

110 FERC ¶61,274
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Old Dominion Electric Cooperative
New Dominion Energy Cooperative

Docket Nos. EC05-1-000
EC05-1-001

ORDER SETTING FOR HEARING DISPOSITION OF JURISDICTIONAL
FACILITIES

(Issued March 8, 2005)

I. Introduction

1. On October 5, 2004, as amended January 7, 2005, Old Dominion Electric Cooperative (Old Dominion) and a newly created entity, New Dominion Energy Cooperative (New Dominion) (collectively, Applicants), filed a joint application under section 203 of the Federal Power Act (FPA)¹ requesting Commission authorization to assign Old Dominion's existing jurisdictional wholesale power contracts with its twelve electric distribution cooperative members (Member Cooperatives)² to New Dominion, which would then become the Member Cooperatives' full requirements power supplier.³

¹ 16 U.S.C. § 824b (2000).

² The Member Cooperatives of Old Dominion include: A&N Electric Cooperative; BARC Electric Cooperative; Community Electric Cooperative; Choptank Electric Cooperative; Delaware Electric Cooperative; Mecklenburg Electric Cooperative; Northern Neck Electric Cooperative; Northern Virginia Electric Cooperative (NOVEC); Prince George Electric Cooperative; Rappahannock Electric Cooperative; Shenandoah Valley Electric Cooperative; and Southside Electric Cooperative.

³ Applicants concurrently submitted, in Docket No. ER05-18-000, a filing to revise Old Dominion's formulary rate to conform it for use by New Dominion, and, in Docket No. ER05-20-000, an application for New Dominion to sell power at market-based rates. On October 12, 2004, Old Dominion and New Dominion filed, in Docket Nos. ES05-5-000, ES05-6-000, and ES05-7-000, an application under section 204

(continued)

2. The Commission has reviewed the proposed transaction under the Commission's Merger Policy Statement⁴ and finds that protesters have raised an issue of material fact as to whether the proposed transaction may have an adverse impact on rates and thus not be consistent with the public interest. We will, therefore, set the application for a trial-type evidentiary hearing on the limited issue of the effect on rates.

II. Background

A. Description of the Parties

3. Old Dominion is a public utility that operates as a not-for-profit electric generation and transmission cooperative, providing generation, transmission, ancillary and other related services to its twelve Member Cooperatives, which serve retail customers in Virginia, Delaware, Maryland and parts of West Virginia.

4. New Dominion is a new entity created as part of a reorganization of Old Dominion. All twelve Member Cooperatives will become members of New Dominion by assigning their membership interests in Old Dominion to New Dominion in exchange for membership interests in New Dominion. New Dominion will become the sole member of Old Dominion.

of the FPA seeking authorization to guarantee each other's obligations and for New Dominion to issue and renew short-term debt. On December 7, 2004, Old Dominion filed, in Docket No. ER05-309-000, an application requesting acceptance of Old Dominion's initial tariff for sales to New Dominion. These filings will be addressed by a separate Commission order to be issued concurrently.

⁴ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996); FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*; Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

B. The Transaction

5. The Member Cooperatives' existing wholesale power contracts with Old Dominion will be assigned to New Dominion under an assignment agreement between Old Dominion, New Dominion and each of the Member Cooperatives. New Dominion will then become the full requirements wholesale power supplier for each Member Cooperative. New Dominion will contract to buy, on a take-or-pay basis, all of the output of Old Dominion's electric generation facilities. New Dominion also expects to make other wholesale electric power sales and is requesting authority to sell to third parties and Member Cooperatives at market-based rates in one of the related proceedings mentioned above.

III. Notice, Interventions and Protests

6. Notice of the Applicants' filing was published in the *Federal Register*, 69 Fed. Reg. 64,041 (2004), with protests and interventions due on or before October 26, 2004. On October 26, 2004, Bear Island Paper Company, L.P. (Bear Island) filed a motion to intervene, protest and request for hearing. On December 28, 2005, as amended on January 18, 2005, Bear Island filed a motion to consolidate this case with those in a number of related dockets.⁵

7. On January 7, 2005, Applicants filed a joint amendment to their application in response to a Commission data request issued on December 7, 2004. Notice of the amendment application was published in the *Federal Register*, 70 Fed. Reg. 3,692 (2005), with protests and interventions due on or before January 28, 2005. On October 29, 2004, the Virginia State Corporation Commission (VSCC) filed an intervention. On January 14, 2005, NOVEC filed a motion to intervene and protest and an answer in support of Bear Island's motion to consolidate. On February 1, 2005, Old Dominion filed an answer to NOVEC's protest, which it amended on February 8, 2005. On February 14, 2005, NOVEC filed comments, and, on February 16, 2005, NOVEC filed an answer to Old Dominion's answer.

