136 FERC ¶ 61,215
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.

Virginia Electric and Power Company Dominion Energy Marketing, Inc. Dominion Nuclear Connecticut, Inc. Dominion Energy Kewaunee, Inc. Dominion Energy Brayton Point, LLC Dominion Energy Manchester Street, Inc. Dominion Energy New England, Inc. Dominion Energy Salem Harbor, LLC Dominion Retail, Inc. Elwood Energy, LLC Fairless Energy, LLC Kincaid Generation, L.L.C. NedPower Mt. Storm, LLC State Line Energy, L.L.C. Fowler Ridge Wind Farm LLC	Docket No. ER11-2774-000

ORDER CONDITIONALLY GRANTING REQUEST FOR WAIVER OF AFFILIATE RESTRICTIONS

(Issued September 29, 2011)

1. On January 28, 2011, Virginia Electric and Power Company (Dominion Virginia Power) and its market-regulated power sales affiliates (Dominion Marketing Affiliates[1]) (collectively, with Dominion Virginia Power, the Dominion Companies) filed a request for waiver of the market-based rate affiliate restrictions (affiliate restrictions) to permit

[1] The Dominion Marketing Affiliates are Dominion Energy Marketing, Inc., Dominion Nuclear Connecticut, Inc., Dominion Energy Kewaunee, Inc., Dominion Energy Brayton Point, LLC, Dominion Energy Manchester Street, Inc., Dominion Energy New England, Inc., Dominion Energy Salem Harbor, LLC, Dominion Retail, Inc., Elwood Energy, LLC, Fairless Energy, LLC, Kincaid Generation, L.L.C., NedPower Mt. Storm, LLC, State Line Energy, L.L.C., and Fowler Ridge Wind Farm LLC. January 28, 2011 Filing at n.1 (January 28 Filing).

the Dominion Companies to continue their shared fuel procurement arrangements. Specifically, the Dominion Companies request waiver of the separation of functions requirement in the affiliate restrictions[2] in order to permit them to share employees who engage in fuel procurement functions on behalf of Dominion Virginia Power, a franchised public utility with captive customers, and the Dominion Marketing Affiliates.[3] In this order, we conditionally grant the Dominion Companies' request for limited waiver of certain affiliate restrictions, effective April 20, 2011.

I. <u>Notice of Filing and Responsive Pleadings</u>

2. Notice of the Dominion Companies' January 28 Filing was published in the *Federal Register*, 76 Fed. Reg. 6608 (2011), with interventions and comments due on or before February 18, 2011. None was filed.

3. On February 24, 2011, the Director of the Division of Electric Power Regulation—West issued a letter under delegated authority directing the Dominion Companies to clarify certain aspects of their filing and to submit additional information.[4] The Dominion Companies submitted their response to the Deficiency Letter on March 17, 2011 (March 17 Response).

4. Notice of the Dominion Companies' March 17 Response was published in the *Federal Register*, 76 Fed. Reg. 17,850 (2011), with interventions and comments due on or before April 7, 2011. None was filed.

II. <u>Request for Waiver</u>

5. The Dominion Companies explain that Dominion Virginia Power is a public utility with captive wholesale and retail customers, and an affiliate of the Dominion Marketing Affiliates. They state that Dominion Virginia Power provides electric service to captive customers located in Virginia and North Carolina,[5] and that the Dominion Marketing Affiliates are all authorized by the Commission to make sales of energy, capacity and certain ancillary services at market-based rates.[6]

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[2] 18 C.F.R. § 35.39(c)(2) (2011).

[3] January 28 Filing at 2.

[4] *Virginia Electric and Power Company*, Docket No. ER11-2774-000 (Feb. 24, 2011) (delegated letter order) (Deficiency Letter).

[5] January 28 Filing at 6-7.

[6] *Id*. at 7.

