominion's facilities. Consequently, ODEC is subject to Dominion's transmission rates. North Carolina Electric Membership Corporation (NCEMC) is a generation and transmission cooperative responsible for the full or partial requirements power supply of 25 electric distribution cooperative members incorporated in the state of North Carolina. To serve the loads of its six members that distribute power at retail in the geographic area served by Dominion's transmission facilities in North Carolina, NCEMC purchases Network Service from PJM over Dominion's transmission facilities.

4. On January 15, 2010, Dominion submitted its 2010 Annual Update to its Annual Transmission Revenue Requirement (2010 ATRR) as an informational filing in Docket No. ER09-545-000. In response to the January 15, 2010 filing, on March 17, 2010, ODEC and NCEMC filed a complaint against Dominion in Docket No. EL10-49-000 (Complaint) requesting 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; (2) direct Dominion to remove the subject costs from its 2010 ATRR and from inclusion in all future Annual Updates of its ATRR; and (3) to the extent necessary, establish hearing procedures to determine the precise amount of costs related to the portions of certain projects that should be excluded from Dominion's transmission rates.<sup>5</sup> The Complaint is currently pending before the Commission.

## **II. Dominion's Instant Proposal**

5. In response to the Complaint filed by ODEC and NCEMC, on March 24, 2010, Dominion submitted proposed Sixth Revised Sheet No. 314G.01 and First Revised Sheet No. 314G.02 (collectively, tariff sheets) as Attachment H-16D to PJM's OATT. Dominion requests that the Commission waive its 60-day prior notice requirement to permit the tariff sheets to become effective March 25, 2010, the day after filing, and also

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<sup>5</sup> Specifically, ODEC and NCEMC request that the Commission direct Dominion to remove three categories of costs that they contend are not appropriately borne by wholesale transmission customers and are not properly included in Dominion's ATRR: (1) the costs for generator interconnection facilities included in Dominion's Bremo-Bear Garden second 230 kV Line; (2) the costs related to delivery point facilities included in the Redfield 230 kV Delivery Point, Nokesville 230 kV Delivery Point, Ft. Belvoir Expansion, DuPont Fabros 230 kV line and Substation, Pleasant View-Hamilton 230 kV line, and Garrisonville 230 kV underground line; and (3) the incremental costs associated with undergrounding the Pleasant View-Hamilton, Garrisonville, and DuPont Fabros projects.

requests waiver of the cost support requirements of 18 C.F.R. § 35.13 (2009). Dominion also filed a request for expedited treatment of the filing. Dominion also requests waiver of the cost support requirements of 18 C.F.R. § 35.13 (2009), arguing that it cannot provide cost support for the facilities that will be directly assigned because those facilities will be identified in the Complaint proceeding.

6. The tariff sheets state that, on March 17, 2010, ODEC and NCEMC filed the Complaint in Docket No. EL10-49-000 and that Dominion reserves all of its rights and remedies with respect to the direct assignment of all of the costs that are the subject of the Complaint. The tariff sheets further state that, if the proceeding in Docket No. EL10-49-000 results in the exclusion of any facilities from Dominion's 2010 ATRR, Dominion "will directly assign the costs of those facilities to the customers<sup>6</sup> who benefit from those 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 from Dominion's 2010 ATRR, pursuant to a filing under section 205 of the Federal Power Act (the 'Direct Assignment Effective Date')." The proposed tariff sheets further state that they serve as the notice required by section 205(d) of the Federal Power Act (FPA)<sup>7</sup> for the purpose of complying with the filed rate doctrine and the prohibition against retroactive ratemaking. Finally, the proposed tariff sheets state that they establish only the effective date of any direct assignment, and do not foreclose any customer's right to challenge the direct assignment on other grounds. The tariff sheets do not contain any other terms and conditions of service, nor do they set forth either a stated rate or a rate formula.