⁵ We will deny Bear Island's motion to consolidate because the section 203 application does not share common issues of law and fact with the section 204 application and section 205 filings in the related proceedings. Bear Island's motion to consolidate and related submissions by the Applicants' and intervenors are further addressed in the separate Commission order mentioned above.

IV. Discussion

A. Procedural Issues

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 285.214 (2004) the timely, unopposed motions to intervene serve to make the entities that filed them a party to this proceeding.

9. Further, while Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 285.213(a) (2004), prohibits answers to protests unless otherwise permitted by the decisional authority, we will accept the answers submitted by the Applicants and other parties because they have provided information that assisted us in our decision-making process.

B. Consistency with Public Interest

10. Section 203(a) of the FPA provides that the Commission must approve a proposed disposition if it finds that the disposition "will be consistent with the public interest."⁶ The Commission generally takes account of three factors in analyzing proposed dispositions of facilities: (a) the effect on competition; (b) the effect on rates; and (c) the effect on regulation. For the reasons discussed below, we will set the proposed transaction for hearing to determine the effect on rates.

1. Effect on Competition

a. Applicants' Submission

11. Applicants state that the proposed transaction is intended neither to limit nor to enhance competition and should have little or no immediate effect on competition. Applicants explain that the assignment is designed largely to maintain the status quo with regard to the Member Cooperatives. They state that the Member Cooperatives are not seeking to expand their ability to access competitive choices. However, the proposed transaction is intended to make the Member Cooperatives more competitive as a group by expanding their collective options and flexibility in the wholesale market. Finally, Applicants state that neither New Dominion nor any affiliate controls barriers to the electric generation business, such as fuel supplies (e.g., natural gas, oil or coal), transportation facilities for such supplies (e.g., railroads, barges or pipelines), or electric equipment.

⁶ 16 U.S.C. § 824b(a) (2000).

b. NOVEC's Protest

12. In its protest, NOVEC, which is the largest of Old Dominion's twelve Member Cooperatives, asserts that the application does not mention the fact that NOVEC's approval of the restructuring was premised on Old Dominion's promise to renegotiate the wholesale power contracts to remove the provision that the wholesale power contracts are "full requirements" contracts. The removal of this provision would allow NOVEC the flexibility to buy power above that available from NOVEC's share of Old Dominion's existing resources from whatever alternate suppliers or resources NOVEC may determine. According to NOVEC, the Applicants do not mention these ongoing negotiations, or the fact that Old Dominion's Board of Directors recently reaffirmed its intention to revise the wholesale power contracts between Old Dominion and NOVEC. NOVEC contends that blocking Member Cooperatives' ability to purchase from competing suppliers is inconsistent with Applicants' statement that the proposed transaction would not harm competition.

c. Commission Determination

13. NOVEC has not provided any evidence to substantiate its allegations that the proposed transaction will have an adverse effect on competition. As NOVEC notes, its currently effective wholesale power contract with Old Dominion is a full requirements contract under which NOVEC does not have the right to obtain power from other suppliers. The Commission's review of a transaction under section 203 focuses only on the effects of the disposition, not on pre-existing conditions.⁷ Because the transaction would not create any barriers to entry in this market or otherwise affect NOVEC's inability to obtain electricity from competing suppliers as a result of its current contract, there are no grounds for relief in this proceeding.

14. We conclude the proposed transaction will not result in any meaningful change in market shares or concentration levels for New Dominion. Accordingly, we find that the proposed transaction will not adversely affect competition.

⁷ *American Electric Power Service Corp. and American Electric Power Company, Inc.*, 100 FERC ¶ 61,346 at P 72 (2002); *Pacificorp*, 87 FERC ¶ 61,288 at 62,151 (1999); *Bangor Hydro-Electric Company*, 86 FERC ¶ 61,281 at 62,014-15 (1998).