6. The Dominion Companies request that the Commission grant a waiver of the affiliate restrictions to the extent necessary to permit them to continue their fuel procurement arrangements as described in their January 28 Filing.[7] In support of their request, the Dominion Companies provide information concerning their fuel procurement arrangements and state that Dominion Virginia Power's captive customers are protected from cross-subsidization as a result of the pervasive regulation by the Virginia State Corporate Commission (Virginia Commission) and the North Carolina Utilities Commission (North Carolina Commission).[8] They state that, given the structure of their current fuel procurement arrangements, the prohibition in the affiliate restrictions against sharing fuel procurement employees is unnecessary to protect their captive customers.[9]

7. The Dominion Companies state that the specific terms and conditions of the Dominion Virginia Power affiliate fuel procurement arrangements, the approvals of such arrangements by the Virginia Commission, and the continuing oversight of such fuel procurement activities by the Virginia Commission and by the North Carolina Commission, along with the existing Commission regulations with respect to sales of non-power goods and services from an affiliate to a utility with captive customers, ensure that Dominion Virginia Power's captive customers are protected from potential cross-subsidization.[10] In particular, the Dominion Companies state that fuel transactions between Dominion Virginia Power and its affiliates are subject to the affiliate rules approved by the Commission in Order No. 707.[11] In addition, Dominion Companies represent that their state-approved fuel procurement practices are "fully consistent with the reasoning underlying the general Commission precedent related to transactions between franchised utilities and their market-regulated affiliates," and they state that "the Commission has generally concluded that captive customers can be protected from potential cross-subsidization if the franchised utility pays no higher than a market price for non-power goods and services."[12] The Dominion Companies also state that the fuel supply arrangements ensure that the pricing of Dominion Virginia Power's fuel supplies

[7] January 28 Filing at 31-32.

[8] *Id*. at 15-16; 30-31.

[9] *Id*. at 32.

[10] *Id*. at 31.

[11] *Id*. at 32.

[12] *Id*. at 33 (citing *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008)).

are fully consistent with the "no higher than market" standard underlying the Commission requirements.

8. The Dominion Companies state that the shared fuel procurement arrangements of Dominion Virginia Power and the Dominion Marketing Affiliates provide benefits to Dominion Virginia Power's captive customers through significant labor efficiencies, market expertise, and consolidated market presence. They state that this lowers administrative costs, and provides Dominion Virginia Power with access to lower cost and more secure fuel supplies. The Dominion Companies state that these benefits will be lost if the Commission requires the complete separation of fuel procurement activities within the Dominion Companies.[13]

9. In their response to the Deficiency Letter, the Dominion Companies state that Dominion Virginia Power serves three wholesale captive customers located within its service area in PJM Interconnection, L.L.C. (PJM) under long-term contracts, which contain annual fuel adjustment clauses that provide for the allocation to the customers of a portion of Dominion Virginia Power's fuel expenses.[14] In addition, the Dominion Companies state that the Dominion Marketing Affiliates serve wholesale customers located within PJM, ISO New England Inc., and Midwest Independent Transmission System Operator, Inc., and that none of the contracts with those customers have fuel adjustment clauses. They state that because none of the Dominion Marketing Affiliates has a franchised service territory or serves any wholesale customers on a cost of service basis, no Dominion Marketing Affiliates have captive wholesale customers.

10. In their response to the Deficiency Letter, the Dominion Companies state that state regulation of rates for both captive retail customers in Virginia and North Carolina and their fuel procurement arrangements ensure that captive customers of Dominion Virginia Power pay prices no higher than the relevant market price for fuel supplies, either through the use of market price indices, or through competitive solicitations or other specific procedures. They state that this eliminates any concern that shared employees procure less expensive fuel for the Dominion Marketing Affiliates than for the franchised public utility to the detriment of captive customers.

[13] *Id*. at 38-39.

[14] The Dominion Companies also state that the Office of Enforcement recently completed an audit to evaluate Dominion Virginia Power's compliance with Commission accounting and reporting regulations concerning the calculation of wholesale fuel adjustment clause charges in Docket No. FA08-17. March 17 Response at 2.