7. In its accompanying transmittal letter, Dominion asserts that if the costs that are the subject of the Complaint are excluded from Dominion's 2010 ATRR, Dominion is at risk of being unable to directly assign those costs as of the date of the exclusion because of the filed rate doctrine and prohibition against retroactive ratemaking. Dominion states that such exclusion would have a substantial impact on Dominion, as the carrying costs on the more than \$225 million of rate base that is the subject of the Complaint amount to more than \$35 million per year.<sup>8</sup>

8. Dominion argues that all customers taking Network Service in the Dominion zone are on notice by virtue of the filing of the Complaint that the current allocation of

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<sup>6</sup> These customers are Central Virginia Electric Cooperative, Inc.; North Carolina Electric Membership Corporation; Northern Virginia Electric Cooperative; Old Dominion Electric Cooperative; Southeastern Power Administration; and Virginia Electric and Power Company (Dominion's own load-serving entity); plus "any other customer that purchases Network Service in the Dominion zone on or after the Direct Assignment Effective Date."

<sup>7</sup> 16 U.S.C. § 824d(d) (2006).

<sup>8</sup> Dominion's March 24, 2010 Transmittal Letter at 4.

transmission costs among transmission customers might be held unjust and unreasonable and, therefore, the filing of the Complaint is sufficient to satisfy the filed rate doctrine and avoid the prohibition against retroactive ratemaking. Dominion states that it is filing the proposed tariff sheets out of an abundance of caution to ensure that its Network Service customers have adequate notice that costs that are excluded from its 2010 ATRR may instead be directly assigned to them.

### **III. Notice and Responsive Pleadings**

9. Notice of Dominion's March 24, 2010 filing was published in the *Federal Register*, 75 Fed. Reg. 16,784 (2010), with interventions and protests due on or before April 14, 2010. ODEC and NCEMC (together, Joint Protestors) each filed timely motions to intervene and jointly filed a protest. PJM and Northern Virginia Electric Cooperative (NOVEC) filed motions to intervene out-of-time. Central Virginia Electric Cooperative, Inc. (CVEC) filed a motion to intervene out-of-time and protest. Dominion filed a motion for leave to answer and an answer to the protests. The Joint Protestors filed a motion for leave to answer and an answer to Dominion's answer.

#### **A. Protests**

10. The Joint Protestors and CVEC assert in their protests that the Commission should reject Dominion's filing. If the Commission does not reject the filing outright, the Joint Protestors and CVEC assert that the Commission should (1) reject Dominion's request for waiver of the prior notice requirement, (2) order a maximum 5-month suspension given that the tariff sheets have not been demonstrated to be just and reasonable, (3) consolidate this proceeding with the pending Complaint proceeding in Docket No. EL10-49-000 to ensure that Dominion's attempts to recover the costs at issue through two separate rate mechanisms are not inconsistent with each other, and (4) clarify that customers do not bear the burden of proof to challenge any future direct assignments.

11. The Joint Protestors argue that Dominion's attempt to reserve the right to retroactively recover any costs the Commission may order removed from the ATRR in the Complaint proceeding through the proposed tariff sheets is an impermissible end-run around section 206 of the FPA.<sup>9</sup> The Joint Protestors argue that the tariff sheets would render the Commission's FPA section 206 authority a nullity, because, if the Commission grants the relief requested in the Complaint and excludes certain costs from wholesale transmission rates, Dominion could at any time thereafter seek to include those very same costs in its wholesale transmission rate through direct assignment.<sup>10</sup> The Joint Protestors

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<sup>9</sup> Joint Protestors April 14, 2010 Protest at 2-4; 16 U.S.C. § 824e (2006).

<sup>10</sup> The Joint Protestors note that the Complaint does not seek to exclude the challenged costs from only Dominion's ATRR, but also seeks to exclude the challenged costs from any Dominion transmission rate, stated or formula.

and CVEC further argue that customers would then have to raise the same arguments against inclusion of the costs in transmission rates that were already raised in the Complaint proceeding, requiring an unnecessary duplicative expenditure of resources.

12. The Joint Protestors also contend that Dominion's filing fails to provide transmission customers with the notice required by section 205 of the FPA to impose a rate change retroactively and therefore fails to provide notice sufficient to overcome the filed rate and prohibition against retroactive ratemaking doctrines.<sup>11</sup> The Joint Protestors argue that, in order for the tariff sheets to provide adequate notice of a possible future rate change, Dominion must have a rate on file, which it currently has not filed and does not propose to file in this proceeding. The Joint Protestors assert that Dominion's failure to specify either a stated direct assignment rate, a formula rate, or data that would allow customers to know the rate they would be charged, shows that Dominion intends for the proposed tariff sheets to act as the type of placeholder tariff that the Commission has rejected in the past.<sup>12</sup> Finally, the Joint Protestors argue that the legal precedent cited by Dominion does not support Dominion's claim that its tariff sheets provide sufficient notice.<sup>13</sup>