2. Effect on Rates

a. Applicants' Submission

15. Applicants state that the current rates will remain essentially unchanged. They argue that the proposed transaction will have beneficial effects on rates because the added options and increased flexibility available to New Dominion and will permit it to offer lower rates to the Member Cooperatives.

b. Bear Island Protest and Applicants' Response

16. Bear Island⁸ alleges that Old Dominion's proposal to sell power to New Dominion would not be subject to the cost-of-service formula rate, *i.e.*, Old Dominion's billing to New Dominion would be reflected in the New Dominion's formula rate as demand- and energy-related purchased power expenses, not as itemized demand- and energy-related expenses, as in Old Dominion's current cost-of-service formula rate. Bear Island alleges that Old Dominion's pass-through of costs to New Dominion could include an improper classification of demand-related costs as energy-related costs and thus could reduce Bear Island's demand cost savings that result from its ability to shed load during Old Dominion's system peak demand. Bear Island also claims that there would be no limit on Old Dominion's mark-up to New Dominion, and there would be no safeguards on the types of costs that Old Dominion could pass through to New Dominion, which would be passed on to the Member Cooperatives and their retail customers.

17. Applicants⁸ argue that Bear Island's accusations are simply speculation designed to delay Applicants' proposed reorganization or require setting the application for an evidentiary hearing. Applicants assert that nothing that affects the demand-side management program will change, as New Dominion's cost-based rate formula will be broken down into demand and energy components very similar to the current Old Dominion formula rate. In addition, they assert that there will be no change to the existing rate design that Bear Island uses for demand-side management, so that Bear Island will still be able to reduce its load at that peak and realize substantial cost savings. Applicants state that all of the Member Cooperatives have invested in a variety of demand-side management initiatives, so they all want to maintain the cost-benefit nature

⁸ Bear Island states that it is a retail customer of Rappahannock Electric Cooperative, which is a Member Cooperative. Bear Island is a newsprint manufacturer that sheds load to curtail demand during Old Dominion's monthly system peak.

of demand-side management and are in favor of this reorganization. Applicants request that the Commission deny Bear Island's motion to intervene, reject its protest, and deny its request for a hearing.

c. NOVEC's Protest and Applicants' Response

18. In its protest, NOVEC contends that the proposed transaction is incomplete and preliminary as filed and that it is too vague for Commission approval. As discussed above, NOVEC states that the application does not disclose the fact that NOVEC is negotiating with Old Dominion to revise the wholesale power contracts. In particular, NOVEC contends that the revisions to the wholesale power contracts proposed in the pending section 205 proceeding are contrary to the no-assignment provision in the wholesale power contracts and that the wholesale power contracts require further revisions to prevent New Dominion from discriminatory treatment of Member Cooperatives in market-based deals.

19. Moreover, NOVEC's protest asserts that the Applicants failed to address the fact that one of the conditions to closing is that there will be no adverse effect on Old Dominion's credit rating. According to NOVEC, Standard & Poors reduced Old Dominion's credit rating from "A+" to "A," in part because of the risk associated with Old Dominion's proposed restructuring; consequently, this condition to closing has not been satisfied. NOVEC urges the Commission to set these matters for hearing on a deferred basis to allow the parties time to work among themselves and, if necessary, with the aid of a Settlement Judge.

20. Old Dominion contends in its answer that it is under no obligation to amend NOVEC's wholesale power contract and flatly denies having agreed to amend it. Old Dominion claims that there is nothing in the wholesale power contract that requires renegotiation and that the wholesale power contract allows assignment with the appropriate prior authorizations, to which NOVEC has already agreed. Moreover, Old Dominion contends that, if the Commission does not reject NOVEC's attempt to force modification of the wholesale power contract, NOVEC will gain a right to unilaterally modify its full requirements wholesale power contract in violation of the *Mobile-Sierra* doctrine.⁹ Finally, Old Dominion disputes NOVEC's assertion that Standard & Poors reduced Old Dominion's credit rating in part because of the risk associated with Old Dominion's proposed restructuring. Old Dominion provides Standard & Poors' Research Bulletin, which, according to Old Dominion, disproves NOVEC's claim. Old Dominion

⁹ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 345 (1956) (*Mobile*); *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956) (*Sierra*).

requests that the Commission reject these aspects of NOVEC's protest and refuse NOVEC's request for Commission-supervised renegotiation of its wholesale power contract, a hearing or other unnecessary proceedings.