11. The Dominion Companies state that Virginia Power Services Energy Corp., Inc. (Virginia Power Services Energy) and Virginia Power Energy Marketing, Inc. (Virginia Power Energy Marketing) were established by Dominion Virginia Power "to procure, store, and transport oil, gasoline, natural gas, and diesel fuel, and to provide Dominion Virginia Power with associated fuel-related risk management services."[15] They state that Virginia Power Services Energy was established to provide services exclusively for Dominion Virginia Power, and Virginia Power Energy Marketing was established to provide services for Virginia Power Services Energy, Dominion Virginia Power, unaffiliated third parties, and later, the Dominion Marketing Affiliates.[16] The Dominion Companies also state that "[w]hile Dominion Virginia Power has limited captive customer load served at wholesale, its affiliates engage in fuel procurement on a fleet-wide basis. In other words, all fuel procured for Dominion Virginia Power is covered by the [Virginia Commission] and [North Carolina Commission] regulatory regime, even though some small percentage of the fuel is ultimately utilized to produce energy to service FERC-jurisdictional customers."[17]

A. Procurement of Natural Gas

12. The Dominion Companies state that Virginia Power Services Energy manages Dominion Virginia Power's oil, gasoline, natural gas, and diesel fuel requirements pursuant to a Fuel Management Agreement that requires Dominion Virginia Power to pay Virginia Power Services Energy an amount equal to the actual costs Virginia Power Services Energy incurs in procuring fuel on behalf of Dominion Virginia Power.[18] They state that a Fuel Agency and Service Agreement between Virginia Power Services Energy and Virginia Power Energy Marketing specifies that Virginia Power Energy Marketing will act as Virginia Power Services Energy's exclusive agent to procure fuel and will sell fuel to Virginia Power Services Energy at the then-current market price for such fuel, plus the cost of transportation.[19]

13. According to the Dominion Companies, the fuel pricing provisions in the Fuel Management Agreement and the Fuel Agency Agreement ensure that Dominion Virginia

[15] January 28 Filing at 18.

[16] *Id*. at 18-19.

[17] *Id*. at n.25.

[18] *Id*. at 19.

[19] *Id*.

Power obtains its fuel under these agreements at prices at or below market.[20] They state that the price for almost all of the natural gas sold by their affiliates to Dominion Virginia Power is the applicable Gas Daily mid-point price for daily sales or the Inside FERC monthly index price for monthly sales.[21] The Dominion Companies state that Virginia Power Energy Marketing's presence in the market allows Virginia Power Services Energy, and in turn Dominion Virginia Power, to obtain through economies of scale a market price for natural gas that it might not be able to obtain on its own.[22]

14. In their response to the Deficiency Letter, the Dominion Companies state that "Virginia Power Energy Marketing procures natural gas on behalf of Virginia Power Services Energy Corp. for Dominion Virginia Power and the Dominion Merchant Affiliates on a stand-alone basis to serve specific needs at specific locations as directed by the Dominion Companies."[23] They explain that natural gas in one specific location would be very difficult to allocate to one entity over another because the areas where the natural gas can be acquired are very specific to the individual entity's needs and Virginia Power Energy Marketing does not have the capability to direct less expensive natural gas to any one affiliate to the detriment of any other affiliate.[24]

B. Procurement of Coal

15. The Dominion Companies represent that Virginia Power Energy Marketing provides coal procurement services to Dominion Virginia Power through the Dominion Resources Services, Inc. Services Agreement, which authorizes Dominion Resources Services Inc. (Dominion Resources Services) to provide various services to Dominion Virginia Power, including services related to fuel commodities,[25] and they state that

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[20] *Id*. at 20.

[21] *Id*. at 20, 34-35. The Dominion Companies state that Dominion Virginia Power purchases a *de minimis* amount of natural gas from third parties (typically between 1.0 and 1.5 percent of its total annual natural gas purchases) in those limited cases where Dominion Virginia Power needs additional natural gas supply on an intra-day basis, for which index pricing is not available. *Id*. n.30.