13. The Joint Protestors and CVEC argue that the Commission should reject Dominion's filing as premature, and that the filing fails to provide the Commission with sufficient information to determine whether the tariff sheets are just and reasonable, given that the Complaint remains pending before the Commission.<sup>14</sup> Furthermore, the Joint Protestors assert that the filing would inappropriately shift the burden of proof to justify the rate to transmission customers.<sup>15</sup>

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<sup>11</sup> Joint Protestors April 14, 2010 Protest at 5-15.

<sup>12</sup> The Joint Protestors refer to: *Trailblazer Pipeline Co.*, 62 FERC ¶ 61,081 (1993); *Virginia Electric and Power Co.*, 103 FERC ¶ 61,010 (2003); *Transcontinental Gas Pipe Line Corp.*, 81 FERC ¶ 61,264 (1997); *Transcontinental Gas Pipe Line Corp.*, 95 FERC ¶ 61,245 (2001); *Columbia Gas Transmission Corp.*, 95 FERC ¶ 61,289 (2001). They further reference: *Citizens Communications Co.*, 95 FERC ¶ 61,158 (2001), *reh'g denied*, 95 FERC ¶ 61,489 (2001) (rejecting a utility's request for a declaration that it would be permitted to impose a surcharge upon its customers if necessary following disposition of a rate dispute as premature, and advising that FERC would address the utility's request at such time as it ruled on the merits of the dispute).

<sup>13</sup> Joint Protestors April 14, 2010 Protest at 9-15.

<sup>14</sup> *Id.* at 5, 15-18; CVEC April 22, 2010 Protest at 3-4.

<sup>15</sup> Joint Protestors April 14, 2010 Protest at 18-20.

14. The Joint Protestors assert that Dominion has not demonstrated good cause for granting waiver of the 60-day prior notice requirement, and that the circumstances in which the Commission grants such waiver are not present here.<sup>16</sup> The Joint Protestors challenge Dominion's reason for granting the waiver, that is, avoiding trapped costs, by arguing that the costs incurred between the refund effective date set in the Complaint proceeding and the effective date of the proposed tariff sheets are not "trapped costs" under Commission policy.

#### **IV. Discussion**

##### **A. Procedural Matters**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>17</sup> the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

16. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>18</sup> the Commission will grant PJM's, NOVEC's, and CVEC's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>19</sup> prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Dominion's answer and thus we will reject Dominion's answer. Consequently, we also reject the Joint Protestors' answer to Dominion's answer.

##### **B. Commission Determination**

18. We will reject Dominion's tariff sheets as unnecessary. Dominion states that it filed the tariff sheets only to provide sufficient notice to its customers to ensure that, should its current allocation of costs be overturned in the Complaint proceeding, a future direct assignment of those costs would withstand a challenge that that future direct assignment violates the filed rate doctrine and the prohibition against retroactive ratemaking. We do not find that a tariff filing is necessary for this purpose in these

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<sup>16</sup> *Id.* at 20-24.

<sup>17</sup> 18 C.F.R. § 385.214 (2009).

<sup>18</sup> 18 C.F.R. § 385.214(d) (2009).

<sup>19</sup> 18 C.F.R. § 385.213(a)(2) (2009).

circumstances. The effective date for a change in the allocation of costs, i.e., ordering a different allocation of costs among customers as compared to the current allocation of costs, if required at all, will be determined in the Complaint proceeding based on the requirements of section 206 of the FPA as applicable to these circumstances.<sup>20</sup>

19. Since we have rejected the tariff sheets, we need not reach Dominion's requests for waiver of the 60-day prior notice requirement or of the Part 35 cost support regulations.

The Commission orders:

The revised tariff sheets are hereby rejected, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>20</sup> *E.g., Occidental Chemical Corporation v. PJM Interconnection, L.L.C. and Delmarva Power & Light Company*, 110 FERC ¶ 61,378, at P 10 (2005) (when a Commission action under section 206 of the FPA requires only a rate design or cost allocation change, the Commission's order will take effect prospectively).