21. In its comments to Old Dominion's answer, NOVEC adds that further approvals from the Member Cooperatives will be necessary to implement the power agreement between Old Dominion and New Dominion. In its answer to Old Dominion's answer, NOVEC contends that Old Dominion has admitted that the wholesale power contract negotiations bear directly on the Commission's ability to consider the proposed transaction and that Old Dominion is obligated to negotiate changes to NOVEC's wholesale power contract, as evidenced by Old Dominion Board of Directors' resolution reaffirming its commitment to renegotiate the wholesale power contract. NOVEC also disputes Old Dominion's allegation that NOVEC is in breach of the Reorganization Agreement. Finally, NOVEC challenges Old Dominion's assertion that the credit downgrade by Standard & Poors was not due to the reorganization. It attaches a second report issued by Moody's Investor Services on January 31, 2005 that states that Moody's views the reorganization "negatively from a credit perspective."

d. Commission Determination

22. We will deny Bear Island's request that we reject in this 203 proceeding Applicants' proposed changes to the formula rate. The rate concerns raised by Bear Island such as improper classification of demand- and energy-related costs and decrease in the incentive to implement demand-side management are beyond the scope of the Commission's review of this transaction under section 203. The Commission does not require applicants under section 203 to insulate their customers from rate effects of non-restructuring-related events such as changes in rates as a part of a contract.¹⁰ The Commission's primary focus under section 203 is to ensure that customers are protected from adverse rate effects associated with the section 203 transaction. We note that concerns such as those raised by Bear Island that the formula rate may become unjust and unreasonable, can be raised in the pending section 205 proceeding.¹¹

¹⁰ See, e.g., *New York State Electric & Gas Corp.*, 86 FERC ¶ 61,020 at 61,053, *order denying reh'g*, 86 FERC ¶ 61,284 at 62,022-23 (1999). See also *Jersey Central Power & Light Co.*, 87 FERC ¶ 61,014 at 61,038 (1999).

¹¹ In the section 205 application, in Docket No. ER05-18-000, New Dominion is seeking approval of the terms of the rate schedule and formulary rate currently used by Old Dominion. Applicants state that the formula rate has been modified to accommodate the proposed assignment from Old Dominion to New Dominion.

23. We will grant NOVEC's request that we set for hearing the effect on rates. NOVEC's submissions and the attached reports from Standard & Poor's and Moody's Investor Services raise an issue of material fact as to whether the proposed transaction would adversely effect rates – that is, whether the credit downgrade could raise rates, and, if so, whether the downgrade is due to the proposed transaction. These questions cannot be resolved based on the record before us and are more appropriately addressed in the trial-type evidentiary hearing. Accordingly, we find that there is an issue regarding the effect on rates that requires the development of a more complete evidentiary record before the Commission can make a determination as to whether to authorize the proposed transaction in this proceeding and on what conditions, if any. We must set this application for a trial-type evidentiary hearing in order to address this issue and to develop a more complete record on which to make a decision on the proposed transaction.

24. However, insofar as NOVEC argues that the credit downgrade constitutes a failure to satisfy a condition to closing, its concerns are beyond the scope of the Commission's review of this transaction under section 203. We are considering here only the transaction proposed in the application. If, as a result of any negotiations between NOVEC and the Applicants, the proposed transaction is modified, the Applicants will still have to obtain Commission authorization to implement the transaction in the modified form. Similarly, our approval of the application does not affect any other approvals necessary to complete the transaction, including a failure by the Applicants to obtain any necessary consent by other parties to the contract.¹² Accordingly, the Applicants' alleged failure to satisfy a condition to closing, *i.e.*, the credit downgrade by Standard & Poors, is not relevant to our analysis of the proposed transaction under section 203.

3. Effect on Regulation

25. Applicants state that there will be no decrease of regulatory oversight as a result of the proposed transaction. They note that the proposed transaction will create a new entity subject to the Commission's regulation. Applicants assert that no exempt or non-jurisdictional entities are created or otherwise involved in the transaction.

26. We find that federal regulation would not be impaired, and we further note that no party alleges that federal regulation would be impaired by the proposed transaction. We also note that no state has indicated that it lacks jurisdiction to consider the transaction's

¹² *Otter Tail Power Co.*, 97 FERC ¶ 61,226 at 62,033 (2001), *order on reh'g*, 98 FERC ¶ 61,112 (2002).

effects on retail rates, nor has any state asked us to do so. Thus, we are satisfied that the proposed transaction will have no effect on regulation, either by the Commission, or by any state regulatory authority.

The Commission orders:

(A) 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 the Federal Power Act, particularly section 203 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held to determine the effect on rates of the proposed transaction, as discussed in the body of this order.

(B) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in the proceeding, to be held within approximately 15 days of the designation of the presiding judge in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. Such 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.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.