[22] *Id*. at 40.

[23] March 17 Response at 8.

[24] *Id*. at 8-9.

[25] January 28 Filing at 21. The Dominion Companies state that a revised Dominion Resources Services Agreement that provides for Virginia Power Energy Marketing to provide the coal procurement services directly, as opposed to providing

Dominion Virginia Power benefits from Virginia Power Energy Marketing's presence. They also state that the Virginia Commission and the North Carolina Commission approved the affiliate agreement allowing Virginia Power Energy Marketing to purchase coal for Dominion Virginia Power, and, with respect to shared procurement with the Dominion Marketing Affiliates, required specific cost and reliability conditions to ensure that Dominion Virginia Power was able to secure the most advantageous contracts. They state that these conditions require that Virginia Power Energy Marketing provide Dominion Virginia Power "first preference" of the lowest priced coal and the lowest priced transportation services, and that the reporting requirement effectively requires Dominion Virginia Power to verify in its annual fuel case filing that the "first preference" has been observed.[26]

16. The Dominion Companies represent that Virginia Power Energy Marketing does not procure coal on a "pool" or "portfolio" basis, but rather secures supply for each affiliate independently in separate transactions.[27] The Dominion Companies further state that the costs of the coal supplies are not allocated among the Dominion Companies, but rather the purchases are made to serve a specific need at a specific location, as directed by the Dominion Companies.[28] The Dominion Companies state that the generation facilities owned by Dominion Virginia Power for which Virginia Power Energy Marketing procures coal are located in Virginia, North Carolina, and West Virginia, and that the Dominion Marketing Affiliate plants for which Virginia Power Energy Marketing procures coal are located in Illinois, Indiana, Rhode Island, and Massachusetts.[29] Further, the Dominion Companies represent that the cost of transportation services provided to Dominion Virginia Power by Virginia Power Energy Marketing is the cost incurred by Virginia Power Energy Marketing for that transportation.[30]

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such services through the Dominion Resources Services Agreement, as is done currently, was filed with the Virginia Commission in December 2010, and if approved, will become effective January 1, 2012. *Id*. n.32.

[26] *Id*. n.36.

[27] *Id*. at 21.

[28] March 17 Response at 10.

[29] January 28 Filing at 22.

[30] *Id*. at 21, 24.

17. The Dominion Companies also state that several procedures are followed by Virginia Power Energy Marketing to ensure that Dominion Virginia Power's captive customers are not subject to paying prices above market for coal supplies. First, they state that the majority of coal supplied for Dominion Virginia Power is procured through formal solicitations, which they suggest protects Dominion Virginia Power's captive customers because coal supplies are priced through a competitive bidding process to ensure the best available market prices.[31] Second, they state that when occasional spot or short-term purchases are made, such purchases are always made at the best available market prices. Third, they represent that when Virginia Power Energy Marketing is in the market simultaneously for spot or short-term purchases for both Dominion Virginia Power and for the Dominion Marketing Affiliates, the lowest priced available supplies of suitable coal for Dominion Virginia Power's generating stations are offered to Dominion Virginia Power first.[32] Finally, the Dominion Companies state that when Dominion Virginia Power or the Dominion Marketing Affiliates receive unsolicited offers by a coal supplier, Virginia Power Energy Marketing will first evaluate all unsolicited offers to determine whether the offer provides a lower cost option of coal qualities suitable for Dominion Virginia Power's generating stations other than available sources.[33]

18. The Dominion Companies maintain that sales of coal from Virginia Power Energy Marketing to Dominion Virginia Power are priced at the lower of cost or market, and sales from Dominion Virginia Power to Virginia Power Energy Marketing are priced at the higher of cost or market and that summaries of these transactions must be filed quarterly with the respective state commissions.[34] The Dominion Companies represent that Virginia Power Energy Marketing maintains auditable procurement records of each transaction executed for Dominion Virginia Power and for the Dominion Marketing Affiliates, and represent that these records provide transparent evidence to demonstrate that the lowest priced available supplies of suitable coal for Dominion Virginia Power's generating stations are offered to Dominion Virginia Power first.

[31] *Id*. at 35.

[32] *Id*.

[33] The Dominion Companies state that this procedure is comparable to the affiliate restrictions requirement that when a market-regulated power sales affiliate brokers power for a franchised utility affiliate, it must offer the franchised utility's power first. *Id*. at n.55 (citing 18 C.F.R. § 35.39(f) (2010)).

[34] *Id*. at 22-23, 36.

C. **Procurement of Oil**

19. The Dominion Companies state that oil procurement is carried out under the Fuel Agency Agreement and the Fuel Management Agreement, and that pursuant to Virginia Power Energy Marketing procurement procedures, procurement of oil is conducted in the same manner for Dominion Virginia Power and the Dominion Marketing Affiliates.[35] The Dominion Companies represent that Virginia Power Energy Marketing, which acts as agent for Virginia Power Services Energy at Dominion Virginia Power's direction in acquiring oil, does not allocate oil supplies, or the cost of oil supplies, among the Dominion Companies, but rather purchases oil to serve a specific need at a specific location, and that all oil procured for Dominion Virginia Power by its affiliates is priced at the Platts New York Harbor Index Price or similar index price.[36] The Dominion Companies also state that the generation facilities owned by Dominion Virginia Power for which Virginia Power Energy Marketing procures oil are located in Virginia, North Carolina, and West Virginia, and that the Dominion Marketing Affiliate plants for which Virginia Power Energy Marketing procures oil are located in Illinois, Indiana, Rhode Island, and Massachusetts.[37] The Dominion Companies state that the applicable fuel supply agreements ensure that Dominion Virginia Power will not pay an above market price for any oil supplies and that Dominion Virginia Power purchases the oil at Virginia Power Services Energy's cost when the oil is consumed,[38] which they claim protects captive customers from any potential cross-subsidization.[39] The Dominion Companies state that if it is determined that it is more economical to purchase oil due to low market prices rather than use existing inventories, oil is purchased for the Dominion Marketing Affiliates by Virginia Power Energy Marketing at spot market index prices, typically at the Platts New York Harbor Index Price. The Dominion Companies state that oil procurement for Dominion Virginia Power is done by Virginia Power Energy Marketing employees, acting as agent for Virginia Power Services Energy, as directed by Dominion Virginia Power, and that oil is purchased based on the same index prices.[40]

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[35] January 28 Filing at 24, n.36.

[36] March 17 Response at 10.

[37] January 28 Filing at 22.

[38] *Id*. at 25.

[39] *Id*. at 36-37.

[40] *Id*. at 24-25.

D. Procurement of Nuclear Fuel

20. The Dominion Companies state that Dominion Virginia Power owns and operates two nuclear facilities, the North Anna and Surry Power Stations, and that two of the Dominion Marketing Affiliates own and operate market-regulated nuclear facilities, the Millstone and Kewaunee Power Stations (collectively, Dominion Nuclear Power Stations). The Dominion Companies state that in 1995, the Virginia Commission approved an arrangement permitting Virginia Power Fuel Corporation, an affiliate of Dominion Virginia Power, to procure and supply nuclear fuel for Dominion Virginia Power's nuclear facilities. They state that Dominion Resources Services acts as the agent to purchase enriched uranium fuel, eliminating many administrative costs.[41] The Dominion Companies also state that Dominion Resources Services procures and supplies nuclear fuel for the Dominion Marketing Affiliates' nuclear stations.[42]

21. The Dominion Companies explain that the Nuclear Analysis and Fuel Department is the fuel engineering group for the Dominion Nuclear Power Stations, and manages all technical and commercial activities related to nuclear fuel prior to, during, and after irradiation.[43] They further state that their Nuclear Fuel Procurement group is located within the Nuclear Analysis and Fuel Department and that the department's employees are employed by Dominion Resources Services.

22. The Dominion Companies also explain that the Virginia Power Fuel Corporation sells enriched uranium to Dominion Virginia Power, and that Dominion Virginia Power pays Virginia Power Fuel Corporation the cost for procurement of uranium and conversion and enrichment services without any mark-up.[44] They state that, to ensure the Nuclear Fuel Procurement group receives any available competitive benefit, the Nuclear Fuel Procurement group developed contracts for uranium, conversion and enrichment that are structured to allow nuclear fuel to be delivered to any plant within the fleet.[45]

23. The Dominion Companies state that their Nuclear Fuel Procurement group primarily arranges for nuclear fuel supply through long-term contracts. They explain that all fabrication is done under long-term contracts, primarily through a competitive bidding process via solicitation. Further, the Dominion Companies state that the Nuclear Fuel

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[41] *Id*. at 26.

[42] *Id*.

[43] *Id*. at 25-26.

[44] *Id*.

[45] *Id*. at 28.

Procurement group has arrangements with most major suppliers to ensure access to global markets and to mitigate the risk of any fuel supply disruptions,[46] and that it maintains uranium inventory to cover a minimum of one year of reload needs to ensure reliable supply in event of a supply disruption. According to the Dominion Companies, these fleet contracts ensure a more diverse and secure supply base than would be possible if the individual uranium, conversion and enrichment contracts were structured for exclusive supply to the individual entities.[47]

24. The Dominion Companies also represent that the Nuclear Fuel Procurement group monitors nuclear fuel costs on a regular basis and makes adjustments when necessary to maintain cost-balance and ensure that Dominion Virginia Power is not disadvantaged. They state that, to the extent possible, fuel is supplied to ensure that Dominion Virginia Power's reload requirements and minimum inventory levels are maintained before allocating nuclear fuel to market-regulated plants, and that reasonable means are used to ensure that regulated plants receive similar or lower average cost nuclear fuel. The Dominion Companies state that nuclear fuel costs are averaged among the combined nuclear fleet. They further state that the Nuclear Fuel Procurement group has procedures in place to ensure that Dominion Virginia Power is not disadvantaged in the administration of fleet contracts and the management of nuclear fuel inventory, and that when necessary it receives preference over market-regulated affiliate needs.[48] They represent that, in the event of a supply disruption that made it necessary to afford an inventory supply preference to Dominion Virginia Power over the Dominion Marketing Affiliates, the Manager of Nuclear Fuel Procurement, who approves allocations of fleet contract deliveries of uranium and related conversion services, would do so on a delivery-by-delivery basis.[49]

25. The Dominion Companies state that the Nuclear Fuel Procurement group, as a larger entity, is afforded more market opportunities, can access more hard market data, and can sustain more active supply relationships, thus having a higher level of security of fuel supply.[50] The Dominion Companies also state that Dominion Virginia Power's combined nuclear fuel supply arrangements are functionally the same as those described in Entergy Corp's November 3, 2006 request to the Commission for a no-action letter

[46] *Id*.

[47] *Id*. at 28-29.

[48] *Id*. at 37.

[49] March 17 Response at 11.

[50] January 28 Filing at 27-30.

with respect to its proposed shared nuclear support functions,[51] and they state that if the Commission continues to follow the reasoning underlying a 2006 no-action letter issued in response to a request submitted by Entergy, then it should grant the Dominion Companies' request for waiver with respect to their shared nuclear fuel procurement activities.[52]

III. Discussion

26. As discussed below, we will conditionally grant Dominion Companies' request for limited waiver of the separation of functions provision in 18 C.F.R. § 35.39(c)(2)(i) to permit the Dominion Companies to share fuel procurement employees, as discussed in their request for waiver. However, we note that this limited waiver does not affect Dominion Companies' obligation to comply with the no-conduit provisions of section 35.39(g).[53]

27. In Order No. 697, the Commission codified certain affiliate restrictions in its regulations to protect captive customers from the potential for a franchised public utility to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliate and its stockholders to the detriment of the captive customers.[54] Captive customers are defined as "any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."[55] The affiliate restrictions govern, among other things, the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering. The Commission requires that, as

[51] *Id*. at 37.

[52] *Id*. at 37-38 (citing *Entergy Corp.*, No-Action Letter, Docket NL07-4-000 (Feb. 8, 2007; *Cinergy Services, Inc.*, No-Action Letter, Docket No. NL06-1-000 (Jan. 31, 2006)).

[53] 18 C.F.R. § 35.39(g) (2011).

[54] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 467, 490, 513, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

[55] Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 202; 18 C.F.R. § 35.36(a)(6) (2011).

a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless explicitly permitted by Commission rule or order granting waiver of the affiliate restrictions.[56] Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of a seller's market-based rate tariff.[57]

28. Under the separation of functions requirement in the affiliate restrictions (section 35.39(c)(2)(i)), employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised public utilities with captive customers.[58] On April 15, 2010, in response to a request for clarification, the Commission provided guidance regarding which employees may not be shared under the affiliate restrictions unless otherwise permitted by Commission rule or order.[59] Specifically, the Commission clarified that, consistent with Order No. 697-A, a franchised public utility with captive customers and its market-regulated power sales affiliate may not share employees that make economic dispatch decisions or that determine the timing of scheduled outages.[60] The Commission also clarified that franchised public utilities with captive customers are prohibited from sharing employees that engage in fuel procurement or resource planning with their market-regulated affiliates. With respect to fuel procurement employees, the Commission explained that a shared employee who procures fuel for both the franchised public utility and the market-regulated power sales affiliate may have the incentive to allocate purchases of lower priced fuel supplies to the market-regulated power sales affiliate while allocating purchases of higher priced fuel supplies to the franchised public utility.[61] The

[56] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 131 FERC ¶ 61,021, at P 2 (April 15 Clarification Order), *order granting in part request for extension of time to comply*, 132 FERC ¶ 61,014 (2010) (July 2 Order), *order on reh'g*, 134 FERC ¶ 61,046 (2011) (Rehearing Order).

[57] Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 549-550.

[58] 18 C.F.R. § 35.39(c)(2)(i) (2011).

[59] April 15 Clarification Order, 131 FERC ¶ 61,021 at P 2. In Order No. 697-A, the Commission clarified that "shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, may not make economic dispatch decisions, and may not determine the timing of scheduled outages for facilities." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253.

[60] April 15 Clarification Order, 131 FERC ¶ 61,021 at P 40.

[61] *Id*. P 42.

Commission denied rehearing of the April 15 Clarification Order, and required that market-based rate sellers comply with the guidance in the April 15 Clarification Order within 90 days, or by April 20, 2011.[62] The Commission has also explained that, to the extent that affected entities believe they need additional guidance concerning compliance with the currently effective market-based rate affiliate restrictions, they may submit a request for a no-action letter regarding specific proposed transactions, practices or situations[63] or may seek waiver of the market-based rate affiliate restrictions on a case-by-case basis.[64]

29. We will conditionally grant the Dominion Companies' request for limited waiver of the separation of functions provision in 18 C.F.R. § 35.39(c)(2)(i) to permit the Dominion Companies to share the fuel procurement employees discussed in their request for waiver, based on the Dominion Companies' representation that their fuel procurement arrangements, as described above, ensure that captive customers will not be harmed. We interpret this representation to be a commitment that captive customers will not be harmed. As discussed above, the Dominion Companies state that Virginia Power Energy Marketing maintains auditable procurement records of transactions executed for Dominion Virginia Power and the Dominion Marketing Affiliates. With respect to the procurement of natural gas, the Dominion Companies represent that the price for almost all of the natural gas sold by Virginia Power Energy Marketing to Virginia Power Services Energy, and in turn from Virginia Power Services Energy to Dominion Virginia Power, is the applicable Gas Daily mid-point price for daily sales or the Inside FERC monthly index price for monthly sales, and that in filling orders for natural gas for the Dominion Companies, Virginia Power Energy Marketing does not have the capability to deliver natural gas associated with any specific upstream supply contract or otherwise have the ability to direct less expensive natural gas to any one affiliate to the detriment of any other affiliate. The Dominion Companies state that when Virginia Power Energy Marketing is in the market simultaneously for spot or short-term purchases of coal for both Dominion Virginia Power and for the Dominion Marketing Affiliates, the lowest priced available supplies of suitable coal for Dominion Virginia Power's generating stations are offered to Dominion Virginia Power first. They represent that oil is secured for each affiliate independently in separate transactions on an as-needed basis, and that oil is purchased at spot market index prices, typically at the Platts New York Harbor Index Price. With respect to their procurement of nuclear fuel, the Dominion Companies

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[62] Rehearing Order, 134 FERC ¶ 61,046 at P 28.

[63] *See* July 2 Order, 132 FERC ¶ 61,014 at P 5 (citing *Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, 123 FERC ¶ 61,157 (2008)).

[64] *See id.* (citing *Cleco Power LLC*, 130 FERC ¶ 61,102 (2010)).

represent that the Nuclear Fuel Procurement group monitors nuclear fuel costs on a regular basis and makes adjustments when necessary to maintain cost-balance and ensure that Dominion Virginia Power is not disadvantaged and that Dominion Virginia Power when necessary receives preference over market-regulated affiliate needs. Further, the Dominion Companies state that their shared fuel procurement arrangements provide benefits worth millions of dollars to Dominion Virginia Power's captive customers that result from labor efficiencies, market expertise and consolidated market presence.

30. Accordingly, we will conditionally grant the Dominion Companies' request for limited waiver of the separation of functions provision to permit the Dominion Companies to share the fuel procurement employees identified based on the Dominion Companies' representation that the specific terms and conditions of Dominion Virginia Power's affiliate fuel procurement arrangements, as described above, ensure that such arrangements will not harm Dominion Virginia Power's captive customers.[65] Additionally, as a condition of this waiver, we will require the Dominion Companies to maintain sufficient records to enable the Commission to audit whether the representations and commitments made in their January 28 Filing and March 17 Response remain true and accurate, including their commitment that captive customers will not be harmed.

31. The waiver conditionally granted herein is limited to the specific facts, representations, policies and procedures presented by the Dominion Companies in their January 28 Filing and March 17 Response, and applies only to the fuel procurement employees discussed in the Dominion Companies' January 28 Filing and March 17 Response. To the extent there is any material change in circumstances that would reflect a departure from the facts, representations, policies and procedures that we have relied upon in granting the requested waiver, the Dominion Companies will be required to inform the Commission within 30 days of any such change. With the exception of the limited waiver specifically granted herein, all of the other affiliate restrictions continue to apply to the Dominion Companies.[66]

32. Finally, we will direct the Dominion Companies to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions sections of their market-based rate tariffs to list the limited waiver granted herein and include a citation to this order.[67]

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[65] *Id*. at 30.

[66] The Dominion Companies' request for waiver of the affiliate restrictions in Docket No. ER11-3027-000 will be addressed in a separate order.

[67] Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 384 *order on reh'g* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C.

<u>The Commission orders</u>:

(A) The Dominion Companies' request for waiver of certain of the market-based rate affiliate restrictions is hereby granted, effective April 20, 2011, subject to conditions, as discussed in the body of this order.

(B) The Dominion Companies are hereby directed to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions sections of their market-based rate tariffs, as discussed in the body of this order.

(C) The Dominion Companies are hereby directed to maintain records to enable the Commission to audit their compliance, as discussed in the body of this order.

(D) The Dominion Companies must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts, representations, policies, and procedures the Commission relied upon in granting the waivers granted herein.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.